Volume 30, Number 5, September 30, 2022

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 261-328

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.

- **COUNTIES—REZONING. Under the applicable county zoning code, the county commission was not required to give additional notice by publication when it deferred a rezoning hearing to a later hearing date. The mailing of a new notice to interested parties within a half-mile radius was sufficient to satisfy the code's notice requirements. An organization formed after the county commission had approved the rezoning did not have standing to file a petition for writ of certiorari challenging the commission's action.** *SAVE CALUSA INC. v. MIAMI-DADE COUNTY. Circuit Court (Appellate), Eleventh Judicial Circuit in and for Miami-Dade County. Filed June 27, 2022. Full Opinion at Circuit Courts-Appellate Section, page 269a.*

- **INSURANCE—PERSONAL INJURY PROTECTION—DELAY IN PAYMENT OF BENEFITS—INVESTIGATION PERIOD. A provider that submitted bills to a PIP insurer as an assignee of the insured is a "claimant" that must be provided with written notice that a claim is being investigated for suspected fraud in order to extend the time to pay a PIP claim under section 627.736(4)(i). Where the insurer provided a suspicion-of-fraud letter to the insured's attorney, but not to the provider, the provider's claim was overdue when the provider's action was filed, and the insurer's mid-litigation payment of benefits constituted a confession of judgment.** *FLORIDA WELLNESS CENTER, INC. v. PROGRESSIVE AMERICAN INSURANCE COMPANY. County Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed August 16, 2022. Full Text at County Courts Section, page 300a.*

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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.

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath or urine test—Hearings—Licensee was not deprived of due process by brief interruptions in proceedings—Licensee's counsel was able to comprehensively examine witnesses—Although licensee contended she was denied due process as result of hearing officer's failure to continue hearing beyond allotted time, licensee failed to identify any testimony she was unable to elicit due to time constraints—Hearing officer did not depart from neutrality by *sua sponte* determining that questioning officer about his family was beyond the scope of review and by interposing a single relevance inquiry about line of questioning concerning initial stop—Lawfulness of detention—With respect to argument that hearing officer's findings regarding indicia of impairment observed by stopping officer were not supported by competent substantial evidence in light of evidence of body cam video and booking photographs of licensee, neither video nor photographs were provided to reviewing court, and it is not within reviewing court's discretion to reevaluate evidence to assess propriety of hearing officer's determination that licensee's evidence was unpersuasive—Licensee's slurred speech, gravelly voice, bloodshot and watery eyes, and droopy eyelids, combined with her speeding, provided reasonable suspicion warranting detention for DUI investigation

CAROLINE ANNE STEVENS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. CA21-0585, Division 59. June 26, 2022. Counsel: Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(KENNETH JAMES JANESK, II, J.) Petitioner Caroline Stevens seeks review of the "Findings of Fact, Conclusions of Law and Decision" of the hearing officer of the Bureau of Administrative Reviews, Florida Department of Highway Safety and Motor Vehicles ("DHSMV" or the "Department"), which were entered on April 22, 2021. The decision of the hearing officer affirmed the order suspending Petitioner's driving privilege. The Court has considered the Petition for Writ of Certiorari and the attached appendix, as well as the Department's response thereto, and being otherwise fully advised in the premises finds as follows:

Statement of Case

Petitioner was arrested for driving under the influence of alcohol or drugs ("DUI") on June 9, 2019, by Officer Joshua Paetsch ("Officer Paetsch") of the Fernandina Beach Police Department ("FBPD"). The events leading up to Petitioner's arrest, as provided in the record before the hearing officer, are as follows:

On February 14, 2021, at approximately 1:00 a.m., Officer Paetsch stopped and detained Petitioner for speeding (50 mph in a 35 mph zone, which was visually estimated by Officer Paetsch based upon his rate of travel using the pace-clocking method, as well as by moving his radar speed detection instrument to confirm Petitioner's speed). When Officer Paetsch activated his emergency lights, Petitioner pulled into the gas pumps area of the Flash Foods convenience store and stopped at a gas pump. Officer Paetsch reported that upon his initial observation of Petitioner, he noticed that her eyes were bloodshot and watery, her eyelids were droopy, and her speech was thick-tongued and slurred. Officer Patsch asked Petitioner to exit her vehicle so that he could further evaluate her because he was concerned that she was driving under the influence based upon these initial observations. Petitioner complied with his request and exited her vehicle.

After Petitioner exited her vehicle, Officer Paetsch stepped aside to his unmarked patrol vehicle to verify her identification documents. While he was verifying Petitioner's identification documents, Officer Paetsch observed Petitioner swaying as she stood at the rear of her vehicle. Officer Paetsch informed Petitioner that he intended to conduct a DUI investigation and proceeded to read her *Miranda* rights from a card. Petitioner agreed to speak with Officer Paetsch and apprised that she had taken one milligram of Clonazepam at approximately 11:00 a.m. the previous day. At this time, she denied consuming any alcoholic beverages or other drugs; however, she advised Officer Paetsch that she possessed a valid medical marijuana card. Officer Paetsch asked if Petitioner suffered from epilepsy, diabetes, or any other medical conditions or physical disabilities which might mimic signs of impairment. Petitioner responded that she takes Clonazepam for PTSD and anxiety and represented that she did not have any other conditions that might mimic signs of impairment. Petitioner agreed to participate in the requested field sobriety exercises.

Officer Paetsch proceeded to conduct the following field sobriety exercises: the horizontal gaze nystagmus (HGN), the walk-and-turn exercise, the one leg stand exercise, and the Romberg Balance exercise. During her performance of the field sobriety exercises, Petitioner exhibited multiple signs of impairment on each exercise. On the HGN exercise, Petitioner demonstrated a lack of smooth pursuit in each of her eyes, exhibited a distinct and sustained nystagmus at maximum deviation, exhibited an onset of nystagmus prior to 45 degrees, and demonstrated the presence of a vertical gaze nystagmus. During the walk-and-turn exercise, Petitioner was directed to walk nine steps in a straight line, making heel to toe contact on each step, and then to turn around and walk back nine steps in the same manner. Petitioner could not maintain her balance while listening to Officer Paetsch's instructions, began the exercise before she was instructed to do so, missed heel to toe contact on both sets of nine steps, made an improper turn by backing off of the line with both feet, and took an improper number of steps (she took 13 steps on the first set of steps and 14 steps on the second set). Petitioner additionally stepped off of the line on multiple occasions on both sets of steps. On the one leg stand exercise, Petitioner was directed to stand on one foot and count to 30. While completing this exercise, Petitioner swayed and placed her foot down repeatedly. Petitioner also had to stop and restart the test, was not looking down at her elevated foot as instructed, and stopped again after multiple failed attempts to complete the exercise. Finally, on the Romberg Balance exercise, in which Petitioner was instructed to keep her feet together, close her eyes, and estimated the passage of 30 seconds, Petitioner failed to successfully complete the exercise as follows: she lost her balance ten seconds-into the exercise, stumbling back and opening her eyes; she opened her eyes and stated that she had counted to "28"; and she estimated the passage of 30 seconds after a full minute had lapsed.

After performing unsatisfactorily on the field sobriety exercises, Petitioner was placed under arrest for DUI and was transported to the Fernandina Beach Police Department, where Officer Paetsch conducted a 20-minute observation period of Petitioner in preparation of a breath test. During this observation period, Petitioner admitted that she had consumed a marijuana edible gummy at approximately 11:00 a.m. and had also smoked marijuana at approximately 6:00 p.m. on the evening preceding her arrest. Officer Paetsch requested Petitioner to submit to a breath test, and she refused, after which he proceeded to read Petitioner the Implied Consent Warning. Petitioner maintained her refusal to submit to a breath test after Officer Paetsch read the Implied Consent Warning to her. Officer Paetsch also

requested for Petitioner to submit a voluntary sample of her urine based upon his suspicion that she had ingested marijuana, and she again refused to do so. Additionally, at the time Petitioner was stopped and detained by Officer Paetsch, there were two passengers in the vehicle she was driving: her fiancé, John Esposito ("Mr. Esposito"), and their toddler son. The officer who was assisting Officer Paetsch, Patrolman Sears, observed Mr. Esposito while Officer Paetsch was conducting field sobriety exercises on Petitioner. Patrolman Sears informed Officer Paetsch that Mr. Esposito stated Petitioner had consumed alcoholic beverages earlier when they had dinner. When Officer Paetsch confronted Petitioner with Mr. Esposito's statement, Petitioner admitted that she had consumed a lemon drop martini earlier that evening. Petitioner was subsequently transported to the Nassau County jail.

As permitted by section 322.2615(6), Florida Statutes, Petitioner requested a formal review of her resulting driver's license suspension and disqualification. An administrative review hearing was held on April 13, 2021, which was presided over by DHSMV hearing officer Ashley Day ("Hearing Officer Day"). The following documents were entered into the record at the formal review hearing: (1) Florida DUI Uniform Traffic Citation and Notice of Suspension, citation number ADL24OE; (2) a copy of Petitioner's Florida Driver License, number S315-101-96-90-0; (3) FDPD Arrest Report/Probable Cause Affidavit; (4) Affidavit of Refusal to Submit to a Breath, Urine or Blood Test; (5) Breath Alcohol Test Affidavit; (6) Implied Consent Warnings; (7) Field Sobriety Report; (8) DVD/In-Car & Body Cam Video (Four Disks); (9) Driver's Exhibit—Caroline Stevens Arrest Information ARRESTS.ORG; and (10) Driver's Exhibit—Caroline Stevens Photograph ARRESTS.ORG. At the hearing, Petitioner, Mr. Esposito, Officer Paetsch, and Petitioner's counsel appeared telephonically. On April 22, 2021, the hearing officer issued an order affirming the suspension and disqualification of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.[1]

Jurisdiction

Pursuant to sections 322.2615(13) and 322.31, Florida Statutes, Petitioner seeks review of the hearing officer's order affirming the suspension of her driving privilege. This Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to Rule 9.030(c)(3), Florida Rules of Appellate Procedure.[2]

Standard of Review

In reviewing an administrative agency decision, the Court must consider the following factors: (i) whether procedural due process was accorded; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. *Fla. Dep't of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *Id.* The Court's certiorari review power does not allow the Court to direct the lower tribunal to take any action, but rather is limited to the Court quashing the order being reviewed. *See Tynan v. Fla. Dep't of Highway Safety and Motor Vehicles,* 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a].

Analysis

Petitioner asserts that the hearing officer's April 22, 2021 order suspending her driving privileges should be quashed for two reasons: first, the Petitioner was deprived of due process because Hearing Officer Day failed to demonstrate neutrality during the April 13, 2021 hearing such that Petitioner was not afforded a meaningful opportunity to present all of her supporting evidence before an impartial officer; and second, because the hearing officer's finding regarding the lawfulness of Petitioner's detention and arrest was not supported by competent substantial evidence and departed from the essential requirements of law. As more particularly described below, the Court finds that Petitioner was not deprived of procedural due process; and further finds that Hearing Officer Day's finding concerning the lawfulness of Petitioner's detention and subsequent arrest was supported by competent substantial evidence and did not depart from the essential requirements of law.

I. Due Process

Petitioner contends that she was deprived of procedural due process where Hearing Officer Day strayed from his position of neutrality at the formal review hearing by continually interrupting the proceedings in a manner that showed bias in favor of the Respondent, as well as by requiring Petitioner to participate in an abbreviated hearing in which she was unable to fully present evidence supporting her position. In support of this contention, Petitioner avers that the review hearing, which was scheduled to commence at 11:00 a.m. for a period of one hour, did not actually commence until 11:11 a.m., and that the evidentiary portion of the hearing did not begin until after 11:30 a.m. Petitioner asserts that Hearing Officer Day proceeded to continually interrupt the proceedings to inquire into counsel's line of questioning, and that Officer Pactsch was permitted to object to questions he did not wish to answer and repeatedly sought assistance from Hearing Officer Day. Additionally, Petitioner alleges that Hearing Officer Day initiated two separate breaks during the proceedings, and that as the hearing continued, Hearing Officer Day continued to delay counsel's examination of witnesses by interrupting the proceedings.

Petitioner contends that after all of the aforementioned delays, which were attributable to matters beyond Petitioner's control and which significantly limited the amount of time available for the presentation of evidence, Hearing Officer Day maintained that Petitioner would be required to complete the presentation of her evidence during the abbreviated hearing timeframe. Hearing Officer Day informed Petitioner that she could alternatively elect for a continuance, but that by doing so she would forfeit her temporary driving permit, and he declined counsel's request for an extension of the permit so that the hearing could be continued. At the hearing, Petitioner's counsel objected that he believed the curtailed time frame would be insufficient for a thorough presentation of the witnesses' testimony and argued that the Department's unwillingness to extend Petitioner's temporary permit placed Petitioner at a procedural disadvantage. Petitioner's counsel proceeded to elicit testimony from the witnesses until Hearing Officer Day concluded the presentation of evidence, and he presented closing argument while maintaining his objections to the procedural limitations imposed during the hearing. Petitioner presently argues that Hearing Officer Day refused to provide her with a meaningful opportunity to challenge the lawfulness of her detainment and subsequent arrest by interposing objections and interruptions to counsel's questioning and by refusing to extend the hearing commensurately.

Standard

The initial determination at certiorari review is to determine whether Petitioner was afforded procedural due process. Both the United States and Florida Constitutions protect individuals from arbitrary and unreasonable governmental interference with their right to life, liberty, and property. *State v. Robinson,* 873 So.2d 1205, 1212 (Fla. 2004) [29 Fla. L. Weekly S112a]. Procedural due process affords notice of a possible government deprivation and a meaningful opportunity to contest it, usually before it is imposed. *Id.* The extent of procedural due process afforded to a party in a quasi-judicial hearing is not as great as that afforded to a party in a full judicial hearing. *Carillon Cmty. Residential v. Seminole County,* 45 So.3d 7,

10 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1467a]. Quasi-judicial proceedings, for example, "are not controlled by strict rules of evidence and procedure." *Jennings v. Dade County,* 589 So.2d 1337, 1341 (Fla. 3d DCA 1991) (citing *Astore v. Florida Real Estate Comm'n*, 374 So.2d 40 (Fla. 3d DCA 1979) and *Woodham v. Williams,* 207 So.2d 320 (Fla. 1st DCA 1968)). However, "certain standards of basic fairness must be adhered to in order to afford due process." *Id.* (citing *Hadley v. Dep't of Admin.,* 411 So.2d 184 (Fla. 1982) and *City of Miami v. Jervis,* 139 So.2d 513 (Fla. 3d DCA 1962)). Generally, a quasi-judicial hearing meets such standards of basic fairness where "the parties are provided notice of the hearing and an opportunity to be heard." *Id.* There is no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met; rather, courts consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand. *Carillon,* 45 So.3d at 10.

Analysis

In support of her argument, Petitioner cites to case law generally providing that the preservation of an appearance of impartiality is a requirement for hearing officers presiding over administrative review hearings to determine the validity of driver license suspensions. *Ducre v. State,* 768 So.2d 1159 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2212b]. Petitioner correctly asserts that although hearing officers are statutorily permitted to ask questions when presiding over these administrative review hearings, this latitude does not override the requirement of impartiality. *Costanza v. Dep't of Highway Safety & Motor Vehicles,* 8 Fla. L. Weekly Supp. 1b (4th Cir. Oct. 6, 2000). Our sister circuit courts have determined that due process was not accorded in situations where hearing officers refused to consider relevant evidence (*Burleson v. Dep't of Highway Safety & Motor Vehicles,* Case No. 2001-CA-5455 (4th Cir. Aug. 9, 2002)), materially limited the scope of direct examination of witnesses (*Costanza, supra,* 8 Fla. L. Weekly Supp. 1b), and participated in hearings by interposing objections (*Cadwell v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 709b (16th Cir. June 2007)). Moreover, hearing officers in driver's license suspension proceedings have been ubiquitously held to depart from their required position of neutrality when their participation in the proceedings has the effect of eliciting evidence that was not already in the record. *Dep't of Highway Safety & Motor Vehicles v. Pitts,* 815 So.2d 738 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D999b]; *O'Brien v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 923a (4th Cir. July 20, 2006) ("Petitioner argues that the hearing officer departed from her neutral role and became an advocate for Respondent by eliciting evidence not already in the record, rather than merely clarifying previously-introduced evidence, which denied him due process . . . this Court agrees."); *Netterville v. Dep't of Highway Safety & Motor Vehicles,* 18 Fla. L. Weekly Supp. 512a (8th Cir. Mar. 24, 2011) (it is a violation of due process when the hearing officer places additional documents into the record over the driver's objection).

After reviewing the transcript of the administrative review hearing in the instant proceeding, the Court finds that Hearing Officer Day did not depart from his position of neutrality. At the outset of the hearing, Hearing Officer Day indicated that the hearing had been scheduled for one hour per Petitioner's request. After the documents submitted by the Fernandina Beach Police Department had been entered into evidence and the witnesses had been sworn, Hearing Officer Day immediately permitted Petitioner's counsel to begin questioning witnesses. (P.A. 35) There was a brief interjection at the outset of the examination of Officer Paetsch concerning the relevance of counsel's line of questioning concerning the initial stop, which did not materially interrupt the proceedings, and counsel was permitted to continue this line of questioning. (P.A. 49-50) Hearing Officer Day briefly paused the proceedings twice: once due to allergies, and once to inform the parties for the next hearing that the hearing would be running past the scheduled time. (P.A. 51, 74) Hearing Officer Day ultimately permitted Petitioner's counsel to question witnesses until 12:45 p.m. During the remainder of counsel's examination of Officer Paetsch, Hearing Officer Day interrupted his examination as follows: once, when counsel asked if Officer Paetsch had children of his own, Hearing Officer Day cautioned counsel about questions delving into the officer's personal life and staying within the limited scope of review; when Mr. Esposito interjected while counsel was examining Officer Paetsch, Hearing Officer Day cautioned him to wait to speak until he was called as a witness; and finally, Hearing Officer Day briefly interposed to caution counsel that the allotted hearing time was approaching and to be mindful of the time allotment. (P.A. 62, 69, 83)

It is evident from the hearing transcript that Petitioner's counsel was permitted to extensively question Officer Paetsch concerning the lawfulness of the stop and to present the full testimony of Petitioner's additional witness, Mr. Esposito. Notably, in the instant Petition, although Petitioner asserts she was deprived of due process because Hearing Officer Day declined to continue the hearing beyond the allotted time frame, she fails to articulate any testimony that she was unable to elicit during the administrative hearing due to the aforementioned time constraints. The Court finds that the brief interruptions evident in the record did not amount to a deprivation of procedural due process, and that the transcript reflects counsel was able to comprehensively examine both witnesses concerning the lawfulness of Petitioner's stop, detention, and arrest. The Court additionally finds that Hearing Officer Day did not exhibit impartiality by *sua sponte* determining that counsel's line of questioning regarding Officer Paetsch's family impermissibly exceeded the limited scope of review or by interposing a single relevance inquiry with respect to counsel's questions regarding the initial stop. Unlike in the cases cited by Petitioner, Hearing Officer Day did not intervene in a manner that precluded the presentation of relevant evidence, and he did not elicit evidence or testimony that was not otherwise in the record. Petitioner's counsel's dissatisfaction with the manner in which Hearing Officer Day presided over the administrative review hearing does not transform her complaints into a colorable claim for a due process violation. The Petition will consequently be denied as to Petitioner's argument that she was not afforded procedural due process at the administrative review hearing.

II. Lawfulness of Petitioner's Detention and Arrest (Competent Substantial Evidence and Essential Requirements of Law)

Petitioner asserts that Hearing Officer Day's order sustaining the suspension of her driving privileges was not supported by competent substantial evidence and that Hearing Officer Day ignored the essential requirements of law in finding that her detention and arrest were lawful. Petitioner argues that because the lawfulness of the initial detention was not proven by competent substantial evidence, the arrest and subsequent breath test request were not lawful and cannot serve as the predicate for an administrative suspension of her license. Petitioner additionally argues that Hearing Officer Day failed to give due consideration to any of the evidence or testimony presented at the hearing by Petitioner and based his findings exclusively on Officer Paetsch's reported observations from the date of the stop, as well as on additional non-record evidence, and asserts that his findings were consequently not supported by competent substantial evidence.

Standard of Review—Competent Substantial Evidence

The Department's decision comes to this Court "clothed with the presumption of correctness." *Smiley v. Greyhound Lines, Inc.,* 704

So.2d 204, 205 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D158a]; *Craig v. Craig,* 982 So.2d 724 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1084a]. This Court may not go beyond the scope of review re-weigh the evidence and substitute its own opinion for that of the Department. *Marion County. v. Priest,* 786 So.2d 623 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1098b]; *see also Orange County v. Butler,* 877 So.2d 810, 812 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1561a]; *Dorian v. Davis,* 874 So.2d 661, 663 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1110b]; *Eckler v. Orange County,* 763 So.2d 545 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1793a]. In reviewing the administrative record, the Court merely determines if the challenged decision was supported by competent substantial evidence. *G.B.V. Int'l, Ltd.,* 787 So.2d at 846; *Snyder,* 627 So.2d at 476. The Florida Supreme Court has opined that "competent substantial evidence" is evidence that a reasonable mind would accept as adequate to support a conclusion. *DeGroot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957); *see also Town of Indialantic v. Nance,* 400 So.2d 37, 40 (Fla. 5th DCA 1981). Competent substantial evidence is such fact-based evidence from which the fact at issue may be reasonably inferred. *Pollard v. Palm Beach Cnty.,* 560 So.2d 1358, 1359 (Fla. 1990 (quoting *DeGroot,* 95 So.2d at 916)). As the Florida Supreme Court has explained:

> The issue before the court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for those are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters.
>
> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. The court's task vis-à-vis the third prong of *Vaillant* is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Town of Manalapan v. Gyongyosi,* 828 So. 2d 1029, 1033 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1992a].

Standard of Review—Essential Requirements of Law

Pursuant to Section 120.68(7), Florida Statutes, a reviewing court is authorized to "remand a case to [an] agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that . . . [t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." *Alvarez v. State Bd. of Admin.,* 326 So.3d 730, 734 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1777a] ("With the passage of Article V, Section 21 of the Florida Constitution effective November 6, 2018, the previously afforded deference to agency interpretation of statutes or rules has been abolished.") (*Internal citations omitted*). The agency's conclusions of law are consequently reviewed *de novo* on certiorari review. *G.R. v. Agency for Persons with Disabilities,* 315 So.3d 107, 108 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D140b]. However, a ruling only constitutes a departure from the essential requirements of law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice, *Clay County v. Kendale Land Development, Inc.,* 969 So.2d 1177 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] (*citing Combs v. State,* 436 So.2d 93, 96 (Fla. 1983)), and a writ of certiorari will not be issued as a result of *a de minimis* legal error. *Futch v. Florida Dept. of Highway Safety and Motor Vehicles,* 1389 So.3d 131, 132 (Fla. 2016) [41 Fla. L. Weekly S150a] ("[T]he departure from the essential requirements of law necessary for the issuance of a writ of certiorari is something more than a simple legal error.") (quoting *Allstate Ins. Co. v. Kaklamanos,* 843 So.2d 885, 889 (Fla. 2003) [28 Fla. L. Weekly S287a]) (*further internal citations omitted*).

Standard—Lawfulness of the Detention and Arrest—Hearing Officer's Scope of Review

In an administrative hearing for review of a driver's license suspension for driving under the influence, the hearing officer's scope of review is limited by statute to the following issues:

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

§ 322.2615(7)(b), Fla. Stat. The Florida Supreme Court has also held that implicit within this scope of review is consideration of the lawfulness of the arrest. *See generally Florida Dep't of Highway Safety & Motor Vehicles v. Hernandez,* 74 So.3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a]. At the formal review hearing, the hearing officer may rely solely upon documentary evidence submitted by law enforcement, including the contents of a crash report, which is deemed self-authenticating. § 322.2615(2), Fla. Stat., Rule 15A-6.013(2), Fla. Admin. Code. The hearing officer is the sole decisionmaker as to the weight, relevance, and credibility of any evidence presented. Rule 15A-6.013(7), Fla. Admin. Code. Furthermore, the burden of proof at the formal hearing is whether the driver license suspension issued by law enforcement was supported by a preponderance of the evidence. *Id.*

Under the implied consent law, a request for a breath test is only permissible if it is made incident to a lawful arrest. *State v. Barrett,* 508 So.2d 361 (Fla. 5th DCA 1987), *rev. denied,* 511 So.2d 299 (Fla. 1987). Specifically, the suspect must be "lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances." § 316.1932(1)(a), Fla. Stat. (2002). The arrest must precede the breath test. *Department of Highway Safety and Motor Vehicles v. Whitley,* 846 So.2d 1163, 1167 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a], *rev. denied,* 858 So.2d 333 (Fla. 2003). An individual "does not violate the Implied Consent Law when he or she refuses to take a [breath] test that is not incidental to a lawful arrest." *DHSMV v. Pelham,* 979 So.2d 304 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D765a].

In determining the lawfulness of an arrest preceding a DUI suspension, the Court must assess the lawfulness of both the initial traffic stop as well as the subsequent detention. With respect to the initial stop, any traffic violation (no matter how insignificant, and irrespective of whether the violation is a moving or non-moving violation) justifies a traffic stop as long as it is supported by probable cause. *Holland v. State,* 669 So.2d 757 (Fla. 1997) [22 Fla. L. Weekly S387a]; *United States v. Botero-Ospina,* 71 F.3d 783 (10th Cir. 1995). However, the detention must last no longer than necessary to resolve the suspected traffic violation, either by warning, citation, or hearing an explanation from the driver, and the detention must be reasonably

related to the initial reason for the stop. *Florida v. Royer,* 460 U.S. 491 (1983); *United States v. Gil,* 204 F.3d 1347 (11th Cir. 2000). Any further detention must be supported by reasonable suspicion of more serious criminal activity and independent of the initial justification. *Cresswell v. State,* 564 So.2d 480 (Fla. 1990); *United States v. Davis,* 430 F.3d 345 (6th Cir. 2005).

Ordering a driver to exit his vehicle converts a consensual encounter into a *Terry* stop since the driver is no longer free to leave. *Popple v. State,* 626 So.2d 185 (Fla. 1993); *A.F. v. State,* 850 So.2d 667 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1768a]; *Danielewicz v. State,* 730 So.2d 363 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D793a]. Courts have held that retention of an individual's driver's license enhances a consensual encounter into an investigatory stop, or *Terry* stop, and under those circumstances where a reasonable person would not feel free to leave without their driver's license, such an encounter can be tantamount to an arrest. *United States v. Thompson,* 712 F.2d 1356 (11th Cir. 1983). When a *Terry* stop is unlawful, any evidence obtained therefrom is tainted and is inadmissible. *Brown v. State,* 744 So.2d 1149 (2d DCA 1999) [24 Fla. L. Weekly D603c].

Petitioner contends that Hearing Officer Day's finding concerning the lawfulness of her detention and subsequent arrest was not supported by competent substantial evidence in several respects. First, Petitioner asserts that the Findings of Fact section of the order upholding the suspension of her license includes the following finding that was unsupported by any evidence or testimony presented at the hearing: "The Petitioner advised Officer Paetsch she was speeding because she was looking for her hotel, then said she was speeding because she was using her maps to locate a hotel." Petitioner contends this finding indicates that Hearing Officer Day considered Petitioner's conflicting explanations for her rate of speed as indicia of impairment when determining whether there was sufficient reasonable suspicion for her further detainment, and she argues that the decision on the issue of reasonable suspicion is consequently premised on evidence that cannot be found in the record. Petitioner additionally contends that Hearing Officer Day impermissibly failed to consider evidence contradicting Officer Paetsch's observations by finding Mr. Esposito's testimony that she had not consumed any alcohol or illegal narcotics on the evening of her arrest to be categorically unpersuasive and by disregarding the photographic evidence refuting Officer Paetsch's observation that Petitioner's eyes were watery and bloodshot.

As a procedural matter, the Court initially observes that Petitioner's counsel submitted a Notice of Filing Exhibits A1, A2, A3, A4, and T1 to the Petition on May 25, 2021, which documents are more particularly described as follows: Exhibit A1 is a copy of Hearing Officer Day's Findings of Fact, Conclusions of Law and Decision entered on April 22, 2021; Exhibit A2 is a copy of the Arrest Report completed by Officer Paetsch on February 14, 2021; Exhibit A3 is a copy of the Field Sobriety Report competed by Officer Paetsch on February 14, 2021; Exhibit A4 is a copy of Petitioner's written refusal to submit to a breath, urine, or blood test; and Exhibit T1 is a copy of the transcript of the formal review hearing on April 13, 2021. Consequently, the Court has not been supplied with a copy of the bodycam video footage from the arrest (DDL-8), nor has it been supplied with the photographs purportedly evidencing that Petitioner's eyes were not watery or bloodshot when she was booked at the Nassau County Jail following her arrest (DE-1 and DE-2). The Court cannot find that Hearing Officer Day impermissibly considered non-record evidence regarding Petitioner's initial explanations for speeding without the benefit of reviewing the bodycam footage to ascertain whether this footage contained the basis for that particular finding of fact. The Court additionally is without the benefit of reviewing Petitioner's booking photographs to determine whether their depiction of Petitioner's eyes is consistent with her asserted position in the Petition.

Notwithstanding the foregoing, the Court finds that Hearing Officer Day's determination that Petitioner displayed signs of impairment was supported by competent substantial evidence. On the issue of competent substantial evidence, Petitioner essentially seeks for this Court to hold that Hearing Officer Day should have arrived at a different determination as to the credibility and weight of the available evidence. Petitioner argues that if her eyes were observed to be watery and bloodshot, the early morning hour at which she was stopped coupled with the presence of her toddler provided a reasonable explanation for this observation; that she offered into evidence images from her subsequent booking at which she allegedly appeared to have clear eyes; and that she presented the testimony of her fiancé, Mr. Esposito, who testified that she had not consumed any alcoholic beverages or illegal substances in the hours preceding her arrest. In its response, the Department argues that Officer Paetsch's testimony and attestations in the arrest report supported a finding that Mr. Esposito's testimony was inherently unreliable, and further asserts that even if the booking report were properly before this Court, what it likely depicted was the fact that Petitioner had sobered up subsequent to her arrest. Both Petitioner and the Department acknowledge that Hearing Officer Day specifically considered Mr. Esposito's testimony and the photographic evidence presented by Petitioner at the hearing and found this evidence to be unpersuasive.

Although the parties' arguments in the instant Petition and response are focused primarily on the credibility and weight of the evidence proffered by Defendant at the formal review hearing, these arguments are outside the scope of this Court's certiorari review. It is not within this Court's discretion to reevaluate the evidence to assess the propriety of Hearing Officer Day's determination that Petitioner's evidence was unpersuasive. *See Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] ("While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision."). The dispositive issue before the Court is whether Hearing Officer Day's finding that Officer Paetsch's observations supported that Petitioner exhibited signs of impairment was supported by competent substantial evidence. Officer Paetsch's observations that Petitioner was speeding, that her eyes were watery and bloodshot and that her eyelids were drooping, and that her speech was slurred and her voice gravelly were contained in both the transcript of the formal review hearing, as well as in his arrest report. Hearing Officer Day's finding that Petitioner exhibited signs of impairment was thus clearly supported by competent substantial evidence, and the Petition will be denied as to this prong.

The Court now turns to the issue of whether Hearing Officer Day's finding that the precise indicia of impairment observed by Officer Paetsch constituted reasonable suspicion warranting the further detention of Petitioner constituted a departure from the essential requirements of the law. Reasonable suspicion supporting an investigatory stop is assessed based on the totality of the circumstances viewed from the standpoint of an objectively reasonable police officer. *State v. Teamer,* 151 So.3d 421, 426 (Fla. 2014) [39 Fla. L. Weekly S478a]. "The reasonable suspicion inquiry falls considerably short of 51% accuracy, for, as we have explained, to be reasonable is not to be perfect." *Kansas v. Glover,* 140 S.Ct. 1183 (2020) [28 Fla. L. Weekly Fed. S111a]; *see also Illinois v. Wardlow,* 528 U.S. 119, 123 (2000) (reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.") In the context of reasonable suspicion of DUI to warrant an investigation, the Fifth District Court of Appeal has held as follows:

In determining whether an officer possesses a reasonable or well-

> founded suspicion of criminal activity so as to justify an investigatory stop, 'the totality of the circumstances—the whole picture—must be taken into account. . . . Those facts include the time of day, the day of the week, the location, the physical appearance of the suspect, the behavior of any vehicle involved, or anything unusual in the situation as interpreted in light of the officer's knowledge.'

State v. Pye, 551 So.2d 1237 (Fla. 5th DCA 1989).

In support of her position that Officer Paetsch's observations were insufficient to constitute reasonable suspicion, Petitioner cites to some trial court case law in which our sister circuits have upheld motions to suppress the results of breathalyzer tests on the basis that the officers in those cases did not have reasonable suspicion to detain the defendants. In *State of Florida v. Gilstrap,* the Seventh Judicial Circuit determined that the arresting officer did not have reasonable suspicion to request field sobriety exercises based solely upon his observations that the defendant was speeding, exhibited an odor of alcohol, and stumbled while exiting her car. 18 Fla. L. Weekly Supp. 1176a (May 20, 2011). The Court held that these indicia of impairment failed "to rise to the level to show a probability that the defendant was impaired by alcohol or had an unlawful amount of alcohol in her system." In *State of Florida v. Knuth,* the Seventh Circuit again determined that the arresting officer lacked reasonable suspicion to detain the defendant for field sobriety exercises where the defendant admitted to consuming alcohol and exhibited an odor of alcohol. 18 Fla. L. Weekly Supp. 470a (Jan. 24, 2011). Both of these cases are readily distinguishable from the instant case because they do not involve observations of multiple physical indicia of impairment.

By contrast, the case law cited by the Department supports Hearing Officer Day's finding that Petitioner's slurred speech, gravelly voice, bloodshot and watery eyes, and droopy eyelids, combined with her initial traffic offense of speeding, constituted sufficient indicia of impairment to support her further detention[3]. In *Origi v. State,* the Fourth District opined that an officer possessed reasonable suspicion sufficient to justify detaining a defendant for a DUI investigation following a speeding stop based upon the officer's observations that the defendant smelled of alcohol and had bloodshot eyes. 912 So.2d 69, 71 (2005) [30 Fla. L. Weekly D2302a]. In *Mathis v. Coats,* the Second District Court of Appeal determined that the appellee had been subjected to a lawful DUI arrest after a traffic stop based on the officer's observations that she had bloodshot eyes, slow coordination, exhibited difficulty following conversation, and had a flushed face, even though she did not have an odor of alcohol and her speech was not slurred. 24 So.3d 1284, 1288 (2010) [35 Fla. L. Weekly D142b]. The Court finds that Hearing Officer Day did not depart from the essential requirements of law by finding *Gilstrap* and *Knuth* to be unpersuasive in this case and by finding that Petitioner's speeding, slurred speech, gravelly voice, bloodshot and watery eyes, and droopy eyelids together provided reasonable suspicion for Officer Paetsch to detain her for further investigation. The Petition will consequently be denied as to the argument that Hearing Officer Day departed from the essential requirements of law in finding that Petitioner was lawfully detained for the DUI investigation preceding her arrest.

Accordingly, it is:

ORDERED AND ADJUDGED that:

1. The Petition for Writ of Certiorari, filed on May 24, 2021, is hereby **DENIED**.

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[1]The exhibits to the Petitioner's Appendix will hereinafter be denoted as "P.A. ___".

[2]While the incident occurred in Nassau County, Florida; Petitioner is a resident of St. Johns County, Florida.

[3]The Court additionally observes that before Petitioner began participating in field sobriety exercises, Officer Paetsch observed her swaying while standing at the rear of her vehicle, which constituted an additional indicium of impairment.

* * *

Counties—Code enforcement—Animals—Dangerous dog—Due process—Evidence—Dog owner appealing "dangerous dog" determination was denied due process as result of hearing officer's failure to view neighbor's Ring doorbell video that allegedly supported dog owner's claim that victim who claimed to have been bitten by dog through dog owner's fence had provoked dog to attack, but was not actually bitten by dog, and that incident did not occur on date alleged by victim—Although video was submitted to county animal services department instead of clerk of court, rules of procedure allowed hearing officer discretion to admit noncompliant evidence, hearing officer recognized that he could not rule fairly without viewing video, and county would not have been prejudiced by hearing officer viewing a video that was already in county's possession

LUIS HORMILLA, Appellant, v. MIAMI-DADE COUNTY, CODE ENFORCEMENT—ANIMAL SERV. DEPT., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-30 AP01. July 16, 2022. On Appeal from an Order of Miami-Dade County Code Enforcement. Counsel: Alan D. Sackrin, Sackrin & Tolchinsky, P.A., for Appellant. Cristina Rabionet, Assistant County Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(SANTOVENIA, J.) Luis Hormilla appeals an order designating his dog Buddy a "dangerous dog" following a Miami-Dade County Code Enforcement hearing. The hearing officer determined that an initial "dangerous dog" determination was correctly issued in accordance with the provisions of 5-C.2(B) of the Code of Miami-Dade County. On appeal, Hormilla argues that his due process rights were violated and that the order departed from the essential requirements of law.

Background

On March 21, 2021, Ubaldo Serra ("Eddie" or "Serra") claims that he walked his dog on a public sidewalk adjoining the front yard of Luis Hormilla's ("Appellant" or "Hormilla") property, which was surrounded by a chain-link fence. As Serra passed by on the sidewalk, Buddy, Appellant's bulldog, pushed his head underneath the fence and allegedly bit Serra on his left ankle. The Hialeah Police Department and the Hialeah Fire Department were called to the scene. As a result of the incident, the Fire Department report noted that Serra sustained lacerations, which were treated at Pasteur Medical Center. The Police Department report noted that Serra had visible scratches on his left ankle.

Subsequently, the Miami-Dade Animal Services Department ("Department") investigated and issued citation R030912 ("Citation") against Appellant and designated Buddy a "dangerous" dog. The Citation cited Appellant for violation of Miami-Dade County Code §5-22(d)(1), which provides that a dog shall be designated dangerous if, when unprovoked, it endangers, attacks, or bites a human. Since Buddy did not have a current rabies vaccination, Appellant was also given a warning for that issue. Additionally, Appellant was required to quarantine Buddy for ten days.

Hormilla timely filed a request for an appeal hearing. On May 24, 2021, Code Enforcement Hearing Officer Jeffrey Wander ("Hearing Officer") conducted the administrative hearing. The following evidence was presented:

Department Investigator Gabriella Dominguez ("Dominguez") testified and introduced reports and exhibits, including a Hialeah Police Department report, a Hialeah Fire Department report, medical records of Serra's treatment at Pasteur Medical Center, and an Animal Bite Report with photos of Buddy, Serra's ankle, and the incident location. Dominguez also played a fourteen second video ("Phone Video") of the incident that Serra had recorded on his cell phone. Fire rescue records showed that there were no "penetration" marks observed on Serra's leg. There was minor bleeding noted and the

cause of injury was characterized by fire rescue as "contact with dog," not a dog bite.

Serra also testified about the how the incident with Buddy occurred.

Appellant testified about Buddy's behavioral history and past interactions with Serra, detailing Serra's history of provoking Buddy and Appellant's other dogs. Appellant's wife, Ana Hormilla, testified that on Saturday March 20, 2021, she encountered Serra while walking his dog and that Serra was kicking and pushing the Hormillas' fence to irritate the dogs that were in the front yard. Ms. Hormilla testified that Serra had been provoking Buddy and the other dogs for years, but the Hormillas had never called the police because they felt badly for Serra.

Appellant also submitted an affidavit of his neighbor, Jose Romo, which stated that Serra is a well-known problem in the neighborhood. Romo had observed Serra provoking Appellant's dogs in the past and indicated that Serra is a troubled individual who needs mental health treatment.

Additionally, Appellant included a statement from veterinarian Spencer Goldstein that he had never witnessed Buddy acting aggressively.

Appellant attempted to introduce a neighbor's ring camera video which he had submitted to the Depaament ("Ring Video"). The Ring Video was not admitted because Appellant had failed to comply with the required evidence submission procedures.

At the conclusion of the Hearing, the Hearing Officer affirmed the Citation.

Standard of Review

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].

Due Process in Administrative Hearings

"A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts. . ." *Id.*

The extent of procedural due process afforded to a party in a quasi-judicial hearing is not as great as that afforded to a party in a full judicial hearing. *Seminole Entertainment, Inc. v. City of Casselberry,* 811 So. 2d 693, 696 (Fla. 5th DCA 2001) [27 Fla. L. Weekly D19a]. Consequently, such hearings are not controlled by strict rules of evidence and procedure. *Id.*

Nevertheless, a party to a quasi-judicial hearing "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Ramos v. Florida International University,* 2021 WL 6690316 (Fla. 3d DCA May 11, 2021) [46 Fla. L. Weekly D2299a] (citing *Kupke v. Orange County,* 838 So. 2d 598, 599 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a] (citing *Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So. 2d 996 (Fla. 2d DCA 1993)).

Analysis

Appellant argues that he was denied due process because the Hearing Officer did not view the neighbor's Ring Video which Appellant contends was critical evidence. We agree.

The Appellant submitted the Ring Video to the Assistant Director of the Department prior to the Hearing, but not to the Clerk of Court. The representative from the Department, Investigator Dominguez did not bring the Ring Video to the Hearing or advise Appellant that the Ring Video had been improperly submitted to the Department instead of to the Clerk.

After indicating that he believed the dog was provoked and that Serra was not bitten by Buddy, as confirmed by the fire rescue notes finding no puncture wound, Hearing Officer Wander stated that he had to view the Ring Video in the County's possession in order to confirm the date of the incident and to see if there was provocation. Moreover, the Hearing Officer expressed a need to see the Ring Video in order to "fairly rule" on the case, but then proceeded to decide the case without seeing the Ring Video. This action was based on Dominguez's insistence that the Ring Video had not been submitted to the Clerk and could not be considered, notwithstanding the fact that the hearing was quasi-judicial and technical rules of evidence and procedure are relaxed. *See Seminole Entertainment, supra.,* 811 So. 2d at 696. Dominguez's assertion that the Ring Video could not be viewed because it was not properly submitted was contrary to the rules of procedure. The Notice of Administrative Hearing refers to the admission of evidence as follows:

> Procedures for the Submission and use of Documentary or Audiovisual Evidence: (Choose only one of the two options below)[1]
>
> . . .
>
> AND (3) Nothing is this procedure limits the Hearing Officer's discretion to admit for a limited purpose, or deny entry or use of such evidence, or fashion whatever relief is appropriate under the circumstances, based on lack of compliance with these procedures; and
>
> (4) If the parties comply in good faith with this procedure but technological issues prevent a meaningful review of the evidence through remote means, the Hearing Officer may defer the matter at its discretion.
>
> Rec., p. 42.[2]

The Ring Video was pertinent to a number of factual issues as to how and when the incident occurred. Serra's phone video did not have a time or date on it. The Hormillas believed the incident occurred on Saturday, March 20th, as they were not home on Sunday, March 21st and the dogs would have been inside the house. Hearing Officer Wander stated that "[i]n any event, I don't know how I can fairly rule on this, I really don't, without seeing that video. And the video was submitted and it's not part of the case file here."

Most importantly, the Ring Video purportedly showing Serra provoking Buddy goes directly to the issue of whether the definition of a dangerous dog even applies. That definition requires that the dog, **when unprovoked**, endangers, attacks, or bites a human. This is not an insignificant determination to be made by a hearing officer, as a dog deemed "dangerous" may be removed from its owner and euthanized. Moreover, significant fines will likely be assessed.

Furthermore, the Ring Video addresses whether the incident occurred as Serra claimed. Serra's account was that Buddy bit him on a Sunday, while the video apparently shows Serra last walking by Appellant's property the day before.

Here, the initial letter advising Appellant that Buddy had been designated a dangerous dog also advised Appellant that he could request an appeal by sending a written request or an email to Investigator Dominguez. Appellant did just that, sending Dominguez an email on May 4, 2021, requesting an appeal before a hearing officer and requesting that "the Uniform Civil Violation Notice #R030912 also be a part of the above requested appeal". The email further requests that Dominguez "[p]lease take a moment to let me know that you have received this request and that it has been properly submitted to you as it relates to the civil violation." Dominguez responded to Hormilla that "[t]he request has been received and is being processed." Notably, there was no mention in that email that all of

Hormilla's evidence was required to be submitted to the Clerk.

We also note that the County would not have been prejudiced by the Hearing Officer's consideration of the Ring Video on the grounds of ambush or surprise as the County was in possession of the Ring Video before the Hearing.

For the foregoing reasons, the decision below is REVERSED. (TRAWICK and WALSH, JJ. concur.)

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[1]The two options are either electronic submission of evidence, or physical submission of evidence.

[2]"Rec." stands for Record on Appeal, filed July 6, 2021.

* * *

Municipal corporations—Comprehensive plan—Amendments—Challenge to local government's decision on small-scale development amendment may be commenced as an original action in circuit court or by certiorari—City commission did not depart from essential requirements of law in approving application for rezoning of development from "single family residential" to "low density restricted commercial" where staff report recommended approval of application and found it consistent with various comp plan objectives and goals, and covenant signed by applicants contains required traffic improvement plans—Approval of application was supported by competent substantial evidence in record, including staff report and letters of support from homeowners and neighboring groups

PRESERVE THE WEST GROVE, INC., SHIRLEY GIBSON, JENA SAUL, ANTHONY VINCIGUERRA, and COURTNEY BERRIEN, Petitioners, v. CITY OF MIAMI, Respondent, and STIRRUP PROPERTIES, INC., 3327 GROVE, LLC, and 3267 CHARLES, LLC, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-56-AP-01. July 6, 2022. On Petition for Writ of Certiorari from the City of Miami Commission approval of Ordinances 13999 and 14000. Counsel: David J. Winker, David J. Winker, P.A., for Petitioners. Victoria Mendez, City Attorney, John A. Greco, Deputy City Attorney, and Kerri L. McNulty, Senior Appellate Counsel, for Respondent City of Miami. Elliot H. Scherker, Brigid F. Cech Samole, and Bethany J.M. Pandher, Greenberg Traurig, P.A., for Respondents Stirrup Properties, Inc., 3227 Grove, LLC and 3267 Charles, LLC.

(Before DARYL E. TRAWICK, MARIA DE JESUS SANTOVENIA, and LISA S. WALSH, JJ.)

OPINION

(PER CURIAM.) This matter comes before this Court on a Petition for Writ of Certiorari filed by Preserve the West Grove, Inc., Shirley Gibson, Jena Saul, Anthoney Vinciguerra, and Courtney Berrien, (collectively "Petitioners"). Petitioners request that this Court quash Ordinances 13999 and 14000, approved by the City Commission of the City of Miami ("Commission"). Ordinance 13999 allowed the amendment of the Future Land Use Map ("FLUM") designation of the Miami Comprehensive Neighborhood Plan ("MCNP") for the proposed development to be changed from "Single Family Residential" to "Low Density Restricted Commercial," pursuant to the small-scale amendment procedures of Section 163.3187, Florida Statutes. Ordinance 14000 allowed the change in zoning classification[1] of the proposed development ("Property") located at 3270 Williams Avenue and 3227, 3247, 3257 and a portion of 3277 Charles Avenue in the City of Miami.

As a threshold issue, Respondents contend that Petitioners' challenge to Ordinance 13999 through which the Commission amended the FLUM is not subject to certiorari review, because Ordinance 13999 was enacted pursuant to the small-scale amendment procedures of Section 163.3187, Florida Statutes.

Section 163.3187, Fla. Stat. (2021) states:

> (1)A small-scale development amendment may be adopted under the following conditions:
>
> (a) The proposed amendment involves a use of 50 acres or fewer and:
>
> (b) The proposed amendment does not involve a text change to the goals, policies, and objectives of the local government's comprehensive plan, but only proposes a land use change to the future land use map for a site-specific small scale development activity . . .
>
> (c) The property that is the subject of the proposed amendment is not located within an area of critical state concern, unless the project subject to the proposed amendment involves the construction of affordable housing units meeting the criteria of s. 420.0004(3), and is located within an area of critical state concern designated by s. 380.0552 or by the Administrative Commission pursuant to s. 380.05(1).
>
> . . .

Respondents cited the case of *Martin Cty. v. Yusem* for the proposition that Petitioners were required to bring this case as an original action in circuit court, and not as a petition for certiorari. 690 So. 2d 1288, 1295 (Fla. 1997) [22 Fla. L. Weekly S156a]. However, very significantly, *Yusem* did not pertain to a small-scale amendment, but rather to a comprehensive land use amendment pertaining to a fifty-four-acre property that was part of a nine-hundred-acre tract of land. The Supreme Court clarified in a later case, *Coastal Dev. of N. Fla., Inc., v. City of Jacksonville Beach,* that in *Yusem* they "expressly declined to pass upon small-scale development amendments, as that issue was not before us." 788 So. 2d 204, 208 (Fla. 2001) [26 Fla. L. Weekly S321a] (citation omitted). Accordingly, *Coastal* held that "[a] challenge to a local government's decision on a small-scale development amendment **may be** commenced as an original action in the circuit court." *Id.* at 209. (emphasis added) Therefore, aggrieved persons are not required to file an original action and may challenge a local government's decision on a small-scale development amendment by certiorari.

The City of Miami Planning Department Staff Analysis ("Staff Report") stated that "[t]he application is subject to small-scale amendment procedures as established in Section 163.3187, Florida Statutes, involving less than 10 acres of Subject Properties." (SA:25). The Report also noted that the proposed Property was consistent with the goals, objectives and policies of the MCNP. Here we find that all the requirements of Section 163.3187, Fla. Stat. have been met for small-scale development, and the Petition for Writ of Certiorari is properly before this Court.

Standard of Review

Review of a quasi-judicial zoning decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgments are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] *(citing City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). Petitioners argue that essential requirements of the law were not observed, and there was a lack of competent substantial evidence to support the Commission's decision.[2]

Essential Requirements of Law

In *Haines,* the Supreme Court, in considering whether the essential requirements of the law were observed, held that "appl[ying] the correct law" is synonymous with "observing the essential requirements of law." 658 So. 2d at 527. Overlooking sources of established law or applying an incorrect analysis of the law results in a departure from the essential requirements of law. *See City of Tampa v. City Nat'l Bank of Fla.,* 974 So. 2d 408, 411 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1319a].

Petitioners contend that the Commission departed from the essential requirements of law because the Respondents' Application for the proposed Property is inconsistent with the legal requirements of Miami 21 and the MCNP. This argument is unavailing. The Staff

Report recommended approval of the Application, finding that it was "consistent" with the various MCNP objectives and goals. Moreover, the Planning, Zoning, and Appeals Board recommended approval of the change in both the zoning classification and the FLUM.

Petitioners also contend that the Application fails to meet certain requirements such as "neighborhood traffic calming plans." The covenant signed by the Respondents contains a section for traffic improvements. We find no departure from the essential requirements of the law.

Competent Substantial Evidence

We now turn to the issue of competent substantial evidence. Competent substantial evidence has been defined as "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Smith v. Dep't of Health & Rehab. Servs.,* 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989) (citation omitted). "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway Safety and Motor Vehicles,* 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a] (citation omitted).

Petitioners argue that the Commission's approval was not based on competent substantial evidence. Specifically, Petitioners contend that the Property will transform the neighborhood in a way that is neither consistent with the comprehensive plan nor compatible with the existing neighborhood. We do not agree. The Staff Report notes that "[t]he proposed rezoning is a response to various changing conditions within the area and citywide." (SA:280). The Staff Report specifically notes that the proposed rezoning is consistent with the expansion and changed conditions in the vicinity of the proposed development, including the Cocowalk retail complex update, additional transportation options, and new office and lodging projects.

The record reflects that the Commission received evidence in the form of letters of support from numerous homeowners who lived near the Property. The Commission also received letters of support from neighboring groups such as the Village West Homeowners and Tenants Association and the Coconut Grove Village Council.

Staff report recommendations constitute competent substantial evidence. *See Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.,* 128 So. 3d 19, 26-27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c]. Here, we find that the City staff conducted a complete review of the Respondents' Application, and recommended approval. We find that there is ample competent substantial evidence in the record to support the Commission's decision.

We conclude that the Commission followed the essential requirements of law and that there was competent substantial evidence to support the Commission's decision. The Petition for Writ of Certiorari is therefore **DENIED.** (TRAWICK, SANTOVENIA and WALSH, JJ., concur.)

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[1]The rezoning of the Property was from a "T3-R" Sub-Urban Transect Zone-Restricted with a Neighborhood Conservation District ("NCD-2") overlay to a "T4-L" General Urban Transect Zone-Limited with an NCD-2 overlay. The change in the zoning classification was made pursuant to the zoning requirements of Article 7, Section 7.1.2.8 of Miami 21.

[2]While not raised by Petitioners, we find that procedural due process was accorded here.

* * *

Counties—Rezoning—Appeals—Standing—Organization formed after county commission approved rezoning does not have standing to file petition for writ of certiorari challenging action—Concern for increased traffic does not confer standing to challenge rezoning on resident of neighborhood—Under county zoning code, commission was not required to give additional notice by publication when it deferred rezoning hearing to later hearing date; mailing of new notice to interested parties within half-mile radius was sufficient—Further, notice issue was waived where petitioners did not object to notice at hearing—Commission did not depart from essential requirements of law in approving rezoning where staff report opined that rezoning would be consistent with applicable laws, and report properly considered environmental evidence at site—Approval was supported by competent substantial evidence that rezoning would not be detrimental to community or environment

SAVE CALUSA INC., a Florida non-profit, and AMANDA PRIETO, Petitioners, v. MIAMI-DADE COUNTY, a political subdivision of the State of Florida, and KENDALL ASSOCIATES I, LLLP, et al., Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-67-AP-01. June 27, 2022. On Petition for Writ of Certiorari from the Miami-Dade Board of County Commissioners approval of Resolution No. Z-34-21. Counsel: David J. Winker, David J. Winker, P.A., for Petitioners. Geraldine Bonzon-Keenan, Miami-Dade County Attorney, Dennis A. Kerbel, Lauren E. Morse, and Cristina Rabionet, Assistant County Attorneys, for Respondent Miami-Dade County. Eileen Ball Mehta, Brian S. Adler, and Liana M. Kozlowski, Bilzin Sumberg Baena Price & Axelrod LLP, for Respondent Kendall Associates I, LLLP.

(Before DARYL E. TRAWICK, MARIA DE JESUS SANTOVENIA, and MARLENE FERNANDEZ-KARAVETSOS, JJ.)

OPINION

(PER CURIAM.) This matter comes before the Court on a Petition for Writ of Certiorari filed by Petitioners Save Calusa, Inc. ("Save Calusa") and Amanda Prieto ("Prieto") (collectively "Petitioners"). Petitioners request that this Court quash Resolution No. Z-34-21, approved by the Miami-Dade Board of County Commissioners ("Commission"). The Resolution allowed Respondent Kendall Associates I, LLLP ("Kendall Associates") the right to rezone 169.27 acres of land located at the former Calusa Country Club Golf Course, at 9400 SW 130 Ave. and 9800 & 9810 East Calusa Club Drive ("Property") in Miami-Dade County. The rezoning would allow 550 single family residential units to be built, along with several ancillary variances and unusual uses.[1]

This Property has a long history. In August 1967, the Zoning Appeals Board approved a golf course and related zoning. In March 1968, the then-owner executed a restrictive covenant for a golf course. In October 2020, the Commission removed the restrictive covenant with the consent of 84 percent of the owners of the single-family lots encircling the Property.

The Miami-Dade County Zoning Board public hearing to consider the zoning change was scheduled and noticed for October 21, 2021, but was deferred by the Commission at their October 19, 2021, meeting. The Commission heard the Respondents' application at its Nov. 17, 2021, Zoning Board meeting.[2]

Standing

As a threshold issue, we find that neither Prieto nor Save Calusa have standing to bring this action. To establish standing under Florida law, a party must show a specific injury, such as a direct impact on the party's property or legal rights, and not just a "general interest" that is no greater than that of other residents. *Renard v. Dade Cty.,* 261 So. 2d 832, 837 (Fla. 1972). During oral argument, Petitioners candidly conceded that Save Calusa was formed after the Commission hearing approving the Resolution. Save Calusa's Articles of Incorporation, which show an effective date of December 23, 2021, were not filed with the Florida Department of State until December 27, 2021, which was more than one month after the hearing. Since Save Calusa did not exist at the time of the Zoning Board meeting, it lacks standing to pursue the relief sought in this petition.

Prieto testified before the Commission that she lived a "few hundred feet from the golf course." [A0026]. She asserts that she has standing due to her close proximity (within 500 feet) to the proposed development. Citing *Renard,* she maintains that she has a special

injury due to the increased traffic in her neighborhood, which negatively impacts her property value. However, this Court finds that Prieto's concerns regarding increased traffic are a "general interest" which is no greater than the concerns of any other resident. *See Exchange Investments, Inc., v. Alachua Cty,* 481 So.2d 1223, 1225 (Fla. 1st DCA 1985) ("[A]uthorities generally agree that traffic is a matter of general concern and does not grant standing."); *Skaggs-Albertson's Props, Inc., v. Michels Belleair Bluffs Pharmacy, Inc.,* 332 So.2d 113, 117 (Fla. 2d DCA 1976). As a result, we find that Prieto lacks standing to raise this claim.

Standard of Review

In reviewing a quasi-judicial zoning decision, we must determine whether procedural due process was afforded; whether the essential requirements of the law were observed; and whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citing City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). Petitioners assert that none of these prongs of the standard of review were met. We do not agree.

Due Process

We first address the issue of whether Petitioners were denied procedural due process. Generally, "due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure *before* judgment is rendered." *Richard v. Bank of America, N.A.,* 258 So. 3d 485, 489 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2531a] (*citing Viets v. Am. Recruiters Enterprises., Inc.,* 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D851a]).

Petitioners contend that the County failed to provide the notice required by law. They assert that because the Zoning Board hearing scheduled for October 20, 2021, was deferred to the Board's November 17, 2021, meeting date, there should have been an additional notice by publication for the new date. In response, the Respondents assert that when a Board meeting is rescheduled in this fashion, the zoning code does not require an additional published notice.

We defer to Miami-Dade County's interpretation of its own zoning code. "The administrative construction of a statute by the agency charged with its administration should not be disregarded or overturned by a reviewing court except for the most cogent reasons and unless clearly erroneous." *Metro. Dade Cty. v. State Dep't of Evntl. Prot.,* 714 So. 2d 512, 515 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1393a] (citation omitted).

Here we find that Miami-Dade County fulfilled all notice requirements of Miami-Dade County Code §33-310 for the October 20, 2021, hearing, including notice by mail and by publication. When that hearing was cancelled for lack of a quorum, all items were deferred to the next available hearing on November 17, 2021. Interested parties within the required half-mile radius, including Prieto, were provided notice by mail of the new hearing date. County staff posted notices on the entrance to the County Commission meeting room on October 20th. Further, the online County calendar was updated to include the new hearing date. We find that these efforts satisfied the requirements of the County Code. There is nothing in the Code which specifically requires an additional notice by publication when a properly noticed hearing is rescheduled at the initially noticed hearing. We further find that procedural due process does not require any additional notice by publication under these circumstances.

Even if there was a credible argument that the lack of an additional notice by publication created a procedural defect,[3] that issue has been waived by Prieto here. Parties in administrative proceedings are required to make objections on the record to preserve any error for appellate review. "It is well settled that, in 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). *See City of Miami v. Cortes,* 995 So. 2d 604, 606 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2691d] (finding that property owners waived error by failing to object to evidence and asking to cross-examine witnesses); *Clear Channel Comms, Inc. v. City of North Bay Village,* 911 So. 2d 188, 190 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b] (affirming appellate division of Circuit Court's decision which held that petitioners failed to preserve their legal challenges for appellate review because they did not make contemporaneous objections before the city commission).

Prieto had sufficient notice of the November 17th hearing, and in fact she participated in that hearing, speaking in opposition to the zoning application. During the hearing, she could have objected to the hearing going forward due to defective notice. She did not. She is thus precluded from raising this issue before this Court.

Essential Requirements of Law

In *Haines,* 658 So. 2d at 527, the Supreme Court determined that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, to warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Id.* (citation omitted).

Petitioners contend that the Commission departed from the essential requirements of law in approving the Planned Area Development (PAD), and that it is inconsistent with the policy objectives and goals of Miami-Dade County's Zoning Code, Comprehensive Development Master Plan ("CDMP") and Land Use Element Policies. This argument is meritless. The Miami-Dade County Department of Regulatory and Economic Resources Staff Report to the Board of County Commissioners ("Staff Report") stated that "[s]taff opines that the rezoning of the Property to PAD together with the ancillary variances and unusual uses would be **consistent** with the CDMP Land Use Element Interpretative text and the maximum density threshold permitted for the **Parks and Recreation and Low-Density Residential** designations on the CDMP Land Use Plan (LUP) map." (emphasis in original) (Resp. Supp. App. 023). The staff report cited to and interpreted the applicable law. Further, no "inherent illegality or irregularity" has been plausibly posited by Respondents. While Petitioners contend that the Commission failed to properly consider environmental evidence at the site, the Staff Report refutes this. We find no departure from the essential requirements of law.

Competent Substantial Evidence

"Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Florida Dep't of Highway Safety and Motor Vehicles,* 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a]. As an appellate court, we may not reweigh the evidence or substitute our judgment for that of the zoning authority. *Haines,* 658 So. 2d at 530.

Petitioners argue that the Commission's approval was not based on substantial competent evidence. Specifically, Petitioners contend that there is no evidence that the surrounding area will be protected from impacts such as "excessive density, noise, light, glare, odor, vibration, dust or traffic" They further assert that the Commission "failed to properly consider environmental evidence."

The Commission received ample evidence that approval of the development of the Property would not be detrimental to the community or environment. County professional staff issued a 200-plus page Staff Report recommendation in favor of the application. Florida law

recognizes such staff reports as substantial competent evidence. *Palm Beach Cty v. Allen Morris Co.,* 547 So. 2d 690, 694 (Fla 4th DCA 1989).

The testimony of the Respondents' experts, including a traffic engineer, a bird behavioral and habitat expert, and an environmental consultant likewise constitute competent substantial evidence. Petitioners did not present any expert witnesses to rebut this testimony. Moreover, the plans and site maps, along with the report from Respondents' economic expert, constitute fact-based reasons for the recommendations that were made. The extensive Staff Report contained material and relevant observations. We find that there is ample competent substantial evidence in the record to support the Commission's decision.

We conclude that the Commission afforded procedural due process, that there was no departure from the essential requirements of law, and that there was substantial competent evidence to support the Commission's vote. The petition for writ of certiorari is therefore **DENIED.** (TRAWICK, SANTOVENIA and FERNANDEZ-KARAVETSOS, JJ., concur.)

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[1]The rezoning would result in a change from GU (Interim Zoning) and EU-M (Estate Modified District-minimum 15,000 square foot lots) to PAD (Planned Area Development). This would allow more residential units than currently allowed under the Miami-Dade County Zoning Code, but fewer than allowed under the Comprehensive Development Master Plan.

[2]The Miami-Dade Board of County Commissioners met in the capacity as the Miami-Dade County Zoning Board.

[3]As Save Calusa did not exist on that date, notice could not have been provided to them by publication or otherwise.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Evidence—Complaint affidavit, though unsworn, complied with requirements of section 322.2615(2)(a) where affidavit was incorporated by reference into properly signed and sworn uniform probable cause affidavit—Complaint affidavit contained sufficient factual details to support finding that licensee refused to submit to breath test after lawful arrest

JUSTINE THOMPSON, 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-8247, Division D. June 28, 2022. Counsel: Keeley R. Karatinos, Karatinos Law, PLLC, Dade City, for Plaintiff. Christie S. Utt, General Counsel, and Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Defendant.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMILY A. PEACOCK, J.) This case is before the court on Justine Thompson's Amended Petition for Writ of Certiorari. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner contends that the Department's decision to suspend her driving privileges was not supported by competent, substantial evidence, and the hearing officer departed from the essential requirements of the law in that the decision relied on documents that failed to meet the requirements of a sworn affidavit, in violation of section 322.2615(2)(a), Florida Statutes. After reviewing the petition, response, relevant statutes, and case law, the court finds that, although itself unsworn, the Complaint Affidavit complied with section 322.2615(2) because it was incorporated by reference into the properly signed and sworn Uniform Probable Cause Affidavit. In addition, the Complaint Affidavit contained sufficient factual details of Petitioner's arrest and refusal to submit to a breath test to provide the hearing officer competent, substantial evidence to support the finding that Petitioner refused to submit to a breath test subsequent to a lawful arrest. Accordingly, the petition is denied.

On August 13, 2021, Petitioner was arrested by Officer Emery of the Dade City Police Department for driving under the influence ("DUI"). Petitioner refused to submit to a breath, blood, or urine test, and her driver's license was suspended.[1] Petitioner timely requested an administrative hearing, which was held on September 13, 2021, to challenge the lawfulness of the suspension of her driving privilege. The hearing officer marked into evidence the self-authenticating documents submitted by the Dade City Police Department. No witnesses testified at hearing.

A Uniform Probable Cause Affidavit was entered into evidence at the hearing; it contained the case number assigned by the Dade City Police Department, the Petitioner's driver's license number, the citation number, and the properly notarized signature of the arresting officer. It states that the affiant had probable cause for the arrest and has a box marked next to the phrase "see attachments." An unsworn Complaint Affidavit containing the same case number as the Uniform Probable Cause Affidavit and signed by the arresting officer was also entered into evidence. The Complaint Affidavit gives a written narrative of the arresting officer's observations leading up to the traffic stop, the arrest, and describes Petitioner's refusal to submit to a breath alcohol test after being read her implied consent. A properly signed and notarized Alcohol/Drug Influence Report that describes Petitioner's behavior and affect prior to arrest was also entered into evidence.

Petitioner asserts that the hearing officer lacked competent, substantial evidence to support a finding of a lawful arrest and refusal to submit to a breath test because the Complaint Affidavit does not have the witness signature of a fellow law enforcement officer or notary, and thus fails to meet the requirements of an affidavit. Additionally, Petitioner argues that the properly signed and notarized Uniform Probable Cause Affidavit did not cure this defect, because it states generally that it incorporates attachments but did not specifically reference the Complaint Affidavit by name as an attachment. Petitioner further argues that the Alcohol/Drug Influence Report also does not cure this issue because it does not contain a written narrative by Officer Emery.

The court disagrees. The Complaint Affidavit contains the required written narrative and was incorporated into the Uniform Probable Cause Affidavit by reference. Additional reports may be incorporated by reference into a sworn report. *Kantner v. Boutin,* 624 So. 2d 779, 781 (Fla. 4th DCA 1993) (citing *Hurwitz v. C.G.J. Corp.,* 168 So. 2d 84, 87 (Fla. 3d DCA 1964)). Here, the properly sworn Uniform Probable Cause Affidavit has a box marked next to the phrase "see attachments." Although it is certainly the better practice for law enforcement to specify in the Uniform Probable Cause Affidavit any incorporated reports, the Uniform Probable Cause Affidavit and the Complaint Affidavit have the same case number, were prepared by the same law enforcement officer, and were submitted together to the hearing officer. There is no doubt the documents were traveling together. The hearing officer, therefore, did not depart from the essential requirements of the law when she found that the properly sworn Uniform Probable Cause Affidavit incorporated the Complaint Affidavit. *Frolova v. State, Dep't of Highway Safety & Motor Vehicles,* 19 Fla. L. Weekly Supp. 76a (Fla. 20th Cir. Ct. Oct. 26, 2011). Because the properly entered Complaint Affidavit contains factual details of Petitioner's arrest and refusal to submit to a breath test, the decision is supported by competent, substantial evidence. *Dobrin v. DHSMV,* 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a]; *DHSMV v. Rose,* 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

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

[1]Despite her arrest in Pasco County, Petitioner's hearing was conducted at the Tampa Bureau of Administrative Reviews, so venue is proper here. §322.2615(13), Fla. Stat. ("A person may appeal any decision of the department . . . to the circuit court in the county . . . wherein a formal or informal review was conducted.").

* * *

Municipal corporations—Development orders—Appeals—Preservation of issues—Arguments raised in petition seeking to quash development order were not preserved for review where issues were not raised at administrative hearing—Fundamental error—Mathematical error made by city in rounding up when calculating density approved for development was clearly erroneous on face of order and is fundamental—Order is reversed as to density determination

VICKY GRANT, EL DUB COMMUNITY LAND TRUST INC., Petitioners, v. CITY OF LAKE WORTH BEACH FLORIDA, OAG INVESTMENT 5 LLC, Respondents. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Appellate Civil Division AY. Case No. 50-2021-CA-010831-XXXX-MB. July 5, 2022. Petition for Writ of Certiorari from the City of Lake Worth Beach City Commission. Counsel: Ryan A. Abrams, Abrams Law Firm, P.A., Fort Lauderdale, for Petitioners. Carlos L. de Zayas, Lydecker LLP, Miami, and J. Andrew Braithwaite, Orlando, for Respondents.

(PER CURIAM.) Petitioners, Vicky Grant and El Dub Community Land Trust Inc. ("Petitioners"), petition the Court to quash the City's Development Order, 2021-04 (the "Development Order"). On appeal, Petitioners argue that the City erroneously applied their Land Development Code ("The Code"). Specifically, Petitioners allege that the City violated Sec.23.2-33, the Sustainable Bonus Incentive Program and Sec 23.3-25, Planned Development District, by approving height, stories and density for the property located at 1715 N. Dixie Hwy, Lake Worth Beach, Florida (the "Property") in excess of what is allowed in the Code. Petitioners also argue the Development Order is not supported by competent substantial evidence.

We hold that Petitioners' arguments raised in the Petition are not preserved because Petitioners failed to object to the application of the Sustainable Bonus Incentive Program and the Transfer of Development Rights Program, to how the height and density were calculated, and failed to challenge the evidence reviewed by the City at the administrative hearing. *Dep't of Bus. & Prof'l Regulation, Const. Indus. Licensing Bd. v. Harden*, 10 So. 3d 647, 649 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D651c]; *Pullen v. State*, 818 So. 2d 601, 602 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1038a] ("[a] party cannot argue on appeal matters which were not properly excepted to or challenged in the administrative tribunal"); *Goodwin v. Florida Dep't of Children & Families*, 194 So. 3d 1042, 1047 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D834a] (quoting *Verizon ex rel. MCI v. Dep't of Corrections*, 988 So. 2d 1148, 1150 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1909a] ("an issue will not be considered on appeal unless the precise legal argument forwarded in the appellate court was presented to the lower tribunal")). The precise legal arguments contained in the Petition were not made at the administrative hearing.

Since the arguments made in the Petition were not preserved, the Court is constrained to whether there was fundamental error. The fundamental error doctrine applies as an exception to the preservation rule. *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970). The Court finds that the City made a fundamental error when calculating the density of the Property. This error is fundamental as it is clearly erroneous on the face of the order and goes to the foundation of the case. *Stevens v. Allegro Leasing, Inc.*, 562 So. 2d 380, 381 (Fla. 4th DCA 1990).

The density depends on the acreage of the Property. The Development Order describes the Property as "consisting of approximately 2.29 acres as more particularly described in Exhibit A." Exhibit A describes the Property as a "vacant 2.29 acre parcel." The Development Order is what is at issue in this appeal, therefore the acreage found in the Development Order controls since that is the acreage that the City relied upon at the time the Development Order was adopted and the Development Order on its face identifies the Property as 2.29 acres. The Development Order allows for 127 units on the Property calculated at 55 units per acre. Since the Property is 2.29 acres as stated in the Development Order, this is a clearly erroneous mathematical error as 2.29 multiplied by 55 equals 125.95. The Code does not allow for rounding up when calculating the allowed density of a property. Code, Sec. 23.1-12. Therefore the density allowed in the Development Order is over two units. Accordingly, we **REVERSE** the Development Order as to the density determination. (CURLEY, ZUCKERMAN, and PARNOFIELLO, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Municipal corporations—Public meetings—Government in the sunshine—Jury trial—Plaintiffs alleging city commission violated Florida's Sunshine laws in connection with its vote to terminate city manager's employment contract are not entitled to jury trial where the remedies requested are equitable in nature—Civil procedure—Summary judgment—Hearing—Continuance—General reference to "pending discovery" is not good cause for exception to strict policy governing continuances—Defendants' motion for summary judgment granted—Notice that stated date, time, and location of special city commission meeting and specified "City Manager's Contract" as general subject matter to be considered provided reasonable notice that city manager's employment might be terminated—Open meeting—Although there is record evidence that could support a verdict in favor of plaintiffs on allegations that members of city commission held improper pre-meeting discussions regarding city manager's termination, any violation was cured by independent final action during open meeting

EMANUEL IVAN SAPP and JACK L. MCLEAN JR., Plaintiffs, v. CITY OF QUINCY, FLORIDA, a Florida Municipal Corporation, RONTE HARRIS, KEITH DOWDELL, ANESSA A. CANIDATE, WILLIE CANIDATE and ROLANDA JACKSON, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsen County. Case No. 2021 CA 824. June 6, 2022. David Frank, Judge. Counsel: Larry K. White, Tallahassee, for Plaintiff. Mohammad O. Jazil, Tallahassee, for City of Quincy, Defendant. Luke Newman, Tallahassee, for Ronte Harris, Defendant. Anessa Jackson, Pro se, Defendant. Louis J. Baptiste, Tallahassee, for Roland Jackson and Willie Candidate, Defendants. Craig J. Brown, Tallahassee, for Keith Dowdell, Defendant.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This cause came before the Court on June 1, 2022 on defendants' motions for summary judgment, and the Court having reviewed the motions and responses, heard argument of counsel, and being otherwise fully advised in the premises, finds

I. PROCEDURAL HISTORY

A. The Lawsuit

The present case involves a very heated local controversy and emotions run high on all sides. There has been a tendency throughout to push the contours of the case toward matters and issues that are not relevant, everything from utility bills to commissioner salaries to political intrigue. The Court on several occasions had to remind the parties, especially the plaintiffs, to focus on the matters that are specifically before the Court.

A plaintiff is sometimes referred to as the "master of the complaint or claim." In other words, the plaintiff decides the form and shape of the action to be filed. The plaintiff's complaint "frames" the issues and the case proceeds forward according to those issues and only those issues.

They only issue framed by plaintiffs' complaint is compliance with Florida's Sunshine laws. Specifically, plaintiffs have alleged two violations of Florida's Sunshine laws associated with the vote to terminate the city manager's employment (contract) at a meeting on November 16, 2021.

The plaintiffs do not challenge the propriety of the termination itself in this lawsuit.

First, plaintiffs allege that the termination action was improperly noticed for the meeting. Plaintiffs do not contend that the timing of the notice was defective, only that the subject stated for action at the meeting was not clear enough. In other words, they challenge the sufficiency of the content of the notice.

Second, plaintiffs allege that certain city commissioners impermissibly discussed the subject with each other prior to the meeting by using intermediaries.

At the meeting, the mayor made a motion to terminate the city manager's contract pursuant to the provisions in the contract that state the manager is an "at will" employee who can be terminated with 30 days' notice.

A vigorous discussion ensued and, eventually, three commissioners voted to terminate the contract, two voted no. The measure passed.

Here, it is important to note that this Court does not sit in judgment of the quality of local government. It cannot tell the city how best to run its affairs, including how it hires or fires city managers. That is the charge of Quincy's political leaders who must answer to their constituents at elections.

"[C]ourts cannot willy nilly strike down legislative enactments or acts of executive officers because they do not comport with judicial notions of what is right or politic or advisable. The power to review is both inherent in and limited by the constitutional document itself. So long as the legislative and executive branches of government do not exceed their grant of power from the people, courts are powerless to limit their discretionary determination as to how, if, when or in what manner they will act." *State ex rel. Second Dist. Ct. of Appeal v. Lewis*, 550 So.2d 522, 526 (Fla. 1st DCA 1989).

B. Plaintiff's Request for Jury Trial

The remedies requested by plaintiffs are a declaratory judgment and injunction. The general nature of the case, therefore, is one of equity.

"Where, as here, the right or remedy is equitable in nature, there is no right to a jury trial." *McGoey v. Sun Tobacco, Inc.*, 941 So.2d 474, 474 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2746c] (citations omitted); see also *Robbins v. Section 3 Prop. Corp.*, 609 So.2d 670, 672 (Fla. 3d DCA 1992), approved, 632 So. 2d 596 (Fla. 1993) (The remedy sought in this tax challenge case is in the nature of an injunction and a declaratory judgment seeking the reinstatement of the Property Appraiser's original assessment. The remedy is equitable in nature; therefore, the right to a jury trial does not apply.").

Regarding the right to a trial by jury in a declaratory judgment case, submission to a jury is generally discretionary:

> 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. When a declaration of right or the granting of further relief based thereon concerns the determination of issues of fact triable by a jury, the issues ***may be submitted*** to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict is required or not. ***Neither this section nor any other section of this chapter shall be construed as requiring a jury to determine issues of fact in chancery actions.***

Fla. Stat. 86.071 (2021) (emphasis added).

Most importantly, final judgment will be entered in this case pursuant to the Court's rulings on motions for summary judgment. The issue of jury trial or non-jury trial is moot. Had the case been set for a jury trial, rather than non-jury trial, the final resolution of the case would have been exactly the same.

C. Plaintiff's Request for Continuance of the Hearing on Summary Judgment

Initially, the plaintiffs sought to fast track this case by requesting emergency hearings and temporary injunctions without hearings.

Pursuant to a case management conference with the parties, the

Court set the final hearing (non-jury trial) for February 25, 2022.

On February 16, 2022, pursuant to plaintiffs' concern that they might not have enough time for discovery, the Court reset the final hearing (non-jury trial) to June 1, 2022, a continuance of more than three months. There were no objections to this timetable.

All four defendants set their motions for summary judgment to be heard on the same day as the final hearing, June 1, 2022.

On May 11, 2022, plaintiffs filed a motion to continue the hearing on summary judgment motions, complaining that:

> The parties have not completed discovery. Although there have many dates for depositions of the parties have been discussed since late February 2022, no party has been deposed. Although, various parties have actually been set for deposition in March and April, 2022, no party has been deposed.
>
> There is also outstanding written discovery and there are also objections to written discovery which are not resolved. There are outstanding requests for public records and/or incomplete responses.

The only specific discovery item that plaintiffs identified as information needed to respond to summary judgment was the depositions of the parties, meaning of course the defendants ("no party has been deposed"). The plaintiffs gave this as their best reason for a continuance even though they knew at that point that every single defendant was set to be deposed prior to the hearing on summary judgment. As it turned out, every single defendant was indeed deposed by plaintiffs prior to the hearing on summary judgment.

Other than the depositions of defendants, plaintiffs identified no specific type of information that they had been denied or needed, nor the relevance of the information to the specific issues in this case.[1]

On May 23 and 25, defendants filed responses vigorously opposing plaintiffs' motion to continue.

On May 26, 2022, the Court adopted the rationale of defendants' written responses and denied plaintiffs' motion to continue.[2]

At least one appellate court has addressed Florida's standard governing motions to continue hearings on summary judgment after the effective date of the new rule. The opinion is *De Los Angeles v. Winn-Dixie Stores, Inc.*, 326 So.3d 811, 812-13 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1986b], issued September 8, 2021. The standard is set forth as follows:

> See *Vancelette v. Boulan S. Beach Condo. Ass'n, Inc.*, 229 So. 3d 398, 400 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1422a] (holding: "Absent a non-moving party's demonstration of diligence, good faith, and the materiality of the discovery sought to be completed, a trial court cannot be faulted for denying a motion to continue a long-scheduled hearing on the motions for summary judgment. A trial court does not abuse its discretion in granting a motion for summary judgment, despite the pendency of discovery, where the non-moving party has failed to act diligently in taking advantage of discovery opportunities"). . . .

Id.

In *De Los Angeles*, the court determined that, when seeking a continuance of a hearing on summary judgment, it was not enough that, ". . .discovery was ongoing, and that De Los Angeles sought to depose a Winn-Dixie witness and compel the production of additional surveillance video." *Id*.

Our Florida Supreme Court's directives on active differential case management require trial court judges "To maximize the resolution of all cases. . .to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown." Florida Supreme Court Administrative Order No. AOSC21-17, Amendment 2, In Re: Covid-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts, November 4, 2021. See also the Judicial Management Council's draft Final Report Workgroup on Improved Resolution of Civil Cases.

Plaintiffs' generalized reference to "pending discovery" is not good cause for an exception to the strict policy governing continuances mandated by the Florida Supreme Court. Moreover, to the extent that a party moving for a continuance has caused its own problems by failing to diligently move the case forward, a continuance should be denied, even if it means the party will not have certain witnesses or evidence at trial. *HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1293 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a].

II. SUMMARY JUDGMENT STANDARD

Florida's summary judgment standard is construed and applied in accordance with the federal summary judgment standard. The new standard is fundamentally the same as the standard for a directed verdict. "Both standards focus on whether the evidence presents a sufficient disagreement to require submission to a jury." *IN RE: AMENDMENTS TO FLORIDA RULE OF CIVIL PROCEDURE 1.510*. Supreme Court of Florida, Case No. SC20-1490, April 29, 2021 (citations and internal quotations omitted). "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." *Id*.

A moving party that does not bear the burden of persuasion at trial can obtain summary judgment on an issue without disproving the nonmovant's case. *Id*. It can satisfy its initial burden by producing evidence in its favor or by simply showing the nonmoving party lacks any evidence. *Id*.

"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*. "When uncontroverted video evidence is available," a court "must view the facts in the light depicted by the video recording." *Butler v. Fla. Dep't of Corrections*, 2021 U.S. App. LEXIS 28609, at *3 (11th Cir. 2021) [(referencing *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) [20 Fla. L. Weekly Fed. S225a]).

Under the federal standard adopted by Florida:

> . . .[S]ummary judgment is appropriate only 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. By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. An issue is "genuine" if a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the nonmoving party in light of his burden of proof. And a fact is "material" if, under the applicable substantive law, it might affect the outcome of the case. Where the material facts are undisputed and do not support a reasonable inference in favor of the non-movant, summary judgment may properly be granted as a matter of law. The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. However, to prevail on a motion for summary judgment, the nonmoving party must offer more than a mere scintilla of evidence for its position; indeed, the nonmoving party must make a showing sufficient to permit the jury to reasonably find on its behalf. This, however, does not mean [a court is] constrained to accept all the nonmovant's factual characterizations and legal arguments." *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994).

Fox v. Gaines, No. 19-81620-CIV, 2022 WL 1746812, at *1-2 (S.D.

Fla. May 31, 2022) (citations and internal quotations omitted).

III. RECORD EVIDENCE AND CONCLUSIONS OF LAW

A. Sufficiency of the Content of the Notice

In addition to the date and time of the meeting, to be held as always at the commission chambers, the challenged notice reads, "City Manager's Contract." This fact is not in dispute.

"The Sunshine Law does not define reasonable notice, 'and the type of notice that must be given for a meeting is variable and depends on the facts of the situation.' *Transparency for Fla. v. City of Port St. Lucie*, 240 So.3d 780, 786 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D850a] (citing Op. Att'y Gen. Fla. 2000-08 (2000))." *Fla. Citizens All., Inc. v. Sch. Bd. of Collier Cnty.*, 328 So.3d 22, 25 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2016a], review denied, No. SC21-1599, 2022 WL 775104 (Fla. Mar. 15, 2022).

As to the content of the notice—the only issue raised in the operative complaint—the Court finds that the notice is reasonable under the Sunshine Law. The "City Manager's Contract" discussion item provided the public with reasonable notice that Mr. McLean's employment might be terminated. The notice also provided the public with the timing and virtual location of the special meeting. *Rhea v. Gainesville*, 574 So.2d 221, 222 (Fla. 1st DCA 1991) (Reasonable notice apprises members of the public "of the pendency of matters that might affect their rights, afford[s] them the opportunity to appear and present their views, and afford[s] them a reasonable time to make an appearance if they wished." (referencing 1973 Fla. AG LEXIS 200)); *Hough v. Stembridge*, 278 So.2d 288, 290-91 (Fla. 3d DCA 1973) (The Sunshine Law does not "contemplate the necessity for each item to be placed on [an] agenda before it can be considered by a public[ly] noticed meeting of a governmental body."); *Government-in-the-Sunshine Manual* 44 (2022 ed.), https://bit.ly/3m49kDD ("notice should contain the time and place of the meeting, and if available, an agenda, or if no agenda is available, a statement of the general subject matter to be considered.").

Reasonable notice need not be specific. Courts have deemed several less-than-specific notices reasonable. In *Law and Information Services v. City of Riviera Beach*, 670 So.2d 1014 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D480b], for instance, a city council "sought applicants for the position of city manager and announced that it would interview the top five candidates between April 20 and April 26, 1994." *Id.* at 1015. But on April 20, at a city council meeting, the city council voted to hire a city manager. *Id*. While the April 20 meeting was noticed, and while the notice contained an agenda, the agenda did not state that a new city manager would be hired. *Id*. The Fourth District Court of Appeal still deemed the notice reasonable: "there is no requirement in the sunshine law that specific matters to be addressed by a public body be listed in advance of the meeting on an agenda." *Id*. The court noted that the date, time, and location of the meeting was noticed and that the meeting was open. *Id*. at 1015-16.

Here, the City is entitled to judgment as a matter of law because the notice was more than reasonable. The notice contained the time and place of the meeting and the "general subject matter to be considered": "City Manager's Contract." *See Government-in-the-Sunshine Manual* at 44. The notice "reasonably" "convey[ed]" that Mr. McLean's contract would either be renewed, terminated, or somehow modified. *See* 1973 Fla. AG LEXIS 200, at *4. Those are the only reasonable inferences that the public can draw from the notice. The notice contained more than just the date and time of the special meeting—it provided the general subject matter and apprised the public of what might happen at the end of the meeting.

Mr. McLean and Mr. Sapp are not challenging the timing or dissemination of the November 16, 2021 special city commission meeting notice. They are only challenging the content of the notice: whether the notice was "specific enough" for the public to know the city commission might terminate Mr. McLean's employment. The Court notes that record evidence indicates Mr. McLean's assistant drafted the subject meeting notice, and that Mr. McLean himself approved it. In fact, the content of the notice for the subject meeting is identical to the content of the notice for the special meeting on May 7, 2019, when Mr. McClean was hired as city manager. That notice read, "Interim City Manager's Contract."

There are no genuine disputes of material fact on the issue of proper notice, and defendants are entitled to judgment as a matter of law.

B. Improper Pre-Meeting Discussions

Plaintiffs mainly contend that the defendant commissioners violated the Sunshine Laws by sending and receiving messages regarding the city manager's contract before the meeting via intermediaries Rolanda Jackson and Willie Canidate.

Ms. Jackson and Mr. Canidate filed affidavits in which they forcefully deny they ever acted as conduits for such discussions.

However, plaintiffs filed the affidavit of Bernice McClean which also addresses the matter of commissioners communicating with each other prior to the meeting. Specifically, Ms. McClean testified that:

> On July 22, 2021, Commissioner Dowdell called her and told her, among other things, that he "has three votes" to fire the city manager.
>
> When asked who the three votes were, he said "me, [Mayor Harris], and [Commissioner Canidate]."
>
> Only minutes after the call ended, Mayor Harris called her and said, "you know why I'm calling you" and "I told [Commissioner Dowdell] not to call you because you are on your way out of town on vacation."

For this specific issue, the record evidence is such that a reasonable jury could return a verdict for the plaintiffs. There is a genuine dispute of material fact regarding the second issue before the Court—whether commissioners improperly communicated with each other prior to the meeting.

C. Whether the Subject Meeting Cured the Improper Pre-Meeting Discussions

There is no dispute about the conduct of the November 16, 2021 meeting; no dispute about what actually occurred. According to the uncontroverted video recording, the meeting was a final and open meeting in the sunshine. The meeting lasted roughly an hour and the city commission engaged in a discussion of Mr. McLean's contract and potential termination. The terms of Mr. McLean's contract were discussed, as were the logistical, financial, and legal implications about terminating his employment.

Sunshine Law violations can be cured by "independent, final action in the sunshine," which the Florida Supreme Court distinguished from mere ceremonial acceptance or perfunctory ratification of secret actions and decisions. *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So.3d 755, 765 (Fla. 2010) [35 Fla. L. Weekly S627a]; *Tolar v. Sch. Bd. of Liberty Cty.*, 398 So.2d 427, 429 (Fla. 1981); *Jackson v. City of Tallahassee*, 265 So.3d 736 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D668c].

The trial court in *Jackson* determined that, ". . .regardless of any asserted violation, the City's later meeting eliminated any purported taint from the earlier process by conducting a full and open public meeting to fill the vacancy." *Id*. The First District affirmed the ruling, noting that there was ". . .no limit on the number of speakers or the topics on which they could speak." *Id*.

In *Tolar*, a school superintendent-elect met privately with school board members and discussed the removal of Tolar as director of administration and the abolishment of his position. 398 So.2d at 427. Then, at a subsequent meeting in which Tolar was present and "given

full opportunity to express his views," the school board members voted to transfer Tolar to another position and abolish his position. *Id.* Tolar, like plaintiffs here, sued for injunctive relief alleging a violation of Section 286.011, Florida Statutes. *Id.* The Florida Supreme Court declined to invalidate the action taken by the school board and instead, held that "the Board took independent, final action in the sunshine in voting to abolish the position. The Board's action was not merely a ceremonial acceptance of secret actions and was not merely a perfunctory ratification of secret decisions at a later meeting open to the public." *Id.* at 428-29.

Compare *Tolar* and *Jackson* to *Transparency for Fla. v. City of Port St. Lucie*, 240 So.3d 780, 783 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D850a]. In *Transparenc*y, the plaintiff appealed a final summary judgment in favor of the City of Port St. Lucie, its council members, and city attorney in a Sunshine Law violation case regarding the termination of the city manager. *Id.* The court determined that the alleged pre-meeting defect was not cured. *Id.* The facts of that case are in stark contrast to the present case. In *Transparenc*y, there was no indication any member of the public attended the meeting, there was no discussion of the terms of the finalized agreement, there was no indication that a copy of the final agreement was made available to the public, the council members never discussed any specific issues, neither the terms of the severance agreement or the reasons for termination were discussed, the public was never invited to speak, and the entire meeting lasted less than fifteen minutes. *Id.*

In the present case the facts are similar to *Tolar* and *Jackson*. The November 16 meeting was video recorded, and the Court reviewed that video recording in its entirety. The meeting lasted roughly one hour and was well attended, with only a few unoccupied seats in the audience section. The city commission's five commissioners—Mr. Harris, Ms. Canidate, Mr. Dowdell, Freida Bass-Prieto, and Angela Sapp—were all active participants at the special meeting. The commissioners discussed the terms of Mr. McLean's contract, (e.g. Mayor Harris discussing section 2(a), (b), and (e) and stating that Mr. McLean's contract may be terminated by either Mr. McLean or the city commission with 30 days' notice). The commissioners also discussed the financial, legal, and logistical implications of terminating Mr. McLean's employment, (e.g. Ms. Bass-Prieto asking and receiving a legal opinion on how Mr. McLean's employment termination will affect "the City's finances" and how the termination will affect pending litigation; Mayor Harris asking and receiving a legal opinion about the terms of Mr. McLean's contract; Ms. Bass-Prieto asking the commission "what's our plan for the future" if Mr. McLean's employment is terminated; Ms. Bass-Prieto expressing concern about the "very costly, costly" financial implications of terminating Mr. McLean's employment).

Both plaintiffs were present at the November 16, 2021 meeting. While Mr. McLean had every opportunity to express his views on termination prior to the vote, he offered no rebuttal or support of his position at the special meeting. Mr. Sapp did speak out. In fact, he aired the very issue of alleged closed or secretive discussions taking place before the meeting.[3]

At least six non-employee members of the community provided public comments. Some commentators vigorously opposed terminating Mr. McLean's employment. Emanuel Sapp, Judy Russ Ware, Sherrie Taylor and Ms. Jackson, all provided public comment regarding their views on McLean' s termination. The mayor then asked if anyone else had anything they wanted to say or present. The public was invited to speak, nobody who requested to speak was denied, at least two speakers came back to the podium after already speaking, nobody requested more time to speak, nobody was cutoff, and the mayor took the vote and concluded the meeting. The public comment portion of the meeting alone lasted some thirty minutes.

This Court will follow the guidance of Florida's Supreme Court and the First District Court of Appeal, and finds that any alleged improper pre-meeting discussion were cured by the November 16, 2021 meeting with independent, final action in the sunshine.

Accordingly, it is ORDERED and ADJUDGED that

1. Defendant City of Quincy's motion for summary judgment is GRANTED.[4]

2. Defendant Harris' motion for summary judgment is GRANTED.

3. Defendant Canidate's motion for summary judgment is GRANTED.

4. Defendant Dowdell's motion for summary judgment is GRANTED.

5. The Court's prior order enjoining the City of Quincy from hiring a permanent replacement for the recently discharged city manager and from entering into a contract for an interim city manager is VACATED.

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[1]There are three issues in this case. The vague reference to "pending discovery" could not be relevant to issue number one—the content of the notice. There are no facts to uncover for that. The wording of the notice is what it is; the parties simply disagree on whether it passes Sunshine law muster. Issue number three, the conduct of the meeting, is also not in dispute or in need of discovery. There is a video recording that tells us everything we need to know about that. Finally, there is issue number two—whether commissioners discussed the matter noticed prior to the meeting using intermediaries. Here, it is possible that something (yet identified) could have been uncovered with further discovery. However, there is no need to determine that because plaintiffs prevailed on issue number two with the evidence they had already obtained. So, even assuming there was something more out there, the denial of the continuance did not prejudice plaintiffs. *See* also defendants' responses.

[2]The Court's posted policies and procedures make clear that certain non-evidentiary motions, such as motions for continuance, will be "ruled upon the papers" without a hearing.

[3]To the extent that any affidavits, such as Mr. Sapp's affidavit, see Pls. Resp. in Opp. Att. 1, contradicts the video recording, a court "must view the facts in the light depicted by the video recording." *Butler*, 2021 U.S. App. LEXIS 28609, at *3.

[4]The claims and defenses as to the city and each of the three commissioners are identical.

* * *

Insurance—Property—Fraud—Motion for summary judgment based on concealment or fraud is denied where only record evidence of alleged fraud is that insured had simply forgotten prior claim—Motion for summary judgment on ground that insurer made good faith payments to insured is denied where appropriate amount of payments is disputed issue of material fact for jury—Post-loss obligations—Failure to comply—Fact that insured has not made repairs to property does not establish breach of "Duty After Loss" provision of policy where insurer has not shown that repairs would have protected property from further damage or that insurer was prejudiced by failure to make repairs—Motion for summary judgment on ground that no further payments are owed since amount paid by insurer exceeds insured's insurable interest in property is denied because appropriate amount of payments is disputed issue of material fact

SHERYL NEEL, Plaintiff, v. SOUTHERN FIDELITY INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 21-CA-000065. May 25, 2022. David Frank, Judge. Counsel: Dillon Hunter Samuels Jess, Jacksonville, for Plaintiff. Esmee Marie Vera-Benavidez, Tallahassee, for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on May 19, 2022 (the "Hearing"), on "Defendant's Amended Motion for Summary Judgment" filed March 28, 2022 (the "Motion"). Counsel for Plaintiff and counsel for Defendant appeared in person for the Hearing. Having considered the summary judgment record in this matter, the Motion and the argument of counsel, and being otherwise fully advised, the Court finds as follows:

SUMMARY JUDGMENT STANDARD

Effective May 1, 2021, Florida became aligned with "the supermajority of states" by generally adopting the federal summary judgment standard articulated by the U.S. Supreme Court 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) (the "Celotex trilogy"). *See*, *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.").

Before May 1, 2021, Florida's prior Rule 1.510 entitled a movant to summary judgment "if the pleadings and summary judgment evidence on file show[ed] there [was] no genuine issue as to any material fact and that the moving party [was] entitled to judgment as a matter of law." Conversely, Federal Rule 56 provided that "[t]he court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." While, at first blush, these summary judgment standards seem similar, the different interpretations given to them by Florida courts and Federal courts amounted to a growing chasm.

Until the new summary judgment standard was adopted, Florida movants had to jump the almost insurmountable hurdle of essentially "proving a negative, i.e., the non-existence of a genuine issue of material fact." *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Consistent with this lofty standard, the prior standard also dictated that "[i]f the record reflects. . .the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *See, e.g.*, *St. Pierre v. United Pacific Life Ins., Co.*, 644 So. 2d 1030, 1031 (Fla. 2d DCA 1994) (emphasis added). Finally, under the old standard, a moving party was burdened with not only establishing their own case but also disproving the other party's defenses. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a] ("Florida courts have required the moving party conclusively 'to disprove the nonmovant's theory of the case in order to eliminate any issue of fact.") (citations omitted). These extremely stringent thresholds ultimately "unduly hindered the use of summary judgment in our state" for over half a century. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a].

Realizing that the historical summary judgment standard did not "best comport with the text and purpose of Rule 1.510," the Florida Supreme Court determined that adopting the federal standard was "in the best interest of [the State of Florida]." *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 194. The purpose of the summary judgment procedure has traditionally been recognized as serving to avoid the cost and delay of unnecessary trials and to dispose of lifeless cases. *See, i.e., Petruska v. Smartparks-Silver Springs, Inc.*, 914 So. 2d 502, 503 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a] ("The great benefit derived from summary judgment is that it puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury."); *Nat'l Airlines, Inc. v. Fla. Equip. Co. of Miami*, 71 So. 2d 741, 744 (Fla. 1954) ("The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact."). In considering such overarching purpose, the Florida Supreme Court found that the adoption of the federal standard better "secures the just, speedy, and inexpensive determination of every action" without inappropriately trespassing upon fundamental and traditional processes for determining the rights of litigants. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 194.

Under Florida's revised summary judgment standard, trial courts are to apply what generally mirrors a directed verdict standard. *See, e.g., Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) ("[T]he non-moving party must either point to evidence in the record or present additional evidence 'sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.' ") (citations omitted). More specifically, a movant in Florida no longer has any duty to negate the opposing party's defenses or denials. Instead, the burden of a moving party is much more aligned to their burden at trial. "[T]he burden on the moving party may be discharged by 'showing' [. . .] that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. "[I]f the nonmoving party must prove 'X' to prevail at trial, the moving party at summary judgment can either produce evidence that 'X' is not so or point out that the nonmoving party lacks the evidence to prove 'X.' " *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018). Once a moving party satisfies said burden, the burden then shifts to the nonmoving party, who must establish the existence of a triable issue via qualified competent evidence.

It is critical to comprehend what constitutes a "genuine issue of material fact" when applying the Celotex trilogy and its progeny. "An issue of fact is 'material' if it is a legal element of the claim under applicable substantive law which might affect outcome of the case." *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997) (citations omitted). An issue of fact "is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* (citations omitted). Trial courts are tasked with viewing all evidence and factual inferences drawn therefrom in the light most favorable to the nonmoving party and to ultimately determine whether that evidence could reasonably sustain a jury verdict. *Id.*

In reviewing an application for summary judgment, trial courts are only to consider the record as identified in subdivision (c). Said materials include portions of the record in the case that represent either sworn testimony or admissions. Trial courts may not consider other materials, nor can they consider testimony at the summary judgment hearing. *See., e.g., Nichols v. Preiser*, 849 So. 2d 478, 481 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1671a]; *First North American Nat'l Bank v. Hummel*, 825 So. 2d 502, 504 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2010a] ("[D]ocuments [that] were not authenticated or supported by an affidavit or other evidentiary proof" should not have been considered on summary judgment motion).

Rule 1.510 does not require that a party seeking summary judgment wait for the conclusion of all discovery to pursue the remedy. Instead, subsection (d) affords a responding party the ability to argue that it needs additional time "to obtain affidavits or declarations or to take discovery" to present facts essential to justify its opposition. Nonmovants seeking additional time should not make such application, however, when they have been dilatory in seeking or taking advantage of discovery opportunities. *See., e.g., Martins v. PNC Bank, NA*, 170 So. 3d 932, 936-37 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1813a] ("[I]f the non-moving party does not act diligently in completing discovery or uses discovery methods to thwart and/or delay the hearing on the motion for summary judgment, the trial court is within its discretion to grant judgment even though there is discovery still pending.").

FINDINGS OF FACT

The insurance policy at issue, Policy No. SHO68217420569 (the "Policy") was issued by Defendant to Plaintiff. The Policy insured property located at [Editor's note: address redacted] Bristol, FL 32321 (the "Property"). The Policy was in effect from March 28, 2020, through March 28, 2021. On or about February 26, 2021, Plaintiff suffered a loss at the Property due to fire and shortly thereafter

reported a claim to Defendant. The claim was assigned number 690100050959. Shortly after the loss, Defendant retained an adjuster, Stephen McGraw to inspect the loss. During his inspection, Mr. McGraw allegedly conversed with Plaintiff. The substance of that conversation, including any potential false statements by Plaintiff, is a matter of disputed fact.[1] Shortly after the loss, Defendant retained a fire origin and cause expert, Rick Holmes to inspect the loss. During his inspection, Mr. Holmes allegedly conversed with Plaintiff. The substance of that conversation, including any potential false statements by Plaintiff, is a matter of disputed fact.[2]

On or about May 11, 2021, Defendant issued payments in the amounts of $95,518.39 to "PHH MORTGAGE SERVICES ISAOA/ATIMA AND SHERYL NEEL" under Coverage A—Dwelling and $702.31 to "SHERYL NEEL" under Coverage C—Personal Property.

On or about June 30, 2021, Plaintiff filed suit, alleging breach of contract by Defendant related to failure to fully pay the claim.

On about July, 2021, Plaintiff authorized PHH, her mortgage company, to apply the insurance claim proceeds to satisfy the balance of her mortgage, $74,674.72. The remainder of the $95,518.39, $20,995.39, was distributed to Plaintiff, who used the money to purchase a camper trailer.

To date, Plaintiff has not repaired the property.

ANALYSIS—CONCEALMENT OR FRAUD

Defendant's Motion demands summary judgment on the ground that Plaintiff has breached the "Concealment or Fraud" provision of the Policy, which states:

> Q. Concealment Or Fraud
>
> We provide coverage to no "insureds" under this policy if, whether before or after a loss, an "insured" has:
>
> 1. Intentionally concealed or misrepresented any material fact or circumstance;
>
> 2. Engaged in fraudulent conduct; or
>
> 3. Made false statements; relating to this insurance.

"To void coverage after a loss pursuant to an insurance policy's "concealment or fraud" provision, an insurer must show a misrepresentation of facts having substantial materiality under circumstances to which the law would attribute the intention to defraud, that is, cheat, deceive and cause the insurer to do other than that which would have been done had the truth been told." *Anchor Property & Casualty Ins. Co. v. Trif*, 322 So.3d 663 (Fla. 4DCA 2021) [46 Fla. L. Weekly D1267a] at 673.

Defendant's Motion, despite citing *Trif*, fails to produce any record evidence or even discussion of materiality, intention to defraud, or Defendant's reliance of the alleged statements.

"[T]he concepts of materiality and reliance are intertwined because the materiality of a misrepresentation turns on its likelihood of inducing reliance in a reasonable person." *See* Restatement (First) of Restitution § 8 (1937) ("(2) A misrepresentation is material if it would be likely to affect the conduct of a reasonable man with reference to the transaction in question.") The record reflects that Defendant conceded that "Plaintiffs (sic) did not cause prejudice to Defendant during its investigation of the claim." Defendant's Response to Plaintiff's Request for Admission, filed August 27, 2021, Response #6.

Also important is that the only record evidence regarding the nature of alleged fraud (misrepresentation) is that plaintiff had simply forgotten the prior claim. Affidavit of Sheryl Neel at ¶14. Viewing the evidence in the light most favorable to Defendant, the best the record does for Defendant is make whether Plaintiff made a misrepresentation of fact during the claim investigation process a disputed issue of fact.[3]

Not only does a failure to remember not support a claim of intentional fraud, it also does not disqualify the affidavit testimony of the Plaintiff for summary judgment purposes.

"In seeking to defeat summary judgment, a party may not create a factual dispute through an affidavit that 'baldly repudiate[s]' the party's earlier deposition testimony. *Ellison v. Anderson*, 74 So. 2d 680, 681 (Fla. 1954); *but see Cary v. Keene Corp.*, 472 So. 2d 851, 853 (Fla. 1st DCA 1985) (noting an exception to this principle when the party offers a credible explanation for the discrepancy between the earlier and later statements)." *Pickford v. Taylor Cnty. Sch. Dist.*, 298 So.3d 707, 710-11 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1556a].[4]

Here, the later testimony did not "blatantly repudiate" the prior testimony and there was an explanation given for the different answers.

On the grounds that Plaintiff's case should be dismissed pursuant to "Concealment or Fraud" provision, Defendant has conceded it cannot prove an element necessary to prove its defense and otherwise failed to produce record evidence that would support its burden of proof. This Court does not find record evidence of concealment or fraud by Plaintiff. The Motion is DENIED on this ground.

ANALYSIS—"GOOD FAITH PAYMENTS" TO PLAINTIFF

Defendant's Motion demands summary judgment on the ground that Defendant made payments to Plaintiff in the total amount of $96,220.70.

Defendant's legal argument is unclear. Neither case law nor any Policy provision is argued.

The Coverage A limits stated in the Policy $157,700.00. There is no dispute that Defendant has not paid that amount.

While the record reflects that certain payments were made, the appropriate amount of payments is the basis of Plaintiff's lawsuit and clearly a disputed issue of material fact for the jury.

On the grounds that Plaintiff's case should be dismissed pursuant to "Good Faith Payments" Defendant has failed to promote a recognized legal argument or produce record evidence that would support its burden of proof on that argument. The Motion is DENIED on this ground.

ANALYSIS—DUTIES AFTER LOSS

Defendant's Motion demands summary judgment on the ground that Plaintiff has breached the "Duties After Loss" provision of the Policy, which states:

> B. Duties After Loss
>
> In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an "insured" seeking coverage, or a representative of either:
>
> 4. Protect the property from further damage. If repairs to the property are required, you must:
>
> a. Make reasonable and necessary repairs to protect the property

The parties do not dispute that no repairs have been completed to date. Nor do they dispute that certain payments have been made. However, Defendant's Motion and argument overlooks most of the Duties After Loss provision, opting to read that Plaintiff must undertake repairs with the money paid by Defendant.

To the contrary, Defendant's burden is to show that there are repairs which Plaintiff should have undertaken that would have protected the property from further damage. Defendant has produced no record evidence to prove that burden.

Additionally, the Policy at-issue requires a showing of prejudice to Defendant. Recent Florida case law reflects that policies with this language are generally improper to be resolved at summary judgment. For example, in *Godfrey v. People's Trust Ins. Co.*, __ So. 3d __ 2022 WL 1100490 (Fla. 4th DCA April 13, 2022) [47 Fla. L. Weekly D1295a], a homeowner appealed a final summary judgment in favor or an insurer "based on her failure to provide the insurer with an

executed sworn proof of loss before filing a lawsuit against it." *Id*. at *1. In reversing the trial court's ruling, the Fourth DCA noted that the policy stated the insurer had "no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us." *Id*. (emphasis added). However, the record reflects that Defendant conceded that "Plaintiffs (sic) did not cause prejudice to Defendant during its investigation of the claim." Defendant's Response to Plaintiff's Request for Admission, filed August 27, 2021, Response #6.

Even more directly, the record reflects that Defendant conceded that "Plaintiffs (sic) complied with all duties after loss pursuant to the Policy." Defendant's Response to Plaintiff's Request for Admission, filed August 27, 2021, Response #8.

On the grounds that Plaintiff's case should be dismissed pursuant to the "Duties After Loss" provision, Defendant already conceded the issue and failed to produce record evidence that would support its burden of proof. This Court does not find record evidence of reasonable and necessary repairs that the Plaintiff is required to undertake to protect the property. As such, the Motion is DENIED on this ground.

ANALYSIS—INSURABLE INTEREST

Defendant's Motion demands summary judgment on the ground that complied, such that no further payments are owed, with the "Insurable Interest and Limit of Liability" provision of the Policy, which states:

> A. Insurable Interest And Limit of Liability
>
> Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:
>
> 1. To an "insured" for more than the amount of such "insured's" interest at the time of loss; or
>
> 2. For more than the applicable limit of liability.

Defendant's argues Plaintiff's insurable interest is only $20,995.39, and as such, the payments made by Defendant exceed that amount.

Defendant provided record evidence that $20,995.39 is the difference between the amount it paid to Plaintiff and the amount Plaintiff paid to satisfy her mortgage balance. Defendant argues this amount is the insurable interest.

Defendant provides no case law or other Policy provision to support its calculation of insurable interest.

Defendant's assertion is at odds with the Policy, case law, and statute defining insurable interest:

> (2) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.
>
> (3) The measure of an insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof.

§627.405 Florida Statutes (2021).

While the record reflects that payments were made, the appropriate amount of payments is the basis of Plaintiff's lawsuit and clearly a disputed issue of material fact for the jury.

On the grounds that Plaintiff's case should be dismissed pursuant to the "Insurable Interest" provision, this Court finds Defendant has failed to promote a recognized legal argument or produce record evidence that would support its burden of proof on that argument. The Motion is DENIED on this ground.

CONCLUSION

The Court finds that, for all grounds outlined and set forth in Defendant's Amended Motion for Summary Judgement,[5] Defendant has failed to produce record evidence sufficiently supporting any legally recognized arguments.

Therefore, it is

ORDERED AND ADJUDGED that Defendant's Amended Motion for Summary Judgment is DENIED.

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[1]At the time of the summary judgement hearing, Defendant had not yet produced Mr. McGraw for deposition. Plaintiff filed a Motion to compel said deposition, which was granted during the May 19, 2022 hearing. An Order is forthcoming.

[2]At the time of the summary judgement hearing, Defendant had not yet produced Mr. Holmes for deposition. Plaintiff filed a Motion to compel said deposition, which was granted during the May 19, 2022 hearing. An Order is forthcoming.

[3]During the hearing, Defendant stated that the alleged "Concealment or Fraud" occurred at the time of the insurance application. However, there has been no record evidence produced to support this assertion—the application is not in the record. Nor is there any discussion, or even mention, of the application in Defendant's Motion.

[4]At the hearing, the Court asked Defendant if it was arguing for the striking of the entire affidavit or just the alleged inconsistent statements and she stated that Defendants sought to strike the entire affidavit. The First District in *Pickford* made it clear that it would be error to grant such a request. *Pickford* at 710-11 ("We find the trial court abused its discretion in striking the entire affidavit based on these two paragraphs. In doing so, the trial court struck another 36 paragraphs not challenged as contradictory, many of which contained allegations relating to the discrimination claim.").

[5]Defendant is not raising, or has not set forth its grounds to raise, in its Amended Motion, other affirmative defenses, including any related to the "Intentional Loss" provision of the Policy.

* * *

Wrongful death—Product liability—Tobacco—*Engle* progeny case—Punitive damages—Motion for leave to amend complaint to add punitive damages claim is granted where plaintiff proffered evidence that defendant tobacco companies engaged in intentional misconduct or gross negligence by conspiring and using fraudulent methods to addict smokers to tobacco cigarettes knowing that smoking caused disease and death, and that harm suffered by decedent was not dissimilar from type of harm typically caused by such bad conduct

SARAH ANDERSON, as Personal Representative of the ESTATE OF HOSEY ANDERSON, deceased, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation and PHILIP MORRIS USA, INC., a foreign corporation, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2020 CA 000757. June 15, 2022. David Frank, Judge. Counsel: J. B. Harris, Coral Gables; Richard J. Diaz, Carlos Salazar, and Bard Rockebach, Coral Gables; Carlos Santisteban, Jr., Miami; and Robert D. Trammell, Tallahassee, for Plaintiff. Charles F. Beall, Jr., Pensacola; and Emily C. Baker, Stephanie E. Parker, John M. Walker, Simon P. Hansen and Jacqueline M. Pasek, Jones Day, Atlanta, Georgia, for R.J. Reynolds, Defendant. Stacey E. Deere, Kansas City, Missouri, for Philip Morris USA, Inc., Defendant.

AMENDED ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO ADD PUNITIVE DAMAGES CLAIM

This cause came before the Court on June 2, 2022 on plaintiff's motion for leave to add a punitive damages claim, and the Court having reviewed the motion and the response, heard argument of counsel, and being otherwise fully advised in the premises, finds

I. The Question

Up to now, amending to add a claim for punitive damages was straightforward, even in an Engle tobacco lawsuit. The only appeal available was certiorari, so the sufficiency of the evidence was not reviewed, only procedure.

That changed April 1, 2022. The Florida Supreme Court recently amended Florida Rule of Appellate Procedure 9.130. *In re Amend. to Fla. Rule of App. Proc. 9.130*, __ So. 3d __, 47 Fla. L. Weekly S1b, 2022 WL 57943 (Fla. Jan. 6, 2022). Beginning April 1, 2022, parties may seek interlocutory appeal of nonfinal orders granting or denying leave to amend a complaint to assert a punitive damages claim. *Id.*

The question is—what substantive standard will our appellate courts tell us to apply when ruling on this type of a motion to amend?

Both defendants and plaintiff acknowledge that the punitive conduct must have some causal relationship to the harm suffered by the individual plaintiff. The parties, however, vigorously disagree on the nature of this punitive damage "causation" *for amendment*

purposes and not for ultimate proof at trial.

II. Plaintiff's Argument

Plaintiff argues the standard is clear—it is that which is set forth in the operative statute Section 768.72, Florida Statutes. In other words, the proffer is a reasonable showing of intentional misconduct or gross negligence.

Plaintiff acknowledges that the standard also includes the requirement commonly recited when courts caution that, ". . .punitive damages cannot be based on conduct ***which is dissimilar to that which harmed the plaintiff***." *Philip Morris USA, Inc. v. Rintoul,* No. 4D20-1963, 2022 WL 1482413, at *5-6 (Fla. 4th DCA May 11, 2022) [47 Fla. L. Weekly D1052f] (emphasis added).

III. Defendants' Argument

Defendants argue that the standard becomes more than the statutory elements of intentional conduct or gross negligence. Instead, the reasonable showing required to amend to add punitive damages to the case also incorporates the "causation elements" of the various underlying causes of action.

Defendants cited *Florida's Standard Jury Instruction in Civil Cases 503.2(b)(1),* which is identical to the statute except that it adds, ". . .which was a substantial cause of loss, injury, or damage to plaintiff."

Defendants point to the Third District's August 5, 2020 *Hardin v. R.J. Reynolds Tobacco Company* as "controlling precedent." Def. Supp. Mem., pp. 3-4.

To begin, defendants are citing to an opinion which was withdrawn and superseded by *Hardin v. R.J. Reynolds Tobacco Co.*, 314 So. 3d 584, 585 (Fla. Dist. Ct. App. 2020) [45 Fla. L. Weekly D2802c], review denied, No. SC21-65, 2021 WL 2309627 (Fla. June 7, 2021).

More importantly, neither opinion would qualify as "controlling precedent" for the present matter. The Third District is clearly addressing the evidentiary burden to survive a motion for directed verdict on plaintiff's punitive damages claim at trial. Nowhere in either opinion does the court address a hearing on the plaintiff's motion to amend to add the punitive damages claim.

Hardin dealt with a failure of liability for the underlying claims. *Hardin* at 591 ("Here, by contrast, the first jury returned a defense verdict on Plaintiff's intentional tort claims, and the second jury was bound by the first jury's finding that Mr. Hardin did not rely on any statement made by R.J. Reynolds or any other tobacco company. Consequently, although Dr. Proctor presented similar evidence that tobacco companies engaged in a campaign of mass deception and fraud, this generic evidence of misconduct was not related to Plaintiff's surviving claims, which were product liability claims and not intentional tort claims.").

Defendants only other authority that they contend is on point is a trial court order, Corrected Order Denying Pl.'s Am. Mot. for Leave to Plead Punitive Damages at 9, *Luque v. R.J. Reynolds Tobacco Co.,* No. 08-111 CA (22) (Fla. 11th Cir. Ct. July 27, 2016) [24 Fla. L. Weekly Supp. 226a]. Here, defendants are correct, that court adopted their arguments.

IV. Analysis

The logical fallacy with defendants' position, see above, is their description of the two-step process for an award of punitive damages. Step one—the plaintiff prevails on liability. Step two—plaintiff prevails on punitive damages. A plaintiff does not get to step two unless plaintiff completes step one. There is no dispute on that. But defendants are not just saying that step one comes before step two. Defendants are attempting to transpose the evidentiary burdens of proof for step one into step two at an early amendment stage of the case. Such a transposition is not supported by Florida law.

"In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide ***a reasonable basis for recovery of such damages***." Fla. Stat. 768.72(1) (2021) (emphasis added).

The standard "for recovery of such damages" was described by the Florida Supreme Court in *Soffer v. R.J. Reynolds Tobacco Co.,* 187 So.3d 1219 (2016) [41 Fla. L. Weekly S101a] as follows:

> The legal standard for establishing entitlement to punitive damages does not vary depending on the underlying legal theory.
>
> The standard jury instructions on punitive damages mirror the statutory directive as to proof of punitive damages as set forth in section 768.72(2):
>
> (2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:
>
> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Important for this analysis, is the focus above on the defendant's conduct—whether the defendant was personally guilty of intentional misconduct or gross negligence. The statute does not refer to "causation" or contain a "causation" element.

In *Soffer,* the Florida Supreme Court explained the relationship, or lack of relationship, between the elements for punitive damages and the elements of the underlying claims:

> Therefore, the defendant cannot be liable for punitive damages simply on the basis of a jury finding that the defendant was strictly liable or negligent. Absent a finding of intentional misconduct, the defendant can be liable for punitive damages only if there is a finding by clear and convincing evidence of gross negligence—***the same standard that applies regardless of the underlying cause of action.***

Id. at 1232-33 (emphasis added). *See also Engle v. Liggett Grp., Inc.,* 945 So.2d 1246, 1262 (Fla. 2006) [32 Fla. L. Weekly S1a] ("***Because a finding of entitlement to punitive damages is not dependent on a finding that a plaintiff suffered a specific injury***, an award of compensatory damages need not precede a determination of entitlement to punitive damages. Therefore, we conclude that the order of these determinations is not critical.") (emphasis added).

Plaintiffs position is a widely held view, including in the United States Supreme Court. *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19, 21-22 (1991) (before punitive damages may be awarded there must be "some understandable relationship" between the defendant's conduct and plaintiff's alleged injury).

The idea is that a defendant is not liable for bad conduct that, generally or hypothetically speaking, could harm a plaintiff. A defendant is liable only for the bad conduct that is ***the type of conduct that could cause the type of injury*** suffered by the plaintiff in the case at hand. *Philip Morris USA, Inc. v. Rintoul,* No. 4D20-1963, 2022 WL 1482413, at *5-6 (Fla. 4th DCA May 11, 2022) [47 Fla. L. Weekly D1052f] ("We also find the JUUL evidence should not have been admitted, because punitive damages cannot be based on conduct which is dissimilar to that which harmed the plaintiff. "). *See also State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 423, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) [16 Fla. L. Weekly Fed. S216a].

Rintoul is instructive. Addressing evidence appropriate for punitive damages, the court gave a detailed example of "dissimilar

conduct:"

> Applying Campbell to this case, we conclude that the JUUL evidence could not be used to support a punitive damage claim for the harm caused to Caprio for at least two reasons. First, the specific conduct which led to Caprio's death was his addiction to tobacco cigarettes and not e-cigarettes. While the nicotine in cigarettes causes an addiction, it is the smoking of the tobacco which results in the terrible diseases its participants can experience. Indeed, the Engle findings which form the basis of liability for this case require smoking cigarettes:
>
> 1 (that smoking cigarettes causes [certain named diseases, including lung cancer]),
>
> 945 So. 2d at 1254, 1276-77 (emphasis added); *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 694 (Fla. 2015) [40 Fla. L. Weekly S188a]. E-cigarettes do not involve smoking tobacco, which was the cause of Caprio's disease. Therefore, the harm caused by the tobacco is entirely dissimilar to the JUUL e-cigarettes.
>
> Second, while Rintoul used JUUL to argue that PM continued to market to minors, getting them addicted to nicotine just as it had enticed minors to smoke in the 1950s, the joint marketing introduced at trial consisted of the placement of JUUL coupons in packs of PM cigarettes. However, because minors cannot legally purchase cigarettes, the coupon was lawful conduct directed at adults, not minors. This is not the same conduct which "replicates the prior transgressions." *See Campbell*, 538 U.S. at 423, 123 S.Ct. 1513.

Philip Morris USA, Inc. v. Rintoul at *6.

Also important is that appellate opinions discussing punitive damage proffers have not included a requirement for specific causation as to the underlying claims. For example, in *Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.,* 16 So.3d 1006 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1791d], the First District outlined all the reasons why a proffer was sufficient. The reasons focused exclusively on the bad conduct of the defendant—mobile homes that were delivered were not the homes purchased, a company practice of switching home serial numbers. *Id.* at 1009. *See also Event Depot Corp. v. Frank,* 269 So.3d 559, 560-61 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1060a]; *Holmes v. Bridgestone/Firestone, Inc.,* 891 So.2d 1188, 1191-2 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D328a]; *Fetlar, LLC v. Suarez,* 230 So.3d 97, 100 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1988a].

In *Bistline v. Rogers,* 215 So.3d 607, 610 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D706a] the court specifically limited the trial court's inquiry to the defendant's conduct. The court never discussed or identified any factors concerning the underlying causes of action or causation.

Finally, there are practical reasons why a motion for leave to amend should not address the elements of the underlying causes of action. Imagine a court denying a motion for leave to amend to add punitive damages on the ground that a plaintiff did not make a reasonable showing of reliance in support of an underlying fraud claim. Then, the plaintiff goes to trial and the jury returns a verdict saying "yes" to liability for fraud. Are punitive damages reinstated? Is the trial extended a few days and the jury re-instructed? Is it a mistrial? Or do the parties simply wait a year or so to sort it out on appeal?

V. Findings of Fact and Conclusions of Law

Even under the most stringent interpretation, the plain meaning of the phrase "a reasonable basis," would not be ultimate facts that meet the burden of proof at trial. It seems clear the Legislature did not mean to hijack a motion to amend hearing and turn it into a mini trial on the merits of all underlying claims. The statute does not require a "fact intensive investigation into the merits," *Porter v. Ogden, Newell & Welch,* 241 F.3d 1334 (11th Cir. 2001).

The correct standard to apply at the amendment stage of a case is that which is set forth in the controlling statute, see above. The standard looks to the behavior of the defendant and does not interweave itself into elements or burdens of the underlying claims. It does include, however, a caveat that the bad behavior cannot be such that it is dissimilar to the conduct that caused the specific plaintiff harm.

By this standard, plaintiff has made the required showing.

Plaintiff has proffered substantial documentary evidence that defendants knew nicotine was addictive, designed their cigarettes to cause addiction, knew cigarette smoke contained carcinogens and other disease-producing chemicals, and knew smoking cigarettes caused disease and death, but nevertheless sold cigarettes by making the reasonable consumer think cigarettes were safe. *See* Plf.'s Mot., Exhibits A-Z; AA-HH.

Plaintiff's proffer also satisfies the requirement that the harm suffered by the specific plaintiff in this case, Mr. Anderson, not be "dissimilar" from the type of harm that typically could be caused by such bad conduct. Defendants' bad conduct was to conspire and use fraudulent methods to addict and inflict lung cancer, resulting in bodily injury and death. Here, the harm is smoking cigarettes leading to death. *Rintoul* at 6 ("First, the specific conduct which led to Caprio's death was his addiction to tobacco cigarettes and not e-cigarettes."); *See* Plf.'s Mot., Exhibit II (Deposition of Willie Anderson), and Exhibit JJ (Deposition of Sarah Anderson).

There is a reasonable showing by evidence in the record or proffered by the plaintiff which would provide a reasonable basis for recovery of punitive damages.

Accordingly, it is ORDERED and ADJUDGED that the motion to amend is GRANTED.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household members—Where insurer's agent was informed of household members but decided not to list them on application because they did not have driver's licenses, insurer had constructive knowledge of undisclosed household members and waived its right to rescind policy—Underwriting affidavit that is the only evidence of premium increase is stricken as deficient where affidavit contains primarily inadmissible hearsay

IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff, v. JUANA ALVARADO, Defendant. Circuit Court, 6th Judicial Circuit in and for Pasco County, Civil Division. Case No. 2021-CA-000447. July 22, 2022. Kimberly Sharpe Byrd, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE AFFIDAVIT OF ROSE CHRUSTIC AND ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on July 21, 2022 on Defendant's Motion to Strike Affidavit of Rose Chrustic and Attached EUO Transcript and Defendant's Amended Motion for Final Summary Judgment, and the Court, having reviewed the file, considered the Motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, it is hereby ORDERED AND ADJUDGED as follows:

1. On June 29, 2022, Plaintiff Imperial filed its Amended Motion for Final Summary Judgment and attached an underwriting Affidavit of Rose Chrustic in Support.

2. However, this affidavit was deficient, containing primarily inadmissible hearsay. For an affidavit to be admissible, it: [M]ust be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts therein referred to in an affidavit must

be attached thereto or served therewith. Fla. R. Civ. P. 1.510(e) (2021).

3. Plaintiff Imperial also violated the sword and shield doctrine in withholding the premium increase quote document from Defendant.

4. For all of the reasons and case law cited therein, Defendant's Motion to Strike Affidavit of Rose Chrustic and Attached EUO Transcript is **HEREBY GRANTED**

5. Defendant filed an affidavit of Defendant Juana Alvarado. Said affidavit clearly establishes that Imperial's agent was informed that Ms. Alvarado's minor children lived with her, but that since neither had a Florida's driver license, the agent made the decision not to list Ms. Alvarado's minor children on the application for insurance prior to Imperial issuing the subject policy of insurance. Thus, Plaintiff Imperial had constructive knowledge of the undisclosed household members being in the household and, as such, waived its right to rescind the subject policy of insurance. *Johnson v. Life Ins Co.,* 52 So.2d at 813 (Fla. 1951); *Murphy Medical Center, Inc. (a/a/o Maria A. Avila) v. Victoria Select Ins. Co.*, 25 Fla. L. Weekly Supp. 193a (Fla. 13th Jud. Cir Ct., Hillsborough Cty., Case No. 15-CC-040027, April 10, 2017, Michael S. Williams, Judge).

6. Based upon the striking of the underwriting affidavit of Rose Chrustic, Plaintiff Imperial has no admissible evidence to support its alleged premium increase.

7. Based upon the aforementioned constructive knowledge and resulting waiver, along with striking of the underwriting affidavit, Defendant's Amended Motion for Final Summary Judgment is **HEREBY GRANTED.**

* * *

Contracts—Commercial lease—Breach by landlord—Torts—Action for specific performance, injunction, declaratory relief, breach of contract, breach of duty of good faith and fair dealing, constructive eviction, fraud in inducement, and negligent misrepresentation based on landlord's failure to apply to city for either unity of title or covenant in lieu of unity of title that would allow tenant to proceed with renovations required to unify separate leased premises into single retail store—Where nothing in lease prevents tenant from submitting plans to landlord for renovation of premises to combine buildings, contract-based claim alleging that landlord unreasonably refused to consent to proposed renovation sets forth viable cause of action—Counts alleging fraud in inducement and negligent misrepresentation are dismissed where lease extensively addresses parties' obligations with respect to proposed renovations

RESTORATION HARDWARE, INC., a Delaware corporation, Plaintiff, v. RS JZ 21 NE 39th, LLC, a Delaware Limited Liability Company, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case No. 2022-786 CA 01. July 12, 2022. Michael A. Hanzman, Judge. Counsel: A. Sheila Oretsky, Mark S. Auerbacher, and Sandra Ramirez, Buchanan Ingersoll & Rooney PC, Miami, for Plaintiff. Todd Legon, Legon Fodiman & Sudduth, P.A., Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

This cause is before the Court upon Defendant's "Motion to Dismiss" Plaintiff's Amended Complaint ("AC"), (D.E. 39). For the reasons set forth below, the Court denies the motion to dismiss Plaintiff's contract-based claims, and grants the motion to dismiss Plaintiff's tort claims.

I. INTRODUCTION

Plaintiff, Restoration Hardware, Inc. ("RH" or "Plaintiff"), brings this action for Specific Performance (Count I), Preliminary and Permanent Injunction (Count II), Declaratory Relief (Count III), Breach of Contract (Count IV), Breach of the Duty of Good Faith and Fair Dealing (Count V), Constructive Eviction (Count VI), Fraud in the Inducement (Count VII), and Negligent Misrepresentation (Count VIII). Each claim arises out of a transaction whereby RH leased commercial property from Defendant RS JZ 21 NE 39th, LLC ("RS JZ" or "Defendant"). The leased property, located in Miami's "Design District," comprises five (5) separate, detached buildings associated with eight (8) folio numbers.[1]

While the AC advances a number of legal theories, each claim is premised on the allegation that RS JZ knew RH was "seeking to open a single gallery store," requiring that the six (6) separate buildings subject to the lease be "opened and connected." AC, p 1. Plaintiff insists that "it was the intent of the Parties that RH would improve and use the Leased Premises as a single retail store or gallery," and that to implement this plan "at least some of the Parcels and the Buildings on those Parcels need[ed] to be unified in order to permit patrons to cross through each separate building." AC, ¶ 15. Absent "connecting the buildings . . . RH customers would be required to exit one building, proceed to the sidewalk and enter into another building," which would allegedly be inconsistent with how it operates its other retail stores and—more importantly—"inconsistent with the express terms of the Lease and intent of the Parties." AC, ¶ 35.[2]

To proceed with the proposed renovation Defendant, as the property owner, would have to consent to the various parcels being legally held under a single folio number, requiring it to apply to the City of Miami for either a "Unity of Title" or "Covenant in Lieu of Unity of Title" ("CIL"). Defendant refuses to do so, claiming that this would "create an 'unacceptable encumbrance' on [its] property" that would have "a material and adverse impact on the Landlord's interest in the Premises." AC, ¶¶ 40, 45.[3] Plaintiff says that by refusing to consent to its proposed renovations, and by refusing to apply for the CIL, Defendant has breached the express terms of the Lease as well as the implied covenant of good faith and fair dealing. Plaintiff also alleges that Defendant induced it into the Lease by misrepresenting that it would consent to unify the title and physical structure of the Premises when, at the time, it had no intention of approving this proposed plan. AC, ¶¶ 141, 153.

II. DEFENDANT'S MOTION TO DISMISS

Defendant moves for dismissal, insisting that the Lease does not impose upon it any obligation to consent to Plaintiff's alteration of the Premises, or apply for a CIL. RS JZ directs the Court to § 2.6 of the Lease, reciting that the Plaintiff accepted the property in its "as is" and "where is" condition—a condition that, at the time of the Lease was executed, consisted of "five separate buildings with (intact) exterior walls." MTD, p. 12. Defendant forcibly argues that "[t]here is no provision in the Lease which provides that the Buildings will be altered to form a contiguous, interconnected space," and "no provision . . . which requires that Landlord execute further documents to facilitate RH's desired configuration of the Buildings as a contiguous gallery." MTD, pp. 12-13. Given the absence of an express provision in the Lease obligating it to apply for/consent to a CIL, Defendant maintains that all Plaintiff's contract—based claims "fail as a matter of law." MTD, p. 15.

Turning to Plaintiff's fraud/negligent misrepresentation claims, Defendant says that each are inadequately pled and, in any event, foreclosed because the Lease "adequately covers" the subject matter of the alleged fraud/negligent misrepresentation, and because Plaintiff has not, and cannot, plead a tort independent of the alleged contractual breaches.

Plaintiff sees it differently. It points out that §1.2(f) of the Lease, titled "Permitted Use," mandates that the Premises be used primarily as a gallery for the retail sales of upscale, specialty products, and that the Landlord represented that there are no "restrictions that would limit, restrict, impair or prevent the construction and operation of Tenant's Permitted Use . . . ." Lease, § 20.22(d). Plaintiff also directs the Court to § 9.1—titled "Tenant's Work"—which obligates it to

"cause the premises to be improved so that they are suitable for the operation of a RH Gallery." *Id.* Seizing on the word "a," and other lease provisions that reference the proposed gallery in the singular, Plaintiff claims the Lease reflects the Parties' intent that RH would use the premises as a "single" contiguous gallery. Resp. pp. 1-2. Plaintiff also points out that the Lease provides that "Landlord will not unreasonably withhold consent to [Tenant's] plans," Resp. p. 5, citing § 9.1(a), and directs the Court to other generic lease provisions, such as the "Covenant of Quiet Enjoyment," *see* § 7.5; the "Time is of the Essence" clause, *see* § 20.2; the "Consents" provision, *see* § 20.8; and the "Landlord Representations," *see* § 20.22(e). These provisions, in Plaintiff's view, imposed upon Defendant a contractual duty to approve its plans and to execute and submit a CIL application to the City of Miami, thereby enabling it to combine the separate buildings into a "single contiguous gallery."

Putting aside its reliance on these provisions, Plaintiff also alleges that during pre-contract negotiations, "Landlord's Broker" represented that a "slight separation" between two of the properties "could be opened up and connected," and "shared with [Plaintiff] certain plans that had been prepared specifically for [Plaintiff] that showed a single, contiguous RH gallery, spanning over separate lots and connected through corridors." AC, ¶¶ 12-13. Plaintiff also alleges that prior to entry into the Lease, its architect prepared "demolition plans" for two parcels "on the most eastern parts of the eight (8) folios that make up the Leased Premises," and that its "internal design team" prepared and sent to "Landlord's Broker" conceptual plans "showing the corridors that would connect the Leased Premises." AC, ¶¶ 20, 21. Plaintiff's architect also "sent RH and Landlord's Broker a pdf and computer aided design plans" which "provided full and actual detail of RH' s improvement requirements . . . ." AC, ¶ 21.[4] According to Plaintiff, this pre-contract course of dealing confirms that these parties "intended" the space to be unified into one contiguous gallery.[5]

III. GOVERNING LAW/ANALYSIS

A. The Contract Based Claims

As this Court, as well as others, has said many times, "[c]ontracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]; *De Prince v. Starboard,* 23 Fla. L. Weekly Supp. 1022a (11th Jud. Cir. April 7, 2016). When parties bargain for the terms of their contract, it is not the Court's prerogative to "substitute their judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach,* 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973). The Court's task is "to enforce the contract as plainly written." *Okeechobee Resorts,* 145 So. 3d at 993. "Courts, without dispute, are not authorized to rewrite clear and unambiguous contracts . . .," *Andersen Windows, Inc. v. Hochberg,* 997 So. 2d 1212, 1214 (Fla. 3d DCA 2008) [34 Fla. L. Weekly D12a], and when a contract "is clear and unambiguous, [a] trial court [errs] by failing to give effect to the contract as written." *Nunez v. Aviv Air Conditioning, Inc.,* 319 So. 3d 731, 733 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D982b]. This edict is especially inflexible where, as here, the contract was entered into by sophisticated parties represented by counsel. *Pinero v. Zapata,* 306 So. 3d 1117, 1118 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1981b] (noting that "[t]he parties entered into the Agreement 'freely and voluntarily, with the advice of counsel' ").

The construction of a contract presents a question of law, and "[a] court must begin its analysis by 'examin[ing] the plain language of the contract for evidence of the parties' intent.' " *Aleman v. Gervas,* 314 So. 3d 350, 352 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2387a], (citing *Beach Towing Servs., Inc. v. Sunset Land Assocs., LLC*, 278 So. 3d 857, 860 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2195a]). Though a court must "examine the whole instrument, not just particular portions, and reach an interpretation consistent with reason, probability, and the practical aspects of the transaction between the parties," *Bucacci v. Boutin,* 933 So. 2d 580, 585 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1606a], when the language of a contract "is clear and unambiguous, it must be construed to mean 'just what the language therein implies and nothing more.' " *Walgreen Co. v. Habitat Dev. Corp.,* 655 So. 2d 164, 165 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1132a].

In some instances a contract is reasonably susceptible to more than one interpretation and, as a result, ambiguous. *Lambert v. Berkley S. Condo. Ass'n, Inc.,* 680 So. 2d 588, 590 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2015a]. But a contract is not ambiguous "simply because the litigants ascribe different meanings to the language employed—something that occurs every time the interpretation of a contract is litigated. Incorrect and even absurd interpretations of unambiguous contracts are often advanced . . . [A] true ambiguity exists only when the language at issue 'is reasonably susceptible to more than one interpretation.' " *City of Pompano Beach v. Beatty,* 222 So. 3d 598, n. 1. (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1556a. *See also Am. Med. Int'l, Inc. v. Scheller,* 462 So.2d 1, 7 (Fla. 4th DCA 1984) ("fanciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations").

Mindful of these overarching principles, the Court now turns to what it finds to be the relevant provisions of the Lease and, based upon these provisions, concludes that nothing prevents the Tenant from submitting its proposed renovation plan, subject to the Landlord's rights to comment and "not unreasonably" withhold consent.

The "Premises" or "Leased Premises" are defined as eight (8) separate parcels located at 15 NE 39th St; 19-25 NE 39th St; 39-45 NE 39th St; 53 NE 39th St; 55 NE 39th St; 75-77 NE 39th St; 81 NE 39th St; and 3925 North Miami Avenue, together with the "buildings currently located on such land." The Lease required the Landlord to deliver, and the Tenant to accept, the Premises in "their 'as is' and 'where is' condition," Lease, § 2.6, and provided that "Tenant shall use the Premises primarily as a gallery for the retail sales of upscale, specialty products for home renovation and embellishment, and as are sold in Tenant's other stores." Lease, § 1.2 (f). The Lease does not define the word "gallery" or the term "a gallery."

While RH clearly accepted the Premises in their "as is" and "where is" condition—meaning that the Landlord was not itself required to complete any improvements prior to delivery—the Lease undeniably contemplated renovations on the part of the Tenant. Section 1.2(k) defines "Tenant's Work" to be "all work necessary to complete the Premises so that they are useable for the Permitted Use and as a retail store." *Id.* Section 9.1 then obligates Tenant to "cause the Premises to be improved so that they are suitable for the operation of a RH Gallery"—an again undefined term. Section 9.1, in pertinent part, goes on to provide that "[w]ith respect to such improvements:

> (a) On or before forty-five (45) days after the Effective Date, and prior to submitting any plans to the City of Miami or any other applicable governing authority, Tenant will deliver a copy of the plans to Landlord who will have a period of five (5) business days within which to provide any comments; Tenant shall cause Landlord's comments to be addressed, will resubmit the plans to Landlord, and the process will continue until the plans are approved. Landlord will not unreasonably withhold consent to Tenant's plans. Landlord's approval will not be confirmation that the proposed plans are in conformance with governmental requirements or are for improvements suitable for their intended purpose. For any alterations after the initial build out of the Premises, the provisions of this paragraph shall

> continue to apply, except that the reference to 45 days after the Effective Date will be changed to be "prior to commencement of construction".

Lease § 9.1(a).

There are no "plans" attached to the Lease. Nor does the Lease describe, or circumscribe, the "plans" the Tenant is allowed to propose. Put another way, nothing in the Lease cabins the Tenant's right to submit any "plans," including ones that would alter the exterior structure of the Buildings. Rather the Lease, as plainly written, authorizes the Tenant to submit any "plans" it wants to put forth, subject to the Landlord's right to "provide any comments," and its right to "reasonably"—or in the words of the Lease "not unreasonably"—withhold consent. Lease § 9.1(a).[6]

Article 10, titled "Changes To Premises," then affords the Tenant the right to make "cosmetic installations, cosmetic improvements, and other cosmetic alterations in or to the Premises" without the "Landlord's consent," and defines "cosmetic" to be a change that "does not involve any core drilling or the exterior walls of any Building or impact the structure of any Building . . . ." *Id.* The provision goes on to provide that "[a]ny installations, improvements and other alterations which are not cosmetic in or to the Premises shall be pursuant to Landlord's prior written consent, which shall not be unreasonably withheld, delayed, or conditioned." *Id.* This provision clearly anticipates that the Tenant could propose structural (non-cosmetic) renovations, again subject to the Landlord's right to comment and to "not unreasonably" withhold consent.

Finally, §20.8—titled "Consents"—provides that: "[w]here in this Lease, Landlord's or Tenant's consent or approval is required and is not expressly permitted to be withheld in Landlord's or Tenant's sole discretion, such consent or approval shall not be permitted to be unreasonably withheld, conditioned or delayed." *Id.* Article 10's requirement of "Landlord's prior written consent" for non-cosmetic alterations (i.e., structural work) does not permit RS JZ to withhold consent in its "sole discretion," meaning that the Landlord's consent to a proposed structural (i.e. non-cosmetic) change may not be "unreasonably withheld."

Reading these provisions singularly, and as a cohesive whole, the Court concludes that nothing in the Lease prevents Plaintiff from submitting "plans" to "renovate" the Premises so as to combine all (or certain of) the Buildings, resulting in a single, continuous gallery. There is simply nothing in the Lease that prevents Plaintiff from presenting such a proposal. And had the Landlord been unwilling to consider any change to the "exterior" of any building, or any material alteration to the physical structure of the "Premises," it could easily have contractually precluded RH from doing any work that would alter/modify the exterior of any building or, at a minimum, bargained for the right to withhold consent for any such work in its "sole discretion."

Because it failed to secure an express prohibition on Tenant altering the exterior structure of the Building(s), or the right to veto any such proposed renovation in its "sole discretion," Landlord seeks refuge in the "as is" and "where is" clause. Its reliance on this provision is misplaced as: (a) that clause simply makes clear that the Landlord was not required to improve the Premises prior to commencement of the tenancy; and (b) the Lease obviously contemplated that Plaintiff would renovate. Put simply, the fact that RH accepted the Premises in their "as is" and "where is" condition is legally irrelevant, as RH is not alleging that RS JZ had any obligation to improve the Premises prior to—or after—delivery.

Defendant also argues that nothing in the Lease, including the various general provisions highlighted by Plaintiff, expressly authorizes the Tenant to "join the Buildings." MTD, p. 13. That is true, but the same could be said if Tenant submitted "plans" to install a wood floor, move a single wall, replace a window or do anything else, as the Lease does not "expressly authorize" any particular work. What the Lease does is permit the Tenant to submit renovation "plans," and it again does not, in any way, restrict what those "plans" may or may not entail. That is how the lease is drafted, and it is not the Court's prerogative to "rewrite" it and impose, by judicial fiat, limitations on the Tenant that the Landlord could have bargained for. *See, e.g., S. Crane Rentals, Inc. v. City of Gainesville,* 429 So. 2d 771, 774 (Fla. 1st DCA 1983) ("[w]here a contract is simply silent as to a particular matter, courts should not, under the guise of construction, impose on the parties contractual rights and duties which they themselves omitted"); *Blok Builders, LLC v. Katryniok,* 245 So. 3d 779, 784 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D927a] ("when a contract is silent on a matter, the court cannot impose contractual rights and duties under the guise of construction").

Finally, Defendant emphasizes that nothing in the Lease compels it to apply to the City for a CIL, and insists that an obligation to do so may not be imposed through the implied covenant of good faith and fair dealing. The Court disagrees.

Although "Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract," *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.,* 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1316a], Defendant correctly points out that this doctrine may not "be utilized to create a breach where there has been no breach of an express term of the contract." *JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.,* 292 So. 3d 500, 508 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D455a]. But if the Court concludes that Landlord's refusal to consent to Tenant's proposed renovation was "unreasonable," and that the Tenant is therefore entitled to move forward with its proposal, Landlord would be required to cooperate in securing whatever governmental permits/approvals were necessary, as the implied covenant obligates contracting parties to proceed in good faith in carrying out the contract, and to exercise whatever discretion they may possess reasonably, so as to not frustrate the "expectations of the contracting parties in light of their express agreement." *Barnes v. Burger King Corp.,* 932 F. Supp. 1420, 1438 (S.D. Fla. 1996). *See, e.g., Bowers v. Medina,* 418 So. 2d 1068, 1069 (Fla. 3d DCA 1982) ("[a]n established contract principle is that a party's good-faith cooperation is an implied condition precedent to performance of the contract").[7]

If RS JZ, a sophisticated corporate entity represented by sophisticated counsel, wanted to impose upon its Tenant a limitation on the type/scope of "plans" that could be submitted, or grant itself unfettered discretion to withhold consent to any structural renovations, the time to demand such terms was "at the bargaining table." *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.,* 86 N.Y.2d 685, 695, 660 N.E.2d 415 (1995). Defendant could have, but failed to, insist upon either term as a condition to entering into the Lease, and this Court declines its invitation to impose non-existent restrictions on the Tenant under the guise of judicial construction.[8]

Because Plaintiff alleges that it provided Defendant with "plans" permitted by the Lease, and that Defendant has unreasonably refused to "consent" to its proposed renovations, the contract-based claims set forth in the AC state viable causes of action.

B. The Fraud/Negligent Misrepresentation Claims

Plaintiff's original complaint brought only the contract-based claims re-alleged in the AC. The current pleading, however, contains additional claims of "Fraud in the Inducement" Count (VII) and "Negligent Misrepresentation" (Count VIII).

In support of these newly added claims, Plaintiff again alleges that Defendant's Broker, knowing that "RH needed a location that would allow it to open a single, large, continuous gallery, represented that 'there is a slight separation of approx. 3-4', between the 3925 NMA

(Baltus) and 19-25 NE 39 St buildings, which could be opened up and connected.' " AC, ¶ 12. Plaintiff further alleges that that Landlord's Broker shared with RH "certain plans that had been prepared specifically for RH that showed a single, contiguous RH gallery, spanning over separate lots and connected through corridors," AC, ¶ 13, and "provided counsel and guidance to RH regarding the professionals RH should engage to improve the Leased Premises" in the manner intended (i.e., to join the Buildings). AC, ¶ 18. Plaintiff alleges that it "justifiably relied" on these representations in "executing the Lease," and that at the time these representations were made, Landlord had no intention of consenting to altering the structure or legal status of its property. AC, ¶¶ 140, 143, 152, 155.

As is clear from the Court's recent order in *Ruben v. DLP Capital Partners, LLC,* 30 Fla. L. Weekly Supp. 71b (11th Jud. Cir. April 13, 2022), it has struggled with precedent attempting to curb tort claims in cases that are, at bottom, no more than garden-variety contract disputes. As the Court pointed out in *Ruben,* plaintiffs routinely try to convert routine contract disputes into tort cases, either "to avoid damage limitations or other contractual terms they find inconvenient; to secure non-contractual (and punitive) damages; or to bring claims against individuals who are not a party to the contract." *Id.* The Court lamented that "the days of simple one count breach of contract cases are long gone." *Id.*

In an attempt to prevent run-of-the-mill contract disputes from morphing into tort claims, our appellate courts have developed two related lines of precedent. The first line of precedent forecloses a claim for fraud in the inducement based upon "alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract." *B & G Aventura, LLC v. G-Site Ltd. P'ship,* 97 So. 3d 308, 309 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2197a]; *GVK Int'l Bus. Group, Inc. v. Levkovitz,* 307 So. 3d 144 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1777a]. The second line of precedent establishes the so-called "Independent Tort Doctrine." Both are intended to prevent contracting parties from doing an end-run around of their bargain and draw (or attempt to draw) a line of demarcation between tort and contract claims.

Despite precedent framing the first doctrine in the disjunctive, some courts limit it to circumstances where the contract, on its face, negates (i.e., expressly contradicts) the claim. *See, e.g., Schwab v. Swire Realty, Inc.,* 2007 WL 9707023, at *5 (S.D. Fla. Apr. 3, 2007) (denying motion to dismiss when the alleged "misstatements were *affirmed* by and contained in the Contract"); *Onemata Corp. v. Rahman,* 2021 WL 5175544, at *4 (S.D. Fla. Oct. 12, 2021) ("the Court finds that the alleged misrepresentations at issue in the fraudulent inducement claims are not contradicted by nor inconsistent with the terms of the Purchase Agreement and the contemporaneously entered contracts"). The Fourth District also has suggested that this line of precedent is implicated only when "the later written contract expressly contradict[s] the alleged oral misrepresentations." *Output, Inc. v. Danka Bus. Sys., Inc.,* 991 So. 2d 941, 944 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2086a].

As the Court said in *Ruben,* however, it is bound by Third District precedent adopting the test in the disjunctive, and "[n]othing in any of our appellate court's opinions suggests that to foreclose a fraud claim the contract must 'expressly contradict' (as opposed to adequately deal with the subject matter of) the alleged misrepresentation(s)." *Ruben, supra.* The Court also expressed its belief that there is no reason "why it should matter whether the agreement 'expressly contradicts' the claim, 'adequately covers' the subject matter of the alleged fraudulent representation(s), or both, because if a particular subject matter 'is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element.' " *Greenwald v. Food Fair Stores Corp.,* 100 So. 2d 200, 202 (Fla. 3d DCA 1958) (citing *Milton v. Burton,* 79 Fla. 266 (1920)).

For these reasons, the court ruled that "[w]hen the parties' later agreement either adequately deals with the subject matter of the alleged fraud, or expressly contradicts the claimed misrepresentation(s), no action for fraudulent inducement may be maintained as a matter of law. This rule pays deference to the sanctity of contracts, holds contracting parties to their bargain, avoids disruption of the parties' allocation of risk, and prevents those who enter into contracts" from claiming that they relied upon an oral representation regarding a subject matter "adequately covered," or "expressly contradicted" by, their agreement. *Ruben, supra,* (citing *TRG Night Hawk Ltd. v. Registry Dev. Corp.*, 17 So. 3d 782, 784 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1633a]).

As discussed earlier, the Lease extensively addresses the Parties' respective obligations regarding any renovations proposed by the Tenant. The Lease permits the Tenant to propose any renovation it desires without restriction. There is simply nothing in it that limits the Tenant's right to propose "plans" for cosmetic work, non-cosmetic work, or both. The Lease then requires that the Landlord review Tenants proposed "plan(s)," comment on those "plans" and either grant or withhold consent, subject to a standard of "reasonableness." That is the protocol these parties bargained for, and Plaintiff will be held to that bargain for good or ill. It will not be permitted to sidestep its bargain by pursuing tort claims based on alleged representations that are "expressly contradicted" by the Landlord's contractual right to "not unreasonably" withhold consent to Tenant's plan(s), and which relate to a subject matter "adequately covered" by the governing agreement.

V. CONCLUSION

Despite the Parties' exhaustive (and excellent) briefing, this case is not complicated. Two sophisticated parties, represented by sophisticated counsel, executed a commercial Lease that contemplated Tenant performing renovations pursuant to undefined and unelaborated upon "plan(s)" that would be submitted, reviewed, commented on and ultimately consented to by Landlord, unless Landlord "reasonably" withheld such consent. Neither party insisted that the proposed "plan(s)" be attached to, or even described in, the Lease, and the contract, on its face, sets no boundary on the type/scope of "plan(s)" the Tenant could propose. So at the end of the day this case presents one issue: Did the Landlord have a "reasonable" basis to withhold its "consent" to renovations that would require the physical joinder of now free-standing Buildings, together with a unification of their title/folio? The answer to that dispositive question must await another day.

For the foregoing reasons, it is here **ORDERED:**

1. Defendant's Motion to Dismiss Counts I-VI of Plaintiff's Amended Complaint is **DENIED**.[9]

2. Defendant's Motion to Dismiss Counts VII and VIII of Plaintiff's Amended Complaint is **GRANTED**, and said Counts are dismissed with prejudice.

3. Defendant shall file its answer and affirmative defenses, if any, to Counts I - VI of the Amended Complaint within twenty (20) days.

4. The Court intends to expedite this matter and try the case during its November 2022 calendar. The parties shall meet and confer in an attempt to agree upon, and submit to the Court, a case management order setting the matter on the Court's November 2022 non-jury trial calendar and incorporating all pre-trial deadlines. Said case management order shall be submitted to the Court via courtMap on or before July 22, 2022.[10]

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[1]The "Lease" is a thirty (30) page document containing hundreds of pages of exhibits including: a "Definitions" page (Exhibit A); "Depiction of Premises" (Exhibit

B); the "Legal Description of Premises" (Exhibit C); a form "Estoppel Certificate" (Exhibit D); a short form "Memorandum of Lease" (Exhibit E); a "Commencement Date Letter" (Exhibit F); and other collateral documents. Suffice it so say, this contract was heavily negotiated between extremely sophisticated parties, represented by sophisticated counsel.

[2]Defendant maintains that at least one other RH Gallery is "spread across multiple buildings that are not interconnected," Reply Memo, fn. 3.

[3]Defendant claims that a CIL "would permanently—and negatively—affect Landlord's property rights well beyond the four-year term of the Lease." MTD, p. 1. According to Plaintiff, RS JZ could easily "unwind" the CIL "at the end of the Lease." AC, ¶ 46. The Court notes that the Lease has an initial four-year term with a six-year "Renewal Option," *see* Lease § 3.6(a) and, in any event, the question of what impact, if any, a CIL might have on the property cannot be considered on a motion to dismiss.

[4]While not specifically alleged, the Court assumes that these design plans reflect a joinder of the multiple structures so as to create a single, unified gallery space.

[5]Defendant denies that the Parties knew, prior to execution of the Lease, that a CIL would be required for Plaintiff's desired configuration, and directs the Court to correspondence, attached to Plaintiff's pleading, suggesting that as of October 2021—months after the Lease had been executed—the issue was still open to debate. MTD, p. 6.

[6]The Court notes that the Lease expressly prohibits the Landlord from changing or modifying "the exterior of the buildings without the consent of the Tenant," Lease § 2.2, but contains no corresponding proscription on the part of the Tenant.

[7]Of course the Court could, at the end of the day, conclude that Landlord's refusal to consent was "not unreasonable" because, among other things, such "consent" would require a material and detrimental change to the physical composition of the "Premises," and a unification of title—something that might unduly burden the property. But if the Court concludes that Landlord's consent was "unreasonably withheld," the implied covenant of good faith and fair dealing would support an order compelling Landlord to take whatever steps are reasonably necessary to implement the permitted renovation.

[8]This entire dispute could easily have been avoided if either of these sophisticated parties had insisted that the Tenant's proposed "plans" be attached to, or described within, the Lease. For whatever reason, neither party decided to insist upon, or ensure, such clarity and, as a result, the Court has been forced to wade through the Lease, assess the Parties' positions and decide a question that could have been answered by actual "plans" incorporated into the Lease or, alternatively, a simple sentence directly and clearly saying whether the Tenant would, or would not, be permitted to attach the Buildings so as to make the space contiguous. The Court does not understand why the Parties, and their sophisticated counsel, did not just address this issue head on. Had they done so, this entire dispute would have been avoided.

[9]The Court declines to address, on a motion to dismiss, the issue of what damages the Plaintiff may seek if it successfully establishes a breach of the Lease. *See, e.g., Abstract Co. of Sarasota v. Roberts,* 144 So. 2d 3 (Fla. 2d DCA 1962). The Court will, however, enforce § 18.5 of the Lease, just as it will enforce the remaining provisions of the Parties' contract.

[10]The Court notes that the Lease contains a "Waiver of Jury Trial." Lease § 20.24.

* * *

Criminal law—Organized scheme to defraud—Exploitation of elderly—Theft from elderly—Limitation of actions—Charges related to defendant's acquisition of property from elderly homeowner under guise of obtaining loan for homeowner with promise that he would immediately reconvey property to him are timely despite passage of more than five years since defendant acquired title to property where homeowner retained equitable interest in property after conveyance of legal title to defendant, and defendant's alleged crimes occurred later within limitations period when he interfered with that equitable interest by selling property to third party—Charges for defendant's alleged crimes against couple who paid deposits for rental of property to defendant but never received access to property or return of deposits are untimely where acceptance of deposits with alleged felonious intent occurred more than five years before charges were filed—If defendant did not have felonious intent when he accepted deposits, Florida law treats failure to repay deposits as civil, not criminal, matter—Tolling provision of section 775.15(12)(a) does not make charges regarding deposits timely where charges were filed more than one year after couple discovered alleged theft—Record does not support application of continuing offense doctrine to tie statute of limitations relating to fraud crime against couple to statute of limitations relating to crimes against elderly homeowner where defendant's acts involved different facts and different victims—Charge of conspiracy to commit organized scheme to defraud is time-barred—Applicable statute of limitations is three, not five, years

STATE OF FLORIDA, Plaintiff, v. ERIC READON, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F22-2535, Section 09. June 29, 2022. Joseph D. Perkins, Judge.

ORDER (1) GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS, AND (2) DENYING AS MOOT MOTION TO STRIKE

This case is before the Court on **(1)** Defendant Eric Readon's ("Readon") March 24, 2022 Motion to Dismiss, **(2)** the State's April 18, 2022 Response, **(3)** Readon's April 26, 2022 Reply, **(4)** the State's April 27, 2022 Notice of Supplemental Affidavit, and **(5)** the State's May 31, 2022 Supplemental Response.[1]

The Court held a hearing on April 29, 2022 and scheduled an additional hearing for May 18, 2022. In its May 18, 2022 Order granting the State's request to reschedule the hearing, the Court ordered the parties to be prepared to address various cases[2] cited in the Order and whether there is substantial evidence that alleged victim Edward Fuller ("Fuller"), despite conveying legal title to the property located at 10911 NW 19th Avenue, Miami, Florida ("10911 Property") to Readon, retained an equitable interest in the property. The Court held a second hearing on June 1, 2022.

On June 14, 2022, Fuller submitted a filing titled Additional Argument in Response to Defendant's Motion to Dismiss by Counsel for Victim as Friend of the Court ("Amicus Curiae Supplemental Brief"). The next day, Readon filed a Motion to Strike Amicus Curiae Supplemental Brief.

For the reasons below, the Motion to Dismiss is **GRANTED IN PART** as to Counts I (only with respect to the allegations relating to alleged victims Safiya and Calvin Singleton), II and V, and **DENIED IN PART** as to Counts I (only with respect to the remaining allegations relating to Fuller), III and IV.

Due to the timing of its filing and the Court's preparation of this Order having already been well underway, the Court did not consider the Amicus Curiae Supplemental Brief. Readon's Motion to Strike Amicus Curiae Supplemental Brief is therefore **DENIED** as moot.

SUMMARY

Readon seeks to dismiss the State's February 11, 2022 five-count Information against him as being untimely under the statute of limitations. The Information charges Readon with crimes against victims Fuller and Safiya and Calvin Singleton (collectively, the "Singletons") as follows:

Count I	Organized Scheme to Default in violation of § 817.034(4)(a)1, Florida Statutes (Fuller and Singletons)
Count II	Conspiracy to Commit Organized Scheme to Defraud in violation of § 777.04, Florida Statutes (unnamed victim)
Count III	Exploitation of the Elderly in violation of § 825.103(3)(a), Florida Statutes (Fuller)
Count IV	Theft from the Elderly in violation of §§ 812.014 and 812.0145(2)(a), Florida Statutes (Fuller)
Count V	Grand Theft in violation of § 812.014(2)(c), Florida Statutes (Singletons)

There is no dispute that the limitations period for Counts I, III, IV, and V is five years. As discussed below, the limitations period for Count II is three years.

Readon's alleged crimes against Fuller relate to Readon's January 30, 2017 acquisition of Fuller's property located at 10911 Property. Readon obtained the property under the guise of obtaining a loan to benefit Fuller and promised he would immediately reconvey the property to Fuller. Instead, on February 13, 2017, without Fuller's permission, Readon sold the property to a third party and kept the proceeds for himself. Readon's alleged crimes against the Singletons

relate to the same 10911 Property. In November and December 2016, the Singletons gave Readon deposits totaling $3,100 to rent the property starting in December 2016. Readon never made the property available to the Singletons and never returned their deposits.

As discussed below, although Readon acquired legal title to the 10911 Property on January 30, 2017—more than five years before the State filed charges—the State's charges against Readon relating to Fuller are timely. The State has presented substantial evidence that Fuller retained an equitable interest in the property after the January 30, 2017 conveyance of legal title, and Readon's alleged crimes occurred on February 13, 2017 when he interfered with Fuller's equitable interest and sold the property. The State filed charges on February 11, 2022—two days before the limitations period expired.

The charges against Readon for his alleged crimes against the Singletons, however, are untimely. For a crime to have occurred, Readon must have had criminal intent when he accepted the security deposits in November and December 2016. If he had such criminal intent, the State's charges are untimely because the State filed them more than five years after the crimes allegedly occurred. Meanwhile, if Readon did not have criminal intent at the time he accepted the deposits, Florida law treats his failure to return the deposits as a civil matter, not a criminal matter.

Finally, Count II is untimely because the limitations period for conspiracy is three years, and the State did not file charges until nearly five years after the events in question.

FACTS[3]

I. FACTS RELATING TO FULLER

The facts relating to Readon's alleged crimes against Edward Fuller are contained within Fuller's Affidavit, filed with the Clerk of Court on April 27, 2022.[4] To summarize, in the 1970s Fuller purchased the 10911 Property, which at the time was an undeveloped plot of land. Fuller's plan was to build his dream home on the property.

After retiring, Fuller spent his life savings—over $700,000—to build his dream home. With the money Fuller had, he was able to complete the exterior shell of the home (exterior walls, windows, doors, roof), but he did not have enough money to complete the utilities and finishing work inside the home. Fuller found himself in a catch-22. He could not afford to complete construction, but could not obtain a bank or Veterans Administration loan to complete the construction without a certificate of occupancy—which he could not secure because construction was not completed.[5]

Fuller kept paying to repeatedly renew his time-limited construction permits. On or around July 18, 2015, Fuller was at the 10911 Property when a car arrived. A man who identified himself as Eric Readon and a woman he introduced as his wife, Lakeisha Readon, got out of the car. Fuller had never met either of them before that date. Readon introduced himself as a pastor of a church. Readon told Fuller that a woman in the Miami-Dade Permit's Office shared with him that Fuller had been working on building the 10911 Property for a long time. Readon told Fuller that for $15,000 to $20,000, Readon could help Fuller obtain the funds to finish his home.

At their first meeting a few days later, Readon introduced Fuller to a private lender. Readon told Fuller that the lender would only provide the loan if Readon owned fifty percent of the 10911 Property. Readon advised that after Fuller completed construction, Fuller could mortgage the property and pay off the construction loan and Readon's fee, and Readon would then return full ownership back to Fuller. Relying on this representation, Fuller, who was 69 years old, transferred fifty percent ownership of the 10911 Property by quit claim deed to Project: Youth Outreach Unlimited (Y.O.U.) -New Beginning Multi-Purpose Community Center, Inc., which Readon said was his Church. He also signed a construction loan for $125,000.

Not long thereafter, Readon started telling Fuller that funds from the loan were running short. Following Readon's instructions, Fuller opened credit cards from First Savings, Capital One, Lowes, and Home Depot. Readon used the cards through a card reader attachment to his cellphone and told Fuller that the transactions were for construction supplies.

Readon told Fuller that the construction finishing costs were more than anticipated but that he had an idea. Fuller would obtain a VA loan to purchase a home Readon owned, and the funds could be used to pay off the credit card bills and purchase supplies to finish the house. For the plan to work, Readon told Fuller that Fuller had to give Readon 100% ownership of the 10911 Property. After Fuller obtained the VA loan, Readon and Fuller would flip ownership, Fuller would get his 10911 Property back, and Readon would get his house back.

Relying on Readon's representations, on October 26, 2015, Fuller signed over Fuller's remaining fifty percent ownership in the 10911 Property via quit claim deed to Project: Youth Outreach Unlimited (Y.O.U.) New Beginning Multi-Purpose Community Center, Inc. The deed was recorded on November 2, 2015. On October 27, 2015, Readon executed a quit claim deed, as owner of Project: Youth Outreach Unlimited (Y.O.U.) New Beginning Multi-Purpose Community Center, Inc, transferring fifty percent ownership in the 10911 Property back to Fuller. Readon recorded this deed on March 21, 2016. On December 18, 2015, Fuller obtained a VA loan in the amount of $180,000 to purchase Readon's property located at 10231 SW 173rd Terrace, Miami, Florida, ("the 10231 Property"). On the same day, Readon, as owner of Project: Youth Outreach Unlimited (Y.O.U.) New Beginning Multi-Purpose Community Center, Inc, transferred one hundred percent ownership of the 10231 Property to Fuller for $180,000. Readon arranged for a woman that he knew to rent the 10231 Property. Fuller never received any of the rent money, even though Fuller was paying the monthly mortgage payment on the 10231 Property.

Readon kept telling Fuller that more money was needed to finish construction and that Fuller needed once again to transfer full ownership of the 10911 Property to Readon's church so they could obtain additional financing. Readon assured Fuller, as before, that Readon would transfer back ownership to Fuller. Relying on Readon's assurances, on April 27, 2016 Fuller again transferred his 50% ownership of the 10911 Property (for a total of 100% ownership) to Project: Youth Outreach Unlimited (Y.O.U.) New Beginning Multi-Purpose Community Center, Inc. Readon recorded this deed on May 6, 2016. Additionally, believing Readon's assurances that he was going to transfer ownership of the 10911 Property back to Fuller, on April 27, 2016 Fuller also transferred 100% ownership of the 10231 Property to Lakeisha Readon, Readon's wife.

After this transfer, Fuller challenged Readon as to why Fuller still had not received title to the 10911 Property back and requested to see the documentation regarding the construction finishing costs. Readon was sitting in Fuller's vehicle at the time. Readon began to scream at Fuller and banged his fist so hard that he cracked the dashboard. Despite the ownership being transferred to Readon's wife, Fuller continued to pay the VA loan on the 10231 Property to calm Readon's anger and keep him satisfied.

A few weeks later in October of 2016, the construction of the 10911 Property was complete, and code enforcement had certified it. Readon told Fuller he had a contact who would make a second loan on the 10911 Property, which would be used to pay off the original construction loan and to pay off all the subcontractors, vendors, and supply bills. Readon then obtained a $280,000 loan on the 10911 Property. None of the proceeds were disbursed to Fuller. Fuller sought documentation for the loan from the title company, but it refused to provide the documents to Fuller. Readon informed Fuller that he needed to execute a corrective quit claim deed because Readon

had listed himself as a witness on the April 27, 2016 deed. Still relying on Readon's representations that he would return the 10911 Property to Fuller, on January 30, 2017, Fuller signed a corrective quit claim deed again transferring 50% ownership (for a total of 100%) of the 10911 Property to Project: Youth Outreach Unlimited (Y.O.U.) New Beginning Multi-Purpose Community Center, Inc.

Readon never told Fuller, who was then being treated for several medical issues, that he was going to sell the 10911 Property. On February 18, 2017, Fuller drove by the 10911 Property and saw people there. Fuller searched online and discovered that on February 13, 2017, Readon had sold the 10911 Property to a third party named Marlon Christopher Bell for $380,000. Fuller did not know Bell. Not only did Readon sell Fuller's retirement home contrary to his promises that he would reconvey it to Fuller, but Fuller did not receive a penny from the sale and was still paying the mortgage on Readon's 10231 Property. Additionally, Readon left Fuller with fines for defaulting on the water bill and over $19,000 in credit card debt for construction supplies and Readon's personal expenses.

II. FACTS RELATING TO SINGLETONS

According to the State, in November 2016, Safiya and Calvin Singleton agreed to rent the 10911 Property from Readon for $2,100 per month. On November 15, 2016, the Singletons gave Readon $2,100 as a security deposit. The agreed move-in date was December 15th or 16th, 2016. On approximately December 16, 2016, the Singletons met with Readon, who told them that the house was not ready for move-in due to incomplete finishing work and inspection issues. Readon requested that they pay him the first month's rent in advance so he could complete the work and resolve the inspection issues. The Singletons agreed to pay Readon $1,000, which they paid that day, and Readon told them they could move in on December 23, 2016. On December 23, 2016, Ms. Singleton drove by the house and saw Readon showing it to another couple. Ms. Singleton approached Readon, and he told her they would speak later. State's Response at 7-8.

Ms. Singleton told her husband, who began researching Readon online and discovered several fraud allegations against him. Ms. Singleton called Readon and asked for their money back, and Readon agreed to return the money. Readon continued to promise the Singletons he would return their money but kept pushing off the date. Ultimately, Readon left the Singletons a message that they could pick up a check at the office of attorney Andrew Kassier. On May 1, 2017, Mr. Singleton went to attorney Kassier's office and was told there was no check. Mr. Singleton then spoke with Readon, who advised for the first time that he was not going to return their money.

LEGAL STANDARD

"Rule 3.190(b) permits the defendant to raise a defense to a charge, such as expiration of a statute of limitations, by motion to dismiss the information." *Pontius v. State*, 932 So. 2d 618, 619 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1824e]. "Once the jurisdiction of a court is challenged by raising the statute of limitations, the burden is on the State to establish that the offense is not barred by the statute." *Gray v. State*, 803 So. 2d 755, 756 (Fla. 2d DCA 2001) [27 Fla. L. Weekly D308c] (quotation omitted). The State must satisfy this burden with competent, admissible evidence. *Id*. at 756; *see Neal v. State*, 697 So. 2d 903, 906 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1749a] (holding that the State cannot use inadmissible hearsay to satisfy its burden to overcome a motion to dismiss based on statute of limitations); *but see Manzini v. State*, 115 So. 3d 1015 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D864a] (holding that trial court's denial of motion to dismiss based on the statute of limitations was not legal error where the State filed a traverse specifically disputing facts as to the defendant's authority over trust funds he received and the date by which those funds were fully dissipated from defendant's trust account).

DISCUSSION

I. COUNTS I, III AND IV RELATING TO READON'S CRIMES AGAINST FULLER ARE TIMELY, BUT COUNTS I AND V RELATING TO HIS CRIMES AGAINST THE SINGLETONS ARE UNTIMELY.

Counts I and III through V are timely if a theft charge would also be timely. This is because the crimes of organized fraud, exploitation of the elderly, and theft from the elderly are simply theft crimes with additional elements.[6] Since all three crimes, like theft, are subject to a five-year limitations period,[7] it follows that if a February 11, 2022 theft charge against Readon would be timely, then, *a fortiori*, Counts I and III through V are also timely.[8]

Theft is a non-continuing offense. *State v. Diaz*, 814 So. 2d 466, 467 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D383e]. "A [non-continuing] offense is committed . . . when every element has occurred," Fla. Stat. § 775.15(3), and the limitations period "starts to run on the day after the offense is committed." *Id*. The elements of theft are

> (1) knowingly (2) obtaining or using, or endeavoring to obtain or use, property of another (3) with intent to deprive the person of a right to the property or a benefit therefrom, or to appropriate the property to one's own use or to the use of any person not entitled thereto.

Pizzo, 945 So. 2d at 1207; *see* Fla. Stat. 812.014(1).

Readon argues that the limitations period started to run at the latest on January 30, 2017 when Fuller signed a corrective quit claim deed for the 10911 Property. Motion at 8. That Readon sold the 10911 Property to Bell on February 13, 2022 is of no moment, he contends, because by then Readon's crime had already been completed. Viewing the crime as having occurred upon the February 13, 2022 sale would lead to the absurd result where the State's claims would be time barred if he had simply kept the 10911 Property for himself but timely because Readon sold the 10911 Property to a third party and kept the illicit profits. Reply at 7. Similarly, Readon contends that all the elements of his crime against the Singletons occurred at the latest in December 2016 when he did not deliver the 10911 Property for rental as promised to them when he took their deposits.

A. Counts I, III and IV are timely because Fuller retained an equitable interest in the 10911 Property, and Readon interfered with such interest when he sold it on February 13, 2017, thereby completing the crime.

1. A grand theft charge may be based on a defendant's interference with a victim's equitable interest in property.

"It is axiomatic that [one] cannot be charged and/or convicted of the theft of his own property." *Brennan v. State*, 651 So. 2d 244, 246 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D614c]; *accord Jenkins v. State*, 898 So. 2d 1134, 1135 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D878a] ("One with an ownership interest in property cannot commit theft in taking it."). "The only exception to his rule is in the very unique situation where an owner takes his own goods from one who has a special property right in them and a legal right to withhold them from the owner." *Hinkle v. State*, 355 So. 2d 465, 467 (Fla. 3d DCA 1978); *accord Russ v. State,* 830 So. 2d 268, 270 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2538a] ("Liens, pledges, and bailments all have the potential to satisfy the theft statute by creating a superior possessory interest in another as against the owner of the item." (quotation omitted)).

One holding legal title to property can commit grand theft by depriving beneficial owners of their property interest. In *State v. Lahurd,* 632 So. 2d 1101 (Fla. 4th DCA 1994), the Fourth District Court of Appeal reversed a lower court's dismissal of an information

charging an estate's personal representative with grand theft arising from his conversion of estate assets to his own use. The court reasoned that "property of another" is "property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property." *Id*. at 1102 (quoting Fla. Stat. § 812.012(4) (1991)); *see* Fla. Stat. § 812.012(5) (2017) (same). While the personal representative might have held legal title to the assets, the representative did not hold beneficial title and had no right to dispose of the estate assets for his own use. *Id.* at 1103.

In *Walls v. State*, 184 So. 3d 1151 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D2514a], Walls provided home-health services to the victim, who was recovering from surgery and taking medication for various psychological conditions. Walls knew that the victim was receiving proceeds from a class action settlement involving the makers of her medication. The victim wanted to deposit her class action payments into her own bank account, but the bank would not open an account for her because of prior worthless check problems. Walls offered to open an account in his name, promising that the victim would have access to the account and that the deposited funds would be used for her benefit. Shortly after opening the account, however, Walls blocked the victim's access to the account and began withdrawing funds for his personal use. Walls eventually withdrew all the funds and closed the account, all without the victim's knowledge or approval. *Id.* at 1152-53. A jury convicted Walls of grand theft. On appeal, Walls argued that the trial court erred in not granting his motion for judgment of acquittal because the account was in his name and, therefore, he had a legitimate property interest in the funds. The Second District Court of Appeal affirmed:

> Mr. Walls "obtained or used" the victim's money when he tricked her into putting her funds in his account, spent the class action settlement proceeds for his own benefit, and denied the victim access to her own money. . . . [T]he evidence easily established that Mr. Walls fraudulently procured the money from the victim with his false promises, denied her access to his account, and spent her money solely for his benefit. The jury certainly had ample evidence before it to conclude that the victim, who suffered from various health issues, opened the bank account in Mr. Walls' name for him to be a caretaker of her money.

Id. at 1154.

In *Escudero v. Hasbun,* 689 So. 2d 1144 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D503a], the trial court entered a temporary injunction prohibiting husband from withdrawing, transferring, or otherwise disposing of certain bank funds pursuant to Florida's Civil Theft Statute.[9] On appeal, the husband argued that he was a co-owner of the funds and was permitted to remove the funds without his wife's consent pursuant to the couple's depositor agreement with the bank. Since he could not be held criminally liable for the theft of his own property, the husband argued, it followed that he could have no liability for civil theft as a matter of law. *Id.* at 1145-46. The Third District Court of Appeal disagreed. While recognizing that a co-owner of property cannot be held criminally liable for the theft of his own property, this proposition of law does not apply where, notwithstanding the terms of the bank's depository agreement, the wife became the sole owner of the subject funds by virtue of her subsequent agreement with the husband:

> Ordinarily, as between co-signatories of a bank account, absent strong evidence of a contrary intent, there is a strong presumption of joint ownership. *Constance v. Constance,* 366 So.2d 804, 807 (Fla. 3d DCA), *cert. denied*, 376 So.2d 70 (Fla.1979). This presumption, however, may be rebutted by one of the co-signators establishing an equitable ownership to the entire proceeds of the account:
>
> It does not follow that, as between the depositor and the joint signer, an equitable ownership cannot be asserted. That equity regards substance and not form is a time-honored maxim by which the true ownership of property may be pursued, even though a deed or grant would bar the way at law.
>
> *Id*. at 807.

Escudero, 689 So. 2d at 1146.

2. The State has presented substantial evidence that Fuller retained an equitable interest in the 10911 Property after quitclaiming it to Readon.

The question thus becomes whether the State has presented substantial, competent evidence that Fuller retained an interest in the 10911 Property after quitclaiming it to Readon. It has. "When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee." *Collinson v. Miller,* 903 So. 2d 221, 228 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D952f] (quotation omitted). A constructive trust arises immediately as a matter of law when the facts sufficient to establish one exist. *See Mayer v. Cianciolo,* 463 So. 2d 1219, 1221 (Fla. 3d DCA 1985) (holding that a constructive trust in favor of son arose when he quitclaimed his joint interest in real property for the sole reason of facilitating its sale by his mother; "where one conveys real property to another, without consideration, in order to promptly consummate a sale of such property by the grantee and where it is expressly agreed that upon making the sale the grantee will remit the purchase money received therefor to the grantor, a trust in the property is created, and the grantee holds only the bare legal title while the grantor retains the beneficial interest in the property."); *Johnson v. Johnson,* 349 So. 2d 698, 699 (Fla. 4th DCA 1977) (holding that where wife conveyed her interest in real property to her husband by quitclaim deed solely to facilitate husband's sale of the property while wife was traveling, and not with the intention of relinquishing all of her beneficial interest in the property and vesting it in her husband, wife became the beneficiary under a constructive trust and the husband became the trustee). A constructive trust beneficiary's interest in real property is an unrecorded interest in the property. *Dubai Islamic Bank v. Attorneys' Title Ins. Fund,* 778 So. 2d 413, 413 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D328f].

Here, the State has presented substantial, competent evidence that Fuller and Readon understood that Fuller conveyed legal title of the 10911 Property to Readon solely to facilitate financing, and that he did so based upon Readon's express and repeated assurances that he would reconvey the property to Fuller. On these facts, substantial and competent evidence exists that Fuller retained an equitable interest in the 10911 Property despite quitclaiming bare legal title to Readon.

3. The State filed charges two days before the statute of limitations expired.

Readon argued at the June 1, 2022 hearing that even if Readon retained an equitable interest in the 10911 Property, these charges are still untimely. He reasons that section 812.012(3) defines "obtains or uses" as including four different scenarios, each separated by a disjunctive "or." If Readon "[o]btain[ed] property by fraud, willful misrepresentation of a future act, or false promise," Fla. Stat. § 812.012(3)(c), the "obtained or uses" element of the crime was completed, even if Readon later made an "unauthorized use, disposition, or transfer of property." *Id*., § 823.012(3)(b). Readon could not cite any authority supporting his position.

This argument, while creative, fails for the simple reason that the State has presented substantial, competent evidence that Readon never obtained equitable title to the 10911 Property because Fuller retained it. The crime of theft occurs when a defendant, *inter alia*, (1) obtains or uses, (2) the property of another. Fla. Stat. § 812.014(1). Whether

or not a theft occurred when Readon obtained legal title to the 10911 Property, since Fuller retained an equitable interest in the property, Readon made an unauthorized use, disposition, or transfer of Fuller's equitable title of the property when Readon sold it to Bell on February 13, 2017.

The State filed charges against Readon based on his alleged crimes against Fuller two days short of five years after Readon sold the 10911 Property. Thus, these charges are timely.

B. Counts I and V relating to Readon's alleged crimes against the Singletons are untimely and due to be dismissed.

Counts I and V relating to Readon's crimes against the Singletons are untimely. First, the State has not presented any evidence, let alone substantial, competent evidence, that the claims are timely. Second, even accepting as true, for purposes of argument, the State's recitation of facts relating to the Singletons, dismissal would still be appropriate.

A key element of grand theft is felonious intent. *Isenhour v. State*, 952 So. 2d 1216, 1221 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D864a]. Either Readon possessed or did not possess felonious intent when he took the Singletons' deposits on November 16, 2016 and December 16, 2016. If he possessed felonious intent, more than five years passed between the date of Readon's crime and the date the State filed charges, requiring dismissal of the charges as untimely. If Readon did not have criminal intent at the time he took the Singletons' deposits but, rather, decided later he would not repay them, then Florida law treats his failure to repay as a civil matter, not a criminal matter. *See Crawford v. State*, 453 So. 2d 1139, 1142 (Fla. 2d DCA 1984).

"The State concedes that . . . it is probable that the defendant never intended to rent the 10911 property to Mr. and Ms. Singleton." State's Response at 8. Nevertheless, the State contends that the Singletons did not discover the fraud until May 1, 2017, and, therefore, the five-year statute of limitations for grand theft was tolled pursuant to section 775.15(12)(a), Florida Statutes.

The Court rejects the State's argument that the tolling provision of section 775.15(12)(a) somehow makes the State's untimely charges timely. Even assuming, for purposes of argument, that section 775.15(12)(a) applied,[10] that section authorizes certain actions to be brought "within 1 year after discovery of the offense by an aggrieved party" notwithstanding the expiration of (or the imminent expiration of) the statute of limitations. If, as the State contends, the Singletons discovered Readon's theft on May 1, 2017, the statute could not help them.

Finally, with respect to Count I, the record does not support the application of the continuing offense doctrine to tie the statute of limitations as to Count I relating to the crimes against the Singletons to the statute of limitations relating to the crimes against Fuller. Although the alleged acts all involved the 10911 Property, the acts involved different facts and different victims. The State failed to advance allegations that would show that the combination of crimes constituted an ongoing course of criminal conduct such that the acts would fall within the same statute of limitations. *Cf. Rosen v. State*, 757 So. 2d 1236, 1239 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1027a]. Therefore, Count I is due to be dismissed as to the Singletons related allegations only.

II. COUNT II FOR CONSPIRACY TO COMMIT ORGANIZED FRAUD IS UNTIMELY UNDER THE STATUTE OF LIMITATIONS.

In Count II, the State charges Readon with conspiracy to commit an organized scheme to defraud in violation of sections 817.034(4)(A)1 and 777.04, Florida Statutes. Contrary to the State's contention, the three-year limitations period in § 775.15(2)(b), not the five-year period in § 817.034(4)(d), applies to the offense of conspiracy to commit an organized scheme to defraud. *See Navarro v. State*, 19 So. 3d 1180, 1181 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2187b]. The last acts the State alleges to have occurred with respect to Fuller and the Singletons are Readon's February 13, 2017 sale of the 10911 Property and Readon's informing the Singletons on or around May 1, 2017 that Readon would not return their deposit. The State did not file charges until February 11, 2022, well after the three-year limitations period expired. Count II is therefore time-barred.

CONCLUSION

Counts II and V are dismissed. Count I is dismissed only insofar as it is based on crimes against the Singletons. The State shall file an Amended Information omitting such allegations from Count I and omitting Counts II and V. The allegations in Count I relating to Fuller shall be deemed to relate back to February 11, 2022.

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[1]The Supplemental Response is dated May 18, 2022 but was served on May 31, 2022.

[2]*Walls v. State*, 184 So. 3d 1151 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D2514a]; *Escudero v. Hasbun*, 689 So. 2d 1144 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D503a]; *Collinson v. Miller*, 903 So. 2d 221 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D952f]; *Mayer v. Cianciolo*, 463 So. 2d 1219 (Fla. 3d DCA 1985); *Johnson v. Johnson,* 349 So. 2d 698, 699 (Fla. 4th DCA 1977).

[3]With respect to the alleged crimes against Fuller, the facts here are facts to which the parties stipulate for purposes of the motion to dismiss or facts for which the Court finds the State has presented substantial, competent evidence. With respect to the alleged crimes against the Singletons, the facts are based on the State's allegations in its Response to the Motion to Dismiss.

[4]The State and defense stipulate (for purposes of the motion to dismiss) that Fuller would testify consistently with his Affidavit and that the Court can consider the Affidavit as if it were live testimony. They also stipulate that the State would present substantial competent evidence that Readon sold the 10911 Property on February 13, 2017. *See* May 17, 2022 email string (included in Court file); *see also* June 1, 2022 hearing transcript.

[5]*See* Joseph Heller, *Catch-22* (Simon & Schuster 1961).

[6] *See Pizzo v. State*, 945 So. 2d 1203, 1207 (Fla. 2006) [31 Fla. L. Weekly S878a] ("Although worded differently, all of the elements of grand theft are included in the offense of organized fraud."); *Rich v. State*, 823 So. 2d 208, 209 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1693c] ("[A]lthough the exploitation statute contains elements not found in the grand theft statute, the grand theft statute does not contain any element not included in the exploitation statute."); Fla. Stat. § 812.0145(2)(a) (reclassifying theft of property valued at $50,000 or more from a second-degree to a first-degree felony when the victim is, and the defendant knows or has reason to believe the victim is, at least 65 years old).

[7]*See* Fla. Stat. § 817.034(4)(d) (Count I); Fla. Stat. § 775.15(10) (Count III); Fla. Stat. §§ 812.035(10) (Counts IV and V); *see also* Reply at 1.

[8]The converse of this proposition is not necessarily true with respect to the organized scheme to defraud charge. This is because, at least under appropriate circumstances, an organized scheme to defraud, unlike theft, is a continuing offense completed upon the last overt act committed pursuant to the scheme. *See Young v. Moore*, 820 So. 2d 901, 903 n. 4 (Fla. 2002) [27 Fla. L. Weekly S514a]; *State v. Diaz*, 814 So. 2d 466, 467 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D383e]; *see also Rosen v. State*, 757 So. 2d 1236, 1238-39 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1027a].

[9]Section 812.035 authorizes civil remedies for violations of, *inter alia*, sections 812.014, Florida Statutes. Civil cases applying Florida's theft statute are therefore helpful to this analysis.

[10]Section 775.15(12)(a) applies to various limitations periods within section 775.15. Section 812.035(1), not section 775.15, governs the limitations period for grand theft.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Amendment of affirmative defenses—Exhaustion of policy limits—Insurer estopped from amending its affirmative defenses to allege exhaustion of benefits 16 months after benefits were exhausted, and after insurer failed to allege the defense in its answer and admitted non-exhaustion in its admissions—Medical provider would be prejudiced by complete bar of its claim if amendment were permitted—Because insurer caused unnecessary waste of time, motion for sanctions is granted

KISSIMMEE INJURY CLINIC, LLC, dba SPINE & INJURY ASSOCIATES a/a/o Fidel Aliaga, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 18524 CODL, Division 73. June 7, 2022. Robert A. Sanders, Jr., Judge. Counsel: Jennifer Peattie, DeLand, for Plaintiff. Wallace Richardson, Kubicki Draper, PA, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO AMEND AND GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS CAUSE having come before this Court on April 29, 2022, on Defendant's Motion for Leave to Amend Affirmative Defenses to include an exhaustion of benefits defense sixteen (16) months after exhaustion, and Plaintiff's Motion for Sanctions. This Court having heard arguments of both parties and the Court being otherwise fully advised, it is hereby ORDERED AND ADJUDGED as follows:

BACKGROUND FACTS

The Plaintiff filed suit on October 6, 2020 alleging that the Defendant, a PIP insurer, failed to properly pay personal injury protection ["PIP"] benefits for services performed on the Defendant's insured. On November 6, 2020 the Defendant was served with Plaintiff's suit and on November 10, 2020 the Defendant exhausted the policy of insurance to another provider.

Despite the exhaustion two (2) months earlier, on January 25, 2021, the Defendant failed to raise the affirmative defense of exhaustion in its response to the Plaintiff's Complaint. On April 29, 2021 and in response to Plaintiff's First Request for Admissions to Defendant, the Plaintiff sought to conclusively establish that "*The Assignor's personal injury protection benefits from the subject accident have not been exhausted*". The Defendant's Response to Plaintiff's First Request for Admissions affirmatively admitted that PIP benefits from the subject accident had not been exhausted. On June 7, 2021, this Court set the case at issue for trial to occur the week of April 18, 2022. On March 17, 2022, thirty-two (32) days prior to trial, the Defendant filed its Motion for Leave to Amend its Affirmative Defenses to include the exhaustion defense.

On April 29, 2022, this Court heard arguments on Defendant's Motion for Leave to Amend its Affirmative Defenses to include an exhaustion defense, sixteen (16) months after exhaustion. The Plaintiff opposed the Defendant's motion arguing the Defendant waited too long to seek the amendment and, in the alternative, sought sanctions against the Defendant for failing to raise this defense in a timely fashion. The Plaintiff relied on multiple on-point cases filed and appearing as Docket #53 including but not limited to cases with the same Defendant as the case at issue. Most notable is the lower court case *A-I Open MRI, Inc. v. United Automobile Ins. Co.,* 20 Fla. L. Weekly Supp. 288b (Broward Cty. Ct. November 13, 2012).

At this hearing, the court heard argument by the Defendant as to why the Defendant waited approximately sixteen (16) months to raise the exhaustion defense. Counsel for the Defendant provided that an Explanation of Benefits dated December 7, 2020 was provided in response to Plaintiff's post-suit supplemental demand letter. This document was not in evidence before the Court on the date of the hearing. Additionally, Plaintiff filed supplemental discovery requesting production of this document on March 24, 2022 to which there is no record that the Defendant responded to this discovery request.

Plaintiff asserted in response to this alleged notice of exhaustion that the representation of counsel is contrary to the deposition testimony of the Defendant's Corporate Representative. The court reviewed the deposition transcript of the Defendant's Corporate Representative with most knowledge on this file where the Defendant's Corporate Representative was asked to confirm that in response to the supplemental demand that the Defendant's response consisted solely of eight (8) pages of checks to which the Defendant's Corporate Representative states "Right. Those are the checks that our company got—that comprise—that constituted our response to the demand, yes." (See Docket #54, Page 16 of said deposition).

The Plaintiff argued that pursuant to FRCP 1.370(b), even if the Defendant were to subsequently produce evidence of notice not currently on the record and contrary to the sworn testimony of the Defendant's Corporate Representative, that the effect of the following failure to raise exhaustion as an affirmative defense and the admissions regarding exhaustion in the Defendant's Response to Plaintiff Request of Admissions, conclusively established the matter.

> **FRCP 1.370 (b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to rule 1.200 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding.**

This Court agrees with the Plaintiff in this application of the Florida Rules of Civil Procedure. Moreover, the rule specifically provides that unless the Court permits withdrawal or amendment the matter is conclusively established. As no motion has been made, the admission remains.

CONCLUSIONS OF LAW AND DETAILED FACTUAL FINDINGS

The Court takes note that the Fifth District Court of Appeal in *Rosario v. Procacci Commercial Realty, Inc.*, *717* So. 2d 148 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2108b] states that "Under Florida Rule of Civil Procedure 1.190(a), refusal to allow amendment of a pleading constitutes an abuse of discretion ***unless*** it clearly appears that allowing the amendment would ***prejudice*** the opposing party; the privilege to amend has been abused; ***or*** amendment would be ***futile***."

The Court finds as to Defendant's "Amended" Affirmative Defense that the Plaintiff would be prejudiced by the allowing of this amendment. As stated in *Affiliated Healthcare Centers, Inc. a/a/o Joseph Mora v. United Automobile Insurance Company*, "[t]he test of prejudice is the primary, but not only consideration. *New River Yachting Center, Inc. v. Bacchiochi,* 407 So. 2d 607,609 (Fla. 4th DCA 1981). In considering prejudice, the Court must consider the timeliness of the motion. The Court also keeps in mind that this is a civil case, with a recommended resolution standard of 18 months." 19 Fla. L. Weekly Supp. 143a (Broward Cty. 2011); see also *Hallandale Beach Orthopedics, Inc. a/a/o David Bendahan v. State Farm Mutual Automobile Insurance Company,* 18 Fla. L. Weekly Supp. 559a

(Broward Cty. 2011).

Additionally, the Court recognizes that "[g]ranting or denying a motion to amend. . .lies within the discretion of the Court. . . [and] Florida appellate Courts have consistently affirmed the denial of untimely motions to amend. *West Gables MRI and Physician First Choice citing New River Yachting v. Bacchiocchi,* 407 So. 2d at 608-09 (Fla. 4th DCA 1981)." See also *Affiliated Healthcare Centers, Inc. a/a/o Jonathan Ponce v. United Automobile Insurance Company,* 18 Fla. L. Weekly Supp. 485b (Broward Cty. 2010). *Orthopaedic Clinic of Daytona Beach, P.A. a/a/o Robert Frierson v. United Services Auto. Assn.,* 19 Fla. L. Weekly Supp. 395a (7th Jud. Cir., Judge Warren, January 17, 2012).

Based on the fact that Plaintiff would be foreclosed, a complete bar to Plaintiff's claim, if the Court granted Defendant's untimely motion, Defendant is estopped from asserting the defense/affirmative defense at this point in litigation.

The Court finds that the Defendant should not be permitted to ***materially change*** its position at this point in the litigation when ***Defendant knew or should have known*** of this defense/affirmative defense prior to filing its sworn responses to Plaintiffs Requests for Admissions and filing its Answer.

Finally, the Court finds as to Defendant's "Amended" Affirmative Defense that it is untimely and as such, the Defendant ***waived its right to assert this affirmative defense.*** The Defendant issued the checks for PIP benefits that exhausted the policy of insurance. Thus, the Defendant was the only party aware of the exhaustion. At the hearing, the Defendant offered no reasonable explanation for failing to advise the Plaintiff or the court of the exhaustion in a timely fashion. The Defendant had the opportunity to learn of the exhaustion multiple times during this sixteen (16) month window when it was preparing for hearings or upon receipt of the various court orders.

For example, after receiving the Court's Summons and Notice which Ordered the Defendant to file a response to the Complaint, that the Defendant should have reviewed its file before responding to the court's Order. Additionally, the Defendant knew or should have known of the exhaustion on January 25, 2021 when filing its Answer and Affirmative Defenses. Lastly, the Defendant knew or should have known of the exhaustion on April 30, 2021 when affirmatively responding to Plaintiff's discovery and establishing that benefits had not been exhausted when in fact, they were.

Florida Rule of Civil Procedure 1.140(h)(1) states "[a] party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2)." Under FRCP 1.140(h)(1), the Defendant has waived its right to assert this defense/affirmative defense. FRCP 1 .140(b) further states that "[e]very defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading. . . ." See also *Douglas Rapid Rehabilitation, Inc. a/a/o Nicole Bowen v. United Automobile Insurance Company,* 18 Fla. L. Weekly Supp. 312b (Broward Cty. Ct. 2010). Defendant did not raise this affirmative defense in its Answer.

Furthermore, the Supreme Court of Florida defined waiver as "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Financial Services, Inc. v. Saldukas,* 896 So. 2d 707 (Fla. 2005) [30 Fla. L. Weekly S115a].

This Court is aware it has the inherent authority to impose sanctions, even in the absence of statutory authority, and this imposition should be done sparingly and cautiously. *Koch v. Koch,* 47 So.3d 320 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2091a]. This Court finds Defendant caused an unnecessary waste of time, and this Court "cannot overlook the conduct of the Defendant in failing to act reasonably in defending this suit." *A-1 Open MRI, Inc. v. United Automobile Ins. Co.*, 20 Fla. L. Weekly Supp. 288b (Broward Cty. Ct. November 13, 2012).[1]

Therefore, Defendants Motion for Leave to Amend its Answer and Affirmative Defenses is DENIED and Plaintiff's Motion for Sanctions is GRANTED. The Plaintiff shall schedule a mutually convenient time for an evidentiary fee hearing at a later date where the amount of the sanction will be determined by the Court.

[1]This Court submits that the findings made by Judge Schiff in *A-1 Open MRI,* properly apply to the instant case: "In this case, the Defendant's conduct is simply egregious." "There was no reasonable argument or evidence provided by the Defendant to excuse the Defendant from advising the Plaintiff and the Court of this exhaustion. . .".

* * *

Insurance—Personal injury protection—Coverage—Proof of claim—Timeliness—Mailbox rule—Where medical provider's affidavit attests that claim for date of service was addressed, stamped, and mailed to insurer via U.S. Mail on day following treatment, provider has met burden to demonstrate timely mailing and is entitled to payment despite insurer's affidavit attesting that claim was not received

CENTRAL FLORIDA INJURY EAST, INC. a/a/o Ross Morgan, Plaintiff, v. NATIONWIDE INSURANCE COMPANY OF AMERICA, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 33183 COCI, Division 84. October 14, 2021. Belle B. Schumann, Judge. Counsel: Jennifer Peattie, DeLand, for Plaintiff. Alina O'Connor, Law Office of David S. Lefton, Plantation, for Defendant.

ORDER ON COMPETING MOTIONS FOR (FINAL) SUMMARY JUDGMENT

THIS CAUSE having come before this Court on October 8, 2021 for hearing on Plaintiff and Defendant's respective Motions for Final Summary Judgment, which the parties agreed would result in final resolution of the matter in lieu of trial, and the Court having heard arguments of counsel, reviewed all evidence, and being otherwise fully advised, it is hereby:

ORDERED AND ADJUDGED as follows:

A. Introduction/Background

This is an action to recover personal injury protection ("PIP") benefits, brought by the Plaintiff. Defendant had not paid the bill for the date of service on October 26, 2015 and raised in its Motion for Summary Judgment that Defendant had not received the claim for the aforementioned date of service.

Plaintiff and Defendant filed their competing Motion for Summary Judgment and supporting Affidavits. The Plaintiff's Affidavit, made with personal knowledge of the routine billing procedures, attested that the claim for the date of service on October 26, 2015 was addressed, stamped and mailed via U.S. Mail to Defendant the day following the date of service. The Defendant's Affidavit attested that the claim for the date of service on October 26, 2015 had not been received.

B. Legal Analysis

Summary judgment is appropriate when there is no genuine issue of any material fact and the issue before the court can be decided as a matter of law. The burden of proving the absence of a genuine issue of material fact is on the moving party. *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985).

1. The Evidence

In Defendant's Affidavit, Defendant conceded that Plaintiff submitted claims for dates of service January 10, 2014 through September 24, 2015. The parties agreed that the only issue remaining was the non-payment of the October 26, 2015 date of service.

Defendant's counsel argued that the Affidavit of its Claim

Specialist stating that the claim had not been received was sufficient to prove that Plaintiff failed to meet its burden to prove proper and timely mailing.

Plaintiff's counsel argued and presented case law regarding: the standard for proof of mailing, rebuttable presumptions, competent and substantial evidence of mailing, as well as case law regarding any resulting prejudice to the Defendant.

2. The Case Law

Under Fla. Stat. §627.736, an insurance company has 30 days to pay or deny a properly and timely submitted bill unless it notifies the insured the claim is being investigated for suspected fraud.

"The mail box rule provides that a package or letter properly addressed and mailed creates a rebuttable presumption that same was received by the addressee." *Scutieri v. Miller*, 584 So.2d 15, 16 (Fla. 3rd DCA 1991). "The presumption that arises from the mail box rule rests upon the common experience and inherent possibility that a letter properly mailed will be received." *4 Walenczyk v. Roy*, 2006 WL 574264 (Conn. Super. 2006). "The rule also provides that a letter properly addressed and mailed must be treated as being received by the addressee unless there is evidence to rebut the presumption." *Brake v. State Unemployment Appeals Comm'n*, 473 So.2d 774 (Fla. 3rd DCA 1985).

". . . where the adjuster states that the bills were not received, does not create a genuine issue of material fact. It has been held that convincing evidence of mailing is not rebutted solely by evidence that it was not received where the question in dispute is not receipt, but instead when or whether a parcel was mailed." *Best Meridian Ins. Co., v. Tuaty*, 752 So.2d 733, 737 (Fla. 3rd DCA 2000) [25 Fla. L. Weekly D808a]; *Service Fire Ins. Co., v. Markey*, 83 So.2d 855, 856 (Fla. 1953).

"Mailing must be proven by producing additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt." *Allen v. Wilmington Tr., N.A.*, 216 So. 3d 685, 688 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D691b] (citing *Burt v. Hudson & Keyse, LLC*, 138 So. 3d 1193, 1195 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1077a]).

Absent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract. *Allstate Floridian Ins. Co. v. Farmer*, 104 So. 3d 1242, 1248-49 (Fla. 5th DCA 2012) [38 Fla. L. Weekly D75a] (holding breach of condition precedent must be material, meaning one causing prejudice, to constitute defense to enforcement of contract).

C. Conclusion

In summary, this Court finds Plaintiff has met its burden to demonstrate timely mailing and is therefore entitled to payment for the date of service on October 26, 2015. Therefore, having no other justiciable issues before the Court,

1. Plaintiff's Motion for Final Summary Judgment is **GRANTED**.
2. Defendant's Motion for Final Summary Judgment is **DENIED**.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident—Where insured reported that her daughter lived with her at time of accident, but there is no evidence that daughter lived with insured on date of application for insurance, insurer had no factual basis for retroactive cancellation of policy based on alleged misrepresentation—Medical provider's motions for judgment on pleadings and for sanctions are granted

PROCARE HEALTH & REHAB. CENTERS, a/a/o Michele Delgado, Plaintiff, v. WHITE PINE INS. CO., Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2018-32284COCI. February 9, 2022. Belle B. Schumann, Judge. Counsel: Jennifer Peattie, DeLand, for Plaintiff. Robert E. Bonner, Meier, Bonner, Muszynski, O'Dell & Harvey, P.A., Longwood, for Defendant.

ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SANCTIONS, ORDER ON PLAINTIFF'S MOTION IN LIMINE AND FINAL JUDGMENT ON THE PLEADINGS

This case is before the Court on several motions, including dueling motions for sanctions filed by each party against the other pursuant to Section 57.105, Florida Statutes (2021). Both motions concern the primary issue of fact in this case: whether Defendant White Pine Insurance Company (or its predecessor) properly cancelled the automobile insurance policy of Michele Delgado retroactively based on an alleged misrepresentation of fact in the application, specifically, that Michele Delgado failed to disclose that her teenaged daughter, Trichele Delgado, lived in her household at the time of the original application. The Court finds as fact that there is no evidence to support the claim that Michele Delgado made a material misrepresentation at the time of the application for insurance. Therefore, based on the following, Plaintiff's Motion for Sanctions is GRANTED and Defendant's Motion for Sanctions is DENIED. Plaintiff's Motion in Limine to exclude any evidence sought to be produced after the Court's imposed deadlines for discovery in anticipation of the trial is GRANTED. Since there were no witness lists provided by the defense in conformity with the discovery deadlines, Plaintiff's *ore tenus* Motion for Judgment on the Pleadings is GRANTED.

On June 8, 2012, Michele Delgado applied for an automobile insurance policy, which was renewed on December 8, 2012, by Defendant's predecessor in interest, Colonial Insurance. (Doc. 97 p. 13) On December 9, 2012, she was involved in an accident, and sustained injuries for which she sought and received treatment from Plaintiff.

On January 23, 2013, Michele Delgado gave an unsworn statement to her insurer. (Doc. 97 p. 8) The recording of this statement is apparently unavailable nine years later. Also on this call was Attorney Thomas DeLattre, who represented her in reference to a civil suit arising from the accident. (Doc. 97 p. 10; Doc. 99 p. 9)

On January 15, 2019, Plaintiff deposed Jennifer Lowe, the Defendant's claims adjuster and corporate representative. (Doc. 97) When Michele Delgado reported the accident on December 10, 2012, she indicated that her daughter, Trichele, was a passenger in the vehicle at the time of the accident. Michele Delgado also reported that her daughter lived with her at the time of the *accident.* (Doc. 97 p. 12) According to Ms. Lowe, there was no investigation into whether Trichele was residing in the household at the time of the *application.* (Doc. 97 p. 12) "I don't see any other notes confirming that she was in the household on the date of the application." (Doc. 97 p. 12) Moreover, Ms. Lowe testified that an insured did not have an obligation to inform the insurer after the date the application was completed that other individuals had since joined the household. (Doc 97 p.12-13) The sole reason that the policy was rescinded retroactively was due to this alleged misrepresentation on the application. (Doc. 97, pp. 14, 20) The policy was rescinded on January 30, 2013, the day after the first claim for service was made by Plaintiff. (Doc. 97 p. 17)

Michele Delgado gave a deposition in this case on January 3, 2022. (Doc. 99) She testified that he daughter Trichele, now age 26, currently lived in Arizona. (Doc. 99 p. 7) At the time in question, late 2012 and early 2013, Trichele lived "off and on" with her mother but also resided with her father in another household. (Doc. 99 pp. 8, 15) She had no present recollection of the January 23, 2013 conversation with the insurance company. (Doc. 99 p. 17)

On June 4, 2019, the Defense[1] filed a Motion for Sanctions against Plaintiff pursuant to section 57.105, Florida Statutes. (Doc. 35) In this motion, the defense contended that counsels for Plaintiffs should be sanctioned by the Court because they knew or should have known that the claim was made against a policy that had been rescinded for failure to disclose Trichele as a member of the household on the original

application for insurance by her mother Michele.

On September 30, 2021, counsel for Plaintiffs filed their Motion for Sanctions against the defense, alleging that, according to the deposition of their corporate representative, Jennifer Lowe, no investigation was conducted by Defendant as to whether Trichele lived in the household of the insured prior to the cancellation of the policy. (Doc. 67) Both motions for sanctions involve the alleged misrepresentation of the same fact and are inextricably intertwined.

Also before the Court is the Plaintiff's Motion in Limine to exclude any evidence produced by the Defense after the discovery deadline imposed by the Court in anticipation of the trial date in October, 2021. (Doc. 75) This motion seeks exclusion of evidence sought by Defendant from third parties in an effort to prove where Trichele lived in June, 2012. No witness list was provided by the defense prior to docket sounding on October 21, 2021. The Court continued this case *sua sponte* in light of the competing Motions for Sanctions which had not been heard prior to trial.

Then, in a suprising and unprecedented turn of events, on November 4, 2021, counsel for the Defense filed an affidavit executed by him personally. (Doc. 78) In this affidavit, counsel for the Defendant, Robert E. Bonner, averred that he had recently located Michele Delgado and spoke on the telephone with her former attorney, Thomas DeLattre. Mr. Bonner further swore:

> Counsel (DeLattre) advised me that he had represented MICHELE DELGADO with respect to the auto accident that is the subject of this PIP claim and that he was on the phone with MICHELE DELGADO when she gave a recorded statement to WHITE PINE INSURANCE COMPANY. Counsel further advised that he specifically recalled MICHELE DELGADO stating that her daughter, TRICHELE DELGADO, was a resident of her home at the time that she applied for the policy in question.

(Doc. 78 p. 6)

At the subsequent deposition of Attorney Thomas DeLattre, conducted on January 11, 2022, Mr. DeLattre testified that he did not recall the specifics of the conversation on January 23, 2013. (Doc. 98 p. 5) He did not recall his client stating that her daughter lived with her at the time of the insurance application as Mr. Bonner swore in his affidavit. Attorney DeLattre denied telling Attorney Bonner the extremely specific, penultimate fact in this case: "There's no way I would specifically know that." (Doc. 99 p. 6-7)

> Q: Do you recall making that statement to Attorney Bonner?
>
> A: I do not.

(Doc. 99 p. 6-7)

At the hearing held in this case on these issues on January 21, 2022, Attorney Bonner admitted that his affidavit was not admissible in evidence as it is at best triple hearsay.[2] The kindest observation this Court can make about the subject of this affidavit by Attorney Robert E. Bonner is that the statements attributed by him to Attorney DeLattre are not supported by Mr. DeLattre's testimony.

Regarding the ultimate factual issue, and upon a direct question by the Court, Attorney Bonner admitted that there was no admissible evidence that Tricele lived in the household of her mother Michele at the time of the application for insurance. This Court agrees with that assessment. The extraordinary step of inserting one's self as a fact witness would not have been necessary if there was any other evidence to support the ultimate factual issue. Mr. Bonner denied that he intended to become a fact witness in this case but that contention is implausible.

The corporate representative testified in 2019 that there was no investigation conducted to determine whether Trichele resided in the household at the time of the application prior to cancellation of the policy. This alleged misrepresentation was the sole basis for cancelling the policy retroactively, one day after the claim was made in 2013. It is axiomatic that this testimony of the corporate representative is binding on the defense.[3]

The defense agrees that the propriety of the cancellation of the policy is an issue properly before the Court. Indeed, there is no other available forum to litigate this issue. The Court finds that there was no evidence to support the sole basis for the cancellation of the insurance policy.

The Defense appears to be placing the entire weight of their argument on the slender reed of the inherent ambiguity of negative testimony. When a witness testifies that "I didn't see that" or "I do not recall saying that" two possible interpretations may lie. First, the statement could mean that the witness had their attention diverted, or may have said it but cannot recollect it, or second, it could mean that the thing never happened. Negative testimony can be quite persuasive evidence, sufficient to sustain a murder conviction, and is generally considered a question for the finder of fact. *State v. Henderson,* 521 So. 2d 1113 (Fla. 1988). It is well established that the absence of an entry in records of regularly conducted activity can be evidence that the event did not occur. §90.803(7), Fla. Stat. (2021).

In this case, the corporate representative testified that there was no notation of any inquiry or investigation into the allegations that Michele Delgado falsely omitted the fact that her daughter Tricele lived in her household at the time of the application. It appears that they presumed that since Tricele lived with her mother at the time of the *accident,* that she also must have lived there at the time of the *application.* However, there is no evidence before the Court to prove that fact. The absence of an entry in their records is evidence that there was no further investigation.

Similarly, Attorney DeLattre testified that he had no current recollection of what Michele Delgado said on the telephone call of January 23, 2013. If he had no recollection of a conversation nine years ago, how could he have related the extremely specific fact at issue to Attorney Bonner a few months ago? It seems unlikely at best.

All of the people involved in this case had a good deal of experience in the investigation and litigation of insurance claims. The lack of a notation or recollection of the ultimate, most important fact in this case is persuasive evidence that no such proof exists.

At the January 21, 2022 hearing on the Motions for Sanctions and Plaintiff's Motion in Limine to exclude all late-discovered evidence, Plaintiff made an *ore tenus* Motion for Judgment on the Pleadings. Although the Court deferred ruling on that motion at that time, upon this thorough review of the case, it is concluded that judgment on the pleadings is indeed appropriate.

A motion for judgment on the pleadings pursuant to rule 1.140(c) tests the legal sufficiency of a cause of action or a defense where there is no dispute as to the facts. *U.S. Fire Ins. Co. v. ADT,* 134 So. 3d 477, 479 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1990a]. The applicable test is the same as if the defense made a motion to dismiss for failure to state a cause of action. *Henao v. Professional Shoe Repair,* 929 So. 2d 723 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1463a].

Since the defense failed to comply with the order of this Court to timely provide a witness list for trial, and only now after nearly four years of litigation, including the very serious allegation of impropriety on the Plaintiff's part for even bringing the suit, is actively seeking to locate evidence to support the action they took nine years ago, the Motion in Limine is well founded. Additionally, as an independent basis for this ruling, the Court finds that the defense is bound by the factual representations of their corporate representative in 2019 that no such evidence was possessed by Defendant before they took the unilateral action to retroactively cancel the insurance policy in 2013, coincidentally the day after the claim was first made. No witness list was provided by the defense. There are no facts in dispute. There was no factual basis to cancel the insurance policy on the sole ground that

Tricele Delgado lived with the insured, her mother Michele Delgado, on the date of the application for insurance. Since there is no admissible evidence for the defense, Plaintiff is entitled to judgment on the pleadings.

Finally, Mr. Bonner's co-counsel in this case suggested that the relatively paltry amount at issue in this case was not a sufficient incentive for Mr. Bonner to gamble his good reputation by deliberately making material misrepresentations of fact to this Court. One need not delve deeply into the annals of human history to find innumerable instances where people caught up in the heat of the moment foolishly squander hard-earned reputations for little gain. Baseball great Pete Rose made a paltry bet that keeps him out of the Hall of Fame to this day. Co-counsel's observation makes this case sadder, but does not make the obvious situation any less apparent by the paltry prize hoped to be gained at such a painfully high price.

WHEREFORE, based on the foregoing, the Court hereby GRANTS the Plaintiff's Motion in Limine to exclude any evidence presented by the defense that failed to comply with the Court's order setting trial and discovery deadlines.

Therefore, there being no disputed facts, Plaintiffs Motion for Judgment on the Pleadings under rule 1.140(c) is hereby GRANTED. Plaintiff shall recover from Defendant the sum of $4,863.94 for unpaid benefits, which shall bear interest at the rate established under section 55.03 Florida Statute, or the rate established in the insurance contract, whichever is greater. Plaintiff shall recover from Defendant the sum of $2,326.75 for interest on the previously unpaid benefits as prejudgment interest, and shall also recover post-judgment interest at the rate established in section 55.03, or the rate established in the insurance contract, whichever is greater.

Plaintiff's Motion for Sanctions is GRANTED and Defendant's Motion for Sanctions is DENIED. Plaintiff shall recover attorney's fees and costs for which the Court reserves jurisdiction for awarding, upon submission to this Court, by separate order.

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[1]Although it is true that this motion was filed by prior defense counsel, Mr. Bonner declined to withdraw it after being repeatedly advised that the factual basis of the motion was contradicted by the testimony of their corporate representative. (Doc. 67 p. 3) Instead, his response was to file a personal affidavit of dubious voracity in an attempt to shore up the complete lack of factual support for his position.

[2]This affidavit has other potential problems as well. Of course the best evidence of the recorded statement is the recording itself. Also it could potentially force Attorney DeLattre to testify adversely to his former client's interest.

[3]Plaintiff provides a collection of citations for this self-evident proposition in Docket number 73, page 2.

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Demand letter satisfied requirements of PIP statute notwithstanding fact that it sought recovery of 100% of all charges—Even if demand letter was defective, insurer waived defense by failing to raise issue of alleged deficiency prior to commencement of litigation

FIRST HEALTH CHIROPRACTIC INC a/a/o Christian Disdier, Plaintiff, v. GRANADA INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 14814 CODL, Division 73. April 7, 2022. Robert A. Sanders, Jr., Judge. Counsel: Jennifer Peattie, DeLand, for Plaintiff. Juan C. Montes, Montes & Associates Law Firm, PL, Miarmar, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION/JUDGMENT

THIS MATTER having come before this Court on March 4, 2022, upon Defendant's Motion for Summary Disposition/Judgment and having heard arguments of counsel and ruled on the evidence presented, it is hereby ADJUDGED as follows:

BACKGROUND

Plaintiff filed this breach of contract action against Defendant for Personal Injury Protection ("PIP") benefits resulting from a motor vehicle accident. Plaintiff provided medical treatment to the assignee, Christian Disdier, via a valid assignment of benefits.

ANALYSIS

Prior to filing this lawsuit, Plaintiff sent the Defendant a pre-suit demand letter pursuant to § 627.736(10), Florida Statutes. Said Statute states in pertinent part:

> (10) DEMAND LETTER. —
>
> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. 627.736" and state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. . .

In this case, Plaintiff's demand letter strictly complied with all mandates of Florida Statutes § 627.736(10)(b)(3). It clearly stated that it is a demand letter under § 627.736. It identified the provider. It identified the name of the insured upon which benefits were being sought. It included the claim number. It included an assignment of benefits and a billing ledger which specified each date of service, the service provided, and the amount billed. Plaintiff went further and specified the amount due, pursuant to the default payment methodology in the PIP Statute. Thus, Plaintiff has strictly complied with § 627.736(10) and satisfied the condition precedent to filing this lawsuit.

Defendant contends that Plaintiff's failed to comply with the pre-suit requirements of § 627.736(10) of the Florida Statutes. Specifically, the Defendant asserts the demand improperly sought recovery at "100% for all charges".

CONCLUSIONS OF FACT AND LAW

The standard of review for granting a Motion for Summary Judgment is well-settled. Florida Rule of Civil Procedure 1.510 provides, in pertinent part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on the file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Moreover, the rule obligates the trial court draw every favorable inference in favor of the non-moving party. See *Moore v. Morris,* 475 So. 2d 666 (Fla. 1985).

This Court finds that Plaintiff's demand letter complied with all requirements of Fla. Stat. § 627.736(10). By attaching the itemized statement to the demand letter, the Plaintiff provided Defendant with all the information necessary in order to review all dates of service, CPT codes billed and the exact charges, or amount due, for each code. Ultimately, the insurance carrier is the only party in a position to know exactly what is owed. The insurance carrier is the only one aware of how much it has paid in total benefits to date, how much and the type of coverage the policy provides for, whether the subject policy includes Medical Payments coverage or a PIP deductible. Many times, a provider is not privy to any of this information until after it has

filed suit and commenced discovery. See *Neurology Partners, P.A. v. State Farm Mutual Automobile Insurance Company,* 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. 2013). See also *EBM Internal Medicine a/a/o Bernadette Dorelein v. State Farm Mutual Automobile Insurance Company,* 19 Fla. L. Weekly Supp. 410a (Fla. Duval, Cty. Ct.).

"To the extent applicable", Plaintiff's demand letter complied with the specifications of § 627.736(10) as it clearly communicated an exact formula to determine the amount it was "claiming" so that the Defendant could quickly and easily make its decision to pay or defend. Plaintiffs' demand letter stated the exact amount that it claimed to be due subject to exact numerical reductions solely within Defendant's file/knowledge. The demand letter clearly stated the total amount that Plaintiff billed minus any prior payments that Defendant had made to others (if any). Defendant "knew" exactly what was being claimed by using the formula provided by Plaintiff subject to numbers only known to the Defendant and therefore there is no "ambiguity" as alleged by the Defendant.

As echoed by many courts throughout the State of Florida, the burden to adjust the claim lies with the insurance carrier, not the medical provider. Furthermore, Plaintiff's demand letter did include an amount owed on the first page of the demand letter, along with a calculation of how the Plaintiff came to that amount. Defendant received Plaintiff's demand letter and by its own admission, reviewed the claim, including all dates of service and CPT codes, and determined an additional payment was needed. Defendant provides this Court with nothing to support its contention that now, it was allegedly confused by the Plaintiff's itemized statement enclosed with the demand letter and did not know what amount to pay in order to avoid litigation.

Lastly, a reservation of the ability to raise any additional claims or issues or a failure to respond to a demand letter at all, does not give the insurance carrier the option to later raise a defect that could have been easily cured during the "safe harbor" period. To rule as such would only allow insurance carriers to essentially ignore demand letters and then once suit is initiated find any defect in order to have a case dismissed on summary judgment, when the defect might have easily been cured during the 30 day "safe harbor" period and litigation prevented altogether. See *Neurology Partners, P.A. v. State Farm Mutual Automobile Insurance Company,* 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. 2013). Therefore, as Defendant failed to raise any issue with the alleged deficiencies in response to demand and in fact, failed to respond to the Plaintiff's demand letter, even assuming *arguendo* Plaintiff's demand letter was not in compliance with Florida Statute § 627.736(10), Defendant waived the defense Plaintiff's demand letter was confusing by not taking issue with the alleged deficiency prior to the commencement of litigation.

Accordingly, it is hereby ORDERED and ADJUDGED that the Defendant's Motion for Summary Judgment is hereby DENIED.

* * *

Bonds—Payment—Motor vehicle repairs—Action seeking payment of bond posted to recover vehicle that was subject of a mechanic's lien for repairs allegedly rendered by plaintiff—Testimony of defendant regarding lack of damage to vehicle and fact that vehicle was being driven and not in repair shop at time claimed is credible—Plaintiff's testimony was not truthful as to extent of vehicle damage and when repairs were commenced—Final judgment entered in favor of defendant

NATIONAL BODY SHOP, CORP., Plaintiff, v. MIO Y TUYO EXPRESS, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-006837-SP-05, Section CC06. July 1, 2022. Luis Perez-Medina, Judge.

FINAL JUDGMENT FOR DEFENDANT AFTER NON-JURY TRIAL

THIS CAUSE came before the Court on June 14, 2022, for Trial. The Court having heard testimony of all parties, and argument of Plaintiff, and being otherwise fully advised in the premises herein, it is hereby:

ORDERED AND ADJUDGED that a Final Judgment is entered in favor of Defendant, Mio Y Tuyo Express, Inc. because Plaintiff failed to meet his burden of proof.

DISCUSSION

Plaintiff was seeking payment of a bond posted by Defendant for $4,552.76. The bond was posted pursuant to Florida Statute 559.917 to recover a vehicle that was the subject of the Plaintiff's mechanic lean under Florida Statute 713.585. The lean was obtained for repairs allegedly rendered by Plaintiff, National Body Shop, Corp. According to paragraph 6 of the complaint, on or about December 15, 2021 the vehicle was "delivered" to Plaintiff for authorized vehicle repairs.

Omar Ojeda testified on behalf of Plaintiff. According to his testimony, On December 13, 2021, Anariel B. Dominguez was involved in a car accident and cited for careless driving while driving a 2016 Toyota Corolla, VIN Number 2T1BURHE3GC581771. Mr. Dominguez brought the car to Plaintiff's shop for repairs on December 15, 2021. While Mr. Dominguez was not called to testify, there was no objection from Defendant regarding hearsay.

Mr. Ojeda further testified that when the vehicle was brought for repairs, it was "crashed" on the front and rear; the quarter panel; and the roof. In addition, the vehicle had "broken lights" which required replacement parts. A detailed estimate for repairs totaling $4,552.76 was created and moved into evidence by Plaintiff. Mr. Ojeda testified that he tried to contact Mr. Dominguez after the car was fixed but Mr. Dominguez never answered the phone and eventually the phone was disconnected.

One of the items needing replacement, according to the detailed estimate provided by Plaintiff, was the "L Rear Combination Lamp Assembly and the L Backup Lamp Assembly." An invoice from a part's supplier was also moved into evidence. The invoice showed that a rear bumper, a tail lamp, and a trunk lamp, were ordered and received on January 6, 2022. Plaintiff also moved photograph of the vehicle during and after the repairs, but no photographs were provided of the damage to the vehicle.

On January 26, 2022, Plaintiff obtained a Notice of Claim of Lien and Proposed Sale of Motor Vehicle (hereinafter "Notice of Lean"). According to the Notice of Lean the vehicle repairs were authorized by "Anariel Breffe Dominguez" on December 15, 2021 and completed on January 12, 2022.

Miak Ruiz testified on behalf of Defendant, Mio Y Tuyo Express, Inc. Mr. Ruiz testified that Mio Y Tuyo Express, Inc. is the owner the 2016 Toyota Corolla and leased it to Mr. Dominguez. Mr. Ruiz further testified that prior to the alleged accident, Mr. Dominguez was notified that he was late on his payments and Defendant's were looking to repossess the vehicle.

Mr. Ruiz indicated that he had proof that the vehicle was never damaged as a result of the accident. Mr. Ruiz moved into evidence vehicle toll violations with photographs of the vehicle taken on December 14, 2021, the day after the accident, and on December 21, 2021, after the vehicle was taken to Plaintiff for repairs. The toll violations were sent to Defendant by the Town of Medley. The violations were issued under the tag registered to the 2016 Toyota Corolla.

The violations also included a video of the back of the vehicle. The Court has viewed both videos and takes judicial notice that the videos are authentic and clearly show the rear 2016 Toyota Corolla. In

neither video was there any evidence of damage to vehicle. In addition, the video showed all the taillights working properly and there was no evidence of damage to the rear bumper.

Defendant also moved into evidence GPS tracking data for the vehicle. The tracking data was from December 6, 2021 through January 25, 2022. According to the tacking data, the vehicle remained at the same location in Medley, Florida, from January 4 through the date the vehicle was allegedly taken to Defendant's body shop on January 17, 2022, five days after the repairs were purportedly completed according to the Notice of Lean prepared by Plaintiff. The vehicle remained in the body shop for four days until January 21, 2022. Prior to January 17, there was no GPS evidence that the vehicle was ever at Defendant's body shop.

The Court found that Defendant's testimony was credible while Plaintiff's testimony was not truthful as to the extent of the damage to the vehicle or when the repairs were commenced. The video evidence provided by Defendant clearly corroborated his testimony that the vehicle was not damaged as a result of the accident. The GPS data contradicted Plaintiff's testimony of when the work was commenced. The evidence further contradicted the information found in the Notice of Lean which was prepared by Plaintiff.

Based on the evidence produced at trial, Plaintiff was unable to meet its burden and prove that the vehicle needed the amount of work done as a result of the December 13, 2021 accident. Accordingly the Court enters Judgment in favor of the Defendant, Mio Y Tuyo Express, Inc. Plaintiff, National Body Shop, Corp. shall take nothing by this action and Defendant shall go hence without day.

* * *

Insurance—Personal injury protection—Confession of judgment—Insurer's post-suit payment in amount less than amount of damages alleged in complaint for unpaid PIP benefits did not constitute confession of judgment—Motion to reconsider order denying motion to enforce confession of judgment is denied

DR. MARSHALL BRONSTEIN, D.C., Plaintiff, v. PROGRESSIVE SELECT INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-000209-SP-23, Section ND02. September 20, 2021. Natalie Moore, Judge.

ORDER DENYING MOTION FOR RECONSIDERATION

This action was heard before the Court on August 26, 2021, on Defendant's Motion For Reconsideration On Court's Ruling Regarding Defendant's Motion To Enforce Confession Of Judgment In Light Of Recent District Court Of Appeals Rulings. After hearing argument of counsel, reviewing the facts, and considering the applicable law, it is **ORDERED** and **ADJUDGED**:

Defendant's motion is **DENIED**.

PROCEDURAL BACKGROUND

Plaintiff sent Defendant a pre-suit demand letter pursuant to Florida Statute §672.736(10), demanding $385.44 in insurance benefits. Defendant sent its response declining to pay the demanded benefits, concluding it had already properly reimbursed Plaintiff pursuant to the relevant statutes and the insurance policy.

On January 3, 2019, Plaintiff filed its Complaint in small claims court. On February 11, 2019, Defendant filed its Notice Of Confession Of Judgment stating that on February 4, 2019, it had paid to Plaintiff $195.19 "for the amount of benefits demanded for Plaintiff's services provided . . ."

On February 12, 2019, Plaintiff filed its Motion for Entry of Judgment Based Upon Of Confession and Motion For Attorney Fees, Costs, Post-Entitlement Interest [And] Expert Attorney's Fees. Neither party set those motions for hearing, and this Court never ruled on those motions.

On February 19, 2019 Defendant filed a motion to invoke the rules of civil procedure wherein it demanded a jury trial. Thereafter, on February 20, 2019 the Court entered an order agreed to by both parties invoking the rules of civil procedure and requiring that Defendant serve a response to the Complaint within 20 days.

In addition to filing to the motion to invoke the rules of civil procedure and requesting a jury trial, Defendant continued litigating the case by filing an Answer, responding to discovery requests, filing several motions for extensions of time to respond to discovery, and entering into agreed orders to provide better answers to discovery.

On June 6, 2019, Defendant filed a Motion To Enforce Confession Of Judgment, Motion For Protective Order, And Motion For Entry Of Final Judgment.

On July 18, 2019, Plaintiff filed a motion for default as to liability.

On April 22, 2020, this Court conducted a hearing on Plaintiff's Motion for Default and Defendant's Motion to Enforce at which Plaintiff's counsel orally advised the Court that it would not be pursuing its Motion for Entry of Judgment. Later, Defendant withdrew the Motion to Enforce in writing.

On June 8, 2020, entered its Order denying Defendant's Motion to Enforce. Defendant now seeks reconsideration of that Order.

ANALYSIS

Defendant paid Plaintiff $195.19 and asks this Court to conclude that it has confessed judgment and closed the case. If the case is closed and the issues are resolved, Defendant argues the Court then has no authority to do anything more than enter the final judgment and award attorney fees. The facts here, however, show that the issues between the parties are not resolved, and thus the case is not closed.

The payment made by Defendant is not the jurisdictional limit of $8,000. It is not $500, the maximum demanded in the initial jurisdictional statement of the statement of the claim (a statement made to determine filing fees). It is not 100% or 80% of total billed amount, of $6,820.00 further alleged in the statement of claim. Nor was it the $385.44 sought in Plaintiff's pre-suit demand letter. Defendant may believe it has properly determined $195.19 to be the amount due, but that is exactly the issue being litigated.

Defendant relies on two recent cases from the district courts of appeal, but neither applies here. First is *Alliance Spine & Joint, III, LLC v. Geico General Insurance Co.*, 2021 WL 2010300 (Fla. 4th DCA May 19, 2021) [46 Fla. L. Weekly D1149a]. There, the plaintiff filed a Complaint for PIP benefits seeking "damages that [do] not exceed ONE HUNDRED DOLLARS ($100)." *Id.* at 244. In a separate paragraph of the Complaint, the Provider alleged Geico owed it "the sum of $54.10" in unpaid PIP benefits. *Id.* Shortly thereafter, the insurer filed a confession of judgment for $100.00. *Id.* The court concluded that "when a party confesses judgment up to the maximum amount of damages alleged in the complaint, the confessing party has, in fact, agreed to the precise relief sought in the complaint." *Id. Alliance* does not apply. Here, Defendant did not pay the maximum amount of damages alleged in the Complaint and thus did not render the issue between the parties moot.

Defendant also relies on *Advantacare of Florida v. GEICO General Insurance Co.,* 318 So. 3d 571 (Fla. 5th DCA 2021). *Advantacare* is an unelaborated per curiam affirmance. "[P]er curiam appellate decisions without a written opinion have no precedential value." *Gould v. State,* 974 So. 2d 441, 445 (Fla. 2d DCA 2007) [33 Fla. L. Weekly D4b] (citing *Department of Legal Affairs v. District Court of Appeal, 5th Dist.*, 434 So. 2d 310, 311 (Fla.1983)). A court may not go behind a per curiam affirmance to try to determine what the facts were that led the appellate court to its affirmance. *Shaw v.*

Jain, 914 So. 2d 458, 461 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2453d].

CONCLUSION

There has been no confession that has ended the dispute between the parties. Plaintiff asserts that additional insurance benefits remain due and the payment made by Defendant can only be deemed to result in what might be termed as a "partial" confession of judgment. Only an agreed settlement, or a determination on the merits of the case, can result in a final disposition. The motion is DENIED.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Failure to attend independent medical examination—Summary judgment is entered in favor of medical provider where insurer failed to establish that insured unreasonably failed or refused to attend IME for which insured was given conflicting and contradictory location information, stipulated that medical services were reasonable and necessary, and failed to submit any summary judgment evidence as to reasonableness of charges

CARE PLUS INJURY REHAB CENTER, INC., a/a/o Antonio Sanchez, Plaintiff, v. UNITED AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-010918-SP-23. Section ND01. July 13, 2022. Myriam Lehr, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Sean Sweeney, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court on July 7, 2022, upon Plaintiff's Amended Motion for Final Summary Judgment, and the Court having considered the motion and the summary judgment evidence presented, having heard argument of counsel (including counsel for Defendant's stipulation as to the relatedness and medical necessity of the services provided by Plaintiff), and being otherwise fully advised,

IT IS ADJUDGED that Plaintiff's Amended Motion for Final Summary Judgment is GRANTED, for the following reasons:

1. United Automobile Insurance Company ("United Auto") issued an automobile insurance policy to Antonio Sanchez, that was in full force and effect on October 18, 2011. On that date, Mr. Sanchez sustained injuries as a result of an automobile accident, for which he received treatment at Care Plus Injury Rehabilitation, Inc. ("Care Plus").

2. Mr. Sanchez executed an Assignment of Benefits in favor of Care Plus, after which Care Plus sent timely bills to United Auto.

3. United Auto sent two (2) letters, scheduling Mr. Sanchez for an Independent Medical Examination ("IME") with Michael Weinreb, D.C., to take place on January 3, 2012 at 11:00 a.m. The first letter scheduled the IME to occur at 2825 E. 4th Ave., Hialeah, FL 33013. The second letter scheduled the IME to occur at 731 E. 9th St., Hialeah, FL 33010. Accordingly, the two (2) IME notices gave conflicting, contradictory information, as to the location of the IME with Dr. Weinreb.

4. Mr. Sanchez did not appear for an IME with Dr. Weinreb at either location.

5. Care Plus filed suit against United Auto when United Auto failed to pay its claim.

6. As an affirmative defense to the lawsuit, United Auto asserts that Mr. Sanchez has unreasonably failed and/or refused to attend IMEs scheduled by United Auto.

7. On December 7, 2021, Care Plus filed its Motion for Final Summary Judgment. United Auto failed to submit summary judgment evidence in opposition to the motion.

8. Effective May 1, 2021, the Florida Supreme Court has adopted the federal summary judgment standard by amended Fla. R. Civ. P. 1.510. The amended rule adopts the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, (1986); and *Matsushita Electric Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) (the "federal summary judgment standard").

9. Pursuant to Rule 1.510(a), Fla.R.Civ.P., "[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." Specifically, "summary judgment is proper 'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *See also Celotex.*

10. Federal Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* Moreover, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts" and the court should not adopt a version of the facts that is "blatantly contradicted by the record" when ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a].

11. 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 72, 75 (Fla. 2021) [46 Fla. L. Weekly D595a] (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12. In applying the federal summary judgment standard to the facts of this case, the Court finds that United Auto has failed to make a showing sufficient to establish the existence of an element essential to United Auto's case, and on which United Auto will bear the burden of proof at trial. More particularly, United Auto has failed to make a showing sufficient to establish that Mr. Sanchez unreasonably failed and/or refused to attend IMEs scheduled by United Auto.

13. As a result of United Auto's having stipulated to the relatedness and medical necessity of the medical services provided by Care Plus, and having failed to submit any summary judgment as to the reasonableness of the charges of Care Plus, this Court finds that the evidence is such that no reasonable jury could return a verdict for United Auto.

14. Accordingly, Care Plus Injury Rehabilitation, Inc. shall recover from United Automobile Insurance Company, 1313 NW 167th St., Miami, FL 33169, PIP benefits in the amount of $7,008.00 plus prejudgment interest in the amount of $3,766.59 for a total sum of $10,774.59, which shall accrue interest pursuant to F.S. §55.03 from the date of this judgment until this judgment is satisfied, at the rate of 4.34%, together with reasonable attorney's fees and costs to be determined at a later date, for all of which let execution issue.

* * *

Civil procedure—Relief from judgment—Summary judgment entered following nonmoving party's failure to respond—Denial of rule 1.540(b) motion—Absence of meritorious defense

DIRECT GENERAL INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. NYDREKA WILLIAMS, Defendant/Counter-Plaintiff. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-028749. September 7, 2022. Michael C. Bagge-Hernandez, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING PLAINTIFF'S MOTION TO VACATE AND FOR REHEARING

[Original Opinion at 30 Fla. L. Weekly Supp. 173a]

THIS ACTION came before the court on September 7, 2022 on Plaintiff's Motion to Vacate and for Rehearing of this Court's Order Granting Defendant/WILLIAMS' Amended Motion for Final

Summary Judgment dated June 12, 2022 and,

1. On March 28, 2022, Defendant filed its Amended Motion for Summary Judgment.

2. Plaintiff DIRECT failed to timely serve a response to Defendant's Amended Motion for Final Summary Judgment as required by Florida Rule of Civil Procedure 1.510(c)(5) ("the nonmovant must serve a response.").

3. Furthermore, "the Court is not required to comb through the record to find some reason to deny a motion for summary judgment. Instead, the party opposing summary judgment must direct [the Court's] attention to specific triable facts." *Lloyd S. Meisels, P.A. v. Dobrofsky*, 47 Fla. L. Weekly D1239a (Fla. 4th DCA June 8, 2022). When a nonmoving party fails to respond to the motion for summary judgment as required by the rule, the Court may consider the moving party's facts as undisputed in granting summary final judgment. *Id.*

4. To succeed on a Rule 1.540(b) Motion to Vacate, the movant must demonstrate that the final judgment was the result of excusable neglect, that the movant exhibited due diligence and that the movant has a meritorious defense. *American Network Transportation Mgmt., Inc. v. A Super-Limo Co., Inc.*, 857 So. 2d 313 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2334b]. Based upon the record evidence and filings to date, the Court finds that Plaintiff does not have a meritorious defense.

5, Plaintiff's Motion to Vacate and for Rehearing is **HEREBY DENIED**.

* * *

Insurance—Discovery—Depositions—Failure to appear—Sanctions

AXIS CHIROPRACTIC & REHAB CENTER, INC., a/a/o Alfred Rivas, Plaintiff, v. LM GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-056449. July 1, 2022. James Giardina, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER having come before the court on June 23, 2022 on Plaintiff's Motion for Sanctions and Plaintiff's Motion to Compel Discovery. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, makes the following findings,

1. Plaintiff's Motion for Sanctions alleges that Defendant's Corporate Representative and Defendant's counsel failed to appear for a duly noticed deposition and that Defendant failed to schedule its Motion for Protective Order for hearing prior to failing to appear for said deposition.

2. Plaintiff's Motion for Sanctions is **HEREBY GRANTED.** The Court placed Timothy Patrick under oath to testify to his Court awarded rate in Hillsborough County, along with the total amount of time he had expended spent in addressing the scheduling requests, missed deposition, filing of Motion for Sanctions and hearing on same. The Court awards three (3) hours of attorney's fees at Mr. Patrick's Court awarded rate of $500.00 per hour, along with the court reporting costs of $85.00 for a total of $1,580.00. Said amount to be paid within thirty (30) days.

3. The deposition of Defendant's Corporate Representative noticed for July 13, 2022 shall go forward.

4. Plaintiff's Motion to Compel Discovery is moot.

* * *

Insurance—Personal injury protection—Confession of judgment—Motion to amend complaint to add action for bad faith that was filed after insurer confessed judgment and recognized medical provider's entitlement to attorney's fees is denied—Provider is not foreclosed from filing bad faith action as separate and distinct cause of action

HESS SPINAL & MEDICAL CENTERS OF BRANDON, LLC, as assignee of Mario Cueto, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-084093, Division S. July 8, 2022. Jack Gutman, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Catherine V. Arpen, Dutton Law Group, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF FINAL JUDGMENT (BASED ON DEFENDANT'S CONFESSION OF JUDGMENT) AND FINAL JUDGMENT

This cause having come before this Honorable Court on Defendant's Motion for Entry of Final Judgment (Based on Defendant's Confession of Judgment), and the Court having heard argument and otherwise being fully advised in the premises, this Court makes the following findings:

Defendant filed a Notice of Confession of Judgment on March 8, 2022, paying benefits in the amount of $66.09 and interest in the amount of $22.35 (for a total of $88.44), which encompassed the amount at issue as presented to Defendant by Plaintiff in its Statement of Particulars filed May 6, 2021. Defendant provided competent evidence that Plaintiff provider accepted tender of that payment by cashing Defendant's check.

Plaintiff filed its Motion for Leave to Amend its Complaint on April 6, 2022, after Defendant confessed judgment on March 8, 2022. Since Plaintiff filed is Motion for Leave to Amend ***after*** Defendant filed its Notice of Confession of Judgment and recognized Plaintiff's entitlement to reasonable attorneys' fees and costs, this court lacks jurisdiction to provide any other relief other than the entry of Final Judgment based on confession. *See GEICO Cas. Co. v. Barber*, 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] (once Defendant "agrees to the entry of a judgment against it . . . the issues between the parties, *as framed by the pleadings*, become moot because the trial court could not provide any further substantive relief. . .". (Emphasis added). *See also, Godwin v. State*, 593 So. 2d 211 (Fla 1992). "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual affect." Here, Plaintiff's Complaint was based on three statutes: Fla. Stat. § 627.736 (PIP statute), § 627.7401 (Notification of Insured Rights), and § 627.428 (Attorneys' fees). Thus, it is these three statutes that are "framed by the pleadings," and after Defendant has confessed judgment, recognized Plaintiff's entitlement to reasonable attorneys' fees and costs, and after Plaintiff has accepted tender of the payment, the court is not able to provide any relief outside these statutes.

Plaintiff's argument that the Civil Remedy Notice was not ripe until after Defendant confessed is without merit. Fla. Stat. § 724.155 only provides for a 60-day safe harbor period, so Plaintiff's motion under that statute was ripe on the 61st day if Plaintiff wanted to file its Motion for Leave to Amend at that time.

Plaintiff, however, is not foreclosed from filing a bad faith action as a separate and distinct cause of action. *See Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D624b]. *See also, GEICO Gen. Ins. Co. v. Harvey*, 109 So. 3d 236 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D178a] ("The Florida Supreme Court has repeatedly recognized that a claim arising from bad faith is grounded upon the legal duty to act in good faith, and is thus separate and independent of the claim arising from the contractual obligation to perform." (Citation and internal quotation marks omitted.)

Based on the foregoing, IT IS therefore **ORDERED** as follows:

1. Defendant's Motion for Entry of Final Judgment (Based on Defendant's Confession of Judgment) is **GRANTED**.

2. Final Judgment is entered for Plaintiff for $88.44, which Defendant has paid.

3. All pending motions, to include Plaintiff's Motion for Leave to Amend Complaint to add a bad faith, are denied as moot.

4. Since Defendant has acknowledged Plaintiff's entitlement to reasonable attorneys' fees and costs, the Court reserves jurisdiction to determine same.

* * *

Insurance—Personal injury protection—Delay in payment—Investigation period—Notice—Declaratoryjudgments—Demand letter—Medical provider was not required to submit presuit demand letter before filing declaratory judgment action that did not seek benefits—Summary judgment—Provider's failure to file response to insurer's motion for summary judgment does not doom its legal position; instead, the court opts to treat insurer's asserted facts as undisputed—Overdue claims—Provider that submitted bills to insurer as assignee of insured, rather than insured, is "claimant" that must be provided with written notice that claim is being investigated for suspected fraud in order to extend the time to pay PIP claim under section 627.736(4)(i)—Where insurer provided suspicion-of-fraud letter to insured's attorney, but not to provider, provider's claim was overdue when action was filed, and mid-litigation payment of benefits constituted a confession of judgment

FLORIDA WELLNESS CENTER, INC. a/a/o Justin Fernandez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-052807, Division J. August 16, 2022. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Cameron Frye and Hector Muniz, for Defendant.

ORDER GRANTING IN PART PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment on Florida Wellness Center's petition for a declaratory judgment. Florida Wellness also moves to strike the affidavit of Ryan Fredericks filed in support of Progressive's motion. The parties appeared for hearings on September 21, 2021, and February 2, 2022.

Section 627.736(4)(i) of the Florida Statutes allows insurers to extend by 60 days the time to pay a PIP claim by giving written notice to "the claimant" that the claim is being investigated for suspected fraud. Progressive provided written notice to the insured's attorney, but not to Florida Wellness, which had assumed the insured's rights under the policy and submitted bills for payment. When Progressive failed to pay the claim within 30 days, Florida Wellness sued for a declaration that Progressive failed to timely investigate and process its PIP claim. Progressive argues that by providing written notice to the insured, it properly invoked the additional 60 days and thus timely paid benefits. Florida Wellness argues "the claimant" must be construed as the medical provider submitting bills to the carrier—not the insured or his attorney—making Progressive's payment tardy.

Under controlling principles of statutory construction, I conclude that "the claimant" means the entity submitting a claim for payment—here, the medical provider—not the insured. Because Progressive therefore incorrectly withheld benefits, it confessed judgment by paying benefits mid-litigation, and Florida Wellness is entitled to summary judgment and an award of attorney fees under the confession-of-judgment doctrine.

I. INTRODUCTION.

A. Factual background.

Justin Fernandez was involved in a car accident on June 27, 2020. After seeking treatment, Fernandez assigned to Florida Wellness his benefits under an insurance policy issued by Progressive. Compl. Exh. A.; Fredericks Aff. ¶ 5. He assigned those benefits on June 30, 2020. Two days later, Progressive received a letter from attorney Julian Sanchez, advising he represented Fernandez for injuries resulting from the accident. Fredericks Aff. ¶ 6, Exh. B. The letter listed the "insured" as Yaneidy Perez and the "Claimant" as Yaneidy Perez and Justin Fernandez. *Id.* Exh. B.

Progressive received the first set of medical bills from Florida Wellness on July 25, 2020. *Id.* ¶ 7, Exh. C. They covered services provided from June 30 through July 21. *Id.* Those bills list Fernandez as the "patient" and the "insured." *Id.* Exh. C. Florida Wellness is listed as the "service facility" and the "billing provider," and the forms provide a billing address for the provider. *Id.*

On July 31, six days after receiving the first set of bills, Progressive sent a suspicion-of-fraud letter to attorney Sanchez, but not to Florida Wellness.[1] Mancuso Depo. at 16:13-22 (Feb. 2, 2021). The letter advised Sanchez, "this notice is being sent to you because as Justin Fernandez's insurance carrier we are required under the Florida Personal Injury Protection (PIP) Statute 627.736 to notify you in writing in the event we have a reasonable belief that a potential fraudulent insurance act may have been committed." Fredericks Aff. Exh. D. Progressive contends that sending this letter allowed an additional 60 days to investigate Fernandez's claim, making its deadline to pay PIP benefits October 23, 2020 (90 days after receiving bills), not August 24, 2020 (30 days after). *See* § 627.736(4)(b) ("[PIP] benefits . . . are overdue if not paid within 30 days . . . ."); § 627.736(4)(i) (allowing "an additional 60 days" for the carrier to conduct its fraud investigation after notifying "the claimant" that the claim "is being investigated for suspected fraud"). Progressive never denied coverage. *See* Fredericks Aff. ¶ 10.

B. Procedural history.

After 30 days expired, Florida Wellness filed suit on September 2, 2020. The lawsuit was not preceded by the pre-suit demand letter prescribed by § 627.736(10). It alleges that Progressive "responded to Plaintiff's medical bills with extremely vague and confusing [explanations of benefits], some of which stated 'Payment is pending as we are currently verifying coverage and/or the fact of loss for this accident.' " Compl. ¶ 8. The complaint seeks two declarations:

a. PROGRESSIVE failed to timely investigate and process Plaintiff's PIP claim pursuant to [§] 627.736(4)(i) and as such, Plaintiff is in [sic] entitled to a declaration of PIP coverage in this matter pursuant to *Florida Statutes*, 86.011.

b. PROGRESSIVE has a duty to pay attorney's fees and costs pursuant to *Florida Statutes*, 627.428 and 57.041, respectively.

Compl. at 4.

While the complaint was pending, on October 15, 2020, Progressive paid all benefits, including all accrued interest, penalties, and postage. Fredericks Aff. ¶ 10. Florida Wellness does not dispute this fact. From the deposition of Rebecca Mancuso, it appears that Fernandez's bills were paid after Perez appeared for an examination under oath on October 9, 2020. Mancuso Depo. at 20:20-25.

Progressive's answer generally denies the allegations and asserts several defenses. Among them, Progressive argues that the claim is moot, that Florida Wellness failed to provide a demand letter in advance of filing suit, and that Progressive properly invoked the 60-day extension in § 627.736(4)(i).

Both parties move for summary judgment. Florida Wellness first filed a motion for summary judgment on March 1, 2021. In it, Florida Wellness argued that Progressive confessed judgment by paying all overdue benefits after suit was filed. As a necessary part of that motion, Florida Wellness argued that Progressive was automatically in breach of the policy by failing to pay benefits within 30 days, in part because it did not notify "the claimant" of its intent to pursue a fraud investigation. The motion does not cite to materials in the record,

merely making a general reference (¶ 2) to Progressive's corporate representative deposition.

Progressive responded on September 1, 2021. It argues that Florida Wellness is not entitled to summary judgment because Progressive never denied benefits. Instead, Progressive contends (at 6 n.1) that it "timely provided notice to Fernandez, the claimant, of its reasonable suspicion of a fraudulent act pursuant to section 627.736(4)(i)." As a result, Florida Wellness's lawsuit was premature, and Progressive did not confess judgment by paying benefits within the statutory 90-day window. Progressive also argues that Florida Wellness does not present a bona fide need for a declaration, and that Florida Wellness failed to send a pre-suit demand letter, as required by § 627.736(10). Finally, Progressive argues that Florida Wellness's motion is procedurally deficient because (1) it does not comply with Rule 1.510(c)(1) because it does not "cit[e] to particular parts of materials in the record"; and (2) it does not address or refute Progressive's affirmative defenses.

These issues were first heard on September 21, 2021. At the hearing, Florida Wellness withdrew its original motion for summary judgment. After it became apparent the parties had not allotted sufficient time to argue the issues presented, I continued the hearing until February 2, 2022, and allowed the parties to supplement their arguments.

In the interim, Florida Wellness filed an amended motion for summary judgment. This motion hewed closer to its complaint and cited to evidence in the record. Once again, it argues that Progressive's payment constitutes a confession of judgment because Progressive sent its fraud letter to Fernandez's attorney—even though Florida Wellness was "the claimant" who should have received notice—failing to invoke the additional 60 days allowed by subsection (4)(i). In support of that argument, Florida Wellness cites a raft of overruled trial court orders holding that a carrier breaches its policy by failing to pay PIP benefits within 30 days.

Progressive timely responded. It argues that this case is moot because Florida Wellness filed suit before 90 days expired. Contrary to Florida Wellness, Progressive contends (at 9) that "the claimant" in § 627.736(4)(i) is "the person whom the insurer suspects has committed a fraudulent insurance act." Because Progressive's investigation concerned Fernandez's involvement in the accident, "the suspected 'fraudulent insurance act' related to Fernandez, not the Plaintiff." Progressive also argues that Florida Wellness failed to submit a pre-suit demand letter, as required by § 627.736(10), and that a carrier does not automatically violate the PIP statute by failing to make payment within 30 days. Finally, Progressive once again argues that the motion does not comply with the procedural requirements of Rule 1.510(c) and fails to address Progressive's affirmative defenses.

Progressive also moved for summary judgment, mirroring its response. Specifically, Progressive argues that it is entitled to summary judgment because (1) the facts do not show a bona fide need for a declaration; (2) Florida Wellness filed suit prematurely, since Progressive properly invoked the 60-day investigatory period of subsection (4)(i); (3) Florida Wellness failed to submit a pre-suit demand letter; and (4) Progressive's payment is not the functional equivalent of a confession of judgment entitling Florida Wellness to attorney fees. Florida Wellness did not respond to the motion, arguing at the lengthy and comprehensive hearing on February 2, 2022,[2] that its amended motion for summary judgment sufficed as a response.

II. STANDARD.

A party is entitled to summary judgment if 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). To establish the absence of a dispute, the movant must cite to particular parts of the record, show that materials cited do not establish a genuine dispute, or show that an adverse party cannot produce admissible evidence to support the fact. Fla. R. Civ. P. 1.510(c)(1). Florida's summary judgment rule adopts the federal standard. *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 76 (Fla. 2021).

Under the federal standard, the movant bears the initial burden of showing that there are no genuine disputes of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant adequately supports its motion, the burden shifts to the nonmovant "to show that specific facts exist that raise a genuine issue for trial." *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 813, 815 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C602a]. This requires the nonmovant to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 323 (internal quotations omitted). The nonmovant must "do more than raise some metaphysical doubt about the material facts" or fall back on allegations; it must "present enough evidence that a jury could reasonably find in its favor." *Bedford v. Doe*, 880 F.3d 993, 997 (8th Cir. 2018). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The trial court's job is to decide whether the parties' evidentiary submissions present "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." *Anderson*, 477 U.S. at 251-52. "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 248-49. To deny summary judgment, "there must be evidence on which the jury could reasonably find for the [nonmovant]." *Id.* at 252.

In the event of genuine 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." *Allen v. Bd. of Pub. Educ. for Bibb Cnty.*, 495 F.3d 1306, 1314 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C987a]. Inferences based on mere speculation, however, are not reasonable. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1301 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1556a]. A court "need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the nonmovant relies, are implausible." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (internal quotations omitted).

Where, as here, the parties agree on the material facts and the primary issues are legal, rather than factual, summary judgment is particularly appropriate. *Crain v. Bd. of Police Comm'rs of Metro. Police Dep't of City of St. Louis*, 920 F.2d 1402, 1405-06 (8th Cir. 1990). As in *Crain*, both parties moved for summary judgment and neither argues that this case turns on anything other than the interpretation of the PIP statute and the application of its framework to the facts presented. *See id.* at 1406. Summary judgment is therefore appropriate. *Accord Prudential Ins. Co. of Am. v. Rand & Reed Powers P'ship*, 972 F. Supp. 1194, 1202 (N.D. Iowa 1997) ("[T]he court now concludes that statutory interpretation—particularly interpretation of the effect of a statute where facts are undisputed—is primarily a legal question amenable to summary judgment.").

III. DISCUSSION.

The facts are undisputed and these motions present the following legal questions: (1) Was Florida Wellness required to submit a pre-suit demand letter before filing this declaratory judgment action? (2) Is this case moot because there is no longer a bona fide need for a declaration? (3) Did Florida Wellness comply with the procedural requirements of Rule 1.510? (4) Should Ryan Fredericks' affidavit be stricken? (5) Did Progressive invoke the 60-day extension of subsec-

tion (4)(i) by sending its fraud notification letter to "the claimant"? (6) Is Progressive's payment of benefits a confession of judgment entitling Florida Wellness to attorney fees? I address these issues in turn.

A. Florida Wellness was not required to submit a pre-suit demand letter under § 627.726(10).

Florida's PIP statute requires a notice of intent to initiate litigation as a condition precedent to filing "any action for benefits." § 627.736(10). The parties agree Florida Wellness did not send a presuit notice. Florida Wellness argues, however, that a declaratory judgment action is not one "for benefits," so notice is not required.

The plain language of the statute supports this argument. Subsection (10) requires presuit notice only for "any action for benefits." § 627.736(10)(a). And because Florida Wellness "seeks no damages whatsoever," the lawsuit is not an "action for benefits," and the provision does not apply.[3] *Bristol W. Ins. Co. v. MD Readers, Inc.*, 52 So. 3d 48, 51 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2832a].[4] For the same reason, Progressive's reliance on *Rivera v. State Farm Mutual Automobile Insurance Co.*, 317 So. 3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a], is misplaced. That case dealt with an action to recover damages in the form of transportation costs allowed under the statute. *Id.* at 199.

Progressive also contends that the pre-suit demand provisions must be strictly construed. Certainly. *See, e.g., Integrated Health Care Servs., Inc. v. Lang-Redway*, 783 So. 2d 1108, 1111 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D699b]; *Patino v. Einhorn*, 670 So. 2d 1179, 1180 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D801c].[5] But strictly construing a statute means narrowly, not punitively, construing it while taking its words at face value. *See Integrated Health*, 783 So. 2d at 1111 (noting presuit conditions must be strictly construed because they "restrict a party's access to Florida's courts and limit preexisting common law rights"); *Patino*, 670 So. 2d at 1179 (holding presuit notification provisions of Chapter 766 must be strictly construed because they are limitations on Article I, Section 21 of the Florida Constitution). Subsection (10)—by its plain terms—applies only to "any action for benefits," and this is not one. So, strictly construed, the requirement does not apply.

B. Florida Wellness's procedural failures do not prevent the Court from deciding the legal issues presented in the cross-motions for summary judgment.

Progressive also argues that Florida Wellness failed to comply with the procedural requirements of Florida's new summary judgment rule. More specifically, it points to Florida Wellness's failure to "cit[e] to particular parts of materials in the record" and Florida Wellness's failure to respond to Progressive's motion for summary judgment. Fla. R. Civ. P. 1.510(c)(1)(A), 1.510(c)(5). Yes, its original motion for summary judgment did not comply with the rule,[6] but I disagree that Florida Wellness has failed to cite to particular parts of the record in its amended motion for summary judgment. There, it cited regularly to the appropriate pages of the corporate representative deposition.

I am more sympathetic to Progressive's argument that Florida Wellness failed to respond to its motion for summary judgment, invoking its own motion as adequate. New rule 1.510(c)(5) *requires* a response "to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions." *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d at 77; *Lloyd S. Meisels, P.A. v. Dobrofsky*, __ So. 3d __, 47 Fla. L. Weekly D1239a, 2022 WL 2057777, at *3 (Fla. 4th DCA June 8, 2022). There is "no wiggle room"; filing a response is "mandatory." *Lloyd S. Meisels*, 2022 WL 2057777, at *3. The non-movant's own summary judgment motion does not suffice. *Id.*

Florida Wellness failed to follow the new rule. But that does not doom its legal positions. If a party fails to file a response, the trial court has several options, including considering facts undisputed, granting summary judgment if the motion and supporting materials show the movant is entitled to it, or issuing "any other appropriate order." Fla. R. Civ. P. 1.510(e)(2), 1.510(e)(3), 1.510(e)(4). I choose to exercise the first of those options, treating Progressive's assertion of facts as undisputed and determining whether those facts show either party is entitled to judgment as a matter of law.

C. Ryan Fredericks' affidavit need not be stricken.

I find Florida Wellness's arguments on this point unpersuasive. Even if I were to strike the affidavit, the undisputed facts of this case are sufficiently established by his deposition transcript and the deposition transcript of Rebecca Mancuso, as Progressive's corporate representative.

D. This case is not moot because the confession-of-judgment question remains.

Progressive argues this case is moot because it paid all benefits, penalties, and postage "before the subject bills became overdue." Ordinarily, a resolution of the issue between the parties renders a case moot because there is no longer an "actual, present, and practical need" for the declaration. But in the insurance context, the trial court must first determine whether the confession-of-judgment doctrine applies before dismissing a case as moot. So, this case is not moot if the doctrine applies, and vice-versa.

Florida's Declaratory Judgment Act provides broad remedial relief. § 86.101, Fla. Stat. County Courts "have jurisdiction . . . to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." § 86.011, Fla. Stat. (emphasis added). Courts may render declaratory judgments concerning the existence or nonexistence of "any immunity, power, privilege, or right," or 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." §§ 86.011(1), 86.011(2). To that end, any person "who may be in doubt about his or her rights under" a contract or statute "may have determined any question of construction or validity arising under such" statute or contract. § 86.021, Fla. Stat.

"[I]t would be difficult to find language which would express a broader scope of jurisdiction" than the Declaratory Judgment Act. *Kendrick v. Everheart*, 390 So. 2d 53, 59 (Fla. 1980) (citing *May v. Holley*, 59 So. 2d 636 (Fla. 1952)). As a result, the Declaratory Judgment Act is "liberally construed to permit a party to obtain a determination of the existence of any right" and to "settle and afford relief from insecurity and uncertainty with respect to rights, status and other equitable or legal relations." *Id.*; *Breen v. Arbomar Condo. Ass'n*, 501 So. 2d 697, 697 (Fla. 2d DCA 1987). *See* § 86.101 (The Declaratory Judgment Act "is to be liberally administered and construed."). Though the Act is liberally construed, granting a declaratory judgment "remains discretionary with the court, and not the right of a litigant as a matter of course." *Kelner v. Woody*, 399 So. 2d 35, 38 (Fla. 3d DCA 1981).

"[W]hile the scope of a court's jurisdiction to issue a declaratory judgment is broad, 'it does have limits—one of which is that courts will not render advisory opinions or give legal advice.' " *MacNeil v. Crestview Hosp. Corp.*, 292 So. 3d 840, 843 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D571a] (quoting *Golfrock, LLC v. Lee Cnty.*, 247 So. 3d 37, 40 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D984a]). To ensure jurisdiction over a petition for declaratory relief, the plaintiff must show:

(1) *There is a bona fide, actual, present practical need for the declaration.*

(2) The declaration should deal with a present, ascertained, or ascertainable state of facts or *present controversy* as to a state of facts.

(3) Some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts.

(4) 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.

(5) The antagonistic or adverse interests are all before the court.

(6) The relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952) (emphasis added).

The "extrastatutory elements" requiring a bona fide dispute and a need for the declaration "ensure that the proceeding is 'judicial in nature' and falls 'within the constitutional powers of the courts.' " *MacNeil*, 292 So. 3d at 843 (quoting *May*, 59 So. 2d at 639). "Thus, absent a bona fide need for a declaration based on present, ascertainable facts, the [trial court] lacks jurisdiction to render declaratory relief." *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192-93 (Fla. 1995) [20 Fla. L. Weekly S333a] (citing *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991); *Ervin v. Taylor*, 66 So. 2d 816 (Fla. 1953)). Jurisdiction is absent if the plaintiff cannot "show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege and that he is entitled to have such doubt removed." *X Corp. v. Y Person*, 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993) (citing *Flagship Real Estate Corp. v. Flagship Banks, Inc.*, 374 So. 2d 1020) (Fla. 2d DCA 1979)). There must be an "actual controversy" between the parties or the "ripening seeds" of one. *Platt v. Gen. Dev. Corp.*, 122 So. 2d 48, 50 (Fla. 2d DCA 1960).

Putting into effect these long-standing guardrails on declaratory discretion, a declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." *Ashe v. City of Boca Raton*, 133 So. 2d 122, 124 (Fla. 2d DCA 1961). The dispute between the parties must be "definite and concrete." *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 859 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D600c] (quoting *Green Party of Alaska v. State, Div. of Elections*, 147 P.3d 728, 732-33 (Alaska 2006)). "Absent a showing of at least a colorable right which would be affected by the requested declaration, dismissal is required." *Webster v. Inch*, 286 So. 3d 847, 848 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2648].

For that reason, "declaratory relief generally is not appropriate where the alleged controversy is moot." *Rhea*, 109 So. 3d at 859 (citing *Ashe*, 133 So. 2d at 124). That is true even when the case becomes moot after the complaint was filed. *See Santa Rosa Cnty.*, 661 So. 2d at 1193 (holding the trial court lacked jurisdiction to grant declaratory relief because the parties settled their dispute, meaning there was no longer a bona fide, actual, or present need to determine the constitutionality of the statutes at issue); *Marco Island Cable, Inc. v. Comcast Cablevision of the S., Inc.*, 509 F. Supp. 2d 1158, 1163 (M.D. Fla. 2007) [20 Fla. L. Weekly Fed. D607a] ("Where there is no longer a bona fide, actual, or present need for a declaration, a court lacks jurisdiction to grant relief under the Florida Declaratory Judgment Act.") (citing *Santa Rosa Cnty.*, 661 So. 2d 1190). Because no "useful purpose" may be served by granting relief on a moot claim where there is "no pending controversy," the mootness doctrine works hand-in-hand with the common law jurisdictional restrictions on the Declaratory Judgment Act. *Santa Rose Cnty.*, 661 So. 2d at 1192. And generally speaking, there is no controversy when an insurance company has paid PIP benefits in full. *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1212-13 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C2031a].[7]

Parties may seek a declaratory judgment on coverage. *Travelers Ins. Co. v. Emery*, 579 So. 2d 798, 801 (Fla. 1st DCA 1991); *Tindall v. Allstate Ins. Co.*, 472 So. 2d 1291, 1292 (Fla. 2d DCA 1985). But here, there is no dispute over coverage—Progressive paid the benefits due. So, ordinarily, the question would be moot. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) [25 Fla. L. Weekly Fed. S585a] ("A case becomes moot, however, 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.' " (quoting *Knox v. Service Employees*, 567 U.S. 298, 307 (2012) [23 Fla. L. Weekly Fed. S425a]); *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992) (An issue is moot when the controversy "has been so fully resolved that a judicial determination can have no actual effect."). There is no "present justiciable question" over a colorable right that would be affected by the declaration. *Webster*, 286 So. 3d at 848; *Ashe*, 133 So. 2d at 124. Declaratory jurisdiction cannot be invoked "where, in fact, there is no real controversy." *Colby v. Colby*, 120 So. 2d 797, 799 (Fla. 2d DCA 1960) (citing *Lieber v. Lieber*, 40 So. 2d 111 (Fla. 1949)).

But insurance is different. Because the insurance code's fees statute is incorporated into every insurance contract, fees must be included in the judgment. *Synergy Contracting Grp., Inc. v. Fednat Ins. Co.*, __ So. 3d __, No. 2D21-149, 2022 WL 3046976 (Fla. 2d DCA Aug. 3, 2022) [47 Fla. L. Weekly D1623a] (*Synergy 2*). And for that reason, mid-suit payment of disputed benefits does not moot litigation when the confession-of-judgment doctrine remains disputed. *Id.* at *2; *Synergy Contracting Grp., Inc. v. Fednat Ins. Co.*, 332 So. 3d 62, 66-67 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2625b] (*Synergy 1*). The insurer may have defenses to a confession of judgment, which may lead to dismissal. But a judgment for the insurer is "inconsistent with the concept underlying the confession of judgment rule—that the insurer by payment of the claim has effectively abandoned the defense of the insured's lawsuit and conceded that its prior withholding of payment had been incorrect." *Synergy 1*, 332 So. 3d at 66 (quoting *Astorquiza v. Covington Specialty Ins. Co.*, No. 8:19-cv-226-T-60CPT, 2020 WL 6321868, at *4 (M.D. Fla. Oct. 28, 2020)). *See Synergy 2*, 2022 WL 3046976, at *2 (agreeing that judgment for the insurer is inappropriate); *Astorquiza*, 2020 WL 6321868, at *3-4 (cited favorably in *Synergy 2*).

While the *Synergy* cases are based on the insurer's payment of an appraisal award rendered during litigation, I see no basis to distinguish them. The same general principles apply. The question of mootness is therefore bound-up in the confession-of-judgment question. The case is not moot if Progressive's payment constitutes a confession of judgment, but Progressive is entitled to a mootness dismissal if the doctrine does not apply. In no case, however, is Progressive entitled to judgment as a matter of law by rendering the case moot. *Synergy 2*, 2022 WL 3046976, at *2.

E. Progressive's payment constitutes a confession of judgment because Progressive failed to notify "the claimant" that the claim was being investigated for fraud.

The confession-of-judgment question necessitates a two-part inquiry. First, did Progressive act incorrectly during its pre-suit investigation and adjustment? Second, if so, does Progressive have a defense to the confession-of-judgment doctrine? Each question is addressed in turn.[8]

1. The confession of judgment doctrine applies because Progressive incorrectly sent the suspicion-of-fraud letter to the wrong party.

"[A]n insurer's concession that the insured was entitled to benefits after a legal action has been initiated is the functional equivalent of a confession of judgment." *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1219 (Fla. 2016) [41 Fla. L. Weekly S415a]. The purpose of the confession of judgment doctrine "is to discourage insurers from

contesting valid claims and to reimburse successful insureds for attorney's fees when they must sue to enforce their insurance contracts." *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1791e] (citing *Progressive Exp. Ins. Co. v. Schultz*, 948 So. 2d 1027, 1029-30 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D548b]). It also "discourage[s] litigation and encourage[s] prompt disposition of valid insurance claims without litigation." *Tampa Chiropractic Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 141 So. 3d 1256, 1258-59 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1441a].

Application of the confession-of-judgment doctrine does not require a finding of bad faith or wrongfulness by the insurance company. *Johnson*, 200 So. 3d at 1218. Instead, recovery of fees requires an "*incorrect* denial" or withholding of benefits by the insurance company. *Id.* at 1219 (emphasis added).[9]

When an insured moves for attorney fees under the confession-of-judgment doctrine, "the underlying issue is whether the suit was filed for a legitimate purpose, and whether the filing acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." *People's Tr. Ins. Co. v. Farinato*, 315 So. 3d 724, 728 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D787a] (quoting *State Farm Fla. Ins. Co. v. Lime Bay Condo., Inc.*, 187 So. 3d 932, 935 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D730a]). Again, this issue circles back to whether the insurance company's actions were "incorrect." *Johnson*, 200 So. 3d at 1219.

That said, the confession of judgment doctrine does not apply in every case where a plaintiff sues an insurer and money is later paid. *Lorenzo*, 969 So. 2d at 398. For example, the doctrine does not reward a "race to the courthouse," where "an insured files a breach of contract lawsuit before the insurer has an opportunity to adjust the claim." *Synergy 1*, 332 So. 3d at 67 n.3 (citing *Lewis v. Universal Prop. & Cas. Ins. Co.*, 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1104a]); *Lorenzo*, 969 So. 2d at 398. Courts are also reluctant to apply the doctrine "where the insureds were not forced to sue to receive benefits" because "applying the doctrine would encourage unnecessary litigation" when a carrier is "complying with its obligations under the policy." *Lorenzo*, 969 So. 2d at 398. *See Farinato*, 315 So. 3d at 728 (same). "It is only when the claims adjusting process breaks down and the parties are no longer working to resolve the claim within the contract, but are actually taking steps that breach the contract, that the insured may be entitled to an award [of] fees under section 627.428, Florida Statutes (2004)." *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 960 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1041a] (citing *Lewis*, 13 So. 3d at 1081).

The touchstone of confession-of-judgment cases seems to be the insurer's compliance with its policy obligations. For example, in *Lorenzo*, the Fourth District quashed an order awarding fees to the Lorenzos "for bringing a premature suit against State Farm, which was complying with its policy obligations, confounding the role of the attorney's fee in facilitating the economical, efficient, and expeditious administration of justice." 969 So. 2d at 398. Because State Farm was complying with its obligations under its policy, applying the doctrine "undermines the statute's purpose by simultaneously rewarding unnecessary litigation and discouraging insurers' prompt compliance with their obligations." *Id.* at 399. In *Contreras*, the insured was not entitled to fees when it was unclear whether the insurer complied with its obligations under § 627.4137. 53 So. 3d at 1199. And in *Farinato*, the insurer "never took any steps to breach the contract," so confession-of-judgment doctrine fees were inappropriate. 315 So. 3d at 730.

Florida Wellness argues first that Progressive breached its policy and confessed judgment as a matter of law by paying benefits after the initial 30-day period expired. PIP benefits are "overdue if not paid within 30 days after written notice is furnished to the insurer." § 627.736(4)(b)(1), Fla. Stat. But an insurer's failure to pay within those 30 days does not automatically result in liability. *Century-Nat'l Ins. Co. v. Regions All Care Health Ctr., Inc.*, 336 So. 3d 445 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D896a]; *Miracle Health Servs., Inc. v. Progressive Select Ins. Co.*, 326 So. 3d 109 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1608a]; *United Auto Ins. Co. v. AFO Imaging*, 323 So. 3d 826 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1570a].

Instead, the question is more nuanced: Was Progressive's withholding of benefits past the initial 30 days "incorrect" because it sent the suspicion-of-fraud notice to the wrong party? Johnson, 200 So. 3d at 1219. If so, its payment constitutes a confession of judgment because Progressive was not complying with the statute, and in turn, the policy. *See Grant v. State Farm Fire & Cas. Co.*, 638 So. 2d 936, 938 (Fla. 1994) ("'[W]here a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract.' ") (quoting *Standard Marine Ins. Co. v. Allyn*, 333 So. 2d 497, 499 (Fla. 1st DCA 1976)). If not, the action is moot and should be dismissed.

2. The "claimant" for the purposes of subsection (4)(i) is Florida Wellness, not Justin Fernandez.

This case comes down to one question of statutory interpretation: Who is "the claimant" referred to in § 627.736(4)(i)? If "the claimant" is the insured or the party suspected of fraud, Progressive prevails. If "the claimant" is the person or entity who submitted the claim for payment to Progressive, Florida Wellness prevails.

When interpreting a statute, Florida courts adhere to the "supremacy-of-text principle." *Boyle v. Samotin*, 337 So. 3d 313, 317 (Fla. 2022) [47 Fla. L. Weekly S111a] (quoting *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) [46 Fla. L. Weekly S9a]). That is, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Ham*, 308 So. 3d at 946 (quoting Scalia & Garner, *Reading Law* at 56). We "presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

In determining what statutory text means, "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Adv. Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) [45 Fla. L. Weekly S10a] (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833)). Therefore, "the goal of interpretation is to arrive at a 'fair reading' of the text by 'determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Ham*, 308 So. 3d at 947 (quoting Scalia & Garner, *Reading Law* at 33).

"As always when 'determining the meaning of a statutory provision,' the Court 'looks first to its language, giving the words used their ordinary meaning." *Health Freedom Defense Fund, Inc. v. Biden*, __ F. Supp. 3d __, No. 8:21-cv-1693-KKM-AEP, 2022 WL 1134138, at *4 (M.D. Fla. Apr. 18, 2022) (quoting *Artis v. Dist. of Columbia*, 138 S. Ct. 594, 603 (2018) [27 Fla. L. Weekly Fed. S28a]). We therefore start with the text, itself:

> If an insurer has a reasonable belief that a fraudulent insurance act, for the purposes of s. 626.989 or s. 817.234, has been committed, the insurer shall notify ***the claimant***, in writing, within 30 days after submission of the claim that the claim is being investigated for suspected fraud. Beginning at the end of the initial 30-day period, the in-

> surer has an additional 60 days to conduct its fraud investigation. Notwithstanding subsection (1), no later than 90 days after the submission of the claim, the insurer must deny the claim or pay the claim with simple interest as provided in paragraph (d).

§ 627.736(4)(i) (emphasis added). The term "claimant" is not defined by the PIP statute, the insurance code, or the policy at issue.

Florida Wellness argues that "the claimant" can only be the medical provider, since they submit the bills to the insurer. Progressive, on the other hand, argues that "the claimant" is the party accused of fraudulent wrongdoing—here, the insured—because they are the only party that should receive a notice concerning that suspected fraud.

Here, it is "difficult to 'conclude that the meaning of the governing text is clear beyond any doubt.' " *Boyle*, 337 So. 3d at 317 (quoting *MRI Assocs. of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.*, 334 So. 3d 577, 583 (Fla. 2021) [46 Fla. L. Weekly S379a]). So, we turn to canons of statutory construction.

As a first step, "[c]ourts often start with dictionaries" from the time the statute was passed. *Health Freedom Defense Fund*, 2022 WL 1134138, at *5. Black's Law Dictionary defines "claimant" as "[s]omeone who asserts a right or demand, esp. formally." BLACK'S LAW DICTIONARY *claimant* (11th ed. 2019). Webster's 1997 College Dictionary defines "claimant" as "a person who makes a claim," and in turn defines "claim" as "a demand for something as due; an assertion of a right or an alleged right," and importantly here, "a request or demand for payment in accordance with an insurance policy." *Lakeland Neurocare Ctrs. v. State Farm Mut. Auto. Ins. Co. ex rel. Mich. Dep't of State Assigned Claims Facility*, 645 N.W.2d 59, 63 (Mich. Ct. App. 2002). That latter definition suggests the provider is the "claimant" who must receive the notice of fraudulent activity under subsection (4)(i).

But dictionaries provide only a helpful starting point because words acquire meaning through the context in which they are used with a view to their place in the overall statutory scheme. *King v. Burwell*, 576 U.S. 473, 486 (2015) [25 Fla. L. Weekly Fed. S430a]; *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). *See Health Freedom Defense Fund*, 2022 WL 1134138, at *5. To determine the meaning a word must bear in a particular context, a court "must rely on the statute's context, including the surrounding words, the statute's structure and history, and common usage at the time," considering all available tools of statutory interpretation. *Health Freedom Defense Fund*, 2022 WL 1134138, at *5 (citing *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) [27 Fla. L. Weekly Fed. S1045a]). A word in a statute may be "given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008) [21 Fla. L. Weekly Fed. S238a]. And courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

Florida Wellness argues (at 3) that the "only reference to 'claimant' in [the] PIP statute refers to a medical provider who holds an assignment of benefits," as described in subsection (10) of the PIP statute. As pointed out by Progressive, that is plainly incorrect. The term "claimant" appears in several other subsections—seven, to be exact. And to make this exercise more difficult, the term appears to be used in two different ways, depending on its placement. In subsection (5), the term "claimant" is used to mean the insured. Both § 627.736(5)(c) and § 627.736(5)(c)(3) refer to the "examination or treatment of the claimant." Because a medical provider cannot be examined or treated, the context gives meaning to the word "claimant," equating it with the insured or another injured person making a claim under the insurance policy. Those subsections also separately use the word "provider," demonstrating that the Legislature intended to differentiate between medical providers and claimants within the context of the requirements of subsection (5). *See generally* Scalia & Garner, *Reading Law* at 170 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

But the presumption-of-consistent-usage canon is far from absolute,[10] and the PIP statute cannot be fairly read to equate "claimant" to the insured or injured person in each and every context in which it is used. *Accord Utility Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) [24 Fla. L. Weekly Fed. S881a] ("[T]he presumption of consistent usage readily yields to context . . . .") (internal quotations omitted). Indeed, none of the remaining uses of the term "claimant" fairly support a meaning of "insured" when read in context.

To the contrary, every other use of the term "claimant" conveys the meaning of the party submitting a claim to the carrier for payment or the party bringing a lawsuit. Subsection (10), which requires written notice to bring a PIP claim, uses "claimant" to mean the party intending to bring suit and sending the notice of intent to sue to the carrier. *See* §§ 627.736(10)(b)(3), 627.736(10)(c). Because PIP claims may be assigned, this definition cannot be cabined to just the insured or the injured party. The only reasonable construction of the term in this context is to mean the party bringing a legal claim—whether that is the insured or the medical provider assigned the insured's rights. Indeed, § 627.736(10)(b)(1) differentiates between the insured and the claimant by requiring in a notice of intent the "name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to *the claimant if the claimant is not the insured*." § 627.736(10)(b)(1) (emphasis added). Subsection (15) likewise uses "the claimant" to mean the person or entity bringing a claim against an insurer in court. And that subsection's use of the term "provider" separately supports, rather than defeats, this interpretation because it shows that a claimant is not always the provider and not always the insured—the "claimant" is whoever makes a demand for payment from the insurer.

But most telling and most informative of context is the way the Legislature uses the word "claimant" and other terms in the rest of subsection (4), alongside subsection (4)(i). First, subsection (4)(b)(2) places obligations on an insurer when it "pays only a portion of a claim or rejects a claim." § 627.736(4)(b)(2). In that instance, the insurer must include "any information that the insurer desires *the claimant* to consider related to the medical necessity of the denied treatment or to explain the reasonableness of the reduced charge." *Id.* And the insurer must include the contact information for the person "to whom the claimant should respond." *Id.* In this context, "claimant" can only refer to the person or entity who submitted a bill for payment to the insurer—whether that be the insured, an injured party, or a medical provider.

Even more informative is the statutory language of § 627.736(4)(h), the subsection immediately preceding (4)(i): "Benefits are not due or payable to or on the behalf of *an insured person* if that person has committed, by a material act or omission, insurance fraud relating to personal injury protection coverage under his or her policy." (Emphasis added.) Reading (4)(h) in *pari materia*, it shows that the Legislature intentionally referred to the insured as "an insured person," rather than a "claimant." The fact that this subjection immediately precedes subsection (4)(i) is meaningful. While subsection (4)(h) bars benefits after discovery of insurance fraud, subsection (4)(i) provides the mechanism for a carrier to investigate that fraud. It is difficult to believe that that Legislature would use "claimant" to mean "insured person" when the preceding subsection uses that exact term.

If Progressive's argument were correct, and the notice had to be

sent to the party suspected of fraud, the Legislature would have used the word "insured person" in the very next section, consistent with how it was used in (4)(h). But they chose not to. Instead, they chose to require notice to the *claimant*, so that the party expecting the swift payment required by the PIP statute would be on notice of a delay.

The statutory context of the term "claimant" points to the "claimant" being the person who submits an invoice or claim for payment. So does the general PIP statutory scheme. It is a fundamental premise of PIP law that a carrier has 30 days to pay or deny a PIP claim after receiving notice of "a covered loss and *the amount of same*." § 627.736(4)(b) (emphasis added). *See State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1082 (Fla. 2006) [31 Fla. L. Weekly S358a] (Anstead, J., concurring in result only) ("The assurance of swift and virtually automatic provision of PIP benefits is accomplished through the requirements of section 627.736(4)(b), which provides that PIP insurance benefits shall be overdue if not provided within thirty days . . . ."); *Century-National*, 336 So. 3d at 448. The time for payment therefore begins when the invoice for payment is submitted—whether by a provider or by the insured—not when the insured gives notice of an accident that may result in a covered loss. This reading is further supported by § 627.736(5)(d), which provides that a carrier is "not considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph . . . ."

When that clock starts ticking, it can be extended only by notifying the claimant of suspected fraud. And the statute provides a strict timeline for that extension: the carrier is allowed an additional 60 days, "[b]eginning at the end of the initial 30-day period." § 627.736(4)(i). That is, 60 additional days calculated from the date of receiving the medical bills showing a covered loss and the amount of that loss. All of these timelines originate from the 30-day timeline on which the PIP statute is based. And when rights under a policy have been assigned to a provider—as here—that 30-day timeline starts running on the day the provider sends a bill with the amount of loss.

Under the overarching PIP scheme, it makes little sense to construe the term "claimant" in (4)(i) to mean the insured, as Progressive argues. What use would a notice be to the insured when it is the provider who submitted the invoice for payment? The party expecting payment—the provider—is expecting payment within 30 days. If insurers could delay that payment without notice to the claimant expecting payment, the Legislature's chosen pre-suit process for PIP claims would be disturbed. Providers with assigned policy rights would constantly be sending pre-suit notices of intent to sue because they were never provided notice by the carrier of its suspicion of fraud. Even where the carrier suspects the insured of fraud, rather than the provider, the notice of that investigation must be provided to the party expecting payment within 30 days: the provider.

The Fourth District recently recognized this distinction, though unintentionally, by observing a provider was "the first *claimant* to submit a bill to Allstate for service rendered to the insured after the accident." *Allstate Fire & Cas. Ins. Co. v. Sports, Spine, Occupational, Rehab., Inc.*, 335 So. 3d 725, 726 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D638b]. That observation captures this analysis and the distinction between a claimant, a carrier, an insured, and a provider. The claimant is the one who submits the invoice for payment, while a provider renders service that the insured receives. And when an insured has assigned his benefits to a provider, it no longer makes sense to consider the insured to be the "claimant" in this context because he can no longer submit a "claim" for payment.

The few courts to address this issue appear to agree. *See, e.g., Johnson v. GEICO Cas. Co.*, 672 F. App'x 150, 156 (3d Cir. 2016) ("Delaware courts have not defined 'claimant' as the person specified in a contract or the party liable for unpaid bills. Instead, Delaware has defined 'claimant' as the party who submits the bill to and receives payment from the insurance company. Insofar as 'Defendants provided . . . ample documentation both that the claims were made by the various medical providers and that the claims were paid directly to the various medical providers,' no reasonable jury could find that [the insured] was the 'claimant' . . . .") (internal citations omitted); *Johnson v. Gov't Employees Ins. Co.*, No. 06-408-RGA, 2014 WL 1266832, at *2-3 (D. Del. Mar. 26, 2014) (relying on *Sammons, infra*, to construe the statutory term "claimant" to be "the person or entity that submitted the bill to the insurer"); *Sammons v. Hartford Underwriters Ins. Co.*, no. S09C-12-026 RFS, 2011 WL 6402189, at *2 (Del. Sup. Ct. Dec. 15, 2011) ("The term 'claimant' acknowledges the general but not universal practice of health care providers submitting payment claims to insurers."), *aff'd Sammons v. Hartford Underwriters Ins. Co.*, 49 A.3d 1194 (Del. 2012); *Lakeland Neurocare*, 645 N.W.2d at 63 (concluding a medical provider—not the insured—was a "claimant" within the context of a no-fault statute because the provider "submitted a claim for personal protection insurance benefits"), *overruled by Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 895 N.W.2d 490 (Mich. 2017)[11]; *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 909 N.W. 2d 495, 504 (Mich. App. 2017) (interpreting the phrase "payment to the claimant" to include "payments made to healthcare providers on the claimant's behalf"); *Peterson v. 21st Century Centennial Ins. Co.*, No. N15C-01-141 CLS, 2015 WL 4154070, at *2 (Del. Sup. Ct. July 9, 2015) ("[T]his Court has found as a matter of statutory construction that the 'claimant' . . . is the person or entity that submitted the bill to the insurer.") (citing *Sammons). See also Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1340 (Cal. App. 2012) (concluding that medical providers qualify as "original claimants" because they instituted liability claims against an insurer).

Though mentioned in subsection (4)(i), sections 817.234 and 626.989 do not provide any additional clues as to the meaning of the word "claimant." They define when a person commits "insurance fraud," § 817.234(1)(a), or a "fraudulent insurance act." § 626.989(1)(a). But the person who commits a "fraudulent insurance act" under § 627.736(4)(i) is not necessarily the "claimant." If it were, the Legislature would have used more specific language. Instead, the Legislature used the passive voice to indicate that if the insurer believes that *anyone* committed a fraudulent insurance act, the insurer must then notice "the claimant." § 627.736(4)(i). The non-specificity of the initial clause in subsection (4)(i), followed by the specific identification of "the claimant" in the following clause, dispels any suggestion that "the claimant" is always the same person the carrier suspects of a fraudulent insurance act.

I recognize that the Second District in *Century-National* said that the insurer must notify "the insured" if it suspects fraud. 336 So. 3d at 448. But that comment was *dicta*. The Second District did not independently evaluate the meaning of the word "claimant," nor did the case turn on that definition. The statement was made in passing, without reference to the actual statutory language. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 44-45 (2016) ("The *holding* of an appellate court constitutes the precedent, as a point necessarily decided. *Dicta* do not: they are merely remarks made in the course of a decision but not essential to the reasoning behind that decision."); *id.* at 46 ("Generally, a dictum is a statement in a judicial opinion that is unnecessary to the case's resolution.").

Instead, giving "full effect to [the PIP] statutory provisions and constru[ing] related statutory provisions in harmony with one another," the term "claimant" in subsection (4)(i) must be read to mean the party or entity submitting a claim for payment to the insurer—here, Florida Wellness, *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 6 (Fla. 2004) [29 Fla. L. Weekly S788a] (citation

omitted).

3. Progressive's defenses to the confession-of-judgment doctrine do not apply.

Notwithstanding this analysis, Progressive argues that Florida Wellness should not be rewarded for racing to the courthouse. That argument has some appeal, and this is a close question. Florida Wellness filed quickly without notice; Progressive never stopped adjusting Fernandez's claim; and Progressive eventually paid benefits within the statutory timeline it thought appropriate.

The problem with that argument is that the payment was still "overdue." § 627.736(4)(b)(1); *Century-Nat'l*, 336 So. 3d at 449. Even if overdue payment does not constitute a breach of contract as a matter of law, the delay due to sending the letter to the wrong party was "incorrect" under the statute. *Johnson*, 200 So. 3d at 1219. This is even more important in a PIP setting, where strict timelines ensure the swift payment of claims. Florida Wellness brought a declaratory judgment action to enforce those timelines, and I cannot say the action was brought for illegitimate purposes when it correctly identified and sought to correct a defect in Progressive's claims-handling process. If one of the purposes of the confession-of-judgment doctrine is to encourage the prompt disposition of valid insurance claims, I cannot conclude that the doctrine does not apply here. *Tampa Chiropractic*, 141 So. 3d at 1258-59. Progressive has a statutory obligation, incorporated into the policy, to adjust the claim within the timeframe set by Florida's PIP statute. Here, it failed to do so. The delay does not automatically render Progressive liable for breach of its contract, but when it pays the benefits due with a lawsuit pending, the confession-of-judgment doctrine applies.

Progressive argues that the suit was not "a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." *Farinato*, 315 So. 3d at 728. In support, it cites *State Farm Florida Insurance Co. v. Lime Bay Condominium, Inc.*, 187 So. 3d 932, 934-35 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D730a]. But *Lime Bay* reversed the trial court's order because an issue of fact remained on whether the insurer complied with its statutory obligations under § 627.7015(9), Fla. Stat. *See Lime Bay*, 187 So. 3d at 936 ("We are satisfied that there are disputes of material fact as to whether there was timely compliance with the notice requirements of subsection 627.70152(2), which in turn leave a dispute of material fact as to whether Lime Bay was compelled to file suit and whether there was a confession of judgment as a matter of law."). Here, as the parties concede, there is no disputed issue of fact, and I have concluded Progressive did not comply with its statutory obligation as a matter of law. Moreover, the portion of *Lime Bay* cited by Progressive relies, in turn, on a part of *Clifton* that has been disapproved. Lime Bay, 187 So. 3d at 934 (citing *Clifton*, 31 So. 3d at 829). *See Johnson*, 200 So. 3d at 1219.

Reading *Lime Bay* consistently with *Johnson* supports a confession of judgment. The *Lime Bay* court intimated that if the insurer failed to comply with its statutory obligations—if its actions were *incorrect* rather than wrongful—then the insurer confessed judgment by making the mid-litigation payment. *See Lime Bay*, 187 So. 3d at 937. That is the same conclusion I reach today. If Progressive failed to comply with its statutory obligation to investigate and pay within 30 days, its actions were incorrect and the mid-litigation payment constitutes a confession of judgment. No longer does Florida law require a wrongfulness or bad faith determination before invoking the doctrine. *Johnson*, 200 So. 3d at 1218. An "incorrect" withholding of benefits is sufficient. *Id.* at 1219.

Nor does *Farinato* control. There, the court found that the insurer "was complying with its policy obligations." *Lorenzo*, 969 So. 2d at 398. The same cannot be said here, since Progressive did not comply with its statutory obligation to adjust the claim within 30 days, and it became "overdue." § 627.736(4)(a)(1).

Progressive also argues (at 10) that it never "wrongfully withheld" benefits because it "properly invoked its right to investigate suspected fraud and properly submit[ted] the letter pursuant to Section 627.736(4)(i)." The problem with that argument is self-evident: Progressive did not "properly" invoke the 60-day extension because it did not send its suspicion-of-fraud letter to the "claimant."[12] Florida Wellness may have filed quickly instead of verifying the status of the claim with Progressive. But I cannot conclude that this was a "race to the courthouse" because Progressive's time to adjust the claim had expired and the claim had become "overdue." This conclusion is unique to PIP cases, and this is a special circumstance, but I find that Progressive confessed judgment by paying benefits after suit had been filed and served.

IV. CONCLUSION.

Because Progressive did not deliver a suspicion-of-fraud letter to "the claimant," it did not invoke the 60-day extension of § 627.736(4)(i), and it incorrectly withheld benefits that were overdue. By paying benefits during litigation, Progressive therefore confessed judgment. Accordingly,

1. Plaintiff's Amended Motion for Summary Judgment is GRANTED *in part*.

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

3. Plaintiff's Motion to Strike Affidavit of Ryan Fredricks Filed by Defendant is DENIED.

3. The Court finds Plaintiff Florida Wellness Center, Inc. ENTITLED to an award of attorney fees under the confession-of-judgment doctrine and § 627.428 of the Florida Statutes.

4. The parties shall, within 14 days, submit by email (civdivj@fljud13.org) a proposed form of a final judgment to be entered based on this order. Competing final judgments are acceptable if the parties cannot agree on the form.

5. The parties shall, within 14 days, confer concerning the amount of attorney fees reasonably incurred by Plaintiff's counsel. If the parties cannot agree on the amount of the attorney fees award, the matter must be set for an evidentiary hearing.

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[1]In its motion for summary judgment (at 2), Florida Wellness notes that Progressive sent an explanation of benefits on July 29 stating that "payment is pending as we are currently verifying coverage and/or the facts of loss." That fact does not seem to be disputed, but Florida Wellness does not cite to any evidence in the record establishing the EOB was actually sent. *See generally* Fla. R. Civ. P. 1.510(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to *particular parts* of materials in the record . . . .") (emphasis added); *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) ("A [trial court] is not required to wade through improper denials and legal argument in search of a genuinely disputed fact. And a mere disagreement with the movant's asserted facts is inadequate if made without reference to specific supporting material. In short, judges are not like pigs, hunting for truffles buried in briefs.") (citations and quotations omitted).

[2]Though these motions presented complicated issues requiring a significant amount of independent research and drafting—on top of managing this division's 11,000 civil cases—I apologize to the parties for the delay in rendering this order. *See* Fla. R. Gen. Prac. & Jud. Admin. 2.215(f). The parties should reasonably expect an expedient disposition of all motions, including this one, no matter their complexity.

[3]As in *Bristol*, this Court holds Florida Wellness to its representations that no damages are or will be sought in this action. *See Bristol*, 52 So. 3d at 51 ("We hold MD Readers to its representations both to this court and to the trial court that no damages whatsoever will be sought in this action.").

[4]*Accord A&M Gerber Chiropractic LLC v. Geico Gen. Ins. Co.*, No. 16-cv-62610-BLOOM/Valle, 2017 WL 850177, at *2 (S.D. Fla. Mar. 3, 2017); *AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co.*, No. 8:15-cv-2543-T-26MAP, 2016 WL 740719, at *3 (M.D. Fla. Feb. 25, 2016).

[5]*But see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 355-66 (2012) (dispelling the "false notion that words should be strictly construed").

[6]I recognize that the new summary judgment rule did not go into effect until May 1, 2021—after Florida Wellness filed its original motion. *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 77 (Fla. 2021) [46 Fla. L. Weekly S95a].

[7]Citing *Harrison v. United Mine Workers of Am. 1974 Ben. Plan & Trust*, 941 F.2d 1190, 1193 (11th Cir. 1991); *Progressive Am. Ins. Co. v. Stand-Up MRI of Orlando*, 990 So. 2d 3, 4 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]; *Neighborhood Health P'ship Inc. v. Fischer*, 913 So. 2d 703, 705 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2449b]; *Graham v. State Farm Fire & Cas. Co.*, 813 So. 2d 273, 274 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D844a]; *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053 (Fla. 3d DCA 2000) [25Fla. L. Weekly D1830a].

[8]The parties seem to agree that the confession-of-judgment doctrine applies to declaratory judgment actions, and the case law supports that assumption. *See Shirtcliffe v. State Farm Mut. Auto.*, 160 So. 3d 555 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D801a]; *O'Malley v. Nationwide Mut. Fire Ins. Co.*, 890 So. 2d 1163 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D5b]; *Bassette v. Standard Fire Ins. Co.*, 803 So. 2d 744-45 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1670b]. *See also Contreras v. 21st Century Ins. Co.*, 53 So. 3d 1194, 1199 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D314c] (implicitly recognizing that the confession of judgment doctrine can apply to a declaratory judgment action, though declining to apply under the "unusual facts" of that case); *Pawtucket Mut. Ins. Co. v. Manganelli*, 3 So. 3d 421 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D386a]; *Mercury Ins. Co. of Fla. v. Cooper*, 919 So. 2d 491 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2648a]; *State Farm Fire & Cas. Co. v. Becraft*, 501 So. 2d 1316 (Fla. 4th DCA 1986).

[9]*Johnson*'s "incorrect denial" standard overrules the holdings in *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D364e], and *Beverly v. State Farm Fla. Ins. Co.*, 50 So. 3d 628, 633 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2373b], which suggested the trial court must resolve a factual dispute over whether the plaintiff "was forced to file suit to resolve the dispute," which could be a barrier to summary judgment. In any event, neither Florida Wellness nor Progressive argues that there is a disputed issue of fact, and I have already accepted Progressive's facts as true due to Florida Wellness's failure to file a response.

[10]*See* Scalia & Garner, *Reading Law* at 170 (recounting critiques of the canon); 1 Joseph Story, *Commentaries on the Constitution of the United States* § 454, at 323 (2d ed. 1858) ("It is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument.") (as quoted in Scalia & Garner, *Reading Law* at 170); *City of Bartow v. Flores*, 301 So. 3d 1091, 1100-01 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1298a] (Winkour, J., concurring in part, dissenting in part) (disagreeing that the presumption of consistent usage canon should be applied because the statute's use of a term is "inexact in other places").

[11]*Covenant* did not overrule the lower court's exercise in statutory interpretation. It found, instead, that medical providers could not pursue any claim under Michigan law and, therefore, a provider could never be a "claimant" under this particular Michigan statutory scheme, no matter how the text was construed.

[12]In its response (at 8), Progressive characterized Florida Wellness's argument as "frivolous." As my analysis shows, I disagree with that assessment. Parties and counsel should, whenever possible, temper their legal arguments and confine them to the facts and legal issues presented.

* * *

Insurance—Personal injury protection—Coverage—Declaratory judgment—Standing—Exhaustion of policy limits extinguished medical provider's claim to benefits and, consequently, extinguished its standing to maintain declaratory action regarding interpretation of PIP policy—No merit to argument that provider has continuing bona fide, present, and practical need for declaration because of ongoing business relationship with insurer or because provider needs to know whether insurer properly applied fee schedule in order to know how much it can lawfully bill insured

CLEARVIEW OPEN MRI, a/a/o A. Diaz, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-001372 (M). June 29, 2018. Herbert M. Berkowitz, Judge. Counsel: Christopher P. Calkin and Mike N. Koulianos, Law Offices of Christopher P. Calkin, Tampa; and David M. Caldevilla, De La Parte & Gilbert, Tampa, for Plaintiff. Robert A. Lowry, Progressive PIP House Counsel, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court for consideration on May 16, 2018, pursuant to Defendant's Amended Motion for Final Summary Judgment (certificate of service April 16, 2018) and Plaintiff's Motion for Summary Judgment (certificate of service April 24, 2018). The Court having reviewed the record evidence, pleadings, and motions, and having considered argument of Counsel and legal authority submitted by the parties, and being otherwise fully advised in this matter, hereby, FINDS as follows:

1. This is a cause of action seeking declaratory relief regarding the interpretation of a contract of motor vehicle insurance and the application of its provisions relative to the Personal Injury Protection ("PIP") portions of the Florida No Fault Statutes (Fla. Stat.§ 627.736) and which specifically seeks no PIP benefits from the Defendant insurer under the policy of insurance issued by the Defendant.

2. It is undisputed that Agueda Diaz was covered under a PIP policy of insurance issued by Defendant (Policy Number 51153652). This policy was in full force and effect on the date of the alleged accident, January 20, 2015 and provided Agueda Diaz $10,000.00 in Personal Injury Protection benefits.

3. Plaintiff is a healthcare provider that provided services allegedly related to the subject Florida motor vehicle accident to its assignor, Agueda Diaz, for date of service March 30, 2015.

4. The Insured, Agueda Diaz, assigned his rights for Personal Injury Protection coverage to Plaintiff on March 30, 2015.

5. Plaintiff submitted billing to Defendant for treatment rendered to Agueda Diaz.

6. Other healthcare providers likewise submitted billing to Defendant for treatment rendered to Agueda Diaz following the January 20, 2015 motor vehicle accident, and Defendant has made reasonable payments to different providers, by virtue of various assignments, pursuant to Agueda Diaz's insurance policy under PIP and pursuant to Florida Statute §627.736.

7. The Defendant continued to issue payments for benefits claimed to be due as such claims were received, as the Defendant did not have reasonable proof that it was not responsible for payment of these bills. Further, the bills were properly completed and timely submitted thereby placing the Defendant on notice of a covered loss(es) and to that extent, were properly payable bills.

8. The Defendant made payment to the Plaintiff pursuant to the contract of insurance, notwithstanding the appropriateness of the manner in which the specific amount was determined.

9. The uncontroverted evidence, as demonstrated by the Defendant's PIP Medical Detail List and the sworn affidavit of its Adjuster, Michelle Dempsey, demonstrates that on or about September 22, 2017, the Defendant satisfied the statutory/policy limit of $10,000.00 for PIP benefits available for this loss via a payment to a medical provider. That payment exhausted all available benefits under the policy of insurance at issue.

10. Over the Plaintiff's objections, the Court accepts said affidavit, and the exhibits thereto, as admissible business records and as sufficient evidence of exhaustion of benefits, thus satisfying the Defendant's summary judgment burden.

11. Despite the Plaintiff's objections, the Court further finds that it is unnecessary for the exhibits supporting the Defendant's Affidavit to include all of the underlying bills received by the Defendant for the entirety of this claim.

12. Once the Defendant demonstrated exhaustion of benefits, the burden shifted to the Plaintiff to demonstrate that there were improper payments under the policy, which may have made additional benefits available. In the instant case, the Plaintiff offered no such evidence to the Court.

13. Furthermore, the Court disagrees with the Plaintiff's position that the assignment of benefits from the claimant extends beyond the exhaustion of benefits. Instead, this Court finds that the Plaintiff has a claim or right to seek declaratory judgment, to the extent that there are any potential PIP benefits, bona fide or otherwise, that may be available to it. The exhaustion of benefits extinguished that claim or right and consequently extinguished Plaintiff's standing to maintain its Complaint for Declaratory Judgment.

14. This Court further rejects Plaintiff's argument that it has a continuing bona fide, present and practical need for this declaration, despite the benefits exhaustion, because it has ongoing business activities with Progressive and/or because the Plaintiff contends that it needs to know whether Progressive made a proper election of the schedule of maximum charges in order for the Plaintiff to know how much it can lawfully bill the insured patient.

15. Finally, this Court has specifically considered the opinion in *Crespo & Associates, P.A. a/a/o A. Vilchis v. Progressive American Ins. Co.,* 25 Fla. L. Weekly Supp. 1047a (Hillsborough Cnty. February 7, 2018), and respectfully disagrees with the holding therein. For the reasons set forth above, and as this Court has previously held in *Tampa Bay Imaging, LLC, a/a/a Rebecca Walker vs. Mercury Ins. Co. of Florida,* 18 Fla. L. Weekly Supp. 901b, (Hillsborough Cnty. May 13, 2011), how the Defendant determined the amount of reimbursement to the Plaintiff, now that benefits have been exhausted, is a question of academic interest only. To interpret and apply declaratory relief in this case would constitute an impermissible advisory opinion. Thus, the exhaustion of benefits prior to the initiation of this action renders moot the Plaintiff's suit for declaratory relief.

Based on the foregoing it is thereby, **ORDERED AND ADJUDGED** that Defendant's Amended Motion for Final Summary Judgment be, and the same is, hereby **GRANTED** and Plaintiff's Motion for Summary Judgment is hereby **DENIED**. Plaintiff shall take nothing by this action. **FINAL SUMMARY JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE DEFENDANT AND IT SHALL GO HENCE FORTH WITHOUT DAY**. The Defendant is the prevailing party in this action. The Court reserves jurisdiction to determine Defendant's entitlement to reasonable attorneys' fees and costs.

* * *

Insurance—Personal injury protection—Coverage—Declaratory judgments—Complaint seeking declaration of coverage was unripe when filed where complaint was filed during investigation period allowed by PIP statute—Complaint is moot and fails to demonstrate need for declaration where insurer extended PIP coverage to medical provider within 90 days of receipt of bills and has exhausted policy limits

FLORIDA WELLNESS CENTER, INC.; Luis Orta, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-041081, Division M. June 8, 2022. Lisa Allen, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Robert A. Lowry, Progressive PIP House Counsel, Tampa, for Defendant.

Order Granting Defendant's Motion for Summary Judgment

This matter comes before the Court at hearing on April 19, 2022 upon Defendant's Second Amended Motion for Summary Judgment Regarding Exhaustion of Benefits with supporting affidavits and exhibits and Plaintiff's First and Second Memorandum of Law In Opposition to Defendant's Motion for Final Summary Judgment. The Court considered the pleadings, motion and summary judgment evidence, responses in opposition, applicable case law and arguments of counsel for both parties.

I. Summary Judgment Standard.

Rule 1.510 of the Florida Rules of Civil Procedure, effective May 1, 2021, states in pertinent part:

* * *

(b) For Defending Party. A party against whom a claim, counterclaim, crossclaim, or third-party claim is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits.

(c) Motion and Proceedings Thereon. The motion must state with particularity the grounds upon which it is based and the substantial matters of law to be argued and must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. The summary judgment standard provided for in this rule 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).

Rule 1.510(b) and (c), *Florida Rules of Civil Procedure* (2021)

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules "designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (quoting *Fed.R.Civ.P.* 1). "At the summary judgment stage, facts must be viewed in the light most favorable to the non-moving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a] (citing Fed.R.Civ.P. 56(c)). When faced with a properly supported motion for summary judgment, the non-moving party "must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.,* 131 F.3d 995, 999 (11th Cir.. 1997). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248. "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. "In essence, 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." *Anderson* at 243. Summary judgment may be granted if no "reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

II. Undisputed Facts.

Plaintiff, Florida Wellness Center, Inc., as assignee of Luis Orta, filed a complaint seeking declaratory judgment determining that Defendant, Progressive American Insurance Company, failed to timely investigate and process Plaintiff's medical bills, submitted on behalf of Plaintiff's assignor, Luis Orta (the "Claimant"), pursuant to Fla. Stat. §627.736(4)(i). Plaintiff's complaint seeks a declaration of PIP coverage. On April 6, 2020, Claimant was involved in a motor vehicle accident. Thereafter, Claimant made a claim for PIP benefits under a policy of insurance issued by Progressive. This policy was in full force and effect on the date of the alleged accident. On May 1, 2020, Progressive received the first billing for medical treatment/services rendered to the Claimant in this claim. On May 5, 2020, consistent with the notice provisions contained in the Policy, Progressive notified Claimant in writing, through his attorney, that Progressive had reasonable belief that a potential fraudulent insurance act

may have been committed. As a result of Progressive's notification to Claimant, Progressive was permitted an additional sixty (60) days to investigate the claim and make a coverage determination pursuant to Fla. Stat. §627.736(4)(i). During the investigation period, Progressive was unable to obtain an Examination Under Oath of the Claimant; nevertheless, the decision was made to extend PIP coverage to the Claimant and PIP benefits payments began to be issued on July 30, 2020, within ninety (90) days of Progressive's receipt of the first bills seeking PIP benefits. Progressive continued to issue payments for benefits as such claims were determined to be compensable. Progressive paid out the statutory/policy limit for PIP benefits for the insured's expenses pertaining to the accident, thus exhausting the available benefits.

III. Analysis.

Plaintiff's declaratory judgment complaint requests this Court to determine whether: (a) Progressive failed to timely investigate and process Plaintiff's medical bills pursuant to Fla. Stat. §627.736(4)(i); (b) Progressive has a duty to pay attorney's fees and costs pursuant to Fla. Stat. §627.428 and §57.041; and (c) Plaintiff is entitled to such other and further relief as the Court deems necessary and appropriate.

The facts presented to the Court show that Defendant paid out its contractual limits on behalf of the insured/Claimant for those charges determined to be compensable. The Plaintiff as assignee stands in the shoes of the insured/Claimant and has only the same rights and benefits as the insured/Claimant, and thus is subject to the policy limits. In this instance, the contract provides for up to $2,500 in medical benefits coverage for non-emergency medical conditions and up to $10,000 in the case of an emergency medical condition. As the full amount of benefits have been paid to policy limits, Plaintiff has no damages and/or recourse to seek from the Defendant at this time.

Based on the pleadings, exhibits, affidavits, depositions and legal arguments presented, the Court finds:

1. Plaintiff's complaint was unripe when filed because the complaint was filed on July 14, 2020 within ninety days of Progressive's receipt of the first bills seeking PIP benefits (May 1, 2020).

2. Plaintiff's complaint is now moot, because Defendant extended PIP coverage to the Claimant and PIP payments began to be issued on July 30, 2020, within ninety days of Defendant's receipt of the first bills seeking PIP benefits.

3. Plaintiff's complaint for declaratory judgment fails to demonstrate that there is a bona fide, actual present practical need for a declaration, because coverage has been extended and Defendant has properly exhausted benefits by making payment up to the policy limit. Payment was made only for timely received bills and was made in the order in which those bills were determined to be compensable. Thus, no further monies are owed by Defendant to Plaintiff.

4. There are no genuine issues of material fact in dispute; thus Defendant is entitled to Final Summary Judgment in its favor as a matter of law.

Accordingly, it is ORDERED AND ADJUDGED:

i) Defendant's Motion For Summary Judgment is GRANTED in favor of Defendant and against Plaintiff.

ii)The clerk is directed to CLOSE this case.

* * *

Insurance—Automobile—Appraisal—Plaintiff that refused to participate in appraisal process mandated by policy failed to fulfill condition precedent to suit—Case dismissed without prejudice

UNIVERSAL CALIBRATION AND DIAGNOSTICS LLC; Derek Laudano, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-009477, Division M. June 15, 2022. Lisa Allen, Judge. Counsel: Jack William Vasilaros, United Law Group PA, Largo, for Plaintiff. Kelsey Hayden, Goldstein Law Group, Plantation, for Defendant.

Order Granting Motion to Dismiss and Compelling Appraisal

This matter comes before the Court upon Defendant's Motion to Dismiss Complaint, or in the alternative, Motion to Compel Appraisal, Defendant's Notice of Filing Certification of Business Records and Plaintiff's Response in Opposition to Motion to Dismiss and Compel Appraisal. Upon review of the pleadings, considering arguments of counsel and being otherwise fully advised in the premises, the Court finds that Defendant's motion should be granted.

Defendant argues that Plaintiff failed to fulfill a condition precedent to bringing the instant lawsuit by failing to participate in an appraisal as expressly required by the Policy. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America*, 704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), citing *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also Foster v. Jones*, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977).

In Florida, a challenge of coverage is exclusively a judicial question. *See Cincinnati Ins.* at 143; *see also Midwest Mut. Ins. Co. v. Santiesteban*, 287 So.2d 665, 667 (Fla. 1973). "However, 'when the insurer admits that there *is* a covered loss,' any dispute on the amount of loss suffered is appropriate for appraisal." *Id.*, citing *Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a]. In *Cincinnati Ins.*, the Second DCA explains:

> Notably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the *extent* of covered damage and the *amount* to be paid for repairs. *Id.* Thus, the question of what repairs are needed to restore a piece of covered property is a question relating to the amount of "loss" and not coverage. Ipso facto, the scope of damage to a property would necessarily dictate the amount and type of repairs needed to return the property to its original state, and an estimate on the value to be paid for those repairs would depend on the repair methods to be utilized. The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any *coverage* question. Because there is no dispute between the parties that the cause of the damage to Cannon Ranch's property is covered under the insurance policy, the remaining dispute concerning the scope of the necessary repairs is not exclusively a judicial decision. Instead, this dispute falls squarely within the scope of the appraisal process—a function of the insurance policy and not the judicial system. Therefore, Cincinnati Insurance acted within its rights when it demanded an appraisal, and the trial court erred in denying the motion on this basis.

Cincinnati Ins. at 143.

Likewise, in this case, it is clear that the issue in dispute is one of the amount of loss and not one of coverage. Defendant admits that there is a covered loss, thus any dispute on the amount of loss suffered is appropriate for appraisal. Defendant has made timely demand for appraisal and has not acted inconsistently with that right at any point relevant hereto. Pursuant to the Policy, upon demand by either party, the other party must participate in the appraisal process prior to filing a lawsuit. Since Plaintiff has refused or failed to participate in the appraisal process, Plaintiff has knowingly and willfully failed to fulfill a condition precedent to filing this action. The Policy provides express language dictating the appropriate appraisal process that should occur in the event one of the parties demands an appraisal. Plaintiff must fully comply with all the terms of the Policy before Plaintiff may sue Defendant for any matter related to the Policy. Thus, the amount of

loss suffered should be determined by appraisal. Accordingly, this matter is not ripe for adjudication until both parties have complied with the appraisal process outlined in the Policy; therefore, this case should be dismissed without prejudice.[1]

For the reasons stated above, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Complaint, or in the alternative, Motion to Compel Appraisal is GRANTED.

2. This case is DISMISSED without prejudice.

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[1] Several trial courts have been reversed for denying motions to dismiss and/or motions to compel appraisals premised on an insured's failure to comply with the appraisal clause of an insurance policy; their respective appellate courts found that participation in the appraisal process was a condition precedent to bringing a lawsuit. *See e.g. United Community Insurance Company v. Lewis*, 642 So.2d 59 (Fla. 3d DCA 1994), *Utah Home Fire Insurance Co. v. Perez*, 644 So.2d 1040 (Fla. 3d DCA 1994), *State Farm Florida Insurance Company v. Unlimited Restoration Specialist, Inc.*, 84 So.3d 390 (Fla. 5th DCA 2010) [37 Fla. L. Weekly D712b], *Progressive American Insurance Company v. Glassmetics, LLC*, [47 Fla. L. Weekly D1106b], 2022 WL 1592154 (Fla. 2d DCA May 20, 2022) and [*Insurance Company v. At Home Auto Glass, LLC*, 2022 WL 1434266 (Fla. 2d DCA May 6, 2022) [47 Fla. L. Weekly D1020a].

* * *

Insurance—Discovery—Order compelling defendant to comply with discovery, issued under administrative rule allowing entry of order compelling discovery without hearing if motion alleges that non-movant has not filed response or objection to discovery, is set aside—Motion for protective order constituted response to discovery

ABSOLUTE WELLNESS CENTER, L.L.C., as assignee of Autumn Landis, Plaintiff, v. STANDARD FIRE INSURANCE CO., a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 21-CC-121132, Division H. April 28, 2022. James Giardina, Judge. Counsel: Kendra A. Washington, FL Legal Group, Tampa, for Plaintiff. L. Allen Gaffney, Tampa, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO SET ASIDE DEFENDANT'S ADMINISTRATIVE ORDER DUE TO FRAUDULENT ASSERTIONS

THESE MATTERS, having come before this Honorable Court on the morning of April 11, 2022, present for Plaintiff, Kendra A. Washington, Esquire, and for Defendant, L. Allen Gaffney, Esquire, and the Court being apprised of applicable case law, argument of counsel, and statute, hereby finds:

1. Under Administrative Order S-2022-003(15), a party may move for the court to enter an order compelling compliance with discovery without a hearing, as long as it complies with Florida Rule of Civil Procedure 1.380(2). The motion must allege the absence of a response or objection to discovery, and no request for an extension of time to respond, and no written showing of good cause filed by the non-moving party.

2. The Defendant moved to compel discovery without a hearing, and an order compelling discovery was entered against the Plaintiff; Plaintiff in turn filed a motion for protective order/motion to stay defendant's discovery request until the pleadings are framed.

3. Thus the issue before the court was whether the Plaintiff's Motion for protective order/motion to stay Defendant's discovery request until the pleadings are framed that specifically referenced Defendant's discovery requests constituted a "response" as contemplated by Administrative Order S-2022-003(15).

4. Plaintiff's motion was filed after Defendant sought discovery, and specifically referenced the discovery the Defendant sought to compel and Defendant had filed no Answer or Affirmative Defense.

5. This Court finds that Plaintiff's motion for protection constituted a response contemplated by Administrative Order S-2022-003(15).

6. The court finds there was a good faith dispute as to the interpretation of the local administrative rule, and therefore declines to find the Defendant acted fraudulently.

It is therefore **ORDERED** and **ADJUDGED** Plaintiff's Motion to Set Aside Defendant's Administrative Order is hereby **GRANTED**.

* * *

Insurance—Personal injury protection—Limitation of actions—Motion to dismiss based on expiration of statute of limitations is denied where granting motion would require consideration of allegations outside of four corners of complaint

ACCESS HEALTH CARE PHYSICIANS, LLC, a/a/o Beth Rule, Plaintiff, v. ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 20-CC-029824, Division H. April 9, 2022. James Giardina, Judge. Counsel: Kendra A. Washington, Tampa, for Plaintiff. Amanda Lee Peterson, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S RENEWED OBJECTION AND MOTION FOR PROTECTIVE ORDER AS TO PLAINTIFF'S DISCOVERY REQUESTS, INCLUDING DEPOSITIONS

THESE MATTERS, having come before this Honorable Court on the morning of March 24, 2022, present for Plaintiff, Kendra A. Washington, Esquire, and for Defendant, Amanda Lee-Peterson, Esquire, and the Court being apprised of applicable case law, argument of counsel, and statute, hereby finds as follows:

1. When ruling on a procedural motion to dismiss, consideration of the motion is limited to the four corners of the complaint. *Brooke v Shumaker Loop & Kendrick LLP* 828 So2d 1078 (Fla. 2nd DCA 2002) [27 Fla. L. Weekly D2323d].

2. The statute of limitations is generally raised only as an affirmative defense. *Fla. R. Civ. Proc. 1.110(d) and 1.140(b).*

3. The complaint in this case did not specify the dates of service at issue.

4. The Defendant moved to dismiss the case based on the dates of service referenced in the demand letter served on behalf of the Plaintiff prior to the filing of the complaint.

5. The demand letter was not attached to the complaint.

6. The Defendant asserts that the dates of service alleged in the demand letter, but that are not attached to the complaint, require the Court to find the statute of limitations had expired.

7. Since the Court is limited to the four corners of the complaint, and can only consider that which is contained therein, the court must consider only the date of loss indicated in the complaint and the subsequent assertions of the breach alleged contained within the complaint.

8. A motion to dismiss a complaint based on the expiration of the statute of limitations can be granted in extraordinary circumstances, where the facts pled in the complaint conclusively establish that the statute of limitations bars the action as a matter of law. *See Wishnatzki v. Coffman Construction, Inc.* 884 So.2d 282 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D1867a].

9. This is not the case in the present matter; the Court would be required to consider allegations outside of the four corners of the complaint in order to conclude the statute of limitations had truly expired.

10. The Plaintiff did not, by way of the complaint in this matter, make an assertion as to the date the alleged breach occurred.

11. Thus, it cannot be concluded based on the four corners of the complaint that the statute of limitations in this matter had expired by the time the complaint was filed.

12. As such, Defendant's procedural motion to dismiss is the improper vehicle to raise statute of limitations.

It is therefore hereby **ORDERED** and **ADJUDGED**:

1. Defendant's *Motion to Dismiss* is **DENIED**.

2. Defendant's *Renewed Objection and Motion for Protective Order as to Plaintiff's Discovery Requests, including Depositions* is **DENIED** as moot.

* * *

Insurance—Personal injury protection—Demand letter—Motion for protective order postponing depositions until after hearing on motion for summary judgment on insurer's demand letter defense is granted where there are no disputed factual issues regarding defense—Provider is precluded from raising argument that it was entitled to conduct deposition on issue of whether insurer's actions waived demand letter defense where provider failed to file reply to the defense

HESS SPINAL & MEDICAL CENTERS OF RUSKIN, LLC, a/a/o Darrell Simmons, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-100614, Division K. June 30, 2022. Jessica G. Costello, 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 PROTECTIVE ORDER

THIS CAUSE, having come on to be heard on May 24, 2022 upon Defendant's Motion for Protective Order, filed on March 08, 2022, and the Court, having reviewed the Court file, the Motion, heard argument of the parties, and being otherwise advised in the premises, finds as follows:

1. This is an action for PIP benefits under Florida Statute § 627.736. Defendant has denied the material allegations in Plaintiff's Complaint and has asserted an affirmative defense alleging that Plaintiff's purported pre-suit demand letter fails to comply with the specificity requirements of § 627.736(10), Florida Statutes. No reply to this affirmative defense has been filed by the Plaintiff.

2. The Defendant has filed a Motion for Summary Judgment, in which the sole issue to be resolved in Defendant's is whether the Plaintiff's pre-suit demand letter complies with the requirements of Florida Statute § 627.736(10). Via the instant motion, the Defendant has moved for a protective order requesting that all depositions of any fact witness in this matter be postponed until after a hearing on this Motion for Summary Judgment.

3. Although, in general, parties are entitled to obtain discovery regarding any non-privileged matter so long as it is relevant, discovery is unnecessary when the basic facts are not at issue and the disputed matter involves a purely legal question to be determined by the Court. *Riverview Family Chiro. Ctr. a/a/o Sherri Chapman v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir., Hillsborough Cty. Ct., Nov. 3, 2014) *(citing Hurley v. Werly,* 203 So. 2d 530 (Fla. 2d DCA 1967) (holding that a party should not be involuntarily deposed when a "dispute involves an essentially legal question and where the basic facts are not at issue.")).

4. The Defendant argues—and this Court agrees—that the issue of whether the purported pre-suit demand letter sent by the Plaintiff in this matter strictly complies with the requirements of Florida Statute § 627.736 is a purely legal issue. *See W. Coast Chiro. & Med. Ctr. a/a/o Jorge Torres v. MGA Ins. Co.,* 19 Fla. L. Weekly Supp. 941a (Fla. 13th Jud. Cir., Hillsborough Cty. Ct., April 26, 2012) *(citing Chambers Med. Grp., Inc. a/a/o Marie St. Hillare v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 207a (Fla. 13th Jud. Cir. (App.), Dec. 1, 2006)) (holding that the determination of whether the Plaintiff complied with the pre-suit demand requirements outlined in Florida Statute § 627.736(10) is purely a question of law).

5. This legal issue does not require deposition testimony of Defendant's Representative because the basic facts surrounding the issue are not in dispute. The Plaintiff argues that it is entitled to conduct the deposition of Defendant's affiant prior to a hearing on Defendant's Motion for Summary Judgment. However, the basic facts presented in Defendant's affidavit, which merely serves to authenticate Plaintiff's purported pre-suit demand letter, are not in dispute. There has been no evidence or argument that the purported pre-suit demand letter attached to this affidavit is not a true and correct copy of the Plaintiff's purported pre-suit demand letter. *See Millenia Chiro., LLC a/a/o Sergio Ojeda v. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 73a (Fla. 9th Jud. Cir., Orange Cty. Ct., March 08, 2017).

6. The Plaintiff further argues that it should be entitled to the to conduct the deposition of Defendant's affiant prior to a hearing on Defendant's Motion for Summary Judgment pertaining to the issue of whether the Defendant's pre-suit actions waived its affirmative defense pertaining to the failure of the Plaintiff's purported pre-suit demand letter to comply with the specificity requirements of § 627.736(10), Florida Statutes.

7. However, the Court finds this argument to be unavailing. As a matter of law, waiver is an affirmative defense that must be pleaded. *Derouin v. Universal Am. Mortgage Co., Ltd.,* 254 So. 3d 595, 600-01 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1939a]. "If an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance." Fla. R. Civ. P. 1.110(a); *Fred R. Leslie D.O., P.L. a/a/o Carol Axe v. GEICO Gen. Ins. Co.,* 28 Fla. L. Weekly Supp. 84a (Fla. 13th Jud. Cir., Hillsborough Cty. Ct., March 27, 2020). In the instant case, Plaintiff has filed no reply to Defendant's affirmative defenses and therefore is precluded from raising the waiver argument.

8. Waiver is "the intentional relinquishment of a known right." *Bueno v. Workman,* 20 So. 3d 993, 998 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2227a]. In the instant case, there is no record evidence to support Plaintiff's contention that this issue warrants a deposition of the Defendant's representative, as the Defendant pled the invalidity of the pre-suit demand letter as an affirmative defense and the issue was raised in subsequent motions. *See Waters Med. Rehab, Inc. a/a/o Hernandez, Gabriella v. State Farm Fire and Cas. Co.,* 27 Fla. L. Weekly Supp. 309a (Fla. 13th Jud. Cir., Hillsborough Cty. Ct., Dec. 17, 2018).

9. Because the resolution of the issue presented in the Defendant's Motion for Summary Judgment is strictly a question of law to be resolved by this Court based exclusively on the face of the demand letter and the applicable law, any information or opinions possessed by the representative that the Plaintiff seeks to depose is completely irrelevant to this Court's determination of whether the Plaintiff complied with the conditions precedent to bring this lawsuit.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Protective Order is **GRANTED.**

2. All depositions in this matter shall be postponed until after the hearing on Defendant's Amended First Motion for Summary Judgment.

* * *

Insurance—Automobile—Windshield repair— Discovery— Depositions—Where insurer denied claim on ground that insured failed to notify insurer of loss and cooperate with investigation of claim, deposition questions regarding identity of adjusters who handled claim, whether insurer receives invoices via fax, and whether there are audio recordings of phone calls received from insured, her daughter, or repair shop are relevant—Information sought is not trade secret, proprietary, or privileged—Motion to compel is granted

HILLSBOROUGH INSURANCE RECOVERY CENTER, LLC, a/a/o Kenneth Jenkins, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-050841, Division K. May 24, 2022. Jessica G. Costello, Judge. Counsel: Kevin W. Richardson, Emilio R. Stillo, and Andrew B. Davis-Henrichs, Stillo & Richardson, PA, for Plaintiff. Angela M. Greenwalt and Milliany Vasquez, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO OVERRULE PRIVILEGE OBJECTIONS AND COMPEL ANSWERS TO DEPOSITION QUESTIONS AND FOR SANCTIONS

THIS CAUSE came before the Court May 10, 2022 on Plaintiff's Motion to Overrule Privilege Objections and to Compel Answers to Deposition Questions against the Defendant and the Court having heard arguments of counsel; reviewed the relevant pleadings and legal authorities; and being otherwise advised in the premises, the court finds as follows:

Background

This matter involves a policy of automobile insurance that was issued by Defendant in favor of the insured. The automobile policy issued expressly provides coverage for physical damage to the windshield of the insured. The Insured vehicle suffered a loss to its windshield on or about October 25, 2016. Pursuant to the policy, the insured contracted with NTK Auto Glass Service, Inc d/b/a Gulf Coast Auto Glass Service (hereinafter referred to as the "Shop"), to repair damage to the windshield.

The Shop confirmed coverage for the loss, performed the required work for the insured, and invoiced Defendant on October 28, 2016. Defendant did not make payment within a reasonable amount of time. The Shop subsequently assigned the claim to Plaintiff Hillsborough Insurance Recovery Center, LLC and Plaintiff filed a complaint for Breach of Contract on or about September 19, 2018.

This is a small claims case which did not require an answer and affirmative defenses.

The Defendant has filed its Motion for Summary Dispostion alleging the following issues:

1. The payment was not due because there is no time requirement to pay for services rendered while Defendant is investigating the claim.

2. Plaintiff is in material breach of the contract for failure to give prompt notice of the loss and/or cooperate which prejudiced the Defendant in its ability to investigate or inspect the loss.

In Support of Defendant's Motion for Summary Dispostion, Defendant filed an affidavit signed by Susana Eberling wherein Ms. Eberling attests that the insured failed to notify GEICO of the subject loss and failed to cooperate with GEICO's investigation of the alleged loss which Defendant purports is a violation of the policy. Ms. Eberling further attests that her statements are based on her personal knowledge of the information involved with the claim and her review of business records maintained by GEICO which are relevant to the file which include but not limited to: the insurance policy, invoice, claims file and coorespondence.

Subsequent to the filing of the Susana Eberling's affidavit, the deposition of Susana Eberling in her capacity as GEICO's corporate representative, was taken on August 18, 2021. During the deposition, defense counsel objected and instructed Ms. Eberling to not answer questions inquiring about any information regarding the claim investigation process, in particular, information regarding the identity of GEICO's employees whom were involved in adjusting and/or handling Plaintiff's loss, whether these individuals were licensed adjusters, whether GEICO receives invoices by facsimile and whether there was any available audio recording of the phone calls received from the insured, the insured's daughter or NTK (the Shop). Defense counsel asserted that the questions sought to disclose confidential business practices, trade secrets and infringed on its claims file privilege.

In particular, the transcript memorializes the following exchange:

15 Q Okay, great. No. 57 states, "The audio recording
16 of the phone call between the insured's daughter and Geico
17 as referenced in Paragraph 8 of Susanna Eberling's
18 affidavit," correct?
19 A That's what the deposition notice says,
20 Mr. Stillo.
21 Q Who did you ask for, to see if that audio
22 recording existed?
23 A I did not ask anyone about a recording. There
24 are no recordings attached to the claim file, and Paragraph
25 8 of the affidavit does not reference a recorded telephone
1 call.
2 Q Your testimony just now was that you don't know
3 where the recordings are maintained, correct?
4 A It is correct that if a recording were made, I do
5 not know where they would be kept because those are
6 recorded for quality purposes only.
7 Q So just because a recording is not attached to
8 the claims file, doesn't mean it doesn't exist, correct?
9 A Mr. Stillo, I don't know what that one exists at
10 all.

Eberling Deposition at Pages 7-8, Lines 15-25, 1-10

8 Q Let's go on to Paragraph 58. "All audio
9 recordings of any conversation between the insured, the
10 insured's daughter, and Geico as it relates to this claim."
11 Did you bring any with you?
12 A I have no recording, Mr. Stillo. As I said
13 before, there are no recordings attached to the claim file,
14 no indication that there was any recordings made.
15 CQ2 Can you state under oath that Geico has no audio
16 recording as set out in 58 in it's possession?
17 MR. NALL: I'll make the same objection;
18 confidential business practices and instruct the
19 witness not the answer.

Eberling Deposition at Page 10, Lines 8-19

10 Q Can you state under oath that Geico has no
11 recording as it relates to this claim between NKT and
12 Geico?
13 MR. NALL: I'll make on objection to confidential
14 business practices and instruct the witness not to
15 answer.
16 MR. STILLO: We'll certify 58 and 59 as well.
17 BY MR. STILLO:
18 Q How long was the call between Sierra Jenkins and
19 —actually, who did she speak with at Geico?
20 A I don't recall the name of the person she spoke
21 with.
22 Q As we sit here today, you don't know what number
23 was called and you don't know who Ms. Jenkins spoke with?
24 MR. NALL: I apologize. I'll object to any names
25 of those involved on the Geico side as to claims file

Eberling Deposition at Page 11, Lines 10-25

1 privilege and instruct the witness not to answer those
2 questions.
3 MR. STILLO: So just so I understand Geico—
4 you're not—Geico is not going to testify as to who
5 Ms. Jenkins spoke with?
6 MR. NALL: That's correct.
7 BY MR. STILLO:
8 Q Who was the first adjuster assigned to this
9 claim?
10 MR. NALL: Same objection as to claims file
11 privilege, and I'll instruct the witness not to answer.

Eberling Deposition at Page 12, Lines 1-11

Q Did the individual at Geico who was—who adjusted this claim—is that individual a licensed adjuster?
MR. NALL: I'm going to object to confidential business practices, trade secrets, and instruct the witness not to answer.
BY MR. STILLO:
Q Does Geico utilize licensed adjusters to handle their glass claims?
MR. NALL: I'm going to respond with the same objection and instruct the witness not to answer.

Eberling Deposition at Pages 16-17, Lines 21-25, 1-6

Q4 Have there ever been cases where Geico has failed to make payment or Geico has not put the invoice that was initially received in the correct claim file?
MR. NALL: I'll object to claims file privilege and instruct the witness not the answer.
MR. STILLO: We're going to certify that. So you believe it's a privilege—just so I understand your objection, counsel. You believe that if Geico misfiles something that—in the past, and without identifying the specific case names that have been filed—but the fact that Geico misfiles things is covered by the privilege? The act of misfiling things is privileged?
MR. NALL: I'll object to question, and I'll—
MR. STILLO: I just want to understand your objection, counsel, because I haven't heard the fact that an insurance puts things in the wrong file is somehow privileged. I just I want to understand that that's your objection.
MR. NALL: It is

Eberling Deposition at Pages 19-20, Lines 7-25, 1

Q What number did Geico attempt to call, ma'am?
I don't know the specific number. It would be the number we have on file for him.
Q Who made the call?
MR. NALL: I'll object to that; claim file privilege, confidential business practices, and instruct the witness not the answer.

Eberling Deposition at Page 28, Lines 3-9

Q Who did you ask if you wanted to see where Geico stored those calls?
MR. NALL: I'm going to object to confidential business practices and instruct the witness not to answer.

Eberling Deposition at Page 33, 8-12

Q Let me ask you, who's the person with knowledge that input information regarding the call with Sierra Jenkins back on October 26th, 2016?
MR. NALL: Going to object to any names as to confidential business practices, claim file privilege and instruct the witness not to answer.

Eberling Deposition at Pages 34-35, Lines 23-25, 1-4

Conclusions of Law

The scope of discovery in Florida is broad, and parties are permitted to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action." Fla. R. Civ. P. 1.280(b)(1). "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b)(1). "Pre-trial discovery [in civil litigation] was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial." *Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462, 466 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D312b] (emphasis and alteration in original) (quoting *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996) [21 Fla. L. Weekly S159a]).

"A primary purpose of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics." *Northup v. Acken*, 865 So.2d 1267 (Fla. 2004) [29 Fla. L. Weekly S144a]. Accordingly, Fla. R. Civ. P. Rule 1.310(a) allows a party to take the deposition of any person including the other party in order to allow the party to prepare its case for trial. Further, Fla. R. Civ. P. Rule 1.280(b)(1) provides:

> 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.
> Emphasis added.

The first question for this court is to determine whether the information sought is 'relevant to the subject matter of the pending action.' Relevant evidence is evidence tending to prove or disprove a material fact. Fla. Stat. § 90.401. Further, evidence pertaining to either proof or the defense of an action is relevant. *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957). As noted above, Defendant purports to have denied Plaintiff's claim based on the insured's failure to notify GEICO and to cooperate with GEICO's investigation of the alleged loss. Obviously, these individuals inquired about have personal knowledge of facts regarding whether the insured failed to cooperate with GEICO and what and how the lack of information, if any, prejudiced GEICO in its investigation. Defendant's investigation of the claim, in particular, whether these individuals were licensed adjusters, whether GEICO receives invoices by facsimile and whether there was any available audio recording of the phone calls received from the insured, the insured's daughter or NTK (the Shop) are relevant to this breach of contract action and the defenses of lack of notice of claim and lack of cooperation, as it would tend to prove whether Defendant complied with its contractual obligations and is otherwise discoverable.

The second question for this court to determine is whether the information sought constituted a trade secret or proprietary information. When a party seeks protection against disclosure of a trade secret or proprietary information, the court must first determine whether the disputed information is in fact trade secret or proprietary. *Summitbridge Nat'l Invs. LLC v. 1221 Palm Harbor*, L.L.C., 67 So. 3d 448, 449 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1888b].

The Florida Legislature has adopted the Uniform Trade Secrets Act and has defined a trade secret as follows:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 688.002(4), Fla. Stat. (2018) (emphases added).

This court finds that information regarding to the identity of GEICO's employees whom were involved in adjusting and/or handling Plaintiff's loss, whether these individuals were licensed adjusters, whether GEICO receives invoices by facsimile and whether there was any available audio recording of the phone calls received from the insured, the insured's daughter or NTK (the Shop) does not meet the definition of 'trade secret.' Furthermore, Defendant did not sufficently argue nor present any evidence to support a finding that the information sought should be considered trade secret, proprietary or privelaged.

It is hereupon, ORDERED AND ADJUDGED that Plaintiff's Motion is hereby GRANTED as follows:

1. Defendant's objections as to confidential business practices, trade secrets and claims file privilege are overruled;

2. Susan Eberling shall appear for a subsequent deposition at Defendant's expense and answer all questions overruled by this court's order. The deposition shall be set to place within sixty days (60) from the date of entry of this order;

3.Defendant shall produce any audio recordings related to the subject claim prior to the taking of Ms. Eberling's deposition;

4. This court further finds Plaintiff's entitlement to attorney's fees and costs in bringing this Motion, amount to be determined at evidentiary hearing.

* * *

Insurance—Discovery

ATHANS CHIROPRACTIC, INC., a/a/o Micaela Falabella, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 20-CC-066217, Division H. May 6, 2021. James Moody, Judge. Counsel: Phillip A. Friedman, FL Legal Group, Tampa, for Plaintiff. Marsha M. Moses, Kubicki Draper, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY AND DEFENDANT'S SECOND AMENDED MOTION FOR PROTECTIVE ORDER AS TO THE DEPOSITION

THESE MATTERS, having come before this Honorable Court on the morning of May 4, 2021 and the Court being apprised of applicable case law, argument of counsel, and statute, hereby **ORDERS AND ADJUDICATES** as follows:

1. Defendant's Motion for Protective order regarding discovery and Defendant's second amended Motion for Protective order as to the deposition is hereby **DENIED.**

2. Plaintiff shall file an Amended Notice of Taking Deposition Duces Tecum to include areas of inquiry regarding FL Legal Group's alleged lien.

3. Defendant shall provide responses to Plaintiff's Discovery propounded on May 3, 2021, within 30 days of this order.

4. The Deposition of the Defendant's Corporate Representative will go forward on May 12, 2021 at 10:00 AM.

* * *

Insurance—Personal injury protection—Coverage—Insurer was required to reimburse for injection provided at urgent care center at 80% of allowance under workers' compensation fee schedule, not at 200% of Medicare Part B drug average sales price

MD NOW MEDICAL CENTERS, INC., d/b/a MD NOW (Patient: Sherry Sidler), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502017SC010477XXXXSBRD. January 13, 2022. Reginald R. Corlew, Judge. Counsel: Chad L. Christensen, GED Lawyers, LLP, Boca Raton, for Plaintiff. William Gutek, Bronstein & Carmona, PA, Ft. Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

This cause came before the Court, on January 6, 2022, on Plaintiff's Motion for Final Summary Judgment and Defendant's Cross Motion for Summary Judgment, and the Court having reviewed the Motions, the legal authority, having reviewed the matters filed of record, having heard argument of counsel, and having been sufficiently advised in the premises, the Court finds as follows:

The sole issue before this Court is whether State Farm paid CPT Code J1885 (Toradol/Ketorolac injection) in accordance with the "schedule of maximum charges" referenced in F.S. 627.736.

Findings of Fact

1. Plaintiff filed the instant action alleging breach of contract for failure to pay personal injury protection benefits.

2. Plaintiff is an urgent care center that provided treatment to the patient on 8/6/15 and billed CPT code J1885. Defendant allowed $.98 based upon 200% of the Medicare Part B Drug Average Sales Price (ASP).

3. CPT code J1885 is reimbursable under the Florida Workers Compensation fee schedule in the amount of $7.00 at the time services were rendered.

4. CPT Code J1885 is not priced under the participating physician fee schedule of Medicare Part B.

5. Plaintiff contends that State Farm was required to reimburse CPT Code J1885 pursuant to the Florida Workers Compensation fee schedule.

6. State Farm contends that payment was proper because it utilized a payment methodology under Medicare.

Conclusions of Law

This issue in this case involves the interpretation of F.S. 627.736(5)(a)1.f. "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Sunrise Chiropractic and Rehabilitation Center, Inc. v. Security National Insurance Company,* 2021 WL 1991674 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a]; *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984).

The pertinent language of F.S. 627.736 is as follows:

F.S. 627.736(5)(a)1 states:

The insurer may limit reimbursement to 80 percent of the following "schedule of maximum charges":

f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:

(I)The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).

(II)Medicare Part B, in the case of services, supplies, and care provided by

ambulatory surgical centers and clinical laboratories.

(III)The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.

However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is

not required to be reimbursed by the insurer.

Further, State Farm's insurance policy at p. 16 states:

> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, ***then we will*** limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13, Florida Statutes, and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. . .

There is a straightforward two-step analysis to determine which specific fee schedule under the "schedule of maximum charges" is to be utilized for the injection billed by Plaintiff in this case.

Step 1- Determine which sub-subparagraph the medical service falls under within the "schedule of maximum charges" referenced in F.S. 627.736;

Step 2- Determine whether the medical service, supply, or care billed by plaintiff is reimbursable under sub-sub-subparagraphs (I), (II), or (III);

If the medical service, supply or care billed:

a) is not covered under the participating physician fee schedule of Medicare Part B;

b) is not provided by a clinical laboratory or an ambulatory surgical center; and

c) is not under the DME fee schedule,

then the insurer is required to limit reimbursement to 80% of the maximum reimbursement allowance under the Florida's workers compensation fee schedule.

In this case, there is no dispute that the CPT Code J1885 falls within 627.736(5)(a)1.f. as it is "all other medical services, supplies, and care. Under sub-subparagraph "f", sub-sub-subparagraphs (I), (II), (III) do not apply to CPT Code J1885.

First, sub-sub-subparagraph (I) does not apply as CPT code J1885 is not reimbursable under participating physicians fee schedule of Medicare Part B. The Medicare Part B Drug Average Sales Price (ASP) is separate and distinct from the participating physician fee schedule of Medicare Part B. There is a different federal statute that establishes the participating physician fee schedule of Medicare Part B and different formula for calculating reimbursement under the participating physician fee schedule compared to the Medicare Drug ASP. T he federal statute establishing the participating physicians schedule is *42 U.S.C. § 1395w-4.* Subsection (b)(1) of that statute instructs the Secretary of the Department of Health and Human Services to establish the fee schedule based on a variety of factors. *42 U.S.C. § 1395w(b)(1).*

The reimbursement value for services under the participating physicians fee schedule of Medicare Part B is calculated by:

> multiplying (1) the relative value of a service; (2) the conversion factor for the particular year; and (3) the geographic adjustment factor applicable to the locality in which the service was provided. *See* 42 U.S.C. § 1395w-4(b) (1). Therefore, using simple arithmetic (addition and multiplication), the reimbursement value for any service, in any part of the United States, for any given year can be easily ascertained by the Defendant using the Medicare Part B Physicians Fee Schedule. The tables of values for the cost factors are published each year in the annual Medicare Physicians Fee Schedule Final Rule and are readily available and easily accessible on the Centers for Medicare and Medicaid ("CMS") website.

See, *Sunrise chiropractic and Rehabilitation Center, Inc. v. Security National Insurance Company,* 2021 WL 1991674 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a]

By contrast, Section 303(c) of the Medicare Modernization Act of 2003 (MMA) amended Title XVIII of the act by adding 1847A, which established the new average sales price drug payment system. Beginning January 1, 2005, drugs not paid on a cost or prospective payment basis will be paid based on the ASP methodology, and payment is 106 percent of ASP. The ASP is calculated by quarterly drug pricing data submitted to CMS by drug manufacturers. See 42 USCA 1395w-3a. Further, the table for the payment allowance limits states:

> The absence or presence of a HCPCS code and the payment allowable limits in this table does not indicate Medicare coverage of the drug. Similarly, the inclusion of a payment allowance limit within a specific column does not indicate Medicare coverage of the drug in that specific category. These determinations shall be made by the local Medicare contractor processing the claim.

The participating physician fee schedule of Medicare Part B is independent from the Medicare Part B Drug ASP and is not a permitted Medicare payment methodology under F.S. 627.736. Accordingly, State Farm's payment for CPT Code J1885 was improper. Next, Sub-sub-subparagraph (II) does not apply as Plaintiff is neither a clinical laboratory or ambulatory surgical center. Sub-sub-subparagraph (III) does not apply as CPT Code J1885 is not "durable medical equipment".

Since sub-sub-subparagraphs (I), (II), (III) are not applicable, Defendant was required pursuant to the PIP statute and the insurance policy to look to the Florida Workers Compensation Fee Schedule to calculate the correct allowable amount for CPT Code J1885. In this case, State Farm's insurance policy states in no uncertain terms that it will limit reimbursement to 80% of the maximum reimbursement allowance under workers' compensation. Defendant's use of the Medicare Part B Drug ASP is contradicted by the clear plain language of F.S. 627.736(5)(a)1.f and the insurance policy. If the legislature required or authorized payment utilizing the ASP, then it would have stated it. Courts are not at liberty "to add words that were not placed there originally." *Pleus v. Crist,* 14 So.3d 941, 945 (Fla. 2009) [34 Fla. L. Weekly S389a]. Because the Florida Workers Compensation Fee schedule is correct, the Medicare payment methodologies referenced in F.S. 627.736(5)(a)3 are not applicable.

Based upon the foregoing, Plaintiff's Motion for Final Summary Judgment is GRANTED. Defendant's Cross Motion for Summary Judgment is DENIED.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Urgent care—Code used to calculate reasonable reimbursement for service provided in urgent care center is reimbursable under PIP statute and workers' compensation reimbursement guidelines—Where billed amount of charge was less that 80% of fee schedule, insurer was required to pay either total charge submitted or 80% of fee schedule allowance

MD NOW MEDICAL CENTERS, INC., d/b/a MD NOW (Patient: Christina Tofini), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502020SC006893XXXXSBRD. March 28, 2022. Reginald R. Corlew, Judge. Counsel: Chad L. Christensen, GED Lawyers, LLP, Boca Raton, for Plaintiff. Christopher Whelton, Cole, Scott & Kissane, P.A., West Palm Beach, for Defendant.

ORDER ON PLAINTIFF'S MOTIONS FOR SUMMARY DISPOSITION AND Defendant's Motion for Final Summary Judgment

THIS CAUSE came before the Court for consideration on March 24, 2022, on Plaintiff's Motion for Summary Disposition regarding HCPCS CODE S9088, Plaintiff's Motion for Summary Disposition regarding CPT Code L3908, and Defendant's Motion for Final Summary Judgment, and the Court having reviewed the Motions, the Court file, and having heard argument of counsel, and having been sufficiently advised in the premises, the Court finds as follows:

Findings of Fact

1. On June 6, 2019, Plaintiff, MD NOW MEDICAL CENTERS,

INC. d/b/a MD NOW, rendered medical services, treatment, and care to Christina Tofini as a result of the motor vehicle accident that occurred on June 6, 2019.

2. Plaintiff, MD NOW MEDICAL CENTERS, INC. d/b/a MD NOW, timely mailed to Defendant, the bill for the above referenced date of service.

3. In response to the bill, Defendant sent Plaintiff an Explanation of Review, which shows how the bill was processed.

4. Defendant's Explanation of Review reflects a denial for HCPCS Code S9088.

5. MD Now Medical Centers provides medical care, treatment, and services to patients that are injured and have Florida Workers Compensation claims under Florida law.

6. MD Now Medical Centers bills HCPCS code S9088 to Florida Workers Compensation insurers for services, care, and treatment provided to patients.

7. MD Now Medical Centers has been paid by Florida Workers Compensation insurers for HCPCS code S9088 for the years 2018, 2019, and 2020.

8. MD Now is a licensed urgent care center and HCPCS code S9088 is a valid HCPCS Code for services provided in an urgent care center for the year in which services were rendered.

9. The use of HCPCS code S9088 has been effective since January 1, 2002 and is utilized by private payors to calculate proper reimbursement for services provided in an urgent care center. The services rendered in an urgent care have increased costs compared to traditional primary care physician office due to extended hours and treating unscheduled walk in patients.

10. HCPCS Code S9088 is a proper code to be utilized for services provided in in an urgent care center for unscheduled walk in patients. HCPCS code S9088 is billed by urgent care centers in conjunction with additional CPT codes for services and is part of the services, care and or treatment provided to the patient. HCPCS code S9088 is utilized to calculate the reasonable reimbursement for all services provided to patients in an urgent care center.

11. The insurer in this case is a private payor. Florida Workers Compensation carriers are also private payors.

Conclusions of Law

The first issue for the Court's consideration is Plaintiff's Motion for Summary Disposition regarding State Farm's denial of HCPCS Code S9088. The Court finds as follows:

12. F.S. 627.736 states in pertinent part:

> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:
>
> (I) The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).
>
> (II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
>
> (III) The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
>
> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, *the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided.* Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

13. The Florida Workers' Compensation Health Care Provider Reimbursement Manual established under F.S. 440.13 and 440.591 establishes reimbursement policies and guidelines for services and supplies provided by health care providers. See, Florida Administrative Code 69L-7.020. Pursuant to the Florida Workers Compensation Health Care Provider Reimbursement Manual, reimbursement is provided for codes that that do not have a "Maximum Reimbursement Allowance" a.k.a set fee schedule amount.

14. Specifically, p. 18 of the Florida Worker's Compensation Health Care Provider Reimbursement Manual provides as follows:

> **General Reimbursement Information, continued Codes with No MRAs**
>
> Carriers must have an established methodology for determining reimbursement for procedure codes that have no established MRAs, unlisted procedure codes, and codes that are paid By Report. Carriers must utilize the expertise of peer review physicians for concurrent review, including the appropriateness and cost of the medical services reported; billing and coding issues; and determining reimbursement.
> a) Carriers will determine reimbursement by comparing the billed procedure code(s) with clinically similar procedure code(s) found in the appropriate CPT or HCPCS Manual; and
> b) Carriers will make reimbursement decisions based on all of the provider's documentation, the carriers medical bills, relative value data, services and supplies and peer physician recommendations; and
> c) Carriers will reimburse all work-related and medically necessary services provided in a documented medical or dental emergency.

In conclusion HCPCS code S9088 is reimbursable pursuant F.S. 627.736 and the Florida Workers Compensation reimbursement guidelines for codes with no Maximum Reimbursement Allowance. HCPCS Code S9088 does not have an established MRA. As such, pursuant to the Florida Workers Compensation Health Care Provider Reimbursement Manual, HCPCS Code is required to be paid by Defendant pursuant to the reimbursement guidelines for "Codes with No MRAs". Accordingly, the Court finds that there is no triable issue and Plaintiff is entitled to Summary Disposition as a matter of law.

The next issue for the Court's consideration is Plaintiff's Motion for Summary Disposition on the statutory Billed Amount (5)(A)5. The issue before the Court is whether the Defendant is statutorily required to pay at either the amount of the charges submitted or 80% of the Schedule of Maximum Charges referenced in Fla. Stat. 627.736(5)(a)(1), when the charge submitted is less than the allowable amount as referenced in Fla. Stat. 627.736(5)(a)(1). Or, whether the insurer is permitted to pay at 80% of the lesser charge submitted?

Plaintiff does not contest that Defendant elected the fee schedule payment methodology as referenced in Fla. Stat. 627.736(5)(a)(1). Plaintiff billed Defendant for Durable Medical Equipment (DME) utilizing CPT Code L3908 in the amount of $50.00. 200% of the Medicare DME fee schedule for L3908 is $108.86, 80% of which is $87.09. Plaintiff contends that the Defendant has improperly calculated reimbursements at amount less than the allowable amount under the Schedule of Maximum Charges as referenced in Fla. Stat. 627.736(5)(a)(1). Specifically, the Plaintiff contends that the Defendant is required to tender payment for L3908 at either the submitted amount of $50.00 or $87.09 (80% of 200% of the Schedule of Maximum Charges as referenced in Fla. Stat. 627.736(5)(a)(1)). The Defendant on the other hand contends that it properly tendered payment at 80% of the submitted charge

The Florida PIP statute authorizes insurers to limit reimbursement to 80% of an amount set by a fee schedule. *Geico Indemnity Company v. Muransky*, 323 So.3d 742, 747

Fla. Stat. 627.736(5)(a)5 provides:

> An insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement. If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted."

In other words, under the PIP statute, if the billed amounts are less than 80% of the fee schedule, the insurer may pay the billed amounts in full or pay the 80% reimbursement rate of maximum charges. *Geico Indemnity Company v. Muransky*, 323 So.3d 742, 747 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a] (citing *Geico Indem. Co. v. Accident & Inj. Clinic, Inc.* (*Irizarry*), 290 So. 3d 980, 984 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b] (analyzing the PIP statute as a whole and concluding that "the amount allowed under subparagraph 1" language in subsection 5. "necessarily encompasses 80% of the applicable fee schedule option" and therefore "if the billed amount is *less than 80% of the fee schedule* (the required amount an insurer must pay), the insurer may opt to pay the lower billed amount in full").

This case centers on whether the Defendant paid this claim in accordance with F.S. 627.736. *Id.* An insurance policy cannot provide less benefits than the statutory minimum. *Sturgis v. Fortune Ins. Co.,* 475 So.2d 1272-73 (Fla. 1985). Accordingly, the Court holds that Defendant is required to pay either 80% of the fee schedule allowance or the total charge submitted for CPT Code L3908. As such, the Court finds that there is no triable issue and Plaintiff is entitled to Summary Disposition as a matter of law.

Therefore, it is

ORDERED AND ADJUDGED, that Plaintiff's Motions for Summary Disposition are hereby GRANTED. Defendant's Motion for Final Summary Judgment is hereby DENIED.

* * *

Insurance—Homeowners—Water mitigation services—Motion for directed verdict following jury verdict in favor of water mitigation company, arguing that there was no evidence of direct physical loss to insured property or that loss occurred within policy period—Motion denied where evidence showed that baseboards were damaged and needed to be removed as result of water event and that insured gave date of loss within policy period when she reported loss to insurer—Taken in light most favorable to insured, evidence supports finding that insurer failed to meet burden to prove that policy exclusion for constant or repeated seepage or leakage applied or that insurer was materially prejudiced by insured's failure to document or preserve loss—New trial—Motion for new trial on ground that verdict is against manifest weight of evidence is denied—Motion for new trial based on alleged cumulative error caused by plaintiff's counsel's comments about cause of water loss is denied—Argument was not presented in original motion for new trial, and court did not grant leave to amend motion—Further, new trial is not warranted where challenged comments were gratuitous in nature, and court sustained every objection to comments and provided curative instructions—Remittitur—Jury award is remitted by cost of thermal imaging where there was no evidence that imaging was actually performed

RAPID RECOVERY TEAM, LLC, a/a/o Regine Ambroise, Plaintiff, v. SAFEPOINT INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RF. Case No. 50-2017-SC-013661-XXXX-MB. June 23, 2022. April Bristow, Judge. Counsel: Frantz C. Nelson, Font & Nelson, Ft. Lauderdale, for Plaintiff. Patrick Chidnese, Bickford & Chidnese, LLP, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT, ALTERNATIVE MOTION FOR NEW TRIAL, AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR REMITTITUR

THIS CAUSE came before the Court on June 13, 2022 for a hearing on Defendant, SafePoint Insurance Company's ("SafePoint"), Motion for Directed Verdict and/or Motion for Judgment, Alternative Motion for New Trial, and Motion for Remittitur. This Motion pertained to a jury trial which was held on February 7-9, 2022. At that trial, Plaintiff, Rapid Recovery Team, LLC a/a/o Regine Ambroise, sought payment from SafePoint for water mitigation services it provided to SafePoint's insured, Regine Ambroise, pursuant to an Assignment of Benefits. Following Plaintiff's presentation of evidence, SafePoint moved for a directed verdict, arguing, among other things, that Plaintiff failed to prove that the insured's property suffered damage sufficient to qualify as a loss during the policy period. The Court orally denied the motion, but invited SafePoint to file a written motion. On February 9, 2022, the jury returned its verdict for Plaintiff, awarding $4,831.50 in damages, which was the total amount of Plaintiff's invoice less material sales tax.

On February 24, 2022, SafePoint served and filed its written motion for directed verdict (DE# 264) wherein it argued that: 1) Plaintiff failed to prove there was a physical loss to the property sufficient to qualify as a loss under the policy, 2) there was no evidence or testimony that the loss occurred within the policy period, 3) Plaintiff failed to rebut the presumption of prejudice caused by the insured's failure to adequately document/preserve the loss, and 4) the evidence established the damages claimed were excluded under the policy. SafePoint also moved for a New Trial, arguing that the verdict was against the manifest weight of the evidence as the "overwhelming evidence and trial established that no damage existed." Finally, SafePoint also moved for remittitur, arguing that some of the damages awarded were contrary to the evidence.

On May 31, 2022, SafePoint filed an "Amended Memorandum in Support of Motions for Directed Verdict and/or Motion for Judgment. Alternative Motion for New Trial, and Motion for Remittitur." Although in a footnote to the title of the motion SafePoint represented that the amended motion and memorandum was filed to include pertinent citations to the transcripts and recently issued legal authorities, the Motion contained a new argument for a new trial, to wit: the cumulative effect of several attempts by Plaintiff's counsel to interject a cause of the water loss via questioning and during closing arguments. As Plaintiff presented no evidence of the cause of the loss, Defendant objected to each of these comments and the Court sustained the objections, providing curative instructions as appropriate. SafePoint now maintains that it is entitled to a new trial based on those comments.

1) Motion for Directed Verdict

"In considering a motion for a directed verdict, the trial court is required to view the evidence in the light most favorable to the nonmoving party and draw all reasonable conclusions and inferences favorable to the nonmoving party." *Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 171-72 (Fla. 4th DCA 1994). "A directed verdict should not be granted unless no view of the evidence could support a verdict for the nonmoving party. *Id.* "The same standards apply to a post-verdict motion for judgment in accordance with prior motions for directed verdict and to the appellate court's review of such directed verdicts." *Id.*

A) No Physical Loss

Heavily relying on *Commodore, Inc. v. Certain Underwriters at Lloyd's London,* 47 Fla. L. Weekly D1044a (Fla. 3d DCA May 11, 2022), SafePoint argues that it is entitled to a directed verdict because no view of the evidence could support a finding that the insured's property suffered a physical loss to the property. The Court finds that SafePoint's reliance on *Commodore* and the cases it cited is factually misplaced.

In *Commodore*, the Third District Court of Appeal interpreted the term "physical loss" as used in an all-risk commercial property policy. Per that policy, the business income losses were covered so long as they arose from a suspension of operations "caused by direct physical

loss or damage to the property." The insured in that case, a bar and restaurant, argued the closure of its bar and restaurant due to COVID regulations qualified as a "direct physical loss or damage to the property." The crux of the insured's argument was that a "physical loss" occurs when a property no longer serves its function, even when there has been no physical alteration to the property. The Third District Court of Appeal disagreed, holding that, per the plain language of the policy, the terms "loss of" and "damage to" were "degrees of harm, which in all events must be physical in order for there to be coverage." *Id. at *5*. The court concluded: "In short, the difference between [the insured's] loss of use theory and something clearly covered—like a hurricane—is that the property did not change. The world around it did. And for the property to be usable again, no repair or change can be made to the property—the world must change." *Id.* at *6 (quotation omitted).

The Court does not disagree with—as *Commodore* makes clear—SafePoint's contention that in order for there to be coverage under a policy providing for coverage based on a "direct physical loss," there must be physical damage to the property. *See also Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1284 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a] ("The plain language of the insurance policy explicitly covers loss that is 'direct loss to property . . . only if that loss is a physical loss.' This Court has previously interpreted the meaning of this language: 'A 'loss' is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property.' " (quoting Loss *Black's Law Dictionary* (10th ed. 2014))). The Court also does not disagree that physical damage means some sort of actual change to the property, as opposed to something that can be cleaned-up without alteration to the property. *See, e.g. Mama Jo's v. Sparta Ins. Co.*, 823 Fed Appx. 868, 879 (11th Cir. 2020) (holding that, under Florida law, "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.' ").

However, in this case, the evidence taken in the light most favorable to Plaintiff established that there was physical damage to the insured's property. The testimony from the insured at trial was that there was a sudden water event emanating from the laundry room, and that water ran out of the laundry room, under the walls, and into the living room. The testimony from Plaintiff's representative was that there was moisture in the wall cavities/drywall/baseboards in the area where the water ran under the walls as evidence by high moisture level readings. The testimony was further that the moisture readings reflected the materials had absorbed water, which would lead to development of mold and fungi. As a result, Plaintiff's representative testified that the baseboards were water damaged and needed to be removed. *See, e.g.* (T.3 at 284). This evidence was sufficient for the jury to find that, as a result of the claimed water event, the insured's property physically changed and, therefore, suffered a "direct physical loss."

B) No loss within policy period

At trial, the insured testified that she could not remember the exact date of the claimed loss. Based on this testimony, in its initial Motion for Directed Verdict, SafePoint argued that Plaintiff failed to prove that the date of the loss was within the policy period. However, in its Amended Memorandum and at the hearing on the Motion, SafePoint articulated that its position was actually that Plaintiff failed to establish there was a "loss" at all within the policy period as Plaintiff did not show the cause of the loss. The Court rejects either argument as grounds for directed verdict.

As recently explained by the Fourth District Court of Appeal

> An all-risks policy provides coverage for all losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage. An insured claiming under an all-risks policy has the burden of proving 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.

Empire Pro Restoration, Inc. v. Citizens Prop. Ins. Corp., 322 So. 3d 96, 98 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1215a] (quotations and citations omitted).

"When an insurer relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations of the complaint are cast solely and entirely within the policy exclusion and are subject to no other reasonable interpretation." *Deshazior v. Safepoint Ins. Co.*, 305 So. 3d 752, 755 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1210a]. Only then does the burden shift back to the insured to demonstrate that the exclusion did not apply. *Empire Pro Restoration, Inc.*, 322 So. 3d at 98.

This means that in this case, Plaintiff was not obligated to initially prove the cause of the loss. Instead, it was only initially obligated to prove that a loss occurred within the policy period. Taken in the light most favorable to the Plaintiff, Plaintiff's evidence met this initial burden. Plaintiff's evidence established that an unexplained sudden water event emanating from the insured's laundry room occurred in 2016. Although the insured could not recall the exact date of this water event, her testimony was that she immediately called a plumber who came to her house the same day. (T. at 500). The plumber then gave her the number to Plaintiff, who she immediately called. The evidence further established that Plaintiff reported to the insured's home on September 29, 2016, which was the same day the insured reported the loss to SafePoint. (T.1 at 98; T.2 at 166). When she reported the loss, SafePoint's records reflected that the insured claimed the loss occurred on September 28, 2016. (T.1 at 98). The policy period was March 4, 2016 through March 4, 2017 and there is no dispute that September of 2016 was within the policy period. Therefore, the evidence taken in the light most favorable to the Plaintiff established that the claimed sudden water event occurred during the policy period. (T. at 86).

As discussed above, the Plaintiff's evidence taken in the light most favorable to Plaintiff also established that this water event caused physical damage to the insured's property, and therefore qualified as a "loss" under the subject all-risk policy. Accordingly, Plaintiff's evidence was sufficient to shift the burden to SafePoint to establish that the loss was based on a policy exclusion.

At trial, SafePoint maintained that the loss was actually caused by constant or repeated seepage or leakage, which is excluded under the policy. However, after weighing the evidence, the jury found that SafePoint did not establish that the exclusion applied. The Court finds that, taking the evidence in the light most favorable to the Plaintiff, a jury could find that SafePoint did not meet its burden. SafePoint's expert, Mr. Grindley, testified that he observed an active, very slow drip-leak from the washer water supply line and that he also saw damage in the form of corner bead corrosion in the doorway between the laundry room and kitchen which was consistent with slab seepage. However, he was unable to offer any opinion as to the cause of any sudden water discharge as claimed by the insured. In the light most favorable to the Plaintiff, the damage observed by Mr. Grindley and the damage from the loss reported by the insured are not mutually exclusive. Put otherwise, that a property has been damaged by a very slow drip in a fixture and slab seepage damage does not preclude the occurrence of a sudden water loss which causes separate and distinct damage.

C) The Insured's Failure to Document/Preserve the Loss and Applicability of a Policy Exclusion

Finally, Defendant asserts that it is entitled to a directed verdict in its favor because it was prejudiced by the insured's failure to ade-

quately document and preserve evidence of the loss and because it established that the claimed loss was caused by an excluded cause. As set forth above, the Court denies the Motion based on the claimed exclusion. The Court also finds that the evidence taken in the light most favorable to Plaintiff supported the jury's finding that SafePoint was not materially prejudiced by the insured's failure to document/preserve the loss. Accordingly, the Court denies Defendant's Motion for Directed Verdict

2) Motion for New Trial

Florida Rule of Civil Procedure 1.530 governs Motions for New Trial. "The role of the trial judge [when considering a motion for a new trial] is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict." *Brown v. Estate of Stuckey*, 749 So. 2d 490, 495 (Fla. 1999) [24 Fla. L. Weekly S397a]. In this case, Defendant argues that a new trial is warranted as the jury's verdict is against the manifest weight of the evidence. The Court denies Defendant's Motion on this ground, finding that, as outlined in the directed verdict section, there was sufficient evidence for the jury to find that there was a loss within the policy period. It was also within the province of jury to find that the loss reported—a sudden water loss—was not caused by the slow drip and slab seepage observed by Mr. Grindley.

As to SafePoint's argument regarding Plaintiff's counsel's commentary during questioning and closing, Rule 1.530(b) provides that a motion for new trial "shall be served not later than 15 days after the return of the verdict in a jury action." That rule further provides that a "timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined." The Court notes that in this case, SafePoint's Motion for new trial was served on February 24, 2022. This Motion was timely filed, but did not raise the alleged cumulative error caused by Plaintiff's counsel's questions/comments as a grounds for new trial. Instead, that argument was raised for the first time in SafePoint's May 31, 2022 "Amended Memorandum." Defendant did not move for leave of court to raise this new argument prior to filing the Amended Memorandum and, therefore, the argument is not properly before the Court. At any rate, exercising its broad discretion in considering a Motion for New Trial, the Court denies the Motion on these grounds as well. *See USAA Cas. Ins. Co. v. Howell*, 901 So. 2d 876, 880 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D590b] ("A trial court's grant or denial of a motion for new trial is within its discretion.").

The Court notes that it sustained each of SafePoint's objections regarding the challenged comments and provided a curative instruction as it deemed appropriate. *See, Id*. (noting that a "simple curative instruction that the jury was to only consider the evidence at trial and that counsel's statements were not evidence would have sufficed to purge the taint of the improper comments."). Further, the Court finds that the curatives sufficed as the comments were not so highly prejudicial and inflammatory that they denied the opposing party its right to a fair trial. *C.f., Allstate v. Marotta*, 125 So. 3d 956, 960 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1224d]. The challenged comments were not "send a message" or "punish" type comments, which are normally the sort justifying a new trial. *Id.* Instead, they concerned a potential reason for the sudden water loss claimed by the insured. While, as the Court noted several times during side-bars at trial, Plaintiff did not introduce any evidence regarding a potential cause of the loss, as discussed above, it was not Plaintiff's burden to prove the cause of the loss. Instead, it was Defendant's obligation to prove that the loss was an excluded loss. The jury found that Defendant did not meet this burden. Thus, as Plaintiff did not have to prove the cause of the loss, the comments, although improper,[1] were legally speaking, somewhat gratuitous. Given this posture combined with the Court's corrective action at trial, the Court denies the Motion for a new Trial.

3) Motion for Remittitur

Finally, SafePoint moves for remittitur of the jury's award, arguing that portions of the award are not supported by the evidence. In a motion for remittitur, the trial court must "review the amount of such award to determine if such amount is excessive . . . in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. (2021). SafePoint argues that the testimony at trial established that Plaintiff's invoice reflected 12 hours for labor not performed, included costs for services provided to the kitchen area wherein the insured stated that she did not notice any "damage," and that Plaintiff included $250 in its invoice for thermal imaging when the testimony at trial was that there was no record of thermal imaging.

First, as to the hours of labor, the jury awarded Plaintiff damages for 18 hours of labor. The Court cannot say that the jury's award in this respect was excessive based on Plaintiff's representative's testimony regarding the basis for those hours. (T.3 260-63).

Second, as to the work performed in the kitchen area, although the insured testified that she did not see water in the kitchen, the testimony presented at trial established that the kitchen and laundry room shared a wall. It also established that wall was water damaged. (See, T.3 at 282-84). Therefore, the Court cannot say that the damages awarded for services performed in the kitchen area are excessive in light of the facts presented to the jury.

Finally, as to the thermal imaging related damages, the Court agrees that the jury's award encompassing $250 for thermal imaging was excessive as there was no testimony establishing that this work was actually performed. In fact, Plaintiff's representative conceded that he had no knowledge as to whether thermal imaging was performed and could produce no evidence establishing that it was. (T.3 270-272). Therefore, the Court finds that the jury's award should be remitted by $250 to a total of $4,581.50.

Conclusion

In sum, the Court DENIES SafePoint's Motions for Directed Verdict and New Trial in their entirety. The Court GRANTS SafePoint's Motion for Remittitur as it pertains to the $250 awarded in damages for thermal imaging, but DENIES the remaining requests for Remittitur. *Plaintiff shall respond* ***in writing within 10 days****, with a courtesy copy to the undersigned judge at* CAD-DivisionL@pbcgov.org*, indicating whether Plaintiff accepts the remitted amount of $4,581.50 or requires a new trial on damages only.* See *J.L. Prop. Owners Ass'n, Inc. v. Schnurr*, 336 So. 3d 291, 299 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D116a].

[1]By entering this ruling, the Court does not in any way mean to condone Plaintiff's counsel's repeated failure to observe the Court's instructions.

* * *

Insurance—Discovery—Depositions—Insurer's motion for protective order regarding adjuster's deposition, based on argument that case can be resolved by summary judgment on legal issue, is denied where pleadings demonstrate that insurer has raised factual issues

ADVANCED DIAGNOSTIC GROUP, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22001914, Division 53. July 1, 2022. Robert W. Lee, Judge.

Order Denying Defendant's Motion for Protective Order Regarding Litigation Adjuster Deposition

The Defendant seeks a hearing on its Motion for Protective Order. Based on a review of the Motion, the Complaint in this case, and the Answer filed by the Defendant, the Court declines to give a hearing on the Motion. As the Court understands the Motion, the Defendant claims this case can be resolved by merely hearing its Motion for

Summary Judgment on a legal issue. And yet, the Defendant's Answer in this case DENIES there is a valid assignment of benefits, and further DENIES Plaintiff's prima face case in total. As a result, the Defendant's Motion for Protective Order is facially not well taken and is hereby DENIED. The Defendant may renew its Motion if therein it stipulates to all issues in this case other than the "legal" issue raised in its Motion.

* * *

Insurance—Personal injury protection—Coverage—Out-of-state policy—Georgia policy that did not provide PIP or medical payment coverage and contained "out of state coverage" language providing coverage only when "compulsory insurance or similar law requires a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state" does not provide PIP coverage for Georgia claimant who is listed driver under policy and was injured in Florida accident—Florida's required security statute does not make PIP insurance compulsory for claimant where there is no evidence that claimant was owner of a vehicle, was driving that vehicle at time of loss, or had been operating vehicle for more than 90 days in Florida in preceding 365 days—Even if claimant met those requirements, statute only requires her to obtain her own PIP coverage or be deemed self-insured; it does not change interpretation of Georgia policy

T.I.O. MEDICAL INTERVENTION, LLC, a/a/o Mary Faison, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-20-030781, Division 52. July 3, 2022. Giuseppina Miranda, Judge. Counsel: John C. Daly, Jr., for Plaintiff. Melissa G. McDavitt, Conroy Simberg, West Palm Beach, for Defendant.

FINAL JUDGMENT AND ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT REGARDING OUT OF STATE COVERAGE

THIS CAUSE having come before the Court for hearing on June 13, 2022 upon Defendant, LIBERTY MUTUAL FIRE INSURANCE COMPANY's Motion for Final Summary Judgment based upon Out of State Coverage. The Court, having read the submissions by the parties, having heard argument of counsel and being otherwise duly advised in the premises, makes the following findings of fact and conclusions of law:

FACTUAL BACKGROUND

1. The subject action involves a claim for personal injury protection insurance benefits filed by Plaintiff, T.I.O. MEDICAL INTERVENTION, LLC (hereinafter "Plaintiff") as assignee of MARY FAISON (hereinafter "Claimant") against Defendant, LIBERTY MUTUAL FIRE INSURANCE COMPANY (hereinafter "Liberty"), arising out of a motor-vehicle accident that occurred on December 19, 2018.

2. Plaintiff alleges that Liberty has issued a policy of insurance "which provided personal injury protection ("PIP") benefits coverage required by law to comply with Florida Statutes Sections 627.730 thru 627.7405."[1]

3. Plaintiff seeks PIP Benefits under a policy Liberty issued to Johnice Clarrington, which was in effect from April 18, 2017-April 18, 2018. The insured was a Georgia Resident and the policy is a Georgia Policy. The policy was issued and delivered in Georgia. The vehicles were garaged at a Georgia address and registered in Georgia.

4. On October 2, 2017, Mary Faison was involved in an accident in Miami, FL involving the insured vehicle. Mary Faison was not the named insured, but was a listed driver under the policy.

5. Following the accident, Mary Faison sought treatment with the Plaintiff on December 19, 2018. The Plaintiff in turn submitted the bill to Liberty under a PIP Claim.

6. The Plaintiff's claim was denied. Liberty asserted that the policy did not afford PIP or Medical Payments Coverage to Mary Faison.

7. Plaintiff later filed the instant suit seeking PIP Benefits under the Liberty Policy. Defendant's only affirmative defense was

> "The subject policy AO2-258-173207-40 was a Georgia policy which did not carry any Personal Injury Protection Benefits or Medical Payments coverage. The subject Georgia policy was not require to cover PIP benefits. As there was no coverage under the subject policy Defendant was proper in declining to pay the Plaintiff's submitted bills and no benefits are due or owing."[2]

8. Prior to the hearing, the parties stipulated that Defendant's Affirmative Defenses do not involve factual issues and can be addressed by a Motion for Summary Judgment as to whether the claimant's policy provides for Personal Injury Protection Benefits.[3]

9. The Parties filed their respective Motions for Final Summary Judgment as to coverage, which were argued by the Parties on June 13, 2022.

10. During the hearing, the Court confirmed there were no issues of fact. The issue before Court was the interpretation of the Liberty's "Out of State Coverage". Questions of insurance policy interpretation are questions of law. *Harrington v. Citizens Property Ins. Corp*., 54 So. 3d 999 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2838a]. Additionally, where the case turns on an interpretation of a statute, the issue presents a question of law for the Court. *See Geico Gen. Ins. Co. v. Virtual Imaging Svcs., Inc.*, 141 So. 3d 147, 151 (Fla. 2013) [38 Fla. L. Weekly S517a];

11. Based on the foregoing, this Court has determined that Defendant's Motion for Final Summary Judgment should be granted.

LEGAL ANALYSIS

A. LIBERTY'S POLICY

The Parties' do not disagree that the subject policy was issued in the State of Georgia. This Georgia policy did not provide PIP or medical payment coverage ("MPC") benefits. The Plaintiff argues that the "Out of State Coverage" provision of the policy requires Liberty to afford PIP Coverage to the Claimant. However the plain language of the policy does not support the Plaintiff's conclusion. The subject policy states:

> **OUT OF STATE COVERAGE**
>
> If an auto accident to which this policy applies occurs in any state or province other than the one in which "your covered auto" is principally garaged, we will interpret your policy for that accident as follows:
>
> A. If the state or province has:
>
> 1. A financial responsibility or similar laws specifying limits of liability for "bodily injury" or "property damage" higher than the limit shown in the Declarations, your policy will provide the higher specified limit
>
> 2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage[4].

Where language is clear and unambiguous, judicial interpretation of statutes, regulations and insurance contracts requires that Courts construe said language according to its plain meaning. *Allstate Ins. Co. v. Holy Cross Hospital*, 961 So.3d 328 (Fla. 2007) [32 Fla. L. Weekly S453a]. Here, Paragraph 2 of the relevant policy language provides coverage when "a compulsory insurance or similar law requires a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province. . ." (emphasis added). However, Florida PIP insurance is not compulsory for all nonresidents. *See* Fla Stat. 627.733.

B. FLORIDA STATUTE 627.733

Florida Statute 627.733 titled "Required Security" states in pertinent part under subsection (2):

> "Every nonresident owner or registrant of a motor vehicle which, whether operated or not, has been physically present within this state for more than 90 days during the preceding 365 days shall thereafter maintain security as defined by subsection (3) in effect continuously throughout the period such motor vehicle remains with this state."

Florida doesn't require a non-resident to maintain insurance whenever she uses a vehicle in the state. Rather, Florida only requires a non-resident obtain PIP insurance if she operates a vehicle in this state for more than 90 days during the preceding 365. There is no evidence that the Claimant, 1) was the owner of a motor vehicle; 2) that she was driving that vehicle at the time of the loss or 3) that she had been operating this vehicle for more than 90 days in Florida of the preceding 365.

Even had the Claimant met all three of the requirements, the law would simply require the nonresident to obtain her own PIP insurance or be deemed a self-insured. These hypothetical facts do not change the interpretation of the policy. Florida law simply does not require every nonresident to maintain insurance whenever the nonresident uses a vehicle in Florida. Accordingly, paragraph 2 of Liberty's policy is inapplicable to Florida PIP.

Plaintiff relies on *Meyer v. Hutchinson*, 861 So.2d 1185, 1186 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2802c] and *Jiminez v. Faccone*, 98 So. 3d 621, 626 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1918a] in support of this position that the policy provides compulsory PIP Coverage to the Claimant. However, the Court finds both the facts and policies of both cases factually distinguishable from the instant case and policy.

Both *Meyer* and *Jimenez* dealt with whether defendant was entitled to threshold injury instruction, not whether PIP Coverage was afforded to the Claimant's medical provider.

In the Liberty policy, the "Out of State Coverage" provision is positioned under "PART A - LIABILITY COVERAGE" which is dissimilar from both the *Meyer* and *Jimenez* provisions. More importantly, the placement of the conformity clause is clearly listed in the policy index under the "PART A - LIABILITY COVERAGE." The strategic placement of the clause Liability supports this Court's conclusion that the provision was intended to apply to Liability coverage, rather than Medical Payments, or PIP. "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a] (*citing Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004) [29 Fla. L. Weekly S774a]).

Furthermore, the Courts in *Meyer* and *Jimenez* determined that the policies' broad language incorporated the compulsory insurance laws of the jurisdiction. This Court finds Liberty's to be more precise and narrowly written than those policies.

CONCLUSION

The Court finds that Liberty's policy of insurance is not ambiguous as to the "Out of State Coverage" provision, nor has the Plaintiff articulated any ambiguities. The "Out of State Coverage" provision is clearly and purposefully placed under the Liabilities portion of the policy. The "Out of State Coverage" provision is not applicable to the policy at large and is not specifically applicable to the PIP Statute. The case law presented by the Plaintiff are factually distinct from the instant case and pertain to different policy language.

Fla. Stat. 627.733 does not require every non-resident vehicle driving in the state of Florida to obtain compulsory coverage. Accordingly, Liberty was not contractually obligated to provide out-of-state no-fault coverage based upon the clear language and context of the policy provisions at issue.

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

1. That the Defendant's Motion for Summary Judgment is GRANTED.

2. Final Judgment is entered in favor of Defendant, LIBERTY MUTUAL FIRE INSURANCE COMPANY. Plaintiff, T.I.O. MEDICAL INTERVENTION, LLC a/a/o MARY FAISON, takes nothing by this action and that Defendant, LIBERTY MUTUAL FIRE INSURANCE COMPANY, go hence without day.

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

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[1]See Paragraph 9 of the Plaintiff's Complaint

[2]See Defendant's Answer and Affirmative Defenses

[3]See Court Order on Case Management Conference on Order Setting Hearing on Defendant's Motion for Summary Judgment entered on March 2, 2022.

[4]Page 3 of Liberty's Policy Form , attached to both Plaintiff and Defendant's Motions for Summary Judgment

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Motion to amend answer to assert defense of accord and satisfaction is denied where hearing on motion was set for same day as hearing on medical provider's unopposed motion for summary judgment—Even if motion to amend were granted, it would not change ruling in favor of provider on motion for summary judgment where proposed defense does not contain any ultimate facts, and insurer did not file response to motion for summary judgment

PATH MEDICAL, LLC, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO21005296, Division 62. May 16, 2022. Terri-Ann Miller, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Rashad El Amin, for Defendant.

ORDER ON Plaintiff's Motion for Partial Summary Judgment Regarding the Proper Reimbursement for CPT 72040, 72070, 72100, 72141 and 72148 and Defendant's Motion to Amend Answer

This cause having come before the Court on Plaintiff's Motion for Partial Summary Judgment Regarding the Proper Reimbursement for CPT 72040, 72070, 72100, 72141 and 72148, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment Regarding the Proper Reimbursement for CPT 72040, 72070, 72100, 72141 and 72148 is granted and Defendant's Motion to Amend Answer is denied for the reasons set forth below.

At the start of the hearing on the instant motions the Defendant advised the Court that they did not oppose the positions taken and the relief requested by the Plaintiff in their motion. Based on same the Court grants Plaintiff's motion and finds that the subject treatment is related and necessary, that reasonableness is not an issue as the policy adopts the fee schedule set forth in Florida Statute 627.736, that Florida Statute 627.736 requires the Defendant as a result of the adopting the fee schedule to remit payment based upon the 2007 Medicare Part B limiting charge because said amount is higher than the Medicare Part B participating physician's fee schedule for the year of treatment, that the Defendant owes the difference between what was paid and 80% of 200% of the 2007 Medicare Part B limiting charge for the subject codes, the Court also takes judicial notice of the print outs from CMS.gov which provide the relevant Medicare Part B amounts and finds that the Defendant owes an additional $166.00 in benefits and interest thereon.

Notwithstanding the Defendant's advisement to the Court that they do not oppose the positions taken and the relief requested by the Plaintiff in their motion the Defendant contends that they do not owe anything based upon an accord and satisfaction affirmative defense

that they were hoping to amend their Answer with. The Defendant set a hearing on their Motion to File Amended Answer on the same date as Plaintiff's motion for summary judgment. The Court hereby finds that the Plaintiff would be materially prejudiced if the Defendant were permitted to amend their affirmative defenses on the same day that Plaintiff's motion for summary judgment was to be heard. The Court is also mindful of the holding in *Noble v. Martin Mem'l Hosp' Ass'n, Inc.,* 710 So. 2d 567, 568 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a] that "[a] party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment. *See Inman v. Club on Sailboat Key, Inc.*, 342 So.2d 1069 (Fla. 3rd DCA 1977)." Lastly the Court notes that even had the Court permitted the amendment it would not have changed the Court's ruling that the Defendant owes additional benefits because the proposed defense does not contain any ultimate facts nor did the Defendant file a response with their factual position to Plaintiff's motion, much less file such a response and factual position 20 days prior to the hearing date, as required by Florida Rule of Civil Procedure 1.510 and as such cannot argue against the positions taken by the Plaintiff. The Court is also mindful of the Supreme Court's commentary on the new Florida Rule of Civil Procedure 1.510 (SC 20-1490) that the new rule was, in part, designed "to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions . . . [and] that the nonmovant **must** respond with its supporting factual position at least 20 days before the hearing."

The Plaintiff is directed to submit a proposed Final Judgment consistent with this ruling.

* * *

Insurance—Venue—Forum non conveniens—Motion to transfer case to Orange County is granted where all parties, site of accident and treatment, and all witnesses are located in Orange County—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. COINX22000875, Division 53. June 13, 2022. Robert W. Lee, Judge.

Order Upon Defendant's Objection to Venue Transferring Case to Orange County for Forum Non Conveniens, with Directions to Clerk

THIS CAUSE came before the Court on June 9, 2022 for hearing of the Defendant's Objection to Venue Improper Venue, and 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 being filed in the County Court in 2021, shattering the record of civil cases filed each month, and more than triple 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.

Background:

1. By Plaintiff's own concession at the hearing, everything in this case happened more than 200 miles away in Orange County, other than the Plaintiff's billing office being even further away in Hillsborough County. The insurance policy at issue in this case insures a driver residing in Orange County; the auto accident occurred in Orange County; the owners and occupants of the other vehicles involved in the accident reside in Orange County; and the medical treatment took place in Orange County.

2. None of the owners of the vehicle, any witness to the automobile accident, or any person involved in the medical treatment reside or work in Broward County.

3. The Plaintiff filed this complaint in Broward County, Florida. The Plaintiff did not allege any connections between the facts of this case and the chosen venue.

4. 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 first notes that this objection to venue was not initiated by the Court, but rather the Defendant's objection to venue. 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]. S*ee 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 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. All the fact witnesses in this case are about 200 - 250 miles north of this 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 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 recognizes that in recent decisions of the Fourth DCA, this factor is of almost no significance when neither party agrees to the transfer. However, in the instant case, the request to transfer was initiated by the Defendant.)

The Court agrees that the Plaintiff has chosen an inconvenient and improper forum because all the parties, accident, treatment and witnesses reside or took place in Hillsborough County. The substantial contacts in this case all fall in Hillsborough County.

Moreover, considering the interests of justice, a Broward County jury should not be burdened with determining a case that has no connection to 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 Co.*, 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 has 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 also Stamen v. Arrillaga*, 169 So.3d 1209, 1210 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1638a] ("a trial court may sua sponte raise the question" of an inconvenient forum "in the interest of justice"), quoting *McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc.*, 39 So.3d 504, 511 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1491c]. *See also Clear Visions Windshield Repair LLC v. GEICO,* 24 Fla. L. Weekly Supp. 194a (Lee Cty. Ct. 2016).

Simply put, this case is a Orange County case that belongs in Orange 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 Orange County. Because this issue lies squarely at the feet of the Plaintiff, the Court exercises its discretion to require the Plaintiff to bear the costs of transfer. Fla. Stat. §47.191.

* * *

Criminal law—Competency to stand trial—Dismissal during continuing incompetency—Rule 3.213(a), which provides for dismissal of misdemeanor charge if defendant remains incompetent after one year and court does not find reason to believe that defendant is expected to become competent to proceed, requires court to make findings regarding continuing incompetency or possibility of becoming competent on or after one-year mark and does not require that findings be made within the year—No merit to arguments that new competency evaluation completed after one-year mark cannot be considered by court and that court has no choice but to dismiss case since more than one year has passed since issuance of order finding defendant incompetent

STATE OF FLORIDA, Plaintiff, v. MARIA G. DECATUR, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052019CT060744AXXX. June 29, 2022. Thomas J. Brown, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Timothy Seller, Assistant Public Defender, Public Defender's Office, Viera, for Defendant.

ORDER

THIS CAUSE came before the Court at a competency hearing/status hearing that began on May 26, 2022 and carried over to the next day on May 27, 2022.

At the hearing, an issue arose over the proper interpretation of Fla. R. Crim. P. 3.213(a). This rule provides, in pertinent part:

> **(a) Dismissal without Prejudice during Continuing Incompetency.** After a determination that a person is incompetent to stand trial or proceed with a probation or community control violation hearing, the charge(s) . . . shall be dismissed 1 year after a finding if the charge is a misdemeanor; . . . provided that the court finds that the defendant remains incompetent to stand trial or proceed with a probation or community control violation hearing unless the court in its order specifies its reasons for believing that the defendant is expected to become competent to proceed. A dismissal under this rule shall be without prejudice to the state to refile the charge(s) should the defendant be declared competent to proceed in the future.

In the instant case, this Court entered an order on May 7, 2021, finding the Defendant to be incompetent to stand trial, based on a competency evaluation issued by Dr. Wendy Anderson. A status hearing was subsequently held on December 1, 2021. At that status hearing, it was agreed that the Defendant remained incompetent and the Court set the next status hearing for March 24, 2022. At the March 24, 2022 status hearing, the Court asked the State whether it intended to seek any additional evaluations or was the State going to let the one year lapse. The reason for asking that was because the Court did not want to get to the end of one year, and then possibly having to go through the process of requesting evaluations and then making the necessary determinations. The State was not ready to answer the Court's question at that time and the Court directed the State to have an answer at the competency control hearing to be held on March 30, 2022. The State did announce at that control hearing that it would be seeking a new evaluation; ultimately the State filed its motion to seek a new competency evaluation on April 6, 2022. The Court signed an order on April 7, 2022, appointing Dr. Kathy Oses to conduct a competency evaluation and setting a competency hearing for May 26, 2022. Dr. Oses's competency report was distributed to the respective parties on May 23, 2022, three days before the scheduled hearing. That hearing began as scheduled but got rolled over to May 27, 2022 as a status hearing.

The issue that arose at the hearing focused on the meaning on the one year mark in rule 3.213(a). The Defense contends that the one year mark in rule 3.213(a) is a "hard and fast" rule. Specifically, according to the Defense, because the competency evaluation prepared by Dr. Oses was completed *after* the one year mark, it came too late to be considered by the Court. Further, the Defense maintains that since more than one year has already passed since the Court issued its May 7, 2021 order finding the Defendant incompetent to stand trial, then the Court now has no choice but to dismiss the case.

The State argues that the one year mark is not a "hard and fast" rule. According to the State, despite recent amendments to rule 3.213(a), the rule continues to require that the Court "find" that "the defendant remains incompetent to stand trial" before a case can be dismissed; further, that the rule also contemplates that even with such a "finding," the case should not be dismissed if "the court in its order specifies its reasons for believing that the defendant is expected to become competent to proceed."[1] Therefore, says the State, since there been no finding that the Defendant remains incompetent to stand trial in the instant case, then dismissal of the case is premature and a hearing needs to be held where the testimony of competing expert witnesses can be presented to the Court.

The Court believes that the issue raised by the Defense presents a case of first impression because there is no case law on point. This Court acknowledges that the rule has been re-written. But the Court still interprets the current rule to mean that the Court, on or after the one year mark, has to make certain findings of fact. The Court does not interpret the rule to mean that the findings must be made *within* the year. The Court interprets the rule to mean that the Court does not have the authority to dismiss *until* one year has elapsed from the original finding of incompetency. Then, after that one year, the Court can have a hearing to make the findings necessary to determine whether (1) the defendant remains incompetent, which means the case should be dismissed, or (2) either the defendant has regained competency or there are reasons for believing that the defendant is expected to become competent to proceed, which means the case should proceed.

Here, there has not yet been a competency hearing which would give rise to the necessary findings. Therefore, the case should not be dismissed at this stage and the Court will consider the competency evaluation issued by Dr. Oses. The Defense at the hearing indicated that it would prefer to have an updated report from Dr. Anderson

before having the competency hearing. By order issued May 31, 2022, this Court appointed Dr. Anderson to conduct such updated report. Said order also scheduled a competency hearing for July 26, 2022, at 1:30 pm before Judge Babb (who will be the presiding judge on this docket beginning July 1, 2022).

The Court also sets this case for a status hearing on June 29, 2022 at 9 a.m. Unless both parties are ready to convert the status hearing into a competency hearing, the competency hearing will be held on July 26, 2022, at 1:30 pm before Judge Babb.

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[1]Prior to the amendments that went into effect on January 1, 2019, rule 3.213(a) provided that after the expiration of five years for a felony or one year for a misdemeanor, the court shall dismiss the charges if it finds, after a hearing, that the defendant remains incompetent to stand trial, there is no substantial probability that the defendant will become mentally competent to stand trial, and the defendant does not meet the criteria for commitment. *See, In Re: Amendments to the Florida Rules of Criminal Procedure,* 265 So.3d 494, 496, 506-08 (Fla. 2018) [43 Fla. L. Weekly S430a] (outlining the changes to this rule (and other rules) in the appendix to the opinion, and noting in the opinion that the amended rule "is reorganized for clarity, to make it easier to determine the dismissal schedule within the rule").

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Financial activities—Gifts—Valuation—A judge must use reasonable diligence in determining if the value of gifts received pursuant to Canon 5D(5)(a) or 5D(5)(h) exceeds $100

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-06. Date of Issue: July 19, 2022.

ISSUE

Does a judge need to report a gift that is received pursuant to Canon 5D(5)(a) or 5D(5)(h) if the judge does not know the value of the gift or whether the value exceeds $100.00?

ANSWER: Yes. Through reasonable diligence the judge must determine whether the value of the gift exceeds $100.00 as well as the value of the item.

FACTS

The inquiring judge is attempting to complete Form 6A. During the preceding calendar year, the judge received a commissioned portrait given by a voluntary bar association and a crystal gavel given by a voluntary bar association to the judge. The judge is not aware of the value of either of these gifts and does not know if the value exceeds $100.00.

DISCUSSION

According to Canon 5D(5)(h) of the Code of Judicial Conduct, all judges are required to report any gift, bequest, favor or loan, *only if* "its value, or the aggregate value in a calendar year of such gifts, bequests, favors, or loans from a single source, exceeds $100.00." Thus, it is incumbent upon each judge to determine the value of each gift received pursuant to Canon 5D(5)(a) and 5D(5)(h).

Canon 6B(2) provides that "[a] judge shall file a public report of all gifts required to be disclosed under Canons 5D(5)(a) and 5D(5)(h) of the Code of Judicial Conduct. . . ." Canon 6B(2) further provides that the disclosure shall be made using Form 6A which is contained in the Commentary to Canon 6 of the Code of Judicial Conduct.

Form 6A includes few instructions although Section 1 of the form directs the judge to "identify all reportable gifts, bequests, favors or loans received during the preceding calendar year, as required by Canons 5D(5)(a), 5D(5)(h), and 6B(2) of the Code of Judicial Conduct." The form then includes a section for the judge to report the date of receipt of the gift, a description of the gift, the source of the gift, and the amount of the gift.

The comments to Canon 6B provide that the "report of gifts, reimbursements or direct payments of expenses . . . during the preceding calendar year [is] to be filed publicly with the Florida Commission on Ethics. . . . This reporting is in lieu of that prescribed by statute as stated in the Supreme Court's Opinion rendered in *In re Code of Judicial Conduct*, 281 So. 2d 21 (Fla. 1973)." Consequently, there is no statutory authority that directly addresses how a judge might determine the value of gifts received.

Although judges are not directly governed by statute with respect to this issue, the Florida Commission on Ethics Rule 34-13.500 provides guidance on assessing the value of a gift. Rule 34-13.500(1) provides in pertinent part as follows:

> In addition to the provisions contained in Section 112.3148(7), F.S., a donee shall use the following rules to determine the value of a gift received from a donor: (1) "actual cost to the donor" as stated in Section 112.3148(7)(a), F.S., means the price paid by the donor which enabled the donor to provide the gift to the donee, excluding taxes and gratuities.

After reviewing the afore-referenced authority, the Committee concludes that if a judge believes the item he or she received qualifies as a gift under Canon 5D(5)(a) and 5D(5)(h), the judge must use reasonable diligence to determine the value of the gift. All members of the Committee agree that a judge cannot simply put $100.00+ as the value on Form 6A. A few members of the Committee believe that a reasonable estimate, with some arguably justifiable basis for the value, should be sufficient.

While socially awkward to ask a donor the value of a gift, the best information in determining the value of an item will usually come directly from the donor. Another option would be to contact an establishment that sells the item or similar items to determine the actual value and whether reporting is required.

Regardless of what resources the judge uses to determine the value of a gift reported on Form 6A, the judge should remember his or her duty to remain transparent. It is suggested that the judge retain documentation of how he or she determined the gift's value in the event a future complaint is filed.

REFERENCES

Fla. Code of Jud. Conduct, Canons 5D(5)(a); 5D(5)(h); 6B(2)
Canon 6B
Form 6A, included in Commentary to Canon 6
In Re: Code of Judicial Conduct, 281 So. 2d 21 (Fla. 1973)
Fla. Commission on Ethics Rule 34-13.500(1)
Section 112.3148(7)(a), Fla. Stat.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—A judge is not required to resign before applying for employment elsewhere

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-07. Date of Issue: July 28, 2022.

ISSUE

May a judge who is considering leaving judicial service apply for jobs while still holding judicial office?

ANSWER: Yes.

FACTS

The inquiring judge is contemplating leaving judicial service and wishes to know whether it is necessary for the judge to resign from office before the judge may apply for employment elsewhere.

DISCUSSION

We can answer this inquiry fairly succinctly. No judicial canon prohibits a judge from seeking employment elsewhere while remaining in office; as such, it is not necessary for the inquiring judge to resign from office while doing so.[1] We would only make two observations for the inquiring judge to remain mindful of. First, if the judge applies for employment with a party or a law firm appearing before the judge, recusal will likely be necessary. *See generally* Fla. Code Jud. Conduct, Canon 5A. Second, if the judge ultimately accepts employment with a law firm, we would remind the judge of the cautionary advice we provided in Fla. JEAC Op. 2020-26 concerning announcements and advertising by the firm prior to the judge leaving office. Those considerations aside, however, we have no hesitation answering the issue above in the affirmative.

REFERENCES

§ 99.012, Fla. Stat. (2022)
Fla. Code Jud. Conduct, Canons 5A; 5F(1)
Fla. JEAC Op. 20-26 [28 Fla. L. Weekly Supp. 748a]

[1]Indeed, Canon 5F.(1) expressly permits sitting judges to "take the necessary educational and training courses required to be a qualified and certified arbitrator or

mediator" in anticipation of leaving judicial service for other employment. A different matter, of course, would arise if the inquiring judge were considering leaving judicial service in order to qualify for election to a different public office. *See generally* § 99.012, Fla. Stat. (2022).

* * *

Judges—Judicial Ethics Advisory Committee—Retired/senior judges—Practice of law—Mediation and arbitration—A senior judge may serve as a hearing officer for a private educational institution to consider sexual harassment complaints filed by students against other students because, under the facts, such service does not constitute mediation, arbitration, or voluntary trial resolution services, or the practice of law

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number 2022-08. Date of Issue: July 28, 2022.

ISSUE

May a retired judge recently approved as a senior judge continue to serve as a hearing officer for a local private educational institution hearing sexual harassment complaints filed by students against other students?

ANSWER: Yes.

FACTS

Prior to being approved as a senior judge, the inquiring judge was serving as a hearing officer for a private educational institution located in a circuit served by the senior judge. The hearing officers are responsible for rendering written reports after hearing sexual harassment complaints filed by students against other students. Under applicable federal rules and the educational institution's policy, one need not be an attorney or judge to serve as a hearing officer. There is no indication that the subject matter of the hearings would be resolved by the courts. Rather, the hearings are internal within the private institution and ultimately resolved by the dean of students, who considers the written reports in deciding whether discipline is appropriate. The penalties range from unfounded, to expulsion, to revocation of a student's degree if such has already been conferred. The inquiring senior judge anticipates that serving as a hearing officer for the student hearings would be infrequent and would not interfere with duties required of a senior judge.

DISCUSSION

Canon 5F(2) of the Florida Code of Judicial Conduct provides:

> (2) A senior judge may serve as a mediator in a case in a circuit in which the senior judge is not presiding as a judge only if the senior judge is certified pursuant to rule 10.100, Florida Rules for Certified and Court-Appointed Mediators. Such senior judge may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge may not advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes his or her mediation, arbitration, or voluntary trial resolution services and shall not permit an entity with which the senior judge associates to do so. A senior judge shall not serve as a mediator, arbitrator, or voluntary trial resolution judge in any case in a circuit in which the judge is currently presiding as a senior judge. A senior judge who provides mediation, arbitration, or voluntary trial resolution services shall not preside over any case in the circuit where such services are provided; however, a senior judge may preside over cases in circuits in which the judge does not provide such dispute-resolution services. A senior judge shall disclose if the judge is being utilized or has been utilized as a mediator, arbitrator, or voluntary trial resolution judge by any party, attorney, or law firm involved in the case pending before the senior judge. Absent express consent of all parties, a senior judge is prohibited from presiding over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator, arbitrator, or voluntary trial resolution judge within the previous three years. A senior judge shall disclose any negotiations or agreements for the provision of services as a mediator, arbitrator, or voluntary trial resolution judge between the senior judge and any parties or counsel to the case.

We addressed similar inquiries in Fla. JEAC Ops. 2019-33 and 2022-05. While both of those opinions concluded that the inquiring senior judges could also serve as hearing officers, neither opinion concluded that the hearings would not constitute "mediation, arbitration, or voluntary trial services." Rather, Fla. JEAC Op. 2019-33 [27 Fla. L. Weekly Supp. 915a] found that the hearing officer position would not involve the provision of such services *in the circuit* where the senior judge presides [emphasis added], and Fla. JEAC Op. 2022-05 concluded that, although the anticipated hearing officer services would fall within the scope of the activity contemplated by Canon 5F(2), the senior judge could serve as a hearing officer as long the hearings were conducted outside any circuit where the senior judge presides.

Under the facts and circumstances of this inquiry, however, we find that the anticipated services as a hearing officer do not involve service as a "mediator, arbitrator, or voluntary trial resolution judge" within the meaning of Canon 5F(2), as the hearings are internal and do not involve matters subject to resolution in the courts. Therefore, the inquiring senior judge may provide the described hearing officer services for the private educational institution, even if located within a circuit where the senior judge presides. In addition, under the facts of this inquiry, we find that the services do not involve the practice of law. *See* Fla. Code Jud. Conduct, Canon 5G.

REFERENCES

Fla. Code Jud. Conduct, Canons 5F(2); 5G
Fla. JEAC Ops. 2019-33 [27 Fla. L. Weekly Supp. 915a] and 2022-05 [30 Fla. L. Weekly Supp. 186]

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