Volume 30, Number 7, November 30, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 397-451

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—STANDING—ASSIGNMENT. A county court judge granted an insurer's motion to dismiss based on lack of standing because the assignment did not contain the "written, itemized per-unit cost estimate for services to be performed by assignee," as required by section 627.7152(2)(a)(4). Although the assignment attached to the complaint included a chart entitled "Good Faith Itemized Per-Unit Cost Estimate" which listed various services and the per-unit costs associated with those services, there was no indication or estimate of how many actual units of each service were to be provided.** *AQUA DOCS WATER RESTORATION, INC. v. PEOPLE'S TRUST INSURANCE COMPANY. County Court, Seventeenth Judicial Circuit in and for Broward County. Filed September 1, 2022. Full Text at County Courts Section, page 447b.*

- **ELECTIONS—MUNICIPAL—CITY COMMISSION—RECALL PETITION. A recall petition targeting several city commissioners who had voted in favor of a motion to prohibit all hiring, including hiring of police officers and firefighters, did not establish the malfeasance that is required to justify recall. Voting was an authorized act by city officials, the hiring freeze was the collective act of the commission, not of individual commissioners, and the freeze did not violate the city charter. Although the petition included an additional ground for recall, the presence of an invalid ground on a recall petition would taint any recall election even if the additional ground were valid.** *HARRIS v. BITTLE. Circuit Court, Second Judicial Circuit in and for Gadsden County. Filed August 30, 2022. Full Text at Circuit Courts-Original Section, page 403a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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20CIR 10	Circuit Court - Original (20th Circuit, page 10)
CO	County Court
M	Miscellaneous Reports

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Bold denotes decision by circuit court in its appellate capacity.

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TABLE OF CASES OVERRULED, MODIFIED OR EXPLAINED (continued)

TABLE OF CASES OVERRULED, MODIFIED OR EXPLAINED (continued)

* * *

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* * *

DISPOSITION ON APPELLATE REVIEW

Disposition of cases previously reported in FLW Supplement on review by appellate courts. This is not a comprehensive listing.

* * *

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CIRCUIT COURTS—APPELLATE

Counties—Animal control—Dangerous dogs—Dogs running at large—Unprovoked attack—Due process—Dog owner not entitled to relief on claim that he was denied due process by county's failure to exchange exhibits prior to hearing on citations where owner offered no support to establish that he was prejudiced—Hearing officer had discretion to allow daughter to translate for mother, who was victim of dog bite, even though daughter was not certified interpreter and was county witness—Owner failed to prove that daughter did not accurately translate mother's testimony where record does not include recording or transcription of Spanish testimony—Record does not support claim that owner was denied opportunity to cross-examine witnesses—Finding that dog was unprovoked at time of attack was supported by competent substantial evidence—Hearing officer rejected, as not credible, owner's testimony that owner's aggressively tackling dog actually provoked dog to bite victim walking on the street—Finding that dog was running at large because of owner's failure to exercise due care is supported by competent substantial evidence that dog followed owner outside though two doors that were left open

JEREMY ST. JEAN, Appellant, v. MIAMI-DADE COUNTY, FLORIDA CODE ENFORCEMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-58-AP-01. September 6, 2022. An Appeal from Miami-Dade County, Florida Code Enforcement. Counsel: Benjamin J. Biard, Winget Spadafora Schwartzberg, LLP, for Appellant. Geraldine Bonzon-Keenan, Miami-Dade County Attorney, Cristina Rabionet, Assistant County Attorney, for Appellee.

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

OPINION

(PER CURIAM.) This matter comes before this Court on an Appeal filed by Jeremy St. Jean ("Appellant") following a Miami-Dade County Code Enforcement Hearing determining that his dog is a "dangerous dog" and was "running at large."

Background

Appellant is the owner of an English bulldog named Gino. Ms. Diamantina Arguello ("Arguello") resides on the same street as Appellant. On September 3, 2020, Arguello went for a walk with her daughter Katherine, and while walking in front of Appellant's house at night, Arguello was bitten by Gino on her leg. She received sutures for her bite at the hospital. The police were called, and a service request was initiated with Miami-Dade County Animal Services Department ("Department") for investigation. Department Investigator Gabriella Dominguez ("Investigator Dominguez") responded to the service request, and after conducting interviews and reviewing affidavits, issued two citations for "dangerous dog" and dog "running at large."

Appellant timely appealed and requested an administrative hearing. On September 27, 2021, Joseph Podgor, Jr., ("Hearing Officer") conducted a hearing and Investigator Dominguez, Arguello, her daughter Katherine Arguello ("Katherine"), and Appellant testified. As Arguello spoke Spanish and did not have an interpreter, the Hearing Officer allowed Katherine to interpret for her mother.

During her testimony, Investigator Dominguez presented her reports, correspondence, and other exhibits including medical records; an affidavit from Diamantina Arguello; a photo of Gino; and a photo of Arguello's dog bite wound.

Appellant also presented exhibits, including his affidavit; photos of his house; videos of Gino; and photos of his girlfriend's daughter with Gino.

Arguello testified that she went out at night to walk with Katherine. She said that while they were walking by Appellant's house, Gino came out and attacked her. Katherine also testified that she had gone out to walk with her mother that evening, during which time Gino ran up to them and bit her mother on the leg.

Appellant testified that he had adopted Gino two years prior, and that he found Gino to be a loving, affectionate and caring dog. He testified that while taking his garbage out on the night in question, Gino accidentally escaped. Appellant further testified that he ran after Gino in a "forceful, aggressive manner" because he was afraid that Gino would run into oncoming traffic and be hit by a car. He tackled Gino from behind in an effort to keep him from running into the street. Appellant contends that Gino's reaction to the tackle was to reach back and snap at what was attacking him. At the same time, Arguello happened to be walking in close proximity, causing Gino to bite Arguello in response to Appellant's provocation.

At the conclusion of the Hearing, the Hearing Officer affirmed both citations.

Standard of Review

Circuit court review of a quasi-judicial decision is governed by a three-part standard: "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Miami-Dade Cty. v. Omnipoint Holdings,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a] (citation omitted). Appellant argues that he was not accorded procedural due process and there was a lack of competent substantial evidence to support the County's decision.[1]

Procedural due process

We first address the issue of whether Appellant was denied procedural due process. "Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure." *Jennings v. Dade Cty.,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). However, certain standards of basic fairness must be followed in order to afford due process. *Id.* "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Id.*

Appellant presents three arguments claiming that the County violated his due process rights. First, he argues that there was no exchange of exhibits prior to the Hearing. Second, he asserts that Katherine Arguello should not have been allowed to interpret for her mother. This argument addresses his contention that Katherine was not a certified interpreter, she was a witness for the County, and she misinterpreted the testimony. Third, he argues that he was not permitted to cross-examine the witnesses.

Appellant's first argument is that the County failed to exchange exhibits with him prior to the Hearing. However, Appellant never made a pre-hearing request for the County's exhibits. Moreover, because the hearing was a quasi-judicial proceeding, strict rules of evidence and procedure are not controlling. *Jennings,* 589 So. 2d at 1340. Appellant offered no support on the record to establish that he was prejudiced by not receiving the exhibits prior to the Hearing. Further, beyond conclusionary statements, he did not explain to this Court how he was prejudiced. Thus, we find that there was no due process violation.

Appellant's second argument concerns the use of Katherine Arguello as an interpreter for her mother. He maintains that because Katherine was not a certified interpreter, and because she was a witness for the County in the Hearing, Appellant's due process rights were adversely affected. Appellant cites to no rule regarding a requirement for certified interpreters in administrative proceedings.

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Moreover, because the Hearing was not controlled by strict rules of evidence and procedure, the Hearing Officer correctly granted some leeway for Katherine to interpret for her mother. We find that the Hearing Officer had the discretion to allow Katherine to translate for her mother, even though she was a County witness. As discussed below, there is nothing in the record to show that her interpretation was inaccurate or prejudicial to Appellant.

Appellant maintains that "[d]uring her testimony, her daughter (Katherine) mistranslated portions of the testimony, testified beyond the translation and failed to translate other information." (Brief, p. 7) However, Appellant has the burden to provide an adequate record to demonstrate error. *Schmitt v. Maile,* 946 So. 2d 60, 61- 62 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D43a]. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979). We agree with the County that because the record provided does not include a recording or transcription of the Spanish testimony that was interpreted, Appellant cannot establish the inaccuracy of Katherine's interpretation. As a result, Appellant has failed to meet his burden to show that Katherine's interpretation of her mother's testimony deprived him of procedural due process.

Appellant's third argument is that he was denied the opportunity to cross-examine the witnesses. The record does not support this assertion. What the hearing transcript does show is that "Mr. Diaz," the attorney for witness Arguello,[2] was told by the Hearing Officer that because he represented a non-party witness, he was not permitted to question witnesses. The Appellant never asked the Hearing Officer if he could cross-examine any of the witnesses. The Hearing Officer never stated that he would not permit Appellant to cross-examine the County's witnesses. Appellant's argument on this point is thus without merit.

Competent Substantial Evidence

We now turn to the issue of competent substantial evidence. "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a]. The test is whether there exists any competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs.,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Dangerous dog (citation 2020-R030916)

Code section 5-22, Dangerous dogs; authority to designate dog as dangerous; confiscation; appeal procedure, states:

> (d) "The Director or designee shall designate a dog as dangerous if the dog commits one (1) or more of the following acts:
>
> (1) To, when unprovoked, endanger, attack, or bite a human;"
>
> ...

Code section 5-22(b)(2) states that " '[u]nprovoked' means that the victim was acting peacefully and lawfully when encountering the dog and that the dog was not acting defensively or responding to a threat."

Appellant was cited for a violation of Code section 5-22, and Gino was labeled a "dangerous dog." Appellant argues that for the Hearing Officer to have established a violation of section 5-22, Gino must have been unprovoked at the time of the incident. Appellant argues that the Hearing Officer mistakenly held that because the Arguellos were not the provoking factors, then Gino was unprovoked. Appellant contends that a dog attack can be considered "provoked" if the dog's owner does something to make the dog either act defensively or respond to a perceived threat. Appellant contends that his chasing and tackling Gino caused Gino to either act defensively or respond to a perceived threat. Hence, Gino's attack could be considered a provoked attack, and under that scenario, section 5-22(b)(2) ("unprovoked") is inapplicable. We find no merit to this argument.

The Hearing Officer had an opportunity to judge the veracity of the witnesses, observe the demeanor of the parties and weigh the testimony of each side. The Officer found the testimony of the Appellant to be inconsistent and not credible. For example, Appellant's testimony was inconsistent when he testified: ". . . I went to grab his collar, which I had taken off, and so I jumped at him, and when I jumped at them, (sic) I grabbed him and I slammed [him] to the ground. And that's when **he reached back and I thought - I just thought he was snapping at me**, and I realized he was - there was two ladies in—I don't—I'm not sure if they were in the street, on the sidewalk, but in front of him." (Tr. at 51:5-13)[3] (emphasis supplied) Appellant further testified: "So after the ladies—one lady in particular jumped back, I was able to get [him], and I just dragged him, carried him, I forget exactly what I did that night, back into the house." (Tr. at 51:25-52:3)

However, Appellant's affidavit states: "I ran after Gino, my dog, and tackled him before he reached two (2) females who were at the edge of the property. When Gino and I slammed to the ground, **Gino slipped out of my grasp and jumped at one (1) of the females**." (R. at 41)[4] (emphasis supplied). Thus, Appellant first testified that Gino reached back and snapped and him, and presumably Arguello. But his affidavit stated that Gino jumped at Arguello, without mentioning that Gino snapped at him.

In addressing Appellant's assertions, the Hearing Officer reasoned that a dog biting a third party a distance away as a response to a threat from an owner tackling a dog was too far removed. The Hearing Officer was well within his discretion to reject as not credible Appellant's testimony that he aggressively grabbed Gino, and thereby provoked Gino to attack Arguello. Instead, he concluded that the typical response from an owner tackling his dog would be for the dog to bite its owner. This conclusion is not contradicted by the record before the Court.

While giving little to no weight to the testimony of Appellant, the Hearing Officer found the testimony of Arguello and her daughter Katherine to be more credible. Katherine translated her mother's testimony as follows: "All of a sudden an English white bulldog came outside of the house. The dog—the dog came out of the house and attacked my mother." (Tr. at 20:9-12) Arguello attested in her affidavit: "I walked in the middle of the street and suddenly the dog came out and attacked me." (R. at 18)

Katherine subsequently testified: "We were standing in the street and the dog bit her on the left side, and then the owner came out and grabbed the dog, and then me and my mom went walking up to the house, our house, and then we called 911 and we called the police." (Tr. at 26:11-16)

The Hearing Officer made credibility determinations regarding the various witnesses' versions of the events that evening. We find that there was competent substantial evidence provided by the testimony of Katherine and her mother. We further find that the citation was correctly issued under Code section 5-22, and that the Department may hold such a dog owner liable under section 5-22(b).

Dog at Large (citation 2020-R030917)

Code section 5-20(d) Regulations on dogs in public areas states: "It shall be unlawful for a responsible party to allow, whether willfully or through failure to exercise due care or control, a dog to be unrestrained or to be at large in any manner in or upon: public property; . . ."

Appellant maintains that the Hearing Officer's finding that Gino was running at large ignored competent substantial evidence. We do not agree. Appellant testified that he opened two doors to go outside, and Gino followed him outside through both doors. Appellant contends that it was an accident that Gino was "untethered," and that Appellant's actions were neither willful nor a failure to exercise due

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case. We find there was ample competent substantial evidence that Appellant failed to exercise due care in restraining Gino, resulting in the unprovoked attack on Arguello.

We conclude that the County accorded the Appellant procedural due process, and there was competent substantial evidence to support the County's decision. The decision of the Hearing Officer is hereby **AFFIRMED.** (TRAWICK, SANTOVENIA and WALSH, JJ., concur.)

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[1]While not raised by the Appellant, we find no departure from the essential requirements of law.

[2]The record does not indicate Mr. Diaz' first name.

[3]"Tr." stands for transcript of the Sept. 27, 2021 Code Enforcement Hearing. The Transcript is contained in Appellant's Appendix, filed on March 21, 2022.

[4]"R." stands for the Record on Appeal, filed November 4, 2021.

* * *

Licensing—Driver's license—Hardship license—Denial—Appeals—Certiorari—Petition seeking review of order denying application for hardship license based on petitioner's failure to abstain from alcohol for five years prior to the application—Petitioner was afforded procedural due process, and hearing officer's conclusion was supported by competent substantial evidence and the applicable law—Certiorari denied

DIGNO SALINAS, Petitioner, v. STATE, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-59 AP 01. August 31, 2022. On Petition for Writ of Certiorari from a Final Order Denying Early Reinstatement. Counsel: Digno Salinas, Pro se, Petitioner. Christie S. Utt, General Counsel, and Elana J. Jones, Assistant General Counsel, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(SANTOVENIA, J.)

Factual Background

Salinas's license was permanently revoked after he accumulated four Driving Under the Influence ("DUI") convictions. On September 22, 2021, he applied for a hardship license pursuant to Section 322.271, Fla. Stat. An administrative hearing was held before a Department of Highway Safety and Motor Vehicles ("Department") hearing officer on October 7, 2021 to determine Salinas's eligibility for such a license. The hearing officer heard testimony from Petitioner about his completion of DUI Evaluation School and his stated need for driving. The hearing officer inquired of Petitioner and he answered that the last time he drank alcohol was on December 24, 2019.

On October 7, 2021, the hearing officer issued a Final Order Denying Early Reinstatement ("Order") citing the Florida Statutes requirement that a petitioner must have abstained from consuming alcohol for the five years prior to the application for a hardship license.

Standard of Review

When conducting certiorari review, the Court is limited to determining whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Analysis

Petitioner does not argue that he was denied procedural due process, that the essential requirements of law were not met, or that the administrative findings and judgment are not supported by competent substantial evidence. Rather, he requests that this court review the Order based on his stated confusion about the date he last consumed alcohol.

In reviewing a decision of an administrative body, a circuit court in its appellate capacity cannot reweigh the evidence where there may be conflicts in the evidence nor substitute its judgment about what should have been done for that of the administrative body. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 529 (Fla. 1995) [20 Fla. L. Weekly S318a]; *School Bd. of Hillsborough Cty. v. Tenney,* 210 So. 3d 130, 134 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2149a]; *Dept. of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs.,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] (The test is whether there exists any competent substantial evidence to support the decision maker's conclusion, and any evidence which would support a contrary decision is irrelevant.). Accordingly, we decline Petitioner's invitation to reweigh the evidence.

One of the requirements to obtain a hardship license under Section 322.271, Fla. Stat. is that the petitioner be drug-free for a least 5 years prior to the hearing. The Florida Supreme Court has acknowledged that to qualify for a hardship license under Section 322.271(4), Fla. Stat., a person must demonstrate to the Department, *inter alia,* that they have been drug- and alcohol-free and have completed an approved DUI program. *See Lescher v. Fla. Dept. of Highway Safety and Motor Vehicles,* 985 So. 2d 1078, f.n. 2 (Fla. 2008) [33 Fla. L. Weekly S434a]. Here, the Petitioner admitted to having consumed alcohol in December 2019. Abstention from the consumption of alcohol is included within the statutory requirement that a petitioner be drug-free for five years. *See State, Dept. of Highway Safety & Motor Vehicles v. Walsh,* 204 So. 3d 169, 172 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2648b]; *State, Dept. of Highway Safety & Motor Vehicles v. Abbey,* 745 So. 2d 1024, 1025 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2413a]. Accordingly, the hearing officer's conclusion that Petitioner was not eligible for a hardship license is supported by substantial competent evidence and applicable law.

Moreover, procedural due process was afforded to Petitioner. *See Kupke v. Orange County,* 838 So. 2d 598 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a] (procedural due process requires notice and an opportunity to be heard). Accordingly, the Petition is DENIED. (TRAWICK and WALSH, JJ., concur)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Detention—Hearing officer did not err in finding that detention of licensee was not unreasonable—Evidence that licensee drove into field when approached by deputy and exhibited multiple indicia of impairment established cause for DUI arrest prior to detention

PRASHANT VADHULAS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 22-CA-2978, Division A. August 31, 2022. Counsel: Leslie Sammis, Sammis Law Firm, P.A., Tampa, for Petitioner. Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHERYL K. THOMAS, J.) This case is before the court on Prashant Vadhulas' Amended Petition for Writ of Certiorari. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner contends that the Department's decision to suspend his driving privileges was not supported by competent, substantial evidence of a lawful arrest because he was subjected to a prolonged detention. After reviewing the petition, response, reply, relevant statutes, and case law, the court finds that the hearing officer in this case relied on competent, substantial evidence, in the form of testimony and video footage, when she found that Petitioner's detention was not unreasonable

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because Petitioner displayed sufficient signs of impairment to establish cause for a DUI arrest prior to the detention. Accordingly, the petition is denied.

On December 18, 2021, the Hillsborough County Sheriff's Office received a 911 call reporting a man fitting Petitioner's description threatening people and doing "doughnuts" in a white Mercedes. Deputy Jacobs reported to the scene and observed a white Mercedes and a man standing in the doorway of the vehicle. Deputy Jacobs ordered Petitioner to show his hands; Petitioner did not comply. Deputy Jacobs stated "sheriff's office" and repeated the order before Petitioner got into the vehicle and drove into a field in reverse. Deputy Jacobs activated his emergency lights and followed Petitioner onto the field. Petitioner stopped and exited the vehicle as instructed. Deputy Jacobs observed numerous signs of impairment: lethargy, glassy eyes, slurred speech, and an unsteady stance. Petitioner asserted that the property belonged to him, though Deputy Jacobs was unable to verify that information for approximately 10 minutes. After the arrival of Deputy Rivera, it was determined that there were no criminal charges for the alleged threats from the 911 call. Petitioner spoke with his attorney on the phone and refused to perform field sobriety exercises (FSEs). Based on the totality of the circumstances, Petitioner was placed under arrest for DUI.

The formal hearing was held on January 19, 2022, and continued on March 3, 2022. Deputy Jacobs and Deputy Rivera both testified. There were some discrepancies within Deputy Rivera's testimony regarding the time of his arrival. The hearing officer was able to review video footage, however, which indicated that the second deputy arrived approximately 31 minutes after a DUI investigator was requested. Petitioner's counsel argued that the delay between the conclusion of the initial investigation and Deputy Rivera's arrival resulted in an unlawfully prolonged detention period. After considering the evidence, the hearing officer found that the initial encounter, detention, and arrest of Petitioner were lawful.

Petitioner asserts that the hearing officer lacked competent, substantial evidence to support a finding of a lawful arrest due to the length of his detention. Specifically, Petitioner argues that his detention became unlawful once law enforcement determined that there was not sufficient cause to arrest him for trespassing or making threats.

The court's scope of review is in this case is limited to "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). When considering whether the hearing officer relied on competent, substantial evidence, this court must ensure that it does not improperly reweigh the evidence in the record. *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a]. "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173, 1175 (Fla. 2017) [42 Fla. L. Weekly S85a] (stating that "the use of and request for real-time video of government-citizen confrontational events have moved consideration beyond governmental words purporting to describe events into a broad, more accurate, fair consideration of the actual events as captured on video").

In this case, the hearing officer determined that the length of time between the initial stop and Deputy Rivera's arrival did not render the detention unlawful because Deputy Jacobs had sufficient cause to arrest Petitioner for DUI after observing the signs of impairment outlined above. The hearing officer relied on the arrest reports, testimony from the deputies, and video footage. While Deputy Rivera's testimony conflicted with the video footage with regard to the amount of elapsed time, the hearing officer relied on period depicted in the footage, which aligned with the testimony from Deputy Jacobs. The hearing officer's reliance on the evidence complies with the standard laid out in *Wiggins*. 209 So. 3d at 1173.

The length of detention alone is not sufficient to determine whether there was an unlawful delay. Where there is no basis for reasonable suspicion, a brief delay could be unlawful. *Rodriguez v. United States*, 575 U.S. 348, 349 (2015) [25 Fla. L. Weekly Fed. S191a]. However, a founded, reasonable suspicion can be the basis for a lengthier detention than the one at issue in this case. *Finney v. State*, 420 So. 2d 639, 643 (Fla. 3d DCA 1982) (citing *State v. Lopez*, 369 So. 2d 623 (Fla. 2d DCA 1979). In this case, Deputy Jacobs had a reasonable suspicion for DUI before determining that the other potential charges were not being pursued. The hearing officer's determination about the detention was primarily based on the existence of a reasonable suspicion for DUI, and thus observed the essential requirements of the law.

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

* * *

DANIEL DEWENTER, Plaintiff, v. CITY OF FORT LAUDERDALE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18028410, Division AP. August 24, 2022. John Bowman, Judge.

FINAL ORDER OF DISMISSAL

THIS CAUSE is before the Court, in its appellate capacity, upon this Court's Order Directing Appellant to File an Initial Brief and Appendix, dated July 11, 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, changing the current case status from "transferred" to "disposed" (or "re-closed" if necessary).

* * *

CHARLES RHODES, Plaintiff, v. BROWARD COUNTY, et al., Defendants. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21016826, Division AW. August 24, 2022. John Bowman, Judge.

ORDER TO WITHDRAW AS COUNSEL AND ORDER DIRECTING CLERK OF COURTS TO CLOSE CASE

THIS MATTER came before th Court on Chandra Parker Doucette, Esq.'s, Motion to Withdraw. After review of the Court file itis hereby **ORDERED** that the Motion to Withdraw is **GRANTED**.

FURTHER ORDERED that the Broward County Clerk of Courts is hereby **DIRECTED** to close this case file.

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Property—Assignment of benefits—Validity—Assignment of benefits is legally ineffective where it was not signed by the policyholder which, in instant case, was mortgagee—Fact that additional insured signed AOB does not cure the defect—Only a party who possesses rights can convey them, and that party for an insurance contract assignment of benefits is the policyholder

MASON DIXON CONTRACTING, INC., a/a/o Sonja Baker and Horace Brown, Plaintiff, v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-26. September 25, 2022. David Frank, Judge. Counsel: Philip Jones, Kuhn Raslavich, P.A., Boca Raton, for Plaintiff. Jamie Billotte Moses, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT AND DISMISSING CASE WITH PREJUDICE

This cause came before the Court on defendant's May 2, 2022 motion to dismiss and the Court having reviewed the motion, response, and court file, and being otherwise fully advised in the premises, finds

Defendant argues that the subject insurance contract cannot be enforced by the specific plaintiff here—Mason Dixon Contracting—because the assignment of benefits it relies upon (attached to the complaint) was legally ineffective. The Court agrees.

An insurance policy is a contract. To enforce a contract a person must be in privity with it. "In a legal context, the term 'privity' is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract." *Expert Inspections, LLC v. United Prop. & Cas. Ins. Co.*, 333 So.3d 200, 203 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D127a] (citations omitted).

"An Assignment of Benefits, or an AOB, is a document signed by a ***policyholder*** that allows a third party, such as a water extraction company, a roofer, or a plumber, to 'stand in the shoes' of the insured and seek direct payment from the insurance company." Florida Office of Insurance Regulation website (emphasis added). That makes sense. It is logical that only a person who possesses the rights can convey them, and that party for an insurance contract assignment of benefits is the *policyholder*.

There is no dispute that, according to the subject insurance policy, the "policyholder" is Vanderbilt Mortgage and Finance. *Amended Complaint* at 2; Exhibit A, Defendant's February 2, 2022 *Motion to Dismiss* at 1.

Therefore, at a minimum, Vanderbilt Mortgage and Finance must have conveyed its rights under the contract to the present plaintiff for the plaintiff to have standing (privity) to sue.

The AOB, however, is only signed by a "Sonja Baker." Exhibit A, *Amended Complaint*.

This means, without going any farther, that the AOB is legally ineffective and fatal to the present lawsuit.

Plaintiff attempts to circumvent this conclusion by bringing the lawsuit, ". . .as an assignee of Sonja Baker and Horace Brown (hereinafter 'Insured')." *Amended Complaint* at 1.

It is undisputed that Horace Brown is listed as the "borrower" on the subject insurance policy. Exhibit A, Defendant's February 2, 2022 *Motion to Dismiss*. Sonja Baker, however, appears nowhere in the document. *Id*.

We assume for the purposes of this order, that Horace Brown is a proper "insured" under the policy. However, alleging that he is one of two assignors is unhelpful to the plaintiff because he did not sign the AOB.

To finally focus on the person who did sign the AOB, the plaintiff then alleges that Horace Brown, ". . .assigned and deeded all interest in the property, mortgage, and insurance to Sonja Baker pursuant to a dissolution of marriage." *Amended Complaint* at 2.

As a preliminary matter, it is doubtful that a plaintiff could simply aver such an allegation in a complaint without attaching the controlling document. Regardless, even if it were true that Mr. Brown legally transferred his ownership and rights to Ms. Baker, it does not cure the principal defect—the policyholder, Vanderbilt Mortgage and Finance, did not sign the AOB. The fact that an additional insured signed the AOB does not cure this defect.[1]

Finally, plaintiff cites *All Ins. Restoration Servs., Inc. v. Heritage Prop. & Cas. Ins. Co.*, 338 So. 3d 448, 450 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1017a] for its argument that the motion should be denied because it goes beyond the four corners of the complaint. *Plaintiff's Opposition to Defendant's Motion to Dismiss* (Amended Complaint) at 2.

Plaintiff is misapplying the case. In *All Ins. Restoration Servs., Inc*., the court determined that consent, (not an issue here), could still be established by documents or actions not addressed in the complaint and its attachments:

> However, those facts standing alone were not dispositive of the standing issue. Notably, the policy provision requiring that the Lugos' mortgagee consent to an assignment of benefits did not prescribe any particular method of expressing that consent, other than that it be in writing. It is therefore possible that the necessary consent in this case could have been given in a writing other than the AOB form. Further, it is also possible that Juan Lugo signed the AOB form as an agent of the mortgagee. Neither of these possibilities is foreclosed by the face of the complaint and its attachments.

In the present case, there are no documents or actions, other than those established by the amended complaint, that are needed to answer the question.

The controlling documents—the insurance policy and AOB—are not in dispute and are sufficiently established by the allegations and exhibits of the complaint. The complaint expressly incorporates the subject insurance policy into its allegations. *Amended Complaint* at 2. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So.3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]. The AOB is attached to the complaint.

The insurance policy identifies the policyholder. The AOB does not have the policyholder's signature. The policyholder, therefore, is not a party to the AOB. The AOB, therefore, does not convey any benefits under the policy.[2]

Accordingly, it is ORDERED and ADJUDGED that the motion is GRANTED and the case is DISMISSED WITH PREJUDICE.

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[1]Florida's District Courts of Appeal are not in complete agreement on whether an insurance policy can require the consent of additional insureds and mortgagees for AOB's. *Kidwell Grp., LLC v. GeoVera Specialty Ins. Co*., 328 So.3d 994, 995 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2242a], review denied, No. SC21-1574, 2022 WL 278264 (Fla. Jan. 31, 2022). That, however, is not the issue here.

[2]Nor are there any documents filed or plead that indicate the policyholder—Vanderbilt Mortgage and Finance—transferred it right under the policy to Ms. Baker.

* * *

Civil procedure—Default—Vacation—Evidence presented by defendant was insufficient to support finding of either excusable neglect or due diligence—Motion to vacate default denied

TYRAN M. MARSHALL, Plaintiff, v. HIGH RISK ENFORCEMENT, LLC, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 21-

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CA-626. August 21, 2022. David Frank, Judge. Counsel: Louis J. Baptiste, Tallahassee, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT

This cause came before the Court on defendant's August 16, 2022 verified motion to set aside the clerk's default entered against it, and the Court having reviewed the motion, response, and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

Timing

On September 16, 2021, the present lawsuit was filed.

On September 30, 2021, the return of service of initial process on defendant was filed, showing that defendant was served the lawsuit on that same day at 12:02 p.m.

On November 12, 2021, the clerk entered a default against defendant.

On February 24, 2022, the Court set the trial of this case. The trial was set to begin with jury selection on August 19, 2022.

On August 15, 2022, the pretrial conference was held. Plaintiff's counsel appeared for the hearing. No one appeared for defendant.

On August 16, 2022, three days before the trial, defendant filed a motion to set aside clerk's default.

On August 18, 2022, the hearing on defendant's motion was held. The motion was denied. This order follows.

A date not included in the summary above is the date on which defendant learned of the lawsuit and default and, thus, its alleged excusable neglect. This was a glaring omission from the one-page affidavit filed by defendant to support its motion. Even worse, defendant came to the hearing on its motion with no evidence on the matter.

During the hearing, counsel for the defendant stated that his "client" learned of the case and default on July 26, 2022 and told him on the same day.

Assuming the date is correct, the glaring omission of evidence is now followed by a glaring question. Why would defendant wait until three days before the jury trial to file a motion to vacate?

Counsel for defendant suggested at the hearing that he waited because he was in discussions with plaintiff's counsel. Plaintiff's counsel confirmed that defense counsel did indeed call him on that day, however, he also made it abundantly clear that at no point did he agree to an extension or any other resolution of the default.

Of course, another plausible possibility is that defendant intentionally waited until the case was on the steps of the courthouse to file the motion because it would be too late to set and conduct a hearing.

If it were the latter, defendant miscalculated. The Court took the action necessary to have the motion heard before the trial began.[1]

The Requirements for Setting Aside a Default

We begin by noting that, inexplicably, defendant has not challenged personal jurisdiction and has not moved to quash what it alleges to be seriously deficient service of process. Instead, the motion is pursued as a Rule 1.540(b) request to set aside a default only. Any possible challenge to personal jurisdiction has been waived.[2] Plaintiff vigorously contests the motion.

That means the defendant must make the necessary evidentiary showing of excusable neglect, a meritorious defense, and due diligence. *Bank of Am., N.A. v. Lane*, 76 So.3d 1007, 1009 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2631a].

Defendant spent considerable time arguing the preference of Florida courts to have matters decided on the merits rather than a technicality, if possible. Who would say, with a straight face, that it is better to resolve cases on technicalities rather than the merits? But this noble policy is tempered by the very strict requirements placed upon a litigant seeking to set aside a default.

"Excusable neglect is found where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir. *But, the law requires certain diligence of those subject to it, and this diligence cannot be lightly excused. Kitchen Design Cabinets, Inc. v. Bentley*, 320 So.3d 1013 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1581a] (citations and quotations omitted) (emphasis added).

"[T]he determination of whether particular conduct constitutes excusable neglect. . . is a factual one, to be decided by the trial judge." *Id.* at 1014.

In *Emerald Coast Utilities Auth. v. Bear Marcus Pointe, LLC*, our First District noted an excellent description of what is and is not excusable neglect. First, what is not excusable neglect:

> Mr. Wiley's evidence on the cause for the delay is the digital age equivalent of 'the dog ate my homework.' Mr. Wiley claims that e-mail difficulties prevented discovery of C.D.S.'s pending motion, but this evidence demonstrates that these difficulties were entirely self-created. . . . An inability to manage an office e-mail system to properly receive notices of filing does not qualify as excusable neglect.

227 So.3d 752, 757 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2131a] (citation omitted).

Next, the court described what could have constituted excusable neglect:

> In short, there was an absence of any *meaningful procedure in place* that, if followed, would have avoided the unfortunate events that resulted in a significant judgment against appellant. Accordingly, the trial court did not abuse its discretion in denying appellant's rule 1.540(b) motion.

Id. at 758 (citation and quotations omitted) (emphasis added).

Finally, defendant must present evidence, not conclusory statements that a mistake was made:

> In order to show excusable neglect, the moving party must produce sufficient evidence of mistake, accident, excusable neglect or surprise as contemplated by rule 1.540(b) before the court's equity jurisdiction may be invoked. If the movant fails to present evidence supporting a legal ground for relief from the judgment, it is an abuse of the trial court's discretion to vacate that judgment. It is not permissible to allege that a defaulting party's negligence is excusable without setting forth the facts to support such a conclusion.

Rodriguez v. Falcones, 314 So.3d 469, 471-72 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2689b].

A verified motion, by itself, is inadequate to establish the necessary proof when there is a noticed and contested evidentiary hearing and the statements of an attorney are not evidence. *Holland M. Ware Charitable Found. v. Tamez Pine Straw LLC*, No. 1D22-4, 2022 WL 3222767, at *3 (Fla. 1st DCA Aug. 10, 2022) [47 Fla. L. Weekly D1701a].

The Evidence to Support Excusable Neglect and Due Diligence

At the hearing, counsel for defendant summarized defendant's position by stating an employee "never passed it up" the "chain of command." He was not, however, able to explain what the chain of command was, who received what when, or how much time passed between any of these actions.

The only allegation in the motion that attempts to say what happened says that the process server gave the suit papers to a non-employee, who then did not give it to anyone at "HRE" (defendant High Risk Enforcement). A Lewis Brown verified the motion.

With little explanation and virtually no facts provided in the motion or at the hearing, we then turn to the only purported evidence in this case—the declaration filed by the same Lewis Brown. The

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declaration provides:

1. I am over the age 18 and have personal knowledge of the facts set forth in this affidavit.
2. I am the owner of HIGH RISK ENFORCEMENT, LLC.
3. I make this affidavit based on my personal knowledge.
4. I never received a copy of the Summons, Complaint, Court Order, Request for Admissions, Request for Production or Interrogatories in the above matter.
5. Mr. Benshimone is no longer affiliated with HRE and has not since October, 2021.[3]
6. As soon as I discovered that a lawsuit had been filed and that a Clerk's Default was entered, I retained counsel to defend and/or resolve the matter

The affidavit tells us Mr. Lewis is the owner of the company and that *he* never received copies of the suit papers but acted as soon as he "discovered that a lawsuit had been filed." He also states that the alleged non-employee is no longer "affiliated with HRE."

Defendant provided little explanation and virtually no facts regarding:

Whether "480 Tall Pines Rd, West Palm Beach, FL 33413" is the location of the company's main office (see return);

Why a Mr. Ben Y Benshimon, who is "31 years of age, White Male, est. age 35, glasses: N, Brown hair, 160 lbs to 180 lbs, 5' 9" to 6'," was present at defendant's office and appeared to be in charge (see return);

Why defendant referred to Mr. Benshimon as a non-employee in the motion, and later referred to him as an employee who is no longer affiliated with defendant;

If not affiliated with the company, why Mr. Benshimon was in the building, and why did he think he should take papers meant for the company;

Who else was in the building, how many of them were regular employees, and why did they not see what happened, or fail to act if they did see;

Why two employees stated the registered agent and sole member, Kyle Lewis Brown, was on the property at the time, but two other employees stated he was in Cuba (see return);

Why on the process server's second attempt to serve the papers was the same man, Mr. Ben Y Benshimon, at the office and why did he tell the process server the registered agent was in Cuba (see return);

Why was this alleged non-employee, Mr. Benshimon, wearing an outfit with the High Risk Enforcement logo on it (see return);

What Mr. Benshimon did with the suit papers if he did not provide them to defendant;

What was the reason the papers were allegedly mishandled at the outset, but somehow found later, when the papers were later found, and who was involved;

Who then advised Mr. Lewis of the lawsuit and default and when;

Why nothing happened until Mr. Lewis was notified;

And most importantly, what was the "meaningful procedure in place" for service of legal papers on the company that defendant alleges excusably fell apart?

Accordingly, it is ORDERED and ADJUDGED that

1. The presentation of facts to support excusable neglect and due diligence was woefully inadequate.
2. Given the dearth of evidence here, it is impossible to determine that defendant was justified in waiting approximately 320 days to file a responsive pleading in this case.
3. The motion is DENIED.

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[1]The fact that the motion was set for a prompt hearing after it was (finally) filed is of no import. Accepting the date defendant claims it found out about the default, there was almost a month for it to prepare for the hearing. Moreover, defendant did not request a continuance prior to the hearing or during the hearing itself.

[2]*Century-National Ins. Co. v. Frantz*, 320 So.3d 929, 931 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1070a] (finding that motion to set aside default that failed to contest service of process or otherwise dispute personal jurisdiction over insured waived any subsequent challenge to personal jurisdiction).

[3]Here, defendant seems to be applying a bit of misdirection. The affidavit says the employment of the person who received a copy of the suit paper ended in October 2021, apparently hoping we would not look to see that service was on September 300, 2021.

* * *

Elections—Municipal recall petitions—City commissioners that are targets of recall petitions are granted declaratory and injunctive relief to stop recall vote process—Alleged act of voting in favor of motion to prohibit all hiring, including hiring of police officers and firefighters, does not establish malfeasance that is required to justify recall where voting is an authorized act of a city official, hiring freeze was collective act of commission, not act of individual commissioners, and freeze did not violate city charter—Presence of invalid grounds on recall petitions would taint any recall election even when valid grounds are also present

RONTE HARRIS, in his official capacity as COMMISSIONER OF DISTRICT 3, CITY OF QUINCY, FLORIDA, and KEITH DOWDELL in his official capacity as COMMISSIONER OF DISTRICT 1, CITY OF QUINCY, FLORIDA, Plaintiffs, v. YVETTE BITTLE, as CHAIR OF DISTRICT 3 RECALL COMMITTEE, YVETTE BITTLE, as CHAIR OF DISTRICT 1 RECALL COMMITTEE, and CITY OF QUINCY, FLORIDA, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2022 CA 401, (Consolidated Case No. 2022 CA 443). August 30, 2022. David Frank, Judge. Counsel: Jack L. McLean, Jr., Tallahassee; Larry K. White, Tallahassee; and Louis Thaler, Coral Gables, for Plaintiffs. Mohammad O. Jazil, Gary V. Perko, and Michael Beato, Tallahassee, for Defendants.

FINAL DECLARATORY JUDGMENT AND INJUNCTION

This cause came before the Court on August 29, 2022 for final hearing on Plaintiffs,' Ronte Harris, in his official capacity as Commissioner of District 3, City of Quincy, Florida ("Harris"), and Keith Dowdell, in his official capacity as Commissioner of District 1, City of Quincy, Florida ("Dowdell") (collectively "Plaintiffs"), complaint for declaratory judgment and supplemental relief, and the Court having reviewed the trial briefs submitted, heard argument of counsel, and being otherwise fully advised in the premises, finds

Procedural History and Uncontested Facts

Harris and Dowdell bring this lawsuit to stop the recall vote process initiated against them. They have sued Ms. Yvette Bittle ("Bittle"), the chair of both recall committees, and the City of Quincy ("the City").

The first lawsuit filed was filed by Harris, Case No. 22-CA-401. The operative Amended Complaint in that case was filed on July 19, 2022. The request for an emergency temporary injunction was denied on July 22, 2022. Bittle answered the amended complaint and asserted a crossclaim on July 31, 2022. The City answered on August 1, 2022.

Dowdell filed his Complaint in Case No. 22-CA-443 on July 22, 2022. There was no specific motion for temporary injunction. Bittle answered the complaint on July 31, 2022. The City answered on August 3, 2022.

The Court consolidated Case No. 22-CA-443 (Dowdell) into Case No. 22-CA-401 (Harris) on August 17, 2022.

Bittle's crossclaim was dismissed on August 17, 2022.

The parties agreed, and the Court determined, several important matters at the case management conference held on July 21, 2022. They were:

(1) The recall committees had satisfied the recall signature requirements.

(2) The only matter before the Court is the legal sufficiency of the content of the petitions. As such, the parties could brief and argue the case without any need for discovery.[1] The case would be decided by the Court as a matter of law.

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(2) The final hearing was set for August 29, 2022.

Specifically, in the complaints, plaintiffs challenge three aspects of the petitions' content. However, at the final hearing, plaintiffs stated that they only were challenging the second ground for recall — the November 9, 2021 vote to pause the hiring of county employees. The ground stated in the petition regarding Harris is that he voted for the measure. The ground regarding Dowdell is that he made the motion for the vote. The complete grounds are as follows:

The petition to recall Harris states as follows:

2. The grounds

COMMISSIONER RONTE HARRIS'S MALFEASANCE IN OFFICE ENTAILED A MEETING OR MEETINGS OUTSIDE A NOTICED PUBLIC MEETING OF THE CITY COMMISSION TO DISCUSS WITH OTHER CITY COMMISSIONERS GIVING HIMSELF AND OTHER COMMISSIONERS A 122% SALARY INCREASE IN VIOLATION OF FLORIDA SUNSHINE LAW, SECTION 286.011, FLORIDA STATUTES.

COMMISSIONER RONTE HARRIS'S MALFEASANCE IN OFFICE ENTAILED VOTING FOR THE NOVEMBER 9, 2021, MOTION THAT PASSED ON A 3-2 VOTE MOTION [sic] TO PROHIBIT ALL HIRING, INCLUDING NEEDED POLICE OFFICERS AND FIREMEN, IN VIOLATION OF SECTIONS 2.04 AND 3.04 OF THE CITY CHARTER.

The petition to recall Dowdell states as follows:

2. The grounds

COMMISSIONER KEITH DOWDELL'S MALFEASANCE IN OFFICE ENTAILED A MEETING OR MEETINGS OUTSIDE A NOTICED PUBLIC MEETING OF THE CITY COMMISSION TO DISCUSS WITH OTHER CITY COMMISSIONERS GIVING HIMSELF AND OTHER COMMISSIONERS A 122% SALARY INCREASE IN VIOLATION OF FLORIDA SUNSHINE LAW, SECTION 286.011, FLORIDA STATUTES.

COMMISSIONER KEITH DOWDELL'S MALFEASANCE IN OFFICE ENTAILED MAKING THE NOVEMBER 9, 2021, MOTION THAT PASSED ON A 3-2 VOTE TO PROHIBIT ALL NEW HIRING, INCLUDING NEEDED POLICE OFFICERS AND FIREMEN VACANCIES, IN VIOLATION OF SECTIONS

The Law on Recalls

"As the statutory scheme for recall elections presently stands, it is apparent that recall is treated as an extraordinary proceeding with the burden on those seeking to overturn the regular elective process to base the petition upon lawful grounds or face invalidation of the proceedings. . . . In our view, the present legislative scheme protects public officials from being ousted when illegal grounds provide the basis for recall. Since we place enormous value on the regular elective process, this legislative scheme is certainly not unreasonable. Accordingly, public officials should not face removal from the office they were lawfully and properly elected to on a ballot that contains illegal grounds for recall in express violation of the statute." *Garvin v. Jerome*, 767 So.2d 1190, 1193 (Fla. 2000) [25 Fla. L. Weekly S692a].

Municipal recall petitions are governed by Section 100.361(2), Florida Statutes. Subsection 100.361 (2)(d) provides, "The grounds for removal of elected municipal officials shall, for the purposes of this act, be limited to the following and must be contained in the petition: 1. Malfeasance;" and six other possible grounds.

It is not this Court's role to "rule on the truth or falsity of the charges" against the commissioners. *Gibson v. Kesterson*, 188 So.3d 125, 128 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D852a] (concurring opinion) (citations omitted). "Instead, [courts] address only whether the conduct alleged in the petition was legally sufficient to establish [malfeasance], a purely legal question." *Id.* (citation omitted).

Important here is the Florida Supreme Court's holding that any inclusion of an invalid ground taints the entire recall process, even where there are additional valid grounds stated. The public policy underpinning the holding is a concern of potential abuse:

> We also agree that approval of a ballot containing invalid grounds would almost certainly lead to abuse. For example, to garner support for a recall petition, an astute draftsman could couple legally insufficient (but politically charged) allegations with legally sufficient (but less politically compelling) grounds. While the valid grounds might not generate support for the recall petition, the invalid grounds might.

Garvin at 1193.

> . . .[I]t would be impossible to prove or determine after the fact, in accordance with any legally acceptable standard, how electors would have responded, had a substantial or significant part of a multifaceted petition been eliminated before the qualifying signatures had been obtained. There can be little doubt that the presence of the invalid grounds would taint any recall election based thereon.

Id. (citations omitted).

Malfeasance

The Petitions specify "malfeasance" as the ground for plaintiffs' recall from office. Malfeasance is the "performance of a completely illegal or wrongful act." *Moultrie v. Davis*, 498 So.2d 993, 995 (Fla. 4th DCA 1986) (citation omitted).

"Legitimate or authorized actions of a city official are not sufficient to justify a recall" for malfeasance or any of the other grounds. *Moultrie* at 995 (citation omitted).

Regarding Harris, the facts stated to establish malfeasance were, ". . .voting for the November 9, 2021, motion to prohibit all hiring, including needed police officers and firemen, in violation of sections 2.04 and 3.04 of the city charter."

First, Harris' voting for a proposed measure, as good or bad as the measure may have been, was an "authorized act of a city official." This would be true even if the resulting ordinance somehow violated a law or charter and, thus, were subject to being struck.

Imagine if the act of voting alone were a valid ground for a recall, should the measure that was passed ultimately be determined to be problematic, as frequently happens in constitutional challenges. Recall special elections would be as commonplace as regular elections.

Second, the ground describes actions taken by the commission, not Harris individually. There is no definition or application of "malfeasance" to a governing body versus an individual member and defendants pointed to none.[2] *Moultrie* at 996 (". . .the allegation is also insufficient, since the electorate's objection is really to an act of the city commission as a whole, rather than an individual act of a commissioner.")

The same is true for Dowdell's motion on the proposed measure. It was an authorized act and it was but one step in the collective action of the commission—the vote.

Even if this Court were to rule that the challenged grounds were the result of an individual rather than collective endeavor, (and it does not), the petitions would still fail because plaintiffs' actions simply did not violate Sections 3.04 or 2.04 of the City of Quincy Charter.

Section 3.04 of the charter governs the "Powers and duties of the City Manager. " Any violation of Section 3.04 would arise from the office of the City Manager and not the City Commission. Prohibitions on actions taken by the City Commission are enumerated in Section 2.04 of the charter.

Section 2.04 prohibits the commission or any of its members from dictating the appointment or removal of any city administrative officer or employee. It also prohibits the commission and commissioners from giving orders to city officers and employees who are under the supervision of the city manager.

When the commission voted to generally prohibit hiring due to budgetary concerns, it did not dictate the appointment or removal of

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a city employee. Nor did it directly engage current employees who were supervised by the city manager. It simply was an instruction to the city manager to hold on hiring prospective employees.

Conclusion

The grounds stated in the petitions to substantiate malfeasance—Dowdell's motion and Harris' vote at the November 9, 2021 meeting—are insufficient as a matter of law. The motion and vote did not constitute "performance of a completely illegal or wrongful act." It was plaintiffs' legal duty to participate, bring motions before the City Commission, and cast votes on behalf of their electors.

Further, the deficient grounds were one of two offered in each petition. That means approximately 50% of the information provided to voters should not have been provided. It would be "impossible to prove or determine after the fact, in accordance with any legally acceptable standard, how electors would have responded, had a substantial or significant part of a multifaceted petition been eliminated before the qualifying signatures had been obtained." To use the words of our Supreme Court in *Garvin*, "There can be little doubt that the presence of the invalid grounds would taint any recall election based thereon." To the extent the present petitions contain valid grounds, they are tainted.

And finally, to use the words of our First District, "In the end, [the recall committees] dispute with [Commissioners Harris and Dowdell] is a matter of public debate that courts do not resolve. *Gibson* at 129.

Accordingly, it is ORDERED, ADJUDGED and DECLARED that

1. The District 3 Recall Petition regarding Commissioner Ronte Harris, from Yvette Bittle, Chairperson Recall Committee, delivered to Janice Shackelford, City Clerk, on March 7, 2022, contains illegal grounds for recall in express violation of Section 100.361, Florida Statutes.

2. The District 1 Recall Petition regarding Commissioner Keith Dowdell, from Yvette Bittle, Chairperson Recall Committee, delivered to Janice Shackelford, City Clerk, on January 12, 2022, contains illegal grounds for recall in express violation of Section 100.361, Florida Statutes.

3. The City of Quincy is permanently enjoined from taking any further action on the above-identified pending recall petitions and processes.

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[1]At the case management conference, the parties were unable to identify a single matter that would require discovery. Bittle, however, suggested that other issues might be raised by her answer or counterclaim that conceivably could necessitate discovery. In response, the Court ordered that any party could file a motion for a discovery schedule should that happen. No party filed a motion requesting discovery.

[2]At the final hearing, Bittle's argument almost entirely focused on the "affirmative defenses" of failure to state a cause of action, untimeliness, and unclean hands. The presentation was completely devoid of any relevant facts or law to support these asserted defenses. Portending more dire consequences, the argument did not squarely contest the case law on malfeasance relied upon by plaintiffs.

* * *

Torts—Premises liability—Slip and fall—Transitory foreign substance—Branch that had fallen on concrete landing at foot of stairs in apartment building—Because plaintiff's deposition testimony regarding frequent presence of debris at apartment complex was vague, imprecise, and subject to interpretation and could support comparative fault defense, motion for summary judgment denied

MARIA PEREZ, Plaintiff, v. THE VUE AT BAYMEADOWS, LP, and EMIF BAYMEADOWS MANAGEMENT, LLC, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CA-003645-XXX-MA, Division CV-A. September 7, 2022. Waddell A. Wallace, Judge. Counsel: Jonathan I. Rotstein, for Plaintiff. Alyssa M. Kersey and Ann Marie G. Flores, for Defendants.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This case came before the Court for hearing on August 4, 2022, on the Motion for Summary Judgment filed May 4, 2022, on behalf of defendants, The Vue at Baymeadows, LP and EMIF Baymeadows Management, LLC. Plaintiff, Maria Perez, filed a Memorandum in Opposition to the Motion Summary Judgment, on July 12, 2022.

Both the Motion for Summary Judgment and opposing memorandum provide well articulated statements of the revised standards for determining summary judgments under Rule 1.510, Florida Rules of Civil Procedure, and the application of Section 768.0755, Florida Statutes, to claims alleging injury from a slip or fall on a transitory foreign substance. Both the motion and opposing memoranda also provide insightful application of this law to the facts of the case.

The relevant summary judgment evidence consists almost entirely of plaintiff's deposition. In her deposition, plaintiff testified that she slipped on a branch from a bush that had fallen on a concrete landing at the foot of stairs to an apartment building. Plaintiff worked for an independent contractor to the owner of the apartments and her job responsibilities included going up and down the stairs at the apartment complex removing trash placed out for collection by the tenants. Defendant The Vue at Baymeadows, LP was the owner of the apartment complex and defendant EMIF Baymeadows, LLC managed the property for the owner.

In her memorandum, plaintiff acknowledges that, under section 768.0755, she must show that defendants had actual or constructive knowledge that the branch had fallen on the apartment premises and that the branch created a dangerous condition. Plaintiff argues that she can prove such knowledge by relying on record evidence showing that the condition occurred with regularity and was therefore foreseeable to defendants. See Section 768.0755 (1) (b), Florida Statutes.

At page 21 of her deposition, defendant testified that she noticed tree branches or debris lying around the premises "all the time." On page 22 of her deposition, she testified that "there was always trees and stuff that should have been cleaned up, you know, debris." She further testified that such debris was located "around the grass area or near the flats where we would land from the second floor." She further testified on page 22 that the debris was near the flat and that "when you come down the stairs, there is a flat, and there was always some stuff around there." On page 43 of her deposition she testified, "I landed on the landing, and I tripped over what might have been a branch." Plaintiff testified that it was dark at the time she fell, and that all she could see was a shadow of the branch, but further testified at page 45 that she felt the branch under foot and estimated its size as "probably about a foot and a half." Plaintiff further testified that she fell in the back area of the complex and "the back area was always like debris and stuff like that out in the back." When asked if the area where she had fallen had been recently cleaned, she responded at page 50, "No. The back was always horrible."

In certain material respects, plaintiff's deposition testimony is vague, imprecise and subject to different interpretations. Her testimony could also provide support for a comparative fault defense. However, these are the type of issues reserved for the trier of fact at trial, even under the revised summary judgment standards outlined in the amended Rule 1.510, Florida Rules of Civil Procedure.

Accordingly, it is

ORDERED:

The Motion for Summary Judgment filed May 4, 2022, on behalf of defendants, The Vue at Baymeadows, LP and EMIF Baymeadows Management, LLC, is DENIED.

* * *

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Insurance—Property—Windstorm loss—Dismissal—Failure to plead sufficient facts to describe the hurricane damage alleged in complaint—Failure to sufficiently plead compliance with all preconditions to suit

MASON DIXON CONTRACTING, INC., a/a/o Debra Peddie, Plaintiff, v. UNDERWRITERS AT LLOYD'S, LONDON, Defendant. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 39-2022-CA-000001-CAAM. September 21, 2022. David Frank, Judge. Counsel: Philip Jones, Kuhn Raslavich, P.A., Boca Raton, for Plaintiff. Vincent P. Beilman, III, Kimberly M. Jones, and Olivia J. Hansen, Wood, Smith, Henning & Berman, LLP, Boca Raton, for Defendant.

ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT

This cause came before the Court on defendant's motion to dismiss the amended complaint, and the Court having reviewed the motion and the court file, and being otherwise fully advised in the premises, finds

The deadline for filing a written response to the present motion has passed. *See* Court's Policies and Procedures. Plaintiff has not filed a response.

In *Thirunavukkarasu v. Fed. Ins. Co.,* No. 620CV2227ORL-40EJK, 2021 WL 3887584, at *2 (M.D. Fla. Feb. 8, 2021), a federal trial court discusses the federal pleading standard as applied to the description of hurricane damage sufficient to withstand a motion to dismiss:

> Defendant argues that Plaintiffs fail to plead the requisite short and plain statement of *facts* suggesting that they are entitled to relief. The Court agrees. The Amended Complaint simply alleges that Plaintiff suffered a covered loss as a result of a "hurricane event." Conclusory allegations of a covered loss under the Policy without any details regarding the circumstances or nature of the loss are not sufficient to meet Rule 8's pleading standard. Rather, at a minimum, Plaintiffs must allege specifically how the damage occurred and what damage occurred. Only then can Defendant be properly apprised of the precise claims being made against
>
> it. *See Emergency Flood Restoration Servs., Inc. v. Chubb Custom Ins.*, No. 6:19-cv-1219, 2019 WL 5451089, at *2 (M.D. Fla. Aug. 9, 2019) (holding the same).

Florida's pleading requirement is more demanding. *Canon v. Ziadie,* 327 So.3d 327, 331 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2038a] ("Unlike the pleading requirements in federal courts where notice pleading is the prevailing standard, the Florida Rules of Civil Procedure require fact pleading to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief.").

Plaintiff has failed to plead sufficient facts to describe the damage it alleges, and has failed to sufficiently plead compliance with all preconditions to suit.

Accordingly, it is

ORDERED and ADJUDGED that the motion is GRANTED. This is the second dismissal of the complaint. A month after the Court's deadline for filing an amended complaint pursuant to the first dismissal, plaintiff essentially turned around and filed the same vague allegations. Plaintiff will have ten (10) days to file a second amended complaint. If a second amended complaint that addresses the deficiencies is not filed by this dealine, the case will be dismissed with prejudice.

* * *

Criminal law—Driving under influence—Search and seizure—Investigatory stop—Where police responding to report of impaired driver found unresponsive defendant slumped over console in running car, defendant appeared confused even when eventually roused, and defendant exhibited nonresponsive behavior and indicia of impairment, officer had reasonable suspicion that defendant was attempting to operate vehicle while impaired and properly initiated DUI investigation—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. MITCHELL J. PEERSON, Defendant. Circuit Court, 7th Judicial Circuit in and for Flagler County. Case No. 2021-CF-001203. September 15, 2022. Terence R. Perkins, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS UNLAWFULLY OBTAINED EVIDENCE

This matter was heard by the Court on the Defendant's Motion to Suppress Unlawfully Obtained Evidence filed on or about February 23, 2022. The defendant seeks to suppress all evidence from his interaction with law enforcement leading to his arrest.

In opposition to the Motion, the State supported the arrest with evidence from a 911 caller, Mr. Ken Switzer, and from the arresting officer, Deputy Marsan. Mr. Switzer was the Loss Prevention Supervisor at Beall's Department Store at the time of the incident. He testified that he watched the defendant on video in his store over several minutes. Mr. Switzer described the defendant as intoxicated, stumbling, losing his balance, and falling asleep while leaning against store racks. Mr. Switzer also noted that the defendant was slurring his speech and had red, watery eyes. The Loss Prevention Officer became concerned when this intoxicated individual left the store, walked across the parking lot, opened the driver's side door, entered the driver's seat, started the car, and turned the headlights on. The supervisor called 911 out of concern for the safety of other shoppers, drivers and for the defendant's own safety. The 911 call was received into evidence along with the Officer's body cam of the approach to the car and the defendant's arrest.

Deputy Marsan responded to the report of an intoxicated driver. She testified that she located the car based on its description and location. She parked her police vehicle close-by and approached the car from the driver's side. The interior of the car was brightly illuminated by the police cruiser's spotlight. The defendant's car was running with the keys in the ignition. The defendant was alone in the driver's seat and slumped over the center console. The driver's window was partially open. Defendant was not awakened by her police vehicle's spotlight or by the Deputy's flashlight. Nor did the defendant respond to the Deputy loudly identifying herself or her concerns regarding the defendant's condition. The Officer was understandably concerned with defendant's well-being (OD, medical condition, etc.) when the defendant didn't respond to verbal commands and appeared unresponsive. But, as the officer reached the window and continued with her commands, the defendant woke up and started answering her questions. But, still, he appeared groggy, confused, tired, disoriented, lethargic and couldn't follow simple verbal commands (like "give me the keys"). Although the Deputy testified to the defendant's apparent impairment, the indicia of impairment, including pinpoint eyes, slurring his speech, remaining confused and groggy are clearly evident on the Deputy's bodycam video.

Based on evidence of impairment and initial noncompliance with simple instructions, and the defendant's specific failure to hand over the car keys, the Deputy asked the defendant to exit the car, for the officer's safety. She testified that in her experience some impaired drivers, regardless of the cause of the impairment, will panic and attempt to drive away when confronted, putting officers, the general public and the impaired driver in danger. Here, the defendant complied by trying to exit the car but she had to assist him in getting out of car, walking around the door, and standing in one place. She testified that the defendant was still lethargic, groggy, "nodding off" while standing, and swaying. He also had balance problems and remained disoriented and confused, although his confusion cleared with time. The Officer noted that the defendant showed "pinpoint"

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eyes and slurred speech, although the defendant's vision was reported as normal in the incident report. Based on these findings of impairment, she asked the defendant to perform Field Sobriety Exercises. The defendant agreed to perform the exercises but failed in many aspects. Based on the investigation and the totality of circumstances, the defendant was charged w/ DUI. Defendant moved to suppress all evidence obtained during the arrest, including the Deputy's body-cam video of the approach and arrest and the results of the Field Sobriety Exercises.

In order to defeat the defendant's Motion to Suppress, the state must show that the Deputy had a reasonable suspicion of impairment sufficient to support further investigation and ultimate DUI arrest. The Court finds that the Deputy was responding to a report of an allegedly impaired driver. Upon locating the suspect car, based on specific description and location, the Deputy was faced with an initially unresponsive driver, slumped over the center console in a running car with the headlights on. The driver was not aroused by the bright light of the police car spotlight, nor the officer's flashlight when she approached the vehicle. He was eventually awakened by the officer's repeated voice commands yet still appeared confused and disoriented. His confusion turned to noncompliance when he was repeatedly asked by the Deputy to shut off the car and hand over the keys but failed to turn over the keys. He also displayed some of the typical characteristics of impairment, including pinpoint eyes, slurring his speech, remaining confused and groggy. As a result of the officer's observations on that evening, she had a reasonable suspicion that Defendant was attempting to operate his motor vehicle while impaired and properly initiated her DUI investigation w/ FSE. Therefore, the Defendant's Motion to Suppress Unlawfully Obtained Evidence is hereby **denied**.

* * *

Criminal law—Search and seizure—Vehicle—Probable cause—Odor of raw marijuana—Officer who smelled odor of raw marijuana emanating from vehicle stopped for traffic infractions had probable cause to believe that offense of illegal possession of marijuana was being committed and to search vehicle—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. CHRISTOPHER FONSECA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F21-9283. September 13, 2022. Milton Hirsch, Judge.

ORDER ON MOTION TO SUPPRESS

I. Introduction

For some purposes possession of, or receiving or distributing, marijuana is a Florida crime. *See, e.g.,* Fla. Stat. §§ 893.03(1)(c)7 and 893.13(1)(a)2. For other purposes, possession of, or receiving or distributing, marijuana is not a Florida crime. *See, e.g.,* Fla. Stat. § 381.986; § 893.13(9)(a) through (h); § 1004.441. For some purposes possession of, or receiving or distributing hemp—a substance that so resembles marijuana in appearance, scent, and the like, that the two can be distinguished only by scientific analysis—is a Florida crime. *See, e.g.,* Fla. Stat. § 581.217(5)(a). For other purposes possession of or receiving or distributing, hemp is not a Florida crime. *See, e.g.,* Fla. Stat. § 581.217(7). And even when possession of, or receiving or distributing, marijuana is not a Florida crime, it may be a federal crime for a Floridian to be in possession of or to receive or distribute, marijuana. *See gen'ly* Title 21, U.S. Code.

In this case, as in countless such cases, police officers stopped a car and then claimed to smell a strong and distinctive odor of marijuana emanating from within the car as they approached it. On the basis of that perceived odor of marijuana, the officers ordered the occupants of the car to step out, and then conducted a search of the passenger compartment. Defendant Fonseca seeks suppression of the fruits of that search, alleging that because marijuana, or something that smells like marijuana, may be lawfully as well as unlawfully possessed, the odor of marijuana does not give rise to probable cause.

II. Facts

The facts are largely uncontroverted and thus may be briefly stated. On May 30 of this year, an Officer Romerez (we never did learn his first name, nor the name of the police department by which he is employed) pulled a car over for non-criminal traffic infractions. Tr. 5-6.[1] When he "approached the driver's side of the car, [he] smelled the odor of fresh marijuana." Tr. 6. He then ordered everyone out of the car and searched it. *Id.* Mr. Fonseca was the front-seat passenger, Tr. 7, and the officer found both marijuana and a firearm under that seat. Tr. 12.

III. Analysis

Once upon a time it was all so simple. Two decades ago, in *State v. Betz,* 815 So. 2d 627 (Fla. 2002) [27 Fla. L. Weekly S285b], the Supreme Court of Florida dealt with a stop in which the police officer, as he approached the car, recognized "the odor of previously burnt marijuana." *Betz,* 815 So. 2d at 633. This "certainly warranted a belief that an offense had been committed [and] unquestionably provided the police officers . . . [with] probable cause to search the passenger compartment of respondent's vehicle." *Id.* (citing *State v. Reed,* 712 So. 2d 458, 460 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D1502a]). To make matters even easier, Betz was described as nervous and jittery, *id.,* and he "act[ed] in an extraordinarily suspicious manner." *Id.* The odor of burnt marijuana suggests not mere possession but recent use. Recent use by the driver of a car suggests the crime of driving under the influence. And an "extraordinarily suspicious manner" is no doubt what Hamlet's mother Gertrude had in mind when she mused, "So full of artless jealousy is guilt/It spills itself in fearing to be spilt" Wm. Shakespeare, *Hamlet,* Act IV sc. 5.

Five years later, in *State v. Williams,* 967 So. 2d 941, 942 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2188a], the First District stated the same point with more emphasis: "the detection by a police officer of the odor of burnt cannabis emanating from a vehicle, by itself, constitutes sufficient 'facts and circumstances' to establish probable cause to search the person of an occupant of that vehicle." Likewise the Fourth District in *State v. Jennings,* 968 So. 2d 694, 696 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2787a]: "The smell of marijuana coming from an occupied vehicle provides probable cause that a violation of the narcotic laws of the state has occurred" (citing *Blake v. State,* 939 So. 2d 192 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2510a]; *State v. Hernandez,* 706 So. 2d 66 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D440a]). (*NB* that in *Jennings* what the officers smelled was not merely marijuana, but "the smell of marijuana smoke," *id.* at 696. Again, smoke suggests not mere possession but active consumption and driving under the influence.) *See also State v. Tigner,* 276 So. 3d 813 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1914a].

But the reasoning of the foregoing cases is passe, says Mr. Fonseca, because, "With the legalization of hemp and medical marijuana, the smell of marijuana alone is insufficient to provide probable cause." *Amended Motion to Suppress Evidence,* p. 4. Appended to Mr. Fonseca's motion is a memorandum authored by State Attorney Katherine Fernandez Rundle, dated August 5, 2019, in which Mrs. Rundle concedes that, "the mere visual observation of suspected cannabis—or its odor alone—will no longer be sufficient to establish probable cause to believe that the substance is cannabis." Arguably Mrs. Rundle's memo is, in the hands of Mr. Fonseca, the admission of a party-opponent, Fla. Stat. § 90.803(18).

The Second District had occasion to consider the matter more recently. The defendant in *Owens v. State,* 317 So. 3d 1218 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D699a], "argue[d] . . . that the search

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of his vehicle was based solely on the odor of marijuana and that because possession of marijuana in some instances, and hemp in all instances,[2] has been legalized in Florida, the odor of marijuana can no longer serve as the basis for probable cause to search a vehicle." *Owens,* 317 So. 3d at 1219. In its analysis, the court at first appeared to offer a forthright and uncompromising rejection of that argument. "[W]e hold that an officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana." *Id.* But the court's position was not quite so forthright and uncompromising as it first seemed. A paragraph later, the court took the position that "the smell of . . . *burning* [marijuana] will continue to provide probable cause for a search of a vehicle." *Id.* (emphasis added). This is so because—as pointed out in the older cases discussed above—burnt or burning marijuana in an automobile is consistent with, and suggestive of, driving under the influence, still very much a crime in Florida. *See* Fla. Stat. § 316.193(1)(a) (driver may be "under the influence" of alcoholic beverages, chemical substances, "or any substance controlled under chapter 893," including marijuana).[3] And in *Owens,* probable cause arose not only from the odor of marijuana, but also from the officer having received "a complaint of reckless and erratic driving; and Owens's odd and erratic responses to the officer's attempts to communicate with him." *Owens,* 317 So. 3d at 1219. The *Owens* court had no occasion to consider whether the scent of raw marijuana, standing alone, gives probable cause to search the car from which the scent emanates.

In *dicta,* the *Owens* court conceded "that there may be a circumstance where an occupant of a vehicle may have a legitimate explanation for the presence of the smell of *fresh* (not burning or burnt) marijuana in the vehicle, such as where the individual has a lawful prescription for it, or that the substance is . . . hemp." *Id.* (emphasis in original). "[S]uch a circumstance . . . *might* provide an affirmative defense to a charge of a criminal offense, but it would not prevent the search." *Id.* at 1120 (emphasis in original). So it appears that, if the facts of a future case squarely present the issue, the Second District will be willing to hold that the scent of raw marijuana alone gives rise to probable cause to search a car from which the scent comes; and that if it turns out after the fact that the scent was attributable to hemp or to medically-prescribed marijuana, that will not render the search unlawful from its inception.[4] But that holding will have to await those facts. *Owens* did not present them.

The most recent appellate opinion in this line of jurisprudence is *Hatcher v. State,* ___ So. 3d ___ (Fla. lst DCA July 6, 2022) [47 Fla. L. Weekly D1463a]. Like Owens, Hatcher "argue[d] . . . that the [police] officer lacked probable cause to search [his] vehicle based solely on the odor of marijuana. He contends that the odor could have instead come from legal hemp, which is indistinguishable from marijuana by sight or smell." *Hatcher,* ___ So. 3d at ___. But like the court in *Owens,* the *Hatcher* court "declined to address" that issue, "because," as in *Owens,* "the smell of marijuana was only one of the factors the officer relied on in making the probable cause determination. Considering the totality of the circumstances . . . we conclude that [that determination] was objective reasonable." *Hatcher,* ___ So. 3d at ___. In *Hatcher,* a police sergeant saw a van "veer[ing] completely out of its lane for no apparent reason and travel[ing] through marked parallel parking spaces for about half a block." *Id.* at ___. The sergeant detained the vehicle. In so doing, he perceived the odor of burnt—not fresh, but burnt—marijuana; and the driver's "laid-back and lethargic demeanor" impressed the sergeant as consistent with the driver being under the influence. The driver also very helpfully confessed that he had no driver's license, and that he had just finished "smoking a blunt." *Id.* at ___. In these circumstances, the First District stated no more than the obvious when it concluded that "we need not resolve whether the smell of marijuana alone remains sufficient to establish probable cause." *Id.* at ___.

To the extent there is confusion in this area, it arises in part from the term of art "probable cause" itself. To a layman, that term would necessarily suggest something more probable than not—something that could be stated with more than, perhaps much more than, fifty-percent certainty.

That, of course, is not what probable cause means to lawyers and judges. Time out of mind, probable cause has been understood to refer to nothing more than "facts and circumstances before [an] officer . . . such as to warrant a man of prudence and caution in believing that [an] offense has been committed." *Carroll v. United States,* 267 U.S. 132, 161 (1925) (citing *Locke v. United States,* 11 U.S. 339 (1813) (Marshall, C. J.)). Although this concept cannot and should not be expressed in percentage terms, it would certainly correspond to a number less, perhaps much less, than fifty percent.

This may seem counter-intuitive to non-lawyers. So, too, may seem the notion that a "determination that reasonable suspicion 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] (citing *Illinois v. Wardlow,* 528 U.S. 119 (2000)). *See also District of Columbia v. Wesby,* 138 S.Ct. 577, 588 (2018) [27 Fla. L. Weekly Fed. S37a] ("probable cause does not require officers to rule out a suspect's innocent explanation"); *Navarette v. California,* 134 S.Ct. 1683, 1691 (2014) [24 Fla. L. Weekly Fed. S690a]; *United States v. Tinoco,* 304 F. 3d 1088, 1116 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C991a] ("Reasonable suspicion exists . . . if the cumulative information of which the detaining officer is aware suggests criminal activity, even if each fact, viewed in isolation, can be given an innocent explanation"); *Wallace v. State,* 8 So. 3d 492, 494 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D925b] ("even seemingly innocent behavior may support an inference that criminal activity is afoot"). Counterintuitive or not, this notion is a practical one. A police officer, acting on the street and in the moment, is obliged to determine whether there is a sufficient factual basis to believe that the person before him has committed, is committing, or is about to commit a crime. The officer may be called upon to detain that person, even to arrest him—serious consequences, to be sure, but not irremediable ones. Consideration of alternative, innocent explanations for the conduct that gave rise to the detention or arrest will come when the urgency of the moment has been abated by the fact of the detention or the arrest. That consideration may be undertaken by the officer, or by the pre-filing unit of the Office of the State Attorney, or by a judge ruling on a pretrial motion, or by a jury returning a verdict of not guilty.[5] But it will be undertaken after the fact, in moments that afford dispassionate consideration, not in seconds that require immediate action.

In the case at bar, Officer Romerez stopped a car for traffic infractions. Presumably it was—certainly it should have been—his intention to issue a ticket and send the driver on his way (no doubt with an admonishment to drive safely). But when he approached the car, he recognized what for any Miami police officer must be the entirely recognizable aroma of raw marijuana. He could have asked the occupants of the car if any of them had medical prescriptions for marijuana; but he was not obliged to do so, and he did not. Any occupant of the car could have volunteered that he had a medical prescription for marijuana; but no occupant was obliged to do so, and they did not. Of course the possibility remained that someone in the car was permitted for medical reasons to possess marijuana. The possibility likewise remained that someone in the car was transporting hemp. These were possibilities consistent with innocence; but as he stood by the detained automobile at the side of the road it would have been impossible for Officer Romerez to weigh those possibilities, to determine if they were merely possible, or actually likely, or perhaps

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even probable. Nor was it his duty to do so. Based on what Officer Romerez knew he was entitled to reach the common-sense conclusion that someone in the car illegally possessed marijuana. To hold that the officer could do no more than fold up his ticket book and walk away would be to turn "probable cause," which should be the most practical and accessible of concepts, into something cryptic and impenetrable. Officer Romerez was not charged with determining if the State would be able to prove its case at trial beyond and to the exclusion of a reasonable doubt. He was charged with determining, based on his training and experience, whether the "facts and circumstances before [him were] . . . such as to warrant a man of prudence and caution in believing that [an] offense has been committed," *Carroll,* 267 U.S. at 161. *See also United States v. Cortez,* 449 U.S. 411, 418 (1981) ("Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior. . . . [T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement"); *Brinegar v. United States,* 338 U.S. 160, 175 (1949) (considerations relating to probable cause "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act").

I conclude that, notwithstanding recent changes in law regarding hemp and medical marijuana, a police officer situated as Officer Romerez was is possessed of probable cause to believe that an offense—the illegal possession of marijuana—is being committed, and to act accordingly. The source of the probable cause is the distinctive scent of raw marijuana. Nothing more is required. Whether, at trial, the State is required as an element of the *corpus delicti* to prove a defendant's non-possession of a medical marijuana prescription, or the defendant is required to put forth his possession of such a prescription as an affirmative defense, is wholly irrelevant to the question of the law of search and seizure presented herein. *See Owens,* 317 So. 3d at 1220 (medical authorization "might provide an affirmative defense to a charge of a criminal offense, but it would not prevent the search").

Perhaps this order will have a short shelf life (and no, not merely because my betters on the Court of Appeal are available, tirelessly, to reverse my errors). For as much as I know it may be the case next month, or next year, or five years from now, that so many Floridians will obtain medical marijuana prescriptions that the likelihood of someone being in possession of *illegal* marijuana will be remote to the point of obscurity. That would change the calculus of probable cause regarding the scent of marijuana emanating from a car. *Cf. Kyllo v. United States,* 533 U.S. 27, 40 (2001) [14 Fla. L. Weekly Fed. S329a] (when law enforcement "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, th[at] surveillance is a 'search' "—the implication being that, if such devices were at some time in the future to come into "general public use," their deployment by law enforcement would cease to be a search). But we are not there yet.

Defendant's motion to suppress is respectfully denied.

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[1]A hearing on Mr. Fonseca's motion to suppress was had on August 10. References are to the transcript of that hearing.

[2]Not quite all instances. *See supra* at 1.

[3]For a musical explanation of this concept, *see* https://www.youtube.com/watch?v=aH20sEbQQZI.

[4]Because the search would be based on probable cause, its fruits would be admissible. If the police, while searching for the marijuana they smell, find other contraband—other narcotic drugs, illicit firearms, stolen property—that contraband would be properly received at trial. And it would be received even if any charge of possession of marijuana arising out of the same search were to result in dismissal or acquittal because the marijuana is shown actually to be hemp, or because the possessor of the marijuana had medical authorization for the possession.

[5]For many years the "common-law circumstantial evidence rule," which taught that in a case in which all material evidence was circumstantial, the jury was obliged to acquit if there existed any reasonable hypothesis other than that of guilt upon which the evidence could be explained, was a pillar of the common law. *See Harrell v. State,* 21 Fla. L. Weekly Supp. 748a (Fla. Cir. Ct. 2014) (Hirsch, J., concurring). It is no longer part of the jurisprudence of Florida. *Bush v. State,* 295 So. 3d 179 (Fla. 2020) [45 Fla. L. Weekly S145a]. It would hardly accord with the common sense that is supposed to govern in this area of the law to require a police officer on the street to stay his hand because he can conjure up some innocent explanation for the behavior he sees before him, but to instruct jurors that they may convict if they find sufficient proof of guilt without regard to possible innocent explanations.

* * *

Criminal law—Sexual battery—Post conviction relief—Counsel—Ineffectiveness—Plea—Voluntariness—Failure to advise of civil commitment consequences of plea—Because defendant received a withhold of adjudication and no incarceration on charge of sexual battery, civil commitment under Jimmy Ryce Act was not a possible consequence of defendant's guilty plea—Accordingly, neither trial court who conducted change-of-plea colloquy nor defense counsel erred in failing to advise defendant of civil commitment consequences

STATE OF FLORIDA, Plaintiff, v. HENRY DAVID RODRIGUEZ, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F18-18677. September 21, 2022. Milton Hirsch, Judge.

ORDER ON POST-CONVICTION MOTION

Having discovered a plot inconsistency in the narrative of the *Iliad* and the *Odyssey*, the Roman poet Horace famously remarked, "*Quandoque bonus dormitat Homerus*:" Even the great Homer nods off sometimes.

In connection with his plea in this case, Henry David Rodriguez was represented by a very scholarly and able young assistant public defender. His plea was taken by an uncommonly experienced and scholarly judge. And yet it is undisputed that his lawyer did not advise him of the "Jimmy Ryce" consequences of his plea (*see* discussion *infra*); and that the judge, in conducting the change-of-plea colloquy, also somehow omitted to advise him of those consequences. He now seeks the vacation of the judgment and sentence he formerly accepted, alleging that he was deprived of his constitutionally-protected right to the effective assistance of counsel, and that his plea was involuntary because not fully informed.

I. Facts

The facts are largely undisputed and may be briefly stated. In late 2018 Mr. Rodriguez was charged herein with armed sexual battery, a crime punishable by life imprisonment; and possession of cocaine, a crime punishable by five years' imprisonment. While this case was pending Rodriguez was charged in an unrelated case, F19-12225, with another count of possession of cocaine.

In June of 2020 Mr. Rodriguez entered into a plea agreement with the prosecution, pursuant to which he pleaded guilty to the much-reduced charge of sexual battery with no serious injury, a crime punishable by no more than 15 years in prison; and to the pending cocaine-possession count. Case F19-12225 was dismissed pursuant to the plea agreement. Thus by operation of the plea agreement Mr. Rodriguez reduced his exposure from life imprisonment plus ten years to not more than 20 years in total. But the actual outcome he procured by his plea agreement was much better even than that. He was allowed a withhold of adjudication, so that he had no formal felony conviction; and he was sentenced to ten years of sex-offender probation. He was not sentenced to so much as a moment in prison.

In accepting this plea agreement the trial court conducted the customary change-of-plea colloquy. *See* Fla. R. Crim. P. 3.172. Subsection (c)(9) of the rule provides that the court must advise a defendant entering a plea of guilty that if

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> the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence.[1]

The rule states with special emphasis that "this admonition shall be given to all defendants in all cases." *Id*. Inexplicably, given the level of experience and scholarship of the trial judge, it was not given in this case. *Quandoque bonus dormitat Homerus*.

It is a principle too well-settled to invite citation to authority that defense counsel, separate and apart from the duties incumbent on the trial court by operation of Rule 3.172, has a duty fully to advise his client of the terms, conditions, and consequences of a proposed plea agreement; and of the advantages and disadvantages, as defense counsel sees them, of accepting the plea. Here, defense counsel—as noted *supra*, a very scholarly and competent young assistant public defender—has no recollection of having advised his client of the possible civil-commitment consequences of his plea. *Quandoque bonus dormitat Homerus*.

Rodriguez insists in his *Motion for Post-Conviction Relief* "that had he been properly advised and informed he would have rejected the State's plea offer . . . and would have proceeded to trial as charged in the original Information." *Motion for Post-Conviction Relief* ("Mtn") at 6. The failure, as he sees it, of his trial counsel properly to advise him of the potential civil-commitment consequences constitutes ineffective assistance of counsel. The failure, as he sees it, of the trial court to inform him of those consequences renders his plea involuntary because uninformed.

I conclude, however, that on the peculiar facts of this case, neither the trial court nor trial counsel erred. Mr. Rodriguez was not entitled to be advised of the Jimmy Ryce consequences of his plea, for the very good reason that there are no Jimmy Ryce consequences of his plea.

Homer never nodded off at all.

I. Withhold of adjudication

In *Washington v. State*, 988 So. 2d 724 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2024a], the defendant entered a plea to a sex crime, received a withhold of adjudication, and was sentenced to ten years of probation. *Washington*, 988 So. 2d at 724. The issue before the court was whether that outcome constituted a conviction for purposes of Fla. Stat. § 394.912(2), the applicable provision of the Jimmy Ryce Act. Turning to the statute itself, the court noted that for the Jimmy Ryce Act to apply, a defendant must have been adjudicated guilty; or adjudicated not guilty by reason of insanity; or adjudicated delinquent. Fla. Stat. § 394.912(2)(a). In other words, "the statue explicitly requires an actual adjudication." *Washington*, 988 So. 2d at 725. "[T]he legislature explicitly defined *conviction* to require a formal adjudication of guilt of the qualifying offense. [As to Washington], the trial court withheld adjudication of guilt in his case." *Id*. (emphasis in original). Because Washington was never adjudicated, he was never convicted for this purpose. He was therefore not subject to proceedings under the Jimmy Ryce Act.

Washington is clearly a pattern for the case at bar. Mr. Rodriguez received a withhold of adjudication. He was, as a matter of law, not convicted of a qualifying sex crime; he was, for this purpose, not convicted at all. The Jimmy Ryce Act is therefore entirely inapplicable to him. At the time of his plea, by the terms of his plea, he faced no Jimmy Ryce consequences. Courts are not obliged to advise defendants, and attorneys are not obliged to counsel defendants, about things that will not happen to them. And even if a martinet were to take the position that the trial court's failure to advise Rodriguez as provided in Rule 3.172(c)(9) was error because the rule itself instructs that "this admonition shall be given to all defendants in all cases," it would be utterly impossible to identify any prejudice or disadvantage that inures or will inure to Mr. Rodriguez as a consequence of his not being told about something that won't ever happen to him.

II. Lawful custody

As noted *supra*, Mr. Rodriguez entered into a remarkably favorable plea agreement. He was sentenced to not a moment of incarceration. He was sentenced to probation. He has served, and continues to serve, that probationary sentence.

The Florida Supreme Court has made emphatically clear "that the legislative intent of the Jimmy Ryce Act is that the person is in lawful custody at the time any initial steps are taken in the commitment process. . . . There are no provisions in the Act that expressly provide or even imply that the State may initiate a civil commitment proceeding after a person has been released from custody." *Larimore v. State*, 2 So. 3d 101, 110-11 (Fla. 2008) [34 Fla. L. Weekly S131a]. *See also id.* at 103 ("the Act requires that an individual be in lawful custody when the State takes steps to initiate civil commitment proceedings"); 107 ("the legislature appears to have specifically contemplated that an individual would be lawfully in the State's custody when civil commitment proceedings are commenced under the Act") (citing *State v. Goode*, 830 So. 2d 817, 825 (Fla. 2002) [27 Fla. L. Weekly S860a]); 117 ("we hold that an individual must be in lawful custody when the State takes steps to initiate commitment proceedings pursuant to the Jimmy Ryce Act").

In his *Defendant's Reply to State's Response to Motion for Post-Conviction Relief* at ¶10, Rodriguez cites to *Luedtke v. State*, 6 So. 3d 653 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D485a] (Alternbernd, J.). But *Luedtke* underscores the point made by *Larimore*: "Under the [Jimmy Ryce] Act, a person is subject to civil commitment proceedings if he or she has been convicted of a sexually violent offense and is *sentenced to total confinement*." *Luedtke*, 6 So. 3d at 656 (emphasis added). It was Luedtke's "plea to the offense of sexual battery . . . *and his resulting confinement* [that] rendered him subject to the provisions of the Jimmy Ryce Act." *Id*. (emphasis added). Mr. Rodriguez, by operation of his very favorable plea agreement, was sentenced to no confinement whatever. He undergoes no confinement now. He could not have been, and cannot now be, subject to the Jimmy Ryce Act. *See also State v. Phillips*, 119 So. 3d 1233 (Fla. 2013) [38 Fla. L. Weekly S211a].

Orders adjudicating post-conviction claims of ineffective assistance of counsel customarily involve protracted consideration and application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, there is nothing to consider and nothing to apply. Trial counsel did not advise his client about the Jimmy Ryce Act. He had no more reason to do so than he did to advise his client about the Uniform Commercial Code, or about the Rule Against Perpetuities. Trial counsel secured for his client a truly favorable plea agreement: one that included no adjudication and no incarceration. Where there is no adjudication, there can be no Jimmy Ryce consequences. Where there is no incarceration, there can be no Jimmy Ryce consequences. So far from being deficient, as *Strickland* uses that term of art, trial counsel's representation was a masterpiece. Henry Rodriguez has nothing to complain of and much to be grateful for.

For a plea to be voluntary and consensual for Sixth Amendment purposes, it must be fully informed. That does not include a requirement that a defendant entering into a plea be informed of irrelevancies. As noted, the trial court in its change-of-plea colloquy did not advise Rodriguez as to the terms of the Uniform Commercial Code, or the Rule Against Perpetuities. For the same reason, it did not advise Rodriguez about the terms of the Jimmy Ryce Act. Mr. Rodriguez's plea was no more rendered uninformed and involuntary as a consequence of the non-advice as to the Jimmy Ryce Act than it was as a consequence of the non-advice as to the UCC or the Rule Against Perpetuities. None of these provisions of law bore in the slightest on

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the trial rights that Mr. Rodriguez was waiving or the benefits that Mr. Rodriguez was receiving. As to those rights, and as to those benefits, he was indeed fully informed. And informed as he was, he made a choice that advantaged him very considerably—a choice that spared him a record of conviction and a term of incarceration, his very serious criminal misconduct notwithstanding.

Defendant's *Motion for Post-Conviction Relief* is respectfully denied.

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[1]Pursuant to Fla. Stat. Ch. 394, Part V, Fla. Stat. § 394.910 *et. seq*., entitled, "Involuntary Civil Commitment of Sexually Violent Predators" but commonly known as the "Jimmy Ryce Act."

* * *

Insurance—Rescission of policy—Insurer that failed to include interest in premium refund check did not return insured to status quo

IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. JOSE GONZALEZ, Defendant/Counter-Plaintiff. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CA-011393. September 8, 2022. Melissa M. Polo, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO FAILURE TO RETURN DEFENDANT TO STATUS QUO

THIS MATTER having come before the court on September 8, 2022 on Defendant's Motion for Summary Judgment as to Failure to Return Defendant to Status Quo. The court having reviewed the file, considered the motion, applicable law, and being otherwise fully advised, finds,

1. It is undisputed that Plaintiff's premium refund check did not return Defendant to the status quo as it failed to include interest. As such, Defendant's Motion for Summary Judgment for Failure to Return Defendant to Status Quo is **HEREBY GRANTED.**

* * *

Contracts—Settlement agreements—Enforcement—Motion to enforce settlement agreement regarding care and visitation with 88-year-old widow is denied—Allegation that widow's son has not explained to her grandson why widow was too tired to receive grandson's visit is denied where parties agreed to abide by widow's wishes regarding visitation—Allegation that son has not collaborated with grandson on matters for which son serves as healthcare surrogate for widow or co-trustee with widow or holds power of attorney for widow lacks merit—Because widow is not incapacitated, son does not exercise power of attorney or healthcare surrogate authority, and son cannot act independently of widow on trust issues—No merit to allegations that son violated agreement by causing widow to refuse visits by her grandson and daughter and obstructing their visits where evidence indicates that visits had been upsetting to widow and caused her to exercise her free will to terminate them—No merit to claim that son refused to rectify improper execution of legal documents where widow, not son, agreed to amend documents—Daughter and grandson who have accepted benefits of documents and promises made by widow as a party capable of exercising her own free will cannot simultaneously assert that widow is not capable of exercising free will regarding visitation

IN RE: BABETTE ARKY. DANIEL GIMBEL, PHYLLIS ARKY, and HARRISON GIMBEL, Petitioners, v. EUGENE ARKY, Respondent. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Probate Division IZ. Case No. 502020CP001374XXXXSB. August 30, 2022. Motion for Rehearing denied September 20, 2022. Charles E. Burton, Judge. Counsel: James G. Pressly, Jr., Pressly, Pressly, Randolph & Pressly, P.A., Palm Beach, for Respondent.

ORDER GRANTING SUMMARY JUDGMENT DENYING VERIFIED MOTION TO ENFORCE SETTLEMENT AGREEMENT

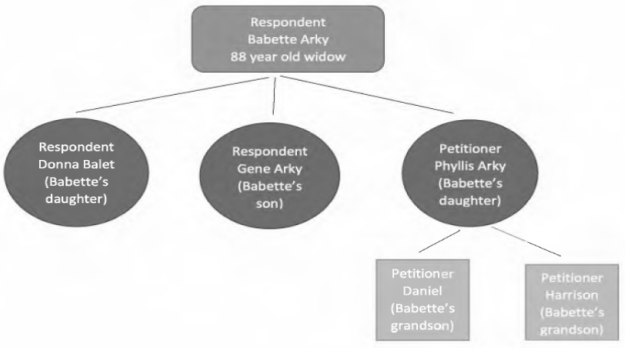
The Court having reviewed Eugene Arky's Renewed Motion for Summary Judgment (D.E. #230) joined by Babette Arky (D.E. #239) and Donna Arky Balet (D.E. #231) and having reviewed submissions by all parties (including Eugene's Renewed Motion for Summary Judgment bates stamped MSJ 001-237) joined by Babette and Donna and Petitioners' Response which was late filed but Movants withdrew any objections based on late filing of the Response); and reviewed the proposed draft Summary Judgments submitted by the parties in response to the Court's invitation dated August 12, 2022 and having heard arguments of counsel at a two hour hearing on August 8, 2022, and having reviewed relevant statutory and case law, grants Eugene Arky's Renewed Motion for Summary Judgment and enters Judgment denying the Verified Motion to Enforce Settlement Agreement dated October 4, 2021 (D.E. #114) on the following grounds:

Matters Considered by the Court

1. Petitioners, Phyllis Arky, Daniel Gimbel, and Harrison Gimbel ("Petitioners"), initially filed the Petition for Judicial Review and Relief dated March 24, 2020 (D.E. #1) seeking less restrictive visitations with Respondent Babette Arky and altered management of Babette's caregivers and her healthcare. The Petition was in two counts, each count referring to restrictions on visitation and hiring of caregivers. Babette had intervened as a party aligned with Eugene in that case. On the eve of trial, that Petition was settled with a Settlement Agreement between Petitioners and Respondents, Babette Arky, Eugene Arky, and Donna Arky Balet, dated July 19, 2021 and approved by the Court on July 21, 2021 (D.E. #113). The Court retained jurisdiction to enforce the Settlement Agreement.

2. Petitioners filed their Verified Motion to Enforce nine weeks later on October 4, 2021 (D.E. #114) seeking removal of Eugene Arky as agent under Babette's Power of Attorney, Healthcare Surrogate, and Co-Trustee of Babette's Revocable Living Trust on the grounds that Eugene materially violated the Settlement Agreement in eight ways listed in the Verified Motion to Enforce at ¶7 a-h. Although the Verified Motion to Enforce seeks Eugene's removal, the Motion directly affects Babette and Donna and they have intervened in opposition to the Verified Motion to Enforce and in support of the Renewed Motion for Summary Judgment.

3. The following family tree is undisputed and clarifies the family relationship of the parties and their designations as Petitioners or Respondents:



The Court will refer to the parties by their first names for convenience and not with any intended disrespect: "Eugene or Gene, Babette, Donna, Phyllis, Daniel, Harrison."

4. At the August 8, 2022 hearing on the Renewed Motion for Summary Judgment, counsel for Eugene as Movant withdrew any reliance on the psychologist records of Kindal Sweet[1] to support the Renewed Motion for Summary Judgment and withdrew his Motion to Strike the Response of Petitioners to the Renewed Motion for Summary Judgment (with affidavits attached) that had been late filed

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on July 29, 2022 and agreed that the Court could consider the Response and Affidavits despite the fact that they were late filed in violation of Fla.R.C.P. 1.510(5) requiring the non-moving party to serve its supporting factual position at least 20 days before the Motion for Summary Judgment hearing. In addition, Eugene's counsel withdrew reliance on Daniel's conduct in visits with Babette in May and June 2022. Accordingly, the Court has not considered either the Kindal Sweet records or the references to Daniel's conduct in visits in May and June 2022.

5. Eugene, Babette, and Donna raise three grounds raised for relief. First, they allege that because Petitioners failed to dismiss the underlying Petition for Judicial Review and Relief by filing a Notice of Voluntary Dismissal they are entitled to summary judgment because Petitioners breached first. The Court finds no merit in the procedural argument as the Motion to Approve the Settlement Agreement resolved all issues between the Parties and Petitioners have never sought to re-open the underlying Petition for Judicial Review and Relief. In addition, they allege that summary judgement should be granted because the relief for breach of the settlement agreement is inequitable to Babette. The settlement agreement is a contract and all parties agreed to its terms and consequences for breach. The Court finds no merit in this argument as the Court approved the agreement (Babette was a party to the agreement) and must enforce its terms based upon the four corners of the document.

6. The Court now addresses the allegations that there were material breaches of the Settlement Agreement. Revised Fla.R.C.P. 1.510 provides that the court shall grant Summary Judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to Summary Judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion."

The Florida Supreme Court's opinion adopting the revised Fla.R.C.P. 1.510 directs the courts as follows in deciding Motions for Summary Judgment:

- "... embracing ... *Celotex* ... means abandoning certain features of Florida jurisprudence that have unduly hindered the use of motions for summary judgments in our state."
- To consider "Whether the evidence presents a sufficient disagreement to require submission to a jury."
- "A moving party who does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case."
- The moving party can either ... or point out that the nonmoving party lacks the evidence to prove X."
- "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." (See Supreme Court of Fla. No. SC 20-1490 April 29, 2021; 317 So.3d 72 (Fla. 4/29/21).

Here, the Petitioners (Phyllis, Daniel, and Harrison) bear the burden of persuasion at trial on their Verified Motion to Enforce Settlement Agreement set for trial on October 17, 2022 and the Movants for Summary Judgment are Eugene, Babette, and Donna.

The following paragraphs 7a through 7h address the alleged material violations of the Settlement Agreement alleged by Petitioners in the Verified Motion to Enforce Settlement Agreement.

¶7a. Eugene refused to disclose to Daniel what Babette did all day on July 21, 2021 which caused her to be too tired to entertain visitors. There is no provision in the Settlement Agreement requiring Eugene to report to Daniel all of Babette's movements. Similarly, Babette did not agree to report her daily/hourly whereabouts to Petitioners. With regard to Babette's being too tired to entertain visitors, the Settlement Agreement expressly provides at ¶3, "The parties agree to abide by Babette's wishes regarding visitation." In Daniel's Affidavit in Opposition to the Renewed Motion for Summary Judgment, he concedes that on July 21, 2021, Babette told him that she was too tired for him to visit, which is consistent with Babette's reserved right in ¶3 of the Settlement Agreement requiring the parties to abide by Babette's wishes regarding visitation. Gene told Daniel he would abide by Babette's wishes (MSJ 075).

Emphasizing the triviality of this alleged material breach referring to Babette's whereabouts on a single afternoon is the fact that this Settlement Agreement was not even effective on that afternoon, because this Court did not serve its Order Approving the Settlement Agreement until 5:12 p.m. on that day (D.E. #113).

7b. Gene has not collaborated with Danny in good faith on all matters for which Gene serves as a fiduciary for Babette. The Settlement Agreement at ¶10 requires Babette and Eugene to collaborate with Daniel on matters "*for which Gene serves as fiduciary to Babette*." (Emphasis added.) Paragraph 10 identifies three fiduciary roles: Power of Attorney, Healthcare Surrogate, Co-Trustee of Revocable Trust. Petitioners cite no evidence in the record or case law to dispute Eugene's affidavit stating that he does not serve as Babette's healthcare surrogate because she has not been declared to be incapacitated and she personally signs medical employment agreements, medical consent forms, and Babette personally signs all medical acknowledgments, claim forms, waivers, employment agreements of medical care providers, etc. (See, e.g. Medical 001, 060, 148, 162) (D.E. #152) As a matter of law, Gene cannot serve as Babette's healthcare surrogate until she has been determined to be incapacitated pursuant to §765.204(1), Fla. Stat. "A principal is presumed to be capable of making healthcare decisions for herself unless she is determined to be incompetent." With regard to the Power of Attorney, there is no evidence in the record contrary to Eugene's affidavit that he has not signed documents in his capacity as agent under the Power of Attorney and Babette signs her own documents. With regard to Eugene's status as a Co-Trustee of Babette's Revocable Trust, as a matter of law, Eugene has no independent control because he is a Co-Trustee with Babette and the Florida Trust Code provides that the Co-Trustees must act unanimously. See §736.0703, Fla. Stat. Thus, Eugene cannot act independently of Babette. Despite having no obligation to collaborate with Daniel, Eugene and Babette have executed, filed, and served on the Petitioners, Trust Accountings for the period commencing with the Settlement Agreement through December 31, 2021 (D.E. #142) and a Supplemental Accounting from January 1, 2022 to June 30, 2022 (D.E. #258). The first Accounting contains the limitation notice requiring a recipient of the Accounting to file suit within six months if he/she has objections, and Petitioners cite to no evidence in the record that they have timely filed an action for breach of trust within the six months statute of limitations period provided in §736.1008(2) and (4)(c), Fla. Stat.

Petitioners have not established a genuine issue of material fact that Eugene has failed to collaborate with Daniel on matters where Eugene is serving in a fiduciary capacity.

¶7c, d, and f. Eugene uses baby monitors to listen to Petitioners' visits; Eugene caused Babette to refuse Petitioners' visits after August 31; and Eugene obstructs visits. These three paragraphs are addressed together because they relate to visits and access to Babette. There are affidavits of Daniel, Phyllis, Harrison, two aides, Eugene, and Babette's deposition testimony focusing on a series of visits culminating in Phyllis' of August 29, 2021 and Daniel's of August 31, 2021 after which the Petitioners did not visit Babette for nine months. The evidence in the record is undisputed that Eugene was not present for these visits. In addition, there is no factual dispute that Eugene, immediately after the Settlement Agreement was approved by the Court, complied with ¶3 by listing the Petitioners' names at the guard gate for Babette's subdivision and giving Petitioners keys to Babette's

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home and the code access to Babette's garage. Those rights have never been removed. The Petitioners have Babette's house keys, guardhouse gate access, and Babette's garage code. The specific terms of the Settlement Agreement at ¶3 are that "Babette agrees to have open visitation with the Parties. The parties will be approved visitors at the guard gate. The Parties will have keys to Babette's house. The Parties will have access to the code to Babette's garage. The Parties agree to abide by Babette's wishes regarding visitation."

7. The only allegations in the Verified Motion to Enforce Settlement Agreement that arguably may constitute a violation of material aspects of the Settlement Agreement are the allegations raised in paragraphs c, d, and f alleging Eugene's breaches with regard to visitation. The affidavits collectively and Babette's deposition testimony established that there is no material issue of fact with regard to Eugene's alleged breaches regarding visitation. It was the behavior of Phyllis and Daniel at visits in late August 2021 that caused Babette to exercise her "wishes regarding visitation" and Eugene was not even present.

8. All of the affidavits are in agreement that incidents occurred during the two August 29 and August 31 visits, that Eugene was not present, that Babette was upset and unhappy with the visits, and that these were the last visits for nine months even though their guardhouse access, house keys, and garage code access were not revoked. The overarching undisputed fact is that Eugene was not present at either of the August 29 or August 31 visits.

9. With regard to the August 29, 2021 visit by Phyllis, the testimony of the aide, Jean Miles, was that Eugene was not present, which is not disputed. She testified that Phyllis disconnected the baby monitor. The aide was in her room, heard shouting, and walked in on Phyllis standing over Babette, red faced and shouting at Babette that Babette was not respecting her. Seeing how upset Babette was, the aide took her to the bathroom and the visit terminated. The aide testified at pp.13-15 that in Phyllis' prior visits she was shouting at Babette (MSJ 096-7). Babette's testimony at p. 819, was similar, with the additional fact that Babette had accused Phyllis of being a liar and being selfish, triggering Phyllis' finger pointing and yelling and standing over her (MSJ 184). Phyllis denied shouting at Babette and described a discussion in which she was telling Babette things about Eugene that she did not like. Her affidavit agrees that the aide came out of her bedroom and took Babette to the bathroom. Phyllis does not contend in her affidavit that Eugene was present. Phyllis' son Harrison was present on August 29, 2021 and does not address Phyllis' conduct during the visit. His affidavit does confirm that the baby monitor was disconnected during the visit. Harrison makes no reference to Eugene's being present and confirms that he has not seen Babette since August 29, 2021. His affidavit states that on the day following Daniel's visit, he called Babette and she told him that she was not accepting visitors on September 4, 2021. He told Babette that this was not fair and she responded that "It is what it is." His affidavit also states that Babette asked him not to aggravate her. Again, no evidence that Eugene was on the phone call.

10. The August 31, 2021 visit by Daniel is recounted almost identically in Daniel's affidavit and the affidavit of the aide by Babette in her deposition, to wit: that Daniel started the visit by beginning to disengage the baby monitor with Babette and the aide asking him not to disengage it; his refusal to comply; and leaving in a huff, slamming the door, when Babette asked him to leave if he would not comply with the request (MSJ 185-6, MSJ 113). Daniel denies the door slamming but otherwise generally concurs with the testimony of Babette and the aide. Babette's depo and the affidavits of the aides confirmed that the baby monitor is not a recording device, but allows the aides to be in their rooms to observe Babette when she is in the living room to determine whether she needs to go to the bathroom (she is unable to ambulate on her own and has UTI and incontinence issues). (MSJ 028, 030, 047, 063, 186)

11. Babette testified at p.14 of her deposition (MSJ 186) that she did not want Daniel to be healthcare surrogate, power of attorney, or Trustee and did not want to have anything to do with him. Babette told her internist that Daniel had caused a big scene that upset her greatly and she was very anxious and wanted him out of her life and that she is beside herself over the danger that Eugene must resign and put Daniel in control (Medical 011-20) (D.E. #152).

12. In Daniel's affidavit, he conceded that in an August 21, 2021 visit with Babette, who was alone, she asked Daniel if he was prepared to apologize to Eugene and on an August 25, 2021 visit (alone—Eugene not present), Babette spoke to him in a "dismissive manner." Babette had just finished 16 months of litigation with Daniel and there is no evidence that her attitude toward Daniel was somehow caused by Eugene. The fact that the Petitioners' affidavits paint a less harsh picture of the August visits does not alter the fact that they were unpleasant and upsetting to Babette causing her to exercise her free will to terminate them and does not create a genuine issue of material fact to support an allegation of Eugene's material breach of the Settlement Agreement.

13. The allegations that Babette's personal decisions can be controlled by Eugene and that Eugene must collaborate with Daniel to decide what is best for Babette are contrary to the Florida Supreme Court's decision in *Fla. National Bank v. Genova*, 460 So.2d 895 (Fla. 1984). Babette has not been determined to be incapacitated and the Settlement Agreement at ¶15 specifically provides that no party will seek to have her declared to be incapacitated. The Petitioners essentially contend that this Court has authority to make determinations that Babette has made wrong or imprudent decisions with regard to visitation, determinations as to her aides, and medical care. Babette reserved to herself in ¶8 her control over her aides and in ¶3 her control over visitation (MSJ 290-1). In *Genova*, the Florida Supreme Court held that, "The courts have no place in trying to save persons such as Mrs. Genova, the otherwise competent settlor of a revocable trust, from what may or may not be her own imprudence with her own assets." The Court affirmed the Fourth District Court of Appeal's decision in *Genova v. Fla. National Bank*, 433 So.2d 1211 (Fla. 4th DCA 1983). The 4th DCA opinion stated, ". . . This court would be overstepping its bounds by becoming, in essence, the settlor's guardian—notwithstanding the absence of her incapacity—in its application of the principle of undue influence to the revocation of a trust of which she is the settlor . . . When does the court stop being a judicial forum and turn into an Orwellian Big Brother? Our judgment tells us that there is a limit to the issuance of judicial fiat based on the belief that the court is saving the wife from what she may do in the future with her own money . . ." See also §736.0207, Fla. Stat. providing that a Revocable Trust may not be challenged during life of the Settlor.

14. Babette testified at p.14 of her deposition that she enjoys her pleasant and jovial visits with Eugene and Donna and her lifestyle and her aides. (MSJ 064)

15. In summary, there is no justiciable issue of fact in the record to support allegations that Eugene interfered or in any way breached his agreements regarding open visitation in the Settlement Agreement and no evidence that the Petitioners should not comply with the provision in ¶3 of the Settlement Agreement that, "The parties agree to abide by Babette's wishes regarding visitation."

16. ¶7(e) Gene refused to rectify improper execution of the advance directives and Trust that Babette signed and refuses to facilitate a proper signing. The Settlement Agreement creates no duty for Eugene with respect to Babette's execution of her amendments to Healthcare Surrogate, Power of Attorney and her Trust to elevate

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Daniel as successor the Eugene. In ¶10 of the Settlement Agreement, it is Babette who agrees to amend her Power of Attorney, Healthcare Surrogate, and Revocable Trust to make Daniel the successor to Eugene. Although the Court could stop there, the failure of the Verified Motion to Enforce to be supported by any evidence of material breach by Eugene is demonstrated by this allegation. Even though it was Babette's obligation under ¶10 of the Settlement Agreement to execute the documents, Eugene's affidavit and the relevant statutory and case law demonstrate that he assisted Babette's counsel and Babette, during the Covid crisis, in obtaining execution of the documents at Babette's bank branch (that was Covid secure) instead of signing in Babette's lawyer's office. Contrary to the allegation that Eugene refused to rectify improper execution and refused to facilitate a proper signing, the documents were in fact legally executed in the bank office. Then, at the request of Babette's lawyer, Eugene facilitated the lawyer supervised execution by driving Babette to counsel's office where the documents were re-executed. (MSJ 076)

17. The initial execution of the Trust Amendment at the bank office on August 18, 2021 was valid, without the requirement of any witnesses or notary, because the Trust Amendment dealt with the designation of a Successor Trustee and did not have any testamentary aspects. Under the Florida Trust Code, a Trust Amendment that merely changes Trustees is only required to be in writing, with no requirement for attesting witnesses. See §§736.0402 and 736.0403(1)(b), Fla. Stat. See also, *Williams v. Williams*, 182 So.2d 10 (Fla. 1966) holding that printed witness names are sufficient if indeed subscribing witnesses were even required. Moreover, the Trust itself provides at Section 3.1 that Amendments are by "written instrument" with no witness requirement.

18. The Healthcare Surrogate form must be signed by two subscribing adult witnesses. See §765.202(1), Fla. Stat. At the initial execution at the Bank on August 18, 2021, the witnesses' printed names were sufficient, as held by the Florida Supreme Court in *Williams v. William*, *supra*. at p.12 noting that the word "subscribe" is more liberal that "sign." Similarly, the Durable Power of Attorney, in addition to being notarized was executed by two witnesses who signed their signatures on one page and printed their names on another. As stated in Eugene's affidavit, Babette's lawyer asked him to take Babette to the bank, find the witnesses, and have them sign the names on all three documents above their printed names, which he did (MSJ 076). The subsequent signatures of the subscribing witnesses above their printed names were valid because the applicable statutes and case law do not require that the witnesses sign the documents before delivery. See *Sweat v. Yates*, 463 So.2d 306 (Fla. 1st DCA 1985); *Medina v. Orange County*, 147 So.2d 556, 557 (Fla. 2d DCA 1962).

19. Any technical issues regarding attesting witnesses were mooted by the subsequent re-execution of the three documents in Mr. Barner's office and Petitioners raise no issue as to the validity of those documents. In fact, Petitioners rely on the validity of those documents to have placed Daniel in the position of successor to Eugene. (See discussion below at Section III.)

20. ¶7g. Gene posted on Facebook a message that Babette had bought a sports car for her aide. The Petitioners offer no basis as to how this social media posting constitutes a material breach of any provision in the Settlement Agreement and they offer no evidence to contradict Eugene's affidavit explaining that he purchased the car with his own money and titled it in his name and then took it to Babette's house to show it to Babette and the aide, where he took a picture of the aide sitting in the driver's seat and jokingly posted it for his social media friends. In addition, the Petitioners offer no explanation as to why they included this allegation in their Verified Motion to Enforce, when Eugene through Babette's counsel had sent them a copy of his personal check written to the dealer and explained that it was a joke, prior to their filing the Verified Motion (MSJ 076-7).

21. ¶7h. Upon notification that Gene breached the Settlement Agreement, he cursed Daniel and challenged him to a fight. Again, Petitioners do not identify the term of the Settlement Agreement that is materially breached by this allegation. Significantly, there is no allegation that the event occurred in the presence of Babette. Eugene's affidavit discloses that when notified of the threatened motion to enforce, he lost his temper because he knew of the adverse impact on Babette that would be caused by reigniting the litigation that had been ongoing since March of 2020 after the brief two month interlude resulting from the Settlement Agreement. He did use coarse language in the call with Daniel and suggested that they settle things man to man. Nobody was on the call except Eugene and Daniel (MSJ 077). There is no evidence in the record that this phone call constitutes a breach of the Settlement Agreement.

22. The Court concludes that the Petitioners, who have the burden of proof at trial on their Verified Motion, have not demonstrated that there is any genuine issue of any material fact to support a material breach by Eugene of the Settlement Agreement. A material breach is defined as one going to the essence of the Agreement. See *Burlington v. Parker*, 160 So.3d 955, 960 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D915c] holding that material breaches go to the essence of the agreement and trivial noncompliance and minor failings are not material breaches.

23. Here, the Petitioners entered into a contract (Settlement Agreement) with Babette, accepting her ability to contract and accepting her ability to independently evaluate and execute the three testamentary documents. Then after accepting the benefits of Babette's ability to make her own independent decisions, they then filed their Verified Motion to Enforce the Settlement Agreement alleging, *inter alia*, that Babette does not make independent decisions and is not capable of doing so because of Eugene's manipulation.

24. In *Free v. Free*, 936 So.2d 699, 702 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2049f], the court recognized that the decision whether to decree specific performance of a contract is a matter that lies within the sound judicial discretion of the trial court and that decision is governed by consideration of all the facts and circumstances, an application of well-settled legal and equitable principles to make for achieving justice and fairness. The court quoted with approval the Florida Supreme Court, "The court contemplating an order of specific performance is obligated to consider whether this remedy, based on the facts of the case, would achieve an unfair or unjust result. If so, specific performance is not permitted." This change of position by the Petitioners after having taken advantage of Babette's Amendments to the testamentary documents, has been denied and characterized as the "gotcha" school of litigation which will not be countenanced. See *Salcedo v. Associacion Cubana, Inc.*, 368 So.2d 1337 (Fla. 3d DCA 1979) which cites *Palm Beach County v. Palm Beach Estates*, 148 So. 544, 549 (Fla. 1933) where the Florida Supreme Court held that a party in an earlier proceeding setting up a status or relationship cannot in a later suit on the same cause of action change his position to the injury of his adversary. Similarly, a party who opposes summary judgment is not permitted to alter his or her previous positions in order to defeat a summary judgment. *Jain v. Buchanan, Ingersoll*, 322 So.3d 1201, 1204 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1399a]. Here the Petitioners have asserted that Babette validly exercised her ow free will and executed a Health Care Surrogate, Trust Amendment, and Power of Attorney to elevate Daniel's position and now inconsistently assert that Babette cannot freely exercise her personal decisions regarding family visits.

25. Not only has Babette changed her Healthcare Surrogate/Power of Attorney/Trust to her detriment, but she has revealed to the

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Petitioners extensive medical records and financial information in compliance with the requirement in ¶4 of the Settlement Agreement that she do so. The extent of these more than 2,000 pages of Babette's financial and medical records for the period after the Settlement Agreement are detailed in Eugene's Affidavit in Support of Renewed Motion for Summary Judgment at ¶24 on pp. 13 & 14 (MSJ 074, 085-6).

26. In addition, Babette agreed in ¶13 of the Settlement Agreement that any lifetime gifts that she makes must be equal and cannot favor one child over another. Thus, Babette's compliance with the Settlement Agreement resulted in elevating Daniel and in limiting her rights to make *inter vivos* gifts to the objects of her bounty. Petitioners have accepted the benefits of documents and promises by Babette as a party who is capable of exercising free will and simultaneously assert that Babette is not capable of exercising her free will.

27. In *Salcedo, supra*., the Court held that a party may not "have his cake and eat it too" (p.1339) which is what the Petitioners are attempting to do in contracting with Babette and accepting amended fiduciary documents to their advantage and then contending that Babette is not capable of independently exercising her free will and acts only under Eugene's direction.

28. Judicial estoppel bars parties from inequitably contradicting themselves on the same issue.

Accordingly, the Petitioners' Verified Motion for Enforcement of Settlement Agreement is DENIED and the Court reserves jurisdiction for determination of entitlement and amount of attorneys' fees and costs to be awarded to Eugene Arky, Babette Arky, and Donna Arky Balet as provided in ¶23 of the Settlement Agreement.

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[1]Counsel's statement of non-reliance on these medical records was for the limited purpose of the Court's consideration of the Renewed Motion for Summary Judgment and counsel specifically reserved the right to introduce these medical records at trial if the Renewed Motion for Summary Judgment is denied.

* * *

Criminal law—Driving under influence—Charges of driving under influence with damage to property of another or driving in willful or wanton disregard for safety that causes damage to property of another are improper where only damage was to defendant's own vehicle—Fact that bank holds lien on vehicle does not make bank owner of vehicle

STATE OF FLORIDA, Plaintiff, v. DAVID DOUGLAS HUMPHREYS, IV, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County, Felony Criminal Division. Case No. 22005448CF10A. September 6, 2022. Michael Lynch, Judge. Counsel: Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS IV AND VII OF THE INFORMATION

THIS MATTER, having come before me upon David Douglas Humphreys, IV's motion to dismiss counts IV and VII of the Information filed against him pursuant to Fla. R. Crim. P. 3.190(b)(1), and having heard the argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the motion to dismiss counts IV and VII of the Information is hereby **GRANTED** for the reasons stated below.

Pursuant to Fla. Stat. § 316.193(3)(c)1, "[a] person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and: (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired; (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood . . . [and that] Any person . . . Who, by reason of such operation, causes or contributes to causing **Damage to the property or person of another** commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083." *Id.* (emphasis added).

Pursuant to Fla. Stat. § 316.192(3)(c)1, "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving . . . Who, by reason of such operation, causes: **Damage to the property or person of another** commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

The prosecutor's office in this case filed an Information against David Humphreys as a result of a traffic accident that occurred on February 6, 2021. In that Information, they have alleged the following:

COUNT IV

HAROLD F. PRYOR, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that DAVID DOUGLAS HUMPHREYS IV, on the 6th day of February, A.D. 2021, in the County and State aforesaid, did then and there unlawfully drive a vehicle, while he was under the influence of alcoholic beverages and/or a substance controlled under Chapter 893 of the Florida Statutes to the extent that his normal faculties were impaired and/or with a blood-alcohol level of 0.08 or more, and who by reason of such operation did cause, or contribute to causing, **damage to the property of another, to-wit: BANK OF AMERICA NA as lienholder**[1], contrary to F.S. 316.193(1), F.S. 316.193(3)(a)(b)(c)1, and F.S. 316.1934(1)

and

COUNT VII

HAROLD F. PRYOR, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that DAVID DOUGLAS HUMPHREYS IV, on the 6th day of February, A.D. 2021, in the County and State aforesaid, did then and there unlawfully drive a vehicle in willful or wanton disregard for the safety of persons or property, and who, by reason of such operation, **caused damage to the property of another, to-wit: BANK OF AMERICA NA as lienholder,** contrary to F.S. 316.192(1) and F.S. 316.192(3) (a) (b) (c)1

See INFORMATION FILED AGAINST DAVID HUMPHREYS (emphasis added).

In each of these counts, the prosecution has alleged that, by Mr. Humphreys' actions, he has "caused damage to the property of another, to wit: **BANK OF AMERICA NA as lienholder**." *Id.* (emphasis added). Yet, as the prosecution has conceded, the vehicle in question, a McLaren, was solely owned at the time of the alleged offenses by the accused, David Humphreys, who financed the purchase of the vehicle with a **loan** from the Bank of America NA. *And see* PROSECUTION'S EXHIBIT "1" and DEFENDANT'S COMPOSITE EXHIBIT "1", the title documents for the vehicle, which clearly shows that "Humphreys, David Douglas, IV" is the *sole* owner of the vehicle.

A lien holder places a lien against an item that is purchased by an individual. However, the lien holder does *not* own the item, in this case a motor vehicle, that the purchaser has purchased using the lenders funds. "A lien holder on a car is a loan lender that has a legal *claim* to your financed car. Because the lien holder is funding the loan, they have a legal interest in the vehicle until the loan has been fully repaid." *See* https://www.travelers.com (emphasis added).

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While a lien holder has a "legal interest in [a] vehicle", *id*., there is a significant difference between having a legal interest in a piece of property and owning it. While Bank of America NA had a legal interest in the car, they had no ownership of it, and the charges against Mr. Humphreys for "causing, damage to the property of another, to-wit: BANK OF AMERICA NA as lienholder" are improper. *And see, e.g, D.S.S. v. State,* 850 So. 2d 459 (Fla. 2003) [28 Fla. L. Weekly S486a] (grand theft conviction vacated where the prosecution failed to produce proof of the ownership of the property insufficient) and *L.D.S. v. State,* 784 So. 2d 1227 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1845a] (in the context of an automobile, the prosecution must present evidence as to the owner or possessor of the property in order to prove the offense of burglary).

Admittedly this is an issue of first impression in this state. As the prosecutor has admitted, and seasoned defense counsel has affirmed, to their knowledge, he is the only prosecutor in the state to try to the such counts/charges where it is a defendant's vehicle that is involved in such an accident.

While this issue has not before been raised before in the context of Fla. Stat. § 316.193(3)(c)1, it has been raised and decided in the context of Fla. Stat. § 316.193(3)(c)2, which involves the charges of serious bodily injury to another.

In *Smith v. State,* 793 So.2d 1118, 1119 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2179a], the defendant was the only person injured in an automobile accident that occurred while that defendant was driving under the influence. The First District Court of Appeals held that the provisions of Fla. Stat. § 316.193(3)(c)2, which made it a third-degree felony to cause serious bodily injury to another as a result of driving under the influence were inconsistent with Fla. Stat. § 316.1933(1), which was incorporated into Fla. Stat. § 316.193(3)(c)2 and which defined serious bodily injury as an injury to any person, including the driver, which consisted of a physical condition that created a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ. The Court, in accordance with the rule of construction set forth in Fla. Stat. § 775.021(1), held that the internal ambiguity had to be resolved in the defendant's favor and it held that the law does not authorize a conviction for DUI with serious bodily injury where only the defendant had been injured. *Id.* at 1119.[2]

In *Adams v. State,* 941 So. 2d 553 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1832a], the defendant filed a motion for post-conviction relief, arguing that his counsel was ineffective for advising him to plead guilty to DUI with serious bodily injury because he was the only person who sustained serious bodily injury. The First District Court of Appeals agreed, holding that "a defendant could not be convicted of DUI with serious bodily injury when the only person that sustained an injury was the defendant." *Id.* at 554.

Finally, in *Brown v. State,* 32 So. 3d 779 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D984b], the prosecution charged the defendant with several offenses related to a multi-car collision. Among them was driving under the influence with damage to the property of another, specifically, a 1997 Chevy truck that the defendant was driving. The prosecution failed to produce any evidence of the truck's ownership. At the close of the prosecution's case, the defendant moved for a judgment of acquittal on that basis, which was denied. The jury subsequently found her guilty. *Id.* at 779.

The Second District Court of Appeals held that "[b]ecause the State did not prove the existence of the charged offense, we conclude that the trial court erred in denying the motion for judgment of acquittal on this charge and reverse." In so doing, the court noted that Fla. Stat. § 316.193(3)(c)(1) "requires the State to prove that the damaged property belonged to someone other than the defendant." *Id.*

While the prosecution has provided this Court with several cases that discuss the rights of a lien holder in a civil context, we agree with the defense that these cases are inapposite to the issue at hand as those cases involved the interpretation of Article 1, Section 9 of the Florida Constitution, and the due process rights of those who have a legal *interest* in a piece of property.[3]

As it is unquestioned that Mr. Humphreys was the owner of the vehicle involved in this accident, he cannot be prosecuted for the damage that was caused to it. As such, this Court dismisses counts IV and VII of the Information.

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[1]"A lien is when a lienholder has a secured interest in a vehicle, mobile home or vessel in the form of a debt due to the lienholder . . ." *See* https://wwwflhsmv.gov/motor-vehicles-tags-titles/liens -and-titles/.

[2]This Court respectfully submits that, as the defense has argued, there is no inconsistency between these two statutes. While Fla. Stat. § 316.193 involves the prosecution and punishment of individuals accused of committing the offense of driving under the influence., Fla. Stat. § 316.1933 governs the circumstances under which blood may be drawn from an individual accused of driving under the influence in cases involving death or serious bodily injury and how and by whom that blood may be drawn. Certainly, the legislature may have wanted to create different standards for the drawing of blood in such serious cases from the circumstances governing the prosecution of DUI cases and this Court is of the belief that, as such, there is no inconsistency between those two statutes.

[3]A property owner can sell that property to anyone they chose to sell it to; an interest holder has no such lawful rights. A property owner can be sued for their misuse of a piece of property; an entity or person with an interest in that property cannot.

* * *

Torts—Discovery—Depositions—Financial and business records of non-party—Inquiry into ownership of medical provider who treated plaintiff is not allowed where information is not relevant to reasonableness of costs of services provided to plaintiff—Trade secrets—Where inquiries regarding provider's billing and collection practices are irrelevant, overbroad, not limited in time and scope, or not reasonably calculated to lead to admissible evidence, court need not determine claim that information constitutes trade secrets—Inquiries and documents regarding plaintiff's treatment and billing are relevant and discoverable

RYAN LUCAS MOSELEY, Plaintiff, v. LUZ ANGELA KLANKWAMDEE, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE-21-011937 (18). September 16, 2022. Febienne E. Fahnestock, Judge. Counsel: Alex Jean, Pompano Beach, for Plaintiff. Luis Menendez-Aponte, Miami, for Defendant. Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale, for Non-Party, Chirocare of Florida.

ORDER GRANTING NON-PARTY CHIROCARE OF FLORIDA'S AMENDED MOTION FOR PROTECTIVE ORDER IN RE: DEFENDANT'S SUBPOENA FOR DEPOSITION DATED APRIL 4, 2022

THIS CAUSE came before the Court for consideration on Non-Party Chirocare of Florida's Amended Motion for Protective Order in Re: Defendant's Subpoena for Deposition dated April 4, 2022, and the court, being fully advised in the premises, rules as follows:

RELEVANT BACKGROUND

Each case raising issues of the appropriate scope of discovery of a medical provider's financial and business records should be decided on its own facts and circumstances. *See Katzman v. Ranjana Corp*., 90 So. 3d 873, 876 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1320a]. This Court must first determine the proper scope of disclosure in this discovery dispute and only after that determination has been made may the court reach the privilege and confidentiality objections. In other words, if the discovery is not relevant or reasonably calculated to lead to the discovery of admissible evidence, then there is no need to determine if it is protected by a privilege.

Defendant Luz Angela Klankwamdee served a Notice of Taking Chirocare of Florida's Billing Corporate Representative Designee(s) Deposition Duces Tecum Pursuant to FRCP 1.310. The eight areas of

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inquiry generally include:

a) direct or indirect ownership of Chirocare;

b) revenue generated from patients with "injury claims";

c) the percentage of revenue generated from PIP claims, worker's compensation claims and from patients treated under a letter of protection;

d) reimbursement rates;

e) Chirocare's billing and recordkeeping software;

f) billing and collection policies and practices;

g) how Chirocare sets its charges;

h) how CPT codes are selected;

i) Chirocare's strategy for determining amounts of payment accepted for services, including payment for less than the billed amount; practices regarding letters of protection; and

j) the average discount accepted over the last three years.

In addition, Defendant requested that the deponent provide copies of "any billing and financial records [ ] reviewed in order to prepare for this deposition."[1]

Nonparty Chirocare of Florida filed a Motion for Protective Order in response to Defendant's request for a deposition *duces tecum.* Chirocare's objections include scope, relevance, undue burden to compile the information and documents requested, HIPPA non-disclosure issues, and trade secret confidentiality. Additionally, Chirocare objected to the areas of inquiry that are unrelated to Plaintiff's treatment as overly broad, unduly burdensome, harassing and not reasonably calculated to lead to the discovery of admissible evidence.

Defendant maintains that the information sought was not based upon a desire to demonstrate bias on Chirocare's part, but rather to determine the reasonableness of the costs of the medical services provided to the Plaintiff by Chirocare.

ANALYSIS

Area of Inquiry No. 1

Area of inquiry number 1 asks for the "names and identities of all persons or entities who hold or have held a direct or indirect ownership interest in the medical facility." Defendant has not demonstrated how this information is relevant to the reasonableness of the costs of the medical services provided to the Plaintiff by Chirocare, nor that the information sought is reasonably calculated likely to lead to the discovery of admissible evidence. Accordingly, Chirocare's Motion is GRANTED as to this area of inquiry.

Area of Inquiry Nos. 2-8

Chirocare maintains that the information sought in areas of inquiry 2 through 8 seek information protected from disclosure as they are confidential trade secrets.

> A three-step analysis applies to a claim that a discovery request seeks production of protected trade secrets. *Id*. at 208-09 (citing § 90.506, Fla. Stat. (2019)). First, the court must determine whether the requested information in fact includes trade secrets. *Id*. at 208-09 (citing *Ameritrust Ins. Corp. v. O'Donnell Landscapes, Inc*., 899 So. 2d 1205, 1207 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D991c]). Although this step usually requires the court to conduct an in camera review of the requested material, such review generally is obviated where there is no dispute that the requests seek trade secret information. *Id*. (first citing *Summitbridge Nat'l Invs. LLC v. 1221 Palm Harbor, LLC*, 67 So. 3d 448, 449 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1888b], then citing *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804, 808 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2480a]).

Gulfcoast Spine Inst., LLC v. Walker, 313 So. 3d 854, 858 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D308b].

The parties dispute whether the information requested are confidential trade secrets. "When a party asserts the need for protection against disclosure of a trade secret, the court must first determine whether, in fact, the disputed information is a trade secret [which] usually requires the court to conduct an in camera review." *Summitbridge Nat'l Invs. v. 1221 Palm Harbor, L.L.C.*, 67 So.3d 448, 449 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1888b] (citing *Ameritrust Ins. v. O'Donnell Landscapes*, 899 So.2d 1205, 1207 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D991c]); *see also Westco, Inc. v. Scott Lewis' Gardening & Trimming*, 26 So.3d 620, 622 (Fla. 4th DCA 2009) [35 Fla. L. Weekly D58a] (holding that where a party claims a document is privileged and the trial court fails to conduct an in camera review or balancing test, the trial court has departed from the essential requirements of the law). Here, the only documents requested are the documents Chirocare's corporate representative would review to prepare for the deposition. Defendant is requesting disclosure of information in the form of deposition testimony, therefore the Court cannot conduct an in camera inspection. While the deponent would be required to produce all of the documents reviewed in preparation for the deposition, which would presumably afford the Court an opportunity to perform an in camera inspection of the documents, the areas of inquiry are very broad. According to Chirocare, the areas of inquiry would require that Chirocare review every patient account in its office, and, as Chirocare argued, would even require the provider to create documents that do not exist.

Notwithstanding, the Fourth District Court of Appeal has previously held that internal cost structure information constitutes a trade secret. *See Laser Spine Inst. v. Makanast*, 69 So.3d 1045, 1046 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2077b] (referring to documents pertaining to billing and collection practices) and *Summitbridge Nat'l Invs.*, 67 So.3d at 450 (referring to information pertaining to how different types of patients are charged). Therefore, it stands to reason that testimony which would disclose this type of information would also constitute trade secrets.

Because the information requested by Defendant likely calls for trade secret information, Defendant must show a reasonable need for the requested information such that the need for producing the information outweighs the interest in maintaining their confidentiality. *Walker*, 313 So. 3d at 858-59.

> [T]his test sets a high burden for a requesting party to force an objecting party to disclose its trade secrets. But Florida law recognizes that ***the burden is even higher where the protected information is sought from a nonparty.*** In particular, ***because "third party financial records . . . are of the utmost sensitivity," they "are not discoverable unless the party seeking discovery establishes a need for the discovery sufficient to overcome the privacy rights of the third party***." *Rousso v. Hannon*, 146 So. 3d 66, 69-70 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1663a] (explaining that this "heightened standard" is necessary to avoid irreparable harm); *see also Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc.*, 26 So. 3d 620, 622 (Fla. 4th DCA 2009) [35 Fla. L. Weekly D58a] ("When confidential information is sought from a non-party, the trial court must determine whether the requesting party establishes a need for the information that outweighs the privacy rights of the non-party."); *Winn-Dixie Stores, Inc. v. Miles*, 616 So. 2d 1108, 1111 (Fla. 5th DCA 1993) (giving "substantial weight" to treating physician's confidentiality concerns in discovery balancing test where physician "did not choose to participate in this litigation but merely agreed to treat a patient who sought out his services").

Id. at 859 (emphasis added). Defendant, as previously stated, needs the information to challenge the reasonableness of Chirocare's charges.

In *Walker*, reviewing facts similar to those present in this case, the appellate court held that the mere fact that the proponent of the discovery challenged the reasonableness of the cost of the medical

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treatment provided did not warrant invasive discovery into a nonparty's trade secrets. *Id*. In so holding, the Walker court distinguished the holdings of *Giacalone v. Helen Ellis Memorial Hospital Foundation, Inc.*, 8 So. 3d 1232 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D881b] (involving a discovery dispute regarding the reasonableness of costs of medical care between parties) and *Gulfcoast Surgery Center, Inc. v. Fisher*, 107 So. 3d 493 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D341a] (quashing an order compelling production of trade secrets on the basis that the record established only that "the requested documents which relate to Gulfcoast's internal cost structure are relevant.") Here, as in Fisher, the information meets the low bar for relevance, but it is also protected.

Although this analysis is not determinative of the Court's ruling on the areas of inquiry, it is included in this Order as guidance in the event Defendant elects to amend its subpoena.

CONCLUSION

The Court finds, orders and adjudges:

(1) the information requested in area of inquiry number 1 regarding the names and identities of all persons or entities who hold or have held a direct or indirect ownership interest in the medical facility is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence;

(2) the information requested in area of inquiry number 2 regarding the percentage of Chirocare's revenue received from PIP claims, patients treating under letters of protection and worker's compensation is overbroad, not limited in time or scope and not reasonably calculated to lead to the discovery of admissible evidence. As established by Chirocare, this would require the non-party to undergo an extensive amount of research and preparation to answer questions that go beyond the scope of the facts of this case;

(3) the information requested in area of inquiry number 3 seeks information regarding other patients, Medicare or insurers that are not involved in this matter. The information sought is irrelevant, overbroad and not reasonably calculated to lead to the discovery of admissible evidence. The Defendant has proffered that Plaintiff was insured by Aetna at the time of the accident. Chirocare has offered to provide a confidential affidavit as to the amount it receives from Aetna for the CPT codes at issue in this case. The Court will therefore inspect the the contract between Aetna and Chirocare of Florida, *in camera*, to determine if the information is protected by the trade secret privilege or if the Defendant's need for the information outweighs Chricocare's right to confidentiality and privacy of the information. The contract will be delivered to the Court within ten (10) days of the date of this Order;

(4) the information requested in area of inquiry number 4 regarding the non-party's medical billing and recordkeeping software and the specific way the software records, generates and tracks bills, payments adjustments and law firms is irrelevant, overbroad, not limited in time or scope, and not reasonably calculated to lead to the discovery of admissible evidence. As such, the Court does not need to determine whether this information would be protected by the trade secret privilege;

(5) the information requested in area of inquiry number 5 regarding the non-party's billing policies and procedures and additional information requested is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In support of its argument as to why it needs this information, Defendant argued that this area of inquiry is necessary to prove its affirmative defenses regarding failure to mitigate damages. The Court does not see how the non-party's billing policies and procedures and the internal cost structures set by Chirocare for all patients and all treatment, without limitations in time or scope, relates to the Defendant's claim that Plaintiff failed to mitigate his damages;

(6) the information requested in area of inquiry number 6 regarding the non-party's policies, procedures and practices regarding unpaid bills of personal injury plaintiffs, including its policies regarding collections, lawsuit settlements and jury verdicts is irrelevant, not limited in time or scope and not reasonably calculated to lead to the discovery of admissible evidence. Therefore, the Court need not reach the conclusion whether this information would be protected by the trade secret privilege;

(7) the information requested in area of inquiry number 7 regarding whether: the non-party has ever accepted less than the full face value of a medical bill generated under a letter of protection; how the non-party determines how to do that; and the average discount accepted for all patients over the last three years is irrelevant, overly broad, not limited in time or scope and not reasonably calculated to lead to the discovery of admissible evidence. Therefore, the Court need not reach the conclusion whether this information would be protected by the trade secret privilege; and

(8) the information requested in area of inquiry number 8 regarding whether any bills issued under a letter of protection have been sold and/or transferred to any third parties in the last three years and the average discount from face values these bills were sold for is irrelevant, overly broad, not limited in time or scope and not reasonably calculated to lead to the discovery of admissible evidence. Therefore, the Court need not reach the conclusion whether this information would be protected by the trade secret privilege.

Areas of inquiry and documents requested that relate to Plaintiff's treatment and billing are relevant and discoverable by Defendant.

WHEREFORE, the Chirocare of Florida's Amended Motion for Protective Order is **GRANTED**, as provided herein. The Defendant may amend its Notice of Taking Deposition of Chirocare's corporate representative in accordance with this Order.

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[1]Defendant agreed that patients' names and identities would not be included in the production.

* * *

Torts—Automobile accident—Rear-end collision—Material issue of fact exists as to each party's negligence where defendant, who rear-ended plaintiff's vehicle, claims that plaintiff came to abrupt stop, and plaintiff admits that she was speaking on cell phone and does not know whether her vehicle was stopped at time of accident—Motion for summary judgment denied

SHYANN A. ANDERSON, and SHAWN D. BROWN, her husband, Plaintiffs, v. PAIGE CANTRILL, and KATHLEEN A. SCHMIDT, Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21002821 (03), Civil Division. September 9, 2022. Barbara McCarthy, Judge. Counsel: David Kleinberg, Aventura, for Plaintiffs. Emilio A. Cacace, Fort Lauderdale, for Defendants.

ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on September 8th, 2022, on Plaintiff's Renewed Motion for Summary Judgment, and the Court having heard argument of counsel, considered the subject Motion and Response in Opposition, applicable case law, and being otherwise advised in the premises, finds as follows:

1. The subject case is an automobile negligence action whereby Plaintiff alleges personal injuries. Plaintiff's renewed summary judgment motion is based on Defendant's vehicle rear-ending Plaintiff's vehicle and that Defendant driver Paige Cantrill is presumed negligent.

2. The Court finds based on the record evidence which includes the party's deposition testimony, that there is a genuine dispute of material fact as to each party's negligence. Defendant Paige Cantrill testified that she was not completely at fault for the accident as Plaintiff made an abrupt stop. Plaintiff's testimony revealed that she was speaking on her cell phone at the time of the accident. Furthermore, Plaintiff testified that she did not know whether her vehicle was stopped or moving at the time of the

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accident. 3.

3. Under Florida law, pursuant to the Comparative Fault Statute judgment against each party's liability is based on such party's percentage of fault in the apportionment of damages. Fl. Sta. 768.81(3).

4. The Supreme Court specifically stated that "the presumption that a rear driver's negligence is the sole cause of a rear-end automobile collision can be rebutted and its legal effect dissipated by the production of evidence from which a jury could conclude that the front driver was negligence in the operation of his or her vehicle." *Birge v. Charron,* 107 So.3d 350, 353 (Fla. 2012) [37 Fla. L. Weekly S735a].

5. The evidence submitted shows that there is a dispute of material fact as to each party's negligence in the accident whereby a reasonable jury could return a verdict for the Defendant. Thus, the issue in this case must be submitted to the jury. *Eppler v. Tarmac America*, 752 So.2d 592, 595-96 (Fla. 2000) [25 Fla. L. Weekly S133a] (stating that an "[a]brupt and arbitrary braking in bumper-to-bumper, accelerating traffic is an irresponsible and dangerous act that invites a collision. Cases involving allegation of such an act are properly submitted to the jury, for the crucible of cross-examination is well-suited for gleaning meritorious from non-meritorious claims"). Defendants cannot be held solely liable for the accident It is hereby ORDERED AND ADJUDGED Plaintiff's Renewed Motion for Summary Judgment is DENIED.

* * *

Civil procedure—Complaint—Amendment—Torts—Requests to amend complaint to add plaintiff's wife as plaintiff and to amend case style accordingly are granted—Motion to file second amended complaint claiming punitive damages is granted where plaintiff made showing that provides reasonable basis for recovery of punitive damages

GREGG GRAHN, Plaintiff, v. RICHARD JOHN DESANTO, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21021856, Division 05. September 13, 2022. Martin J. Bidwill, Judge.

ORDER GRANTING PLAINTIFF'S MOTION TO FILE A SECOND AMENDED COMPLAINT ADDING A PLAINTIFF AND CLAIMING PUNITIVE DAMAGES, AND INSTRUCTING THE CLERK TO CHANGE THE CASE STYLE

This case is before the Court on Plaintiff's Motion to File a Second Amended Complaint Adding a Plaintiff and Claiming Punitive Damages, and Instructing the Clerk to Change the Case Style. On September 7, 2022, the Court heard oral argument on the Motion. The Court is fully-advised on the Motion and ORDERS:

1. By agreement of the parties, Plaintiff's request to add his wife as a Plaintiff is granted.

2. By agreement of the parties, Plaintiff's request to change the style of this case is granted. The Clerk of this Court shall change the style of this case to *Gregg Grahn and Terry Grahn v. Richard John DeSanto*.

3. This Court grants Plaintiff's request to file a Second Amended Complaint claiming punitive damages. The Court finds Plaintiff made a reasonable showing by evidence and proffer in Plaintiff's Motion and proposed Second Amended Complaint that provides a reasonable basis for the recovery of punitive damages. *See* Fla. R. Civ. P. 1.190(f). The Second Amended Complaint is deemed filed as of the date of the Motion to Amend. *See Totura & Co., Inc. v. Williams*, 754 So. 2d 671, 681 (Fla. 2000) [25 Fla. L. Weekly S141a]. Defendant has twenty days from the date this Order is signed to respond to the Second Amended Complaint.

4. The granting of Plaintiff's Motion renders this case not at issue. Therefore, this case is removed from its current trial docket of June 5-29, 2023. The Parties shall submit a new proposed trial order, or if no such proposed order is submitted, then they shall appear at a case management conference to be set by the Court.

* * *

Torts—Premises liability—Supermarket—Discovery—Mental health records—Psychotherapist-patient privilege—Defendant's motion to compel production of mental health records of plaintiff who was injured on store premises in order to impeach plaintiff's case with evidence of "drug-seeking behavior" that would support argument that plaintiff was exaggerating her pain to obtain opioids is denied—Plaintiff has dismissed claim for mental anguish, and claim for loss of enjoyment of life does not put plaintiff's mental health at issue

CYNTHIA JAMES, Plaintiff, v. WINN DIXIE STORES, INC., Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 21-CA-628. August 31, 2022. David Frank, Judge. Counsel: Craig Richards, Tallahassee, for Plaintiff. J. Blake Hunter and Kathy J. Maus, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION OF PLAINTIFF'S MENTAL HEALTH RECORDS

This cause came before the Court on defendant's motion to compel the production of plaintiff's mental health records from the Apalachee Center in Tallahassee, and subsequent orders addressing the same. The Court ordered an in camera inspection. To assist its review, the Court asked defendant to provide a description of the documents it believes may be included and not subject to the psychotherapist patient privilege, which it did in an August 23, 2022 letter from defense counsel to the Court.

Defendant argues that records relating "to any drug seeking behavior" would be relevant and admissible to determine if the plaintiff is "exaggerating her pain in order to obtain opioids." Defendant also contends that the records are discoverable, despite the psychotherapist patient privilege, because plaintiff is seeking damages for loss of enjoyment of life due to the incident alleged in the complaint and, as such, the records are relevant and admissible "in order to compare Plaintiff's pre- and post-loss medical, psychological, and social condition."

Neither ground proffered by defendant is sufficient to overcome Florida's psychotherapist patient privilege.

A court may not order the production of mental health records until it finds that an exception to the privilege applies. Indeed, where the privilege is clear, and there has been no finding that an exception applies, there should be no production or in camera inspection. *Hicks v. State*, 276 So.3d 127, 128 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1525a] ("We conclude that absent a clear and unequivocal waiver of the psychotherapist-patient privilege at issue, the compelled disclosure of the confidential therapy notes for the three minor children 'is exactly the type of fishing expedition that this Court, the United States Supreme Court, and our sister courts have strongly cautioned against.' ") (citations omitted); *Webb v. Dollar Tree Stores, Inc.*, 987 So.2d 778, 778 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1873a], citing *Bandorf v. Volusia County Dep't of Corrections*, 939 So.2d 249 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2550a] ("Because the plaintiff did not plead and has otherwise unequivocally renounced any claim for mental anguish or mental pain and suffering arising from the accident in issue, the trial court order requiring that her psychiatric records be produced for its in camera inspection ran directly afoul of the psychotherapist-patient privilege created by section 90.503, Florida Statutes (2007), and therefore must be quashed.").

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Section 90.503(2), Florida Statutes (2017), which codifies the privilege, specifically provides as follows:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

In defining the scope of the privilege, section 90.503(4) lists three exceptions:

> (a) involuntary commitment proceedings;
>
> (b) court-ordered mental examinations; and
>
> (c) where the patient raises his or her own mental condition during the litigation.

"Importantly, however, the last exception applies when the patient, not the party seeking the information, places his or her mental health at issue. In other words, the moving party cannot 'pierce the privilege' by simply lodging a claim that raises an issue regarding the patient's mental health." *J.B. v. State*, 250 So.3d 829, 832 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1530a] (citations omitted).

Our First District further explained exception (c):

> [T]he Legislature established an exception based on an intentional decision by the patient about what claim or defense to prosecute. . .in section 90.503. . .paragraph (c) expressly applies only when the patient—and no one else—as part of the litigation puts her mental health condition at issue by affirmatively raising it as part of a claim or defense. That is, the privilege does not apply if the patient makes a conscious, tactical choice—intrinsic to the litigation—to put her mental health condition into dispute, making the facts of her condition fair game for the opposing party.

Vincent v. Vincent, 319 So.3d 68, 69-70 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2792a] (concurring opinion, citations omitted).

And critically, the First District made it clear that exception (c):

> . . . does not apply merely because the psychiatric records might contain information that would be relevant for impeachment purposes or in connection with a defense that the injuries complained of are the result of some preexisting mental or emotional condition. We held that "the section 90.503(4)(c) exception applies only when the patient-rather than some party who opposes the patient in litigation-places his mental or emotional condition in issue.

Hannon v. Shands Teaching Hosp. & Clinics, Inc., 970 So.2d 344, 345 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2876b], citing *Bandorf v. Volusia County Department of Corrections*, 939 So.2d 249 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2550a].

Defendant's hope to find records that will impeach plaintiff's case with "drug seeking behavior" is a classic example of the impermissible fishing for documents that, if ever found, would be inadmissible in any event. Defendant cannot put plaintiff's mental health records and information at issue, and thus make them relevant, by its actions or arguments, only the plaintiff can.

Defendant may not pierce the privilege to "compare pre- and post-loss" mental anguish. Plaintiff dismissed her mental anguish claim. Its off the table.

Defendant also asserts that a claim for "loss of enjoyment of life" as a component of plaintiff's damages puts plaintiff's mental health at issue. The law is exactly the opposite:

> Here, the trial court concluded that by including a claim for mental anguish in her original pleading, and thus making her mental condition an element of her claim, Ireland permanently waived her psychotherapist-patient privilege. This, however, is not a correct statement of the law. Because Ireland has withdrawn her claim for mental anguish, her mental condition is no longer an element of her claims. *See Byxbee v. Reyes*, 850 So.2d 595, 596 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1444b] ("Byxbee withdrew his claim for mental anguish. A claim for loss of enjoyment of life, 'without more, does not place the mental or emotional condition of the plaintiff at issue so as to waive the protection of section 90.503.' " (quoting *Partner-Brown v. Bornstein,* 734 So.2d 555, 556 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D1329a])).

Ireland v. Francis, 945 So.2d 524, 525 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2455a].

Accordingly, it is ORDERED and ADJUDGED that the subject mental health records are neither admissible nor discoverable, and there will be no in camera review.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Evidence—State's failure to preserve—Open container—Motion to exclude evidence relating to an open container allegedly containing an alcoholic beverage found in vehicle on ground that evidence was not preserved by arresting officer is denied—Any evidence that container was empty actually empty when defendant was stopped would be merely potentially useful and pose only some likelihood of exonerating defendant

STATE OF FLORIDA, Plaintiff, v. PATTI RENEE HURTUBISE, Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2022 MM 1957, Division 1. September 13, 2022. Charles Young, Judge.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF AN ALLEGED OPEN CONTAINER OF AN ALCOHOLIC BEVERAGE

THIS CAUSE came before the Court upon the Defendant's Motion in Limine. This Court, having considered the Defendant's Motion, reviewed the file in this case, held a hearing on September 12, 2022 and otherwise being fully advised in the premises states:

1. The issue before the court is whether the arresting officer, Deputy J. Barnett, had a duty to preserve the open container found in the vehicle for further testing or at the very least preserved the condition of the open container, more particularly, whether there was any liquid in the container.[1]

2. The court did not receive any additional testimony regarding the motion.

3. The parties do not dispute that there was a container in the vehicle.

4. The parties did dispute the "condition" of the container, ie—whether it held any liquid and whether any liquid therein, if any, was in fact alcohol in nature.

5. The Defendant's counsel also raised the issue regarding the deputy's video, albeit not played in court for the motion for exclusion of an audio portion of the video, whereby the deputy made a comment when purportedly smelling the container as hearsay. The State argued the statement was allowed under the "present sense impression" which the Court interpreted as the "spontaneous statement" exception under §90.803(1), Fla. Statutes.

6. As the Court understands the facts as stated by counsel, the open container was not taken or preserved by the Deputy as part of the evidence in this case and was left in the vehicle of the Defendant.

After hearing argument and reviewing the motion and cases provided, the Court finds as follows:

1. The State presented a second DCA case regarding not the State's failure to preserve evidence obtained, but rather the State's failure to gather and preserve evidence in a particular manner. *State of Florida v. Powers,* 555 So.2d 888 (Fla. 2nd DCA 1990)

2. In *Powers* the court stated, "Law enforcement does not have a constitutional duty to perform any particular tests." *State of Florida v. Powers,* 555 So.2d 888 (Fla. 2nd DCA 1990) *citing Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, L.Ed.2d 281 (1988).

3. There was no testimony that the Escambia County Sheriff's Office has a policy for collecting such evidence as part of the Department's procedures.

4. If the Deputy testifies regarding observations and perceptions without the alleged open container and its alleged content of lack thereof, it becomes an issue of the weight of the testimony and the admissibility of the Deputy's testimony.

5. "Whatever duty law enforcement has to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Powers* at 891.

6. In order to "meet the standard of constitutional materiality, evidence must both possess an exculpatory value and be of such a nature that the defendant cannot obtain comparable evidence by other reasonably available means. *Id.* at 891.

7. Counsel for the Defendant argued that it would be argued that the container was empty when the Defendant was stopped. While that testimony was not presented during the hearing and only anticipated potential testimony during the trial, the ruling would be the same regarding the motion since, "evidence that is merely "potentially useful" posing only some likelihood of exonerating a defendant, does not reach the standard of constitutional materiality. *State v. Bennett,* 111 So.3d 943 (Fla. 2nd DCA 2013) [38 Fla. L. Weekly D846a].

IT IS THEREFORE ORDERED AND ADJUDGED that,

The Defendant's Motion is hereby DENIED.

---

[1]Defense counsel before the hearing stated that the issue of "due process" rights stated in paragraph 6 of the motion was not an issue for this hearing.

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to breath test—Incomplete implied consent warning—Although implied consent warning read to defendant did not include language added to warning by Florida Legislature in 2021, refusal is admissible where defendant was advised of at least one adverse consequence of refusal

STATE OF FLORIDA, Plaintiff, v. PATTI RENEE HURTUBISE, Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2022 MM 1957, Division 1. September 13, 2022. Charles Young, Judge.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF REFUSAL

THIS CAUSE came before the Court upon the Defendant's Motion in Limine. This Court, having considered the Defendant's Motion, reviewed the file in this case, held a hearing on September 12, 2022 and otherwise being fully advised in the premises states:

1. The issue before the court is whether the arresting officer, Deputy J. Barnett, having read the Defendant the Implied Consent Warning that did not include the language added by the Florida Legislature in 2021, created a circumstance whereby the Court should exclude into evidence the refusal by the Defendant to provide a sample. (See §316.1932(1)(a) Fla. Stat. (2021).

2. The court did not receive any additional testimony regarding the motion.

3. The parties do not dispute that a portion of the warning was read to the Defendant.

4. The parties do not dispute that what was read by the Defendant did not include the language added by the Florida Legislature in 2021.

5. The State of Florida argues that *Grzelka v. State of Florida,* 881 So.2d 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a] provides that there is no statutory requirement to exclude evidence if the statutory warning is not complete. *Id.* at 634.

6. The *Grzelka* court goes on to say that the trial court has discretion regarding the whether the refusal is admissible pursuant to the "general rules of evidence." *Id.* at 634.

7. Further, *Grzelka* states, "[b]ecause Appellant was advised *of at least one adverse consequence* that would result from her

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refusal, her decision to refuse was relevant and the court did not abuse its discretion in admitting the evidence." *Id.* at 634-35. (Emphasis added)

8. Counsel for the Defendant argues that *Howitt v. State,* 266 So.3d 219 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2229c] and *Florida DHSMV v. Hernandez,* 74 So.3d 1070 (Fla.S.Ct. 2011) [36 Fla. L. Weekly S654a] provide that this court should exercise the discretion provided to exclude the evidence of refusal in this case.

9. The court is not persuaded by *Howitt* as a basis for the exclusion of the refusal evidence in this matter. In fact, *Howitt* reinforces the Fifth Circuit's previous decision in *Grzelka* and states "Unlike the defendant in *Grzelka,* in this case, by the investigator's own admission, the officers *did not read Howitt any portion of the implied consent law* or otherwise inform him of any consequences of refusing to take a breath test." *Howitt v. State,* 266 So.3d 219, 223 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2229c] (Emphasis added)

10. The Defendant's reliance on *Florida DHSMV v. Hernandez,* 74 So.3d 1070 (Fla.S.Ct. 2011) [36 Fla. L. Weekly S654a] the court believes is misplaced as *Hernandez* is factually distinguishable as it regards the authority of the DHSMV regarding scope and decisions on a lawful arrest. While *Hernandez* does delve into legislative intent, this court does not choose to go an further than the holding in *Grzelka* based upon the undisputed facts presented for the hearing. Whereby the *Grzelka* court finds that as long as some consequence is presented to the Defendant, then the refusal is admissible pursuant to the general rules of evidence this Court finds likewise.

IT IS THEREFORE ORDERED AND ADJUDGED that,

The Defendant's Motion is hereby DENIED.

* * *

Criminal law—Driving under influence—Evidence—Demonstrative aids—Intoxilyzer—Although reliability of Intoxilyzer is relevant issue, use of Intoxilyzer owned by defense counsel would do more to confuse and distract than to assist jury where defense instrument was not maintained in same manner as test instrument, there would be no scientific evidence to explain why test instrument was unreliable, and manner in which defense Intoxilyzer was kept and moved around in the courtroom evokes an emotional response

STATE OF FLORIDA, v. STEWART McELWANEY, PID No. 812667, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. ADVMNPE, Driving Under the Influence. August 17, 2022. Cathy McKyton, Judge.

ORDER GRANTING STATE'S ORAL MOTION IN LIMINE / DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court originally on May 3, 2022 (motion for reconsideration heard June 15, 2022), on the State's oral Motion in Limine brought forth on the day of trial, seeking to prohibit Defense counsel from utilizing an intoxilyzer 8000 instrument privately owned by Defense counsel as a demonstrative aid during trial. The State and the Defense (on cross examination of the State's witness) presented sworn witness testimony, oral argument and provided supporting case law. After consideration of the sworn testimony and the argument of counsel, the Court makes the following findings of fact and conclusions of law:

The Defendant was arrested for DUI on 12/24/20 and provided breath samples using an intoxilyzer 8000 of .116 and .122. The arresting officer, Cpl. Jonathan Hurt, has been employed by Clearwater Police Department since 2015. He has extensive training in DUI investigation and holds both a BTO permit and an Agency Inspector permit. Cpl. Hurt observed the intoxilyzer 8000 instrument owned by Defense counsel and testified that it looks "pretty much the same" (he was able to identify pieces of the instrument), and appears to be identical in terms of anatomy. He also testified that he had no knowledge of where the particular instrument was purchased or kept, and could not tell if the instrument had been modified in any way, nor if its ports were functioning. Cpl. Hurt could not state that the particular instrument was a "fair and accurate" representation of the instrument used in this case, and stated that he did not believe it would assist the jury in understanding his testimony.

Defense counsel argues that the use of the intoxilyzer 8000 as a demonstrative aid is relevant because the reliability of the breath test is an issue in any DUI case, and the way the machine is tested is part of that discussion. Since the anatomy of the intoxilyzer 8000 owned by counsel is identical to the anatomy of the machine used in this case, it is more effective to actually have the jury look at it. The intent is to use it as a visual aid, focusing on the fact that there is a difference in the use of a hose (where a person blows into the instrument) and where the test solutions are inserted (directly into the instrument from a completely different location), ultimately making the argument to the jury that the intoxilyzer 8000 and the related protocols are unreliable.

The State argues that the proposed demonstrative aid would not aid the witness' testimony because it is not the same instrument (there is no way to know if the instrument is the same on the inside), and it is clearly not being kept in the manner that the intoxilyzer used in this case has been kept. There is also no evidence to suggest that the instrument used in this case was not working properly. The State argues that the use of the demonstrative aid is to confuse and mislead the jury.

This Court noted on the first trial date, when the intoxilyzer owned by Defense counsel was sitting on a chair in the courtroom, that it looked much like a "boom box"—an unsophisticated piece of equipment just sitting there. Certainly the instrument looks much different (as this court has observed in person and in hundreds of videos) in its secure placement in the breath testing centers. Counsel reminded the court that there are many mobile units in use with law enforcement agencies around the country, and while that is certainly the case, the breath test in this case was not conducted using a mobile unit. It was conducted in a specific location designated and maintained for that purpose. The **reliability** of the breath test, the intoxilyzer 8000, and the related protocals is relevant. However to present the issue in this way, using a demonstrative aid that may or may not be the same as the instrument used in the case and certainly not maintained in the same way, with no related testimony, scientific or otherwise, to explain why the instrument is unreliable, would do more to confuse or distract the jury. In addition, while the stated intent is not to evoke an emotional response, the Court does find that the manner in which it is kept and moved around in the courtroom does evoke an emotional response. *Walker v State,* 82 So. 3d. 115 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2686a].

Therefore, it is ORDERED AND ADJUDGED that the State's Motion in Limine is GRANTED and Defense Motion for Reconsideration is DENIED.

* * *

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Insurance—Personal injury protection—Demand letter did not comply with statute where ledger attached to demand letter reflected a zero balance

INTEGRITY MEDICAL GROUP, LLC, a/a/o Maria Herrada, Plaintiff, v. DEPOSITORS INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2018 16478 CODL, Division 73. August 10, 2022. Rachel D. Myers, Judge. Counsel: Jennifer Peattie, Simoes Reeves Law, Deland, for Plaintiff. Justin Cincola, Law Office of David. S. Lefton, Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION/JUDGMENT

THIS CAUSE having come before the Court on June 30, 2022 on Defendants Motion for Summary Disposition/JUDGMENT regarding its Deficient Demand Letter defense, this Court having been advised of the facts of the case and relevant legal authorities makes the following findings of fact and conclusions of law as follows:

This Court previously heard Plaintiff's Motion for Summary Disposition on the Physician Assistant reduction issue on January 2, 2022 and ruled in favor of the Plaintiff, however there was the remaining issue of whether Plaintiff's presuit demand letter complied with Fla. Stat. 627.736(10). The Rules of Civil Procedure were invoked over 2 years prior to the motion being filed, however the parties agreed to invoke the Small Claims Rule 7.135 at the hearing on January 2, 2022, however the standard for both summary judgment and summary disposition is virtually the same and does not affect the end result of this Court's ruling.

Plaintiff billed for CPT code 99204 for date of service May 26, 2016 totaling $662.12. Defendant paid $225.43 for this bill applying the physician assistant payment methodology to the 200% of medicare fee schedule amount. Plaintiff states in its Motion for Summary Disposition that the proper fee schedule amount pursuant to the schedule of maximum charges under Fla. Stat. 627.736(5)(a)(1) is $331.52 and that Defendant owes $40.59. The amount claimed by Plaintiff in this action was never alleged in its presuit demand letter.

In its presuit demand letter, Plaintiff attached a ledger showing there was no balance owed for the services at issue. Specifically, the ledger attached to the letter states:

> "Maria has 1 claims totaling $662.12 with an outstanding balance of $0.00. (Claim number omitted in this order for privacy) (08/26/2016) totals $662.12, has a balance of $0.00, and is PAID."

The ledger then further shows in numerous areas that the balance between what the insurer paid and the amount billed was entered as an "adjustment" and that there was a $0 balance. Specifically, it says that "insurance" has a $0 balance.

The purpose of the presuit demand letter provision under Fla. Stat. 627.736(10) is to give the insurer notice of what its potential liability would be and to give the insurer one last chance to pay the claim to avoid litigation. Here, medical provider clearly notified the insurer that there was no money owed by submitting a ledger attached to the demand letter showing a $0 balance. Any reasonable person that receives a bill or statement stating there is no money owed would not make a payment on that bill or statement.

An insured, or an assignee thereof, is required to provide a demand letter prior to bringing an action for PIP benefits pursuant to Florida Statutes Section 627.736(10). Subsection (10) requires that pre-suit demand be specific. The relevant portion states:

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

§ 627.736(10), Fla. Stat. (emphasis added).

The specificity requirement of subsection (10) is consistent with other related portions of the PIP Statute. Subsection (4)(b) provides that PIP benefits shall be "overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss **and of the amount of the same**." § 627.736(4)(b), Fla. Stat. (emphasis added). Further, subsection (4)(b) provides that no payment shall be overdue, notwithstanding written notice, "when the insurer has reasonable proof to establish that the insurer is not responsible for the payment." *Id.* at 627.736(4)(b)(4). This is surely the case when the insurer does not know what "payment" is due. Subsection (5)(d) provides that for purposes of subsection (4)(b) an "insurer shall not be considered to have been furnished with notice of the amount of the covered loss or medical bills due unless the statement or bills" comply with subsection (5) and they are "properly completed in their entirety as to all material provisions, with all relevant information being provided therein." § 627.736(5)(d), Fla. Stat. This court finds the statute unambiguous and refers to its plain meaning. When a statute is clear and unambiguous, it should be given its plain meaning. *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984).

Numerous Florida decisions have held that the pre-suit demand pursuant to section 627.736(10) must be specific and accurately state the amount the provider has charged and the exact amount it demands from the insurer for the insurer to avoid getting sued. In *MRI Associates of America, LLC v. State Farm Fire & Casualty Co.,* 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b], the Fourth District explained that the pre-suit demand letter of section 627.736(10) "**requires precision** in a demand letter by its requirement of an 'itemized statement specifying each exact amount' " sought by the provider. The court explained that because the purpose of the PIP Statute is to encourage the speedy payment of medical bills, the statute required that the amounts at issue be specified early in the claims process. *Id.* The court stated that "[t]his requirement of precision in medical bills discourages gamesmanship on the part of those who might benefit from confusion and delay." *Id.* Due to such, the court found: "The statutory requirements surrounding a demand letter are significant, substantive preconditions to bringing a cause of action for PIP benefits." *Id.* (citing *Menendez v. Progressive Ins. Co.,* 35 So. 3d 873, 879-80) (Fla. 2010) [35 Fla. L. Weekly S222b]).

Very recently, the Third District Court of Appeal agreed with the Fourth District's *MRI Associates* decision, holding that a demand letter pursuant to section 627.736(10) requires precision, which includes the provider putting the insurer on notice of "**the exact amount** for which it will be sued if the insurer does not pay the claim." *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So. 3d 197, 204-05 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a] (emphasis added). The Third District held that the plaintiff failed to serve a valid pre-suit demand letter on the insurer because it failed to specify the exact amount requested for reimbursement for each charge at issue and thus did not state with specificity the amount due and owed. *Id.* at 207.

Circuit courts around the State of Florida, sitting in their appellate capacity, have upheld this strict compliance standard and have granted summary judgment in favor of the insurer/defendant for the plaintiff/

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provider's failure to abide by the statute's precise requirements. *See State Farm Mut. Auto. Ins. Co. v. Douglas Diagnostic Ctr., Inc. a/a/o Jainek Perez,* 25 Fla. L. Weekly Supp. 942b (Fla. 17th Cir. Ct. Dec. 18, 2017) (reversing final judgment in favor of plaintiff/provider and holding that defendant/insurer was entitled to summary judgment as a matter of law because plaintiff/provider failed to send a statutorily compliant pre-suit demand letter); *Lake Worth Emergency Chiropractic Ctr., P.A., a/a/o Ryan Garter, v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 65a (Fla. 15th Cir. Ct. July 14, 2014) (holding that section 627.736(10) requires strict compliance and a "pre-suit demand letter that included a single incorrect entry as part of its itemized demands [was] sufficient to require summary judgment for the defendant"); *Mercury Ins. Co. of Fla. v. Harvey Nelson,* 20 Fla. L. Weekly Supp. 122a (Fla. 17th Cir. Ct. Sept. 24, 2012) (holding plaintiff's demand letter insufficient, explaining that it is a condition precedent of section 627.736 "for the plaintiff to submit a demand letter to the insurer that specifies a compensable amount which the insurer could pay the provider to avoid litigation. Unless the insurer is put on notice of the exact amount to pay in order to avoid litigation . . . the entire purpose of summitting a demand letter would be defeated"); *Hernandez v. Progressive Ex. Ins. Co.,* 14 Fla. L. Weekly Supp. 232c (Fla. 11th Cir. Ct. Jan. 17, 2007) (affirming summary judgment in favor of the defendant because the plaintiff failed to comply with the strict and unambiguous requirements of the pre-suit demand requirements); *Chambers Med. Grp., Inc., a/a/o Marie St. Hillare, v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. Ct. Dec. 1, 2006) (holding "strict compliance with the notice requirements is required to effect the purpose of the statute . . . 'substantial compliance' would trigger significant litigation as to the sufficiency of the papers attached to a demand letter, the result of which would be that payment of claims would cease to be automatic, and providers would be relieved of their obligation under the statute"). *See generally Tampa Bay Imaging, LLC v. Esurance Ins. Co.*, 17 Fla. L. Weekly Supp. 1033b (Fla. Hillsborough Cnty. Ct. 2009) (holding that no suit should have ever been brought because the insurer never owed the amount specified in the demand letter and that "to proceed on a defective or statutorily deficient presuit demand letter would essentially circumvent the legislative purpose of the presuit demand letter provisions of the Florida Motor Vehicle No-Fault law.").

There have been other County Courts that have considered the issue where the presuit demand letter states that $0 is owed and those courts have held that the presuit demand letter does not comply with Fla. Stat. 627.736(10). See *Florida Injury Longwood, LLC a/a/o Aaron Clements v. USAA Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 970b (Fla. Cty. Ct. 9th Cir. 2017); *Injury Centers of St. Pete., Inc. a/a/o Stetson Estes v. Garrison Property and Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 192a (Fla. Cty. Ct. 13th Cir. 2017). This Court sees no distinction between the facts of this case and the facts of the these two county court decisions and therefore summary judgment is appropriate in favor of Defendant.

IT IS THEREFORE ORDERED AND ADJUDGED, that this GRANTS Summary Judgment in favor of Defendant.

* * *

Insurance—Motion to dismiss—Arguments regarding enforceability of plaintiff's contract with insured and coverage under policy for plaintiff's services are not suitable for resolution through motion to dismiss—Plaintiff must file amended complaint with policy attached

INTERACTIVE ENGINEERING, INC., a/a/o Rodney Sandel, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY, d/b/a FRONTLINE INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2022 SC 000405. September 14, 2022. Andrea Totten, Judge. Counsel: Mark Ibrahim, Law Office of Kanner & Pintaluga, P.A., Boca Raton, for Plaintiff. Laura Alvarado, Stone, Glass & Connolly, LLP, Palmetto Bay, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

THIS CAUSE came before the Court on September 13, 2022, regarding Defendant's Motion to Dismiss the Complaint with Prejudice, and the Court having reviewed the filings of the parties and otherwise being fully advised, it is:

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss the Complaint with Prejudice is GRANTED IN PART WITHOUT PREJUDICE and DENIED IN PART.

2. The Court finds that the arguments raised by Defendant against Plaintiff's Complaint regarding the enforceability of Plaintiff's contract with the Insured and the services rendered by the Plaintiff as being a covered loss under the policy are not suitable for resolution in a Motion to Dismiss as it requires the Court to confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant."

3. The Court finds, however, the Plaintiff, now being in possession off the insurance policy, must attach it to the Complaint.

4. Plaintiff shall have five (5) days to file its Amended Complaint with the subject policy of insurance attached.

5. Defendant shall have twenty (20) days from the filing of the Amended Complaint to file an Answer.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Traffic stop—Officer had reasonable basis for stopping vehicle where defendant drove on bike path more than once, passed in no-passing zone, and was weaving within her lane—Detention—Length of detention prior to start of DUI investigation was reasonable where defendant exhibited multiple indicia of impairment and officers were actively investigating and determining next steps to take with defendant from time of initial interaction through time DUI investigator arrived and asked defendant to exit vehicle—Motion to suppress is denied

STATE OF FLORIDA, v. DEBORAH SAPP, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2022 CT 1. September 21, 2022. D. Melissa Distler, Judge. Counsel: Alexander Gilewicz, Assistant State Attorney, Office of the State Attorney, for State. Sam Masters, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTIONS TO SUPPRESS

THIS MATTER came before the Court on the Defendant's Amended Motion to Suppress Unlawfully Obtained Evidence. The Court, having heard testimony from Corporal Joseph Barnett, Sergeant Shane Meehan and Deputy Austin Chewning, having reviewed the AXON video recordings admitted into evidence, and having heard argument from both Counsel for the State and for the Defendant, the Court makes the following findings of fact:

Findings of Fact:

On January 1, 2022, Corporal Joseph Barnett was patrolling A1A as a supervisor in the area. As he was traveling, he testified that he stopped the Defendant in her vehicle due to being unable to maintain single lane, traveling back and forth over the center yellow line and to the right into the bicycle lane. Three separate deputies interacted with the Defendant DEBORAH SAPP; AXON recordings were submitted into evidence, published during the hearing and reviewed by the Court.[1] The investigation ultimately led to the Defendant DEBORAH SAPP being arrested for the charge of Driving under the influence by Deputy Chewning.

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Upon viewing the recordings, one is a forward-facing camera mounted to Corporal Barnett's vehicle; this is the only recording that shows the driving pattern. The other is the AXON recording mounted to Corporal Barnett's person. The first recording starts with the suspect vehicle immediately in front of the corporal traveling on a two-lane road with a double yellow line (no passing permitted). This recording begins with a vehicle traveling in the opposite direction; as it does so, the Defendant's vehicle swiftly swerves from the center of the lane all the way over to the right and into the bicycle lane (both right side tires). The suspect vehicle then corrects back into the lane and swerves over to the left towards the center line, immediately swerving back to the right, this time with the two right tires traveling onto and over the white bicycle lane line. The vehicle slowly drifts back towards the center of the lane; yet as another vehicle approaches in the opposite lane of travel, the vehicle travels sharply to the right and again drives on the bicycle lane with the tires going completely over the line. The vehicle swerves back towards the center of the lane and sways back and forth within the lane, touching the right bicycle lane once again. This driving pattern described above is captured for and spans a full thirty seconds before Corporal Barnett initiates the traffic stop.

This video reflects five distinct swerves during which the right-side tires touch or completely cross over the bicycle lane in the first twenty-seven seconds. Corporal Barnett further testified that prior to turning on his camera, he did observe the vehicles' driver side tires cross over the double yellow line before it turned into a broken yellow line. He also testified that he developed concerns that the driver may be impaired, tired, possibly experiencing medical issue based solely on its driving pattern.

At timestamp 00:37:51 of the AXON recording, Corporal Barnett initiates the traffic stop. He approaches the vehicle and begins interacting with the Defendant at 00:39:05. From the AXON recording, a sidewalk is visible with persons walking along the sidewalk throughout the investigation.

The Defendant DEBORAH SAPP has her window down and initiates conversation with the deputy as he approaches, saying the following:

Defendant: Hey y'all

Deputy: Hi

Defendant: Hey, I was, I come from Daytona. And I was trying to find a hotel. I am trying to get off the road and there's my driver's license and registration.

Deputy: You're coming from Daytona?

Defendant: Well, I did come up and I, I got to get off this road so, yes sir.

Deputy: Okay, what hotel are you trying to get to?

Defendant: Well, I was trying to get, I had reservations in Daytona, but I booked the wrong day so I'm trying to just get off the road.

Deputy: Okay, is anyone else in the car with you?

Defendant: No, it's just me, yes sir

Deputy: And where are you coming from?

Defendant: Uh I, I live in Brunswick.

Deputy: Brunswick Georgia?

Defendant: Yes sir. And I went to Jacksonville, and I'm coming back up that way.

Deputy: Okay alright the reason why I stopped you, it looked like you were unable to maintain a lane.

Defendant: No sir, I can assure you, I can't see good at night, I put my glasses on, please, I am just like, I just want to get off this road, I'm so nervous.

Deputy: 110; 10-4 standby (talking to his dispatcher). Alright just relax for a minute, okay?

Defendant: Okay, I just want to get off this road and back to the main road.

At 00:40:45, Corporal Barnett begins calling in her Georgia tag for verification. He then proceeds to his vehicle and begins the process to run her driver's license on his computer. At 00:44:11, Corporal Barnett starts speaking with Sergeant Meehan and another deputy about his interaction with her and states as follows: "I thought she was signal 1, I couldn't smell anything. She's like all over the road. I'm going up to that call on A1A and she's in front of me and she can't drive, something, I don't know. She kind of had a slurred speech when I first talked to her, but so I just pulled her over." At 00:45:30 Corporal Barnett gets out of his car after checking her license. Another deputy who has arrived is seen taking off northbound away from this scene, and Sergeant Meehan is talking to the Defendant at the passenger side of her vehicle. At 00:46:17, Corporal Barnett asks dispatch if a whiskey unit is available.

The Defendant is evasive when being asked where she is and where she was coming from. The Defendant repeats multiple times that she just wants to get off the road, stating "please" and that she is "so nervous." She also thought she was near the Georgia border, which would be over an hour from her location in Flagler County. At 00:48:46, Corporal Barnett asks Sergeant Meehan if they need a whiskey unit. He responds, "I don't know." The deputies are talking with her about directions and roads, simply trying to figure out what may be happening with her. The Defendant begins using her phone to confirm her reservation at the Hilton in Daytona. She is unable to look for the item in her phone and talk to the deputy. Both deputies noted her speech as being possibly slurred with a thick southern accent. At 00:52:57, Corporal Barnett and Sergeant Meehan talk about how they smell something, but they cannot tell what it is. Sergeant Meehan suggests that field sobriety be performed to determine if she is okay to drive and describes the interaction as very unusual. At 00:53:40 Deputy Chewning comes up and Corporal Barnett explains what has transpired. It is almost seventeen minutes into the traffic stop when Deputy Chewning begins a DUI investigation.

Deputy Chewning testified about his observations of the Defendant when he approached the vehicle. He testified that the Defendant was sitting in the driver's seat of the vehicle at the time he made first contact with her. Deputy Chewning testified that he noted slurred speech, red bloodshot watery eyes, which he cited as indicators of being under the influence of alcohol or a controlled substance. He explained that while speaking with her, she was staying at some hotel and was uncertain where she was. Deputy Chewning noted that she thought she was still in Daytona Beach where her hotel was; she was unfamiliar with the city which she was in. Deputy Chewning additionally testified that he smelled a strong odor alcoholic beverage from her person and breath, and that he noted such while she was still seated in her vehicle.

It is this sequence of events on which the Defendant bases her Motion to Suppress. The Defendant first argues that there was no legal basis to conduct a traffic stop and that there was insufficient evidence that the Defendant's driving endangered any other vehicles or pedestrians; therefore, she could not be pulled over for failing to maintain a single lane. The Defendant's Motion to Suppress Evidence further alleges an unlawful length of detention and no reasonable suspicion to conduct a DUI investigation. The Defendant asserts that the deputies did nothing for 17 minutes while waiting for the whiskey unit to arrive, when the deputies on scene were fully capable of completing a DUI investigation on their own without delay. The State argued that Corporal Barnett had a valid basis to stop the vehicle for both violation of a traffic control device and also based on the driving pattern, to determine if the driver was ill, tired, or impaired. The State further argued that there was reasonable articulable suspicion for a DUI investigation based on the observations of all deputies, including driving pattern, crossing into the bike lane multiple times, the driver's confusion, lack of knowledge as to where she was, slight slurred

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speech, eyes glassy and watery, odor of alcohol, and flushed face. The State also made a distinction between cases involving delays in traffic stops involving canine matters versus delays in DUI stops. The State framed the question to determine whether there was any reasonable articulable suspicion of impairment or criminal activity, and that if so, a continued detention to investigate that criminal activity was permitted, citing *Sterbenz v. State,* 12 FLW Supp 612a (6th Judicial Circuit 2005).

Conclusions of Law:

The undisputed testimony of Corporal Barnett and the AXON recordings reflect that the Defendant violated Florida Statute 316.1995, driving upon a sidewalk or bicycle path on more than one occasion and Florida Statute 316.0875, no-passing zones. *See Dep't of Highway Safety and Motor Vehicles v. Jones,* 935 So.2d 532 (Fla. 3rd DCA 2006) [31 Fla. L. Weekly D1518a]; *Lomax v. State,* 148 So.3d 119 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1942a]. These violations, viewed objectively, coupled with the weaving within the lane, provided sufficient legal grounds for Corporal Barnett to conduct a stop. As a result, the Court holds that Corporal Barnett had a reasonable basis for the traffic stop for the civil traffic violations and a welfare check to determine if the driving pattern witnessed was due to the driver being ill, tired, or impaired in the early morning hours of January 1, 2022.

The Court must now evaluate the length of detention and determine whether such was unreasonable, as alleged in the Motion. The Court finds that Corporal Barnett and Sergeant Meehan were actively investigating and determining the next steps to take with the Defendant DEBORAH SAPP from the time of the initial interaction at 00:39:05 through the time Deputy Chewning asks her to step out of the vehicle at 00:54:50. By all accounts, the interaction was an unusual one. There were several indicators of impairment beyond the initial driving pattern visible in the video recording; the Defendant's confusion about where she was and evasiveness in answering the deputies' questions about where she came from and where she was traveling to; the Defendant's repeated expression of nervousness and wanting to get off the road; her admission to making a reservation for the wrong date; her belief that she was close to the Georgia border. There are additional indicators testified to by the deputies, which include slight slurred speech, glassy and watery eyes, odor of alcohol, and flushed face. Based upon the testimony and the AXON recordings, the Court finds that the length of detention prior to the DUI investigation commencing was reasonable. The deputies had reasonable articulable suspicion of impairment and continued to investigate while waiting for Deputy Chewning.

Based upon the foregoing, the Defendant's Motion to Suppress Evidence is DENIED.

[1]The time references herein are the timestamps located on the top right corner of all video recordings. The timestamps on the recordings are not consistent with each other. The recording from the forward-facing camera mounted on the vehicle begins at 05:38 while the recording from Corporal Barnett's AXON recording begins at 00:37. The only reference to the forward-facing camera recording involves the driving pattern description.

* * *

Criminal law—Driving under influence—Search and seizure—Investigatory stop—Defendant seated in vehicle legally parked on residential street was seized when police parked patrol vehicle with emergency lights activated behind vehicle that was legally parked on residential street and two officers approached vehicle in full uniform and illuminated vehicle interior with flashlights—Because officers did not have reasonable suspicion of criminal activity under totality of circumstances, seizure was unlawful—Motion to suppress is granted

STATE OF FLORIDA, v. HALEY M. MCCORMICK , Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 302155 MMDB, Division 83. September 22, 2022. David A. Cromartie, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS UNLAWFULLY OBTAINED EVIDENCE

THIS CAUSE came before this Court upon the Defendant's Motion to Suppress Unlawfully Obtained Evidence, 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:

FACTS:

In the early morning hours of March 12, 2022, Officer Christopher Indahl of the Daytona Beach Police Department observed a vehicle parked partially in the roadway at 324 Temko Terrace. Officer Indahl observed the brake lights to be activated. Due to the late hour and the minimal traffic for this residential neighborhood, Officer Indahl became concerned that the vehicle could be involved in criminal activity. Officer Indahl ran the tag and determined the vehicle was registered to an address in Edgewater, Florida. There was not a call from any citizen regarding the vehicle in question. A second officer arrived on scene. Officer Indahl informs the new officer that he plans on seeing what's up with the vehicle. Officer Indahl pulls behind the vehicle and turns on his blue lights. Officer Indahl and the second officer both approach the vehicle with their flashlights pointed into the vehicle. Both officers were wearing full uniforms with gun belts. As the two officers approached, one on the driver's side and one on the passenger's side, Defendant, Haley McCormick rolled down her window. Eventually, as a result of Defendant's interactions with the officers, Defendant was arrested for the offense of Driving Under the Influence.

LEGAL ANNALYSIS:

A citizen-police encounter becomes an investigatory stop, or Terry stop, once an officer shows authority in a manner which restrains the defendant's freedom of movement such that a reasonable person would feel compelled to comply, *Popple v. State* (Fla. 1993), 626 So.2d 185: *Rinehart v. State,* 778 So.2d 331 (Fla. 2nd DCA 2000) [26 Fla. L. Weekly D227a], *Thomasset v. State,* 761 So.2d 383 (Fla. 2nd DCA 2000) [25 Fla. L. Weekly D1042b], *Parsons v. State,* 825 So.2d 406, 408 (Fla. 2nd DCA 2002) [27 Fla. L. Weekly D998a]. The Court finds this case to be similar to *Smith v. State,* 87 So.3d 84 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D970a]. In *Smith,* the defendant was legally parked on a residential street and did not give any indication that he may be in need of police assistance. The deputy parked "catty corner" to defendant's vehicle and activated his emergency lights. The deputy illuminated the interior of the vehicle with his spotlight. The Court in *Smith* quoted the Florida Supreme Court "[R]egardless of the officer's intent in activating the lights, whether a seizure occurred is determined by what a reasonable person in G.M.'s position would have concluded based on the conduct of the officers." *Smith* at 88 citing *G.M. v. State,* 19 So.3d at 980 (Fla. 2009) [34 Fla. L. Weekly S568a]. The Court in *Smith* concluded that under "the totality of the circumstances, where, as here, appellant was legally parked on a residential street and did not give any indication that he might be in need of police assistance, no reasonable person would have felt free to drive away after an officer activated his emergency lights and used a spotlight to illuminate the person's parked vehicle." *Smith* at 88. This Court concludes that under the "totality of the circumstances" of this case, a reasonable person in the Defendant's position would not have felt free to leave when Officer Dahl parked his car behind Defendant's vehicle with emergency lights activated. Certainly, once the two officers approached the vehicle in full uniform and illuminated the vehicle's interior with flashlights, Defendant was subject to a seizure.

Once it is determined that a seizure has occurred, the Court must determine whether the officers had the appropriate level of suspicion

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to conduct a stop. In order to conduct an investigatory stop or detention, a law enforcement officer is required to have a well-founded suspicion of criminal activity. *Popple at* 186. In making a determination whether there is reasonable suspicion to justify a detention, Courts must look at the "totality of the circumstances" in each case to determine whether the detaining officer has a particularized and objective basis for suspecting criminal activity. *Santiago v. State,* 133 So.3d 1159, 1163 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D452a]. "[A] mere suspicion or hunch is not enough to justify a temporary detention." *Id.* at 1164.

Under the "totality of the circumstances" Officer Indahl did not have a reasonable suspicion of criminal activity. Officer Indahl was acting on a simple hunch. Therefore, the seizure of Defendant was unlawful.

For the foregoing reasons, it is hereby:

ORDERED AND ADJUDGED that Defendant's motion is GRANTED. Any Evidence collected after officers approached Defendant's vehicle is suppressed. The balance of Defendant's motion is not addressed as moot.

* * *

Criminal law—Leaving scene of accident with property damage—Jury instructions—Knowledge of crash—Defendant is not entitled to jury instruction, or to argue to jury, that she should be acquitted of leaving scene of accident with only property damage because she did not know that she had been in a crash—Evidence—Because defendant's lack of knowledge of crash is not a defense to the charge, photos of her apartment and statements by defendant to law enforcement intended to reflect her mental state at time of crash are not relevant and are inadmissible

STATE OF FLORIDA, Plaintiff, v. ALLISON JEAN LANDSDOWNE, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2022-CT-000640-A, Division II. September 13, 2022. Susan Miller-Jones, Judge.

ORDER GRANTING THE STATE'S MOTION IN LIMINE AND DENYING DEFENDANT'S MOTION FOR SPECIAL JURY INSTRUCTION

THIS CAUSE comes before the Court upon the State's "Motion in Limine," filed August 29, 2022; and Defendant's "Motion for Special Jury Instruction," filed August 29, 2022. On September 7, 2022, a hearing was held on the motion, at which the Court heard legal argument. Upon consideration of the motions, the legal argument of the parties, and the record, this Court finds and concludes as follows:

1. The State moves to prohibit the defense from the following at trial:

(a) Prohibit the defense from introducing Defendant's statement and testimony that she did not know that she was involved in a crash; and

(b) Prohibit the defense from entering into evidence photographs from her apartment to show that she is a victim of domestic violence.

2. The State moves, additionally, to admit the 911 call from an eyewitness to the crash which includes the eyewitness's observations regarding the crash and Defendant's leaving the scene. During the hearing, the State and defense agreed that the eyewitness 911 call would be admissible.

3. Defendant moves the Court to instruct the jury that knowledge of the crash is an element of the offense of Leaving the Scene of a Crash involving only damage to property. *See* § 316.061(1), Fla. Stat. (2021).

4. "The Florida Legislature enacts criminal laws and can specify the knowledge requirement for criminal acts." *Goodman v. State,* 229 So. 3d 366, 377 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2285b]. "At common law, all crimes consisted of an act or omission coupled with a requisite mental intent or mens rea." *State v. Oxx,* 417 So. 2d 287, 288-89 (Fla. 5th DCA 1982) (footnote omitted). "Notwithstanding this common law requirement, it was long ago recognized that the legislature has the power to dispense with the element of intent and thereby punish particular acts without regard to the mental attitude of the offender." *Id.* at 289.* "Although the legislature may punish an act without regard to any particular (specific) intent, the State must still prove general intent, that is, that the defendant intended to do the act prohibited." *Id.* at 290. "General intent is usually inferred from the act itself, but if a defendant puts the general intent in issue, the issue must go to the jury." *Tollefson v. State,* 525 So. 2d 957, 961 (Fla. 1st DCA 1988).

5. Here, reframing Defendant's request, Defendant is requesting that the word "knowingly" be added before "failed" in paragraph four of the relevant standard jury instruction. *See* Fla. Std. Jury Instr. (Crim.) 28.4(a). In essence, Defendant is requesting that the State prove beyond a reasonable doubt that she willfully or purposefully failed to stop at the scene of the crash. However, there is no such *actual knowledge* requirement in the statute, which is what Defendant's special jury instruction is asserting. Further, "intent is less necessary as an element of a public welfare offense because the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *State v. Giorgetti,* 868 So. 2d 512, 518 (Fla. 2004) [29 Fla. L. Weekly S95a] (quoting *Morissette v. United States,* 342 U.S. 246, 255-56, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). Public welfare offenses almost uniformly involve statutes that provide "for only light penalties such as fines or *short jail sentences,* not imprisonment in the state penitentiary." *Id.* (quoting *Staples v. United States,* 511 U.S. 600, 616, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)) (emphasis added). Leaving the Scene of a Crash with only property damage is a public welfare offense. And, in that regard, this Court specifically notes that "[t]here is a vast gulf between the sanctions imposed for leaving the scene of an accident where only property damage is involved. . . and the criminal penalties for leaving the scene of an accident where injury or death is involved." *State v. Dumas,* 700 So. 2d 1223, 1226 (Fla. 1997) [22 Fla. L. Weekly S668a].

6. Section 316.061(1), Florida Statutes (2021), states: "The driver of any vehicle involved in a crash resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such crash or as close thereto as possible, and shall forthwith return to, and in every event shall remain at, the scene of the crash until he or she has fulfilled the requirements of s. 316.062. A person who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083." Like the DUI statute, section 316.061(1) only requires that a defendant have committed the indicated acts. The statute is indifferent to the defendant's specific intent for doing so.

7. In analogizing section 316.061(1) to the DUI statute, this Court notes that "DUI is a general intent crime[.]" *Mollenberg v. State,* 907 So. 2d 554, 556 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1596a]. "Intent to operate a motor vehicle is not an element of the charge of DUI, nor is lack of intent to operate a motor vehicle a legally cognizable defense to DUI." *McCoskey v. State,* 76 So. 3d 1012, 1014 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2661a] (citing § 316.193, Fla. Stat. (2010)). Accordingly, in a DUI case, a defendant cannot testify, or argue to the jury, that she should be acquitted because she did not intend to drive.

8. Here, Defendant is not entitled to an instruction, or to argue to the jury, that she should be acquitted because she did not know that she had crashed into another person's vehicle. Defendant's proposed jury instruction is not a correct statement of the law. *Id.* ("Although Florida law guarantees a defendant the right to argue his theory of defense, a defendant may do so only so long as the 'theory is valid under Florida law.' ") (citing *Peterson v. State,* 24 So.3d 686, 690

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(Fla. 2d DCA 2009) [34 Fla. L. Weekly D2607a]. Accordingly, Defendant's request is denied; and she is not permitted to argue that she is entitled to an acquittal because she did not know that she had been in a crash.

9. Because Defendant's lack of knowledge of the crash is not a defense to the charged offense, the photos of her apartment, which are intended to reflect her mental state at the time of the crash, are not relevant; and, therefore, inadmissible. Further, Defendant's self-serving statements to law enforcement are also inadmissible.

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

I. The State's motion in limine is hereby **GRANTED**.

II. Defendant's motion for special jury instruction is hereby **DENIED**.

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*"[A]n overall general distinction is drawn between statutes codifying crimes recognized at common law and statutes that proscribe conduct not prohibited at common law. The common law crimes were commonly referred to as crimes *mala in se* or 'infamous' crimes; as such, intent was considered to be so inherent in the idea of the offense that it was deemed included as an element, even though the statute codifying the offense failed to specify an intent element. In contrast, the latter category of crimes (those proscribing conduct not prohibited at common law) were generally classified as crimes *mala prohibita,* and the doing of the act was considered punishable, regardless of intent." *State v. Oxx,* 417 So. 2d 287, 289 (Fla. 5th DCA 1982) (internal footnote omitted). "The *mala prohibita* crimes were considered to be regulatory in nature and were enacted to protect the public health, safety and welfare. Unlike their common law counterparts, many such crimes result from neglect where the law requires care, or inaction where the law imposes a duty to act; they may not result in direct injury to persons or property but merely create a danger or possibility of danger that the law seeks to minimize. In this sense, whatever the intent of the violator, the injury is the same. Thus, where codifying crimes *mala in se,* intent is required. . . but where codifying crimes *mala prohibita,* intent can be disposed of." *Id.* at 290 n.4.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Safe harbor letter and ensuing motion for sanctions were premature and frivolous where the documents necessary to discern whether benefits were properly exhausted were not provided to plaintiff until 17 days after service of safe harbor letter, and medical provider had to file suit and conduct discovery to determine whether benefits were properly exhausted—Motion to tax attorney's fees and costs is denied

ACCESS MEDICAL SERVICES, INC., a/a/o Renee Dukes, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-005831-O. August 26, 2022. Andrew A. Bain, Judge. Counsel: David Edwards, Reifkind, Thompson & Rudzinski, LLP, Fort Lauderdale, for Plaintiff. Christopher Bertels, Maitland, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR ENTITLEMENT AND MOTION TO TAX ATTORNEYS' FEES AND COSTS

THIS MATTER having come before the Court on Defendant's Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs on August 4th, 2022, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is,

HEREBY ORDERED AND ADJUDGED, as follows:

1. Defendant's Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs is DENIED.

Factual Background

2. This case arises out of a claim for Personal Injury Protection ("PIP") benefits as a result of an automobile accident occurring on or about May 30, 2018. Defendant issued a policy of insurance which included $10,000.00 in PIP benefits which did inure to the benefit of Renee Dukes ("Claimant") and was in full force and effect at all times relevant to the accident occurring on May 30, 2018.

3. Following the accident, the Claimant presented to Access Medical Services, Inc. ("Plaintiff", for dates of service June 11, 2018 through July 30, 2018 for treatment of the injuries sustained in the May 30, 2018 accident. Claimant treated with a number of providers in regards to this motor vehicle accident.

4. The Defendant takes the position that they have paid out $10,000.00 in this matter pursuant to the policy issued for the named insured Claimant, that the policy and thus benefits have exhausted, and therefore the instant suit was not viable at its inception and therefore Plaintiff acted in bad faith in filing their complaint while seeking to litigate and conduct discovery on the issue of whether the payments rendered by Defendant to any third-party providers were proper.

5. A demand letter was sent by Plaintiff's counsel to Defendant on November 19, 2021, which included an assignment of benefits, medical bills, the date of loss, the dates of service at issue, and the amounts billed and paid. On December 10, 2021, Defendant provided its demand response claiming that benefits had exhausted and that the demand letter itself was insufficient. The Defendant argued that the PIP logs were disclosed to Plaintiff, but were not part of the record evidence before the court.

6. On February 14, 2022, Plaintiff filed its Complaint citing breach of contract and seeking unpaid benefits for the policy at issue. On March 9, 2022, Plaintiff filed several sets of discovery requests, seeking the necessary documents needed to gauge whether the payments rendered by the Defendant were proper. On March 14, 2022, Defendant filed its Answer and Affirmative Defenses, citing benefits exhaustion.

7. On March 22, 2022, Defendant issued a Safe Harbor Letter and proposed 57.105 Motion for Sanctions alleging that the instant action was frivolous in nature due to benefits having previously exhausted. The proposed 57.105 Motion included unverified copies of Defendant's PIP Log, Explanations of Benefits, and Declaration page, but failed to include the Defendant's policy, HCFA's, medical records, proofs of mailing, or any documents attesting to the accuracy of the documents that were provided, all of which would be needed to determine whether payments were properly issued to third-party providers.

8. On April 8, 2022, **17 days after Defendant served their 57.105 Safe Harbor Letter**, on Friday at 4:36 PM, Defendant filed its responses to Plaintiff's initial discovery requests.

9. On April 14, 2022, six days after Plaintiff's receipt of the non-privileged claim file, Defendant filed its 57.105 Motion for Sanctions ("Motion"). Plaintiff dismissed suit on May 26, 2022, and Defendant thereafter sought a hearing for their Motion.

10. During the August 4, 2022 hearing for Defendant's Motion, Plaintiff argued that it was entitled to conduct discovery to confirm whether benefits had properly exhausted, that the current case law out of the Third and Fourth DCA's supported their contention that the matter was not frivolous, that factual discrepancies were eventually discerned from the discovery documents procured from Defendant's counsel regarding payments issued by Defendant to third-party providers, and that the dismissal was, in fact, a business decision based on the potential viability of the suit following receipt of the documents at issue needed to verify same.

DISCUSSION

11. In addressing motions for attorney fees, or sanctions, under 57.105, Florida appellate courts have consistently found, "[w]hen assessing attorney's fees against a losing party's attorney, the trial court must find that there were no justiciable issues of law or fact and that the losing party's attorney did not act in good faith based on the representations of his or her client." *See Siegel v. Rowe,* 71 So. 3d 205, 211 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2169a], *citing Weatherby Assocs., Inc. v. Ballack,* 783 So. 2d 1138, 1143 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D873a].

12. The issue presented in Defendant's Motion has already been

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decided by at least one appellate court. In *Progressive Select Ins. Co. v. Dr. Rahat Faderani, DO, MPH, P.A.,* 330 So. 3d 928, 929 (Fla. Dist. Ct. App. 2021) [46 Fla. L. Weekly D2420a], the 4th DCA explained, "[b]ecause the use of NCCI edits comports with the statute, Progressive did not make improper payments or act in bad faith in using the edits to reduce the bill of the third-party provider. As it is undisputed that Progressive exhausted insured's PIP benefits by the proper payment of claims prior to this lawsuit, Progressive is not liable for payment in excess of the policy limits." Accordingly, *Faderani* clearly demonstrates that the discovery of improper payments will preclude the finding of a proper exhaustion of benefits.

13. In this case, there is sufficient evidence to establish that Plaintiff needed to both file suit and conduct discovery before determining whether benefits were properly exhausted as no documents were provided with Defendant's December 10, 2021, Demand Response. Further, the documents necessary to discern proper exhaustion were not produced until Defendant's Responses to Plaintiff's Initial Request for Production were filed on April 8, 2022, 140 days following Plaintiff's first request for same in their November 19, 2021, Demand Letter, and 17 days **after** Defendant served its March 22, 2022, 57.105 Safe Harbor Letter, rendering both the Safe Harbor Letter and accompanying Motion for Sanctions premature and frivolous themselves.

14. The Fourth DCA has spoken on the issue of exhaustion and advised that "[o]nce the PIP benefits are exhausted through payment of **valid claims,** an insurer has no further liability of unresolved, pending claims, absent **bad faith** in the handling of the claim by the insurance company." *See Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.,* 137 So. 3d 1049, 1057 (Fla. Dist. Ct. App. 2014) [39 Fla. L. Weekly D491a]. The key point is that the claim must be **valid** for an exhaustion to have actually taken place. In conjunction with valid payments, a gratuitous payment may not be made by the insurer to prematurely or errantly exhaust benefits. The Third DCA has held that an insurer may be exposed to the damages beyond PIP policy limits where it made erroneous payment of another provider's untimely and/or improperly billed charges, thereby premature exhausting benefits. *Coral Imaging Servs. v. Geico Indemn. Ins. Co.,* 955 So. 2d 11, 16 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a]. Such erroneous payments "must be characterized as 'gratuitous,' and should not be considered as having been made against the limits of the PIP policy." *Id.*; *see also Progressive Express Ins. Co. v. So. Fla. Institute of Medicine,* 14 Fla. L. Weekly Supp. 520a (Fla. 11th Cir. Ct. App., Apr. 11, 2007) (holding that pursuant to *Coral Imaging,* a claimant may recover after benefits have exhausted if the insurer improperly paid "non-compensable" claims thereby exhausting the benefits prematurely or incorrectly); and, *Doral Health Center, P.A. a/a/o Sara M. Perez v. United Auto,* Miami-Dade Case No. 13-2176 SP 24 (Fla. 11th Cir. County Ct. February 5, 2016) [23 Fla. L. Weekly Supp. 963a](noting that neither insurer nor insured is responsible for unpayable charges under PIP).

15. The Third DCA recently rendered an opinion providing an analysis on whether payments exhausting benefits were proper by using the 2007 Limiting Charge Fee Schedule. *See Priority Med. Centers, LLC a/a/o Susan Boggiardino v. Allstate Ins. Co.,* 319 So. 3d 724, 726 (Fla. Dist. Ct. App. 2021) [46 Fla. L. Weekly D978b]. While *Priority Med. Centers* ultimately affirms the lower court's ruling in favor of State Farm's application of the 2007 Limiting Charge, the fact that the Court considered the provider's argument, rather than deeming it moot, and instead rendering a three-page analysis on the alleged improper utilization of the 2007 Limiting Charge, shows that establishing whether a gratuitous payment was rendered in an exhaustion case is an issue properly raised in litigation regarding whether benefits were properly exhausted. This holding further strengthens Plaintiff's position that the instant matter was neither frivolous nor brought in bad faith.

16. As there are currently no conflicting DCA opinions with either the *Priority Med. Centers* or *Faderani* holdings regarding the potential viability of exhaustion suits, these cases represent the law of Florida. *See Stanfill v. State,* 384 So. 2d 141, 143 (Fla. 1980). The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. *See Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992) (*quoting State v. Hayes,* 333 So. 2d 51, 52 (Fla. Dist. Ct. App. 1976).

17. Thus, it is very clear that Defendant's payments to the other providers, along with their failure to provide the required supporting documentation requested by Plaintiff to verify that said payments were properly made, permitted Plaintiff the opportunity to discern whether any overpayments and/or gratuitous payments resulting in a premature/errant exhaustion of the PIP benefits at issue under the policy had taken place.

18. The Defendant did not provide the requested documentation following receipt of Plaintiff's Demand Letter along with their usage of the 57.105 Safe Harbor Letter and Motion as an intimidation tactic was improper. The evidence and controlling case law establishes that Plaintiff was entitled to verify whether the benefits assigned to the policy at issue were properly exhausted. By potentially improperly allowing more than the schedule of maximum charges, Defendant would have made the claimant liable for an increased co-pay—a clear potential harm and prejudice to the claimant. Under the PIP statute, the claimant may not be balance billed for any amount in excess of the schedule of maximum charges. See F.S. 627.736(4) ("If an insurer limits payments as authorized subparagraph 1., the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits.").

Opinion

19. The Court finds that information regarding the payments made to third-party providers and whether such payments are gratuitous and should not be counted against the $10,000.00 PIP limit is discoverable as such potential improper payments may serve as the basis of a non-frivolous litigable issue.

20. The Court agrees in the relevance of several opinions provided by the Plaintiff to the instant matter, including the 3rd and 4th DCA rulings in *Priority Med. Centers* and *Faderani,* which clearly hold that issues regarding potentially improper payments in a benefits exhausted matter, are litigable.

21. The Court finds that the issue in this matter is dissimilar to that raised in *Northwoods v. State Farm.* Although Defendant argued that the *Northwood* case should be viewed in favor of Defendant's position, the *Northwood* case deals with a situation where the PIP insurer paid a valid claim at the proper amount, not where the PIP insurer did not provide the required supporting documentation regarding all payments made to third-party providers until 140 days after Plaintiff provided its demand letter, which is what occurred in this case.

22. Accordingly, the Court finds in favor of Plaintiff and Defendant's Motion for Sanctions is hereby DENIED.

* * *

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Landlord-tenant—Public housing—Eviction—Failure to deposit rent into court registry—Tenant who was recipient of subsidy and whose rent was zero had no obligation to deposit rent into registry—Final judgment for removal of tenant which was based upon misrepresentations regarding tenant's failure to deposit rent into court registry is vacated, and writ of possession quashed—Because eviction complaint was prematurely filed prior to expiration of 7-day notice period, complaint dismissed without leave to amend—Despite landlord's claim that tenant voluntarily vacated premises after writ of possession was posted, landlord is ordered to restore possession of premises to tenant

937 JOSE MARTI, LLC, Plaintiff, v. JANELLE HOLT, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-016414-CC-05, Section CC01. August 29, 2022. Michael Barket, Judge. Counsel: Steven B. Herzberg and Safa Chowdhury, Vazquez & Associates, Miami, for Plaintiff. Alexandra Mesa, Dade Legal Aid, Miami, for Defendant.

ORDER ON DEFENDANT'S EMERGENCY MOTION TO VACATE FINAL JUDGMENT FOR REMOVAL OF TENANT, QUASH WRIT OF POSSESSION, DISMISS PLAINTIFF'S COMPLAINT OF EVICTION, AND TO RESTORE POSSESSION TO TENANT OF THE RENTAL UNIT

This matter came before the Court on August 23, 2022 for a second hearing on Defendant's Emergency Motion to Vacate Final Judgment for Removal of Tenant, Quash Writ of Possession, Dismiss Plaintiff's Complaint of Eviction, and to Restore Possession to Tenant of the Rental Unit. The first hearing on this matter occurred on July 26, 2022, but the Court re-set the hearing to insure proper service of the notice of hearing on Plaintiff. At today's hearing Counsel for Plaintiff, Defendant, and Defendant's counsel appeared. A court reporter was also present. The Court heard argument from Plaintiff's and Defendant's Counsel, reviewed the Court file, and being otherwise fully advised on the premises, that the Court rules as follows:

1. Defendant, who has been living at this apartment since January 2020, is a recipient of a subsidy and pays zero ($0) rent at this Section 8 Moderate Rehabilitation property.

2. On June 29, 2022, a Final Judgment for Removal of Tenant was entered in error by the Court based on misrepresentation by Plaintiff in its Motion to Strike Defendant's answer that no rent had been deposited into the Court's registry despite the fact that Defendant's rent is zero ($0) and Defendant had no obligation to deposit any rent into the Court's registry.

3. A Writ of Possession was then entered by the Clerk of Court on June 29, 2022.

4. Pursuant to *Fla. R. Civ. P.* 1.540 (b), Defendant's Emergency Motion to Vacate the Final Judgment for Removal of Tenant, Quash Writ of Possession, Dismiss Plaintiff's Complaint of Eviction and to Restore Possession to Tenant of the Rental unit is GRANTED in its entirety.

5. This eviction complaint is based on a 7-day notice for noncompliance with no opportunity to cure (termination of tenancy notice) dated June 9, 2022.

6. The eviction complaint was filed on June 15, 2022, prior to the expiration of the 7-day notice for non-compliance.

7. Plaintiff's Complaint was prematurely filed as the earliest possible date that Plaintiff could commence the eviction proceedings was on June 17, 2022. *See Victory Properties, LLC v. Brooks*, 19 Fla. L. Weekly Supp. 492a (Orange Cty. Ct. 2012); *See also St. Victor v. Lafavor*, 15 Fla. L. Weekly Supp. 292a (Broward Cty. Ct. 2008) (concluding that eviction Complaint filed on last day of period given for tenant to vacate was premature. Thus, filing the suit prematurely, the Plaintiff failed to terminate the tenant's rental agreement and had no lawful right to commence an eviction proceeding); *Baker v. Stanley*, 9 Fla. L. Weekly Supp. 342b (Broward Cty. 2002), *Coleman v. Cabino Rentals*, 9 Fla. L. Weekly Supp. 134a (Columbia Cty. 2002), *Miami Soar Management Corp. v. Martinez*, 27 Fla. L. Weekly Supp. 190a (Miami Dade Cty Ct. 2019).

8. Pursuant to Fla. Stat. § 83.59 and 83.56(2)(a), an action for possession cannot be commenced until the tenancy is properly terminated by serving tenant with a proper notice.

9. Since Plaintiff in this case filed the complaint prematurely without allowing the 7 days to expire pursuant to the notice, Plaintiff has failed to comply with the condition precedent before the filing of the Complaint. Termination of the tenancy is a statutory pre-requisite to an action for eviction and must be satisfied prior to filing the eviction action. *Oakridge Apartment Complex, Inc. v. Perry*, 13 Fla. L. Weekly Supp. 839c (Alachua Cty. 2006); *Live Oak Villas Mobile Home Park v. Andrews*, 5 Fla. L. Weekly Supp. 469a (Fla. Suwannee Cty. 1998

10. A statutory cause of action cannot be commenced until Plaintiff has complied with all conditions precedent. *See Ferry Morse Seed Co. v. Hitchcock*, 426 So. 2d 958 (Fla. 1983).

11. When less than all the requisite elements of a cause of action exist when the complaint is filed, the complaint must be dismissed without leave to amend. *Rolling Oaks*, 492 So. 2d 686 (Fla. 3d DCA 1986).

12. When a court grants relief from judgment, it should restore the parties to their positions before the judgment was entered. *Bane v. Bane*, 775 So.2d 938 (Fla. 2000) [25 Fla. L. Weekly S1070a]; *Adelhelm v. Dougherty*, 176 So. 775 (Fla. 1937); *Zwakhals v. Sentft*, 206 So.2d 62 (Fla. 4th DCA.1968).

13. Plaintiff argued that Defendant had voluntarily vacated the unit after the Writ of Possession had been posted by the Sheriff on July 8, 2022 because the Sheriff had not yet executed the Writ of Possession.

14. However, this Court Orders Plaintiff to restore possession of the rental unit to Defendant within twenty four (24) hours from the time of the hearing which occurred on August 23, 2022 at 9:45 a.m.

15. The Court hereby restores Defendant to her position of being in possession of the unit which was the position she was in before the Final Judgment for Removal of Tenant was erroneously entered.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

1. Plaintiff's Eviction complaint is dismissed without leave to amend.

2. The Final Judgment for Removal of Tenant entered on June 29, 2022 is vacated.

3. The Writ of Possession entered by the Clerk on July 5, 2022 is Quashed.

4. Defendant shall be placed back in possession of the unit located at [Editor's note: address redacted], Miami, FL 33130, and her tenancy shall be reinstated and restored within twenty-four (24) hours from the time of the hearing which occurred on August 23, 2022 at 9:45 a.m.

5. The Court retains jurisdiction over the issue of attorney's fees and costs.

6. The Court retains jurisdiction to enforce this Order.

* * *

Insurance—Homeowners—Coverage—Constant or repeated seepage or leakage of water—Exclusion for seepage and leakage occurring "over a period of weeks, months or years" only applies to exclude coverage for seepage or leakage over period of 14 or more days—Insurer's reliance on anti-concurrency language in policy to deny coverage for water damage is misplaced where it is undisputed that only source of leakage is from air conditioning unit—Loss is covered by all-risk policy

CHAUNCEY LESTER, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-002440-CC-25, Section CG01. August 26, 2022. Linda Melendez, Judge. Counsel: Bobby Nunez, Nunez Law, P.L., Miami, for Plaintiff. Otto

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N. Espino, Luks Santaniello, Miami, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on August 16, 2022 on Plaintiff's Motion for Final Summary Judgment. The Court having carefully reviewed the moving papers and supporting and opposing documents filed in the Court record, including the parties' exhibits, considered the grounds for the Motions, heard argument of counsel and considered the supplemental authority and applicable law prior to issuing this Order, this Court finds as follows:

Plaintiff, Chauncey Lester ("Plaintiff"), filed a Complaint for Declaratory Relief seeking a declaration in her favor, *inter alia*, that the subject loss was covered under Plaintiff's "all-risk" homeowners insurance policy #01446070 (the "Policy") issued by the Defendant, Citizens Property Insurance Corporation ("Defendant").

Plaintiff reported a loss to Defendant for damage from an air conditioner leak, with date of loss of October 10, 2019. Following its investigation, Defendant sent a denial letter dated January 6, 2020, stating that it was "unable to provide coverage for the damage to the walls and baseboards which occurred as a result of constant or repeated exposure to water over a period of weeks, months, or years" and referenced the Policy.

Defendant filed its Answer, Affirmative Defenses, Demand for Jury Trial, and Notice of Appearance wherein its sole defenses were that Plaintiff failed to state a cause of action for declaratory relief,[1] and that Plaintiff's claim was excluded in its entirety under the following exclusion:

> **SECTION I—EXCLUSIONS**
>
> **A.** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> **12. Constant Or Repeated Seepage Or Leakage Of Water Or Steam**, or the presence or condensation of humidity, moisture or vapor; over a period of weeks, months or years, unless such seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor, and the resulting damage is unknown to all "insureds" and is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.
>
> B. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not otherwise excluded or excepted in this Policy is covered.
>
> 3. Faulty, Inadequate Or Defective:
>
> b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> c. Materials used in repair, construction, renovation or remodeling; or,
>
> d. Maintenance;
>
> of part of all of any property whether on or off the "residence premises.

Plaintiff filed the instant Motion for Final Summary Judgment (the "Motion") on/about May 17, 2022. Defendant filed its response (the "Response") to the Motion on/about June 17, 2022. On or about Aug. 16, 2022, the Court held a special set hearing on Plaintiff's Motion in which it heard the argument of counsel, and considered admissible record evidence.

As of May of 2021, Florida adopted the same standard as federal courts for summary judgment; as such, a party is entitled to summary judgment when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 222-23 (1986).

"For factual disputes to be considered genuine, they must have a real basis in the record." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005) [19 Fla. L. Weekly Fed. C127a]. Specifically, the non-moving party "must produce "substantial evidence" to defeat a summary judgment motion." *Kesinger v. Herrington*, 381 F.3d 1243, 1249-50 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C977a]. Stated otherwise, a factual issue is "genuine" if the evidence is grounded in the evidence such that a reasonable jury could rely on such evidence to return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005) [19 Fla. L. Weekly Fed. C127a].

A fact is deemed "material" if it might affect the outcome of the suit under the governing law. *Id*. Consequently, the court's focus is "whether the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Bishop v. Birmingham Police Dep't*, 361 F.3d 607, 609 (11th Cir. 2004) [22 Fla. L. Weekly Fed. C1496a].

In the instant matter, Plaintiff alleges that while the Policy was in force, the subject property suffered direct physical loss from a leak from the interior air conditioning system at the property.

The issue is whether there is an exclusion within the Policy that supports a denial of Plaintiff's entire claim. In this case, the interpretation of the Policy's "Constant Or Repeated Seepage Or Leakage Of Water Or Steam" provision (the "Provision") is in dispute as to whether it is an exclusion or a limit of damages for a water loss that has been occurring for 14 or more days.

Plaintiff argues that the Provision should be interpreted to include coverage for the first thirteen (13) days of any water loss as it only excludes any loss that occurs after "weeks, months or years." In support of its position Plaintiff cites to *Hicks v. Am. Integrity Ins. Co. of Fla.*, 241 So. 3d 925, 926 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D446a; rehearing and certification denied at 43 Fla. L. Weekly D1138a] (which incorporates *Wheeler v. Allstate Insurance*, 687 F.App'x 757, 759 (10th Cir. 2017)) and *Whitely v. Am. Integrity Ins. Co. of Fla.*, 249 So. 3d 1312, 1313 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1503a] (citing to *Hicks*, 241 So. 3d).

Conversely, Defendant argues that the Policy language in *Hicks* and *Whitely* is not the same and therefore not binding on this Court, and therefore the Provision excludes coverage for the subject loss. The relevant policy language in *Hicks* and *Whitely* reads as follows:

> . . .we do not insure, however, for loss:
>
> 2. Caused by, the following is added:
>
> f. Constant or repeated seepage or leakage of water or steam over a period of 14 or more days from within a plumbing, heating, air conditioning or automatic fire protection sprinkler system or from within or around any household appliance, shower stall, shower tub or bathtub installation.

See, *e.g.*, *Hicks*, 241 So. 3d at 926; *Whitely*, 249 So. 3d at 1313.

The Parties agree, and this Court holds, that judicial interpretation of an insurance Policy is in the exclusive province of the Court and questions involving policy construction are not permitted to go to a jury. *Eagle American Ins. Co. v. Nichols*, 814 So. 2d 1083 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D596a]. *Accord Granada Ins. Co. v. Ricks,* 12 So.2d 3d 276, (Fla 3d DCA 2009) [34 Fla. L. Weekly D1001a] ("the meaning of an insurance contract is a question of law). . . ."

The first issue is whether the Plaintiff has met the initial burden placed upon her under an "all-risk" property insurance policy. "An all-risks policy provides coverage for all losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage*." Kokhan v. Auto Club Ins. Co. of Fla.*, 297 So. 3d 570, 572 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1194a] (quoting *Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2nd DCA 2014) [39 Fla. L. Weekly D2471a]. Under an "all risks" policy, the burden is upon the insured to show a physical

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loss to property while the policy was in force. The burden then shifts to the insurer to prove the physical loss was the result of an excluded cause of loss. *Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2nd DCA 1984); *Castillo v. State Farm Florida Ins. Co.*, 971 So. 2d 820, 824 (Fla. 3rd DCA 2007) [32 Fla. L. Weekly D2474a]; see also *Tower Hill Prime v. Newell*, 183 So. 3d 1247, 1247 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D249a].

The use of the word "weeks", the plural of "week", according to its plain meaning, would mean more than one week, as in two (or more) weeks—*i.e.,* 14-plus days. It then follows that the phrase "over a period of weeks, months or years" is tantamount to the phrase "over a period of 14 or more days." As such, there is no distinguishable difference between the language in the Provision and the language contained in the policies in *Hicks* or *Whitely* that would permit this Court to interpret that portion of the Provision any differently.

Defendant also argues that the policy at issue in *Whitely* and *Hicks* is distinguishable because the exclusionary language therein does not contain anti-concurrency lead-in language. An anti-concurrent cause provision is a provision in a first-party insurance policy that provides that when a covered cause and non-covered cause combine to cause a loss, all losses directly and indirectly caused by those events are excluded from coverage. See *Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So.3d 486, 487 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D433a]; *cf.* to *Sebo v. American Home Assurance Co., Inc.*, 208 So. 3d 694, 697 (Fla. 2016) [41 Fla. L. Weekly S582a].

In support of its position, Defendant relies upon *Security First Ins. Co. v. Czelusniak*, 305 So. 3d 717 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D1151b]. Defendant's reliance upon the anti-concurrency provision in the subject insurance contract and *Czelusniak* is misplaced for several reasons.

First, as the Court recognized in *Czelusniak*, "[g]enerally, 'when ***independent perils*** converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine.' " *Id.* at 718 (emphasis added) (citing to *Sebo v. American Home Assurance Co., Inc.*, 208 So. 3d 694, 697 (Fla. 2016) [41 Fla. L. Weekly S582a]).

It is undisputed that the only source of any leakage is from the air conditioning unit inside the subject property. Further, as Defendant states in its response, "Plaintiff's Motion for Final Summary Judgment defines the 'Loss' as 'an escape of water from the Property's air conditioning system.' Defendant denies this is the loss (**in terms of damage claimed**) but acknowledges this is the ***peril*** from which Plaintiff attributes the damage which has been claimed." Defendant's Response at Page 1; fn. 1 (emphasis not original).

This acknowledgement by Defendant of a single peril causing the loss renders the anti-concurrency lead-in language irrelevant because the anti-concurrency provision requires ***independent perils*** to combine to cause the loss, *supra*. Defendant fails to identify another independent peril that combined with the leak from the air conditioning unit to cause the subject loss. Additionally, it is illogical to state that an exclusion which provides that a single peril which is "continuous" in nature would also be two independent perils merely due to the amount of time which has passed; to do so would require the Court to impermissibly construe the Policy in Defendant's favor, particularly when Defendant drafted the subject insurance contract, including the Provision at issue herein.

Second, *Czelusniak* is distinguishable from the instant case as there was no caselaw provided in *Czelusniak* which found that the relied upon exclusionary language acted to limit recovery as opposed to excluding the loss in its entirety. This distinction is critical as the Provision would still only act as a limit to the damages that could be recovered because that ambiguity is not resolved by adding anti-concurrency lead-in language.

Accepting Defendant's position would mean that an otherwise covered leak in the subject property solely damaged the same areas that were solely damaged beyond the 13th day of the leak from the air conditioning system then the anti-concurrency provision would prevent the Insured from obtaining coverage for those losses. Such a conclusion would contradict the Provision that specifically states that damages from weeks—14 or more days—is not covered. Moreover, reaching such a conclusion in this action would ignore Defendant not having attempted to distinguish any of the damages occurring in the first 13 days of the leak from the air conditioning system.

Finally, if Defendant wanted to exclude all losses from a leak that had been ongoing for a period of weeks, months or years, it could have easily done so by including language presently used by Defendant and other insurance companies which states that, "[i]n the event this exclusion applies, we will not pay for any damages sustained starting from the 1st day and instance the constant or repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor began. . ." See, *e.g.*, 5/17/2022 *Notice of Filing* of Tower Hill Insurance Policy; pg. 4 of 15. Yet, Florida does law prohibits this Court to rewrite the Policy in such a way to give the Exclusion the effect which Defendant intended. See *World Fin. Grp., LLC v. Progressive Select Ins. Co.*, 300 So. 3d 1220, 1222-23 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D120d].

Accordingly, based on the foregoing, Plaintiff's Motion for Final Summary Judgement is hereby GRANTED. The Court finds that the subject loss was covered under Plaintiff's "all-risk" homeowners' insurance contract written and issued by Defendant, but makes no findings as to the amount or scope of covered damages as that is not part of the relief sought in the instant action. The Court shall retain jurisdiction for purposes of any post-judgment motions for interest, attorneys' fees, costs, etc.

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[1]This issue was previously ruled upon by the Court in a hearing on Defendant's Motion to Dismiss held on April 9, 2020 (DE 25).

* * *

Insurance—Default—Unliquidated damages—Motion for default final judgment is denied because damages sought in complaint are not liquidated and trial to address damages has not been held

SUMMERLIN IMAGING CENTER, LLC, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-012058-SP-05, Section CC06. September 9, 2022. Luis Perez-Medina, Judge.

AMENDED ORDER DENYING DEFAULT FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS CAUSE having come on to be considered on Plaintiff's Motion for Default Final Judgment, and the Court being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the Plaintiff's Motion for Default Final Judgment is **DENIED** since the damages sought in the Complaint are not liquidated and the case has not been set for a trial to address damages. *Millan v. Marquez,* 338 So. 3d 963, 964 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D294a].

The law in Florida is well settled that a defaulting party "has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages." *Cellular Warehouse, Inc. v. GH Cellular, LLC,* 957 So. 2d 662, 666 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a] (quoting *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983)). *See also DYC Fishing, Ltd. v. Martinez,* 994 So. 2d 461, 463 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2604a] ("When unliquidated damages must be determined as a result of a default, the defaulting party 'is

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entitled to notice of an order setting the matter for trial, and must be afforded an opportunity to defend.' " (quoting *Viets v. Am. Recruiters Enters., Inc.*, 922 So. 2d 1090, 1095 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D851a])).

Here, the Complaint states that the exact amount of damages are "unknown as they continue to accrue." Complaint ¶ 18. In addition, no billing statement is attached to the Complaint. Thus, Plaintiff has no basis to argue that Defendant has defaulted on an amount not requested in the Complaint and now being sought for the first time via affidavit. Moreover, Plaintiff cannot claim that the damages in the Complaint are liquidated since the proper amount cannot be determined with exactness from the cause of action as plead, by an arithmetical calculation, or by application of definite rule of law. *Cellular Warehouse, Inc.*, 957 So. at 665.

* * *

Attorney's fees—Amount

MIROSLAVA ARNAEZ, Plaintiff, v. STATEBRIDGE CO., LLC, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-015706-CC-23, Section ND06. September 19, 2022. Ayana Harris, Judge. Counsel: Robert Wayne, for Plaintiff.

FINAL JUDGMENT OF ATTORNEY'S FEES AND COSTS FOR TRIAL COUNSEL

THIS CAUSE having come before this Court on Plaintiff's Motion to Tax Attorney's Fees and Costs on September 6, 2022, via Zoom, and the Court having reviewed the file and court docket, including the Default Final Judgment of Liability previously entered on June 30, 2022, in favor of the Plaintiff as well as the Affidavit of Robert Wayne, the Fee Expert Report and Affidavit and the Retainer Agreements all filed and subsequently submitted into evidence, it is hereby

ORDERED and ADJUDGED as follows:

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

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

3. In support of his fee request, Mr. Wayne submitted a retainer agreement and affidavit into evidence reflecting the total time he incurred in prosecuting the instant Florida Consumer Collection Practices Act (FCCPA) matter.

4. Both the retainer agreement and affidavit of Mr. Wayne reflect an hourly rate of $500.00, which Mr. Wayne testified was reduced from his standard hourly rate of $725.00. The retainer and affidavit were admitted into evidence.

5. Mr. Wayne's affidavit reflected a total time of 9.5 hours for work and services performed up through entitlement being granted on June 30, 2022.

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

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

8. The Court finds that a reasonable hourly rate for Mr. Wayne is $500.00 and the Court also finds that the reasonable hours expended by Mr. Wayne in this cause is 9.5 hours.

9. Mr. Dangler testified as to the *Quanstrom* factors and testified that he believed that Mr. Wayne's reduced hourly rate and time expended was very reasonable under the circumstances and facts presented.

10. Accordingly, this Court finds that the reasonable hourly rate time of 9.5 hours incurred by Mr. Wayne at a reasonable hourly rate of $500.00/hour is **GRANTED**.

11. Plaintiff is entitled to recover the expert witness fees of attorney Bryan Dangler Esq. based upon the holding and reasoning contained in the cases *Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985), and that attorney Bryan Dangler reasonably expended 3 hours. The Court finds that a rate of $425.00/hour is a reasonable hourly rate for the services of Mr. Dangler per his report, analysis and affidavit filed, along with his resume and the testimony he provided during the hearing. The total award for Mr. Dangler is **GRANTED** at 3 hours at $425.00/hour which equals $1,275.00

12. The Court finds that Robert Wayne is entitled to pre-judgment interest. *See Quality Engineered Installation, Inc. v. Higley South, Inc., et. al.* 670 So.2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a]. This was also stated and discussed in Mr. Dangler's report and affidavit that was admitted into evidence.

13. Pre-judgment interest accrues from the date of the vesting of entitlement to attorney's fees, which was entered on June 30, 2022 through the date of this order at the statutory rate. Neither pre-judgment interest nor post-judgment interest needs to be pled. *Mercedes-Benz of North America, Inc. v. Florescue & Andrews Invs., Inc.*, 653 So. 2d 1067 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D896b] (noting "pre-judgment interest does not have to be pled"); *Napp v. Carman*, 576 So. 2d 361 (Fla. 4th DCA 1991) (noting "post-judgment interest is governed by statute and need not be pled").

14. Therefore, Plaintiff's counsel Robert Wayne of the Law Office of Robert Wayne ***shall recover from*** Defendant Statebridge Company LLC the following:

a. Reasonable attorney's fees in the amount of $4,750.00

b. Pre-judgment interest in the amount of $38.97

c. Expert witness fees for Bryan Dangler, Esq. in the amount of $1,275.00.

d. Costs in the amount of $530.85

For a total sum of ***$6,594.82***, which shall be subject to post judgment interest at the statutory rate from the date this judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which let execution issue.

IT IS ALSO ORDERED that the judgment debtor STATEBRIDGE COMPANY LLC, whose mailing address is 6061 South Willow Drive #300 Greenwood Village CO 80111 shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on judgment creditor ROBERT WAYNE at 1225 SW 87 Ave, Miami Florida 33174 within 45 days from the date of this Final Judgment, unless the Final Judgment is satisfied or post judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper and to compel the judgment debtor to complete the 1.977 form, including all required attachments, and to serve it on the judgment creditor's attorney.

* * *

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Criminal law—Driving under influence—Search and seizure—Breath test—Substantial compliance with administrative rules—Where department inspector who conducted annual inspection of Intoxilyzer five weeks after it was used to test defendant's breath found that Flow and R Values were outside of acceptable range and could not say that results from instrument were reliable at or around time of testing, test results are inadmissible under either implied consent law or traditional scientific predicate—Motion to suppress is granted

STATE OF FLORIDA, v. JAMES PATRICK ROTROFF, Defendant. County Court, 12th Judicial Circuit in and for DeSoto County. Case No. 2021CT000390AXMA. September 5, 2022. Danielle L. Brewer, Judge. Counsel: Kayla Boone, State Attorney's Office, for State. Keeley Karatinos, Karatinos Law, PLLC, Dade City, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

THIS CAUSE came to be heard before the Court on 27 June 2022 on Defendant's Motion to Suppress Breath Test Results Which are Scientifically Unreliable, the State's Memorandum of Law Regarding Defendant's Burden, and Defendant's Response to State's Memorandum of Law Regarding Defendant's Burden. ASA Kayla Boone, Esq., represented the State of Florida. Ms. Keeley R. Karatinos, Esq., represented the Defendant, James Rotroff. The State presented the testimony of Captain Joshua Pitts of the DeSoto County Sheriff's Office and Mr. David Reyes-Rivera of the Florida Department of Law Enforcement. The Court, after receiving documentary and testimonial evidence, and after hearing the arguments of the State and Defendant's Counsel makes the following findings of fact and conclusions of law:

1. The Parties agree that the Defendant was arrested on 31 October 2021 for Driving Under the Influence with Property Damage.

2. The Parties agree that, as an incident of the Defendant's arrest, pursuant to the Implied Consent laws contained in § 316.1932, *Florida Statutes,* Deputy Nunez requested that the Defendant submit to a breath test.

3. The Parties agree that the Defendant submitted to the testing.

4. The Parties agree that no warrant for the breath tests of the Defendant was sought or issued.

5. The Parties agree that the Defendant blew into Intoxilyzer 80-001340 twice, and that the readings from the instrument indicated breath alcohol contents of 0.147 and 0.140, respectively, for the two tests.

6. The Parties agree that a breath test is a search.

7. Defendant argued in his Motion to Suppress and at the hearing that the results of the breath tests administered on the Defendant on 31 October 2021 should be suppressed because they are scientifically unreliable. Specifically, the Defendant argued that the tests administered on the Defendant were not in compliance with the statutes and administrative rules governing breath tests because the Intoxilyzer 80-001340 "did not pass the November 2021 Agency Inspection, and was taken out of evidentiary use as a result of the Department Inspection." Def.'s Mot. to Suppress, pg. 3.

8. The State argued in its Memorandum of Law Regarding Defendant's Burden and at the hearing that Defendant's Motion to Suppress was a Motion in Limine as "the FDLE has properly determined that the Intoxilyzer 8000 is an approved and accurate evidentiary breath test instrument, and the Defendant's breath sample was conducted utilizing such an approved instrument in substantial compliance with Chapter 11D-8 of the Florida Administrative Code." State's Memorandum, pg. 3. The State also argued in its Memorandum and at the hearing that even if this Court finds that that State did not substantially comply with Chapter 11D-8, that the State should have the opportunity to admit the breath test results under the traditional scientific predicate.

9. The Court determined at the hearing that the Defendant's Motion to Suppress was a proper Motion to Suppress, rather than a Motion in Limine. However, the Court's analysis and holding in this Order, based on the evidence presented at the hearing, is the same regardless of whether the Defendant's Motion is proper as a Motion to Suppress or should have been a Motion in Limine.

10. Section 316.1932, *Florida Statutes,* states that "[a] person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is 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." § 316.1932 (1)(a) 1.a., *Fla. Stat.*

11. Section 316.1932 (2), *Florida Statutes,* states that "[t]he Alcohol Testing Program within the Department of Law Enforcement is responsible for the regulation of the operation, inspection, and registration of breath test instruments utilized under the driving. . .under the influence provisions. . . ." § 316.1932 (1)(a) 2., *Fla. Stat.* Further, "[a]n analysis of a person's breath, in order to be considered valid under this section, must have been performed substantially according to methods approved by the Department of Law Enforcement." § 316.1932 (1)(b) 2., *Fla. Stat.* And, "[t]he tests determining the weight of alcohol in the defendant's blood or breath shall be administered at the request of a law enforcement officer substantially in accordance with the rules of the Department of Law Enforcement." § 316.1932 (1)(f) 1., *Fla. Stat.* "Such rules must specify precisely the test or tests that are approved by the Department of Law Enforcement for reliability of result and ease of administration, and must provide an approved method of administration which must be followed in all such tests given under this section." *Id.*

12. Rule 11D-8.002 defines "Approved Breath Alcohol Test" as "a minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an **approved breath test instrument**, producing two results within 0.020 g/210L, and reported as the breath alcohol level, on a single Form 38 affidavit." Fla. Admin. Code r. 11D-8.002.

13. Rule 11D-8.002 defines "Evidentiary Breath Test Instrument" as "a breath test instrument approved by the Department under Rule 11D-8.003, F.A.C., and used primarily to conduct alcohol breath tests pursuant to Florida law." Fla. Admin. Code. r. 11D-8.002.

14. Rule 11D-8.002 defines "Instrument Registration" as "when issued by the Department, certifies that the specified breath test instrument meets the requirements of Rules 11D-8.003 and 11D-8.004, F.A.C.[.], and is authorized to be placed into evidentiary use." Fla. Admin. Code r. 11D-8.002.

15. Rule 11D-8.003 states that "[t]he approved breath test method for evidentiary breath testing is Infrared Spectroscopy, also known as Infrared Light Absorption" and the Department approves the use of the CMI, Inc. Intoxilyzer 8000 using software evaluated by the Department. Fla. Admin. Code r. 11D-8.003. "A Department inspection performed in accordance with Rule 11D-8.004, F.A.C., validates the approval, accuracy and reliability of an evidentiary breath test instrument." *Id.*

16. "Registered breath test instruments shall be inspected by the Department at least once each calendar year to ensure accuracy and reliability, and must be accessible to the Department for inspection." Fla. Admin. Code r. 11D-8.004. "A department inspection must be conducted subsequent to repair and prior to being placed in evidentiary use." *Id.*

17. Rule 11D-8.006 requires that "[e]videntiary breath test instruments shall be inspected by an agency inspector at least once each calendar month. . .in accordance with the Agency Inspection Procedures. . . ." Fla. Admin. Code r. 11D-8.006.

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18. Captain Joshua Pitts of the DeSoto County Sheriff's Office testified that he was the designated and FDLE permitted Agency Inspector for the Intoxilyzer 80-001340 during all relevant times during this litigation (October-November 2021).

19. Captain Joshua Pitts testified that he completed an Agency Inspection of the Intoxilyzer 80-001340 on 27 October 2021 and 22 November 2021. He testified that the Intoxilyzer 80-001340 passed both October 2021 and November 2021 Agency Inspections.

20. Captain Pitts testified that during the 22 November 2021 Agency Inspection, there was an "RFI Detect" during the early portions of the Inspection (during the Alcohol Pre-Test). He testified that this could have been caused by a person with a radio device passing by his office during the time of the Inspection.

21. The Court finds that the Agency Inspections conducted by Captain Pitts were substantially in compliance with Rule 11D-8 of the Florida Administrative Code.

22. Captain Pitts testified that in December 2021 he sent both of the DeSoto County Sheriff's Office Intoxilyzers, including Intoxilyzer 80-001340, to the FDLE for Department Inspection. In a Memo dated 1 December 2021, Captain Pitts requested that both Intoxilyzers be returned to DCSO so that DCSO could donate them when the deregistration process was complete. Def.'s Ex. B. In an e-mail from Captain Pitts to Taylor Cutschow with FDLE, Captain Pitts indicates that DCSO recently purchased two new Intoxilyzers and that DCSO wished to deregister the two instruments sent for Department Inspection, including Intoxilyzer 80-001340. Def.'s Ex. B. Captain Pitts testified that nothing was wrong with Intoxilyzer 80-001340 at the time he sent it for Department Inspection and that the reason for the requested deregistration was because DCSO had purchased two new instruments and DCSO wished to donate the old ones to an organization for training purposes. Captain Pitts testified that after the Department Inspection, the Intoxilyzer 80-001340 was returned to the DCSO and was deregistered and destroyed.

23. The Court finds the testimony of Captain Pitts to be credible.

24. Mr. David Reyes Rivera testified that he is employed by the Florida Department of Law Enforcement (FDLE) in the FDLE's Alcohol Testing Program. Mr. Rivera testified that he is a program consultant for FDLE's Alcohol Testing Program and serves as a Department Inspector. He testified that one of his responsibilities as a Department Inspector is to ensure instruments utilized for breath testing are in compliance with the Department's Rules and to conduct annual inspections of instruments utilized for breath testing. He testified that he was the Department Inspector responsible for the 2021 annual inspection of the Intoxilyzer 80-001340, maintained by the DeSoto County Sheriff's Office.

25. Mr. Rivera testified that he completed the annual inspection of the Intoxilyzer 80-001340 on 7 December 2021 (around 5 weeks after the Defendant provided breath samples).

26. Mr. Rivera testified that during his inspection he observed that the "R Value" of the instrument was below the acceptable threshold. He testified that the R Value of the instrument was 75 and that an acceptable R Value would be 100 or above. Further, he testified that 3 of the 4 Flow Values were also outside of the acceptable range. *See* Def.'s Ex. E.

27. Because of these issues, Mr. Rivera testified that he performed a calibration of the instrument to bring the values to the ideal range for breath testing. After calibration, the R Value remained below the acceptable threshold (76) and 2 of the 4 Flow Values continued to be outside of the acceptable range. *See* Def.'s Ex. E.

28. Mr. Rivera testified that a scientifically reliable breath test involves the elements of time, volume, and slope.

29. Mr. Rivera testified that the R Value and Flow Values directly correlate and are critical to the "Volume" element of that analysis. He testified that the R Value and Flow Values both relate to the measurement of breath and that the manufacturer of the Intoxilyzer indicates that the R Value should not go below 100 to ensure accurate breath test results.

30. Mr. Rivera testified that the Intoxilyzer 80-001340 would have been required to be sent for repair if it was to go back into evidentiary use. However, because the DCSO was planning on "retiring" the instrument, the instrument was returned after the agency inspection, without repairs, and without being certified for evidentiary use.

31. Mr. Rivera testified that there would be no way for him to know what the R Value was prior to his inspection.

32. Mr. Rivera testified that, while the instrument would have continued to operate with its values outside of the acceptable range, *he could not say it was reliable.*

33. Mr. Rivera testified that he cannot guarantee scientific reliability of the Intoxilyzer 80-001340 because the Flow and R Values were outside of the acceptable range and continued to be outside of the acceptable range after calibration.

34. The Court finds the testimony of Mr. Rivera to be credible.

35. Breath test results "are admissible into evidence only upon compliance with the statutory provisions and administrative rules enacted by the Department [ ]." *State v. Donaldson,* 579 So. 2d 728, 729 (Fla. 1991) (citing *State v. Bender,* 382 So. 2d 697 (Fla. 1980)).

36. "[T]here must be probative evidence (1) that a breathalyzer test was performed substantially in accordance with methods approved by [the Department], and with a type of machine approved by [the Department], by a person trained and qualified to conduct it and *(2) that the machine itself has been calibrated, tested, and inspected in accordance with [Department] regulations to assure its accuracy before the results of a breathalyzer test may be introduced*." *Id.* (emphasis added).

37. In this case, while the breathalyzer test was performed substantially in accordance with the methods approved by the Department, with a type of instrument approved by the Department, and by a person approved by the Department, Mr. Rivera's testimony stating that he could not say the results of the instrument were reliable results in a failure of the instrument to comply with Rule 11D-8.004 which states that "[r]egistered breath test instruments shall be inspected by the Department at least once each calendar year *to ensure accuracy and reliability*." Fla. Admin. Code r. 11D-8.004. Further, due to Mr. Rivera's testimony as to the scientific unreliability of the Intoxilyzer 80-001340 at or around the time the Defendant submitted to breath testing, the State is precluded from introducing the Defendant's breath test results under the traditional scientific predicate.

NOW, THEREFORE, the Court hereby orders as follows:

1. Because implied consent revolves around a defendant consenting to an "approved chemical test" of his breath, and because the FDLE Inspector tasked with ensuring the scientific accuracy and reliability of the instrument utilized cannot attest to the scientific reliability of the Intoxilzer 80-001340 at the time the Defendant gave his breath sample, the Court hereby GRANTS the Defendant's Motion to Suppress.

2. Further, should this Motion have been more properly heard as a Motion in Limine, the Court hereby GRANTS same as any probative value is far outweighed by the prejudicial effect of the potential scientific unreliability of the Intoxilyzer 80-001340.

3. The Court hereby excludes any mention of, reference to, or inquiry regarding Deputy Nunez's request for a breath test, the Defendant's response to the request, as well as any testimonial, physical, or scientific evidence obtained as a result of that request.

4. Observations or statements of the Defendant made subsequent to Deputy Nunez's request for a breath test are not excluded by virtue of this Order as long as they do not contain reference to the breath test

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or breath test results. The Court specifically makes no finding as to observations or statements of the Defendant made subsequent to Deputy Nunez's request for a breath test that do not contain reference to the breath test or breath test results and these issues may be addressed in a properly filed Motion in Limine or Motion to Suppress.

* * *

Insurance—Personal injury protection—Declaratory action—Mootness—Insured's action seeking determination of whether insurer must allow insured to appear for examination under oath via video or telephone based on COVID-19 guidelines and orders was rendered moot when insurer rescinded requirement that insured attend any EUO—Accordingly, trial court is without jurisdiction to enter judgment in favor of insured and petition for declaratory judgment is dismissed—Attorney's fees—Trial court has jurisdiction to determine entitlement to attorney's fees even after case has been dismissed as moot—Where insurer forced insured to litigate in-person EUO issue by not resolving issue and by sending confusing and cryptic messages to insured, and insured forced insurer to make determination that insured was not required to attend EUO by filing suit, insured is entitled to award of fees and costs pursuant to section 627.428(1)—Because suit was dismissed as moot, insured is not entitled to recover costs pursuant to section 57.041(1)—Motion for reconsideration of order granting insured's unopposed motion for summary judgment is denied

TYLER HILCHEY, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 20-CC-023122, Division L. September 21, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Hector Danillo Muniz, Jr., Andrews Biernacki Davis, Tampa, for Defendant.

[Prior report at 30 Fla. L. Weekly Supp. 244a]

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT AND MOTION TO TAX ATTORNEY'S FEES AND COSTS ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court at a hearing on August 9, 2022, on Plaintiff's Motion for Entry of Final Judgment and Motion to Tax Attorney's Fees and Costs filed on July 5, 2022, (Doc. 131), and Defendant's Motion for Reconsideration and Response/Memorandum of Law in Opposition to Plaintiff's Motion to Tax Attorney's Fees and Costs filed August 5, 2022, (Doc. 137).[1] Having reviewed and considered the motions, the supporting memoranda, the relevant materials in the court file, the arguments of counsel, and the applicable law, and being otherwise fully advised, the Court finds as follows:

I. BACKGROUND

A. Factual Background

On January 27, 2020, Plaintiff, an individual, sustained injuries from a motor vehicle accident, for which he sought personal injury protection (PIP) benefits through a policy of insurance issued by Defendant. Doc. 117, p. 1. Defendant, an insurance company, had insured Plaintiff at the time of the motor vehicle accident. Doc. 118, p. 6. Subsequent to the accident, Plaintiff sought medical attention, and the medical provider sent invoices directly to the Defendant. Defendant received these invoices on or about February 18, 2020. *Id.* at 7.

On March, 16, 2020, Defendant sent a letter to Plaintiff stating "Progressive is currently verifying coverage and/or the facts of the accident." *Id.* at 11. Defendant subsequently requested that Plaintiff attend an examination under oath (EUO). Doc. 117, p. 1. On April 1, 2022, Attorney Victor Bobet, who no longer represents Plaintiff, contacted Defendant to arrange for the EUO to be conducted remotely due to concerns surrounding close, in-person contact and the risk of infection of COVID-19. *Id.* Defendant's adjuster, Heather Hilliard, stated that the EUO would be conducted in line with the CDC guidelines, but that no guarantees would be made that the EUO would be conducted remotely. *Id.*

After the telephone call between Mr. Bobet and Ms. Hilliard, on April 1, 2020, Ms. Hilliard sent an email to Mr. Bobet confirming April 28, 2020, as the EUO date, but the email did not mention if the EUO would be conducted in-person or remotely. *Id.* Upon receipt of the email, Mr. Bobet wrote a letter to Defendant expressing his concerns of having the EUO conducted in-person during the COVID-19 pandemic and reiterating his request to have the EUO conducted remotely. *Id.* at pgs. 1-2.

On April 6, 2020, Defendant sent a letter to the Plaintiff confirming the EUO for April 28, 2020. *Id.* at 2.

The EUO letter stated in relevant part:

> "The EUO will provide you the opportunity to explain the details of the claim and provide supporting information and/or documentation.
>
> Per our conversation, we have scheduled your EUO and you are hereby required to appear for it on the date and time listed below. If you need the assistance of an interpreter, you should let us know immediately, and one will be provided to you at no cost. Should you fail to inform us of this need prior to the EUO, the EUO will be canceled despite your appearance on the scheduled date.
>
> **4/28/2020**
>
> **10:00 am - Remote. The directions for dial in & video login will be provided at a later date.**
>
> In order to ensure our customers' safety, we are currently monitoring the status of COVID-19 and Progressive is following the recommendations from the Centers for Disease Control and Prevention (CDC) as well as the guidelines set forth by state and local officials, including practicing social distancing. **If the CDC and/or state and local officials continue to recommend social distancing at the time of your scheduled EUO, we may proceed with a video or telephonic meeting in lieu of an in-person appearance. We will contact you prior to your scheduled examination under oath and an additional notice will be sent confirming your in-person, video or telephonic appearance at the examination under oath.**
>
> In addition to appearing for this EUO, we require that you provide the following items and documents for review and copying at the time of the EUO. We may need to request additional information or documentation later that will assist us in resolving the claim.
>
> 1. Legal photo identification such as driver's license or passport.
> 2. Any medical supplies or equipment given for in home use by a medical provider.
> 3. Please provide copies of any prescription receipts related to medical treatment from this accident.
>
> The EUO will be taken before a court reporter. You will be required to read and sign your statement if it is transcribed. We will provide you with a copy of the final statement once it has been transcribed and you have returned the original signed statement to us.
>
> **Failing to appear for the EUO or failing to produce the documentation as required may be treated as a violation of the terms and conditions of the insurance policy and could result in a denial of the claim.**

Id. at 8 (emphasis added).

The EUO letter was signed, "Heather N. Hilliard for Eva Rodriguez" *Id.* at 9.

On April 7, 2020, Plaintiff filed a Petition for Declaratory Judgment alleging a doubt as to whether or not Defendant could force Plaintiff to attend an in-person EUO during the COVID-19 pandemic,

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with "safer-at-home guidelines" in place from various state and federal authorities. Doc. 1, p. 3. Plaintiff did not receive any clarification from Defendant about his obligation to attend an in-person EUO prior to filing suit. Doc. 117, p. 2. On July 15, 2020, in its Answer and Affirmative Defenses to the Petition, Defendant's First Affirmative Defense asserts Defendant does not require Plaintiff to attend any EUO, and therefore Plaintiff's Petition is moot. Doc. 28, p. 3.

B. Procedural Background

i. Petition for Declaratory Judgment

In his Petition for Declaratory Judgment pursuant to Florida Statute § 86.011 et. seq. filed on April 7, 2020, Plaintiff states that this instant action requests a determination of "whether or not PROGRESSIVE must allow HILCHEY to appear for a video or telephonic EUO based upon the aforementioned Federal, state and local Orders and Guidelines." Doc. 3, p. 3, para. 15. Additionally, Plaintiff requests attorney's fees and costs pursuant to Florida Statutes § 627.428 and § 57.104. *Id.* at 4.

ii. Order Granting Plaintiff's Motion for Summary Judgment

On July 30, 2022, the Court granted Plaintiff's Second Amended Motion for Summary Judgment, *inter alia.* Doc. 130 [30 Fla. L. Weekly Supp. 244a].[2] In its order, the Court noted that Defendant had not filed any response to Plaintiff's Second Amended Motion for Summary Judgment. *Id.* at 7. As the nonmoving party, Florida Rule of Civil Procedure 1.510(c)(5) required Defendant to file a response and failure to do so permitted the trial court to consider the facts set forth in the moving party's motion for summary judgment as "undisputed for purposes of the motion." *Lloyd S. Meisels, P.A. v. Dobrofsky,* 341 So. 3d 1131, 1134 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a] citing Fla. R. Civ. P. 1.510(e)(2).

The Court found that the undisputed facts as presented in Plaintiff's motion rendered the instant action moot since Plaintiff's Petition had requested a declaration of whether or not Defendant could force the Plaintiff to sit for an in-person EUO, and Defendant had stated that it waived any requirement for Plaintiff to sit for an EUO. *Id.* at pgs. 11-13. As such, the Court ordered that "absent a bona fide need for a declaration based on present, ascertainable facts, the Court lacks jurisdiction to render declaratory relief, and the instant case is ordered disposed of accordingly." *Id.* at 13. The Court also determined that the "Confession of Judgment"[3] doctrine applied to the instant case at that the Defendant confessed judgment when Defendant rescinded the requirement that Plaintiff attend the EUO. *Id.* 13-17.

iii. Plaintiff's Motion for Entry of Final Judgment and Motion to Tax Attorney's Fees and Costs

On July 5, 2022, Plaintiff filed the instant motion for entry of final judgment and for attorney's fees and costs. Doc. 131. In the motion, Plaintiff asked for an order adopting the Court's Order granting Summary Judgment and entering "declaratory judgment of coverage in favor of the Plaintiff." *Id.* at p. 1, ln. 2.

Plaintiff also argues entitlement to attorney's fees and costs pursuant to Florida Statutes § 627.428(1) and § 57.041, respectively. *Id.* at ln. 3. Plaintiff supports his claim for attorney's fees pursuant to § 627.428 by arguing that Plaintiff has sustained damage as a result of "Defendant's wrongful denial of coverage." *Id.* at p. 2, ln. 5. Plaintiff does not advance any argument for entitlement to fees and costs pursuant to § 57.041.

iv. Defendant's Response and Motion for Reconsideration

On August 5, 2022, Defendant filed its opposition to Plaintiff's request to entitlement to attorney's fees and its request for the Court to reconsider its order granting Plaintiff's Second Amended Motion for Final Summary Judgement. Doc. 137.[4] Defendant argues that Plaintiff is not entitled to a declaration of coverage and argues that any declaration of coverage exceeds relief requested in the complaint. *Id.* at 2, lns. 11-13. Defendant also argues that Plaintiff is not entitled to final judgment because the suit is moot. *Id.* at 3, ln. 16.

Defendant further argues that the Court should not grant Plaintiff's motion for entitlement for fees and cost. *Id.* 3. Defendant advances that position by arguing that in order for Plaintiff to recover attorney's fees and cost pursuant to Florida Statute § 627.428. Plaintiff must have recovered some money or "other benefit" under the insurance policy. *Id.* at 3-5. Defendant reasons that, since Plaintiff's complaint did not seek monetary damages or "some other benefit," Plaintiff should not be entitled to attorney's fees and costs pursuant to § 627.428. *Id.* Defendant does not respond to Plaintiff's motion for fees entitlement pursuant to § 57.041.

II. DISCUSSION

A. Plaintiff's Motion for Entry of Final Judgment and Motion to Tax Attorney's Fees and Costs

i. Plaintiff's Motion for Entry of Final Judgment

A "final judgment . . . is a final resolution of the rights and obligations of the parties" and "complet[es] all judicial labor with regard to the . . . relief [originally] requested." *Cardillo v. Qualsure Ins. Corp.*, 974 So. 2d 1174, 1175 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D550a]. "A final order or judgment is one which evidences on its face that it adjudicates the merits of, and disposes of, the matter before the court and leaves no judicial labor to be done." *Id.* at 1175-76. The Plaintiff in the case *sub judice*, requests the court to enter judgment on its behalf; however, the Court cannot.

"The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192 (Fla. 1995) [20 Fla. L. Weekly S333a] (citing *Martinez v. Scanlan,* 582 So. 2d 1167, 1170 (Fla. 1991)). A declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." *Ashe v. City of Boca Raton*, 133 So. 2d 122, 124 (Fla. 2d DCA 1961); *see Ready v. Safeway Rock Co.*, 157 Fla. 27, 24 So. 2d 808, 811 (1946) (Brown, J., concurring specially) ("It is well settled that a proceeding for a declaratory judgment must be based upon an actual controversy . . . . No proceeding lies under the declaratory judgments acts to obtain a judgment which is merely advisory or which merely answers a moot or abstract question.") (citation omitted). Thus, absent a bona fide need for a declaration based on present, ascertainable facts, the trial court lacks jurisdiction to render declaratory relief. *Martinez*, 582 So. 2d at 1170.

The Florida Supreme Court decided a similar case in *Santa Rosa County v. Administration Commission*, 661 So.2d 1190 (Fla. 1995) [20 Fla. L. Weekly S536c]. There, a county and the state department of community affairs had a dispute about the county's proposed comprehensive plan. *Id.* at 1191. The dispute resulted in two lawsuits—one in front of the division of administrative hearings and the other in the circuit court for declaratory and injunctive relief. *Id.* The parties settled the administrative action, and the department of community affairs moved for summary judgment in the declaratory relief case because there was "no present need for a declaratory judgment." *Id.* at 1192. The trial court granted the motion because "[t]he [s]ettlement [a]greement resolved the dispute between the parties as to the particular facts alleged in the complaint," and therefore, there was "no longer . . . a bona fide, present need for the declaration." *Id.* (quoting trial court's order on rehearing). The Florida Supreme Court agreed that "all disputes between the parties were resolved by the stipulated settlement agreement . . . . [B]ecause there was no pending controversy, the Declaratory Judgment Act was no

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longer available" to the county. *Id.*

The instant case is similar to *Santa Rosa County*. The issues presented in Plaintiff's petition request a determination of "whether or not Progressive must allow Hilchey to appear for a video or telephonic EUO based upon the aforementioned Federal, state and local Orders and Guidelines." Doc. 3, p. 3, para. 15. Since Defendant rescinded the requirement of Plaintiff having an EUO, the issue was made moot. Therefore, the Court is without jurisdiction to enter a judgment in Plaintiff's favor. "A moot case generally will be dismissed." *Synergy Contracting Group v. Fednat Ins. Co.*, 332 So. 3d 62, 66 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2625b]; *Breslof v. Pines of Delray N. Ass'n,* 583 So. 2d 810, 811 (Fla. 4th DCA 1991) (questioning whether judgment should have been entered in a moot case because "dismissal [was] the appropriate disposition"); *see also Waters v. Dep't of Corr.*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2567a] ("Because the issues Appellant requested the trial court determine ceased to exist at the time his petition was filed, the trial court properly dismissed Appellant's petition for writ of mandamus as moot."), *reh'g denied* (Dec. 7, 2020).

The Court hereby dismisses Plaintiff's Petition as moot, but reserves jurisdiction to determine the issue of entitlement to, which it does *infra*, and the amount of, attorney's fees.

ii. Plaintiff's Motion to Tax Attorney's Fees and Costs

1. Court's jurisdiction to enter fees after a determination of mootness

Even when a court is divested of its subject matter jurisdiction over the substantive claim by virtue of intervening dismissal or mootness, "[i]t is well established that a [trial] court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) ("For example, [trial] courts may award costs after an action is dismissed for want of jurisdiction."). Motions for costs or attorney's fees are treated as "independent proceeding[s] supplemental to the original proceeding" and thus the imposition of costs and attorney's fees is not a judgment on the merits of an action for which there is no jurisdiction. *Cooter & Gell,* 496 U.S. at 395 (citing *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939)). "No Article III case or controversy is needed with regard to attorney's fees as such, because they are but an ancillary matter over which the district court retains equitable jurisdiction even when the underlying case is moot. Its jurisdiction outlasts the 'case or controversy.' " *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1329 (9th Cir. 1999). "[A] determination of mootness of the action on the merits [does not] preclude an award of attorney's fees." *S-1 v. Spangler*, 832 F.2d 294, 297 n.1 (4th Cir. 1987).

In Florida, attorney's fees are also generally considered ancillary to the underlying substantive claim. *See Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977 (Fla. 1987). The Florida Supreme Court has held that § 627.428 is incorporated into every insurance contract and in that regard also noted that the fee statute provides that the fee award "shall be included in the judgment or decree rendered in the case." *State Farm Fire & Cas. Co. v. Palma,* 629 So. 2d 830, 832 (Fla. 1993). Thus, when an insured is forced to sue to enforce the insurance contract because the insurer has contested a valid claim, "the relief sought is both the policy proceeds and attorney's fees pursuant to § 627.428." *Id.*

Where one party's voluntary action results in an issue becoming moot, that action may be the functional equivalent of a verdict in favor of the other party, thus making the other party entitled to an award of attorney's fees. *Payne v. Cudjoe Gardens Prop. Owners Ass'n, Inc.,* 875 So. 2d 669, 671 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1084a] (finding that the defendants voluntarily complied with the deed restrictions at issue in the case, thus mooting the issue, and making the plaintiffs entitled to attorney's fees); *see Wollard v. Lloyd's and Co. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983) (finding that the voluntary payment of a claim is "the functional equivalent of a confession of judgment or a verdict in favor of the insured," for the purpose of determining *entitlement* to attorney's fees); *Garrido v. SafePoint Ins. Co.*, 47 Fla. L. Weekly D173a (Fla. 3d DCA Jan. 12, 2022) (stating that a confession of judgment is *not* the functional equivalent of a trial court's judgment for the purpose of determining the thirty-day window for filing a motion requesting attorney's fees under Rule 1.525, which *requires* a final judgment by the court).

The Court finds that it has jurisdiction to determine entitlement to attorney's fees even after the case has been dismissed for mootness.

2. Analysis under Florida Statute § 627.428

Under Florida law, an insured is entitled to an award of attorney's fees when judgment is entered against an insurer and in favor of the insured. Florida Statute § 627.428(1) states:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Id. The Florida Supreme Court has held that this statutory rule also applies when the insured and the insurer settle an action before judgment is entered. *Wollard,* 439 So.2d at 218-19. The Florida Supreme Court explained that "[w]hen the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit." *Id.* at 218. The payment of the insured's claim, thus, is equivalent to a "confession of judgment." *Id.* Moreover, "[r]equiring the plaintiff to continue litigation in spite of an acceptable offer of settlement . . . puts an unnecessary burden on the judicial system, fails to protect any interest—the insured's, the insurer's or the public's—and discourages any attempt at settlement." *Id.*

Florida's appellate courts have since extended the confession of judgment rule beyond the situation in *Wollard*—which involved the settlement of a first-party suit between the insured and the insurer—to the settlement of third-party suits and the voluntary dismissal of a related complaint for declaratory relief filed by an insurer against the insured. *See, e.g., Mercury Ins. Co. of Fla. v. Cooper*, 919 So. 2d 491 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2648a]; *Unterlack v. Westport Ins. Co.,* 901 So. 2d 387 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1228a]; *O'Malley v. Nationwide Mut. Fire Ins. Co.,* 890 So. 2d 1163 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D5b]. The Florida courts have explained that the settlement of a third-party claim and voluntary dismissal of the related declaratory-judgment action constitute a confession of judgment sufficient to trigger an award of attorney's fees. *See Cooper,* 919 So. 2d at 492-93; *Unterlack,* 901 So. 2d at 389; *O'Malley,* 890 So. 2d at 1164 (applying the confession of judgment rule because, by providing a defense and settling the underlying tort claim the insurer "provided the insured precisely what [the insurer] was contending the insured was not entitled to in the declaratory action.").

The purpose of § 627.428 "is to provide an adequate means to afford a level process and make an already financially burdened insured whole again, and to also discourage insurance companies from withholding benefits on valid claims." *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1209 (Fla. 2016) [41 Fla. L. Weekly S415a]; *see also Wollard,* 439 So. 2d at 218 (section 627.428 is intended "to discourage litigation and encourage prompt disposition of valid insurance claims without litigation."). "By its very terms Fla. Stat. §

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627.428(1) does not require an insured party to succeed on the merits of a case in order to recover attorney's fees." *Atain Specialty Ins. Co. v. Henry's Carpet & Interiors, Inc.*, 564 F. Supp. 3d 1265, 1271 (S.D. Fla. 2021) (internal citations omitted).

In analyzing the cases where the courts have granted the insured entitlement to attorney's fee after the declaratory judgment action has become moot, this Court finds that Plaintiff is entitled to recovery of attorney's fees. First, prior to filing suit, Defendant required Plaintiff to attend an EUO. This fact is important because "[a]n insured's refusal to comply with a demand for an examination under oath is a willful and material breach of an insurance contract which precludes the insured from recovery under the policy." *Goldman v. State Farm Fire Gen. Ins. Co.,* 660 So. 2d 300, 303 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a]; *accord S. Home Ins. Co. v. Putnal,* 57 Fla. 199, 49 So. 922, 932 (1909); *Stringer v. Fireman's Fund Ins. Co.*, 622 So. 2d 145, 146 (Fla. 3d DCA 1993). Trial courts have jurisdiction to "render declaratory judgments on the existence, or nonexistence [o]f any immunity, power, privilege, or right; or [o]f any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists *or will arise in the future.*" § 86.011, Fla. Stat. (emphasis added). That is precisely what Plaintiff did in the instant case, Plaintiff sought a determination of a future immunity, power, privilege, or right in regards to the insurance policy contract in effect between the two parties.

If Plaintiff had not attended an in-person EUO, Plaintiff may have been in breach of the contract. As noted by Plaintiff, local, state, and federal governments enacted various "stay at home" requirements due to the COVID-19 pandemic. Prior to filing suit, Defendant could have easily resolved this issue by requiring Plaintiff to attend an EUO remotely, which Plaintiff was willing to do, or cancel the EUO requirement altogether, which Defendant ultimately did after filing suit. "The general rule is to the effect that an insurance company must pay those attorney's fees if the company wrongfully caused the parties to resort to litigation by not resolving the conflict when it was reasonably within the company's power to do so." *Kearney v. Auto-Owners Ins. Co.,* 8:06-CV-00595, 2010 WL 3119380, at *6 (M.D. Fla. Aug. 4, 2010) (citing *Crotts v. Bankers & Shippers Ins. Co. of N.Y.*, 476 So.2d 1357, 1358 (Fla. 2d DCA 1985)).

In the instant case, by not resolving whether or not Plaintiff was required to attend the EUO in-person and sending a cryptic and confusing message to Plaintiff informing Plaintiff that Plaintiff may have to attend the EUO in-person, Defendant forced Plaintiff to litigate the issue. By filing suit, Plaintiff forced Defendant to make a determination if Plaintiff was required to attend an in-person EUO, which Defendant ultimately decided that Plaintiff did not have to attend the EUO at all. Based on these facts, the Court finds that the Plaintiff is entitled to attorney's fees pursuant to Florida Statute § 627.428(1), and reserves jurisdiction to determine the amount of fees to be awarded pursuant to this Order.

3. Analysis under Florida Statute § 57.041

Under Florida Statute § 57.041(1), "[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment. . . ." *Cheetham v. Brickman*, 861 So. 2d 82, 83 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2585d] ("[O]nly a prevailing party who recovers a judgment is entitled to recover costs under section 57.041."). In *Wolfe*, the Second District Court of Appeals explained that the "statute expressly demands that the party recovering judgment be awarded costs" and rejected the prevailing party standard as applicable to an award of costs pursuant to section 57.041(1). *Wolfe v. Culpepper Constructors, Inc.,* 104 So. 3d 1132, 1136 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2708a] (emphasis omitted) (*quoting Hendry Tractor Co. v. Fernandez*, 432 So.2d 1315, 1316 (Fla.1983)). In *Hawks v. Libit*, 251 So. 3d 321 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1663b], the court held that the plain language of § 57.041(1) Fla. Stat. requires that the "party recovering judgment"—as opposed to the "prevailing party" (though oftentimes a party will be both)—is entitled to an award of costs. *See also Hardeman Landscape Nursery, Inc. v. Watkins*, 290 So. 3d 574, 576 n. 1 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D186b] (stating that while the "prevailing party" is entitled to attorney's fees, the trial court was correct when it determined that a party must "recover judgment" to be entitled to costs); *Waters v. Dep't of Corr.*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2567a] ("A petitioner is not a prevailing party entitled to costs [pursuant to § 57.041(1)] where the petition is dismissed as moot.").

In the instant case, This Court dismissed Plaintiff's suit as moot, therefore, Plaintiff is not entitled to costs pursuant to § 57.041(1) Fla. Stat. This ruling does not affect the Court's prior analysis to entitlement pursuant to § 627.428(1), *supra*; the Court makes a ruling as a matter of completeness. *See Rahabi v. Florida Ins. Guar. Ass'n, Inc.*, 71 So. 3d 241, 244 n. 1 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2259a].

B. Defendant's Motion for Reconsideration

Despite the lack of a specific rule permitting a court to rehear its denial, courts have the inherent authority to reconsider most matters. *See Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 292 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D553a] (construing unauthorized motion for rehearing as motion for reconsideration and explaining general ability of trial court to reconsider matters it could not otherwise rehear) (citing *Monte Campbell Crane Co., Inc. v. Hancock*, 510 So. 2d 1104 (Fla. 4th DCA 1987)); *see also Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998) [23 Fla. L. Weekly S625a]; *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 851 (Fla. 1962) ("[I]t is well settled that a trial court has the inherent authority to control its own interlocutory orders prior to final judgment.").

Courts have also recognized that a "reconsideration of a previous order is an extraordinary remedy to be employed sparingly." *Mannings v. School Board of Hillsborough County, Fla.*, 149 F.R.D. 235 (M.D. Fla. 1993) (citing *Taylor Woodrow Construction Corp. v. Sarasota/Manatee Airport Authority*, 814 F. Supp. 1072, 1073 (M.D. Fla. 1993)). "[O]nly a change in the law, or the facts upon which a decision based," will justify a reconsideration of a previous order. *Mannings*, 149 F.R.D. at 235. "For reasons of policy, courts and litigants cannot be repeatedly called upon to backtrack through the paths of litigation which are often laced with close questions." *Kuenz v. Goodyear Tire & Rubber Company*, 617 F. Supp. 11, 14 (N.D. Ohio, E.D. 1985). There is a "badge of dependability necessary to advance the case to the next stage." *Id*.

Defendant requests that the Court reconsider its June 30, 2022, ruling granting Plaintiff's Motion for summary judgment. The Court sees no reason to reconsider its order. As noted in the order granting summary judgment:

> The summary judgment rule requires the nonmoving party to serve a response to the motion for summary judgment. *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1135 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a] Rule 1.510(c)(5) states that 'the nonmovant must serve a response. There is no wiggle room in the word 'must.' That word makes the filing of the response mandatory. *Id*. On a motion for summary judgment, by requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion. *Id*. Failure of the nonmoving party to file a response, permits the trial court to consider the facts set forth in the moving party's motion for summary judgment as 'undisputed for purposes of the motion.' *Id*. citing Fla. R. Civ. P. 1.510(e)(2).

Defendant does not explain why it did not file any response, but relies on the fact that Defendant had filed previous motions for summary

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judgment (as the non-moving party in *Lloyd S. Meisal, P.A.*) and merely requests this Court to reexamine its prior ruling. Pursuant to *Lloyd S. Meisels, P.A.*, and Fla. R. Civ. P. 1.510(e)(2)&(3), the Court is disinclined to reconsider its prior ruling. There for the Defendant's motion for reconsideration is denied.

III. CONCLUSION

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

1. This case is hereby **DISMISSED.**

2. The Plaintiff's Motion for Entry of Final Judgment and Motion to Tax Attorney's Fees and Costs filed on July 5, 2022, (Doc. 131) is hereby **GRANTED IN PART AND DENIED IN PART**.

3. The Defendant's Motion for Reconsideration and Response/ Memorandum of Law in Opposition to Plaintiff's Motion to Tax Attorney's Fees and Costs filed August 5, 2022, (Doc. 137) is hereby **DENIED.**

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[1]On August 8, 2022, Defendant filed a Motion for Reconsideration of the Court's July 1, 2022, Order Granting Plaintiff's Second Amended Motion for Final Summary Judgement. (Doc. 139). None of the parties or the Court filed a notice of hearing for that motion and the Court did not hear arguments from the parties in support or opposition to that motion. Thus, the Court does not make any ruling at this time regarding Defendant's Motion for Reconsideration filed on August 8, 2022, (Doc. 139).

[2]The Court's July 30, 2022, Order is an omnibus order specifically granting Plaintiff's Second Amended Motion for Summary Judgment filed on March 18, 2022, (Doc. 116), denying Plaintiff's Motion for Judgment on the Pleadings as moot, (Doc. 113), and denying Defendant's Motion for Reconsideration/Clarification and/or Motion for Amendment of Orders Denying Defendant's Amended and Second Motions for Final Summary Judgment filed March 23, 2022, (Doc. 119). Doc. 130.

[3]*See Wollard v. Lloyd's & Cos. of LIoyd's*, 439 So. 2d 217, 218 (Fla. 1983).

[4]In its motion, Defendant cites July 1, 2022, as the date that the Court entered the summary judgment order in Plaintiff's favor; however, the docket does not contain any orders filed on July 1, 2022. The Court understands the Defendant's motion for reconsideration to refer to the order filed on June 30, 2022, found in Doc. 130.

* * *

Insurance—Discovery—Attorney-client privilege—Crime-fraud exception—Motion to compel discovery regarding accounting for plaintiff's bodily injury settlement is denied—Defendant failed to show that plaintiff sought attorney's advice in order to commit, or attempt to commit, crime or fraud, as required to support crime-fraud exception to attorney-client privilege—Nexus between accounting and plaintiff's alleged commission of fraud through submission of conflicting affidavits regarding outstanding medical bills is not sufficient to invoke exception

SASA ZIVULOVIC, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-041262, Division J. August 4, 2022. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, Tampa, for Plaintiff. Catherine V. Arpen, Dutton Law Group, Tampa, for Defendant.

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

BEFORE THE COURT is Defendant's Motion to Compel Plaintiff's Responses to Defendant's Interrogatories and Defendant's Motion to Determine the Sufficiency of Plaintiff's Answers and Overrule Objections to Defendant's Request for Admissions, filed July 24, 2022. The parties appeared for a hearing on August 4, 2022.

For the reasons stated on the record, Defendant's motion to compel answers to its first set of interrogatories is denied as moot because Plaintiff served responses on July 29—after the motion was filed but before the hearing. The Court finds Defendant entitled to an award of the "reasonable expenses incurred in obtaining the order." Fla. R. Civ. P. 1.380(a)(4). The parties shall confer as to the amount and set the matter for an evidentiary hearing if they cannot agree.

For the reasons stated on the record, Defendant's motion to compel a response to Request for Admission 12 is granted. Fla. R. Civ. P. 1.370(a). Plaintiff shall provide an amended answer to Request 12 within 10 days of this order.

For the reasons stated on the record, Defendant's motion to compel a response to Request for Admission 22 is granted. The attorney-client privilege does not protect disclosure of underlying facts. § 90.502(2), Fla. Stat.; *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1387 (Fla. 1994); *Coffey-Garcia v. S. Miami Hosp., Inc.*, 194 So. 3d 533, 537 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1458a] (citing *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981)). Plaintiff shall provide an amended answer to Request 22 within 10 days of this order.

Finally, at the hearing, the Court denied Defendant's motion to compel a response to Request for Admission 13, reserving for this order an explanation of that ruling.

Request 13 asked Plaintiff: "Admit that you received an accounting from Borkovic Law Group indicating how your bodily injury claim was settled, including payments to treating providers." Plaintiff responded, "Objection. Attorney client privileged settlement." Apparently conceding that any such admission would reveal a privileged communication,[1] Defendant moves to compel an answer under the crime-fraud exception to the attorney-client privilege.

The exception is statutory: "There is no lawyer-client privilege under this section when . . . [t]he services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." § 90.502(4)(a). The exception ensures that the cloak of privilege does not extend to communications "made for the purpose of getting advice for the commission of a fraud or crime." *Am. Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1777b].

The initial burden in a crime-fraud analysis falls on the party seeking disclosure. So, Defendant must first "allege that the communication was made as part of an effort to perpetrate a crime or fraud, and the party must also specify the crime or fraud." *Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Devs., Inc.*, 873 So. 2d 339, 342 (Fla. 3d DCA 2003) [30 Fla. L. Weekly D2450a] (citing *Fla. Mining & Materials Corp. v. Continental Cas. Co.*, 556 So. 2d 518, 519 (Fla. 2d DCA 1990)). "Second, the party that seeks disclosure must establish a prima facie case that the party asserting the attorney-client privilege sought the attorney's advice in order to commit, or in an attempt to commit, a crime or fraud." *Id.* (citing *Fla. Mining,* 556 So. 2d at 519; *First Union Nat'l Bank v. Whitener*, 715 So. 2d 979, 982 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D1446a]). In other words, the movant must preliminarily show "that the party asserting the attorney-client privilege employed counsel or sought a lawyer's advice in order to commit, or in an attempt to commit, some crime or fraud." *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2776f] (citations omitted).

The Court finds Defendant has failed to sustain this initial burden. Defendant argues (at 15) that Plaintiff committed a fraud "by submitting a conflicting sworn affidavit to the court." This, according to Defendant (at 16), led Plaintiff to improperly receive a settlement distribution that should not have occurred "until after all bills from all treating providers had been negotiated and no bills remained outstanding." The nexus of the requested discovery (confirming the content of an accounting communication from Plaintiff's attorney) to this action is allegedly "to get to the foundation of truth regarding all representations made by Plaintiff."

That nexus is not sufficient. The fraud alleged is the submission of conflicting affidavits under oath, yet Defendant seeks information contained in an accounting from a bodily injury settlement. Defendant has not shown the accounting "was made as part" of the alleged effort to perpetrate a fraud through disparate affidavits. *Butler, Pappas*, 873 So. 2d at 342. The evidence also fails to show that the party—that is,

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Sasa Zivulovic—sought his lawyer's advice for the purpose of committing, or attempting to commit, some fraud.[2] *Turney*, 824 So. 2d at 183. Because Defendant failed to satisfy its initial burden, the Court need not hold an evidentiary hearing or examine the document *in camera*.

Accordingly,

1. Defendant's Motion to Compel Plaintiff's Responses to Defendant's Interrogatories and Defendant's Motion to Determine the Sufficiency of Plaintiff's Answers and Overrule Objections to Defendant's Request for Admissions is GRANTED in part and DENIED in part.

2. Defendant's motion to compel responses to Defendant's interrogatories is DENIED as moot.

3. Defendant's motion for an award of expenses is GRANTED. Defendant is entitled to the reasonable expenses incurred in bringing that portion of the motion to compel related to the interrogatories.

4. Defendant's motion to compel responses to Requests for Admission 12 and 22 is GRANTED. Plaintiff shall serve amended responses to Requests 12 and 22 within 10 days of this order.

5. Defendant's motion to compel a response to Request for Admission 13 is DENIED.

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[1]Where the parties agree that a communication is privileged on its face, the party seeking disclosure of the communication bears the burden of proving that it is not privileged. *Coffey-Garcia,* 194 So. 3d at 537.

[2]This conclusion is made only for the purpose of assessing Plaintiff's assertion of privilege. This finding is not effective for any other purpose or binding on the Court in any other decision.

* * *

Insurance—Personal injury protection—Declaratory action alleging doubt as to whether insurer is required to apply deductible to 100% of medical provider's bill before applying fee schedule limitations and whether insurer's policy unambiguously elects use of fee schedule method of reimbursement is not barred by collateral estoppel based on prior action for breach of contract where service dates in two actions are different and application of deductible was not addressed in prior action—Declaratory action is barred by res judicata—Voluntary dismissal of prior action with prejudice operates as adjudication of that action on its merits, actions are identical in substance, and deductible issue could have been raised in prior action—Requested declarations are moot where questions of law at issue have been settled by binding authority

CRESPO & ASSOCIATES, P.A., a/a/o Iraida Vargas, Plaintiff, v. INFINITY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 19-CC-010132, Division L. July 29, 2021. Michael C. Baggé-Hernández, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa, for Plaintiff. Gladys Perez Villanueva, Miami Springs, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & FINAL JUDGMENT FOR DEFENDANT

THIS CAUSE came before the Court at a motion hearing on May 18, 2021, on Defendant, INFINITY INSURANCE COMPANY's Motion for Summary Judgment. The Court, having reviewed the motion, evidence filed by the parties, and other pleadings in the file, having heard argument of counsel, and being otherwise fully advised, finds and declares as follows:

I. BACKGROUND

After receiving an assignment of benefits, Plaintiff provided medical services to Iraida Vargas ("Vargas") who was insured under a personal injury protection ("PIP") insurance policy issued by Defendant. *See* Compl. Thereafter, Plaintiff sued Defendant for damages, alleging it breached the policy by underpaying benefits due for Plaintiff's services in a prior action. *See Crespo & Assocs., P.A., a/a/o Vargas, Iraida v. Infinity Indem. Ins. Co.*, 16-CC-014159 Div (H) (the "Prior Action"); *see also* Req. for Judicial Notice Feb. 18, 2021. In the Prior Action, Plaintiff agreed to settle its claim in exchange for payment of an agreed-upon amount of benefits with interest, and payment of Plaintiff's attorneys' fees and costs. *See* Def.'s Composite F filed May 15, 2021. Defendant issued checks to Plaintiff and its counsel in the agreed-upon amounts and Plaintiff dismissed the Prior Action with prejudice. *See* Notice of Voluntary Dismissal, *Crespo & Assocs., P.A., a/a/o Vargas, Iraida v. Infinity Indem. Ins. Co.*, 16-CC-014159 Div (H) Feb. 7, 2018.

Over a year after dismissing the Prior Action with prejudice, Plaintiff sued Defendant in this action *sub judice*, asserting a claim for declaratory relief based on allegations that Defendant improperly applied the deductible and did not properly invoke the use of the "fee schedule method." *See* Compl.

II. UNDISPUTED FACTS

Vargas was insured under a PIP policy (the "Policy") Defendant issued. Compl. at ¶ 16. On or about May 20, 2015, Vargas sustained personal injuries in an automobile accident. *Id.*; *see also* Compl. dated May 4, 2016 (the "Prior Action Complaint") at ¶ 3. After obtaining an assignment of benefits from Vargas, Plaintiff provided medical services to Vargas. Compl. at ¶¶ 22-23; Prior Action Compl. at ¶¶ 1, 9. On July 27, 2015, Plaintiff sent Defendant a pre-suit demand letter pursuant to section 627.736(10), Florida Statutes. *See* Aff. of Michael Sanford (Sanford), Ex. B filed on Sept. 6, 2019. The demand indicates that the date of loss was May 20, 2015. *Id*. Plaintiff sought $3990.92 in PIP benefits for services provided to Vargas between May 26 and June 12, 2015. *Id.* Defendant responded to the demand by letter dated August 19, 2015, noting its prior payments and application of the deductible. Sanford Aff., Ex. C. Defendant paid Plaintiff $2367.95 in benefits, which was eighty percent of the amount owed after Defendant limited reimbursement in accordance with the Medicare fee schedules as authorized by section 626.736(5)(a)1., Florida Statutes, and the text of the Policy, then applied the $1000 deductible. Sanford Aff. at ¶ 5.

On January 13, 2016, Plaintiff issued a second pre-suit demand letter pursuant to section 627.736(10), Florida Statutes. Sanford Aff., Ex. D. Like the first demand, the second demand pertains to a May 20, 2015 date of loss. *Id*. Plaintiff sought $128.60 in PIP benefits for services provided to Vargas between September 11 and November 2, 2015. *Id*. Defendant responded to the second demand by letter dated February 8, 2016, noting that the bills that were the subject of the demand had been fully paid. Sanford Aff., Ex. E. Both demand letters pertain to payment for medical services that were provided as a result of the May 20, 2015 accident. Sanford Aff. at Ex. B & D (both referring to date of loss (DOL) of May 20, 2015.). Thereafter, on May 4, 2016, Plaintiff filed the Prior Action Complaint in Hillsborough County Court, alleging that Defendant underpaid PIP benefits for services Plaintiff provided to Vargas in connection with the May 20, 2015 accident and seeking an award of damages, interest, attorneys' fees, and costs. *See* Prior Action Complaint at pp. 1, 3, 4. In December 2017, counsel for Plaintiff and counsel for Defendant agreed to settle the litigation as follows: Defendant agreed to pay $3500 in attorneys' fees and costs to Plaintiff's counsel and $128.60 in benefits, plus interest, to Plaintiff. This agreement was memorialized in written correspondence between counsel. See Sanford Aff., Ex. F. In January 2018, Defendant issued a check to Plaintiff's counsel for $3500 and issued checks to Plaintiff for $128.60 (benefits) and $16.35 (interest); Defendant's records indicate that the checks were negotiated. Sanford Aff. at ¶ 9 & Ex. G.

Pursuant to the parties' settlement agreement, on February 7, 2018, Plaintiff filed a notice of voluntary dismissal with prejudice of the

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Prior Action. *See* Notice of Voluntary Dismissal in Prior Action filed Feb. 7, 2018. On December 28, 2018, the Florida Supreme Court issued its decision in *Progressive Select Insurance Co. v. Florida Hospital Medical Center*, 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a] ("*Progressive*"). *Progressive* resolved conflicting decisions of the Fourth and Fifth District Courts of Appeal on the question of whether an insurer must apply the deductible before or after applying the statutorily-authorized fee schedule limitations to a medical provider's charge. *See id.* at 220. The Court construed section 627.739(2), Florida Statutes, and held that "when calculating the PIP benefits due an insured, the deductible must be subtracted from the total medical charges before applying the reimbursement limitation in section 627.736(5)(a)1.b." *Id*. at 226.

Plaintiff filed the instant action on or about February 14, 2019. *See* Compl. In the Complaint, Plaintiff alleges that, "pursuant to the Policy which was in effect on or about May 20, 2015,"it treated Vargas between May 26, 2015 and June 1, 2015 for injuries Vargas suffered in a motor vehicle accident that occurred during the Policy period. Compl. at ¶¶ 18, 19, 23. Plaintiff alleges it furnished Defendant with a statutory pre-suit demand letter "for the relevant date(s) of service" and asserts that Defendant "failed and/or refused to properly pay" PIP benefits for such services. Complaint at ¶¶ 27-28.

Plaintiff seeks a declaratory judgment (including supplemental relief and attorneys' fees), alleging doubt as to whether Defendant is required to apply the deductible to 100% of a medical provider's bill before applying the fee schedule limitations authorized by section 626.736(5)(a)1. Compl. at ¶ 34(a). Plaintiff further alleges doubt as to whether Defendant's policy unambiguously "invoke[s]" the "Fee Schedule Method" as its "choice of one particular method of calculating PIP benefits to the exclusion of all others." *Id.* at ¶ 34(b).

III. DISCUSSION

a. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).[1] A fact is "material" if, under the applicable substantive law, it might affect the outcome of the case. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute of fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby,* 477 U.S. at 248. The burden of demonstrating the absence of a genuine dispute of material fact rests with the moving party. *Celotex,* 477 U.S. at 323. In determining whether the moving party has carried its burden, a court must view the evidence and factual inferences drawn therefrom in the light most favorable to the non-moving party. *Liberty Lobby,* 477 U.S. at 255; *Allen*, 121 F.3d at 646. "Summary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." *Northland Cas. Co. v. HBE Corp.*, 160 F. Supp. 2d 1348, 1358 (M.D. Fla. 2001).

b. DEFENDANT'S DEFENSES

Defendant has argued two bars to litigation as its main defenses: Collateral Estoppel and Res Judicata. These defensive doctrines are not interchangeable and there is a distinction between the two. *See Forty One Yellow, LLC v. Escalona*, 305 So. 3d 782, 788 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2413a] (quoting *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 862-63 (Fla. 4th DCA 1972)).

1. Collateral Estoppel

Collateral estoppel (also called estoppel by judgment) "bars relitigation of the same issue between the same parties which has already been determined by a valid judgment." *Zikofsky v. Mktg. 10, Inc.*, 904 So. 2d 520, 525 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a] (citing *Topps v. State,* 865 So. 2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a] and *Stogniew v. McQueen,* 656 So. 2d 917, 919 (Fla. 1995) [20 Fla. L. Weekly S208a]); *see also Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977) ("Collateral estoppel . . . is a judicial doctrine which in general terms prevents identical parties from relitigating issues that have been decided between them."). The doctrine recognizes that " '[o]nce a party has had an opportunity to litigate a matter in an action in a court of competent jurisdiction, he should not be permitted to litigate it again to the harassment and vexation of his opponent.' " *Sun-Island Realty, Inc. v. Fed. Deposit Ins. Corp.*, 606 So. 2d 437, 438 (Fla. 4th DCA 1992) (citation omitted).

Under Florida law, collateral estoppel, or issue preclusion, applies when " 'the identical issue has been litigated between the same parties or their privies.' " *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003) [28 Fla. L. Weekly S401a] (quoting *Gentile v. Bauder,* 718 So. 2d 781, 783 (Fla.1998) [23 Fla. L. Weekly S488a]). The litigated service dates are different. In the prior action for breach of contract, the dates of service were between September 11, 2015, and November 2, 2015. *See* Compl. in Prior Action ¶ 1. In the instant case, the dates of service cover May 26, 2015, through June 1, 2015. *See* Compl. ¶ 23. Additionally, the issue of the application of the deducible was not addressed in the prior action. Being that the issues are not identical, collateral estoppel does not bar litigation in the instant action.

2. Res Judicata

The Defendant has also argued that res judicata applies to the instant case. Res Judicata is a procedural bar that prohibits relitigation of claims in a subsequent cause of action and includes claims that were raised or could have been raised in the prior action. *Topps v. State,* 865 So. 2d 1253, 1254-55 (Fla. 2004) [29 Fla. L. Weekly S21a] (citing *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001) [26 Fla. L. Weekly S784a]). "It applies when the later suit shares four 'identities' with the earlier one: (1) the 'identity of the thing sued for,' (2) the 'identity of the cause of action,' (3) the 'identity of persons and parties to the action,' and (4) the 'identity of the quality of the persons for or against whom the claim is made.' " *Provident Funding Assocs., L.P. v. MDTR*, 257 So. 3d 1114, 1117 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2288b] (quoting *Bryan v. Fernald*, 211 So. 3d 333, 335 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D462a]).

For the doctrine of res judicata to apply, the ruling in the prior action must be on the merits of the claim. *See Topps*, 865 So. 2d at 1255. This promotes the purpose underlying the doctrine of res judicata that if a party has already had the matter decided, the party has had its day in court. *See id.* "Based on principles of res judicata, a judgment on the merits will thus bar 'a *subsequent* action between the same parties on the same cause of action.' " *Jasser v. Saadeh*, 103 So. 3d 982, 984 (Fla. 4th DCA 2012) [38 Fla. L. Weekly D16a] (quoting *Youngblood v. Taylor*, 89 So. 2d 503, 505 (Fla. 1956)) (emphasis supplied by *Jasser* court).

Initially, the Court looks to see whether there was an adjudication on the merits in the Prior Action. "As a general rule, a voluntary dismissal with prejudice operates as an adjudication on the merits, barring a subsequent action on the same claim." *W & W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.*, 35 So. 3d 79, 83 (Fla. 4 DCA 2010) [35 Fla. L. Weekly D1065a] (citation omitted); *see Pino v. Bank of New York*, 121 So. 3d 23, 35 (Fla. 2013) [38 Fla. L. Weekly S168a] (discussing seeking relief from "voluntary dismissals

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inadvertently taken with prejudice" and noting that "a plaintiff who unintentionally files a dismissal *with* prejudice to the commencement of another action . . . is adversely impacted by the dismissal—the plaintiff can no longer bring the same cause of action against the defendant because of res judicata principles") (emphasis in original); *MBlock Investors, LLC v. Bovis Lend Lease, Inc.*, 274 So. 3d 504, 507 n. 4 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1432d] (noting the general rule and indicating that the fact a case "ended with a settlement and voluntary dismissal does not preclude this court from applying the doctrine of res judicata if it otherwise applies"); *Dep't of Revenue, ex rel. Cowie v. Orlowski*, 184 So. 3d 1200, 1202 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D121a] (indicating that "[t]he law is clear that, where the four identities are present, 'a voluntary dismissal with prejudice operates as an adjudication on the merits, barring a subsequent action on the same claim' ") (citation omitted); *see also Nationstar Mortgage , LLC v. Glisson*, 286 So. 3d 942, 944 (Fla. 2d DCA 2019) [45 Fla. L. Weekly D19c] (indicating a dismissal "can either be with prejudice, same being an adjudication on the merits, or without prejudice, which is not an adjudication on the merits" and that "[i]t is well-established that a dismissal without prejudice will not support a claim of res judicata, as it does not constitute an adjudication on the merits") (citations and internal quotations omitted) (alteration in original); *MX Invs., Inc. v. Crawford*, 700 So. 2d 640 (Fla. 1997) [22 Fla. L. Weekly S530a] (construing "the terms 'voluntary dismissal' and 'involuntary dismissal' in section 768.79(6) . . . to mean a dismissal with prejudice so that the dismissal is the basis for a judgment of no liability as contemplated in section 768.79(1) . . ." and finding that entitlement to attorney fees under section 768.79 is "only when a voluntary dismissal is with prejudice or is a second voluntary dismissal").

The Court finds that the voluntary dismissal with prejudice in the Prior Action operates as an adjudication on the merits making res judicata potentially applicable in this action. As such, the Court must now turn to the analysis of the four identities—(1) the thing sued for, (2) the cause of action, (3) the persons or parties, and (4) the quality or capacity of the persons—to determine whether res judicata applies.

The parties, as well as the quality or capacity of those parties, are identical in the Prior Action and this action. The parties in both actions are Crespo & Associates, P.A., as Plaintiff, and Infinity, as Defendant. Further, in looking beyond simple identity and at "the quality or capacity of the persons for or against whom the claim is made," both the Prior Action and this matter involve the same Plaintiff, in its capacity as the assignee of Iraida Vargas, initiating action against the same Defendant, as issuer of the same policy of insurance to Iraida Vargas, and seeking to recover (or the determination it is entitled to recover) PIP benefits pursuant to that policy of insurance for services rendered as a result of the same automobile accident.

Regarding the identity of "the cause of action" and "the thing sued for," the Court finds that, looking at the core of the two actions, these identities are established as well. "To decide whether there is an identity of cause of action between two lawsuits, a court looks not only at the causes of action actually raised in the first suit, but also at every other matter which the parties might have litigated and had determined, within the issues as framed by the pleadings or as incident to or essentially connected with the subject matter of the first litigation." *Zikofsky v. Marketing 10, Inc.*, 904 So. 2d 520, 523 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a] (internal quotations omitted) (alteration omitted). It is not necessary that there is exactness in the causes of action in the two lawsuits. Rather, "[t]he presence of this identity is a question of 'whether the facts or evidence necessary to maintain the suit are **the same** in both actions.' " *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1209 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D185c] (citations omitted) (emphasis in original); *see also Brennan v. Lyon*, 915 F. Supp. 324, 328 (M.D. Fla. 1996) (stating "the principal test for determining whether the causes of action are identical under Florida law 'is whether the primary right and duty are the same in each case . . . a court must compare the substance of the actions, not their form.' . . . To put the matter another way, 'if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, [then] the two cases are really the same "claim" or "cause of action" for purposes of [claim preclusion]' " (citations omitted) (alteration in original)).

Although not the same in form or label, the actions are, at their core, identical in substance. Both the Prior Action and this matter require the same facts and evidence. The nucleus of facts and the rights and duties of the parties are the same—the same PIP insurance policy, the same automobile accident, the same medical provider, the same assignment of benefits, and the same issue—the proper adjustment and payment of claims for reimbursement. The actions also ultimately seek the same "thing"—Plaintiff's entitlement to, and recovery of, PIP benefits in an amount greater than what had been paid by Defendant. Additionally, at the time of the Prior Action was filed and litigated, Defendant had already applied the deductible to Plaintiff's bills. As such, any issue with the deductible's application certainly could have been raised, litigated, and determined in that action. The fact that the law on the issue of the deductible application may have been unsettled, does not negate the fact that the issue could have been raised[2] within the issues framed in the pleadings of the Prior Action.

Based on the foregoing, the Court finds that the doctrine of res judicata applies in this matter and this action is barred based on the voluntary dismissal with prejudice of the Prior Action.

c. LACK OF JURISDICTION TO GRANT DECLARATORY RELIEF

Defendant also argues that this Court lacks jurisdiction to grant declaratory relief on two grounds. First, Defendant argues "Plaintiff's claim is moot by virtue of the parties' settlement." Def.'s Mot. Summ. J. 14 Sept. 6, 2019. Second, Defendant argues "there is no bona fide, actual, present practical need for the requested declaration" because the sought declarations are matters that have been addressed by binding authority from the Florida Supreme Court. *Id.* at 14-16.

Given the Court's determinations above with regard to the defenses related to settlement of the Prior Action, it is unnecessary to address Defendant's first jurisdictional argument. As such, the Court turns to Defendant's second jurisdictional argument, the need for a bona fide, actual present declaration.

Plaintiff's Complaint alleges that there is a "doubt concerning its rights, and a bona fide, actual, present, and justiciable controversy exists between the Plaintiff and the Defendant concerning the proper interpretation of the terms of the Defendant's insurance policy." Pl.'s Compl. ¶ 34 (Feb. 14, 2019). Specifically, the Plaintiff questions the following sections of the policy:

> (a) Does Section 627.73992) require the deductible amount to be applied to 100% of the health care provider's bill, without application or consideration of the Fee Schedule Method?
>
> (b) If a PIP insurance policy does not clearly and unambiguously invoke the Fee Schedule Method of its choice of one particular method of calculating PIP benefits to the exclusion of all others, is the PIP insurer prohibited from applying the Fee Schedule Method to bills covered by the PIP deductible?
>
> (c) Does a PIP insurer's application of the Fee Schedule Method to bills covered by the PIP deductible, improperly shift liability form the PIP insurer to its insured for payment of amounts that exceed the insured's deductible.

Pl.'s Compl. ¶ 34 (Feb. 14, 2019).

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In response to Defendant's argument that the sought declarations are matters that have been addressed by binding authority from the Florida Supreme Court, Plaintiff asserts that "the complaint clearly states a cause of action for Declaratory Relief," that "since the issue has never been decided in this matter there is a bona fide, actual, present practical need for the declaration," and that "the complaint is properly plead and should stand as filed." Pl.'s Resp. in Opp'n to Def.'s Mot. Summ. J. ¶ 35, 37, & 41 (Dec. 14, 2020). While the sufficiency of the pleading may be sufficient to survive a motion to dismiss, it is not sufficient to simply properly plead a cause of action at the motion for summary judgment stage.

Notably, Plaintiff does not appear to contest Defendant's argument that the cited binding case law has resolved the relevant issues. Rather, Plaintiff indicates: "To date the Defendant still has not adjusted the loss in accordance with law. The Defendant either believes that it paid the deductible correctly or simply does not believe the Supreme Court's ruling on the same applys [sic] to them." *Id.* at ¶ 36. Further, Plaintiff argues that the "Court must intervene and make a declaration" because "the Defendant refuses to observe the law on the proper application of the pip deductible" in this matter. *Id.* at ¶ 40. Plaintiff does not appear to be in doubt about its rights under the relevant statutes and insurance policy or have questions about the construction or interpretation of same.

While the existence of factual issues does not necessary prevent a declaratory judgment action and the existence of other remedies does not preclude a declaratory judgment action, " '[t]he purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations.' " *Vazquez v. Citizens Property Insurance Corporation,* 304 So. 3d 1280, 1286 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a]. When a decision has been rendered that settles the particular question of law, a request for declaratory relief is rendered moot. *See id.* (finding the trial court erred in "issuing a declaration on a settled question of law").

The Court finds that the questions of law at issue in Plaintiff's declaratory judgment action have been settled by binding authority and, as such, the requested declarations are moot. *See Progressive Select Insurance Company v. Florida Hospital Medical Center*, 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a]; *Allstate Insurance Company v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a]. There is no "present practical need" for this Court to declare what has already been established in binding authority. In these circumstances where the questions of law are settled and there is no uncertainty, Plaintiff's action, while framed as one for declaratory relief, essentially seeks an advisory opinion on a breach of contract matter.

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

1. The Defendant's Motion for Summary Judgment is hereby GRANTED. The Motion is granted with regard to the application of res judicata to this matter and the lack of jurisdiction for declaratory relief given the question of law having been settled by binding authority.
2. Final Summary Judgment is hereby entered in favor of Defendant, Infinity Insurance Company. Plaintiff shall take nothing by this action and Defendant shall go hence without day.
3. The Court reserves jurisdiction relative to entitlement to and amount of attorney's fees and costs, if any.

[1]On April 29, 2021, the Florida Supreme Court issued a *per curiam* decision stating that the adjudication of any summary judgment motion decided on or after May 1, 2021, including pending cases shall be construed using the summary judgment standard construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *In re Amendments To Florida Rule of Civil Procedure 1.510,* __ So. 3d __, 46 Fla. L. Weekly S95a (Fla. Apr. 29, 2021).

[2]The Court notes this is one aspect that sets res judicata apart from collateral estoppel—for res judicata to apply the issue need not have been actually litigated, but, as noted in *Zikofsky*, involves matters that "the parties might have litigated" within the issues framed in the pleadings or connected to the first litigation. 904 So. 2d at 523.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Insurer's motion to compel appraisal is granted —There is valid contract with mandatory appraisal provision, and appraisal is appropriate since issue is amount of loss, not coverage

SHAZAM AUTO GLASS, LLC, a/a/o Victor Zavitsky, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-081775, Division I. August 29, 2022. Leslie Schultz-Kin, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott, & Kissane P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND COMPELLING APPRAISAL

THIS CAUSE came before the Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint, or Alternatively Motion to Stay and Compel Appraisal. The Court, having reviewed the Motion, heard arguments of counsel, and being otherwise duly advised in the premises, grants Defendant's Motion to Dismiss.

Defendant asserts that Plaintiff's Amended Complaint fails to state a claim for declaratory relief and should be dismissed because there is no bona fide, practical need for a declaratory judgment on any issues of interpretation or application of the subject insurance policy concerning the amount Defendant paid to Plaintiff. Defendant has invoked the appraisal provision of the policy and seeks dismissal of this action until Plaintiff completes appraisal. Defendant asserts Plaintiff is attempting to side step the remedial mechanism of appraisal and intertwine this Court into judicial declaration when the intent of the policy is to have a means of avoiding litigation where a dispute exists as to the amount of loss. The Court agrees with Defendant.

Appraisal is a mandatory condition precedent and the failure to satisfy it renders this matter ripe for dismissal. *See United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994) (reversing denial of motion to dismiss declaratory judgment action for failure to comply with condition precedent of appraisal). In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of Amer.*, 704 So. 2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a].

Plaintiff's Amended Complaint seeks declaratory relief and the Court's determination as to whether the appraisal provision contained in the subject policy is enforceable. The Court finds there is a valid and enforceable contractual agreement for appraisal and that the issues at hand concern the amount of loss, not coverage, which is appropriate for appraisal. This Court is therefore bound to enforce the appraisal provision of the policy. *See U.S. Fire Ins. Co. v. Franko*, 443 So. 2d 170, 172 (Fla. 1st DCA 1983); *Lewis*, 642 So. 2d at 59.

Florida's Second District Court of Appeal has issued a binding opinion in favor of the Defendant and appraisal. In *Progressive Amer. Ins. Co. v. Glassmetics, LLC a/a/o Devan Hammond*, 2022 WL 1592154 (Fla. 2d DCA May 20, 2022) [47 Fla. L. Weekly D1106b], the Second DCA found that the appraisal provision in Progressive's policy was not ambiguous, nor against public policy. Further, the appraisal provision provided sufficient procedures and methodologies, did not conflict with a retained rights clause, and did not violate

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assignee's rights of access to courts, jury trial or due process.

Plaintiff's Amended Complaint raises issues already ruled upon by the Second DCA in *Glassmetics*. As such, Plaintiff cannot be in doubt about these issues. There is no justiciable question, nor need for further declaration. Accordingly, Plaintiff's Amended Complaint regarding the enforceability of the appraisal provision fails to state a cause of action.

At hearing, Plaintiff relied on *People's Trust Ins. Co. v. Marzouka*, 320 So. 3d 945 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a], as standing for the proposition that compelling appraisal is not appropriate when a declaratory judgment count questioning the appraisal provision is pending. The Third DCA, however, recognized that motions to compel appraisal "should be granted whenever the parties have agreed to [appraisal] and the court entertains no doubts that such an agreement was made." *Id.* at 947.

Moreover, the Third DCA in *Marzouka* recognized, "[T]rial courts ordinarily have the discretion to decide the order in which appraisal and coverage determinations are made." *Id.* at 948. "Analogously, where declaratory counts challenging the enforceability of an appraisal clause exist, courts must enjoy no less power to decide whether to address such arguments in an adjudication of the merits of such counts or in response to a motion to compel appraisal, before the appraisal can be enforced, as well as to decide whether an evidentiary hearing is warranted." *Id.*

Plaintiff further relied on *Progressive Amer. Ins. Co. v. Dr. Car Glass, LLC*, 327 So. 3d 447 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2030c]. Citing *Marzouka*, the Third DCA in *Dr. Car Glass* dismissed Progressive's petition seeking certiorari review of a trial court order denying a motion to dismiss or to compel appraisal. *Dr. Car Glass*, however, appears to be the exception to the rule to compel appraisal—a decision clearly left to the trial court's discretion. The Third DCA acknowledged as much in *Dr. Car Glass* when it discussed the fact that the "trial court ordinarily has discretion" to determine the order in which to resolve claims seeking to enforce an insurance policy and those challenging enforceability. *Id.* at 447.

In the end, the Second DCA has told this Court what to do in *Glassmetics*. This Court, therefore, follows the Second DCA's binding precedent and directs the parties to appraisal consistent with their agreement.

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

1. Plaintiff's Amended Complaint fails to state a cause of action.
2. This case is dismissed without prejudice.

* * *

Insurance—Discovery—Depositions—Failure to appear—Sanctions

CIELO SPORTS AND FAMILY CHIROPRACTIC CENTRE, LLC., a/a/o Patrick Kiszla, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-119758. September 21, 2022. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Michelle Strickland and David B. Kampf, Ramey & Kampf, P.A., Tampa, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AND GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL DISCOVERY

BEFORE THE COURT are Plaintiff's Motion for Sanctions, which the Court construes as a motion to compel deposition and for fees, and Plaintiff's Motion to Compel Discovery. The parties appeared for a hearing on August 30, 2022. Upon consideration of the filings and the arguments of the parties,

1. Plaintiff's Motion for Sanctions is GRANTED. Fla. R. Civ. P. 1.130(b)(6). Defendant's Corporate Representative and Defendant's counsel failed to appear for a duly noticed deposition. A party must file and schedule for hearing a Motion for Protective Order prior to failing to appear for said deposition.

2. Plaintiff's counsel is entitled to reasonable attorneys' fees for time spent related to the noticed deposition, the filing of Plaintiff's Motion for Sanctions and attending a hearing on same.

3. The deposition of Defendant's Corporate Representative must occur within 60 days from August 30, 2022.

4. The parties are given twenty 20 days to attempt to reach a resolution on the total amount of attorney's fees to be awarded as sanctions. Should the parties not be able to reach an agreement, the matter shall be set for an evidentiary hearing before the Court.

5. Plaintiff's Motion to Compel Discovery is GRANTED IN PART. As to the objections raised in No. 1 of Defendant's Response to Request to Produce, Plaintiff's Motion is GRANTED and Defendant's objections as to vague, ambiguous, and overly broad are overruled. Defendant must produce a privilege log within 30 days and the Court reserves on objections as to attorney client privilege, work product and/or claim file privilege pending production of said privilege log.

6. "Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all." *Walker v. Lakewood Condo. Owners Ass'n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999); *accord Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 688 (S.D. Fla. 2011) ("[J]udges in this district typically condemn boilerplate objections as legally inadequate or meaningless."); *Ritacca v. Abbott Laboratories*, 203 F.R.D. 332, 335 n.4 (N.D.Ill. 2001) ("As courts have repeatedly pointed out, blanket objections are patently improper, . . . [and] we treat [the] general objections as if they were never made."). As such, objections that do not involve privilege can be waived.

7. The objections raised in No. 2 of Defendant's Response to Request to Produce are sustained pursuant to *State Farm Mut. Auto. Ins. Co. v. O'Hearn*, 975 So. 2d 633 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D708a]. Plaintiff's motion is denied in this respect.

* * *

Insurance—Personal injury protection—Jurisdiction—Amendment of complaint to add bad faith claim—Once insurer confessed judgment for amount pled in complaint and recognized medical provider's entitlement to attorney's fees and costs, court lacked jurisdiction to take any action other than to enter judgment based on confession—Moreover, bad faith claim is required to be separate and independent action

HESS SPINAL & MEDICAL CENTERS OF PALM HARBOR, LLC, a/a/o David Greenaway, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-093473, Division M. August 18, 2022. Lisa A. Allen, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Catherine V. Arpen, Dutton Law Group, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR ENTRY OF FINAL JUDGMENT AND FINAL JUDGMENT

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

Plaintiff filed its Complaint on September 9, 2021 based on three statutes: Fla. Stat. § 627.736, § 627.740, and § 627.428. These three statutes are "framed by the pleadings." Defendant filed a Notice of Confession of Judgment on March 8, 2022, paying benefits in the amount of $99.00 and interest of $4.29, for a total of $103.29, which was the amount pled in Plaintiff's Complaint. Defendant provided competent evidence that Plaintiff provider accepted tender of that payment by cashing Defendant's check. Plaintiff filed its Motion for

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Leave to Supplement and/or Amend Complaint on June 9, 2022.

Since Plaintiff filed is Motion for Leave to Supplement and/or Amend Complaint ***after*** Defendant filed its Notice of Confession of Judgment, and ***after*** Defendant recognized Plaintiff's entitlement to reasonable attorneys' fees and costs, this court lacks jurisdiction to provide any other relief other than the entry of Final Judgment based on confession. *See GEICO Cas. Co. v. Barber,* 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] (once Defendant "agrees to the entry of a judgment against it . . . the issues between the parties, *as framed by the pleadings*, become moot because the trial court could not provide any further substantive relief. . .". (*Emphasis added). See also, Godwin v. State,* 593 So. 2d 211 (Fla. 1992) stating "an issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual affect." "Where statute provided for recovery of attorney's fees upon entry of judgment in favor of insured against insurer, insured was not required to continue litigation where insurer had paid claim; payment of claim was functional equivalent of confession of judgment. Instead, the trial court should have merely entered the confessed judgment in favor of Fridman, reserving jurisdiction to award costs, prejudgment interest, an if authorized by law, reasonable attorney's fees." *GEICO Cas. Co. v. Barber,* 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] (quoting *Wollard v. Lloyd's & Cos. of Lloyd's,* 439 So. 2d 217 (Fla. 1983)).

Further, Plaintiff's motion for leave to supplement and/or amend complaint is denied because the case law binding on this court requires the bad faith action to be a separate and independent claim. *See GEICO Cas. Co. v. Barber,* 147 So. 3d 109 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] (quoting *GEICO Gen. Ins. Co. v. Harvey,* 109 So. 3d 236, 240 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D178a] "The Florida Supreme court has repeatedly recognized that a claim arising from bad faith is grounded upon the legal duty to act in good faith, and is thus ***separate and independent*** of the claim arising from the contractual obligation to perform.") (*Citation and internal quotation marks omitted.*) *See also, Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006) [31 Fla. L. Weekly S882a].

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

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

2. Final Judgment is entered for Plaintiff for $99.00, plus interest, which Defendant has paid.

3. Plaintiff's Motion for Leave to Supplement and/or Amend Complaint is **DENIED**.

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

5. Plaintiff will file an Affidavit of its reasonable attorney's fees and costs with this court within 30 days of the entry of this Order.

* * *

Insurance—Personal injury protection—Coverage—Declaratory action is rendered moot where question of law raised by action has been settled by prior appellate decision

CLEARVIEW OPEN MRI, a/a/o Nelson Duartes, Plaintiff , v. AVENTUS INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-094183, Division J. September 1, 2022. J. Logan Murphy, Judge. Counsel: Philip Louis Colesanti, II, Roig Lawyers, Tampa, for Plaintiff. Christopher P. Calkin. The Law Office of Christopher P. Calkin, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss Plaintiff's Complaint Seeking Declaratory Relief. Defense counsel appeared at the September 1, 2022 hearing, but Plaintiff's counsel did not.

For the reasons stated on the record, I disagree with Defendant's arguments that a declaratory judgment action is inappropriate in this first-party action, and that the action contravenes the notice requirement of Florida's No-Fault Law. *See* s. 627.736(10)(a), Fla. Stat.; *Bristol W. Ins. Co. v. MD Readers, Inc.*, 52 So. 3d 48, 51 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2832a]; *Cintron v. Edison Ins. Co.*, 339 So. 3d 459, 462 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1079a].

I agree, however, that there is no "bona fide, actual, present, and practical need for the declaration," *X Corp. v. Y Person*, 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993), because the Third District settled the alleged dispute in *Priority Medical Centers, LLC v. Allstate Ins. Co.*, 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b]. *See Brown-Peterkin v. Williamson*, 307 So. 3d 45, 50 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2518a] ("However, once a prior appellate decision settles a question of law as to which declaratory relief is sought, the relief requested is rendered moot."); *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1286 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a] ("As our decision in *Servando* settled the question of law, the declaration requested was rendered moot.").

Accordingly,

1. Defendant's Motion to Dismiss Plaintiff's Complaint Seeking Declaratory Relief is GRANTED.

2. The Amended Complaint is DISMISSED without prejudice as moot.

3. Plaintiff is GRANTED leave to file an amended complaint within ***14 days*** of this order, failing which this case will stand dismissed without prejudice.

* * *

Insurance—Personal injury protection—Coverage—Medical benefits—Claim that insurer underpaid one CPT code by $0.72 is barred by doctrine of *de minimis non curat lex*

ALL-PRO ORTHOPEDICS AND SPORTS MEDICINE P.A., Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20034945, Division 49. May 4, 2022. Nina W. Di Pietro, Judge.

Order Granting Summary Disposition in Favor of Defendant

THIS CAUSE having come on to be considered on May 4, 2022, regarding a Summary Disposition Hearing, the Court having reviewed the court file, having heard from both parties remotely via Zoom, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED as follows:

1. The parties appeared on March 21, 2022 for a Pretrial Conference in anticipation of their scheduled Jury Trial. At the Pretrial Conference, the parties informed the Court that there were no factual issues to be tried and all that remained were issues of law.

2. On March 28, 2022, the parties filed a Statement of Stipulated Facts laying out the following:

a. The amount in controversy for this matter is $0.72.

b. The legal issue in this case is whether the $0.72 is owed or whether it is barred by the doctrine of de minimis non curat lex.

3. At the Summary Disposition hearing, Defendant correctly acknowledged that the CPT code at issue should have been paid at the 2007 limiting charge, resulting in $0.72 being owed to Plaintiff. In spite of this admission of liability, Defendant argued that pursuant to *Precision Diagnostic, Inc. v. Progressive American Insurance, Co.,* 330 So.3d 32 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2282d], no benefits should be awarded based upon the legal maxim "de minimis non curat lex".

4. In opposition, Plaintiff argued that the holding in *Precision*

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Diagnostic should only apply to cases in which interest is being sought (as opposed to this case where PIP benefits are at issue).

5. The Court declines to ratify Plaintiff's position since the Fourth District Court of Appeals specifically discussed cases seeking other types of damages (restitution, loss of supplemental benefits, child support, etc.) in the text of *Precision Diagnostic* and noted that the principal of "de minimis" was upheld in those cases. *Id.* at 35.

6. Finally, the Court finds that Plaintiff did not provide any other persuasive argument as to why the $0.72 owed was not "a trifling amount".

7. Based upon the above, the Court finds that there is no triable issue, the legal maxim of "de minimis non curat lex" applies to this matter, and Summary Disposition is hereby granted in favor of Defendant.

* * *

Civil procedure—Default—Motion to vacate clerk's default that was not submitted under oath or with reference to any supporting affidavit is summarily denied

MICHAEL GARCIA, P.A., Plaintiff, v. KEISHA DWYNETTE HENRY, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22032642, Division 53. September 13, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANTS' MOTIONS TO VACATE CLERK DEFAULT

THIS CAUSE came before the Court for consideration of the Defendants' Motions to Vacate Clerk's Default, and the Court's having reviewed the Motion and the relevant legal authorities; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

Before a motion to vacate a default can be considered on the merits, the moving party must submit the motion under oath or with supporting affidavit. *See Garcia v. State*, 306 So.3d 212, 215 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1402b]; *Dodrill v. Infe, Inc.*, 837 So.2d 1187, 1187 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D558d]; *Mieles v. Lugo*, 26 Fla. L. Weekly Supp. 865a (5th Cir. App. 2019); *Irkhin v. Simonelli,* 25 Fla. L. Weekly Supp. 996c, 997 (12th Cir. App. 2017); *Woodard v. Mid-Atlantic Finance Co*., 2015 WL 12659998, *1 (Fla. 4th Cir. 2005). *See also Waterson v. Seat & Crawford*, 10 Fla. 326, 330 (1863) (defendant submitted affidavit demonstrating meritorious defense and unavoidable neglect); *Orchard Grove Ass'n, Inc. v. Gregory*, 26 Fla. L. Weekly Supp. 114a, 115 (17th Cir. Ct. 2018) (defendant submitted verified motion setting forth excusable neglect). Because the Defendants did not submit the motions under oath or with reference to any supporting affidavit, the Motion should be summarily denied. Accordingly, it is hereby

ORDERED and ADJUDGED that the Defendants' Motions to Set Aside Default are DENIED without prejudice.

* * *

Insurance—Property—Standing—Assignment—Motion to dismiss based on lack of standing is granted where assignment does not contain "written, itemized per-unit cost estimate for services to be performed by assignee," as required by section 627.7152(2)(a)(4)—Chart of per-unit cost of services without indication or estimate of how many units per service were to be provided did not satisfy statutory requirement

AQUA DOCS WATER RESTORATION, INC., Plaintiff, v. PEOPLE'S TRUST INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22034910, Division 53. September 1, 2022. Robert W. Lee, Judge.

FINAL ORDER OF DISMISSAL UPON COURT'S ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

THIS CAUSE, having come before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice (the "Motion to Dismiss") and Defendant's Motion to Stay Discovery Pending Court's Ruling On Defendant's Motion To Dismiss Plaintiff's Complaint With Prejudice (the "Motion to Stay"), on August 29, 2022, it is hereby:

ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss is **GRANTED**;

2. Plaintiff's case arises out of an assignment of insurance benefits agreement executed by and between the insured-assignor and Plaintiff-assignee on March 1, 2022, which is attached to Plaintiff's Complaint as an exhibit.

3. Plaintiff's assignment of benefits agreement is subject to section 627.7152, Florida Statutes, which applies to assignment agreements executed on or after July 1, 2019. *See Total Care Restoration, LLC v. Citizens Prop. Ins. Corp.,* 337 So. 3d 74, 75-76 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D926a]; *Kidwell Grp., LLC v. Olympus Ins. Co.,* 5D21-2955, 2022 WL 2897749, at *1-*2 (Fla. 5th DCA July 22, 2022) [47 Fla. L. Weekly D1571a].

4. Section 627.7152 is clear an unambiguous as to what is required to constitute a valid and enforceable assignment of benefits.

5. Section 627.7152(2) provides the specific requirements which must be included in an assignment agreement for such an agreement to be valid and enforceable. *See* § 627.7152(2)(d), Fla. Stat.

6. Plaintiff's assignment of benefits agreement does not comply with all the statute's mandatory requirements. Specifically, Plaintiff's assignment agreement does not comply with section 627.7152(2)(a)(4), which provides that an assignment agreement must "[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee."

7. Within the assignment attached to the Complaint is a chart of various services and associated per-unit costs thereof that is labeled as a "Good Faith Itemized Per-Unit Cost Estimate," which appears as follows:

Good Faith Itemized Per-Unit Cost Estimate

X	Service Call ($200.00		Service Call After-Hours ($25.00)
2	Air Mover ($30.00/Day)		Cat. 1 Water Extraction ($25.00/ sq. ft.)
2	Dehumidifier ($115.00/Day)		Cat. 2 Water Extraction ($80.00/ sq. ft.)
2	Air Scrubber ($155.92/Day)		Cat. 3 Water Extraction ($1.70/ sq. ft.)
	Wall Cavity Drying Injector ($150.00/Day)	X	Mitigation Supervisor ($120.00/Hr.)
	Power Distribution Box ($100.00/Day)	X	Cleaning ($.65/ sq. ft.)
	Board Up ($75.00/per opening)		Blue Roof Tarp (2,500.00)
	Content Manipulation ($68.00/Hr.)		Shrink Wrap for Roof ($2.50/ sq. ft.)
X	Anti-Microbial Agent ($1.14/ sq. ft.)	X	Demolition Labor ($35.00/Hr.)
X	Furniture Protection ($25.00/piece)	X	Containment Labor ($35.00/Hr.)

9000.00

8. However, despite its label, this is not an "itemized per-unit cost estimate" of the services to be performed by the assignee.

9. Though prices per unit are included and there is some indication as to which equipment and services were to be provided, there is no indication or ***estimate*** as to how many units per service were to be provided. Yet, somehow, there is a $9,000.00 figure engrafted just below the "estimate" that could not have been calculated based on the insufficient information therein. This is clearly not a "per-unit cost estimate" as required by the statute. If the Legislature had desired to make disclosure of the "per-unit cost" sufficient standing alone, it would not have added the word "estimate" at the end of the phrase.

10. For example, the chart includes an item indicating anti-microbial agent was to be provided at $1.14 per square foot, but fails

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to include an ***estimate*** of how many square feet of anti-microbial agent was to be provided. The same applies for the other services checked off with "X" marks. And even for the equipment line items that include the price per day for usage which are demarked with the number 2, there is no indication as to whether "2" is an estimate of the number of days of usage or of the number of air movers, dehumidifiers, and air scrubbers to be used.

11. The result is that absent a per-unit cost estimate of ***each*** itemized service, it is impossible to discern how the $9,000.00 total estimate figure was reached. This facially contravenes the plain language and obvious purpose of the statute, which is to notify the interested parties of the estimated cost of each service to be provided.

12. "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2567a]. An assignment of benefits "is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place." *Progressive Express Ins. Co. v. McGrath Community Chiropractic,* 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b].

13. Accordingly, Defendant's Motion to Dismiss **GRANTED**, and this case is DISMISSED with prejudice because the statutory deficiency is, at this point, incurable. Plaintiff shall take nothing in this action, and the Defendant may go hence without day.

* * *

Civil rights—Housing discrimination—Florida Deceptive and Unfair Trade Practices Act—Attorney's fees—Award of attorney's fees to defendant who prevailed in suit alleging that defendant violated county human rights act and FDUTPA by discriminating against tenants using Section 8 payment vouchers where suit was based on single unlawfully recorded telephone call and plaintiff housing alliance knew from beginning of suit that it did not possess admissible evidence to establish claim, did not have any evidence of unlawful discrimination, and did not having standing to bring suit

FLORIDA FAIR HOUSING ALLIANCE, INC., Plaintiff, v. OAKWOOD MANOR APARTMENTS, LLC, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22001870, Division 54. September 23, 2022. Florence Taylor Barner, Judge. Counsel: Jibrael Hindi and Jennifer Gomes Simil, Law Offices of Jibrael S. Hindi, Ft. Lauderdale, for Plaintiff. Jared Whaley, Coffey Burlington, P.L., Miami, for Defendant.

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

This cause came before the Court for hearing via Zoom on September 20, 2022, on Defendant's March 22, 2022 Motion for Sanctions ("57.105 Motion") and Defendant's May 12, 2022 Motion for Entitlement to Attorney's Fees and Costs ("FDUTPA Motion") (together, "Motions"). The Court, having reviewed both Motions; Plaintiff's September 9, 2022 Amended Response thereto; the docket of this case;[1] the docket of *Florida Fair Housing Alliance, Inc. v. 25 Plaza Corp.*;[2] the authorities cited by the parties; and having heard argument of counsel, the Motions are GRANTED as follows:

PROCEDURAL HISTORY

This action was based on a single phone call placed Plaintiff's "field tester," Ryan Turizo, on September 30, 2020. Plaintiff originally filed this case in Circuit Court on January 14, 2021.[3] Its two-count Complaint alleged a one count of housing discrimination based on source of income under the Broward County Human Rights Act ("Ordinance"),Ch 16 ½, § 35 and a derivative second count under Florida's Deceptive and Unfair Trade Practices Act, § 501.201, et seq., Fla. Stat., based on a *per se* violation of the Ordinance. Plaintiff alleged that an unidentified "field tester" placed a phone call to Defendant on September 30, 2020. *Id.* ¶¶ 11-14. Plaintiff alleged that during this single phone call, its "field tester" was told that rental property was available, but that Oakwood Manor did not accept Section 8 Payment Vouchers. *Id.* ¶ 15.

Plaintiff alleged that the phone call constitutes a "discriminatory housing practice" by "discriminating, based on source of income, against prospective tenants" under the Ordinance, and that Plaintiff had been damaged by being "forced to divert resources" from its "programs and services designed to advance fair housing in Florida," including "counseling, education, and outreach." *Id.* ¶¶ 5, 9, 14, 18-19, 27.[4] Based on these allegations, Plaintiff contended that it was "aggrieved person" with standing to sue under the Ordinance. *Id.* ¶¶ 24-27.

After eleven months without record activity, and the issuance of a Notice of Lack of Prosecution, Plaintiff simultaneously dismissed the Circuit Court action and re-filed the case, with a substantively identical complaint, in County Court on January 5, 2022. Plaintiff propounded discovery (including a Request for Production, Requests for Admission, and Interrogatories) with initial process.[5]

Defendant moved to dismiss for lack of standing and failure to state a claim on February 1, 2022. Defendant served Plaintiff with a Request for Production and Interrogatories on February 8, 2022. Separately, Defendant served—but did not file—the 57.105 Motion on February 28, 2022. Defendant also responded to Plaintiff's discovery on February 28, 2022.[6]

Relevant here, Defendant provided Plaintiff with sworn interrogatory responses and internal email correspondence showing that—contrary to Plaintiff's allegations—Defendant accepted Section 8 Housing Choice Vouchers, and other forms of government assistance, in compliance with the Ordinance. Defendant specifically requested any documents, including recordings, of the phone call described in the Complaint.

Plaintiff did not respond to Defendant's discovery, or produce any recordings or documents, despite this Court's Order dated March 8, 2022 requiring production by April 1, 2022. Plaintiff opposed Defendant's motion to dismiss in writing on March 2, 2022. The Court held a hearing on the motion on March 8, 2022. On March 28, 2022, the Court entered a written order granting Defendant's motion to dismiss for failure to state a claim under the Ordinance and FDUTPA, and for lack of standing, on March 28, 2022, giving Plaintiff 20 days leave to amend.

Plaintiff did not amend this pleading or voluntarily dismiss the action. Instead, at a hearing on April 18, 2022—the final day on which Plaintiff could file an amended pleading under the Court's March 28, 2022 order—Plaintiff's counsel stated on the record, during Defendant's Motion to Compel Discovery—that Plaintiff would not be filing an amended complaint. Based on that representation, the Court denied Defendant's Motion to Compel Discovery.

On May 12, 2022, Defendant timely filed its FDUTPA Motion seeking taxation of fees and costs as the prevailing party. The Court entered an order requiring Plaintiff to respond to Defendant's post-dismissal discovery requests by September 6, 2022. In response to those requests, Plaintiff produced—for the first time in the nearly two-year pendency of this action—a recording Mr. Turizo made of the September 30, 2020 phone call.[7] As detailed further below, the recording appears to have been done without actual consent of the party being recorded and contradicted Plaintiff's characterizations of the call in its pleadings and unsworn interrogatory responses.[8]

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APPLICABLE LEGAL STANDARDS

Section 57.105

Fla. Stat. § 57.105 provides in relevant part:

> (1)Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid by the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> a. was not supported by the material facts necessary to establish the claim or defense; or
>
> b. would not be supported by the application of then-existing law to those material facts.

Fla. Stat. § 57.105(1)(a) & (b).

Section 57.105(a) provides that sanctions are mandatory if the asserted claim would not be supported by the application of existing law to the material facts. *See, e.g., Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482, 490 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2003a]; *Albritton v. Ferrera*, 913 So. 2d 5, 8 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2099a]. Unlike the prior version of the statute, the current version authorizes "an award of attorney's fees when a claim, pleading, or other filing—as opposed to the entire case—is without merit." *Country Place Comm. Ass'n, Inc. v. J.P. Morgan Mortg. Acquisition Corp.*, 51 So. 3d 1176, 1180 (Fla. 2d DCA 2010) [36 Fla. L. Weekly D31a]; *see also Albritton*, 913 So. 2d at 8 (1999 amendment "lowered the bar a party must overcome before becoming entitled to attorney's fees").

A claim is "supported by material facts" under Section 57.105 when "the party possesses **admissible evidence sufficient to establish the fact** if accepted by the finder of fact." *Schurr v. Silverio & Hall, PA*, 290 So. 3d 634, 637 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D367b] (emphasis added).

Section 57.105 sanctions are available against a party and its attorneys unless an offending pleading is withdrawn within twenty-one days of service. Fla. Stat. § 57.105(1) & (4); *see also Visoly*, 768 So. 2d at 490. "The purpose of 57.105 is to discourage baseless claims in civil litigation by placing a price tag through attorney's fee awards on losing parties who engage in these activities." *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982).

Section 57.105 also seeks to deter meritless "individual allegations," not just an entire lawsuit or count in a complaint. *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D328d]. "Individual allegations" refers to "a series of allegations framing a theory of liability based on a factual scenario that is not supported by law." *Id*.

A trial court's findings under § 57.105(1) must be based on substantial competent evidence presented to the court at the hearing on attorney's fees or otherwise before the court and in the trial record. *See, e.g., Blue Infiniti, LLC v. Wilson*, 170 So. 3d 136, 140 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1573f].

FDUTPA

When considering the award for attorneys' fees and costs under FDUTPA, some suggestive factors to be considered by the court might include: "(1) the scope and history of the litigation; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting in similar circumstances; (4) the merits of the respective positions-including the degree of the opposing party's culpability or bad faith; (5) whether the claim brought was not in subjective bad faith but frivolous, unreasonable, groundless; (6) whether the defense raised a defense mainly to frustrate or stall; (7) whether the claim brought was to resolve a significant legal question under FDUTPA law." *Humane Soc. of Broward Cty, Inc. v. Florida Humane Soc.*, 951 So. 2d 966 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D702c]. Some factors may not apply in certain cases, and not all factors need to be considered in every case. *Id* .

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff does not dispute, either in its papers or at the hearing on the Motions, that Defendant is the prevailing party under both Section 57.105 and Florida's Deceptive and Unfair Trade Practices Act. The Court finds that Defendant is the prevailing party for purposes of both Motions.

2. Competent substantial evidence supports the conclusion that Plaintiff knew or should have known that its claims were unsupported by material facts and the application of then-existing law to those facts.

3. The Court takes compulsory judicial notice of Sections 934.02-06, Florida Statutes ("Wiretap Act"). The Wiretap Act plainly prohibits the interception of communication (which includes recording of phone calls) unless all parties to the communication have given prior consent.

4. The Court had the opportunity to review the phone call at the hearing. The Court finds that the recording Mr. Turizo made of the September 30, 2020 phone call[9] was not made with explicit consent of the party being recorded in derogation of the Wiretap Act.

> a. At 00:07-11, Angela answers the phone and says "thank you for calling Oakwood Manor Apartments, this is Angela, how may I help you."
>
> b. At 00:08-09—simultaneously with Angela speaking - Mr. Turizo mumbles in a nearly inaudible voice "this call is being recorded." The speaking voice Mr. Turizo uses is for this statement is markedly different, and in a much lower tone and register, than the speaking voice he uses on the remainder of the phone call.
>
> c. Nothing in the phone call indicates that Angela heard Mr. Turizo's statement, and she did not otherwise consent to Mr. Turizo recording the call.[10]

5. Directly contrary to the Complaint's allegations, Angela did not tell Mr. Turizo that housing was available. At 00:17, Mr. Turizo asks, "do you have something available like, right around now," Angela responds, "no, I don't." This exchange occurs prior to any mention of Section 8 housing choice vouchers.

6. At 00:31 seconds—after being told that no housing is available - Mr. Turizo asks, "um, do you guys take the Section 8 assistance vouchers," Angela responds, "no, we are pretty much full, we do not accept, um, vouchers."

7. Contrary to Plaintiff's pleadings, Angela's statement does not show that Defendant "refuses" to accept Section 8 vouchers, based on the full context of the conversation.

8. Plaintiff did not allege, nor present any evidence, that Mr. Turizo (or any Section 8 voucher holder) was refused available housing, as a tester or otherwise, based on any discriminatory classification under the Ordinance.

9. No reasonable fact finder could conclude that Angela heard Mr. Turizo's statement "this call is being recorded," or that she otherwise consented to having the call recorded.

10. The Court finds that Angela did not consent to Mr. Turizo recording the phone call.

11. As such, the phone call was plainly unlawful, and would have been inadmissible under the Wiretap Act. Because the phone call formed the entire basis for this Plaintiff's claims, the Court finds that Plaintiff knew or should have known that it did not possess admissible evidence sufficient to establish its claims before filing this lawsuit.

12. Further, Plaintiff knew or should have known, based on the

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improperly recorded phone call, that there had been no unlawful discrimination based on source of income.

13. The Court finds, based on the record evidence, that Plaintiff engaged in bad faith conduct by recording and using the phone call as the basis of this action without the consent of the party to the call.

14. Plaintiff had actual knowledge that neither Plaintiff nor Mr. Turizo was an "aggrieved person" under the clear and unambiguous statutory language of the Ordinance, at the inception of this lawsuit and thereafter.

15. Plaintiff continued to litigate this action, and oppose dismissal, after Defendant provided Plaintiff on February 25, 2022 with internal email correspondence showing that Defendant accepts applicants with Section 8 Housing Choice Vouchers; sworn interrogatory responses on February 28, 2022 affirming that (a) Defendant accepts Section 8 Housing Choice Vouchers and other forms of government assistance and (b) Defendant had 15 residents in the two years preceding the interrogatory responses who received Section 8 Housing Choice Vouchers or other governmental assistance; and denied, in response to requests for admission, that Defendant refuses to accept Section 8 Housing Choice Vouchers.[11] So, in addition to knowing that its claims were unsupported by material facts *ab initio*, Plaintiff knew after the lawsuit that its claims were unsupported by material facts, and wrongfully continued the litigation.

16. The Court finds that Plaintiff lacked material facts to support its claims under the Ordinance and FDUTPA *ab initio*. Plaintiff - a corporation - is not, and has never been, eligible to receive Section 8 Housing Choice Vouchers. Mr. Turizo, the "field tester," was not, and is not, a Section 8 Housing Choice Voucher holder. There was never any allegation, or evidence, that Plaintiff was acting on behalf of a Section 8 Housing Choice Voucher holder. Absent such facts, there is no plausible claim of unlawful discrimination based on source of income under the Ordinance.

17. Plaintiff's alleged theory of standing was that the phone call "forced" the Alliance "to divert resources from" its "programs and services designed to advance fair housing," including "counseling, outreach, and educational efforts, "into this litigation," Compl. ¶¶ 4, 19. The Court finds that this claim was not supported by material facts, either at the inception of the lawsuit or thereafter.

18. Plaintiff did not present any admissible evidence[12] that it in fact offered any fair housing related programs and services, as alleged in its complaints. Defendant presented competent substantial evidence, in the admissible form, that Plaintiff did not in fact offer, or expend resources on, fair housing related programs and services as alleged. Specifically, Defendant presented Plaintiff's 2020 IRS 990-EZ Short Form Tax Return; statements made by Mr. Turizo in an October 30, 2020 Sun-Sentinel Article; and the absence of any documents produced by Plaintiff to support its "diversion of resources" allegations, showing that Plaintiff did not in fact offer or expend resources on fair housing related programs and services. In fact, the record evidence demonstrated that no resources were diverted as a result of any action by the Defendant. Accordingly, the Court finds that that Plaintiff's alleged injury—"diversion of resources"—was unsupported by material facts.[13]

19. Further, as the Court noted in its March 28, 2022 Order Granting Motion to Dismiss, FDUTPA plainly does not allow for recovery of any damages other than actual damages. *See, e.g., Rodriguez v. Recovery Perf. & Marine*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1122a]; *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 824-25 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1817a]; *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1706b]. FDUTPA specifically does not allow recovery for consequential damages. *Id*.

20. Plaintiff never alleged, nor presented any evidence, that it suffered actual damages. Instead, its pleadings alleged purely consequential damages, which are not recoverable under FDUTPA.

21. Further, the Court finds that Plaintiff did not suffer the consequential damages alleged in its complaints. Plaintiff's September 9, 2022 Notice of Filing did not contain any admissible evidence, Plaintiff attached what purport to be flyers for events (none apparently related to fair housing) beginning on October of 2020 through 2021 and 2022. Even if presented in admissible form, these documents contradict Plaintiff's allegations of "mission frustration" and "diversion of resources" based on a phone call that occurred in September of 2020.

22. Based on the foregoing, the Court finds that Plaintiff knew *ab initio* that its claims for relief and theory of standing were unsupported by material facts, and the application of then-existing law to those facts.

23. The Court has considered and weighed the discretionary *Humane Society* factors in accordance with the foregoing. The Court places great weight on the third, fourth, and fifth factors. Even if the Plaintiff had a commendable purpose, the manner in which this litigation was set up—recording a phone call without actual consent, and then misrepresenting its contents for two years - was appalling and shocked the judicial conscience. This behavior should be deterred. The Court finds that the Plaintiff acted in bad faith for the reasons stated above. Devfendant met its burden of proof by demonstrating that Plaintiff does have the resources to pay a fee award based on the tax return evidence. Plaintiff, however, did not present evidence that it could not satisfy an award of fees and instead, Plaintiff sought and was granted a protective order against pre-entitlement discovery on that issue. Beyond that, the record evidence, in the form of Plaintiff's 2020 tax returns, shows that Plaintiff has some ability to satisfy an award of fees. The scope and history of the litigation, given its basis, weighs in Defendant's favor. The remaining factors are inapplicable or slightly favor Plaintiff. In balancing the *Humane Society* factors, the factors heavily weigh in favor of an award of fees and costs against Plaintiff in order to deter futire conduct as occurred in this action in the manner in which it occurred in this action.

It is therefore ORDERED and ADJUDGED that

Defendant Oakwood Manor is the prevailing party for purposes of this action under Section 57.105 and Florida's Deceptive and Unfair Trade Practices Act;

Defendant is entitled to recover its reasonable attorney's fees and costs, under FDUTPA and as a sanction under Section 57.105;

The parties are directed to comply with the Court's July 19, 2022 Preliminary Order on taxation of fees and costs, effective September 20, 2022, prior to setting an evidentiary hearing on amount.

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[1]The Court takes compulsory judicial notice of the docket of this case, including the previously-filed action CACE-21-000980, pursuant to Sections 90.902-903, Florida Statutes.

[2]Case No. Case No. 2020-025636, in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

[3]Defendant's September 14, 2022 Notice of Filing and Request for Compulsory Judicial Notice, Ex. A (Docket) and B (Complaint for Housing Discrimination). The Court finds that the Complaint is competent, admissible evidence for purposes of this proceeding under Section 90.803(18), Florida Statutes as both party admissions and adoptive admissions, to the extent that Plaintiff's Responses to Defendant's Second Set of Interrogatories manifested an adoption or belief in the truth of the allegations theirein. *See, e.g., State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla.4th DCA 2001) [26 Fla. L. Weekly D111a], *approved*, 894 So. 2d 5 (Fla. 2004) [29 Fla. L. Weekly S533a]).

[4]Count II of the Complaint alleges a claim under Florida's Deceptive and Unfair Trade Practice Act ("FDUTPA"), which is entirely based on, and derivative of, the Ordinance violation alleged in Count I.

[5]Defendant's September 14, 2022 Notice of Filing and Request for Compulsory Judicial Notice, Ex. D (Jan. 5, 2022 Notice of Voluntary Dismissal).

[6]Defendant's September 19, 2022 Notice of Filing and Request for Compulsory

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Judicial Notice.

[7]Plaintiff's unsworn Interrogatory Responses confirm that Ryan Turizo was the "field tester" who made the September 30, 2020 phone call. *See* Defendant's September 15, 2022 Notice of Filing Record Evidence, Ex. A (Plaintiff's September 6, 2022 Responses to Second Set of Interrogatories).

[8]The Court is troubled by Plaintiff's apparent refusal to verify or swear to its interrogatory responses, despite requests from the Defendant to do so and the requirements of Florida Rule of Civil Procedure 1.340(a).

[9]Plaintiff produced the recording in conjunction with its September 6, 2022 discovery responses. *See* Defendant's September 15, 2022 Notice of Filing Record Evidence at Ex 1 (Plaintiff' Responses to Second Set of Interrogatories); Ex. 2 (place holder for recording of phone call). The Court listened to the phone call at the September 20, 2022 special set hearing, and grants leave of court to file a USB drive containing the electronic file of the recorded phone call with the Clerk of Court.

[10]It was undisputed that Oakwood Manor does not record its employees' phone calls.

[11]Defendant's September 19, 2022 Notice of Filing and Request for Judicial Notice, Ex. 1 (Defendant's February 28, 202 Response to Plaintiff's First Set of Interrogatories); Ex. 2 (Defendant's February 28, 202 Response to Plaintiff's First Request for Production); Ex. 3 (Defendant's February 28, 2022 Response to Plaintiff's First Request for Admissions).

[12]Defendant's September 19, 2022 Objection to Plaintiff's September 9, 2022 Notice of Filing is well-taken.

[13]Defendant's September 15, 2022 Notice of Filing Record Evidence, Ex. A (Plaintiff's September 6, 2022 Response to Second Set of Interrogatories); Ex. 6 (2020 IRS 990-EZ Short Form Return of Organization); Ex. 7 (Oct. 31, 2020 South Florida Sun-Sentinel, "Convicted felon says he's fighting unfair housing. Landlords say he's in it for the money.")

* * *

Insurance—Motion to abate is denied

ADVANCED DIAGNOSTIC GROUP, a/a/o Cynthia Keller, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21071996, Division 53. September 16, 2022. Robert W. Lee, Judge.

ORDER ON PLAINTIFF'S MOTION TO ABATE COUNT (BREACH OF CONTRACT)

THIS CAUSE having come on to be considered on Plaintiff's, AVANCED DIAGNOSTIC GROUP A/A/O CYNTHIA KELLER, Plaintiffs Motion to Abate Count (BREACH OF CONTRACT), and the Court being fully and duly advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

1. Plaintiff's Motion is hereby **Denied**. This case has been pending for many months. Further, this is a dispute over about $30.00, not warranting an abatement. If the Plaintiff desires to submit a new demand letter, it may take a dismissal and refile its case.

* * *