Volume 30, Number 9, January 31, 2023

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 527-596

**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.*

- **MUNICIPAL CORPORATIONS—CODE ENFORCEMENT—SHORT-TERM RENTALS. A code enforcement special magistrate did not err in finding that a property owner violated the city code by using a property located in a residential area as a short-term rental for fewer than seven days and by renting to more than four unrelated persons. Although the owner produced an alleged lease for a seven-day stay by one family, witness testimony provided competent substantial evidence that the property was rented to a university lacrosse team for two days. There was no merit to the argument that the owner was deprived of due process because the owner was not afforded an opportunity to cure the violation where the violation was an incurable "transient" violation.** *SUPER HOST, LLC v. CITY OF TAMPA. Circuit Court, Thirteenth Judicial Circuit (Appellate) in and for Hillsborough County. October 24, 2022. Full Text at Circuit Courts-Appellate Section, page 538a.*

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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**

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

**Bold** denotes decision by circuit court in its appellate capacity.

**MUNICIPAL CORPORATIONS (continued)**



**RES JUDICATA**



**TORTS**



**VENUE**



* * *

**TABLE OF CASES REPORTED**



**TABLE OF CASES (continued)**



* * *

**TABLE OF STATUTES CONSTRUED**

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

FLORIDA STATUTES

**TABLE OF STATUTES CONSTRUED (continued)**



* * *

**TABLE OF CASES TREATED**

*Case Treated / In Opinion At*



**TABLE OF CASES TREATED (continued)**



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# CIRCUIT COURTS—APPELLATE

**Licensing—Commercial driver's license—Suspension—Second violation within five years—Section 318.18(12) mandates suspension of license where CDL holder's driving record shows that he has two convictions for failing to properly secure load within five years—Because federal regulation and state law do not allow CDL holders to participate in diversionary programs, prior infraction that resulted in withhold of adjudication constitutes an adjudication for purposes of applying section 318.18(12)**

JEROME ANDREW TAUDTE, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2022-AP-4, Division AP-A. October 10, 2022. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: M. Scott Thomas, for Petitioner. Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

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

Petitioner has a Commercial Driver License (CDL). The Department suspended Petitioner's Florida license for one year following a second or subsequent violation of section 316.520(1), Florida Statutes. Petitioner challenges the suspension, arguing that he only has one adjudication because one of his prior infractions resulted in a withhold of adjudication.

States may not "defer imposition of judgment . . . for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record." 49 C.F.R. § 384.226. In compliance with this regulation, Florida does not allow holders of a (CDL) to participate in diversionary programs. § 318.14 (9)-(10), Fla. Stat. (2021).

Because he could not participate in a diversionary program, Petitioner's violation of section 316.520(1), Florida Statues, constitutes a conviction under both federal and state law for holders of a CDL:

> Conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

§ 383.5 C.F.R. (2021); *see also* Fla. R. Traf. Ct. 6.560; *State v. Keirn,* 1085, 1090 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1144d].

Accordingly, Petitioner's driving record shows that he has two convictions for failing to properly secure a load. Section 318.18(12), Florida Statutes, mandates that the Department suspend the driver license of any person who has committed this offense twice within five years.[1]

Therefore, Petitioner has failed to demonstrate a departure from the essential requirements of the law, and the Petition is **DENIED**.

(KALIL and NORTON, JJ., concur.)

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[1]The full text of the statute reads:

> The penalties required for a noncriminal disposition pursuant to s. 318.14 or a criminal offense listed in s. 318.17 are as follows:
> ...
> (12) Two hundred dollars for a violation of s. 316.520(1) or (2). If, at a hearing, the alleged offender is found to have committed this offense, the court shall impose a minimum civil penalty of $200. For a second or subsequent adjudication within a period of 5 years, the department shall suspend the driver license of the person for not less than 1 year and not more than 2 years.

The Florida Uniform Traffic Control Law does not define the term "adjudication." The Administrative Procedure Act, 5 U.S.C. § 551(7) (2021), defines adjudication as the "agency process for the formulation of an order." Other jurisdictions have used a similar definition. *See e.g., Shoreline Transp., Inc. v. Robert's Tours and Transp., Inc.,* 779 P.2d 868, 872 (Haw. 1989) ("[A]djudication is the process by which the agency applies either law or policy, or both, to the facts of a particular case."); *Waslow v. Pa. Dept. of Educ.,* 984 A.2d 575, 581 (Pa. 2009) ("An administrative adjudication is defined . . . as any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made." (quoting 2 Pa.C.S. § 101)); *York v. Athens College of Ministry, Inc.,* 821 S.E.2d 120, 123 (Ga. Ct. App. 2018) ("Also, adjudication is [generally] the decision making process for applying preexisting standards to individual circumstances." (alteration in original) (quoting *State v. Intl. Keystone Knights of the Ku Klux Klan,* 788 S.E.2d 455 (2016))); *HTH Cos., Inc. v. Mo. Dep't. of Labor and Indus. Relations,* 157 S.W.3d 224, 228 (Mo. Ct. App. 2004) ("In contrast to a rule, an adjudication is '[a]n agency decision which acts on a specific set of accrued facts and concludes only them.' " (alteration in original) (quoting *Missourians for Separation of Church and State v. Robertson,* 592 S.W.2d 825, 841 (Mo. App. 1979))); *Trans Shuttle, Inc. v. Pub. Utils. Com'n of State,* 89 P.3d 398, 408 (Colo. 2004) ("[A]n adjudication involves a determination of rights, duties, or obligations or identifiable parties by applying existing legal standards to facts developed at a hearing conducted for the purpose of resolving the particular interests in question." (quoting *AviComm, Inc. v. Pub. Utils. Comm'n,* 955 P.2d 1023, 1030 (Colo. 1998))). Our own supreme court has also relied on a similar definition. *See Raymond James Fin. Servs., Inc. v. Phillips,* 126 So. 3d 186, 191 (Fla. 2013) [38 Fla. L. Weekly S809a] ("The term adjudicatory refers back to adjudication, which is defined as both '[t]he legal process of resolving a dispute,' as well as 'the process of judicially deciding a case.' " (quoting *Black's Law Dictionary* 47)).

Defining adjudication solely as a process would end in an absurd result, as the statute clearly does not contemplate suspending the license of a person who has twice been part of a process resulting in a decision. *See Brown v. Nationscredit Fin. Servs. Corp.,* 32 So. 3d 661, 663 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D539b] ("[A] literal interpretation of the statutory language need not be given if doing so would lead to an unreasonable or absurd result." (citing *Maddox v. State,* 923 So. 2d 442, 446 (Fla. 2006) [31 Fla. L. Weekly S24a])). Reading the two sentences of section (12) together, it is clear that the Legislature intended for the Department to suspend the driver license of a person who had committed the offense of improperly loading a vehicle twice within a five year period. This interpretation has been adopted by Florida's courts when reconciling other provisions of the traffic code. *See State v. Keirn,* 720 So. 2d 1085, 1090 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1144d].

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(BASS, Judge, dissenting.) I respectfully dissent. Section 318.18(12), Florida Statutes, requires a second or subsequent "adjudication." The traffic court withheld adjudication. By the plain meaning of the language the traffic court used, Petitioner did not suffer the requisite second adjudication.

* * *

**Licensing—Driver's license—Hardship license—Denial—Licensee has failed to show that denial of hardship license was legally deficient because agency did not consider evidence regarding his past medical diagnosis and subsequent medication where that evidence was not presented during hardship license hearing**

TIMOTHY R. CARSON, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 5th Judicial Circuit (Appellate) in and for Hernando County, Civil Division. Case No. 27-2021-CA-001015-CAAM. October 19, 2022. Counsel: Elana J. Jones, Former Assistant General Counsel, DHSMV, for Respondent.

**ORDER ON MOTION TO/FOR ORDER TO SHOW CAUSE—HARDSHIP**

(PAM VERGARA, J.) THIS CAUSE came before this Court upon a Motion To/For Order to Show Cause—Hardship which was filed *pro se* by the Petitioner, Timothy R. Carson, on or about March 24, 2022 ("Motion"). The Court entered an order on May 16, 2022, which gave the Respondent ten days to file a response to the Motion. The Respondent's Response to Petitioner's Motion for Order to Show Cause was filed May 26, 2022 ("Response"). This Court, having considered the Motion, the Response, and having reviewed the case file, finds as follows:

**I. BACKGROUND & ISSUE**

**1.** On December 17, 2021, Petitioner filed a Petition for Writ of Certiorari, along with exhibits.

**2.** The Petitioner contends that he pleaded to charges following an accident but now seeks a hardship license for employment purposes. The Petitioner further contends that his past driving record is only blemished by prior incidents caused due to schizophrenia, and he otherwise has a clean record since acquiring needed medication.

**3.** The Petitioner states he needs a hardship license to keep his job, his home, support his kids and pay for other responsibilities.

**4.** The Motion contends that the Petitioner was informed by the Bureau of Administrative Review that he was eligible for an employment hardship license. The Motion further states that the noted review denying the hardship license did not have information concerning Petitioner's past medical diagnosis of schizophrenia which had caused the preceding accident. It is thus argued that without the knowledge that the Petitioner has since been medicated and has an otherwise clean driving record lasting several years that the Bureau would not have been able to make an educated decision.

**5.** The Petitioner now asks that Court to grant him an employment hardship license.

**6.** The Respondent, as noted in the Response, has no position concerning the Petitioner's motion and will respond should this Court find there is a preliminary basis of relief and issue an order to show cause to the Respondent.

**II. RULES**

**7.** The authority to grant a hardship license lies solely with the Department of Highway Safety and Motor Vehicles. An appeal of such a decision may be initiated by filing a petition for writ of certiorari with a circuit court within 30 calendar days of the order by following the procedure specified in Fla. Stat. §322.31.

**8.** Pursuant to Fla. Stat. §322.31, writ of certiorari cases are governed by the Florida Rules of Appellate Procedure.

**9.** Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process is accorded, (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgement are supported by competent substantial evidence, *DHSMV v. Silva,* 806 So. 2d 551, 553 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a].

**10.** Even if the Petitioner's due process rights were violated during a hardship hearing, remand is the appropriate remedy to address such a violation. See *Department of Highway Safety and Motor Vehicles v. Chamizo,* 753 So.2d 749, 752 (Fla. 3rd DCA 2000) [25 Fla. L. Weekly D711e] ("Where there hearing officer makes a harmful trial error, the remedy is to send the matter back for a new hearing").

**III. ANALYSIS**

**11.** In the case at hand, the Petitioner asserts that the Petitioner's past medical diagnosis of schizophrenia, subsequent medication, and past driving record were not known by the Respondent. The Petitioner claims that his schizophrenia "caused the entirety of the incidents" that show on his past driving record which Respondent relied upon before denying his hardship license. However, Petitioner does not state that the Respondent was presented with this information during the hearing, only that the Respondent did not have the information of such.

**11.** The Final Order Denying Early Reinstatement filed by the Respondent stated that the sanction at issue against the Petitioner related to a Failure to Stop and Render Aid. The noted order denying early reinstatement to Petitioner following the hardship hearing further stated that the Petitioner's driving record, testimony, qualifications, fitness and need to drive were all considered during the hardship hearing.

**12.** To make a case that a new hardship hearing should be held, the Petitioner was required to show that due process was not accorded, or that essential requirements of the law were not observed, or that the findings and judgement were not supported by competent substantial evidence. It is not enough at this stage to state that the Respondent did not consider evidence which had not even been put forth during the hardship hearing for consideration. The Petitioner does not dispute that an accident occurred, that he plead to the given charge, and that he had prior incidents in his record. Such would constitute competent substantial evidence from which the Respondent could have based the decision to deny the hardship license upon.

**13.** This Court thus finds that neither the Petition for Writ of Certiorari nor the Motion at issue allege facts sufficient to show that the Respondent's denial of the Petitioner's requested hardship license was legally deficient pursuant to the three-part standard noted in *DHSMV v. Silva,* 806 So. 2d 551, 553 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a].

**IV. CONCLUSION**

**14.** This Court's review is limited to determining whether the agency provided procedural due process, observed the essential requirements of law, and supported its findings with competent substantial evidence. See *Miami-Dade County v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 198-99 (Fla. 2003) [28 Fla. L. Weekly S717a]; see also *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). As the Petitioner has failed to allege procedural due process concerns in the instant matter, denial of both the Motion and Petition for Writ of Certiorari is required at this time. In view of the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

**1.** The Motion To/For Order to Show Cause—Hardship filed on or about March 24, 2022 is **DENIED**.

**2.** The Petition for Writ of Certiorari filed on December 17, 2021, is **DENIED.**

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Timeliness—Failure to conduct formal review hearing within 30 days of request for hearing did not deprive licensee of due process where hearing was scheduled to occur within 30 days, as required by statute, and continued at request of licensee—Licensee was not deprived of due process when, rather than assigning case to another hearing officer when assigned hearing officer became unavailable, hearing was continued for second time—Failure to provide valid breath sample—Finding that licensee's failure to provide valid breath sample was willful, rather than result of facial paralysis, was supported by competent substantial evidence**

REGAN NIEMANN, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 21-000009AP-88A. UCN Case No. 522021A000009XXXXCI. October 21, 2022. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative Reviews Department of

Highway Safety and Motor Vehicles. Counsel: Eliam Michael Isaak, Tampa, for Petitioner. Christie Utt, General Counsel, and Mark L. Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(**PER CURIAM**.)

**Facts and Procedural History**

On January 2, 2021, Petitioner was charged by citation with Driving Under the Influence ("DUI"), pursuant to Fla. Stat. § 316.193. Petitioner was also given citations for failure to stop at a steady red light and for driving on the wrong side of the roadway. The DUI citation served as notice of Petitioner's driver license suspension for refusing to submit to a breath test in violation of Florida's implied consent law. Petitioner timely requested an administrative hearing to challenge the lawfulness of her driver license suspension. The request for the formal review hearing was received by the Department on January 11, 2021. The formal review hearing was scheduled for February 3, 2021 and was to be held telephonically and through zoom to allow for the identification of each witness. Petitioner (through counsel) submitted draft subpoenas for three law enforcement witnesses to the Department via email on January 27, 2021 at 10:47a.m. for approval and issuance. Petitioner and Hearing Officer Kathryn Bischoff exchanged emails regarding the form of the subpoenas. Hearing Officer Bischoff sent an email at 10:52a.m. that the subpoenas did not meet the current form and were being rejected. Petitioner responded at 11:21a.m. that the subpoenas were in the correct form. Officer Bischoff approved the subpoenas and returned the executed subpoenas by email to Petitioner at 3:09p.m. Petitioner stated his process server would not be able to serve the subpoenas on the designated witnesses with the St. Petersburg Police Department prior to 4:00p.m. as the subpoenas would not be accepted by the St. Petersburg Police Department liaison and the witnesses would not be served 7 days prior to the hearing as required by Florida Administrative Code Rule 15A-06.012(3) F.A.C. (2007). Petitioner requested a continuance due to the inability to comply with Rule 15A-06.12(3). Hearing Officer Bischoff continued the hearing to February 11, 2021.

The February 11, 2021 hearing date was continued by the Department due to Hearing Officer Bischoff being called out of the office for a family emergency. Petitioner was notified and the hearing was continued to March 10, 2021.

On March 10, 2021, the formal review began; however, only two witnesses testified. At this hearing, Hearing Officer Bischoff entered into evidence the self-authenticated documents submitted by the St. Petersburg Police Department pursuant to § 322.2615(2). Petitioner did not contest the lawfulness of the traffic stop and as such, it is not addressed in this opinion. Other documentation entered into evidence provided the factual basis for Petitioner's refusal to submit to a breath test. The Breath/Urine testing Form indicates that the Petitioner initially refused to submit to a breath test, then agreed to the breath test after being read the implied consent warning. The handwritten notes of the breath test operator state in pertinent part:

> "Asked def is she would take the test. Initially agreed, then changed her mind. Read "IC". Def then agreed to provide sample. I showed & explained how to properly blow into mouth piece. Def then placed half of her mouth on mouth piece and began blowing. Instrument did not make a tone as def did not blow properly into it. Def then began complaining of her facial paralysis stating she could not wrap her lips around mouth piece. Def continued trying to blow into mouth piece eventually getting the instrument to tone. The she would readjust her mouth which stopped the air flow."

The Breath Alcohol Test Affidavit reflects that the first sample resulted in "No Sample Provided". The second sample was "Subject Test Refused."

After being identified and sworn in, Officer Amanda DeSoto testified that she has been with the St. Petersburg Police Department for 10 years. Officer DeSoto observed Petitioner's driving and initiated the traffic stop. She stated she observed Petitioner to have some glassy eyes, a small odor of alcohol and she could "detect and I could understand a little bit of her speech to be thick-tongued and mumbled." In response to Petitioner's questions Officer DeSoto testified:

> A. I could see something was wrong with her face. I did not know what.
> Q. Okay
> A. She had—she appeared to be on one side disfigured in sort of a way.
> Q. Would you say it was obvious that she had some sort of issue with half of her face?
> A. Yes.

Officer DeSoto had no further contact with Petitioner. The second witness was Officer Naomi Wright with the St. Petersburg Police Department. At the time of the arrest, Officer Wright was assigned to the DUI squad. Based on Officer Wright's conversation with Petitioner it was established that Petitioner is blind in her left eye due to an injury sustained in a car accident. The following exchange occurred between Petitioner's counsel and Officer Wright:

> Q: (by counsel) Now, during this time period that you were making these observations you also observed, did you not, that she has a very distinct and noticeable issue with her face?
> A: Yes, I wouldn't say extremely noticeable, but yes.
> Q: I noticed in your report, you explain—or you—noted as she had face paralysis as a physical defect.
> A: Well, one of the health questions that I Ask if they have any physical defects, and her response was, 'Yes, I have face paralysis.' "
> Q: Now, how close were you standing to her when you were having this conversation with her about her—her personal information?
> A: I would say roughly one to two feet.
> Q: Could you see yourself that there's an issue with her face?
> A: I could, yes.
> Q: Okay, was it obvious to you?
> A: Not extremely obvious, no.
> Q: Okay, Did you notice that she had an issue with her face before she told you about it?
> A: No, not really. No, I didn't.

At the close of the testimony, Petitioner moved to invalidate the driver license suspension due to the failure of Officer Lamour to appear. Hearing Officer Bischoff denied the motion as failure of the breath officer to appear was not an automatic invalidation. Hearing Officer Bischoff ruled that she would allow Officer Lamour 48 hours to provide just cause for his failure to appear at the March 10, 2021 hearing. Petitioner requested that she be allowed to testify at a later hearing, either after Officer Lamour testified or a motion to enforce the subpoena was ruled on. The Petitioner's temporary driving permit was extended allowing the Petitioner to hold a restricted driving privilege throughout the remainder of the administrative process.

At the March 24, 2021 hearing, Officer Lamour testified that he had attempted to contact the BAR office to call in for the hearing but was not able to get through on the telephone at the time of the hearing. The hearing officer found this explanation constituted just cause for his nonappearance. In response to counsel's questioning, Officer Lamour testified that he was not able to tell that Petitioner had facial paralysis. He stated that Petitioner had no difficulty communicating with him and he had no knowledge of a facial paralysis until informed by Petitioner when she was "giving the breath test." Officer Lamour testified that the breath test operator, not the individual taking the test, holds the mouthpiece. The individual must wrap their lips around the mouthpiece to create a seal to push deep-lung air into the breath test tube which then goes into the air chamber. The breath test machine

emits an audible tone when the individual submits a correct air sample. Petitioner's counsel asked:

> Q: So as I understand it, she put the mouth piece in her mouth and was trying to find a position where she was able to create a seal, but was incapable of doing that?
>
> A: No, she did find a seal at one point, because the instrument did tone. As soon as she heard that tone going off, she then readjusted the mouthpiece out of her mouth causing the instrument to no longer take in anymore air which then gave us the no sample provided, so it seemed like to me as soon as she heard the tone on the instrument go off, she would then readjust the mouthpiece intentionally.

Petitioner's testimony was via video, to allow the hearing officer to visually observe Petitioner's facial movements. Petitioner explained her facial paralysis was due to being ejected from a car as a result of a drunk driving accident. Petitioner was not the driver in the accident. Petitioner explained that she could not form a seal for the breath test because her nerves attached to the wrong muscles as a result of her injury. Petitioner stated she could not hold a seal for a long time without her muscles tiring and giving out. Petitioner stated she was given approximately four to five opportunities to submit to a breath sample. Petitioner opined that Officer Lamour was not able to observe her difficulty in forming a seal because he was on the right side of her, but her facial paralysis affects the left side of her face. Petitioner submitted limited medical records explaining that because the accident had occurred over 10 years ago, the treating hospital had destroyed the records. Petitioner's records were dated November 8, 2013 and May 22, 2014. Petitioner testified that she had consumed alcohol prior to her driving that evening, although she takes drinking and driving very seriously as she believes the accident that caused her injuries was the result of an impaired driver.

Hearing Officer Bischoff issued her Findings of Fact, Conclusions of Law and Decision April 2, 2021. Hearing Officer Bischoff found that Petitioner's failure to provide breath samples constituted a refusal and was not due to a physical inability to do so based upon her facial paralysis. The Findings of Fact state:

> "I observed the Petitioner closely on video during the hearing, including her testimony. Facial paralysis was not obviously apparent with the exception that the Petitioner's left eye does not appear completely open. During the testimony of Officer Soto and Officer Wright a slight dimple would appear at times to the left of Petitioner's mouth. The Petitioner's speech was clear during her testimony and she did not appear to have any difficulty speaking or moving her lips."

Hearing Officer Bischoff ruled:

> I find the Petitioner failed to prove she was physically unable to provide a valid breath test. The petitioner only told Officer Lamour she had facial paralysis and could not wrap her lips around the mouthpiece during the first breath sample. The Petitioner had a conversation with Officer Lamour prior to the breath test during which Officer Lamour explained the test. The Petitioner did not mention facial paralysis at that time or voice any concern about her ability to follow the instructions for a valid breath test. The Petitioner was able to obtain a tone, indicating she was pushing air into the machine, but then moved her mouth causing the tone to stop. Thereafter, the Petitioner continued to move her mouth and not follow Officer Lamour's instructions resulting in no breath sample provided. I find Officer Lamour's opinion this behavior on the part of the Petitioner was intentional to be credible. The evidence is clear the Petitioner only mentioned her facial paralysis one time despite multiple attempts to provide a breath same. The evidence does not show the Petitioner objected to her failure to provide a breath sample being a refusal. The Petitioner did not request to provide a blood sample, despite her position she was unable to provide a breath sample and her belief a breath test would have exonerated her.
>
> This Hearing Officer's observations of the Petitioner are the same as those of Officer Wright and Officer Lamour—facial paralysis is not immediately apparent. The Petitioner's speech was clear during her testimony and she did not appear to have any issues with her face or lips while speaking.

The order of suspension of the driving privilege of Petitioner was affirmed. Petitioner subsequently filed the instant Petition for Writ of Certiorari.

**Standard of Review**

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento,* 989 So. 2d 692, 693 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1926a]. This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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

§ 322.2615, Fla. Stat.

"The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not . . . . Substantial evidence has been defined as evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *State v. Edwards,* 536 So. 2d 288, 292 (Fla. 1st DCA 1988). The hearing officer is the sole decision maker as to the wright, relevance and credibility of any evidence presented. Rule 15A-6.013(7), Fla. Admin. Code.

**Discussion**

Petitioner incorrectly argues that the hearing officer departed from the essential requirement of law by failing to hold the formal review hearing within 30 days of Petitioner's request as required by Fla. Stat. 322.2615(6)(a). Petitioner's application was deemed received by the Department on January 11, 2021. *Sloas v. State, Dep't of Highway Safety & Motor Vehicles,* 5 Fla. L. Weekly Supp. 570a (Fla. 9th Cir. Ct May 26, 1998). The initial hearing was scheduled within thirty days of that date, specifically February 3, 2021. The hearing was continued because Petitioner was unable to timely serve the subpoenas on the police officers. Petitioner argues that the delay in subpoenaing the officers was due to the delay in the hearing officer approving the subpoenas and therefore any continuance was "foisted upon the Petitioner". Petitioner sent draft subpoenas to the hearing officer on January 27, 2021. The subpoenas had to be served by the close of business on January 27, 2021 as required by Fla. Admin. Code 15A-

60.12(3)(c). The hearing officer originally found the subpoenas to be incorrect, but after emails between Petitioner and hearing officer, the subpoenas were issued that day. Petitioner argues that his process server would have been unable to drive the subpoenas to the St. Petersburg Police Department within the 51 minutes remaining before 4:00p.m. deadline set by the police department to accept the subpoenas.

At this point, Petitioner could have proceeded to the formal review hearing without the testimony of the officers or he could request a continuance for service of the subpoenas. The Petitioner requested a continuance for service of the subpoenas. The hearing was reset February 11, 2021. On February 11, 2021, Petitioner was informed that the hearing officer had a family emergency and the hearing would need to be continued. Even assuming arguendo that the continuance of the February 3, 2021 was due to the hearing officer not timely approving the subpoenas sent to her the morning of January 27, 2021, Petitioner's argument is incorrect.

Petitioner alleges the Department failed to adhere to the thirty day hearing requirement under § 322.2615(6) when it rescheduled her proceeding; therefore, her suspension should be invalidated. The Court finds this argument without merit. § 322.2615(6)(a) states: "if the person arrested requests a formal review, the Department must schedule a hearing to be held within 30 days after such request." However, § 322.2615(9) outlines the procedure for staying a person's driver license after a request for a formal review, when the Department should invalidate the suspension and when the Department should issue a temporary driving permit. The Florida Legislature specifically amended the section in 1991 changing the language from "if the department fails to conduct the formal review hearing within 30 days" to "if the department fails to schedule the formal review to be held within 30 days" Chapter 91-255, § 20, Laws of Florida. If the hearing must be conducted within 30 days, there would be no purpose of any rules outlining continuance procedures under § 322.2615(9) or Fla. Admin. Code 15A-6.015(2). *Vodar v. State of Florida, Dep't of Highway Safety and Motor Vehicles,* 15 Fla. L. Weekly Supp 226a (Fla. 13th Cir. Ct. Jan. 11, 2008); *Collard v. State of Florida, Dep't of Highway Safety and Motor Vehicles,* 4 Fla. L. Weekly Supp. 749b (Fla. 9th Cir. Ct. June 2, 1997)

Fla. Stat. § 322.2615(9) states in relevant part:

> If the schedule hearing is continued at the department's initiative or the driver enforces the subpoena as provided in subsection (6), the department shall issue a temporary driving permit that shall be valid until the hearing is conducted if the person is otherwise eligible for the driving privilege.

Petitioner argues that a due process violation occurred when Hearing Officer Bischoff was unavailable to conduct the February 11, 2021 hearing and it was continued rather than being assigned to another hearing officer. Petitioner states: "It is inconceivable that no one was available anywhere in the State of Florida to preside in the absence of the hearing officer assigned to the Petitioner's case." Hearing officers are not widgets. In *Wolk v. State of Florida, Dep't of Highway Safety and Motor Vehicles,* 14 Fla. L. Weekly. Supp. 136a (Fla. 17th Cir. Ct. Dec. 11, 2006) the assigned hearing officer was unavailable for the hearing. The Court held that the Department did not violate the due process rights of the Petitioner. The hearing was continued by the Department and held on August 16, 2006 and during that time, the Petitioner was given a temporary driving permit during the continuance as per Fla. Stat. § 322.2615(9).

Petitioner's formal review hearing was set within the 30-day requirement. Petitioner moved to continue the February 3, 2021 hearing. The hearing was reset to February 11, 2021, which was still within the 30-day window. The February 11, 2021 hearing date was continued at the request of the Department and Petitioner's temporary permit was continued in compliance with § 322.2615(9). Petitioner was issued a temporary driving permit January 13, 2021 and the permit was continued throughout the administrative review hearing. The Court finds Petitioner is not entitled to relief on this claim. There has been no due process violation.

Petitioner's second argument is the hearing officer departed from the essential requirements of law by failing to invalidate the Petitioner's suspension as a result of her facial paralysis causing her inability to provide a sufficient breath sample. Petitioner posits that the hearing officer's determination that the Petitioner willfully refused is a legal conclusion and as such the court has the authority to reverse the decision.

In reviewing the record, the court may not reweigh the evidence nor substitute its judgment for that of the hearing officer. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989). The court's task is to review the record for evidence that supports the agency's decision, not that which rebuts it. See *Broward Cnty. v. G.B.V. Int'l, Ltd.,* 787 So. 2d 838, 846 (Fla. 2001) [26 Fla. L. Weekly S389a]. The circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it is supported by the hearing officer's findings. *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 942 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. "Clearly, this Court is in no position to reweigh the evidence or to substitute its judgment for that of the agency. The Hearing Officer was the trier of fact and was in the best position to evaluate the evidence and the credibility of the witnesses in making her determination about the circumstances under which Santiago submitted to the tests." *Santiago v. Dep't of Highway Safety and Motor Vehicles,* (3 Fla. L. Weekly Supp. 43b (Fla. 20th Cir. Ct. March 1 1995). Based upon the competent substantial evidence standard, this Court must only decide "whether the record contains the necessary quantum of evidence." *Lee County v. Sunbelt Equities II, Ltd. Partnerships*, 619 So. 2d 996, 1003 Fla. 2d DCA 1993).

Petitioner directs the Court to *Counts v. Dep't of Highway Safety & Motor Vehicles,* 19 Fla. L. Weekly Supp.1001a (Fla. 15th Cir. Ct. Sept. 5, 2012) and *Brass v. Dep't of Highway Safety & Motor Vehicles,* 19 Fla. L. Weekly Supp. 5a (Fla. 15th Cir. Ct. Oct. 5, 2011) wherein the findings of the hearing officers that the petitioners' failure to comply with a breath or urine test was a refusal were reversed and the court found that the petitioners were unable to comply with the required tests. In *Counts,* the driver had asthma and provided medical records that proved the diagnosis. Additionally, *Counts* while in the presence of the officer breathed heavily, coughed repeatedly and requested a blood test. In *Brass,* the petitioner was unable to submit a urine sample. In that case, the officer testified that the petitioner could not provide a sample and additional evidence was that the petitioner had a prostate issue. Hearing Officer Bischoff distinguished the cases cited by Petitioner in her Findings. In *Counts,* the petitioner had noticeable physical signs of difficulty breathing. In *Brass,* the petitioner repeatedly requested additional water and time to be able to submit to a urine sample.

In *Dep't of Highway Safety & Motor Vehicles v. Cherry,* 91 So. 2d 849 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a], the petitioner kept biting the mouthpiece and would barely blow into it. Law enforcement deemed this action as an "implied refusal." *Id*. at 853. The circuit court found that Ms. Cherry's actions did not constitute a refusal, but on second tier certiorari review, the Fifth DCA held that "although Ms. Cherry did not expressly refuse to submit to a breath alcohol test, she did so by purposely avoiding the submission of valid samples." *Id.* at 855. The Fifth DCA also held that the circuit court had improperly reweighed the evidence before the hearing officer and

applied the wrong law by engaging in its own review of the evidence to reach a different conclusion. *Id*. at 856.

Petitioner may argue that *Cherry* is distinguishable because Petitioner offered a credible excuse of why she did not submit valid breath samples; however, Hearing Officer Bischoff made a specific finding that "Based on my observations of the Petitioner and the evidence presented, I find it more credible than not the Petitioner willfully failed to provide two valid breath samples."

Petitioner presented medical records of a physical therapy initial plan of care dated November 18, 2013 and a physical therapy plan of care progress report dated November 27, 2014. The unrebutted testimony of Petitioner is that she suffered facial paralysis. Officer Soto testified that it was obvious to her that there was something wrong with Petitioner's face. Officer Wright testified that she did not at first notice anything about the Petitioner's face until she was told of the facial paralysis. Officer Lamour testified he did not notice the facial paralysis while he was speaking with Petitioner prior to the breath test and that he had no difficulty communicating with her. Petitioner did not tell Officer Lamour she suffered from facial paralysis until she was requested to take the breath test. Hearing Officer Bischoff observed Petitioner on a video while the witnesses and Petitioner testified. Hearing Officer Bischoff stated "Facial paralysis was not obviously apparent with the exception that the Petitioner's left eye does not appear completely open. During the testimony of Officer Soto and Officer Wright a slight dimple would appear at times to the left of Petitioner's mouth. The Petitioner's speech was clear during her testimony and she did not appear to have any difficulty speaking or moving her lips."

"The hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented." Fla. Admin. Code R15-6.013(7)(c). A hearing officer is not required to believe the testimony of any witness, even if that Testimony is unrebutted. *State of Florida, Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *Dep't of Highway Safety and Motor Vehicles v. Marshall,* 848 So. 2d 482 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b].

There was competent substantial evidence to support the findings of Hearing Officer Bischoff.

**Conclusion**

The Court must determine only whether the administrative findings and judgment are supported by competent substantial evidence, and we find that it is. Procedural due process was accorded, the essential requirements of law have been observed, and the Hearing Officer's findings of fact and decision are supported by competent substantial evidence. Petition for Writ of Certiorari is denied. (SHERWOOD COLEMAN, KEITH MEYER, and GEORGE M. JIROTKA, JJ.)

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Timeliness—Remote proceedings—Date stamp placed on request for formal review hearing by Department of Highway Safety and Motor Vehicles, rather than date placed on request by licensee, is date from which timeliness of hearing is measured—Continuance of hearing that was originally scheduled to occur within 30 days of stamped date of receipt of request does not affect validity of license suspension—Appearance of hearing officer telephonically from outside of county where notice of suspension was issued did not deprive licensee of due process—Telephonic appearance by hearing officer is authorized by amended department rule and by Governor's executive order in response to COVID-19 pandemic**

LANDON JAMES COADY, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 21-000007AP-88A. UCN Case No. 522021AP000007XXXXCI. October 12, 2022. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: Brooke Elvington, for Petitioner. Christine Utt, General Counsel, and Mark L. Mason, Former Assistant General Counsel, for Respondent.

(**PER CURIAM**.) This matter is before this Court on Petitioner, Landon James Coady's Petition for Writ of Certiorari, filed on March 26, 2021. Having reviewed the record before this Court and the applicable law and being otherwise fully advised, this Court finds that the Petitioner has not demonstrated entitlement to certiorari relief.

**Brief Procedural History**

On December 30, 2020 Petitioner was arrested in Hillsborough County for driving under the influence ("DUI") in violation of section 316.193, Florida Statutes. The DUI citation issued to Petitioner also served as a notice of his driver license suspension for refusing to submit to a breath test. Petitioner, through counsel, mailed his application for a formal review of his driver license suspension before the Department's Bureau of Administrative Reviews ("BAR") at 2814 E. Hillsborough Ave, Tampa, FL 33606. The cover letter from Petitioner's counsel is dated January 5, 2021 and Petitioner has a printed receipt from the United States Postal Service (USPS) showing the packet was mailed to the BAR on January 5, 2021. There is no return receipt from the USPS establishing when the packet was received. The application contains a stamp at the top of the document "Date received by DHSMV" with the date January 19, 2021. The same date stamp is also included on Petitioner's cover letter referencing the application, the citation and the $25.00 check for the filing fee.

On February 2, 2021, the Department mailed a Notice of Telephonic Formal Review Hearing to Petitioner setting the formal review hearing on February 17, 2021 at the Tallahassee branch of the Department. The Department sua sponte continued the hearing to February 24, 2021 at the Department's Clearwater Branch. The hearing was conducted February 24, 2021 before Attorney Hearing Officer Kathryn Bischoff, who was physically located at the Clearwater Branch. The hearing was held telephonically and without witness testimony. Petitioner's counsel made the following arguments at the hearing:

1. The suspension should be invalidated for failure to schedule a review hearing within thirty (30) days pursuant to Florida Administrative Code 15A-6.013;

2. The driver license suspension should be invalidated for violation of Rule 15A-6.009 for failure to hold the formal review hearing in the office nearest to the county in which the arrest was made; and

3. The suspension should be invalidated because the documents used to support the driver license suspension lacked a law enforcement oath and/or affidavit.

The hearing officer rendered a final order February 26, 2021 affirming Petitioner's driver license suspension and made findings as to each of Petitioner's arguments:

Ruling 1: Denied. DDL#3 and DDL#4, the letter from counsel for Petitioner requesting a formal review hearing and application for formal review hearing, respectively are both date stamped January 19, 2021. DDL#5 shows the filing fee for the formal review hearing ($25.00 check referenced in DDL#3) was processed January 19, 2021; the same day it was received, along with the request for formal review hearing, at the Tampa office of the Bureau of Administrative Reviews. The formal review hearing was initially scheduled for February 17, 2021, and continued by the Department to February 24, 2021. February 17, 2021, is 29 days after the application was received by the Bureau of Administrative Reviews in Tampa. Rule 15A-6.013(1)(a) FAC states the formal review hearing shall be scheduled to be held within 30 days after the request was received by the division. Continuance of a formal review hearing that was original/

scheduled within the 30 days shall not affect the validity of the suspension Rule 15A-6.013(1)(a). The rule is clear the 30 days to schedule a formal review hearing runs from the date the request is received by the Bureau of Administrative Reviews. There is no "mailbox" rule or rule that extends from the time the request is mailed.

Ruling Motion 2: Denied. Rule 15A-6.009 FAC requires "Hearings shall be held at the nearest Department Hearing Office assigned to the county where the arrest occurred or the notice of suspension or disqualification was issued. The Hearing Officer is authorized to conduct all hearings using communications technology approved by the department." Due to COVID-19 restrictions all hearings held by the Department are being conducted telephonically. Petitioner did not subpoena any witnesses for the formal review hearing and therefore there is no confrontation issue that could have affected Petitioner's due process rights. In the interest of providing Petitioner the most timely formal review hearing, holding the hearing telephonically from a Department office in Clearwater, Florida has a de minimis impact and furthers the interest of both the Petitioner and the Department.

Ruling Motion 3: Denied. DDL#2 page 2 of 23 is entitled "Criminal Report Affidavit/Hillsborough County, Florida" and constitutes a probable cause affidavit supporting the arrest. The affidavit is sworn to and digitally signed by the arresting officer. The affidavit is attested to through digital signature by Cpl. Simms, badge number provided.

The Petitioner challenging the final order was timely filed.

**Standard of Review**

"[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a]. When exercising certiorari review, the court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. See *Department of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

**Discussion**

"As an initial matter, the [c]ourt notes the limited scope of its review. It must only determine whether competent, substantial evidence existed in support of the hearing officer's findings and final decision." *Garcia v. Department of Highway Safety and Motor Vehicles,* 27 Fla. L. Weekly Supp. 670b (9th Cir. Ct. Sept. 11, 2019) citing *Dusseau v. Metro Dade Cty. of Cty. Comm'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] (holding that once the reviewing court determines there is competent substantial evidence to support the hearing officer's decisions, the court's inquiry must end, because the issue is not whether the hearing officer made the best, right, or wise, decision, but whether the hearing officer made a lawful decision).

Petitioner asserts the driver's license suspension must be invalidated as the formal review hearing did not occur within the 30 day time period required by Administrative Code 15A-6.013. Petitioner was charged with DUI on December 30, 2020 and requested a formal review within ten days of the arrest. Petitioner presented evidence that the request was mailed form counsel's office on January 5, 2021 and could not have been recived later than January 10, 2021 under the "mailbox rule". Florida Rule of Judicial Administration 2.514(b) provides that "when a party may or must act within a specified time after service and service is made by mail, 5 days are added after the period that would otherwise expire under subdivision (a). The Florida Rules of Judicial Administration do not apply to hearings held pursuant to Fla. Stat. 322.2615; as such, the mailbox rule is not applicable. *State Dep't of Highway Safety & Motor Vehicles v. Fernandez,* 114 So.3d 266, 271-272 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D729a].

The issue of whether the date indicated on the request for formal hearing or the date stamp by the Department has been addressed in *Slaos v. State Dep't of Highway Safety & Motor Vehicles,* 5 Fla. L. Weekly Supp. 570a (Fla. 9th Cir. Ct. May 26, 1998) stating, "[h]ence, just as the date-stamp placed on a document by the Office of the Clerk of the Court (rather than the date placed on the document by the party filing the document) constitutes the date on which the document was filed, the date stamp placed on a request for formal review hearing by the Department's office (rather than the date placed on the document by the petitioner filing the request) constitutes the date on which the request was filed". The *Sloas* court also found that "as the fact-finder, the hearing officer was entitled to examine all of the documents that were submitted into evidence and to resolve any inconsistencies therein. We cannot, on certiorari review, reweigh or reevaluate the hearing officer's findings of fact."

Petitioner cites to *Pfleger v. Department of Highway Safety & Motor Vehicles,* 18 Fla. L. Weekly Supp. 706a (6th Cit. Ct. May 11, 2011) as authority that the failure to schedule a hearing within the 30 day window constitutes a procedural due process error which requires invalidation of a suspension. In *Pfleger,* the arresting officer did not appear at the formal review hearing even though the officer had been served by subpoena for the hearing. *Pfleger* held that the "arresting officer's unexcused, unexplained non-appearance denied Petitioner the opportunity to confront and cross-examine him at the formal hearing within thirty days as contemplated by Department rules." *Pfleger* is not applicable to the facts of the case. The hearing officer's order may only be quashed if the record lacked competent, substantial evidence for the hearing officer's findings. The hearing officer committed no error in relying upon the date stamp to determine that the applicable date of receipt was January 19, 2021.

Petitioner next argues that procedural due process was denied as the Department failed to schedule the formal review hearing in the proper venue. The Petitioner was arrested in Hillsborough and pursuant to Administrative Code 15A-6.009, the review hearing should have occurred in Hillsborough. Petitioner cites to several decisions where the formal review hearings were not conducted in the county of the suspension and the driver's license suspensions were invalidated. It is of note that the cases cited were issued prior to the April 7, 2013 amendment of Rule 15A-6.009 "Location of Hearings". The pre-April 7, 2013 rule, as interpreted by the circuit courts provided that "hearings shall be held in the judicial circuit where the notice of suspension was issued, unless otherwise ordered by the hearing officer with the consent of the driver." However, after April 7, 2013, the rule was amended to read: "hearings shall be held at the nearest Department Hearing Office assigned to the county where the arrest occurred or the notice of suspension or disqualification was issued. The Hearing Officer is authorized to conduct all hearings using communications technology approved by the department." Clearly, the first sentence of the current rule imposes a venue requirement for in-person hearings so that a licensee would not be required to travel to any county for the formal review hearing. When the amendment is read with the Notice of Proposed Rule Change published when the rule was amended, it states "PURPOSE AND EFFECT: The Department seeks a proposed change to this rule in order to clarify jurisdiction for hearings at Bureau of Adminstrative Review (BAR) offices. This proposed language could provide cost-savings by providing greater flexibility for Hearing Officers and witnesses to appear telephonically in lieu of personal appearances at BAR offices." To require the hearing officer to appear personally at the BAR office in

the county of the licensee's arrest, even if appearing telephonically, defeats the purpose of the rule change. If the venue requirement applied to the telephonic portion of the administrative rule, there would not be greater flexibility afforded to hearing officers, along with witnesses as contemplated by the change. Hearing officers would still be obligated to conduct all hearings in the nearest Department Hearing Office, even if they are telephonic. Such a construction would defeat the stated intent of the rule amendment and should not be read to do so. *Dep't of Highway Safety & Motor Vehicles v. Patrick,* 895 So. 2d1131, 1136 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D349a]; *Celaj v. Dep't of Highway Safety & Motor Vehicles,* 29 Fla. L. Weekly Supp. 566a (7th Cir Ct. Oct. 4, 2021). Additionally, in this case, Petitioner did not present any witness testimony. As such, by allowing the hearing officer to appear telephonically from Clearwater rather than Hillsborough, the Petitioner was not deprived a meaningful opportunity to examine a witness.

The hearing officer found that due to COVID-19, all hearings held by the Department were being held telephonically. This finding is supported by Executive Order 20-52 issued by the Office of the Governor in response to the COVID-19 pandemic and extended by Executive Order 21-45. The Executive Order specifically provides: "[e]ach State agency may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of that agency, if strict compliance with the provision of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency."

Executive Order 20-52 issued by the Office of the Governor in response to the Covid-19 pandemic, and extended by Executive Order 21-45 which was in effect at the time of Petitioner's hearing, gave the Department the authority to suspend the venue requirement.

Petitioner was able to have his hearing and present evidence and argument. Petitioner did not subpoena witnesses. The appearance of the hearing officer in Clearwater, rather than in Hillsborough, did not impact his ability to file his appeal in the county where he resides pursuant to Fla. Stat. § 322.31.

Petitioner did not address the issue of the invalidated suspension as the documents, used to support the suspension laced a law enforcement oath and/or affidavit. The Court deems the issue abandoned.

**Conclusion**

The Court must only determine whether the administrative findings and judgment are supported by competent, substantial evidence, and we find that they are. Procedural due process was accorded, the essential requirements of law have been observed, and the Hearing Officer's findings of fact and decision are supported by competent substantial evidence.

**ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is denied. (SHERWOOD COLEMAN, PATRICIA A. MUSCARELLA, and GEORGE M. JIROTKA, JJ.)

* * *

**Counties—Animal control—Dangerous dogs—Statute allowing for dog owner's civil liability for dog bite to be diminished by negligence of another is not applicable to proceeding to determine whether dog should be designated as dangerous—No merit to argument that finding of dangerousness is precluded because tenant who was taking care of dog during owners' absence was trespassing when he entered locked bedroom to remove dog and let him into yard where attack occurred—Evidence demonstrates that tenant had permission to let dog into yard, and fact that tenant ignored owners' safety protocols for dog did not make him a trespasser—Finding that attack was unprovoked was supported by competent substantial evidence where there was conflicting testimony concerning whether dog was being held down by tenant for his son to pet him or was running free when dog attacked son**

ISIANA LOPEZ and DONOVAN EVANS, Appellants, v. MIAMI DADE COUNTY CODE ENFORCEMENT DIVISION, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-38-AP-01. L.T. Case No. 2021-X000174. October 24, 2022. Appeal from an Order of Hearing Officer for Miami-Dade County, Department of Code Enforcement. Counsel: Isiana Lopez and Donovan Evans, Pro se, Appellants. Geraldine Bonzon-Keenan, County Attorney, and Christopher J. Wahl, Assistant County Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(PER CURIAM.) Isiana Lopez and Donovan Evans appeal an order upholding a finding that their dog Jade qualifies as a dangerous dog under Section 5-22, Miami-Dade County Code, entitling Miami-Dade County to seize and euthanize the dog.

**Background**

The Appellants own Jade, a yellow Labrador mixed breed dog. In 2019, Jade was first cited as a dangerous dog when she bit an animal and the animal's owner who tried to break up a fight while Jade was off the property. To resolve the incident, Jade's owners entered a Settlement that stipulated that: "if Jade in the future commits any of the acts set forth in section 5-22(d) of the Code of Miami Dade County, then in any legal proceeding . . . Jade shall, as a matter of law, be treated . . . as if Jade were already designated dangerous under section 5-22 of the Code of Miami-Dade County."

That stipulation was triggered when, on June 20, 2021, Animal Control issued another citation charging that on April 11, 2021, Jade endangered, attacked or bit a human in violation of section 5-22. (App. 12). The County filed an *ex parte* petition, alleging that Jade's attack caused severe injuries and determining that Jade should be declared dangerous and euthanized (R. at 7-9). A county court judge granted the petition, and Jade was taken into custody pending the outcome of any hearings or appeals.

The Appellants requested a hearing to challenge the violation of 5-22. The factual accounts of the incident were conflicting, but all witnesses consistently testified that Jade bit tenant Manuel Abreu's two-year-old child Dean while the child was on the owners' property.

Manuel Abreu lived on the property with the Appellants. While the Appellants were traveling, Mr. Abreu remained at the home and took care of Jade. He was aware that the owners required that Jade's care must adhere to certain protocols. While outside, the owners required Jade to be hooked to a line trolley, to curtail her movements. When in the house, she was required to be kept in a locked kennel in the owners' locked bedroom. Further, when Mr. Abreu's two-year-old child Dean was visiting at the home, Jade was required to remain locked up. The owners testified that since the first incident in 2019, they took every safety precaution with Jade to prevent future injury. Ms. Lopez testified that Mr. Abreu was aware of the safety protocols for many years. Mr. Evans specifically testified that Mr. Abreu had permission to take Jade out of her locked kennel in the owners' bedroom and let her outside.

After Dean was bitten, Mr. Abreu initially told the Animal Control inspector that a stray dog came on the property and bit Dean. At the hearing, Mr. Abreu testified that this account was untrue. He testified that he "gave faith to" Jade and let her in the backyard while he and Dean were also outside. Jade passed Dean several times, then Dean "got too close," and Jade bit him. He alerted his son's mother and the Appellants, then rushed Dean to the hospital. Dean sustained several bites on the body, was treated for several open wounds and received a series of rabies vaccines.

A witness to the incident, Ms. Hitopoles, was standing next to Mr. Abreu when Jade bit Dean. She testified that she was on the patio with Dean when Mr. Abreu brought Jade outside. Ms. Hitopoles asked if she could bring Dean inside or if Mr. Abreu could connect Jade to the

trolley. Mr. Abreu instead held Jade and encouraged his son to approach to pet her. Ms. Hitopoles could see that Jade was uncomfortable and she started to walk over to intervene. Before she could take any action however, Jade bit Dean.

The Appellants expressed their sorrow and frustration at the unfairness of having their dog destroyed when they did everything they could to ensure that Jade could be kept safely. Had they not left Jade in the custody of Mr. Abreu, this incident would not have occurred.

The Hearing Officer upheld the finding of dangerous dog pursuant to Section 5-22 of the Miami-Dade County Code and ordered that the dog be destroyed. Mr. Abreu was ordered to pay the fine.

**Analysis**

Appellate review of quasi-judicial proceedings in the circuit court is governed by well-established standards: (1) whether due process was afforded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Miami-Dade County v. Omnipoint Holdings*, 863 So. 2d 195, 198 (Fla. 2003) [28 Fla. L. Weekly S717a].

The Appellants make three arguments. Appellants first argue that the owners' liability under section 767.04, Florida Statutes should be diminished by Mr. Abreu's negligence. We treat this claim as an argument that the essential requirements of law were not observed.

These proceedings were conducted pursuant to section 5-22 of the Miami-Dade County Code. Section 767.04 governs civil liability for a dog bite in the circuit court, not whether a dog should be designated as dangerous under the municipal code. Sections 5-22 and 5-23 do not incorporate this statute. Nor is there a provision which would mitigate a dangerousness designation based on the negligence of another party. Section 5-22(f) provides:

> Notwithstanding any other provision of this section, the responsible party shall not be liable, and the dog shall not be designated as dangerous, if the threat, injury or damage was sustained:
>
> (1) by a human who, at the time, was unlawfully on the property of the responsible party; or
>
> (2) by a human who, while lawfully on the property of the responsible party, was tormenting, abusing, or assaulting the dog, the responsible party, or another person lawfully on the property; or
>
> (3) while the dog was protecting or defending a human within the immediate vicinity of the dog from an unjustified attack or assault; or
>
> (4) by a human who was engaged in or attempting to engage in a criminal activity at the time of the attack; or
>
> (5) while the dog was engaged in a legal hunt or in a legal sport or exhibition such as an obedience trial, conformation show, field trial, hunting/retrieving trial, or herding trial; or
>
> (6) while the dog was engaged in law enforcement work under the direction of a law enforcement officer.
>
> . . .

These are the only exceptions to a designation of dangerous dog in the code. Thus, the negligence of Mr. Abreu does not mitigate the finding of dangerousness. As a result, the essential requirements of law were met.

The Appellants next argue that Mr. Abreu trespassed in their bedroom to remove Jade from her locked kennel. This argument tracks section 5-22(f)(1) of the Code precluding a finding of dangerousness if the bite was caused by a human unlawfully on the property. We consider this argument under the rubric of whether there is competent substantial evidence to uphold the hearing officer's findings. "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Florida Dept. of Highway Safety and 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. Commrs.*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. In other words, we do not re-weigh the evidence.

Appellants' argument is unsupported by the evidence. Both Mr. Abreu and Mr. Evans testified that Mr. Abreu had permission to let Jade into the backyard. The only way he could let her out is by entering the locked bedroom. It was uncontroverted that Mr. Abreu was required to abide by the owners' requirements for keeping Jade. That Mr. Abreu disregarded all the protocols in doing so does not make him a trespasser. There was certainly competent substantial evidence to sustain the hearing officer's findings.

Finally, the Appellants claim that Jade was provoked into biting Dean and therefore not subject to a dangerous dog finding as set forth by section 5-22(f)(2) of the Code. We also treat this argument as an argument that there was no competent substantial evidence supporting the conclusion that the bite was unprovoked. Ms. Hitopoles' testimony would certainly support the conclusion that Manuel Abreu provoked the attack by holding Jade down while Dean was encouraged to pet her. But her testimony was refuted by Mr. Abreu who testified that Jade was running free and bit Dean when he came too close. Because there was competent substantial evidence to support the conclusion that Jade was *unprovoked*, we must reject this final argument.

We are not unsympathetic to the Appellants' expressed sorrow and frustration at the unfairness of having their dog destroyed when they did everything they could do to ensure that Jade could be kept safely. Notwithstanding, we are constrained to apply the standard on appeal. The decision below is AFFIRMED. (TRAWICK, WALSH, and SANTOVENIA, JJ. concur.)

* * *

46 NW 17 CT LLC, Appellant, v. CITY OF MIAMI, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-16 AP 01. L.T. Case No. BB202200156. October 25, 2022. On appeal from a Final Order of the City of Miami Unsafe Structures Panel. Counsel: Michael Garcia, Michael Garcia, P.A., for Appellant. Eric Eves and Bryan E. Capdevila, Assistant City Attorneys for Victoria Mendez, City Attorney, for Appellee.

(Before TRAWICK, WALSH, and SANTOVENIA, JJ.)

(PER CURIAM.) AFFIRMED.[1]

[1]This Court, which hears all appeals from decisions of the City of Miami's Unsafe Structures Board, **strongly** suggests that, although it is not required by the Miami City Code, both the Case Resume **and** the Calculation Sheet be included as part of the record in cases considered by the Board in order to ensure that the essential requirements of law are followed. *See Cutting Edge Real Estate Sols., LLC v. City of Miami, Building Dep't,* 28 Fla. L. Weekly Supp. 463c (Fla. 11th Jud. Cir. Aug. 11, 2020).

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop and arrest—Officer had reasonable suspicion to stop licensee's vehicle where officer observed licensee driving wrong way at excessive speed, and licensee fled when officer attempted to initiate stop—Use of handcuffs for officer safety was warranted after licensee attempted to flee for second time after pulling into parking lot—Observation of multiple indicia of impairment gave rise to probable cause for DUI arrest—Lawfulness of detention—34-minute delay between stop and commencement of field sobriety exercises was not so excessive as to require that license suspension be set aside where officer had probable cause for detention based on reckless driving, fleeing and eluding, and indicia of impairment—Neither detention nor transport of licensee to another location to perform field sobriety exercises was improper**

SERGIO ANDRES RIANO GARCIA, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-000796, Division J. October 21, 2022. Counsel: Mark Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND DENYING MOTION FOR LEAVE TO AMEND OR FOR REMAND

(REX MARTIN BARBAS, J.) This case is before the Court on Petition for Writ of Certiorari filed January 27, 2022, and amended February 18, 2022. The petition is timely, and this Court has jurisdiction. §322.31. Fla. Stat.; Rules 9.100(c)(2) and 9.030(c)(3) , Fla. R. App. P. Petitioner seeks review of a final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine the amount of alcohol in his blood. Petitioner contends that his arrest was unlawful because of the length of time he was detained by law enforcement and also that the unlawful detention rendered any consent to relocate and perform field sobriety exercises irredeemably tainted. Because a request for a breath test must be incident to a *lawful* arrest, Petitioner contends that the decision departs from the essential requirements of law. The Court has reviewed the petition, response, reply, appendices, and applicable law and determines that where law enforcement personally observed Petitioner traveling southbound in the northbound lanes of traffic at an excessive speed, and Petitioner fled when law enforcement attempted to initiate a stop, law enforcement had reasonable suspicion for the stop. Moreover, when Petitioner attempted to flee a second time, the use of handcuffs was warranted. Thereafter, indicators of impairment formed the basis for further detention and arrest, such that the resulting request that Petitioner submit to a breath test was lawful. The petition must therefore be denied.

FACTS AND PROCEDURAL HISTORY

On October 17, 2021 at approximately 4:39 a.m., Trooper Darling was driving southbound on Dale Mabry Highway when he saw Petitioner's vehicle driving southbound in the northbound lanes at an excessive speed. Trooper Darling immediately activated his emergency equipment and began to pursue Petitioner. Petitioner did not slow down and used a break in the median to transition to the southbound lanes. Petitioner continued to drive away from Trooper Darling, at times reaching speeds as high as 100 miles per hour, until Petitioner turned into Chica's Cabaret on West Martin Luther King Boulevard.

Trooper Darling saw Petitioner exit from the driver's side of the vehicle and a female passenger exiting from the passenger side. Petitioner and his passenger attempted to blend in with a crowd of people lined up at the entrance to the club. Trooper Darling exited his vehicle to effect the stop. The crowd pointed at Petitioner, confirming Trooper Darling's identification of Petitioner as the driver. Petitioner again ignored Trooper Darling's order directing him to show his hands and attempted to elude him a second time. Petitioner was subsequently placed in handcuffs, with Trooper Darling telling Petitioner he was being handcuffed for officer safety.[1] By then, Trooper Darling already added a fleeing and eluding charge to the reckless driving charge.

The record shows that Petitioner exhibited signs of impairment including an odor of alcohol; slurred speech; bloodshot and watery eyes; and swaying while standing. Although the record is unclear about what specific time Petitioner was placed in the police vehicle, it was between 4:47 a.m., when Petitioner turned into the parking lot, and 5:22 a.m., when Petitioner was transported to another location for field sobriety exercises he agreed to perform. Petitioner was handcuffed until transported to an adjacent parking lot to perform the field sobriety tests, which he performed poorly, providing additional indicators of impairment. Based on these indicators of impairment, Petitioner was arrested for DUI. Thereafter, Petitioner was requested and refused to submit to a breath test. As a result, his driving privileges were administratively suspended.

Petitioner requested and received a formal review of the administrative suspension. At the formal review a hearing officer is required to determine whether the law enforcement officer had probable cause to believe Petitioner was driving or in actual physical control of a vehicle while under the influence of drugs or alcohol, whether Petitioner refused to submit to a breath test after being requested to do so by a law enforcement officer, and whether the Petitioner was told that if he refused to submit to a test his driving privilege would be suspended for a year, or 18 months for a subsequent refusal. §322.2615(7)(b)(1-3), Fla. Stat. In her November 29, 2021 Order, the hearing officer concluded that the stop was justified because Petitioner was observed driving southbound in the northbound lane and fled when law enforcement attempted to initiate a traffic stop. The hearing officer found that the 34-minute delay between the stop and his removal to another location for field sobriety exercise was not unreasonable because other events in that timeframe justified the extended detention. Finally, the hearing officer found that the DUI arrest was lawful because law enforcement officer had probable cause based on the results of the field sobriety exercises. This petition followed.

STANDARD OF REVIEW

"[A] circuit court conducting first-tier certiorari review of an administrative decision is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a].

ANALYSIS

It is axiomatic that the request for a breath test must be incident to a lawful arrest. §316.1932(1)(a)(1)(a), Fla. Stat. Where Petitioner's wrong-way travel at an excessive speed provided reasonable suspicion for law enforcement to initiate a traffic stop, and Petitioner thereafter attempted to elude law enforcement officer not once, but twice, probable cause for an eluding charge existed. This justified the detention and use of handcuffs for officer safety. "Courts have generally upheld the use of handcuffs in the context of a *Terry* stop where it was reasonably necessary to protect the officer's safety or to thwart a suspect's attempt to flee." *Hidelgo v. State*, 25 So. 3d 95, 97 (Fla. 3d DCA 2009) [35 Fla. L. Weekly D18a]. Although police should not routinely handcuff suspects to conduct an investigative stop, the determinative factor for the use of handcuffs is whether it is a reasonable response to the particular situation, not the officer's

subjective belief. *Id.*; *Studemire v. State*, 955 So. 2d 1256, 1258 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1352c] (notwithstanding lapse by officer, objective circumstances provided justification for use of handcuffs). Put another way, the test for evaluating an officer's acts based on concern for safety is not the officer's subjective thoughts, but the rational inferences that a reasonably prudent person would draw under the circumstances. *Studemire,* at 1258. Thereafter, where Petitioner exhibited signs of impairment including an odor of alcohol, slurred speech, bloodshot and watery eyes, and swaying while standing, probable cause for the arrest for DUI existed.

The court is unpersuaded by Petitioner's argument that the time between his initial detention and the commencement of field sobriety exercises was excessive such that it requires that the suspension be set aside. In support of his argument, Petitioner relies on *Cocke v. State*, 889 So.2d 132 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2693a]. In *Cocke*, defendant was stopped in response to a Be-On-the-Look-Out of a suspicious incident, and, after being patted down, was handcuffed and locked in the rear seat of a police car for at least 25 minutes, after which he gave a confession to smoking marijuana. *Id.* at 133. The court in *Cocke* found that the stop became a de facto arrest when the defendant remained handcuffed in a patrol car for a significant amount of time despite the fact that he did not resist arrest, had no weapon, was not belligerent, and there were no expressed concerns about officer safety. *Id.* at 135. The court found that in the absence of probable cause for the detention, the use of handcuffs was unwarranted. *Id.* at 134. Here, in contrast, Petitioner drove recklessly in an attempt to elude law enforcement, justifying the stop. Thereafter, Petitioner again attempted to evade law enforcement, justifying the use of handcuffs. In addition, Petitioner exhibited additional indicators of impairment, justifying the arrest for DUI.

Petitioner's argument that the officer had no reason to believe that Petitioner remained a flight risk requires the Court to reweigh evidence. This court may not do so. *Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a] (order granting a writ of certiorari overturned because the court necessarily reweighed evidence and substituted its own judgment instead of determining whether the evidence supported the conclusions made by the hearing officer). Petitioner also argues that the alleged improper detention tainted the consent to be transported and to perform field sobriety exercises. The detention was not improper. Nor is it improper to transport a detainee to another, safer location to perform field sobriety exercises. *Andrix Johnson v. State Dep't of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 1067a (Fla. 13th Cir. Ct. [Appellate] January 21, 2021).

PETITIONER'S MOTION FOR LEAVE TO AMEND

Additionally, Petitioner has filed a Motion for Leave to Amend or Alternatively a Motion for Remand of his petition because of evidence discovered after the entry of all briefs. This Court, in certiorari, does not "sit as a trial court to consider new evidence or make additional findings." *Vichich v. Dep't of Highway Safety & Motor Vehicles*, 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a]. Remand has been ordered by circuit courts where petitions have been granted because a party was denied due process. *Dep't of Highway Safety & Motor Vehicles v. Azbell*, 154 So. 3d 461, 462 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D108c]. But the court refused to remand for a second bite of the apple with different evidence. *Id.* Only one chance to offer evidence is allowed unless the petitioner was prevented from presenting material evidence. *Id.* Here, the proffered testimony is that the officers can be heard giving a different reason for why they are using handcuffs, but this does not negate the circumstances present—that Petitioner twice attempted to elude law enforcement—which allowed for their use. The hearing officer determined that the events leading up to the use of the handcuffs justified the detention, and case law cited above supports that conclusion. The Court finds that the indicators of impairment and Petitioner's two attempts to elude officers were competent, substantial evidence to support this finding.

It is therefore ORDERED that the Motion for Leave to Amend or Alternatively Motion for Remand is DENIED. It is FURTHER ORDERED that the petition is DENIED.

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[1]Trooper Darling testified that earlier in his pursuit of Petitioner, Petitioner pulled into a poorly lit dead-end area and seemed to be approached by other people, leading the trooper to believe that there was a possibility of an ambush.

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Officer had probable cause to arrest licensee whose vehicle was stopped for driving at night without headlights where licensee had odor of alcohol and glassy/bloodshot/watery eyes and resisted attempts to investigate his level of impairment**

MICHAEL WAYNE JOHNSON, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-5102, Division B. October 11, 2022. Counsel: Michael Lynch, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARK WOLFE, J.) This case is before the court on Michael Wayne Johnson's Petition for Writ of Certiorari filed June 16, 2022. The petition seeks review of the Department's final order issued on May 17, 2022, upholding the suspension of his driving privilege for refusing to submit to a breath test after his arrest for suspected driving under the influence (DUI). The petition is timely, and this court has jurisdiction. Rules 9.100(c)(2), and Rule 9.030(c)(3), Fla. R. App. P; §322.32, Fla. Stat. Petitioner contends that the hearing officer departed from the essential requirements of the law in upholding the suspension because the arrest was not supported by probable cause. Where Petitioner was stopped for driving at night without headlights, had an odor of alcohol emanating from his breath, had glassy/watery and bloodshot eyes, and resisted further attempts to investigate his level of impairment, sufficient indicators of impairment existed providing probable cause for the arrest. Accordingly, the petition is denied.

**Standard of Review**

This court reviews administrative decisions to uphold suspensions to determine whether the Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). Petitioner makes no assertion that he was denied due process. As such, this court must only determine if the decision by the hearing officer departed from the essential requirements of the law.

**Facts and Procedural History**

On April 9, 2022, Petitioner was observed by Deputy Williams driving a vehicle at night without headlights and conducted a traffic stop. Deputy Williams observed that the Petitioner had glassy/watery and bloodshot eyes and detected a distinct odor of alcohol on the Petitioner's breath. Petitioner was informed of the observations and was asked to exit the vehicle pursuant to a DUI investigation. He refused. When Petitioner refused a second request that he step out of his vehicle, Deputy Williams removed Petitioner from his vehicle. Deputy Williams then attempted to put the Petitioner's hands behind his back while commanding him to do so and felt the Petitioner tense and pull away. Deputy Williams then informed the Petitioner that he was being placed under arrest for DUI. Thereafter, Petitioner was read

implied consent and refused to submit to a breath test. As a result, Petitioner's driving privileges were administratively suspended.

On May 17, 2022, an administrative hearing was held to review the suspension of Petitioner's driving privilege. Petitioner did not call any witnesses at the hearing but did move to lift the suspension because no probable cause supported the arrest. Petitioner argued that because the odor of alcohol alone does not give rise to probable cause, at most there was only reasonable suspicion for a DUI investigation. The hearing officer considered Petitioner's motion, argument, and case law, in addition to the documentary evidence submitted by law enforcement. That same day, the hearing officer rendered a written order upholding the suspension of Petitioner's driving privilege.

**Analysis**

Petitioner does not contend that he was denied due process. Petitioner's only argument is that the hearing officer departed from the essential requirements of law because the arresting officer did not have enough indicators of impairment to arrest for DUI. Petitioner claims that the only indicators reported by Deputy Williams were an odor of alcohol emanating from Petitioner breath and glassy/watery and bloodshot eyes. Petitioner asserts that these indicators were not sufficient to arrest for DUI. Petitioner contends that, at best, these indicators constituted only reasonable suspicion for a DUI investigation.

In support of his argument, Petitioner relies on *State v. Kliphouse*, 771 So. 2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. In *Kliphouse* the court found that the arresting officer had observed an odor of alcohol emanating from the appellee as the only indicator of impairment, and that alone was not sufficient probable cause for the officer to determine that the driver was impaired. *Id.* The issue was whether there was reasonable cause to show that the defendant was under the influence of alcohol to the extent that his normal faculties were impaired, which the court determined was the same probable cause necessary for a DUI arrest, and the parties had stipulated that the *only* indicator of impairment was the odor of alcohol on his breath. *Id.* at 18. In determining whether the odor of alcohol alone would constitute probable cause, the court concluded that an odor of alcohol must usually be combined with other factors. *Id.* at 23. The defendant was unconscious when the arresting officer arrived on scene, there was no opportunity for the officer to observe any other aspects of his conduct or appearance that would give rise to a reasonable inference of impairment, and witnesses at the scene reported that the appellee had been operating his motorcycle in a safe manner. *Id*. With no other indicators, there was no probable cause to believe the appellee was impaired while driving, and the court upheld the decision to suppress evidence. The court expressly limited its holding "to cases with the unique circumstances presented in this case." *Id.* at 24.

The facts of this case are distinguishable from those in *Kliphouse*. Petitioner argues that the only factors of consequence are the glassy/watery and bloodshot eyes and the odor of alcohol, but he overlooks that the hearing officer also considered other indicators of impairment. The hearing officer determined that the odor of alcohol, combined with the fact that petitioner was driving without headlights, failed to follow law enforcement's instructions, and refused to exit his vehicle after being told that he was being investigated for DUI provided the necessary probable cause that Petitioner was driving a vehicle with his normal faculties impaired by alcohol. Florida courts require that the underlying facts and circumstances be sufficient such that a probable cause can be determined by a person of reasonable caution. *State v. Brown*, 725 So.2d 441, 444 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a]. The hearing officer determined as much here. Having determined that the narrow set of circumstances of *Kliphouse* do not apply to the facts presented in this case, this court finds that the hearing officer did not depart from the essential requirements of law.

Petition DENIED.

* * *

**Municipal corporations—Code enforcement—Short-term rentals—Code enforcement special magistrate did not err in finding that property owner violated city code by using property in residential area as short-term rental for fewer than seven days and renting to more than four unrelated persons where, although owner produced alleged lease for seven-day stay by one family, witness testimony provided competent substantial evidence that property was rented to university lacrosse team for two days—Due process—No merit to argument that owner was denied due process because it was not afforded opportunity to cure violation where violation was incurable "transient" violation—Magistrate erred in mischaracterizing violation as "irreparable," rather than "transient," and imposing enhanced fine that is reserved by city code for most serious "irreparable" violations—Fact that magistrate inquired about previous proceeding involving same owner does not appear to have negatively impacted his ability to remain impartial and neutral—Magistrate's order is defective for failing to set forth facts and legal conclusions**

SUPER HOST, LLC, Appellant, v. CITY OF TAMPA, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 20-CA-5743, Division X. Code Enf. Case No. COD-20-0001288. October 24, 2022. Counsel: Christopher DeCort, Tampa, for Appellant. David Harvey and Toyin K. Aina-Hargrett, Tampa, for Appellee.

APPELLATE OPINION

(EMILY A. PEACOCK, J.) This case is before the court to review an order of the code. enforcement special magistrate finding Appellant Super Host, LLC in violation of the city code for improper use of property within its zoning designation. The subject South Tampa property had been used as a vacation or short-term rental for a university lacrosse team in a residential area zoned RS-60. In the RS-60 zoning classification, the city code prohibits rentals for fewer than seven days or to more than four unrelated persons (the single-family requirement). The property was found to have violated the code's zoning classification on both grounds in a single transaction. In support of its appeal, Appellant contends that no competent, substantial evidence supports the order finding violation, where an alleged contract provides that the rental was for the minimum seven days and for occupancy by one family. In addition, Appellant argues that it was denied due process for myriad reasons, including 1) that Appellant was not given an opportunity to cure the violations, 2) it was denied a hearing by a neutral fact-finder, and 3) because it was assessed an excessive fine. Witness testimony provided competent, substantial evidence that the term of the rental was for fewer than seven days and to more than four unrelated persons. Additionally, Appellant was afforded due process in that it was provided adequate notice and opportunity to be heard by a neutral fact-finder. The City's refusal to provide Appellant an opportunity to cure did not deny Appellant due process because the violations, being transient, were not curable. Appellant is correct, however, that the special magistrate departed from the essential requirements of law when he imposed a fine in an amount reserved for irreparable violations, where the code did not consider the subject violations to be irreparable. Accordingly, the decision is affirmed in part and reversed in part, and the matter remanded for further proceedings.

FACTUAL BACKGROUND

On January 20, 2020, Gail Wallach, the coach for the University of Alabama (Huntsville) women's lacrosse team, used *homeaway.com* to rent the subject property for the team's lodging in advance of an upcoming match with University of Tampa. As reflected by documents the investigator obtained from *homeaway.com*, the reservation

was scheduled for two nights beginning Friday, February 7, and ending Sunday, February 9, 2020, for which the sum of $4,896.00 was paid. The investigator also received photographs taken during the team's occupancy. They showed a number of team members at the property, additional staff, and the large coach-style bus that transported the group. Because the rental allegedly violated the city code on two bases, specifically that the rental term was less than the seven-day minimum and also ran afoul of the "single-family" requirement,[1] the City issued a combination notice of violation and notice of hearing several months later.[2]

THE CASE

On May 29, 2020, Appellant Super Host, LLC was served with a notice of violation and notice of hearing. As required by section 9-3(a), Tampa, Fla., Code, the notice of violation named Appellant as the violator and advised Appellant that its property at 4209 W. Vasconia Street in Tampa violated sections 27-43 (defining "dwelling unit"), and 27-156 (setting forth zoning districts and their permitted uses) from February 7 through February 9, 2020. It went on to advise that the property was zoned RS-60, residential single family, and permitted for owner occupancy or rental on a weekly or longer basis. The notice directed Appellant to "cease illegal use of subject property as a short-term rental." Although the notice explained that a dwelling unit is a "habitable unit for occupancy by one family only; for owner occupancy or for rental, lease or other occupancy on a weekly or longer basis," it did not set forth specific facts indicating a violation of the single-family requirement. The notice did not offer an opportunity to cure the violation. A notice of hearing accompanied the notice of violation.

Appellant appeared for the hearing and was represented by counsel. At the conclusion of the hearing, the special magistrate found Appellant's property to have violated the code because it 1) was rented for less than a week—the minimum time provided for dwelling units in the code—and 2) was rented to more than four unrelated persons in violation of the single-family occupancy requirement. Concluding that the violation was irreparable, the special magistrate imposed a $10,000.00 fine. This timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

This court has appellate jurisdiction to review code enforcement orders pursuant to sections 162.11 and 26.012, Florida Statutes. Code enforcement orders are reviewed to determine whether Appellant was afforded due process, whether the decision comports with the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW / COMPETENT, SUBSTANTIAL EVIDENCE

Appellant argues that no competent, substantial evidence supports the special magistrate's decision finding a code violation. If competent, substantial evidence supports the local government's decision, the decision is presumed to adhere to the essential requirements of law. *State v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a] (*citing Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]). As noted in the facts, Appellant was found to have violated the proper use of zone on two grounds—the length of the rental term and because it was rented to more than four unrelated persons.

*The short-term rental violation.*

Regarding the length of the rental term, the City argues that a two-day rental is a violation of sections 27-43, 27-156, and 27-156 Table 4-1, Tampa, Fla., Code. In the property's zoning classification, which is RS-60, residential dwellings are the most common use. The code defines "dwelling unit" as:

> Dwelling unit: A room or group of rooms forming a single independent habitable unit used for or intended to be used for living, sleeping, sanitation, cooking and eating purposes *by one (1) family only*; for owner occupancy *or for rental, lease or other occupancy on a weekly or longer basis*; and containing independent kitchen, sanitary and sleeping facilities.

Tampa, Fla., Code §27-43 (emphasis added).

The definition of dwelling unit incorporates a proscription against short-term rentals by requiring that rental terms be for a week or longer. From there, the code's section 27-156, and its Table 4-1, address *allowable* uses in the specific zones. They contain the official schedule of district regulations.[3] The code's section 27-156 provides in pertinent part:

> Sec. 27-156. - Official schedule of district regulations.
>
> (a) Schedule of statements of purpose and intent. The following array presents for the several districts the statements of purpose and intent applicable to each district.
>
> (1) Single-family residential districts. Single-family districts provide for detached residential housing development on a variety of lot sizes in accordance with the Tampa Comprehensive Plan. Accessory uses, compatible related support uses for residential development and special uses are also permitted or permissible.[4]
>
> ***
>
> d. RS-60 residential single-family. This district provides areas for primarily low density single-family detached dwellings similar to those provided for in the RS-150, RS-100 and RS-75 single-family districts, but with smaller minimum lot size requirements.

Table 4-1 contains the schedule, in table form, of permitted, accessory, and special uses by zoning district.[5] It prohibits the use of land or structures "that are not expressly listed in the schedule of permitted uses by district as permitted principal uses or permitted accessory uses. . .in that district." Tampa, Fla. Code, § 27-156.

The list of permitted uses (no administrative approval required) is limited to single family detached dwellings, day care and nurseries,[6] golf courses, public use facilities,[7] and temporary film production. Uses listed as permitted special uses may be established in that district only after approval of an application for a special use permit in accordance with the procedures and requirements in Article II, Division 5. Accessory structures and living facilities, as well as some commercial uses and home businesses fall in this category. Congregate living facilities and bed-and-breakfasts are prohibited uses in the zone, as are hotels and motels. Vacation or short-term rentals are not even a listed category, and, therefore, are prohibited. Where the code limits the permitted uses in the zone primarily to dwellings, defines dwellings to include minimum tenancies and limits occupancy to a single family, and omits short-term rentals of any kind as a permitted use in the zoning classification, it makes clear that short-term rentals in residential areas are prohibited.

Competent, substantial evidence supports that the lacrosse team occupied the space for only two days. Several neighbors testified to it. The transaction details from *homeaway.com* confirmed that the reservation was from February 7-9, 2020. The coach signed a sworn affidavit that she rented the property for only two days. Appellant's representative, Ryan Slate, attempted to rebut the foregoing evidence by propounding what purported to be a contract signed by the coach reserving the property for seven days and limiting the rental to a single family. Appellant argued that the two-night stay or *occupancy* does not negate a seven-day *lease*. In a sworn affidavit, however, the coach denied signing any such document. Appellant did not subpoena the coach and was, therefore, unable to authenticate the coach's signature. As a result, the special magistrate gave it little, if any, weight. It is the province of the special magistrate, as fact-finder, to consider, weigh, and resolve conflicts in evidence. *Naples Estates Ltd. P'ship v.*

*Glasby,* 331 So. 3d 863, 866 (Fla. 2d DCA 2021) [47 Fla. L. Weekly D54d] (internal citations omitted). Moreover, this court is not permitted to reweigh the evidence presented even if it might reach a different conclusion. *City of Deland v. Benline Process Color Co., Inc.*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986), *citing Bd. of Cnty. Comm'rs of Pinellas Cnty. v. City of Clearwater*, 440 So. 2d 497, 499 (Fla. 2d DCA 1983).

Thus, the City met its burden with regard to the short-term rental violation. Tampa, Fla., Code § 9-108(l).

*The "single-family" violation.*

The second basis for concluding that a violation occurred was that the rental ran afoul of the zone's single-family occupancy requirement. Under the code, a family can be any number of related persons,[8] but no more than four unrelated persons may share a dwelling in residential areas. Tampa, Fla., Code § 27-43 (defining "family" and "dwelling"). There was no meaningful dispute that the 20 or so teammates and staff were not related. Appellant again argued that the above-mentioned lease between Appellant and the tenant expressly provided that "vacation rental is for a 'family' rental, which means only 1 family[,]" and further defined the term "family" as it is in the code. But other evidence presented showed that Appellant's representative Ryan Slate met the tenants at the property upon their arrival and was aware a university lacrosse team would be staying there. Appellant did not object to this evidence.[9]

As noted above, this Court is not free to reweigh the evidence. Whether or not the contract was authentic, competent evidence supports that Appellant's representative met the tenants and provided access to the property—after the contract was purportedly signed. Thus, Appellant's intent to pass the responsibility to the tenant does not negate Appellant's knowledge that a violation occurred or its responsibility for it. *See* Tampa, Fla., Code § 1-6(b). If the facts support that a violation occurred, the reviewing court will not disturb the decision. *Orange Cnty. v. Butler*, 877 So. 2d 810, 813 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1561a]; *see also Dorian v. Davis*, 874 So. 2d 661, 663 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1110b]. Here, again, the City met its burden to prove that the occupancy was not by a family as defined by the code.

DUE PROCESS

State law and the city code recognize that the formal rules of evidence do not apply to code enforcement hearings, "but fundamental due process shall be observed and shall govern the proceedings." § 162.07(3), Fla. Stat.; Tampa, Fla., Code § 9-108(i). The fundamentals of the process due in administrative proceedings are fair notice and an opportunity to be heard in a meaningful manner. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. Although Appellant appeared, was represented by counsel, and participated in the hearing, it now contends its due process rights were violated on several grounds, including that Appellant was not given an opportunity to cure the violations, it was assessed an excessive fine, and it was denied a hearing by a neutral fact-finder.

*Adequacy of Notice/Inability to cure.*

Consistent with the requirements of section 9-3(b) and (c), and section 9-107(e), the city's notice advised Appellant of the date, location, and facts giving rise to the violation, as well as the date and location of the scheduled hearing. Hearings are scheduled only if a previous opportunity to cure is not exercised, or when, as here, a violation cannot be cured. Appellant contends that it was denied due process because neither the notice of violation nor notice of hearing afforded Appellant the opportunity to cure the alleged violations. The question is whether omitting an express statement that the violations were not curable from the notice of hearing violated Appellant's due process rights. The short answer to this question is no.

Although subject to conditions, the code often, but not always, affords the opportunity to cure code violations. Tampa, Fla., Code § 9-3(c). Violations for which the opportunity to cure is not provided include repeat violations, threats to public health, violations deemed irreparable or irreversible, and those that are transient and itinerant. Tampa, Fla., Code §§ 9-3(c), 9-107(b-e).

During the course of the hearing, the assistant city attorney, when asked why Appellant was not given an opportunity to cure the violation before requiring it to appear for hearing, said that the violation, being "irreparable," could not be cured. *See e.g.,* Tampa, Fla., Code § 9-2 (definition of "irreparable" or "irreversible"), § 9-3(c) (notice of *violation* not required for specific types of code violations, including those that are irreparable). The notice did not specifically advise Appellant that the violation was considered irreparable or otherwise incurable, it simply omitted a time to cure and scheduled the matter for a hearing.

"Irreparable" is defined as "unable to return to the original condition." Tampa, Fla. Code § 9-2. When a violation is not curable, giving the violator an opportunity to cure is obviously an exercise in futility, and the code recognizes its futility by withholding time to correct such violations. Tampa, Fla., Code § 9-3(c). A survey of the city code, however, revealed that certain violations are *expressly* characterized as irreparable or irreversible. Some examples include the unpermitted removal of protected trees in violation of § 27-284.2.4; retail sale of nitrogen-containing fertilizer in violation of § 21-148; destruction of upland habitat in violation of § 27-287.22; and dumping in storm drains in violation of § 21-9, Tampa, Fla., Code. Large fines accompany those violations, and specific code sections alert the public to that possibility.[10] The violation alleged here—improper use of zone—is not deemed irreparable under the code, and the assistant city attorney's characterization of the violation as irreparable was mistaken.

In addition to irreparable violations, other classes of violations allow the city to proceed directly to a hearing. These include those that are "transient" or "itinerant." *See* Tampa, Fla., Code § 9-2, (defining "transient" or "itinerant" violations).[11] Because they are temporary and cannot be undone, transient violations, like irreparable or irreversible violations, are not curable. Tampa, Fla., Code § 9-3(c).[12] The code's procedure for handling transient violations are similar to those provided for irreparable ones in that the code allows inspectors to determine that a violation is transient and issue an immediate citation without giving the violator an opportunity to correct the violation. *See* Tampa, Fla., Code § 9-3(c)(1), (3). Section 9-3(c)(1) allows the inspector to issue a notice of hearing in accordance with section 9-107, Tampa, Fla., Code. In turn, section 9-107 (c-e) sets forth notice procedures for those situations for which no opportunity to cure is provided. Subsection (c) addresses notices for repeat violations, subsection (d) addresses notices for health and safety violations, and subsection (e) addresses notices for irreparable violations. But section 9-107 does not mention transient violations. Because of its omission, "[i]t is necessary to fill the procedural gaps. . .by the commonsense application of basic principles of due process." *City of Tampa v. Brown*, 711 So.2d 1188, 1188 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1061b].

In *all* instances in which a code enforcement officer has reason to believe that a violation is either a threat to public health and safety or is otherwise not correctible, the officer must attempt to notify the violator and schedule a hearing, which the code enforcement officer did. §9-107 (c-e), Tampa, Fla., Code. Appellant was provided ample notice of the violation and hearing, as well as an opportunity to be heard and defend against the allegations. *Massey v. Charlotte Cnty.*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b].

Appellant was represented by counsel, and indicated his understanding of the elements of the violation. Although the special magistrate was misinformed as to why the violation was incurable (irreparable as opposed to transient), the assistant city attorney's misstatement did not change the fact that the violation was incurable, and Appellant presented no authority to suggest that the notice was rendered ineffective by the City's omission of a specific statement to that effect. The notice was, therefore, adequate for the proceeding, and Appellant was not denied due process because he was not provided an opportunity to cure the violation.

*Departure from the Essential Requirements of Law / Amount of Fine*

Although the mischaracterization of the violation as irreparable does not affect the *adequacy* of the notice in this case, it was not without consequences. When a violation is determined to be irreparable, it is subject to a significant fine—up to $15,000. *See* Tampa, Fla. Code § 9-110(e). Transient violations, unlike irreparable ones, do not appear to be subject to such enhanced penalties. Therefore, the special magistrate departed from the essential requirements of law and denied Appellant due process when he treated the violation as irreparable and assessed a $10,000 fine. *See e.g. Maple Manor, Inc. v. City of Sarasota,* 813 So. 2d 204, 206-07 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D762b] (petitioner denied fair notice when penalties imposed exceeded board's authority). In light of the imposition of a fine reserved for the most serious violations, this cause must be remanded to allow the special magistrate to reconsider its amount under appropriate provisions of the code. In so doing, the Court does not suggest a specific amount to be imposed.

*Right to an Impartial Fact-finder and Form of Judgment*

Appellant also contends that his due process right to an impartial fact-finder was violated when the special magistrate recalled a previous proceeding involving the same Appellant and subject matter. The special magistrate went on to inquire why the matter was not being handled as a repeat violation.[13] Appellant suggests also that the special magistrate gave more consideration to the coach's sworn affidavit than the contract the coach denied signing. It is the province of the special magistrate to resolve conflicts in the evidence. *Glasby,* 331 So. 3d at 866. Moreover, nothing about the special magistrate's inquiry into a past proceeding appears to have negatively reflected on his ability to remain impartial and neutral. *Cf. Turner v. State*, 745 So. 2d 456, 458 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2572c] (it was not improper for court to raise questions regarding case status without compromising neutrality), *citing McFadden v. State,* 732 So. 2d 1180, 1185 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D941a].

Finally, the Court agrees with Appellant that the order finding violation is defective because it fails to set forth facts as required by the code, together with any legal conclusions. Tampa, Fla., Code § 9-108(n). Mere recitation of the code provisions allegedly violated does not comply with the requirement to set forth findings of fact.

CONCLUSION

Where neighbors testified as to the two-day rental between February 7-9, 2020, the tenant admitted to renting the property for only two days, and transaction details confirmed the two-day reservation, competent, substantial evidence supports the magistrate's conclusion that Appellant violated the seven-day minimum rental requirement in the RS-60 zoning classification. Similarly, where the evidence showed that Appellant knew that approximately 20 team members and university staff occupied the property during the subject rental term, and provided no rebuttal evidence suggesting that they were related, the special magistrate's conclusion that more than four unrelated persons stayed on the property is supported, and a violation of the single-family requirement is sustained.

But where the City conflated *transient* violations with those that are *irreparable*, both of which are not afforded an opportunity to cure under the code, the Court agrees with Appellant that the $10,000.00 fine must be re-evaluated. Accordingly, the matter is remanded for the special magistrate to reconsider the amount of the fine under the code provisions applicable to improper uses of zone.

It is therefore ORDERED that the decision of the code enforcement special magistrate is AFFIRMED with regard to the finding of code violations. It is FURTHER ORDERED that the $10,000.00 fine is QUASHED and the cause is REMANDED for the special magistrate to conduct further proceedings consistent with this opinion. (BARBAS, J., Concurs. MOE, J., dissents with written opinion.)

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(MOE, J., Dissenting.) I would reverse in its entirety the special magistrate's order finding an irreparable violation. I would do so with instructions to (1) conduct a properly noticed hearing and (2) if a violation is found, determine the proper amount of the fine.

I.

Procedural due process requires fair notice and an opportunity to be heard and defend. *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (Fla. 1936). A general notification that some aspect of the case will be called up will not pass muster; fair notice means the specific matter to be adjudicated must be identified. *See, e.g.*, *Haeberli v. Haeberli*, 157 So. 3d 489, 490 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D429b] (reversing on due process grounds when one motion was noticed for hearing but two other motions not included in the notice were adjudicated); *Brill v. Brill*, 905 So. 2d 948 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1565a] ("It is generally a due process violation for a trial court to determine matters not noticed for hearing."); *Epic Metals Corp. v. Samari Lake E. Condo. Ass'n, Inc.*, 547 So. 2d 198, 199 (Fla. 3d DCA 1989) ("A trial court violates a litigant's due process rights when it expands the scope of a hearing to address and determine matters not noticed for hearing.").

The opportunity to be heard and defend oneself is, in a case like this, bound up with notice. The word "defend" in the context of a court proceeding means "to deny or oppose the right of a plaintiff in regard to a wrong charged." Webster's Third New International Dictionary (Unabridged) 590 (2002). To have a meaningful opportunity to defend, the "wrong charged" needs to be known to the one mounting the defense.

Under the Code, when a property owner receives a notice of violation the notice should in most instances give the owner an opportunity to cure. *See* Tampa, Fla. Code § 9-107(b) (2022) ("Except as provided in subsections (c), (d), and (e), if a violation of the City Code or city ordinances is observed, the code enforcement officer shall notify the violator and give time to correct the violation."). No opportunity to cure need be given for violations that are repeated, considered by the code enforcement officer to be irreparable or irreversible, or believed by the code enforcement officer to present a serious threat to public health, safety, and welfare. *Id.* But when the code enforcement officer relies on one of those exceptions and does not give an opportunity to cure, the Code requires that the property owner be notified that the exception applies. The use of the word "shall" in the Code means this is not optional. *Izaguirre v. Beach Walk Resort/Travelers Ins.*, 272 So. 3d 819, 820 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1306a] ("Based on its plain and ordinary meaning, the word 'shall' in a statute usually has a mandatory connotation."); *Persaud Props. FL Invs., LLC v. Town of Ft. Myers Beach*, 310 So. 3d 493, 496 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2772a] (Black, J.) (municipal ordinances are subject to the same rules of construction as statutes).

For example, Section 9-107(c) provides that the owner has no opportunity to cure if the violation is perceived to be a repeated one. Tampa, Fla., Code § 9-107(c) (2022). However, the City must say so in the notice. Section 9-107(c) states that the code enforcement officer "shall notify the violator of the finding" and the secretary is to be notified to schedule the hearing only "upon notifying the violator of a repeat violation." *Id.*

The Code provision relied upon by the City in this case—Section 9-107(e)—is similar to Section 9-107(c). The property owner is not entitled to cure the perceived violation if the code enforcement officer "has reason to believe the violation is irreparable or irreversible." Tampa, Fla., Code § 9-107(e) (2022). Where the opportunity to cure is denied based on a code enforcement officer's belief that the violation is "irreparable or irreversible," Section 9-107(e) mandates that the code enforcement officer make a reasonable effort to notify the owner that the infraction is considered irreparable "and the notice shall so state." *Id.* Reading Section 9-107(e) in the context of the preceding subsections and considering the plain meaning of the words "and the notice shall so state," it is clear that the notice itself should state that the code enforcement officer had reason to believe that the violation is irreparable or irreversible, for the purpose of explaining why an opportunity to cure was not provided pursuant to Section 9-107(b).

A larger fine is attached to violations under Section 9-107(c) or (e). *See* Tampa, Fla., Code § 9-110 (2022). In contrast with a fine of up to $1,000 per day for a standard first violation, the fine for a repeat violation is up to $5,000 per day. *Id.* For an irreparable or irreversible violation, the fine is up to $15,000 per day. *Id.*

This is where the opportunity to defend is important to the due process analysis. It is not that Super Host was given no notice at all. In fact, Super Host received both a Notice of Violation and a Notice of Public Hearing. The issue is that neither of the notices contained the language required by the Code. Because the notices did not say that the code enforcement officer considered the violation to be irreparable, Super Host's counsel came prepared to argue a type of violation that requires an opportunity to cure and carries a fine of no more than $1,000 per day. When Super Host pointed out that the type of notice given required an opportunity to cure, the City announced for the first time that the violation was considered irreparable.

Notably, the idea of the violation being irreparable came from the City Attorney, not the code enforcement officer. After being sworn in and asked why he did not give an opportunity to cure, the code enforcement officer never said that he had a reason to believe the violation was irreparable or irreversible. Instead, he refused to answer and deferred to "the legal department," and the City Attorney stepped in.

Lack of notice deprived Super Host of the opportunity to mount a persuasive defense. For a municipal code violation that carries a fine of no more than $1,000 per day and requires an opportunity to cure, what reasonable lawyer would go out and subpoena the lacrosse coach in Alabama to authenticate her signature on the lease? However, if the City had noticed an irreparable violation, the situation is entirely different. That violation carries a financial penalty up to fifteen times higher for each day that the property was in violation, and there was no argument to be made that the client deserved the opportunity to cure. In that situation, the need for a more forceful evidentiary presentation would be expected and the more costly preparation justified.

In a similar vein, while I appreciate the acknowledgment that the single-family violation was "not clearly noticed as a violation," *see* n.9, *supra*, I disagree with the conclusion that the issue was tried by consent. Failure to object is not a consent to try an unpled theory when the evidence presented was relevant to other issues. *Derouin v. Universal Am. Mortgage Co., LLC*, 254 So. 3d 595, 603 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1939a]. In the context of a proceeding that itself was a due process violation because of deficiencies in the notice, I would not find that Super Host consented to try the single-family violation. Just like the City Attorney's argument that the violation was irreparable, neither the notice of violation nor the notice of hearing mentioned a single-family violation.

II.

After concluding that Super Host was not given fair notice that the violation was considered irreparable—and recognizing that the Code requires this—the majority still upholds the violation. The twist is that the majority finds that the violation was not irreparable; rather, it was "transient."

There are a few problems with this. The most glaring one is that no one has advanced this argument. The City never asserted that the violation was transient. Super Host certainly didn't either. The special magistrate did not find a transient violation. The idea of a transient violation appears for the first time in the majority's analysis. The trouble is that "[a]n appellate court is 'not at liberty to address issues that were not raised by the parties.' Nor may an appellate court 'depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention." *Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1686a]. " 'Basic principles of due process'—to say nothing of professionalism and a long appellate tradition—'suggest that courts . . . ought not consider arguments outside the scope of the briefing process.' " *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1126 (Fla. 2014) [39 Fla. L. Weekly S689a].

Raised only in a footnote, the majority justifies its approach under the tipsy coachman doctrine. *See* n.11, *supra*. But this case is a poor candidate for application of that doctrine and even the opinion cited for the proposition—*Robertson v. State*—counsels against its application here. The underlying issue is the deprivation of a constitutional right to due process because Super Host received inadequate notice. Inadequacy in the notice deprived Super Host of a meaningful opportunity to be heard and to defend. *Robertson* disapproved of the application of the tipsy coachman doctrine in a case where inadequate notice of an issue deprived a party of a meaningful opportunity to be heard and defend and prevented the fulsome development of a record. *Robertson*, 829 So. 2d at 906. Specifically, it found that the intermediate appellate court "improperly relied upon the 'tipsy coachman' doctrine where no notice was provided and as a result the defendant never had an opportunity to present evidence or make argument as to the new theory. *Id.* Moreover, the majority does not apply the tipsy coachman doctrine in a manner that actually leads to an affirmance. This case is going back to the special magistrate, because the majority's new theory relating to transient violations still requires reversal. The reason the entire case cannot be affirmed is that the special magistrate did not find—because the City did not argue—that this violation was transient. The special magistrate found that the violation was irreparable and assessed a fine that the special magistrate found appropriate for an irreparable violation.[14]

One of the first principles of American justice is that our system is adversarial in nature. *See generally United States v. Campbell*, 26 F.4th 860, 910 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C819a] (Newsom, J., dissenting) (discussing the differences between adversarial and inquisitorial systems of justice). Lawyers make arguments, judges make decisions. While from time a superior argument may appear to—for whatever reason—have been left on the table, respect for the lawyers as the masters of the case counsels against a judicial assist. And this case to me represents the easiest situation to justify deciding the case merely on the arguments presented. The beneficiary of the assist is the one who is beyond doubt

the most powerful and experienced franchise player on the field—at least as it relates to proceedings on alleged violations of the City of Tampa Code. *Id.* A taxpayer-funded litigant who levied excessive fines on a party that was denied due process because of a sloppy notice is, in my view, a poor candidate for a handout. But in any event, the inherent problem with deciding a case on an issue not briefed or argued by the parties is that it "disort[s] the litigation process." *Id.*

A second problem—which in my view is a predictable consequence of deciding a case on an argument no one made—is that the analysis is incomplete. For example, the majority does not really reconcile Section 9-107 with Section 9-2 or Section 9-3. When interpreting a statute, "it is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with each other." *Brittany's Place Condo. Ass'n v. U.S. Bank, N.A.*, 205 So. 3d 794, 798 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2267a] (quoting *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004) [30 Fla. L. Weekly S15a]).

Section 9-107 is the provision of the Code that establishes code enforcement procedures and requires that the property owner be given an opportunity to cure at the time the owner is notified of the violation, unless an enumerated exception applies. And Section 9-107 requires that if an enumerated exception is believed to apply, the notice of violation should say so. Section 9-107 contains no enumerated exception for transient violations.

The majority also fails to reconcile Sections 9-2 and 9-3 with Section 9-110, which sets out the administrative fines available for each type of violation. Tampa, Fla., Code § 9-110 (2022). Section 9-110(d) states that "[a] fine imposed pursuant to this section shall not exceed one thousand dollars ($1,000) per day per violation for a first violation and shall not exceed five thousand dollars ($5,000) per day per violation for a repeat violation." *Id.* Section 9-110(e) states that if an irreversible violation is found, "a fine not to exceed fifteen thousand dollars ($15,000) per violation may be imposed. *Id.* When the violation is found to "present[ ] a serious threat to the public health, safety, and welfare" Section 9-110(g) provides that the appropriate city department may make the repairs to bring the property into compliance and charge the violator with the cost of the repairs along with the fine imposed." *Id.* Section 9-110 makes no reference to a transient violation and provides no penalty for it.

The canons of statutory construction are helpful here. The omitted-case canon reflects "[t]he principle that a matter not covered is not covered." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012). In other words, "the statute means what it literally says" and if the drafter of the statute "intended to provide additional exceptions, it would have done so in clear language." *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J.) ("My own reaction is that either the statute means what it literally says or that it does not; that if the Congress intended to provide additional exceptions, it would have done so in clear language; and that the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process.").

Applying the omitted-case canon, the fact that a transient violation is not listed as an enumerated category of violations in Section 9-107 or Section 9-110 is strong evidence that a transient violation is not itself a category of violation. *See* Tampa, Fla., Code § 9-107 (2022). A plausible, plain reading of Sections 9-2 and 9-3 together with Section 9-107 is that the word "transient" does not refer to what the violation *was*; rather, it describes the *way that the violation occurred*.

A first-time code violation could be a transient violation if it "moved from place to place or [stayed] in place for a short time." Tampa, Fla., Code § 9-2 (2022) ("Itinerant or transient in nature violation means that a [sic] violation which may be moved from place to place or which stays in place for a short time."). Likewise, a violation that is repeated, considered by the code enforcement officer to be irreparable or irreversible, or believed by the code enforcement officer to present a serious threat to public health, safety, and welfare could be transient, if the violation moved from place to place or stayed in place for only a short time.

When a violation occurs in a transient manner, Section 9-3 gives the code enforcement officer discretion to determine that, as a practical matter, a violation that already occurred cannot be cured because of the way the violation occurred—meaning that the violation occurred for only a short time or moved from place to place. If the code enforcement officer considered the violation transient, either the civil citation or the notice of hearing must say so. With awareness of the issue, the property owner can be prepared to defend by addressing whether the violation was in fact transient. This reading is consistent with police power held in check by the Constitution's guarantee of due process.

I cannot join in the conclusion that transient violations are never capable of being cured and can only be punished. *See* n.12, *supra*. It seems to depend on what causes the violation. If the violation is caused by an act or omission of the property owner that the property owner is able and willing to change, then it seems as though even a transient violation could be cured. Operation of an impermissible short-term rental may be an example of this. Assume the short-term rental is the result of the property owner listing the home online as available for rental for periods of time shorter than what is permitted by the Code. And assume the code inspector learns of this through a neighbor who complains that a renter stayed less than the minimum time, and then the inspector goes online and finds the home listing. The code inspector posts the notice of violation, but the renter by that point is gone. The violation occurred in a transient way, but the property owner could decide to cure the violation by altering the listing so that the home is no longer available for a short-term rental. If the owner chooses to allow a second short-term rental and the scenario repeats itself, then the code inspector could issue a notice of repeat violation. The fine is higher, and the Code does not require an opportunity to cure. Both the first and second violations in that example were transient, but the second occurred because the owner chose not to cure.

Now, the purpose of pointing this out is not to state that this is the law as it relates to a transient violation under the Code; there are perhaps other constructions and arguments to consider. Had the City argued in the hearing that the violation was transient and the special magistrate found in its favor on that basis, the briefing on this would surely be well-enough developed that we could make a fair and well-considered judgment as it then would be our role to do. The point is that, relating back to what I view as the due process violation, this concept of a transient violation has no place in today's decision because Super Host did not have fair notice and an opportunity to be heard and defend on that argument any more than it did an irreparable or single-family violation. This is part and parcel of why I would have reversed the special magistrate's order in its entirety, with the instructions previously noted and without any mention of a transient violation.

This case presents an example of varying approaches to statutory construction. For the majority, the Code-drafter's omission of transient violations is viewed as a mistake that the Court can easily rectify by "filling in the procedural gaps" with judicial spackle. I see it differently. First, the matter at hand is substantive and not proce-

dural. The question is whether Super Host has committed a civil wrong and, if so, which wrong was committed. Inventing a new category of wrongs is substantive. Second, I return to the fact that transient violations are not an enumerated type of violation in the Code and the absence of this type of violation in the Code does not create a "gap" that requires filling. As explained above, when I consider the plain and ordinary meaning of the words used in the Code and the various provisions read in relation to one another, the word transient seems to have been chosen by the drafters of the Code as a description of a way a violation can occur, rather than creating a separate category of violations. Whatever it is that "filling in the procedural gaps" means, fixing or adding to Code provisions and statutes is a role constitutionally denied to judges. Art. 1, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.") Although I have the greatest respect for my colleagues in the majority, I cannot join them and for that reason I dissent.

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[1]The "single-family" violation appears in the notice as part of the definition of "dwelling unit."

[2]The COVID pandemic was cited as the reason for the delay in issuing the citation and notice of hearing.

[3]https://library.municode.com/fl/tampa/codes/code_of_ordinances?nodeId=COOR_CH27ZOLADE_ARTIIIESZOD IDIRE_DIV1GEZODI_S27-156OFSCDIRE

[4]In RS-60, the only permitted accessory use relates to parking. Tampa, Fla., Code § 27-156, Table 4. Special uses require administrative approval. *Id.*

[5]See link in footnote 3.

[6]Day care facilities and nurseries require no administrative approval if limited to five persons or fewer. Tampa, Fla. Code, § 27-156, Table 4.

[7]Public use facility is defined as "[t]he use of land, buildings or structures by a municipal or other governmental agency to provide protective, administrative, social and recreational services directly to the general public, including police and fire stations, municipal buildings, community centers, public parks and any other public facility providing the above services, but not including public land or buildings devoted solely to the storage and maintenance of equipment and materials and not including public cultural facilities or public service facilities." Tampa, Fla., Code § 27-43.

[8]Related by blood, marriage, adoption, or legal guardianship.

[9]Because Appellant affirmatively defended against the allegation that he violated the single family requirement, attempted to introduce evidence in support of that defense, and did not object to evidence that he personally met the party at the premises, this single-family aspect of the violation, although not clearly noticed as a violation, is deemed to have been tried by consent. *Federal Home Loan Mrtg. Corp. v. Beekman,* 174 So. 3d 472, 475 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1927a] (when there is no objection to the introduction of evidence on that issue, it is tried by consent).

[10]*See e.g.* Tampa, Fla., Code § 21-9, which states:

> (a) It shall be unlawful for any individual to introduce any foreign matter (including, but not limited to, trash, leaves, grass clippings, debris, garbage, fill, construction materials, organic or inorganic pollutants, acids, and petroleum products), whether by action or inaction, to any public drainage system including but not limited to streets. It is a public nuisance for any person to damage, obstruct or interfere with the operation of any public drainage system, whether by action or inaction.
>
> (c) A violation of paragraph (a) is deemed an *irreparable and irreversible* violation (emphasis added.)

[11]Although the nature of the subject violations as transient were not argued in the proceeding below, it is axiomatic that an appellate court will uphold a lower tribunal's ruling where, as here, an alternative theory *supports* it. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) [27 Fla. L. Weekly S829a]. A court may not rely on unpreserved argument to reverse a judgment, however.

[12]Transient violations cannot be cured, only punished. Were that not the case, local governments would have no enforcement mechanism against transient violations.

[13]The special magistrate's recall was accurate in that Appellant was previously the subject of a code enforcement proceeding on the same property. It was, however, dismissed for unknown reasons. Because no violation had been found in the earlier proceeding, the underlying matter could not be, and was not, handled as a repeat violation.

[14]The majority articulates that this case was not handled as a repeat violation, but I find that more difficult to conclude. For a two-night reservation, the fine was $10,000. A simple first-time violation can be only up to $1,000 per day under the Code. An irreparable violation is up to $15,000 per day. A repeat violation is assessed at up to $5,000 per day. Perhaps the math is coincidental (2 nights x $5,000), but the fine is not clearly consistent with an irreparable violation (2 nights x $15,000).

* * *

**Appeals—Dismissal—Failure to file initial brief**

YVETTE LEVELL, Appellant, v. CITY OF SUNRISE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22008393, Division AP. October 18, 2022.

**ORDER OF DISMISSAL**

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order Directing Pro Se Appellant to File an Initial Brief dated August 24, 2022. Appellant was directed by this Court to file and serve an Initial Brief and Appendix within 30 days. Appellant has failed to comply with this Court's August 24, 2022, Order.

Accordingly, it is hereby **ORDERED** that this Appellate proceeding is **DISMISSED** and the Clerk of Court is **DIRECTED** to close this case.

* * *

**Licensing—Driver's license—Suspension—Driving with unlawful blood or breath alcohol level—Lawfulness of stop—Where licensee swerved within his lane and into center turn lane multiple times, deputy had reasonable basis for traffic stop irrespective of whether anyone was endangered—Further, stop was warranted to determine reason for erratic driving under community caretaking doctrine**

SANDOLO DESOUZA, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 22-03-AP. October 18, 2022. Counsel: Mark Mason, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

**ORDER DENYING WRIT OF CERTIORARI**

(SUSAN STACY, J.) Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of his driver's license for driving or being in actual physical control of a motor vehicle while under the influence of alcoholic beverages. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

**BACKGROUND**

On January 1, 2021, at approximately 1:30 a.m., Deputy Zachary Gilroy of the Monroe County Sheriff's Office was on patrol when he observed Petitioner driving northbound on US 1, swerving within his lane of travel and leaving his lane of travel multiple times swerving into the center turn lane. Deputy Gilroy conducted a traffic stop and Petitioner stopped in the right turn lane. When he made contact with Petitioner, Gilroy asked if there was anything mechanically wrong with the vehicle that would cause it to swerve all over the road, and asked if Petitioner had any medical issues that would cause him to swerve the vehicle. Petitioner responded "no" to both questions. Gilroy relocated the traffic stop to a parking lot.

When Petitioner got out of his vehicle, he was uneasy on his feet and had to grab onto the vehicle to steady himself. Deputy Gilroy observed that Petitioner had bloodshot, watery, glossy eyes, slowed and slurred speech, the odor of alcohol emitting from his breath, and he swayed while standing. After Petitioner performed poorly on field sobriety exercises, Gilroy arrested him for driving under the influence and transported him to the Key West DUI room where he provided two breath samples. The results were 0.094 and 0.099. He was issued citations for failing to maintain a single lane in violation of section 316.089(1), Florida Statutes, and driving under the influence in violation of section 316.193(1), Florida Statutes. His license was

suspended pursuant to section 322.2615, and he sought formal review of the suspension.

The Department conducted a formal review hearing on February 2, 2022. The following documents were submitted into the record: Florida DUI Uniform Traffic Citation No. A1TXOWE; a copy of Petitioner's commercial driver's license; Arrest Report; Breath Alcohol Test Affidavit; Agency Inspection Report; Field Sobriety and DUI Check Sheet; FIBRS Incident Report; and Florida Uniform Traffic Citation No. AFJ8LXE. No witnesses were subpoenaed for the hearing. Counsel for Petitioner moved to invalidate the suspension arguing that there was no probable cause for the traffic stop because there was no evidence to indicate that Petitioner drove in a way to affect other traffic, relying on the case of *Crooks v. State.* The hearing officer reserved ruling.

On February 10, 2022, the hearing officer issued her Findings of Fact, Conclusions of Law and Decision, finding that the following facts were supported by a preponderance of the evidence: Deputy Gilroy observed Petitioner driving northbound swerving within his lane and leaving his lane of travel on multiple occasions by swerving into the center lane of travel; Gilroy detected an odor of an unknown alcoholic beverage emitting from Petitioner's breath; Petitioner had bloodshot, watery, glossy eyes, slow and slurred speech, and was unsteady on his feet; Petitioner did not perform field sobriety exercises to standard; Petitioner was placed under lawful arrest for DUI; and his breath test results were 0.094 and 0.099. The hearing officer concluded that all elements necessary to sustain the suspension and disqualification for driving with an unlawful breath alcohol level were supported by a preponderance of the evidence, and affirmed the suspension of Petitioner's driver's license.

**STANDARD OF REVIEW**

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (internal citation omitted).

**ANALYSIS**

In a formal review hearing for suspension of a driver's license for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, the hearing officer's scope of review is limited to the following issues:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in section 316.193.

§ 322.2615(7)(a), Fla. Stat. (2021).

The only issue presented in the Petition is the lawfulness of the traffic stop. Specifically, Petitioner argues that the sole basis for the stop was that he "changed lanes or moved out of lanes, without any evidence of any impact or effect on traffic—and nothing more." Petitioner contends that *Crooks v. State,* 710 So. 2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b], mandates that the suspension be invalidated on the record presented because there was no substantial competent evidence that any vehicle was affected by his movement and, therefore, no traffic violation occurred.

The Department argues that the evidence established a sufficient basis to conduct a traffic stop upon Petitioner's failure to maintain a single lane and also to conduct a welfare check pursuant to the community caretaking function of law enforcement.

"The constitutional validity of a traffic stop depends on purely objective criteria." *Dep't of Highway Safety & Motor Vehicles v. Jones,* 935 So. 2d 532, 534 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1518a]. "This objective test 'asks only whether any probable cause for the stop existed' making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Id.* (quoting *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]). "If, therefore, 'the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional.' " *Id.* (quoting *Dep't of Highway Safety & Motor Vehicles v. Utley,* 930 So. 2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a]).

"[A] stop of a motorist is permissible when an officer has probable cause to believe that the motorist has violated a traffic law, even if a reasonable officer would not have detained the motorist for such a violation." *State v. Girard,* 694 So. 2d 131, 131 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1363a] (citing *Whren v. U.S.,* 517 U.S. 806 (1996)). "All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute." *Davis v. State,* 788 So. 2d 308, 309 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1215a].

Section 316.089(1), Florida Statutes (2021), provides that "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic, . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Some Florida appellate courts have refused to find a violation of this statute where a driver's failure to maintain a single lane did not endanger himself or herself or anyone else. *See Peterson v. State,* 264 So. 3d 1183, 1188 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a] (holding that because there was no evidence that appellant's crossing the white line on two occasions created a reasonable safety concern, the deputy did not have probable cause to believe that he violated section 316.089(1)). However, the Fifth District Court of Appeal has held that failure to maintain a single lane, where a driver "deviated from his lane by more than what was practicable," is a violation of section 316.089(1) "irrespective of whether anyone is endangered." *Yanes v. State,* 877 So. 2d 25, 26-27 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a]; *see also Jones,* 935 So. 2d at 535 ("failure to maintain a single lane alone, can under appropriate circumstances, establish probable cause").

Furthermore, Florida courts have recognized that "a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (finding the deputy had a founded suspicion to stop respondent to determine the cause of his erratic driving); *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975) ("Because of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation."). "Under the community caretaking doctrine, an officer may stop a vehicle without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare." *State v. Rodriguez,* 18 Fla. L. Weekly Supp. 940a (Fla. 11th Cir. Ct. July 15, 2011). "The purpose of such a stop is to ascertain whether the driver

of the vehicle is in need of assistance due to illness, tiredness, or impairment and to protect the motoring public from harm." *Id.*

Here, the record clearly shows that Deputy Gilroy had an objectively reasonable basis for making the traffic stop. Petitioner swerved within his lane of travel and left his lane of travel multiple times, swerving into the center turn lane. Deputy Gilroy asked Petitioner if there was anything mechanically wrong with his vehicle and if he had any medical issues that would cause him to swerve the way he did. Petitioner's driving pattern violated section 316.089(1), and was also consistent with someone who was potentially ill, tired, or impaired. Thus, the hearing officer's finding regarding the validity of the traffic stop is supported by competent substantial evidence.

Based upon the foregoing, it is hereby **ORDERED** and **ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. (RUDISILL and RECKSIEDLER, JJ., concur.)

* * *

Volume 30, Number 9
January 31, 2023
Cite as 30 Fla. L. Weekly Supp. ___

# CIRCUIT COURTS—ORIGINAL

**Insurance—Property—Assignee's action against insurer—Dismissal with leave to amend—Failure to state date of loss, peril that caused loss, and sufficient information regarding repairable dollar value being alleged**

PREMIER ROOFING OF JACKSONVILLE, LLC, a/a/o Faith Wright, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2022-CA-001435, Division CV-C. October 3, 2022. Robert M. Dees, Judge. Counsel: Matthew A. Jordan, Weisser Elazar & Kantor, PLLC, Orlando, for Plaintiff. Kara K. Cosse, Kubicki Draper, Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE

THIS CAUSE came before the Court on defendant State Farm Florida Insurance Company's motion to dismiss and/or motion for more definite statement and incorporated memorandum of law, and motion for extension to respond to discovery, and after hearing oral argument from counsel on record for both parties via hearing on September 22, 2022, and reviewing the motion, complaint, and relevant case law, and otherwise being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's motion is GRANTED without prejudice.

2. Pursuant to Florida Rule of Civil Procedure 1.110(b), a plaintiff must include a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief." It is necessary for plaintiff to "state his pleadings with sufficient particularity for a defense to be prepared." *Horowitz v. Laske,* 855 So. 2d 169, 173 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2052b] (citing *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So. 2d 561 (Fla. 1988)).

3. Plaintiff's complaint stated at paragraph 5 that "[w]hile the Policy was in full force and effect, the Property suffered an accidental direct physical loss (Loss)." At the hearing, State Farm argued that the policy was in effect for exactly one year, and many of the policy's post-loss conditions occur in less than a year's time. Accordingly, without a specific date, this statement is not plead with sufficient particularity for the defense to be prepared because its broadness attempts avoidance of post-loss conditions that the parties agreed to pre-loss.

4. Defendant withdrew the indispensable party standing issue described in its motion, as both Faith Wright and Irwin Wright are named in the policy in dispute.

5. Plaintiff's lawsuit is dismissed, without prejudice, for the plaintiff to amend the complaint to state the date of loss, the peril that caused the loss, and to provide additional information with regard to the repairable dollar value being alleged.

6. Plaintiff shall amend the complaint pursuant to this order within twenty (20) days of the September 22, 2022, hearing, or by October 19, 2022.

* * *

**Criminal law—Boating under influence—Resisting officer without violence—Stop—Wildlife officers—Stop of defendant's boat was lawful, even if stop was based on mistaken belief that boat was violating law prohibiting wakeboarding after dark, where probable cause existed to conduct stop based on lack of navigation lights at sunset—Officer had reasonable suspicion to conduct BUI investigation after observing that defendant had odor of alcohol, bloodshot eyes and was thick-tongued with "cotton mouth"—Officer was not required to give *Miranda* warnings at time he initiated BUI stop by ordering defendant to tie boat off at dock and meet him on shore—Detention—Delay in issuance of citation was not unlawful where defendant's own bad acts were responsible for delay—No merit to argument that officer used wrong field sobriety exercises by opting for seated exercise rather than "walk and turn" exercise because seated exercise eliminated any bias that could be caused by defendant having "sea legs"—Breath test—Alleged failure to read implied consent warning, even if proven, would not merit suppression where defendant did submit to breath test—Instrument used to test defendant's breath was in substantial compliance with statutory procedures, properly calibrated, and reading breath alcohol content accurately—Fact that instrument is now broken is irrelevant—Motion to suppress is denied**

STATE OF FLORIDA, v. TARAN NOLAN TIPTON, Defendant. Circuit Court, 7th Judicial Circuit in and for Putnam County. Case No. 2021-MM-0984, Division 53. October 26, 2022. Kenneth J. Janesk, II, Judge.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

This matter is before the Court pursuant to Defendant's Motion to Suppress. ("MOTION") [DIN 100].[1] The Court having considered the Motion, testimony of witnesses, evidence to include the body cam footage[2], arguments of Counsel, relevant controlling caselaw, and being otherwise fully advised in its premise finds as follows:

Defendant is charged with the first-degree misdemeanor charges of boating under the influence ("BUI") and Resisting without Violence ("RWOV") as a result of being stopped at the Palatka City docks on 17 June 2021. In Defendant's self-admitted "Domino effect" motion he begins his attack of the State of Florida's ("SOF") case with the stop performed by Florida Fish and Wildlife ("FWC") Officer Christmas and continues through each aspect of their interaction up through the reliability for the Intoxylizer 8000; arguing that if the Court agrees at any stage, then the subsequent evidence (to include the final breath test results of .124) ought be suppressed as fruit of the poisonous tree. There are seven aspects of the investigation for the Court to consider.

**The Stop**

Defendant first argues the stop claiming it was only for wakeboarding after dark when FWC Christmas testified that he was stopping[3] the vessel for wakeboarding after dark as well as not having the navigation lights on as required. Fla. Stat. §327.50 requires navigation lights to run from sunset to sunrise. With the Court taking judicial notice, and both sides stipulating, the sunset was 8:28 that day; there is no dispute that the vessel was out at sunset but Defendant points out the thirty minute "grace period" when skiing (or wakeboardig) after dark. Defendant highlights the earliest portion of the body cam footage where FWC Christmas is talking to an unrelated family and points out Defendant skiing after dark and his own memorable name. "I bring presents but some don't like what I bring." This is just one of the many times where FWC Christmas only brings up the wakeboarding after dark on the body cam footage but testified that he rarely gives all the reasons for a stop. Defendant urges the Court to view this omission as FWC Christmas lying and adding a legal reason for the stop after he learns of the grace period. While there was much testimony about the navigation lights the Court is confident and finds that the navigation lights were not running after sunset, as required by law. The body cam footage coupled with the testimony of Donavan Green makes this fact clear. The Court is able to see for itself through the body camera footage. Donavan Green was also unequivocal on this fact. This portion of his testimony earns a great deal of reliability because he is the roommate, friend and witness of Defendant but still admitted to this damning fact. With the Court clear that

the navigation lights were not on when they lawfully should have been this issue becomes a simple application of clear case law. When it comes to stops there is a history of cases citing "pretextual" versus "objective" reasons for the stop. To ensure that law enforcement were stopping people for the right reasons an earlier standard required the Court to determine if the law enforcement officer ("LEO") truly believed a law was being violated. *State v. Wimberly*, 988 So. 2d 116 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a]. The Fifth DCA simplified things however in *State v. Parker*, where the Court no longer must look into the conscience of the LEO but rather just apply the "objective" standard to see if there was a lawful reason to affect the stop; albeit even if the LEO was not aware of that actual reason during the stop. 311 So. 3d 1029 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D356a]. "Thus, when addressing the constitutional validity of a traffic stop, a trial court is tasked with applying "a strict objective test which asks only whether any probable cause for the [traffic] stop existed." *Id.* at 1032.[4] So simply put even if FWC Christmas was only stopping the vessel because of his mistake about the wakeboarding after dark law, his stop was still lawful because probable cause still existed due to the lack of navigation lights at sunset. With SOF prevailing on this matter, the Court next addresses if FWC Christmas met the burden to begin his BUI investigation.

**BUI Investigation**

For FWC Christmas to move into a BUI investigation the legal standard is "reasonable suspicion." *State v. Taylor*, 648 So. 2d 701 (1995) [20 Fla. L. Weekly S6b]. While *Taylor* was a case of driving under the influence ("DUI"), the caselaw is the same and more voluminous in the realm of DUI. It is well established through caselaw that for an officer to be in conformity with the protections afforded through the Fourth Amendment the LEO needs "reasonable suspicion" to start his investigation and should only make an arrest if by the end of his investigation his "reasonable suspicion" rises to "probable cause." *Id.* at 703.[5] Odor or alcohol, glassy bloodshot eyes was the observations by the LEO which justified his DUI investigation. *Ameqrane, supra.* FWC Christmas listed odor of alcohol, bloodshot eyes, "thick tongued"[6] with "cotton mouth"[7] and unwarranted aggression as things he observed which gave him reasonable suspicion. Each occupant of Defendant's boat who testified admitted to seeing Defendant drinking throughout the day. No witness could be exact about how much and the time of last consumption but with all eyewitnesses in agreement to Defendant drinking it makes common sense that FWC Christmas did in fact smell alcohol on Defendant. SOF admitted Defendant's booking photo[8] to corroborate and the Court could view the same on the body cam footage. Defense Counsel's point however is well taken that the same blood shot and watery eyes could be the result of being out on the water for an entire day; a warning issued by NASBA, the authority on conducting BUI investigations. As per the thick tongued and cotton mouth observations, the Court was able to observe the same from the body cam footage. While interacting with FWC Christmas, Defendant is seen continually sticking his tongue out of his mouth in an effort to fix such a dry mouth. The immediately aggressive behavior of Defendant; refusing to give over his identification while alerting that his is also a law enforcement officer who knows how the FWC's system works for checking identification immediately upon approaching FWC Christmas could mean many things other than intoxication. "Are you fucking kidding me", "I'll stand wherever the fuck I want to" could be the result of Defendant's disdain for FWC Christmas as much as it could be a sign of intoxication; however, what this angry interaction best demonstrates for the Court is that FWC Christmas has the time to make the observations of which he testified. Had the interaction been as quick as FWC Christmas ordering Defendant to get his ID and registration and had Defendant simply turned back to the boat to get these items, FWC Christmas may not have had the opportunity to smell the alcohol or really look into Defendant's eyes; nor would the Court have had the opportunity to observe the "thick tongued cotton mouth" for so much time on the body cam footage. FWC Christmas had ample factors to meet the reasonable suspicion standard required in *Ameqrane, supra.*

***Miranda* Warning**

Defendant next argues that he should have been *Mirandized* and that Defendant was in custodial arrest "all the way back at the dock" when FWC Christmas ordered Defendant to tie off the boat and meet him on shore. This argument however fails when compared to Defendant's argument that FWC Christmas needed to proceed with extra caution when reaching reasonable suspicion per NASBA and relevant caselaw. *State v. Burns*, 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a]. The body cam footage shows Defendant first being *Mirandized* at the 18-minute mark. In *Burns* the Court held that a "routine traffic stop" where defendant was asked for his license, registration and to perform field sobriety task did not constitute custodial interrogation, thus sparking the need for *Miranda* warnings. "Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest." *Id.*[9] With the facts of our case so analogous to those in *Burns*, this again will not be the domino to make the rest fall.

**Delay in the Citation**

Defendant next argues the delay in issuing the citation, the reason FWC Christmas was originally interacting with Defendant. While Defense Counsel and SOF disagree a bit on the duration it is clear from the body cam footage that their entire interaction at the dock is about 1 hour with Field Sobriety Tasks (FSE) not being conducted for over 15 minutes and the citation taking every bit of 30 minutes to be written. FWC Christmas testified about radio issues playing a part in this delay. SOF argues correctly and the body cam footage is the best evidence that Defendant is the culprit of such delay. As explained earlier Defendant argued about producing his ID, which lead to a six-minute delay. The rest of the eighteen minutes is FWC Christmas calling for backup from the local sheriff's office ("PCSO") and Defendant blaming his friend to be the driver of the boat. Both Defendant and FWC Christmas spend the first 18 minutes debating back and forth about the law and professional etiquette. The next duration is chockfull of Defendant asking FWC Christmas to "go another route" seeking "professional curtesy." The Court agrees with Defendant that the citation should not have taken so long; however, through the body cam evidence the Court finds that Defendant is the party responsible for such delay. Defendant cannot benefit with a suppression through his own bad acts.

**Utilizing the wrong Field Sobriety Tasks**

Defendant next argues that FWC Christmas utilized the wrong FSE when he opted for the seated FSE instead of the "walk and turn" which is more traditionally utilized in a DUI investigation. FWC Christmas testified he opted for the seated FSE because it was a "marine environment" as well FWC Christmas does not believe he can demonstrate the "walk and turn" well enough due to a history of injuries. FWC Christmas went as far as to testify that he keeps a chair in his patrol vehicle and will use the seated FSE during a DUI investigation outside of a "maritime environment." NASBA suggests the seated FSE in marine conditions to avoid someone failing the traditional "walk and turn" task, not because of intoxication but because of "sea legs."[10] Neither party could produce caselaw corroborating the validity of either argument. While the Court is unsure how it would rule on FWC Christmas' unconventional "chair in the trunk" DUI procedure, the Court finds that performing the seated FSE makes perfect common sense when coupled with the testimony that Defen-

dant had been wakeboarding and out on a vessel for the better part of the day. If anything, the seated FSU gave Defendant a greater advantage of being successful with the FSEs, as it eliminated any bias that could have been caused by "sea legs."

**Implied Consent**

Defendant next argues he was not read implied consent. Defendant is correct that the body cam footage does not show the reading of implied consent. FWC Christmas testified that he read it from a card but where and when it was read became cloudy as he was impeached through his deposition. The Court however, need not spend much time making findings on this ground. The only necessary finding is that Defendant did submit to a breath test; thus implied consent does not play a suppression role. *State v. Iaco*, 906 So. 2d 1151 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1556a].

**Intoxylizer 8000 Compliance**

Defendant finally shifts attention to Putnam County Sheriff's Office ("PCSO") and their responsibility for the instrument used to test Defendant's blood alcohol level ("BAC"). Defendant describes PCSO as "in shambles" while SOF cites *State v. Burke*, arguing that PCSO was in "substantial compliance" with the statutory procedures. 599 So. 2d 1339 (1992). The Court heard from two PCSO "agency inspectors"[11] as well as one Florida Department of Law Enforcement ("FDLE") "Department Inspector".[12] Through the testimony it was learned that the instrument used to measure Defendant's BAC was tested monthly by PCSO and then annually by FDLE.[13] Each Agency Inspector had some issues with the testing (seemingly "operator error") but all three inspectors were consistent that FDLE policy allows the test to be attempted twice before the instrument fails. There was no testimony that the instrument ever failed twice and FDLE Soto was clear that that instrument stores exactly what happens to include when the instrument fails a test. The larger argument surrounded an uploading issue where the instrument would not transmit the monthly test results to FDLE. More than one witness suggested the upload issue was a result of PCSO switching their phones to a digital service. The reason is not important but Defendant attacks PCSO Roberts' solution to the problem. With the transmission not working, Roberts testified that he opted to simply set an appointment and drive the instrument to Tallahassee, allowing FDLE to download the monthly test. There was great debate if this meant the instrument was "out of service", requiring an additional agency test when put back into service. PCSO Roberts opined it was not "out of service" because, even though boxed up the same way it would be for shipping, Roberts had it in his vehicle the entire time and could have taken it out of the box to use. FDLE Soto opined the same, pointing out the instruments are routinely carried in LEO vehicles to conduct breath tests roadside. The Court need not be the authority on this as the Court finds PCSO has acted in "substantial compliance" as required by *Burke*, supra. The *Burke* court is clear that the "substantial compliance" is so that the court is confident that the instrument is trustworthy and reliable. *Id.* The Court is confident that the instrument was properly calibrated and reading BAC accurately. The policy allows for an agency to box up the instrument and put it in the hands of a third-party delivery company (i.e - FedEx) so that the instrument can reach Tallahassee before being delivered back. In our case PCSO Roberts was the delivery man. He never tossed the boxed instrument inside a truck full of other deliveries before sending it up and down conveyor belts to another truck and back and forth Route 75. Instead, he securely delivered it to and from FDLE in Tallahassee, giving the Court even more faith that the instrument returned from Tallahassee reading correctly. Defendant finally argues that the instrument now is broken but SOF correctly rebuts that this fact has no relevant value.

Therefore it is ORDERED AND ADJUDGED that:

1. Defendant's Motion to Dismiss is DENIED.

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[1]Denotes the numbered filing within the Court file as the Docket Identification Number. [ie-DIN 1].

[2]State's Exhibit 4.

[3]In reality the vessel was not stopped but rather when the vessel tied up at the Palatka City dock, FWC Christmas approached the vessel and its occupants.

[4]Citing *Holland v. State*, 696 So. 2d 575 (Fla. 1997) [22 Fla. L. Weekly S387a].

[5]*See Also State v. Ameqrane*, 39 So. 3d 339 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D1148b].

[6]A reference explained as someone who's speech is affected by their tongue seeming almost too big for their mouth to the point where their speech is slurred.

[7]A common reference explaining someone with an excessively dry mouth so much that their speech is impaired.

[8]State's Exhibit 2.

[9]Citing *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

[10]A common reference to someone being unsteady on their feet caused by being on a boat with waves or just upon disembarking from the boat but still being unsteady due to the time on a boat.

[11]LEO's who were responsible for the upkeep, maintenance, and monthly testing of the instruments for PCSO.

[12]Employee of FDLE who is responsible for the annual agency inspection of the instruments as well as helps the local agencies remain in compliance.

[13]State's Exhibit 5-9.

* * *

**Attorney's fees—Amount—Hourly rate—Court has insufficient information from which to determine reasonable hourly rates for 17 of 22 timekeepers involved in case—No fees are awarded for entries by those 17 timekeepers—Number of hours—Court accepts opinion on reasonable number hours from fee expert who conducted line-by-line analysis of time records and appropriately deducted matters that should not be included**

JOAN SZUTAK and DAVID E. SZUTAK, Trustee of the David E. Szutak Trust, Plaintiffs, v. RYAN J. PEREIRA, Defendant. Circuit Court, 7th Judicial Circuit in and for St. Johns County. Case No. CA14-882, Division 55. November 14, 2022. Howard M. Maltz, Judge.

**ORDER AWARDING DEFENDANTS' ATTORNEYS' FEES AND COSTS**

This cause is before this Court pursuant to Defendants Ryan Pereira and Terri Pereira's Motions for Attorney's Fees and Costs. [DIN 474, 827][1] The Court had previously determined these Defendants were entitled to recover their reasonable attorney's fees and costs. [DIN 563,828]. Thus, the issue currently before this Court is the amount of attorney's fees and costs to be awarded. The Court has considered the arguments of counsel, as well as the evidence presented by the parties at an evidentiary hearing. Being fully advised in the premises, the Court finds as follows.

*A. Procedural History*

What began as a routine lawsuit over the alleged failure to disclose defects in the sale of a residence morphed into an over eight-year odyssey of contentious litigation, hundreds of filings, multiple appeals, and ultimately a jury trial earlier this year. Hopefully, this Order represents the final chapter of this case before this Court. The relevant procedural history follows.

The long journey in this case began with a Complaint filed on July 17, 2014, by Plaintiffs Joan Szkutak, and David Szkutak both individually and as trustee of The David E. Szkutak Trust, against Ryan Pereira and Terri Pereira. [DIN 6] The Szkutak's purchased the Pereira's home and alleged there were defects the Defendants failed to disclose during the transaction. *Id.* On July 26, 2016, the Defendants' Motion for Summary Judgment on Plaintiff David Szkutak's individual claim was granted. [DIN 228] On July 29, 2016, the Defendants moved for attorney's fees from David Szkutak, pursuant to their unaccepted Proposal for Settlement. [DIN 230, 231] An evidentiary hearing was held on that Motion for Attorney's Fees on

August 8, 2017, wherein Defendants sought $48,001.25. [DIN 369, 372] On December 28, 2018, the Court entered an Order directing David Szkutak to pay Defendants $24,012.50 in attorney's fees. [DIN 563].

On July 17, 2017, Defendant Terri Pereira moved for summary judgment on the claims asserted against her. [DIN 367] On April 6, 2018, the Court granted summary judgment in favor of Terri Pereira. [DIN 463] That same day, Terri Pereira moved for attorney's fees, pursuant to her unaccepted Proposal for Settlement. [DIN 474] On November 21, 2018, the Court entered an Order finding Terri Pereira was entitled to recover her attorney's fees; however, determination of the amount to be awarded was deferred until now. [DIN 563]

The Plaintiffs appealed the entry of the Final Summary Judgment in favor of Terri Pereira. [DIN 501] On May 14, 2018, the Fifth District Court of Appeal affirmed this Court's entry of that Final Summary Judgment, and likewise, found Terri Pereira was entitled to recover her appellate attorney's fees. [DIN 574, 580] The appellate court directed this court to determine the amount of appellate attorney's fees Terri Pereira should recover. [DIN 574] The amount of appellate attorney's fees to be awarded is currently before this Court.

In January 2022, the remaining claims of Plaintiffs Joan Szkutak and David Szkutak, as trustee of The David E. Szkutak Trust, against Ryan Pereira proceeded to jury trial. At the conclusion of the trial, the jury rendered a verdict in favor of Ryan Pereira. [DIN 819] On February 25, 2022, Ryan Pereira filed his Motion for Attorney's Fees and Costs, pursuant to the prevailing party attorney's fees clause in the purchase and sale agreement between the parties. [DIN 827] On March 22, 2022, this Court entered an Order finding Ryan Pereira was entitled to recover his attorney's fees and costs, with the amount to be determined at a later time. [DIN 828]

Thus, this Court must determine the amount of attorney's fees to award to Terri Pereira, as a result of summary judgment being entered in her favor, and her defense of the appeal of that Order, as well as the amount of attorney's fees to award to Ryan Pereira, as a result of the verdict in his favor. This Court must also determine the amount of taxable costs to be awarded to the Defendants.

This Court conducted an evidentiary hearing to determine the amount of fees and costs to be awarded which spanned two days. On July 25, 2022, this Court received testimony from the Defendant's witnesses: Charles Jimerson, Esq.; Zachary Roth, Esq.; Ryan Pereira; D. Brad Hughes, Esq.; and William Cooper, Esq. The Court also received numerous exhibits. On November 3, 2022, the Court received testimony from the Plaintiffs' witness James Hauser, Esq., and likewise, received numerous exhibits.

*B. Standard to Determine the Award of Attorney's Fees*

This Court is directed to utilize the lodestar approach in determining the amount of attorney's fees to award, which requires the Court to determine the number of hours reasonably expended in the litigation, and multiply that by the reasonable hourly rate for the services of the prevailing party's attorney. *Fla. Patient's Compensation Fund v. Rowe,* 472 So.2d 1145, 1150-51 (Fla. 1985); *Joyce v. Federated Nat'l. Ins. Co.,* 228 So.3d 1122, 1126 (Fla. 2017) [42 Fla. L. Weekly S852a].

The Court has reviewed and considered the factors in determining reasonable attorney's fees set forth in Rule 4-1.5, Fla. Rules of Professional Conduct, and as discussed in *Rowe, supra.* This Court considered the following factors as guides to determining the reasonable fee to be awarded in this case:

a. The time and labor required, the novelty, the complexity and difficulty of the questions involved, and the skill required to perform the legal service properly;

b. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

c. The fee, or rate of fee customarily charged in the locality for legal services of comparable or similar nature;

d. The significance of, or amount involved in the subject matter of representation, the responsibility involved in the representation, and the results obtained;

e. The time limitations imposed by the client or by circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

f. The nature and length of the professional relationship with the client;

g. The experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of services; and

h. Whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested on any significant degree on the outcome of the representation.

*See also, Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828, 830-31 (Fla. 1990).

At the evidentiary hearing in this matter, the Court received opinion testimony from William Cooper, Esq., who testified as the Defendants' expert witness on the issue of attorney's fees. The Court also received opinion testimony from James Hauser, Esq., who testified as the Plaintiffs' expert witness on the issue of attorney's fees. Both Mr. Cooper and Mr. Hauser are very experienced attorneys and qualified to render opinions on the issue.

*C. Hourly Rates*

The Defendants seek to recover attorney's fees for the efforts expended by 22 timekeepers. There is no agreement among the parties regarding the reasonableness of the hourly rates sought by the various timekeepers. At the evidentiary hearing, Mr. Cooper rendered no opinions regarding the hourly rates sought on behalf of any of the timekeepers. Mr. Cooper testified that he was of the belief there was no dispute over the hourly rates, and thus, didn't delve into that issue. Mr. Cooper indicated that he knows many of the lawyers involved in this litigation from his mediation practice, and looked up some of the lawyers, without specifying whom, to see how long they had been practicing. Mr. Cooper acknowledged that he didn't speak to the timekeeper attorneys, or anyone else about their rates or qualifications. Mr. Hauser likewise provided no expert opinions regarding the hourly rates sought by the timekeepers.

The only lawyer among the timekeepers that the Court received competent, substantial evidence about in order to determine a reasonable hourly rate applying the *Rowe* factors is Mr. Hughes, based on the testimony he provided at the evidentiary hearing. Due to the length of this litigation, Mr. Hughes' hourly rate changed a number of times. Mr. Hughes' hourly rate ranged from $325 to $405 during the life of this case. Applying the *Rowe* factors, the Court finds Mr. Hughes' hourly rates to be reasonable.

In the Court's December 28, 2018 Order awarding fees to the Defendants as a result of the summary judgment being granted in their favor on David Szkutak's individual claim, the Court found the hourly rates for Brandon C. Meadows, Esq. ($245), Adam B. Edgecombe, Esq. ($255), Suzanne H. Clark, Esq. ($255), and Kayla A. Haynes, Esq. ($225) to be reasonable.[2] [DIN 563] This Court takes judicial notice of those rates as reasonable and will apply them accordingly. *See* Fla. Stat. §90.202.

This Court has insufficient information on the remaining timekeepers to determine a reasonable hourly rate; therefore, there will be no fees awarded for entries by those timekeepers. *See e.g., Westaway v. Wells Fargo Bank, N.A.*, 230 So.3d 505, 508 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1926a] ("*Rowe* factor does call upon courts to consider the experience, reputation, and ability of the lawyer or lawyers performing the services, that factor itself makes clear that the

lawyers' relative experience cannot be considered in isolation but, at a minimum, must be weighed in conjunction with their reputation and ability.")(internal citation omitted)

*D. Reasonable Number of Hours Expended*

The fees experts' methodologies utilized to determine the reasonable number of hours expended differed. Mr. Cooper testified that he did not conduct a line-by-line review of the time entries for the hours sought, but he looked at the total number of hours claimed and then made deductions for certain categories of work he felt were not compensable in the instant case, such as time spent on the third party claims, time billed for unrelated matters, collections efforts for the previous attorney's fee award against David Szkutak, and time entries for unrelated claims. Because the attorneys' hourly rates changed over time, Mr. Cooper then used a "blended rate" for the deductions, rather than the actual rate charged for the tasks billed or the rates he felt were reasonable.

Mr. Hauser testified that he conducted a line-by-line analysis of all the time entries. In analyzing the entries, Mr. Hauser indicated he made deductions for block billing (*See Cousins v. Duprey*, 325 So.3d 61, 76 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1685a]; *Kearney v. Auto-Owners Ins. Co.,* 713 F. Supp. 2d 1369, 1377-78 (M.D. Fla. 2010)); the third party claims; the unasserted malicious prosecution claim; vague entries; secretarial and ministerial tasks (*See Universal Property & Casualty Ins. Co. v. Deshpande,* 314 So.3d 416, 420 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2511a]; *No. Dade Church of God, Inc. v. JM Statewide, Inc.,* 851 So.2d 194, 196 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b]); time spent litigating the amount of fees (*See Mediplex Constr. Of Fla., Inc. v. Schaub,* 856 So.2d 13 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2061d]); time spent on a petition for writ of certiorari challenging the Court's Order permitting a claim for punitive damages[3]; duplications of efforts; excessive billing; erroneous entries from other matters; travel time (*See Hahamovitch v. Hahamovitch*, 133 So.3d 1062, 1063 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D107a]); and other miscellaneous matters.

In determining the number of reasonable hours expended to arrive at a lodestar amount, a fee expert must conduct a line-by-line analysis of the time records. *Certain Underwriters at Lloyd's London v. Candelaria*, 339 So.3d 463, 467-68 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1086b]; *Citizens Property Insur. Corp. v. Casanas*, 336 So.3d 746, 748 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2324b]. Mr. Cooper's analysis fails because he acknowledged he did not conduct the requisite line-by-line analysis. Because Mr. Hauser did conduct the required line-by-line analysis, and appropriately deducted matters that should not have been included, the Court accepts Mr. Hauser's opinions.

*E. Attorney's Fees Awarded*

Accordingly, the Court finds the following number of hours to be reasonable, with the applicable reasonable hourly rates indicated.

*i. Ryan Pereira's Claim*:

| Timekeeper | Hours | Rate | Total |
|---|---|---|---|
| D. Brad Hughes | 52.5 | $325 | $17,063 |
| D. Brad Hughes | 89.7 | $330 | $29,601 |
| D. Brad Hughes | 301.35 | $370 | $111,499 |
| D. Brad Hughes | 39.7 | $395 | $15,682 |
| D. Brad Hughes | 8.55 | $405 | $3,463 |
| D. Brad Hughes | 0.5 | $410 | $205 |
| Adam B. Edgecome | 23.65 | $225 | $6030.75 |
| Kayla A. Haynes | 67.05 | $225 | $15,086.25 |
| Total = | | | $198,630 |

In addition, the Plaintiff David Szkutak already paid $24,012.50 towards Defendants' fees, as result of the Court's prior award. The Court will deduct this amount from the amount awarded to Ryan Pereira. Plaintiffs argue the amount should be reduced by $48,001, the total amount sought at that earlier fee hearing; however, reductions made by the Court at that time, may also reflect reductions made currently, and thus, could result in a double reduction.[4]

**Total Fees Awarded to Ryan Pereira—$174,617.50**

*i. Terri Pereira's Claim*:

Terri Pereira's claims for attorney's fees arise from her obtaining summary judgment in her favor, and the fees incurred in defending the appeal of that Order. Her fee award is broken down separately below.

*a. Non-appeal fees*

| Timekeeper | Hours | Rate | Total |
|---|---|---|---|
| D. Brad Hughes | 27.35 | $395 | $10,803 |
| Kayla A. Haynes | 5.75 | $225 | $1,293.75 |

*b. Appeal Fees*

| Timekeeper | Hours | Rate | Total |
|---|---|---|---|
| D. Brad Hughes | 38.5 | $370 | $14,245 |
| Charles Jimerson[5] | 0.5 | $415 | $207.50 |
| Kayla A. Haynes | 3.25 | $225 | $731.25 |

**Total Fees Awarded to Terri Pereira—$27,280.50**

*F. Taxable Costs*

As the prevailing parties, Defendants are entitled to recover their taxable costs, pursuant to Fla. Stat. §57.041. The Defendants seek costs totaling $41,027.28. The Plaintiffs only challenge the costs paid to Gibraltor Construction Services ($12,255) and Alta Engineering ($7552.65). The charges for Gibraltor Construction Services were incurred for a consulting expert that did not testify at trial. This Court agrees with the *Statewide Uniform Guidelines for Taxation of Costs in Civil Cases*, and will not award that cost. The cost sought for Alta Engineering is for Mr. Newkirk, a professional engineer who testified at trial on behalf of the Defendant. The Court finds $7552.65 a reasonable cost for an engineer's trial testimony and preparation time, and thus, this cost will be awarded. Accordingly, the Court will award **$28,772.28** in taxable costs.

Therefore, it is ORDERED AND ADJUDGED that:

1. The Defendants' Motions for Attorney's Fees and Costs are GRANTED.

2. Defendant Ryan Pereira is awarded $174,617.50 for reasonable attorney's fees, with prejudgment interest accruing from March 2, 2022.[6]

3. Defendant Terri Pereira is awarded $27,280.50 for reasonable attorney's fees, with prejudgment interest accruing from November 21, 2018.

4. The Defendants are awarded taxable costs in the amount of $28,772.28.

5. The Defendants shall submit amended final judgments to the Court corresponding to this Order.

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[1]References to the Court Docket are made by identifying the Docket Identification Number ("DIN") for the filing. *E.g.,* [DIN 1].

[2]There were no fees incurred as a result of Mr. Meadows' and Ms. Clark's efforts in the motions currently before this Court. Fees for Mr. Meadows' and Ms. Clark's time and effort were awarded in the December 28, 2018 Order.

[3]In denying the Petition for Writ of Certiorari, the appellate court made no determination of entitlement to recover attorney's fees.

[4]Both experts agree the amount of the previous award should be deducted from the fee awarded here; however, Mr. Cooper indicates $24,012.50 should be deducted, while Mr. Hauser indicates $48,001 should be deducted. For the reason stated, the Court agrees with Mr. Cooper.

[5]The Court also received testimony from Charles Jimerson, Esq., at the evidentiary hearing. Although the purpose of Mr. Jimerson's testimony was to introduce time and billing records from his firm, and Mr. Jimerson's billing was very minimal, the Court

received enough information to determine his reasonable hourly rate.

[6]A party is entitled to recover prejudgment interest on an attorney's fees award accruing from the date the entitlement of attorney's fees is established. *Quality Engineered Installation v. Higley S.*, 670 So.2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a]; *Peavy v. Dyer*, 605 So.2d 1330 (Fla. 5th DCA 1992).

* * *

**Torts—Pedestrian struck by vehicle—Punitive damages—Amendment of complaint to add claim for punitive damages—Plaintiff has shown reasonable basis for concluding that defendant's behavior was either intentional or recklessly indifferent where defendant testified that he had clear view of roadway and of plaintiff, who was standing in road directing funeral procession, but that he had "no need to stop for a human being in the roadway"**

DYLAN VOGT, Plaintiff, v. JEROME HENIN, Defendant. JEROME HENIN, Counter-Plaintiff/Third Party Plaintiff, v. DYLAN VOGT, Counter-Defendant, and METRO-STATE SPECIAL SERVICES/ VEHICLE PROTECTION UNIT, LLC, and S.E. FUNERAL HOMES OF FLORIDA, LLC, f/k/a BALDWIN-FAIRCHILD FUNERAL HOMES, INC., Third Party Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-003041-O. April 13, 2022. A. James Craner, Judge. Counsel: Michael B. Brehne, Law Offices of Michael B. Brehne, P.A., Altamonte Springs, for Plaintiff. Neil F. McGuinness, McGuinness & Cicero, Fort Lauderdale; Scott R. Rost, Brennan, Manna & Diamond, PL, Orlando; and William E. Ruffier, Dellecker, Wilson, King, McKenna, Ruffier & SOS, Orlando, for Defendant Jerome Henin.

## ORDER GRANTING PLAINTIFF'S THIRD AMENDED MOTION FOR LEAVE TO AMEND COMPLAINT TO ASSERT A CLAIM FOR PUNITIVE DAMAGES

This cause came before the Court March 23, 2022 on PLAINTIFF'S THIRD AMENDED MOTION FOR LEAVE TO AMEND COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES, the Court having reviewed the file and proffered evidence and otherwise been advised in the premises, states as follows:

## FACTS

On or about July 27, 2017, Plaintiff was working as an independent contractor providing motorcycle escort for a funeral procession in the City of Winter Park at the intersection of Orlando Avenue and Minnesota Avenue. Plaintiff dismounted his motorcycle to direct traffic during the procession. As traffic was proceeding, a black sport utility vehicle operated by Defendant attempted to merge into the procession.

Plaintiff raised his hand to gain the attention of Defendant to alert him to his presence in the intersection. Defendant drove into the lane the procession was traveling and then abruptly swerved out of the lane and directly into the intersection where Plaintiff was standing. Defendant then drove his vehicle so that it contacted Plaintiff causing injury to him.

Plaintiff filed a multi-count complaint against Defendant alleging, battery, intentional infliction of emotional distress, and negligence among others. During the course of discovery, the Defendant's deposition was taken. Afterwards, Plaintiff filed a motion to amend their complaint to include a count for punitive damages.

A hearing was conducted on Plaintiff's motion to amend on March 23, 2022 where the Court was able to view and analyze the evidence proffered by Plaintiff as well as Defendant. After review of the video of the incident as well as the deposition testimony of Defendant, the Court makes the following ruling:

After careful consideration of the proffered evidence, review of Fla. Stat. §768.72 as well as Fla. R. Civ. P. 1.190 including subsection (f) as well as relevant case law including *Despain v. Avante Group, Inc.,* 900 So. 2d. 637 (Fla. 5 DCA 2005) [30 Fla. L. Weekly D947a] and *Kovacs v. Williams,* 331 So. 3d 850 (Fla. 5 DCA 2021) [46 Fla. L. Weekly D2632a] as well as *Varnedore v. Copeland,* 210 So. 3d 741 (Fla. 5 DCA 2017) [42 Fla. L. Weekly D360a] and applying the facts in this case, I find the motion well taken.

Particularly, the Court relies on the videotape that shows a big Range Rover, 4000 to 4500 lbs. heading north on the highway at speed, moving along with the traffic in the funeral procession. Defendant then merged into the procession.

Instead of remaining in his lane, he pulled out to the right towards Plaintiff who was a pedestrian at that point standing in the middle of the road with his hand up. Defendant headed towards the direction of Plaintiff and came together with him as it appears contact occurred.

Next, the Court considered the statements of Defendant himself during his deposition. According to Defendant's sworn testimony, Defendant had a clear view of the roadway and a clear view of the plaintiff in the road. Defendant testified he had an empty lane before him and that he had "no need to stop for a human being in the roadway."

Defendant testified that he had the ability to stop "before the plaintiff or stop to the left of the plaintiff or to the right of the plaintiff." Defendant testified he "could have stopped a million feet before the plaintiff." He also testified that it was safe to merge to the right even for "pitiful drivers." He testified he was aware he had a responsibility to take action to avoid hitting the plaintiff and Defendant knew Plaintiff was present on the roadway directing him to stop.

Regardless, Defendant then moved his vehicle forward knowing the plaintiff was in front of him. Defendant denied accepting any responsibility for bringing contact with the plaintiff and denied any fault.

Based on the above, I find that Plaintiff made a reasonable showing by evidence in the record that would provide a reasonable basis for recovery of punitive damages. Plaintiff has satisfied their burden by establishing a reasonable basis to conclude that Defendant's behavior was either intentional or recklessly indifferent.

I find this comports with the definitions cited in *Despain* which explain that punitive damages may be awarded against someone who's behavior exhibits the following:

> 1. Gross and flagrant character evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or there is a want of care which would raise the presumption of conscious indifference to consequences.
>
> 2. Conduct which is willful, wanton, gross, flagrant, reckless or consciously indifferent to the rights of a person.

I also find the showing comports with both of the standards that are memorialized in Florida Statute §768.72 regarding intentional misconduct as identified within the statute as well as gross negligence within that statute.

Therefore, **IT IS ORDERED AND ADJUDGED:**

1. That Plaintiff's Third Amended Motion for Leave to Amend Complaint to Add a Claim for Punitive Damages is hereby GRANTED.

2. Plaintiff's amended complaint is deemed filed as of the date of this Order.

3. Defendant has ten (10) days from the date of this Order to answer Plaintiff's amended complaint.

* * *

**Insurance—Automobile—Material misrepresentations on application—Failure to disclose household resident—Insurer waived defense of material misrepresentation on application by continuing to bind policy and to accept insured's premiums for at least seven months after learning of alleged misrepresentation—Further, insurer is precluded from using alleged misrepresentation as basis to deny coverage where undisputed evidence established that insured advised agent who sold him policy that non-driver lived with him, and existence of that resident was revealed during report on insured that insurer ran at inception of policy—Insurer has failed to establish materiality of alleged misrepresentation where "excluded driver" surcharge insurer applied to create additional premium applied only to drivers who operate vehicle, not to non-driver residents**

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DANIEL LAINE and UNIQUE CHIROPRACTIC CARE CENTER, INC., v. DANIEL LAINE, Defendant/Counter-Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Plaintiff/Counter-Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CA-11488-O. October 27, 2022. Vincent Chiu, Judge. Counsel: Alex Avarello, McFarlane Dolan & Prince, Coral Springs, for Plaintiff/Counter-Defendant. Coretta Anthony-Smith, Anthony-Smith Law, P.A., Orlando; and Tricia Neimand, Neimand Law, LLC, North Miami Beach, for Defendant/Counter-Plaintiff.

## ORDER GRANTING DEFENDANT/ COUNTER-PLAINTIFF'S DANIEL LAINE'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING PLAINTIFF/ COUNTER-DEFENDANT DIRECT GENERAL'S MOTION FOR SUMMARY JUDGMENT

**THIS CAUSE**, having come before the Court on September 23, 2022 on Defendant/Counter-Plaintiff Daniel Laine's Motion for Final Summary Judgment and Plaintiff/Counter-Defendant Direct General's Motion For Summary Judgement and the Court, after review of the Motions, the evidence filed, the Court record, and after hearing argument of counsel, and being otherwise advised in the premises, it is hereby **ORDERED AND ADJUDGED** that:

Defendant/Counter-Plaintiff's Daniel Laine's Motion for Final Summary Judgment is hereby **GRANTED** and Plaintiff/Counter-Defendant Direct General's Motion for Summary Judgement is hereby **DENIED**. The Court's oral ruling made at the September 23, 2022 hearing is hereby **VACATED** and replaced by the ruling reflected in this Order.

The issues, as framed by the Parties, is whether Daniel Laine made a material misrepresentation on the application for insurance by failing to list non-driver Mileus Laine as a household resident on the application for insurance, and if Direct waived its defense of material misrepresentation by binding the policy and continuing to collect and retain Daniel Laine's premiums after knowing about the alleged misrepresentation.

## FINDINGS

The Court finds that Direct waived its defense of material misrepresentation by its unequivocal act of continuing to bind and accept Daniel Laine's premiums for, at a minimum, seven months after learning about the alleged misrepresentation.

Additionally, the Court finds that the undisputed record evidence establishes that Daniel Laine advised the agent who sold him the policy at inception that Mileus Laine lived with Daniel Laine. Because Direct did not file any countervailing evidence, that is an admitted fact. Under Florida law, when an agent has notice of alleged misrepresentation, an insurer is precluded from later using that misrepresentation as a basis to forfeit coverage.

The Court further finds that Direct cannot establish the "materiality" required under Florida Statute Section 627.409 because Direct applied surcharges that under Florida law, cannot be utilized on a policy where only the minimum mandatory coverages of personal injury protection and property damage coverages were obtained by the insured. Direct's corporate representative further admitted Direct does not have a surcharge it may apply to household members and that the "excluded driver" surcharge it applied to create the additional premium in this case would apply to drivers who operate the vehicle.

Lastly, the Court finds that Direct had direct knowledge of the misrepresentation as the undisputed evidence establishes that Direct investigated the contents of the application when it ran an A-Plus report at inception which revealed Mileus Laine as a resident Daniel's Laine's address and continued to bind the insurance policy at the same premium rate.

## UNDISPUTED FACTS

1. On August 30, 2018, Daniel Laine entered into an insurance contract with Direct General Insurance Company ("Direct") that was effective on August 30, 2018.

2. The only coverages applicable to the subject policy are the minimum statutory requirements of $10,000.00 in personal injury protection and $10,000.00 property damage.

3. Mr. Laine went to a Direct agent to apply for the subject insurance.

4. The agent who sold the subject policy was an employee of Direct.

5. On August 30, 2018, once Mr. Laine provided the requisite information to the agent, the agent puts the information into Direct's system.

6. Upon receipt of the information and application provided by the agent on August 30, 2018, Direct investigated the information by running three reports—a motor vehicle report, an A-Plus report, and a credit report.

7. The A-Plus report, which was in the possession of Direct, identified that Mileus Laine was a resident of the exact same address as listed on Daniel Laine's policy application.

8. Additionally, Daniel Laine testified that he fully disclosed to the agent that Mileus Laine lived at the same residence.

9. Notwithstanding the A-Plus report and Mr. Laine's statements to the agent that he advised Mileus Laine lived at his address, Direct bound the subject policy at the stated premium rate and accepted premium from Daniel Laine from August 30, 2018 until May 4, 2019.

10. Daniel Laine was involved in an accident on January 3, 2019.

11. Direct received notice of the claim on January 9, 2019.

12. Just two days later, on January 11, 2019, Direct took a recorded statement of Daniel Laine.

13. That same day, the claim was referred to Direct's Special Investigations Unit ("SIU").

14. On January 14, 2019, SIU investigator Luis De La Cruz reviewed the file and discovered a "potential unlisted household member issues with the policy."

15. On January 17, 2022, Mr. De La Cruz completed an in person recorded statement with Daniel Laine at his house wherein Daniel Laine again disclosed (for the second time) that Mileus Laine had been living at his residence for about a year.

16. On March 7, 2019 Direct then took an examination under oath of Daniel Laine.

17. During the Examination Under Oath, Daniel Laine disclosed (for the third time), that Mileus Laine lived in his residence.

18. On March 15, 2019, Direct determined that a material misrepresentation existed as Daniel Laine failed to list Mileus Laine on his application for insurance.

19. However, despite making a determination there was a "material misrepresentation", Direct did not deny the claim—instead it continued to bill and accept payment of premiums from Daniel Laine.

20. In fact, Direct General did not deny the claim until July of 2019

when it sent a refund check for a portion of the premiums paid.

21. Direct then filed this instant action contending there is no coverage under the subject policy due to material misrepresentation in the application for insurance.

22. Because the uncontroverted evidence establishes that Direct continued to bill and collect premiums from Daniel Laine after it knew about the alleged material mispresentation; that Direct had actual notice and possession of an A-Plus report which put Mileus Laine as a household member at the time it bound the subject policy; that Daniel Laine disclosed same to the agent that sold him the policy at the time of the application; and, coupled with the fact that Direct utilized a surcharge that is impermissible on policies with only PIP and PD coverages that applies solely for drivers of the vehicle, the Court finds summary judgment must be granted in Daniel Laine's favor.

## ANALYSIS

### I. Summary Judgment Standard

In evaluating the claims for summary judgment, the Court applies the newly amended Florida Rule of Civil Procedure 1.510(a) which states "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Summary judgment puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury. *Petruska v. Smartparks-Silver Springs, Inc.*, 914 So. 2d 502 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a]. Florida has adopted almost in its entirety the federal rule 56. In applying this new Rule 1.510 the Court is to look to *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), commonly referred to as the "Celotex trilogy", as well as the overall body of case law interpreting Rule 56.

In *Celotex*, the Supreme Court of the United States held

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). In *Anderson*, the Supreme Court of the United States made clear

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra*, and *Cities Service, supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra*, 391 U.S., at 288-289, 88 S.Ct., at 1592. If the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (per curiam), or is not significantly probative, *Cities Service, supra*, at 290, 88 S.Ct., at 1592, summary judgment may be granted.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

In *Matsushita*, the Supreme Court of the United States expounded that to survive a motion for summary judgment there must be a "genuine" issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Thus, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *See id.* In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." *See id.* (quoting Fed. Rule Civ. Proc. 56(e)).

### II. Material Misrepresentation Standard

In Florida, a material misrepresentation is

> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) **If the true facts had been known** to the insurer pursuant to a policy requirement or other requirement, the insurer **in good faith** would not have issued the policy or contract, **would not have issued it at the same premium rate**, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

§ 627.409, Fla. Stat. (emphasis added). Thus, a misrepresentation in an insurance contract application *may* prevent recovery under the contract if, had the true facts been known to the insurer, the insurer would not have issued the policy, would not have issued it at the same premium rate, or in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss. *Fresh Supermarket Foods, Inc. v. Allstate Ins.*, 829 So. 2d 1000 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2477c].

***a. Under Florida law a claim material misrepresentation can be waived, and the undisputed record evidence establishes Direct General waived its claim.***

Well-established Florida jurisprudence makes clear that a claim of material misrepresentation can be waived. *See, e.g., Johnson v. Life Ins. Co. of Ga.,* 52 So. 2d 813, 815 (Fla. 1951); *Frisbie v. Carolina Cas. Ins. Co.,* 103 So. 3d 1011 (Fla. 5th DCA 2012) [38 Fla. L. Weekly D49d]; *Echo v. MGA Ins. Co.,* 157 So. 3d 507 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D442a]*; Graham v. Lloyd's Underwriters at London,* 964 So. 2d 269, 276 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2212c]; *Leonardo v. State Farm Fire and Cas. Co.,* 675 So. 2d 176, 178 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1165a]; *Gurrentz v. Fed. Kemper Life Assur. Co.,* 513 So. 2d 241, (Fla. 4th DCA 1987); *Wimberg v. Chandler,* 986 F.Supp. 1447, 1455 (M.D.Fla.1997). Unequivocal actions that recognize a continued existence of a policy are wholly inconsistent with an allegation of rescission will constitute a waiver. *Johnson v. Life Ins. Co. of Ga.*, 52 So. 2d 813 (Fla. 1951). The Florida Supreme Court stated it best when it held "when an insurer has knowledge of the existence of facts justifying a forfeiture of the policy, any unequivocal act which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof." *Johnson v. Life Ins. Co. of Ga.*, 52 So. 2d 813, 815 (Fla. 1951).

Here, the undisputed record evidence establishes that: (1). at the

time of the application, Direct General ran an A-Plus report, the contents of which specifically showed Mileus Laine's address as the address on policy and that Direct General chose not to review the contents of the report; (2). that at the time of the application, Daniel Laine advised Direct General's employee/agent who sold him the policy of insurance that Mileus Laine resided at his address; (3). that during the January 17, 2019, in person recorded statement with Direct General STU investigator Mr. De La Cruz, Daniel Laine again disclosed (for the second time) that Mileus Laine had been living at his residence for about a year; (4). that during the March 7, 2019 examination under oath of Daniel Laine, Daniel Laine disclosed (for the third time), that Mileus Laine lived in his residence; (5). that despite having the A-Plus report in its file and admission to the agent on August 30, 2018, Direct General continued to bind the policy at the same premium rate as well as bill and collect premium from Daniel Laine on October 2, 2018; November 01, 2018; December 4, 2019; and January 3, 2018; (6). that despite being advised again of the alleged misrepresentation during the January 17, 2019 recorded statement Direct General continued to bill and collect premiums from Daniel Laine on February 5, 2019 and March 5, 2019; (7). that despite being advised again of the alleged misrepresentation during the March 7, 2019 examination under oath, Direct General continued to bill and collect premiums from Daniel Laine on April 3, 2019 and May 4, 2019; (8). that from April 1, 2019 through June 27, 2019 Direct General took no action on Mr. Laine's claim.

The unrebutted record evidence established that Direct knew of the alleged misrepresentation on August 30, 2018; January 17, 2019; and March 7, 2019. Yet, Direct General continued its unequivocal act of billing Daniel Laine for his policy of insurance and collecting premiums thereby acting in a manner wholly inconsistent with the forfeiture of coverage and lulling Mr. Laine into the false sense of security that he would be covered by his insurance policy for this loss and any others that may have arisen.

Direct did not present any evidence to counter Mr. Laine's claim of waiver. Counsel for Direct just stated there was no waiver because the application did not list Mileus Laine and thus, the carrier "did not have knowledge" and thus, "there is no waiver issue". Direct's argument is belied by the uncontradicted record evidence that Direct was notified by Daniel Laine that Mileus Laine lived with him at least three times—August 30, 2018; January 17, 2019, and March 7, 2019. Direct also undertook its own investigation of the application and ran an A-Plus report on August 30, 2019 that revealed Mileus Laine at the same address as Daniel Laine's. Direct presented no contradictory evidence or argument against the fact that despite being notified four separate times, that Direct continued to bill and collect premiums from Daniel Laine. These unequivocal actions run completely inconsistent with Direct's now claim of forfeiture and result in a waiver of Direct's claims of misrepresentation. *See Johnson v. Life Ins. Co. of Ga.,* 52 So. 2d 813, 815 (Fla.1951).

***b. Direct is estopped from asserting material misrepresentation as the undisputed facts establishes Daniel Laine disclosed Mileus Laine to the agent at the time of the application.***

The Florida Supreme Court made clear in *Columbian Nat. Life Ins. Co. v. Lanigan* that "In this jurisdiction it is well settled that if the insured gives truthful answers to questions contained in the application for life insurance, and the company's agent, either through fraud or mistake, inserts answers in the application which do not accord with the information given, the insurer cannot insist on breach of warranty, but is estopped from making such defense." 154 Fla. 760, 766-67, 19 So.2d 67, 70 (Fla. 1944) (citing *Massachusetts Bonding & Ins. Co. v. Williams*, 123 Fla. 560, 167 So. 12).

The District Courts of Appeal have followed this precedent, consistently holding that "notice to the agent at the time of the application for insurance of facts material to the risk is notice to the insurer, and will prevent the insurer from insisting upon a forfeiture for cause within the knowledge of the agent." *Fresh Supermarket Foods, Inc. v. Allstate Ins.,* 829 So. 2d 1000 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2477c] (citing *Poole v. Travelers Ins. Co*., 179 So. 138, 143 (1937); *United Servs. Auto. Ass'n v. Clarke*, 757 So. 2d 554 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1022c]).

As discussed, Daniel Laine filed an affidavit testifying that at the time of the application for insurance, he disclosed to Direct's employee/agent who sold the subject policy that Mileus Laine lived with him. Direct did not file any opposition evidence to rebut this fact. Instead at hearing, counsel for Direct argued that "at best they've created an issue of fact" but that he didn't believe so because "the contract is a contract". However, these arguments are unavailing. Direct did not dispute Daniel Laine's testimony and therefore, this fact is undisputed. As such, Florida law compels that because it is undisputed that Direct's employee/agent had notice of the facts material to the risk at the time of the application, Direct is precluded from now insisting upon a forfeiture for the cause that was clearly within its agent's knowledge. *See Columbian Nat. Life Ins. Co. v. Lanigan,* 154 Fla. 760, 766-67, 19 So.2d 67, 70 (Fla. 1944); *Fresh Supermarket Foods, Inc. v. Allstate Ins.,* 829 So. 2d 1000 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2477c]; *Poole v. Travelers Ins. Co*., 179 So. 138, 143 (1937); *United Servs. Auto. Ass'n v. Clarke*, 757 So. 2d 554 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1022c].

***a. Direct did not establish materiality as required under Florida law.***

**i. Direct created an additional premium through its "driver exclusion" surcharge despite its application, underwriting guidelines and admission that this exclusion is prohibited on PIP and PD only policies.**

It is undisputed that Daniel Laine's policy of insurance only provided for two coverages—$10,000 in personal injury protection (PIP) and $10,000 property damage (PD)—the mandatory statutory minimums. Direct claims that it rescinded the subject policy because Daniel Laine failed to list household member Mileus Laine on the application for insurance, which had Direct known it would have charged an additional premium. Direct created the "additional premium" by utilizing an excluded "driver" surcharge. Direct utilized this charge specifically because Direct does not have a surcharge for simply being a "household member".

Moreover, the excluded driver section of Direct's application where Direct contends Mileus Laine should have been listed is also not applicable. The application in no uncertain terms declares "this Driver Exclusion **shall not apply** to the minimum limits for: (1) Personal Injury Protection or Property Damage Liability Coverage"—the only two coverages obtained by Mr. Laine. Therefore, pursuant to the terms of the application Mileus Laine was not required to be listed as an excluded driver nor could Direct charge a premium for him to be listed in this section because the explicit language of the application itself prohibits this exclusion from applying to policies with only minimum limits of PIP and PD coverages. Direct' own underwriting guidelines further support Plaintiff's argument, looking at Rule 15 of subsection 10, which specifically state, again, exclusion endorsements **do NOT apply** to Personal Injury Protection or Property Damage coverages. Both the application and the underwriting guidelines prohibiting exclusions on PIP and PD only policies are in accord with Florida law as $10,000.00 of personal injury protection coverage and $10,000.00 of property damage coverage are statutorily mandatory coverages required in Florida.

Here, Direct did not file any evidence in opposition to the facts above. However, counsel for Direct insisted that even though Direct

agreed the exclusion did not apply to the only coverages Daniel Laine obtained, Direct could nevertheless apply the exclusion and charge for it because Mr. Laine "could have added any coverage throughout the course of this policy" and "because of all the what ifs".

When discussing the explicit provision of Direct's own underwriting guidelines which states "[t]his provision shall not apply to the minimum limits", counsel for Direct's sole argument against this was that "what if he chose to purchase property damage liability of $20,000. . .or $50,000". This argument is the definition of "some metaphysical doubt" as described by the United State Supreme Court. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 585, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). The new summary judgment rule is clear that the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts" as they come forward with "specific facts showing that there is a *genuine issue for trial*." *See id*.

Accordingly, Defendant/Counter-Plaintiff Daniel Laine's Motion for Final Summary Judgment is hereby **GRANTED**. The Court finds that Daniel Laine is entitled to coverage under his policy. Plaintiff/Counter-Defendant Direct General's Motion for Summary Judgement is hereby **DENIED**.

Therefore, Final Judgment is entered in favor of Defendant/Counter-Plaintiff Daniel Laine and he shall go hence without day. Plaintiff/Counter-Defendant Direct General Insurance Company shall take nothing from this action.

The Court hereby reserves jurisdiction to award attorney's fees and costs to Defendant/Counter-Plaintiff Daniel Laine.

* * *

**Criminal law—Sexual predator designation—Petition to remove sexual predator designation is denied—Although law in effect at time defendant was designated as a sexual predator permitted designated predator to petition court to remove designation, current law does not provide for discretionary removal of designation by courts,—Retroactive application of amendment omitting discretionary removal of designation does not violate prohibition against ex post facto laws because registration requirement does not constitute punishment**

STATE OF FLORIDA, Plaintiff, v. JESUS HUERTAS, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F96-9095, Section 09. November 3, 2022. Joseph D. Perkins, Judge. Counsel: Natalie Snyder, Assistant State Attorney, for Plaintiff. Eugene M. Simon, for Defendant.

**ORDER DENYING PETITION TO REMOVE JESUS HUERTAS FROM SEXUAL PREDATOR REGISTRY**

This case is before the Court on Petitioner Jesus Huertas's April 21, 2022 Petition to Remove Defendant from Sexual Predator Registry ("Petition"). On May 19, 2022, the Court *sua sponte* entered an Order requiring the parties to address, among other things, the retroactivity *vel non* of the various amendments to section 775.21, Florida Statutes. On June 19, 2022, Huertas submitted his Brief in Support of Petition for Removal ("Supplemental Brief"), on July 18, 2022, the State of Florida submitted its Response, and on August 15, 2022, Huertas submitted his Reply. The parties agreed that the Court should rule based on their written submissions without holding an additional hearing.

After consideration, the Court holds, as a matter of first impression, that that the current version of section 775.21(6)(*l*) governs, and the Court lacks discretion to remove Huertas from Florida's Sexual Predator Registry. The Court therefore **DENIES** the Petition.

**BACKGROUND**

The Court designated Huertas as a sexual predator on March 25, 1997. *See* Petition, Exhibit B. At the time, the law permitted a person designated as a sexual predator to petition the court to remove the designation:

> A sexual predator must maintain registration with the department for the duration of his or her life, unless the sexual predator has had his or her civil rights restored, or has received a full pardon or has had a conviction set aside in a postconviction proceeding for any felony sex offense which met the criteria for the sexual predator designation; however, a sexual predator who has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 10 years and has not been arrested for any felony or misdemeanor offense since release, may petition the criminal division of the circuit court for the purpose of removing the sexual predator designation. The court has the discretion to grant or deny such relief.

Fla. Stat. § 775.21(6)(e) (1996).

Over the next decade, the Legislature amended section 775.21 many times, adding various requirements and modifying the procedure for removal of a sexual predator designation. Under the statute effective from July 1, 2006 to June 30, 2007, the requirements for removal of the designation depended on the date of the designation:

> A sexual predator must maintain registration with the department for the duration of his or her life, unless the sexual predator has received a full pardon or has had a conviction set aside in a postconviction proceeding for any offense that met the criteria for the sexual predator designation. However, a sexual predator who was designated as a sexual predator by a court before October 1, 1998, and who has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 10 years and has not been arrested for any felony or misdemeanor offense since release, may petition the criminal division of the circuit court in the circuit in which the sexual predator resides for the purpose of removing the sexual predator designation. A sexual predator who was designated a sexual predator by a court on or after October 1, 1998, who has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 20 years, and who has not been arrested for any felony or misdemeanor offense since release may petition the criminal division of the circuit court in the circuit in which the sexual predator resides for the purpose of removing the sexual predator designation. A sexual predator who was designated as a sexual predator by a court on or after September 1, 2005, who has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 30 years, and who has not been arrested for any felony or misdemeanor offense since release may petition the criminal division of the circuit court in the circuit in which the sexual predator resides for the purpose of removing the sexual predator designation. The court may grant or deny such relief if the petitioner demonstrates to the court that he or she has not been arrested for any crime since release, the requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the removal of the designation as a sexual predator or required to be met as a condition for the receipt of federal funds by the state, and the court is otherwise satisfied that the petitioner is not a current or potential threat to public safety. The state attorney in the circuit in which the petition is filed must be given notice of the petition at least 3 weeks before the hearing on the matter. The state attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied. If the court denies the petition, the court may set a future date at which the sexual predator may again petition the court for relief, subject to the standards for relief provided in this paragraph. Unless specified in the order, a sexual predator who is granted relief under this paragraph must comply with the requirements for registration as a sexual offender and other requirements provided under s. 943.0435 or s. 944.607.

Fla. Stat. § 775.21(6)(*l*) (2007).

The Legislature amended section 775.21 effective July 1, 2007 to omit discretionary removal of a sexual predator designation. Since then, section 775.21(6)(*l*) has required that a sexual predator register

for life in most circumstances: "A sexual predator shall maintain registration with the department for the duration of his or her life, unless the sexual predator has received a full pardon or has had a conviction set aside in a postconviction proceeding for any offense that met the criteria for the sexual predator designation." Fla. Stat. § 775.21(6)(*l*) (2022).

**DISCUSSION**

Huertas argues that the amendments to section 775.21 do not apply retroactively due to the prohibition against *ex post facto* laws in both the United States and Florida Constitutions. U.S. Const. art. I, section 10; Fla. Const. art. I, section 10. "In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Gwong v. Singletary*, 683 So. 2d 109, 112 (Fla. 1996) [21 Fla. L. Weekly S444a] (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)).

Here, the second prong does not apply because "the registration requirement[s] of [section] 775.21 . . . are procedural and regulatory in nature and do not constitute punishment." *Rickman v. State*, 714 So. 2d 538 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D1504a] (rejecting *ex post facto* challenge); *accord Fletcher v. State*, 699 So. 2d 346, 347 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2264d] ("[T]he designation 'sexual predator' is neither a sentence nor a punishment but simply a status resulting from the conviction of certain crimes."); *see also Givens v. State*, 851 So. 2d 813, 814-15 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1809d] (holding that sexual offender registration statute, section 943.0435, Florida Statutes, is procedural and nonpunitive and, therefore, its retroactive application does not violate *ex post facto* principles).[1]

The seminal case on this point is *Smith v. Doe*, 538 U.S. 84 (2003) [16 Fla. L. Weekly Fed. S142a]. In *Smith*, the Court considered whether Alaska's Sex Offender Registration Act, requiring individuals convicted of certain sex offenses to register for life, could be applied to individuals convicted before the Act was enacted. The Court held that the Act could apply retroactively without violating the *ex post facto* clause because it was regulatory and nonpunitive in nature. *Id*. at 95-96.

Petitioner acknowledges *Smith* but asserts that the Florida Supreme Court "receded" from it in *Therrien v. State*, 914 So. 2d 942 (Fla. 2005) [30 Fla. L. Weekly S725a]. In *Therrien*, the Court refrained from addressing constitutional questions and, instead, narrowly held as a matter of statutory construction that section 775.21 "does not authorize imposition of a sexual predator designation on a defendant based on a predicate offense that did not qualify the defendant for sexual predator status at the time of sentencing." *Id*. at 944. Contrary to Petitioner's contention, the Court did not "acknowledge[ ] that at least some aspects of section 775.21 are substantive in nature and not retroactive in application." Supplemental Brief at 2. Indeed, the Court reached its decision interpreting the version of section 775.21 in effect at the time of the sexual predator designation, *Therrien*, 914 So. 2d at 949, not the version in effect at the time of the underlying crime or time of sentencing.

Moreover, unlike section 775.21(4) and (5) governing sexual predator criteria and designation requirements, nothing in the text of current section 775.21(6)(*l*) conditions the procedure for removing a sexual predator designation on the date of the designation. The Legislature's 2007 amendment omitted prior language linking the removal procedure to the date of a designation, and the Court is not at liberty to resupply those omissions. *See Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364-65 (Fla. 1977) (holding that courts must assume the Legislature intended to omit words when amending a statute and are not at liberty to supply those omissions to the statute).

Petitioner's remaining cases are inapplicable because the statutes at issue, unlike section 775.21, either altered the definition of criminal conduct or increased the penalty by which a crime is punishable. *See Peugh v. United States*, 569 U.S. 530, 533 (2013) [24 Fla. L. Weekly Fed. S253a] (holding that "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense"); *Carr v. United States*, 560 U.S. 438 (2010) [22 Fla. L. Weekly Fed. S385a] (holding, as a matter of statutory construction, that amendment to Sex Offender Registration and Notification Act making it a crime to travel interstate and fail to register did not apply to travel occurring before the effective date of the amendment, thereby avoiding *ex post facto* question); *United States v. Walker*, 849 Fed. Appx. 822, 825 (11th Cir. 2021) (holding that where law at time of sentencing provided that maximum sentence defendant would face upon revocation of supervision was two years in prison, sentencing defendant upon revocation to five-year minimum mandatory sentence in effect at time of revocation violated *ex post facto* clause); *Witchard v. State*, 68 So. 3d 407, 410 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1959a] (holding that applying statute requiring mandatory electronic monitoring as part of punishment for offenses committed before the statute's enactment would result in *ex post facto* violation).

Finally, contrary to Petitioner's argument, the Court sees no meaningful difference between statutory amendments governing the obligation to register as a sexual predator on one hand, and the ability to be removed from the registry on the other. "The overriding purpose of the legislation designating certain individuals as 'sexual predators' and requiring these individuals to register themselves is to protect the public from repeat sex offenders, sex offenders who use violence, and those who prey on children." *Fletcher*, 699 So. 2d at 346-47. "[T]he designation 'sexual predator' is neither a sentence nor a punishment but simply a status resulting from the conviction of certain crimes." *Id*. at 347. A statutory amendment governing the removal of a sexual predator designation does not somehow morph this regulatory "status" into a sentence or a punishment.

The Court does not interpret *Farber v. State*, __ So. 3d __, 2022 WL 2821508 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1559b] to suggest otherwise. Rather, in *Farber*, the trial court exercised its discretion in denying a petition to relieve the petitioner from the duty to register as a sex offender. The Third District Court of Appeals, having determined that the trial court did not abuse its discretion, refrained from issuing an advisory legal opinion regarding the applicability of amendments to section 943.0435 governing such petitions.[2]

**CONCLUSION**

For the reasons stated above, the Court holds, as a matter of law, that it lacks the discretion Huertas asks the Court to exercise. It therefore **DENIES** the Petition.

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[1]Since the second prong of the *ex post facto* test does not apply, the Court need not and does not address whether, under the first prong, the law is retroactive in its effect. *See Love v. State*, 286 So. 3d 177, 187 (Fla. 2019) [44 Fla. L. Weekly S293a] (discussing what it means for a procedural statute to apply retroactively).

[2]Unlike the trial court in *Farber*, the Court denies Huertas' Petition on legal ground and has not exercised any discretion.

* * *

**Criminal law—Probation—Violation—Immunity—Justifiable use of force—Statute that affords immunity for "criminal prosecution and civil action" for persons who justifiably use, or threaten to use, force is not applicable to probation violation hearing based on allegation that defendant punched a woman in the face**

STATE OF FLORIDA, v. ANTHONY SANDERS, Defendant. Circuit Court, 11th

Judicial Circuit in and for Miami-Dade County. Case Nos. F05-9297D, F07-44274B, Criminal Division. October 11, 2022. Ramiro C. Areces, Judge. Counsel: Andrea M. Piloto, Miami-Dade State Attorney's Office, for Plaintiff. Zachary Rosenberg, Miami-Dade County Public Defender's Office, for Defendant.

**ORDER GRANTING STATE'S SECOND MOTION TO STRIKE DEFENDANT'S MOTION FOR STATUTORY IMMUNITY**

THIS MATTER having come before the Court on the State of Florida's Second Motion to Strike Defendant's Motion for Statutory Immunity (the "Motion") and this Court, having read the Motion, heard the argument of counsel, reviewed the case file, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

The State's Motion is GRANTED.

Defendant, on probation for two cases, is alleged to have violated his probation by committing a new criminal offense—namely, punching a woman in the face and chipping her tooth. The State is not filing charges on the underlying new law offense, but *is* going forward on the affidavit of violation of probation.

Defendant contends that his actions were justified.[1] But, rather than raise the justified use of force as a defense at the probation violation hearing, Defendant seeks to avoid the probation violation hearing altogether. This, Defendant cannot do.

The Florida legislature has expressly provided that certain persons who use, or threaten to use, force are entitled to immunity "from criminal prosecution and civil action." *See* Fla. Stat. § 776.032(1). Defendant contends that he is one such person. This Court disagrees.

"In interpreting a statute, legislative intent is the 'polestar' that guides a reviewing court in its analysis. We initially determine legislative intent by construing the statute's plain and ordinary meaning." *State v. Lacayo,* 8 So. 3d 385, 386-87 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D488a]. It is only when the language of a statute is ambiguous that courts are to resort to the rules of statutory construction. *Id.* at 387.

The statutory provision at issue is plain and unambiguous. Specifically, it affords immunity from "criminal prosecution" and "civil actions. *See* Fla. Stat. § 776.032. A probation violation hearing is neither. *See e.g. Clarington v. State,* 314 So. 3d 495 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2671a] ("Unlike a criminal prosecution, a probation violation hearing is a post-adjudicatory proceeding."); *see also Gagnon v. Scarpelli,* 511 U.S. 778, 782 (1973) ("Probation revocation. . .is not a stage of a criminal prosecution, but does result in a loss of liberty.").[2]

Notwithstanding the unambiguous language of the statute, Defendant contends this Court should follow an Order entered by another Eleventh Circuit Court Judge in an unrelated case. *See State v. Williams,* Case No. F17-6176, Order Granting Petition for Writ of Prohibition dated August 3, 2017. This Court is not bound by the decisions of another trial court and most respectfully disagrees with said trial court's interpretation of the statute. *See State v. Bamber,* 592 So. 2d 1129, 1132 (Fla. 2d DCA 1991) ("Trial courts do not create precedent" and its rules are "not binding, even in the adjacent courtroom.").

Accordingly, the State's Motion to Strike Defendant's Motion for Statutory Immunity is GRANTED. Defendant has no statutory right to immunity from a probation violation hearing. Defendant may raise any arguments concerning a justifiable use of force at the probation violation hearing. Defendant's Motion for Statutory Immunity is STRICKEN.

[1]Of course, Defendant has not *actually* made this contention. His motion is unsworn and there is no reference to any record evidence that may establish a "*prima facie* claim" of pre-trial immunity. As this Court has repeatedly stated, "prima face" has long been understood to be *evidence* that is *sufficient to establish a fact* if left unrebutted. *See* Bryan A. Garner, Black's Law Dictionary (10th ed. 2014) (Prima facie means "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be provided to be untrue."); *see also e.g. Hitson v. Mayo,* 99 So. 2d 297, 299 (Fla. 1957) (quashing writ of habeas corpus and stating, "[r]egardless of the motive, the unsworn statements presumptively authorized by petitioner for inclusion in his brief will not be considered adequate prima facie proof in these circumstances. . . ."); *State v. Russell,* 611 So. 2d 1265, 1267 (Fla. 2d DCA 1992) (the State made a prima facie showing of conspiracy where it "*presented evidence* to support a prima facie case") (emphasis added); *3618 Lantana Road Partners, LLC v. Palm Beach Pain Mgmt, Inc.,* 57 So. 3d 966, 968 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D651a] (plaintiff "presented *sufficient evidence* at trial to establish a prima facie claim for eviction") (emphasis added); *Wygodny v. K-Site 600 Associates,* 644 So. 2d 579 (Fla. 3d DCA 1994) (finding appellant had brought forth "some evidence" and, therefore, made a prima facie claim); *In re Alcala's Estate,* 188 So. 2d 903, 907 (Fla. 2d DCA 1966) ("[t]he appellant's evidence, properly weighed, presents a prima facie case of marital consent and raises the strong presumption of marriage."). Florida courts, moreover, have long held that an attorney's unsworn statements are insufficient to establish any fact. *See Olson v. Olson,* 260 So. 3d 367, 369 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2527a] (an attorney's "unsworn statements do not establish facts"); *see also Romeo v. Romeo,* 907 So. 2d 1279, 1284 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1903a] ("it is black letter law that argument of counsel does not constitute evidence"); *State v. Brugman,* 588 So. 2d 279 (Fla. 2d DCA 1991) ("An attorney's unsworn statement does not establish a fact in the absence of a stipulation."). Nevertheless, the Third District Court of Appeal recently adopted the analysis set forth in *Jefferson v. State,* 264 So. 3d 1019 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D135a]. *See Casanova v. State,* 335 So. 3d 1231 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2326a]. In *Casanova,* the Third District Court of Appeal held a defendant can raise "a *prima facie* claim of self-defense immunity from criminal prosecution even though the motion to dismiss is not sworn to by someone with personal knowledge or supported by evidence of testimony establishing the facts in the motion to dismiss." *Casanova,* 335 So. 3d at 1232. This Court is bound to follow *Casanova.* The result, however, can be discordant. For example, pursuant to *Jefferson* and *Casanova,* defendants can now file motions that include no sworn allegations, nor refer to any record evidence, and claim that they used *some* justified force. Said motion will then trigger a lengthy, sometimes days-long, pre-trial evidentiary hearing involving witnesses and alleged victims to disprove that defendant used some justified force. If defendant is unsuccessful in his motion, he is then free to argue an inconsistent position at trial—namely, that he did not use *any* force, justified or otherwise. This is not a problem borne of unwise policymaking in Tallahassee; it is a problem created by the judicial excision of a plain and ordinary term—specifically, "*prima facie*"—from the language of a statute.

[2]The statute's definition of "criminal prosecution," moreover, cannot be reasonably read to include post-adjudicatory proceedings in a case in which the defendant was not originally afforded immunity. *See* Fla. Stat. § 776.032(1).

* * *

**Mortgages—Default—Waiver—On rehearing, trial court concludes that it erred in entering summary judgment determining that assignee of original mortgagee of apartment complex is entitled to interest at default rate retroactively from date of initial default that occurred under mortgagee—Trier of fact could find that mortgagee, and hence its subsequent assignee, waived right to collect interest at default rate commencing on date of default where default was purely non-monetary filing of mechanic's lien, mortgagee had actual knowledge that lien was filed, mortgagee never declared default or placed borrower on any notice of default, mortgagee continued to accept payments for principal and interest due under note at contractual interest rate and did not notify borrower it was accruing or demanding interest at default rate, mortgagee first accelerated loan when new owner acquired title to complex in junior-lien foreclosure sale, and mortgagee provided new owner with a loan payoff letter that did not claim default interest prior to date title to complex was transferred to new owner—Argument that mortgagee was not required to notify borrower of intent to claim interest at default rate is unavailing where waiver derives not merely from lack of notice but from entire course of dealing by mortgagee—Anti-waiver clauses in note/mortgage do not foreclose waiver defense where clauses were satisfied or waived**

COF INVESTMENT, LLC, a Delaware limited liability company, Plaintiff, v. COLUMBUS APARTMENTS, LLC, and LAKE WORTH DEVELOPMENT TRUST, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case No. 2021-27467 CA 01 (43). November 16, 2022. Michael A. Hanzman, Judge. Counsel: James N. Robinson, White & Case

LLP, Miami, for Plaintiff. Justin B. Kaplan, Nelson Mullins Riley & Scarborough LLP, Miami, for Defendant Columbus Apartments. Matias R. Dorta, Dorta Law, Coral Gables; Paul C. Huck, The Huck Law Firm, P.A., Coral Gables; George Minski, Hollywood; and John Paul Arcia, John Paul Arcia P.A., Miami, for Defendant Lake Worth Development Trust.

## SUPPLEMENTAL ORDER ON MOTION FOR REHEARING

### I. INTRODUCTION

Before the Court is Defendant Lake Worth Development Trust's ("Lake Worth") Motion for Rehearing (D. E. 125) of the Court's August 3, 2022 Order on Summary Judgment ("S. J. Order") (D. E. 120). For the reasons explained below the Motion for Rehearing is **GRANTED,** and the Court's S. J. Order is **VACATED**.

### II. RELEVANT FACTS

#### A. COF's Acquisition and the Borrower's Prior Defaults

In December 2021, Plaintiff, COF Investment LLC ("COF"), bought a Note/Mortgage from its Assignor, Ocean Bank, N. A. ("Ocean Bank"). The Note, in the principal amount of Nine Million Three Hundred Thousand Dollars ($9,300,000.00), was secured by a Mortgage and Security Agreement ("Mortgage") encumbering real property (an apartment complex) owned and operated by Defendant Columbus Apartments LLC ("Columbus" or "Borrower").

In April 2019, years before COF's acquisition of the Note/Mortgage, Columbus permitted an $18,900.00 mechanic's lien to be recorded against the property—an Event of Default under the Mortgage. Despite its knowledge of this default, COF's predecessor/assignor—Ocean Bank: (a) never declared a default; (b) continued to collect/accept payments of principal/interest at the contractual interest rate specified in the Note; (c) negotiated/accepted an Amended and Restated Promissory Note which superseded and replaced the Initial Promissory Note; and (d) issued an estoppel letter which provided a payoff that did not include any default interest until title to the property was transferred in July 2021. Given what it perceived to be its substantial "equity" cushion, Ocean Bank apparently was not concerned about the filing of this $18,900.00 lien.

On January 12, 2021, a final judgment foreclosing the mechanic's lien was entered by the circuit court, and on July 12, 2021, the Miami-Dade County Clerk of Court conducted a foreclosure sale. Defendant Lake Worth bought the property at this forced sale for Five Hundred Two Thousand Dollars ($502,000.00), a price that obviously took into account Ocean Bank's senior mortgage lien. *See Spinney v. Winter Park Bldg. & Loan Ass'n,* 162 So. 899, 904 (Fla. 1935) (a buyer at a junior lien foreclosure is "assumed to have taken the amount of the [senior] mortgage indebtedness . . . into consideration"). When title to the property transferred to Lake Worth (another Event of Default), Ocean Bank ended its slumber and exercised its option to accelerate the debt.

#### B. The Ocean Bank Estoppel Letter

Following Lake Worth's purchase of the Property, the Borrower attempted to buy it back, and Lake Worth attempted to purchase the Note and Mortgage from Ocean Bank. During these negotiations Lake Worth requested an estoppel letter from Ocean Bank pursuant to section 701.04 of the Florida Statutes. In October 2021, Ocean Bank provided a letter representing the total amount due to be $10,080,033.00, which did not include default interest dating to the original date of default (i.e., April 2019). The payoff letter instead computed interest at the default rate commencing in July 2021, when the property was transferred to Lake Worth and the debt accelerated. The estoppel letter also provided that "[i]n the event that this statement contains any errors or omissions, Ocean Bank shall not be prejudiced by such error or omission, but shall be entitled to receive all amounts due under the terms of documents evidencing and securing the referenced loan." The Borrower did not repurchase the Property and Lake Worth did not buy the Note and Mortgage from Ocean Bank.

#### C. COF's Demand

In December 2021, Ocean Bank sold the Loan to COF and assigned COF all rights under the Note, Mortgage, and other Loan Documents. Shortly thereafter, COF filed this foreclosure action against the Borrower and Lake Worth, the current titleholder. In its Verified Complaint, and through separate correspondence attached to the Complaint, COF demanded default interest from the original date of default (i.e., April 2019). Both Defendants answered. The Borrower admitted its default, admitted the amount due, and raised no defenses. Lake Worth admitted the date of default, but raised defenses contesting the amount of interest due, and alleging that Ocean Bank had waived any defaults prior to July 19, 2021. Lake Worth also demanded (and received) from Plaintiff an estoppel letter, which claimed $15,230,784.93 due as of February 11, 2022—an amount inclusive of default interest from the original default date of April 16, 2019.

### III. PROCEDURAL HISTORY

In April 2022, COF filed its Verified Complaint seeking "Enforcement of Promissory Note" against Columbus (the Borrower), and "Foreclosure of Mortgage" against both Columbus and Lake Worth, the current title owner of the "Property" as defined in the Mortgage.[1] Despite the fact that its Assignor, Ocean Bank: (a) never declared a default; (b) continued to collect/accept payments for principal/interest at the rate provided for in the loan documents; (c) negotiated an Amended and Restated Promissory Note post default; and (d) issued an estoppel letter confirming a payoff that did not seek default interest until July 2021, COF claims an entitlement to interest at the "Default Rate" (24% per annum) retroactively from the date of the initial default (April 2019)—which increases the amount claimed due by approximately Five Million Dollars ($5,000,000.00).

Lake Worth disputes COF's claim for this retroactive default interest. In its "Amended Answer, Affirmative Defenses and Counterclaim," it insists that COF is the "alter ego" of Columbus; that the assignment from Ocean Bank "is a fiction;" and that "in fact the loan was paid off." Lake Worth also alleges that "Ocean Bank waived any default committed by Columbus which may have occurred prior to July 19, 2021;" that "Ocean Bank had not declared the loan was in default nor made claim upon Columbus for default interest prior to assigning the Loan to Plaintiff;" and that Ocean Bank expressly waived any claim for default interest via its October 21, 2021 estoppel letter, which was issued "before the loan was assigned to the Plaintiff."

The Parties filed cross-motions for summary judgment. COF maintained that the operative loan documents, as plainly written, permit it to charge interest at the default rate commencing on the date of the first Event of Default (April 2019), even though Ocean Bank never declared a default or accelerated until July 2021. Through its opposition to COF's motion, and its cross motion, Lake Worth argued that a lender: (a) must exercise its option to accelerate *before* it can exercise its option to charge interest at the default rate; and (b) must give notice of its intent to accrue default interest *prior* to doing so. Lake Worth also argued that Ocean Bank's estoppel letter foreclosed COF's attempt to charge interest at the default rate. Neither party moved for summary judgment on the broader issue of whether Ocean Bank waived the right to charge default interest prior to July 2021 and, if so, whether COF is bound by that waiver.

On August 3, 2022, the Court entered its S. J. Order. Considering the relevant loan documents, the Court found that the Lender (now COF) was entitled to accrue default interest "from the date of default, not from the date the Lender notified or advised the Borrower of its decision to exercise this contract right." S. J. Order, p. 7. The Court

concluded that nothing in the operative contracts required the "Lender to 'notify' the Borrower that default interest began accruing." S. J. Order, p. 8. Rather, an event of default triggered "the right to accrue interest at the default rate, regardless of whether the Lender's intent to do so is communicated to the Borrower or not." S. J. Order, p. 10, citing *LaGrange Ventures, LLC v. Wells Fargo Bank, N.A.,* No. 15 C 7922, 2016 U.S. Dist. LEXIS 96327, at *4 (N.D. Ill. July 22, 2016) ("[t]he late invocation of the always-present default right by [the Assignee] was apparently inconsistent with [Defendant's] expectations. It should not have been, since the note expressly permits the holder to 'delay or forgo enforcing any of its rights or remedies' without consequence").

The Court also rejected Lake Worth's claim that acceleration was the *sine qua non* to the lender's right to accrue interest at the default rate, as the contract here expressly permitted the Lender to charge the default rate from the date of default—not from the date of any acceleration. *See, THFN Realty Co. v. Kirkman/Conroy, Ltd.,* 546 So. 2d 1158, 1158 (Fla. 5th DCA 1989). Finally, the Court rejected Lake Worth's reliance on Ocean Bank's estoppel letter, finding that its " 'contractual obligation to pay interest is independent of the requirement to provide an estoppel letter under section 701.04,' and any failure to provide an accurate estoppel letter does not affect Plaintiff's rights under the Loan Documents." S. J. Order, p. 11, citing *Branch Banking & Tr. Co. v. Kraz, LLC (In re Kraz, LLC),* 626 B.R. 432, 439 (M.D. Fla. 2020).

Consistent with its S. J. Order, on August 10, 2022, the Court entered a Final Judgment of Foreclosure awarding COF all amounts claimed, including interest at the default rate commencing in April 2019. Lake Worth then filed its Motion for Rehearing (D.E. 125), raising two grounds. First, Lake Worth insisted that the Order improperly "applies inconsistent rules of law to foreclosure remedies—one rule for acceleration and another rule for default interest." Mot., p. 1. Second, and in the alternative, Lake Worth claimed that the Court applied the wrong "date of default" in awarding interest. Mot., p. 2.

On point one, Lake Worth continued to argue that a "default interest" clause should be treated the same as an "acceleration" clause, and that because an optional acceleration clause is not triggered until the lender notifies the borrower that the option has been exercised, default interest should not accrue until the lender notifies the borrower that this option has been exercised. In urging the Court to impose such a notice requirement, Lake Worth posited that under the Court's Order, "a performing loan can be subject to millions of dollars in default interest and that the holder/mortgagee can hold off exercising its option until the loan is almost fully paid off." Mot., p. 5. This ruling would, according to Lake Worth, encourage "bad behavior by lenders in the primary market commercial and residential markets, as performing loans can now be called for a technical default after years of service, with property owners forced to foreclosure because of the amount of default interest now available to lenders." Mot., pp. 5-6. According to Lake Worth, the Court's ruling would encourage lenders to lie-in-wait, collect interest at the contractual rate on a performing loan despite a non-declared non-monetary default, and then, when the loan became due, spring upon the borrower a demand for interest at the default rate.

As for its second point, Lake Worth argued that, in the alternative, default interest from April 16, 2019 should not be awarded because the Amended and Restated Note (dated January 7, 2020) superseded the Note and erased any prior default interest obligation. Thus, Lake Worth asked the Court to "amend the Final Judgment to reflect a default date of January 12, 2021, the date of the first post—January 7, 2020 default.

On August 31, 2022, the Court entered its "Order on Motion for Rehearing." Rejecting Lake Worth's first argument, the Court explained the difference between acceleration and default interest clauses, and why the latter (unlike the former) need not be triggered by notice. Turning to Lake Worth's parade of horribles, which again posited that under the Court's ruling a lender could continue to collect interest at the contractual rate, accrue it at the default rate, and years later demand the "spread" based upon a non-monetary default it never placed the borrower on notice of, the Court wrote:

> The Court highly doubts that this "gotcha" would be judicially countenanced, but this hypothetical case is so far removed from the circumstances *sub judice* it warrants no further discussion.

Order, p. 5. As for Lake Worth's second point, the Court set the matter for oral argument and, in the meantime, vacated its Final Judgment and cancelled the foreclosure sale.

When the Parties appeared for oral argument, the Court discerned (or first appreciated) that this case may present the exact "gotcha" Lake Worth hypothesized. For whatever reason (either Lake Worth did not make it clear, or this Court failed to grasp it) the Court previously did not appreciate that: (a) the April 2019 default was purely non-monetary; (b) that Ocean Bank never declared any default based upon the filing of the April 2019 mechanic's lien; (c) that after accepting payments for 9 months, Ocean Bank negotiated an "Amended and Restated Note"; (d) that for 2 ½ years after April 2019, Ocean Bank, with actual knowledge of the default, continued to collect/accept payments of principal/interest at the contractual interest rate; and (e) that Ocean Bank, fully aware of the default, also issued the estoppel letter which, on its face, made no claim to interest at the default rate prior to July 2021. COF, as its successor, now demands the interest "spread," which in this case amounts to approximately Five Million Dollars ($5,000,000.00).

Upon discerning, and fully appreciating, that the April 2019 Event of Default was purely non-monetary; that Ocean Bank continued to collect/accept payments at the contractual rate proscribed by the Note for years after this Event of Default, and that Ocean Bank then negotiated an Amended and Restated Note with full knowledge of the default, the Court ordered supplemental briefing on the question of whether these facts, which ***appear*** to be uncontested, could preclude Ocean Bank's assignee (COF) from collecting default interest. The Court also ordered the Parties to mediation. The Parties filed their respective briefs and have now advised the Court that mediation resulted in an impasse.

**IV. WAIVER**

Relevant to the issue of whether Ocean Bank, and hence its assignee COF, waived any right to collect interest at the default rate commencing April 2019, the following facts ***appear*** to be undisputed:[2]

> 1. The April 2019 Event of Default was purely non-monetary (the filing of the mechanic's lien). All other Events of Default prior to November 2021 (i.e., the foreclosure case, sale, etc.) also were purely non-monetary;
>
> 2. Ocean Bank had actual knowledge that the mechanic's lien was filed, as it was aware of the lien foreclosure suit;
>
> 3. Ocean Bank never declared, or in any way placed the Borrower (Columbus), on notice of this default;
>
> 4. From April 2019 through November 2021 (2 ½ years), Ocean Bank collected/accepted payments for principal/interest due under the Note (and later the Amended Note) at the contractual interest rate;
>
> 5. Lake Worth acquired title to the property on July 12, 2021. At that point, Ocean Bank first accelerated the loan.
>
> 6. At no time between April 2019 and October 21, 2021, did Ocean Bank advise or notify the Borrower that it was accruing or demanding interest at the default rate;

7. That on October 21, 2021, Ocean Bank, in accordance with Section 701.04 of the Florida Statutes, provided to Lake Worth a Loan Payoff Letter which did not claim default interest prior to the date title to the property was transferred to Lake Worth (July 2021); and

8. The Borrower's first monetary default (non-payment) occurred when it failed to make the November 2021 mortgage payment.

Given these ***apparently*** undisputed facts, the Court concludes that a trier of fact could find that Ocean Bank waived any right to collect interest at the default rate commencing April 2019, and that COF acquired the loan documents subject to that waiver. Under these circumstances, a holding that the defense of waiver is unavailable as a matter of law would encourage/permit lenders to sit back silently in the face of a non-monetary default, accept/collect interest at the contractual rate specified in a note, accrue interest at the default rate without notifying the borrower (or subsequent title holder), and then, after lying-in-wait, demand the "spread" (here millions of dollars) years later. The law does not, and should not, countenance such a "gotcha." *See, e.g., E.A. v. Dept. of Children and Families,* 894 So. 2d 1049, 1051-52 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D303a] (the purpose of Rule 8.525(d) of the Florida Rules of Juvenile Procedure "is not to terminate parental rights on a 'gotcha' basis"); *Jaszay v. H.B. Corp.,* 598 So. 2d 112, 113 (Fla. 4th DCA 1992 (reversing final summary judgment holding statute of limitations barred action, appellate court held that the "appellee is estopped from asserting the limitations defense because it stipulated to a sixty-day extension of the pre-suit screening period required under section 766.106, Florida Statutes," and pointed out that "we we will not countenance such 'gotcha' maneuvers"); *Salcedo v. Asociacion Cubana, Inc.,* 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979) ("we might say that the courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed").

Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin. Services, Inc. v. Saldukas,* 896 So. 2d 707, 711 (Fla. 2005) [30 Fla. L. Weekly S115a], and "[a] party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution." *DK Arena, Inc. v. EB Acquisitions I, LLC,* 112 So. 3d 85, 97 (Fla. 2013) [38 Fla. L. Weekly S231a]. "Waiver does not require detrimental reliance," and it "involves the act and conduct of only one of the parties . . . ." *Id.* at 97.

To avoid Ocean Bank's possible (and some might say likely) waiver, COF first tries to frame the issue as one of "notice," arguing—as this Court has already found—that "[n]othing in the Note requires the Lender to notify the Borrower (or a subsequent titleholder) of an intent to exercise that right as a condition to default interest accruing." S.J. Order, p. 7. Though correct, COF misses the point. As the Court has already said, Ocean Bank's failure to "notify" the Borrower of an intent to charge interest at the default rate was: (a) not required under the loan documents; and (b) not by itself a waiver of anything. So if, for example, the Borrower stopped making payments, Ocean Bank was at liberty to start accruing interest at the default rate without "proclaiming" its intent to do so, or otherwise "notifying" the Borrower. But that is not all that happened here.[3]

Ocean Bank did more—indeed far more—than fail to notify the Borrower of an intent to accrue interest at the default rate. It: (a) failed to declare any default; (b) continued to collect/accept payments at the interest rate provided for in the Note for 2 1/2 years after the April 2019 Event of Default; (c) negotiated an Amended and Restated Note which did not provide for any embedded default interest either through a recalculation of principle owed or otherwise; and (d) issued an estoppel letter which demanded default interest commencing in July 2021, when title was transferred to Lake Worth. All of this occurred prior to COF acquiring the Note/Mortgage. The issue here is not merely one of notice (or lack thereof). It is whether this course of dealing resulted in a waiver of whatever right Ocean Bank had to charge interest at the default rate from April 2019 - July 2021.

COF next takes refuge in the run-of-the-mill "anti-waiver" clauses contained in the Note/Mortgage, insisting that they foreclose Lake Worth's waiver defense as a matter of law. *See, e.g., Nat'l Home Communities, L.L.C. v. Friends Of Sunshine Key, Inc.,* 874 So. 2d 631 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D927a] (the "defenses of waiver and estoppel [are] defeated as a matter of law by the [anti-waiver] provisions of the contract itself"). It relies upon § 13.5 of the Note, and § 9.3 of the Mortgage:

> 13.5. No Implied Waiver. Bank shall not be deemed to have modified or waived any of its rights or remedies hereunder unless such modification or waiver is in writing and signed by Bank, and then only to the extent specifically set forth therein. ***A waiver in one event shall not be construed as continuing or as a waiver of or bar to such right or remedy in a subsequent event.*** After any acceleration of, or the entry of any judgment on, this Note, the acceptance by Bank of any payments by or on behalf of Borrower on account of the indebtedness evidenced by this Note shall not cure or be deemed to cure any Event of Default or reinstate or be deemed to reinstate the terms of this Note absent an express written agreement duly executed by Bank and Borrower.
>
> 9.3. No Implied Waiver. Mortgagee shall not be deemed to have modified or waived any of its rights or remedies hereunder unless such modification or waiver is in writing and signed by Mortgagee, and then only to the extent specifically set forth therein. ***A waiver in one event shall not be construed as continuing or as a waiver of or bar to such right or remedy on a subsequent event.***

Note § 13.5; Mortgage § 9.3. (Emphasis added). COF also refers the Court to the following remedy provision, also contained in § 9 of the Mortgage:

> 9.2. Remedies Cumulative. The rights and remedies of Mortgagee as provided in this Mortgage or in any other Loan Document shall be cumulative and concurrent, may be pursued separately, successively or together, may be exercised as often as occasion therefor shall arise, and shall be in addition to any other rights or remedies conferred upon Mortgagee at law or in equity. The failure, at any one or more times, of Mortgagee to assert the right to declare the Liabilities due, grant any extension of time for payment of the Liabilities, take other or additional security for the payment thereof, release any security, change any of the terms of the Loan Documents, or waive or fail to exercise any right or remedy under any Loan Document shall not in any way affect this Mortgage or the rights of Mortgagee.

COF's reliance on these anti-waiver clauses is misplaced, as it fails to appreciate what they say, and how they operate.

Absent ambiguity an anti-waiver clause, like any other contract term, must be construed/enforced as plainly written. *See, e.g., Walgreen Co. v. Habitat Dev. Corp.,* 655 So. 2d 164, 165 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1132a] (when the language of a contract is clear and unambiguous, it must be construed to mean "just what the language . . . implies and nothing more"). As for the portion of these clauses which recite, in plain English, that ***"a waiver in one event shall not be construed as continuing or as a waiver of or bar to such right or remedy on a subsequent event,"*** they are clear as the proverbial bell and mean exactly what they say. If the lender waives a right or remedy (and the clause assumes an initial waiver has occurred), it will not be deemed to have waived that right/remedy in the event of ***subsequent*** (i.e., future) breaches/defaults. Thus, this sentence within the anti-waiver clauses prevents a party from arguing that a waiver of a right/remedy should be deemed a permanent waiver of that same right/remedy in the event of future breaches/defaults.

How these clauses operate is illustrated by ample precedent, including *LRB Holding Corp. v. Bank of Am., N.A.,* 944 So. 2d 1113 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2980c], cited by COF. The court, relying on the anti-waiver clause, held that a bank's acceptance of "numerous" late payments in the past (39 times to be precise) did not prevent it from accelerating the loan based upon later "repeated failures" to make timely payments. *Id.* at 114. That is precisely how anti-waiver clauses work, because that is precisely what they say. The fact that the bank had previously, on 39 occasions, waived the right to receive timely payment did not mean it waived the right to insist on timely payments going forward.

Properly read and construed, an anti-waiver clause does nothing more than preserve a party's right to change its mind, and declare a breach/default, even though it previously waived the same breach/default. It protects against the argument that the initial waiver is irrevocable, and allows a party to decide, at any time, not to tolerate future/continuing breaches, despite having tolerated them in the past. It does not give a party a license to waive breaches/defaults and then declare them years later in the absence of a new (or continuing) default/breach. *See, e.g., Nat'l Home Communities, L.L.C. v. Friends of Sunshine Key, Inc.,* 874 So. 2d 631 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D927a] (allowing manager of trailer park to enforce ***continuing*** code violations despite a failure to enforce those same violations for the previous 8 years) (emphasis added). Put another way, these clauses do not rescue a party from a waiver that has already occurred. They protect a party against the claim that a "waiver" once is a "waiver" forever. That is what they plainly say, and that is what they plainly do.

Secondly, to the extent COF relies upon the portion of the anti-waiver clauses which decree that any "waiver" must be "in writing and signed by Bank," even an anti-waiver clause is waivable. *See, e.g., Gen. Elec. Capital Corp. v. Bio-Mass Tech, Inc.,* 136 So. 3d 698 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D335a]; Williston on Contracts, 4th § 39:36 (4th Ed. 2000) ("[t]he general view is that a party to a written contract can waive a provision of that contract by conduct despite the existence of a so-called antiwaiver or failure to enforce clause in the contract . . . "). *Protean Inv'rs, Inc. v. Travel, Etc., Inc.,* 499 So. 2d 49, 50 (Fla. 3d DCA 1986) ("[w]e conclude that, notwithstanding the presence of an anti-waiver provision in the subject lease, the defendant lessor [Protean Investors, Inc.] is estopped to claim that the plaintiff lessee [Travel, Etc., Inc.] was in default of the subject lease due to certain late rental payments made thereunder, and therefore had forfeited the right of first refusal under the lease"). Moreover, the Amended and Restated Note, the estoppel letter (or other writings that may be revealed through discovery) might properly be considered sufficient "writing(s)" to satisfy the anti-waiver provisions, assuming they were not otherwise waived. *See, e.g., Rybovich Boat Works, Inc. v. Atkins,* 587 So. 2d 519, 522 (Fla. 4th DCA 1991) ("[t]he trial court was correct in noting that by the various amendments, the buyer had acknowledged and confirmed that seller had fully performed all of the obligations under the agreement. Therefore, the buyer had contractually and in writing waived any right to claim additional defects").

The fact that these anti-waiver clauses do not immunize COF against Lake Worth's waiver defense is illustrated by *In re Crystal Waterfalls, LLC,* 2017 WL 4736707 (U.S. C.D. Cal. Oct. 20, 2017), a case with strikingly similar facts. The Debtor, as part of a real estate purchase, executed a promissory note secured by a "commercial security agreement" in favor of First Commercial Bank ("FCB"). The Note required 59 regular monetary payments with a final balloon payment of approximately Six Million Dollars ($6,000,000.00). The Note allowed FCB to charge interest at a "Default Rate" upon any default. The loan documents also required the debtor to pay "all taxes on the Property."

In December 2011, the Debtor "failed to make payment of the property taxes then due on the Property," and later failed to pay "taxes that subsequently became due." *Id.* The Debtor did, however, continue paying FCB the "regular monthly payments due." *Id.* FCB initially did not declare a "default of the Loan Agreement at the time the property taxes were not paid," or "include any accrued interest associated with the non-payment of property taxes in its accounting as to those payments when they were made." *Id.*

"In December 2014, Debtor once again did not pay property taxes that were then due." *Id.* at *2. At that point, FCB "deemed Debtor in default of its obligations under the Loan Agreement," and "recorded a 'notice of default and election to sell [the property] under deed of trust,' " citing " '[p]roperty taxes are not current' as the basis for the claimed default." *Id.* FCB later provided a guarantor of the loan (Gao) with a payoff estimate of $6,966,801.72 as of November 2, 2015—an amount that "did not include any interest calculated by using the Default Rate." *Id.*

On November 17, 2015, Crystal Waterfalls, LLC ("Crystal") purchased the loan documents from FCB and, as part of the transaction, "paid $998,382.12 to bring the property taxes current." *Id.* Crystal then filed a "proof of claim" in the Debtor's bankruptcy for the amount of $9,689,902.46, which included interest, calculated at the Default Rate, "starting in December 2011, which is when Debtor first failed to pay property taxes." *Id.* Just like COF, the subsequent purchaser claimed a right to collect interest at the Default Rate from the first default, despite its predecessor's decision to accept "its regular monthly payments." *Id.* at *3.

The Debtor moved to disallow the claim for "increased default interest from December 2011," advancing a number of grounds, including the argument that FCB, Crystal's predecessor/assignor, "had waived any right to collect default interest." *Id.* Crystal, like COF here, responded by arguing that: (a) the Debtor had defaulted on the loan in December 2011; (b) the loan documents "allowed for the retroactive collection of interest at an increased rate from December 2011;" and (c) it was "not required to adhere to [FCB's] internal accounting" of interest owed. *Id.*

The bankruptcy court ruled that Crystal could not collect default interest for the period prior to its ownership of the Note, finding that its predecessor, FCB, had "waived its right" to collect it. The bankruptcy court reasoned that:

> [T]he facts establish that FCB waived its right to collect default interest under the Note and Loan Agreement. First, when asked to provide an estimated payoff amount, FCB quoted an amount that did not include default interest. Second, and more significant, the Loan Schedule and Payment History that FCB provided to [Appellant] show that, during the time it held the Note, FCB did not take the position that it was owed default interest . . . . [H]ad FCB claimed entitlement to default interest, it would not have applied a portion of the Debtor's monthly payments to reduce the Note's principal balance. Rather, FCB's records would have indicated that the principal balance had increased, because the Debtor's payments were insufficient to cover interest at the default rate, let alone reduce the principal balance. The Loan Schedule and Payment History show that FCB, which knew the Debtor was in default, relinquished its right to collect default interest.

*Id.*

Crystal appealed to the district court. Affirming, the district court first recited the "principal facts" relied upon by the bankruptcy court in support of its "finding of wavier:"

> *First,* in November 2015, FCB provided an estimated payoff amount for the Note that was based on the Contract Rate of interest, not the Default Rate. In the proceedings before the Bankruptcy Court, evidence was presented that this estimate was identified as a "prelimi-

nary figure for reference only," rather than a final statement of the amount owed. R3 606; R1 56-58. However, the Bankruptcy Court determined that this was not sufficient to warrant a conclusion that there had been no waiver. On the contrary, it found that, by informing Debtor of an amount owed based on the Contract Rate, FCB expressed an intention not to collect default interest for the period of its ownership of the Note, thereby forgoing any such right.

*Second,* the PSA supports a finding that FCB had relinquished its right to collect default interest. The PSA provided that "the statement of the principal balance and accrued and unpaid interest for the Loan set forth on Exhibit A [the Loan Schedule], attached hereto, is true and correct as of the Calculation Date." R2 405. The Loan Schedule stated that $385,533 in unpaid interest was owed as of November 17, 2015, which was three days prior to the filing of this bankruptcy proceeding. R2 414. The Bankruptcy Court made the factual determination that this figure "reflects interest calculated at the non-default rate." R3 614. It is substantially less than the $1.1 million in interest that Appellant seeks to recover.

*Third,* FCB provided Appellant with a Loan Payment History pursuant to the PSA. It shows that FCB continued to accept monthly interest payments from Debtor at the non-default rate from December 2011 to the time the Note was transferred. R1 143. This showed that FCB had applied some of Debtor's monthly payments to the principal balance on the Note. This led to the finding by the Bankruptcy Court that the "Loan Schedule and Payment History show that FCB, which knew the Debtor was in default, relinquished its right to collect default interest." R3 614.

*Id.* at *5.

The district court then concurred with the bankruptcy court's conclusion that given these facts, "it would be inappropriate and unconscionable to allow collection" by Crystal, FCB's successor, "of Default Interest starting in December 2011," and agreed that Crystal, as FCB's successor, was bound by FCB's waiver. *See, e.g., In re Sweet,* 369 B.R. 644, 650-52 (Bankr. D. Colo. 2007) ("assignee of debt 'may not retroactively substitute his discretion for that of [the previous note holder] in order to apply default interest' from the date upon which a default first occurred"); *In re Lichtin/Wade, LLC,* 2012 Bankr. LEXIS 3642, at *13 (Bankr. E.D.N.C. 2012) ("[B]ecause the original loan holder, BB & T, did not express an intent to charge default interest on the date of maturity, the assignee, ERGS, cannot retroactively substitute its judgment for that of BB & T").

The district court also found *LaGrange Ventures, LLC v. Wells Fargo Bank, N.A.,* 2016 WL 8711597 (E.D. Ill. July 22, 2016)—the principal case relied upon here by COF (and discussed at length in the Court's S. J. Order) distinguishable, concluding that:

*LaGrange,* which is not controlling, is also distinguishable. Here, FCB had a right to collect default interest immediately upon default. However, notwithstanding its right to do so, it did not declare a default in December 2011. Furthermore, even after the default was declared, FCB did not charge Debtor default interest for an entire year, and made affirmative representations to Debtor and to Appellant that such interest was not owed. Therefore, even [sic] there was a default in December 2011, FCB's subsequent conduct, as well as its representations to Appellant in connection with the PSA, demonstrates an intention to waive the right to collect such interest.

Finally, the district court, like the bankruptcy court, rejected the argument that interest at the Default Rate could be retroactively charged by Crystal because the anti-waiver clause foreclosed an argument that FCB had waived the right to collect it, noting that "non-waiver clauses may themselves be waived, when enforcing them would be inappropriate or unconscionable." *Id.* The district court then held that: "[w]hen viewed as a whole, the facts presented . . . were sufficient to support . . . [a] finding of waiver by FCB," and that Crystal, as FCB's assignee, "holds no rights that are greater than those previously held by [its] assignor," FCB. *Id.* at 8.

This Court embraces the analysis employed by these courts and concludes that based upon the present record the trier of fact could reasonably find that: (a) Ocean Bank waived its right to collect interest at the default rate prior to July 2021; (b) that COF, Ocean Bank's assignee, is bound by that waiver; and (c) the anti-waiver clauses relied upon by COF were satisfied or waived.

**V. CONCLUSION**

In zealously advocating its position, COF describes Lake Worth as a "distressed asset purchaser" who bought "an apartment complex for pennies on the dollar at a Junior-lien foreclosure sale," and now belatedly seeks to boost its yield and secure an exorbitant "return" by avoiding a liability it was (or should have been) fully aware of, as it "had every opportunity to examine the terms of the Note and Mortgage, and it had every opportunity to assess what was due and owing based on the contract's language." S. J. Order, p. 6. Those who live in glass towers should not throw stones, as COF also could be portrayed as a "distressed asset purchaser" that acquired a Note/Mortgage, perhaps at a steep discount, and now seeks to boost its yield and secure an exorbitant "return" by attempting to collect $5,000,000.00 of default interest it knew had never been claimed by its Assignor, and likely was not owed because the right to collect it had been waived. The bottom line is that each of these Parties can label the other a "greedy opportunist," and neither are deserving of any rachmones. So they will just have to take the law as the Court finds it, as neither will have an "equitable" leg up here.

As for what that law is, the Court concludes that the trier of fact could find that Ocean Bank waived any right to collect interest at the Default Rate from April 2019 through July 2021, and that COF, as its Assignee, is subject to that waiver. The Court therefore erred in entering summary judgment in COF's favor. The question of whether a waiver occurred will be decided based upon a complete post-discovery record, either via summary judgment or trial.[4]

Accordingly, it is hereby **ORDERED**:

1. The Court's Order August 3, 2022 "Order on Summary Judgment" is **VACATED.**

2. The Parties are to advise the Court when they will be ready to try this case and submit a case management order with all operative pre-trial deadlines. The Court expects to try this matter within 90 days.

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[1]The Verified Complaint also brings claims for: (a) foreclosure of a lien against personal property; (b) enforcement of "Assignment of Leases and Rents"; and "Appointment of Receiver." *See* Verified Complaint, Counts III-V.

[2]Again, neither side has moved for summary judgment on this issue.

[3]While the Court has ruled that nothing in the loan documents expressly required the Lender to "notify" the Borrower of an intent to accrue/charge interest at the default rate upon an Event of Default, one could persuasively argue that in circumstances such as this, involving a purely non-monetary default, courts should impose such a requirement. In the case of a monetary default (i.e., non-payment), a borrower should reasonably anticipate being on the hook for interest at the default rate, and should hardly be surprised to later learn that the lender had been accruing it as of the date of default. The same cannot be said in circumstances involving a non-monetary default and, in the Court's view, lenders should, in that instance, be required to advise/notify borrowers of an intent to accrue/charge at the default rate before being permitted to do so. This case presents a perfect example of why courts should impose such a requirement. Given Ocean Bank's conduct, the Borrower had no reason to believe it would be charged interest at the default rate commencing April 2019, and it appears as though Ocean Bank had no intention to charge default interest prior to July 2021. But had Ocean Bank intended to accrue/charge interest at the default rate, and "notified" the Borrower, the Borrower could have taken action to mitigate its exposure, such as curing the default. Imposing a "notice" requirement in circumstances involving a non-monetary default would eliminate the prospect of a borrower being ambushed (and possibly face foreclosure and the loss of the property) by a delayed claim for years of accrued default interest, and prevent the type of "bad behavior" Lake Worth fears could permeate the marketplace, as lenders would not be permitted to lie in wait and spring upon borrowers belated demands for default interest. In any event, the "notice" issue is of no moment here because, as the Court previously concluded, any "lack of notice" defense (assuming one were available) would be personal to the Borrower, and not

available to Lake Worth. *See* S. J. Order, p. 6 (a "subsequent purchaser such as Lake Worth also lacks standing to contest defenses personal to the borrower, such as usury or the lack of notice"); *Clay Cnty. Land Tr. No. 08-04-25-0078-014-27, Orange Park Tr. Services, LLC v. JPMorgan Chase Bank Nat. Ass'n,* 152 So. 3d 83, 84 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2433a] (subsequent owner "does not have standing" to argue lack of notice because the "borrower . . . was the only party who could plead nonperformance of [this] conditions precedent").

[4]The Court acknowledges that whether a waiver has occurred is generally "a question of fact." *See, Frisbie v. Carolina Cas. Ins. Co.,* 103 So. 3d 1011 (Fla. 5th DCA 2012) [38 Fla. L. Weekly D49d]. But any issue that generally presents a question of fact may be decided as a matter of law if the undisputed facts can lead to only one reasonable conclusion. *See, e.g., Fernandez v. Fla. Nat'l College, Inc.,* 925 So. 2d 1096, 1100 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D922a] ("when a party bearing the burden of proof on an issue fails to provide any supportive evidence, or when all of the evidence presented by both parties is so unequivocal that reasonable persons could reach but one conclusion, a question that is ordinarily one of fact becomes a question of law, to be determined by the court"); *Gutierrez v. Sullivan,* 338 So. 3d 971 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D290a] (same). The Court therefore does not foreclose the possibility that the issue of "waiver" could be decided on summary judgment, particularly given the new standard recently adopted by our Supreme Court.

* * *

**Mortgages—Foreclosure—Intervention—Parties who claim to have timely exercised right of redemption acquired through mortgagors of property, but whose tender of redemption amount was rejected by mortgagee's servicing agent, are entitled to intervene in foreclosure action—Tender of redemption amount specified in judgment was timely exercise of statutory right of redemption, which servicer was required to accept irrespective of servicer's demand for other amounts allegedly due for insurance and which nullified foreclosure process—Motion to vacate foreclosure sale is granted—Mortgagors, who have unclean hands because they sought postponement of foreclosure sale through bankruptcy filing that was eventually withdrawn, are required to compensate buyers at foreclosure sale for forfeited court registry fees**

U.S. BANK TRUST NA, AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST BY CALIBER HOME LOANS, INC., Plaintiff, v. THERESA T. SAWYER, WILLIAM G. SAWYER, GLEN OAKS PROPERTY OWNER'S ASSOCIATION, INC., et al., Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502018CA015746XXXXMBAG. September 22, 2022. Luis Delgado, Judge. Counsel: Gilbert Garcia Group, P.A., for Plaintiff. Owei Z. Belleh, for Defendants William and Theresa Sawyer. Robert B. Burr, for Defendant Glen Oakes Property Owners Association, Inc. Kevin L. Hagen and Jonathan Jaffe, Nation Lawyers Chartered, Sunrise; and Peter M. Armold, for Intervenors, Mladen and Maricka Lazarevic. Adam Falcon, for Third Party Bidder, Adam & Rui Falcon.

## ORDER GRANTING MOTION TO INTERVENE AND ORDER VACATING FORECLOSURE SALE AND CERTIFICATE OF SALE

THIS CAUSE, came before the Court by way of an evidentiary hearing taking place on parts of two (2) days, September 6, 2022 and September 7, 2022. The Court heard residential Purchasers Mladen and Maricka Lazarevic's Motion to Intervene in Action ("Intervention Motion") and Defendants William G. and Theresa T. Sawyer's Objection to Sale and Motion to Set Aside Foreclosure Sale of March 9, 2022 ("Objection/Motion").

The Court reviewed the aforementioned Motions and reviewed the Purchasers Mladen and Maricka Lazarevic's Memorandum of Law as to Exercise of Right of Redemption, Plaintiff's Response to Memorandum on Redemption filed by Proposed Intervenors and the Intervenors' Reply to Plaintiff's Response, as well as both the Plaintiff's and Adam and Rui Falcon, Certificate of Sale Holders', Response to both the Intervention Motion and the Objection/Motion.

The Court heard testimony from Michael Paterno, of Fay Servicing LLC (the Plaintiff's loan servicing agent), Amber Tracey, Esq. (the closing agent on the residential sale transaction between the Sawyers and the Lazarevics), Owei Belleh, Esq. (counsel for the Sawyers), Mladen Lazarevic and Maricka Lazarevic (residential purchasers from the Sawyers), and took stipulated testimony from William Sawyer and Theresa Sawyer (the Mortgagors and sellers of the residential property to the Lazarevics). Having considered the testimony of the witnesses, the exhibits accepted into evidence, the facts stipulated by the parties, all matters judicially noticed, and the arguments of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law:

### Findings of Fact

A. The Plaintiff and the Sawyers entered into a Consent Final Judgment on July 14, 2021 in favor of the Plaintiff. Said Consent Final Judgment provided that the Sawyers had agreed not to contest the Final Judgment or the Sale Date or impede the issuance of the Certificate of Title even should she file bankruptcy.

B. The Sawyers facilitated postponement of the foreclosure sale scheduled pursuant to the Consent Final Judgment on November 18, 2021. Plaintiff did not file a response in opposition to the Sawyers' Motion to Cancel the November 18, 2021 Foreclosure Sale. The Court granted the Sawyers' Motion to Cancel the November 18, 2021 Foreclosure Sale without a hearing and rescheduled foreclosure sale scheduled for December 16, 2021.

C. The Sawyers requested and received payoff figures from the Plaintiff, through its servicing agent Fay Servicing on January 8, 2022. These figures were updated on January 25, 2022 and January 26, 2022 to reflect an increased amount based on a hazard insurance advance. These payoff figures were not based on the judgment but were based on the loan as through a judgment hand not been entered. The Sawyers, and their attorney, and the closing agent Amber Tracey received the aforementioned payoff letters. The closing agent Amber Tracey received the January 8, 2022 payoff letter

D. On March 7, 2022, the Court finds that the sum of $665,352.83 (the "Redemption Amount Paid") was tendered to Fay Servicing, LLC (the "Plaintiff's Servicer") via wire transfer as a result of the sale of the subject property between the Sawyers and the Lazarevics. The Court finds that this amount was sufficient to exercise the right of redemption in the Consent Final Judgment entered in favor of Plaintiff on July 14, 2021.

E. The Court notes that the wire sender did not contact Fay Servicing, LLC to advise that the "redemption" was being tendered. However, the Court notes that the wire was, in fact, received by Fay Servicing, LLC and (as stated herein) that the wire was a sufficient redemption tender.

F. The amount of moneys specified in the Consent Final Judgment of Foreclosure that issued herein (the "Judgment"), and thus, required to be paid to cure Theresa T. and William G. Sawyer's (the "Sawyers") indebtedness and prevent the foreclosure sale scheduled for March 9, 2022 (the "Foreclosure Sale") pursuant to the statutory right of redemption in Fla. Stat. § 45.0315 and as referenced in the Judgment as of March 7, 2022 was $664,193.15 (the "Redemption Amount"). This amount reflects the judgment amount of $645,407.75, post judgment interest in the amount of $17,735.40 at the judgment rate of 4.25% (236 days x $75.15 per day), and the costs of three publication fees and Clerk's sale fees totaling $1,050.00.

G. Plaintiff's Servicer refused to accept the tender of the Redemption Amount Paid ostensibly because it had advanced $8,599.00 in post-judgment forced-placed hazard insurance on January 24, 2022, as the prior hazard policy expired in January of 2022. Per Plaintiff's testimony and evidence, Plaintiff states that it was owed a total of *$674,409.10* as of March 7, 2022.

H. The Court notes that Plaintiff has not sought to obtain an amendment to the Judgment based on the hazard insurance advance or otherwise.

I. On March 9, 2022, unaware of the tender of the Redemption Amount in the Consent Judgement, the Clerk of the Court conducted the Foreclosure Sale.

J. On March 10, 2022, Adam and Rui Falcon (the "Falcons"), as

the highest bidder at the Foreclosure Sale, paid the balance of their bid sum of $807,600 (the "Falcons' Funds") into the Registry of the Clerk of the Court.

K. The Certificate of Sale that issued herein to the Falcons ("Certificate of Sale") was filed March 10, 2022, which became the time by which the Sawyers or the Lazarevics were required to have exercised the statutory right of redemption.

L. Although in the Consent Final Judgment, the Sawyers had agreed not to contest the Judgment and Sale Date or impede the issuance of the Certificate of Title, the Court finds that the defendant had the statutory right of redemption and pursuant thereto, that right could be exercised up until the filing of the Certificate of Sale on March 10, 2022.

M. However, upon consideration of the evidence and testimony, the Court finds that the Sawyers had unclean hands in equity based on case facts discussed above because they sought postponement the sale of through a bankruptcy filing that was eventually intentionally withdrawn.

N. On March 22, 2022, the Redemption Amount Paid was returned by Plaintiff's Servicer to the Trust Account of the Closing Agent, Amber Tracey, P.A., where it is being held for the benefit of the Sawyers and/or the Lazarevics; and therefore, the Sawyers and/or the Lazarevics stand ready, willing and able to tender the Redemption Amount.

**Conclusions of Law**

A. The Lazarevics, who claimed to have timely exercised the statutory right of redemption, acquired through the Sawyers, which tender was rejected, are entitled to intervene, based upon the narrow exception to the rule prohibiting post-judgment purchaser pendente lite intervention where the interests of justice so require, as well as based upon the Court's general discretion. *De Sousa v. JP Morgan Chase, N.A.,* 170 So.3d 928 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1748a]; *Nelson Bullock Co. v. South Down Development Co.,* 181 So. 365, 366 (Fla. 1938) (discretion of the chancellor; intervenor asserted superior interest); *see, John Stepp, Inc.* and *Popescu*, both Infra.

B. The tender of the Redemption Amount Paid to Plaintiff's Servicer was a timely exercise of the valued and protected equitable statutory right of redemption under Fla. Stat. § 45.0315, which nullified the foreclosure process as a matter of right. *Popescu v. Laguna Master Association, Inc.,* 184 So.3d 1196, 1199 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D128a].

C. The Sawyers and/or the Lazarevics redeemed when they paid the Redemption Amount Paid, which was in excess of the Redemption Amount. *Section 45.0315, Fla. Stat.* (. . . the amount of moneys specified in the judgment . . . ."); *Indian River Farms v. YBF Partners,* 777 So.2d 1096, 1099 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D286b] (redeem by paying the debt (total due), interest and costs); *Cooper Smith Properties, Ltd. v. Flower's Baking Co. of Florida, Inc.,* 432 So.2d 683, 684 (Fla. 5th DCA 1983) (not required to pay an amount in excess of what judgment determines to be due); *Blue Heron Land Co. v. Brown,* 125 So. 369, 370 (Fla. 1930) (the costs *of such proceedings*).

D. Under *Section 45.0315, Florida Statutes,* Plaintiff's Servicer was obligated to accept the tendered Redemption Amount Paid pursuant to the Judgment. *Verneret v. Foreclosure Advisors, LLC,* 45 So.3d 889, 892 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2062a].

E. Regardless of any demands by Plaintiff's Servicer for other amounts, the Sawyers and/or the Lazarevics could redeem by paying the amounts specified in the Judgment. *Sedra Family Ltd. Partnership v. 4750 LLC,* 124 So.3d 935, 936 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2681a]; *Parsons v. Whitaker Plumbing of Boca Raton, Inc.,* 751 So.2d 655, 656 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2450d] (amounts not "specified in the judgment including attorney's fees, are not required to be paid").

F. The fact that the Plaintiff's Servicer erred in failing to accept the tender, does not render the exercise of the right of redemption untimely. *Indian River Farms* at 1100.

G. There is no authority requiring Notice of the exercise of the statutory right of redemption prior to the Clerk of the Court having conducted the Foreclosure Sale. *Popescu* at 1200.

H. The Falcons, as a purchaser of property at a judicial sale, are generally subject to the rule of caveat emptor and are charged with knowledge that redemption by the Sawyers or the Lazarevics was always a possibility. *John Stepp, Inc. v. First Federal Sav. & Loan Association of Miami,* 379 So.2d 384 (Fla. 4th DCA 1980).

I. The Clerk of the Court, if it was without notice of the prior redemption, earned the statutory sales and registry fees when it held the Foreclosure Sale and the Falcons' Funds were received into the Court Registry. *Wilken v. North County Co., Inc.,* 670 So.2d 181, 182 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D765h].

J. In a situation such as this, it is appropriate for the Court, in the exercise of its discretion and to do equity. The Court requires the Sawyers to compensate the Falcons for the forfeited Court registry fees ("Forfeited Fees"). *Id*.

It is thereupon,

**ORDERED AND ADJUDGED that**:

1. The Intervention Motion filed by the Lazarevics is GRANTED (said Motion being granted on September 6, 2022 in open Court prior to the start of the hearing on the Objection to Sale). The Lazarevics' intervention was appropriate to further the interest of justice, and was neither subordinate to, nor in recognition of the propriety of, the main proceeding inasmuch as it was for the express purpose of asserting the right of redemption pursuant to Section 45.0315, Fla. Stat., and the Lazarevics are herein and were throughout the hearing, referred to generally as Defendants.

2. With regard to the Objection/Motion, the Objection to sale is sustained and the Motion be and the same is hereby ***GRANTED***. Both the Foreclosure Sale and the Certificate of Sale are each hereby ***VACATED*** as a nullity.

3. The Redemption Amount shall be paid forthwith to the Trust Account of Gilbert Garcia Group, P.A. ("Plaintiff's Counsel"), and upon receipt, the statutory right of redemption specifically provided for in the Judgment and Section 45.0315, shall have been exercised nunc pro tunc back to March 7, 2022.

4. The Court hereby directs the Clerk of the Court to return to the Certificate of Sale Holder, Adam and Rui Falcon, TIE, the sum of $825,374.70, forthwith, representing the Falcons' winning bid amount of $807,600.00, Documentary Stamps $5,653.20 and "Clerk Fees"/Registry Fees of $12,121.50. The Court finds that the Sawyers had unclean hands during the case. Accordingly, the Sawyers are ordered to pay to the Clerk of the Court the sum of $12,121.50 in the next twenty-one (21) days representing payment to the Clerk of the Court for the "Clerk Fees"/Registry Fees. If not paid within twenty-one (21) days, the Sawyers shall be in contempt of the Court.

* * *

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January 31, 2023
Cite as 30 Fla. L. Weekly Supp. ____

# COUNTY COURTS

**Criminal law—Driving under influence—Search and seizure—Detention—Officers responding to single-vehicle accident unlawfully detained defendant while awaiting arrival of DUI investigator where officers did not have reasonable suspicion that defendant was driving under influence and made no attempt to prepare traffic citation while awaiting arrival of investigator but instead took up unrelated matters—Defendant's droopy eyes and inability to identify cause of accident were insufficient to give rise to reasonable suspicion—Motion to suppress is granted**

STATE OF FLORIDA, Plaintiff, v. KRISTINA L. LAWRENCE, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2021 CT 2043. SPN No. 268154. October 10, 2022. Monique Richardson, Judge. Counsel: Jack Campbell, State Attorney of 2nd Judicial Circuit, Tallahassee, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS—UNLAWFUL DETENTION

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

*Findings of Fact*

On November 20, 2021, Officer Bishop and Officer Magruder responded to a disabled vehicle in Leon County, Florida. A video was played during the motion hearing which showed the initial interaction between the Defendant and law enforcement.

Upon arrival, Officer Bishop activated her emergency lights and positioned her vehicle behind the Defendant's vehicle. Officer Bishop conducted a driver side approach to the vehicle, briefly spoke with the Defendant about what caused the accident, and then advised her to "give her just a second." At this point, Officer Bishop testified that the Defendant was slurring her speech and her eyes appeared droopy. However, she did not smell an odor of alcohol or controlled substance. Officer Bishop then stepped away from the Defendant's vehicle. She did not return to the Defendant's vehicle to speak more with her or to gauge her sobriety thereafter. Officer Roy was requested.

While waiting for Officer Roy to come on scene to conduct a DUI investigation, the Officers Bishop and Magruder did not begin an accident investigation or prepare any traffic citations. There were no further actions to assist the Defendant. Instead, video evidence captured Officer Bishop's conversation with Officer Magruder. In the video, Officer Bishop was overheard stating, "I don't know if [Officer Roy] would want me to go ahead and get her out." Officer Magruder then replied, "just let her sit there." Video evidence further overheard the two officers laughing and discussing their dinner plans.

Officer Roy eventually arrived on scene within a few minutes after Officer Bishop's initial contact with the Defendant. Video evidence captured Officer Bishop's conversation with Officer Roy where she described what she had witnessed: "I don't smell anything. Her eyes look kind of droopy. She can't tell me what she hit."

Officer Roy subsequently contacted the Defendant and eventually arrested her for DUI.

*Application of the Law*

Generally, a traffic stop may not last longer than necessary for law enforcement to address the traffic violation warranting the stop. *Wooden v. State,* 244 So.3d 1170 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D810a] (citing *Rodriguez v. United States,* 575 U.S. 348, 135 S. Ct. 1609, 1614, 191 L. Ed.2d 492 (2015) [25 Fla. L. Weekly Fed. S191a]. In the instant case, the responding officers made no attempts to prepare a traffic citation. Instead, the officers took up unrelated matters so they could wait for a more experienced officer to begin a DUI investigation.

A traffic stop may be extended only where there is a reasonable suspicion of criminal activity. *Whitfield v. State,* 33 So.3d 787, 789 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D915] (finding a stop unlawful where officers did not have a reasonable suspicion and took up unrelated matters so that a K9 unit could arrive and perform a sniff). Because the officers made no attempt to prepare a citation, the question turns to whether the officers had a reasonable suspicion that the Defendant was driving under the influence.

During the motion hearing, Officer Bishop testified that she did not smell an odor of alcohol, see any open containers, or overhear any admissions of alcohol consumption from the Defendant. To counteract this testimony, the State argued that the Defendant's car accident combined with Officer Bishop's observations gave rise to a reasonable suspicion allowing the Defendant to be investigated for DUI. The Court is not persuaded by the State's argument.

Notably, a reasonable suspicion must be well-founded and articulable. *Popple v. State,* 626 So.2d 185, 186 (Fla. 1993). This suspicion must be more than a "mere hunch" based on bare intuition. *State v. Teamer,* 151 So.3d 421 (Fla. 2014) [39 Fla. L. Weekly S478a]. The video evidence revealed that Officer Bishop advised a fellow officer that her observations were limited the Defendant's eyes were "droopy," and she could not identify what she had hit. A suspicion based on such limited observations is not well-founded or articulable. At most, Officer Bishop had a "mere hunch" that the Defendant was driving under the influence based on her bare intuition. Although the Court recognizes that a traffic accident can factor into whether a motorist is impaired, a crash without more is insufficient to detain an individual for a DUI investigation.

The Court finds that this case is similar to *State v. Kennedy,* 25 Fla. L. Weekly Supp. 362c (Fla. 7th Jud. Cir. 2017). In *Kennedy,* the Defendant was involved in a single vehicle accident. After arriving to the scene, responding officers did not observe any indicators of impairment and decided not to issue a traffic citation until after they could spend more time observing the defendant for signs of impairment. The *Kennedy* court found the Defendant's Fourth Amendment rights were violated. In their ruling, the court noted "it [was] a textbook example of detaining a citizen without reasonable suspicion in order to try to develop evidence of a crime." Like the officers in *Kennedy,* Officer Bishop's conduct indicated that the Defendant was detained in hopes of another officer finding signs of impairment sufficient for a DUI arrest.

Ultimately, this Court finds that the Defendant's Fourth Amendment rights were violated when Officer Bishop failed to develop a reasonable suspicion of criminal activity and delayed the stop by taking up unrelated matters. It is therefore:

**ORDERED AND ADJUDGED** that the Motion to Suppress based on an Unlawful Detention is **GRANTED.** All evidence obtained after Officer Bishop's initial interaction with the Defendant shall be suppressed.

* * *

**Criminal law—Driving under influence—Search and seizure—Vehicle stop—Traffic infraction—Officer did not have probable cause to stop defendant for violation of statute prohibiting red light visible from directly in front of a vehicle where officer did not determine whether red light emanating from after-market ground effect lights on defendant's vehicle was visible from front end of vehicle prior to stop—Officer's testimony that defendant was also stopped for speeding is not credible or reliable where officer did not mention speeding when defendant asked him why he was stopped—Motion to suppress is granted**

STATE OF FLORIDA, v. JAYLON R. PENDLETON, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2022-CT-001. SPN No. 268457. September 28, 2022. Jason L. Jones, Judge. Counsel: Jack Campbell, State Attorney, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS—UNLAWFUL STOP

**THIS CAUSE** came before the Court on September 2, 2022, to hear the Defendant's Motion to Suppress an Unlawful Stop. After reviewing the pleadings, case law provided by both parties, and listening to testimony and arguments by counsel, the Court finds as follows:

### FINDINGS OF FACT

On January 1, 2022, Officer Sheckles with the Tallahassee Police Department conducted a stop on a vehicle driven by Mr. Pendleton. Officer Sheckles testified that the purpose behind the stop stemmed from two traffic violations: (1) red after-market ground effect lights, and (2) speeding. Mr. Pendleton was ultimately arrested for DUI.

Video evidence provided a candid account of what took place during the stop. In the video, Mr. Pendleton made multiple attempts to clarify the purpose behind the stop. When responding, Officer Sheckles stated several times that he stopped Mr. Pendleton because of his after-market ground lights and failed to advise Mr. Pendleton of any traffic violations related to unlawful speed. The State stipulated at the hearing that Officer Sheckles never mentioned speeding in the body camera footage. Instead, Officer Sheckles advised Mr. Pendleton that he was only stopped because of the after-market ground lights installed on the vehicle.

During the motion hearing, Officer Sheckles testified that he assumed that the after-market ground lights were visible on the front end of the vehicle since they were noticeable from the side and rear end of the vehicle. However, he also conceded that he did not confirm whether the lights were visible from the front end of the vehicle prior to stopping Mr. Pendleton. Then, when questioned about his failure to advise Mr. Pendleton about the alleged speeding violation, Officer Sheckles explained that his usual practice entails not informing citizens of the full purpose behind a traffic stop.

### CONCLUSIONS OF LAW

The stopping of an automobile is lawful where law enforcement has probable cause to believe a traffic violation has occurred. *See State v. Wimberly,* 988 So.2d 116 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a], citing *Whren v. United States,* 517 U.S. 806 (1996). In Florida, probable cause is defined as "a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged." *Dunnavant v. State,* 46 So.2d 871 (Fla. 1950).

Regarding the red lights underneath the vehicle, Officer Sheckles testified that Mr. Pendleton violated Florida Statute Section 316.2397(1), which states:

> A person may not drive or move or cause to move any vehicle or equipment upon any highway within this state with any lamp or device thereon showing or displaying a red, red and white, or blue light visible ***from directly in front*** (emphasis added) thereof except for certain vehicles provided in this section.

There was no evidence at the hearing that supported the position that Mr. Pendleton violated Section 316.2397(1). Probable cause would arise if the red lights had been visible "from directly in front" of Mr. Pendleton's vehicle. Officer Sheckles conceded that he did not confirm whether the lights were visible from the front end of the vehicle prior to stopping Mr. Pendleton. Instead, based on his training and experience as an auto mechanic, he assumed that the lights would have been visible from the front since they were visible on the side and rear of the vehicle. This amounted to nothing more than a mere assumption, which is insufficient to establish probable cause.

The other basis for the stop put forth by Officer Sheckles was that Mr. Pendleton was speeding, a violation of Florida Statute 316.183. The Court is troubled by Officer Sheckles's testimony explaining that his usual practice entails not informing citizens of the full purpose behind a traffic stop. If Officer Sheckles saw Mr. Pendleton speeding, when Mr. Pendleton asked why he was pulled over the easiest explanation would have been speeding instead of trying to explain the intricacies of after-market ground lights. This Court finds his testimony both not credible and unreliable for purposes of establishing probable cause for speeding. It is therefore:

**ORDERED AND ADJUDGED** that the Motion to Suppress based on an Unlawful Stop is **GRANTED**. Any evidence obtained as a direct result of the unlawful stop shall be suppressed.

* * *

**Attorney's fees—Prevailing party—Attorney's fees and costs awarded to defendant in debt collection action which was dismissed for lack of prosecution—No merit to plaintiff's argument that court cannot award attorney's fees to defendant over whom it lacks personal jurisdiction—Plaintiff cannot raise jurisdictional argument commonly reserved to defendant if defendant did not first raise it—Defendant waived jurisdictional arguments and service of process by filing notice of appearance**

CAPITAL ONE BANK (USA), N.A., Plaintiff, v. CHRISTINA SMITH, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 35-2021-SC-3656. October 27, 2022. Carla R. Pepperman, Judge. Counsel: Kevin Spinozza, Pollack & Rosen, for Plaintiff. Bryan A. Dangler, The Power Law Firm, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS

THIS CAUSE came before the Court during a hearing on October 11, 2022, on Defendant's Motion for Attorney Fees and Costs, and the Court having reviewed the file, heard argument by counsel, and being otherwise fully advised in the premises, finds as follows:

Plaintiff filed a one-count action against the Defendant for account stated. Counsel for Defendant filed a Notice of Appearance and Designation of E-mail address on July 29, 2021. The Court involuntarily dismissed the action ten (10) months later, on May 5, 2022, for lack of prosecution. Defendant subsequently moved for an award of attorney fees as the prevailing party. In response to Defendant's motion, Plaintiff argued that this Court did not and does not have personal jurisdiction over the Defendant by which it may award attorney fees. The Court disagrees. Plaintiff cannot raise a jurisdictional argument commonly reserved for a Defendant if the Defendant did not first raise it. Defendant voluntarily appeared in this action upon filing its Notice of Appearance and Designation of Email Address, a paper. *Beckwith v. Bailey*, 119 Fla. 316, 161 So. 576 (1935). Service of process can be waived, and a defending party can voluntarily serve responsive pleadings, motions, or papers, thereby waiving jurisdictional arguments and service. *Id.*

**ORDERED AND ADJUDGED** that Defendant's motion is hereby **GRANTED**. The Court reserves jurisdiction to determine the amount of attorney fees and costs to be awarded at a later hearing. The

parties agree that Defendant may submit an Affidavit and Report by its chosen fee expert in lieu of live testimony at said hearing.

It is further **ORDERED AND ADJUDGED** that within 5 days from date of e-service of this Order, attorney Bryan A. Dangler, Esq. shall furnish a copy of this Order to each self-represented party by U.S. Mail, first class, postage paid or via E-Portal and file a certificate signed by that attorney that delivery of this Order has been made as set forth herein.

* * *

**Criminal law—Driving under influence—Evidence—Refusal to submit to breath test and field sobriety exercises—Defendant's refusal to submit to field sobriety exercises following lawful request is admissible in evidence where defendant was advised of at least one adverse consequence of refusal—Confusion doctrine—Refusal to submit to breath test is also admissible—Although implied consent warning was read after officer had read *Miranda* warnings, there was no indication that defendant's refusal to submit to breath test was result of confusion regarding right to counsel or that defendant's request for counsel was result of police conduct—Motion to suppress is denied**

STATE OF FLORIDA, v. SHANNON SANTORE, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2022 CT 144. November 1, 2022. D. Melissa Distler, Judge. Counsel: Alexander Gilewicz, Assistant State Attorney, for State. G. Kipling Miller, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO SUPPRESS**

THIS MATTER was heard on the Defendant's Motion to Suppress Unlawfully Obtained Evidence on September 21, 2022. Having reviewed the record, having considered the testimony from Deputy Hill and evidence presented by way of redacted limited clips of AXON video recordings, the arguments of counsel, and being advised in the premises, this Court finds as follows:

*Findings of Fact:*

On February 28, 2022, the Defendant SHANNON SANTORE was arrested for the offenses of Driving Under the Influence with Property Damage and Willful Refusal to Submit to a Breath Test. On that date, Flagler County Sheriff's deputies were dispatched to a crash with injuries. Deputy Hill testified that while interacting with the Defendant, he noticed signs of impairment and requested that she submit to field sobriety exercises. The interactions between the Defendant and the deputies are contained on Deputy Hill's AXON video recording, which were redacted heavily by agreement of the parties and admitted into evidence without objection as State's Exhibits 1 (roadside interaction) and 2 (Intoxilyzer room interaction).

The Court reviewed the AXON video recordings, the first of which reflects the Defendant standing outside of a vehicle which was partially overturned and on its side, speaking with another gentleman and eventually Deputy Hill. Deputy Hill explained that another deputy who had been conducting the crash investigation had concluded the crash portion and that Deputy Hill was then going to proceed with a DUI investigation due to the deputies' observations of the Defendant's indicators of impairment. Deputy Hill then proceeds to read the Defendant the *Miranda* warning. At the conclusion, Deputy Hill confirmed that the Defendant understood her rights and asked whether she wanted to speak with him. She succinctly and simply responded, "No." Deputy Hill then asked if the Defendant was willing to perform field sobriety exercises. Again, she succinctly and simply responded, "No." Deputy Hill then stated, "You understand that refusal to perform field sobriety exercises I have to go off of my indication of what I have seen and what I observed, right?" The Defendant responded, "Correct." After that brief explanation, Deputy Hill placed the Defendant under arrest.

Deputy Hill testified that he then transported the Defendant to the Flagler County Inmate facility, at which time he provided the Defendant an opportunity to submit to a breath test. State's Exhibit 2 is another redacted short portion of the interaction between a breath test operator, Deputy Hill and the Defendant, as captured by Deputy Hill's AXON recording.

The recording begins with the breath test operator explaining how the machine runs through a series of tests before requesting samples. During a pause while the machine was warming up, spontaneously the Defendant states, "I would prefer my attorney be here." The breath test operator then clarifies, "Okay so you don't want to?" The Defendant succinctly and simply replies, "No sir." The breath test operator continues, "Okay. Well with that being said, I will read you your *Miranda* rights [sic] as well, and that is perfectly fine." The breath test operator then begins to read Implied Consent from a document posted inside the Intoxilyzer room. The breath test operator states, "I am now requesting you submit to a test of your breath to determine the alcohol content." The Defendant replies, "No thank you." The breath test operator continues to explain the consequences of refusal per Florida Statute, including the language that the refusal to submit would be admissible into evidence at a criminal proceeding. When asked whether she still wished to refuse the test after being read Implied Consent, the Defendant simply and succinctly responded, "Yes." Approximately one minute later, Deputy Hill then reads *Miranda* again to the Defendant. When asked if she would like to speak with him, she replies, "No, I only wish to speak with my attorney." Deputy Hill testified and the video recording confirms that the Defendant never appeared confused and never asked for clarification on her rights.

The Defendant's Motion to Suppress sets forth two main issues. Seeking to exclude the Defendant's refusal to submit to field sobriety exercises under the "safe harbor" doctrine set forth in *Howitt v. State,* 266 So.3d 219 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D406b]; *Menna v. State,* 846 So.2d 502 (Fla. 2003) [28 Fla. L. Weekly S340a], and progeny, the Defendant claims there were insufficient adverse consequences of the refusal to submit to field sobriety exercises explained to the Defendant, thereby requiring the suppression of the refusal to submit to the exercises. The Defendant further argues that the invocation of *Miranda* and the request to submit to the breath test requires verbal responses from the Defendant, which is not permitted after the invocation. Secondly, the Defendant claims that the confusion doctrine prohibits the introduction of the refusal to submit to the breath test, since the deputy read *Miranda* prior to implied consent and therefore caused the Defendant's alleged confusion. The Defendant cites county court opinions, including *State v. Jay Knouse,* unpublished Volusia County opinion, October 27, 2017, citing *Kurecka v. State,* 67 So.3d 1052 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b] and *State v. Alves,* 3 Fla. L. Weekly Supp. 553a (9th Cir. Ct. April 24, 1995). The Defendant also cites *State v. Crawford*, 29 Fla. L. Weekly Supp. 605a (7th Cir. Ct September 15, 2020); *State v. Conn,* 25 Fla. L. Weekly Supp. 1022a (7th Cir. Ct December 17, 2017); *State v. Amandi,* 20 Fla. L. Weekly Supp 284a (Fla. 11th Cir. Ct September 28, 2011).

The State argues that the deputy's advisement that he would have to make a decision based off what he had seen thus far was sufficient to allow the State to elicit testimony that the Defendant refused to submit to the exercises. The State further argued that there was no confusion on the Defendant's part with respect to her right to counsel and that even if there was confusion, it was not created by law enforcement. The State argues that if confusion exists which is not created by law enforcement, then the officers have no duty to correct the confusion, rendering the refusal admissible. The State cited *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]; *State v.*

*Burns,* 661 So.2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D807a]; *State v. Fara,* 9 Fla. L. Weekly Supp. 88a (Fla. 12th Cir. Ct. Appellate December 18, 2001); *State v. Cummins,* 26 Fla. L. Weekly Supp. 753a (Fla. 6th Cir. Ct. Appellate, December September 11, 2018); *South Dakota v. Neville,* 459 U.S. 553 (1983); *Occhicone v. State,* 570 So.2d 902 (Fla. 1990); *State v. Liefert,* 247 So.2d 19 (Fla. 2d DCA 1971); *O'Neill v. State,* 29 Fla. L. Weekly Supp. 150b (7th Cir. Ct. Appellate April 12, 2021).

*Conclusions of Law:*

It is well settled that a refusal to submit to roadside field sobriety exercises is admissible into evidence so long as possible adverse consequences of the refusal are explained to the arrestee. *Taylor v. State,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]. Additionally, refusals to submit to breath testing are generally admissible under Florida Statute § 316.1932 and pursuant to the analysis in *State v. Burns,* 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D807a]; *see also, State v. Fara,* 9 Fla. L. Weekly Supp. 88a (Fla. 12th Cir. Ct. December 18, 2001). Such post arrest refusals to perform physical tasks are admissible as to the physical, non-testimonial aspects of the requested testing. *Id*. at 849, citing *Wilson v. State,* 596 So.2d 775 (Fla. 1st DCA 1992) and *Occhicone v State,* 570 So.2d 902 (Fla. 1990). However, if officers do not read any portion of Implied Consent or otherwise inform a defendant of any consequences of refusing a breath test, the admission of either a refusal to submit to field sobriety exercises or a refusal to submit to breath testing without advisement of **any** adverse consequences can be harmful error. *Howitt v. State,* 266 So.3d 219, 224 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D406b]. If an arrestee is misled by the State that there is a "safe harbor" by taking a certain course of action, the exercise of such action is inadmissible at trial. *South Dakota v. Neville,* 103 S.Ct. 916 (1983).

In cases involving traffic crashes and the application of Florida Statute § 316.066(4), law enforcement typically transitions while still roadside and prior to an arrest from the evidentiarily inadmissible crash investigation to a DUI investigation by "switching hats" and reading *Miranda* warnings to the suspect. When *Miranda* is read prior to the request for breath test, as it is customarily in crash cases, the judicially created exclusionary rule known as "the confusion doctrine" may apply. *See Kurecka v. State,* 67 So.3d 1052 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b] (holding that the defendant's confusion in the cited case was not based upon circumstances wherein law enforcement created a defendant's confusion about the right to counsel before breath testing, but that under such circumstances, the confusion doctrine could apply).

In reviewing *Kurecka* in depth for its application of the confusion doctrine, this Court recognizes that the Fourth District began its analysis by acknowledging that under Florida law, "a person arrested for DUI does not have the right to consult with counsel before deciding whether to submit to a breath test." *Id*. The Fourth District Court of Appeal then distinguished between cases in which law enforcement had arguably been the source of a mistaken belief that he or she could consult with counsel prior to taking a breath test (*Miranda* read prior to implied consent) and cases in which law enforcement did not contribute to the mistaken belief by the arrestee but rather failed to correct it (*Miranda* read after implied consent). *Id.* at 1057-1060. The *Kurecka* court also noted that nothing in the implied consent statute required law enforcement to advise people arrested for DUI that their right to counsel did not attach to their decision to submit to breath testing. *Id*. While the court in *Kurecka* observed that explaining this to suspects who request counsel would be a minimal burden on law enforcement, the court also recognized that the imposition of any such obligation must come from the legislature rather than from the judiciary. *Id*.

The instant case involves a rather common scenario without many published opinions: namely a crash, wherein a defendant had a statutory privilege and protection for all statements under Florida Statute § 316.066(4), which then transitioned to a DUI investigation, wherein law enforcement read *Miranda* warnings to ensure that any verbal interactions would be admissible at trial, followed by an invocation of the right to counsel. The State submitted *State v. Fara,* 9 Fla. L. Weekly Supp. 88a (Fla. 12th Cir. Ct. December 18, 2001), which the Court finds to be the only published case addressing the facts set forth herein.[1] The other cases cited by the parties all have slightly different factual scenarios. For example, *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b] involved a vehicle that was followed by law enforcement and which stopped on its own volition. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) involved a parked car stopped on the shoulder of a highway. *Howitt v. State,* 266 So.3d 219 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D406b] involved a crash and leaving the scene with a complete lack of advisement as to any possible adverse consequence for refusal to perform field sobriety exercises or refusing to submit to the breath test. *See also Grzelka v. State,* 881 So.2d 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a] (holding that refusal to submit to breath test was admissible when the arrestee was advised of at least one adverse consequence that would result from the refusal). Obviously, any observations of the Defendant's physical appearance, general demeanor, slurred speech, or odor of alcohol are not protected by an invocation and therefore would be admissible. *See Pennsylvania v. Muniz,* 496 U.S. 582 (1990).

In the instant case, the Defendant was lawfully requested to submit to field sobriety exercises. Her refusal to submit was simple and clear. Deputy Hill then advised that he would have to proceed with his DUI investigation solely off the indicators he had already noted and described to her. The Defendant continued to refuse to submit to the exercises. While brief, the Court finds that this advisement is sufficient to apprise of the adverse consequences of refusing: namely that the deputy would proceed with the DUI investigation with or without her cooperation. Because the Defendant was advised of at least one adverse consequence that would result from her refusal, her decision and choice to refuse to submit is admissible and relevant. *See Grzelka v. State,* 881So.2d 633, (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a]. Additionally, the evidence presented to the Court shows no confusion on the Defendant's part. While she voluntarily shares that she would "prefer" her attorney be present for the breath test, said statement was uttered as the breath test operator was explaining how the instrument functions. After her reference to counsel, the breath test operator then read full implied consent; the Defendant's answers were concise and simple in refusing to submit. There was no mention of her lawyer after being told her refusal would be admissible in evidence in a criminal proceeding, and the undisputed evidence shows that her request for counsel was not as a result of police conduct.

The Defendant's Motion to Suppress is DENIED. The Defendant SHANNON SANTORE'S statements made upon invocation of her *Miranda* rights are excluded; however, the non-testimonial refusal to submit to field sobriety testing after adverse consequences were provided is admissible into evidence. Testimony relating to the deputy's observations of the Defendant's physical appearance, general demeanor, slurred speech, or odor of alcohol are not excluded by this Order. With respect to the breath test, there was no confusion in the Defendant's refusal to submit to breath testing. The Defendant SHANNON SANTORE voluntarily interjected her preference relating to counsel without any immediate mention of *Miranda* or counsel by law enforcement. Therefore the Defendant's refusal to submit to a lawful breath test after implied consent shall be admissible. Any statements relating to her request for counsel while speaking

with the breath test operator shall not be admissible.

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[1]The instant case is distinguishable from the case of *State v. Boyer,* authored by this Court last year. In that case, and based on the specific facts therein, the Court found that the Defendant's refusal to submit to field sobriety exercises was inextricably intertwined with his invocation of *Miranda* warnings. The Court could not parse the Defendant's invocation and declination to speak from his refusal to submit to field sobriety exercises in *Boyer.* Additionally, in the *Boyer* case, the Court had given the State additional time to submit further caselaw in support of their position; no additional cases were submitted. In the instant case, the State had the same opportunity and did submit caselaw, which is binding upon the Court. *State v. Fara,* 9 Fla. Law Weekly Supp. 88a (Fla. 12th Cir. Ct. December 18, 2001). As a result of all of the above, the Court recedes from any portion of the *Boyer* and *State v. Stellone* holdings inconsistent with this opinion.

* * *

**Insurance—Contempt—Insurer that intentionally failed to comply with orders requiring it to conduct bulk meet and confer conference and to coordinate bulk hearing on discovery motions pending in 220 cases is found in contempt in every case—Compensatory sanctions in form of attorney's fees and costs are awarded to plaintiff—Coercive sanctions of $10,000 are awarded in each of 220 cases but can be purged by strict and timely compliance with all court orders and satisfaction of all future discovery obligations**

EMERGENCY PHYSICIANS, INC. d/b/a EMERGENCY RESOURCES GROUP, as assignee of Alyssa Devenny, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-002577-O. November 1, 2022. Amy J. Carter, Judge. Counsel: Robert D. Bartels, Bradford Cederberg, P.A., Orlando, for Plaintiff. Debbie Brown, Law Office of Kelly L. Wilson, Orlando, and Edward K. Cottrell, Smith, Gambrell & Russell, LLP, Jacksonville, for Defendant.

**AMENDED ORDER ON PLAINTIFF'S MOTION FOR CONTEMPT FOR DEFENDANT'S VIOLATION OF THIS COURT'S MAY 25, 2022 AND JUNE 27, 2022 ORDERS REQUIRING DEFENDANT TO CONDUCT A BULK MEET AND CONFER CONFERENCE AND COORDIANTE A BULK HEARING, MOTION TO ENFORCE THIS COURT'S MAY 25, 2022 AND JUNE 27, 2022 ORDERS, MOTION FOR SANCTIONS AND MEMORANDUM OF LAW**

**THIS MATTER** having come before this Honorable Court on October 13, 2022 on Plaintiff's Motion for Contempt for Defendant's Violation of this Court's May 25, 2022 and June 27, 2022 Orders requiring Defendant to Conduct a Bulk Meet and Confer Conference and Coordinate a Bulk Hearing, Motion to Enforce this Court's May 25, 2022 and June 27, 2022 Orders, Motion for Sanctions, and Memorandum of Law, and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, hereby makes the following findings:

1. On May 12, 2022, the parties, through their respective attorneys, attended a hearing on Plaintiff's Motion to Compel One Group Meet and Confer Telephonic Conference and Plaintiff's Motion to Compel One Group Hearing in *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Alyssa Devenny v. Geico Indemnity Company,* Orange County Case Number 2020-SC-002577-O. The motion attached a list of two hundred forty (240) similarly situated cases pending in Division 71 involving three (3) identical motions. Those motions were 1) Plaintiff's Motion to Compel Production of Documentation/Items; 2) Plaintiff's Motion to Compel Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6); and 3) Defendant's Motion for Protective Order.

2. The purpose of the bulk hearing was to streamline the judicial process since this Court, along with the Circuit Appellate and Fifth District Court of Appeal, has already Ordered Defendant to Produce the requested discovery documents and sit for deposition.

3. After hearing arguments of counsel, this Court granted Plaintiff's Motion. Pursuant to the Court's Order entered May 25, 2022, the parties were to coordinate one group meet and confer telephone conference within fifteen days of the May 25, 2022 Order and the group meet and confer was to be completed within thirty (30) days from the May 25, 2022 Order. The Court's ruling applied to all two hundred forty (240) cases.

4. Pursuant to the Court's deadlines, the meet and confer was to be scheduled by June 9, 2022 and it was to occur on or before June 24, 2022.

5. On June 1, 2022, Plaintiff's office provided three (3) dates to the Defendant's attorney, who handled the May 12, 2022 bulk hearing, to conduct the meet and confer in compliance with the Court's Order.

6. On June 1, 2022, Defendant responded advising that it was not available for any of the dates and provided alternative dates outside of the Court's Order.

7. The dates provided by Defendant were outside of the timelines established by the Court.

8. The parties ultimately set the bulk meet and confer to occur on June 13, 2022 at 2:00 p.m.

9. At 1:18 p.m. on June 13, 2022, Defendant emailed the Plaintiff and asked to reschedule the meet and confer contending that the matter was "included in the order for the bulk meet and confer".

10. At 1:43 p.m., on June 13, 2022, Plaintiff responded advising that the bulk meet and confer was what was set for the 2:00 p.m. conference, that Plaintiff was proceeding forward with the meet and confer as agreed to by the parties and that if Defendant attempted to reschedule the meet and confer that it would be in violation of the Court's Order.

11. At 2:00 p.m., Plaintiff called Defendant for the scheduled bulk meet and confer.

12. During the phone conference, Defense counsel advised for the first time that there was an alleged scheduling error on Geico's part, that the necessary parties for the Defendant, attorneys Debbie Brown Esquire and Edward K. Cottrell, Esquire were not present, so the meet and confer could not go forward as scheduled.

13. The parties did address the scanning error associated with the list of two hundred forty (240) cases contained in Exhibit "A" to the Court's May 25, 2022 Order and agreed to submit an Agreed Order to the Court fixing the scanning error.

14. Following the meet and confer conference, Plaintiff confirmed the events of the meet and confer in an email and advised Defendant that Defendant was in violation of the Court's May 25, 2022 Order and that Plaintiff would not pursue sanctions as long as Defendant coordinated the meet and confer to occur on or before the June 24, 2022 deadline.

15. Defendant, via its counsel, responded to the email on June 15, 2022, agreed to the amended order fixing the scanning error of cases, and did not dispute anything else documented by Plaintiff.

16. On June 27, 2022, this Court entered the Agreed Order Correcting Exhibit "A" to the Court's May 25, 2022 Order. The Order simply attached the full list of two hundred forty (240) cases but did not modify any of the deadlines from the May 25, 2022 Order.

17. Despite full knowledge of the Court's deadlines, being given a professional courtesy from Plaintiff to the Defendant to fix the Defendant's initial noncompliance, and once again being reminded of the Court's deadlines, Defendant failed to conduct the Court Ordered Meet and Confer by the June 24, 2022 deadline.

18. Consequently, Plaintiff filed its Motion for Contempt against Defendant, in all cases subject to the May 25, 2022 and June 27, 2022 Orders, for Defendant's noncompliance.

19. On July 6, 2022, Plaintiff, via email, requested to coordinate a meet and confer on the Motion for Contempt.

20. Defendant failed to respond to the inquiry so Plaintiff sent a second request on July 8, 2022 requesting to set a meet and confer.

21. Defendant finally responded and confirmed that the meet and confer would proceed forward on July 12, 2022 and later advised that attorneys Debbie Brown, Esquire and Edward K. Cottrell, Esquire would be attending the meet and confer.

22. The parties attended the meet and confer conference on July 12, 2022 and had a court reporter present so there was a transcript of the conversation.

23. It was clear from the scheduling emails that the July 12, 2022 meet and confer was coordinated to discuss Plaintiff's Motion for Contempt and there was absolutely no communication from Geico requesting to have a meet and confer on the bulk discovery motions.

24. The meet and confer transcript clearly established that Geico was under the impression that the meet and confer was to discuss the bulk meet and confer ordered by the Court even though that was not what was scheduled between the parties.

25. The parties addressed all pending motions during the meet and confer and since they were unable to resolve any issues, a hearing was scheduled on October 13, 2022 to address all pending motions.

26. On October 5, 2022, Defendant filed a Memorandum of Law in Opposition to Plaintiff's Motion for Contempt and Edward K. Cottrell, Esquire filed a Notice of Appearance as Co-Counsel in *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Alyssa Devenny v. Geico Indemnity Company,* Orange County Case Number 2020-SC-002577-O. Defendant did not file a Memorandum of Law in Opposition to Plaintiff's Motion for Contempt in any of the other cases set for hearing on October 13, 2022.[1]

27. Defendant's Motion asserted that Plaintiff counsel was aware of which parties needed to be present for the meet and confer, that the Plaintiff did not coordinate the meet and confer with the right parties, that Plaintiff never reached out to schedule the meet and confer with any additional parties from Geico, that this was a simple scheduling error and not willful disobedience on part of the Defendant, and that contempt was not warranted since the parties complied with the Court's order.

28. Additionally, during the October 13, 2022 hearing, Defendant argued that the attorney who handled the May 12, 2022 bulk hearing concerning the bulk litigation did not have authority on the cases that were set for the May 12, 2022 hearing, that the meet and confer was timely coordinated, and that the meet and confer was completed in compliance with the Court's May 25, 2022 and June 27, 2022 Orders.

29. The record before the Court does not support Defendant's position.

First, Geico's counsel could not articulate how counsel had authority to handle the May 12, 2022 bulk hearing but did not have authority to handle the subsequent meet and confer ordered by the Court.

Second, Defendant never advised Plaintiff until June 13, 2022 as to who on Defendant's end needed to be present for the bulk meet and confer. Plaintiff coordinated with the attorney who handled the May 12, 2022 hearing. Defendant was in the best position to know who needed to attend a Court ordered meet and confer conference.

Third, Defendant's argument that Plaintiff never reached out to schedule the meet and confer with any additional parties from Geico is without merit. Following the June 13, 2022 meet and confer, Plaintiff advised Defendant in writing that the meet and confer did not go forward as scheduled, that Defendant was in violation of the Court's Order, and that Plaintiff would not seek sanctions as long as the meet and confer occurred prior to the June 24, 2022 deadline. Defendant did not dispute Plaintiff's confirmation.

Fourth, Defendant's argument that the meet and confer was timely coordinated was not accurate. Pursuant to the Court's May 25, 2022 Order, the meet and confer was to be scheduled within fifteen (15) days and occur within thirty (30) days of the Order. Thus, the meet confer should have been scheduled no later than June 9, 2022 and it should have occurred no later than June 24, 2022. Plaintiff provided dates to coordinate the meet and confer within the time frame established by the Court and it was Defendant that requested that it be scheduled outside of the time frame. Additionally, it was Defendant's failure to have the necessary parties present which caused the June 13, 2022 meet and confer not to proceed forward as scheduled. Plaintiff reminded Defendant of the June 24, 2022 deadline and advised Defendant that it would seek sanctions if Defendant failed to comply. When Defendant failed to comply, Plaintiff moved for contempt/sanctions.

Fifth, Defendant's argument that the meet and confer was timely completed in compliance with the Court's May 25, 2022 and June 27, 2022 Orders is likewise without merit. The record is clear that Defendant's actions caused the untimely meet and confer not to proceed forward as scheduled. Defendant never provided new dates to schedule the meet and confer and was warned by Plaintiff what would happen if Defendant failed to comply. Additionally, the subsequent emails sent by Plaintiff requested to set a meet and confer on the motions for contempt. Defendant never mentioned scheduling the bulk meet and confer on the discovery motions. Finally, the meet and confer transcript confirmed that Defendant was mistaken about what was actually set for the meet and confer. Even giving Defendant the benefit of the doubt that the discovery motions were requested and scheduled for the July 12, 2022 meet and confer, that date is clearly outside of the timeframe ordered by the Court. Thus, the meet and confer was not timely completed in compliance with the Court's May 25, 2022 and June 27, 2022 Orders.

Finally, the Court is not convinced that this "was a simple scheduling error". Geico was represented at the May 12, 2022 hearing, Geico was fully aware of this Court's ruling as it pertained to all 240 cases, Geico was aware of prior rulings from this Court, the rulings from the Ninth Circuit Appellate Court[2], and Fifth District Court of Appeal[3] concerning the exact same discovery issues involved in each of the 240 cases subject to the bulk meet and confer, litigation, and hearing. Additionally, this is not the first time that Defendant has violated this Court's Discovery Orders.[4]

30. The record clearly established Defendant's contumacious disregard for the Rules of Civil Procedure as well as this Court's authority.

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

1. Plaintiff's Motion for Contempt for Defendant's Violation of this Court's May 25, 2022 and June 27, 2022 Orders requiring Defendant to Conduct a Bulk Meet and Confer Conference and Coordinate a Bulk Hearing, Motion to Enforce this Court's May 25, 2022 and June 27, 2022 Orders, Motion for Sanctions, and Memorandum of Law is granted. The Court finds Defendant in contempt of court in each of the two hundred twenty (220) cases that were set for hearing on October 13, 2022.

Florida courts have the inherent power to hold parties in contempt for intentionally failing to obey a court order. *See Rojo v. Rojo,* 84 So. 3d 1259 (Fla. 3d DCA 2012) [ 37 Fla. L. Weekly D899a]. Such empowerment assists courts in administering public justice and enforcing the rights of private litigants by ensuring that judicial rulings serve more than a mere advisory role. *See Gompers v. Buck's Stove & Range Co.,* 221 US. 418 (1911). A trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice. *See Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell P.A. v. United States Fire Insurance Company,* 639 So. 2d 606 (Fla. 1994).

Rule 1.380(b)(2)(D) of the Florida Rule of Civil Procedure provides that if a party failed to obey an order to provide or permit

discovery, then the court may make an order treating as contempt of court for failure to obey. *See H.K. Development, LLC v. Greer,* 32 So. 3d 178 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D792a]. The Court noted that purposeful disobedience of a court order that has not been stayed or appealed is quintessentially contumacious. *See id. citing Johnson v. Allstate Insurance Company,* 410 So. 2d 978 (Fla. 5th DCA 1982)("A party may not ignore a valid order of court except at its peril. There are avenues of redress by appellate review for orders which may be erroneous, but so long as such orders are entered by a court which has jurisdiction of both the subject matter and the parties, they cannot be completely ignored without running the risk that an appropriate sanction may be imposed.)

Contempt sanctions are categorized as criminal or civil, and civil contempt sanctions are further classified as either compensatory or coercive sanctions. *See Channel Components, Inc. v. America II Electronics, Inc.,* 915 So. 2d 1278 (Fla. 2d DCA 2005) [ 31 Fla. L. Weekly D3a]. Since civil contempt sanctions are viewed as nonpunitive and avoidable, there are fewer procedural protections that are required. *See id.* The key safeguard in civil contempt proceedings is a finding by the trial court that violator has the ability to purge the contempt, however, there is no requirement that the amount of a fine coincide with some strict element of proof of damages or losses caused by the noncompliance. *See id.* Compensatory sanctions are designed to compensate the injured party for losses sustained whereas coercive sanctions are designed to coerce the offending party into compliance. *See Huber v. Disaster Solutions, LLC,* 180 So. 3d 1145 (Fla. 4th DCA 2016) [40 Fla. L. Weekly D2728a].

When awarding sanctions as part of a contempt proceedings, there must be evidence that the amount of the sanctions has (or any indication that it was intended to have) any relationship to the amount of damages suffered as a result of the parties' failure to comply with the Court's Order. *See H.K. Development, LLC v. Greer,* 32 So. 3d 178 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D792a]. Actual damages incurred by a party to the action is the appropriate measure for a civil contempt sanction payable to the party, including [attorney] fees and costs. *See id.* Additionally, the costs and expenses of the proceeding to punish the guilty party are allowed. *See id.* These sanctions may be awarded in civil contempt proceedings without any findings as to the parties' respective need and ability to pay. *See id. citing Lamb v. Fowler,* 574 So. 2d 262 (Fla. 1st DCA 1991).

In light of Defendant's actions in this matter, Plaintiff is entitled to compensatory sanctions in the form of reasonable attorney's fees and costs associated with preparing for and attending the June 13, 2022 bulk meet and confer, preparing the Motion for Contempt, preparing for and attending the July12, 2022 meet and confer, the cost of the July 12, 2022 transcript, and for attending the October 13, 2022 hearing. The Court reserves jurisdiction to determine the amount. If the parties are unable to resolve the amount of sanctions owed by Defendant, then Plaintiff shall set a fee hearing before the Court.

The Court also finds that coercive sanctions are warranted in this matter to prevent further discovery abuses/violations by the Defendant. The Court further finds that there is no other type of sanction that may persuade or coerce the Defendant into comply with future orders of this Court. The Court awards coercive sanctions against Defendant consisting of a $10,000 sanction in each of the two hundred twenty cases identified in the Court's May 25, 2022 and June 27, 2022 Orders that went to hearing on October 13, 2022. Defendant can purge this sanction by strictly and timely complying with all of the Court's orders moving forward and satisfying all future discovery obligations in strict adherence to the Florida Rules of Civil Procedure. If Plaintiff proves another violation in any of the two hundred twenty (220) cases set for hearing on October 13, 2022, then the $10,00 sanction will become payable in each case that the Plaintiff proves another violation by the Defendant.

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[1]The October 13, 2022 hearing consisted of 220 cases as 20 of the cases from May 25, 2022 and June 26, 2022 Orders were settled by the Defendant prior to the October 13, 2022 hearing.

[2]1) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Stella Aguirre),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009265-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2014-SC-12922-O (Judge DuBois, Orange Cty., July 27, 2018); 2) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Tamelia Johnson),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009267-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2011-SC-7224 (Judge DuBois, Orange Cty., July 27, 2018); 3) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Francisco Ramirez),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009266-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-007215-O (Judge DuBois, Orange Cty., July 27, 2018); 4) *GEICO Ind. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Derrick Garland),* Ninth Cir. Ct., Appellate, Case No. 2018-CA009264-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-007986-O (Judge DuBois, Orange Cty. July 27, 2018); 5) *GEICO Ind. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Kervans Joseph),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009263-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2014-SC-013002-O (Judge DuBois, Orange Cty., July 27, 2018); 6) *GEICO Gen. Ins. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o William Beattie),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009262-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2016-SC010815-O (Judge DuBois, Orange Cty., July 27, 2018); 7) *GEICO Ind. Co. v. Phoenix Emergency Medicine of Broward, LLC (a/a/o Narida Hingoo),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-9261-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2015-SC-007225-O (Judge DuBois, Orange Cty., July 27, 2018); 8) *GEICO Gen. Ins. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Kingsley Blair),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009260-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2016-SC-000719-O (Judge DuBois, Orange Cty., July 27, 2018); 9) *GEICO Gen. Ins. Co. v. Emergency Physicians, Inc. d/b/a Emergency Resources Group (a/a/o Mercedes Prudencio-Alvarez),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009259-O (Judge Kest, Ninth Jud. Cir., Appellate, July 8, 2019), Orange County Case No. 2015-SC-0055890 (Judge DuBois, Orange Cty., July 27, 2018); 10) *GEICO Ind. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Jasayra Peralta),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009258-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-005597-O (Judge DuBois, Orange Cty., July 27, 2018); 11) *GEICO Ind. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Francis Rayshard),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009257-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-004285-O (Judge DuBois, Orange Cty., July 27, 2018); 12) *GEICO Ind. Co. v. Emergency Physicians of Central Florida, LLP (a/a/o Brenda Kasper),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-009256-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2014-SC-008390-O (Judge DuBois, Orange Cty., July 27, 2018); and 13) *GEICO Ind. Co. v. Emergency Medical Associates of Tampa Bay, L.L.C. (a/a/o Christopher Bahl),* Ninth Jud. Cir. Ct., Appellate, Case No. 2018-CA-008670-O (Judge Kest, Ninth Jud. Cir., Appellate, July 9, 2019), Orange County Case No. 2015-SC-14820-O (Judge Allen, Orange Cty., July 17, 2018 and July 25, 2018).

[3]*GEICO General Insurance Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of Karmen Pearson,* Case No. 5D21-0603 (Fla. 5th DCA, August 4, 2021), Orange County Case No. 2014-SC-008387-O; GEICO *General Insurance Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of Caroline Lee,* Case No. 5D21-0591 (Fla. 5th DCA, August 4, 2021), Orange County Case No. 2016-SC-010506-O; *GEICO Indemnity Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of Christine Quinn,* Case No. 5D21-0601 (Fla. 5th DCA, August 4, 2021), Orange County Case No. 2014-SC-012930-O; *GEICO Indemnity Company v. Phoenix Emergency Medicine of Broward, LLC., as assignee of John Collins,* Case No. 5D21-0604 (Fla. 5th DCA August 4, 2021), Orange County Case No. 2015-SC-013910-O; *GEICO Indemnity Company v. Emergency Physicians of Central Florida, as assignee of Matthew Herr,* Case No. 5D21-0251 (Fla. 5th DCA August 4, 2021), Orange County Case No. 2020-SC002711-O; and *GEICO Indemnity Company v. Florida Hospital Medical Center, as assignee of Ines Gill,* Case No. 5D21-1675 (Fla. 5th DCA September 8, 2021), Orange County Case No. 2020-SC-011974-O.

[4]*See e.g. Venice Emergency Medical Associates PA a/a/o Ellen Nimick v. Government Employees Insurance Company,* Orange County Case Number 2021-SC-035859-O (Judge Carter February 2, 2022), *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Taylor Pippin v. Geico Indemnity Company,* Orange County Case Number 2020-SC-021952-O (Judge Carter January 25, 2022); *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Taylor Pippin v. Geico Indemnity Company,* Orange County Case Number 2020-SC-021952-O (Judge Carter January 25, 2022); *Emergency Physicians, Inc. d/b/a Emergency*

*Resources Group a/a/o Taylor Pippin v. Geico Indemnity Company,* Orange County Case Number 2020-SC-021952-O (Judge Carter January 25, 2022), *Florida Hospital Medical Center a/a/o Nayely Ramos v. Geico Indemnity Company,* Orange County Case Number 2020-SC-006900-O (Judge Carter May 31, 2022)

* * *

**Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Members of household—Under provisions of insurer's underwriting manual authorizing rescission of policy if risk was materially misrepresented and unacceptable under rules set forth in manual, insurer was not permitted to rescind policy of insured who failed to disclose two household residents whose addition to policy would have necessitated increase in premium, but who did not constitute unacceptable risk according to rules of underwriting manual**

UNIVERSAL X RAYS CORP., a/a/o Carlos Marchan, Plaintiff, v. UNITED AUTO. INS. CO, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-016137-SP-23. Section ND05. October 26, 2022. Chiaka Ihekwaba, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Christina J. Hudson, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR FINAL SUMMARY JUDGMENT**

THIS CAUSE came before the Court on October 10, 2022 upon the Defendant's Motion for Final Summary Judgment re: No Coverage Due to Material Misrepresentation and Plaintiff's Cross-Motion for Summary Judgment, and the Court having reviewed the motions and the summary judgment evidence, having heard argument of counsel and being otherwise fully advised, it is

ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment re: No Coverage Due to Material Misrepresentation is DENIED and Plaintiff's Cross-Motion for Summary Judgment is GRANTED, for the reasons set forth below:

According to the summary judgment evidence, Iris Marchan submitted an application for an automobile insurance policy (the "Policy") to United Automobile Insurance Company ("United Auto"), neglecting to disclose Jason Marchan and Jordan Marchan as household residents. Had Iris Marchan listed Jason Marchan and Jordan Marchan in her insurance application as household residents, the additional policy premium would have amounted to $1,877.00. United Auto rescinded the Policy, based upon Iris Marchan's having failed to disclose Jason Marchan and Jordan Marchan as household residents.

According to ¶14B of United Auto's Underwriting Manual, "coverage will be rescinded/rejected if a risk is materially misrepresented *and unacceptable by the rules in this manual*." The United Auto Underwriting Manual does not include as an "Unacceptable Risk" the additional risk created as a result of the addition of previously undisclosed household residents. More particularly, the Underwriting Manual sets forth the following 18 categories of Unacceptable Risks:

A. More than 18 underwriting points in the past 36 months.

B. Applications without the Insured's street and/or residence address.

C. Vehicles over twenty-five (25) model years for liability as a single vehicle and up to thirty (30) years if it is a 2nd or 3rd vehicle; vehicles over twenty (20) model years for Comprehensive/Collision. Exception: This does not apply to renewal policies.

D. The number of vehicles exceeds the number of drivers in the household by more than one (1).

E. Polices with multiple garaging addresses, except students attending school in FL.

F. Drivers over the age of seventy five (75) are required to submit UAIC'S approved medical statement signed by a physician indicating ability to operate a motor vehicle.

G. Comprehensive must always include Collision, and Collision must include Comprehensive on Full Coverage Policies.

H. Vehicles with ACV over $65,000 (NADA) or ISO Symbol or higher (26 or higher for Model Years 2010 and prior) for Comprehensive/Collision.

A. Students attending school outside Florida.

J. Military operators (acceptable if driver is to be stationed in Florida for a minimum of one (1) year from inception of the policy).

K. Vehicles not registered in Florida or vehicles that will be operated outside of Florida in the scope of one's business.

AX. The following occupations are unacceptable: real estate salespersons, chauffeur, valet parkers, taxi cab drivers, jitney drivers, day care drivers, patient transporter, for-hire or ride sharing drivers (including but not limited to Uber/Lyft drivers), or any other occupation which requires more than 4 hours per work day in any vehicle. EXCEPTION: Truck drivers that can provide proof of a trucker's policy which includes PIP insurance will be allowed.

ALL. Applicants/drivers with a revoked driver's license.

N. Vehicles garaged outside the state of Florida.

O. Drivers with three or more accidents, regardless of fault, within the last 36 months.

P. Vehicles with an out of state (non-Florida) mailing address.

Q. Applicants and drivers with a felony conviction, including anything drug related, unless the applicant or driver is granted a restoration of civil rights by the Governor and the Board of Executive Clemency. This rule only applies to new business.

R. Drivers with adverse prior claim history. Adverse prior claims history means any driver with one or more claim(s) or a household with one or more claim(s) in the past 36 months prior to the original effective date involving personal injury protection. This rule only applies to new business.

***ANALYSIS***

The Florida Supreme Court amended Rule 1.510, Fla. R. Civ. P. to "align Florida's summary judgment standard with that of the federal courts and of the supermajority of states that have already adopted the federal summary judgment standard." *In re Amendments to Florida Rule of Civil Procedure* 1.510, 309 So.3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. In connection therewith, the summary judgment standard provided for in Rule 1.510 "shall be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986)" (the "*Celotex* trilogy"). Those cases stand for the proposition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action". *Celotex*, 477 U.S. at 327.

The Florida Supreme Court has articulated the following "key points" while observing that "embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state"—

1. There is a fundamental similarity between the summary judgment standard and the directed verdict standard. Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury".

2. A moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under the new rule, such a movant can satisfy its initial burden of production in either of two ways: "If the nonmoving party must prove X to prevail at trial, the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X. A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial."

3. The correct test for the existence of a genuine factual dispute is "whether the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." Under the new rule, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." It will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised."

***UNITED AUTO IMPROPERLY RESCINDED THE POLICY, WHERE THE ADDITION OF JASON MARCHAN AND JORDAN MARCHAN DID NOT PRESENT AN UNACCEPTABLE RISK UNDER UNITED AUTO'S UNDERWRITING MANUAL***

In *South Broward Hospital District a/a/o Carolina Gonzalez Rodriguez v. United Automobile Insurance Company*, 27 Fla. L. Weekly Supp. 654a (Broward County, September 5, 2019), *per curiam aff'd*, 326 So.3d 1110 (Fla. 4th DCA, 2021), United Auto had rescinded an auto insurance policy based upon the named insured's failure to advise United Auto as to his correct address at the time of the policy renewal. In that case, as here, United Auto's Underwriting Supervisor, Jorge de la O, testified that had the named insured provided the correct information, United Auto would have charged an additional premium based upon that correct information.

However, Judge Mardi Levey Cohen recognized that in addition to a material misrepresentation, the United Auto Underwriting Manual also required an unacceptable risk in order to permit rescission of the United Auto policy. Jorge de la O had testified that the correct address did not present an unacceptable risk and that United Auto was bound to follow the rules in its own Underwriting Manual. Accordingly, Judge Mardi Levey Cohen granted plaintiff's motion for final summary judgment, concluding:

> Even if Mr. Samur's failure to disclose his Miramar address as the correct garaging address constituted a material misrepresentation, since the Miramar address did not constitute an unacceptable risk or violate any of the rules in the United Auto Underwriting Manual, United Auto was not permitted to rescind the Policy, under ¶14B of its Underwriting Manual.

Even though the above case is not binding on this Court, this Court agrees with Judge Mardi Levey Cohen and finds that the same principal and analysis applies to the case now before this court. Even if the failure on the part of Iris Marchan to disclose Jason Marchan and Jordan Marchan as household residents constituted a material misrepresentation, that material misrepresentation did not give rise to an unacceptable risk. Had the addition of Jason Marchan and Jordan Marchan to the policy presented an unacceptable risk, Jorge de la O would have so testified, instead of testifying that had Iris Marchan listed Jason Marchan and Jordan Marchan in her insurance application as household residents, the additional policy premium would have amounted to $1,877.00. Clearly, a risk cannot be unacceptable if the insurer is able to quantify the premium it would charge in order to assume that risk. In addition, the United Auto Underwriting Manual clearly spells out eighteen (18) categories of unacceptable risks, none of which include the additional risk created as a result of the addition of previously undisclosed household residents.

The summary judgment evidence demonstrates that there is no genuine dispute as to any material fact. The evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of whether United Auto was entitled to rescind the Policy, whereas a reasonable jury certainly could return a verdict for Plaintiff on the issue. The summary judgment evidence does not present a sufficient disagreement to require submission to a jury. It is therefore,

ORDERED AND ADJUDGED that

Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation is DENIED and Plaintiff's Cross Motion for Summary Judgment is GRANTED.

* * *

**Insurance—Homeowners—Standing—Assignment of benefits—Undated estimate that was not signed by assignee or assignor did not comply with statutory requirement that assignee provide insured with written estimate of services to be performed that is executed by and between assignee and assignor—Further, assignment is defective for including provision that impermissibly shortens statutorily required rescission period—Case dismissed with prejudice**

TOP MOLD SOLUTIONS, LLC, Plaintiff, v. PEOPLE'S TRUST INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-026704-CC-05, Section CC06. October 28, 2022. Luis Perez-Medina, Judge. Counsel: Daniela Barreto, Coconut Grove, for Plaintiff. Michael B. Greenberg, Deerfield Beach, for Defendant.

**ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE & DEFENDANT'S MOTION TO STAY DISCOVERY PENDING COURT'S RULING ON DEFENDANT'S AMENDED MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE**

**THIS CAUSE**, having come before the Court, on October 3, 2022, upon Defendant People's Trust Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint with Prejudice ("Defendant's Motion to Dismiss") and Defendant's Motion to Stay Discovery Pending Court's Ruling on Defendant's Motion to Dismiss (the "Motion to Stay Discovery"), and the Court having heard the arguments of both parties' counsel, having reviewed the motions, and otherwise being fully advised in the premises, and it is hereby:

**ORDERED and ADJUDGED** that:

Defendant's Motion to Dismiss is **GRANTED**;

Plaintiff's case arises out of an assignment of insurance benefits agreement executed by the insured-assignor on May 27, 2021 and by Plaintiff-assignee on May 28, 2022, which is attached to Plaintiff's Complaint as an exhibit. 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]; *accord Kidwell Grp., LLC v. Olympus Ins. Co.*, No. 5D21-2955, 2022 WL 2897749, at *1-*2 (Fla. 5th DCA Jul. 22, 2022) [47 Fla. L. Weekly D1571a].

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. These requirements are clear and unambiguous. "A court's determination of the meaning of a statute begins with the language of the statute." *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 145 (Fla. 2019) [44 Fla. L. Weekly S298a]. "If that language is clear, the statute is given its plain meaning, and the court does not 'look behind the statute's plain language for legislative intent or resort to rules of statutory construction.' " *Id.* (quoting *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008) [33 Fla. L. Weekly S671a]).

Strictly construing the statute, Plaintiff's assignment of benefits agreement does not comply with all the statute's mandatory requirements. 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." The assignment agreement provides that an estimate is incorporated by reference, thereby establishing that Plaintiff's estimate was a distinct, separate document

from the assignment agreement itself.[1] While the Court finds that incorporation by reference of a separate estimate may satisfy the statute under certain conditions, those conditions were not met here according to *The Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co.,* 343 So. 3d 97, 98 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b]. *See Lam v. Univision Communications, Inc.,* 329 So. 3d 190, 195 n.4 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2235a] ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." (quoting *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992))).

In *Kidwell Grp.,* the Fourth District Court of Appeal affirmed a dismissal with prejudice of an action based on an assignment of benefits agreement where an unexecuted invoice that postdated the assignment agreement did not satisfy sections 627.7152(2)(a)(4) and 627.7152(2)(a)(1), which provides that an assignment agreement must "[b]e in writing and executed by and between the assignor and the assignee." 343 So. 3d at 97-98; *see Castellanos v. Reverse Mortgage Funding LLC,* 320 So. 3d 904, 907 n.6 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1090a] ("[T]he law is clear that alternative bases for an appellate court's decision do not render them dicta."); *Clemons v. Flagler Hosp., Inc.,* 385 So. 2d 1134, 1136 n.3 (Fla. 5th DCA 1980) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." (alteration in original) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949))); *accord Sampson Farm Ltd. P'ship v. Parmenter*, 238 So. 3d 387, 393 n.7 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D169a]; *Paterson v. Brafman,* 530 So. 2d 499, 501 n.4 (Fla. 3d DCA 1988) ("The fact that this was an alternative holding of the court does not detract from its binding authority.").

Plaintiff's undated estimate is not signed by either the assignor or the assignee. Accordingly, Plaintiff's assignment agreement is invalid and unenforceable because Plaintiff's separate estimate does not comply with subsection (2)(a)(1)'s requirement of execution "by and between the assignor and the assignee," and, consequently, subsection (2)(a)(4) of the statute. *See Kidwell Grp.,* 343 So. 3d at 97-98. To be sure, the same result would obtain even if the estimate were dated with the same date as the assignment agreement, as the separate estimate would still have to be executed by and between the assignor and the assignee. *See id.*; *see also Super Green Air Control LLC v. People's Trust Inc. Co.,* 2022-012098-SP-05, (Fla. 11th Cty. Ct. Aug. 30, 2022) (Barket, J.), Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice & Defendant's Motion to Stay Discovery Pending Court's Ruling on Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice (dismissing complaint with prejudice where neither assignor nor assignee executed the separate estimate that was dated the same date as the assignment of benefits).

Separately, the Court also finds that the assignment agreement does not comply with section 627.7152(2)(a)(2), which provides in pertinent part that an assignment agreement must:

> Contain a provision that allows the assignor to rescind the assignment agreement without a penalty or fee by submitting a written notice of rescission signed by the assignor to the assignee . . . ***at least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed*** . . . .

§ 627.7152(2)(a)(2), Fla. Stat. (emphasis added).

Rather than allowing the assignor to effectuate rescission "at least 30 days ***after the date work on the property is scheduled to commence*** if the assignee has not substantially performed" as required by subsection (2)(a)(2), Plaintiff's assignment agreement allows for rescission "should the work contracted for not be substantially complete within thirty (30) days ***of Assignor executing this agreement.***" (Emphases added). The Court is persuaded that this violates the statute by Judge Janowitz's well-reasoned decision in *ASAP Ultimate Restoration Corp. v. People's Trust Ins. Co.,* 2021-031583-SP-25, (Fla. 11th Cty. Ct. Jul. 5, 2022), Order of Dismissal Upon Granting Defendant's Motion to Dismiss. There, facing the same exact incongruence between the language required by subsection (2)(a)(2) and the rescission provision provided in Plaintiff's assignment agreement here, it was determined that "[t]he different language [was] not a simple mistype" and was "more restrictive to the insured assignor" than what the statute allows, thereby rendering the assignment agreement invalid and unenforceable. This Court reaches the same conclusion as to Plaintiff's assignment, as Plaintiff's version of the rescission provision impermissibly shortens the statutorily required timeframe in which the insured has to effectuate rescission in relation to the commencement date of the work.

"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].

Accordingly, Defendant's Motion to Dismiss **GRANTED**, and the Court hereby dismisses this case with prejudice due to the incurable defects of the assignment agreement. Plaintiff shall take nothing in this action, and the Defendant may go hence without day.

The Motion to Stay Discovery is moot.

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[1]Additionally, DocuSign indicia appears on the top left corner of the three (3) pages to the assignment agreement, but does not appear on the estimate included in Plaintiff's Exhibit A. This further establishes that the estimate was separate from the assignment agreement.

* * *

**Insurance—Personal injury protection—Complaint alleging breach of contract for nonpayment of PIP benefits is not required to state which CPT codes are at issue or exact amount owed**

PRIME MEDICAL & REHAB SERVICE, INC., a/a/o Genevieve Gonzalez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-018809-SP-26, Section SD05. November 17, 2022. Michaelle Gonzalez-Paulson, Judge. Counsel: Nicolas M. Babinsky, Babinsky Law, LLC, Miami Springs, for Plaintiff. Jose Villegas, Orlando, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT**

**THIS CAUSE** having been reviewed by the Court on Defendant's Motion to Dismiss or In The Alternative, Motion for More Definite Statement, and the Court having heard argument of counsel and otherwise being fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. This case involves a claim seeking Personal Injury Protection (PIP) benefits whereby the Plaintiff has filed its Complaint alleging breach of contract against the Defendant for failure to pay amounts owed pursuant to Florida Statute 627.736 and the Defendant's policy of insurance.

2. The Defendant has filed its Motion to Dismiss or in the alternative, Motion for a More Definite Statement alleging that the Plaintiff's Complaint fails to allege the bill(s) at issue, specifically the exact CPT code(s) at issue, and the amounts alleged owed.

3. Additionally, Defendant claims that Plaintiff's Complaint is ambiguous since the jurisdictional amount listed in paragraph 1 is $100.00-$500.00 and paragraph 20 of the complaint states that the

Plaintiff submitted bills totaling $6,754.79. The Court does not find these two paragraphs to be ambiguous. Paragraph 20 states the total amount *submitted* to the Defendant, however, paragraph 1 indicates the limit of the damages sought. Based on the Complaint, Plaintiff is limited to recovery of damages between $100-$500 unless this Court grants leave for Plaintiff to amend its Complaint to seek additional damages.

4. Defendant further states that due to the ambiguous nature of the complaint, Defendant is unable to formulate a response as it is unknown what it is exactly it is defending against.

5. This Court has reviewed the four corners of the Plaintiff's Complaint and hereby finds that the Plaintiff has properly pled a cause of action, such that the Defendant is able to properly file a responsive pleading.

6. Any additional information the Defendant may be seeking as to the CPT codes at issue or the amount at issue, can be obtained through the course of discovery as that is the purpose of discovery.

7. There is no requirement that the Plaintiff provide any additional information other than the information already included in the Complaint. To be clear, there is no requirement that the Plaintiff state which CPT codes are at issue or an exact amount owed as the law does not require such in order to sufficiently state a cause of action for breach of contract. In fact, Florida law specifically permits pleading general damages.

8. The Court hereby finds that the Plaintiff's Complaint is legally sufficient and the Plaintiff has properly pled a cause of action for breach of contract.

It is therefore ORDERED AND ADJUDGED that Defendant's Motion to Dismiss, or in the alternative, Motion for More Definite Statement is **DENIED.** Defendant shall file an Answer to Plaintiff's Complaint within 20 days of the date of this order.

* * *

**Insurance—Personal injury protection—Affirmative defenses—Exhaustion of policy limits—Payment of invalid claims—Insurer's motion for summary judgment on exhaustion of benefits defense is denied where there is no evidence that payment to another medical provider was valid payment for services that were medically necessary, ordered, or prescribed—Amount of policy benefits available to fully reimburse plaintiff is not reduced by insurer's payment of invalid claims**

GABLES INSURANCE RECOVERY, INC., Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-020230-SP-25, Section CG03. November 7, 2022. Patricia Marino Pedraza, Judge. Counsel: Matthew E. Ladd, The Law Office of Matthew E. Ladd, Coral Gables, for Plaintiff. Jason P. Remy, Roig Lawyers, Miami, for Defendant.

## ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING ITS AFFIRMATIVE DEFENSE OF EXHAUSTION OF PIP BENEFITS [D.E. 27]

THIS CAUSE CAME TO BE HEARD ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT regarding its affirmative defense of exhaustion of PIP Benefits [D.E. 27] on Oct. 17, 2022. After reviewing the Motion, Response, and stated record evidence and after hearing argument by the parties, the Defendant's Motion is Denied. A question of fact remains regarding the validity of the payments made to Therapeutic Rehab Center and whether such payments are chargeable against the available policy benefit limit.

### STATEMENT FACTS

1. The Plaintiff's predecessor in interest is All X-Ray Diagnostic Corp. (AXR).

2. The Plaintiff alleges Defendant insurer paid All X-Ray less than what was required by the applicable fee schedule.

3. The Defendant admits that it paid what Defendant believed to be owed at the time, but did not pay to the applicable and required limiting charge. See Depo. of Defendant's Corp. Rep. Beth Hagerty, P. 23:20-P24:19

### THE DISPUTED FACTS PRECLUDE SUMMARY JUDGMENT

4. The bills at issue in this claim involve improperly paid bills to Therapeutic Rehab Center for services the Defendant initially did not pay.

5. The Defendant initially denied services billed for certain therapy modalities because documentation was required to support the additional units billed. (See Ex. G. of the Adjuster's Depo and Ex. D and F Explanation of Benefits and Reconsideration Review).

6. The Defendant never received any additional basis to support the medical necessity or other criteria to properly trigger payment and states that the decision to pay for the disputed services was a "business decision', rather than because the claims were valid, (that the services were medically necessary and required to be paid). See Adjuster Depo. P. 28-35, 38, 41, 48-49.

7. The validity of the payments to a provider which the Defendant seeks to avail itself of the exhausted benefits defense is disputed and therefore the issue of fact remains and summary judgment is unavailable.

### RECORD EVIDENCE

8. In addition to the deposition transcript of the Defendant's corporate representative, the Plaintiff filed an affidavit indicating that certain services provided by Therapeutic Rehab Center were not ordered or prescribed (and therefore would not be medically necessary and entitled to payments of the limited policy benefits). [D.E. 32]

9. The Defendant/ movant submitted an affidavit indicating that it paid $10,000 of PIP benefits, but did not address the specific payments allegedly improperly paid by Plaintiff in its affidavit.

10. The Plaintiff's affidavit refutes the Defendant's contention that at least $2,001.88 were paid for valid charges. (Plaintiff's affidavit #8 and #11 D.E. 32])

11. The Defendant (movant) has not submitted anything in opposition to suggest that Plaintiff's contention is wrong or that it has proof that the services addressed were ordered, prescribed, and/or medically necessary.

12. The Defendant did not present any evidence in support of its burden to prove there is no question of fact regarding the validity of the payments which the Plaintiff's claim were not validly paid.

### SUMMARY

13. The issue before the court is the determination of the validity of the payments made by Defendant to determine if such payments were correctly charged against the limited policy benefits.

14. Defendant mis-cites dicta in *GEICO Indem. Co. a/a/o Rita M. Lauzan v. Gables Ins. Recovery. Inc.,* 159 So.3d 151, (3rd DCA 2014) [39 Fla. L. Weekly D2561a] in support of its position.

15. The Defendant has not carried its burden of proof regarding the applicability of its affirmative defense that it exhausted benefits by only paying "valid claims". If the **jury** determines that the disputed payments were valid, Defendant will prevail on its affirmative defense. If the jury determines that the payment was invalid, then the Defendant will not prevail on its affirmative defense.

16. The validity of the payment to Therapeutic Rehab Center is contested by the Plaintiff and the Defendant's record evidence does not refute the Plaintiff's affidavit that the payment was invalid and therefore benefits remain available to pay its claim.

17. Defendant mis-cites dicta in *GEICO Indem. Co. a/a/o Rita M. Lauzan v. Gables Ins. Recovery Inc.,* 159 So.3d 151, (3rd DCA 2014)

[39 Fla. L. Weekly D2561a] in support of its position.

**ISSUE**

18. The issue before the court is the determination of the validity of the payments made by Defendant to determine if such payments were correctly charged against the limited policy benefits.

**RULE**

19. The Defendant has the burden of proof regarding summary judgment on its affirmative defense that no genuine issues of material fact exist. See Fla. R. Civ. P. 1.510 and *Holl v. Talcott,* 191 So.2d 40, 43 (Fla. 1966).

20. The Defendant must prove that the amounts paid were paid for valid services that required compensation of the limited benefits. See *Coral Imaging Services v. Geico Indem. Ins.,* 955 So.2d 11, 16 (3rd DCA, 2006) [31 Fla. L. Weekly D2478a].

21. Summary judgment is precluded by the question of fact of whether the payments of $2001.55 were for valid medically necessary services (that were ordered or prescribed by a duly licensed provider) and if so, did the payments otherwise satisfy the statutory and/or contractual criteria.

22. The Third District articulated that the amount of policy benefits available are not reduced by an insurance company's payment of invalid claims because such payments should not be considered "payment" under the PIP policy. See *Coral Imaging Services v. Geico Indem.* Ins., 955 So.2d 11, 16 (3rd DCA, 2006) [31 Fla. L. Weekly D2478a].

23. Neither the law nor the policy allows an insurance company to expose an insured patient to unpaid obligations due to the insurance company's failure to follow the law (and contract) to pay only those claims which are *valid* (lawfully ordered, rendered, related, reasonable, and medically necessary).

**ANALYSIS**

24. The matter before this Court involves the Plaintiff contesting the validity of the $2001.55 in payments made to a provider which the Plaintiff alleges to not have been entitled to the payment, leaving the amounts paid as available benefits.

25. The Defendant (movant) provided no record evidence to refute Plaintiff's position or otherwise prove that the payment to the other provider was valid, medically necessary, ordered, or prescribed. Therefore, a question of fact remains for the jury to determine.

26. The Defendant has not met its burden to prove that the $2,001.55 alleged by the Plaintiff, that were paid from the limited benefits available, were paid for valid claims that were medically necessary, ordered, and/or prescribed as *required by Fla. Stat. 627.736(4)-(13).*

27. Florida Statute 627.736 requires that an insurance company only pay benefits which are reasonable (in amount), related to an accident, and medically necessary.

28. Invalid claims which are not reasonable, related, or medically necessary, (or are not timely billed as required), or otherwise fail to satisfy conditions precedent (i.e. attendance at an examination under oath or are not properly documented ordered, or proscribed, are not subject to payment of policy benefits. (See Fla. Stat. 627.736(4)-(13)).

29. The amount of policy benefits available are not reduced by an insurance company's payment of invalid claims because such payments should not be considered "payments" under the PIP policy. See *Coral Imaging Services v. Geico Indem. Ins.,* 955 So.2d 11, 16 (3rd DCA, 2006) [31 Fla. L. Weekly D2478a] (While Geico remains free to pay providers for charges that are untimely ***or otherwise submitted in express contravention of the statute***, such payments should not be considered a "payment" under the PIP policy. By interpreting the statute in this manner, the remaining provisions of Section 627.736 will be effectuated and the clear legislative intent fulfilled.) (emphasis added).

30. Insurance companies are not excused from paying valid claims by their paying of invalid claims because any "payments" made to invalid claims are not considered "payments" under the policy. *Coral Imaging,* 955 So. 2d at 16.

31. Defendant mis-cites dicta in *GEICO Indem. Co. a/a/o Rita M. Lauzan v. Gables Ins. Recovery. Inc.,* 159 So.3d 151, (3rd DCA 2014) [39 Fla. L. Weekly D2561a] in support of its position.

32. The Court in that case held that Coral Imaging wasn't applicable to the matter which addressed the sequence and priority of payments to other providers, all of which the Court determined *were* providers entitled to receive the payments made. See *Id*., at 155 (the issue in *Geico a/a/o Rita M. Lauzon v. Gables Ins. Rec.* was the sequence of the payments).

33. Additionally, while the Defendant attempts to rely on the dicta articulated in *GEICO a/a/o Rita Lauzon v. Gables Ins. Rec.,* 150 So. 3d 151, (3rd DCA 2014) [39 Fla. L. Weekly D2561a] it does so only by overlooking the following sentence in the dicta it relies on where the court clearly articulates that the Lauzon matter involved benefits which were validly paid to the other provides.

34. Specifically, the Third District explained: "**Here, in contrast, benefits *were not improperly* exhausted. Rather, every medical provider GEICO paid on behalf of Lauzan was entitled to payment and all the claims paid were timely." *Id.* at 155.**

35. There is no dispute that *Plaintiff's claim is* valid (it was paid in part pursuant to the wrong fee schedule amount leaving a balance due related to the limiting charge). See Depo Transcript of Defendant's Corp. Rep. [D.E. 34] pages 19-24. Contrary to the analysis by the Defendant in its motion, the issue before the court is not to determine bad faith, priority of payment, or making payments of valid claims in excess of the policy limits.

36. A jury could conclude that the Defendant improperly reduced the amount of policy benefits available to pay the Plaintiff's claim.

37. The same analysis applies to charges for dates of service on 6/30, 8/4, 8/9, 8/11, 8/17, 8/19) (See Plaintiff's Affidavit [D.E. 32] filed in support of this response).

38. Defendant's assertion that its exhaustion of the benefits is an absolute defense is misstated or otherwise mis-applied to the matter before the court.

39. Defendant fails to apply *Coral Imaging* (and it's prongy) which considers "payments" are only those amounts paid for *valid* claims and seeks to limit this Court's application by citing the dicta in *GEICO Ind. Co. v. Gables Ins. Rec.* (supra.) which clearly expresses that payments are only chargeable against the limited policy benefits if the provider is lawfully entitled to the payment (which requires that the "payment" be made only for medically necessary, order and/or prescribed services).

40. This court's analysis of what is a "valid" claim requires the application of Judge Emas's reasoning adopted by the Third District in *Coral Imaging* shortly before his tenure on the District Court.

41. The Third explained the that the validity of the claim is essential to a payment being considered a "payment" regarding the applicability of policy benefits and further stated:

> In addressing the proper interpretation of a statutory provision, courts must defer to the legislative intent as expressed by the statute in question. "Legislative intent, as always, is the polestar that guides a court's inquiry under the Florida No-Fault Law. . . ." *United Auto. Ins. Co. v. Rodriguez,* 808 So.2d 82, at 85 (Fla. 2001) [26 Fla. L. Weekly S747a]. A fundamental principle of statutory construction is that "[w]here the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law." *Rodriguez*, at 85.

The initial question which must be answered, then, is whether the wording of the statute is "clear and amenable to a logical and reasonable interpretation." I conclude that the majority's interpretation of the statute does not meet this threshold test. . .

[955 So.2d 14]

The first and most obvious reason why the majority's statutory interpretation is not logical or reasonable is that it requires the provider to violate one provision of the statute in order to receive the benefit of another provision of the same subsection. . .

Therefore, the provider is not even permitted to submit a bill for untimely services. Only by violating this portion of the statute can we ever reach the question of whether an insurer has the authority to pay an untimely bill . . .

3. In order to be in a position to receive payment on its untimely claim, Professional Reading had to violate the express provisions of Section 627.736(5)(b) by submitting a statement of charges which included untimely-billed services.

**It cannot logically or reasonably be argued that the Legislature intended to require the provider to violate one portion of a statute in order to receive a benefit under another portion of the same statute. . .**

The unreasonableness of this position [of allowing claims that are not required to be paid to be considered payments against the policy limits] can be seen by taking the majority's interpretation to its logical conclusion, resulting in this very possible scenario:

1. Assume that Coral Imaging submits a timely bill for services totaling $10,000 (representing the limits of the PIP benefits).

2. Assume further that Professional Reading submits an untimely bill for services totaling $10,000 (also representing the limits of the PIP benefits).

3. Geico, the insured, receives Coral Imaging and Professional Reading's bills on the same day, and notes that Coral Imaging's bill was timely while Professional Reading's bill was untimely.

4. Under the majority's interpretation, Geico has the right to pay either Coral Imaging's timely bill or Professional Reading's untimely bill.

5. Geico chooses to pay the entire $10,000 to Professional Reading for its untimely bills, thereby exhausting the limits of the PIP policy.

As a result of paying the untimely bill and exhausting the limits of the PIP policy, Geico denies all payment on Coral Imaging's timely-submitted bill of $10,000.

6. Coral Imaging, having been denied payment on its timely-submitted bill, now seeks payment from the insured for the $10,000 in services provided.

These results expose an interpretation of the statute that is neither reasonable nor logical: the statute provides that "the injured party is not liable for, and the provider shall not bill the injured party for, charges that are unpaid because of the provider's failure to comply with this paragraph." The 30-day time limitation requires a provider to submit its bill on a timely basis and, if the provider does not do so and the insurer does not pay, the provider cannot bill the insured for the services. This provision is intended to put teeth into the 30-day time limitation by placing the provider on notice that it will have no recourse against the insured if it fails to meet the time requirements under the statute.

However, by paying Professional Reading's untimely bills (and in doing so, exhausting the PIP benefits) the insurer has exposed its own insured to an additional $10,000 obligation from Coral Imaging; upon exhausting the PIP benefits by paying Professional Reading, and denying payment to Coral Imaging on its timely bill, Coral Imaging is now permitted to seek payment from the insured because it complied with the statutory 30-day time requirement. If, on the other hand, Geico chose (or was duty-bound by statute) to deny Professional Reading's untimely bill (therefore allowing Geico to pay Coral Imaging's timely bill of $10,000), Professional Reading would have no recourse against the insured because the statute provides that "[t]he injured party is not liable for, and the provider shall not bill the injured party for, charges that are unpaid because of the provider's failure to comply with this paragraph." [§ 627.736(5)(b), Fla. Stat. (1999).]

Therefore, if the majority's reading of the statute is accurate, the insurer may unilaterally decide whether its insured will be exposed to liability for Coral Imaging's timely-submitted bill by exercising its authority under the statute to pay an untimely-submitted bill. This interpretation allows the insurer to avoid or defeat altogether the purpose of the time limitation by paying an untimely provider and subjecting its own insured to liability the statute was created to prevent. Given this application, I do not believe that the majority's interpretation of Section 627.736(5)(b) can be characterized as logical or reasonable.

In order to be construed logically and reasonably, and to effectuate the legislative intent, the statute must be read as:

Prohibiting the provider from submitting for payment the untimely charges and (if said untimely charges are improperly submitted) requiring the insurer to deny payment as violative of the express provisions of Fla. Stat. § 627.736(5)(b); or

Prohibiting, or treating as gratuitous, any payment for charges submitted in violation of the 30-day time requirements. . .

An interpretation of a statute by the highest court of a state is generally regarded as an integral part of the statute. *Seddon v. Harpster,* 396 So.2d 662 (Fla. 2d DCA 1979).

I believe that, in order to interpret the statute in a logical and reasonable manner, and to effectuate its legislative purpose, the provision must be read as prohibiting Geico from paying the untimely and improperly-billed charges submitted by Professional Reading, as violative of the provisions of § 627.736(5)(b). Alternatively, the payment by Geico must be characterized as "gratuitous," and should not be considered as having been made against the limits of the PIP policy. While Geico remains free to pay providers for charges that are untimely or otherwise submitted in express contravention of the statute, such payments should not be considered a "payment" under the PIP policy. By interpreting the statute in this manner, the remaining provisions of Section 627.736 will be effectuated and the clear legislative intent fulfilled.

(Emphasis and footnotes in original).

As this analysis demonstrates, there has been a violation of a "clearly established principles of law resulting in a miscarriage of justice." *Combs v. State,* 436 So.2d 93, 95-96 (Fla.1983), cited with approval in *Ivey v. Allstate Ins. Co.,* 774 So.2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]. In this case, the Circuit Court Appellate Division applied the incorrect law in interpreting the statute as elucidated in the dissent, and deviated from the form of law and the rules prescribed for rendering it.

See *Coral Imaging Services v. Geico Indem. Ins.,* 955 So.2d 11-16 (Fla. App. 2006) [31 Fla. L. Weekly D2478a].

42. In the matter before this court, like the facts in *Coral Imaging,* the statute specifies what is required for a claim to qualify as a valid claim.

43. Florida Stat. 627.736(1)(a) specifies when benefits are owed. Specifically, **"27.736 Required personal injury protection benefits; exclusions; priority; claims.—**

(1) REQUIRED BENEFITS.—An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to the named insured, . . . to a limit of $10,000 in medical and disability benefits . . .as follows:

(a) *Medical benefits*.—Eighty percent of all reasonable expenses for ***medically necessary medical***, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices and medically necessary ambulance, hospital, and nursing services if the individual receives initial services and care pursuant to subparagraph 1. within 14 days after the motor vehicle accident. The medical benefits provide

reimbursement only for:

**1. Initial services and care that are lawfully** provided, supervised, **ordered, or prescribed** by a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, or a chiropractic physician licensed under chapter 460 or that are provided in a hospital or in a facility that owns, or is wholly owned by, a hospital. Initial services and care may also be provided by a person or entity licensed under part III of chapter 401 which provides emergency transportation and treatment.

2.Upon referral by a provider described in subparagraph 1., followup services and care consistent with the underlying medical diagnosis rendered pursuant to subparagraph 1. **which may** be provided, supervised, ordered, or prescribed. . ."

44. Additionally, Florida Stat. 627.736(6)allows for the insurance company to investigate a claim to ensure that it pays only those amounts for **medically necessary** services. Specifically, Fla. Stat. 627.736(6)(2016)states:

(b) Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested by the insurer against whom the claim has been made, furnish a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why the items identified by the insurer were reasonable in amount and medically necessary, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for such treatment or services was incurred as a result of such bodily injury, and produce, and allow the inspection and copying of, his or her or its records regarding such history, condition, treatment, dates, and costs of treatment if this does not limit the introduction of evidence at trial. Such sworn statement must read as follows: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief." A cause of action for violation of the physician-patient privilege or invasion of the right of privacy may not be brought against any physician, hospital, clinic, or other medical institution complying with this section. The person requesting such records and such sworn statement shall pay all reasonable costs connected therewith. If an insurer makes a written request for documentation or information under this paragraph within 30 days after having received notice of the amount of a covered loss under paragraph (4)(a), the amount or the partial amount that is the subject of the insurer's inquiry is overdue if the insurer does not pay in accordance with paragraph (4)(b) or within 10 days after the insurer's receipt of the requested documentation or information, whichever occurs later. As used in this paragraph, the term "receipt" includes, but is not limited to, inspection and copying pursuant to this paragraph. An insurer that requests documentation or information pertaining to reasonableness of charges or medical necessity under this paragraph without a reasonable basis for such requests as a general business practice is engaging in an unfair trade practice under the insurance code.

45. Like in *Coral Imaging,* the identical matter before this court requires the same initial question which must be answered is whether the wording of the statute is "clear and amenable to a logical and reasonable interpretation." See *Id*. at 13.

46. The statute only requires payment of medically necessary services and that the submissions for payment of benefits comply as set forth in Fla. Stat. 627.736(6).

47. The medical records clearly show that code 97110 was billed for two views that were paid, but for which the medical records submitted with the billing documentation does not support such payment. See Depo Ex. E, P. 26. (The same analysis applies to charges for dates of service on 6/30, 8/4, 8/9, 8/11, 8/17, 8/19) (See Plaintiff's Affidavit filed in support of this response).

48. Applying Judge Emas's logic, does a provider who performs services which are not ordered or proscribed or otherwise does not submit documents evidencing medical necessity for a service in compliance with Fla. Stat. 627.736(6) deserve to benefit from another provision of the statute requiring prompt payment?

49. The answer pursuant to Judge Emas's reasoning is certainly no.

50. Judge Emas explained in *Coral Imaging* that the first and most obvious reason [that the violation of the statute requiring that payments are only for those services which are medically necessary (ordered and/or proscribed)] is not logical or reasonable because "it requires the provider or insurance company to violate one provision of the statute in order to receive the benefit of another provision of the same subsection. . ."

51. Therefore, the like the provider who is not even permitted to submit a bill for untimely services, an insurance company cannot make a qualifying "payment" for services which were not medically necessary (at least without the required form and supporting documentation required by Fla. Stat. 627.736(6)).

52. Identical to *Coral Imaging,* only by violating the portion of the statute which requires that the bills comply with the statutory provisions detailing the medical necessity and that the services are ordered and/or proscribed, can this court ever reach the question of whether an insurer has the authority to pay a bill for a service which is not medically necessary.

53. In order to be in a position to receive payment on its unsupported claim, like the untimely claim in *Coral Imaging,* the insurance company had to violate the express provisions of Section 627.736 by making a payment for services which were not medically necessary.

54. Like in *Coral Imaging,* it cannot logically or reasonably be argued that the Legislature intended to require a violation of one portion of a statute in order to receive a benefit under another portion of the same statute.

55. The Defendant's position suggesting that allowing claims that are not required to be paid to be considered "payments" against the policy limits was described by Judge Emas and the Third District as "unreasonable".

56. Identical to the reasoning in *Coral Imaging,* these results expose an interpretation of the statute that is neither reasonable nor logical: the statute provides that only medically necessary services be paid which were ". . .ordered, or prescribed. . ."

57. By paying bills for services that are not ". . .ordered, or prescribed. . ." (and therefore not medically necessary) the insurer exposes its own insured to an additional obligation by the provider who performed the lawfully rendered service.

58. The Defendant cannot be permitted to use policy benefits to expose its own insured to valid claims by paying invalid claims that are not supported by evidence of medical necessity in compliance with the statue. See 627.736(1), (5), and(6).

59. If the Defendant's position were to be granted, the insurer will be empowered to continue to unilaterally decide whether its insured will be exposed to liability for Plaintiff's valid bill by exercising its authority under the statute to pay an invalid bill, and then fail to defend its insured from being responsible for services which are not medically necessary or otherwise due.

60. The Defendant's position seeks to allow the insurer to avoid or defeat altogether the purpose of the statute by paying an invalid bill and subjecting its own insured to liability the statute was created to prevent.

61. The Third District rejected the Defendant's position and stated that such a position is neither logical or reasonable. See *Coral Imaging,* at 14.

62. Like in *Coral Imaging,* in order to be construed logically and reasonably, and to effectuate the legislative intent, the statute must be read as: prohibiting the insurance company from payment of limited policy benefits for invalid charges (if said charges are improperly submitted and that medical necessity is unsupported) and allowing the insurer to deny payment as violative of the express provisions of Fla. Stat. § 627.736; or

63. Prohibiting, or treating as gratuitous, any payment for charges submitted which are not medically necessary or otherwise valid.

64. As stated by Judge Emas and adopted by the Third District:

> "While the Defendant remains free to pay providers for charges that are not medically necessary or otherwise submitted in express contravention of the statute, such payments should not be considered a "payment" under the PIP policy. By interpreting the statute in this manner, the remaining provisions of Section 627.736 will be effectuated and the clear legislative intent fulfilled.

65. Determining otherwise would be what the Third District determined as a violation of a "clearly established principles of law resulting in a miscarriage of justice." *Combs v. State,* 436 So.2d 93, 95-96 (Fla.1983), cited with approval in *Ivey v. Allstate Ins. Co.,* 774 So.2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a].

66. Regarding the balance of Progressive's arguments: bad faith is not required when the analysis of what constitutes a "valid" or "invalid" payment is considered, policy benefits are not exhausted by payments which are not "valid", medically necessary, ordered, prescribed, related or related an accident, and the the English Rule of Priorities has no applicability to the analysis before the court.

## CONCLUSION

67. Defendant has the burden of proof regarding the applicability of the affirmative defense of exhaustion of benefits.

68. There is no record evidence that the payment of the $2001.55 alleged qualifies as a required "payment" of benefits to order, as a matter of law, that the amounts paid were for a validly claim that was medically necessary, ordered, and/or prescribed.

69. Defendant has not met its burden, and the motion for summary judgment is DENIED.

70. The matter shall be set for trial to allow a jury to determine the validity of the "payment."

* * *

**Insurance—Personal injury protection—Res judicata—Estoppel—Circuit court decision holding that policy at issue in county court case is void *ab initio* has no binding effect on county court where plaintiff medical provider was not party in circuit court action—Further, court cannot take judicial notice of circuit court ruling where insurer has not filed circuit court case file or certified copies of ruling**

PHYSICIANS GROUP, LLC, a/a/o Vincent Duran, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020-SC-005001-NC. November 7, 2022. Emanuel LoGalbo, Jr., Senior Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Robert K. Savage, Alfred Villoch, III, and Alexis Gay, Savage Villoch Law, PLLC, Tampa, for Defendant.

## ORDER (1) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND (2), DIRECTING THAT PLAINTIFF'S MOTIONS SEEKING RELIEF IN THE FORM OF FINAL OR PARTIAL SUMMARY JUDGMENT BE RESET FOR HEARING

HAVING considered the submissions of the parties and the argument of counsel for both sides on defendant's motion for summary judgment at hearing on October 26, 2022, the court enters its orders as follows:

1. Defendant argues that because it is undisputed that the 12th Circuit Court sitting in Manatee County has ruled that the policy at issue here is void *ab initio,* this court must likewise hold that the policy is void *ab initio.*

2. Despite the undisputed nature of defendant's assertion, there is no evidentiary value to the assertion thus far in these proceedings.

3. The reason is that judicial notice is not availing to defendant as defendant has offered neither the 12th Circuit's court file itself, inclusive of the ruling, nor certified copies of the ruling.

4. Thus, defendant's argument is mere assertion.

5. Defendant argues the applicability of the principle of res judicata or Estoppel by Judgment while advancing the 12th Circuit's ruling.

6. As plaintiff was not a party in the 12th Circuit's suit, this court finds that the 12th Circuit's ruling has no binding effect on plaintiff.

7. Defendant's motion for summary judgment is denied.

8. As to plaintiff's motions seeking relief in the form of final or partial summary judgment, the court orders the matter to be reset for hearing. The court finds that the hearing and arguments of counsel on October 26 did not reach all the arguments and assertions specified in the several submissions of the parties relating thereto. A hearing with more detailed presentations on the issues is required for adjudication.

* * *

**Insurance—Automobile—Windshield repair—Appraisal—Plaintiff that refused to participate in appraisal process mandated by policy failed to fulfill condition precedent to suit—Declaratory action—Where appellate court has recently ruled that appraisal provision at issue is enforceable, count for declaratory judgment as to enforceability of appraisal provision fails to state cause of action—Even if there were no binding appellate opinion on enforceability issue, trial court has discretion to compel appraisal on breach of contract action while corresponding declaratory judgment action questioning enforceability of appraisal provision is pending—Case dismissed without prejudice—Motion to compel appraisal granted**

EXPRESS AUTO GLASS, LLC; MICHEL CRUZ, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY; PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 18-CC-020053, Division M. June 17, 2022. Lisa Allen, Judge. Counsel: Marc Nussbaum, St. Petersburg, for Plaintiff. Geoffrey Schuessler, Clearwater, for Defendant.

## Order Granting Motion to Dismiss Amended Complaint and Compel Appraisal

This matter comes before the Court at hearing on May 2, 2022 upon Defendant's Motion to Dismiss Plaintiff's Amended Complaint and/or Motion to Stay and Compel Appraisal and Notice of Filing Certification of Business Records. Plaintiff's Amended Complaint alleges two counts (Count I—breach of contract and Count II—declaratory judgment) was filed on March 18, 2022 without leave of Court or by written consent of Defendant. Plaintiff's Amended Complaint added a count for Declaratory Judgment relief requesting this Court to determine whether the appraisal provision contained in the Policy is enforceable. Plaintiff also filed a Motion to Stay Pending Certiorari Proceedings/Motion for Protective Order In Response to Defendant's Motion to Dismiss and/or Abate for Appraisal based on a then pending appeal in the Florida Second District Court of Appeal in case styles, *Progressive American Ins. Co. v. Glassmetics a/a/o Devon Hammond*, 2D21-0488, lower case 16-CC-42084, Hillsborough County.

Defendant argues that Plaintiff failed to fulfill a condition precedent to bringing the instant lawsuit by failing to participate in an appraisal as expressly required by the Policy. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See The Cincinnati Insurance Company v. Cannon Ranch Partners, Inc.*, 162 So.3d 140, 143 (Fla. 2d DCA 2014) [40 Fla.

L. Weekly D78a]; *see also Green v. Life & Health of America*, 704 So.2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."), citing *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *see also Foster v. Jones*, 349 So.2d 795, 799-800 (Fla. 2d DCA 1977).

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

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

*Cincinnati Ins*. at 143.

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

In its Motion to Stay, Plaintiff argues that "the exact issues relevant to Defendant's Motion to Compel Appraisal are currently pending" on appeal in *Progressive v. Glassmetics*. And that "the subject of the Petition addresses the issue of Plaintiff's assertions [in the instant case] that involve the provisions being ambiguous; the policy provisions not being valid or enforceable based upon constitutional grounds and the denial of access to the courts; the involved provisions violates public policy."

Conveniently, the Florida Second DCA recently issued its opinion in *Progressive America Insurance Company v. Glassmetics, LLC*, 2022 WL 1592154, No. 2D21-488 (Fla. 2d DCA May 20, 2022) [47 Fla. L. Weekly D1106b]. The Second DCA ruled that the appraisal provision contained in Progressive's policy was not ambiguous, was not against public policy, provided sufficient procedures and methodologies, did not conflict with a retained rights clause, and did not violate assignee's rights of access to courts, jury trial or due process.

A complaint for declaratory relief under chapter 86, like any other complaint, must be legally sufficient. In general, the complaint must allege that: (1) there is a bona fide dispute between the parties; (2) the plaintiff has a justiciable question as to the existence or nonexistence of some right, status, immunity, power or privilege, or as to some fact upon which existence of such a claim may depend; (3) the plaintiff is in doubt as to the claim; and (4) there is a bona fide, actual, present need for the declaration. *Ribaya v. The Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa*, 162 So.3d 348, 352 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D820b]. Since the exact issues raised in Plaintiff's Declaratory Judgment count have already been considered, discussed in length and ruled on by the Second DCA in *Progressive v. Glassmetics*, Plaintiff cannot be in doubt as to these issues nor is there a bona fide, actual, present need for another declaration. Accordingly, Plaintiff's Count II for Declaratory Judgment as to the enforceability of the appraisal provision fails to state a cause of action.

Even if this Court did not have a binding Second DCA opinion that is directly on point at its fingertips, this Court would still maintain the discretion to adopt a dual track approach pursuant to *Villagio At Estero Condominium Association, Inc. v. America Capital Assurance Corporation*, 2021 WL 1432160, *3 (Fla. 2d DCA April 16, 2021) [46 Fla. L. Weekly D879a]. At hearing, Plaintiff argued that the Florida Third DCA's opinion in *People's Trust Insurance Company v. Marzouka*, 320 So.3d 945 (Fla. 3d DCA May 19, 2021) [46 Fla. L. Weekly D1155a], prevents this Court from granting appraisal on a breach of contract action when a corresponding declaratory judgment action questioning the enforceability of the appraisal provision is pending. Upon a close review of *People's Trust v. Marzouka*, the Third DCA acknowledged 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." *People's Trust* at 947. Further, the Third DCA stated, "However, trial 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.* Simply put, the trial court has the discretion to allow the declaratory action to be tried prior to the resolution of the underlying liability action, but the trial court is not bound to do so. Furthermore, in *People's Trust* the insured sought declaratory judgment relief in relation to the preferred contractor endorsement contained within the property insurance contract, such provision is distinctly different and more complex than the simple and common appraisal provision found in Progressive's automobile Policy herein.

Accordingly, Plaintiff's Count I for breach of contract is not ripe for adjudication until both parties have complied with the appraisal process outlined in the Policy; and Plaintiff's Count II for declaratory judgment relief fails to state a cause of action. Therefore, this case should be dismissed without prejudice.[1]

For the reasons stated above, it is ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Complaint, or in the alternative, Motion to Compel Appraisal is GRANTED.
2. Plaintiff's Motion to Stay is DENIED as moot.
3. This case is DISMISSED without prejudice.

4. The Clerk is directed to ADMINISTRATIVELY CLOSE this case.

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

* * *

**Insurance—Personal injury protection—Coverage—Declaratory action—Petition for declaratory relief alleging controversy over insurer's denial of PIP coverage is moot where insurer provided insured with notification of coverage and paid her medical providers' bills well before filing of petition, and evidence of payments unequivocally refutes allegations that coverage was erroneously denied due to material misrepresentation on policy application and that insurer failed to timely investigate and process claims—No merit to argument that insurer could have dispelled all doubt as to coverage by producing PIP log—Insurer was not required to provide insured with copy of log in response to pre-litigation requests**

TORRI FITZPATRICK, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20CC087391. October 25, 2022. Jack Gutman, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Philip L. Colesanti II, Roig Lawyers, Tampa, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING MOOTNESS OF PLAINTIFF'S PETITION FOR DECLARATORY RELIEF AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court on October 20, 2022 on 1) Defendant's Motion for Summary Judgment Regarding Mootness of Plaintiff's Petition for Declaratory Relief filed May 7, 2021 and 2) Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support Thereof and in Opposition to Defendant's Motion for Summary Judgment filed July 12, 2022. The Court, having reviewed the motions, supporting memoranda, summary judgment evidence, applicable law and argument of counsel, and being otherwise advised in the Premises makes the following findings:

**FACTUAL BACKGROUND**

On November 22, 2018, Plaintiff, an individual sustained injuries from a motor vehicle accident. At the time of the accident, she was insured as the named insured on a policy issued by Defendant. On December 15, 2018, after learning of the accident, Defendant issued a reservation of rights letter to Plaintiff. The reason for the reservation of rights letter was due to numerous attempts made by Defendant to contact Plaintiff met by no response. On February 6, 2019, Plaintiff, through her personal injury attorney—Terence S. Moore, issued a letter of representation to Defendant and requested a statement of coverage. On February 19, 2019, Defendant was afforded an opportunity to speak directly with Plaintiff and her counsel. A determination to afford coverage was made following that call. The following day, on February 20, 2019, Defendant issued a letter to Mr. Moore stating in part "At present, there are no known policy or coverage defenses that said insurer reasonably believes is available at this time. The said insurer has no record of any other insurance coverage that would apply to this loss." It is important to note that at the time this coverage determination was made, Century-National had yet to receive a single claim for reimbursement from Plaintiff or her medical providers in connection with this claim.

The first set of bills received in connection this claim came on March 1, 2019 from Outpatient Pain & Wellness, DC and Sterling Medical Group. Additional bills came between March 25, 2019 and May 7, 2019, from Sterling Medical Group and Murthay Ravipati MD. On March 22, 2019, after applying the $1,000.00 policy deductible to 100 percent of the expenses and losses as required by § 627.739(2), Fla. Stat., Defendant issued payment to Sterling Medical Group, in the amount of $461.02. On June 12, 2019, an additional $1,314.94 was issued in benefits, with interest where appropriate regarding the remaining claims along with Explanations of Benefits to the providers explaining the basis for payment. Besides the bills referenced above, the record reflects no additional claims for No-Fault benefits were received by Defendant. Notably, Plaintiff herself admitted she personally did not make any claims for benefits (medical, mileage reimbursement, wage loss, replacement services, etc).

**PROCEDURAL BACKGROUND:**

This matter came before the Court from a Petition for Declaratory Judgment filed on December 7, 2020 by Torri Fitzpatrick. The Petition alleges controversy over Century-National's improper denial of coverage. Said Petition makes specific claims alleging Century-National erroneously denied coverage due to a material misrepresentation in the policy application by Plaintiff and due to the failure to timely investigate and process Plaintiff's PIP claim pursuant to § 627.736(4)(i), Fla. Stat. Plaintiff further asks the Court to find the denial was improper.

During the course of litigation, both parties engaged in all forms of discovery (written and oral deposition). Plaintiff three times attempted to amend its Petition to present different questions of controversy for relief. All three times the amendments were either withdrawn by Plaintiff or denied by the Court as futile for failing to state a valid cause of action.

**STANDARD OF REVIEW:**

Effective May 1, 2021, The Florida Supreme Court amended Fla. R. Civ. P. 1.510 to imitate the federal summary judgment standard. *See In re: Amendments to Fla. Civ. P. 1.510,* 309 So. 3d 192, 192 (Fla. 2020) [46 Fla. L. Weekly S6a] (adopting the federal summary judgment standard); *In re: Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d 72, 74 (Fla. 2021) [46 Fla. L. Weekly S95a] (largely replacing the text of existing rule 1.510 with the text of Federal Rule of Civil Procedure 56).

Upon its effect date, the amendment "govern(s) the adjudication of any summary judgment motion decided on or after that date, including in pending cases." *In re: Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d at 77. In this case, the Motions for Summary Judgment are being decided after the effective date of the amendment. Therefore, the amended rule applies.

Under the amended rule, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a) (2021). In applying the amended rule, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *In re: Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d at 75 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). The moving party has the initial burden of showing the absence of a genuine issue as to all material fact. *Celotex Corp. v. Catrett,* 477 U.S.

317, 323 (1986) ("A party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact."). Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to present evidence showing a genuine issue of material fact that precludes summary judgment. *Celotex,* 477 U.S. at 323-25. A party cannot defeat a motion for summary judgment by resting on the conclusory allegations in the pleadings. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248.

**MOOTNESS:**

Pursuant to Chapter 86 of the Florida Statutes, declaratory relief is appropriate upon the showing of:

1. The existence of a bona fide dispute between the parties.

2. A justiciable question regarding the existence of a power, privilege, right or immunity.

3. The Complainant is in doubt as to the power, privilege, right, or immunity.

4. Bona fide, actual, and present need for the declaration.

*May v. Holley,* 59 So. 2d 636, 639 (Fla. 1952). The Declaratory Judgments Act authorizes declaratory judgments as to insurance policy obligations to defend and coverage for indemnity. *See Legion Ins. Co. v. Moore,* 846 So. 2d 1183 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1195a].

Based on the evidence presented to the Court via Defendant's summary judgment evidence (deposition transcripts of Maribel Lopez, Century-National's corporate representative, Torri Fitzpatrick; executed interrogatories of Torri Fitzpatrick; and affidavits of Maribel Lopez and Terence S. Moore), the Court finds that Defendant—Century-National Insurance Company has presented sufficient evidence to demonstrate no genuine dispute as to any material fact. Here the evidence clearly shows the coverage was afforded. Notification of said coverage was provided to Plaintiff—through her counsel via the February 20, 2019 statement of coverage letter. Further, the act of paying bills to Plaintiff's medical providers on March 22, 2019 and June 12, 2019, well before the commencement of litigation occurred on December 7, 2020 demonstrates there was nothing for the Court to construe as it relates to the allegations raised by the Petition. Declaratory relief "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 (Fla. 2d DCA 1961). There can be no bona fide dispute as to the denial of coverage when coverage was afforded more than eighteen months prior to the action seeking declaratory relief.

The evidence of these payments also clearly and unequivocally refutes the allegations of Plaintiff's Petition that coverage was erroneously denied due to a material misrepresentation on the policy application and improper denial due to a fraudulent insurance act under § 627.736(4)(i), Fla. Stat. no evidence of any communication (letters, phone calls, etc.) were presented to support these allegations. Plaintiff's counsel even conceded these points during its presentation.

As such, relying on the four corners of the Petition, review of the evidence, and Plaintiff's concessions of no dispute into the evidence presented by Century-National, the Court finds Plaintiff's Petition was moot.

**PRESUIT ENTITLEMENT TO PIP LOGS**

The Court also considered Plaintiff's argument that it was in doubt as to coverage and Defendant could have dispelled all question of coverage by responding to Plaintiff's requests pre-suit for PIP logs. Again, the Court reiterates coverage was afforded. The Court disagrees with Plaintiff's position, noting the failure to supply PIP logs prior to the commencement of litigation does not provide a reasonable belief to dispute coverage.

The Florida legislature revised the No-Fault Law in 2012 to establish a provision mandating the creation and maintaining of a log of PIP benefits. This revision to the No-Fault Law not only created an obligation on the insurer to keep a log of benefits, but also expressly provides when the log must be produced. Specifically, the revision/addition states:

> An insurer shall create and maintain for each insured a log of personal injury protection benefits paid by the insurer on behalf of the insured. If litigation is commenced, the insurer shall provide to the insured a copy of the log within 30 days after receiving a request for the log from the insured.

§ 627.736,(4)(j), Fla. Stat. The second half of the statute clearly and unequivocally imposes a right or privilege of entitlement to the PIP log at a specific time; upon the commencement of litigation. An action is deemed to commence upon the filing of a complaint or petition. *See* Fla. R. Civ. P. 1.050. Plaintiff's Petition was filed on December 7, 2020, but its requests for PIP Logs came on June 17, 2019, and June 27, 2019. As such the Court finds there was no denial of a power, privilege, right or immunity based on Plaintiff's unfulfilled requests. The Court further notes that even if Plaintiff would have been allowed to amend its petition as requested, the outcome would not have changed.

**CONCLUSION:**

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

1. Defendant's Motion for Summary Judgment Regarding Mootness of Plaintiff's Petition for Declaratory Relief is hereby **GRANTED.**

2. Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support Thereof and in Opposition to Defendant's Motion for Summary Judgment is hereby **DENIED.**

3. Final judgment is entered for Century-National Insurance Company and against Plaintiff, Torri Fitzpatrick. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

4. The Court reserves jurisdiction to consider a timely motion to tax costs and attorneys fees as well as Defendant's Motion for Sanctions pursuant to Section 57.105(1), Florida Statutes filed on June 2, 2021.

* * *

**Insurance—Personal injury protection—Discovery—Motions to compel depositions and better responses in second suit for PIP benefits that was filed following dismissal with prejudice of initial suit and filed for purpose of determining whether asserted attorney charging lien had been violated are denied—Discovery is premature prior to court's determination of legal questions of whether it has jurisdiction of second suit and whether lien exists**

SPINECARE ASSOCIATES, LLC, a/a/o Debora Hamilton, Plaintiff, v. LM GENERAL INSURANCE COMPANY, a Foreign Corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-049508. October 23, 2022. Leslie Schultz-Kin, Judge. Counsel: Kelly Blum, FL Legal Group, Tampa, for Plaintiff. Sarah Sorgie Hanson, Conroy Simberg, Tampa, for Defendant.

**ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DEPOSITION/FOR SANCTIONS AND PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES**

THIS CAUSE came on to be heard on Plaintiff's Motion to Compel Deposition/for Sanctions and Plaintiff's Motion to Compel Better Responses, with Defendant's Response to Plaintiff's Motions to Compel Discovery, and the Court having heard argument of counsel on June 28, 2022, and being otherwise advised in the premises, makes the following findings/rulings:

***Summary of Positions***

1. Plaintiff has filed the subject cause of action for breach of contract to recover PIP benefits as outlined in the Complaint.

2. Defendant maintains the cause of action is improperly filed as a duplicate cause of action and in violation of a prior settlement reached as to these claims that resulted in a dismissal with prejudice.

3. Defendant asserts the Court lacks jurisdiction given the dismissal with prejudice citing *Dandar v. Church of Scientology Flag Service Organization, Inc.,* 190 So. 3d 1100 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D534c].

4. Defendant further maintains that any discovery pertaining to a lien violation is premature given the current status of the pleadings, would invade privileged information surrounding settlement, and may reveal information between competing law firms of the same client, citing to *Diaz-Verson v. Walbridge Aldinger Company,* 54 So. 3d 1007 (Fla. 2d DCA 2010) [36 Fla. L. Weekly D26b] and *Rousso v. Hannon,* 146 So. 3d 66 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1663a].

5. Defendant requests this Court to determine its jurisdiction and Plaintiff's standing to maintain this cause of action before any determination of discovery is made.

6. Defendant also requests this Court to determine whether a lien exists before discovery is had as to whether a lien was violated. In support of its position, Defendant cites *Feldman, P.A. v. Infinity Assurance Insurance Company,* 2019 WL 13130258 (Fla. 11th Jud. Cir. App. December 31, 2019) [27 Fla. L. Weekly Supp. 925b], wherein the Appellate Circuit Court of the 11th Judicial Circuit determined a lien could not be perfected by way of a statutorily mandated pre-suit demand letter.

7. Plaintiff maintains the underlying breach of contract cause of action was filed without knowledge of the first filing and that the subject litigation is now maintained to establish a lien violation occurred.

8. At the hearing, Plaintiff cited to the Court among other similar cases, *Heller v. Held,* 817 So. 2d 1023 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1323b] and *Miller v. Scobie,* 152 Fla. 328 (Fla. 1943) in support of its position that it may pursue a lien violation in an original cause filing and that the lien may be pursued in the name of the Plaintiff.

9. Plaintiff's counsel advises that upon acquiring the deposition of the Defendant, it will establish a payment occurred after notice of a lien and then will be in a position to amend the Complaint to frame the scope of the pleadings within the tenor of a lien violation. Plaintiff maintains the discovery is necessary to address these factors.

10. The record reflects two causes of action for breach of contract of PIP benefits have been filed as demonstrated by the Affidavit filed by A. Amador on April 14, 2022.

11. One cause of action was dismissed with prejudice and the other cause of action is being maintained for the purpose of pursuing an alleged lien violation, although the pleadings do not currently reflect his position.

***Legal Findings***

12. In *Dandar v. Dandar, supra.,* the Second District Court of Appeal squarely stated that "once a case is voluntarily dismissed, a trial court is divested of jurisdiction to proceed in the case in any manner." *Id.* at 1103.

13. The Second DCA cited to *Pino v. Bank of New York,* 121 So. 3d 23, 32 (Fla. 2013) [38 Fla. L. Weekly S168a], wherein the Florida Supreme Court addressed the divesture of jurisdiction where a dismissal with prejudice occurs, quoting " '[t]he voluntary dismissal serves to terminate the litigation, to instantaneously divest the court of its jurisdiction to enter or entertain further orders that would otherwise dispose of the case on the merits, and to preclude revival of the original action." *Id.*

14. A voluntary dismissal with prejudice is the act of finality that deprives a court of jurisdiction of that case. *Id.*

15. The record before this Court demonstrates the filing of two lawsuits with the first dismissed with prejudice. Plaintiff concedes the underlying cause of action is not maintained for the purposes of recovery of PIP benefits, but is maintained for the purpose of recovery over an attorney fee charging lien.

16. Logic dictates there can only be one original cause of action. The dismissal with prejudice of the first filed lawsuit calls into question the Court's jurisdiction of the second lawsuit and whether jurisdiction was properly invoked at the outset to permit ancillary proceedings.

17. The documents provided by the Plaintiff indicate Plaintiff relies upon a pre-suit demand letter as the means to perfect the lien alleged at issue. In *Feldman, P.A. v. Infinity Assurance Insurance Company, supra.,* the medical provider's attorney sought to claim a charging lien for pre-suit work completed by counsel.

a. The Eleventh Judicial Circuit Appellate Court affirmed the trial court's order striking the charging and retaining lien, finding a lien could not exist for pre-suit work completed where the attorney was discharged before a lawsuit had been filed.

b. The Appellate Circuit Court concluded §627.428, Fla. Stat., did not apply to pre-suit work and the burden did not shift to the insurer to be responsible for payment for pre-suit work.

c. The Appellate Circuit Court further noted a charging lien is not to be imposed just because services are provided, but the services must have produced a positive result.

d. The Eleventh Judicial Circuit Appellate Court further noted the discovery sought by the attorney was properly denied as he was not a party to the litigation and it was improper to permit him to intervene to conduct discovery. The Court further held "Moreover, because Feldman was not entitled to attorney's fees for his pre-suit work, his right to discovery on this matter is moot."

18. Plaintiff appears to maintain its lien is of a different nature than the "typical attorney fee charging lien" as addressed by the courts. At this time, however, the legality of the alleged lien that has triggered the alleged violation has not been determined.

19. Contrarily, in *Heller v. Held, supra.*, as cited by the Plaintiff, an attorney's charging lien was filed within the original cause of action with a finding the lien was valid and enforceable.

a. As noted by the *Heller* Court, attorney Heller had been discharged and a Notice of Withdrawal was filed within the original cause of action following his termination by his client, Thomas Held.

b. A charging lien was subsequently filed within the original cause of action within the timeframe designated by the trial court.

c. Within the original cause of action, the trial court determined a charging lien existed and entered a final judgment against Thomas Held (the individual who had hired and fired attorney Heller).

d. After attorney Heller could not collect against Thomas Held, he brought suit against the other Defendants who were part of the original action to collect on the charging lien that had already been determined to exist by a court of law.

e. The underlying issue in *Heller v. Held,* as addressed by the Court, was whether attorney Heller could pursue his charging lien, which was already established by the court in the original cause of action, against the other parties to the litigation where attorney Heller represented Thomas Held.

f. Notably, the final judgment in the original cause of action determined a charging lien existed and a judgment was awarded.

20. Similarly, in *Miller v. Scobie, supra.,* counsel for the party Plaintiff maintained pursuit of its charging lien in the original cause of action albeit in the name of the Plaintiff, which the Court deemed

permissive.

21. Specific to discovery, it is well settled that the test for discovery is always relevance and that risk of disclosure of confidential information outweighs the remote relevancy. *Diaz-Verson, supra., and Rousso v. Hannon, supra.* It is likewise well-settled that discovery is limited to those matters relevant to the litigation as framed by the parties' pleadings. *Id.*

***Conclusions***

22. The Court finds the cases cited by Plaintiff distinguishable from the present facts in that none of the cases involve the second filing of an identical cause of action for the purposes of pursuing a lien after a dismissal with prejudice was filed.

23. To the extent Defendant maintains a voluntary dismissal with prejudice occurred of an original cause of action, a second duplicate cause of action cuts against the findings expressed in *Dandar*, *supra.*

24. The cases cited by Plaintiff are not demonstrative of the jurisdiction of the Court in that jurisdiction of the Court is not addressed where a dismissal with prejudice had been filed and there was not a prior determination of the existence of an enforceable lien.

25. None of the cases cited by Plaintiff address whether a statutorily mandated pre-suit demand letter for PIP benefits may serve as a means to establish a legally viable lien.

26. It follows that whether the Court has jurisdiction in the subject cause of action is a legal question to be addressed by the Court. To the extent the Court's jurisdiction has not been properly invoked, any orders issued stand to be voided. Thus, the Court finds it is necessary to determine whether it has jurisdiction in this matter.

27. Further, whether a "lien" exists is a legal determination for the Court.

28. To the extent a valid and enforceable lien does not exist, no basis exists for discovery of whether a lien violation occurred.

29. The respective parties plainly dispute the existence of a lien. While Plaintiff maintains the existence of a valid lien and Defendant maintains a valid lien does not exist, this is a legal determination to be had by the Court should the Court permit this second lawsuit for the purposes of determining a lien violation.

30. To the extent a settlement occurred, such settlement discussions are deemed confidential. Likewise, it is apparent the Plaintiff medical provider may have been represented by two competing law firms, in which case the deposition of the Defendant may unintentionally cause irreparable harm to the non-party Plaintiff's firm involved who is not part of the subject litigation.

31. For these reasons, the discovery sought by Plaintiff is premature at best.

**ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED:**

32. Plaintiff's Motion to Compel Deposition/For Sanctions and Motion to Compel Better Responses to Discovery are **DENIED** pending the Court's determination of the legal issues involved specific to its jurisdiction/Plaintiff's standing, and then if necessary, the existence of a lien.

* * *

**Insurance—Automobile—Windshield repair— Appraisal— Declaratory action—Where allegations in complaint target enforceability of appraisal clause, court cannot grant motion to dismiss and compel appraisal without prematurely and improperly adjudicating that issue—Court cannot compel appraisal where insurer did not present any evidence at or before hearing that appraisal was ripe**

NUVISION AUTO GLASS, LLC, a/a/o Denise Almeida, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-008874, Division J. September 23, 2022. J. Logan Murphy, Judge. Counsel: James R. Collins, FL Legal Group, Tampa, for Plaintiff. Kathryn A. Desire, Fort Lauderdale, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR TO ABATE, STAY, AND COMPEL APPRAISAL**

BEFORE THE COURT is Defendant's Motion to Dismiss, or alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal. Plaintiff responded, and the parties appeared for a hearing on May 17, 2022.[1] Upon consideration, the motion is denied.

**1. INTRODUCTION.**

In October 2021, Progressive's insured, Denise Almeida, damaged her windshield. Compl. ¶ 5. She assigned her rights under the Progressive policy to NuVision in exchange for a windshield "repair/replacement." Compl. ¶ 8. After performing the work, NuVision sent Progressive an invoice for $1,163.62. Compl. Exh. A. Progressive then invoked the appraisal clause of its policy. Compl. ¶ 13.

Instead of participating in appraisal, NuVision filed a declaratory judgment action against Progressive. In it, NuVision alleges that the "comprehensive insurance portion of the subject automobile insurance policy is non-specific as to what parts, materials, services, and labor rates/hours are not reimbursable." Compl. ¶ 12. The complaint argues that Progressive is trying to "limit its responsibilities and reimbursement amounts by invoking" appraisal, and that NuVision is unsure whether appraisal is ripe because Progressive "fails to specify . . . what parts, labor, services and/or materials are covered and/or excluded for the subject windshield replacement." Compl. ¶¶ 13, 14.

Paragraph 34 of the complaint seeks an exhaustive list of declarations (15, to be exact) concerning the construction and applicability of Progressive's appraisal clause. They can be grouped into three categories. First, whether appraisal was properly invoked:

A. Whether a genuine dispute exists/existed so as to allow for the invocation of the appraisal clause in the subject contract's Comprehensive Coverage.

D. Whether the Defendant provided the proper, timely notice of dispute to invoke the appraisal clause.

L. Whether the Defendant has waived its right to appraisal by taking an inconsistent position to appraisal.

M. Whether Defendant has chosen a competent, impartial and disinterested appraiser.

N. Whether the Defendant has properly paid the loss pursuant to the relevant portion of the policies [*sic*] limit of liability.

Second, the standard for calculating the amount of loss:

A.[2] Whether the invocation of the appraisal clause was ripe, i.e., whether all parts, labor, and services were determined as covered and/or reimbursable under the subject policy.

D. Under what standard were the subject charges to be reimbursed under the policy, for instance under a usual and customary or prevailing competitive price, etc.

E. Whether the Defendant's appraiser will be/is/was required to assess a value for each of the individual charges for parts, labor hours, and/or services in calculating a reimbursement amount under the subject policy.

And third, the general validity of the appraisal clause under Florida law:

F. Whether the appraisal clause of the policy violates the intent, and/or underlying public policy behind *Fla. Stat.* § 51 [*sic*] and the resulting *Florida Small Claims Rules*.[3]

G. Whether the appraisal clause is/was being used to prevent the Plaintiff from its Florida Constitutional Right to access to the courts over a reimbursement dispute.

H. Whether the appraisal clause of the policy violates *Fla. Stat.* § 627.7288 per se, its intent, and/or underlying public policy.

I. Whether the prevailing party in an appraisal dispute is entitled to appraisal cost and/or court cost reimbursement pursuant to the subject policy and/or *Fla. Stat*. § 57.041.

J. Whether the invocation of the appraisal clause is being used to violate/evade/subvert the public policy of *Fla. Stat*. § 627.428.

K. Whether the appraisal clause set forth proper notice on procedures and methodologies governing the process to the Insured/Assignors.

Progressive moves to dismiss or to compel appraisal and stay the case. The motion does not directly reference any of these allegations. It does, however, touch on many of the general subject areas, arguing the issues raised do not preclude appraisal. In particular, the motion argues at length that the only issue between the parties is the amount of loss, and the method of calculating that loss is to be left to the appraisers. The motion provides no evidence of invoking appraisal before suit. But it does reveal (at 2) that Progressive concedes coverage and it contends (again, without evidence) that the "only dispute in this matter is a dispute as to the amount of loss." Progressive also argued at the hearing that NuVision has conceded this fact by alleging in its complaint that Progressive "has sought to limit its responsibilities and reimbursement amounts by invoking an appraisal clause contained in the subject policy." Finally, the motion does not address any of NuVision's alleged public policy barriers to appraisal.

The response generally contends (at 4-5) that litigation should proceed so that a court may determine the method of valuing the loss, in part because the limit-of-liability clause is ambiguous. NuVision also presents unpersuasive arguments on the sword-and-shield and cost-prohibitive doctrines.

In addition to its written response, NuVision argued at the hearing that appraisal is inappropriate because the Court did not have the policy available to review the governing language. It also argued that its declaratory judgment action should be treated differently than a standard breach of contract action. Progressive countered by arguing that no matter the label, NuVision has failed to comply with a condition precedent to suit. Neither party requested an evidentiary hearing.

**II. DISCUSSION.**

Progressive moves to dismiss or stay the case based on the appraisal clause in Almeida's insurance policy. The problem is that Progressive has not addressed the allegations in the complaint targeting the validity of the very clause Progressive seeks to enforce. Progressive did not argue that those portions of the complaint should be dismissed for any reason other than compelling appraisal.[4] "Because these are challenges targeting the enforceability of the appraisal and other policy provisions themselves," the Court cannot grant the "motion to compel appraisal . . . without improperly and prematurely adjudicating these issues with regard to the declaratory judgment claims." *People's Tr. Ins. Co. v. Marzouka*, 320 So. 3d 945, 948 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a]. *Accord Progressive Am. Ins. Co. v. Dr. Car Glass, LLC*, 327 So. 3d 447 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2030c]. *Cf. Higgins v. State Farm Fire & Cas. Co*., 894 So. 2d 5, 18 (Fla. 2004) [29 Fla. L. Weekly S533a] (allowing trial courts to exercise discretion to allow a declaratory judgment action to be tried before resolution of the underlying liability claims); *Express Damage Restoration, LLC v. Citizens Prop. Ins. Corp*., 320 So. 3d 305 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1023a] (affirming disposal on *summary judgment* of a declaratory judgment action raising whether the insurer properly invoked appraisal).

Before a trial court can compel appraisal, it must make a preliminary determination as to whether the demand for appraisal is ripe. *Citizens Prop. Ins. Corp. v. Admiralty House, Inc*., 66 So. 3d 342, 344 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1436a]. A finding that appraisal is ripe must be supported by competent substantial evidence. *Am. Cap. Assurance Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n, Inc*., 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2463a] (citing *Fla. Ins. Guar. Ass'n v. Hunnewell*, 173 So. 3d 988, 991 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D661a]). Progressive did not present *any* evidence that appraisal was ripe at before or during the hearing. True, NuVision appears to allege that Progressive invoked the appraisal clause, but invoking the clause does not make it automatically ripe. *See Corzo v. Am. Superior Ins. Co.*, 847 So. 2d 584, 585 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1432c]. And it's also true that Progressive filed its policy and appraisal letter *after* the hearing. But that evidence cannot be considered without due process implications. Neither party requested an additional evidentiary hearing, and without evidence at the hearing, the Court cannot conclude that substantial competent evidence supports appraisal at this time.

Essentially, Progressive is asking the Court to treat this declaratory judgment action as one for breach of contract. But under the arguments raised by Progressive, the appraisal clause does not foreclose NuVision's ability to bring a declaratory judgment action challenging the enforceability of that clause. *See Comisar v. Heritage Prop. & Cas. Inc. Co*., __ So. 3d __, No. 4D21-2468, 2022 WL 3221701, at *2 (Fla. 4th DCA Aug. 10, 2022) [47 Fla. L. Weekly D1678a].

Accordingly, Defendant's Motion to Dismiss, or alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal is DENIED. Defendant shall answer the complaint within **20 days** of this order.

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[1]The parties' written offerings greatly complicate the resolution of this motion. Both appear to be taken from templates on the topic of appraisal. Few of the arguments raised in the motion are relevant to this case, and the response is similarly inadequate. In fact, in their many pages, neither the motion nor the response ever refer to a single allegation in the complaint. Motions and responses should be tailored to the case in which they are filed and the arguments counsel intend to pursue. Counsel are warned that future prosecution of similar filings will result in the filing being stricken as impertinent.

[2]Two allegations in Paragraph 34 are labeled "A."

[3]The error in this allegation makes it impossible to discern what public policy is allegedly violated, especially since the Small Claims Rules don't apply to this action. *See* 13th Jud. Cir. Admin. Order S-2022-003 ¶ 11(A).

[4]The Court is restricted to the parties' arguments on the papers and at the hearing. *Bank of N.Y. Mellon in interest to JPMorgan Chase Bank, N.A. v. Barber*, 295 So. 3d 1223, 1225 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1068a]. *See DiGiovanni v. Deutsche Bank Nat'l Tr. Co*., 226 So. 3d 984, 988 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D772a]; *Shore Mariner Condo. Ass'n, Inc. v. Antonious*, 722 So. 2d 247 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D2712a].

* * *

**Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—Insured who failed to attend properly noticed EUOs failed to satisfy condition precedent under PIP statute and policy—Insurer's failure to pay or deny claim within 30 days did not preclude it from contesting coverage based on insured's failure to attend EUOs**

FLORIDA WELLNESS CENTER, INC., a/a/o Luis Ramirez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-003026. October 23, 2022. Leslie Schultz-Kin, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Roy Kielich, Andrews Biernacki Davis, Tampa, for Defendant.

**ORDER GRANTING DEFENDANT'S AMENDED SECOND MOTION FOR FINAL SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION TO STRIKE**

THIS CAUSE, having come on to be heard on June 16, 2022 upon Plaintiff's Motion to Strike Affidavit of Gessin Pineda, Plaintiff's

Motion for Summary Judgment, and Defendant's Amended Second Motion for Final Summary Judgment, and the Court having reviewed the Court file, the Motions, heard argument from counsel for both parties, and being otherwise advised in the premises, finds as follows:

1. Plaintiff has filed the instant action as a Petition for Declaratory Judgment, seeking a declaration regarding Personal Injury Protection ("PIP") coverage to the assignor, Luis Ramirez, pertaining to an automobile accident that occurred on or about September 11, 2020.

2. The record evidence before this Court demonstrates that there exists no genuine issue of material fact as to the following:

a. On December 15, 2020, the Defendant sent the assignor a letter scheduling an Examination Under Oath ("EUO") to occur on December 30, 2020. This letter was mailed to the assignor via FedEx to the address provided by the assignor to the Defendant on December 14, 2020.

b. The assignor failed to appear for the December 30, 2020 EUO.

c. On December 30, 2020, the Defendant sent the assignor a letter scheduling a second EUO to occur on January 11, 2021. This letter was mailed to the assignor via FedEx to the address provided by the assignor to the Defendant on December 14, 2020.

d. The assignor failed to appear for the January 11, 2021 EUO.

e. On January 19, 2021, the Defendant issued a denial of PIP coverage for the September 11, 2020 accident due to the assignor's failure to appear for two scheduled EUOs.

3. The Court finds the Defendant provided proper notice to the assignor of the requested EUOs. Pursuant to the deposition testimony of Defendant's Corporate Representative, these notices were sent to the address provided by the assignor to the Defendant on December 14, 2020, as noted above. Under Florida law, there is a rebuttable presumption that "mail properly addressed, stamped, and mailed was received by the addressee." *Brown v. Giffen Indus., Inc.,* 281 So. 2d 897, 900 (Fla. 1973). Here, there is no record evidence to suggest that the assignor was not provided with proper notice.[1]

4. In 2012, the Florida Legislature amended Florida Statute 627.736(6)(g) to provide:

> An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, **submitting to an examination under oath**. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. **Compliance with this paragraph is a condition precedent to receiving benefits.** An insurer that, as a general business practice as determined by the office, requests an examination under oath of an insured or an omnibus insured without a reasonable basis is subject to s. 626.9541.
>
> (Emphasis added).

5. Courts have long held that a "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001) [26 Fla. L. Weekly S549a]. In that endeavor, when statutory language is clear, the plain language of the statutory sections must determine their meaning. *Hawkins v. Ford Motor Co.,* 748 So. 2d 993, 997 (Fla. 1999) [24 Fla. L. Weekly S480a]. This amendment to the Florida Statute specifies that compliance with an EUO is a *condition precedent* to receiving benefits and mandates that an insured or omnibus insured must attend an EUO, if requested, prior to receiving PIP benefits.

6. Defendant's policy of insurance and encompassing endorsements comport with the statutory language and clearly state that submitting to an EUO is a condition precedent to receiving benefits under the policy. Specifically, the pertinent portions of Defendant's policy state as follows:

> **PART II(A)- PERSONAL INJURY PROTECT COVERAGE**
>
> **(. . .)**
>
> **Conditions**
>
> **(. . .)**
>
> **Examination Under Oath**. An insured seeking benefits must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. **Compliance with this paragraph is a condition precedent to receiving benefits.**
>
> **(. . .)**
>
> **PART VI - DUTIES IN CASE OF AN ACCIDENT OR LOSS**
>
> For coverage to apply under this policy, **you** or the person seeking coverage must promptly report each accident or loss even if **you** or the person seeking coverage is not at fault. **You** or the person seeking coverage must provide **us** with all accident/loss information including time, place, and how the accident or loss happened. **You** or the person seeking coverage must also obtain and provide **us** the names and addresses of all persons involved in the accident or loss, the names and addresses of any witnesses, and the license plate numbers of the vehicles involved.
>
> (. . .)
>
> A person seeking coverage must:
>
> 1. cooperate with **us** in any matter concerning a claim or lawsuit;
> 2. provide any written proof of loss **we** may reasonably require;
> 3. allow **us** to take signed and recorded statements, including sworn statements and **examinations under oath**, which **we** may conduct outside the presence of **you** or any other person claiming coverage, and answer all reasonable questions **we** may ask and provide any documents, records, or other tangible items that **we** request, when, where, and as often as **we** may reasonably require;
>
> (. . .)
>
> (Emphasis in original and emphasis added).

7. Based on the foregoing, this Court finds that the assignor failed to comply with a valid condition precedent under Fla. Stat. 627.736(6)(g) prior to filing suit. Furthermore, the claimant failed to comply with the terms and conditions of Defendant's policy of insurance. As such, PIP coverage was properly denied under this claim.

8. In its Motion for Summary Judgment, Plaintiff argues that Defendant violated Florida Statutes Section 627.736(4)(i) by failing to pay or deny its claim within 30 days. This position, however, is directly contrary to recent binding case law from the Second District Court of Appeal in *Century-Nat'l Ins. Co. v. Regions All Care Health Ctr., Inc.,* 336 So. 3d 445 (Fla. 2d DCA April 20, 2022) [47 Fla. L. Weekly D896a].

9. In *Century-Nat'l Ins. Co.,* the Second DCA reversed the trial court's granting of summary judgment in favor of the medical provider in the context of an action for declaratory relief, holding that "[t]he statute is clear, the penalty for failing to pay or deny a PIP claim within the time constraints of the statute results in the claim being 'overdue.' However, '[n]othing in the statute provides that once a payment becomes overdue the insurer is forever barred from contesting the claim.' " 336 So. 3d at 448 (*citing United Auto. Ins. Co. v. Rodriguez,* 808 So. 2d 82, 87 (Fla. 2001) [26 Fla. L. Weekly S747a]);[2] *accord Miracle Health Services, Inc. v. Progressive Select Ins. Co.,* 326 So. 3d 109 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1608a].

10. Similarly, the Fifth District Court of Appeal in *United Auto. Ins. Co. v. AFO Imaging,* 323 So. 3d 826 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1570a], specifically held that "the insurer is not barred from contesting the claim just because a payment becomes overdue" and "subsection (4)(i) does not alter the penalties for overdue

payments," which is statutory interest. As such, any ruling that determines an insurer is barred from contesting a claim for failing to deny or pay a claim within the timeframes set forth in Fla. Sta. 627.736(4) is an improper interpretation of the statute. *Id.*; *Century-Nat'l Ins. Co.,* 336 So. 3d at 445.

11. Additionally, the Third District Court of Appeal, in *Palmetto Physical Therapy, Inc., et al. v. Progressive Select Ins. Co.,* 320 So. 3d 213 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D332a], confirmed a lower court's ruling and held that summary judgment was properly granted for Progressive based on an insured's failure to submit to an EUO. In doing so, the Third DCA affirmed the lower court's findings, which held:

> In summary, Fla. Stat. 627.736 makes an Examination Under Oath a **condition precedent** to receiving benefits. Regardless of any reason the Claimant may have had for failing to attend the EUOs, **§627.736 (6)(g) does not include any mitigating factors for this Court to consider**. Unlike under §627.736(7)(b), where the Florida Legislature expressly mentioned and therefore created an unreasonable refusal standard, permitting consideration of mitigating factors with respect to Independent Medical Examinations, the Legislature did not include such provision or create such a standard in §627.736(6)(g). Defendant attempted to schedule and properly noticed an EUO of the Claimant twice. As the Claimant failed to appear both times, he failed to satisfy a condition precedent and is not entitled to benefits. As the Plaintiff stands in the shoes of the Claimant and is entitled to no greater rights or benefits than the Claimant, Plaintiff is not entitled to benefits either. See, *Fla. East Coast Railway Co. v. Eno,* 128 So. 3d 622 (Fla. 1930).
>
> *See Palmetto Physical Therapy, Inc., et al. v. Progressive Select Ins. Co.,* (Lower Tribunal Case No. 16-588) (Honorable Gloria Gonzalez-Meyer) (03/01/2019). *Affirmed by* the Florida 3d DCA in Case No. 3D19-2334 on February 10, 2021. Mandate issued April 30, 2021).
>
> (Emphasis added).

12. Based on the foregoing, and pursuant to Florida Rule of Civil Procedure 1.510, there exist no triable issues and there remains no genuine dispute as to any material fact. The assignor failed to submit to two EUOs in accordance with the Policy and the provisions of Fla. Stat. 627.736(6)(g) of the Florida No Fault Law, which is a condition precedent to receiving PIP coverage.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Strike Affidavit of Gessin Pineda is **DENIED**.

2. Plaintiff's Motion for Summary Judgment is **DENIED.**

3. Defendant's Amended Second Motion for Final Summary Judgment is **GRANTED**.

4. Final Summary Judgment is entered in favor of Defendant, PROGRESSIVE AMERICAN INSURANCE COMPANY. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

5. The Court reserves jurisdiction to consider any timely motion relative to entitlement to and amount of attorneys' fees and costs, if applicable.

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[1]"[W]hen something is mailed by a business, it is presumed that the ordinary course of business was followed in mailing it and that the mail was received by the addressee." *Torrey v. Torrey,* 815 So. 2d 773, 775 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1083a]. "To expect evidence as to the individual, actual act of mailing or as to receipt of the mailed item would be 'totally unreasonable.' " *Id.*; *citing Brown,* 281 So. 2d at 900.

[2]In *Century-Nat'l Ins. Co.*, the trial court had entered summary judgment in favor of the medical provider finding that because Century-National failed to "pay or deny the claim within 30 days and did not invoke the additional time limitation under Fla. Stat. 627.736(4)(i), . . . [Century-National] was in breach of contract and [Century-National's] rescission of the policy was improper." 336 So. 3d at 448.

* * *

**Civil procedure—Motion to vacate dismissal entered after plaintiff repeatedly failed to meet deadlines to submit default final judgment package to chambers is denied—Although dismissal entered was without prejudice, entry of dismissal with prejudice would have been warranted**

BANK OF AMERICA, N.A., Plaintiff, v. KELVIN E. DENIS, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22029561, Division 53. November 6, 2022. Robert W. Lee, Judge.

**ORDER DENYING DEFENDANT'S MOTION TO VACATE DISMISSAL**

This cause came before the Court on November 1, 2022 for hearing of the Plaintiff's Motion to Vacate Dismissal. The Court's having reviewed the Motion and matters of record, and having considered counsel's argument and the relevant legal authorities, finds as follows:

A default was entered against the Defendant in this case. Because of the Plaintiff's ongoing dilatory practice of failing to submit judgment packages to the Court, resulting in dozens if not hundreds of cases languishing in this County, this Court entered its Order on June 21, 2022 giving the Plaintiff 30 days to submit its default final judgment package to chambers, as permitted by Rule 2.516(h)(1), Fla. R. Gen. Prac. & Jud. Admin. The Order also provided that failure to timely submit the judgment package would result in the Court's concluding that the case had been resolved or abandoned, and the Court would dismiss the case without further notice or hearing. (The Plaintiff has previously "settled" many cases by payment plans, without providing any record notice of such settlement.) The Plaintiff, as has become too common, did not comply with this Order. The Court has no record of receiving the required default judgment package, nor any settlement paperwork.

Rather than dismiss the case immediately after the expiration of the 30-day deadline, the Court gave the Plaintiff an additional week to submit the judgment package. The Plaintiff failed to comply. As a result, on July 28, 2022, the Court entered its Final Order of Dismissal. Although this Order was served on the Plaintiff by email (CMS e-service), the Plaintiff waited another 18 days to file its Motion to Set Aside the Dismissal. Moreover, although the Court authorized a hearing on the Motion, the Plaintiff did not diligently move its Motion to hearing until November 1, 2022. At the hearing and in its Motion, the Plaintiff requested the Court to consider the *"Kozel"* factors. The Plaintiff also argued that they submitted the judgment package "one day late." The Court finds that this is simply not the case. To this day, the Plaintiff has not submitted the judgment package to chambers as required by the Court's Order. (Because the Defendant has been defaulted and has no registered email address, the Court requires the judgment package to be submitted to chambers, with stamped return envelopes, so that the Court can mail a copy of the judgment to the Defendant. Because of dozens of interactions with the Plaintiff on this specific point, the Court has no doubt that the Plaintiff is well aware of this requirement.)

The case of *Kozel v. Ostendorf* does not apply to this case because the dismissal was ***without prejudice***. *Federal Nat'l Mortgage Ass'n v. Linner,* 193 So.3d 1010, 1012-13 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1348a]; *SRMOF II 2012-1 Trust v. Garcia*, 209 So.3d 681 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D369b]; *Lopez v. Worldwind Investment Group, LLC,* 335 So.3d 1212 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2301c]. Nevertheless, the Court will consider the *Kozel* factors as requested by the Plaintiff to demonstrate that the greater sanction of dismissal ***with prejudice*** would have been warranted under the facts of this proceeding:

> 1) Whether the attorney's disobedience was willful, deliberate or contumacious, rather than an act of neglect or inexperience;

2)Whether the attorney has previously been sanctioned:

3)Whether the client was personally involved in the act of disobedience;

4)Whether the delay prejudiced the opposing party:

5)Whether the attorney offered reasonable justification for noncompliance: and

6)Whether the delay created significant problems of judicial administration.

*See Ham v. Dunmire,* 891 So. 2d 492, 496 (Fla. 2004) [30 Fla. L. Weekly S6a]: *Kozel v. Ostendorf*, 629 So. 2d at 818 (Fla. 1993). Further, the Florida Supreme Court has held that "[a] deliberate and contumacious disregard of the court's authority will justify application of the severest of sanctions [dismissal or default], as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness." *Mercer v. Raine*, 443 So. 944, 946 (Fla. 1983).

As for the first factor, the Court finds that the Plaintiff's conduct in this case was certainly not the result of mere neglect or inexperience, but rather a willful disregard of the Court's Order, as set forth in more detail below.

Next, the Court considers whether the attorney has previously been sanctioned. The Plaintiff's firm has been admonished many times for its failure to comply with these same orders in other cases. Further, prior to the June 21, 2022 Order, the Plaintiff has had numerous other cases dismissed for the same reason.

As for the third factor, the Court finds that the misconduct at issue lies in substantial part at the feet of the Plaintiff itself, i.e., the client. *See A-1 Mobile MRI, Inc. v. United Auto. Ins. Co.,* 12 Fla. L. Weekly Supp. 337d (Broward Cty. Ct. 2005). The Court has been made well aware that the Plaintiff has set up a business model to process its cases at its own pace, without regard to the requirements of Court rules. The Plaintiff routinely delays providing its attorneys with the affidavits it needs to move forward to final judgment. Further, because this issue has been ongoing for several years, the Plaintiff itself is certainly aware of the requirements of the Court. Coupled with this, Plaintiff's counsel—a high volume consumer debt firm—has clearly set in place an inadequate system of following up on Court orders and emails. This Plaintiff's conduct shows that it apparently believes the Court's Orders are not "orders," but rather "suggestions" to which it may comply at its leisure.

The fourth factor is not overly relevant, as the Defendant was defaulted in this case.

Next, the Court considers whether the Plaintiff offered a reasonable explanation for its non-compliance. The Plaintiff has offered no credible explanation as to why it failed to comply with this Court's Order. The Plaintiff has been aware of the Court's requirements for several years now. It is hard for the Court to fathom that this Court's Orders get lost in the proverbial crack. Moreover, the Plaintiff cannot create a problem by providing an apparent insufficient number of attorneys and staff to handle its cases. *See A-1 Mobile MRI, Inc. v. United Auto. Ins. Co.,* 12 Fla. L. Weekly Supp. 987a (Broward Cty. Ct. 2005).

Finally, the Court considers whether the problem has created a significant problem for judicial administration. Simply put, it has. This Court has had to create a follow up procedure for this Plaintiff's cases that the Court frankly should not have had to create. If this involved an occasional case filed from time to time; the Court's routine case management procedures would be able to deal with the issue. But that is not the case with the hundreds—if not thousands—of cases that the Plaintiff's firm files. The Court has created a "Notice of Impending Dismissal" form to remind the Plaintiff of its responsibilities to submit a judgment package. The Court then has to place the matter on a tickler system and review the case when the deadline passes. At that point, the Court then again has to determine whether to tickler again a "grace period." After that point, an Order of Dismissal has to be prepared. And, then the Plaintiff may file, as it did in this case, a Motion to Set Aside Dismissal, take the Court's hearing time, and ask the Court to make findings on the record.

In this particular case, and in considering the factors set forth in *Kozel* and as analyzed in *Mercer*, the dismissal is warranted. The Court further finds that no other sanction will suffice, as the numerous admonitions provided to the Plaintiff have apparently not worked. The Plaintiff has provided no assurance that the noncompliance will be remedied. Perhaps the Plaintiff will begin to take the steps necessary to insure that the Florida Rules of Civil Procedure and orders of the court meet with consistently *prompt* and *complete* compliance. Perhaps the Plaintiff will begin to see that dilatory conduct will not meet with tacit approval by the Court. And, as the dismissal in this case was without prejudice, perhaps the Plaintiff will consider having its paperwork in order BEFORE it files its lawsuits. Accordingly, it is hereby

ORDERED that the Plaintiff's Motion to Vacate Dismissal is DENIED.

* * *

**Insurance—Venue—Forum non conveniens—Motion to transfer case to Polk County is granted where accident occurred in Georgia, all parties and witnesses reside in Polk County, treatment took place in Polk County, and interests of justice dictate that Broward County jury not be burdened with determining case that has no connection to Broward County**

ADVANCED DIAGNOSTIC GROUP, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22021878, Division 53. November 6, 2022. Robert W. Lee, Judge.

**ORDER TRANSFERRING CASE TO POLK COUNTY, WITH DIRECTIONS TO CLERK**

THIS CAUSE came before the Court on October 17, 2022 for hearing of the Defendant's Motion to Transfer Venue due to forum non conveniens, and the Court's having reviewed the Motion and entire court file, heard argument, and reviewed the relevant legal authorities, finds as follows:

This case is one of ***literally thousands*** of insurance cases that have been flooding Broward County courts during the past two years that having nothing whatsoever to do with Broward County, other than the fact that Plaintiff's counsel may have an office here, or Plaintiff's counsel simply does not want to file their cases—for whatever reason—in their home county. Indeed, Broward County Court had more than 130,000 civil cases being filed in the County Court in 2021, shattering the record of civil cases filed each month, and more than triple the amount of the last pre-Covid year, 2019. This case is yet but one exemplar of the forum shopping occurring for these type of cases.

**Background:**

1. By Plaintiff's own concession at the hearing, everything in this case happened more than 200 miles away from Broward County. The automobile accident occurred in the State of Georgia. The medical services took place in Polk County, Florida, with billing services emanating from Hillsborough County. The insurance policy at issue in this case insures a driver residing in Polk County.

2. None of the owners of the vehicle, any witness to the automobile accident, or any person involved in the medical treatment resides or works in Broward County.

3. The Plaintiff filed this case in Broward County. The Plaintiff did not allege any connections between the facts of the case and the chosen venue.

4. The Defendant has demanded a jury trial, which is in keeping with the great majority of cases coming before the Court in which an insurance company is a defendant.

**CONCLUSIONS OF LAW**

The Court first notes that this objection to venue was not initiated by the Court, but rather the Defendant's objection to venue. The Court finds that the undisputed record in this case establishes that Broward is forum *non conveniens.* The Fourth District Court of Appeal has aligned itself with the decision of the Third District Court of Appeal in *Caceres v. Merco Grp. of Palm Beaches,* 282 So.3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2802a]. *See Expert Inspections LLC v. State Farm Florida Ins. Co.,* Case No. 4D21-520 (Fla. 4th DCA May 19, 2021) [46 Fla. L. Weekly D1152d]. In *Caceres,* the appellate court relied on decisions which upheld a trial court's decision to transfer a case to another Florida county when the other location was the "location of the majority of witnesses and the site of the alleged contact, noting that 'in the interest of justice' Polk County should not hear a case where the only connection was the location of the lawyer's office," citing *E.I. DuPont de Nemours & Co. v. Fuzzell,* 681 So.2d 1195, 1197 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a].

When venue is otherwise proper, the Florida Legislature has for more than 50 years set forth a simply-stated procedure for transferring the case from county to another: "For the convenience of the parties or witnesses or in the interests of justice, any court of record may transfer any civil action to another court of record in which it might have been brought." Fla. Stat. §47.122. This Court recognizes that these are in the disjunctive—it is possible that parties will not be inconvenienced, but witnesses will be. It is further possible that both parties and witnesses will not be inconvenienced, but in the interests of justice, the trial court determines that the case should nevertheless be transferred to another county. In the instant case, however, all three components militate against the case remaining in Broward. All the fact witnesses in this case are about 200 - 250 miles north of this county. And, the interests of justice strongly compel a decision that the workload of the Broward County Court should not be exponentially increased because attorneys simply want to practice here, and further that Broward jurors be called upon to make decisions in cases that have nothing to do with the county in which they live. Moreover, the Court notes that the laws in play in the instant case are such that the jurors of the county in which the treatment took place are uniquely in a better position to determine whether the provider's medical charges are reasonable. (The Court recognizes that in recent decisions of the Fourth DCA, this factor is of almost no significance when neither party agrees to the transfer. However, in the instant case, the request to transfer was initiated by the Defendant.)

The Court agrees that the Plaintiff has chosen an inconvenient and improper forum because all the parties, accident, treatment and witnesses reside or took place in Polk County. While there are contacts with the State of Georgia and Hillsborough County, the substantial contacts in this case all fall in Polk County where the treatment took place and the witnesses reside.

Moreover, considering the interests of justice, a Broward County jury should not be burdened with determining a case that has no connection to Broward County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co.,* 673 So.2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a] (finding the trial court was correct in transferring a case from Dade County to Hillsborough County as a "Dade County jury, which is both a scarce and precious resource, should not be burdened with determining a case that has no connection with Dade County"). See also *Hall v. R.J. Reynolds Tobacco Co.*, 118 So.3d 847 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] (affirming transfer of case from Dade County to Seminole County based upon the fact that Dade County has no relevant connection to the case); *Pep Boys v. Montilla,* 62 So.3d 1162, 1166 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1171a] (stating that the interest of justice weighs in favor of Sarasota County . . . "Broward County's connections to the case are that the plaintiff's attorney is from there and the tire had been sold and installed there. Broward County is a larger, more populous county, has crowded dockets, and the community has virtually no connection to the case"). *See also Stamen v. Arrillaga,* 169 So.3d 1209, 1210 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1638a] ("a trial court may sua sponte raise the question" of an inconvenient forum "in the interest of justice"), *quoting McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc.,* 39 So.3d 504, 511 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1491c]. *See also Clear Vision Windshield Repair, LLC v. GEICO,* 24 Fla. L. Weekly Supp. 194a (Lee Cty. Ct. 2016).

Simply put, this case is a Polk County case that belongs in Polk County. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Transfer Case is GRANTED. The Clerk shall transfer this case to Polk County. Because this issue lies squarely at the feet of the Plaintiff, the Court exercises its discretion to require the Plaintiff to bear the costs of transfer within 30 days, failing which this case shall be dismissed without prejudice without further notice or hearing to refile in Polk County if desired. Fla. Stat. §47.191.

* * *

**Insurance—Homeowners—Standing—Assignment of benefits—Purported estimate contained in assignment does not comply with section 627.7152(2)(a)4 where it is nothing more than price list, post-assignment invoice shows that assignee charged for labor costs not included in price list, and price list did not provide homeowners any meaningful way to determine what actual cost of work would be—Case dismissed with prejudice**

ALL-STARS DRY RESTORATION CORP., Plaintiff, v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22039281, Division 53. November 19, 2022. Robert W. Lee, Judge.

**FINAL ORDER OF DISMISSAL**

THIS MATTER, having come before the Court for hearing of the Defendant's Amended Motion to Dismiss, and the Court's having heard argument, and being advised of the premises thereby, it is hereby ordered and adjudged,

1. Defendant's Amended Motion to Dismiss is hereby GRANTED. Florida Statute § 627.7152(2)(a)(1-7) provides the requirements for a valid assignment agreement as prescribed by the Florida Legislature.

2. Specifically, Fla. Stat. § 627.7152(2)(a)(4) provides that the assignment agreement must: "Contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee."

3. The "estimate" contained in the instant assignment agreement does not comply with Fla. Stat. § 627.7152(2)(a)(4), as it is nothing more than a price list. Further, the post-assignment invoice also attached to the Plaintiff's Complaint (thus within the "four corners" of the Complaint) shows that the Plaintiff charged for per-unit labor costs that were not included within the purported estimate and further that the "price list" was well of the mark and did not provide the homeowners any meaningful way to determine what the actual cost of the work would be.

4. Therefore, Plaintiff's Complaint is DISMISSED with prejudice, as it is clear that this deficiency cannot be cured after the fact.

* * *

**Insurance—Personal injury protection—Affirmative defenses—Amendment—Motion for leave to amend answer to add demand letter defense is denied—Insurer has been aware of potential demand letter defense since onset of litigation, insurer has repeatedly stipulated that only issue to be decided in case was applicability of Medicare Budget Neutrality Adjuster, and medical provider would be extremely prejudiced by addition of new defense after deadline for filing summary judgment motions and initial hearing date for motions have passed**

IMAGING CENTER OF WEST PALM BEACH, LLC, a/a/o Kiara Cordero, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO21021067, Division 70. October 26, 2022. Kim Theresa Mollica, Judge. Counsel: Howard Myones, Myones Legal, PLLC, Fort Lauderdale; and Sisy Mukerjee, Coral Springs, for Plaintiff. William Forman, North Palm Beach, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES BASED UPON RECENTLY DECIDED 4TH DCA CASE LAW**

**THIS CAUSE,** having come before the Court, regarding Defendant's Motion for Leave to Amend Affirmative Defenses Based Upon Recently Decided 4th DCA Case Law, the Court having heard argument of counsel, reviewed the case law and the Court having been otherwise fully advised in the premises, the court finds as follows:

**FINDINGS OF FACT**

This action concerns medical treatment provided by the Plaintiff to Kiara Cordero on April 17m, 2018. Kiara Cordero was insured with State Farm Mutual Automobile Insurance Company under a policy providing Personal Injury Protection benefits. The Plaintiff submitted a notice of intent to initiate litigation pursuant to Fla. Stat. 627.736(10) at least 30 days prior to the initiation of this lawsuit and after the bills had become overdue. (¶7, Joint Stipulation I).[1]

Thereafter, claiming that State Farm did not pay properly pursuant to the fee schedules found in the referenced statutes, Plaintiff filed a one count complaint on June 29, 2021 alleging that State Farm did not make timely and/or proper payment of benefits pursuant to their insurance policy. Defendant filed its Answer, Affirmative Defenses, Objection to Venue and Demand for Jury Trial on July 22, 2021. Defendant's Answer and Affirmative defenses contained only one affirmative defense:

> "State Farm asserts that all bills were properly paid per the fee schedule(s) elected by the policy. The bills which were submitted to Defendant, were properly evaluated based upon the relevant statute(s) and pursuant to the terms and conditions of the applicable State Farm 9810A insurance policy. State Farm's 9810A policy language specifically references the use of the applicable schedule of maximum charges, including Medicare guidelines and payment procedures, by importing that schedule into the policy. By so doing, the policy unquestionably complies with the provision of the PIP statute requiring notice of an insurer's intent to limit reimbursement based on the applicable schedule of maximum charges. Fla. Stat. §627.736(5)(a)(5). As such, there is nothing further for Plaintiff to recover."

Importantly, there was no mention of a defective demand letter.

On August 16, 2021, the Defendant filed its "Motion for Summary Judgment as to the Application of Statutory Fee Schedules and Motion for Sanctions pursuant to F.S. §57.105." In its motion, the Defendant claimed that they provided notice of their intent to reimburse pursuant to the fee schedules found in Fla. Stat. 627.736(5)(a)(1-5) and that the previous payments made by the Defendant were properly paid. Therefore, Defendant asked for Summary Judgment in its favor. There was no mention of a defective demand letter as an additional reason for final judgment in its favor.

On August 18, 2021, the Defendant filed a motion to abate discovery and set hearing on their motion for summary judgment. They stated that the issues in this case were purely legal, there was no need for fact finding discovery and their motion for summary judgment, which did not mention the demand letter, would be completely dispositive of all issues/defenses at controversy in this case. On February 9, 2022, the Defendant filed an amended motion to abate and to set hearing on their motion for summary judgment, again claiming their motion for summary judgment was completely dispositive of every issue in the case.

On June 1, 2022, the Parties entered Joint Stipulation I. This stipulation set out a number of undisputed facts and issues. Most importantly, the parties agreed that the only dispute left in this case was whether the Defendant could apply Medicare's Budget Neutrality Adjuster (BNA) to Plaintiff's bills. There was no mention of a dispute as to the sufficiency of the demand letter.

On July 22, 2022, the parties attended a case management conference and proffered to this Court that the only issue left to be determined was the Medicare BNA issue. The court ordered that all summary judgments be filed by August 22, 2022 to be heard on October 7, 2022 or they are waived. Both parties filed their respective summary judgments on the BNA issue by August 22, 2022. The Defendant did not file a summary judgment regarding the demand letter before the deadline set by the Court's July 22, 2022 case management order.

On August 25, 2022, the parties attended another case management conference and confirmed that both parties had filed all the relevant summary judgment motions and were ready to proceed on October 7, 2022.

On September 22, 2022, the parties entered a second joint stipulation ("Joint Stipulation II"). The parties set out more undisputed facts regarding the BNA issue and then stated "the only matter to be determined by the Court is whether the Defendant must reimburse the Plaintiff without the Medicare BNA adjustment or whether the Defendant may use the BNA adjustment when determining the correct amount of reimbursement." ¶8, Joint Stipulation II.

Later that day, the Defendant first filed its motion for leave to amend attempting to add a demand letter affirmative defense based on the 4th DCA's July 27, 2022 ruling in *Chris Thompson, P.A. a/a/o Elmude Cadau vs. Geico Indemnity Company*, 47 Fla. L. Weekly D1588b (Fla. 4th DCA 2022). Their motion for leave to amend states that they just discovered this newly available affirmative defense based upon the 4th DCA's ruling two months earlier. However, no mention of this ruling and no motion for leave to amend was filed before the August 25, 2022 case management conference or before the entrance of Joint Stipulation II.

On October 7, 2022, this Court was not available for the parties motions for summary judgment and they were reset to December 14, 2022.

On October 26, 2022, the Court held a hearing on Defendant's Motion for Leave to Amend Answer and Affirmative Defense. The Defendant argued that the Plaintiff would not be prejudiced by the insertion of its new legal defense theory at the proverbial "11th Hour" and that the Defendant would be prejudiced because they only recently discovered the available demand letter defense. The court disagrees with both assertions.

**LEGAL FINDINGS**

Rule 1.190, Fla. R. Civ. P., provides that leave to amend shall be freely given when justice so requires and a test of prejudice is the primary consideration in determining whether a motion for leave to amend should be granted. *New River Yachting Center, Inc. v. Bacchiocchi*, 407 So.2d 607 (Fla. 4th DCA 1981). While Florida courts enforce the liberality of Rule 1.190 in granting motions for leave to amend, Florida appellate courts regularly recognize that the

trial courts possess the discretion to deny such motions where appropriate. *Noble v. Martin Mem'l Hosp. Ass'n*, 710 So.2d 567, 568 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]. There comes a point in litigation where each party is entitled to some finality. *Id.* "The rule of liberality gradually diminishes as the case progresses to trial." *Versen v. Versen*, 347 So.2d 1047, 1050 (Fla. 4th DCA 1977). A party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment. *Inman v. Club on Sailboat Key, Inc.*, 342 So.2d 1069 (Fla. 3rd DCA 1977). The 4th DCA recently held that it was not an abuse of discretion to deny a motion for leave to amend when a motion for summary judgment was pending and the case was set for trial. *Bronstein v. Allstate Ins. Co.*, 315 So. 3d 44 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D725b].

Ultimately, the Court finds that the Plaintiff would be prejudiced and the Defendant would not. The Defendant has been aware of a potential demand letter defense since receiving the demand in 2018 and since being served with the lawsuit in July 2021. They were aware of the defense when they filed their motions for summary judgment, their motions to abate discovery and entered into both Joint Stipulations. They were aware of the demand letter affirmative defense when they told the court at case management conferences that the only issue to be decided was the applicability of Medicare's BNA and when they entered into the Joint Stipulations that also stated the only issue to be decided was BNA. "It is the policy of the law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes." *Broche v. Cohn,* 987 So.2d 124, 127 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1741a]. Parties are bound by their stipulations even if they "fall out of love" with their earlier litigation strategy. *Lockheed Space Operations v. Pham*, 600 So.2d 1261, 1263 (Fla. 1st DCA 1992).

This Court is going to hold Defendant to its stipulations. To not do so would prejudice the Plaintiff who is also bound to the same stipulations.

Finally, the Court finds that the Plaintiff would be prejudiced as the only reason the final summary judgments did not go forward on October 7, 2022 is due to the Court's unavailability. As such, allowing the Defendant to add a new affirmative defense at this stage, after the deadline set by the Court to file summary judgments has passed, and after the initial special set hearing date has passed, would be extremely prejudicial to the Plaintiff.

As such, after review of the pleadings, both parties' arguments, all supplemental authority provided to this court, and the court otherwise being fully advised in the premises, the court, within its discretion, finds that the Plaintiff would be severely prejudiced by allowing Defendant to amend its affirmative defenses to add in a new legal theory at this stage of litigation.

**CONCLUSION**

Wherefore, this Court **ORDERS AND ADJUDGES** that Defendant's motion is **DENIED.** The Parties' motions for final summary judgment will be heard on December 14, 2022.

[1]See Joint Stipulation of Facts filed June 1, 2022 ("Joint Stipulation I").

* * *

**Insurance—Automobile—Motion to amend complaint to add bad faith count is granted—Motion to compel appearance of insurer's corporate representative for deposition is granted**

DNS AUTO GLASS SHOP, LLC, a/a/o Sherman Dantzler, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-SC-005022-19P. September 23, 2022. Frederic Schott, Judge. Counsel: William S. England, Chad Barr Law, P.A., Altamonte Springs, for Plaintiff. Miguel A. Rodriguez, Carlton Fields, P.A., Orlando, for Defendant.

**ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD A SECOND COUNT FOR BAD FAITH, PLAINTIFF'S MOTION TO COMPEL APPEARANCE OF CORPORATE REPRESENTATIVE & ALTERNATIVE MOTION TO STRIKE, PLAINTIFF'S OBJECTION TO DEFENDANT'S NOTICE OF INTENT TO SERVE SUBPOENA DUCES TECUM ON NON-PARTY AND PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

**THIS MATTER** came before the Court on September 16, 2022 on Plaintiff's Motion to Amend Complaint to add a second Count for bad faith, Plaintiff's Motion to Compel Appearance of Corporate Representative & Alternative Motion to Strike, Plaintiff's Objection to Defendant's Notice of Intent to Serve Subpoena Duces Tecum on Non-Party and Plaintiff's Motion for Protective Order and after being considered by the Court, having heard argument of counsel for the parties and otherwise being fully advised of the premises; it is hereby **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion to Amend Complaint to add Bad Faith Count is hereby GRANTED. The Court finds that the Plaintiff has presented facts upon which a bad faith claim arises and provided the requisite statutory notice to the Defendant required for a bad faith claim to be added in the Complaint in the instant case. Plaintiff's Amended Complaint is hereby deemed filed pursuant to Florida Rule of Civil Procedure 1.190 and Plaintiff's COUNT II- VIOLATION OF FLORIDA'S UNFAIR INSURANCE TRADE PRACTICES ACT (BAD FAITH) §624.155 and §626.9541, Florida Statutes shall be abated pursuant to *Fridman v. Safeco Ins. Co.,* 185 So. 3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a], until such time as Count I is adjudicated and resolved.

2. Plaintiff's Motion to Compel Appearance of Corporate Representative is GRANTED. & Alternative Motion to Strike is GRANTED. The Defendant shall produce its Corporate Representative for Deposition on or before January 31, 2023. Plaintiff's Motion Alternative Motion to Strike is DENIED.

3. The Court takes no action on Plaintiff's Motion for Protective Order as the issues contained therein are premature.

4. The Court, after taking note of Plaintiff's Counsel's withdrawal of Plaintiff's Objection to Defendant's Notice of Intent to Serve Subpoena Duces Tecum on Non-Party, takes no action on the Objection. Defendant shall provide copies to Plaintiff of documents obtained in response to Subpoenas issued to Mygrant Glass Company, Inc., Pilkington North America, Inc., PGW Auto Glass, LLC, and/or Pittsburgh Glass Works PGW.

* * *

**Insurance—Automobile—Motion to amend complaint to add bad faith count is granted—Motion to compel appearance of insurer's corporate representative for deposition is granted**

DNS AUTO GLASS SHOP, LLC a/a/o Angel Colon, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-SC-005983-19P. November 7, 2022. Frederic Schott, Judge. Counsel: William S. England, Chad Barr Law, P.A., Altamonte Springs, for Plaintiff. Miguel A. Rodriguez, Carlton Fields, P.A., Orlando, for Defendant.

**ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD A SECOND COUNT FOR BAD FAITH, PLAINTIFF'S MOTION TO COMPEL APPEARANCE OF CORPORATE REPRESENTATIVE & ALTERNATIVE MOTION TO STRIKE, PLAINTIFF'S OBJECTION TO DEFENDANT'S NOTICE OF INTENT TO SERVE SUBPOENA DUCES TECUM ON NON-PARTY AND PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

**THIS MATTER** came before the Court on November 11, 2022 on Plaintiff's Motion to Amend Complaint to add a second Count for bad

faith, Plaintiff's Motion to Compel Appearance of Corporate Representative & Alternative Motion to Strike, Plaintiff's Objection to Defendant's Notice of Intent to Serve Subpoena Duces Tecum on Non-Party and Plaintiff's Motion for Protective Order and after being considered by the Court, having heard argument of counsel for the parties and otherwise being fully advised of the premises, it is hereby **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion to Amend Complaint to add Bad Faith Count is hereby GRANTED. The Court finds that the Plaintiff has presented facts upon which a bad faith claim arises and provided the requisite statutory notice to the Defendant required for a bad faith claim to be added in the Complaint in the instant case. Plaintiff's Amended Complaint is hereby deemed filed pursuant to Florida Rule of Civil Procedure 1.190 and Plaintiff's COUNT II- VIOLATION OF FLORIDA'S UNFAIR INSURANCE TRADE PRACTICES ACT (BAD FAITH) §624.155 and §626.9541, Florida Statutes shall be abated pursuant to *Fridman v. Safeco Ins. Co.,* 185 So. 3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a], until such time as Count I is adjudicated and resolved.

2. Plaintiff's Motion to Compel Appearance of Corporate Representative is GRANTED. & Alternative Motion to Strike is GRANTED. The Defendant shall produce its Corporate Representative for Deposition on or before March 3, 2023. Plaintiff's Motion Alternative Motion to Strike is DENIED.

3. The deposition of Plaintiff's Corporate Representative shall take place by March 3, 2023.

4. The Court takes no action on Plaintiff's Motion for Protective Order as the issues contained therein are premature.

5. The Court, after taking note of Plaintiff's Counsel's withdrawal of Plaintiff's Objection to Defendant's Notice of Intent to Serve Subpoena Duces Tecum on Non-Party, takes no action on the Objection. Defendant shall provide copies to Plaintiff of documents obtained in response to Subpoenas issued to Mygrant Glass Company, Inc., Pilkington North America, Inc., PGW Auto Glass, LLC, and/or Pittsburgh Glass Works PGW.

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**Criminal law—Refusal to submit to breath test—Refusal to sign DUI citation—Search and seizure—Vehicle stop—Although officer's stated reasons that he stopped defendant for failure to use turn signal without any impact on traffic and hunch that criminal activity was afoot were not legally sufficient to support stop, officer's observation of defendant speeding provided legal basis for stop—Motion to suppress is denied**

STATE OF FLORIDA, Plaintiff, v. JONATHON STEER, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-CT-028906-AXXX-XX. November 3, 2022. Michelle V. Baker, Judge. Counsel: Erin Ramos, Assistant State Attorney, State Attorney's Office, Titusville, for Plaintiff. Zachry J. Leverton, Assistant Public Defender, Titusville, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**

This cause came on to be heard before the Court upon the Defendant's Motion to Suppress, filed on September 7, 2022. At the hearing held on October 6, 2022, the Court heard the testimony of Titusville Police Officer Cameron Peppiatt as well as argument of counsel. Having considered the Motion, testimony, argument and relevant case law, the Court finds the following:

On May 22, 2022, the Defendant was arrested for refusing DUI testing and refusing to sign a DUI citation. The DUI investigation was initiated after the Defendant was pulled over for a traffic stop. It is the Defendant's argument that the traffic stop was illegal.

According to Officer Peppiatt's testimony, he was conducting an unrelated property check when he observed a vehicle make a U-turn on Cheney Highway. The officer left the property check location to follow the vehicle based upon his observation that the front of the vehicle dipped when stopping, indicating that the brakes were slammed and then the back of the vehicle dipping indicating rapid acceleration as the U turn was completed. The speed limit in the area was 40 mph and the officer estimated that the vehicle was travelling at 50 mph. The officer speculated that the driver was attempting to "elude" him although the officer had not engaged his lights. The officer then observed the Defendant make a left turn at a high rate of speed without first engaging his turn signal. The officer turned behind the Defendant and engaged his lights. The Defendant stopped and the officer developed probable cause to initiate a DUI investigation.

According to the officer's report, he initiated the traffic stop based upon the Defendant's failure to use his turn signal when turning left. When asked at the suppression hearing why he stopped the Defendant, the officer stated that it was based upon the driver's reaction to seeing the officer and the fact that the observations were made at 4:00 a.m. in a high crime area and his belief, without any further articulated basis, that the Defendant was engaged in criminal activity.

As argued by the Defendant, a stop based upon the failure to use a turn signal, absent an impact on traffic, would be improper. *State v. Riley,* 638 So.2d 507 (Fla. 1994), *Hurd v. State,* 958 So. 2d 600 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a].

A stop based upon an officer's hunch that criminal activity was afoot would also be improper. The fact that the Defendant failed to use a turn signal while driving in a high crime area during the early morning hours did not provide the officer with a reasonable suspicion of criminal activity.

However, the officer also testified that he observed the Defendant driving over the speed limit. As stated by the Fourth District Court of Appeal in *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a], "the constitutional validity of a traffic stop depends on purely objective criteria. The objective test asks only whether any probable cause for the stop existed, making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." (internal citations omitted). "The test is whether a police officer could have stopped the vehicle for a traffic violation." *Baden v. State,* 174 So. 3d 494, 496 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b] (citing *Hurd*). "It is well established in Florida that a vehicle may be stopped for a speeding violation based on an officer's visual observations." *Gallardo v. State,* 204 So. 3d 979, 980 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2691d].

Thus, although the officer's stated reasons for the traffic stop were not legally sufficient, his observation of the Defendant driving in excess of the speed limit provided a legal basis for the traffic stop that gave rise to the DUI investigation.

Based upon the foregoing, it is

**ORDERED AND ADJUDGED**:

The Defendant's Motion to Suppress is **DENIED**.

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**Criminal law—Driving under influence—Evidence—Judicial notice—Motion to take judicial notice of fact that Buprenorphine is controlled substance under Florida law is granted—Judicial notice is taken of fact that Suboxone contains Buprenorphine where fact is not commonly known but can be easily verified by sources not subject to dispute—No merit to argument that taking judicial notice of this fact is not permissible since it would require court to take judicial notice of element of DUI offenses with which defendant is charged where fact is "judicially cognizable" fact, and judicial notice of fact does not mean that state is relieved of proving that defendant was impaired by controlled substance**

STATE OF FLORIDA, Plaintiff, v. SAMUEL ROBERT PALMIERI, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No.

052018CT058537AXXXXX. June 25, 2021. Benjamin B. Garagozlo, Judge. Counsel: Andrew Dressler, Assistant State Attorney, and Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Jeffrey R. Lotter, Orlando, for Defendant.

**ORDER GRANTING STATE'S AMENDED REQUEST TO TAKE JUDICIAL NOTICE**

THIS CAUSE came on to be heard before the Court on the State's Amended Request to Take Judicial Notice. The Court, and after hearing argument from the parties, and otherwise being fully advised of the premises, hereby finds as follows:

1. On December 11, 2018, Defendant was arrested for Driving Under the Influence with Property Damage and Driving Under the Influence. He was subsequently charged by information with both counts on January 17, 2019.

2. On December 11, 2020, the State filed its original Request for Judicial Notice.

3. On December 19, 2020, the defendant filed a Response/Objection to the State's Request to Take judicial Notice.

4. On January 27, 2021 the State filed its Amended Request for Judicial Notice. The Amended Request consisted of two requests for judicial notice under Fla. Stat. § 90.201 and 90.202.

5. A hearing was held on May 12, 2021 at which both the State and Defendant were present.

6. In its Amended Request, pursuant to Fla. Stat. § 90.201(1), the State first requested that the Court take judicial notice of the fact that Buprenorphine is a controlled substance. The State specifically relied on Fla. Stat. § 893.03(3)(a)3., which states:

> "(3) SCHEDULE III.—A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. The following substances are controlled in Schedule III:
>
> (a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant or stimulant effect on the nervous system:
>
> . . . 3. Buprenorphine."

Fla. Stat. § 893.03(3)(a)3. (2021).

7. Fla. Stat. § 90.201(1) states that "[a] court shall take judicial notice of: (1) Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States." Fla. Stat. § 90.201(1) (2021).

8. Clearly, as Fla. Stat. § 893.03(3)(a)3 is public statutory law of the Florida Legislature, this Court is required to take judicial notice of the statute. Accordingly, the Defense stipulated to this determination during the hearing. As such, this Court grants the State's request for judicial notice and hereby takes judicial notice of Fla. Stat. § 893.03(3)(a)3., which lists Buprenorphine as a controlled substance under Florida law.

9. As the Court has now taken judicial notice of the above-named statute, the jury is to be instructed at trial that Buprenorphine is a controlled substance under Florida law.[1]

10. Pursuant to Fla. Stat. § 90.202(12), the State's second request in its Amended Request to Take Judicial Notice was for this Court to take judicial notice of the fact that Suboxone contains Buprenorphine. The Defense objected to this second request.

11. The concept of judicial notice is essentially premised on notions of convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it." *Huff v. State,* 495 So.2d 145, 151 (Fla. 1986). This basic concept is codified in Fla. Stat. § 90.202(11), which authorizes a court to take judicial notice of "[f]acts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court."

12. However, as Professor Ehrhardt explains: "Many facts are not commonly known but are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. There is little necessity for formal proof of these indisputable facts and they may be judicially noticed by the court pursuant to section 90.202(12)." Charles W. Erhardt, *Evidence,* § 202.12 (2021 ed.).

13. As noted by Professor Ehrhardt, Fla. Stat. § 90.202(12) authorizes a court to take judicial notice of "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned."

14. As further explained by Professor Erhardt:

> . . . For example, the exact time of sunset in Tampa, Florida on June 13, 2012, would not be a matter of common knowledge in Tampa or elsewhere. However, with resort to the records of the United States Weather Bureau, the time can easily be determined. Section 90.202(12) recognizes that these indisputable facts may be noticed. If a fact is subject to reasonable dispute, it should not be judicially noticed by the trial court. The fact must then be established by the introduction of evidence.
>
> The burden is upon the party requesting judicial notice to supply the court with the records or other information that show the accuracy of the fact. If the court finds that the source is one whose accuracy can be questioned, it may not judicially notice the fact under section 90.202(12). If the source is reliable, e.g., an encyclopedia or an official governmental document, and no disagreement regarding the fact appears, the fact may be noticed.

*Id.* (Footnotes omitted).

15. In support of its second request, the State attached the following exhibits to its Amended Request: (1) Literature from the United States Drug Enforcement Agency stating that Suboxone contains Buprenorphine, (2) a printout from Drugs.com stating that Suboxone contains Buprenorphine, and (3) Defendant's Response/Objection to the State's original request for judicial notice (as well as the Exhibit A attached to said Response/Objection), stating that Suboxone contains Buprenorphine.

16. At the hearing, Defendant conceded that it was a fact not subject to dispute that Suboxone contains Buprenorphine. In fact, as noted above, Defendant's own Response/Objection cited information from reputable sources that Suboxone contained Buprenorphine.

17. Defendant nevertheless objected to the State's second request on grounds that this request would require the Court to take judicial notice of an element of the two DUI offenses that Defendant is charged with in the instant case. Citing *Huff v. State*, 495 So.2d 145 (Fla. 1986) and *McDaniels v. State*, 388 So.2d 259 (Fla. 5th DCA 1980), Defendant argued that the State is improperly attempting to use judicial notice as a substitute for proof of an element of the DUI offenses and is thereby improperly attempting to shift the burden of proof to the Defendant. This Court disagrees.

18. This Court recognizes that, as stated in *McDaniels, supra,* judicial notice "may not be used to dispense with proof of essential facts that are not judicially cognizable." 388 So.2d at 260 (citing *Amos v. Moseley,* 74 Fla. 555, 77 So. 619 (1917) and *Moore v. Choctawhatchee Elec. Co-Op, Inc.,* 196 So.2d 788 (Fla. 1st DCA 1967)). However, the facts for which judicial notice has been sought in the instant case *are* "judicially cognizable." The instant case is thus contrasted with both *Huff, supra,* where the trial court improperly took judicial notice of evidence produced at the defendant's prior trial, and with *McDaniels,* where the trial court improperly took judicial notice of the "unproved elements" of the length of the barrel of the shotgun in that case without any testimony or a measuring device concerning

the length of the barrel.

19. Like the example Professor Erhardt provided about the exact time of sunset in Tampa, Florida on June 13, 2012, the fact that Suboxone contains Buprenorphine is not commonly known but it can be easily verified by sources not subject to dispute. And here, Defendant does not dispute the sources cited by the State nor does Defendant dispute the fact contained in those sources. Accordingly, the fact that Suboxone contains Buprenorphine constitutes an "indisputable fact." The fact that Suboxone also contains other ingredients does not change this "indisputable fact" and does not take this "indisputable fact" out of the purview of judicial notice.

20. Moreover, in reviewing the jury instructions for the two DUI counts in this case, this Court finds that merely because the Court is taking judicial notice of the fact that Suboxone contains Buprenorphine does not mean that the State is relieved of proving the elements of the DUI charges, including the element of impairment by a controlled substance. As such, this Court does not find that it is taking judicial notice of a fact the State is required to prove at trial.

21. Therefore, this Court finds that it is proper under Fla. Stat. § 90.202(12) to take judicial notice of the fact that Suboxone contains Buprenorphine.

22. As such, this Court hereby takes judicial notice that Suboxone contains Buprenorphine. At trial, the jury will be instructed that Suboxone contains Buprenorphine.

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[1]Specifically, the instruction will come in the form of filling in the blank with the word "Buprenorphine" in the following standard jury instruction for Driving Under the Influence offenses: "(_____) is a controlled substance under Florida law."

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