Volume 30, Number 6, October 31, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 329-395

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.

- **INSURANCE—PROPERTY—INSURED'S ACTION AGAINST INSURER—CONDITIONS PRECEDENT. The circuit court denied a property insurer's motion which sought to dismiss an insured's complaint against it because of the insured's failure to provide the notice of intent to initiate litigation required by section 627.70152(3)(a). The court ruled that the statute may not be applied retroactively to a policy issued prior to the statute's effective date because the statute affects potential recovery of attorney's fees and attaches new legal consequences to events completed before the statute was enacted.** *WALKER v. STATE FARM FLORIDA INSURANCE COMPANY. Circuit Court, Second Judicial Circuit in and for Gadsden County. Filed September 12, 2022. Full Text at Circuit Courts-Original Section, page 339a.*

- **ATTORNEY'S FEES—CLASS ACTIONS—CONTINGENCY RISK MULTIPLIER. In a common fund class action related to the catastrophic collapse of a condominium building, the circuit court concluded that the result obtained by counsel warranted application of a contingency risk multiplier. The court's order included an extensive discussion of the extenuating and highly unusual aspects of the case and various factors which mitigated risk.** *IN RE: CHAMPLAIN TOWERS SOUTH LITIGATION COLLAPSE. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed August 29, 2022. Full Text at Circuit Courts-Original Section, page 344a.*

- **MORTGAGE FORECLOSURE—CONDITIONS PRECEDENT—HUD REGULATIONS. The circuit court entered a final judgment denying foreclosure after finding that the mortgagee failed to comply with a federal regulation requiring that the mortgagee have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting.** *PENNYMAC LOAN SERVICES, LLC v. USTAREZ. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed June 29, 2022. Full Text at Circuit Courts-Original Section, page 352a.*

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

Bold denotes decision by circuit court in its appellate capacity.

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Implied consent warning—Despite discrepancies in documents regarding times of arrest and of reading of implied consent warning, hearing officer's finding that licensee was arrested prior to reading of warning was supported by competent substantial evidence in narrative portion of arrest affidavit relating sequence of events

BRANDON TYLER WILDS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2021 31476 CICI, Division 32. July 11, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARY G. JOLLEY, J.) THIS CAUSE came before this Court on a Petition for a Writ of Certiorari (Dckt. No. 2) filed on November 15, 2021 by Brandon Tyler Wilds ("Petitioner"). The court, having reviewed the Petition and attached Exhibits, the Response filed by the Florida Department of Highway Safety and Motor Vehicles (Dckt. No. 15)("the Department"), and being otherwise fully advised in the premises, finds as follows:

Statement of the Case

Petitioner was arrested on July 29, 2021 for driving under the influence of alcohol or drugs. The sworn Arrest Affidavit provides that Petitioner was requested to submit to a breath test to determine his alcohol content. Petitioner refused and was then read the Implied Consent Warning, which he advised he understood and maintained his refusal. (Dckt. No. 2 at 21-22). The officer completed a sworn Affidavit of Refusal to Submit to Breath and/or Urine Test. (Dckt. No. 2 at 30). Petitioner's driving privileges were suspended as a result.

Petitioner timely requested an administrative hearing on the suspension of his driver's license. The administrative hearing was held on October 6, 2021. (Dckt. No. 6).

On October 15, 2021, the hearing officer entered his Findings of Fact, Conclusions of Law, and Decision, upholding the suspension of Petitioner's driver's license. The hearing officer found that the arresting officer had probable cause to conclude that Petitioner was driving or in actual control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances. The hearing officer further determined, based upon the documentary evidence, that Petitioner refused to submit to any such test after being requested to do so and was advised that if he refused to submit his driver's license would be suspended. (Dckt. No. 2 at 2627). In doing so, the hearing officer found there was sufficient evidence to establish that the breath test request and Implied Consent warning were incidental or after Petitioner's lawful arrest. . (Dckt. No. 2 at 12).

Specifically addressing Petitioner's argument under the implied consent law that there wass no competent substantial evidence which demonstrated that the request for a breath test occurred after Petitioner's arrest, the hearing officer found:

> . . . [T]he Charging Affidavit (DDL3) states that Petitioner was placed under arrest for the offense of DUI (8:14 pm) and then was requested to submit to a lawful test of his breath to which he refused. Petitioner was read Implied Consent from a department issued Implied Consent Card, advised he understood, and continued to refuse. Further, the Affidavit of Refusal (DDL5) states that Petitioner was read Complied Consent at 8:15pm and this is substantiated by the Implied Consent Warning form (DDL5). I find that [the] arrest time of 9:46pm within [the] DDL5 to be a clerical error. Lastly, I find the evidence to be reconcilable and can be deemed sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached. I further find that there is not a hopeless conflict within the record based on the charging affidavit (DDL3) account and the balance of the documents within the record.

Dckt. No. 2 at 12.

The instant petition for a writ of certiorari was timely filed. An order to show cause was entered and a response was filed in accordance therewith. No reply was filed. This review follows.

Statement of the Facts

The following documentary evidence was before the hearing officer as no testimony was offered.

On July 29, 2021, at approximately 2000 hours (8:00pm), Daytona Beach Shores Department of Public Safety Officer Molly Billue was conducting routine traffic patrol when she saw a person operating a golf cart and unable to maintain its lane. *See* Dckt. No. 2 at 21. Officer Billue proceeded to follow the golf cart and observed it traveling from the left southbound lane into the right southbound lane and then straddling the broken white line while there was traffic on the roadway. *Id.* Officer Billue further witnessed the golf cart travel into the turn lane and proceed through a red light at the intersection of South Atlantic Avenue and Moore Avenue. Officer Billue immediately activated the patrol car lights and sirens, and conducted a traffic stop. *Id.* Upon contact with Petitioner, the driver of the golf cart, Officer Billue observed him to have bloodshot, watery eyes, slurred speech, and the odor of alcoholic beverages emanating from his person. *Id.*

Officer Billue approached Petitioner, explained the reason for the stop, and requested his driver's license and registration. Petitioner was asked if he had been drinking, to which he replied, "A little bit." *Id.* at 21-22. Both Officer Billue and her partner, Officer Epling, observed a cup in the cup holder of the golf cart that contained a small amount of beer. *Id.* at 22. Petitioner was asked to step out of the golf cart and Officer Billue observed Petitioner walk with an unsteady gait toward the front of the patrol car. Officer Billue advised Petitioner she believed him to be too impaired by drugs and/or alcohol to safely operate a motor vehicle. *Id.*

She asked Petitioner to perform Standardized Field Sobriety Exercises, which he refused, and he was subsequently placed under arrest for the offense of DUI. Officer Billue requested Petitioner to submit to a lawful test of his breath for determining its alcohol content, which he refused. *Id.* Officer Billue read Petitioner the Implied Consent Warning from her departmental issued Implied Consent card. Petitioner advised he understood and continued to refuse. *Id.* He was then transported to the Daytona Beach Shores Department of Public Safety ("DBSDPS") police station for processing.

While at the police station, Officer Billue read Petitioner his constitutional rights pursuant to *Miranda*[1] and Petitioner expressed his understanding of said rights. *Id.* Petitioner waived his rights and answered questions from the DBSDPS's Alcohol Influence Report. Officer Billue asked Petitioner if he had been drinking and he advised, "Slightly, yes." The officer asked how much he had to drink and he advised he had a "few beers" and "not too much, 2 or 3 beers." *Id.*

The following exhibits were admitted into evidence, including: (i) DDL1—Florida DUI Uniform Traffic Citation (A34H9ME); (ii) DDL2—Florida Uniform Traffic Citation (AE6HD4E); (iii) DDL3—Arrest Affidavit; (iv) DDL4—Daytona Beach Shores Department of Public Safety (DBSDPS) DUI Report; (v) DDL5—DBSDPS Implied Consent Warning Form; (vi) DDL6—Affidavit of Refusal to Submit to Breath and/or Urine Test; (vii) DDL7—DBSDPS Your Rights Form; and (viii) DDL8—Alcohol Influence Report.

RULING

This Court has jurisdiction to consider this Petition pursuant to sections 322.2615(13) and 322.31 of the Florida Statutes (2021) and Florida Rule of Appellate Procedure 9.030(c)(3).

In reviewing an administrative agency decision by certiorari, this Court's role is strictly limited to consideration of: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

The first factor, procedural due process, "requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (internal citations omitted). The second factor, "whether the essential requirements of law were observed," requires an analysis of whether the lower tribunal applied the correct law. *Heggs,* 658 So. 2d at 530; *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a]. The third factor focuses on whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Florida Public Service Commission,* 380 So.2d 1028, 1031 (Fla. 1980).

"Evidence contrary to the agency's decision is outside the scope of the inquiry [during first tier certiorari review], for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence." *Dusseau,* 794 So. 2d at 1275. In other words, the Court must take care not to reweigh the evidence or substitute its judgment for the findings of the Department Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [petitioner's] driver's license should have been suspended").

Petitioner attacks the third prong for review, contending that no competent substantial evidence supports the suspension of his driver's license based upon his refusal to submit to a lawful request for his breath. Specifically, he argues that the evidence fails to demonstrate the request for a breath test occurred after his arrest as required by section 316.1932 of the Florida Statutes (2021), commonly referred to as the "implied consent law."

To be admissible under the implied consent law, a request for a breath test must be incident to a lawful arrest. *State v. Barrett,* 508 So. 2d 361 (Fla. 5th DCA), *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." *See* section 316.1932(1)(a), Fla. Stat. (2021). Otherwise stated, the arrest must precede the breath test. *Dept. of Hwy. Safety and Motor Veh. v. Whitley,* 846 So. 2d 1163, 1167 (Fla. 5th DCA) [28 Fla. L. Weekly D1090a], *rev. denied,* 858 So. 2d 333 (Fla. 2003).

Petitioner contends that the time entries on the Affidavit of Refusal to Submit to Breath and/or Urine Test ("Refusal Affidavit") prove Officer Billue requested he submit to a breath test prior to him being arrested. (Dckt. No. 2 at 24). Specifically, the Refusal Affidavit reflects that Officer Billue requested Petitioner submit to a breath test at 8:15 p.m. and that Petitioner was arrested at 9:46 p.m. While Petitioner acknowledges that the Arrest Affidavit narrative states he was advised of Implied Consent after his arrest, he contends that without definitive times for each action, one must draw an inference from these documents to determine the correct sequence of events. Petitioner contends that the common sense inference to be drawn is that the single time entry for his arrest on the Refusal Affidavit was the actual time of his arrest.

The hearing officer found to the contrary, finding that a single inconsistent time entry on the Refusal Affidavit was insufficient to overcome the more specific written narrative in the Arrest Affidavit that fully explained the correct sequence of events. He further found that the evidence was reconcilable that Petitioner's arrest occurred before his refusal.

The competent substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record, which as a whole supports the findings. *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citations and quotations omitted). In *Labuda v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 208a (Fla. 7th Cir. Ct. May 22, 2012), this Court held that even though there were time discrepancies in the documents regarding the times of arrest and a reading of the implied consent warning, a hearing officer's finding is supported by competent substantial evidence when the narrative portion of the probable cause affidavit relates the sequence of events. Similarly, in *Feeley v. State Dep't. of Highway Safety & Motor Vehicles,* 29 Fla. L. Weekly Supp. 57b (Fla. 5th Cir. Ct. Mar. 16, 2021) (citing *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488 (1951)), the court found:

> The hearing officer in the instant matter based a decision on the Arrest Affidavit that stated that the arresting Deputy first arrested the Defendant and then later requested the Defendant submit to a breath test. For this Court to call the Arrest Affidavit into question by comparing it to additional case documents would be to wrongly reweigh the evidence at this state of review. There was competent substantial evidence to support the hearing officer's findings of facts and decision.

Id.

Here, a plain reading of the documents before the hearing officer below supports his finding that they were not hopelessly in conflict, and instead support the most logical chronological conclusion given the narrative in the Arrest Affidavit. With that, Petitioner has failed to demonstrate entitlement to relief on the basis that the finding below was unsupported by competent substantial evidence. *See Labuda,* 20 Fla. L. Weekly Supp. at 208a (competent substantial evidence supported hearing officer's findings based upon documentary evidence and in particular "in the case of Mr. Labuda, the narrative section of the probable cause affidavit makes the sequence of events clear"); *Soles v. Dep't. of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Cir. Ct. Sept. 22, 2008) (rejecting argument that arrest documents in the record were "replete with conflicts, inconsistencies and unanswered questions," where hearing officer had the guidance of a sworn statement made by the arresting officer which was competent substantial evidence of a refusal to submit to breath test following a lawful arrest); and *Jones v. Department of Highway Safety and Motor Vehicles,* 3 Fla. Weekly Supp.

534c (Fla. 7th Jud. Cir. January 26, 1995)(despite contradictory time entry in refusal affidavit, hearing officer's determination that the Implied Consent Warning was read to Petitioner after he was arrested based on the chronology set for in Arrest Affidavit was competent substantial evidence to support findings and errant time entry on refusal affidavit was a clerical error).

WHEREFORE, based upon the foregoing, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DENIED**.

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

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Traffic infraction—Failure to maintain single lane—Competent, substantial record evidence supported hearing officer's conclusion that officer had probable cause to believe licensee had violated section 316.089—Even in the absence of traffic infraction, officer had reasonable suspicion to conduct a welfare check after observing erratic driving pattern

STEVEN WILDER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. CA22-456, Division 55. July 21, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HOWARD M. MALTZ, J.) Petitioner Steven Wilder seeks review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Review, Florida Department of Highway Safety and Motor Vehicles ("Department") entered on March 16, 2022. The decision of the hearing officer affirmed the order of suspension of the driving privilege of Petitioner. This Court, having considered the briefs of the parties, finds as follows:

Petitioner was arrested by Corporal S. Canning of the St. Augustine Police Department ("SAPD") for driving under the influence of alcohol on February 4, 2022. Following his arrest, Petitioner was advised of his implied consent warning including the sanctions for refusing to submit to an approved breath alcohol test. After being so advised, Petitioner refused to submit to a breath test. Petitioner was issued a citation for offenses including DUI, and his driving privilege was immediately suspended pursuant to Fla. Stat. § 322.2615 for refusing to submit to a breath alcohol test.

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

1. Florida Uniform Traffic Citation and Notice of Suspension #ABAM4PE
2. Florida Uniform Traffic Citation #AET1J5E
3. Florida Uniform Traffic Citation #AET1JAE
4. Affidavit of Refusal to Submit to Breath and/or Urine Test
5. Copy of Petitioner's Driver's License
6. Arrest Report
7. State of Florida Recognizance for Appearance at Court
8. St. Johns County Sheriff's Office Booking Information

At the formal review hearing, Petitioner sought to invalidate the administrative suspension of his driver's license. On March 16, 2022, the hearing officer issued her Findings of Fact, Conclusions of Law and Decision affirming the suspension of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.

Jurisdiction

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

Standard of Review

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

Analysis

Petitioner challenges the hearing officer's conclusion by asserting there was not competent, substantial evidence to support the lawfulness of Cpl. Canning's stop of his vehicle, which led to his subsequent arrest for DUI.

In order to uphold a license suspension under Fla. Stat. § 322.2615, the hearing officer must find that Petitioner was lawfully arrested. *Fla. Dep't. of Hwy. Safety and Motor Vehicles v. Hernandez,* 74 So.3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a]. For an arrest to be lawful, the initial stop must be based on reasonable suspicion of a crime or probable cause for a traffic infraction.

The hearing officer had before her Cpl. Canning's arrest report which described Petitioner's driving on February 4, 2022, at 11:06 p.m. as:

> The defendant was traveling southbound on N. Ponce De Leon Blvd. near the intersection of Sargossa St. in the left (fast) lane, failing to maintain a single lane by crossing over the solid painted line on the left side of the travel line. Upon activating my emergency lights in my marked patrol vehicle bearing agency insignia, the defendant continued to travel westbound on Madeore St. with his hazard lights activated, leaving the intersection I initially began my traffic stop (S. Dixie Highway/Madeore St.)

Furthermore, the hearing officer received testimony from Cpl. Canning that included his more detailed description of Petitioner's driving pattern as "unable to maintain his lane," by crossing the left lane dividing line approximately three times. (*Hearing transcript,* p. 10-11)

Fla. Stat. § 316.089 provides in relevant part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply:
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

This Court finds *Yanes v. State,* 877 So.2d 25 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a], to be instructive wherein the Court affirmed the trial court's denial of a motion to suppress. There, the defendant was observed by a deputy sheriff driving his vehicle on

Florida's Turnpike when defendant crossed the "fog line" three times within one mile. *Id.* at 26. The Court found the traffic stop was proper, pursuant to Fla. Stat. § 316.089 because under the circumstances the lane deviation was more than practicable. The Court rejected the defendant's argument that the initial stop was improper because despite crossing the fog line three times, defendant did so without endangering anyone. *Id.* The Court went on to explain that even in the absence of a traffic violation, the stop would have been justified under the circumstances. The Court explained:

> . . . here evidence was adduced that Appellant's abnormal driving caused the deputy to suspect that Appellant was impaired or otherwise unfit to drive. We think his suspicion was well-founded, thereby justifying the stop, even in the absence of a traffic violation. *See Esteen v. State,* 503 So.2d 356 (Fla. 5th DCA 1987) (weaving within lane and driving slower than posted speed justified stop based on reasonable suspicion of impairment, unfitness or vehicle defects, even absent a traffic violation); *State v. Carrillo,* 506 So.2d 495 (Fla. 5th DCA 1987) (weaving within lane five times within one-quarter mile sufficient to establish reasonable suspicion of impairment); *Roberts v. State,* 732 So.2d 1127 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533a] (weaving several times sufficient to justify stop); *State v. Davidson,* 744 So.2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a] (evidence of abnormal driving, albeit not amounting to a traffic violation, justified stop based on reasonable suspicion of impairment); *State v. DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992) (using lane as "marker" to position vehicle and slowing to 30 miles per hour sufficient to justify stop based on suspicion of impairment or defects in vehicle).

Id. at 27

There is competent, substantial evidence in the record that Cpl. Canning had probable cause that Petitioner violated Fla. Stat. § 316.089 by deviating from his lane of travel approximately three times within a short distance. Moreover, there is competent, substantial record evidence to support the hearing officer's finding that stated:

> Based on the facts as set forth above, I find that there was a lawful basis for a welfare check. While Cpl. [Canning] testified that he was not concerned that the petitioner would lose control of his vehicle he did not state that he had no concerns that the petitioner was ill, tired or impaired; and while there was no evidence that others were affected, based on petitioner's driving pattern as outlined above there was an objective basis to believe that the petitioner was ill, tired or impaired and thus there was a lawful basis for a welfare check.

Appendix p. 16. Even absent a traffic violation, Cpl. Canning had reasonable suspicion Petitioner could be impaired or to conduct a welfare check, under the circumstances. *See Fla. Dep't. of Hwy. Safety and Motor Vehicles v. DeShong,* 603 So.2d 1349, 1352 (Fla. 2d DCA 1992); *Bailey v. State,* 319 So.2d 22 (Fla. 1975); *Roberts v. State,* 732 So.2d 1127, 1128 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533a]; *Yanes, supra.*

Because there is competent, substantial record evidence to support the hearing officer's conclusion that Cpl. Canning's stop of Petitioner's vehicle was lawful, Petitioner is not entitled to certiorari relief.

Therefore, it is ORDERED AND ADJUDGED that:

The Petitioner for Writ of Certiorari is hereby DENIED.

* * *

Municipal corporations—Code enforcement—Appeals—Certiorari—Timeliness of petition—Petition challenging citation for engaging in short term rentals without business tax receipt was untimely where petition was not filed within 30 days of receipt of notice of violation

BIROL OZYESILPINAR, Petitioner, v. CITY OF MIAMI BEACH, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-42-AP-01. L.T. Case No. CC2020-08192. August 8, 2022. Petition for Writ of Certiorari from Final Order of Enforcement by City of Miami Beach. Counsel: Birol Ozyesilpinar, in proper person, Petitioner. Rafael A. Paz, City Attorney for City of Miami Beach; and Woody Clermont and Yoe Lopez, Senior Assistant City Attorneys, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ORDER GRANTING MOTION TO VACATE ORDER PRECLUDING CITY OF MIAMI BEACH FROM FILING BRIEF AND ORDER OF DISMISSAL

(PER CURIAM.) This is an untimely-filed Petition for Writ of Certiorari, seeking to review a Notice of Violation in citation number CC2020-8192, dated on January 21, 2020. (App. at p. 5)[1] The violation alleges the Petitioner engaged in a short-term rental without obtaining the requisite business tax receipt. *Id.* The face of the citation indicates that it was delivered by certified mail. The Appendix also contains a signed receipt of the certified delivery. *Id.* at p. 6.

The Petitioner failed to appeal the citation to the Special Master within 10 days. Failure to appeal constituted a waiver of the right to contest the violation. *See* Section 102-387(d)(2), Miami Beach Code. Had the Petitioner appealed and had the citation been upheld, Petitioner would have been entitled to appeal that decision to the 11th Judicial Circuit, Appellate Division, within 30 days. *See* Section 162.11, Fla. Stat.; Section 102.387(d)(3)e, Miami Beach Code. But he did not.

Instead, he did nothing. A year and a half later, on July 6, 2021, the City recorded a claim of lien on the property. (App. at p. 7) Forty-eight days later, he filed his Petition for Writ of Certiorari. In it, he cites Rule 9.141, Florida Rules of Appellate Procedure, a rule providing for the right of a convicted criminal defendant to seek a belated appeal. He argues that his Petition is belated because he never received the notice of violation from the City and was unaware of the violation until he was served with the notice of claim of lien.

The City of Miami Beach filed no response to the Petition, and, as a sanction, was precluded from filing a responsive brief or from participating in any oral argument. (DE 23) Thereafter, the City filed a motion to vacate the order and to dismiss this case. (DE 25)

In its motion, the City argues that this Court lacks jurisdiction to entertain this Petition. The City points out that the Petitioner failed to exhaust his administrative remedies by failing to take a timely appeal of the citation to the Special Master. Therefore, there has been no final agency action which would entitle him to appeal to this Court.

More importantly, the City argues that because this is an appeal authorized by general law, the Petitioner was required to file a notice of appeal within 30 days of rendition of the order of final agency action. *See* Rule 9.110(a)(2), Fla. R. App. P. Failing to file a timely notice of appeal divests this Court of jurisdiction, and it must, therefore, dismiss. *See, e.g., State of Fla. Dep't. of Highway Safety & Motor Vehicles v. Melendez*, 132 So. 3d 1237, 1237 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D458a] ("The 30-day filing deadline established by Rule 9.100(c) is jurisdictional in nature and not merely a matter of procedure. . . As such, an untimely Petition divests this court of jurisdiction over the untimely filed Petition and it should be dismissed".).

Petitioner claims that he did not receive the notice of violation. He cites the criminal rule of appellate procedure entitling a criminal defendant to file a belated appeal. Setting aside the docket entry bearing out the Petitioner's signed receipt of the Notice of Violation by certified mail (DE 19 at p. 5), we lack the authority to grant a belated appeal—or a belated petition for writ of certiorari—even under such alleged circumstances.

Florida Rule of Appellate Procedure 9.190 governs appellate review of administrative actions. Rule 9.190(b)(3) provides that:

> "[review of quasi-judicial decisions of any administrative body, agency, board or commission not subject to the APA shall be

commenced by filing a petition for writ of certiorari in accordance with rules 9.100(b) and ((c), unless judicial review by appeal is provided by general law.

§162.11, Florida Statutes, states:

An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the code enforcement board. **An appeal shall be filed within 30 days of the execution of the order to be appealed.**

(Emphasis added). In a recent decision of this Court dismissing a similar untimely appeal, we explained:

> While Appellant asks this Court to exercise jurisdiction because of an asserted denial of due process, such a request is beyond the power of this Court to grant. Neither trial nor appellate courts in this state are authorized to extend the time for filing notices of appeal, "no matter what reason or method is employed in an attempt to do so." *Congregation Temple De Hirsch of Seattle, Wash. v. Aronson,* 128 So. 2d 585, 586 (Fla. 1961). Similarly, in *Jones v. Jones,* 845 So. 2d 1012, 1013 (5th DCA 2003) [28 Fla. L. Weekly D1254b], the court dismissed an appeal filed more than 30 days after rendition of a judgment, stating: "[j]urisdictional time limits may not be altered by the actions or inactions of the parties or the trial court. . .The trial court was without authority to extend the time to file a motion for rehearing or to file the notice of appeal". Following the same rationale, the court dismissed an appeal as untimely in *Capone v. Florida Board of Regents,* 774 So. 2d 825, 827 (Fla. 4th DCA 2000) [26 Fla. L. Weekly D43a] (concluding that a court's local rules and practices for filing of non-jurisdictional papers cannot usurp the constitutional power of the supreme court's authority to establish the time limit within which appellate review must be sought).

See Fla. Auto Reserve v. Town of Medley, 2021-43-AP-01, 2022 WL 205042 at *2 (Fla. 11th Cir. Ct. Jan. 11, 2022) (Trawick, J.).

Appellate court jurisdiction "may be 'raised at any time . . . because jurisdiction derives only from constitutional or statutory authority or in consequence of fundamental common-law principles.' " *Bramblett v. State*, 15 So. 3d 839 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1505a] (quoting *Crapp v. Criminal Justice Standards & Training Comm'n*, 753 So.2d 787 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D822f]). For this reason, we grant the City's motion to vacate this Court's order precluding it from responding to the Petition.

Based on the foregoing authorities, we find that this appeal is untimely and must therefore be **DISMISSED.** (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

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[1]The Appendix is not paginated, and page references will be to the digital page numbers.

* * *

Counties—Public utilities—Water and sewer—Certiorari challenge to hearing officer's order holding property owner responsible for high bill for water usage at property during year that it was occupied by squatters who could not be removed because of COVID moratorium on evictions—Due process—Hearing officer did not apply, as argued, a presumption of correctness to water meter readings —Readings were presented as prima facie evidence, and owner did not challenge readings—Denial of billing adjustment based on owner's lack of access to property during moratorium did not violate due process, as there is no adjustment under rules for customers who do not have access to their own property—Failure to afford an adjustment based on alleged act of vandalism did not violate due process—Owner did not present evidence to support claim of broken pipe, and fact that squatters left water running constantly was not act of vandalism—Owner was not entitled to adjustment for concealed leak where he failed to provide required proof of repair—Owner was not entitled to once-in-lifetime adjustment for extreme circumstances where he did not submit request on required form with affidavit of inspection by licensed plumber—Failure of water department, which did not have access to property during squatters' occupancy due to locked gate and dog, to bill quarterly did not violate due process

ANDRES GONZALEZ, Petitioner, v. MIAMI-DADE COUNTY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-57-AP-01. July 29, 2022. On a Petition for Writ of Certiorari from a Final Order of a Hearing Officer, Miami-Dade Water and Sewer Department. Counsel: Wayne R. Atkins, Xander Law Group, P.A., for Petitioner. Geraldine Bonzon-Keenan, Miami-Dade County Attorney, and Angela F. Benjamin, Assistant County Attorney, for Respondent.

(Before WALSH, TRAWICK and SANTOVENIA, JJ.)

OPINION

(WALSH, J.) Petitioner Andres Gonzalez ("Petitioner") has filed a Petition for Writ of Certiorari challenging a Miami-Dade Water and Sewer Department Hearing Officer's order holding him responsible for a $56,333.77 water bill. Petitioner claims that this decision violated his procedural due process rights.

Background

On January 20, 2020, Petitioner purchased a house ("Property") in Miami-Dade County and opened an account with the Miami-Dade Water and Sewer Department ("WASD"). The previous owner's account was closed in 2017. Although after his purchase, Petitioner promptly obtained a judgment on a detainer action to evict squatters on the property, he could not take possession because a COVID moratorium on evictions prevented execution of a writ of possession. From February 2019, through May 2020, WASD attempted to read the meter at Petitioner's Property at least six times but was unable to do so because the property was enclosed by a locked gate, occupied by squatters, and because there was a dog on the premises. In November 2020, Petitioner served a writ of possession to remove the squatters. In December 2020, WASD was finally able to access the Property and obtain a meter reading, resulting in the high bill for water usage.

In January 2021, WASD mailed a bill to Petitioner for $56,333.77 for water usage during the period of time from January 20, 2020, through December 1, 2020. WASD also sent a letter to Petitioner notifying him that after the account for the Property was closed and water disconnected in 2017, at some point, the water meter was subsequently turned on without authorization and the meter registered unbilled consumption. The record indicates, however, that billed usage occurred after the Petitioner purchased the Property. (App. at 50-61)

After receiving the bill, Petitioner went in person to the WASD and explained to a representative that he had been unable to evict the squatters on his property due to the Covid-19 moratorium on evictions. Petitioner also claimed that he personally made repairs to a broken pipe in November 2020.

WASD asked Petitioner to provide documentation to support any possible adjustment under WASD's rules and regulations. The Petitioner alleged that two possible adjustments existed—one for vandalism and one for concealed leaks. However, none of the documentation provided by the Petitioner was sufficient to permit WASD to provide Petitioner an adjustment, and the adjustment was denied.

Petitioner then requested an administrative hearing to review WASD's denial of his billing adjustment.

At the administrative hearing, the Hearing Officer explained that the purpose of the Hearing was to determine whether WASD delivered the amount of water shown on Petitioner's bill. WASD identified potential billing adjustments in the code for vandalism or

concealed leaks but negated these adjustments because Petitioner offered inadequate documentation. Petitioner argued that he had difficulty communicating with any individual in WASD regarding the documentation he provided.

In support of the Petitioner's allegation that he was entitled to a billing adjustment for a leak that was concealed or hidden, Petitioner provided a photo of a repaired pipe and a Chase Bank record reflecting an unspecified Home Depot purchase. (App. 21-23) Regarding his alleged entitlement to a billing adjustment for acts of vandalism, the Petitioner was asked by WASD to provide evidence in support of this adjustment, but never did. (App. 85-86) The Petitioner admitted that he never made any report of vandalism. (App. 132-33)

Finally, the Petitioner failed to show, as was required for a one-time lifetime billing adjustment,[1] that he was a customer in good standing with the Department. The Petitioner also did not provide the required affidavit by a licensed plumber as to any leaks attesting that the customer did not allow the water to flow inadvertently. The Petitioner never had a licensed plumber check for concealed or visible leaks and no affidavit was provided to the Department. By the Petitioner's own admission, squatters left the water running in the unit.

The WASD witness expressed his sympathy for the circumstances leading to the high bill, but explained the Department's decision as follows:

> The department cannot be held responsible for any water use or loss that has occurred downstream of the point of delivery. It is the responsibility of the customer. Now, there was a statement made from the customer to department staff on April 5th where he states that the high consumption is caused by tenants leave (sic) the fixtures opened, and unfortunately, the department does not have an adjustment that can be provided for fixtures being left open. An adjustment can be provided for a meter which is tested and fails above the legal accuracy standard. An adjustment can be provided if there's an outlet leak at the connections to the meter. An adjustment can be provided for acts of vandalism or for concealed leaks. For customers with pools, we provide a once a year reduction on the sewer charges only for the volume capacity of the pool, but all of those credits and reductions to the invoicing have some basis in our regulations and have some form of requirement which must be met, documentary or from the customer or in some form of record system from the department when the department performs outlet leak repairs, but always there is some backup, some paperwork, work order, invoice for repairs that will tell us there was a plumbing issue and it has been repaired and the water loss has been mitigated.

(App. 87-88)

Although WASD could not adjust the bill on the ground that squatters left the water running, WASD offered to accept a long-term payment plan for the high usage.

After an agreed-upon recess, the Hearing Officer entered Findings of Fact and Conclusions of Law which determined that the Petitioner is "responsible for the amount stated on the subject bill(s) for water and sewer services." The Hearing Officer determined that 1) the water usage charges were in line with WASD's rules and regulations, and 2) the water meter measured water delivered to the Property within acceptable standards of accuracy. The Hearing Officer did not sustain any of the Petitioner's claimed billing adjustments. At the conclusion of the Hearing, the Hearing Officer explained that as an administrative hearing officer, while very sympathetic, he was not allowed any discretion in his findings.

Standard of Review

This Court applies a three-part standard of review to an administrative agency's decision: "(1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *See Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citation omitted).

Analysis

Petitioner does not argue that there was a dearth of competent substantial evidence nor that there was a failure to abide by the essential requirements of law. Therefore, we will not address these elements of the standard of review, as they have not been challenged. Petitioner confines his arguments to whether his due process rights were abridged.

> Fundamental to due process is that the ultimate decision in any hearing be based upon evidence presented, which the accused has sufficient opportunity to refute. *Goldberg v. Kelly,* 397 U.S. 254, 270, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). To fulfill these requirements, a party is entitled to both "notice and a meaningful opportunity to be heard." *Pena v. Rodriguez,* 273 So. 3d 237, 240 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a]; *see also* Amend. XIV, U.S. Const.; Art. I, § 9, Fla. Const.

Fla. Int'l. Univ. v. Ramos, 335 So. 3d 1221, 1224 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2299a].

Petitioner presents three arguments claiming that WASD violated his due process rights. First, he argues that the Hearing Officer gave WASD an impermissible evidentiary presumption in its favor. Second, he asserts that WASD failed to follow its own rules in connection with Petitioner's lack of access to the Property. This argument addresses WASD's failure to provide certain billing adjustments. Third, he argues that WASD failed to follow its own rules regarding billing frequency. (Amd. Pet., pp. 5-6)

No Presumption of Accuracy for Water Meter Readings

Petitioner's first argument is that the Hearing Officer assigned undue weight to the water meter reading or essentially converted the meter reading into a "presumption" which violated his due process rights. In *Miami-Dade Cty. v. Reyes,* 772 So. 2d 24, 29 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2014b], the court held that Miami-Dade County hearing guidelines granting (at that time) an evidentiary presumption of correctness to water meter readings violated due process. The County guidelines then provided that "when the meter is found to be within acceptable standards of accuracy, a 'very strong presumption is created' in favor of the accuracy of the water bill." The court in *Reyes* explained that evidence of water meter consumption only provides *prima facie* evidence which "does not amount to a legal presumption." *Id.*

Here, there was no presumption of correctness given to the water meter readings in this case. Instead, in accordance with *Reyes,* WASD presented water meter readings as *prima facie* evidence of the amount of water delivered to the Property. In fact, at no point during the hearing was a presumption mentioned nor found by the Hearing Officer.

Petitioner also complained about the unfairness of the high water meter readings in view of his inability to evict squatters on the property because of COVID-19 restrictions. He further recounted that he performed a subsequent repair of a pipe. But he offered no testimony refuting the accuracy of the meter reading and did not challenge WASD's reading of the meter. And he never explained what pipe required fixing or whether that repair related to the high readings. Thus, Petitioner failed to provide this Court with a record sufficient to demonstrate any error by the Hearing Officer in finding the water meter reading to be accurate.

No Due Process Violation for Denying Adjustment Based on Lack of Access to Property or Failure to Provide Certain Billing Adjustments

Petitioner's second argument is that in denying him a billing adjustment because he took possession of his property in November

of 2020, the Hearing Officer denied him due process. Petitioner argues that WASD failed to follow its own rules in failing to provide a billing adjustment for a customer who lacks access to their own property. We recognize that the Petitioner could not execute a writ of possession to evict the squatters because of COVID-19 restrictions. However, there is no specific adjustment under WASD rules for a customer who does not have access to their own property. Therefore, no violation of due process occurred.

Petitioner further argues that the Hearing Officer denied him procedural due process in failing to follow three WASD rules which permit billing adjustments for acts of vandalism, concealed leaks, and a one-time lifetime adjustment for extreme circumstances.

Miami-Dade Water and Sewer Department Rules and Regulations for Water and Sewer Service, (Revised, March 2018), (hereinafter "WASD Rules and Regulations"), Section 2.10(1)(d) states:

> Acts of Vandalism—Customer shall report such acts immediately to the Department and request termination of service until the Customer's plumbing can be fully repaired. The Customer shall then submit to the Department, in writing, the nature of the vandalism, the date of occurrence, the date of repair, and police case number. Adjustments will be determined similarly to those for concealed leaks as described in Section 2.10(e) and 3.10.

Petitioner argues that "he provided documents to (WASD) on this point, but the Hearing Officer appeared to believe there was a requirement that he "contact the police.' " (Reply, p. 7) Petitioner believes that proof of his eviction proceeding against the squatters on his property suffices for the requirement of "contacting the police," or filing a police report to prove an act of vandalism.

Petitioner's argument fails because Petitioner failed to submit documentation supporting his claim of vandalism. The Petitioner's evidence did not support a claim of vandalism. He presented two photos of a capped pipe (App.22-23), and a Chase Bank transaction for an unspecified purchase from Home Depot. (App.21, 101) Furthermore, we find that Petitioner failed to comply with the specific requirement of Section 2.10(1)(d) to submit in writing the nature of the vandalism, the date of the occurrence, the date of repair, and police case number. Moreover, there was no allegation of an act of vandalism—instead, Petitioner claims that squatters occupied his premises, turned the water on without permission, and prevented him from entering his property. This is not an act of vandalism which would entitle the Petitioner to a billing adjustment.

Petitioner next argues that he should be entitled to mitigation of his water bill due to a concealed leak.

> Section 2.10(1)(e) Concealed leaks of WASD Rules and Regulations states:
>
> . . .
>
> The Department shall also provide a one-time lifetime adjustment to its quarterly customers, equal to 100% of the difference, in the event of a concealed or hidden leak that results in a bill that exceeds by six (6) times the past year's average water quarterly consumption. In order to qualify for the adjustment, the Customer shall be required to make the necessary repairs and submit to the Department the information specified below. A corrected bill shall be issued which shall be based either on the previous year's average consumption or on the rate of consumption after the repair has been made.
>
> In order to be considered for an adjustment, the customer must provide the Department with the following:
>
> (1) Within thirty (30) days after notification by way of bill, letter, door hanger, email, etc. from the Department advising a plumbing problem may exist, the Customer must provide the Department with a letter from the company or person who has made the repair. This letter must contain the date the repair was made, the location and the material used to make the repair. There will be a charge to provide a concealed leak credit . . . unless the repair was performed by a licensed plumber and the plumber's license number is provided in the letter.
>
> (2) The area of the repair should be left exposed (the Customer must insure that hazardous conditions do not exist as a result of the repair), for inspection by the Department's investigator.

Petitioner argues that the Hearing Officer incorrectly opined that "the law required proof of repairs by a certified plumber. . . ," and that the Hearing Officer conflated Section 2.10(1)(e) Concealed Leaks Adjustment with Section 2.10(1)(f) One-Time Lifetime Adjustments. Section 2.10(1)(f) (lifetime billing adjustment) specifically requires proof of repairs by a licensed plumber, while Section 2.10(1) (e) (concealed leaks) requires proof by a licensed plumber only in the event there is a charge to provide a concealed leak credit.

Regardless of whether Petitioner was correctly or mistakenly required to furnish "proof by a certified plumber," Petitioner did not provide WASD with a letter from the company or person who made the repair, the date the repair was made, and the location and the material used to make the repair. Although Petitioner stated that he repaired a water pipe, he failed to provide any documentation attesting to his repair, what was broken or what was replaced. Further, there was no proof that the leak was "concealed." The photograph introduced by the Petitioner certainly is not self-evident proof of a "concealed" leak to qualify under Section 2.10(1)(e).

Petitioner also cites WASD Rules and Regulations entitling him to a credit to a customer's water bill as a one-time lifetime adjustment.[2]

> Section 2.10(1)(f) One-Time Lifetime Adjustments for Extreme Circumstances. At the discretion of the Director, the Department may issue a one-time lifetime billing adjustment to customers where there are extreme circumstances that merit an adjustment as delineated below.
>
> . . .
>
> (2) In order to request a one-time lifetime billing adjustment, a customer must submit their request on a form proscribed by the Department; and must provide the Department with a notarized affidavit stating that a licensed plumber has checked the residence (inside and out) for leaks (both concealed and visible); that the customer did not leave a hose running inadvertently or otherwise allow water to flow for any period of time; . . .

Applying the above section, Petitioner did not submit a request on WASD's form or provide a notarized affidavit. No licensed plumber ever inspected the Property to support any affidavit that anyone on the Property did not leave a hose on inadvertently or otherwise allow the water to flow. Accordingly, we find no due process violation in the Hearing Officer's denial of a one-time lifetime adjustment. And again, at oral argument, the Petitioner's counsel conceded that he was withdrawing his argument that there was an error in the failure to provide a lifetime billing adjustment.

Petitioner next argues that the previous owner of the Property should be responsible for the water bill until a notification of change in occupancy was received by WASD.

> Section 2.02(11) Change in Occupancy states:
>
> When change of occupancy takes place on any premises supplied by the Department with water service, customers can make the request to start or discontinue service online via https://accounts.miamidade.gov/uaa/login, or call the Department's Customer Service Section at 1-800-565-1800 or send written notice (including letter, fax or email) to the Department not less than two (2) days prior to the date of change by the outgoing Customer, such outgoing Customer to be held responsible for all water service rendered to such premises until such notification has been received by the Department. The application of a successor occupant for water service will automatically terminate the prior account.

Section 2.02 (11) clearly states that after a customer requests to start or discontinue service either through calling, writing or applying

online to WASD, the previous owner's water service is automatically terminated. Petitioner was informed by WASD that the previous customer's account ended on September 26, 2017. (App. 82). Petitioner candidly admitted that the previous owner's account was "inactive" (Reply at p. 4).

No Due Process Violation for Billing Frequency and "High Bill Policy"

Petitioner's third argument is that he was denied due process due to WASD's failure to follow its own rules regarding billing frequency, and its "high bill policy." Section 3.07(2) and Section 2.11(1) of WASD's Rules and Regulations call for bills to be rendered monthly or quarterly and that high bills (those that exceed 100 percent of the previous year's average) shall be investigated by WASD.

> Section 2.11-Investigative Procedures (1) High Bill Policy—states: Any account which indicates a single billing cycle consumption that exceeds 100 percent of the previous year's average shall be automatically investigated by the Department without charge to the Customer. Additionally, any account which indicates a single billing cycle consumption that exceeds the previous year's average by more than a 50 percent average, shall be investigated by the Department, at the Customer's request, without charge to the Customer. The investigator will determine if the meter has been correctly read and attempt to determine whether there is continuing registration, which may indicate leakage on the Customer's property. However, it is not the responsibility of the investigator to check any internal or external plumbing belonging to the Customer.

Petitioner argues that because due process requires notice and an opportunity to be heard, WASD's failure to comply with its own Rule 2.11(1)- deprived Petitioner of notice of his high bill. Accordingly, Petitioner contends that this is a due process violation. However, Rule 2.11(1) states "[a]ny account which indicates a single billing cycle consumption that exceeds 100 percent **of the previous year's average. . .**" (emphasis supplied). There was no previous year's average available as Petitioner acquired the Property in January 2020, but WASD could not read the meter until December 2020. Also, because WASD had no notice of the previous year's bill, WASD could not have initiated any investigation.

WASD correctly counters that this due process argument focuses on WASD's failures, rather than the Hearing Officer's alleged failures. We are required to determine whether procedural due process was afforded, the sole argument presented in this Petition. Such due process was afforded here. *See Ramos,* 335 So. 3d at 1224.

Moreover, by raising the argument without asserting any error on the part of the Hearing Officer, Petitioner has asked this Court to improperly re-weigh the evidence. *See Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Com'rs.,* 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a].

Furthermore, Petitioner contends that he could have taken steps to reduce his water bill if WASD had billed him in a timely manner or quarterly. Even accepting as unrefuted Petitioner's argument that it was not his fault that he had no access to his Property, his claim of inadequate billing does not waive his obligation to pay his water bill. And Petitioner did not follow the requirements of WASD's Rules and Regulations to obtain a mitigation of his water bill. Finally, WASD was only given access to read the meter in November 2020. (App. 50-61) Thereafter, it *did* bill the Petitioner quarterly. *Id.*

While this Court is sympathetic to Petitioner's plight, our review is constrained as the Petitioner failed to supply adequate documentation pursuant to the applicable rules. Considering the Petitioner's predicament in his inability to shut the water off for 11 months, WASD offered him a long-term payment plan rather than demanding the entire arrearage. (App. 142) Moreover, had the Hearing Officer found in favor of Petitioner, such finding would be unsupported by competent substantial evidence. The findings by the Hearing Officer, therefore, were correct and did not violate the Petitioner's due process rights.

The Petition for Writ of Certiorari is therefore **DENIED.** (SANTOVENIA and TRAWICK, JJ., concur.)

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[1] At oral argument, Petitioner's counsel conceded that he was withdrawing his claim based on the failure to afford a one-time lifetime billing adjustment.

[2] Counsel for Petitioner withdrew at oral argument any claim that he is entitled to the one-time lifetime adjustment as he argued in his briefing. In the event that this concession is not an abandonment of this claim, we elect to address it.

* * *

Municipal corporations—Variances—Appeals—Certiorari—Mootness—Petition for writ of certiorari challenging town commission's approval of variance for dock in excess of maximum size allowed by town code is moot where commission has adopted ordinance increasing maximum allowable dock size—Fact that dock at issue fails to meet side setback requirements of new ordinance does not fall within exception to mootness where issue was not raised in petition and did not exist at time petition was filed

STEPHEN NAGY, et al., Petitioners, v. TOWN OF LAUDERDALE BY THE SEA, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22004339, Division AW. July 29, 2022.

Final Order of Dismissal for Mootness

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, on Respondent's Motion to Dismiss Petition for Certiorari on Grounds of Mootness dated June 28, 2022. Having considered the Motion to Dismiss, Petitioners' Response to the Motion and Respondent's Reply in Support of the Motion to Dismiss, having reviewed the case file and considered applicable law, and being otherwise duly advised, the Court rules as follows.

On June 28, 2022, Respondent filed a Motion to Dismiss the Petition for Writ of Certiorari ("Writ") on the basis that it was now moot. Respondent argues that because the Town of Lauderdale-by-the-Sea's Commission adopted Ordinance 2022-02 ("Ordinance") the Writ, if granted; will have no actual or practical effect. In essence, the Writ's purpose is now a nullity as a result of the passing of the Ordinance. Respondent's position is based upon the arguments and relief sought forth in the Writ, and Petitioners' request that the variance for the commercial dock be quashed.

Petitioners' Writ argues that the Town of Lauderdale-by-the-Sea improperly approved a variance for 4403 Tradewinds Inc. ("Tradewinds") to build a 11.4 to 13.5 foot wide dock when the Town Code allowed for a maximum of 8 feet. Subsequently, with the passing of the Ordinance, the maximum allowable dock width is now 15 feet. Because of this, Respondent argues the issue is now moot.

In Petitioners' Response to the Motion to Dismiss, two main arguments are made: (1) the Court should only consider the application under the law existing at the time of its approval; and (2) the new code ordinance requires a 10 foot side setback, while Tradewinds approved side setback is only 5 feet. Therefore, the approved dock variance is not allowable under the new Ordinance.

This Court has carefully considered the arguments of the parties, as well as, reviewed the cited case law. Firstly, Petitioners fail to provide any form of legal support as to their argument that the Court should only consider the prior code ordinance. This Court queries as to why Petitioners feel the Court should not consider whether an issue is no longer in controversy and is now moot? However, because Petitioners' fail to provide any substantive or legal argument in support of this position, and because Respondent's case law provides overwhelming support for the opposite position; this Court rejects Petitioners' argument as to this point.

As for Petitioners' other argument, the "side setback" parameters

of the new code ordinance are not at issue herein or in these proceedings. Petitioners seek to have this Court not consider the new Ordinance in their prior argument, yet here, take a contradictory position seeking to have the Court consider only the new Ordinance. The Court declines to do so. Petitioners' Writ challenges a specific variance under a specific portion of the prior town code, one that is no longer in effect. However, in response to the Motion to Dismiss, Petitioners' raises a completely new argument, regarding a new issue under a new Ordinance, which was neither raised in their Writ nor was it an existing issue at the time of filing. For these reasons, the Court rejects Petitioners' second argument.

Finally, the Court makes note that Petitioners' response mainly fails to address the arguments made by respondent in the Motion to Dismiss, rather, Petitioners provide case law and argument in support of those arguments made in their Writ. These arguments provide little assistance to this Court in reaching a determination.

"An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992); *see also O'Boyle v. Town of Gulf Stream,* 257 So. 3d 1036, 1043 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2386a] ("A moot case will generally be dismissed." (citation omitted)); *Lund v. Dep't of Health,* 708 So. 2d 645, 646 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D887d] ("The general rule in Florida is that a case on appeal becomes moot when a change in circumstances occurs before an appellate court's decision, thereby making it impossible for the court to provide effectual relief." (citing *Montgomery v. Dep't of Health & Rehab. Servs.,* 468 So. 2d 1014 (Fla. 1st DCA 1985))). *Jeda v. Gerasci,* 330 So. 3d 549, 551 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2484a]. While exceptions apply to this general rule, for instance: "(1) when questions of great public importance are raised, (2) when issues are likely to recur, or (3) if collateral legal consequences that affect the rights of a party flow from the issue to be determined." *O'Boyle v. Town of Gulf Stream,* 257 So. 3d 1036, 1043 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2386a]. Petitioners fail to raise any of these exceptions or explain to the Court where a controversy lies that would render this case as ***NOT*** moot.

Accordingly, after due consideration and for the above-stated reasons, it is:

ORDERED that Respondent's Motion to Dismiss Petition for Certiorari on Grounds of Mootness dated June 28, 2022, is hereby **GRANTED**. This Appellate proceeding is **DISMISSED** as moot and The Broward County Clerk of Courts is hereby **DIRECTED** to close this case as "disposed".

* * *

Counties—Code enforcement—Appeals—County's motion to remand case for *de novo* hearing is treated as confession of error

SOLER IGNACIO, Appellant, v. MIAMI-DADE COUNTY, BUILDING AND NEIGHBORHOOD COMPLIANCE, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-65-AP-01. August 11, 2022. Appeal from decision by Miami-Dade County Code Enforcement Hearing Officer. Counsel: Gary M. Murphree, AM Law LLC, for Appellant. Geraldine Bonzon-Keenan, Miami-Dade County Attorney, and Zach Vosseler, Assistant County Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) We treat the Appellee's Motion to Remand for a *de novo* hearing as a confession of error. *See Martinez Gonzalez v. State,* 29 Fla. L. Weekly Supp. 785a (Fla. 11th Cir. App. Feb. 14, 2022), citing *Barfield v. Dept. of State, Division of Licensing,* 568 So.2d 493, 494 (Fla. 1st DCA 1990) (Department's motion to dismiss appeal as moot treated "as in the nature of a confession of error"); *Djokic v. Dep't of Hwy. Safety & Motor Vehs.*, No. 2021-061-AP-01, 2022 WL 1262573, at *1 (Fla. 11th Cir. App. Div. Apr. 27, 2022) [30 Fla. L. Weekly Supp. 137b]. Accordingly, the decision below is QUASHED.

We deny the Appellant's Motion for Attorney's Fees. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

* * *

Appeals—Failure to file initial brief and appendix—Dismissal

CHARLES B. SERABIAN, Plaintiff, v. CITY OF FORT LAUDERDALE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22005268, Division AP. August 16, 2022.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order Directing Pro Se Appellant to File and Initial Brief dated July 5, 2022. Appellant was directed to file an Initial Brief and Appendix and that a failure to comply would result in the dismissal of this Appeal. As of the date of this Order, Appellant has failed to comply with this Court's Orders

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

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

* * *

Volume 30, Number 6
October 31, 2022
Cite as 30 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Insurance—Property—Insured's action against insurer—Conditions precedent—Notice of intent to initiate litigation—Motion to dismiss based on insured's failure to provide notice required by section 627.70152(3)(a) is denied where policy became effective prior to effective date of statute—Statute may not be applied retroactively where statute affects potential recovery of attorney's fees and attaches new legal consequence to events completed before its enactment

JENKINS WALKER, OTHA WALKER, and LOUISE WALKER, Plaintiffs, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-6. September 12, 2022. David Frank, Judge. Counsel: William Stephen Black II, for Plaintiffs. Christopher S. Dutton, Pensacola, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PURSUANT TO SECTION 627.70152 AND GRANTING CONTINGENT MOTION TO STAY CASE UNTIL COMPLETION OF APPRAISAL

This cause came before the Court on September 8, 2022 for hearing on defendant's motion to dismiss pursuant to Florida Statute 627.70152 and contingent motion to stay the case until the completion of appraisal, and the Court having reviewed the submissions and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

I. Procedural History and Facts

This case arises out of a dispute over the amount of insurance benefits due to plaintiffs as a result of claimed damage from Hurricane Michael on about October 10, 2018 at their property located at [Editor's note: address redacted], Gadsden County, Quincy, Florida.

Defendant provided insurance for the property under a policy with effective dates of August 2, 2018 through August 2, 2019.

On August 15, 2019, defendant received plaintiff's claim for the alleged damages. Defendant acknowledged receipt of the claim and assigned a claim number.

Defendant inspected the property and extended coverage for the loss under the claim. It determined the reasonable net actual cash value due for the repairs to the property to be $4,989.82.

On September 17, 2019, defendant received an estimate from No Stress Insurance Claims on behalf of the plaintiffs with a net claim amount of $116,252.79.

On January 5, 2022, the lawsuit was filed.

Defendant seeks dismissal pursuant to Florida Statute 627.70152 or alternatively to stay litigation pending appraisal.

The statute provides:

> A court must dismiss without prejudice any claimant's suit relating to a claim for which a notice of intent to initiate litigation was not given as required by this section or if such suit is commenced before the expiration of any time period provided under subsection (4), as applicable.

"Notice" is described as follows:

> As a condition precedent to filing a suit under a property insurance policy, a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department. Such notice must be given at least 10 business days before filing suit under the policy, but may not be given before the insurer has made a determination of coverage under s. 627.70131. Notice to the insurer must be provided by the department to the e-mail address designated by the insurer under s. 624.422.

Fla. Stat. 627.70152(3)(a) and (5) (2022).

There is no dispute that plaintiffs did not provide the notice required by the statute.

The effective date of the statute is July 1, 2021.

II. Defendant's Argument

Defendant argues, "As referenced above, this lawsuit was filed on September 29, 2021. Accordingly, Plaintiffs must comply with Fla. Stat. § 627.70152 before filing suit to recover benefits under the policy," and the failure to do so requires dismissal without prejudice. Def. Mot. at 5.

Defendant points out that the failure to provide notice deprives defendant (and plaintiffs) of several important procedures, to include: "...the insurer must respond in writing within ten (10) business days after receiving the notice, and may accept coverage, continue to deny coverage, assert the right to re-inspect the property, respond by making the settlement offer, or require the claimant to participate in appraisal or another method of alternative dispute resolution. Further, the statute includes a provision regarding entitlement to attorney fees, which is based on the difference between the amount obtained by the claimant and the insurer's presuit settlement offer." *Id*.

III. In the Words of Lee Corso—"Not So Fast!" Florida State and Federal Trial Courts Struggle with the Application of the Statute

Plaintiffs, and this Court, do not challenge defendant's generally-stated position regarding the notice requirement when applicable. Rather, the issue is whether it applies at all.

The specific issue is whether the statute can be applied retroactively or must be applied prospectively. If the answer is prospectively only, the defendant would concede that the requirement does not apply to the present case and the motion would have to be denied. Defendant's central argument for this motion, therefore, is that the statute may be applied retroactively.

A. State Appellate Decisions

Defendant acknowledged *Security First Ins. Co. v. Stokely*, No. 2D21-3609, 2022 WL 1592574 (Fla. 2d DCA May 20, 2022) as a state appellate court opinion against its position, but emphasizes that it is non-binding because it was a denial of a writ of certiorari without more.[1] The ruling is simply, "Denied. *See Menendez v. Progressive Express Ins. Co., Inc.*, 35 So.3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b]." *Id*.

Actually, the Second District has issued at least three per curiam affirmances adopting the retroactive position citing to *Menendez*. *Security First Ins. Co. v. Fields*, No. 2D21-3645, 2022 WL 1592639 (Fla. 2d DCA May 20, 2022); *Security First Ins. Co. v. Stokely*, No. 2D21-3609, 2022 WL 1592574 (Fla. 2d DCA May 20, 2022); and *Security First Ins. Co. v. Peyton*, No. 2D21-3607, 2021 WL 8531697 (Fla. 2d DCA May 20, 2022).

As of the date of this Order, the only published state appellate court case that the Court can find in Westlaw that contains the subject statute number, "627.70152," is *Water Damage Express, LLC v. First Protective Ins. Co.*, 336 So.3d 310, 312, FN1 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D645a]. That case, however, deals with a different section, Section 627.7152(10). Section 627.70152 only is mentioned within a quote addressing an unrelated matter.

B. State Trial Court Rulings

As of the date of this Order, there appear to be only six published (FLW SUPP) state trial court rulings on the matter:

> *Ramiro Estevez and Rafaela Luque, Plaintiffs, v. Family Security Insurance Company, Defendant*. County Court, 9th Judicial Circuit in and for Osceola County, 30 Fla. L. Weekly Supp. 95a.

Adopts retroactive position essentially relying upon wording of statute with no discussion of substantive rights.

James Hunt, Shannon Hunt, Plaintiffs, v. United Property & Casualty Insurance Company, Defendant. Circuit Court, 1st Judicial Circuit in and for Santa Rosa County, 30 Fla. L. Weekly Supp. 71a.

Adopts retroactive position distinguishing *Menendez* and limiting its holding to the PIP statute.

Enid Dawes, Plaintiff, v. Universal Property and Casualty Insurance Company, Defendant. County Court, 17th Judicial Circuit in and for Broward County, 30 Fla. L. Weekly Supp. 50b.

Adopts prospective position based on a conclusion that the rights and matters affected are substantive.

Alysha Bredemus and Jason Mazzota, Plaintiffs, v. Family Security Insurance Company, Inc., Defendant. Circuit Court, 1st Judicial Circuit in and for Escambia County, 29 Fla. L. Weekly Supp. 793a.

Adopts retroactive position by distinguishing *Menendez* without discussion.

Jodi Kittleson and Gary Kittleson, Plaintiffs, v. National Specialty Insurance Company, Defendant. County Court, 18th Judicial Circuit in and for Brevard County, 29 Fla. L. Weekly Supp. 745a.

Applies retroactive position but not contested.

Amaury Vila and Claudia Vila, Plaintiffs, v. American Integrity Insurance Company of Florida, Defendant. Circuit Court, 5th Judicial Circuit in and for Marion County, 29 Fla. L. Weekly Supp. 709a.

Adopts prospective position with discussion of substantive matters and rights an concludes *Menendez* is controlling.

C. Federal Trial Court Rulings

We also can look to the treatment of the issue by the federal courts.

The most recent ruling appears to be *Hershenhorn v. Am. Home Assurance Co.*, No. 2:21-CV-897-JES-MRM, 2022 WL 3357583, at *2 (M.D. Fla. Aug. 15, 2022). In the ruling, the court summarizes the majority view among Florida federal trial courts:

> Courts considering whether § 627.70152 applies to policies issued before the statute's enactment have overwhelmingly found that, because the statute affects substantive rights by imposing new duties on the insured, it cannot be applied retroactively. *See, e.g.*, *Dozois v. Hartford Ins. Co. of the Midwest*, ___ F. Supp. 3d. ___, No. 3:21-CV-951-TJC-PDB, 2022 WL 952734, at *1 (M.D. Fla. Mar. 30, 2022) (applying *Menendez v. Progressive Exp. Ins.* Co., 35 So. 3d 873, 874 (Fla. 2010) [35 Fla. L. Weekly S222b]) ("Section 627.70152's pre-suit notice requirement imposes new duties, obligations, and penalties; therefore, it does not apply retroactively to Plaintiffs' policy, which was executed before the statute went into effect."); *Williams v. Foremost Prop. & Cas. Ins. Co.*, No. 3:21-CV-926-MMH-JBT, 2022 WL 3139374, at *1 (M.D. Fla. Aug. 5, 2022) (following *Dozois*); *Bharratsingh v. Lexington Ins. Co.*, No. 0:22-CV-60037, 2022 WL 3279537, at *1 (S.D. Fla. Aug. 10, 2022) (same) (collecting cases); but *see Art Deco 1924 Inc. v. Scottsdale Ins. Co.*, No. 21-62212-CIV, 2022 WL 706708, at *2 (S.D. Fla. Mar. 9, 2022) (finding § 627.70152 procedural and dismissing case without prejudice).

Other federal district court cases confirm the majority view. *Villar v. Scottsdale Ins. Co.*, No. 22-CV-21362, 2022 WL 3098912, at *4 (S.D. Fla. Aug. 4, 2022) ("As an initial matter, the Court notes that the pre-suit notice does not only affect the potential recovery of attorney's fees under Fla. Stat. § 627.70152(8)(b) but also Plaintiff's ability to bring suit under Fla. Stat. § 627.70152(3). As such, Defendant's argument that the applicable date is the date that Plaintiff filed suit—the date at which Defendant had a potential claim for attorney's fees—rather than the date the policy was issued is unpersuasive."); *Broward Design Ctr., Inc. v. Scottsdale Ins. Co.*, No. 22-CV-60613-RAR, 2022 WL 1125787, at *1 (S.D. Fla. Apr. 15, 2022) ("The Court is particularly persuaded by the reasoning set forth in *Dozois v. Hartford Insurance Company of the Midwest*, which explained that the pre-suit notice requirement under Section 627.70152(3)(a) 'imposes new duties, obligations, and penalties; therefore, it does not apply retroactively.' "); *Rosario v. Scottsdale Ins. Co.*, No. 21-24005-CIV, 2022 WL 196528, at *2 (S.D. Fla. Jan. 21, 2022) ("Based on the analysis in *Menendez*, and finding no opposition from *Scottsdale*, the Court reads the Florida Supreme Court's holding broadly and discerns no basis for not applying it in this case. Accordingly, because none of the requirements set forth in Florida Statute sections 627.70152 existed at the inception of the Rosarios' policy period, the new obligations *Scottsdale* looks to are inapplicable in this case.").

IV. Analysis

Here it helps to identify the rule or legal proposition set forth by the Florida Supreme Court in *Menendez* to which several courts are referring. *Menendez* tells us that when determining if a statute can be applied retroactively, ". . .the Court applies a two-pronged test. First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively.[2] Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles." *Menendez* at 877. If a statute does not pass the two-prong test, it cannot be applied retroactively and the ". . .statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Menendez* at 876 (quoting *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996) [21 Fla. L. Weekly S102c]). *See also Total Care Restoration, LLC v. Citizens Prop. Ins. Corp.*, 337 So.3d 74, 76-77 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D926a].

Regarding the subject statute here, the score for published state trial court rulings is 4 to 2 in favor of retroactive. Nonetheless, the analysis in the two prospective position cases is far more detailed and persuasive.

This Court agrees with the strong majority view expressed by Florida's federal trial courts. Particularly incisive in this regard is *Dozois*.

> Hartford urges this Court to follow other Florida circuit courts that have distinguished *Menendez* on the ground that § 627.70152 does not provide the same right to immediate benefits; thus, the pre-suit notice requirement does not impair Plaintiffs' substantive rights. However, the cited decisions analyzed the pre-suit notice provision in isolation whereas *Menendez* took a more holistic view of the provision at issue. Similar to *Menendez*, this Court not only considers § 627.70152(3), but also the provisions that are triggered by § 627.70152(3): §§ 627.70152(4), (5), and (8)(b), which include additional duties, obligations, and penalties.
>
> In sum, assuming the Legislature intended § 627.70152 to apply retroactively, § 627.70152(3) and its associated provisions are substantive. Section 627.70152's pre-suit notice requirement imposes new duties, obligations, and penalties; therefore, it does not apply retroactively to Plaintiffs' policy, which was executed before the statute went into effect. The case is not due to be dismissed under § 627.70152(5).

Dozois at *3 (citations omitted).

Generally, the most compelling analysis for this Court is simple—what has the First District said about the matter. Neither the parties nor the Court has found a First District holding on point. The First District has, however, discussed *Menendez* and the general principles involved. Holding the retroactive application of Florida Statute 1012.795(1)(n) unconstitutional, the First District said:

> Even where the Legislature has expressly stated that a statute will apply retroactively, reviewing courts must reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty. *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla.1995) [20 Fla. L. Weekly S173a]; *see also Metro. Dade County*, 737 So.2d at 499 (quoting *Landgraf v. USI Film*

Prods., 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)) (holding the central focus of an inquiry into the retroactive application of the statute is whether doing so "attaches new legal consequences to events completed before its enactment.").

Presmy v. Smith, 69 So.3d 383, 387 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2052a].

Fitchner v. Lifesouth Cmty. Blood Centers, Inc., 88 So.3d 269 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D886a] is also instructive. *Fitchner* was an appeal of a wrongful death case. The trial court dismissed the plaintiff's complaint on the ground that the plaintiff had failed to serve notice of the suit under the medical malpractice statute. *Id.* at 272. The question on appeal was whether a statutory amendment including blood banks within the class of health care providers that are protected by the presuit screening requirements can be applied retroactively. *Id.* Calling *Menendez* "an analogous case," the First District held that it cannot. *Id.* at 282 ("On the merits of the issue, we hold that the part of the 2003 amendment that includes blood banks within the protections of the medical malpractice statute cannot be applied retroactively to a cause of action accruing before the effective date of the amendment. Accordingly, we reverse the order of dismissal and remand the case for a trial on the merits of the claim of negligence.").

Even more instructive was the First District's discussion of the general principles controlling the case:

> The courts presume that a statute will apply prospectively only and that it will not apply to conduct occurring before the statute was enacted. Attempts to apply statutes retroactively to pre-enactment conduct are generally looked upon with disfavor in the law. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). The retroactive application of legislation runs contrary to one of the most basic functions of a statute: to give notice of the conduct the government seeks to regulate. As the Supreme Court stated in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), summarizing the entire body of the law on this point, "Retrospective laws are, indeed, generally unjust." (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)).

Fitchner at 279.

V. Conclusion

For the reasons stated above, the Court finds that the subject statute, Section 627.70152, affects the potential recovery of attorney's fees and "attaches new legal consequences to events completed before its enactment." Accordingly, it is

ORDERED and ADJUDGED that the motion to dismiss is DENIED. Defendant's alternate motion to stay litigation pending appraisal, however, is well taken and GRANTED.

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[1]*See Dep't of Legal Affs. v. Dist. Ct. of Appeal*, 5th Dist., 434 So.2d 310, 313 (Fla. 1983) ("The situation is slightly different in reference to calling a court's attention to one of its own unwritten decisions. We reiterate that such a decision is not a precedent for a principle of law and should not be relied upon for anything other than res judicata. Usually, however, it would not be improper for counsel, in an effort to persuade a court to adopt a certain position, to refer to such a decision and thereby suggest to the court how it previously viewed the proposition. That court has the records of its own decisions and the judges have the opportunity to discuss such cases collegially. Conversely, because such decisions have no precedential value, a court may take the view that it desires not to consider such cases in any circumstance, and it may properly disregard such a reference in briefs or arguments presented to it.").

[2]There does not appear to be any clear indication that the Legislature intended the statute to be retroactive. It may be limited to prospective application on that basis alone. However, the intent will be assumed for the analysis in this Order.

* * *

Insurance—Homeowners—Interest—Class action—Action against insurer for breach of contract and violation of section 627.70131(5) based solely on failure of insurer to pay interest on overdue claims is dismissed because statute incorporated into policy expressly prohibits private right of action—Class actions—Because substantive claims for relief are dismissed with prejudice, plaintiff has no standing to represent class—Moreover, individualized questions associated with underlying claims of class members will predominate and render action inappropriate for class action treatment

AYMEE TAYLOR, individually and on behalf of those similarly situated, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CA-004553 (Class Representation). August 11, 2022. Michael S. Sharrit, Judge. Counsel: Tracy L. Markham, Southern Atlantic Law Group, PLLC, Winter Haven; William L. Sundberg and Alison M. Thiele, Sundberg, P.A., Tallahassee; and Christopher B. Hall, Hall & Lampros, LLP, Atlanta, Georgia (pro hac vice), for Plaintiff. Marcy Levine Aldrich, Bryan T. West, and Scott E. Allbright, Jr., Akerman LLP, Miami, and Christian George, Akerman LLP, Jacksonville, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

On July 27, 2022, the Court conducted a hearing on Defendant's Motion to Dismiss the Second Amended Class Action Complaint (the "Motion"). The Court heard argument of counsel, reviewed the file, and was otherwise fully advised. It is therefore **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion is GRANTED.

2. Count I (Breach of Contract) and Count II (Violation of Fla. Stat. 627.70131(5)) of the Second Amended Complaint are hereby dismissed with prejudice.

3. The Court finds that the statutory prohibition against a private right of action contained in Fla. Stat. § 627.70131(5) (2020) (. . . "failure to comply with this subsection does not form the sole basis for a private cause of action") applies broadly to both Counts I and Count II.

4. The operative language of the Plaintiff's policy tracks the language of Fla. Stat. § 627.70131(5) (2020) and does not promise independent or additional benefits to the policyholder.

5. The policy's interest payment provision is "surrounded by statutory limitations and requirements"—including Fla. Stat. § 627.70131(5) (2020). *See Found. Health v. Westside EKG Assocs.*, 944 So. 2d 188, 195 (Fla. 2006) [31 Fla. L. Weekly S669b] ("Florida courts have long recognized that the statutory limitations and requirements surrounding traditional insurance contracts may be incorporated into an insurance contract for purposes of determining the parties' contractual rights."); *Citizens Ins. Co. v. Barnes,* 124 So. 722, 723 (1929) ("where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract").

6. The provisions of § 627.70131(5) "may not be waived, voided, or nullified by the terms of the insurance policy." Fla. Stat. § 627.70131(5) (2020).

7. In certain circumstances, a party may be able to assert a claim for breach of contract based on certain statutory provisions incorporated into the policy—even where a statute does not provide for an explicit private right of action. (*See* Plaintiff's Response in Opposition to Defendant's Motion at 6). In this case, however, the incorporated statute expressly prohibits a private right of action. Fla. Stat. § 627.70131(5) (2020).

8. The Court's findings do not render the contractual promise to pay interest meaningless, (*See* Plaintiff's Response in Opposition to Defendant's Motion at 11) because a right to an interest payment may still be enforced as a part of a broader suit for benefits (*i.e,* where interest is not the "sole basis" for the action).

9. Because her substantive claims for relief are hereby dismissed with prejudice, the Plaintiff has no standing to represent the putative class. Further, the Court finds that individualized questions associated

with underlying claims of class members will predominate and render this action inappropriate for class action treatment.

10. Plaintiff shall take nothing from this action as against the Defendant; and the Defendant shall go hence without day. The Court reserves jurisdiction to consider any motion for attorney's fees and/or costs by the Defendant.

* * *

Civil procedure—Partition of property—Uniform Partition of Heirs Property Act—Property is heirs property where father and daughter own property as equal cotenants, no agreement exists addressing partition of property, and daughter acquired her title from father—Court accepts parties' agreement as to appraised value of property but must conduct equitable accounting prior to any determination of cotenant buyout or partition of property—Where father's primary request was for partition in kind, and he only requested partition by sale if partition in kind could not be made without great prejudice to parties, daughter's request to be allowed buyout under section 64.207(1), which allows for buyout by any cotenant except cotenant that requested partition by sale, is premature

PHILIP COLLINS BENJAMIN, JR., Plaintiff, v. SHIRLEY BENJAMIN, Defendant. Circuit Court, 5th Judicial Circuit in and for Sumter County. Case No. 2021-CA-000330. July 29, 2022. Jason J. Nimeth, Judge. Counsel: Felix M. Adams, Bushnell, for Plaintiff. Shannine Anderson, Sanford, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR DETERMINATION OF VALUE AND FOR COTENANT BUYOUT AND PLAINTIFF'S REQUEST FOR ACCOUNTING

THIS CAUSE came before the Court on Defendant's Motion for Determination of Value and for Cotenant Buyout and Plaintiff's Response to Defendant's Motion to Determine Value and Petition for an Accounting, and the Court having held a hearing on June 10, 2022, at 3:15 PM through Zoom where Philip Collins Benjamin, Jr., (hereinafter "Plaintiff") was present with Counsel and Counsel for Shirley Benjamin (hereinafter "Defendant") was present; and the Court having reviewed said pleadings, having considered the arguments of the parties, and having reviewed the applicable law, finds as follows.

FACTS

On June 8, 2021, Plaintiff brought this action for the partition of the real property located at 4636 County Road 302 in the City of Lake Panasoffkee, Florida (hereinafter "the property") which consists of two contiguous parcels which contain lots 25-29. Plaintiff originally bought the Property in 2013 through two separate transactions, and he later conveyed a one-half interest in the property to his daughter, Defendant. Plaintiff and Defendant each have a one-half interest in the property as cotenants. Defendant resides in a mobile home located on parcel B of the property.

At the hearing on June 10, 2022, the parties stipulated to the use of the appraisal from Henry Goodwin of Goodwin Appraisals, Incorporated, for the valuation of the property. The appraisal effective date was December 20, 2021, and the report was generated January 2, 2022. The appraised value of the property is $92,500.

ANALYSIS

Defendant asks the Court to determine the property to be heir property in accordance with section 64.203, Florida Statutes. She further requests the Court to determine the value of the property according to the agreed appraisal submitted with her motion. She further requests the Court to grant permission for her to buyout Plaintiff's interest in the property pursuant to section 64.207(1). Plaintiff opposes the designation of the property as heirs property as it is contrary to the spirit of the statute. He further requests an equitable accounting pursuant to section 64.206(7), if the property is designated as heirs property. He also requests the Court's denial of the Defendant's request to buyout his interest in the property.

The Court is not aware of, nor has the Court been provided, any appellate opinions interpreting the Uniform Partition of Heirs Property Act codified in sections 64.201 through 64.214. "In order to discern legislative intent, courts should look first to the plain language of the statute." *Nicarry v. Eslinger*, 990 So. 2d 661, 664 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2166a] (citing *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) [25 Fla. L. Weekly S641a]; *see also State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005) [30 Fla. L. Weekly S381a] ("the legislative history of a statue is irrelevant where the wording of a statute is clear and the courts 'are not at liberty to add words to statutes that were not placed there by the Legislature") (citing *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315 and quoting *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999) [24 Fla. L. Weekly S467a]). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning. . .the statute must be given its plain and obvious meaning." *Eustache v. State*, 248 So. 3d 1097, 1100 (Fla. 2018) [43 Fla. L. Weekly S291a] (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Adv. Op. to the Gov. re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) [45 Fla. L. Weekly S10a] (citing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012)). "When necessary, the plain and ordinary meaning 'can be ascertained by reference to a dictionary." *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000) [25 Fla. L. Weekly S331a] (quoting *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992)).

I. WHETHER THE PROPERTY IS HEIRS PROPERTY UNDER SECTION 64.203

Section 64.203, Florida Statutes, provides that "[i]f the court determines that the property is heirs property, the property must be partitioned under this part, unless all of the cotenants otherwise agree in a record." Heirs property is defined as

> real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action: (a) [t]here is no agreement in a record binding all the cotenants which governs the partition of the property; (b) [o]ne or more of the cotenants acquired title from a relative, whether living or deceased; and (c) [a]ny of the following applies: 1. [t]wenty percent or more of the interests are held by cotenants who are relatives; 2. [t]wenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or 3. [t]wenty percent or more of the cotenants are relatives.

§ 64.202(6). A relative is "an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this part." § 64.202(10). A descendant is "an individual who follows another individual in lineage, in the direct line of descent from the other individual." § 64.202(3). The meaning of section 64.202(6) is plain, and the terms and meaning of the text is unambiguous.

It is undisputed that Plaintiff and Defendant own the property as cotenants. Additionally, no agreement exists between the parties addressing the partition of the property. Defendant acquired her title from Plaintiff, who is her father. The parties own the property as cotenants with each having an equal fifty percent interest in the property. Therefore, the requires of section 64.202(6) are met and the property is heirs property.

II. DETERMINATION OF THE VALUE OF THE PROPERTY

"Except as otherwise provided in subsections (2) and (3), if the Court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (4)." § 64.206(1). Subsection (2) provides that "[i]f all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation." § 64.206(2). Additionally,

> After a hearing under subsection (6), but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.
>
> In addition to a determination of value under this section, the court shall determine the amount of the equitable accounting upon the request of any cotenant and shall appropriately adjust any price, purchase price, apportioned price, buyout, judgment, or partition granted under this part based on the results of the equitable accounting.

§ 64.206(7).

The parties have agreed to the appraised value of the property; therefore, "the [C]ourt shall adopt. . .the value produced by the agreed method of valuation." § 64.206(2). However, the Court must conduct an equitable accounting as part of any value determination. § 64.206(7) ("[i]n addition to the determination of value under this section, the court *shall* determine the amount of the equitable accounting upon the request of any cotenant. . ."); *see also Lamar Outdoor Advertising - Lakeland v. Florida Dept. of Transp.*, 17 So. 3d 799, 802 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1669b] ("[a] subsection of a statute cannot be read in isolation; instead, it must be read "within the context of the entire section in order to ascertain legislative intent for the provision" and each statute "must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts") (citing *Florida Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) [33 Fla. L. Weekly S493a]). Therefore, value of the property shall be established at $92,500. Furthermore, Plaintiff's petition for equitable accounting is granted, and the Court shall conduct an equitable accounting prior to any determination of cotenant buyout, judgment, or partition of the property.

III. DEFENDANT'S REQUEST TO BUYOUT PLAINTIFF'S INTEREST IN THE PROPERTY

Defendant argues that Plaintiff is barred from seeking a buyout of Defendant's interest because when Plaintiff brought this action, he requested the Court to partition the property, or in the alternative sell the property, if equitable division could not occur. However, Plaintiff argues that he is not barred from an opportunity to buyout the property as he requested sale only in the alternative and even if he had requested the sale of the property, it was prior to any determination of value; thus, the exclusion of 64.207(1) does not apply.

"If any cotenant requested partition by sale, after the determination of value under [section] 64.206, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interest of the cotenants that requested partition by sale." § 64.207(1). In evaluating the plain meaning of a statute, the Court must also consider the rules of grammar. *See Wagner v. Botts*, 88 So. 2d 611, 613 (Fla 1956) ("[w]e realize that punctuation is considered to be the most fallible and the least reliable indication of the legislative intent in interpreting a statute [because h]istorically, parliamentary enactments originally were not punctuated at all, [but] the Legislatures of our country have consistently attempted to follow the rules dictated by the grammar books with the result that statutes now are punctuated prior to enactment; [thus t]he better rule now seems to be that punctuation is a part of the [text] and that it may be considered in the interpretation of the [text], but it may not be used to create doubt or to distort or to defeat the intention of the Legislature"); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2021) ("[a]lthough drafters, like all other writers and speakers, sometimes perpetrate linguistic blunders, they are presumed to be grammatical in their compositions").

Section 64.207 contains a parenthetical element. *See* Grace Fleming, UNDERSTANDING PARENTHETICAL ELEMENTS, https://www.thoughtco.com/what-is-a-parenthetical-element-1857161 (January 18, 2018) ("[a] parenthetical element is a word or group of words that interrupts the flow of a sentence and adds additional (but nonessential information) to that sentence"). "[P]arenthetical elements are usually set off by some form of punctuation in order to avoid confusion." *Id*. The parenthetical element of 64.207 is "after the determination of value under s. 64.206" setoff by commas. Without this clause the sentence is still grammatically correct, and it reads, "[i]f any cotenant requested partition by sale the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale." Thus, the parenthetical element merely adds the information of when the notice must be sent to the parties, but not necessary in the conveyance of the main subject of the sentence.

Section 64.207(1) begins with a conditional clause. A conditional clause establishes an understanding that when certain conditions are present then the remainder of the sentence is applicable which is commonly understood as "if this, then that." *See* Sidney Greenbaum, OXFORD ENGLISH GRAMMAR 340 (Oxford University Press ed. 1996) ("[c]onditional clauses generally express a direct condition, indicating that the truth of the host clause. . .is dependent on the fulfilment of the condition in the conditional clause. . ."). The word "if" means "in the event that, allowing that, on the assumption that, [or] on condition that." Merriam-Webster Online Dictionary, 2021. https://www.merriam-webster.com/dictionary/if (29 July 2022). Thus, the beginning clause of 64.207—"[i]f any cotenant requested partition by sale"—is a conditional clause, so when this condition is present, "the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale." Therefore, the notice requirement of 64.207(1), only applies when a cotenant requested a partition of sale, regardless of when the request is made.

In the case at hand, Plaintiff has petitioned the Court to

> enter judgment in favor of the [p]laintiff for all costs incurred for the partition of the subject property, including reasonable attorney's fees expended for the common benefit of the parties, and that such costs and attorney fees be paid by the parties entitled to share in the partitioned property, in proportion to their respective interests in the property; and moreover, that the [p]laintiff be reimbursed for sums advanced for all costs beyond Plaintiff's proportion and that such costs be included and specified in the judgment; and Plaintiff pray[ed] further that [the] Court:
>
> 1. Partition. . .the property, according to the respective interest of the parties, or in the alternative, if the partition cannot be made without great prejudice to the parties, that the Court order the sale of the property and the division of the proceeds from such sale according to the rights and interests of the parties;
>
> 2. Appoint a commission to make the partition and to make their report to the Court without delay;
>
> 3. Award attorney's fees and costs in accordance with Section 64.081, Florida Statutes; and
>
> 4. Grant such further relief as this Court may deem just and equitable.

(Plaintiff's Complaint, Wherefore Clause). Plaintiff's first request is to partition in kind. Although Plaintiff petitioned in the alternative, it does not negate the primary request. In fact, even the Uniform Partition of Heirs Property Act contemplates alternative outcomes when handling heirs property. *See* § 64.208(1) (". . .the court shall enter a judgment of partition in kind unless the court is satisfied that commissioners appointed pursuant to [section] 64.061 have considered the factors listed in [section] 64.209 and found that partition in kind will result in prejudice to the cotenants as a group"). Therefore, section 64.207 is premature at this time and Defendant's request to buyout Plaintiff's equity is DENIED.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion for Determination of Value and Cotenant Buyout is GRANTED IN PART AND DENIED IN PART.

IT IS THEREFORE FURTHER ORDERED AND ADJUDGED that Plaintiff's Petition for an Accounting is GRANTED.

* * *

Attorney's fees—Condominiums—Wrongful death—Class actions—Contingency risk multiplier—Common fund class action related to the collapse of the Champlain Towers condominium building in 2021—Discussion of reasonable lodestar fee given the highly unusual litigation which necessitated non-stop effort on part of experienced counsel—Although counsel agreed to forgo any entitlement to a multiplier, and court's order of appointment said none would be awarded, the result obtained by counsel warrants court's reassessment of the issue—Counsel's risk, while considerable, was mitigated by the payment of all out-of-pocket costs from receivership estate—Risk was also mitigated by fact that, given tragic nature of case and the exposure faced by each defendant, it was highly likely some defendants would feel pressure to settle, creating funds from which counsel could be paid—Given the extenuating and highly unusual aspects of case, a multiplier of close to 3, representing approximately 6.4 percent of the common fund generated through counsel's efforts, is appropriate

IN RE: CHAMPLAIN TOWERS SOUTH LITIGATION COLLAPSE. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-15089 CA 01, Complex Business Litigation. August 29, 2022. Michael A. Hanzman, Judge.

ORDER ON CLASS COUNSEL'S MOTION FOR ATTORNEY'S FEES

I. INTRODUCTION

On June 24, 2021, at approximately 1:38 a.m., the Champlain Towers South Condominium Building suffered a catastrophic failure and partial collapse, resulting in an unfathomable loss of life, and the eventual destruction of 136 condominium units.[1] Despite the herculean (and round the clock) toil of courageous first responders who risked their lives in a valiant rescue effort, virtually everyone in the portion of the building that collapsed perished.[2] This was, as the Court has said before, a "Black Swan" event that caused immeasurable pain and suffering. People from all walks of life, ages 1 to 92, died in homes mistakenly assumed to be safe. Others fortunate enough to escape were traumatized.

Though shaken, our community (and many outside our community) rallied. First responders spent weeks risking their lives and safety to rescue (and later recover) victims on a site consumed by stifling summer heat, heavy thunderstorms, fires and other perils; and our political leaders, law enforcement agencies, and charitable organizations provided support and comfort to families riding an emotional rollercoaster, anxiously awaiting what they knew would likely be devastating news. Some were forced to endure weeks of agony and uncertainty before their loved ones were finally located and recovered.

Lawsuits predictably followed, including this putative class action brought on behalf of all those who suffered loss of life and/or economic damages. To coordinate and manage the litigation, the Court quickly entered an order which: (a) appointed a "Class Action Leadership Structure"; (b) directed the filing of a "consolidated amended class action complaint"; and (c) stayed all other civil actions arising out of the collapse. (D. E. 73). The Court also asked the Board of Directors of the Champlain Towers South Condominium Association ("Association") to step aside and consent to the appointment of a receiver who would assume control of the Association, marshal its assets, defend against the anticipated avalanche of claims, and otherwise assume all duties/powers the Board possessed pursuant to Chapter 718 *et seq.* of the Florida Statutes and common law. In response to the Court's request, the Board agreed not to oppose Michael Goldberg, Esq.'s appointment as Receiver—an appointment the Court made on July 2, 2021. (D. E. 25).[3]

II. THE INITIAL FEE STRUCTURE

Given the highly unusual circumstances of this case, the Court made it clear at the outset that this would not be "business as usual," and advised counsel that those seeking a leadership role would be committing to public service, with no assurance of any compensation. July 7, 2021, Tr. p. 16. To secure "a leadership role," counsel would have to agree to work "on somewhat of a pro bono basis with absolutely no assurance of payment or legal entitlement to any fees whatsoever." July 7, 2021, Tr. p. 16. Counsel would have no right to be paid "any contingent risk multipliers, percentage fees, or other profit that would eat into the receivership estate," and while they "would have their out-of-pocket costs covered by the receivership estate, . . . their time would be completely at risk with absolutely no assurance of payment . . . and no legal right to payment." *Id.* p. 17. The Court asked counsel whether they were "willing to proceed on [these terms], recognizing that there will be no large profit and no one is going to get [rich] on this case." *Id.* pp. 17-18. The Court also made it clear that this was "not a negotiation," and that its proposal was take it or leave it. *Id.* p. 19.

To their credit, many of the most skilled, experienced and reputable members of the Bar enthusiastically, and without hesitation, agreed to assume this representation on the Court's terms. Others passed, unwilling to devote what would surely be considerable time and effort with a potential "upside" of being paid their standard hourly rates. The Court appointed those willing to risk their time, again noting that those serving had agreed to do so "with no legal entitlement to receive **any** attorney's fees," and commending counsel "for assuming this weighty responsibility as a public service, recognizing the possibility that they will not be compensated for the time expended in this case." July 16, 2021 Order. (D. E. 70)[4].

At that time, when the case was in its infancy, the prospect for a substantial recovery relative to the harm suffered appeared bleak. The Court was faced with 98 wrongful death claims, multiple personal injury claims, the destruction of 136 condominium units, and a staggering loss of personal property. The collective damages would likely eclipse One Billion Dollars ($1,000,000,000.00). As for sources of potential recovery, the Association was woefully underinsured, carrying a mere Forty-Eight Million Dollars ($48,000,000.00) in combined property and liability coverage. Those involved in the initial development/construction of the building were long gone, statutes of limitation and repose had long expired, and while a few potential claims were identified at the outset, it was obvious that the then apparent litigation targets did not possess sufficient resources to satisfy these claims, even assuming liability.

Suffice it to say, sources of potential recovery appeared scarce. The Association had its combined $48 million in coverage, the real estate—which the Court tentatively valued at approximately One Hundred Million Dollars ($100,000,000.00)—could be monetized, and there might be another $100-$200 million recovered at best. To

any objective observer, it looked like there might be $250-$300 million available to compensate victims, less the considerable expense it would take to operate the receivership and pursue claims. Even assuming all went well, victims would receive only a fraction of their damages, and counsel would likely receive no more than their standard hourly rates, if that. Counsel nevertheless agreed to take on the representation, and embarked on what appeared to be a losing, and potentially disastrous, business venture. *See, e.g., Florin v. Nationsbank of Georgia, N.A.,* 34 F.3d 560, 565 (7th Cir. 1994) ("[a] court must assess the riskiness of the litigation by measuring the probability of success . . . *at the outset* . . ."); *In re Fine Paper Antitrust Litig.,* 751 F.2d 562, 583 (3d Cir. 1984) (risk must be "measured at the point when the attorney's time was committed to the case").

Fortunately, things did not turn out as expected, in large part due to the skill and perseverance of counsel. They identified and pursued every conceivably viable claim against over thirty defendants (or potential defendants), leaving no stone unturned. Many of the legal theories advanced were novel, the substantive issues implicated were sophisticated, and the procedural complexities of this highly unusual case presented formidable obstacles wholly unrelated to the merits. Counsel also had to navigate actual and potential intra victim conflicts, and ensure that the claims of each contingency were adequately investigated and zealously pursued by attorneys with undivided loyalty. They also had to coordinate, and work side-by-side, with a Receiver whose interests were not always simpatico with those of the putative class.

As if these burdens were not enough, counsel also had to cope with the intense pressure imposed by this Court's immutable deadlines, forcing many to work full time on this case for what could have been years. The Court granted few extensions of time to file pleadings, brief motions or respond to discovery; trial was scheduled within eighteen (18) months of filing; and counsel was forewarned that this case would move at a breakneck pace. They were told to "buckle up" and be prepared to devote whatever resources were needed in order to prepare the case for trial on the Court's timetable, and that is what they did, without complaint.

III. THE EXTRAORDINARY RESULT ACHIEVED

The result achieved here is extraordinary and unprecedented. First, and unrelated to counsel's litigation efforts, the Association's insurance carriers immediately tendered policy limits, providing approximately Fifty Million Dollars ($50,000,000.00) to the receivership estate. The Receiver, assisted by Michael T. Fay and John K. Crotty of Avison Young, also secured a One Hundred Twenty Million Dollars ($120,000,000.00) sale of the real estate.[5] Class counsel were then able to negotiate settlements with all defendants (and a number of potential defendants) which, in the aggregate, resulted in a $1.02 billion recovery.[6] Combined with the insurance tendered and the proceeds of the land sale, this resulted in a fund of approximately $1.2 billion available to compensate victims.

As for those who lost condominiums, they received the aggregate amount of Ninety-Six Million Dollars ($96,000,000.00), representing the collective appraised value of all units the day prior to the collapse, an amount far in excess of what they were legally entitled to. As this Court explained in its Order approving the "Allocation Settlement Agreement," condominium owners were subject to being assessed up to the entire "value" of their units in order to satisfy uninsured/underinsured wrongful death claims.[7] Fla. Stat. § 718.119(2). That assessment could have wiped out all equity, and left owners on the hook for any existing mortgage, as the Statute authorizes an assessment up to the "value" of the unit, notwithstanding debt.

Putting aside the fact that the condominium owners could have walked away empty handed, they have received full appraised value despite what we now know was the uninhabitable condition of the building on June 23, 2021—something that would have to have been disclosed to any potential buyer. *See, e.g., Johnson v. Davis,* 480 So. 2d 625 (Fla. 1985). Nor was the unit owners' recovery reduced by the then pending Fifteen Million Dollars ($15,000,000.00) assessment levied to pay for obviously needed renovations. Unit owners also did not have to pay any attorney's fees or receivership expenses and, to top it off, the Court instructed the Receiver to absorb their 2022 real estate taxes.

The bottom line is that the condominium owners received full appraised value for units that were unmarketable, without paying a nickel of expense or being called upon to pay the assessment pending at the time of the collapse. They have been "made whole" when, had the case played out, they likely would have received nothing. They were made whole because, and only because, the Court forced repeated mediations with Mr. Greer who masterfully negotiated the Allocation Settlement.

The wrongful death/personal injury claimants will also receive "full value" on their claims, subject only to attorney's fees and costs. The Court, together with retired Judge Jonathan T. Colby, met with virtually all wrongful death and personal injury claimants and valued each and every case. Before those hearings, counsel was ordered to provide a good faith estimate of the "value" the law would ascribe to each claim. The vast majority of class members received an award within (and in many cases in excess of) the "value" estimated by counsel. This result is, to the best of the Court's knowledge, unprecedented in any class action/mass tort case. And it was achieved within ten (10) months.

IV. CLASS COUNSEL'S FEE REQUEST

Counsel ask the Court to award a lodestar of $22,242,841.75, enhanced by a contingency risk multiplier of 4.5—resulting in a total fee of $100,092,787.87. Each attorney appointed by the Court filed a declaration in support of the Motion detailing their backgrounds, prior experience in complex cases and, most importantly, the services provided by their respective firms.[8] The Motion is supported by the affidavit of Phillip Freidin, an expert who opines that: (a) "Class Counsel's lodestar should be $22,242,841,75," and (b) ". . . that a multiplier of 4.5 times the lodestar is appropriate here." Freidin Affidavit, ¶¶ 14, 18.

While they, and their expert, acknowledge that "the Court made clear that attorney's fees were at the discretion of the Court," *see* Freidin Affidavit, ¶ 20, and that they would have no entitlement to a multiplier, they ask the Court to award one largely because "no one expected this kind of result, ever, let alone this quickly." Freidin Affidavit, ¶ 19. *See also* Tropin Affidavit, ¶ 47 ("The results achieved are far beyond what I or anyone else could have reasonably foreseen when KTT first took on the case in the days following the collapse")

The Court agrees that the result achieved here exceeds all expectations and, as it made clear at a prior hearing, it is willing to revisit the multiplier issue "up to a point." June 23, 2022, Tr. pp. 82-83, 96. It will do so because, at the time it appointed counsel, tempering their expectations, and holding down the fees they may have otherwise been entitled to, appeared necessary given the concern that victims would receive a small percentage of their losses. That concern no longer exists, and the Court will not reflexively or obstinately abandon thoughtful analysis, or close its eyes and ignore how things actually turned out, just because counsel generously (and commendably) agreed to take on the case, and forgo any right to a multiplier, at a time when it looked like the victims might receive an anemic recovery. Their good deed will not be punished.

That is not to say that the initial fee deal is out the window. The Court also will not ignore the fact that counsel committed to the case knowing that, in all likelihood, they would be paid their lodestar, at most. But it will exercise its discretion and award a "reasonable" fee,

taking into account the terms counsel initially agreed upon, as well as all other relevant factors, including the exceptional result achieved. What is fair is fair, and class members who will obtain the benefit from counsel's work will not be unjustly enriched by being charged a fee equal to only 2% of the recovery; a fraction of the 25%-40% attorney's fee that would typically be paid in wrongful death/personal injury cases, or the percentage fee of 25%-30% typically awarded in common fund class actions. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) ("persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched").

V. GOVERNING LEGAL PRINCIPLES/ANALYSIS

In setting a reasonable fee to be awarded in a common fund class action, a court is required to determine the hours reasonably expended and appropriate hourly rates (*i.e.,* "lodestar"), and then consider a contingency risk and/or results achieved multiplier. *See, e.g., Kuhnlein v. Dep't of Revenue,* 662 So. 2d 309 (Fla. 1995) [20 Fla. L. Weekly S526a]; *Standard Guar. Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990); *Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985).[9] The factors guiding this analysis include:

(1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Kuhnlein, supra. These factors are essentially the same as those considered by federal courts in setting reasonable attorney's fees. *See, e.g., Johnson v. Georgia Highway Exp., Inc.,* 488 F.2d 714 (5th Cir. 1974).

Turning to some of the factors most relevant here, in its over thirty-five (35) years as an practicing lawyer/judge, this Court has never encountered a more complex and difficult case, both procedurally and substantively. Most lawyers would not even think about stepping into this arena, and only the most skilled would have any chance of a successful exit. As the Court has said repeatedly, class counsel here are "hall of famers" who possessed the expertise and talent to assume such an enormous undertaking, not to mention the resources that would have to be committed, with no ongoing source of payment or assurance of compensation. The carrying costs in terms of attorney time were substantial, and the risk significant.

This case, like any case of this magnitude, also imposed severe time limitations upon counsel, precluding other employment, especially given the demanding schedule imposed by the Court. This was again not "business as usual," and counsel was forewarned that the litigation pace would be far from leisurely. This case commanded considerable time and labor with no "time-outs" or "lulls" in the action. And counsel's ability to be paid rested entirely upon achieving a favorable outcome.

The Court also must take into account the "significance of" the subject matter of the representation, and the "responsibility imposed upon counsel." *Kuhnlein,* 662 So. 2d at 323. This is perhaps the most high-profile case ever litigated in our community, and the loss was catastrophic and tragic. Counsel worked in a glass house, and under intense pressure to deliver results. They answered the call and steered the case to a swift and favorable conclusion, sparing these families from the anxiety, stress and uncertainty that comes with prolonged litigation.

In deciding an appropriate fee, the Court should also take into account the view of those who are being asked to pay it—the wrongful death/personal injury claimants. *See, e.g., Camden I,* 946 F.2d at 775 (among the factors that impact the determination of appropriate percentage to be awarded as a fee is "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel"). Their views are particularly pertinent here, as these families are not typical "absent" class members who have had no knowledge of, or involvement in, the case. They are people who suffered a devastating loss, and who have been actively involved in the litigation, witnessing counsel's work from the perch of a front row seat. Many have been fully engaged and others, while less involved, attended the over 40 hearings held over the last year. Very few have voiced any objection to counsel's fee request, and most of those who objected believe that some multiplier is justified—just not 4.5.

As discussed earlier, the Court's task is a two-step process. It must first determine counsel's lodestar. On that particular issue the Court finds Mr. Freidin's opinion credible. Though counsel devoted substantial time to the case, and the hourly rates billed are no doubt generous, this was highly unusual litigation that necessitated an all-out, non-stop effort on the part of experienced counsel. *See Rowe,* 472 So. 2d at 1150, ("the amount of an attorney fee award must be determined on the facts of each case . . .").[10] The Court finds that counsel's combined lodestar is $22,242,841.75.

That brings us to where the rubber meets the road—counsel's request for a multiplier of 4.5, close to the highest permitted by law. *See Kuhnlein, supra* (in a common fund class action the court may award a multiplier of up to 5 times counsel's lodestar). In assessing the appropriate multiplier here, the Court is not writing on a clean slate, as counsel agreed to forgo any entitlement to a multiplier, and the Court's order of appointment said that none would be awarded. To be sure, the result obtained here, by itself, warrants revisiting the issue, but again only up to a point. In light of the deal going into this case, the Court will not sanction a fee which, for all practical purposes, is the highest amount that could possibly be awarded.

Counsel's risk, while considerable, also was mitigated by the Court's decision to have the receivership estate advance/pay all out-of-pocket costs. Counsel was therefore not required to advance substantial capital that would otherwise be at risk in a case of this magnitude. And given the tragic nature of this case, and the "bet the company" exposure faced by each defendant, it was highly likely that some would feel pressure to settle, creating funds from which counsel could be paid. That grim reality also served to mitigate counsel's risk.

There can, however, be no doubt that counsel's skill, diligence and tenacity uncovered substantial claims that would never have been on the radar screen of those less capable, and the quality of their work and well-earned reputations clearly contributed to the remarkable result achieved. Sophisticated defendants do not resolve claims for the amounts paid here unless they are confident that their adversaries will do whatever it takes to thoroughly prepare the case, actually try it, and never fold the tent.

The Court also witnessed firsthand the emotional toll this case has taken on counsel, and appreciates the delicate touch required to traverse this difficult terrain. Counsel developed close relationships with these clients, became personally invested in their cause, and absorbed their pain and suffering. The Court watched the lawyers shed tears with those who lost loved ones, guiding them through their darkest hour with empathy, compassion and kindness, as they endured

five (5) straight weeks of heart wrenching mini-trials on damages, often at a pace of three (3) to four (4) per day. The process was excruciating, but counsel again rose to the occasion with professionalism and competence, ensuring that every client's claim was given the attention it deserved.

Given the extenuating (and highly unusual) aspects of this case, the Court finds that a multiplier is appropriate and awards class counsel a fee of $65,000,000.00, which represents approximately 6.4 percent of the $1.02 billion common fund generated through their efforts, and a multiplier of close to 3.[11] This is far less than these clients would have been required to pay lawyers retained to bring wrongful death/personal injury claims, and far less than the percentages typically awarded in common fund class actions brought in jurisdictions that employ the "percentage approach." It is, however, a reasonable fee that fairly compensates counsel, while holding them (albeit partially) to their commitment to "public service" in this extraordinary case.

VI. CONCLUSION

Throughout this case the Court has said that it has never been more proud of our Bar. Every attorney who assumed a leadership role brought their "A" game and exceeded the Court's justifiably high expectations. They literally put their lives and law practices on hold, devoting themselves to the cause of these victims—people who had suffered immeasurable loss and were in desperate need of counsel. As a result of counsel's efforts, civil justice—which is all we who labor here can aspire to—was delivered with a result that compensates every victim the full value the law ascribe to their claim, and ends this litigation, thereby allowing grieving families to concentrate on the healing process while honoring loved ones lost. There could not have been a more favorable legal outcome for the victims of this tragedy.

To those who would question counsel's compensation, the Court would remind them that, as eloquently stated by Judge Lord:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370 (D. Minn 1985). This Court agrees, and if God forbid a tragedy like this were to happen again, the result here should encourage attorneys of this caliber to step up in a time of need, and certainly not discourage them from doing so. These attorneys stepped up here, and they deserve to be recognized and fairly compensated for their outstanding work.

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

1. Class counsel is awarded the sum of Sixty-Five Million Dollars ($65,000,000.00) in attorney's fees. The Receiver shall also pay counsel any unreimbursed out of pocket costs.

2. The Court, by separate Order, will also award reasonable fees for services rendered by counsel in connection with the claims process.

3. The Court again reminds counsel that no attorney's fees or costs may be demanded, requested, or accepted from class members directly. No fees and costs will be paid other than those awarded by the Court.

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[1]While only 55 units were destroyed immediately upon the partial collapse, the remainder of the building eventually had to be demolished.

[2]Three people, Angela Gonzalez, Deven Gonzalez and Jonah Handler were rescued. Each suffered significant injury.

[3]The Court again commends the surviving members of the Board for acknowledging that they were in no position to handle the countless issues that had to be immediately addressed and recognizing that the appointment of a receiver was in the best interest of all concerned, particularly victims. The Board's decision to step aside, based in part upon the sage counsel of its attorney, Paul Singerman, Esq., saved valuable time and judicial effort, and enabled Mr. Goldberg to hit the ground running with the Board's complete cooperation. This proved to be extremely valuable, as Mr. Goldberg wasted no time and has, as the Court expected, done a remarkable job.

[4]The Federal Judicial Center's Manual on Complex Litigation encourages courts to "consider advising parties at the outset of the litigation about the method to be used in calculating fees and, if using a percentage method, about the likely range of percentages," a protocol that will "clarify expectations, and reduce the opportunity for disputes." Ann. Manual for Complex Lit. ("MCL") § 14-211.

[5]While some families were upset that the property would not be dedicated as a permanent memorial, the Court was steadfast in its belief that using this asset for a public purpose was not feasible, and that it would have to be monetized in order to provide compensation to victims.

[6]The settlements reached by class counsel, with the assistance of Mr. Greer, total $1,021,199,000.00.

[7]The Allocation Settlement Agreement was approved by the Court on April 6, 2022. (D. E. 653). Though afforded the opportunity, no unit owner opted-out of this accord.

[8]The Court has carefully reviewed the affidavits of Harley S. Tropin, Rachel Furst, Ricardo M. Martinez Cid, Adam Moskowitz, Javier Lopez, Stuart Z. Grossman, Curtis Miner, Gonzalo R. Dorta, Willie E. Gary, Jeffrey P. Goodman, Marybeth Lippsmith, William F. "Chip" Merlin, Jr., H.K. "Skip" Pita, Judd Rosen, John "Jack" Scarola, Jorge E. Silva, Bradford Rothwell Sohn and Luis E. Suarez. Each attorney described, in great detail, the services their firm rendered, the time expended, and the hourly rates of all professionals who worked on the case. To his credit, Mr. Grossman also acknowledged that his firm volunteered to prosecute this case on a pro bono basis, and never expected to receive "any fees at all." He then expressed gratitude to the Court "for its efficient management and oversight of [the] case," and asked the Court to "exercise its discretion" and award "what is most appropriate for all involved."

[9]Many jurisdictions set common fund fee awards using what is described as the "percentage approach," in which a reasonable fee is calculated as a percentage of the fund. *See Camden I Condo. Ass'n, Inc. v. Dunkle,* 946 F.2d 768 (11th Cir. 1991). Other jurisdictions use the "lodestar method," requiring that the court first ascertain a reasonable base lodestar which may then be enhanced to take into account factors such as contingent fee risk and results. *See, e.g., Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3d Cir. 1973). After weighing in on the long running debate over which of these methods best furthers the public policy of incentivizing—but not overcompensating—counsel, our Supreme Court opted for the lodestar approach, allowing for a maximum multiplier of 5, or no multiplier at all. *Kuhnlein, supra*; *Homer & Bonner, P.A. v. Miami-Dade Cnty.,* 884 So. 2d 425 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2170a].

[10]The Court notes that this is not a fee shifting case, where a litigant is being forced to pay its opposing counsel. In the fee shifting context, a court must carefully scrutinize the requested lodestar. But even in that context, a court may undertake a flexible, equitable analysis. *Jomar Properties, L.L.C. v. Bayview Const. Corp.*, 154 So. 3d 515 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D206a]. The Court has reviewed, albeit not "fly specked," counsel's time records, and cannot conclude that Mr. Freidin's "opinion" lacks a foundation or is otherwise suspect.

[11]The Court notes that this percentage is in line with fee awards in what are described as megafund cases. *See, e.g., Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.,* 2005 WL 1213926 (E.D. Pa. May 19, 2005); *Carlson v. Xerox Corp.,* 596 F. Supp. 2d 400 (D. Conn. 2009). This case fall comfortably within that category.

* * *

Criminal law—Search and seizure—Vehicle—Traffic stop—Reasonable suspicion—Window tint—Motion to suppress contraband discovered in vehicle during traffic stop for allegedly unlawful window tint is granted where the only testimony was that the windows on a black car driven at night were tinted and no ticket or citation for a tint violation was issued—While officer appeared sincere in his expression of his subjective opinion that the window tint he saw was too dark, the state must show articulable reasonable suspicion through the presentation of objectively-assessable evidence—In absence of some objective facts that would justify a reasonable officer's belief that the tint on defendant's windows was so dark as to constitute a violation of the law, defendant's right to travel on public roadways free from seizure was not to be infracted

STATE OF FLORIDA, Plaintiff, v. KAHLIL CHERISMA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F21-13369. September 7, 2022. Milton Hirsch, Judge.

ORDER ON MOTION TO SUPPRESS

I. Facts

According to Kahlil Cherisma, he was pulled over by a police car engaging its emergency lights behind his own car. Tr. 5.[1] Having stopped, he rolled his windows down and put his hands up. Tr. 6. An Officer Lugo approached and asked him if he had any drugs or weapons. *Id.* Before Cherisma had a chance to answer, the officer opened the car door and told him to step out, *id*., and to face the car. Tr. 7. The officer again asked if Mr. Cherisma had any drugs or guns. *Id.* Mr. Cherisma acknowledged that there was a gun in the car. *Id*. The officer asked if he could go inside the car, Tr. 8, and, having done so, retrieved the firearm for the possession of which Cherisma is charged herein.

Officer Lugo's own testimony is not dissimilar. He describes having observed a black Nissan with tinted windows. Tr. 11. He concedes that this took place at "nighttime," *id*.—we never did learn just what time of night it was—in an area that was dark. *Id*. He did not testify to any present recollection of any source of light, but did offer that "after looking at the body-worn camera, there is lights on the side from whatever business that is." *Id*. He claimed that the window tint was so dark he could not see through the back or side windows into the car, *id*., and had no good view of the driver. Tr. 12. Again, we were not told whether this inability to see into the car was manifest before or after the car was stopped; if before, how long before; or at what distance; or whether the car was still or moving at the time. *See* Tr. 21-22. The officer admits that he never performed any kind of test on the window tints, and that he did not issue a citation to Mr. Cherisma for improper tints. Tr. 22.

In any event, Officer Lugo concedes that he stopped the car, Tr. 13, walked up to the driver's side, *id*., and asked if there were any weapons or drugs in the car. Tr. 14. He then instructed both the driver and passenger to get out of the car. Tr. 13. Having told Mr. Cherisma to face the car, Tr. 14, and having told Mr. Cherisma's passenger to lift up his shirt so the officer could see if anything was beneath it, Tr. 15, Officer Lugo then asked to look inside the car. *Id*. He agrees that Mr. Cherisma had told him that there was a gun in the car. Tr. 18.

II. Analysis

The sole issue in this case is the lawfulness of the stop of the car. If the stop was lawful, Officer Lugo was permitted to ask Mr. Cherisma if there were guns or drugs in the car. *State v. Hinman*, 100 So. 3d 220 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2555b]; *State v. Martissa*, 18 So. 3d 49 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1862a]; *State v. Olave*, 948 So. 2d 995 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D517a]; *Hewitt v. State*, 920 So. 2d 802 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D543a].[2] He was permitted to do so without reciting *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420 (1984). He was permitted to order the driver and passenger out of the car, and to oblige them to remain until he completed the issuing of a traffic citation. Fla. Stat. § 316.1935(1). All these things the officer was permitted to do—if the stop of Mr. Cherisma's car was lawful.

Carroll v. United States, 267 U.S. 132 (1925) is a watershed in the American jurisprudence of search and seizure. *Carroll* involved "bootleggers," illegal importers of Canadian whiskey into the United States during the pendency of the social experiment known as "Prohibition." Their car was stopped on a public road, searched, and found to contain liquor, for the possession of which they were prosecuted. The search was, of course, conducted in the absence of warrant, based upon nothing more than (and, depending on one's reading of the case, not as much as) probable cause. The Court was called upon to consider "a distinction between the necessity for a search warrant in the searching of private dwellings and that of automobiles and other road vehicles [in] the enforcement of the Prohibition Act." *Carroll*, 267 U.S. at 147. In the America of the 1920's, whiskey was increasingly hard to come by; automobiles, increasingly easy. If revenue agents were obliged to procure warrants for passing vehicles, the vehicles, and the opportunity to search and seize, would pass long before the warrants were procured.

This seems obvious, remarkably so, now. It was not in 1925. That the Court would put its imprimatur on wholesale warrantless searches on America's highways and byways based upon nothing more than the appearance of probable cause to law-enforcement officers was a sharp break with the past. Dissenting for himself and Justice Sutherland, Justice McReynolds was clearly appalled at the prospect that, "While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by Federal officers without a warrant and upon mere suspicion." *Id*. at 163 (McReynolds, J., dissenting).

The majority, had it felt the need to do so, could have pointed out that there is a difference between probable cause and, in Justice McReynolds's words, "mere suspicion." Probable cause was then, as it is now, a term of art in the law, referring to "facts and circumstances before the officer . . . such as to warrant a man of prudence and caution in believing that the offense has been committed." *Carroll*, 267 U.S. at 161 (quoting *Locke v. United States*, 11 U.S. 339 (1813) (Marshall, C.J.); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). The test of probable cause looks to those facts of which the police were possessed at the time of the challenged search, seizure, or arrest. It takes no account of impressions, gut reactions, or instinct. It takes no account of facts of which the police were not but perhaps could or should have been possessed. "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

The law could scarcely be otherwise. Courts are obliged to demand that officers of the law act upon facts and evidence, amenable to review according to objective standards at hearings on motions to suppress. Citizens are entitled to demand that officers of the law be in actual possession of probable cause before those officers cross the line drawn by the Fourth Amendment around a citizen's liberty and privacy. To hold otherwise would be to invite police to arrest now, to search now, or to seize now, gambling on the chance that probable cause could be made to appear later. But the protections enshrined in the Fourth Amendment are not to be likened to a roll of the dice or the purchase of a lottery ticket. The Fourth Amendment is not a game of chance. It is not a game at all.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court created a lesser standard than probable cause, the standard of articulable reasonable suspicion,[3] as justifying, not a full-custody arrest, search, or seizure, but a limited detention and, if there is reason to believe the person thus detained is armed and dangerous, a frisk of his person. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court extended its *Terry* doctrine to stops of automobiles. Thus after *Long* it may be the law in Florida that when a police officer encounters a car in circumstances which give rise to articulable reasonable suspicion that the car is, has been, or is about to be, involved in "a violation of the criminal laws of this state," the officer may detain the car and those within.[4] *See* Fla. Stat. § 901.151(2), Florida's statutory codification of *Terry*. If during the course of this brief detention the officer develops articulable reasonable suspicion that persons in the car are in possession of a weapon and constitute "a threat to the safety of the officer of any other person," the officer may conduct a search "only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon." Fla. Stat. § 901.151(5).

By way of articulable reasonable suspicion, Officer Lugo says that the tint on Mr. Cherisma's windows appeared to him to have been darker than the law allows. On the record before me, there are three

findings I can make with confidence about this case: that Officer Lugo seemed very sincere in his expression of his entirely subjective opinion that the window tint he saw was too dark; that window tint, if too dark, can constitute "a noncriminal traffic infraction, punishable as a nonmoving violation as provided in [Fla. Stat.] Ch. 318," Fla. Stat. §§ 316.2952(7); 316.2953; 316.2954(3), and thus a lawful basis for a traffic stop; and that police-officer testimony to the effect that a traffic stop was made based on window tints that impressed the officer as being too dark has become repetitive—concerningly so, to me and to other judges.[5] Apart from those three observations, there are few if any conclusions that I can reach.

As the discussion *supra* at pp. 3-5 attempts to make clear, the State of Florida, whether seeking to show probable cause or articulable reasonable suspicion, must do so by presenting objectively-assessable evidence, not gut reaction or subjective impression. The locution "articulable reasonable suspicion" itself conveys that message. It is not enough that suspicion seem reasonable to the detaining officer. That officer must be able to articulate the reasonableness of that suspicion—to show the court evidence, to point the court to facts, sufficient in quantity and quality to reach the threshold of reasonableness set by the Fourth Amendment itself. I recognize the importance, the vital importance, to a police officer on the all-too-dangerous streets of Miami, of an acutely-tuned instinct for danger and misconduct. But I cannot make findings of fact, sufficient to grant or deny a motion to suppress, based on instinct, however acutely tuned. I need facts. I need evidence. I need something amenable to objective evaluation.

Chief Justice Warren was at pains to convey that message in *Terry*. To detain a passerby, a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the detention. *Terry*, 392 U.S. at 21. This is necessarily the case, because, "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of" the police conduct. *Id*. For the judge to provide that detached, neutral determination of reasonableness (or unreasonableness), "it is imperative that the facts be judged against an objective standard." *Id*.

I do not wish to be misunderstood. I am not, emphatically not, suggesting that when Officer Lugo offered his impression that Mr. Cherisma's car windows were tinted too darkly, he bore false witness. Police officer after police officer testifies in our courts every day that he or she detained an automobile for impermissibly dark tints. Whether many, or few, or almost (as we hope is the case) none, of those officers is lying is more than I can know and more than the case at bar obliges me to determine. In *People v. McMurty*, 64 Misc. 2d 63, 65-66 (N.Y.Crim. Ct. 1970), Judge Irving Younger[6] detailed the epidemic of "dropsy" that was then plaguing the courts of New York:

> Spend a few hours in the New York City Criminal Court nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another. This is now known among defense lawyers and prosecutors as "dropsy" testimony. . . . Surely . . . not in *every* case was the defendant unlucky enough to drop his narcotics at the feet of a policeman. It follows that at least in some of these cases the police are lying.

Four decades later, an equally accomplished legal scholar, Judge Robert Gross of Florida's Fourth District, detailed the epidemic of "consent" that appeared to be rampant in the courts of Florida. *See Ruiz v. State*, 50 So. 3d 1229, *passim esp.* at 1233 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D99c] ("when considering the large number of 'consent' cases that have come before us, the finding of 'consent' in so many curious circumstances is a cause for concern").

A judge's decision that a police officer is telling the truth or lying when the officer testifies that the defendant dropped a bag of drugs as the officer approached; a judge's decision that a police officer is telling the truth or lying when the officer testifies that a defendant freely consented to the warrantless search of his home, or his person; is a decision that is almost always made with difficulty and almost never made with certainty. Fortunately for me, the decision whether there is articulable reasonable suspicion that a car's windows are too dark is made easier by the very objective statutory definition of how dark is too dark.

Fla. Stat. § 316.2952 deals with windshields. It prohibits "sunscreening material," except "along a strip at the top of the windshield, so long as such material is transparent and does not encroach upon the driver's direct forward viewing area as more particularly described and defined in Federal Motor Vehicle Safety Standards No. 205 as the AS/1 portion of the windshield." Fla. Stat. § 316.2952(2)(b). I freely concede that I have not the slightest idea what "Federal Motor Vehicle Safety Standards No. 205 as the AS/1 portion" means, but it is the business of police officers to know what it means; it is the business of police departments to teach police officers what it means; and it is the business of the State Attorney's Office to present evidence that, in a case as to which the legality of a traffic stop is challenged, this standard was not met.

Fla. Stat. § 316.2953 deals with side windows. It provides that sunscreening tint "is authorized for such windows if, when applied to and tested on the glass of such windows on the specific motor vehicle, the material has a total solar reflectance of visible light of not more than 25 percent as measured on the nonfilm side and a light transmittance of at least 28 percent in the visible light range." I take a backseat to no man in my ignorance of the meaning of the foregoing statutory language, but it is the business of police officers to know what it means; it is the business of police departments to teach police officers what it means; and it is the business of the State Attorney's Office to present evidence that, in a case as to which the legality of a traffic stop is challenged, this standard was not met.

Fla. Stat. § 316.2954 deals with rear windows. It provides, at subsection (1)(a), that tinting is permissible if it "has a total solar reflectance of visible light of not more than 35 percent as measured on the nonfilm side and a light transmittance of at least 15 percent in the visible light range." I have no more specific understanding of the meaning of that language than to assume that it correlates, more or less, with a passage from Shakespeare's *Macbeth*, Act I sc. 5: "Nor heaven peep through the blanket of the dark"—but it is the business of police officers to know what it means; it is the business of police departments to teach police officers what it means; and it is the business of the State Attorney's Office to present evidence that, in a case as to which the legality of a traffic stop is challenged, this standard was not met.

In fact a related statute tells us that police officers are to be trained in the understanding of the foregoing statutory language; and that if they are so trained, and equipped to act on their training, they may testify to their findings. Fla. Stat. § 316.2955 directs the Florida Department of Highway Safety and Motor Vehicles to "adopt rules approving light transmittance measuring devices for use in making [the] measurements required by §§ 316.2951-316.2954." Fla. Stat. § 316.2955(3). A police officer equipped with such a light-measuring device, and properly trained in its use, "shall be competent to give testimony regarding the percentage of light transmission when the testimony is derived from the use of an approved device. The reading from an approved device is presumed accurate and shall be admissible into evidence." *Id*. Clearly the law contemplates that an officer intending to detain a wayfarer based on the officer's concern that the

wayfarer's car has window tints too dark will be equipped with, and well-trained in the use of, a light-measuring device of the kind identified in § 316.2955. He will then testify, at the ensuing hearing on any motion to suppress, as to the reading produced by the device. That reading, coupled with such other facts as may be presented, will enable the judge to make a determination of the existence or not of articulable reasonable suspicion—a determination made on facts and evidence, not on general impressions and instinctive reactions. *See, e.g., State v. Petion*, 992 So. 2d 889, 892 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2505a] (Altenbernd, J.) ("Using a tint meter, the sergeant determined that the tinting registered a 5% transmittance ratio when any reading below 28% was a violation of the uniform traffic control law").[7]

As I noted *supra* at p. 6, there are three findings I can make with confidence on this record: that Officer Lugo seemed very sincere in his expression of his entirely subjective opinion that the window tint he saw was too dark; that a window tint, if too dark, can constitute "a noncriminal traffic infraction, punishable as a nonmoving violation;" and that police-officer testimony that a traffic stop was made based on window tints that impressed the officer as being too dark has become concerningly repetitive to me and to other judges. I can engage in no further fact-finding because no further facts were presented to me. Officer Lugo did not recall the artificial lighting conditions at the time of stop, but he very commendably prepared for the hearing by reviewing the video made by his body camera. Reference was made to that video at the hearing, but the video itself was never offered in evidence by the State. Query whether the State's failure to place that video before me supports an inference that the video would have shown poor, perhaps hopelessly poor, lighting conditions. The officer testified that the stop took place at night, and that the car itself was black. If Officer Lugo had a tint-measuring device, he did not use it. Perhaps that in itself supports an adverse inference. If his employer, the Miami-Dade Police Department, one of the largest and most modern police departments in the country, declined to provide him with a tint-measuring device (in derogation of the intent, if not the letter, of Fla. Stat. § 316.2955(3)), that may support an adverse inference as well. At the end of the day, I have testimony that windows on a black car driven in the dark of night were tinted, and that the officer issued no ticket or citation for a tint violation. It is not a crime or infraction for car windows to be tinted. Many Miamians tint their car windows. In the absence of some objective facts that would justify a reasonable officer in a reasonable belief that the tints on Mr. Cherisma's car were so dark as to constitute a violation of law, Cherisma's right to travel on the public roadways free from seizure was not to be infracted.

I say again that Officer Lugo appears to be an honest and well-intentioned policeman. But the road to articulable reasonable suspicion is not paved with good intentions—it is not, in any event, paved with good intentions alone. Something more is required. Here, nothing more is presented.

Defendant's Motion to Suppress is respectfully granted.

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[1]A hearing was had on Mr. Cherisma's motion to suppress on August 1. All transcript references are to the transcript of that hearing.

[2]The rationale offered in the case law for this practice is, of course, the safety of the officer and of any passersby. Certainly that would justify the question: Do you have any guns or other weapons? How it justifies the question: Do you have any drugs? is less than clear. In this case, however, the question unearthed no drugs. Mr. Cherisma is charged solely with the possession of a concealed firearm without a concealed weapons permit.

[3]Contrary to popular belief, the phrase "articulable reasonable suspicion" appears nowhere in Chief Justice Warren's *Terry* opinion. The phrase is a retrojection. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979), in which the Court, citing *Terry*, refers to an "articulable basis amounting to reasonable suspicion." *See also id.* at 664 (Rehnquist, J., dissenting) ("absent an articulable, reasonable suspicion of unlawful conduct, a motorist may not be" detained).

[4]I say that this *may be* the law in Florida. Certainly *Michigan v. Long* applies the lower-than-probable cause standard of articulable reasonable suspicion to car stops, so as a matter of U.S. constitutional law, a Florida police officer can stop a car on nothing more than articulable reasonable suspicion. *And see* Fla. Const. Art. I § 12, pursuant to which Florida *constitutional law* as to search and seizure must track U.S. constitutional law. But Florida, like every American state, remains free to impose as a matter of *statute law* higher standards than the constitutional minima. Fla. Stat. § 933.19 adopts the *Carroll* case in all its particulars as the statute law of Florida. And *Carroll*, which antedates *Terry* by some four decades, requires nothing less than probable cause to justify the detention of a car on the roads of Florida.

[5]My observation that police witnesses testify with formulaic predictability that traffic stops were based on too-dark window tint is, strictly speaking, not based exclusively on matters making up "the record before me" in this case alone. But I am not required, in giving context to one suppression hearing, to ignore what I learn in other, similar suppression hearings. *See* Fla. Stat. § 90.202(6) (entitling me to take judicial notice of court records); and (12) (entitling me to take judicial notice of, "Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned"). As it happened, on the very day I presided over the hearing on the motion to suppress in this case, I presided over a hearing on a motion to suppress in *State v. Fonseca*, Case No. F21-9283. True to form, the officer in that case testified that he stopped the defendant's car because he felt that the window tints were too dark.

[6]Judge Younger later spent many years as a most distinguished academic, in which capacity he is well-remembered even today. Four decades after the fact, I have fond recollections of my law-school days taking the course in the law of evidence taught by Professor Younger.

[7]By its terms, the locution "articulable reasonable suspicion" requires a police officer to be reasonable, not to be a human tint-measuring device. If an officer sees a passing car that appears to him to have unlawfully dark windows, the officer may detain that car. If, upon closer examination, preferably with the tint-measuring device identified in the referenced statutes, it appears that the window tint is in fact unlawful, the officer may proceed as he or she would in connection with any other *Terry* stop, *i.e.*, may proceed as provided in Fla. Stat. § 901.151. If, however, it appears that the window tint is lawful (and no other evidence of crime is made to appear), the officer must send the person thus detained on his way without further restriction or inquiry. *See* Fla. Stat. § 901.151(4).

* * *

Consumer law—Motor Vehicle Retail Sales Finance Act—Class action settlement—For purposes of settlement only, class certification is found to be appropriate for class consisting of all borrowers under loan agreements entered into from four years prior to filing of action—Settlement agreement is approved where settlement is fair, adequate and reasonable and is not product of collusion between parties

DEANNE C. JENKINS, Plaintiff, v. E.R. TRUCK & EQUIPMENT CORPORATION, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-024681-CA-01, Section CA15. August 19, 2022. Jose Rodriguez, Judge. Counsel: Robert W. Murphy, Murphy Law Firm, Charlottesville, Virginia; and Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Kenneth G. Gilman, Gilman Law, LLP, Bonita Springs, for Defendants.

FINAL APPROVAL ORDER

THIS CAUSE came before the Court on August 19, 2022 on the Motion for Final Approval of Class Action Settlement Agreement between the Class Representative, DEANNE C. JENKINS, an individual, on behalf of herself and all others similarly situated, and Defendants, E.R. TRUCK & EQUIPMENT CORPORATION, a Florida corporation, AZARES 3, LLC, a Florida limited liability company, EAST HARBOR, INC., a Florida corporation, all doing business as "East Harbor," BRUNO RASCHIO, an individual, and GIAN F. RASCHIO, an individual. Based on the record, the evidence and argument presented, the Court makes the following findings concerning as to certification of a class and the fairness, reasonableness, and adequacy of the Class Settlement:

A. The instant class action was filed by the Class Representative alleging that East Harbor violated the requirements of state law by charging unlawful interest rates for financing some motor vehicle purchases. In particular, the Class Representative claimed that some commercial truck loans through East Harbor were in excess of the interest rate ceiling permitted under the Florida Motor Vehicle Retail Sales Finance Act ("FRSFA"), Fla. Stat. §520.01, *et seq.*

B. After lengthy and extensive settlement discussions, the respective parties entered into a Class Action Settlement Agreement ("Settlement Agreement"),[1] which has been previously filed with the Court. The Court adopts the terms and definitions contained in the Settlement Agreement as provided below.

C. As provided for below, the Settlement Agreement provides for benefits including *inter alia* the plenary repayment of any "Excess Finance Charge" which is defined as the disputed, but agreed upon, amount of finance charges that some Settlement Class Members paid under a Loan Agreement in excess of what Plaintiff contended was allowed under FRSFA.

D. Based on the record, the Court finds, for purposes of settlement only and without prejudice to any determination for litigation should settlement not be concluded, that Fla. R. Civ. P. Rule 1.220(a) has been satisfied as follows: *numerosity*—joinder of all class members is impracticable; (2) *commonality*—the putative class members' claims share common questions of law or fact; (3) *typicality*—the named Plaintiff's claims are typical of those of the class and the class to each other; and (4) *adequacy*—the named Plaintiff will fairly and adequately protect the interests of the class. Additionally, the Court finds for purposes of settlement only that Fla. R. Civ. P. Rule 1.220(b)(2) has been satisfied in light of allegations that Defendants acted and refused to act on grounds generally applicable to the Class thereby making appropriate declaratory relief and corresponding final injunctive relief with respect to the Class as a whole.[2] In light of the foregoing, class certification of a settlement class is appropriate in this case.

E. The Parties agree, for settlement purposes only and without prejudice to any determination for litigation should settlement not be concluded, that pursuant to Rule 1.220, Florida Rules of Civil Procedure, the Court may certify a class consisting of:

> All borrowers under a Loan Agreement entered into from four years prior to the filing of the instant action to July 1, 2020.
>
> ("Settlement Class" or "Class").

F. Upon review of the record and for the reasons set forth below, this Court hereby gives its final approval of the Settlement Agreement and finds the Settlement to be fair, reasonable, and adequate.

G. The Court finds that the Class Members are receiving fair, reasonable and adequate Settlement Benefits pursuant to the Settlement Agreement in this action.

H. The Court finds that the Class Members were adequately represented by the Class Representative and Class Counsel.

I. The Court must determine whether the proposed Settlement is "fair, adequate and reasonable and that it is not the product of collusion" between the parties. *See, Grosso v. Fidelity Nat. Title Ins. Co.,* 982 So. 2d 1165 (Fla. 3rd DCA 2008) [33 Fla. L. Weekly D241a]; *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984). In making this determination, the Court considers six factors:

> (a) The likelihood that plaintiff would prevail at trial;
>
> (b) The range of possible recovery if plaintiff prevailed at trial;
>
> (c) The fairness of settlement compared to the range of possible recov[ery] discounted for the risk associated with litigation;
>
> (d) The complexity, expense and duration of the litigation;
>
> (e) The substance and amount of opposition to the settlement; and
>
> (f) The stage of the proceedings at which the settlement was achieved.

J. In determining the adequacy of the proposed Settlement, the Court need not, and does not, decide the merits of the case. This Court has considered the submissions of the parties, which demonstrates a degree of uncertainty in the Class Representative prevailing in her claims. The Settlement Benefits set forth in the Settlement Agreement and noted above represent a significant benefit to the Class Members. Given the factual and legal obstacles standing in the way of a full recovery if this case were litigated to conclusion, and the perils of maintaining an action through a final judgment or appeal, this Court finds that the Settlement provides for a reasonable and adequate recovery that is fair to all Class Members. If this case were to proceed without settlement, the resulting litigation would be complex, lengthy and expensive. The Settlement eliminates a substantial risk that the Class Members would walk away empty-handed after trial.

K. Further, Defendants have defended this action vigorously and have indicated they would continue to do so, absent settlement. Because of resulting motion practice, trial and appeals, it could be a lengthy period before the Class Members would see any recovery even if they were to prevail on the merits, which would not produce a better recovery than they may have achieved in this Settlement.

L. The Parties negotiated the Settlement after a thorough review and analysis of the legal issues involved for several months after the filing of the lawsuit. The facts demonstrate that the Class Representative was sufficiently informed to negotiate, execute and recommend approval of the Settlement. *See, e.g., Davies v. Continental Bank,* 122 F.R.D. 475, 479-80 (ED Pa.1996).

M. This Court may also consider the opinions of the participants, including Class Counsel. *Parker v. Anderson*, 667 F. 2d 1204, 1209 (5th Cir. 1984), cert. denied, 459 U.S. 828 (1985). Class Counsel has considerable experience in the prosecution of large and complex consumer class actions. Counsel for the Defendants is likewise experienced. This Court gives credence to the opinion of counsel, amply supported by the Court's independent review that this settlement is a beneficial resolution of the class action claims.

N. In addition to finding that the terms of the proposed settlement are fair, reasonable, and adequate, the Court must determine there is no fraud or collusion between the parties or their counsel negotiating the settlement terms. *Bennett*, 737 F.2d 986*; Miller v. Republic National Life Insurance Company*, 559 F.2d 426, 428-29 (5th Cir. 1977). In this case, there is no suggestion of fraud or collusion between the parties. Furthermore, the terms of the Settlement and a negotiated settlement achieved after mediation make it clear that the process by which the settlement was achieved was fair. *Miller,* 559 F.2d at 429.

O. Due to the efforts of Class Counsel, a class action consisting of approximately 88 members has been presented for certification. The Settlement Agreement negotiated by Class Counsel provides for a complete refund of the Excess Finance Charges totaling One Hundred and Sixty-Nine Thousand Six Hundred Thirty-Two and 21/100 Dollars ($169,632.21)

P. The relief to the Class provides for plenary recovery of actual damages for the Class.

Q. The terms of the Settlement Agreement, including all exhibits thereto, are fully and finally approved as fair, reasonable, and adequate as to, and in the best interest of, the Class.

R. Through the Settlement Agreement, the parties agreed that Class Counsel would be paid reasonable attorney's fees and court costs in an amount not to exceed One Hundred Ten Thousand Dollars ($110,000.00) ("Attorney Fee Award").

S. As for the Attorney Fee Award, the request for $110,000.00 by Class Counsel is fair and reasonable compensation to Class Counsel in accordance with Rule 1.220, Florida Rules of Civil Procedure, and the factors set forth therein.

T. Through the Settlement Agreement, the Parties agreed that the Class Representative would receive, in addition to the class benefits, an incentive award in the sum of Ten Thousand Dollars ($10,000.00) ("Class Representative Incentive Award") for her efforts in obtaining the above-described benefits to the Class. The Court finds that such an award is reasonable and appropriate, in light of the results obtained.

U. As the Settlement Agreement provides for only prospective

relief, the class is mandatory in nature as a so-called "(b)(2) class." As such, unlike class actions seeking just monetary relief under (b)(3), personal notice of certification is not required to be given to class members, and no right to opt out upon certification is provided. *See, generally, Penson v. Terminal Transport Company, Inc.,* 634 F. 2nd 989, 993 (5th Cir. 1981) ["[t]hus, Rule 23 does not mandate any notice of an opt-out right for members of a class certified under Rule 23(b)(2), and this Court has held that generally no absolute right to opt out exists"]. As no class member will be releasing claims by court order, due process is satisfied.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

1. The Settlement Agreement is approved and made part of the judgment of this Court.

2. The Court certifies the Settlement Class pursuant to Rule 1.220, Florida Rules of Civil Procedure.

3. Plaintiff is hereby appointed Class Representative for the Settlement Class. Counsel for Plaintiff, Robert W. Murphy, Esquire and Joshua Feygin, Esquire, are hereby appointed Class Counsel for the Settlement Class.

4. Defendants shall comply with the terms of the Settlement Agreement with respect to future acts required of Defendants, for which the Court shall reserve jurisdiction to enforce.

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[1]All defined terms contained herein shall have the same meanings as set forth in the Settlement Agreement. Some definitions, however, are repeated for clarity.

[2]The Court notes that Defendants have contended and continue to contend that the claims asserted against them lack merit and that they have agreed to the Settlement Agreement to avoid the expense and delay of litigation.

* * *

Mortgage foreclosure—Conditions precedent—Federal HUD regulation requiring that mortgagee have face-to-face interview with mortgagor, or make a reasonable effort to arrange such a meeting—Based on discrepancies in testimony of representative of process server for mortgagee regarding alleged visit to the mortgaged property and mortgagor's testimony, court finds that mortgagee failed to meet burden to prove that it complied with requirement to visit property for purpose of arranging face-to-face interview—Mortgagor was prejudiced by failure to make reasonable effort to arrange face-to-face interview where failure denied him help that he was entitled to as FHA borrower

PENNYMAC LOAN SERVICES, LLC, Plaintiff, v. EDDY E. USTAREZ, a/k/a EDDY USTAREZ, et al., Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2019CA001667. June 29, 2022. Roger Colton, Senior Judge. Counsel: Nathaniel Callahan, Akerman, LLP, Ft. Lauderdale, for Plaintiff. Malcolm E. Harrison, Malcolm E. Harrison P.A., Wellington, for Defendant.

FINAL JUDGMENT ON THE MERITS DENYING FORECLOSURE

THIS CASE was tried at a bench trial on September 11, 2019. Present before the Court appeared Daniela Vasquez, for the Plaintiff, represented by Matthew Feluren, and the Defendant Eddy Ustarez, represented by Malcolm E. Harrison. After the reversal of the Court's Order of Involuntary Dismissal, this Court issued the following order after a July 29, 2022 hearing on the Defendant's Request for a Final Order on the Merits Denying Foreclosure. During this hearing, the Plaintiff was represented by Nathaniel Callahan of Akerman Senterfitt.

The uncontradicted evidence and testimony at trial showed that the Defendant's loan is insured by the Federal Housing Administration ("FHA") a division of the United States Department of Housing Urban Development ("HUD.") Both the Defedant's Note and Mortgage incorporate the HUD regulations and clearly state that the Plaintiff's ability to file a foreclosure action could be limited by the HUD regulations.

Under these conditions, the Fourth District Court of Appeals has held that the Plaintiff must comply with the relevant HUD regulations. *See PennyMac Loan Servs. LLC v. Ustarez,* 303 So.3d 578 (Fla. 4th 2020) [45 Fla. L. Weekly D2174a]:

> *. . . .the text of the Borrower's note and mortgage "does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary." And 24 C.F.R. § 203.500 provides that "no mortgagee shall commence foreclosure or acquire title to a property until the requirements of [subpart C-servicing requirements, inclusive of § 203.604] have been followed." 24 C.F.R. § 203.500 (2019). As a result, PennyMac contractually agreed to self-impose the HUD regulation on itself before accelerating and foreclosing here. See Bank of Am., N.A. v. Jones , 294 So. 3d 341, 342-43 (Fla. 4th DCA 2020)* [45 Fla. L. Weekly D699a] *(holding that although note and mortgage there required compliance with HUD regulation, mortgagee established a prima facie case of excusal from the face-to-face meeting requirement upon borrower's refusal to meet).*

The dispositive issue at the trial was whether the Plaintiff complied with 24 CFR 203.604—the face-to-face requirement—before commencing this foreclosure action.

All parties agreed that there was no face-to-face meeting before the instant foreclosure lawsuit was filed.

The regulations provide for several exceptions to the face-to-face requirement. Only one of which was raised by the Plaintiff during the September 11, 2019 trial of this matter. Pursuant to 24 CFR 203.604(c)(5), the Plaintiff would be excused from conducting a face-to-face meeting if it had made a "reasonable effort" to arrange one. As explained by the Second District Court of Appeals in *Derouin v. Universal American Mortgage Company,* 254 So.3d 595, 598 (Fla. 2nd DCA, 2018) [43 Fla. L. Weekly D1939a]

> *a meeting is unnecessary when "[a] reasonable effort to arrange a meeting is unsuccessful." 24 C.F.R. § 203.604(c)(5). "A reasonable effort to arrange a face-to-face meeting with the mortgagor" includes "at a minimum . . . one letter sent to the mortgagor certified by the Postal Service as having been dispatched" and "at least one trip to see the mortgager at the mortgaged property." 24 C.F.R. § 203.604(d).*

After the trial, the Court made findings of fact that establish that the Defendant rebutted the Plaintiff's prima facie case of foreclosure. To wit, the Court found that:

a. The parties agreed that there was no face to face meeting;

b. Based upon the testimony of the parties and Liz Mills, a field representative for JMA services (a process server) and the discrepanices in her testimony, ie,

1. Date of the alleged trip to the property was 6/21/2019 or 6/22/2019;
2. Defendant's car was in the driveway;
3. Photograph of the front of the property and the vehicle in the driveway;
4. Location of the door bell;
5. Presence of a barking dog and
6. The defendant's own testimony

As a result of the inconsistencies in the Plaintiff's evidence about the alleged trip to the property, the Court finds that the Plaintiff failed to meet its burden of proving by the greater weight of the evidence that it complied with the requirement to make a visit to the property for the purpose of attempting to arrange a face-to-face meeting as required by 24 CFR 203.604(d).

Finally, the Court finds that the Defendant was prejudiced by the Plaintiff's failure to inform him of his right to a face-to-face meeting because it denied him help that he was entitled to as an FHA-insured borrower. In this case the Defendant has testified that he was both working and making significant payments to try to catch up his

arrears. The Defendant made substantial payments of $3,000, $1,600 and $2,000 in an effort to get caught up. In addition, the Defendant was working full time as of the June 2018 date of default. Further, the Defendant had a roommate who was paying him rent. The Defendant testified that when he spoke to the Plaintiff's representatives on the phone their emphasis was on collections and that no one ever informed him of his right to a face-to-face meeting or explained his options to him to save his home. On this basis, the Court finds the Defendant was prejudiced by the Plaintiff's failure to make a "reasonable effort" to arrange the face-to-face interview with him to which he was entitled as an FHA-insured borrower.

It is therefore

ORDERED AND ADJUDGED that the Plaintiff, PENNYMAC LOAN SERVICES, LLC, take nothing by this action and that Defendant, EDDY USTAREZ go hence without day.

Attorney's fees are assessed in favor of the Defendant as the prevailing party. The mortgage contract contains a provision which entitles the Plaintiff to an award of attorney's fees if the Plaintiff is required to take action to enforce the mortgage. Thus the Court may allow reasonable attorney's fees to the Defendant for prevailing in this action pursuant to Fla.Stat. 57.105(7).

The Court retains jurisdiction in this matter for the purposes of effecting and enforcing this Final Judgment, considering and determining attorney's fees, and entering any other orders that are just and proper.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Detention—Continued detention by officer who stopped defendant for inoperable taillights was unlawful where officer did not observe indicia of impairment or odor of alcohol during interaction with defendant while she was seated in her vehicle and had nothing more than a hunch regarding defendant's impairment prior to requesting that she exit vehicle to perform field sobriety exercises—Motion to suppress is granted

STATE OF FLORIDA, v. CHELSEA ROCHESTER, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2017-CT-777, SP No. 249460. October 25, 2019. Nina Ashenafi-Richardson, Judge. Counsel: Jack Campbell, State Attorney, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

ORDER

THIS CAUSE came before the Honorable Court on September 23, 2019 to hear the Defendant's Motion to Suppress based on an unlawful detention. After reviewing the pleadings, case law provided by both parties, and listening to testimony from Officer Northway and arguments by counsel, the Court makes the following ruling:

Findings of Fact

On March 24, 2017, Officer Northway with the Tallahassee Police Department conducted a stop on a vehicle driven by Ms. Rochester for inoperable taillights. Officer Northway testified multiple times in this case (twice at trials that ended in hung juries and once at the motion hearing) that there were no indicators of impairment in Ms. Rochester's driving pattern. After Ms. Rochester pulled over, Officer Northway approached the vehicle on the driver's side. At this point, the sole purpose of the stop was for the inoperable taillights.

When Officer Northway made contact with Ms. Rochester, she asked for her license, registration, and proof of insurance. Ms. Rochester immediately handed over her license and, after searching for about a minute, was able to produce her registration and proof of insurance. While she searched for the registration and proof of insurance, Officer Northway testified that Ms. Rochester mistakenly told her she was still looking for her license; however, Officer Northway confirmed Ms. Rochester never fumbled these items or handed her incorrect documents. When Officer Northway told Ms. Rochester the reason for the stop, she testified that Ms. Rochester was shocked[1] and her eyes widened. At this point Officer Northway testified that she noticed bloodshot and watery eyes so she asked Ms. Rochester where she was coming from. Ms. Rochester declined to answer and told her she lived nearby. Based on this information, Officer Northway asked Ms. Rochester to exit the vehicle and perform field sobriety exercises. Ms. Rochester complied with the officer.

At this point Officer Northway had not smelled an odor of alcohol or controlled substance nor heard any admission of alcohol or drug use. Officer Northway noted that there was an odor of fast food coming from the vehicle but the officer did not attempt to first separate Ms. Rochester from the vehicle to investigate the odor prior to detaining Ms. Rochester to conduct a DUI investigation. Officer Northway testified she did not smell an odor of alcohol until Ms. Rochester was already under arrest for DUI and in the back of her patrol vehicle.

Application of the Law

The legal standard for law enforcement to request field sobriety exercises and detain a citizen for a DUI investigation is reasonable suspicion. *DHSMV v. Guthrie,* 662 So.2d 404, 405 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2480b]; *State v. Taylor,* 648 So.2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b]. Reasonable suspicion must be supported by an officer's well-founded, articulable suspicion of criminal activity. *Popple v. State,* 626 So.2d 185, 186 (Fla. 1993). When interpreting whether a suspicion is reasonable, trial courts apply an objective standard. *State v. Teamer,* 151 So.3d 421 (Fla. 2014) [39 Fla. L. Weekly S478a]. There must be more than a "mere hunch" based on bare intuition. *Teamer* at 426; *See also U.S. v. Arvizu,* 534 U.S. 266, 274 (2002) [15 Fla. L. Weekly Fed. S81a]; *Berry v. State,* 973 So.2d 1255, 1256 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D461a]. "The officer's suspicions need not be inconsistent with a hypothesis of innocence. Rather, they need to be based only on rational inferences, from articulable facts, which reasonably suggest criminal activity." *Beahan v. State,* 41 So.3d 1000, 1004 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1799e].

In this case, Defendant was detained without any odor of alcohol. The State cited two cases to support their argument for reasonable suspicion without any odor of alcohol or drugs: *State v. Belluomo,* 18 Fla. L. Weekly Supp. 1012a (Manatee Cty. Ct. December 22, 2010) and *Wiseberg v. State,* 12 Fla. L. Weekly Supp. 193a (6th Jud. Cir. Ct. June 29, 2004). While it is true reasonable suspicion was found in these cases without an odor of alcohol or drugs, in both cases, the defendants admitted use of prescription medication which are not applicable to the case at bar. Further, *Belluomo* involved a defendant who rear-ended a police vehicle, while *Wiseberg* involved a defendant found passed out in the driver's seat of a vehicle "haphazardly" parked with the driver's door open, fact patterns not applicable to this case.

This Court finds that Officer Northway had nothing more than a hunch regarding criminal activity, especially since Ms. Rochester was asked about FSEs while still seated in her vehicle. A more prudent approach would have been to remove Ms. Rochester from the vehicle to determine whether any odors of alcohol or drugs existed. There was testimony that the only odor detected was coming from the fast food meal defendant purchased before the stop. Doing so would have also given the officer an opportunity to further evaluate Ms. Rochester's dexterity and stability. This Court finds that the limited observations made by Officer Northway while interacting with Ms. Rochester while she was seated in her vehicle, through her open window, did not reasonably suggest criminal activity. Other Courts have not found reasonable suspicion based on similar observations *even with an odor of alcohol,* which in this case was not noticed until after the Defendant was arrested. *See Egierski v. Florida Dep't of Highway Safety,* 13 Fla. L. Weekly Supp. 1148b (Volusia Cty. Ct. September 12, 2006); *State v. Bertoni,* 13 Fla. L. Weekly Supp. 568b (17th Jud. Cir. Ct. March 14, 2006); *State v. Littlefield,* 13 Fla. L. Weekly Supp. 1000a (Osceola Cty. Ct. July 11, 2006); *State v. Durant,* 22 Fla. L. Weekly Supp. 1095a (Hillsborough Cty. Ct. March 4, 2015); *State v. Willert,* 24 Fla. L. Weekly Supp. 54a (Pasco Cty. Ct. April 22, 2016); *State v. Smith,* 27 Fla. L. Weekly Supp. 386b (Volusia Cty. Ct. May 28, 2019).

ORDERED AND ADJUDGED that the Motion to Suppress based on an Unlawful Detention is **GRANTED**. All evidence obtained after Officer Northway asked Ms. Rochester out of her vehicle to perform field sobriety exercises shall be suppressed.

[1]A motion to suppress the stop based on Ms. Rochester's belief that her taillights were operable was denied at the same hearing as this motion to suppress for an unlawful detention.

* * *

Criminal law—Driving under influence—Search and seizure—Blood test—Consent—Voluntariness—State failed to prove that consent to blood test was freely and voluntarily under totality of circumstances where consent was given while defendant was lying in hospital bed in distressed state and nurse stated that pain medication was being withheld until officer completed request for blood sample—Motion to suppress is granted

STATE OF FLORIDA, v. KAITLYN ODOM, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2018-CT-1845. SP No. 256611. April 18, 2022. Monique Richardson, Judge. Counsel: Jack Campbell, State Attorney's Office, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

[Prior report at 27 Fla. L. Weekly Supp. 635a]

ORDER

THIS CAUSE came before the Court on October 13, 2021 to hear the Defendant's Motion to Suppress Blood Test. Having reviewed the pleadings, case law provided by both parties, and considered the evidence presented and arguments by counsel, the Court makes the following ruling:

Findings of Fact

On June 1, 2018, law enforcement responded to a crash in Leon County, Florida. Ms. Odom was transported to Tallahassee Memorial Hospital due to her injuries. Law enforcement responded to the hospital and conducted a DUI investigation.

This Court previously considered the motion to suppress in 2019 based only on argument of counsel. The Appellate Court instructed this Court to base its decision on the totality of the circumstances. At the hearing on October 13, 2021, the parties presented the body cam footage from Defendant's hospital room. The footage allowed this Court to now base its decision objectively on the totality of the circumstances.

The body cam footage begins with Ms. Odom in what appears to be a distressed state while laying on a hospital bed, hooked up to various monitors. Her chest can be seen pulsing faster than a normal pace. The officer informed her that he is there to conduct a DUI investigation. He then stated prior to reading Miranda warnings, "Now just real quick, before I ask you any questions, I gotta read you something okay?" Ms. Odom spoke to the officer while laying on the hospital bed and answered questions regarding where she was coming from and what she had to drink After she answered the questions, the officer stated, "Well I realize they've got some stuff to do so I'm going to speed this process up. I got something I need to read to you alright?" The officer proceeded to quickly read a voluntary request for a blood sample to which Ms. Odom replied, "I want to speak to my attorney first." Notably this was moments after she was told she has a right to an attorney. The officer responded, "Well, that's not possible, but let me read to you the consequences if you refuse and then we'll go from there." The officer quickly read the consequence portion of the implied consent form previously submitted into evidence while Ms. Odom's chest was still visibly pulsing and in distress. At one point Ms. Odom interrupted the officer and stated "that's fine" regarding accepting the consequences. However, at the end of the discussion, the officer asks, "So you consent to having your blood drawn" and Ms. Odom responded with "yes sir."

It was evident from the footage that medical services were being withheld from Ms. Odom so that law enforcement could request their sample. After Ms. Odom acquiesced to the blood test, the officer said, "So I'm going to get that started and they're going to take that first because I think they're going to take you for CT scans and maybe some other stuff." You can hear Ms. Odom mention the pain in her ankle and hips. The video ended with the nurse in the room saying they were withholding pain medication until law enforcement completed their request for a blood sample.

There was no evidence that TPD made any attempt to secure a search warrant or that exigent circumstances existed that would excuse attempting to secure a search warrant.

Application of the Law

Article I, Section 12 of the Florida Constitution states that the right to be free from unreasonable searches and seizure "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." A search is per se unreasonable when "conducted outside the judicial process, without prior approval by judge or magistrate. . .subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant,* 556 U.S. 332, 338 (2009) [21 Fla. L. Weekly Fed. S781a]. When relying on consent, the State has the burden of proving the consent was freely and voluntarily given. *Bumper v. North Carolina,* 391 U.S. 543, 548 (1968).

In its original order, this Court cited *Birchfield v. North Dakota,* 136 S.Ct. 2160 (2016) [26 Fla. L. Weekly Fed. S300a] which considered consent related to blood draws. The Appellate Court instructed this Court that "In *Campbell v. State,* 288 So.3d 739 (Fla. 5th DCA 2019) [45 Fla. L. Weekly D11e], the Court recognized that *Birchfield* is limited to cases where consent was given only after threat of criminal offense. There was no threat of criminal offense in this case as shown in the Implied Consent Form. Therefore, the test becomes one of voluntariness, which must be determined based on the totality of the circumstances."

Based on the totality of the circumstances after this Court has had the opportunity to review the body cam footage from inside the hospital room, this Court finds that the State has not proven consent was freely and voluntarily given.

ORDERED AND ADJUDGED that the Motion to Suppress the Blood Test is GRANTED.

* * *

Criminal law—Driving under influence—Search and seizure—Arrest—Warrantless DUI arrest was unlawful where officers found defendant asleep in vehicle that was no longer operable because it was out of gas, officers were not investigating a crash, and officers did not witness defendant in actual control of vehicle when it was operable—Motion to suppress is granted

STATE OF FLORIDA, v. JOSEPH XUEREB, JR., Defendant. County Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2398-CT. September 11, 2020. Kathy L. Garner, Judge. Counsel: Jack Campbell, State Attorney, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

ORDER

THIS CAUSE came before this Court on September 2, 2020 to hear the Defendant's Motion to Suppress based on an unlawful arrest. After reviewing the pleadings, case law provided by both parties, and listening to testimony from the troopers and arguments by counsel, the Court makes the following ruling:

Findings of Fact

On June 5, 2020, FHP Trooper Strohecker pulled in behind a vehicle that appeared be disabled on the shoulder of I-10. She testified that the vehicle was not running and its emergency flashers were activated. When Trooper Strohecker got to the window, she observed Mr. Xuereb sleeping in the driver seat. After making contact with Mr. Xuereb, she learned that the vehicle had run out of gas. She also noticed an odor of alcohol so Trooper Brien arrived on scene to conduct a DUI investigation. Trooper Brien testified that he found the keys to the vehicle within reach of Mr. Xuereb. Mr. Xuereb admitted to the troopers that he drove the vehicle to where it was on the side of I-10; however, none of the troopers witnessed the vehicle when it had gas and was operable. There was also no testimony that any BOLOs had been issued for this vehicle or that any other law enforcement

observed Mr. Xuereb driving it when it was operable. After the DUI investigation, Mr. Xuereb was arrested for DUI and transported to the Gadsden County Jail where he refused to provide a breath sample.

Application of the Law

Florida Statute §901.15 sets forth when law enforcement may arrest someone without a warrant. This statute is commonly referred to as the "warrant requirement." Subsection (5) of the statute authorizes arrests for misdemeanor DUIs only when the offense "has been committed in the present of the officer." There are two exceptions to this warrant requirement in misdemeanor DUIs. Law enforcement can go forward with a warrantless arrest for DUI, despite not witnessing all of the elements in person, if law enforcement develops probable cause for a DUI after responding to the scene of a traffic crash. *Fla. Stat.* §316.645 (2019). Regarding the second exception, an officer can make an arrest without witnessing all of the elements by relying on the observations of other law enforcement who witnessed the missing elements under the fellow officer rule. *Fla. Stat.* §901.15(5) (2019); *See also Sawyer v. State,* 905 So.2d 232 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D1466c].

The Defense provided this Court with various opinions from the District Courts of Appeal and local county and circuit orders that applied the warrant requirement to DUI cases. They all stand for the same general proposition; if law enforcement is not investigating a crash, an officer cannot make a warrantless arrest for DUI unless the offense was committed in the presence of the arresting officer or a combination of all officers involved. *Sawyer v. State,* 905 So. 2d 232, 234 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1466c] (arrest violated warrant requirement rule because only civilians, not law enforcement, witnessed driver in actual physical control of the vehicle); *Steiner v. State,* 690 So. 2d 706, 708 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D850a] (same); *State v. Bass* 19 Fla. L. Weekly Supp. 653a (Leon Cty. Ct. April 18, 2012) (same); *Green v. State,* 20 Fla. L. Weekly Supp. 745a (4th Jud. Cir. Ct., March 14, 2013) (even though the driver admitted to driving and had the keys, the arrest violated the warrant requirement because the driver was outside his vehicle that was not running when law enforcement arrived on scene); *State v. Perez,* 24 Fla. Law Weekly Supp. 431a (Leon Cty. Ct. July 8, 2016) (even though the driver admitted to driving and was inside the vehicle that was turned off, the arrest violated the warrant requirement because the keys were 6-12 inches outside the vehicle when law enforcement arrived on scene).

In this case when the troopers arrived on scene the vehicle was no longer operable. There was no testimony at the hearing that troopers witnessed Mr. Xuereb in the vehicle when it was operable prior to running out of gas. There was also no testimony that the troopers were investigating a crash. As a result, since the troopers did not witness Mr. Xuereb in actual physical control of a vehicle, the arrest was unlawful and in violation of the warrant requirement.

The State provided five cases in support of its argument that the arrest was lawful, two of which merit discussion. In *Jones v. State,* the First DCA answered a certified question from the trial court regarding whether or not the State had to prove a vehicle was "capable of immediate self-powered mobility" with regards to actual physical control. 510 So.2d 1147 (Fla. 1st DCA 1987). The First DCA answered the question in the negative. *Id*. This case however deals with a sufficiency of the evidence argument at trial rather than whether the initial arrest itself was unlawful under the warrant requirement. Notably, all of the cases provided by the Defense that analyzed the warrant requirement came after *Jones*. The State also provided this Court with *Mills v. Florida Dep't of Highway Safety and Motor Vehicles,* which was a decided a few months ago. FLWSUPP 2804MILL (12th Jud. Cir. Ct. May 11, 2020) [28 Fla. L. Weekly Supp. 283d]. While *Mills* is factually similar to the case at hand involving a vehicle out of gas, the court did not scrutinize the arrest under the warrant requirement of Florida Statute §901.15. The court instead, similarly to *Jones*, analyzed a sufficiency of the evidence argument and found that the DHSMV hearing officer had enough circumstantial evidence to conclude the driver was in actual physical control. Since the issue of the warrant requirement was not raised to the *Mills* or *Jones* court, this Court does not find those opinions instructive on this issue. Therefore, it is

ORDERED AND ADJUDGED that the Motion to Suppress based on an Unlawful Arrest is GRANTED. All evidence pertaining to the warrantless arrest of Mr. Xuereb shall be suppressed.

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to breath test—Reading of implied consent warning was improper where officer knew that defendant was engaged in conversation with another officer and was not paying attention during reading and made no attempt to secure defendant's attention—Because defendant was not made properly aware of adverse consequences of refusal, refusal is suppressed

STATE OF FLORIDA, v. KRISTINA L. LAWRENCE, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2021 CT 2043, SP No. 268154. August 26, 2022. Monique Richardson, Judge. Counsel: Jack Campbell, State Attorney, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS BREATH TEST REFUSAL

THIS CAUSE came before the Honorable Court on July 20, 2022, to hear the Defendant's Motion to Suppress Refusal to Submit Breath Test. After reviewing the pleadings, case law provided by both parties, and listening to testimony and arguments by counsel, the Court makes the following ruling:

Findings of Fact

On November 20, 2021, law enforcement responded to a disabled vehicle in Leon County, Florida. While there, TPD Officer Roy investigated the Defendant for DUI, and she was ultimately arrested without being afforded the opportunity to perform any field sobriety exercises.

After her arrest, Officer Roy initially asked the Defendant whether she would like to give a breath sample. The Defendant repeatedly advised Officer Roy that she was not refusing but wanted to speak to a supervisor based on the circumstances surrounding her arrest. According to Officer Roy, the Defendant's response was considered a refusal; therefore, he retrieved the Implied Consent form to read to the Defendant.

A new officer approached the Defendant and Officer Roy as he began to read the Implied Consent warnings. Believing the new officer was a supervisor, the Defendant began to inquire with him about his title. It is apparent from the video that the Defendant was turned away from Officer Roy and engaged in conversation with another officer for much of the time Officer Roy spent reading the consequence portion of the form.

Officer Roy testified that he was aware the Defendant was engaged in conversation with another officer and believed she was not paying attention. There was no evidence that Officer Roy made any attempt to direct the Defendant's attention to the Implied Consent warnings or confirm that the Defendant heard him while he was reading Implied Consent. When Officer Roy requested the Defendant to submit to a breath test for a second time, she maintained that she was not refusing and wanted to speak to a supervisor. Officer Roy then escorted the Defendant to his patrol car and advised her he would contact a supervisor for her. He called the supervisor moments later with his bodycam still activated and told his supervisor that, "she wants you to come out here and do her DUI investigation not me because she

doesn't like me. She has no complaint, no reason, nothing other than the fact she's in handcuffs, she's under arrest, she's going to jail." The supervisor's response could not be heard on video but after a few moments of silence, Officer Roy stated "Exactly, I'll take care of it."

Application of the Law

Generally, reading Implied Consent warnings pull a defendant out of the "safe harbor," making them aware that their refusal to submit a breath test carries with it adverse consequences. However, determining whether the defendant was pulled out of the safe harbor does not hinge upon the quantity of the warnings but instead hinges upon the quality of the warnings. *See South Dakota v. Neville,* 459 U.S. 553 (1983) (defendant's refusal to submit to testing was admissible where he was aware he would lose his driver license after a refusal, effectively pulling him out of the safe harbor). Courts have similarly excluded evidence when law enforcement gives a perfunctory reading of Miranda warnings, thereby minimizing or downplaying their significance. *See Ross v. State,* 45 So.3d 403, 428 (Fla. 2010) [35 Fla. L. Weekly S501a]; *see also Ramirez v. State,* 739 So.2d 568, 576 (Fla. 1999) [24 Fla. L. Weekly S353a].

In the instant case, the State argues that law enforcement complied with Florida Statute § 316.1932 because the arresting Officer read the Defendant Implied Consent warnings. Contrary to the State's argument, intentionally reading Implied Consent warnings to someone known to be distracted and not paying attention is improper where there are no attempts to secure their attention. This is not the type of warning contemplated by Implied Consent laws and the United States Supreme Court holding in *Neville.*

As the Defense argued, it is not the Defendant's responsibility to pull herself out of the safe harbor. It is the arresting officer's responsibility to do so. Without attempting to capture the Defendant's attention even once, based on the totality of the circumstances of this case, the Defendant was not properly made aware of the adverse consequences associated with her failure to submit to the breath test. Therefore, it is hereby

ORDERED AND ADJUDGED that the Motion to Suppress the Refusal to Submit a Breath Test is **GRANTED**.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Community caretaking—Officer responding to report of defendant asleep in vehicle with motor running in strip mall parking lot exceeded scope of welfare check when he opened vehicle door without warning and without first attempting to wake defendant—Traffic infraction—No merit to argument that defendant committed traffic violation by obstructing traffic in parking lot where evidence shows that traffic was free to go around defendant's vehicle, and there is no evidence that defendant intentionally or willfully obstructed traffic—Motion to suppress is granted

STATE OF FLORIDA, v. LOGAN TAYLER JONES, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2021-CT-1370, SP No. 267183. August 9, 2022. Jason Jones, Judge. Counsel: Jack Campbell, State Attorney, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court upon Defendant's Motion to Suppress based on an unlawful detention. On July 6, 2022, a hearing was held on the motion. After reviewing the pleadings, case law provided by both parties, and listening to testimony and arguments by counsel, the Court makes the following ruling:

FINDINGS OF FACT

On August 16, 2021, officers with the Tallahassee Police Department were dispatched to the front of a strip mall where a motorist was reportedly asleep in his car with the motor running. The responding officer, Officer Roberts, testified that he intended to check the welfare of the motorist, Mr. Jones.

Officer Roberts also testified he did not attempt to contact the person who called for assistance. He further testified he did not attempt to wake Mr. Jones by knocking on the window or calling out to him. Officer Jones shined a flashlight into one of the vehicle windows and then immediately opened the driver's side door of the vehicle. Mr. Jones instantly woke up and informed Officer Roberts that he was okay. At this point, Officer Roberts testified that he did not smell an odor of alcohol or controlled substance. Rather than contacting EMS or providing any other assistance to Mr. Jones, Officer Roberts responded by ordering Mr. Jones to turn off the vehicle. He then ordered Mr. Jones out of the vehicle and Mr. Jones was later arrested for DUI.

CONCLUSIONS OF THE LAW

Law enforcement has a duty to "ensure the safety and welfare of the citizenry at large," which is encapsulated under the Community Caretaking doctrine. *State v. Brumelow,* 289 So.3d 955, 956 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D3025a]. To do this, law enforcement may conduct welfare checks on individuals. However, "[b]oth the scope and manner of a welfare check must be reasonable." *Taylor v. State,* 326 So.3d 115, 118 (1st DCA 2021) [46 Fla. L. Weekly D1641a].

The level of intrusive means that may be utilized during a welfare check is dependent on the level of urgency at hand. *Id.* Here, the issue is not whether it was appropriate for law enforcement to conduct a welfare check but whether the Officer exceeded the scope of a permissible welfare check.

Florida's First DCA recently considered which level of intrusive measures may be deployed when law enforcement conducts welfare checks on individuals found asleep in their vehicles, thereby circumventing the Fourth Amendment of the US Constitution. In *Taylor,* law enforcement sought out to conduct a welfare check on an individual who was found asleep in their vehicle with a large knife on his lap. *Id.* at 117. The responding Deputy was unable to articulate any specific concerns for the health or safety of the defendant beyond the fact that he was asleep. *Id.* at 119. Without inquiring into the defendant's well-being, the officer opened the door to the defendant's vehicle. The First DCA held that the officer exceeded the scope of a permissible welfare check. *Id.* at 118.

This Court is guided by *Taylor* and concludes Officer Roberts exceeded the scope of a welfare check when he decided to open Mr. Jones's vehicle door without attempting to wake Mr. Jones and without warning. Handling a welfare check in this manner constitutes an unlawful seizure under the Fourth Amendment.

Officer Roberts could have taken a more prudent approach by inquiring into Mr. Jones's well-being by attempting to wake him up. This would have given Officer Roberts an opportunity to further evaluate Mr. Jones's welfare and determine whether it was necessary to enter the vehicle to ensure his well-being.

The State alternatively argued at the motion hearing that Mr. Jones committed a traffic violation for obstructing traffic. Officer Roberts also testified regarding this violation but admitted he did not cite Mr. Jones for an infraction. The video footage provided by the Defense showed there were no lane markings in this parking lot and traffic was free to go around Mr. Jones. Further, Florida Statute 316.2045 prohibits only a willful, intentional obstruction of traffic. *See Underwood v. State,* 801 So.2d 200, 202-203 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2885b]; *Bent v. State,* 310 So.3d 470, 471 (2nd DCA 2020) [45 Fla. L. Weekly D1904a]. There was no evidence presented at the hearing that Mr. Jones intentionally or willfully obstructed traffic.

This Court finds that the limited observations made by Officer Roberts when he first approached Mr. Jones's vehicle did not reasonably justify opening his car door without warning and constituted an unlawful seizure under the Fourth Amendment.

ORDERED AND ADJUDGED that the Motion to Suppress based on an Unlawful Detention is **GRANTED**. All evidence obtained after Officer Roberts opened Mr. Jones's door shall be suppressed.

* * *

Criminal law—Driving under influence—Evidence—Breath test results—Substantial compliance with administrative rules—Twenty-minute observation period—Administrative rule providing that a second 20-minute observation period is not required before administering subsequent "sample" did not alleviate need to conduct second observation period before administering second breath test after first test generated "slope not met" message—No merit to argument that history of malfunction in machine used to test defendant's breath renders test results inadmissible where there is nothing to indicate non-compliance with rules governing inspection, maintenance, and repair of machine—Motion to suppress is granted based on failure to conduct second observation period

STATE OF FLORIDA, v. TIA LASHAWN JOHNSON, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. ADW49ME, Division SCTII. June 28, 2022. Diane M. Croff, Judge. Counsel: John Barnes, Assistant State Attorney, Office of the State Attorney, Clearwater, for State. Marc N. Pelletier and Timothy F. Sullivan, Law Offices of Russo, Pelletier & Sullivan, P.A., St. Petersburg, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE BREATH TEST RESULTS

THIS CAUSE coming to be heard April 29, 2022 on Defendant's Motion in Limine to Exclude Breath Test Results, filed January 3, 2022, the State's Response, filed April 28, 2022, with Mr. Marc Pelletier, Esq. and Mr. Timothy Sullivan, Esq. appearing on behalf of the Defendant, TIA LASHAWN JOHNSON, and John Barnes, Esq., appearing on behalf of the State of Florida, the Court being fully advised in the premises, and testimony and legal argument being placed on the record, the Court makes the following findings:

FACTUAL FINDINGS

1. On October 23, 2020 at approximately 6:12 p.m., the Defendant was arrested following a traffic crash for Driving Under the Influence and transported to the St. Petersburg Police Department (S.P.P.D.).

2. The Defendant submitted to a breath test performed by S.P.P.D. Officer Paul Hines, a qualified Breath Test Operator. Officer Hines began his twenty (20) minute observation of the Defendant at 6:28 p.m. Throughout the observation period, Officer Hines faced the Defendant who was seated within two feet of him. Officer Hines did not observe the Defendant regurgitate or put anything in her mouth.

3. Officer Hines used the Intoxilyzer 8000 (serial number 80-001051) to perform two breath tests and the results were recorded on separate FDLE/ATP forms 38. During test number one, the Defendant provided the first breath sample at 6:50 p.m. which resulted in a message of "Slope Not Met" and the test was aborted.

4. Officer Hines then conducted a second test of the Defendant's breath. The first breath sample was provided at 6:56 p.m. with of reading of .302, a second sample at 7:00 p.m. with of reading of .278 and a third sample at 7:03 p.m. with of reading of .286.

5. A second twenty (20) minute observation period was *not* conducted between the first and second breath tests. Officer Hines did not believe he was required by the rules to conduct a second observation period before starting the second test. In fact, he believed the rules stated a second observation period was not required before conducting a second test.

6. Officer Hines initially testified that he believed there would be two possibilities for receiving a message of "Slope Not Met"—either mouth alcohol was present or the machine made an error. He received the "Slope Not Met" message only one time since being permitted in 2018 as a Breath Test Operator. He later testified that a third possibility for the "Slope Not Met" message was the Defendant was sucking and blowing into the instrument contrary to his instructions, although nothing in his training materials would support this possibility.

7. S.P.P.D. Officer Sean McCullough, a qualified Agency Inspector, has served as the Agency Inspector for breath test instruments for S.P.P.D. since January 2021, having completed his certification in December 2020. As the custodian of records for the breath test instrument utilized in the instant case, Officer McCullough supplied a number of records requested by the Defense regarding the inspection, maintenance and repair of that instrument, as well as other breath tests conducted using it.

8. Officer McCullough testified that he believed the Defendant's sucking and blowing into the breath test instrument can generate a "Slope Not Met" or "Volume Not Met" message.

9. Officer McCullough offered his opinion that results of the Defendant's second breath test, specifically samples 2 and 3 are "accurate," but distinguished that the testing was not done in compliance with the FDLE's Agency Inspector manual which requires a second observation period be conducted by the Breath Test Operator after a "Slope Not Met" message.

LEGAL FINDINGS

The Defense argues her breath test results are not reliable and must be excluded for two main reasons: 1) the breath test operation procedures by employed by Officer Hines were not conducted in substantial compliance because he failed to conduct a second twenty (20) minute observation period after the first test generated a "Slope Not Met" message; and/or 2) the particular instrument used to conduct the breath test has a history of malfunction.

Under Florida's Implied Consent laws, drivers who accept the privilege of driving within the State of Florida are deemed to have consented to submitting to an approved test to determine their blood alcohol level. *See* F.S. §316.1932. The Florida Department of Law Enforcement (FDLE) is responsible for regulating the operation, inspection and registration of breath test instruments, including the establishment of uniform requirements for instruction and curricula for those who operate, inspect and instruct on the breath test instruments. *Id.* The procedures governing the operation, inspection and registration of breath test instruments are contained within Chapter 11D-8 of the Florida Administrative Code (F.A.C.). Rule 11D-8.008, F.A.C., outlines the qualifications required for FDLE to issue a valid permit to a Breath Test Operator and Agency Inspector, including the successful completion of the respective courses. FDLE's Criminal Justice Standards and Training Commission approves the lessons plans for each of those courses. The Breath Test Operator Course Lesson Plan (March 1, 2007 and August 1, 2015 versions) and the Agency Inspector Course Lesson Plan (August 1, 2015) were received as Defense Exhibits 3, 4 and 13. The standard for a valid and admissible breath result is "substantial compliance" with the rules, although insubstantial differences will not invalidate the test. *See* F.S. §316.1932.

Rule 11D-8.007(3), F.A.C., provides "[t]he breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. This provision shall not be construed to otherwise require an additional twenty (20) minute observation period

before the administering of a subsequent *sample.*" (emphasis added). The State interprets the above provision of the code to mean a second observation period is not required before administering the second *test.* The Defendant had been observed for the requisite period of time and did not regurgitate nor did she place anything inside her mouth. Therefore, argues the State, the purpose of the observation period had been achieved. i.e. the operator reasonably ensured mouth alcohol did not affect the test, and the rule does not require a subsequent observation period before restarting the test.

A plain reading of the language within Rule 11D-8.007(3) conveys that a second twenty (20) minute observation is not required for a second *sample.* The rule does not alleviate the need to conduct another observation period before administering a second *test,* as the State argues it does. On the other hand, nothing in the rule requires another a second twenty (20) observation period before administering a second *test.* The language of the rule simply clarifies that additional twenty (20) minute observation periods are not required between the two, or possibly three, breath *samples* that comprise an approved breath test as defined elsewhere in the rule. Under the facts of this particular case, the State's reliance on this provision as justification for not conducting a second observation between the two tests period is misplaced.

The Breath Test Operator and Agency Inspector lesson plans (each of which is 37-46 pages in length) offer more detailed and robust guidance on the operation of the breath test instruments than F.A.C. Chapter 11D-8. Each of the lesson plans contain nearly identical sections setting forth seventeen (17) different messages the Intoxilyzer 8000 may produce based upon incorrect operational procedures or conditions. Each of the lesson plans identify the specific message, provide a description of the message, and state the corresponding action the Breath Test Operator or Agency Inspector *must* take for each message. Use of the word "must" indicates the action is not optional, but required. A number of messages require the operator to restart the test. However, of the seventeen (17) possible messages, "Slope Not Met" is the only message that requires the operator to "perform another 20 minute observation period and restart the test." The Court observes that the requirement to perform another 20 minute observation period is not present in the August 1, 2015 version of the Breath Test Operator Lesson Plan as it was in the March 1, 2007 version of that plan. However, the requirement is present in the August 1, 2015 Agency Inspector Lesson Plan and imposes the obligation on the Breath Test Operator to conduct the subsequent 20 minute observation period. Additionally, all three lesson plans contain testing scenarios and sample answers for those scenarios. All three lesson plans set forth the scenario for "Slope Not Met" and when obtaining such a message on the first test, indicate that another twenty minute observation period is to be conducted before restarting the second breath test. Thus, the operational procedures make clear that when a "Slope Not Met" message is generated by the Intoxilyzer 8000, the breath test operator must perform another twenty-minute observation period and restart the test.

The Court found the testimony of both Officer Hines and McCullough to be credible as to their actions. That said, there was insufficient evidence presented as to what caused the "Slope Not Message" message. While both officers speculated that the Defendant's sucking and blowing into the machine caused the message (as opposed to mouth alcohol), neither officer pointed to any basis in their background or training for this belief, nor did the State offer any authority for that theory. As such, the Court cannot consider a purely speculative theory which is furthermore irrelevant to the issues presented in the instant motion. On the relevant issue concerning the need for another 20 minute observation period, despite Officer McCullough's opinion that the results of the second test were accurate, he properly conceded that the test was not conducted in compliance with FDLE's Agency Inspector Manual which directs a subsequent observation period after a "Slope Not Met" message.

It is worth noting that a review of other breath test results produced by this same instrument (contained within Defense Exhibit #12) demonstrates that at least one other Breath Test Operator with the S.P.P.D., Nicole S. Kline, observed the requirement to conduct another 20 minute observation period following a "Slope Not Met" message. In a test conducted by her on August 10, 2020, the observation period for the breath test began at 23:50 and the first sample, produced at 00:19, generated a "Slope Not Met" message. A second test was then conducted after a second 20 minute observation period which began at 00:20. The collection of the two samples in that second test occurred at 00:42 and 00:44. Those results demonstrate at least one occasion where the rules are not being followed uniformly within the same agency.

Finally, as to the issues raised by Defense with regard to the malfunction of the instrument itself (Intoxilyzer 8000, serial number 80-001051), the Court finds no merit in those claims which would render its breath test results inadmissible. Although the machine required service on occasions both before and after the date it was used to obtain the Defendant's breath test results, there is nothing to indicate non-compliance with the rules governing its inspection, maintenance and repair. Records demonstrate the instrument was removed from service when appropriate, sent out for repair, repaired, and tested before being placed back into service. The monthly and annual inspections were properly conducted by the agency and FDLE. The agency inspection last occurred on October 7, 2020, 16 days prior to the Defendant's breath test. The months for which the defense argues the inspections were not conducted are months when the instrument was out of service and such inspections are not "missing." The instrument was maintained in compliance with Chapter 11D-8, F.A.C. On that basis, the motion is denied.

The operation of the breath test instrument in this case, specifically the failure to conduct a second twenty (20) minute observation period after receiving a "Slope Not Met" message on the first test, was not in substantial compliance with the agency regulations and the breath test results are therefore inadmissible.

Accordingly, the Defendant's Motion in Limine to Exclude the Breath Test Results is GRANTED. DONE and ORDERED this 26th day of June, 2022, in Clearwater, Pinellas County, Florida.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Traffic infraction—Stop was lawful where deputy had probable cause to believe that defendant was speeding and weaving—Community caretaking—Stop was also justified by legitimate concern that defendant was ill, tired, or impaired based on erratic driving pattern—Observations of odor of alcohol, bloodshot and glassy eyes, and slurred speech provided legal basis to compel performance of field sobriety exercises—Statements of defendant—Defendant's admission that he had consumed 4 or 5 beers was not inadmissible product of custodial interrogation without *Miranda* warnings where admission occurred in response to roadside questioning during investigatory detention—Motion to suppress is denied

STATE OF FLORIDA, v. BRETT O'DONNELL, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020-104115MMDL. March 21, 2022. Belle B. Schumann, Judge.

ORDER DENYING MOTION TO SUPPRESS

This case comes before the Court on the Defense Motion to Suppress. After a hearing on March 15, 2022, and upon consideration of the evidence and all legal authority presented, the Court DENIES the motion. The traffic stop that ultimately led to the arrest of Defen-

dant Brett O'Donnell for DUI was justified under either or both of two theories: that there was probable cause to believe he was speeding and weaving *or* that this driving pattern established a reasonable suspicion that the driver was ill, tired or impaired. Once validly stopped, several indicia of impairment provided probable cause that O'Donnell was driving under the influence. Moreover, the Defendant's admission that he had consumed four or five beers during the resulting traffic stop is not the unlawful product of custodial interrogation.

On September 19, 2020, at about 10 pm, Volusia County Deputy Sheriff Royce James observed a pickup truck being driven by the Defendant east on State Road 92 (International Speedway Blvd.) The truck was "oscillating" from side to side of the lane, and left the lane of travel by crossing the lines on both sides of the lane several times. The truck was also traveling well in excess of the posted speed limit, more than 70 mph in a 55 zone. Based on these observed infractions, as well as a concern that the driver could possibly be ill, tired or impaired, the deputy effected a traffic stop.

The defense takes issues with the sufficiency of each of these traffic infractions. The video of the driving pattern, as well as the testimony of the deputy, clearly indicates that the truck was weaving from one side of the lane to the other, and several times crossed the center line dividing the lanes of eastbound travel as well as the solid fog line on the right side of the lane. The traffic stop was justified on this basis.

Much of the hearing was consumed with the sufficiency of the evidence of speeding. The deputy testified that the defendant was driving over 70 mph where the posted speed limit was 55 mph. The defense presented testimony that the deputy did not pace the speed of the truck for long enough, objected to the lack of predicate for the calibration of the speedometer, and presented still photographs every five seconds captured from the body camera video. Nevertheless, the deputy was certified in speed measurement in 2014, and testified he had made thousands of stops for speeding. A lay witness can testify to the speed of a vehicle, particularly where, as here, the speed is significantly over the posted speed limit. *See, e.g. Lewek v. State*, 702 So. 2d 527 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2471b]. This is not traffic court and the question presented here is not whether the State proved that the defendant was going 72 in a 55 zone beyond a reasonable doubt. Rather, the question is whether there is an objective basis for the stop on a probable cause standard. The Court finds as fact that the Defendant was obviously speeding and so the stop was justified on this basis.

Generally, a traffic stop is lawful under the fourth amendment ". . .where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996); *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. In order to determine the constitutional validity of a traffic stop, the "correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Florida Dept. of Highway Safety and Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S80a].

There are three levels of encounters between the police and citizens: consensual encounter, seizure (also called an investigatory detention or *Terry* stop), and arrest. *Saturnino-Boudet v. State*, 682 So. 2d 188, 191-192 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2173j]. In a consensual encounter, the individual is not restrained in any way, but rather is free to either voluntarily comply with the officer's requests or ignore them. *Hayward v. State,* 24 So. 3d 17, 34-35 (Fla. 2009) [34 Fla. L. Weekly S679a]. A seizure occurs when the officer restrains the individual, either by the application of physical force or by making a show of authority to which the individual yields. *State v. Canada*, 715 So. 2d 1164, 1165 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2007b]. To be valid, a seizure must be supported either by a reasonable suspicion of criminal activity or probable cause to believe a traffic infraction occurred. *Jones v. State*, 842 So. 2d 889, 891 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D470b]. Finally, an arrest is the most intrusive type of encounter and therefore requires a greater evidentiary showing, i.e. probable cause to believe the suspect has committed a criminal offense. *Saturnino-Boudet*, 682 So. 2d at 191-192.

Probable cause has been defined to mean "a fair probability," *State v. Malone*, 729 So. 2d 1008, 1010 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D899a] (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)), or "more likely than not," *League v. State*, 778 So. 2d 1086, 1087 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D654a]; *State v. Jones*, 417 So. 2d 788, 792 n.8 (Fla. 5th DCA 1982)(Cowart, J., concurring), or "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion," *P.B.P. v. State*, 955 So. 2d 618, 625 (Fla. 2d DCA) [32 Fla. L. Weekly D1114a] (quoting *United States v. McClain*, 444 F.3d 556, 562 (6th Cir. 2005)). Probable cause exists where the totality of the facts known to the officer at the time would cause a reasonable person to believe that an offense has been committed. *State v. Walker*, 991 So. 2d 928, 931 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2014a].

Thus the appropriate standard here is whether there was probable cause to believe that either of two traffic infractions had occurred. The Court finds that the State has satisfied its burden of proof. Once a police officer stops a vehicle for a traffic infraction, the officer is justified in detaining the driver for the length of time reasonably necessary to issue a citation or warning. *Sanchez v. State*, 847 So. 2d 1043, 1046 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1239b]. Included in this "reasonably necessary" time period is the time necessary to run the driver's license, tag, and active warrants checks that routinely accompany a traffic stop. *State v. Stone*, 889 So. 2d 999 (Fla. 5th DCA 2004) [30 Fla. L. Weekly D71a].

Additionally and independently, the stop was justified by the "community caretaking" function, as James had a legitimate concern for Defendant's safety and took steps to determine if he was ill, tired or impaired. *State v. Jimoh*, 67 So.3d 240 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2469a]; *Dermio v. State*, 112 So. 3d 551 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a]. After eliciting testimony regarding the traffic pattern, the State asked,

> Q: Based on the Defendant's driving pattern what did that lead you to suspect?
>
> A: It could mean a couple of things, intoxication, could be a medical issue, could be texting and driving. (hearing time 10:49:53)

Later, the deputy reiterated that based on the driving pattern prior to the stop, he suspected that the driver might be intoxicated, sick, tired or distracted.

On cross-examination, the deputy agreed that many people stopped for speeding and weaving across the demarcated lines of travel are not impaired. "Could be ill, tired or impaired, could be something else, I don't know at that point." That is the whole point of an investigation: to dispel or confirm the reasonable suspicion. Contrary to the defense argument, the officer repeatedly and clearly stated that in addition to the infractions he observed, the stop was made to dispel the reasonable suspicion that the driver was ill, tired or impaired. O'Donnell's driving pattern provided a reasonable suspicion which justified a stop even if there had been no violation of a vehicular regulation and no citation had been issued. *Ndow v. State*, 864 So. 2d 1248 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a]. The Court finds that the stop of this vehicle could be based on either or both of these theories, the commission of traffic infractions or a concern that the driver was possibly ill, tired or impaired.

This unusual operation of the vehicle by deviating from the lane by more than was practicable provided a valid basis for the stop, irrespective of whether anyone was endangered. *Yanes v. State*, 877 So. 2d 25 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a]. This is

true even if he had drifted into the adjoining lane only once, but here, he weaved from side to side crossing the lines several times. *State v. Wilson*, 268 So. 3d 927 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1007a]. Additionally, as stated previously, O'Donnell was speeding well in excess of the speed limit.

James testified that when he spoke to O'Donnell after the valid stop, he observed the odor of alcohol, saw he had red, bloodshot and glassy eyes, had slightly slurred speech. James observed signs of impairment and developed probable cause to believe O'Donnell was driving under the influence of alcohol. These observations provided a valid legal basis to compel O'Donnell to perform field sobriety exercises. *State v. Taylor,* 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]; *State v. Burns*, 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a], *case dismissed*, 767 So.2d 1366 (Fla. 1996). O'Donnell's performance on the FSE's added to the probable cause for the arrest.

Once he was validly stopped and exited the vehicle, O'Donnell admitted that he had been drinking alcohol, and had consumed four or five beers. The Defense contends that this admission should be suppressed as it was allegedly the product of custodial interrogation without benefit of *Miranda* warnings. This argument ignores several decades of controlling legal precedent.

As stated previously, there are three levels of encounters between the police and citizens: a consensual encounter, an investigatory detention, and an arrest. A traffic stop, such as the one conducted by Deputy James, falls under the second category. *Jones, supra; D.A. v. State,* 10 So. 3d 674, 676 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D867b]. It is well-settled that roadside questioning during a traffic stop does not constitute custodial interrogation for *Miranda* purposes, as explained by the Fifth District Court of Appeal:

> [H]aving initiated a traffic stop, Officer Robson was not required to "Mirandize" Thomas after observing Thomas' nervous behavior. *Miranda* warnings are required only in instances of custodial interrogation. *See Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997) [22 Fla. L. Weekly S563b]. Traffic stops are generally not considered to constitute custodial interrogation and law enforcement officers are permitted to ask a moderate number of questions to confirm identity and to confirm or dispel suspicions related to the scope of the stop without being required to first inform a motorist of his or her *Miranda* rights. As the United States Supreme Court explained:
>
> > [T]he usual traffic stop is more analogous to a so-called "*Terry* stop," *see Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " *Ibid.* (quoting *Terry v. Ohio*, *supra*, 392 U.S., at 29, 88 S.Ct., at 1884.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda.*
>
> *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)(footnotes omitted); *see State v. Olave*, 948 So. 2d 995 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D517a] (defendant who had been stopped for broken taillight and asked to exit vehicle was not subject to custodial interrogation for purposes of *Miranda* when police officer asked him whether he had any drugs or weapons in his pockets); *State v. Dykes*, 816 So. 2d 179 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D989c] (motorist was not subjected to custodial interrogation, for purposes of *Miranda,* when he was pulled over in routine traffic stop and questioned by one officer while another officer wrote citation for minor undisputed traffic violation). In the instant case, Thomas was not in custody when Officer Nye asked his permission to be searched and, accordingly, there was no requirement that Thomas first be "Mirandized."

State v. Thomas, 109 So. 3d 814, 817-818 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D372a]; see also, *State v. Janusheske*, 111 So. 3d 967 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D939b]. Even if James had drawn his weapon and directed O'Donnell to lie on the ground, the investigatory stop would not have been automatically converted into an arrest. *Young v. State*, 270 So. 3d 471 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D921d]. Therefore, the defense contention that O'Donnell's admissions that he had consumed four or five beers should be suppressed as the product of a custodial interrogation that required a *Miranda* warning is simply incorrect as a matter of law.

In addition to this admission, there were several other indicia of impairment observed. There may be other explanations for some of these indicators, but that does not dispel the reasonable inference that he was impaired. This is an argument for a jury. A determination that probable cause exists ". . .need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002) [15 Fla. L. Weekly Fed. S81a]. Whether this evidence will satisfy the State's higher burden at trial of beyond and to the exclusion of a reasonable doubt is a question to be resolved by a jury.

WHEREFORE, based upon the foregoing factual findings and legal authority, the Motion to Suppress is DENIED in all respects.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Accident report privilege—Statements made by defendant that were prompted by officer's questioning during accident investigation are inadmissible pursuant to accident report privilege—Where at close of accident investigation officer advised defendant that he was commencing criminal investigation but failed to read *Miranda* warnings, statements made in response to questioning during criminal investigation must also be excluded—Spontaneous statements made by defendant during criminal investigation are admissible—Defendant's refusal to perform field sobriety exercises is not admissible where defendant was not advised of any adverse consequences of refusal

STATE OF FLORIDA, v. CORY TYLER MILLER, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020-312588 MMDB, Division 81. April 8, 2022. David H. Foxman, Judge.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court for a hearing on Defendant's Motion to Suppress, at which the parties presented evidence and legal argument. The Court is fully advised and finds as follows:

Defendant is charged with DUI with damage and prior refusal. The charges stem from a single-vehicle accident. By stipulation, the evidence at the suppression hearing consisted entirely of the body camera footage of the arresting officer. The video, which is approximately 90 minutes long, consists of the officer's interactions with Defendant on scene, in the patrol car, and at the police station. Defendant makes numerous statements over the course of the video which may be construed as inculpatory.

Defendant raises two issues in his motion. First, he argues that Defendant's statements must be excluded under the accident report privilege. Second, he argues that his refusal to perform the field sobriety exercises must be excluded because he was not advised of any adverse consequences for refusing the exercises.

Defendant first contends that any statements he made to the arresting officer must be excluded as privileged under the accident report privilege. Under the accident report privilege, incriminating statements made during an accident investigation are inadmissible. *Vedner v. State,* 849 So. 2d 1207 (Fla. 5th DCA) [28 Fla. L. Weekly D1721b], *rev. denied,* 861 So. 2d 433 (Fla. 2003). The relevant statute reads as follows:

> Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated.

§ 316.066(4), Fla. Stat. (2020). The purpose of this privilege is to encourage truthful reporting to law enforcement after an accident:

> The purpose of the accident report privilege is to encourage people to make an accurate report of the circumstances surrounding an accident so that the state can use the information to make the highways safer. The legislature has made the decision that in both criminal and civil actions, it is better that statements made by a defendant not be introduced before the jury than to restrict the goal of safer highways for society. . . The Florida legislature has recognized the constitutional mandate against self-incrimination and immunized the report and any accompanying statements from use against the person making them.

Wetherington v. State, 135 So. 3d 584, 586 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D794a] (quoting Charles W. Ehrhardt, *Florida Evidence* § 501.2 (West 2012 ed.)).

The Court grants the motion for any statements Defendant made to the arresting officer during the accident investigation. These statements, which were prompted by questioning from the officer, are privileged and therefore inadmissible.

Defendant also seeks to exclude all of his statements that came after the officer completed the accident investigation and began a criminal investigation. An officer seeking to question a suspect following an accident investigation must "change hats" by informing the defendant that the officer is now conducting a criminal investigation and by reading the defendant the *Miranda* warnings.[1] *State v. Norstrom,* 613 So. 2d 437, 440-441 (Fla. 1993); *State v. Marshall,* 695 So. 2d 686 (Fla. 1997) [22 Fla. L. Weekly S308b]. At the conclusion of the accident investigation in this case, the officer advised Defendant he was commencing a criminal investigation, but failed to read Defendant the *Miranda* warnings. This was not a sufficient transition to the criminal investigation. *See State v. Kerrigan,* 14 Fla. L. Weekly Supp. 103a (Fla. Broward Co. Ct. Oct. 10, 2006). Because of the failure to properly change hats, any statements that Defendant made to the officer in response to questioning during the criminal investigation must be excluded.

During the criminal investigation, Defendant made several incriminating statements to the officer that were not in response to questioning. The State contends that these spontaneous statements are not privileged. In this context, a spontaneous statement is one a suspect makes voluntarily and not in response to questioning from the police. *See e.g. State v. Binion,* 637 So. 2d 952 (Fla 4th DCA 1994)(statements volunteered by suspect in the back of the patrol car following DUI arrest were deemed spontaneous where the suspect was not being questioned by the officer). Defendant argues that there is no exception to the privilege for spontaneous statements because the failure to properly change hats leaves the suspect under the erroneous impression he must continue to divulge information to the officer under the mandatory duty to report.

The weight of the authority supports the conclusion that spontaneous statements are not privileged under the accident report privilege. *See Perez v. State,* 630 So. 2d 1231 (Fla. 2d DCA 1994); *State v. Daszkal,* 22 Fla. L. Weekly Supp. 582a (Fla. 15th Cir. Ct. Jan. 7, 2015); *Edelstein v. State, Dept. of Hwy. Safety & Mtr. Veh.,* 17 Fla. L. Weekly Supp. 978b (Fla. 11th Cir. Ct. July 22, 2010); *Hessburg v. State, Dept. of Hwy. Safety & Mtr. Veh.,* 14 Fla. L. Weekly Supp. 707a (Fla. 5th Cir. Ct. May 21, 2007). Accordingly, the Court finds that spontaneous statements made by Defendant during the criminal investigation are not privileged and may be introduced at trial. The motion to suppress is denied as to these spontaneous statements.

As for the second issue, the State concedes that Defendant's refusal to perform the field sobriety exercises must be excluded. *See Howitt v. State,* 266 So. 3d 219, 223-224 (Fla 5th DCA 2019) [44 Fla. L. Weekly D2229c]. Accordingly, the motion to suppress is granted on this issue.

WHEREFORE, Defendant's motion to suppress is granted in part and denied in part. To summarize, Defendant's statements during the accident investigation are excluded. Defendant's statements in response to questioning during the criminal investigation are excluded. Defendant's spontaneous statements during the criminal investigation are admissible. Defendant's refusal to perform field sobriety exercises is excluded.

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

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to field sobriety exercises is admissible where officer who stopped defendant for reckless driving on motorcycle had reasonable suspicion to believe he was DUI based on odor of alcohol and bloodshot eyes, and officer advised defendant prior to requesting that he perform exercises that anything he said could be used against him and of adverse consequences of refusal

STATE OF FLORIDA, v. COREY MCKINLEY CHASTAIN, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 301923 MMDB, Division 83. June 28, 2022. David A. Cromartie, Judge.

ORDER ON MOTION TO SUPPRESS/IN LIMINE REFUSAL TO SUBMIT TO FSTS

THIS CAUSE came before this Court upon the Defendant's Motion to Suppress/In Limine Refusal to Submit to FSTs, and after a review of the Motion, the argument of counsel, the contents of the Court file and the applicable law, it is hereby ORDERED as follows:

The facts that were established at the suppression hearing are as follows:

The Parties stipulated to the axon video of Officer Vincent Castellano from the beginning until five minutes and twenty-three seconds be admitted into evidence and then those portions of the video were played to the Court. The Defendant was pulled over by Officer Vincent Castellano of the Daytona Beach Shores Department of Public Safety on March 6, 2022. Officer Vincent Castellano states on the video that Defendant is driving recklessly through the city and estimates Defendant was driving his motorcycle around hundred MPH. Defendant is placed in handcuffs, read Miranda and told he is being arrested for the offense of Reckless Driving. Officer Castellano states that Defendant reeks of alcohol, has bloodshot eyes and is not wearing eye protection as required when operating a motorcycle. Defendant is asked why he is driving so fast and Defendant replies I

don't know and that he did not believe he was going that fast. Defendant is asked to perform field sobriety exercises. Defendant indicates he doesn't want to do them. Officer Castellano then states that you reek of alcohol, are driving like an idiot through the city, have bloodshot eyes and are not wearing required eye protection. You don't want to perform field sobriety exercises? Defendant again indicates he does not want to perform the exercises. Officer Castellano then states "You understand that failure to do those field sobriety exercises when you have such indications that would indicate that you are too impaired to operate a motor vehicle you stand to, you still can be arrested for driving while impaired? You understand that?" Defendant on the video nods that he understands and does not perform the field sobriety exercises.

CONCLUSIONS OF LAW

If a law enforcement officer has reasonable suspicion that a defendant driver is impaired, the law enforcement officer may compel the defendant to perform field sobriety exercises. In *State v. Taylor*, 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b], the Florida Supreme found that an officer only needs reasonable suspicion to believe a DUI suspect is impaired for the officer "to conduct a reasonable inquiry to confirm or deny that probable cause exists to make an arrest" for DUI. *Id*. at 703-704. *See also*, *State v. Leifert*, 247 So.2d 18, 19 (Fla. 2d DCA 1971) (finding "the question of consent concerning such physical tests has been held to be immaterial" and determining "we hold that the police officer, after having observed appellee drive in a weaving fashion and then noticed the smell of alcohol on his breath, had sufficient cause to believe that appellee had committed a crime in the operation of a motor vehicle and could require him to take part in such physical sobriety tests.")

Based on the relevant case law, the Court finds that the Defendant's refusal to submit to field sobriety exercises is relevant to the State's prosecution of this case. The State relied on *State v. Taylor*, 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b] and the Court agrees that *Taylor* is binding precedent on this issue. The Court in *Taylor* stated:

> Taylor had ample incentive to take the tests: He was aware of the circumstances surrounding the officer's request; he knew the purpose of the tests; and he had ample warning of possible adverse consequences attendant to refusal . . . . Given the strong incentives to take the tests, Taylor's claim that his refusal was an innocent act loses plausibility. In short, he knew that refusal was not a "safe harbor" free of adverse consequences and acted in spite of that knowledge. His refusal thus is relevant to show consciousness of guilt. If he has an innocent explanation for not taking the tests, he is free to offer that explanation in court.

In the instant case, Officer Castallano informed the Defendant that if he failed to perform the field sobriety exercises with the indicators of impairment he showed he could be arrested for driving while impaired. The Defendant was already arrested for Reckless Driving, but this does not mean that being arrested for an additional criminal charge is without consequence. The Court, therefore, finds that unlike the case of *Howitt v. State*, 266 So.3d 219 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D406b], where "the offices did not advise Howitt of any adverse consequences of refusing to perform the field sobriety tests", Mr. Chastain was advised of possible adverse consequences for refusing. Furthermore, prior to his refusal, the Defendant was advised that anything he said could be used against him. This warning provides an additional warning that his statement that he would not perform the field sobriety exercises could be used against him.

Thus, the Defendant's refusal to perform field sobriety exercises is relevant to the State's prosecution and the Court Denies Defendant's Motion to Suppress/In Limine Refusal to Submit to FSTs.

* * *

Insurance—Homeowners—Discovery—Photographs of damage—Work product privilege—Photographs of alleged roof damage taken by field adjuster during initial inspection are not work product—If photographs are work product, insured has proven need for photographs and inability to obtain substantially similar photographs—Counsel for insured was unable to be present at initial inspection, and counsel's ability to confront adjuster regarding inspection and to evaluate strength of insurer's preexisting damage defense will be diminished by lack of access to photographs

WAYNE ANDERSON and MARYANN ANDERSON, Plaintiffs, v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2021 42049 COCI. July 29, 2022. Robert A. Sanders, Jr., Judge. Counsel: Connie McCarthy and Edward Stickles, Sunshine State Law Firm, P.A., Winter Park, for Plaintiffs. Cody Ingalls, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO OVERRULE OBJECTION

THIS CAUSE, having come to be heard before the Court on July 20, 2022, on Plaintiff's Motion to Overrule Objection to Defendant's Response to Plaintiff's Request for Production.

Factual Background

1. On or about December 15, 2021, Plaintiff filed its initial discovery requests with the filing of the Complaint.

2. Defendant filed its responses on or about February 17, 2022.

3. In response to the Request to Produce, Defendant objected to the production of certain photographs taken by the field adjuster who conducted the inspection of the property based upon work-product privilege.

4. On or about March 10, 2022, Plaintiff filed a Motion to Overrule Objections, specifically addressing the photographs requested in Request to Produce No. 12.

5. Plaintiff has acknowledged they are only requesting the photographs rather than any written opinions of the field adjuster which may be included within the photograph report.

6. Both parties appeared in front of Honorable Judge Sanders on July 20, 2022.

Legal Analysis

7. The Defendant has the burden to prove that the requested photographs are covered by work-product privilege as alleged in the Defendant's Privilege Log. Defendant has failed to specifically articulate the basis of the privilege in the privilege log.

8. A specifically articulated document request for "photographs of the alleged property damage" may require either:

a. Production of such photographs; or

b. Disclosure on the privilege log with a specifically articulated basis for protection from discovery.

9. Work-product privilege may be discoverable if the party seeking discovery is able to show a substantial need and the absence of the ability to obtain the substantial equivalent by other means.

10. Defendant has asserted that the photographs are protected by work-product privilege under *Avatar Property & Casualty Insurance Company v. Mitchell,* 314 So.3d 640 (Fla. 3rd DCA 2021) [46 Fla. L. Weekly D168a] alleging that the photographs were taken in anticipation of litigation despite the photographs being taken during the initial claim's investigation process, prior to any indication that Plaintiff may initiate litigation.

11. Counsel for Defendant focused his argument on the foreseeability prong in arguing that litigation was foreseeable at the time of the initial claim's investigation. While *Mitchell* is persuasive authority, it is not binding on this Court.

12. In response, Plaintiff relies upon *Avatar Property & Casualty Insurance Company v. Simmons,* 298 So.3d 1252 (Fla 5th DCA 2020)

[45 Fla. L. Weekly D1429a] wherein the 5th DCA upheld a discovery order compelling Avatar to turn over photographs contained within its claims file. The Court said "Even if. . .a "claims file" is work product, it is not necessarily true that *every* document in a claims file is work product. Putting a document in a claim file doesn't make it immune; it is only immune if it is work-product."

13. Further, in *Simmons* the 5th DCA addressed the underlying motion hearing where the Court gave Avatar multiple opportunities to identify why the photographs at issue were work-product, however Avatar failed to provide any sufficient response other than the documents were within the claim file and work-product. Similarly in this matter, Defendant was unable to articulate why litigation would be foreseeable at the initial inspection. Defendant was unable to articulate any percentage of claims which are inspected and never enter litigation.

14. Based upon the arguments of the parties, this Court finds that the photographs are not work-product and orders Defendant to produce all photographs taken by the field adjuster during the inspection at the property on or about September 29, 2021. Defendant may redact any notes or opinions of the field adjuster which may appear on the photographs.

15. Assuming, arguendo, that the photographs are work-product, the next prong of the evaluation turns on Plaintiff's inability or substantial hardship in obtaining similar documents.

16. Defendant argues that Plaintiff has unlimited access to the roof to photograph the roof as necessary.

17. It is undisputed by the parties, that Counsel for Plaintiff was not present at the time of the initial inspection and were not able to observe the roofing system at the same time as the field adjuster.

18. Plaintiff has argued that it meets the hardship prong as counsel was not present at the time of the inspection, Plaintiff requires the photographs to properly evaluate and advise the client on the damages observed at the time of the inspection, and the lack of field adjuster photographs diminish the Plaintiff's ability to confront the field adjuster regarding the inspection.

19. Furthermore, Plaintiff asserts that Defendant alleges the damages are subject to an exclusion under the policy for pre-existing damage and the ability to review the requested photographs are necessary for a full evaluation of the strength of Defendant's affirmative defense.

20. Based upon the argument of the parties, Plaintiff has met the burden to demonstrate the need for the photographs taken by the field adjuster and undue hardship in the ability to obtain Plaintiffs' own substantially similar photographs.

21. Therefore, even if the photographs requested are protected by work-product privilege, the Court finds that the Plaintiff has shown the inability to obtain the substantial equivalent photographs by any other means.

Based upon the arguments of the parties, it is hereby ORDERED AND ADJUDGED:

1. Plaintiff's Motion to Overrule Objections to Request to Produce Number 12 is hereby GRANTED limited to the photographs taken during the inspection on or about September 29, 2021;

2. Defendant shall provide the requested photographs within ten (10) days of the date of this Order;

3. Defendant shall redact any written notes or opinions contained within the photographs or photograph report.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Traffic infraction—Statutory requirement that all lights and reflectors mounted on "rear of any vehicle" shall display or reflect red color did not supply probable cause to stop defendant driving truck with white cargo lights mounted on back of truck cab—As used in statute, "rear of any vehicle" refers to lights or reflectors mounted at back or rearmost part of vehicle, not to rear-facing cargo lights on truck cab—Reasonable suspicion—Deputy's observations of defendant weaving within his lane once as he went around curve, leaving turn signal on for "unusual" amount of time, and "irregularly" toggling cargo lights on and off were not sufficient to create reasonable suspicion that defendant was intoxicated or impaired—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. JUAN ALFREDO DIAZ, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2021 105460 MMDL. July 29, 2022. A. Christian Miller, Judge. Counsel: Aaron D. Delgado, Aaron Delgado & Associates, Daytona Beach, for Defendant.

ORDER SUPPRESSING EVIDENCE FROM UNLAWFUL TRAFFIC STOP

This matter is before the court on the *Defendant's Motion to Exclude and Suppress Evidence Following an Unlawful Traffic Stop and Inadmissible Field Sobriety Exercises* ("Motion to Suppress") filed on April 14, 2022. The court has reviewed the Motion to Suppress and the court file, conducted a hearing on July 8, 2022, and considered the evidence, arguments and authorities cited by the parties. Based upon the foregoing, the court finds as follows:

The Defendant challenges[1] the lawfulness of the traffic stop. He argues Deputy Maletto did not possess probable cause to believe a traffic infraction had occurred, nor reasonable suspicion of criminal activity. The State argues Deputy Maletto had probable cause to believe the Defendant violated Florida Statute 316.224(3), or in the alternative, Defendant's driving pattern taken as a whole gave Deputy Maletto reasonable suspicion of DUI to justify an investigatory detention. The court analyzes these arguments below.

Probable Cause of Traffic Violation

The only traffic law violation alleged by Deputy Maletto as a basis for the traffic stop is a violation of Florida Statute 316.224(3), which reads as follows:

> All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stop light or other signal device, which may be red, amber, or yellow, and except that the light illuminating the license plate shall be white and the light emitted by a backup lamp shall be white or amber. Deceleration lights as authorized by s. 316.235(6) shall display an amber color.

The evidence at the suppression hearing demonstrated that the Defendant's Nissan pickup truck displays a pair of factory-issued white cargo lights mounted on the outside, rear portion of the passenger cab, directly above the rear window in front of the truck bed ("the cargo lights"). The cargo lights are positioned on either side of a third brake light and contained within the same housing assembly. *See Diagram A*[2].

Diagram A

Deputy Maletto alleges the cargo lights were noncompliant with the above Florida Statute because they emitted a white color and did not qualify for one of the statute's permitted exceptions. Thus, the issue before the court is whether Florida Statute 316.224(3) applies to cargo lights like those pictured above. The resolution of this issue turns on the meaning of the phrase "the rear of any vehicle" as used in the above statute. Defendant argues the rear of any vehicle includes only the rearmost portion of the vehicle where the brake lights, backup lights, turn signals, tag lights, et cetera are located. Defendant further argues the cargo lights on his truck, although rear facing, are not truly located on the rear of the vehicle, as contemplated in the statute. The State encourages the court to take the broadest view of the statutory term "the rear of any vehicle" and to include any lights mounted on any portion of a vehicle facing to the rear. Such a construction of the statute would therefore include the cargo lights on Defendant's truck.

The court begins this analysis, as with all questions of statutory interpretation, with the language of the statute itself. "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it must be given its plain and obvious meaning." *USAA Cas. Ins. Co. v. Mikrogiannakis,* ___So.3d ___, p.3 (Fla. 5th DCA July 22, 2022) [47 Fla. L. Weekly D1569a] (internal citations omitted). As the Florida Supreme Court recently noted, "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." *Lab. Corp. of America v. Davis,* 339 So.3d 318 (Fla. 2022) [47 Fla. L. Weekly S134a] (internal citation omitted). The Court also noted " 'Context is a primary determinant of meaning.' " *Id. citing Scalia & Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).* Therefore, this court must consider the whole text of the statute, "in view of its structure and of the physical and logical relation of its many parts." *Id.*

The statute at issue addresses color requirements for various lamps, reflectors and lights commonly found on vehicles operating on Florida's roadways. It contains four separately numbered paragraphs, the first three[3] of which are substantive. The first paragraph requires various named lamps and reflectors "mounted on the front or on the side near the front of a vehicle" to display an amber color. Fla. Stat. 316.224(1). The second paragraph requires various named lamps and reflectors "mounted on the rear or on the sides near the rear of a vehicle" to display a red color. Fla. Stat. 316.224(2). Paragraph three, however, is structured more broadly than the first two. The first clause of paragraph three's first sentence establishes, "All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color. . . ." Fla. Stat. 316.224(3). The remaining portions of paragraph three carve out exceptions to its general requirements. *Id.*

After this preliminary reading of the statute, it would appear the State's interpretation should prevail—after all this part of the statute indicates it applies to "all lighting devices" mounted on the rear of "any vehicle." *Id.* However, contained within the same clause is the descriptive phrase "mounted on the rear of any vehicle." This modifying language limits the otherwise broad language of the statute's applicability. The question remains, however, what is the "rear" of a vehicle as that term is used in the statute? The court next looks to the context of the whole statute.

The content and wording of the exceptions listed in paragraph three provides some insight. The first exception concerns "the stop light or other signal device," which are permitted to be red, amber, or yellow. *Id.* The second exception addresses "the light illuminating the license plate," which are required to be white. *Id.* The third exception focuses on "the light emitted by a backup lamp," which are required to be white or amber. *Id.* And the fourth exception concerns "deceleration lights[4]," which must display an amber color. *Id.*

The common theme of these named exceptions is their location on a vehicle. Each of these specific lights are located on the rearmost portion of the vehicle—either on the bumper (tag lights) or in taillight assemblies immediately behind the rear quarter panels (backup lamps, stop lights, signal devices). None of these specific examples listed in the statute's exemptions are located where the cargo lights on the Defendant's truck are located—in the middle of the vehicle, immediately behind the passenger cabin (albeit rear facing).

Language in paragraph two of the statute provides further insight. Paragraph two also focuses on lamps and reflectors "mounted on the rear" of a vehicle. Fla. Stat. 316.224(2). However, paragraph two goes a step further and uses slightly different wording—"mounted on the rear *or on the sides near the rear* of a vehicle. . ." *Id.* (emphasis added). This modified language signals slightly broader applicability. Therefore, it would seem the narrower limiting descriptive phrase in paragraph three ("mounted on the rear of any vehicle") focuses that portion of the statute's application on just those lights and reflectors located on the rearmost portion of a vehicle. The juxtaposition of different modifying phrases so close together within the same statute surely is not meaningless. *See Williams v. State,* 244 So.3d 356, 360 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D802a] (noting "the court must give full effect to all statutory provisions and avoid readings that would render a part of a statute meaningless. . . .").

Nevertheless, the court recognizes the wording in the statute could be considered ambiguous, particularly as applied to cargo lights in pickup trucks like the Defendant's. Unsurprisingly, the statute does not define the term "rear." Nor does Chapter 316's definition section (s. 316.003) contain a definition for the term. Additionally, the court has been unable to find any case law interpreting the meaning of the term, and the parties have not provided any to the court[5].

Florida Statute 316.224 was initially enacted in 1971. *See Chapter 71-135, Laws of Florida.* Remarkably, the relevant language has not changed since its original enactment. At the time this statute was first enacted, the noun "rear" was defined as "1: the back part of something . . . 2: the space or position at the back." *Webster's New Collegiate Dictionary* (7th ed. 1970). Similarly, *The American Heritage Dictionary of the English Language* defined the term "rear" as follows: "1. The hind part of something. 2. The point or area *farthest from the front* of something . . . ." (School ed. 1970) (emphasis added). *See Broward County v. Florida Carry, Inc.,* 313 So.3d 635, 639 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D642a] (recognizing courts can look to dictionaries to "ascertain the plain and ordinary meaning of a word" where the legislature has not defined a word used in a statute).

Applying this definition of the term "rear" to the statute's language, it is clear the Defendant's interpretation should prevail. A fair reading of the statute's language, by a reasonable reader competent with the English language, would have understood the statutory requirements at issue in this case to apply only to those lights and reflectors mounted at the back or rearmost points of the vehicle. Thus, Florida Statute 316.224(3) does not apply to the rear facing cargo lights mounted in the middle of the Defendant's truck. That Deputy Maletto could have reasonably concluded the law required otherwise is of no moment. *See State v. Wimberly,* 988 So.2d 116, 119 n.2 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a] (noting that an officer's mistake of law, no matter how reasonable, cannot provide grounds for objectively reasonable probable cause).

Reasonable Suspicion of Criminal Activity

Having concluded that Deputy Maletto did not have probable cause to believe the Defendant committed a traffic violation, the court must now analyze whether Deputy Maletto observed sufficient facts to develop a "founded suspicion" of criminal activity. *State, Dept. of Highway Safety and Motor Vehicles v. DeShong,* 603 So.2d 1349, 1352 (Fla. 2d DCA 1992).

In addition to the purported traffic violation, Deputy Maletto also observed the following driving pattern over the course of approximately a half mile, which formed the basis of his conclusion that criminal activity was afoot:

- The Defendant's cargo lights, which are manually operated, were turning on and off at "irregular" intervals.
- The Defendant left his turn signal on for an "unusual" amount of time after completing a lane change.
- While navigating a right-hand curve in the roadway, the driver's side tires struck the dashed white line separating the left and right northbound lanes of travel.
- The vehicle then drifted back across the lane (within the same lane of travel) and the passenger's side tires struck the solid line on the outer edge of the lane of travel.

On cross examination, Deputy Maletto commendably agreed that, although unusual, there was nothing erratic, dangerous, or unsafe about the Defendant's driving pattern. Additionally, the Defendant pulled over within a reasonable time after Deputy Maletto initiated the traffic stop. There was no indication either way that the Defendant's speed was either excessive or unusually slow under the circumstances.

Florida law of course recognizes that a police officer may conduct a traffic stop to investigate a driver for weaving within a lane of travel; but, most often the weaving is continuous and/or coupled with other erratic and unsafe driving behavior. *See e.g. State v. Davidson,* 744 So.2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a] (reversing order granting motion to suppress where officer observed driver traveling 40-50 m.p.h. on I-75 and continually driving across the line and jerking back in opposite direction in corrective manner); *Roberts v. State,* 732 So.2d 1127 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1475c] (upholding traffic stop where driver observed continually weaving right and left within the lane several times); *State v. Carillo,* 506 So.2d 495, 496 (Fla. 5th DCA 1987) (quashing order of suppression where officer observed driver moving from extreme right-hand side of road to extreme left-hand side of lane in excess of five times over quarter mile); *Esteen v. State,* 503 So.2d 356, 357 (Fla. 5th DCA 1987) (affirming denial of motion to suppress where driver traveling 45 m.p.h. on I-95 and "driving in erratic fashion. . . weaving within the right lane. . . executing an S shape up the Interstate" over the course of a half mile.); *Cf. Crooks v. State,* 710 So.2d 1041, 1042 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b] (reversing trial court's denial of motion to suppress where officer observed driver drift over right-hand lane line three times and officer did not think driver was intoxicated or otherwise impaired).

Unlike most of the cases cited above, Defendant here was observed weaving one time within his lane of travel while negotiating a curve. There was no continuous weaving back and forth as in *Davidson, Roberts,* and *Carillo.* There was no crossing from one extreme side of the road to the other as in *Carillo.* There was no driving significantly under the speed limit as in *Davidson* and *Esteen.* The additional observations of leaving a turn signal on an "unusual" amount of time and "irregularly" toggling cargo lights are not, in this court's opinion, sufficient to create a founded suspicion of criminal activity, even when coupled with the limited weaving. Even Deputy Maletto very candidly agreed that nothing about the Defendant's driving pattern was erratic, dangerous, or unsafe.

Under these circumstances, the court concludes that Deputy Maletto did not have a reasonable suspicion of criminal activity at the time he initiated the traffic stop of the Defendant's vehicle.

WHEREFORE, it is ORDERED as follows:

1. The Defendant's Motion to Suppress is GRANTED.
2. All evidence of the Defendant's detention and arrest, including his identity and any evidence flowing from the arrest, are hereby suppressed and shall not be used against the Defendant in any further proceedings in this matter.

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[1]Based upon the court's ultimate ruling that the traffic stop was unlawful, it does not reach the other issues raised by the Defendant's Motion.

[2]The included photo is for demonstrative purposes only as it is not a photograph of the Defendant's truck. However, it does appear to be substantially like the Defendant's truck, as displayed in a still frame from Deputy Maletto's body worn camera or dash camera footage displayed during the hearing. Neither party introduced any video evidence from this traffic stop at the Motion to Suppress hearing.

[3]The statute's fourth paragraph establishes the penalty for a violation.

[4]Deceleration lights are those found on a bus designed to "caution[ ] following vehicles that the bus is slowing, preparing to stop, or is stopped." Fla. Stat. 316.235(6). The statute also dictates the deceleration lights shall be placed "on the rear of the vehicle" along with other specified placement and operational requirements. *Id.*

[5]The only appellate case citing to Fla. Stat. 316.224 is *Vasta v. State,* 662 So.2d 1327 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D2461a], which was provided by the State. *Vasta* dealt with a neon yellow tag light, which the court found was a violation of subsection three of the statute. *Id.* at 1328. However, as the focus in this case is on the Defendant's cargo lights, which are indisputably located at a different place on the vehicle, *Vasta* is distinguishable.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Community caretaking—Where information from 911 call and subsequent return call after 911 call was disconnected indicated that someone inside caller's vehicle was trying to get out of vehicle and might need immediate assistance and that vehicle had almost struck a law enforcement officer, stop of vehicle known to be registered to caller and actions taken to investigate need for assistance were justified as exercise of community caretaking function—Motion to suppress is denied

STATE OF FLORIDA, v. HEATH EDWARD WARD, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2021 CT 553. July 22, 2022. D. Melissa Distler, Judge. Counsel: Alexander Gilewicz, Assistant State Attorney, Office of the State Attorney, for State. G. Kipling Miller, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER came to be heard on the Defendant's Motion to Suppress Unlawfully Obtained Evidence. The Court, having heard testimony from Sergeant Daniel Weaver, Sergeant Frank Gamarra, and 911 operator Mackenzie Davis and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Sergeants Weaver and Gamarra each testified that they were on duty as road patrol supervisors for the Flagler County Sheriff's Office on July 9, 2021. On that same day, Mackenzie Davis was a civilian 911 operator for the Flagler County Sheriff's Office. Based upon a call received to the sheriff's office and answered by Ms. Davis, and subsequent calls and investigation performed, Sergeant Weaver ultimately stopped and arrested the Defendant HEATH EDWARD WARD for Driving Under the Influence.

Ms. Davis testified that she was answering non-emergency lines on the day in question. She completed twelve months of dispatcher training prior to working for the sheriff's office. With respect to this case, Ms. Davis received a call at 22:59; based on what she heard, she typed notes into the computer aided dispatch (CAD) system. The 911 call was introduced into evidence as Defense Exhibit 1. The original 911 call reveals background conversation between a man and woman. The call then disconnects. When Ms. Davis attempted to call the number back, the call was not answered and went to a voicemail identifying HEATH WARD as the owner of the phone. She was able to use their database to find an address and three vehicles associated with Mr. Ward. At the time of the incident, Ms. Davis heard "let me out" and indicated such on the CAD notes, which were distributed to on-duty law enforcement officers. After reviewing the call in open court, Ms. Davis changed her testimony from the female voice saying "let me out" to "I'm getting out."

The 911 call begins with a female voice in the background saying she is getting out. Then a male voice tells the female to do a simple thing and hit directions to their home address to get directions to go home. The male's voice is thick tongued and slurring. There is then silence on the call, which ultimately disconnects. The second 911 call back rings several times and then goes to the Defendant's voicemail. The Defendant's voice on the voicemail recording sounds distinctly crisper and more precise than the slurred voice on the 911 call.

Sergeant Gamarra testified that he continued with the investigation utilizing the information revealed by Ms. Davis. Sergeant Gamarra called back the number that had originally called 911 and received an "open line." He heard both a male and female voice; he said it sounded like a dispute was going on, the male sounding intoxicated and stuttering his words. He believed the female stated she wanted to be let out of the vehicle. At the time of the call, Sergeant Gamarra was not able to ascertain how many people may have been in the vehicle, but he only heard two voices on the call. Sergeant Gamarra immediately relayed what he heard over dispatch. He also overheard the male voice discuss being close to and in danger of striking law enforcement. This was relayed over the radio to others, including the sergeant's opinion that the male may either be near a law enforcement officer or a guard shack.

Sergeant Weaver testified that the owner of the phone that called 911, HEATH EDWARD WARD may have been driving one of three vehicles, including the white Lexus which was ultimately stopped; furthermore, the address of [Editor's note: address redacted] was associated with the Defendant. Sergeant Weaver testified that he began looking for vehicles associated with the Defendant and near his known residence on Surfview Drive. Because there was evidence of a disturbance occurring within the vehicle, with the female asking to be let out of the vehicle, Sergeant Weaver testified that he was concerned for the welfare of all occupants. Sergeant Weaver acknowledged that the sole basis for the stop was the 911 call and the subsequent call from Sergeant Gamarra to the telephone number. Sergeant Weaver's testimony included a line-by-line review of the CAD notes to determine what the sergeant based his investigation on. This included Ms. Davis's original interpretation of the female saying, "let me out." The CAD notes also included "male sounded intoxicated" and something about doing the simple thing, then the call hung up.

Sergeant Weaver located a white Lexus as it was approaching San Jose Drive; as the vehicle pulled into the gated community, he stopped the vehicle. The stated purpose was to check on the welfare of both the driver and the passenger of the vehicle. The AXON recording was admitted into evidence as State's Exhibit 1. The sergeant was shining his light inside the vehicle to see if anything was thrown around inside the vehicle and to check the occupants for marks or bruising based upon the nature of the call. Sergeant Weaver asked for his drivers' license, registration and insurance. The Defendant only provided the drivers' license and had to be reminded for the other documents. Sergeant Weaver testified that while the Defendant was still seated in the vehicle, he noted the defendant's speech was slow and slurred, eyes bloodshot and glassy, and a strong odor of alcohol coming from the vehicle. The Defendant asked if he was speeding, to which Sergeant Weaver replied that he would explain.

Sergeant Weaver testified that he conducted an investigatory stop to check the wellbeing of both parties in the vehicle. The subjectively stated purpose for the stop was to determine if a domestic disturbance was occurring and to determine the welfare of all occupants of the vehicle. Sergeant Weaver testified that in disturbance situations, the parties are separated to make sure they are alright and to obtain information from each of them without the other around. Sergeant Weaver asked the defendant to step out of the vehicle for the above stated purpose. After patting him down, the AXON recording admitted into evidence revealed that Sergeant Weaver immediately asked about the 911 call and argument. The Defendant denied the 911 call and kept repeating that it was so weird that he was stopped for that purpose. Deputy Lane separately spoke with the passenger, Mrs. Ward, who ultimately denied any allegations of violence. Sergeant Weaver also testified that, upon being asked to step out of the vehicle, Mr. Ward seemed unsteady on his feet, repeated himself multiple times, had slurred speech and that the odor of alcohol emitted from his person. Sergeant Weaver even verified the Defendant's phone number, confirming his phone was the one that called into 911; this was done while checking his drivers' license before any mention of the Defendant being impaired.

It is this sequence of events on which the Defendant bases his Motion to Suppress. The Defendant argued that there was no lawful basis for the stop and therefore all information obtained thereafter must be suppressed. The State argued that this was a lawful welfare check, which ultimately developed a sufficient basis for a DUI investigation.

The Court must first determine what level of police-citizen encounter this constituted. A consensual encounter involves minimal police contact, which allows the citizen to either voluntarily comply with a request or choose to ignore the officer's request. *Popple v. State,* 626 So.2d 185 (Fla. 1993). The second type of encounter is an investigatory stop, where "a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." *Id.* The third type, which is an arrest, requires probable cause and is not at issue in this case. In *Popple,* the Florida Supreme Court held that an officer's request that an occupant of a lawfully parked car step out of his vehicle was a "seizure" of the occupant requiring reasonable suspicion. *Gentles v. State,* 50 So.3d 1192, 1197 (Fla. 4th DCA 2011) [35 Fla. L. Weekly D2900a]. Welfare checks, also known as the community caretake function, however, do not implicate the Fourth Amendment. *Dermio v. State,* 112 So.3d 551 (Fla. 2nd DCA 2013) [38 Fla. L. Weekly D776a]. Furthermore, the facts are reviewed what an objectively reasonable law enforcement officer would do in the circumstances; the officer's subjective opinion is not dispositive. *Tripp v. State,* 251 So.3d 982 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1562a].

A temporary detention can be justified under the officer's exercise of his community caretaking function. *See Cady v. Dombrowski,* 413 U.S. 433 (1973). Under the community caretaking function, the officer has the authority to check a person's status and condition to determine whether an individual needs assistance. *See Nolin v. State,* 946 So.2d 52 (Fla. 2nd DCA 2006) [32 Fla. L. Weekly D27b]. Furthermore, asking for identification from an individual who is stopped for welfare check does not convert the welfare check into a seizure. *See, e.g. Tripp,* 251 So.3d at 986; *State v. Baez,* 894 So.2d 115, 116 (Fla. 2004) [29 Fla. L. Weekly S663a]. Factors to be considered in evaluating whether the emergency aid/community caretaker doctrine applies include (1) Was there an objectively reasonable basis for a belief in the immediate need for police assistance for the protection of life or property?; (2) Were the officer's actions motivated by an intent to aid or protect, rather than solve a crime?; and (3) Do the police actions fall within the scope of the emergency? *State v. Perez,* 12 Fla. L. Weekly Supp. 35a (Fla. Miami Circuit Court October 5, 2004),

Applying this test to the instant case, the totality of the circumstances show that there was an objectively reasonable basis for a belief in the immediate need for police assistance for the protection of life or property. Examination of the original information provided to Sergeant Weaver from dispatch and the additional information from Sergeant Gamarra provided an objectively reasonable basis that

someone inside a vehicle may need immediate assistance. There was additional information that the vehicle almost struck a law enforcement officer, and that a female still trying to get out of the vehicle ten minutes later per CAD notes. The sergeant's actions of stopping a vehicle known to be registered to the caller and questioning its occupants were motivated by an intent to aid and protect rather than solve a crime; this conclusion is supported by his actions of separating the parties and spending several minutes inquiring as to the 911 call and whether any disturbance occurred. These same actions fell within the scope of the emergency and determining the welfare of the parties. In so doing, Sergeant Weaver noted indicators of impairment while performing the welfare check, which ultimately led to a criminal investigation.

The Court finds that the actions taken by Sergeant Weaver were reasonable, motivated by an intent to aid or protect rather than solve a crime, and within the scope of the emergency with which he was faced. Based upon the above findings of fact, it is therefore ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is DENIED.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Custodial interrogation—Reasonable person would not have believed that they were in custody where officer responding to report of defendant asleep and unresponsive in vehicle parked in valet lot of hospital was polite and nonconfrontational in explaining to defendant that he believed he had been drinking and was impaired, officer attempted to assist defendant in calling someone to pick him up, officer did not ask defendant to exit vehicle until defendant attempted to start vehicle, and officer was given consent to search vehicle to locate defendant's cell phone—Defendant was in custody once officer removed vehicle keys from ignition, made it clear that no further efforts to allow defendant to leave would be made, and moved defendant to second location to perform field sobriety exercises as part of DUI investigation—All testimonial statements made by defendant without benefit of *Miranda* warnings en route to second location and after being moved to that location, and officers' statements repeating defendant's statements, are suppressed

STATE OF FLORIDA, Plaintiff, v. ANTONIO LASHAWN SMITH, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2020-CT-000212-A, Division III. April 11, 2022. Walter M. Green, Judge.

ORDER GRANTING, IN PART, DENYING, IN PART, AMENDED MOTION TO SUPPRESS

THIS CAUSE comes before the Court upon Defendant's "Amended Motion to Suppress," filed February 9, 2022, pursuant to Fla. R. Crim. P. 3.190(h). On March 15, 2022, a hearing was held on the motion. Officer Terrell Williams of the University of Florida Police Department testified at the hearing. Upon consideration of the motion, the hearing testimony, the evidence presented at the hearing, the legal argument of the parties, and the record, this Court finds and concludes as follows:

Defendant moves the Court to suppress "any statements unlawfully obtained from him including his responses to Officer William's [*sic*] statements and questions, and Officer Zyskowski's statements and questions[.]" According to Defendant, his statements to the officers "were unlawfully obtained as the statements were made without *Miranda*[1] warnings."

I. FACTS

On February 4, 2020. Officer Terrell Williams and Officer Frank Zyskowski of the University of Florida Police Department (UPD) responded to Shands Hospital North in reference to a possibly intoxicated person asleep in a vehicle in a valet parking lot. Upon arrival at the valet parking lot, Officer Williams was notified by Shands security personnel that the person inside the vehicle was unresponsive; and that there was a bottle of vodka sitting on the passenger seat next to him.

Officer Williams then approached the vehicle and initiated contact with the driver, and sole occupant, who was identified as Defendant. As Officer Williams stood next to the vehicle, and prior to any communication between them, Defendant voluntarily opened the driver's side door of his vehicle.

The following interaction then occurs[2]:

(1) Officer Williams asks Defendant, who appears visibly impaired, "What's going on?" After a significant delay in response, Defendant states, "I'm gonna go home."

(2) Officer Williams then asks Defendant if he is working; and explains that UPD was called to the scene because hospital security was worried about him. Defendant does not respond.

(3) Officer Williams then asks Defendant if he knows how he got to the parking lot. Defendant responds, "No, sir." Officer Williams asks him again with no response.

(4) Subsequently, Officer Williams asks Defendant for his name. Defendant answers that his name is "Tony." Officer Williams introduces himself to Defendant as "Terrell" and tells him that it is nice to meet him.

(5) Officer Williams then explains to Defendant that he is parked in a valet parking lot; and that the vehicles in the lot are supposed to be vacant unless occupied by a valet who is moving them. He then continues to ask Defendant "what is going on" with him.

(6) When Officer Williams asks Defendant whether he works days or nights, Defendant appears sluggish and struggles to speak. Defendant additionally struggles to respond when Officer Williams asks him where he works and where his worksite is located.

(7) When Officer Williams asks Defendant if he knows where he is at, Defendant is unresponsive to the question asked and states that he needs to get home.

(8) When Officer Williams asks Defendant if he knows when he got to the parking lot, Defendant is unresponsive to the question asked and states that he needs to get home.

(9) Officer Williams then asks Defendant, "Are you okay?" Defendant responds that he just needs to get home. Officer Williams tells Defendant, "I want you to get home. . . but there are a couple things that we're trying to figure out first." He then explains to Defendant that he is not suspected of breaking into anyone's vehicle; the only issue to be determined is whether he is in a condition to be driving the vehicle. He further explains that he believes that Defendant has been drinking and is trying to sleep it off. Defendant responds that he just wants to stay in the parking lot and sleep. Officer Williams replies that he would not have a problem with doing that but for the fact that the location is a valet parking lot at which Defendant is not authorized to park.

(10) Officer Williams then offers to allow Defendant to find a safe way back home since he cannot allow Defendant to drive. He asks Defendant if there is someone that he (Defendant) can call to come pick him up. Defendant does not respond to the question.

(11) Officer Williams asks Defendant, again, if he knows when he got to the parking lot. Defendant responds, "I really don't know."

(12) Officer Williams then confronts Defendant with the information that he has to rely upon in determining how to proceed further:

(a) Shands Hospital North staff called UPD to the scene due to the safety concern caused by Defendant being unresponsive to them.

(b) Defendant does not know when he got to the parking lot.

(c) Defendant is sitting in the driver's seat of the vehicle with the keys in the ignition.

(13) Officer Williams tells Defendant that there are only two options at this point:

(a) Defendant can find someone who can pick him, and his vehicle, up.

(b) "Possibly," Defendant will be arrested

(14) Officer Williams then explains that he is leaning towards option 1.

(15) When Defendant indicates that he would like to call someone to pick him up, he is thereafter unable to locate his phone, despite Officer Williams assisting him by calling his phone.

(16) Defendant then attempts to start his vehicle, at which point Officer Williams tells him not to start it.

(17) Subsequently, Officer Williams directs Defendant to exit the vehicle.

(18) Once Defendant exits the vehicle, he is visibly swaying. Officer Williams comments on the fact that Defendant is swaying; and Defendant admits that he is swaying. Officer Williams allows Defendant to lean against the vehicle.

(19) Officer Williams then, again, advises Defendant of the reason for his investigation:

(a) "There is a safety concern that brought us [UPD] here."

(b) Defendant is parked in a valet parking lot which he is not authorized to be parked at.

(c) When Shands Hospital security approached Defendant's vehicle and tried to wake him up, Defendant was unresponsive.

(d) Defendant is unable to tell him when he got to the parking lot.

(e) When Defendant opened the door to his vehicle, he (Officer Williams) could smell the "fairly strong" odor of an alcoholic beverage. And Officer Williams is unable to determine if Defendant was drinking before he got to the parking lot or after he got to the parking lot.

(f) When Defendant exited his vehicle, he was swaying back and forth.

(20) Defendant then gives Officer Zyskowski consent to search his vehicle for his (Defendant's) phone so that he can call someone to pick him up.

(21) While Officer Zyskowski is searching for Defendant's phone, Officer Williams continues to ask Defendant what is going on with him. Defendant responds, "I just want to go home."

At this point, the two officer decide to have Defendant proceed to a different location to perform field sobriety exercises. Defendant is subsequently moved to the second location. While at the second location, and after continuous and persistent questioning, Defendant admits to the officers that he is impaired. Ultimately, Officer Williams arrests Defendant for DUI.

II. ABSENCE OF *MIRANDA* WARNING

"DUI investigations are not immune from the requirement that *Miranda* warnings be given if police are conducting a custodial interrogation." *Jump v. State,* 983 So. 2d 726, 729 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1494a]. *Miranda* warnings are required only when an individual is undergoing actual custodial interrogation by the police. *Duddles v. State,* 845 So. 2d 939, 941 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1052b]. In determining whether a suspect is in custody, the examining court must decide whether under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement such that they would not feel free to leave or to terminate the encounter with the police. *Id.* Factors to be considered are:

(1) The manner in which the police summon the suspect for questioning;

(2) The purpose, place, and manner of the interrogation;

(3) The extent to which the suspect is confronted with evidence of his or her guilt; and,

(4) Whether the suspect is informed that he or she is free to leave the place of questioning.

Id. (citing *Ramirez v. State,* 739 So. 2d 568, 574 (Fla. 1999) [24 Fla. L. Weekly S353a]; *see also MacKendrick v. State,* 112 So.3d 131, 138-39 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1030d]; *Hunter v. State,* 8 So.3d 1052, 1064 (Fla. 2008) [33 Fla. L. Weekly S745a]; *Evans v. State,* 911 So.2d 796, 799-800 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D1586a]. In determining whether a suspect was in custody, the court must consider all of the circumstances of the interrogation. *Evans,* 911 So.2d at 799. "Then, the court must determine whether a reasonable person in the same circumstances would 'have felt he or she was not at liberty to terminate the interrogation and leave.' " *Id.* (quoting *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': 'was there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.' " *Id.* (quoting *Keohane,* 516 U.S. at 112); *see also Yarborough v. Alvarado,* 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) [17 Fla. L. Weekly Fed. S327a].

Here, the initial interaction between Defendant and Officer Williams occurred at Defendant's vehicle, which was already parked in a private parking lot at the time that Officer Williams arrived. Throughout the interaction, Officer Williams was polite, courteous, non-confrontational, patient, and respectful. And Officer Williams repeatedly offered to allow Defendant to call someone to pick him up from the scene; and at no time did he threaten Defendant with arrest. Although Officer Williams confronted Defendant with his belief that Defendant had been drinking and was impaired, he did not advise Defendant that he smelled a "fairly strong" odor of an alcoholic beverage coming from his vehicle until after Defendant was out of the vehicle. The fact that Officer Williams asked Defendant to exit the vehicle is not dispositive of him being in custody because by that point Officer Williams had explained to Defendant that he could not let him drive in his condition. Further, even after having Defendant exit the vehicle, Officer Williams still allowed Defendant the opportunity to access his phone to call someone to pick him up; and had Officer Zyskowski consensually search the vehicle in a further attempt to locate Defendant's phone. A reasonable person under the circumstances would not have felt as if they were in custody.

Once Officer Zyskowski was unable to find Defendant's phone in Defendant's vehicle, he and Officer Williams decided to move Defendant to a second location to perform field sobriety exercises. After the decision was made, Officer Williams removed Defendant's keys from the ignition of his vehicle. Officer Williams then advised Defendant that they would be going to this second location for that purpose.

In *State v. Frechette,* 20 Fla. L. Weekly Supp. 682a (Fla. Brevard Cty. Ct. April 1, 2013), the defendant was transported from the location of the traffic stop to a safer location for the purpose of performing Field Sobriety Exercises, and subsequently questioned prior to the start of the exercises. In determining whether the defendant was in custody at the time of the questioning, the *Frechette* court found that: (1) the defendant was stopped by a police officer using blue lights and a siren to stop the car; (2) the purpose, place and manner of the interrogation in question was after the defendant was transported in a police car to a secondary location to perform Field Sobriety Exercises; (3) the defendant was being asked to perform Field Sobriety Exercises as a part of a DUI investigation; and, (4) the defendant was not informed that he was free to leave, and in fact could not leave because his vehicle was at the location of the stop. In ultimately determining that there was a custodial interrogation, the *Frechette* court relied upon *State v. Evans,* 692 So.2d 305 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1084b], which held that the defendant in that case was in custody when he was taken from one location to another location as part of a DUI investigation. The *Frechette* court further noted that "[a] reasonable person would

certainly believe he was not free to leave when placed in a locked patrol car and transported to another location."

Here, although not exactly like the facts in *Frechette* and *Evans,* the facts of this case at the time that the officers moved Defendant to the second location are such that a reasonable person would have believed that they were in custody. At the time that Officer Williams moved Defendant to the second location, Officer Williams had:

(1) Confronted Defendant with evidence of his guilt:

(a) Defendant was unresponsive when Shards Hospital security approached his vehicle and tried to wake him up.

(b) Defendant was unable to tell him when he got to the parking lot.

(c) Defendant appeared to have been drinking at some point that morning or the night before.

(d) When Defendant opened the door to his vehicle, he (Officer Williams) could smell the "fairly strong" odor of an alcoholic beverage.

(e) When Defendant exited his vehicle, he was swaying back and forth and needed to lean against his vehicle.

(f) Defendant was sitting in the driver's seat of the vehicle with the keys in the ignition.

(2) Removed the keys from the ignition of Defendant's vehicle.

(3) Made it clear that no further effort to allow him to leave would be made.

(4) Made it clear that a DUI investigation was being conducted.

Further, even after moving Defendant to the second location, the two officers continued questioning Defendant and confronting him with the evidence against him.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

I. Defendant's motion is hereby **GRANTED** as to any testimonial statements made by Defendant after he was moved from the parking lot to the second location to perform field sobriety exercises. This includes any testimonial statements that Defendant made while being walked over to the second location; and any statements by the officers which are them repeating Defendant's testimonial statements.

II. Defendant's motion is hereby **DENIED** in all other respects.

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[1]*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2]The interaction is contained on Officer Williams' bodycam video.

* * *

Criminal law—Evidence—Expert—Breath test—Motion for *Daubert* hearing concerning admissibility of breath test evidence is denied—Testimony regarding results of breath test machines are not expert testimony subject to *Daubert* standard—Evidence is not new or novel, and defendant failed to provide record support of serious, specific, and substantial question as to continued reliability of the science, theory, or methodology

STATE OF FLORIDA, Plaintiff, v. TRAVIS M. BENNETT, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CT-000683-A-E. Citation No. 8790-XFD. October 20, 2022. Faye L. Allen, Judge.

ORDER GRANTING STATE'S MOTION TO STRIKE AND/OR SUMMARILY DENY DEFENDANT'S MOTION IN LIMINE WITH REGARD TO HORIZONTAL/VERTICLE GAZE NYUSTAGMUS TEST AND DEFENDANT'S MOTION IN LIMINE—SCIENTIFIC EVIDENCE AND DEMAND FOR DAUBERT HEARING TO DETRMINE THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE

THIS MATTER having come before the Court on the State's Motion to Strike or Deny Defendant's Motions as noted above, a hearing was held on September 08, 2022, wherein the State's motion was granted as to Field Sobriety exercises (HGN) and ruling was reserved as to the Daubert Hearing on the breath test. The Court having heard argument, reviewed the Court file and being otherwise duly advised, it is hereby

ORDERED and ADJUDGED as follows:

Breathe testing machines and their results are specifically regulated by the Florida Legislature through rules promulgated by the Florida Department of Law Enforcement. "The Florida legislature has adopted a statutory scheme to insure accurate and reliable breath test results. . . .[T]estimony regarding the result of a diagnostic instrument, such as Intoxilizer 8000, is not expert testimony" subject to the Daubert standard. *State v. Ullery,* 21 Fla. L. Weekly Supp. 1096a (18th Jud. Cir., County Court, 2014). Further, Breath test evidence is not new or novel and the Defendant has failed to provide record support of a serious, specified and substantial question as to the continued reliability of the science, theory or methodology. See *State v. Regisme,* 24 Fla. L. Weekly Supp. 811a (Fla. 15th Cir. Ct., November 22, 2016), per curiam affirmed, *Regisme v. State,* 242 So.3d 405 (Fla. 4th DCA 2018).

The State's Motion to Strike as to Scientific Evidence and Demand for Daubert is hereby GRANTED. Defendant's Motion for Daubert Hearing is DENIED. The Daubert Hearing scheduled for October 24, 2022 is hereby cancelled.

* * *

Insurance—Personal injury protection—Request for information or documentation—Summary judgment is entered in favor of medical provider on affirmative defense alleging lack of compliance with section 627.736(6)(b) where provider fully and completely responded to only request for information or documentation sent by insurer within statutorily provided thirty-day period for bills at issue

MIRACLE CHIROPRACTIC & REHAB CENTER, LLC, a/a/o Marie Joseph, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-12506-O. July 26, 2022. Eric H. DuBois, Judge. Counsel: Pamela Rakow-Smith, Eiffert & Associates, P.A., for Plaintiff. Julie Lewis Hauf, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COMPLIANCE WITH FLORIDA STATUTE §627.736 (6)(b)

THIS MATTER came before the Court on July 6, 2022 on the Parties competing motions for summary judgment: Defendant's Motion for Summary Judgment based on Plaintiff's Failure to Respond to Defendant's 627.736(6)(b) Request and Plaintiff's Motion for Summary Judgment based on Plaintiff's compliance with Defendant's requests pursuant to Fla. Stat. §627.736(6)(b) and Defendant's First Affirmative Defense, and the Court having considered the evidence submitted and arguments of counsel and being considered by the Court and otherwise being fully advised of the premises; it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion for Summary Judgment based on Plaintiff's Failure to Respond to Defendant's 627.736(6)(b) Request is hereby **DENIED.**

2. Plaintiff's Motion for Summary Judgment based on Plaintiff's compliance with Defendant's requests pursuant to Fla. Stat. §627.736(6)(b) and Defendant's First Affirmative Defense is hereby **GRANTED**.

3. On December 8, 2017, the assignor Marie Joseph was involved in a motor vehicle accident in which she sustained personal injuries as a result of that accident.

4. Marie Joseph was insured under a policy of insurance issued by Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("State Farm"), which included no-

fault benefits and medical payments benefits on the date of the subject motor vehicle accident.

5. Marie Joseph treated at the Plaintiff MIRACLE CHIROPRACTIC & REHAB CENTER, LLC's ("Miracle") medical facility from December 11, 2017 through January 18, 2018.

6. State Farm received Miracle's bills for dates of service December 11, 2017 through January 18, 2018 on January 23, 2018 and February 5, 2018.

7. On February 14, 2018 State Farm sent a request for documents and information pursuant to section 627.736(6)(b) of the Florida Statutes to Miracle.

8. In February, 2018 and on October 7, 2019, Miracle sent its response to State Farm's Fla. Stat. §627.736(6)(b) request.

9. On October 18, 2019, State Farm sent correspondence acknowledging receipt of Miracle's October 7, 2019 response to State Farm's Fla. Stat. §627.736(6)(b) letter and documents provided.

10. On January 15, 2020 Miracle sent a demand letter pursuant to Fla. Stat. §627.736(10) to State Farm for dates of service December 11, 2017 through January 5, 2018 and January 18, 2018 received by state Farm on January 28, 2020.

11. State Farm's Corporate Representative, Elaine Smith testified that State Farm did not make payment on Miracle's bills as a result of Miracle's failure to provide the documents requested in its (6)(b) requests.

12. On March 25, 2020, Miracle filed its Complaint against State Farm for payment of No-Fault Benefits and medical payments benefits pursuant to section 627.736 of the Florida Statutes and the policy of insurance.

13. On July 28, 2020, State Farm filed its Answer and Amended Affirmative Defenses to Miracle's Complaint and Demand for Jury Trial and raised as its First Affirmative Defense:

> Defendant affirmatively alleges that Defendant sent a valid F.S. sec. 627.736 (6)(b) request to Plaintiff, for which it did not receive a full and complete response, therefore the bills claimed to be at issue are not overdue.

See Def. Answer and Amended Affirmative Defenses filed on July 28, 2020.

14. State Farm claims the reason for non-payment of Miracle's bills is based on Miracle's non-compliance of State Farm's (6)(b) requests pursuant to Florida Statute §627.736.

15. At the summary judgment hearing, State Farm withdrew any arguments pertaining to any subsequent Fla. Stat. §627.736(6)(b) requests sent outside the statutorily provided thirty (30) day period for the bills at issue. Thus, the Court finds this issue is rendered moot and the only timely request for the Court to consider is the February 14, 2018 request.

16. Rule 1.510(a) states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). "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 Celotex v. Catrett,* 106 S.Ct. 2548, 91 L. Ed. 2d 265, 477 U.S. 317 (1986). In other words, "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* Moreover, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts" and the court should not adopt a version of the facts that is "blatantly contradicted by the record" when ruling on a motion for summary judgment. *Scott v. Harris,* 550 U.S. at 380.

17. The Court has applied the current standard and burden of proof required by Florida Rule of Civil Procedure 1.510 (2021), governing motions for summary judgment. *Celotex,* 477 U.S. at 322.

18. The record evidence in this case reveals that Miracle fully complied with State Farm's February 14, 2018, Fla. Stat. §627.736 (6)(b) request.

19. Section 627.736(6)(b) of the Florida Statutes states in relevant part as follows:

> Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested by the insurer against whom the claim has been made, *furnish a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce, and allow the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment* if this does not limit the introduction of evidence at trial. . . If an insurer makes a written request for documentation or information under this paragraph within 30 days after having received notice of the amount of a covered loss under paragraph (4)(a), the amount or the partial amount that is the subject of the insurer's inquiry is overdue if the insurer does not pay in accordance with paragraph (4)(b) or within 10 days after the insurer's receipt of the requested documentation or information, whichever occurs later.

See §627.736(6)(b), Fla. Stat (2018)(emph. added).

20. Fla. Stat. §627.736(6)(b) requires Defendant to pay Plaintiff's bills within thirty (30) days in accordance with (4)(b) or within 10 days after the insurer's receipt of the requested documentation or information, whichever occurs later. *See* §627.736(4)(b) and(6)(b). Fla. Stat. (2018).

21. State Farm does not dispute that Miracle responded to its request for documents and information pursuant to section 627.736(6)(b) of the Florida Statutes. But, rather State Farm contends that Miracle did not provide what State Farm deemed to be a "full and complete" response to its request.

22. Based on the record evidence, this Court finds Miracle responded with detailed enough and specific answers to each of State Farm's requests and fully complied with Fla. Stat. §627.736(6)(b).

23. More specifically, in response to State Farm's Fla. Stat. §627.736(6)(b) request, Miracle provided an affidavit of the medical provider, Dr. Dieter H. Gluck, attesting that the treatment was reasonable, necessary and related to the subject accident and the charges were reasonable in price, copies of the medical licenses for Dieter H. Gluck, DC and Bruce L. Thomas, DC, medical records detailing the treatment to Ms. Joseph, a PIP Sign in log with the dates the patient treated at Miracle, the written final exam report with a detailed history of the patient's condition, treatment, diagnostic and orthopedic findings, a patient ledger detailing each

service, date of treatment and costs for the treatment, totaling 57 pages, which State Farm acknowledged it received.

24. Accordingly, a review of the record evidence clearly reflects Miracle complied with Fla. Stat. §627.736(6)(b) by providing a full and complete response to State Farm's request.

25. Based on the foregoing, the Court finds that there is no genuine dispute of material fact that Plaintiff fully complied with State Farm's request pursuant to Florida Statute section 627.736(6)(b). Therefore, the Court denies Defendant's motion for summary judgment and enters summary judgment in favor of Plaintiff as to this issue and as to Defendant's First Affirmative Defense.

* * *

Criminal law—Driving under influence—Search and seizure—Officers had sufficient indicia of impairment to conduct DUI investigation where defendant, who was found asleep behind wheel of vehicle in middle of intersection, could not clearly respond to officers' questions, dropped soda can while talking with officers, and did not appear to know where he was—Thirteen-minute detention awaiting arrival of DUI unit was not prolonged detention—Officers had probable cause for DUI arrest based on totality of circumstances following performance of field sobriety exercises—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. WILLIAM GORDON JACOBS, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021 CT 5995 AO, Division 62. July 26, 2022. Brian F. Duckworth, Judge.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come before the Court on the Accused's Motion to Suppress and the Court having evaluated all testimony and evidence and having considered the arguments from counsel, hereby makes the following findings upon which it enters this Order.

1. That this court heard testimony from Ofc. Green OPD and Ofc. Deschriver OPD and observed video.

2. That the Officers were called to the scene where the Defendant was found asleep behind the wheel of his vehicle in the middle of an intersection.

3. The Defendant was medically cleared by Fire Rescue and was then approached by Ofc. Green. The Defendant's DL was suspended.

4. The Officer testified (and the court observed thru body cam video) the physical condition of the Defendant. During the interaction it was apparent that the Defendant physical condition was out of the ordinary. He dropped a soda can while talking to the officer and couldn't clearly respond to questions. He did not appear to know where he was. Based on the observations there was clearly sufficient indicia of impairment to conduct a DUI investigation.

5. A DUI unit was called and arrived within 13 minutes. The court finds there was no prolonged detention.

6. Following Field Sobriety Exercises, the Defendant was arrested. Based on the totality of the circumstances presented at the hearing, there was sufficient probable cause for arrest.

ORDERED and ADJUDGED, the Defendant's Motion is DENIED

* * *

Insurance—Personal injury protection—Discovery—Documents—Election of deductible

FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Siang Lim, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-016614-O. May 10, 2022. Eric H. DuBois, Judge. Counsel: David B. Alexander, Bradford Cederberg, P.A., Orlando, for Plaintiff. Robin Jackson-Bernhardt, Law Office of Kelly L. Wilson; and Edward Cottrell, Smith, Gambrell & Russell, LLP, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTATION/ITEMS FROM DEFENDANT SOUGHT BY PLAINTIFF WITHIN PLAINTIFF'S FIRST REQUEST TO PRODUCE TO DEFENDANT; GRANTING PLAINTIFF'S MOTION TO COMPEL THE DEPOSITION OF DEFENDANT'S CORPORATE REPRESENTATIVE PURSUANT TO FLA. R. CIV. P. 1.310(b)(6); AND DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS MATTER having come before this Honorable Court on 1.) Plaintiff's Motion to Compel Production of Documentation/Items from Defendant Sought by Plaintiff within Plaintiff's First Request to Produce to Defendant (COS: 8/19/2020), 2.) Plaintiff's Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS: 7/24/2020), and 3.) Defendant's Motion for Protective Order (COS: 5/28/2020), and this Honorable Court having heard argument of counsel on April 26, 2022 and being otherwise fully advised in the premises, finds as follows:

1. This is a breach of contract action for damages surrounding an automobile accident that occurred on July 28, 2018. Plaintiff has sought discovery in this matter related to Defendant's position that an alleged Personal Injury Protection deductible was affirmatively elected by the named insured. It is Plaintiff's position that no deductible was permitted to be applied by Defendant and damages remain due and owing. Considering Defendant's position that a deductible was allegedly elected by the named insured in this matter, the named insured would have had to make such election and Plaintiff is entitled to discovery regarding said election, if any.

2. The discovery at issue has come before numerous trial courts in central Florida in the preceding five (5) years. Both the Ninth Judicial Circuit Court, sitting in its appellate capacity, and the Fifth District Court of Appeal have entertained Petitions for Writ of Certiorari filed by Defendant, and other affiliated GEICO entities, surrounding trial court orders granting the discovery Plaintiff seeks in the present matter. The Ninth Judicial Circuit Court, sitting in its appellate capacity, in 2019 denied thirteen (13) Petitions for Writ of Certiorari filed by GEICO involving the subject discovery.[1] GEICO dismissed another Petition for Writ of Certiorari upon the Ninth Judicial Circuit Court, sitting in its appellate capacity, denying the above mentioned thirteen (13) Petitions for Writ of Certiorari.[2] Thereafter, copious additional trial court orders were entered and GEICO brought the issue to the Fifth District Court of Appeal via numerous Petitions for Writ of Certiorari. In August and September of 2021, the Fifth District Court of Appeal denied GEICO's Petitions for Writ of Certiorari on the exact discovery that is at issue in the case at hand.[3] In response to the Fifth District Court of Appeal denying GEICO's Petitions, GEICO subsequently dismissed the remaining Petitions (seventy-eight (78) Petitions) pending at the Fifth District Court of Appeal. Further, the substantive underlying election issue has been considered and ruled upon by the Ninth Jud. Cir. Ct., sitting in its appellate capacity.[4] Without question, the discovery at issue has been allowed by the Ninth Jud. Cir. Ct., sitting in its appellate capacity, as well as the Fifth District Court of Appeal.

IT IS THEREFORE, ORDERED AND ADJUDGED that:

1. Plaintiff's Motion to Compel Production of Documentation/Items from Defendant Sought by Plaintiff within Plaintiff's First Request to Produce to Defendant (COS: 8/19/2020) is **GRANTED**.

2. Within forty-five (45) days from the date of this Order, Defendant shall produce to Plaintiff the following:

• All documents signed by the Insured, including the application for insurance, the specific election for any deductible and any and all renewal policies.

• The entire application of insurance for the policy of insurance at issue executed by the Named Insured.

• Any Personal Injury Protection (PIP) deductible election forms signed by the Named Insured in the possession of Defendant.

• Any documentation signed by the Named Insured in the possession of Defendant

• Any information or documentation in the possession of Defendant regarding compliance by Defendant with Fla. Stat. 627.739 surrounding application of an alleged PIP deductible in the subject claim.

3. The documentation/information/items requested by Plaintiff and ordered by the Court herein to be produced by Defendant to Plaintiff are discoverable in whatever form that the documentation/information/items might be stored (i.e., including but not limited to, electronically stored, archive stored, program/system/data stored, electronic application, electronic signatures, blank application, blank documents/information/items, etc.) and Defendant shall produce same to Plaintiff within forty-five (45) days from the date of this Order.

4. Plaintiff's Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS: 7/24/2020) is hereby **GRANTED**.

5. Defendant shall designate its corporate representative(s) pursuant to Fla. R. Civ. P. 1.310(b)(6) based upon the areas of inquiry (paragraphs numbered one (1.) through twenty-three (23.)) set forth on pages one (1) through three (3) of Plaintiff's Notice of Taking Deposition Duces Tecum attached hereto as ***Exhibit "A."*** [Editor's note: Exhibit A not included]**.**

6. Defendant's designated corporate representative(s) pursuant to Fla. R. Civ. P. 1.310(b)(6) shall answer deposition questions based upon the scope of inquiry (paragraphs numbered one (1.) through twenty-three (23.)) set forth on pages one (1) through three (3) of Plaintiff's Notice of Taking Deposition Duces Tecum attached hereto as ***Exhibit "A."***

7. Defendant's designated corporate representative(s) pursuant to Fla. R. Civ. P. 1.310(b)(6) shall have with him/her at the time of the deposition(s) the documentation/information/items set forth within the duces tecum portion of Plaintiff's proposed Notice (paragraphs numbered one (1.) through twenty-six (26.) set forth on pages three (3) through six (6) of Plaintiff's Notice of Taking Deposition Duces Tecum attached hereto as ***Exhibit "A."***

8. Pursuant to Fla. R. Civ. P. 1.310(b)(6), the notice of taking deposition that shall control the deposition(s) of Defendant's corporate representative(s) is Plaintiff's Notice of Taking Deposition Duces Tecum attached hereto as ***Exhibit "A."***

9. The deposition(s) of Defendant's corporate representative(s), pursuant to Fla. R. Civ. P. 1.310(b)(6) and as detailed above, shall be coordinated by the parties within sixty (60) days from the date of this Order and shall occur within one hundred twenty (120) days from the date of this Order.

10. Defendant's Motion for Protective Order (COS: 5/28/2020) is hereby **DENIED**.

11. If Defendant is claiming an alleged privilege to any of the documentation/items/information ordered produced above and ordered herein to be brought to the deposition(s) of Defendant's corporate representative(s) as set forth within Plaintiff's Notice of Taking Deposition Duces Tecum attached hereto as ***Exhibit "A,"*** Defendant shall file a privilege log, setting forth in detail each and every document/item/information that Defendant is alleging privilege and setting forth in detail for each and every document/item/information the legal authority that Defendant is relying upon to support Defendant's alleged privilege within twenty (20) days from the date of this Order. If Defendant files an alleged privilege log as described above, Plaintiff may file a motion to compel the documentation/items/information set forth upon Defendant's alleged privilege log. The hearing upon Plaintiff's motion to compel alleged privileged documentation/items/information shall be coordinated within ten (10) days from Plaintiff's filing of Plaintiff's motion to compel alleged privileged documentation/items/information. The hearing upon Plaintiff's motion to compel alleged privileged documentation/items/information shall occur within thirty (30) days from Plaintiff's filing of Plaintiff's motion to compel alleged privileged documentation/items/information, or sixty (60) days from the date of this Order, whichever is later.

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[1]1) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Stella Aguirre),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009265-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2014-SC-12922-O (Judge DuBois, Orange Cty., July 27, 2018); 2) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Tamelia Johnson),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009267-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2011-SC-7224 (Judge DuBois, Orange Cty., July 27, 2018); 3) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Francisco Ramirez),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009266-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-007215-O (Judge DuBois, Orange Cty., July 27, 2018); 4) *GEICO Ind. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Derrick Garland),* Ninth Cir. Ct., Appellate, Case No. 2018-CA-009264-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-007986-O (Judge DuBois, Orange Cty. July 27, 2018); 5) *GEICO Ind. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Kervans Joseph),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009263-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2014-SC-013002-O (Judge DuBois, Orange Cty., July 27, 2018); 6) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o William Beattie),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009262-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2016-SC-010815-O (Judge DuBois, Orange Cty., July 27, 2018); 7) *GEICO Ind. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Narida Hingoo),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-9261-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2015-SC-007225-O (Judge DuBois, Orange Cty., July 27, 2018); 8) *GEICO Gen. Ins. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Kingsley Blair),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009260-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2016-SC-000719-O (Judge DuBois, Orange Cty., July 27, 2018); 9) *GEICO Gen. Ins. Co. v. Emergency Physicians, Inc. d/b/a Emergency Resources Group (a/a/o Mercedes Prudencio-Alvarez),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009259-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2015-SC-005589-O (Judge DuBois, Orange Cty., July 27, 2018); 10) *GEICO Ind. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Jasayra Peralta),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009258-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-005597-O (Judge DuBois, Orange Cty., July 27, 2018); 11) *GEICO Ind. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Francis Rayshard),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009257-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-004285-O (Judge DuBois, Orange Cty., July 27, 2018); 12) *GEICO Ind. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Brenda Kasper),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009256-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2014-SC-008390-O (Judge DuBois, Orange Cty., July 27, 2018); and 13) *GEICO Ind. Co. v. Emergency Medical Associates of Tampa Bay, L.L.C. (a/a/o Christopher Bahl),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-008670-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-14820-O (Judge Allen, Orange Cty., July 17, 2018 and July 25, 2018).

[2]*GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Dorothy Lawrence) v.,* Ninth Jud. Cir. Ct., Appellate, Case No. 2017-CA-010494-O (Judge Schreiber, Ninth Jud. Cir., Appellate, Nov. 5, 2019), Orange County Case No. 2015-SC-007209-O (Judge DuBois, Orange Cty., Nov. 1, 2017).

[3]*GEICO General Insurance Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of Karmen Pearson,* Case No. 5D21-0603 (Fla. 5th DCA, August 4, 2021), Orange County Case No. 2014-SC-008387-O; *GEICO General Insurance Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of Caroline Lee,* Case No. 5D21-0591 (Fla. 5th DCA, August 4, 2021), Orange County Case No. 2016-SC-010506-O; *GEICO Indemnity Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of Christine Quinn,* Case No. 5D21-0601 (Fla. 5th DCA, August 4, 2021), Orange County Case No. 2014-SC-012930-O; *GEICO Indemnity Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of John Collins,* Case No. 5D21-0604 (Fla. 5th DCA August 4, 2021), Orange County Case No. 2015-SC-013910-O; *GEICO Indemnity Company v. Emergency Physicians of Central Florida, as assignee of Matthew Herr,* Case No. 5D21-0251 (Fla. 5th DCA

August 4, 2021), Orange County Case No. 2020-SC-002711-O; and *GEICO Indemnity Company v. Florida Hospital Medical Center, as assignee of Ines Gill,* Case No. 5D21-1675 (Fla. 5th DCA September 8, 2021), Orange County Case No. 2020-SC-011974-O.

[4]*See USAA Gen. Ind. Co. v. Florida Hospital Medical Center (a/a/o Wassim Khan),* Ninth Jud. Cir. Ct., Appellate, Case No. 2017-CV-000119-O (Judge Carsten, Ninth Jud. Cir., Appellate, Feb. 1, 2019 and March 5, 2019), Orange County Case No. 2015-SC-7091-O (Judge DuBois, Orange Cty., July 24, 2017).

* * *

Consumer law—Debt collection—Account stated—Interest—Because plaintiff did not attach written agreement to support claimed rate of interest that exceeded the interest rate set by section 55.03, complaint failed to sufficiently state cause of action—Motion to dismiss is granted

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. TODD DAVIS, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2019-CC-006379. August 24, 2022. Kevin Kohl, Judge. Counsel: Yesica Liposky, Dinsmore & Shohl, LLP, Tampa, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before the Court at a hearing on August 15, 2022, on Defendant's Motion to Dismiss, at which counsel for both parties appeared and presented argument, and the Court being fully informed in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Defendant's Motion to Dismiss sets forth six arguments for dismissal of the Plaintiff's Complaint (hereafter "Complaint") in separate paragraphs numbered 1 to 6.

2. At the hearing, counsel for Defendant announced that Defendant was waiving the arguments set forth at Paragraphs 1, 2 and 4.

3. The Court denies the requests for dismissal set forth in paragraphs 5 and 6 without further discussion.

4. Paragraph 3 of the Defendant's Motion to Dismiss seeks dismissal of the Complaint based upon the rate of interest set forth in the statement attached to the Complaint.

5. The Complaint seeks relief under a single count for account stated in the amount of $5,292.19 due on a Synchrony Mastercard credit account. The face of the complaint establishes the total amount claimed to be due without further detail as to what comprises the balance.

6. The Defendant argues that the amount sought by the Plaintiff contains a claim for interest at a usurious rate and therefore must be supported by a written agreement which is required to be attached to Complaint.

7. The Plaintiff argues that the Plaintiff did not add any interest to the account balance and that the interest reflected in the account statement attached to the Complaint became part of the principal balance that was charged off and sold to the Plaintiff.

THE COMPLAINT'S CLAIM FOR INTEREST

8. The Complaint attaches a monthly statement directed to Todd Davis related to a Synchrony Walmart Card that states that the "Statement Closing Date" is November 21, 2017 and the "Payment Due Date" is December 14, 2017. The statement provides additional detail as to the calculation of the total amount due. At issue is an entry on the Statement showing interest in the amount of $102.36 which was calculated at the rate of 23.90% per annum.

9. In ruling on a motion to dismiss the trial court is confined to the allegations found within the four corners of the complaint. *Migliazzo v. Wells Fargo Bank, N.A.*, 290 So.3d 577, 578 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D203c].

10. When ruling on a motion to dismiss, the trial court must read all allegations of the complaint as true. However, "[a]ny exhibit attached to a pleading is part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis for a motion to dismiss." *Se. Med. Prod., Inc. v. Williams*, 718 So. 2d 306, 307 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D2102b] (Quoting *Franz Tractor Co. v. J.I. Case Co.*, 566 So.2d 524, 526 (Fla. 2d DCA 1990)).

11. Although the face of the Complaint is silent as to interest, the detail on the Statement that is attached establishes that the Complaint seeks interest, which, to some degree, is calculated at 23.90%.

AUTHORITY REGARDING THE INTEREST

12. 687.02 (1), Florida Statutes states in pertinent part: "All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. . . . ."

13. 655.954(1), Florida Statutes states in pertinent part:

> Notwithstanding any other provision of law, a financial institution shall have the power to make loans or extensions of credit to any person on a credit card or overdraft financing arrangement and to charge, in any billing cycle, interest on the outstanding amount at a rate that is specified in a *written agreement,* between the financial institution and borrower, governing the credit card account. . . . . (emphasis added).

14. 687.01, Florida Statutes states: "In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in *s. 55.03.*"

15. The interest rate provided by 55.03 was never as high as 23.90% during the applicable time frame.

16. The Plaintiff's primary contention is that because it chose to pursue this case under an account stated theory and collect a lump sum balance without charging any additional interest that it is not required to attach a written agreement.

17. An account stated claim exists independent of the underlying contract, requires no evidence of breach of the contract, and can exist in the absence of any contract at all. *Ham v. Portfolio Recovery Assocs., LLC*, 260 So.3d 450, 455 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2667b], *quashed on other grounds*, 308 So.3d 942 (Fla. 2020) [46 Fla. L. Weekly S9a].

18. The boiler plate language on the face of the Complaint sufficiently states a cause of action for account stated; however, it is the inclusion of the interest for which the Plaintiff fails to properly state a cause of action.

19. As set forth above, Florida Statutes require the interest being sought herein be supported by a written agreement.

20. Fla.R.Civ.P. 1.130 (a) requires:

> All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

21. There is no written agreement attached to the Complaint.

22. While courts generally presume that the common law remains in effect when a statute is enacted in derogation of the common law, this presumption is inapplicable where the statute expressly says otherwise or "is so repugnant to the common law that the two cannot coexist. *Jax Utilities Mgmt., Inc. v. Hancock Bank*, 164 So. 3d 1266, 1271 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D948a] (quoting *Major League Baseball v. Morsani*, 790 So.2d 1071, 1078 (Fla. 2001) [26 Fla. L. Weekly S465a]).

23. If allowed, the Complaint would provide the Plaintiff the opportunity to seek interest in circumvention of Florida's statutory and procedural requirements.

24. As utilized in this instance, Florida's statutory scheme is so repugnant to the common law claim that the two cannot coexist.

25. Since the Plaintiff is required to attach a written agreement supporting the claimed rate of interest, and the Plaintiff has failed to do so, the Complaint fails to sufficiently state a cause of action.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Defendant's Motion to Dismiss Plaintiff's Complaint is *GRANTED.*

B. The Plaintiff shall have twenty (20) days from the date of this Order to file an amended complaint.

* * *

Civil procedure—Insurance—Default—Vacation—Excusable neglect—Explanation that past due answer was not visible because of the manner in which answers were shown in counsel's system did not establish excusable neglect—Due diligence—Fifteen-week delay between entry of default and filing of motion to vacate, with additional eight-month delay before hearing on motion was set, does not establish due diligence—Motion to vacate is denied

STUART B. KROST, M.D., P.A., a/a/o Martin Martinez, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-004924-SP-24, Section MB01. August 22, 2022. Stephanie Silver, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale, for Plaintiff. Giannina Maselli, Doral, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT AND FINAL JUDGMENT FOR THE PLAINTIFF

THIS CAUSE, having come before the Court regarding Defendant's Motion to Vacate Default Judgment and Plaintiff's Motion for Entry of Final Judgment, and the Court having heard argument of counsel, having reviewed the case law, having considered all Affidavits filed and any additional memorandum of law submitted by the parties, and having been otherwise fully advised in the premises, finds as follows:

FACTS

This case was filed on May 12, 2021. A summons was issued on May 20, 2021. The Defendant, INFINITY INDEMNITY INSURANCE COMPANY, was served on June 24, 2021. Therefore, a response to the Complaint was due on or before July 14, 2021. On August 3, 2021, the Court entered its uniform order setting pretrial case management deadlines. Among those deadlines included a deadline to serve the action by September 9, 2021, submission of a fact and exhibit list by March 7, 2022, and disclosure of expert witnesses by May 7, 2022. There is no dispute that the Defendant has not complied with any of those deadlines. The Plaintiff did comply with the deadline to serve the Defendant. As the Defendant did not file a response to the Plaintiff's complaint within 20 days of service, the Plaintiff filed its motion for default on August 5, 2021. This Court entered default against the Defendant on August 9, 2021.

The docket reflects that Giannina Maselli, Esq. appeared on behalf of the Defendant on August 18, 2021, but no further action was taken by Infinity until November 23, 2021, at which time a motion to vacate default and answer and affirmative defenses were filed. These documents were filed five (5) months after the Defendant was served with the summons and complaint and three and a half (3.5) months after the Court entered default against the Defendant. Additionally, the Motion to Vacate Default was not supported by any sworn testimony. A signed and executed affidavit in support of Defendant's Motion to Vacate Default was not filed until July 27, 2022, nearly a year after the Default was entered. Therein, Ms. Maselli stated that she never received notice of the default and stated that the Defendant's internal system did not show a past due answer. However, there was nothing in the Affidavit stating why no one in her office checked the docket to determine whether a default had been entered when she filed her notice of appearance. At that point, the default was only nine (9) days old. By the time the motion to vacate was filed, it had been 15 weeks.

Despite the motion to vacate being filed in November 2021, this hearing was not originally scheduled until July 15, 2022 and did not take place until August 11, 2022. The Defendant's Affidavit filed July 27, 2022 states that the first time the Defendant learned of the Default was in November 2021. There is nothing in the filings nor the sworn affidavit stating why it took eight (8) months from discovery the default and filing the motion to vacate for the Defendant to set their motion for hearing. In fact, the only evidence the Court was able to review was the Plaintiff attorney's five (5) attempts to set the Defendant's motion to vacate for hearing in order to move the case along and Defendant's failure to respond to any of those attempts.

LEGAL ANALYSIS

Florida has a long-standing policy of liberality in granting motions to set aside defaults. *North Shore Hospital, Inc. v. Barber*, 143 So.2d 849 (Fla. 1962). In order to prevail on a motion to vacate a default, a party must establish that there was (1) excusable neglect in failing to timely file a response; (2) a meritorious defense, and (3) due diligence in requesting relief after discovery of the default. *Bequer v. National City Bank*, 46 So.3d 1199 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2485a]; *Santiago v. Mauna Loa Invs., LLC*, 189 So.3d 752, 758 (Fla. 2016) [41 Fla. L. Weekly S91a]. While it is within the Court's discretion whether or not to grant the motion to vacate, failure of the moving party to prove any of the three elements must result in a denial of the motion to vacate. *Id.*

Excusable neglect is found "where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any of the other foibles to which human nature is heir." *Somero v. Hendry Gen. Hosp.*, 467 So.2d 1103, 1106 (Fla. 4th DCA 1985). Excusable neglect must be provided by sworn statements or affidavits. *Geer vs. Jacobsen*, 880 So.2d 717, 720 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a]. Courts have held that an affidavit that failed to explain "what happened to the complaint or suit papers other than admitting that the complaint was received and then was lost or misfiled" did not show excusable neglect. *Hurley v. Government Employees Insurance Co.*, 619 So.2d 477 (Fla. 2d DCA 1993). The 3rd DCA has also reversed a trial court order setting aside a default where the Defendant's affidavit failed to offer any explanation as to what happened that resulted in the failure to respond to the complaint, but only outlined the defendant's policies and procedures regarding responding to lawsuits. *Bequer v. National City Bank*, 46 So.3d 1199.

As for meritorious defense, the Defendant filed its proposed answer and affirmative defenses along with the motion to vacate on November 23, 2021, and the Plaintiff is not challenging Defendant's assertion that they have a possible meritorious defense, as such there is no need to rule on whether the Defendant does.

In regards to due diligence, it has long been the law of this state, well understood by practitioners, that "swift action must be taken upon first receiving knowledge of any default." *Westinghouse Credit Corp v. Steven Lake Masonry, Inc.*, 356 So.2d 1329, 1330 (Fla. 4th DCA 1978). "Timely action is required to avoid 'defaulting' upon the opportunity to set aside a previously entered default. *Lazcar Int'l Inc. v. Caraballo*, 957 So.2d 1191, 1192 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D769a]. Any allegation of due diligence must be supported by affidavit or sworn statements. *Church of Christ Written in Heaven v. Church of Christ Written in Heaven*, 947 So.2d 557, 559 (Fla. 3d DCA 2006) [32 Fla. L. Weekly D106b]. Delays between defaults and motions to vacate with lengths of six weeks (*Lazcar*, 1191 So.2d 1191), more than a month (*Trinka v. Struna*, 913 So.2d 626, (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1282a]), five weeks (*Fischer v.*

Barnett Bank of S. Fla., N.A, 511 So.2d 1087 (Fla. 3d DCA 1987), one month (*Bayview Tower Condo. Ass'n v. Schweizer*, 475 So.2d 982, 983 (Fla. 3d DCA 1985) and seven weeks (*Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So.2d 300 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2717c] have all been found to be unreasonable and without due diligence. There must be some competent, substantial evidence of some exceptional circumstances explaining the delay. *Lazcar* at 1193.

FINDINGS

The Court rules as a matter of law that the Defendant has not met its burden to show that it acted with excusable neglect or due diligence. Based upon the July 27, 2022 affidavit and the sworn testimony of Giannina Maselli at the August 11 hearing, Infinity seems to be arguing that a failure of communication between the attorneys and a former assistant led to the 15 week delay between default and motion to vacate and then further eight month delay between the filing of the motion to vacate default and the hearing being set on the motion. There is nothing provided by the Defendant to show that their failure to review the docket in the 14 week period between filing a notice of appearance and drafting its motion to vacate default was anything but grossly negligent and therefore unable to show excusable neglect. *Hurley v. Government Employees Insurance Company*, 619 So.2d 477. The Defendant's affidavit solely states that "due to the manner in which answers due are shown in our system, the past due answer was not visible." However, nothing in the affidavit nor the testimony from the hearing provides any detail as to why that rises to excusable neglect or what it even means.

Further, even if this Court was to find that the Defendant acted with excusable neglect, the Court cannot and will not find that the Defendant acted with due diligence. As stated above, 15 weeks went by between the entering of the default and the Defendant's motion. Another eight months went by before the hearing on the motion to vacate was ultimately set. The Defendant did not provide any sworn testimony in support of its motion to vacate until July 27, 2022, more than 13 months after being served with the complaint and almost a year since the entry of the default itself. Perhaps most importantly, despite the fact that the Defendant filed its motion to vacate default and an answer and affirmative defenses, the Court's review of this file shows that they did nothing else. They served no discovery. They answered no discovery. They did not comply with other court Orders. They did not request depositions. They did not disclose witnesses or exhibit lists. Nothing in the affidavits, sworn testimony nor review of the docket shows anything rising remotely near due diligence on behalf of the Defendant. The Defendant never responded to the Order Compelling Discovery. In fact, since the hearing one week ago, the Defendant has not complied in any way with the late discovery.

The Case Management Deadlines imposed in August 2021 (after the Defendant was served with process) specified that the Fact Witness and Exhibit Lists should have been filed by March 7, 2022. The Defendant never provided discovery so no witness lists or exhibit lists from either party could have been filed. The Plaintiff is prejudiced by this failure to comply with discovery as well. The expert witness deadline has passed. The written discovery deadline is August 30, 2022. Moreover, the pretrial motions were supposed to be filed by August 5, 2022. Because of the Defendant's failure to do anything in this cause, those deadlines have passed. Finally, and most concerning is the Motions for Summary Judgment and Daubert motion deadlines have passed. The Plaintiff could never have complied despite trying. The Defendant simply never complied in any way.

This Court has strongly considered vacating the Default and sanctioning the defense, requiring them to pay attorneys' fees and sanctioning the defense with the inability to file the Motion for Summary Judgment. This Court is mindful of recent caselaw from the Fourth District Court of Appeal regarding striking pleadings. This Court has not struck any pleadings. Rather, this Court believes that the Defendant failed to act in any meaningful way to have the default in this case set aside with any diligence. The Proposed Order they furnished was incorrect and the Defendant neither fixed it nor responded in any way until June 2022 after this Court denied the Plaintiff's Motion for Final Judgment. If the Defendant wished to act with diligence, it would have complied with its discovery requirements both before and after the Motion and Order to Compel. The Defendant's failure to serve any discovery shows that the Defendant acted with no diligence in ensuring that they could defend this case.

The Plaintiff tried on multiple occasions as the record is clear and was adduced at the hearing to have this matter set. The Proposed Order the Defendant submitted was clearly wrong. Instead of making an easy correction, the Defendant did nothing. The Defendant never provided discovery. The Defendant failed to comply with Orders compelling discovery. The Defendant never even ensured the Default was waived. The Court understands that defense counsel was out of the office in May 2022 and understands that a secretarial snafu occurred at the end of 2021. What the Court does not understand is why there was a delay from August-November 2021 and then a delay from January - April 2022.

This Court well recognizes that Florida law heavily favors adjudicating matters on their merits. This Court agrees that there may be a meritorious defense. The affidavit is scant at best establishing excusable neglect. The Defendant has not established diligence in pursuing this matter.

Swift action must be taken upon receiving notice of a default. This Court holds that the Defendant did not take any swift action upon receiving notice of the default and therefore cannot show that they acted with due diligence and their motion to vacate must be **DENIED**.

FINAL JUDGMENT

The Plaintiff moved for Entry of Final Judgment on June 20, 2022. In support of that motion, the Plaintiff alleged that a default was entered against the Defendant on August 9, 2021. That default has not been vacated and the Defendant's motion to vacate that default has just been denied. The Plaintiff filed its affidavits in support of its final judgment on May 3, 2022. In those Affidavits, Dr. Stuart Krost testifies that the treatment he provided was reasonable, related and necessary as supported by the medical records he attached to the affidavit. Additionally, the Affidavits stated that the Plaintiff recognizes the Defendant's policy provides notice of its intent to limit reimbursement to the schedule of maximum charges found in Fla. Stat. §627.736(5)(a)1-5 and therefore requests the Court enter a final judgment in the amount of $2,219.55 in medical benefits and applicable interest.

WHEREFORE, Final Judgment is hereby entered in favor of the Plaintiff and against the Defendant, INFINITY INDEMNITY INSURANCE COMPANY in the amount of $2,512.32 to STUART B KROST MD PA for medical benefits and prejudgment interest. This amount shall bear interest at the statutory rate for which sum let execution now issue.

The Court reserves jurisdiction and ruling on any motion for attorneys' fees and costs which may be timely filed hereafter.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Estoppel—Summary judgment entered in favor of insurer where it was uncontroverted that insured failed to disclose household resident and prior insurance claim involving that resident as driver of insured vehicle and that the undisclosed information would have materially impacted insurer's decision to issue the subject policy—Insured cannot defend against rescission of policy on ground that she did not read application before signing it where she admitted that she was not prevented from reading application—No merit to argument that insurer is estopped from rescinding policy because its agent filled out the application—There was no evidence that agent incorrectly recorded otherwise truthful statements by insured, had any personal knowledge of alleged misrepresentations, or contributed to misunderstanding of application questions at issue—Moreover, medical provider waived defense of estoppel by failing to raise it in any responsive pleading

FAMILY CARE REHAB GROUP CORP., a/a/o Eislaimy Morlote, Plaintiff, v. THE RESPONSIVE AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-012863-CC-26, Section SD05. May 19, 2022. Michaelle Gonzalez-Paulson, Judge. Counsel: Jon Sorensen, The Sorensen Law Firm, LLC., Homestead; and Christian Carrazana, Christian Carrazana, P.A., Homestead, for Plaintiff. Brittany Brooks, Leiter Belsky & Tharp, Fort Lauderdale, for Defendant,.

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

THIS CAUSE, having come before the Court on May 2, 2022, on the Responsive Auto Insurance Company's Amended Motion for Final Summary Judgment and Family Care Rehab Group Corp.'s Motion for Final Summary Judgment and the Court having reviewed the motions and Court file, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendant's Amended Motion for Final Summary Judgment is **GRANTED** and Plaintiff's Motion for Final Summary Judgment is **DENIED**.

FACTUAL BACKGROUND

1. On May 2, 2020, Eislaimy Morlote ("Morlote") was involved in a motor vehicle accident and made a claim for Personal Injury Protection ("PIP") benefits under an insurance contract with The Responsive Auto Insurance Company (hereinafter referred to as "RESPONSIVE.")

2. Plaintiff, as Morlote's assignee, filed a breach of contract action [editor's note: text missing from court document] RESPONSIVE for recovery of PIP benefits on August 17, 2020.

3. The application for the RESPONSIVE policy of insurance pursuant to which Plaintiff's claims were made was signed by Morlote on December 27, 2019.

4. The undisputed Examination Under Oath ("EUO") testimony of Morlote relied upon by RESPONSIVE established that Morlote never tried to read the application for insurance, was not in any way prevented from reading the application for insurance, and never asked the agent who sold the RESPONSIVE policy at issue any question regarding the application for insurance. Morlote's testimony further established that she understood that her signature formed a legally binding contract and that she regularly signs documents without first reading them.

5. RESPONSIVE presented uncontroverted evidence that at the time of application for insurance Morlote was residing with Gabriel Flores, that Gabriel Flores had made a claim for personal injury protection benefits for an accident occurring on July 19, 2019, five months prior to the date of application, and that Gabriel Flores was driving the listed vehicle at the time of the motor vehicle accident at issue. RESPONSIVE also presented uncontroverted evidence that at the time of application for insurance, Morlote never mentioned to the agent that Gabriel Flores was residing in her household, would be driving the insured vehicle, or his prior personal injury protection claim. It was further uncontroverted that the undisclosed information would have materially impacted RESPONSIVE's decision to issue the subject policy.[1]

6. Plaintiff's sole argument in opposition to RESPONSIVE's Motion for Final Summary Judgment was that RESPONSIVE was estopped to rely on the representations in Morlote's application for insurance because Morlote's only input in the application process was to sign an unread application. In support, Plaintiff relied on the Declaration of Eislaimy Morlote filed on June 24, 2020 in which Morlote declared that the RESPONSIVE agent completed the policy application, that Morlote does not read or speak English, and that Morlote did not read the policy application.

7. At no time prior to hearing on Plaintiff's Motion for Final Summary Judgment did Plaintiff affirmatively raise the avoidance of estoppel in any responsive pleading or otherwise move for leave to file a belated reply to RESPONSIVE's affirmative defense of material misrepresentation.

OPINION

Plaintiff reads the Florida Supreme Court's opinion in *Massachusetts Bonding & Ins. Co. v. Williams*, 167 So. 12 (Fla. 1936) as an exception to the same Court's subsequent opinion in *All Florida Surety Co. v. Coker*, 88 So. 2d 508, 510 (Fla. 1956) and relies upon such 'exception' for the proposition that an insurer is estopped from relying on representations contained in an application where the application is filled in by an agent who has failed to propound any of the application questions to the insured. Because *Williams* dealt squarely with whether the agent of an insurer incorrectly transcribed an applicant's verbal answers to verbal inquiries and because *Coker* and *Williams* can be interpreted without conflict, this Court disagrees with Plaintiff's interpretation and finds *Williams* inapplicable where, as in the instant case, there is no evidence that answers contrary to those recorded in the application were ever communicated to the agent. Because RESPONSIVE presented uncontroverted evidence that Morlote never mentioned Gabriel Flores or Gabriel Flores's prior personal injury protection claim to the agent in this case, the Florida Supreme Court's opinion in *Coker* applies and RESPONSIVE is entitled to summary judgment as a matter of law.

The rule expressed in*Coker* that one who signs a contract is presumed to know its contents and is bound thereby is in accordance with a legion of Florida Supreme Court opinions and has repeatedly been applied in appellate courts of this State. In *Allied Van Lines, Inc. v. Bratton*, the Florida Supreme Court, quoting its prior opinion in *Atl. Coast Line R. Co. v. Dexter*, reiterated that with respect to a contractual limitation, " 'it is not essential to the validity of such a limitation that it be shown that the [contracting party] was aware of it, or that he had read it, or that it had been explained to him, or his attention called to it, provided [the other party] made use of no improper means to prevent his noticing or objecting to it. . . .' " *Allied*, 351 So. 2d 344, 348 (Fla. 1977) (quoting *Atl. Coast Line R. Co.*, 39 So. 634, 634 (Fla. 1905)). This principle, the Court opined, "has been followed in an unbroken line of Florida cases."*Allied*, at 348. The legal consequence of terms assented to in an insurance contract can only be avoided by a showing that the signee was induced not to read the terms, that the legal significance of such terms was misrepresented, or that the contracting party did not have a reasonable and fair opportunity to exercise their right to choose alternative insurance coverage. *Id.* at 348. None of these circumstances are presented in this case.

The Third District Court of Appeal has expressly recognized that an applicant is bound by the contents of a signed insurance application

and that an insurer is entitled to rescind its policy in reliance on same. *Gonzalez v. Am. Heritage Life Ins. Co.*, 747 So. 2d 991 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2644c]. Similarly, the Second District Court of Appeal has held that an "[i]nsured's failure to read the automobile policy application in its entirety prior to signing it did not obviate insurer's right to rescind the policy for nondisclosure of material information." *Nationwide v. Kramer,* 725 So. 2d 1141 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D2326a]. Applying the rule in *Coker* to facts similar to those propounded by Plaintiff in this case, the Second District Court of Appeal in *Reliable Fin. Co. v. Axon* held that where the only argument for excuse from the contents of an application is that the application was pushed in front of the signee for immediate execution, such circumstances fall far short of escaping the rule of *Coker*. *Reliable Fin. Co.*, 336 So. 2d 1271 (Fla. 2d DCA 1976). Likewise, the Fifth District Court of Appeal in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton* has held that both individuals capable and incapable of reading English are "free to elect to bind themselves to contract terms they sign without reading" and that the "[b]urden is on person who cannot read to know that he cannot read and if he desires to have instrument read and explained to him to select a reliable person to do so before he signs it." *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 467 So. 2d 311 (Fla. 5th DCA 1985).

Most recently, the Third District Court of Appeal was confronted with material facts identical to those at issue in this case in *Dy Medical Ctr. Corp. a/a/o Wilmer Lazo De La Vega v. United Automobile Insurance Company*, No. 3D21-795 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D551c] and *Sergio Sabillion v. United Automobile Insurance Company*, No. 3D21-0580 (Fla. 3d DCA 2021). The Third District Court of Appeal affirmed summary judgment in favor of the insurer in both cases, and in *Dy Medical Ctr. Corp.*, the Court elucidated its opinion by reference to *Coker*, stating that " '[i]f a person [who signs his name to an instrument] cannot read the instrument, it is as much his duty to procure someone to explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him [from denying its contents.]' " Though the Court in *Sabillion* affirmed the trial court without written opinion, "it is fundamental black letter law that a per curiam disposition affirming a trial court order without a written opinion, occurs when the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliott v. Elliott*, 648 So.2d 137 (Fla. 4th DCA 1994).

Plaintiff contends that despite the Third District Court of Appeal's reliance on *Coker* and recent opinions in favor of the insurer under identical operative facts, *Coker* is inapplicable where Plaintiff is not trying to defeat the insurance contract, but is instead trying to enforce it. Plaintiff's contention ignores that RESPONSIVE's defense of rescission is itself an enforcement of the material misrepresentation provisions of the policy and application at issue[2]. Applying *Coker* and the "unbroken line of Florida [opinions]" to the same effect, Morlote cannot defend against rescission pursuant to the material misrepresentations provisions of the subject policy on the grounds that she signed the policy application without reading it, unless she avers facts demonstrating that she was prevented from reading the policy application or was induced by RESPONSIVE to refrain from reading it. *Allied*, at 348. The pertinent provisions of the Examination Under Oath testimony of Morlote, then, are as follows:

> Q. When that link was sent to you [by e-mail] to sign the application, did you take the time to read your policy?
>
> A. No.
>
> Q. Did the agent in any way prevent you from reading your application?
>
> A. No.
>
> Q. Did you ask your agent any questions regarding your policy?
>
> A. No.
>
> Q. At any time did you mention to your agent that Mr. Flores was involved in the accident where he claimed injuries before?
>
> A. No.

Because Morlote readily admitted that she was not prevented from reading the application, and was in a position—having received the application by e-Mail—particularly conducive to having the opportunity to read and/or procure a reliable person to explain the application to her, she is bound by the representations therein. Plaintiff presented no evidence to controvert the conclusion that Morlote was neither prevented nor induced to refrain from reading the application for insurance with RESPONSIVE. In fact, Morlote admitted in her Examination Under Oath that she never tried to read the application for insurance and further that she never asked the RESPONSIVE agent any questions regarding same.

Notwithstanding the foregoing, Plaintiff contends that both the Third District Court of Appeal and RESPONSIVE have overlooked an 'exception' created by *Williams*, and relies in part on legal treatises and the opinions of out-of-state jurisdictions to define the exception. The opinions relied upon by Plaintiff define this exception, referred to by Plaintiff as the 'majority rule,' as follows:

> "[w]here an application for insurance is made out by an insurance agent in the course of his agency and the insured truthfully gives the agent the correct answers, but the ***agent records the answers in the application incorrectly*** without the fault, knowledge, or collusion of the insured, and the insured signs the application without first having read it—although he had the opportunity to do so—in reliance upon the good faith of the agent, the insurance company is not relieved from liability on the policy, and the act of the agent in recording incorrect answers is deemed the act of the insurer and not that of the insured. The theory upon which this rule—which is the majority rule—rests is that the agent in making out the application acts for the insurer, and the insurer is therefore estopped to assert the mistake." [Emphasis added.]
>
> **Plaintiff's Response to Motion for Summary Judgment**, ¶ 18 (quoting *Pomerenke v. Farmers Life Ins. Co.*, 36 N.W.2d 703 (Minn. 1949)).

This Court does not find the 'exception' relied upon by Plaintiff to be any different than that articulated by the Florida Supreme Court in *Williams*, by the Third District Court of Appeal in *Beneby*, and by the Second District Court of Appeal in *Fresh Supermarket*, and disagrees with the Plaintiff that application of this exception creates any genuine issue of material fact in this case. At the heart of the 'exception' defined by the foregoing cases is the actual or constructive knowledge of the agent as to the truth of the matters underlying the misrepresentations. In *Fresh Supermarket Foods, Inc. v. Allstate Ins. Co.*, for example, the court's finding of a material issue of fact was the direct result of allegations that the insurer's agent was aware of the insured's alleged misrepresentations. *Fresh Supermarket Foods, Inc.* at 1001 ("The [Appellant's] affidavits indicate that. . .the agent would have had knowledge of the facts underlying the alleged misrepresentations on the application.") Likewise, the court in *Beneby v. Midland Nat. Life Ins. Co.*, reversed summary judgment in reliance on a line of cases standing for the proposition that there is question of fact regarding whether an applicant's erroneous expression of opinion or judgment in response to a question couched in special knowledge or misconstrued by the agent can be advanced to vitiate a policy. *Beneby* at 1194. As with the 'majority rule' as defined by Plaintiff in the foregoing excerpt, *Williams* would apply where an agent has incorrectly transcribed an applicant's verbal answers to verbal inquiries. *Williams* at 14. Likewise, the rule expressed in *Fresh Supermarket Foods, Inc.* would apply where the agent has personal knowledge of an applicant's misrepresentation(s) independent of verbal answers, and the rule expressed in *Beneby* would apply where an agent has

contributed to the misunderstanding of an application question, thereby causing an erroneous response. *Beneby v. Midland Nat. Life Ins. Co.*, 402 So.2d 1193 (Fla. 3d DCA 1981); *Fresh Supermarket Foods, Inc. v. Allstate Ins. Co.*, 829 So.2d 1000 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2477c]. Plaintiff has not presented any factual circumstances as would warrant application of the 'majority rule' to estop RESPONSIVE from relying on Morlote's misrepresentations to rescind the subject policy. Specifically, Plaintiff presented no evidence that the agent failed to record a contrary representation by Morlote, that the agent had any personal knowledge of the alleged misrepresentations, or that the agent contributed to the misunderstanding of an application question subject to opinion.

Plaintiff's erroneous reliance on the opinions of out-of-state jurisdictions on matters already decided in Florida aside, the conclusion that imputed knowledge is the crux of the summary judgment reversals relied upon by Plaintiff is also well-supported by the opinions cited to by Plaintiff, in each of which the 'majority rule' was applied in the context of an allegation of the agent's actual or constructive knowledge and a subsequent failure by the agent to correctly record such knowledge. *Bunn v. Monarch Life Ins. Co.*, 478 P.2d 363 (Or. 1971) (application of majority rule to allegation that agent had actual knowledge of misrepresentation); *Pennsylvania Life Ins. Co. v. McReynolds*, 440 S.W.2d 275 (Ky. Ct. App. 1969) (record warranted conclusion that applicant made full disclosures to agent who considered them too inconsequential to report on the application form); *Pomerenke v. Farmers Life Ins. Co.*, 36 N.W.2d 703 (Minn. 1949) (insurance company not relieved from liability under the policy where insured truthfully gives the agent the correct answers but agent records them on the application incorrectly without the fault/knowledge or collusion of the insured).

In this case, Plaintiff failed to present any evidence that 'correct answers' or otherwise truthful statements regarding household resident information and/or prior claims were ***ever*** communicated to the agent or that the agent failed to correctly transcribe same. To the contrary, the undisputed evidence presented by RESPONSIVE established that Morlote ***never*** mentioned Gabriel Flores or his prior claim for personal injury protection benefits to the agent.

Plaintiff presented no evidence of ***any*** factual circumstance that would fall into even the exception defined by the legal treatises relied upon by Plaintiff. Plaintiff's Response to [RESPONSIVE's] Motion for Summary Judgment itself defines the exception as providing that "an applicant's failure to read the answers recorded by the insurer's agent is not regarded as negligence where the applicant has given truthful answers and was induced by the agent not to read the application before signing it. The fact that the insured could have read the application will not aid the insurer as there is no duty to read the application form to check for false answers. In this instance, the applicant or insured must offer proof that he or she did not read the application." 6 *Couch on Insurance* §85.57 (3rd Ed. 2021). Again, the 'exception' defined by Plaintiff is a nonsequitur to the uncontroverted facts in this case. Plaintiff presented no evidence tending to show that the agent incorrectly recorded statements as they were otherwise given or that the agent in any way induced Morlote to sign without reading. Instead, Morlote's sworn testimony reflects that she ***never*** mentioned Gabriel Flores or his prior claim for personal injury protection benefits to the agent.

In addition to the foregoing, Plaintiff failed to affirmatively raise the avoidance of estoppel in any responsive pleading or to otherwise move for leave to file a belated reply to RESPONSIVE's affirmative defense of material misrepresentation at any time prior to hearing on the parties' cross motions for summary judgment. Florida Rule of Civil Procedure 1.100(a) requires that "[i]f an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance." The Committee Notes to the 1972 amendment of Rule 1.100(a) indicate that a reply is "mandatory when a party seeks to avoid an affirmative defense in an answer. . . ." Florida Rule of Civil Procedure 1.110(d) provides that as with other matters constituting an avoidance, estoppel must be affirmatively plead. Florida courts have repeatedly recognized that all defenses not raised by motion or responsive pleading are waived pursuant to Florida Rule of Civil Procedure 1.140(h). *Florida Dept. of Health & Rehab. Services v. S.A.P*, 835 So. 2d 1091, 1110 (Fla. 2002) [27 Fla. L. Weekly S980a]. Plaintiff contends that it need not have raised estoppel because its argument in opposition to RESPONSIVE's affirmative defense of material misrepresentation is a mere denial. Plaintiff, however, does not deny the factual underpinnings of RESPONSIVE's defense, i.e. that Gabriel Flores was an undisclosed household resident, that Gabriel Flores made a claim for personal injury protection benefits within the thirty-six (36) months preceding the application for insurance, or that RESPONSIVE would not have issued the subject policy had all true facts been known. The essence of Plaintiff's argument is that despite the truth of these allegations, RESPONSIVE is estopped to rescind the policy due to an alleged failure by the agent to propound the application questions to the insured. By definition, Plaintiff's argument is that of estoppel. Plaintiff's own Response to [RESPONSIVE's] Motion for Summary Judgment states that, "if Morlote is to be believed rather than Defendant's agent, then Defendant is *estopped*," and "Plaintiff instead asserts that Defendant is *estopped*. . .," among other references to estoppel. [*Emphasis added*.] At summary judgment, a court must only consider those issues raised by the pleadings. *Reina v. Gingerale Corp.*, 472 So.2d 530, 531 (Fla. 3dDCA 1985); *Hemisphere Nat'l Bank v. Goudie*, 504 So.2d 785 (Fla. 3d DCA 1987). Plaintiff's failure to properly plead the defense of estoppel precludes this Court from denying RESPONSIVE's Motion for Final Summary Judgment on separate grounds.

WHEREFORE, based on the foregoing, the Court concludes that because the uncontroverted facts in this case are subject to the Florida Supreme Court's ruling in *Coker* and the legion of subsequent case law in accordance therewith, and further because any exception created by the Florida Supreme Court in *Williams*, the Third District Court of Appeal in *Beneby*, or the Second District Court of Appeal in *Fresh Supermarket* are inapplicable where, as in the instant case, there is no evidence to suggest that the agent incorrectly recorded otherwise truthful statements or that the agent in any way prevented or induced Morlote to refrain from reading the application, and further because the Plaintiff failed to affirmatively plead the avoidance of estoppel, there are no genuine issues of material fact and RESPONSIVE is entitled to final summary judgment as a matter of law.

WHEREFORE, based upon the foregoing findings of fact and conclusions of law, it is hereby

ORDERED AND ADJUDGED that the Plaintiff, FAMILY CARE REHAB GROUP, CORP.'s Motion for Summary Judgment is **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, THE RESPONSIVE AUTO INSURANCE COMPANY'S Amended Motion for Final Summary Judgment is **GRANTED** and that the Defendant, THE RESPONSIVE AUTO INSURANCE COMPANY, shall go hence without day.

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[1]The materiality of Morlote's alleged misrepresentations was not contested by Plaintiff.

[2]The policy issued to Morlote contained a Misrepresentation and Fraud provision stating, "[a]ny claim may be denied or this policy may be void if an 'insured'. . .[c]onceals or misrepresents any material facts or circumstances concerning this insurance or the subject thereof. . ." Additionally, Morlote signed and dated the application for insurance immediately below the following certification:

I have read each of the questions (numbered 1-11) above and answered all questions truthfully. I realize that any incorrect information may constitute

a material misrepresentation, which may result in my Insurance coverage being voided or my claim being denied. . . .

The applicant(s) represents the statements and answers made in this application to be true, complete and correct and agrees that any policy may be issued or renewed in reliance upon the truth, completeness and correctness of such statements and answers. The applicant(s) further understands that falsity, incompleteness, or incorrectness may jeopardize the coverage under such policy so issued or renewed in accordance with Section 627.409, F.S.[Bold in original.]

* * *

Insurance—Personal injury protection—Attorney's fees—Expert witnesses—Motion to waive attorney's fees expert or preclude taxation of expert's fee as cost is denied—Testimony of expert is required to establish reasonableness of attorney's fees, and expert expects to be compensated for testimony

PRESGAR IMAGING OF CMI SOUTH, LC, a/a/o Vince Khadem, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-002820-SP-24, Section MB01. May 5, 2022. Stephanie Silver, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale, for Plaintiff. Sherria Williams, House Counsel of United Automobile Insurance Company, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO WAIVE ATTORNEY FEE EXPERT OR, IN THE ALTERNATIVE, TO PRECLUDE/LIMIT TAXATION OF EXPERT WITNESS FEE

THIS CAUSE, having come to be heard on May 4, 2022, upon Defendant's Motion to Waive Attorney Fee Expert Witness or Motion to Preclude Taxation of Expert Witness Fee, and the Court having reviewed the motion, Plaintiff's memorandum in response to the motion and after waiting for the appearance of counsel for Defendant for over 20 minutes, who did not appear, hereby holds as follows:

On May 6, 2021, the Plaintiff filed a one count breach of contract action against the Defendant for the recovery of unpaid personal injury protection benefits. Ultimately, the Defendant made a voluntary payment and filed a confession of judgment. On October 7, 2021, the Plaintiff filed its motion for attorney's fees and costs. The Plaintiff made multiple attempts to resolve its motion for attorney's fees and costs with no success. Therefore, they retained an expert to help pursue its claim for attorneys fees pursuant to Fla. Stat. Section 627.428. In response to Plaintiff's motion for attorney's fees, the Defendant filed the instant motion requesting that the Court strike Plaintiff's ability to retain an expert to testify as to the reasonableness of the hours billed and hourly rate of Plaintiff's counsel, or in the alternative to rule that they are not responsible for the cost of the expert.

Florida law has a long-standing practice of requiring testimony of expert fee witnesses to establish the reasonableness of attorney's fees. *Snow v. Harlan Bakeries, Inc.*, 932 So.2d 411, 412 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1128a]. *See, also, Black Point Assets, Inc. v. Ventures Trust 2013-I-H-R, BY MCM Capital Partners, LLC*, 236 So.3d 1134, 1136 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D118a] (Attorneys' fees award must be supported by expert evidence.); *Rodriguez v. Campbell*, 720 So.2d 266, 267 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2227c] (same); *United Auto. Ins. Co. v. Hallandale Beach Orthopedics (a/a/o Linda Brown)*, 16 Fla. L. Weekly Supp. 731a (Broward Cir. Ct. AP 2009), ([s]ince plaintiffs in PIP cases are often required to provide expert testimony to prove the reasonableness of their rates and time spent, even in cases that were settled quickly, the sheer volume of cases requiring such testimony militates against other attorneys donating their time as a "matter of professional courtesy;" "[i]t defies reason to expect other attorneys to abandon their own practices for a few hours at a time on multiple occasions to provide their services free of charge. The appellee, as a very frequent litigant in both the county trial courts and the appellate divisions of the circuit court of this county, is well aware of the volume of PIP litigation that requires the testimony of attorneys' fees experts, and the time that such experts have to expend in providing such testimony. *see, also, Progressive Auto Pro, d/b/a Progressive Select Ins. Co. v. Dennis J. D'Eramo, D.C., P.A. (a/a/o Kimberly Occhionero)*, 17 Fla. L. Weekly Supp. 917a (Seminole Cir. Ct. AP 2010)(Fee expert expected to be paid and would not have agreed to review the file and testify if he were not compensated for his time; accordingly, pursuant to *Stokus*, "the trial court did not abuse its discretion by awarding expert witness fees.").

In addition, Fla. Stat. 92.231(2) states that "Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in an amount agreed to by the parties, and the same shall be taxed as costs." §92.231 (2), Fla. Stat. (2019); *see also Stokus v. Phillips*, 651 So. 2d 1244, 1246 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D627c] ('We view [*Travieso v. Travieso*, 474 So. 2d 1184 (Fla. 1985)] to mean that an award of such fees is not discretionary if the testifying attorney expects to be compensated for his testimony.").

Accordingly, it is ORDERED AND ADJUDGED that:

Defendant's Motion to Waive Attorney Fee Expert or in the alternative to Preclude/Limit Taxation of Expert Witness Fee is **DENIED**. Plaintiff may bring its expert, Mac Phillips, Esq., to the forthcoming hearing on Plaintiff's Motion for Attorney's Fees & Costs and the expert witness fee shall be taxed against the Defendant in an amount to be determined by this Court upon conclusion of the hearing on the fee motion. Furthermore, the Court holds that because the Defendant's motion attempts to negate a cost that the Plaintiff must incur, the Court holds that the Plaintiff shall be entitled to recover for the post-confession attorney's fees incurred because of Defendant's attempt to contest a recoverable cost. This Court further recognizes that some fee hearings involve awards for a small amount of time set in cases. This Court does not believe that an expert should receive a significant percentage of the overall award in all cases in which the attorney is not seeking extensive awards. Therefore, the Plaintiff's expert may be compensated for less time than the expert spends on the case.

* * *

Insurance—Automobile—Where insurer named in complaint is entirely separate corporation from proper defendant, dismissal of action rather than amendment of complaint is required

GABLES INSURANCE RECOVERY, a/a/o Pedro J. Jimenez, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-018356-SP-26, Section SD06. July 26, 2022. Laura Maria Gonzalez-Marques, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court for a hearing on May 2, 2022, on Plaintiff's Motion to Amend Complaint to Correct Party Name and Defendant's Motion to Dismiss. The Court having heard the argument of Counsel and being otherwise advised in the premises, it is hereby

ORDERED and ADJUDGED

Defendant's Motion to Dismiss is **GRANTED**. The proper defendant in this case appears to be Garrison Property and Casualty Insurance Company ("Garrison"), an entirely separate corporation from the named Defendant, United Services Automobile Association. Because these are two distinct legal entities, the Court also finds that this is not a case of simply correcting a misnomer. Accordingly, Plaintiff's Motion to Amend Complaint to Correct Party Name is **DENIED**.

This case is **DISMISSED**.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order postponing depositions of fact witnesses until after hearing on insurer's motion for summary judgment is granted—Motion raises purely legal issue regarding sufficiency of the assignment of benefits to confer standing on medical provider—No merit to argument that provider is entitled to depose insurer's corporate representative to inquire whether insurer's presuit actions constitute equitable assignment—Equitable assignments are prohibited in PIP suits

GULF COAST INJURY CENTER, LLC, a/a/o Shelby Russ, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-112889, Division I. August 16, 2022. Leslie K. Shultz-Kin, Judge. Counsel: Joseph Shafer, 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 August 08, 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 lacks standing to the extent it does not have a true and/or valid written assignment of benefits. 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 is whether the purported assignment of benefits executed by the patient in this matter is legally sufficient to confer standing upon the Plaintiff to bring this lawsuit. 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 assignment of benefits executed by the patient in this matter is sufficient to confer standing upon the Plaintiff is a purely legal issue.

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 Representative to inquire into whether the Defendant's pre-suit actions and/or payments in this claim constitute a waiver of the standing defense. However, the standing requirement is one that must be met at the inception of the lawsuit; therefore, the Defendant's pre-suit actions cannot constitute a waiver of its Affirmative Defense pertaining to the Plaintiff's lack of standing. *See Sarasota Mem. Hosp. a/a/o Raul Betancourth v. Auto-Owners Ins. Co.,* 22 Fla. L. Weekly Supp. 1085b (Fla. 12th Jud. Cir., Sarasota Cty. Ct., Feb. 18, 2015) (*citing Progressive Exp. Ins. Co. v. McGrath Comm. Chiro.,* 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]; *see cf. Dage v. Deutsche Bank Nat'l Trust Co.,* 95 So. 2d 1021, 1024 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2044b] (recognizing that lack of standing is an affirmative defense).

6. The Plaintiff further argues that it should be entitled to conduct the deposition of Defendant's Representative to inquire into whether the Defendant's pre-suit actions and/or payments in this claim constitute an equitable assignment.

7. However, Florida Statute § 627.736(10)(b)1. (2021) requires a *written* assignment of benefits giving rights to the claimant if the claimant is not the insured prior to bringing an action for PIP benefits. It has been expressly held, therefore, that equitable assignments are prohibited in PIP suits under the PIP statutory scheme. *See Roger M. Romano, DC, PA a/a/o Robert McClay v. State Farm Mut. Auto. Ins. Co.,* 23 Fla. L. Weekly Supp. 266b (Fla. 12th Jud. Cir., Sarasota Cty. Ct., Oct. 30, 2014) (*citing Ins. Corp. of New York v. M & J Health Ctr., Inc.,* 13 Fla. L. Weekly Supp. 682a (Fla. 11th Cir. Ct. (App.), April 4, 2006)). Without a valid *written* assignment, a Plaintiff lacks standing, and the Court lacks subject matter jurisdiction. *Id.*; *see also Sarasota Mem. Hosp. a/a/o Raul Betancourth v. Auto-Owners Ins. Co.,* 22 Fla. L. Weekly Supp. 1085b (citing *Progressive Exp. Ins. Co. v. McGrath Comm. Chiro.,* 913 So. 2d 1281 (Davis, J. specially concurring)); *Paul J. Zak, M.D., P.A., d/b/a Coastal Spine Specialists a/a/o Carlos Alemar v. Auto-Owners Ins. Co.,* 23 Fla. L. Weekly Supp. 255b (Fla. 6th Jud. Cir., Pinellas Cty. Ct., July 10, 2015).

8. "An assignment is defined as a 'transfer or setting over of property or of some right or interest therein, from one person to another. It is the act by which one person transfers to another, or causes to vest in another, his right of property or interest therein.' An assignment transfers to the assignee all the interest of the assignor under the assigned contract. In the absence of an ambiguity on the face of [an assignment], it is well settled that the actual language used in the [assignment] is the best evidence of the intent of the parties, and the plain meaning of that language controls." *Paul J. Zak, MD, PA d/b/a Coastal Spine Specialists a/a/o Carlos Alemar v. Auto-Owners Ins. Co.,* 23 Fla. L. Weekly Supp. 255b (Fla. 6th Jud. Cir., Pinellas Cty. Ct., July 10, 2015) (internal citations omitted). Where no ambiguity exists on the face of the assignment, the Court may not rely on parol evidence to explain, elucidate, or clarify the intention of the parties. *Id.* (*citing Treasure Salvors, Inc. v. Tilley,* 534 So. 2d 834, 836 (Fla. 2d DCA 1988)). As such, the question of whether the written assignment of benefits is sufficient to confer standing to the Plaintiff under the PIP statute is purely a matter of law, to be determined based on the plain language of the document itself. *See Advanced 3-D Diagnostics a/a/o Ziky Jeannestin v. State Farm Fire and Cas. Co.,* 20 Fla. L. Weekly Supp. 1082a (Fla. 9th Jud. Cir., Orange Cty. Ct., July 23, 2013); *Open MRI of Orlando, Inc. a/a/o Raquel Ramos,* 17 Fla. L. Weekly 731a (Fla. 9th Jud. Cir. (App.), April 16, 2010).

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 assignment of benefits, Plaintiff's corporate status, 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 purported assignment of benefits executed by the patient in this matter is legally sufficient to confer standing upon the Plaintiff 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, filed on February 18, 2022.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order postponing depositions of fact witnesses until after hearing on insurer's motion for summary judgment is granted where summary judgment motion involves purely legal question

PHYSICIANS GROUP, LLC, a/a/o Tyrone Jackson, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-114982. August 7, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Joseph Shafer, 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 August 02, 2022 upon Defendant's Motion for Protective Order, filed on April 19, 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.

2. The Defendant has filed a Motion for Summary Judgment, based on the undisputed fact that Defendant timely issued full payment to Plaintiff in response to its pre-suit demand letter for all outstanding amounts at issue in Plaintiff's pre-suit demand letter prior to the filing of the above styled lawsuit. 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. In the instant case, the Court agrees that there is no genuine dispute pertaining to the fact that Plaintiff's demand letter dated May 07, 2021 requested payment in the amount of $619.76 for benefits (plus interest, penalty and postage), if the insurer is lawfully entitled to may pursuant to the Medicare Fee Schedule method of reimbursement, and Defendant issued pre-suit payment in the amount of $720.32 in benefits (plus interest, penalty and postage) on September 09, 2021.

5. There is nothing further regarding this question that the Defendant's Representative could testify to at deposition that would have any bearing on the issue presented in Defendant's Motion for Summary Judgment, and a deposition of any fact witness in this matter can do nothing to further the Plaintiff's position on that issue. *See Hurley,* 203 So. 2d 530, 534-36; *In re Estate of Herrera v. Berlo Indus.,* 840 So. 2d 272, 273 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b] (holding that summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact).

6. Under Rule 1.280(c)(1), Florida Rules of Civil Procedure, for good cause shown, the Court may enter an order to protect a party from annoyance, undue burden or expense, including that the discovery not be had. *Affiliated Healthcare Ctrs., Inc. a/a/o Julio Paez v. Allstate Fire and Cas. Ins. Co.,* 29 Fla. L. Weekly Supp. 139a (Fla. 11th Jud. Cir., Miami-Dade Cty. Ct., April 20, 2021). Moreover, pursuant to Rule 1.200(a)(4), Florida Rules of Civil Procedure, the Court has the discretion to fashion orders to govern the conduct of discovery, including to schedule, order, expedite or limit discovery. *Id.*

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 First Motion for Summary Judgment.

* * *

Insurance—Automobile—Standing—Assignment—Sufficiency

HILLSBOROUGH INSURANCE RECOVERY CENTER, LLC, a/a/o David Barr, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-059600, Division M. November 2, 2021. Miriam V. Valkenburg, Judge. Counsel: Kevin Richardson, Emilio Stillo, and Andrew Davis-Henrichs, Stillo & Richardson, P.A., Davie, for Plaintiff. April Johnson and Luke Smith-Marin, Law Office of David S. Dougherty, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION REGARDING ASSIGNMENT OF BENEFITS

THIS CAUSE was heard on October 18th, 2021, on Plaintiff's Motion for Partial Summary Disposition Regarding Assignment of Benefits. The Court, having heard arguments of counsel, reviewed Plaintiff's Motion, those Affidavits attached to said Motion, the relevant pleadings and the relevant legal authorities, as well as the clerk's docket, hereby **ORDERS AND ADJUDGES** as follows:

1. Plaintiff has met its burden of creating a prima facie entitlement to judgment as a matter of law on the issue of whether PLAINTIFF has standing to prosecute the instant lawsuit.

2. The Court finds that the Assignment of Benefits signed by David Barr on June 4th, 2018, together with the Assignment of Benefits made on October 25th, 2018, by and between NTK Auto Glass Service, Inc. d/b/a Gulf Coast Auto Glass Service and Hillsborough Insurance Recovery Center, LLC, confer sufficient standing to PLAINTIFF to prosecute the instant lawsuit.

3. The Court further finds there is no record evidence to countervail the Affidavits attached to PLAINTIFF's Motion.

4. PLAINTIFF's Motion for Partial Summary Disposition Regarding Assignment of Benefits is hereby GRANTED.

* * *

Insurance—Personal injury protection—Conditions precedent—Examination under oath—Insurer's motion for rehearing of final declaratory judgment finding that insurer breached PIP policy by failing to notice EUO within 30 days of receipt of bills and by failing to pay or deny claim within 90 days is granted based on subsequent binding appellate opinions—Under new precedent, insurer properly denied claim based on insured's failure to attend two EUOs despite fact that EUOs were scheduled to occur more than 30 days after insurer's receipt of bills, and insurer's failure to pay or deny claim within 90 days did not cause insurer to lose its right to contest coverage based on insured's failure to attend EUO

HILLSBOROUGH THERAPY CENTER, INC., a/a/o Ainadi Bermudez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2020-CC-036257. July 28, 2022. Monique M. Scott, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Cameron S. Frye and Kenneth P. Hazouri, de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR REHEARING

[Original Opinion at 29 Fla. L. Weekly Supp. 259c]

THIS MATTER came before the Court on February 23, 2022, on Defendant, PROGRESSIVE SELECT INSURANCE COMPANY's ("Progressive"), Amended Motion for Rehearing of the Court's Order

Granting Plaintiff's Motion for Final Summary Judgment and Entry of Final Declaratory Judgment (the "Summary-Judgment Order"), and the Court having reviewed the motion and court file, having heard the argument of counsel, and being otherwise being fully advised in the premises, hereby makes the following findings of undisputed fact and conclusions of law:

1. This is an action for declaratory relief involving a PIP claim governed by section 627.726, Florida Statutes (2018) ("§ 627.736"). The claim arose out of an August 26, 2018, automobile accident involving Ainadi Bermudez ("Ms. Bermudez"), who was insured under a policy of automotive insurance (the "Policy") issued by Progressive. Plaintiff, HILLSBOROUGH THERAPY CENTER, INC. ("Plaintiff"), provided treatment to Ms. Bermudez following the accident and submitted its bills directly to Progressive for PIP benefits pursuant to an assignment of benefits from Ms. Bermudez.

2. On October 3, 2018, Progressive received Plaintiff's first set of bills for treatment provided to Ms. Bermudez. Progressive did not, however, pay Plaintiff's bills because it was investigating Ms. Bermudez's PIP claim for potential fraud.

3. On October 17, 2018, Progressive exercised its right to extend its investigatory period of Plaintiff's claim from 30 days under § 627.736(4)(b) to 90 days under § 627.736(4)(i) by notifying Ms. Bermudez's attorney that her claim was being investigated for suspected fraud.

4. As part of its fraud investigation, Progressive scheduled Ms. Bermudez for an examination under oath ("EUO") on December 19, 2018, pursuant to the Policy's EUO provision. Ms. Bermudez failed to attend the EUO. Progressive then scheduled a second EUO of Ms. Bermudez for January 10, 2019. Ms. Bermudez also failed to attend the second scheduled EUO.

5. Based on Ms. Bermudez's failure to attend the two EUOs duly requested under the Policy, Progressive denied Plaintiff's claim for PIP benefits for its treatment of her pursuant to § 627.736(6)(g), which states in pertinent part as follows:

> (g) An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. . . . Compliance with this paragraph is a condition precedent to receiving benefits.

6. Following Progressive's denial of its claim, Plaintiff filed this action requesting a declaration of PIP coverage for its treatment of Ms. Bermudez. Plaintiff later filed a Motion for Summary Judgment arguing that Progressive could not deny payment of the medical bills Progressive received on October 3, 2018, because Progressive breached the policy by failing to pay those bills within 30 days of receiving them, and this breach occurred before Ms. Bermudez's first EUO was scheduled on December 19, 2018. (P's MSJ, ¶ 9) As authority for this argument, Plaintiff cited *Amador v. United Auto. Ins. Co*., 748 So.2d 307 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a] and its progeny decision of *January v. State Farm Mut. Ins. Co*., 838 So.2d 604 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a]. (*Id.*) Notably, both *Amador* and *January* were decided long before the Legislature added § 627.736(6)(g) to the PIP statute in 2012.

7. Following an April 13, 2021, hearing on Plaintiff's Motion for Summary Judgment, the Court entered its Summary-Judgment Order on June 21, 2021. The Summary-Judgment Order rules that Progressive breached the Policy by failing to notice Ms. Bermudez's EUO within 30 days of receiving the Plaintiff's bills, and then by failing to pay or deny the Plaintiff's claim for PIP benefits within 90 days under § 627.736(4)(i). (Summary-Judgment Order, ¶ 2, 10, 12-13).

8. On July 14, 2021—after the Court had entered its Summary-Judgment Order—the Third District issued *Miracle Health Services, Inc. a/a/o Kirenia Tamayo v. Progressive Select Ins. Co.*, 326 So. 3d 109 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1608a].

9. *Miracle Health* held that under § 627.736(6)(g) and the policy, Progressive properly denied the plaintiff's claim for PIP benefits for medical treatment provided to the insured based on her failure to attend an EUO that was scheduled for a date *more than 30 days after Progressive had received some of the at-issue medical bills*. *Id.* at 113. In doing so, the Third District explained that the "plain language of section 627.736(6)(g) and Progressive's policy clearly and unambiguously require compliance with the policy provision of submitting to an examination under oath as a condition precedent to receiving PIP benefits." *Id*. In rejecting the plaintiff's arguments under *Amador*, the court stated:

> We cannot, and do not, read *Amador* for the proposition that an insurer's failure to pay PIP benefits within thirty days thwarts its ability to investigate the claim or discover facts by discharging the insured's statutory obligation [under § 627.736(6)(g)] to comply with conditions precedent to receiving benefits.
>
> * * *
>
> We, therefore, conclude that the Legislature engaged in a meaningful balancing of interests when it amended the PIP statute enacting section 627.736(6)(g).

Id. at 114. In affirming the summary judgment for Progressive based on the above analysis, *Miracle Health* concluded by holding that "[t]he plain language of section 627.736(6)(g) and Progressive's policy clearly and unambiguously require compliance with the policy provision of submitting to an examination under oath as a condition precedent to receiving PIP benefits." *Id.* at 114-15.

10. *Miracle Health* is directly on point and is the only opinion from a Florida district court addressing § 627.736(6)(g)'s application in a situation where the EUO was scheduled to occur more than 30 days after the insurer received the medical bills at issue in the PIP suit. Accordingly, *Miracle Health* is binding precedent in this case, and this Court is duty-bound to follow the opinion. *E.g.*, *Omni Ins. Co. v. Special Care Clinic, Inc.*, 708 So. 2d 314, 315 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D714a]; *Auto Owners Ins. Co. v. Marzulli*, 788 So. 2d 1031, 1034 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D734a]. Under *Miracle*, Progressive properly denied Plaintiff's claim for PIP benefits based on the Ms. Bermudez's failure to attend the two duly scheduled EUOs, which requires a denial of Plaintiff's Motion for Summary Judgment.

11. This conclusion is not altered by Progressive's extension of its time period to investigate the claim from 30 days to 90 days under § 627.736(4)(i), which, under *Miracle Health*, is irrelevant to a medical provider's loss of PIP coverage for a claim under § 627.736(6)(g) based on the insured's failure to attend an EUO in compliance with the policy.

12. Furthermore, on July 2, 2021—again after the Court had entered its Summary-Judgment Order—the Fifth District issued *United Automobiles Ins. Co. v. AFO Imaging d/b/a Advanced Diagnostic Group a/a/o Ruben Torres*, 323 So. 3d 826 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1570a] ("*AFO Imaging*"). *AFO Imaging* reversed a summary judgment ruling that the insurer had breached the policy by waiting until after the expiration both the 30-day investigatory period under § 627.736(4)(b), and the extended 90-day investigatory period under § 627.736(4)(i), to deny the plaintiff's PIP claim. *Id.* at 829. In doing so, the Fifth District first explained the Florida's Supreme Court's earlier holdings that insurers are not barred from contesting a claim that becomes overdue upon expiration of § 627.736(4)(b)'s 30-day period. 323 So. 3d at 828. The court then explained that § 627.736(4)(i) "permits extension of the time before which payments become "overdue," but does not alter the consequences for an overdue payment." *Id.* at 329.

13. On April 20, 2022, after the Court had conducted its hearing on Progressive's Amended Motion for Rehearing of the Summary-Judgment Order, the Second District issued *Century-National Ins. Co. v. Regions All Care Health Center, Inc.*, 336 So. 3d 445 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D896a]. *Century National* holds that an insurer's failure to pay or deny a PIP claim within either the 30- or 90-day periods allowed under § 627.736(4)(b) and (4)(i), respectively, results in the PIP claim becoming overdue but does not bar the insurer from contesting the PIP claim or defending the resulting PIP suit. *Id.* at 448-49. In reaching this conclusion, Second District adopted and quoted the Fifth District's holding in *AFO Imaging* "that while 'section 627.736(4)(b) and (i) . . . establishes a timeframe for investigating claims and making payments, those provisions do not bar an insurer from contesting the claim." *Id.* (ellipsis in original).

14. Even if Progressive had failed to deny Plaintiff's PIP claim within 90 days of receiving the subject medical bills on October 3, 2018, the result of this failure under *Century National* and *AFO Imaging* would be that Plaintiff's PIP claim became overdue in the same manner as if Progressive had not timely paid the PIP benefits within 30 days under § 627.736(4)(b) without an extension under (4)(i). The consequences for PIP benefits becoming overdue in this manner are that: **a)** the medical provider may then serve a statutory pre-suit demand letter under § 627.736(10), which exposes the insurer to interest, a 10% statutory penalty, and postage in addition to the claimed PIP benefits; and **b)** if the insurer does not pay the demanded benefits plus interest, penalty, and postage within 30 days, the provider may file a lawsuit to recover the claimed PIP benefits, which also exposes the insurer to the penalties of interest, costs, and attorneys' fees. *See United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 87 (Fla. 2001) [26 Fla. L. Weekly S747a]. As explained in *Century National* and *AFO Imaging*, Progressive's failure to pay or deny Plaintiff's PIP claim within 90 days as stated in § 627.736(4)(i) would not cause Progressive to lose its right to contest coverage for Plaintiff's PIP claim based on Ms. Bermudez's failure to attend the EUOs or otherwise.

15. Based on the undisputed facts and conclusions of law set forth above, it is hereby ORDERED and ADJUDGED as follows:

a. Progressive's Amended Motion for Rehearing is GRANTED.

b. The Court's Order Granting Plaintiff's Motion for Final Summary Judgment and Entry of Final Declaratory Judgment dated June 21, 2021, is VACATED, SET ASIDE, AND OF NO FURTHER FORCE OR EFFECT.

c. Plaintiff's Motion for Final Summary Judgment is DENIED.

* * *

Civil procedure—Summary judgment—Continuance—Denial—Outstanding discovery

PHYSICIANS GROUP, LLC, a/a/o Markese Golden, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-049193, Division J. August 9, 2022. J. Logan Murphy, Judge. Counsel: Joseph Schaffer, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Steven T. Sock, Dutton Law Group, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment as Demand Was Paid in Full Leaving Plaintiff Without a Cause of Action. Plaintiff filed a "motion in limine to strike" Defendant's supporting affidavit, but otherwise did not file a response or any evidence in opposition to the motion. For the reasons stated on the record at the hearing, the motion is GRANTED. Fla. R. Civ. P. 1.510(e)(2), 1.510(e)(3). The Court will enter final judgment separately.

At the hearing, Plaintiff moved *ore tenus* for a continuance of the summary judgment hearing due to outstanding discovery, citing *Brandauer v. Publix Super Markets, Inc.*, 657 So. 2d 932 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1588a]. For the reasons stated at the hearing, the motion to continue is DENIED. Fla. R. Civ. P. 1.510(d); *Rodriguez v. Avatar Prop. & Cas. Ins. Co.*, 279 So. 3d 1279, 1281-82 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2449b]; *Teague v. Pepsi Co.-Frito Lay*, 270 So. 3d 528, 529 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1175b]; *Martins v. PNC Bank, Nat'l Ass'n*, 170 So. 3d 932, 936-37 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1813a].

FINAL JUDGMENT FOR DEFENDANT

For the reasons stated in the order granting Defendant's motion for summary judgment, the Court enters FINAL JUDGMENT in favor of Defendant First Acceptance Insurance Company, Inc. and against Plaintiff Physicians Group, LLC. Defendant First Acceptance Insurance Company, Inc. shall go hence without day.

The Court retains jurisdiction to award costs and fees, upon appropriate motion and finding of entitlement.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order postponing depositions of fact witnesses until after hearing on insurer's motion for summary judgment is granted where motion involves purely legal question

TRAN CHIROPRACTIC AND WELLNESS CENTER, INC., a/a/o Marcela Cisneros Corona, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-117064, Division I. July 31, 2022. Leslie Schultz-Kin, Judge. Counsel: Joseph Shafer, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Roy A. Kielich, Andrews Biernacki Davis, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS CAUSE, having come on to be heard on July 19, 2022 upon Defendant's Motion for Protective Order, filed on March 15, 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.

2. The Defendant has filed a Motion for Summary Judgment, based on the undisputed fact that Defendant timely issued full payment to Plaintiff in response to its pre-suit demand letter for all outstanding amounts at issue in Plaintiff's pre-suit demand letter prior to the filing of the above styled lawsuit. 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. In the instant case, the Court agrees that based on the current status of the pleadings in this matter, there is no genuine dispute pertaining to the fact that Plaintiff's demand letter dated October

29, 2021 requested payment in the amount of $430.58 for benefits (plus interest, penalty and postage), and Defendant timely issued payment in the amount of $651.45 in benefits (plus interest, penalty and postage) on December 01, 2021.

5. There is nothing further regarding this question that the Defendant's Representative could testify to at deposition that would have any bearing on the issue presented in Defendant's Motion for Summary Judgment, and a deposition of any fact witness in this matter can do nothing to further the Plaintiff's position on that issue. *See Hurley,* 203 So. 2d 530, 534-36; *In re Estate of Herrera v. Berlo Indus.,* 840 So. 2d 272, 273 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b] (holding that summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact).

6. Under Rule 1.280(c)(1), Florida Rules of Civil Procedure, for good cause shown, the Court may enter an order to protect a party from annoyance, undue burden or expense, including that the discovery not be had. *Affiliated Healthcare Ctrs., Inc. a/a/o Julio Paez v. Allstate Fire and Cas. Ins. Co.,* 29 Fla. L. Weekly Supp. 139a (Fla. 11th Jud. Cir., Miami-Dade Cty. Ct., April 20, 2021). Moreover, pursuant to Rule 1.200(a)(4), Florida Rules of Civil Procedure, the Court has the discretion to fashion orders to govern the conduct of discovery, including to schedule, order, expedite or limit discovery. *Id.*

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—Attorney's fees—Amount—Expert fees—Contingency multiplier—Prevailing plaintiff entitled to reasonable attorney's fees and costs, but is not entitled to a contingency risk multiplier

MONIQUE MCFARLANE, Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-004707. September 23, 2022. Jack Gutman, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

FINAL JUDGMENT AWARDING ATTORNEY'S FEES AND COSTS

THIS CAUSE came before the Court for evidentiary hearing on September 21, 2022, on Plaintiff's Motion to Tax Attorney's Fees and Costs pursuant to Section 627.428, Florida Statutes. After observing the demeanor and credibility of the witnesses, weighing the testimony and other evidence presented, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

A. Introduction

1. Together with the legal standards for attorney's fees and contingency fee multiplier awards established in Florida, the Court considered the arguments of counsel, the parties' written submissions in the record, the affidavits and testimony of Timothy Patrick, Esq., testimony of David Caldevilla, Esq., and testimony of Dawn Jayma, Esq., the exhibits entered into evidence during the hearing, the advocacy skills displayed by counsel in this case, the complexity of the issues in this case, as well as the Court's own knowledge about the skills, experience, and reputation of comparable attorneys.

2. In reaching the findings contained in this judgment, the Court has considered the credibility and demeanor of the witnesses, weighed the evidence, and complied with the requirements of Florida Rule of Professional Conduct 4-1.5(b)(1) and (2), the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and applicable case law, including but not limited to, *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) and *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990).

B. Reasonable Lodestar Amount

3. The greater weight of the evidence presented demonstrated that the reasonable hourly rate is as follows:

Timothy A. Patrick, Esq. - $600.00 per hour

4. The greater weight of the evidence presented demonstrated that the following number of hours are reasonable:

Timothy A. Patrick, Esq. - 45.2 hours.

5. Based on the foregoing, the Court finds that a reasonable lodestar amount is $600 x 45.2, which is $27,120.00.

C. Contingency Risk Multiplier

6. Based on the controlling case law and the greater weight of the evidence, the Court finds that the Plaintiff is not entitled to a contingency fee multiplier in this case. The Plaintiff did not establish that she could not have obtained other competent counsel in this market absent the availability of a contingency fee multiplier. The Plaintiff's fee expert did not establish that Plaintiff's counsel was the only competent counsel in the relevant market. *Universal Property & Cas. Ins. Co. v. Raghunath Deshpande*, 314 So. 2d 416 (Fla. 3d DCA 2020 [45 Fla. L. Weekly D2511a].

D. Expert Witness Fees

7. In addition to the foregoing, the Plaintiff is entitled to an award of costs to cover a reasonable fee for the services rendered by her expert witness, David Caldevilla, Esq., in the amount of $10,885.00, based upon a reasonable rate of $650.00 per hour, and a reasonable amount of time of 16.7 hours.

E. Other Taxable Costs

Aside from expert witness fees, the parties stipulated to other taxable costs of $870.00.

G. Total Amount of Attorney's Fees and Costs Awarded Under Section 627.428, Fla. Stat.

9. In summary, based on the foregoing determinations, the total reasonable attorney's fees and costs awarded to Plaintiff are as follows:

Reasonable Lodestar Amount	$27,120.00
Reasonable Expert Witness Fees Taxed as Costs	$10,885.00
Other Taxable Costs	$870.00
Total Reasonable Attorney's Fees and Costs	$38,875.00

10. Accordingly, final judgment is hereby awarded in favor of the Plaintiff, Monique McFarlane, who shall recover from the Defendant, Ocean Harbor Casualty Insurance Company, the sum of $38,875.00 in reasonable attorney's fees and costs, that shall bear prejudgment interest from February 8, 2022 through the date of this final judgment, plus post-judgment interest thereafter, at the rate of 5.53% per annum, which rate shall thereafter adjust annually on January 1 of each year pursuant to section 55.03(3), Fla. Stat., FOR WHICH SUM LET EXECUTION ISSUE.

11. The Defendant shall deliver its payment to Plaintiff's counsel and make its check payable to Patrick Law Group, P.A. Trust Account.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order postponing depositions of fact witnesses until after hearing on insurer's motion for summary judgment is granted where summary judgment motion involves purely legal question of sufficiency of demand letter

HESS SPINAL & MEDICAL CENTERS OF NEW PORT RICHEY, LLC, a/a/o Kayla Lynch, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-029481, Division L. August 2, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Joseph Shafer 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 August 01, 2022 upon Defendant's Motion for Protective Order, filed on July 22, 2021, 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.

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 Declaration and Certification of Business Records, which merely serves to authenticate Plaintiff's purported pre-suit demand letter and claim file documents, are not in dispute. There has been no evidence or argument that the purported pre-suit demand letter and/or PIP Payment Log attached to this Declaration are not true and correct copies. *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. 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, 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—Homeowners—Water damage—Endorsement limiting water damage endorsement is valid and enforceable—No merit to assignee's contention that payments that exhausted benefits included gratuitous payment where, at time policy limits were paid out, insurer had only received one invoice from assignee and was not on notice of invoices submitted by assignee nearly one year later—No merit to claim that insurer did not properly issue payment to assignee where evidence shows that check made payable to both insureds and assignee was mailed to insureds, and there is no evidence that insureds did not receive payment

TOTAL CARE RESTORATION, LLC, a/a/o Theresa Eckert, Plaintiff, v. HOMEOWNERS CHOICE PROPERTY AND CASUALTY INSURANCE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21001182, Division 48. August 28, 2022. Jennifer Wigand Hilal, Judge. Counsel: Leo Mannon, Florida Insurance Law Group, LLC, Miami, for Plaintiff. Scott Gold, Homeowners Choice Property & Casualty Insurance Company, Inc., Miami Lakes, for Defendant.

ORDER GRANTING DEFENDANT'S FINAL SUMMARY JUDGMENT

This cause came to be heard via Zoom Video Conference on July 20, 2022, on Defendant's Motion for Final Summary Judgment and after reviewing the record and hearing arguments of counsel, and being otherwise fully advised in the premises it is hereby;

ORDERED and ADJUDGED as follows:

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

A. No Gratuitous Payment and the Limited Water Damage Endorsement is Valid and Enforceable

1. As to the first issue, the Court finds that Defendant properly paid the Limit of Coverage up to the subject policy's $10,000.00 cap pursuant to the Limited Water Damage Endorsement.

2. As to the $10,000.00 Limited Water Damage Endorsement no counterevidence was provided by Plaintiff and it is widely recognized by the Florida Fourth District Court of Appeal that said "limiting coverage" caps are unambiguous and enforceable. *See Charles Herrington v. Certain Underwriters At Lloyd's London*, Case No. 4D21-1669 (Fla. 4th DCA June 29, 2022) [47 Fla. L. Weekly D1394b] (Court holding that a $5,000.00 Water Damage Endorsement was valid and enforceable).

3. At the hearing Plaintiff agreed that all payments made by Defendant were properly issued except the payment of $2,388.63 to the Insureds, Edmund Burkett and Theresa Eckert, which Plaintiff contends was a "gratuitous payment." The Court disagrees with Plaintiff's position.

4. The record reflects that these payments totaling $10,000.00 were issued on August 14, 2020.

5. As it relates to First-Party Property claims there is no specific case law regarding timelines of what invoices are due when received.

6. However, the record clearly shows that at the time of payment on August 14, 2020, the only invoice received from Plaintiff, Total Care Restoration LLC, was a single invoice for $3,000.00 for various water mitigation services which was submitted to Defendant on May 7, 2020.

7. The record reflects that *after the full $10,000.00 payment cap* was made on August 14, 2020, Plaintiff attempted to submit additional invoices which were not submitted to Defendant until June 11, 2021, nearly a year after Defendant had already exhausted the $10,000.00 Coverage Limit pursuant to the Limited Water Damage Endorsement.

8. Based on this timeline, Defendant could not have made any gratuitous payments as Defendant was not on notice of any additional invoices. Furthermore, Defendant has no duty to withhold funds that the Insureds are entitled to under the policy.

9. Therefore, Defendant had properly exhausted the full $10,000.00 fulfilling its duties and obligations under the subject policy.

B. Defendant Properly Issued the $3,000 Payment to Total Care Restoration when it was sent to the Insureds

10. The next issue pertains to Plaintiff's contention that the payment of $3,000.00 was never sent out. However, the Court finds no evidence was provided to support this argument.

11. It is well established that that evidence of mailing cannot be rebutted merely by evidence that the document was not actually received. *Service Fire Ins. Co. v. Markey*, 83 So.2d 855, 856 (Fla. 1955).

12. Plaintiff incorrectly cites to *Allen v. Wilmington Trust, N.A.,* 216 So. 3d 685 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D691b]. In *Allen*, a trust failed to provide through affidavit testimony swearing that a "notice letter" had been mailed. *Id.*

13. Here the record evidence clearly shows through the affidavit of Defendant's Corporate Representative that the $3,000.00 check for payment for Total Care Restoration LLC's invoice was mailed to the Insureds' address and said payment included both the Insureds' name and Total Care Restoration's name on the payment.

14. Case law is clear as the Fourth District recently ruled in *Expert Inspections, LLC a/a/o Pat Beckford v. United Property & Casualty Insurance Company*, 333 So. 3d 200 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D127a] that an insurer's payment relating to an assignee's invoice is deemed properly sent even if the payment was sent to the insured so long as the payment includes the assignee on the payment.

15. Plaintiff has provided no evidence, affidavit, or testimony from the Insureds stating that they did not receive the payment issued by Defendant.

16. This Court also finds that this case is akin to the Fourth District Court of Appeal's recent holding in *Expert Inspections, LLC a/a/o Pat Beckford*, where Plaintiff's assignment included a "direction to pay" clause which creates a duty for the insured to endorse any payment to the service provider. The Assignment of Benefits here, just like the one at issue in *Expert Inspections, LLC a/a/o Pat Beckford* provided that "if, for any reason payment is made to the Client by the insurance company for the services provided by Service Provider under this contract, it shall be endorsed over to Service Provider within three (3) business days."

17. It is quintessential that no evidence has been provided in the record reflecting that Plaintiff attempted to contact the Insureds regarding any payments received from Defendant. Also, once again, it is undisputed that no evidence has been provided showing that the Insureds never received the funds.

18. Therefore, Plaintiff has failed to rebut Defendant's contention that payment was issued and sent and must be deemed as properly sent.

C. Conclusion

19. Accordingly, the Court finds that Defendant has fully complied with all of its duties and obligations under the policy and cannot have breached the contract and is therefore entitled to summary judgment.

20. Judgment is entered in favor of the Defendant, and the case is hereby dismissed with prejudice.

* * *

Civil procedure—Insurance—Default—Vacation—Insurer that had not filed or served any document in action was not entitled to notice of default and, accordingly, lack of notice did not establish excusable neglect for insurer's failure to file response to complaint—Further, insurer did not exercise due diligence where there was four-month delay in setting motion to vacate for hearing

FLORIDA MOBILE GLASS, a/a/o Rhondrea Francis Pearson, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22005881, Division 81. August 16, 2022. Tabitha Blackmon, Judge. Counsel: Andrew Davis-Henrichs and Emilio R. Stillo, Emilio Stillo, P.A., Davie, for Plaintiff. Britney Wotton, Banker Lopez Gassler, P.A., for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT

THIS CAUSE came before the Court on August 16, 2022, upon Defendant's Motion to Vacate Default and Plaintiff's Motion for Entry of Final Judgment. The Court, having reviewed the Motion and court file, and heard argument of counsel, finds as follows:

1) The Complaint in this case was filed on January 26, 2022.
2) On February 4, 2022, Defendant was duly served.
3 On February 17, 2022, the Court entered a Sua Sponte Notice of Impending Default granting Defendant an additional 20 days within which to file an Answer to the Complaint. As Defendant had not filed any paper in this case at that point in time, they were not noticed when the Court uploaded the Order via the eportal and therefore not entitled to notice pursuant to Fla. R. Civ. P. 1.500(b).
4) On March 7, 2022, Defendant filed a Notice of Appearance, but no Motion for Extension of Time to Respond to Plaintiff's Complaint.
5) On March 17, 2022, this Court issued the Uniform Order Setting Pretrial Deadlines and Related Requirements pursuant to Administrative Order.
6) On March 20, 2022, the Court Sua Sponte entered an Order of Default, which Defendant was served with via the eportal.
7) On March 28, 2022, Defendant filed its Motion to Vacate Default, Affidavit in support of its Motion, and its Answer and Affirmative Defenses.
8) On March 29, 2022, Defendant filed Amended Answer and Affirmative Defenses without leave of Court and in violation of Fla. R. Civ. P. 1.190(a), as a trial Order had been issued in this case.
9) On April 19, 2022, Plaintiff filed its Motion for Final Judgment.
10) On July 27, 2022, Plaintiff scheduled its Motion to Enter Final Judgment along with Defendant's Motion to Vacate Default for hearing on August 16, 2022 via a Notice of Hearing.
11) On August 16, 2022, the Court heard the two motions referenced above in number 10. Defendant argued that it did not receive notice of the impending default. Defendant's assertion that it is entitled to notice of the entry of a Default by the Court when it did not file any paper in the case is misplaced. Fla. R. Civ. P. 1.500(b) is clear that the only time that the "party must be served with notice of the application for default" is if "such party has filed or served any document in this action. . .". The Court does not find this to be excusable neglect for why Defendant did not file a responsive pleading to Plaintiff's

Complaint. In fact, Defendant never even sought an extension of time between service of the Complaint on February 4, 2022 and the entry of the default on March 20, 2022.

12) Additionally, the Court finds that Defendant did not exercise due diligence in setting its Motion to Vacate Default for hearing. The Motion was filed on March 28, 2022, but was not set for hearing until *Plaintiff* did so via a notice of hearing on July 27, 2022 (approximately four months after the filing of the Motion to Vacate).

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion to Vacate Default is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant failed to use due diligence in setting the Motion for hearing in a timely manner as more than six-weeks has elapsed between the filing of the motion and issuance of this Order. The 4th and 3rd DCA Courts have held that a six-week delay in filing a Motion to Set Aside a Default, after notice of the Default, showed there was no due diligence exercised as a matter of law pursuant to *Hepburn v. All Am. Gen. Const. Corp.,* 954 So. 2d 1250, 1252 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1082b] citing *Lazcar Int'l Inc. v. Rene Caraballo,* 32 Fla. L. Weekly D769a, 957 So. 2d 1191, 2007 WL 837197 (Fla. 3d DCA 2007). The Court likens the delay in setting the Motion to Vacate Default, after Defendant was on notice of the Default and the delay in scheduling the Motion to the *Hepburn* and *Lazcar* cases in finding that Defendant did not use due diligence in setting aside the default this case. The Court in *Trinka v. Struna,* 913 So. 3d 626 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1282a] also held that an attorney who filed a motion to vacate a default one month after learning of said default did not act with due diligence and found that the attorney ". . .ignored his duty to act with all due diligence. . ." *Id*. at 627.

Plaintiff's Motion for Entry of Final Judgment is granted. Plaintiff shall submit a Final Judgment within thirty (30) days, failing which this case shall be dismissed without further notice or hearing.

* * *

Insurance—Personal injury protection—Rescission of policy—Refund of premiums—Where insured assigned right to receive premiums paid for PIP coverage to medical provider if policy was rescinded because of material misrepresentation on application, insurer was required to issue PIP portion of refunded premiums to provider following rescission of policy

FLORIDA INTEGRATED MEDICAL SERVICES, a/a/o Sylvers Petit-Homme, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO20014241, Division 70. July 28, 2022. Kim Theresa Mollica, Judge. Counsel: Michael Fischetti, Fischetti Law Group, Boynton Beach, for Plaintiff. Rashad Haqq El-Amin, Miami, for Defendant.

Final Summary Judgment

THIS MATTER having come before the Court for hearing on July 6, 2022, on Plaintiff's Motion for Summary Judgment dated May 19, 2022, and the Court having reviewed the Court file, including all record evidence presented, the parties' motions and supporting documents, and the Court having heard argument of counsel and being otherwise fully advised in the premises,

the Court finds as follows:

1. This case involves a relatively narrow issue: whether the Plaintiff's assignment of benefits requires the Defendant to issue the PIP portion of premiums to the medical provider should there be a policy recission due to a Material Misrepresentation and a subsequent refund of the insurance policy premiums. There are no issues of material fact in dispute, and the matter is ripe for Summary Judgment.

2. Plaintiff provided medical services to the assignor Sylvers Petit-Homme that were related to an automobile accident which the assignor was involved in on or about February 5th , 2020.

3. Plaintiff's medical bills were submitted to the Defendant pursuant to a proper and legally sufficient Assignment of Benefits dated on or about March 10th, 2020.

4. This instant lawsuit was filed by the Plaintiff on or about September 2, 2020, after no payments were made in response to the Plaintiff's pre-suit demand letter filed under Fla. Stat. 627.736(10). There is no dispute to the sufficiency of the demand letter.

5. The Plaintiff's assignment of benefits clearly states in part; "To the extent the PIP insurer contends there is a material misrepresentation on the application for insurance resulting in the policy of insurance is declared voided, rescinded, or canceled, I, as the named insured under said policy of insurance, hereby assign the right to receive the premiums paid for my PIP insurance to this provider and to file suit for recovery of the premiums. The insurer is directed to issue such a refund check payable to this provider only. . ."

6. There is no question that the Defendant received this Assignment of Benefits prior to the Defendant rescinding the instant insurance policy in this claim and issuing premium refunds.

7. The Defendant failed to issue the PIP portion of the policy premiums to the Plaintiff as instructed under the assignment of benefits.

8. The Court agrees that the plain meaning found in the Assignment of the Benefits in this instant case entitles the Plaintiff to the PIP portion of the premiums based on the recession of the policy and that the Plaintiff was entitled to a refund of those premiums. The Defendant in this instant case was failed to issue the refunded premiums to the proper party in this case.

9. The Court finds that the Plaintiff is the prevailing party and is entitled to a final judgment in the amount $99.99 in jurisdictional damages and is entitled to attorney's fees and costs. The Plaintiff shall submit a final judgment to the Court.

* * *

Insurance—Personal injury protection—Complaint—Motion for more definite statement, based on discrepancy between amount of damages alleged in demand letter and amount alleged in complaint is denied—Complaint sufficiently pleads cause of action, and additional information regarding CPT codes or amount at issue can be obtained through discovery

MARTIN L. LESIN, D.C., P.A., a/a/o Alec Grant, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22027917, Division 62. August 8, 2022. Terri-Ann Miller, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter P.A.,West Palm Beach, for Plaintiff. Walwin Taylor, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT

THIS MATTER having come before the Court on Defendant's Motion for a More Definite Statement and the Court having heard argument of counsel, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED, as follows:

This case involves a claim seeking Personal Injury Protection (PIP) benefits whereby the Plaintiff has filed its Complaint alleging breach of contract against the Defendant for failure to pay amounts owed pursuant to Florida Statute 627.736 and the Defendant's policy of insurance. The Defendant has filed its Motion for a More Definite Statement alleging that the Plaintiff's Complaint fails to provide the specific amount of charges, description of services, CPT codes at issue or otherwise specify what payment of No-Fault benefits it alleges was due or owing that would enable Defendant to confidently and accurately answer the Complaint. Additionally, Defendant alleges that

the Plaintiff has provided conflicting information, as its condition precedent Demand Letter states that an amount of $635.16 is owed, and at issue, but its Complaint states the amount in damages does not exceed $100.00. Therefore, under the circumstances, Defendant is unable to respond to Plaintiff's Complaint, nor engage in discovery as it is unaware and otherwise confused as to what is claimed to be due, or at issue in this suit.

This Court has sufficiently reviewed the four corners of Plaintiff's Complaint and hereby finds that the Plaintiff has properly pled a cause of action, such that the Defendant is able to properly file a responsive pleading. Any additional information the Defendant may be seeking as to the CPT codes at issue or the amount at issue, can be obtained through the course of discovery, as that is what the discovery process is intended for. Additionally, the Defendant is in possession of the same documents it is claiming were provided to the Plaintiff in this case and this Court is not going to require the Plaintiff to provide any additional information nor require the Plaintiff to state the exact amount it is seeking in its Complaint as the law does not require such.

This Court finds the Plaintiff's Complaint is legally sufficient and Plaintiff has properly pled a cause of action for breach of contract.

It is therefore ORDERED AND ADJUDGED that Defendant's Motion for a More Definite Statement is DENIED. Defendant shall file and serve an Answer to Plaintiff's Complaint within twenty (20) days of the date of this Order.

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Florida Consumer Collection Practices Act—Predelivery vehicle service fees—Complaint was sufficient to state cause of action against automotive dealer where complaint alleged that dealer violated FDUTPA by failing to disclose predelivery service fees on vehicle lease, that dealer violated FCCPA by collecting fees where it knew debt was illegitimate, and that plaintiff who paid fees suffered actual damage as consequence of violations—Motion to dismiss or for summary disposition is denied

JONATHAN PEREZ, Plaintiff, v. RICK CASE CARS, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20012763, Division 60. January 9, 2022. Allison Gilman, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood; and Darren Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. Kenneth L. Paretti, Quinton & Paretti, P.A., Miami, for Defendant.

ORDER ON DEFENDANT'S SECOND AMENDED MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION FOR SUMMARY DISPOSITION

THIS MATTER, having come before the Court on Defendant's second amended motion to dismiss and in the alternative motion for summary disposition. The Court, having listened carefully to the arguments of counsel, reviewed the pleadings and the applicable law, and being otherwise fully advised in the premises, hereby makes the following findings:

The Plaintiff's complaint alleges that Plaintiff leased a vehicle from Defendant under a Florida Closed-End Vehicle Lease Agreement ("Lease"). Plaintiff's Complaint ¶¶ 5-7. On the Lease, Defendant charged Plaintiff two pre-delivery service fees: (1) a $132.95 "ELECT FILING" fee; and (2) a $741 "3rd PARTY TAG AGENCY/DEALER FEE." Compl. ¶¶ 10-11; Compl. Exhibit A pg. 15. The Lease does not have the following disclosure associated with those fees: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." Compl. ¶12 *citing Fla. Stat.* § *501.976(18).*

Based on the above, Plaintiff has sued Defendant for violating the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and the Florida Consumer Collection Practices Act ("FCCPA"). Compl. ¶¶ 59-71. Plaintiff's FDUTPA and FCCPA claim allege that Defendant violated *Fla. Stat.* § *501.976(18)* which provides:

> It is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a dealer to . . . Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure:
>
> "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."

The Complaint alleges that despite having charged line-item, predelivery service fees on the Lease, Defendant omitted the above disclosure from where the fees are found on the Lease. Compl. Ex. A pgs. 15-19. The Complaint also alleges that Defendant knew the fees were an illegitimate debt and it had no legal right to charge and collect them from Plaintiff. *See, e.g., Id.* ¶¶ 5-24. As a result, Plaintiff suffered actual damages, having had paid the fees, because of Defendant's FDUTPA and FCCPA violations.

ANALYSIS

To state a FDUTPA claim, a plaintiff must plead these three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d Dist. App. 2006) [31 Fla. L. Weekly D3148a]. A violation of *section 501.976(18)* constitutes a *per se* FDUTPA violation. *Fla. Stat.* § *501.203(3)(c)* (providing that a *per se* violation occurs when a defendant violates "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices"); *see State Farm Mut. Automobile Ins. Co. v. Performance Orthapaedics & Neurosurgery, LLC,* 315 F. Supp. 3d 1291, 1300 (S.D. Fla. 2018).

The FCCPA § 559.72(9) requires that no person shall:

> Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist.

When analyzing whether a defendant has violated the FCCPA, courts "refer to other statutes that establish the legitimacy of the debt and define legal rights*." Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1126 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C337a] (finding that the Higher Education Act, *20 U.S.C.* §§ *1001 et seq.*, was such a statute as its regulations define the rights of third-party debt collectors, and debtors, when federal student loans are collected) (internal citations omitted); *Brook v. Suncoast Schools, FCU,* 8:12-CV-01428-T-33, 2012 WL 6059199, at *3 (M.D. Fla. Dec. 6, 2012) (finding FCCPA violated when defendant asserted illegitimate legal right by trying to collect a debt using unfair and deceptive practices in violation of FDUTPA); *Cabrera v. Haims Motors, Inc.*, 288 F. Supp. 3d 1315, 1326 (S.D. Fla. 2017).

A hearing was held on December 1, 2021. As stated on the record during the hearing, the Court denies the motion to dismiss for these reasons:

> I think the statute [*Fla. Stat.* § *501.976(18)*] is clear that it does need to—the language needs to be contained on all of the documents and it's clearly not. And even though the damages may be very small, but I think it's clear there was damage. So, for those grounds, I am going to deny the Motion to Dismiss.

Transcript 27:3-13.

Based on the above, the Court rules that:

1. Defendant's second amended motion to dismiss and in the alternative motion for summary disposition is **DENIED**.

2. Defendant must respond to the complaint within (15) days after entry of this order.

* * *

Insurance—Personal injury protection—Complaint—Motion for more definite statement is denied where complaint sufficiently pleads cause of action, and additional information regarding CPT codes or amount at issue can be obtained through discovery

CENTER FOR BONE AND JOINT SURGERY OF THE PALM BEACHES, P.A., a/a/o Tiara Singh, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22027913, Division 55. August 23, 2022. Daniel Kanner, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter P.A., West Palm Beach, for Plaintiff. Walwin Taylor, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT

THIS MATTER having come before the Court on Defendant's Motion for a More Definite Statement and the Court having heard argument of counsel, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED, as follows:

This case involves a claim seeking Personal Injury Protection (PIP) benefits whereby the Plaintiff has filed its Complaint alleging breach of contract against the Defendant for failure to pay amounts owed pursuant to Florida Statute 627.736 and the Defendant's policy of insurance. The Plaintiff states in its Complaint that this is an action for Breach of Contract, for a claim less than $100.00, exclusive of interest, attorney's fees, and costs.

The Defendant has filed its Motion for a More Definite Statement alleging that the Plaintiff's Complaint fails to provide the specific amount of charges, description of services, CPT codes at issue or otherwise specify what payment of No-Fault benefits it alleges was due or owing that would enable Defendant to confidently and accurately answer the Complaint. Therefore, Defendant alleges that under the circumstances, Defendant is unable to respond to Plaintiff's Complaint, nor engage in discovery as it is unaware and otherwise confused as to what is claimed to be due, or at issue in this suit. At a minimum, Defendant alleges it is uncertain of the amount of damages alleged owed to the Plaintiff.

This Court has sufficiently reviewed the four corners of Plaintiff's Complaint and hereby finds that the Plaintiff has properly pled a cause of action, such that the Defendant is able to properly file a responsive pleading. Any additional information the Defendant may be seeking as to the CPT codes at issue or the amount at issue, can be obtained through the course of discovery, as that is what the discovery process is intended for. This Court is not going to require the Plaintiff to provide any additional information nor require the Plaintiff to state the exact amount it is seeking in its Complaint as the law does not require such.

This Court finds the Plaintiff's Complaint is legally sufficient and Plaintiff has properly pled a cause of action for breach of contract.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion for a More Definite Statement is **DENIED WITHOUT PREJUDICE**. Defendant shall file and serve an Answer to Plaintiff's Complaint within twenty (20) days of the date of this Order.

* * *

NEELD FAMILY CHIROPRACTIC, Plaintiff, v. SECURITY NATIONAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22000500, Division 53. July 25, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO EXCUSE PERSONAL APPEARANCE AT MEDIATION

The Defendant's Motion to Excuse Personal Appearance at Mediation is DENIED. Although this case appears to have no tie to Broward County, neither party objected to its proceeding here, so no one should now be heard to complain that it is an inconvenience for a client to appear here.

* * *

Volume 30, Number 6
October 31, 2022
Cite as 30 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Judge may write children's book about becoming a judge in conjunction with an out-of-state attorney so long as book does not comment on pending cases or controversies—Judge may promote book within guidelines established by Code of Judicial Conduct, be identified as a judge in the book, and establish a private business entity with co-author to market the book

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-09. Date of Issue: August 29, 2022.

ISSUES

1. Is a judge permitted to write a children's book about what judges do, what it takes to become a judge, and to emphasize that children who are members of minority groups can grow up to become judges? **YES**, so long as the book does not comment on pending cases or controversies, or give legal advice.

2. Is the judge entitled to share any profits from the book with its co-author? **YES**.

3. May a judge create a limited liability company (LLC) to market and collect income from a children's book the judge has written? **YES**.

4. If so, may the co-author be a partner in the LLC, or must the judge create and operate the LLC alone? **YES**, the judge need not be the sole owner/operator.

5. May the judge give public readings of the book at schools, community centers, and similar institutions? **YES**, so long as the judge does not comment on pending cases or legal controversies or give legal advice, and the activities do not conflict with the judge's professional schedule.

6. If so, may the judge wear a judge's robe when doing so? **NO**.

7. May the judge give public readings in conjunction with a "lawyers for literacy" program? **YES**, so long as the judge does not comment on pending cases or legal controversies, give legal advice, or solicit lawyers to purchase copies of the book or for invitations to such events, and these activities do not interfere with the judge's schedule.

8. May the judge promote the book *via* media outlets such as radio? **YES**, so long as the judge does not comment on pending cases or legal controversies or give legal advice and, once again, the promotional activities do not intrude into the judge's professional schedule.

9. If so, may the judge be identified as a sitting judge, and discuss the role of a judge? **YES**.

FACTS

The inquiring judge has co-authored a children's book with an attorney who does not practice in Florida. The book is intended to educate its readers about the role of a judge and to inspire children to dream of becoming judges, regardless of race, gender, or ethnic background. The judge advises that (a) the book will be marketed to parents and the general public, and not directly to lawyers,[1] (b) the book will identify the author only by name, that is, it will not mention that the author is a judge,[2] (c) the judge will not market or give public readings of the book during business hours, (d) profits from sales of the book will not go to any organization, person, or other entity apart from the authors themselves, and (e) for every book sold on Amazon.com, one will be donated to a school, community center, or a child in need. The judge has read the several opinions by this Committee regarding judges who wish to become authors, but asks several questions not expressly addressed in those opinions.

DISCUSSION

The inquiring judge's questions are answered above in the order they were presented in the inquiry. However, we believe those questions can be subdivided into three discrete lines of inquiry, the first being whether a judge may author such a book at all. This Committee is occasionally called upon by judges who have written, or plan to write, books, ranging from fiction (Fla. JEAC Op. 2019-30) [27 Fla. L. Weekly Supp. 778a] to professional topics (Fla. JEAC Op. 2019-18) [27 Fla. L. Weekly Supp. 336a] and even, as noted in the foregoing footnote, to children's books (Fla. JEAC Op. 2010-12) [17 Fla. L. Weekly Supp. 857a]. Much like the campaign literature we are often asked to vet, it is not possible for the Committee to offer more than general guidance about what sort of subjects these out-of-court writings should avoid. As noted in Fla. JEAC Op. 2019-30 [27 Fla. L. Weekly Supp. 778a], "The only way to make that kind of assessment is to read the whole book."

That said, the description of the book's content provided by the judge indicates nothing that would detract from the dignity of judicial office. Further, it appears unlikely that the book will comment on pending cases or controversies, or give legal advice. While writings of this sort are strongly discouraged, educating and uplifting children are not. Canon 4 of the Florida Code of Judicial Conduct encourages judges to "engage in activities to improve the law, the legal system, and the administration of justice." Enlightening children about the judicial process furthers this goal. As was noted in footnote 2, the proposed book should fall squarely within the scope of Canon 4B.

The second category of questions concerns the means, if any, whereby the judge can promote the book. Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b] sets forth a "laundry list" of eight factors that a judge should consider when going before the public, not all of which would apply to writing and promoting a book. Of primary relevance, the activity must not detract from the judge's fulltime duties. In other words, the judge must not spend an inordinate time away from the bench to promote the book. To do otherwise would unfairly burden one's fellow judges who would have to take up the slack caused by any absences.

Additionally, the extracurricular activities must not call into question the judge's impartiality. Examples would include commentary on disputed legal issues or on pending cases, and giving legal advice. Nothing in the brief syllabus provided by the inquiring judge suggests that either the book itself or the judge's public readings of it would run afoul of these requirements. With respect to public events sponsored by lawyers or Bar associations, we see no impediment to a judge participating in such functions, including reading the book if requested to do so—however, as with requests to *purchase* the book, the judge should not approach lawyers about opportunities to read or otherwise promote the book.

As noted, the judge has asked whether a robe may be worn during any public readings of the book or other promotional events. The question of who may or may not wear a robe, and when, has most commonly come before this Committee in the context of candidates who wish to portray themselves enrobed in their campaign advertising. However, the thrust of those opinions is whether such advertisements would convey an inaccurate impression that the individual is *currently* a judge. In the present case there is no question about that. We turn, therefore, to a review of available precedent regarding robe-wearing outside of court. These opinions focus on the impact upon the dignity of the office and the improper promotion of the private interests of the judge or others.

In Fla. JEAC 2007-07 [14 Fla. L. Weekly Supp. 693a], a local public library contemplated a promotional campaign that did not involve fundraising; however, local "celebrities" would allow their

images to be employed on billboards and in promotional literature. One of the persons solicited was a sitting judge. A majority of the Committee concluded that "the judge's gavel-wielding, robe-adorned, photographic promotion of a discrete entity constitutes the impermissible promotion of the private interests of another in contravention of Canon 2B" even though the library was a public entity.[3] On the other hand, we have approved the use of a robe by a judge conducting a mock trial for purposes of educating police officers; *see* Fla. JEAC Op. 2018-10 [26 Fla. L. Weekly Supp. 247a]; but in so doing, we reasoned that this activity was consistent with the encouragement in Canon 4B that judges participate in the betterment of the legal system. From an abundance of caution, we conclude that wearing the judicial robe while promoting the book is closer to the situation in Fla. JEAC Op. 2007-07 [14 Fla. L. Weekly Supp. 693a] and therefore not allowed.

Obviously, if the judge successfully promotes the book a benefit will accrue, not only to the judge, but the co-author as well. In Fla. JEAC Op. 2021-14 [29 Fla. L. Weekly Supp. 490a], which involved a judge's participation in podcasts broadcast by the judge's spouse, this Committee devoted considerable attention to the effect of Canon 2B on the judge's contemplated plans. Canon 2B prohibits judges from "lend[ing] the prestige of judicial office to advance the private interests *of the judge or others*" (*emphasis added*). While the Committee found nothing improper about what the judge would discuss during those podcasts, its decision that the judge could participate was not unanimous, two members expressed concerns that the judge would be lending prestige to the sponsor of the podcasts, as well as the judge's spouse.

By promoting the book, the inquiring judge would be advancing not only the judge's private interests, but those of the co-author as well. In Fla. JEAC Op. 2021-14 [29 Fla. L. Weekly Supp. 490a] we were presented with a second, possibly unique question, *viz.,* whether the inquiring judge, who was otherwise green-lighted to participate in the spouse's podcasts, could post a congratulatory message on the web site Linkedin.com once a book published by the spouse was released. All but one committee member agreed the judge could not do so for fear the message would be seen as an endorsement, that is, that it would improperly lend judicial prestige to the spouse's interests.

Notably, however, that judge did not write or co-write the book. We have clearly expressed our belief that a judge could promote the judge's biography of a prominent attorney, including posting notices on social media and booking speaking engagements—subject, of course, to compliance with Code guidelines—even though the judge would benefit personally from sales of the book. Fla. JEAC Op. 2020-21 [28 Fla. L. Weekly Supp. 562a]. Moreover, nothing in the Code expressly prevents judges from co-authoring anything. We therefore conclude that it is inappropriate to create a double standard that, on the one hand, permits judges to publicize solo efforts and, on the other, precludes the same type of activity when there is a co-author.

Finally, the third category of questions relates to the manner in which profits from the sale of the book are to be handled. Although Fla. JEAC Op. 1998-01 did not actually involve a judge who planned to co-author a book, it nevertheless addressed that issue as well as the specific question by the inquiring judge. Because the co-author of our inquiring judge's book, though an attorney, is not licensed in Florida, the potential conflicts discussed in Fla. JEAC Op. 1998-01 and opinions cited therein do not arise. As for the contemplated establishment of a limited liability company, we look to Canon 5A(4) of the Florida Code of Judicial Conduct, which cautions judges against any extrajudicial activities that would interfere with the proper performance of a judge's duties—that is, consume an inordinate amount of the judge's time. Nothing about the judge's inquiry suggests to us that marketing the book, so long as it is done on the judge's personal time, away from the courthouse, and did not involve soliciting lawyers, would interfere with the judge's job.

Canon 5D provides further guidance on judges' private business activities. Subsection (1)(a) bars judges from conducting themselves in a manner that "may reasonably be perceived to exploit the judge's judicial position." We do not interpret judicial authorship, even for profit, as qualifying as such exploitation. Further, while subsection (b) discourages "frequent transactions" between judges and "lawyers or other persons likely to come before the court," as noted the attorney who will co-author this judge's book does not practice in Florida and the inquiring judge is clearly aware that the book cannot be directly marketed to lawyers by the judge or anyone under the judge's direction.

Canon 5D does not forbid judges from participating in private businesses *per se*, at least if the business is "closely held by the judge or members of the judge's family." Canon 5D(3)(a). A small LLC, set up for a limited purpose, should not run afoul of this provision. As was made clear in Fla. JEAC Op. 2014-27 [22 Fla. L. Weekly Supp. 769a], the primary concern over LLC's is that judges must choose their professional associates carefully so as not to require frequent disqualification. We do not read Fla. JEAC Op. 2020-25 [28 Fla. L. Weekly Supp. 747a] as holding to the contrary. It is distinguishable because the inquiring judge had, prior to election, owned a Professional Corporation, governed by Fla. Stat. § 621.03 *et seq.,* organized solely for the purpose of practicing law, which sitting judges are forbidden from doing.

REFERENCES

Section 621.03, Florida Statutes.
Florida Code of Judicial Conduct, Canons 2B, 4, 4B, 5A(4), 5B, 5C(1), 5D, 5D(1)(a), 5D(1)(b), 5D(3)(a)
Fla. JEAC Opinions 1998-01, 2007-07, 2010-12, 2014-27, 2018-10, 2019-02, 2019-18, 2019-30, 2020-01, 2020-21, 2020-25, 2021-03, 2021-14

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[1]In Fla. JEAC 2019-18 [27 Fla. L. Weekly Supp. 336a], this Committee agreed that the inquiring judge could write a book on family law issues, subject to guidelines set forth in the opinion, but cautioned that neither the judge, the judicial assistant, nor the judge's family members should market the book to attorneys. Such conduct could reasonably be viewed by those individuals as coercive. This should not be read as *preventing* lawyers from purchasing the book of their own volition.

[2]We are not convinced that the author cannot self-identify as a judge. Admittedly, prior opinions of this Committee, specially tailored to the unique situations presented to us, may have contributed to some confusion on this point. In Fla. JEAC Op. 2021-03 [29 Fla. L. Weekly Supp. 54a], we concluded that a sitting judge could write an "advocacy article" in support of proposed legislation affecting the safety of autistic children, finding such an endeavor consistent with Canon 5B of the Florida Code of Judicial Conduct (encouraging judges to write or speak on non-legal subjects so long as it does not run afoul of other provisions in the Code) and also that the article would not constitute "lobbying," which is strictly controlled by Canon 5C(1). However, we also found that signing the article *as a judge* would improperly lend the prestige of judicial office to a private endeavor. *See* Canon 2B. The present case, however, does not involve the type of activity contemplated by Canon 5B, but rather falls within Canon 4B, which permits judges to "speak, *write*, lecture [and] teach" about these subjects as well as "the role of the judiciary as an independent branch within our system of government" (*emphasis added*). In Fla. JEAC Op. 2010-12 [17 Fla. L. Weekly Supp. 857a], which coincidentally also involved a children's book, we found no impediment to identifying the author by profession, describing it as "incidental to the avocational activity of the author." Judges' unique insights into the law and the legal system may enhance the credibility of their writings, even when aimed at children rather than adults. *See also* Fla. JEAC Op. 2020-01 [27 Fla. L. Weekly Supp. 1055a]. We do not believe the Code of Judicial Conduct proscribes this.

[3]However, the opinion also drew a distinction between advertising a specific institution and a more generalized "public awareness campaign promot[ing] only literacy, the value of education, or a similar concept[.]"

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Government boards and commissions—Judge may not serve on or consult with an executive branch policy-making committee or commission which is focused on school safety issues rather than the law, legal system, administration of justice, or independence of judiciary

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-10. Date of Issue: August 30, 2022.

ISSUE

May a judge serve on an executive branch committee created by the Florida Department of Education ("FDOE") where the committee's goal is to enhance school safety by addressing improvements in how local school districts report student/school-related conduct, communication, and disciplinary matters to FDOE?

ANSWER: No.

FACTS

The inquiring judge has been asked by the Office of School Safety, which is a part of FDOE, to serve on the recently created School Environmental Safety Incident Reporting ("SESIR") committee. The creation of SESIR was directed by the chair of the Marjory Stoneman Douglas High School Public Safety Commission ("MSD Commission"). The SESIR committee will report back to the MSD Commission. A recent grand jury report stated that the drafters of an administrative rule which, among other things, describes incidents of student conduct or communication that must be reported by local school districts, failed to use definitional terms that mirror terminology used in Florida's criminal statutes describing the same conduct. The Office of School Safety has reached out to the inquiring judge, as well as state's attorneys and criminal law practitioners, to become a member of the SESIR committee to assist in harmonizing the definitions to be used in a proposed revision of the rule with those used in criminal statutes. There will be at least two in-person and two virtual meetings that the judge would be expected to attend during the next two months.

DISCUSSION

Canons 4C and 5C(1) state that a judge shall not appear at a public hearing or consult with an executive or legislative body, except on matters concerning the law, legal system, or administration of justice. Canon 5C(2) provides that a judge must not accept appointment to a governmental committee or commission that is concerned with issues of fact or policy on matters other than the improvement of the law, legal system, or administration of justice.

The JEAC has issued opinions in the past determining that Canons 4 and/or 5 dictate that a judge should not serve: on a county elections task force to address issues encountered in recent general elections (Fla. JEAC Op. 13-03) [20 Fla. L. Weekly Supp. 303a], on a committee drafting a code of ethics for county commissioners (Fla. JEAC Op. 09-06) [16 Fla. L. Weekly Supp. 479b], as a member of a county fire board (Fla. JEAC Op. 99-11), or as a member of an advisory board concerning a city's promotional process (Fla. JEAC Op. 93-20). It was the JEAC's conclusion in each of those opinions that the matter(s) which each group addressed was not the law, legal system, or administration of justice.

On the other hand, the JEAC has in the past concluded it was proper for judges to serve on a city's mortgage fraud board for the purpose of educating the public (Fla. JEAC Op. 08-01) [15 Fla. L. Weekly Supp. 296a]; on alcohol, drug abuse and mental health councils (Fla. JEAC Ops. 88-24; 88-30); on juvenile detention center community advisory and juvenile justice boards (Fla. JEAC Ops. 94-04; 94-31); and on a task force on gang-related activities (Fla. JEAC Op. 00-05) [7 Fla. L. Weekly Supp. 366a]. The JEAC concluded that in those instances, each group's focus was law related. In some of these opinions, at least one member dissented and concluded that the inquiring judge should not serve as a member of the group.

Here, the very important goal of enhancing school safety is the focus of both the SESIR Committee and the MSD Commission, rather than the law, the legal system, or the administration of justice. Thus, it is the JEAC's opinion that the above-cited Canons require the inquiring judge to decline the invitation to join the SESIR committee.

REFERENCES

Fla. Code Jud. Conduct, Canons 4C, 5C(1, 2).
Fla. JEAC Ops. 88-24, 88-30, 93-20, 94-04, 94-31, 99-11, 00-05, 08-01, 09-06, 13-03.

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