Volume 31, Number 1, May 31, 2023

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 1-50

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

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

## SUMMARIES

*Summaries of selected opinions or orders published in this issue.*

- **INSURANCE—ATTORNEY'S FEES. A property insurer was awarded attorney's fees in an action brought by an insured's assignee based upon the conclusion that the plaintiff knew or should have known that the assignment which did not include a provision allowing for rescission of the assignment by written notice did not strictly comply with section 627.7152 and was, therefore, invalid and unenforceable.** *SUNSHINE MOLD SOLUTIONS v. CITIZENS PROPERTY INSURANCE CORPORATION. County Court, Eleventh Judicial Circuit in and for Miami-Dade Florida. March 17, 2023. Full Text at County Courts Section, page 34a.*

- **INSURANCE—ATTORNEY'S FEES. A summary disposition in favor of an insurer in an action brought against it by the insured's assignee was not entitled to an award of attorney's fees under section 627.7152(10)(a)1, which provides that an insurer is entitled to fees if the judgment obtained by an assignee is less than 25% of the difference between the assignee's presuit demand and the insurer's settlement offer, where the insurer made no presuit settlement offer.** *INTERACTIVE ENGINEERING, INC. v. SECURITY FIRST INSURANCE COMPANY. County Court, Seventh Judicial Circuit in and for Flagler County. February 6, 2023. Full Text at County Courts Section, page 27b.*

- **ABORTIONS—COUNSELING—RESTRICTIONS—INJUNCTION. Clerical members of various religious congregations filed a motion seeking to enjoin the enforcement of Florida's Reducing Fetal and Infant Mortality Act on the grounds that the Act criminalizes the right of clerics to provide counseling in accordance with their religious beliefs and doctrines in support of a person's freedom to choose abortion, family planning, and reproductive health and, in so doing, infringes on the clerics' rights of free speech and free exercise of religion, in violation of the Establishment Clause and the Florida Religious Freedom Restoration Act. The court concluded that the plaintiffs could not demonstrate a credible threat of prosecution constituting a concrete palpable injury sufficient to confer standing.** *HAFNER v. STATE. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. March 3, 2023. Full Text at Circuit Courts-Original Section, page 21a.*

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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.

**PUBLIC UTILITIES**



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**TABLE OF CASES REPORTED**



* * *

**TABLE OF STATUTES CONSTRUED**

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

FLORIDA CONSTITUTION



FLORIDA STATUTES



**TABLE OF STATUTES CONSTRUED (continued)**

FLORIDA STATUTES (continued)



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**TABLE OF CASES TREATED (continued)**



* * *

**DISPOSITION ON APPELLATE REVIEW**

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

Nationwide Financial Services, LLC v. Hollywood Imports Limited, Inc.

County Court, Seventeenth Judicial Circuit, Broward County, Case No. COSO 13-012404 (61). County Court Order at 29 Fla. L. Weekly Supp. 814c (April 29, 2022). Affirmed In Part Reversed In Part at 48 Fla. L. Weekly D915a

* * *

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# CIRCUIT COURTS—APPELLATE

**Municipal corporations—Development orders—Village's denial of application for 480 unit development on property zoned for maximum of 400 units is not supported by competent substantial evidence and departed from essential requirements of law where village previously agreed to transfer development rights for 85 units permitted on other environmentally sensitive land owned by developer on condition that developer donate environmentally sensitive land to village, and developer fulfilled condition of transferring land to village—No merit to argument that denial was justified by developer's failure to rezone donated land and amend comprehensive plan where village had not imposed that condition on transfer; and law did not require rezoning—No merit to argument that village was not obligated to accept land transfer—Claim that village had to choose to accept donated land was not supported by record—Village was equitably estopped from denying transfer after developer relied on village's approval of transfer and met conditions imposed by village**

17777 OLD CUTLER ROAD, LLC, Petitioner, v. VILLAGE OF PALMETTO BAY, FLORIDA, a Florida municipal corporation, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-00012-AP-01. March 13, 2023. On Petition for Writ of Certiorari from the Village of Palmetto Bay approval of Resolution No. 2022-05. Counsel: Eileen Ball Mehta, Kenneth J. Duvall, and Liana M. Kozlowski, Bilzin, Sumberg Baena Price & Axelrod LLP; Jerry B. Proctor, Jerry B. Proctor, P.A., for Petitioner. Laura K. Wendell and John J. Quick, Weiss Serota Helfman Cole & Bierman, P.L., for Respondent.

## OPINION

(Before TRAWICK, SANTOVENIA, and DE LA O, JJ.)

(De la O, Judge.) Petitioner, 17777 Old Cutler Road, LLC, petitions this Court to quash Village Resolution No. 2022-05, adopted by the Respondent, Village of Palmetto Bay ("Village"), on January 24, 2022. (App. 00001-00004).[1]

For well over a decade, Petitioner has made efforts to build a 480 unit development on property zoned for a maximum of 400 units. In 2016, the Village determined that Petitioner owned other land on which it could develop 85 units. This other land was environmentally sensitive land the Village wished to preserve and use as a park and a fire station. As a result, Petitioner obtained approval from the Village to transfer the 85 development units from this environmentally sensitive land on the condition it donate the land to the Village. Believing it had satisfied the conditions for transferring those 85 development units, Petitioner combined them with its existing right to develop 400 units on its property, and sought approval for its 480 unit development. However, at a final public hearing, the Village denied the 85 development units existed because Petitioner had not fulfilled a condition which the Village had not imposed and the law does not require—the rezoning of the environmentally sensitive land Petitioner was donating to the Village.

On certiorari review, the Village argues there was competent substantial evidence to justify denial of Petitioner's application for development because Petitioner did not rezone the donated land. The Village also raises a new argument: that it was not obligated to accept the donated land. Neither argument is supported by competent substantial evidence. Moreover, the Village did not observe the essential requirements of law. Petitioner relied on the Village's 2016 approval and met the conditions imposed by the Village for the transfer of the development credits. Therefore, the Village is equitable estopped from denying the transfer of the 85 units. For all of these reasons, the Petition is granted, and the Village's denial is quashed.

*Background*

Petitioner owns two abutting parcels of land in the Village, comprising approximately 80 acres (collectively, the "Property").[2] There are two folio's—the Development Site and the Donation Sites.[3] In 1985, the Development Site was rezoned to an Office Park District to accommodate office buildings for Burger King, and the Donation Sites were zoned GU-Interim District.

In 2005, the Donation Sites were designated as "Parks and Recreation" or "Environmentally Protected Parks" in the comprehensive plan. In June 2008, the Village created the Village Mixed-Use Zoning District (VMU), which zoned approximately 44 acres of the Development Site as VMU. The Donation Sites were zoned Interim in 2009, a category that coincides with the County's GU Interim District.[4]

In 2015, the Village adopted a Transfer of Development Rights ("TDR") ordinance to preserve environmentally sensitive lands and to increase park land. On January 11, 2016, the Petitioner requested a "determination of development right"[5] from the Department of Planning and Zoning regarding the west 22 acres of the Donation Sites, pursuant to the provisions of the Interim Zoning District and the TDR ordinance. In his letter response regarding the possible transfer of 85 units, former Director Darby Delsalle determined that:

> both rezoning and an amendment to the Village's adopted Comprehensive Plan would typically be required to allow 85 units before the transfer could occur. Such rezoning and comprehensive plan amendments have not occurred, and the Applicant [Petitioner] has not applied for rezoning and comprehensive plan amendments to approve the potential 85 units on the Sender Site.

(App. 00003) ("Trending Determination Letter").

In March and May 2016, the Village conducted quasi-judicial public hearings which resulted in the Village adopting: (1) the VMU Comprehensive Plan Amendment (Resolution 2016-13); (2) the VMU Zoning Amendment (Resolution 2016-14), and (3) the TDR Amendment (Resolution 2016-28) (collectively, the "2016 Approvals").[6] The 2016 Approvals permitted up to 400 multi-family units on the Property. Resolution No. 2016-28 specifically transferred the development rights of 85 residential units from the Donation Sites to the Development Site. (App. 00689-00698) if certain conditions were met.

On October 5, 2017, relying on the 2016 Approvals, the Petitioner submitted an application to construct a 480-unit multi-family development on the Development Site ("Site Application"). Several public hearings were held regarding the Site Application. For the first public hearing on October 18, 2021, the Village staff prepared a thorough 74-page report ("Staff Report") recommending approval of the Site Plan for 480 units and acceptance of the deed pursuant to the 2016 Approvals. (App. 00005-00078). The Staff Report also recommended acceptance by the Village of the declaration of restrictions, covenants and reservations pursuant to Ordinance No. 2016-14, and Resolution No. 2016-28. (App. 00006).

The second public hearing on November 15, 2021 consisted of Petitioner's presentation to the Village, along with testimony from the public for and against Petitioner's Site Application.

At the third public hearing, on January 24, 2022, the Village approved Resolution No. 2022-05 which denied Petitioner's Site Application. The Village denied the Site Application *solely* based on the January 26, 2016 Trending Determination Letter from Darby Delsalle, former Director of the Department of Planning and Zoning. (App. 00733). The Conclusions of Law section determined that the Donation Sites had to first be rezoned, and the comprehensive plan amended, to allow for 85 development units before those units could be available for transfer to the Development Site.

*Standard of Review*

A three-part standard governs this Court's review: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative decision is supported by competent substantial evidence. *Village of Palmetto Bay v. Palmer Trinity Priv. Sch., Inc.,* So. 3d 19 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c].

A decision granting or denying a site plan is governed by local regulations that must be uniformly administered. An applicant must first demonstrate grounds for approval according to the legislated zoning criteria. *See Irvine v. Duval Cty. Planning Comm'n,* 495 So. 2d 167 (Fla. 1986). An application satisfies these criteria once consistency with a zoning authority's land use plan and zoning criteria have been demonstrated. *See Jesus Fellowship, Inc., v. Miami-Dade Cnty.,* 752 So. 2d 708, 709 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1179b]. Once an applicant meets that burden, the burden shifts to the opposition to demonstrate that the application does not meet the criteria and is in fact adverse to the public interest. "The application must be granted unless the opposition carries its burden, which is to demonstrate [by competent, substantial evidence] that the applicant's request [does] not meet the standards and are in fact adverse to the public interest." *Id.*

> We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. We are of the view that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

*De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957) (cleaned up).

*Petitioner Met Its Burden Under Irvine*

Petitioner satisfied its burden of proof as required by *Irvine v. Duval Cnty. Planning Comm'n,* 495 So. 2d 167 (Fla. 1986). The Village's professional staff recommended approval of the Site Application to construct a multi-family residential development consisting of 480 multi-family development units. (App. 00005-00078). The staff's favorable recommendation constitutes competent substantial evidence for approving the Site Application. In *Palmer Trinity,* the Third District Court of Appeal held that a similar review by Village staff constituted competent substantial evidence that the request served the public interest. *Id.* at 26-27 (and cases cited therein). "Based on this record, the burden shifted to the opponents of the request to introduce competent substantial evidence demonstrating that the application did not meet the standards and was, in fact, adverse to the public interest." *Id.* at 27 (cleaned up).

*The Village Failed to Meet Its Burden*

Under *Irvine,* the burden shifted to the Village to demonstrate, by competent substantial evidence, that the Site Application did not meet the relevant standards and was adverse to the public interest. In response to the Petition, the Village presented two arguments to justify its denial of the Site Application.

> In seeking to develop 480 multifamily units, the success or failure of the application depended upon the completed transfer of development rights to 80 extra units to the Development Site. This did not occur for two reasons. First, the contingency for the transfer was not met, namely, that the Village accept title to lands, subject to a declaration of restrictions, covenants and reservation, on which terms the Village and the Developer failed to agree. Second, the transfer of the 80 extra units was incomplete because no rezoning or amendment to the PR land use designation on the 22-acre "sending site" has as yet occurred.

Response at 60.

We initially note that the Village's first argument was *not* included as a basis for denial in Village Resolution No. 2022-05. (App. 00003). The sole reason set forth in the resolution was the Village's conclusion that the Petitioner failed to rezone the Donation Sites and amend the Comprehensive Plan and, therefore, the 85 units were unavailable for transfer to the Development Site.

> Based on the letter dated January 26, 2016 issued by Mr. Darby DelSalle, the-then Village Planning & Zoning Director, which constitutes substantial competent evidence, the Village Council DENIES the application based on the above facts and the requirement that rezoning and a comprehensive plan amendments must be approved for the 85 units to first exist and then be available for transfer to the Receiver Site.

*Id.*

Nevertheless, we will also address the Village's argument that the Petitioner did not meet the condition in Resolution No. 2016-28 because the Village did not accept title to the Donation Sites.

*Petitioner was Not Required to Rezone the Donation Sites or Amend the Comprehensive Plan*

The Village's conclusion that the Petitioner did not have 85 units to transfer to the Development Site, and therefore its Site Application had to be denied, is unsupported by any evidence, much less competent substantial evidence, and is contradicted by the evidence in the record. The only support for the Village's conclusion comes from a skewed interpretation of the Trending Determination Letter. Because the interpretation ascribed to the Trending Determination Letter is so obviously wrong, unsupported by either law or reason, we can only conclude that it was crafted to support a predetermined conclusion.

During the November 15, 2021 public hearing, a Village Commissioner asked the Village Attorney if the Village was "required" to give the Petitioner the 85 units to transfer from the Donations Sites to the Development Site.

> COUNCIL MEMBER MATSON: Okay. Mr. Attorney, are the 85 TDRs required to be given, or is that optional for the Council?
>
> MR. DELLAGLORIA: Well, that actually brings up a very interesting question. And as I read the resolution, which—actually be able to find, as I read Resolution 2016-28, the Village has agreed to this transaction under that resolution. . . . But the deal has been made through that resolution. Okay.
>
> The problem is, and I might as well get to it now to address it. The problem is that I don't believe the transaction was ever correctly completed. And I say that based on the very letter that the applicants have relied on, which is the Director's letter of January 26th, 2016.
>
> Now, the last line of the letter says, applying the assumptions—it appears that the building right potential for the 22 net acres would be 85 units.
>
> But the director had a lot of language in front of that last sentence. At the last sentence of the third paragraph of that letter, after the director went through some analysis as to what should, you know, this be. He states, "For private development to occur on the property, be it residential or commercial, the land use designation shall change accordingly."
>
> In the next paragraph, the Director writes, "Typically a determination would be applied to the property, and then be followed by a rezoning request consistent with the identified uses." You see, this is what they did wrong. Back in 2015 or '16 when the Council passed this resolution, they should have immediately come forward and done three things.
>
> They should have asked for the covenant, the 1985 covenant to go away, just be rescinded or whatever. Then they should have applied for both a rezoning and a re-comp plan, but they didn't do that. The Director's letter says, they had to do both.
>
> And now the conundrum we are in is that even though we have a transaction that was approved by the Council to do a resolution, they

still have to finish the steps necessary to make that happen.

They can't get there from here. And they can't get there from here based on the very letter that they've been relying on all this time.

(App. 00496-00498).

To state the obvious, the Village Attorney's understanding of the Trending Determination Letter is not competent substantial evidence. The Trending Determination Letter would be competent substantial evidence if it in fact required rezoning of the Donation Sites as the Village asserts. It does not.

The Village Attorney's analysis, and the Village's argument on certiorari, rests wholly on the word "typically." In the Trending Determination Letter, Director Darby Delsalle explained that "Typically, a [trend of development] determination would be applied to the property and then be followed by a rezoning request consistent with the identified uses and intensity." (App. 00734).

Based on a fair reading of the plain meaning of the Trending Determination Letter, and a review of the applicable ordinances and resolutions, it is difficult to avoid the conclusion that the Village is deliberately misreading the Trending Determination Letter and misapplying the relevant law.

First, the Trending Determination Letter does not refer to transferring development rights. In fact, the word "transfer" does not appear anywhere in Director Delsalle's letter. This is unsurprising because the Trending Determination Letter only establishes the potential number of units which could be developed on a site.

Second, the Trending Determination Letter makes the unremarkable observation that "For private development to occur on the property, be it residential or commercial, the land use designation shall change accordingly." This was written in the context of explaining that because the land was zoned PR (Parks and Recreation), its land use designation would have to be changed if residential or commercial development was actually going to occur on the land. The entire point of transferring development rights, however, is to *prevent* such development on the land which is transferring those rights. *See* Resolution 1016-28 ("once development rights are transferred, they are not available for private development on the sender site") (App. 00689). As Village Attorney Dexter Lehtinen noted during the March 7, 2016 public hearing: "The 22 acres is currently found to have 85 residential development rights on it. They can build 85 units on that 22 acres. Those 85 units are not increased, but transferred." (App. 00819).

Third, the Trending Determination Letter notes that "typically" (*i.e.,* usually) a trending determination is followed by a rezoning request. But "typically" does not mean "always," "must," or "shall." Indeed, by saying "typically," one acknowledges that sometimes things are done differently.[7] Which is precisely the case here where, rather than trying to develop the land subject to the Trending Determination Letter, the owner is transferring to another property the rights to the units which could potentially be developed.

Fourth, the very point of the Trending Determination Letter was to determine the "potential" units which could be built on the Donation Sites so that an equal number could be transferred to the Development Site without the need to rezone. As far back as 2014, the Village Manager noted:

The property in question is presently zoned Interim (I), with a land use designation of Parks and Recreation. The I zoning category created by the Village was designed to mirror Miami-Dade County's Government Use (GU) designation which essentially provided for a trending of development. In other words, if a property is surrounded by one (1) acre single family homes, then you could apply those regulations to that property ***in lieu of rezoning***.

(App. 01758) (emphasis added).

Fifth, the Staff Report recognized that Resolution 2016-28 transferred the development rights from the Donation Sites to the Development Site (subject to five conditions):

On May 2, 2016, the Mayor and Village Council of the Village of Palmetto Bay adopted Resolution 2016-28, pursuant to Section 30-30.15 of the Village code, entitled the transfer of development rights (TOR), transferring 85 residential development units from the donor site at 17901 Old Cutler Road, consisting of 21.22 acres of wooded upland along Old Cutler Road, presently referred to as the West Donation Site: to the receiver site that is the VMU-zoned land abutting it to the east, and presently referred to as the Development Site.

(App. 00042).

Sixth, the Village's TDR ordinance does not require that a sender site be rezoned before the development rights can be transferred to a receiving site. (App. 00652-00653). The Petitioner complied with all the requirements of the TDR ordinance, as evidenced by the Village's approval of the transfer of development rights in Resolution 2016-28.

Seventh, and most significantly, Resolution 2016-28 expressly granted the transfer of the development rights as requested by the Petitioner subject to five conditions.

The Village Council grants the transfer of developments request with the following conditions:

1. The applicant shall provide sealed surveys that accurately depict the sender site, receiver, and land dedication site, prior to the transfer of the 85 residential units. Said surveys will be deemed acceptable for purposes of transferable rights and land dedication upon staff determination that they are generally reflective of the Attachments A, B, and C of the Resolution.

2. As part of the land dedication process, and prior to transfer of the 85 residential units, the lands involved shall comply with Chapter 28, Subdivisions, of the Miami-Dade County Code of Ordinances, and/or record any other legal instrument deemed necessary to ensure clear title.

3. The approved Resolution shall be recorded to the titles of all lands involved.

4. Prior to transfer of the 85 residential units The Village shall receive clear title to the dedicated lands as generally described in Attachment C of the Resolution and as further depicted in the survey submitted and accepted pursuant to condition of 2 of this recommendation.

5. All previous conditions, approvals, covenants and resolutions shall remain in effect unless otherwise altered by the granting of this request and any conditions assigned therein.

This is a final order.

(App. 00691). Resolution 2016-28, by its terms, rejects the Village's newfound rezoning requirement because such a condition was not listed when it approved the transfer of the 85 units to the Development Site. *See Miami-Dade Cnty. Expressway Auth. v. Elec. Transaction Consultants Corp.,* 300 So. 3d 291, 294 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D44a] ("The deficiency in this interpretation is plainly encapsulated within the maxim, *expressio unius est exclusio alterius.* If one subject is specifically named in a contract, or if several subjects of a large class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded.") (cleaned up).

Finally, although judicial and collateral estoppel may not be technically applicable here, Petitioner correctly notes that in a different certiorari proceeding the Village acknowledged that the development rights were rightfully transferred to the Petitioner.

Instead, the Village staff followed the provisions in the existing TDR Ordinance, 2015-17, and made a trend determination of what development rights may exist for the Sender Site, and the Council then transferred the potentially available development rights to the Receiver Site. This procedure ensured that the Sender Site will be

> donated to the Village and remain free of residential development in perpetuity, one of the primary purposes articulated in Ordinance 2015-17 for the granting of the TDR, and ultimately what Petitioner wants most fervently. A Council determination that the Sender Site had "vested rights" was neither necessary nor was it ever made. . . . It is irrelevant whether there is competent substantial evidence in the record whether the Sender Site had "vested rights." **The site had potential development rights, which is all that is required for a transfer of such rights under the TDR Ordinance.**

(App. 01212) (emphasis added) .

In summary, the assertion that the Petitioner was required to rezone the Donation Sites and amend the Comprehensive Plan before the development rights for 85 units could be transferred to the Development Site is unsupported by any evidence in the record. Nothing in the Interim Zoning District ordinance, the TDR ordinance, the 2016 Approvals, or in any other legislation of the Village, Miami-Dade County, or the State of Florida, requires rezoning before development rights can be transferred. We know this to be so because nowhere in the Village's 62-page Response does it cite to any authority for this proposition other than the Village Attorney's comments during the 2021-2022 hearings. We also know this is so because the Village Attorney relied exclusively on his interpretation of the Trending Determination Letter. There is not a scintilla of other authority relied on by the Village, the Village Attorney, or the Response.

In light of the plain meaning of the Trending Determination Letter, Resolution 2016-28, and the other applicable resolutions and ordinances, we have no difficulty concluding that the Village did not have competent substantial evidence to support its denial of the Site Application.

*The Village was Required to Accept the Donation Sites*

Resolution 2016-28 transferred the development rights from the Donations Sites to the Property if five conditions were met. The Village now claims that condition 4 was not satisfied. "[T]he contingency for the transfer was not met, namely, that the Village accept title to lands, subject to a declaration of restrictions, covenants and reservation, on which terms the Village and the Developer failed to agree." Response at 60; *see also id.* at 55-56 ("the transfer of those rights . . . depended on the contingency that the Village Council choose to accept ownership of the West Donation Site"). This position is not supported by competent substantial evidence.

First, condition 4 did not require the Village to *accept* title. Rather, condition 4 required that "[p]rior to transfer of the 85 residential units The Village shall *receive* clear title to the dedicated lands." (App. 00691) (emphasis added). Resolution 2016-28 required the Village to accept the Donation Sites if clear title were provided by the Petitioner. The suggestion that the Village had to "choose to accept" the Donations Sites is a position unsupported by the plain language of the resolution.

The record evidence establishes that the Petitioner was, and is, prepared to provide clear title to the Donation Sites. Refusing to accept such title, and as a result claiming Petitioner has not complied with the conditions required by Resolution 2016-28, does not satisfy the Village's obligation to support its denial with competent substantial evidence.

Second, Resolution 2016-28 contained no requirement that the Donations Sites be subject to acceptable restrictions, covenants, and reservations. It is true the parties attempted to negotiate restrictions on the future use of the Donation Sites that would be acceptable, but this was not a condition of Resolution 2016-28. Regardless, the Petitioner proposed the very restrictions which the Village is obligated to impose on the Donation Sites upon obtaining ownership pursuant to Resolution 2018-68. (App. 00699).

> The Village Council hereby states its intention to preserve in its natural state the land currently zoned Interim ("I"), located east of and contiguous to Old Cutler Road, and north of and contiguous to SW 184th Street (that is, located at the northeast corner of Old Cutler Road and SW 184th Street), when the Village becomes the owner of such land, by taking the following steps at such time:
>
> (A) Adopting and recording a covenant running with the land, which requires the land be preserved in its natural state and prohibits any development, except for the development of: (1) bicycle or pedestrian trails which do not disturb the fundamental natural condition of the contiguous land; and (2) a Miami-Dade Fire and Rescue facility at the southeast corner of the land, no larger than necessary and appropriate to accommodate a fire/rescue station in the health and safety interests of area residents.

(App. 00699-00700). Resolution 2016-28 also recognized that the purpose of the Village receiving the Donations Sites was to make "available [ ] a passive park and conservation area with only ancillary structures, . . . [and] a much needed fire rescue facility," and that the donation was "consistent with and in furtherance of the recognized purpose of the TDR program including the creation [of] additional open[ ] space, preservation of environmentally sensitive lands, and public facilities." (App. 00689). The Petitioner's proposed restrictive covenants where aligned with these goals. (App. 00090-00093).

In short, the Village's denial did not pretend to rely on the argument it raises now on certiorari review. Consequently, it cannot *post-hoc* assert it to justify its denial. Especially when the given reason is unsupported by the Village's 2016 Approvals and the proposed restrictive covenants comply with Resolution 2016-68.

Even if we ignore the fact that disagreement over the restrictive covenants was not a stated basis for the denial of the Site Application, the Village's invocation on certiorari review of a disagreement over the language of the proposed restrictive covenants is not competent substantial evidence given the nature of the restrictions proposed by the Petitioner. As such, the Village departed from the essential requirements of the law.

"Every citizen has the right to expect that he will be dealt with fairly by his government." *Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So. 2d 10, 18 (Fla. 1976).

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.

*Town of Largo v. Imperial Homes Corp.,* 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

*Equitable Estoppel*

Equitable estoppel is available on certiorari review.[8]

> The rules of fair play require us to conclude that under the facts of this case, the County is equitably estopped from enforcing section 33-50 of the Code against the Castros. Thus, we hold that the circuit court erred in failing to apply the doctrine of equitable estoppel to the circumstances of this case and thereby departed from the essential requirements of the law.

*Castro v. Miami-Dade Cnty. Code Enf't,* 967 So. 2d 230, 234 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1728a]. *See The Florida Companies v. Orange Cnty., Fla.,* 411 So. 2d 1008, 1012 (Fla. 5th DCA 1982) ("appellant's petition for certiorari demonstrated that the county should be estopped from denying appellants the right to develop their property in accordance with the plat preliminarily approved, since substantial expenditures had been made in reliance on the county's

approval of the plat. The circuit court should have granted the writ of certiorari on this ground."); *Equity Res., Inc. v. Cnty. of Leon,* 643 So. 2d 1112, 1119-20 (Fla. 1st DCA 1994) ("The fact that the county continuously issued permits for the unrestricted construction of the project over a period of 18 years with knowledge of expenditures for improvements to be made for the benefit of the undeveloped as well as developed land is legally sufficient to establish that it would be grossly unfair to allow the county to deny Pelham and Equity Resources a vested right at the eleventh hour of their development of Phase II. The doctrine of equitable estoppel is based fundamentally on rules of fair play. The trial court applied incorrect legal principles in ruling on the merits of the estoppel claim and thereby departed from the essential requirements of law.") (cleaned up).

The Petitioner relied upon Resolution 2016-28's approval of the transfer of development credits. The Village Manager and the Village Attorney confirmed that the Applicant could build 400 units on the Development Site as a matter of right and that the Donation Sites had 85 development rights eligible for transfer. (App. 00815, 00819). The 2016 Approvals transferred the 85 development units from the Donation Sites to the Development Site subject to conditions which did not include rezoning. (App. 00678-00697). The Village and the Petitioner successfully defended Resolution 2016-28 in the appellate division of the Circuit Court. (App. 01126-01347). The Applicant spent more than $720,000 in preparing the Application and engaging the professional consultants and attorneys necessary to pursue it. (App. 00442).

The Village's additional condition that the Donation Sites had to be rezoned before their 85 development rights could exist is, therefore, inequitable. This Court has previously held that unreasonable conditions imposed by the Village amount to a departure from the essential requirements of law:

> . . . the court can consider whether the conditions are whimsical or capricious. Conditions on a use, just like exceptions to a rule, can swallow or drown the use which was intended to be approved in the first place. Owners are entitled to fair play; their properties, which may represent their life fortunes, should not be subjected to whimsical or capricious conditions.

*Palmer Trinity Priv. Sch., Inc. v. Village of Palmetto Bay,* 18 Fla. L. Weekly Supp. 342a (Fla. 11th Jud. Cir. Ct., Feb. 11, 2011) (quoting *Cap's-On-The Water, Inc., v. St. Johns. County,* 841 So. 2d 507, 508-09 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D537a] .

*Conclusion*

The Village denied the Site Application because the Petitioner had not rezoned the Donations Sites. The denial was based on a faulty interpretation of the Trending Determination Letter, an interpretation not supported by a plain reading, the 2016 Approvals, or any statute or ordinance. In other words, an interpretation unsupported by competent substantial evidence. On certiorari, the Village raised another reason for the denial: its voluntary decision not to accept the warranty deed from the Petitioner for the Donation Sites. The Village was required to accept the Donation Sites. Choosing not to so that it could claim the Petitioner had not transferred the 85 units to the Development Site was inequitable and departed from the essential requirements of the law.

As the Petitioner correctly asserts:

> Foisting a park designation on private property, prohibiting private, beneficial use, repudiating previously granted development rights and denying entirely a site plan that staff recommended as compliant with all published criteria is viscerally, intellectually and legally wrong.

Reply at 2.

We grant the Petition for Writ of Certiorari. Village Resolution No. 2022-05 is **QUASHED.**[9] (TRAWICK and SANTOVENIA, JJ., concur.)

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[1]"App." stands for Petitioner's Appendix to Petition for Writ of Certiorari.

[2]The Property is bounded by SW 184 Street to the south, the Village's Ludovici Park, which is near SW 176 Street, to the north, Old Cutler Road to the west, and the shoreline of Biscayne National Park to the east. The Property forms a virtual island, separated from the surrounding single-family neighborhoods by vegetation, roads, and intervening governmental properties.

[3]The Property's zoning classifications and comprehensive plan designations do not coincide exactly with the tax folio boundaries. The Development Site refers generally to the area in the center of the Property. The Donation Sites refers generally to the area of the Property located northwest, west and south of the Development Site.

[4]By Resolutions Nos. 2009-11, 2017-53, and 2018-68, the Village has repeatedly reaffirmed its support for acquiring the western 22 acres of the Donation Sites.

[5]A " 'determination of development' right means an official zoning letter issued by the Village which verifies the maximum residential and/or commercial development potential of a particular property." (App. 00030).

[6]By Ordinance No. 2016-13, the Comprehensive Plan was amended to reflect a total of up to 400 permitted multifamily residential uses. The Ordinance provided that "for purposes of consistency throughout the Village's Comprehensive Plan a note is added to reflect the VMU land use designation's eligibility to participate in the Transfer of Development Rights program as provided for at Policy 1.1.14." (App. 00678).

Ordinance No. 2016-14 amended the text of the Village Mixed Use zoning district (Sec. 30-50.19), and provided a notation in Section 30-50.19(e)(1)e, that the Village Mixed Use zoning district is eligible to participate in Section 30-30.15 TDR.

The Findings of Fact section of Resolution No. 2016-28 stated that "[t]he Rules that govern transfer of development rights are at Section 30-30.15 of the Land Development Regulations." (App. 00690). The Conclusions of Law section specified that "the transfer of development rights application was reviewed pursuant to Section 30-30.15(f) of the Village of Palmetto Bay's Code of Ordinances and was found to be conditionally consistent." *Id.*

[7]Indeed, Director Delsalle explained exactly why the zoning designations on the Donations Sites were not typical.

> The property in question is presently zoned Interim (I) with a land use designation of Parks and Recreation (PR). The I zoning category was applied to the property when the Village adopted its own land development regulations in 2009. It was previously zoned Government Use (GU) under Miami-Dade County's zoning provisions. The PR designation was applied in 2005 when the Village adopted its Comprehensive Plan and corresponding Future Land Use Map (FLUM). Chapter 163 of the Florida Statutes requires zoning to be consistent with land use. Although the I zoning category is consistent with a PR designation, it may be considered awkward in the context of the private ownership of land.

(App. 00733).

[8]Petitioner asserted equitable estoppel in the quasi-judicial hearing before the Village Council.

> Because we've been at this for a while, we've spent a lot of money in this process. We've relied on the zoning, the resolutions, the ordinances that are out there, and the law. . . . [W]e have judicial doctrines that provide protection to people, like my clients, who rely on those decisions even though the elected officials change. And those doctrines include equitable estoppel and res judicata. . . . [W]e are relying on those doctrines. . . .

(App. 00441, 00446).

[9]Were it allowed, this Court would quash the Village's denial of the Site Application and remand with directions to the Village to grant it. However, pursuant to *Miami-Dade Cnty. v. Snapp Indus., Inc.,* 319 So. 3d 739 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1029a], this Court is empowered only to quash the Village's denial. *But see Debes v. City of Key West,* 690 So. 2d 700, 703 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a] ("circuit court decision so fundamentally and seriously departs from the controlling law that a miscarriage of justice has resulted and that review on certiorari is therefore both justified and required. Upon that review, the decision is quashed and the cause remanded with directions to require the City Commission to grant the application in question.") (cleaned up).

* * *

**Counties—Utilities—Water—Rates—Overbilling—Assisted living facility—Certiorari challenge to hearing officer's finding that county water department overbilled hospital for assisted living facility's water usage by billing at non-residential rate rather than new mixed-use rate, determining that hospital should have been billed for ALF at mixed-use rate, and backdating refund for overbilling for four years—No merit to argument that hearing officer erred in refusing to recognize and abide by county's unwritten policy to treat ALFs with more than 6 beds as non-residential where hearing officer found testimony regarding alleged policy lacked credibility, and alleged policy conflicts with plain language of ordinance defining rate classifications—No merit to claim that hearing officer exceeded scope of hearing by making determination that mixed-use rate applied to ALF where hearing officer made it clear at multiple points in hearing that, if he found that county used wrong billing rate, he would determine correct rate, and county did not object or attempt to limit scope of hearing—Further, applicable rules required that hearing officer take final administrative action, not make piecemeal decisions—Hearing officer erred in backdating refund for four years where four-year period includes time before correct mixed-use rate was enacted**

MIAMI-DADE COUNTY, Petitioner/ Cross-Respondent, v. MIAMI JEWISH HOME & HOSPITAL, Respondent/ Cross-Petitioner. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-3-AP-01. December 21, 2022. On a Petition for Writ of Certiorari from a Final Order of a Hearing Officer, Miami-Dade Water and Sewer Department. Counsel: Geraldine Bonzon-Keenan, Miami-Dade County Attorney, and Sarah E. Davis, Assistant County Attorney, for Petitioner/ Cross-Respondent. Thomas H. Robertson and Nicholas J. Rodriguez, for Respondent/ Cross-Petitioner.

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

**OPINION**

(WALSH, J.) We review a Petition and a Cross-Petition for Writ of Certiorari challenging a Miami-Dade Water and Sewer Department (WASD) Hearing Officer's order. The order determined that WASD overbilled the Miami Jewish Home & Hospital (MJH) for water usage at an incorrect rate. The order also determined what the proper rate for water usage should have been on the MJH property. Finally, the order backdated a refund due to MJH for overbilling at the wrong rate. Both Miami-Dade County and the Miami Jewish Home and Hospital challenge different portions of the order.

We find that the Hearing Officer did not violate the due process rights of the County in determining the rate for water usage. Neither did the Hearing Officer's order violate due process, lack competent substantial evidence, nor depart from the essential requirements of law in finding that WASD should have billed MJH at the "Mixed-Use" rate for one of its buildings. However, we conclude that the order departed from the essential requirements of law by backdating a refund retroactively prior to the enactment date for the "Mixed-Use" rate and therefore quash the order in part.

**Background**

*The Water and Sewer Coded Rates of Billing for Water Usage*

The Miami-Dade Water and Sewer Department ("WASD") sets its rates for water usage by applying different codified billing rates to properties. In 2008, WASD implemented the following billing codes:

**Residential Customer**:

Residential: a retail customer/account consisting of a single-family residence or duplex being served by a common meter.

**Multi-Family Dwellings:**

Multi-family: a retail customer/account consisting of more than two residential customers served by a common meter.

**Non-Residential:**

Non-Residential: a retail customer/account consisting of business, commercial industrial use, or any combination thereof.

The Miami Jewish Home & Hospital facilities at issue in this proceeding were coded under the "Non-Residential" rate.

In 2018, the County implemented an additional billing rate:

**Mixed-Use Buildings:**

MIXED USE: a retail customer/account consisting of more than two residential dwellings and non-residential activities served by a common meter in which permit application was submitted prior to October 1, 2016 (Ordinance No. 16-107)

The "Mixed-Use" rate had an effective date of January 1, 2018. (Appendix to Response to Petition for Writ of Certiorari at Exhibit "E")

*The Miami Jewish Home & Hospital Hazel Cypen Tower (HCT) and Irven Cypen Tower (ICT)*

The Miami Jewish Home & Hospital ("MJH") owns and operates a licensed medical campus, assisted living facility, residential towers, and hospital facility located at 5066 Northeast Second Avenue in Miami. On the MJH campus, the Hazel Cypen Tower ("HCT") is comprised of 113 apartments, a secured memory care unit, dining room, beauty salon and 24-hour nursing services, including emergency call buttons within each unit. The residents are tenants who sign a lease with MJH. The memory care floor, dining room, and beauty salon facilities exist solely for the benefit of the residents within the HCT.

Both the HCT and the Irven Cypen Tower (ICT), a residential building comprised of 85 apartments, were historically coded by WASD at the "Non-Residential" billing rate, a rate significantly higher than the residential rates in existence prior to 2018.

On June 11, 2020, MJH requested that the Miami-Dade Water and Sewer Department ("WASD") recode the HCT from a "Non-Residential" to a "Multi-Family" rate classification. This request was denied. MJH also requested that the Irvin Cypen Tower ("ICT") be recoded to the "Multi-Family" rate. MJH's request to recode the ICT to the "Multi-Family" rate was ultimately granted by WASD just prior to the hearing, but the refund for miscoding the ICT was only backdated to June 11, 2020, the date of the request. Although the ICT was recoded, MJH argued that the refund date for both the HCT and ICT should go back four years, in accordance with the WASD rule on refunds.

On June 22, 2021, MHJ subsequently submitted a separate reclassification request to recode both buildings to the "Mixed-Rate" classification, but the County never responded to this request.

*Hearing*

A hearing was conducted before a WASD hearing officer. The Hearing Officer was required to determine the answers to the following questions prepared by the parties. First, "[w]hether the rate code used by the Department from the point the account was opened until the customer requested a recoding was in accordance with the Miami-Dade Water and Sewer Department's policies, procedures, rules and regulations for rate classifications?" Second, "[i]s the customer entitled to a refund?" Third, "[i]f the customer is entitled to a refund, from what date?"

When the hearing commenced, the Hearing Officer also read into the record a prepared opening statement, concluding as follows:

> In order to make a finding and conclude as a matter of law that the rate code is correct, I must find, after hearing and weighing all evidence presented by both parties, that the preponderance of the evidence indicates that the rate code used by the Department was the correct rate code.
>
> If the preponderance of the evidence does not indicate that the rate code used by the Department was the correct rate code, I will decide that the proper rate code should have been—what the proper rate should have been and whether the Department should have granted a refund for any overpayment of the charges, water charges.

> All right. That is the opening statement as prepared and presented for this hearing, and I am ready to proceed with the clerk swearing in all live parties, who will testify as to the facts concerning this case . . . .

(App. at p. 14) Neither party objected to this prepared opening. The parties prepared this opening statement for the Hearing Officer to read.

At the hearing, the County's witnesses testified that WASD abided an unwritten policy in which WASD coded all assisted living facilities with more than six beds as "Non-Residential." The County's witnesses all acknowledged that people lived in apartments in the HCT and that HCT, like all other ALFs, is residential in character. One witness, WASD employee Richard Reese, testified that the ALFs with more than six beds were coded "Non-Residential" based on state statute 419.001, but could not explain why. MJH's witness, Jason Pincus, testified that residents at HCT use their addresses to receive mail, register to vote and register their driver's licenses. Residents redecorate their apartments within the HCT to look like their homes, much in the same way they do at the ICT, the apartment building on campus. Residents are "tenants" and sign a residential lease with MJH. The memory care unit in the HCT is locked and not open to the public. No evidence was presented that the beauty salon nor any other component of the HCT was used by anyone other than the residents.

At the close of evidence, the County argued that the Hearing Officer was obligated to defer to the County's alleged unwritten policy to treat HCT as "Non-Residential" for water billing. MJH specifically argued that the HCT should be classified at a "Mixed-Use" rate: 'Now, to my mind, those are mutually exclusive. You're residential or you're not. If you have a residential component, and there is something else there, you are a mixed use." (App. at p. 241) The County did not object to this argument nor did the County object to the Hearing Officer deciding the correct rate.

MJH further argued that the problem with deferring to WASD's adherence to an unwritten policy to code a residential building as non-residential is that such a policy contradicts what the County Commission enacted. "To say that . . . an assisted living facility has no residential value to it and therefore is a nonresidential is almost absurd. And so I am saying, suggesting to you, that at the very worst, these should be considered mixed-use." (App. at p. 242) Again, the County did not object or raise any concerns that a determination of the correct rate would tread on its due process rights.

Regarding whether the code applied by WASD followed "Miami-Dade Water and Sewer Department's policies, procedures, rules and regulations for rate classifications," the Hearing Officer opined:

> What we have is, "we've always done it that way," or "it's policy, trust me." And that is so troublesome, that I can't rely on it. **I don't have any competent and substantial evidence to that effect.**
>
> So in answer to the question whether it was in compliance with these policies, procedures, rules and regulations, I don't find I have competent and substantial evidence to say yes."

(emphasis added)

The Hearing Officer answered three predetermined questions as follows:

A. Whether the rate code used by the Department from the point the account was opened until the customer requested a recoding was in accordance with the Miami-Dade Water and Sewer Department's policies, procedures, rules and regulations for rate classifications?
   1. ICT—No
   2. HCT—No
B. Is the customer entitled to a refund?
   1. ICT—Yes
   2. HCT—Yes
C. If the customer is entitled to a refund, from what date?
   1. ICT—June 11, 2016
   2. HCT—June 11, 2016

Finally, the Hearing Officer discusssed at length the correct rate code that should have applied to the HCT. He noted that the amenities at the HCT—a call button, nurse services, a guard on the memory floor—were not very different from other residential buildings. The Hearing Officer concluded:

> I'm going to say that at least this is a mixed use, but I cannot see where just being an adult assistance facility—assisted living facility in any way fits into any of the definitions, other than mixed use. And as such, it would be interesting to see if in the future, that floor is segregated out in the building with a different meter, but that is not on our table today.
>
> So I would say that it is not a non-residential unit, but that it should be re-coded, reclassified, to the mixed use.

(App. at 258)

The Hearing Officer then turned to the partes: "I think I've covered all of the bases that I need to do. Can anybody tell me if I've missed anything? Hello?" (App. at 258) The County's only response was "No, we just wanted to say thank you. We understand the ruling." (App. at 260) Again, the County did not object or complain that this finding violated its due process rights.

The Hearing Officer then read another prepared speech into the record. This speech was a duplicate of the speech made in opening. He stated:

> In order to make a finding and conclude as a matter of law that the rate code is correct, I must find, after hearing and weighing all the evidence presented by both parties, that the preponderance of the evidence indicated the rate code used by the Department was the correct rate code.
>
> And if the preponderance does not indicate the rate code used by the Department as the correct rate code**, I will decide the proper rate code and whether the Department should be granted a refund**.

(App. 260-61) (emphasis added) Again, the County did not object or complain that somehow its due process rights were being violated by the Hearing Officer making the correct rate determination.

**Analysis**

This Court's review is limited to determining (1) whether procedural due process was accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a]; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Metro. Dade Cty. v. Blumenthal*, 675 So. 2d 598, 601 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c].

*Hearing Officer's Findings were Supported by Competent Substantial Evidence and Did Not Depart from the Essential Requirements of Law*

The County first argues that the Hearing Officer's determination that WASD incorrectly coded the HCT as "Non-Residential" was unsupported by the record. The record was replete with testimony that HCT was residential in character, that the residents treated their units as their homes, and that the building's amenities were for the use of the residents. Parsing the record for evidence supporting the County's argument would result in the court impermissibly re-weighing the evidence. *See Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. We therefore find that there was competent, substantial evidence supporting the hearing Officer's ruling that the HCT was coded incorrectly as a "Non-Residential" property.

We likewise reject the County's claim that the Hearing Officer failed to abide the essential requirements of law in refusing to

recognize or abide by the County's so-called "unwritten" policy to treat ALFs with more than 6 beds as "Non-Residential." We do so for two reasons.

First, the Hearing Officer did not refuse to apply an unwritten policy, as the County contends. Rather, he found the testimony by WASD witnesses that they applied an unwritten policy to lack credibility or to be entitled to no weight: "What we have is, 'we've always done it that way,' or 'it's policy, trust me.' And that is so troublesome, that I can't rely on it. I don't have any competent and substantial evidence to that effect." The Hearing Officer was entitled to reject the testimony regarding the existence of an unwritten policy as lacking credibility. *See McNeill v. Pinellas County Sch. Bd.*, 678 So. 2d 476, 478 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1880b].

Second, the County's alleged unwritten policy conflicts with the plain language of the enacted ordinances.[1] " 'When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' " *Lacayo v. Versailles Gardens I Condo. Assn., Inc.*, 325 So. 3d 295 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1869a] (quoting *A.R. Douglass, Inc., v. McRainey*, 137 So. 157, 158 (Fla. 1931)). Under the County's codified rate schedule, the code "Non-Residential" is defined as "a retail customer/ account consisting of business, commercial industrial use, or any combination thereof." The plain and obvious meaning of the term non-residential is that it is not residential. HCT is residential. All witnesses testified that HCT's units were the homes or residences of its residents and that HCT was "residential" in character. HCT contains a beauty salon, dining facility, call button function, and locked memory floor for the benefit of the residents of the HCT. None of these amenities transform the HCT to a "Non-Residential" building within the plain language of the enacted rate.

The plain and obvious meaning of the enacted definition of non-residential—"a retail customer/ account consisting of business, commercial industrial use, or any combination thereof"—is that the facility does not include residences. And the evidence was uncontroverted that HCT was a residential building.

Looking at it another way, the County complains that it had an "unwritten policy" to code residential facilities with more than 6 beds as "Non-Residential." The County argues that if it proved this policy, the Hearing Officer had no choice but to find that HCT was properly coded "Non-Residential." But the question asked of the Hearing Officer was not whether WASD coded the HCT in accord with its policy, unwritten or otherwise. Instead, the question presented was whether WASD's denial of recoding the HCT was "in accordance with the Miami-Dade Water and Sewer Department's **policies, procedures, rules and *regulations*** for rate classifications?" Even if coding complied with a so-called unwritten policy, it did not comply with the enacted regulation, that being the ordinance that codified the rates. As such, there is no departure from the essential requirements of law, as the rate used by WASD violated a County ordinance, a "regulation[ ] for rate classifications."

We also reject MJH's Cross-Petition's claim that the Hearing Officer's order departed from the essential requirements of law because he was required to recognize a policy which would have required re-coding the HCT at the "Multi-Family" rate and its intertwined claim that this conclusion was unsupported by competent substantial evidence.[2] The findings MJH urges would invite re-weighing the evidence, something we are forbidden to do. *See Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] We decline to grant certiorari on these claims.

*Due Process*

The County argues that by exceeding the agreed-upon scope of the hearing and making an additional determination that the "Mixed-Use" rate applied to the HCT, the Hearing Officer violated its due process rights. According to the County, the Hearing Officer was only permitted to address the three questions submitted by the parties in an agreed-upon form of order which read as follows:

A. Whether the rate code used by the Department from the point the account was opened until the customer requested a recoding was in accordance with the Miami-Dade Water and Sewer Department's policies, procedures, rules and regulations for rate classifications?
B. Is the customer entitled to a refund?
C. If the customer is entitled to a refund, from what date?

The record below belies the County's claim of a due process violation. From the inception of the hearing, the Hearing Officer made clear that if he found that WASD used the wrong billing rate, he would determine what the correct rate should have been.

Prior to evidence being presented, in a speech prepared by the parties, the Hearing Officer stated,

> If the preponderance of the evidence does not indicate that the rate code used by the Department was the correct rate code**, I will decide that the proper rate code should have been—what the proper rate should have been** and whether the Department should have granted a refund for any overpayment of the charges, water charges.

The County did not speak up or object.

At the conclusion of the evidence, MJH argued

> To say that . . . an assisted living facility has no residential value to it and therefore is a nonresidential is almost absurd. And so I am saying, suggesting to you, that at the very worst, these should be considered mixed-use.

Again, the County did not speak up or object.

After argument, the Hearing Officer made his finding that the HCT should have been classified at the "Mixed-Use" rate. After making these findings, he invited comment: "I think I've covered all of the bases that I need to do. Can anybody tell me if I've missed anything? Hello?" (App. at 258) The County's only response was "No, we just wanted to say thank you. We understand the ruling." (App. at 260)

Finally, after making the findings, the Hearing Officer again read a prepared speech, including the remarks:

> And if the preponderance does not indicate the rate code used by the Department as the correct rate code**, I will decide the proper rate code and whether the Department should be granted a refund**.

"Generally, due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure before judgement is rendered." *Richard v. Bank of America, N.A.*, 258 So. 3d 485, 487 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2531a] (citation omitted).

At no time did the County object, complain that the Hearing Officer exceeded an agreed-upon scope of the hearing, or tell the Hearing Officer that in making this finding he violated the County's due process rights. Certainly, the County had a "real opportunity to be heard" on the issue of the rate to be applied. *Id.* Accordingly, the record refutes the County's assertion that its due process rights were violated. From the outset, the County was put on notice of the scope of the hearing and did not seek to limit the scope of the hearing.

Furthermore, the Hearing Officer was not free to make a piecemeal ruling as the County suggests. WASD hearing rules **require** that the Hearing Officer take **final agency action** on any billing dispute matter. WASD rules do not permit piecemeal rulings. WASD Rule 2.07(14) provides:

> The Hearing Officer will consider all facts, evidence, testimony, and other information presented at the hearing and will make an appropriate ruling. In addition, the Hearing Officer's ruling will be

conveyed in writing to the Customer. **The ruling of the Hearing Officer will constitute final Department action on the matter.** No customer shall be entitled to a hearing for disputes over billings more than four years old. The Hearing Officer shall not recommend adjustments of billings over four years old.

Except as to those matters reviewable by the County Commission as expressly set forth in the Code of Miami-Dade County**, a decision of the Hearing Officer shall constitute final administrative action from which there shall be no further administrative appeal.** Any person aggrieved by the decision of the Hearing Officer may seek review in the Circuit Court for Miami-Dade County, Florida, or a Court having competent jurisdiction in accordance with Florida law.

(emphasis added). Thus, under WASD rules, a hearing officer is **required** to take "final administrative action." Decisions may not be made piecemeal.

If we were to accept the County's due process argument, we would not have jurisdiction to hear these petitions. We have jurisdiction to review **final** administrative action, akin to **plenary appeal**. We have no jurisdiction to review a non-final finding. *See Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So. 2d 1270, 1273-74 (Fla. 2001) [26 Fla. L. Weekly S329a] ("Although termed "certiorari" review, review at this level is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal"); *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (same); *De Groot v. Sheffield*, 95 So. 2d 912, 915 (Fla. 1957) **("[T]he ultimate judgment of such official or board based on the showing made at the hearing is subject to appropriate judicial review**.") (emphasis added).

Therefore, we find that there was no due process violation here and decline to grant certiorari on this ground.

*Departure from the Essential Requirements of Law in Backdating the Reclassification of HCT*

The County next argues that backdating a refund for improperly coding the HCT as "Non-Residential" to June 11, 2016 (four years before the request to re-code to the "Multi-Family" rate) was a departure from the essential requirements of law. We agree and quash this portion of the order.

Rule 2.10(2) of the WASD Rules requires that refunds for overbilling shall be backdated "to the earliest date for which the Department has meter readings . . . but in no event shall the Department re-bill or provide credits for periods beyond four years." June 11, 2016, the date determined by the Hearing Officer, is four years before the date of the MJH request. However, the date of June 11, 2016, predates the County's January 1, 2018 enactment date for WASD's new "Mixed-Rate" classification. Under the order, the County would be required to refund MJH for the difference between the "Mixed-Use" and "Non-Residential" rates for a time period prior to the enactment of the "Mixed-Use" classification.

Backdating the refund for HCT to a time before the "Mixed-Use" classification was enacted would retroactively apply the ordinance. To determine whether an ordinance may be retroactively applied, we apply a two-prong test. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n Inc.*, 67 So. 3d 187, 193-194 (Fla. 2011) [36 Fla. L. Weekly S311a]. First, we must determine if there is evidence of legislative intent to apply the statute retroactively. Only if there is such legislative intent, we then must determine whether retroactive application is constitutionally permissible. *Id.* at 194.

Here, there is no evidence of legislative intent to apply the enacting ordinance retroactively. Implementing order 4-110 enacting the "Mixed-Use" rate has an effective date of January 1, 2018. (App. to Cross-Pet. at Exh. C) Nothing in the ordinance stated an intent to apply the new rate retroactively. The Hearing Officer therefore departed from the essential requirements of law in backdating the refund prior to the date the new rate was enacted. Accordingly, we quash this portion of the order below. (SANTOVENIA and TRAWICK, JJ., concur.)

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[1]The County argues that it has a well-established right to judicial deference to its interpretation of the ordinance, citing to *Colonnade Med. Ctr., Inc. v. State, Agency for Health Care Administration*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1021a]. In *Colonnade*, the court deferred to AHCA's interpretation of an applicable statute through its rules. We question the continued viability of *Colonnade* and whether this precept continues to remain true. A recent amendment to the Florida Constitution in Article 5, Section 21 now forbids court deference to an agency's interpretation of a state statute. This constitutional amendment was adopted because judicial deference to an agency's interpretation of enacted law violates the basic due process right of a party to judicial interpretation of a state statute. *See, e.g., Pedraza v. Reemployment Assistance Appeals Comm'n*, 208 So. 3d 1253, 1256-58 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D239a] (Shepherd, J. concurring). This constitutional provision does not apply to municipal ordinances. But we decline to defer to WASD's own interpretation because it deprives the parties of the right to a judicial interpretation of an ordinance and is especially troubling where WASD's interpretation directly contravenes the plain language of the enacted ordinance.

[2]The County points out MJH's inconsistency in arguing against an unwritten policy in response to the County's petition yet arguing strict adherence to WASD's unwritten policy in MJH's cross-petition. In addition, we point out that MJH *specifically argued at the close of evidence that HCT should be coded at the "Mixed Rate."* (App. at p. 241, 242) Having advocated for that rate classification below, they cannot now argue that such classification was in error. *See, e.g., Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38 (Fla. 1st DCA 1970) (doctrine of estoppel precludes party from taking inconsistent positions in judicial proceedings).

* * *

**Counties—Code enforcement—Building code—Certiorari challenge to order of county Mechanical Contractors Licensing and Examining Board's suspension of state-licensed mechanical contractor's permit-pulling privileges within county is denied—No merit to argument that Board did not have authority to suspend contractor's privileges because county Board of Adjustments and Appeals is invested with authority to "maintain proper standards of construction"—Consistent with chapter 489, county has created more than one local construction regulation board and has expressly authorized Mechanical Contractors Licensing and Examining Board to review building codes and recommend alterations and to suspend, revoke, or deny permitting privileges, thereby giving it authority of both local construction board and local licensing enforcement body—Findings that contractor willfully performed HVAC work exceeding scope of permit and had been found guilty in another county of willful building code violation within last 12 months were supported by competent substantial evidence—Selective enforcement defense was not proven by testimony regarding citations for use of unlicensed contractors that were not issued to homeowners because homeowners are not similarly-situated to contractor—No merit to claim that 18-month suspension is too severe where penalty falls within those available under code for violations proven**

SPIRO PAIZES, FLORIDA HOME IMPROVEMENT SERVICES, INC., Petitioner, v. SARASOTA COUNTY MECHANICAL CONTRACTORS LICENSING AND EXAMINING BOARD, Respondent. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2018-CA-001247. October 8, 2020.

**ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI**

(ANDREA McHUGH, J.) THIS MATTER is before the Court on a timely Amended Petition for Writ of Certiorari, filed by Petitioner, Spiro Paizes ("Paizes"), on July 1, 2018, seeking review of a February 8, 2018, final administrative order, issued by Respondent, Sarasota County Mechanical Contractors Licensing and Examining Board ("Board"). That order suspended Paizes' privileges/operating certificate within Sarasota County for mechanical contracting for 18 months.[1] The Court directed the Board to respond to the amended

petition, by order rendered April 8, 2019; the Board filed a Response on May 8, 2019, and Paizes filed a Reply on May 26, 2019.

While the amended petition was pending, Paizes requested that the Court grant a stay of the Board's decision; the Court denied the motion, without prejudice, by order filed April 8, 2019. The motion for stay was not renewed.

Having reviewed the filings of the parties, the case file, and the applicable law, and being otherwise duly advised in the premises, the Court now finds as follows:

**Case History**

By Administrative Complaint, dated January 16, 2018, the Board charged Paizes with three counts of violating the County Building Code, pursuant to Sarasota County Ordinance 83-63, as amended by Sarasota County Ordinance 2011-017, § 22-127(5)(h).[2] The Board conducted a hearing on February 1, 2018,[3] which resulted in a Final Order, dated February 8, 2018, concluding that the allegations of counts 1 and 3 had been proven, and that Paizes' permitting privileges/operating certificate would be suspended for 18 months.

This timely petition for certiorari review followed.

**Standard of Review**

Common law certiorari is available to review quasi-judicial orders of local agencies and boards not made subject to the Florida Administrative Procedure Act, when no other method of review is provided. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; Fla. R. App. P. 9.030(c)(3) and 9.190(b)(3). Unlike other types of certiorari proceedings, review of a local administrative action is not truly a discretionary writ because the review is of right; a court operates in an appellate capacity without the authority to reweigh evidence or substitute its judgment for that of the administrative agency. *Haines City Community Development,* 658 So. 2d at 530. On review, circuit courts must employ a limited three-pronged test to determine whether (1) procedural due process was afforded to the parties; (2) the essential requirements of the law were observed; and (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Sarasota County v. Kemper,* 746 So. 2d 539, 541 (Fla. 2d DCA 1999) [25 Fla. L. Weekly D228b] (per curiam).

**Present Petition**

**Ground 1: Authority of the Board to act upon Paizes' permit-pulling privileges**

Paizes contends that the Board acted outside of its legal authority when it revoked his permit-pulling privileges in the County, and thereby departed from the essential requirements of the law, because only a "construction regulation board" may impose sanctions on a state-licensed contractor's permitting privileges, pursuant to § 489.113(4)(b), Fla. Stat., and the Board fails to meet the definition of such a board, which must "maintain the proper standard of construction of [the] County." § 489.105(12), Fla. Stat. He avers that when Sarasota County adopted the Florida Building Code and made specific amendments to it, including the creation of the Board of Adjustment and Appeals, the County imbued that board with the authority to hear appeals from decisions and interpretations made by the County Building Official related to the building code standards; therefore, it is *the Board of Adjustment and Appeals* that is actually invested with the authority to "maintain the proper standard of construction." Paizes claims, moreover, that the Board of Adjustments and Appeals is the *only* body authorized to revoke his permitting privileges, and that the decision in *Snowman v. Contractor's Examining Board,* 704 So. 2d 717 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D135a], supports this construction.

The Board responds that Chapter 489 permits local governments to determine what board or boards will assume the responsibility of being a "local construction regulation board," and § 489.105(12), Fla. Stat., does not limit a locality to creating only one such board. Sarasota County has chosen to create more than one "construction regulation board" and the Board acts in this capacity by regulating the qualifications of contractors and the quality of their work, and by reviewing the Building Code and recommending Code alterations to the Board of County Commissioners. The Board avers that this intent is evidenced by a special finding made by the County, contained in Chapter 22 of the Sarasota Code of Ordinances (hereinafter "Sarasota Code"), and that the *Snowman* decision was previously distinguished by this Court, when it denied relief to a similarly-situated contractor in *Paul Marchese v. Sarasota County General Contractors Licensing & Examining Board,* Sarasota Case No. 2016-CA-001187 (12th Jud. Cir. Ct., June 6, 2017) (unpublished decision), *affirmed,* 253 So. 3d 575 (Fla. 2d DCA 2018) (unpublished Table disposition; 2018 WL 4517263) (per curiam).

The Court did address this same issue in *Marchese* and distinguished *Snowman* to find that the Sarasota County General Contractors Licensing and Examining Board had the authority under state and local law to impose permit-pulling restrictions on a state-licensed contractor. As discussed further below, both the General Contractors Licensing and Examining Board and the Mechanical Contractors Licensing and Examining Board were created by the same provisions of the Sarasota County Code, and they exercise the same type of authority and perform the same duties, but in relation to different contracting disciplines, so that *Marchese* is not distinguishable from this case on this basis. The Court's ruling in *Marchese* was affirmed, per curiam, by the Second District Court of Appeal. *See id.* Because of the summary nature of the affirmance, however, the Court cannot know whether the District Court rested its decision on the Court's finding on the merits, or on the Court's alternative finding that res judicata applied to preclude petitioner Marchese from litigating the jurisdictional question. Both findings were challenged on appeal. Accordingly, the Court addresses this issue in more detail now.

Chapter 162 authorizes counties and local municipalities to enforce state and local construction codes through the creation of "one or more code enforcement boards," authorized to impose administrative fines and other noncriminal penalties to enforce those construction provisions. *See* §§ 162.02-04 and § 162.05(1), Fla. Stat. The board must meet certain composition and term-of-service requirements, though some discretion is given to the local authority as to who is qualified to serve on the board.[4] A code enforcement board has the authority to, among other things, "issue orders having the force of law to command whatever steps are necessary to bring a violation into compliance." § 162.08(5), Fla. Stat.

By contrast, Chapter 489 regulates those persons working in the construction industry, with some exceptions not applicable here. In addition to setting forth state licensing and registration requirements, it also allows counties and municipalities to set up local permitting systems and create their own regulatory and enforcement bodies. One of these is a "local construction regulation board," which may be created for the purpose of "maintain[ing] the proper standard of construction of that county or municipality."[5] *See* § 489.105(12), Fla. Stat. This type of board may "deny, suspend, or revoke the authority of a certified contractor to obtain a building permit or limit such authority to obtaining a permit or permits with special conditions," where just cause is found, after a public hearing. *See* § 489.113(4)(b), Fla. Stat. Chapter 489 also authorizes an unspecified "local enforcement body" to engage in the local licensing, registration, and discipline of non-state certified contractors. *See* § 489.131(3)(f), (7), Fla. Stat. Discipline permitted for locally-licensed contractors includes

license revocation, *see* § 489.131(7); whereas, by contrast, state-licensed contractors may only have their local permit-pulling privileges revoked. *See* § 489.113(4)(b) and § 489.131, Fla. Stat.

Pursuant to these statutes, Sarasota County has created construction-related boards that serve these various functions. Chapter 22, Article II of the Sarasota Code, titled "Building Code," adopts the Florida Building Code and provides amendments, thereto, including the establishment of a Board of Adjustments and Appeals.[6] The board is granted "the power, as further defined in [subsection] 108.4, to hear appeals of decisions and interpretations of the Building Official and consider variances from the technical codes." § 22-34(108.3), Sarasota County Code. The powers enumerated in subsection 108.4 are related to hearing appeals brought by "the owner of [a] building or structure or his [or her] duly authorized agent," from decisions made by the County Building Official as to the lawful construction or alteration of a building or structure, under the building code.[7] *See* § 22-34(108.4.1), Sarasota County Code. None of the powers enumerated in subsection 108.4 include the authority to set requirements and regulate the quality and character of work performed by contractors within the County, or to suspend, revoke or deny a "Sarasota County Operating Certificate," which is required to pull-permits in the County. *See* § 22-122(2), Sarasota County Code.

Instead, the County placed that authority with the Mechanical Contractors Licensing and Examining Board (the Board),[8] via Chapter 22, Article V, titled "Building Contractors."[9] The Board is expressly tasked with the combined duties of a "local construction regulation board" and a local licensing "enforcement body," as defined in Chapter 489. These duties include: making recommendations as to which trades in the industry require certificates of competency; examining applicants regarding their qualifications and investigating their character, experience, financial responsibility and fitness; conducting public hearings to evaluate complaints against contractors; imposing sanctions including reprimands, fines, suspensions, and revocations of local licenses, upon finding misconduct; and considering the reinstatement of delinquent or inactive operating certificates upon request. *See* § 22-127(5)(a)-(h), Sarasota County Code. Significantly, the Board is also authorized "to review the various building codes and recommend alterations thereof to the Board of County Commissioners for consideration and adoption." § 22-127(5)(i), Sarasota County Code.

Giving § 22-127(5), Sarasota County Code, a "plain and ordinary" reading, *see Brittany's Place Condominium Association, Inc. v. U.S. Bank, N.A.,* 205 So. 3d 794, 798 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2267a], it is apparent that the Board lawfully acts as a "construction regulation board," as defined by § 489.105(1), Fla. Stat. Aside from the express authority of the Board to recommend changes to the County Building Code, the Board's ability to suspend, revoke, or deny permitting privileges to a contractor, upon a finding of fraud or willful violation of the building code, also serves the goal of "maintain[ing] the proper standard of construction" by ensuring that future sub-standard construction by a malfeasant contractor is averted. This purpose is reflected in the County's finding, in enacting Article V, that:

> [T]he construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable or short-lived products or services. Therefore, it is necessary and in the interest of the public health, safety and welfare of the citizens of Sarasota County to regulate the construction industry.

Section 22-121(1), Sarasota County Code.

As a chartered county, Sarasota County has the ability to tailor its government structure, through it ordinances, to suit the needs of the residents, so long as the structure does not conflict with general law. *See* Florida Constitution, art. 8, sec. 1(g); *Hollywood, Inc. v. Broward County,* 431 So. 2d 606, 609 (Fla. 4th DCA 1983). No such conflict appears to have been created by the County's decision to provide a division of labor between the Board of Appeals and Adjustments, and the Contractor Licensing and Examining Board, both of which are imbued with the authority of a "construction regulation board." Chapter 489 places no limit on the number of construction regulation boards that a locality may create, and the County was free to create a second such board that serves primarily to regulate, license, and sanction contractors working within the County.

In the *Snowman* case, *supra,* the Third District Court of Appeal faced a similar challenge to the actions of the non-chartered Monroe County government. Mr. Snowman was a state-licensed contractor who had his permit-pulling privileges temporarily suspended by the Monroe County Examining Board, based on its finding that Snowman failed to provide workers' compensation insurance and registered a fictitious name when engaging in local construction work. The court agreed with Snowman that it was the Board of Adjustments and Appeals that was imbued by the county with the authority to "maintain standards of construction," not the Examining Board, and the latter was not a "construction regulation board" and had no authority to suspend Snowman's privileges.

The Monroe County Code did not, however, imbue its Examining Board with the authority "to review the various building codes and recommend alterations thereof to the Board of County Commissioners for consideration and adoption," as did Sarasota County. *See* § 22-127(5)(i), Sarasota County Code. Nor did Monroe County make a codified finding that linked government regulation of the construction industry to preventing contractors from providing "unsafe, unstable or short-lived products or services" in order to avoid "a danger of significant harm to the public health safety and welfare." § 22-121(1), Sarasota County Code; *see generally* § 489.131, Fla. Stat. (providing that nothing in Chapter 489, Pt. 1 should be construed to limit the power of a county to "enforce other laws for the protection of the public health and safety").

The Court also places little weight on the fact that the County's enactment of the Board is not located in Article II, alongside the Board of Adjustment and Appeals, and is, instead, set forth in Article V. Both articles are subsumed under Chapter 22, which encompasses "Building and Building Regulations." Because the Board is imbued with the authority of a "construction regulation board" *and* a local licensing "enforcement body," as authorized by Chapter 489, its separate placement within Chapter 22 imports little weight. Since *Snowman* was decided, the Court is unaware of any case that has been squarely presented with the same issue. The one case from the Fifth District Court of Appeal that cited to *Snowman,* did so only in *dicta,* when ruling on a contractor's procedural due process claim. *See Orange County Building Codes v. Strickland Construction Services Corp.,* 913 So. 2d 718 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2487a] (observing that County Board of Adjustment and Appeals was proper "construction regulation board," pursuant to *Snowman,* when ruling on contractor's challenge to board's failure to afford procedural due process before suspending contractor's permit-pulling privileges).

Accordingly, Paizes' challenge to the authority of the Board to take action against his permit-pulling privileges is rejected. Ground 1 is denied.

**Ground 2: The Board's finding that work exceeded the air conditioning permit**

Paizes contends the record before the Board fails to contain competent substantial evidence that he violated the Sarasota County Code as charged in count 1 of the administrative complaint by

willfully "commencing an HVAC addition/alteration with new ductwork and relocated air returns and electrical addition/alteration for the addition of a new HVAC system exceeding the scope of permit 16-137640BE."[10] The Board responds that the record contains competent substantial evidence to support its findings.

Neither Chapter 489 nor the Sarasota County Code contains a definition of "willful," so that the Court must search for other common, accepted definitions. *Black's Law Dictionary* (11th ed. 2019), defines "willful" as a "voluntary and intentional act, but not necessarily malicious. . . [that] involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong." Our courts have ascribed a similar definition in the civil context, finding a "willful" act to be one where the actor "voluntarily and intentionally performed with specific intent and bad purpose to violate or disregard the requirements of the law." *Fugate v. Florida Elections Commission,* 924 So. 2d 74, 75 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D616e]; *and see Hazen Paper Co. v. Biggins,* 507 U.S. 604, 617 (1993) (where actor evidenced "reckless disregard" for matter prohibited).

In the present case, the Board engaged in no discussion of the willfulness element, so that the Court presumes that it applied a similar definition and considers what evidence, if any, exists to support this finding.

The evidentiary standard of "competent substantial evidence" has been interpreted as "evidence a reasonable mind would accept as adequate to support a conclusion." *Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So.2d 996, 1002 (Fla. 2d DCA 1993) (citing to *Town of Indialantic v. Nance,* 400 So. 2d 37, 39 (Fla. 5th DCA 1981) (additional citation omitted)). "Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonable be inferred." *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.,* 857 So. 2d 202, 204 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1686a] (quoting *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). Competent evidence can come from the fact-based (non-opinion) testimony of citizens, *see Metropolitan Dade County v. Section 11 Property Corp.,* 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1866a], and of professional staff and staff reports, when they are based on the staff's professional experiences and personal observations. *See Village of Palmetto Bay v. Palmer Trinity Private School, Inc.,* 128 So. 3d 19, 27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c] (citing to cases on this point). Contrary evidence in the record may bear upon the wisdom of the tribunal's decision but it is "irrelevant to the lawfulness of the decision," so long as there is competent substantial evidence to support the decision. *Dusseau v. Metro. Dade County Bd. of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *accord Orange County v. Butler,* 877 So. 2d 810, 813 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1561a]; *Bell v. City of Sarasota,* 371 So. 2d 525, 527 (Fla. 2d DCA 1979).

A review of the record shows that Paizes entered into a contract with homeowners Jose Dasso and Lucy Ramos for work at [Editor's note: Address redacted], Sarasota, to include a re-roofing, a new split HVAC unit, and a variety of repairs "including all labor and materials," in exchange for payment of $23,733.00.[11] The contract included the following relevant terms:

- [Contractor] shall acquire Building Permit from Sarasota County for New Re-Roof and new split HVAC unit as described herein;
- New HVAC unit shall have new electrical wires run with disconnects;
- Install additional new air ducts and returns to code to accommodate new location and missing ducts.

Paizes denied that he installed any electrical wiring other than the "whip" connection between the condenser unit and the disconnect box and explained the "wiring" referenced in the contract was the whip.[12] He likewise denied installing the disconnect box and explained it was installed sometime earlier by someone else as part of an effort to use an old R-22 Rheam unit to service the residence.[13] Finally, he denied installing any new ductwork.[14]

Lucy Ramos testified that when she bought the residence in July 2016, the only exterior air conditioning equipment was an old package unit on the roof and no equipment was located on the side of the house.[15] She stated it was her understanding that Paizes would install new wiring and disconnects as part of the contracted air conditioning work and that she discussed with him the subject of raising the existing ducts to a higher level.[16] An e-mail received from Paizes, and identified by Ramos, dated August 18, 2016, stated, "We installed a new concrete pad for the outside condenser unit and will be finishing the new electrical wiring with all the duct work as well. Coper lines will be run with the connections soldered on, etc."[17]

Officer Harvey Ayers discussed photographs submitted as evidence showing that, prior to Paizes' renovation work, the residence had no air conditioning unit where one was located at the time of the hearing, and it appeared that a brand new HVAC unit had been installed with new electrical work.[18] Ayers testified that the permit applied for was an express permit intended for a change out, size for size, of existing air conditioning equipment for new equipment. He concluded an express permit was not the appropriate permit for the scope of work performed in this case.[19]

This was "evidence a reasonable mind would accept as adequate to support a conclusion." *Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (quoting *Town of Indialantic v. Nance,* 400 So. 2d 37, 39 (Fla. 5th DCA 1981) (additional citation omitted)). While the evidence on these points was disputed, contrary evidence in the record bears only on the wisdom of the Board's decision and is "irrelevant to the lawfulness of the decision." *Dusseau v. Metro. Dade County Bd. of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *accord Orange County v. Butler,* 877 So. 2d 810, 813 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1561a]; *Bell v. City of Sarasota,* 371 So. 2d 525, 527 (Fla. 2d DCA 1979). Ground 2 is denied.

**Ground 3: The Board's finding of a code violation for being found guilty in another county or municipality within the last 12 months of a willful building code violation**

Paizes contends the record before the Board fails to contain competent substantial evidence that he violated the Sarasota County Code as charged in count 3 of the administrative complaint by "being found guilty in another county or municipality within the last 12 months of fraud or a willful building code violation if such fraud or violation would have been a violation if committed in Sarasota County."[20] Paizes contends his violation found by the Manatee County Construction Trades Board ("Manatee Board") for an expired permit was not "willful" in that mitigating circumstances beyond his control prevented him from closing out the permit. The Board responds the finding is supported by competent substantial evidence.

In evaluating this claim, the Court relies upon the authorities cited in Ground 2 in relation to willfulness and competent substantial evidence.

The County introduced documentary evidence that Paizes had been found in violation of the Manatee County Building Code ("Manatee Code") within the past 12 months.[21] The April 26, 2017, order of the Manatee Board found that service of notice of hearing was properly made but Paizes failed to appear. The Manatee Board further found that Paizes had violated several provisions of the Manatee Code, state statutes, and the Florida Building Code pertaining to an air

conditioning permit issued on March 17, 2016, that remained open as of the date of the hearing before the Manatee Board. The Manatee Board's order directed Paizes to close the open permit within 14 days and pay $996.00 in processing costs on penalty of revocation of his permitting privileges in Manatee County. Paizes' permitting privileges remained suspended from April 26, 2017, to November 26, 2017, when the permit was finally closed.[22]

Paizes admitted to being found in violation of the Manatee Code within the past 12 months.[23] He testified that the delay in finally closing out the permit was attributable to the fact that the owners lived in the Ukraine and were difficult to contact: "And there's no way to get an inspection because the inspector needed to go inside. And then we finally, we wrote letters, you know, sent certified letters, did everything that I could, and then they—finally they came back into town."[24] No copies of such letters were provided to the Board.

This was "evidence a reasonable mind would accept as adequate to support a conclusion." *Lee County v. Sunbelt Equities, II, Ltd. Partnership.* Ground 3 is denied.

**Ground 4: The Board's failure to consider selective enforcement as a defense**

Paizes contends that the Board's finding is undermined by evidence that he has been singled out for selective enforcement by the County, based on hostilities that existed between himself and Deputy Building Official Guy McCauley. He also argues that he was not given time to fully develop this argument with respect to code citations he contends should have been, but never were, issued to homeowner Lucy Ramos for her use of unlicensed contractors.

Florida recognizes selective enforcement as a cognizable defense in code enforcement proceedings. *See, e.g., Powell v. City of Sarasota,* 953 So. 2d 5 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2349a] (finding claim of selective enforcement of nuisance abatement provisions to be legally cognizable and that respondents "were entitled to present evidence in proof of it"). This defense is rooted in the Equal Protection Clause of the Fourteenth Amendment, and federal courts have held the defense requires that: (1) the individual was treated differently from other similarly situated individuals, and (2) the differential treatment was based on impermissible considerations. *See Lozman v. City of Riviera Beach,* 39 F. Supp. 3d 1392, 1411 (S.D. Fla. 2014). Under the first prong, "similarly situated" requires that the individual and comparators be "prima facie identical in all relevant respects." *Id.* Under the second prong, impermissible considerations include "malicious or bad faith intent" to injure the individual." *Id.*

Any testimony regarding citations that were not issued to homeowner Ramos would have been irrelevant to Paizes' selective enforcement defense. Homeowners are not similarly-situated to contractors-for-hire. They are not subject to the licensing requirements of Chapter 489 of the Florida Statutes, *see* § 489.103(7)(a), Fla. Stat., and they are permitted by the Sarasota Code to supervise their own construction, subject to certain limitations, including obtaining a county building permit for this purpose. *See* § 22-122, Sarasota Code. Citations not issued to licensed contractors, under similar circumstances, would be relevant. However, the record does not support such a finding.

No evidence was admitted to show that similarly-situated contractors were *not* cited by the County, or that Paizes was otherwise singled out for unfair treatment. Paizes argued to the Board that McCauley was motivated by personal animus again him, based on a past incident, and that the present case was being pursued as the result of their feud. Ground 4 is denied.

**Ground 5: Severity of the sanction imposed**

Paizes contends the severity of the sanction ordered by the Board, suspension of mechanical contracting permit privileges for 18 months, violates his Eighth Amendment right to protection against cruel and unusual punishment as it relates to count 3 of the administrative complaint. He argues this penalty is grossly disproportionate to the finding that he violated the Manatee Code in the past 12 months by allowing a permit to remain open.

An administrative penalty may be reviewed on appeal for an abuse of discretion. *See Kale v. Department of Health,* 175 So. 3d 815, 817 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1331a]. When an administrative body imposes a penalty within the permissible statutory range, "an appellate court has no authority to review the penalty." *Kale* at 817, citing *Mendez v. Fla. Dep't of Health,* 943 So.2d 909, 911 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D3015a].

In this case, the record shows the Board considered and approved the 18 month permitting suspension as a sanction for finding Paizes guilty of *both* count 1 and count 3.[25] The penalty imposed by the Board falls within the range of those available to it under the code. *See* § 22-127(5)(h), Sarasota County Code.[26] The Court shall not disturb the penalty imposed by the Board. Ground 5 is denied.

It is, therefore, **ORDERED AND ADJUDGED** that the amended petition for writ of certiorari is **DENIED**.

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[1]*See* Paizes' "Amended Appendix in Support of Amended Petition for Writ of Certiorari" ("Amended Appendix") [Document Identification Number "DIN" 24] at Appendix 13. The Appendix, as amended and supplemented, has been filed in three parts, on July 1, 2018, so that the Court will refer to the appropriate DIN number assigned in the docket, for clarity. Paizes has identified each of the 14 exhibits within his Appendix as Appendices #1-14, rather than provide the individual pagination required by Fla. R. App. P. 9.100(g) and 9.220(c). The Court will utilize the same designations to avoid confusion, and will refer to each exhibit within the Appendix as individual "Appendix" 1 to 14.

[2]*See* Amended Appendix [DIN 24] at Appendix 5. Count 2 was dismissed by the County at the outset of the Board hearing.

[3]*See* Amended Appendix [DIN 25] at Appendix 12.

[4]A local code enforcement board must consist of at least seven members where the population exceeds 5,000, each member must serve three years, members must be residents of the locality, and the composition should include, when possible, an architect, a businessperson, an engineer, a general contractor, a subcontractor, and a realtor. *See* § 162.05, Fla. Stat. Discretion is given to the local municipal or county authority to appoint members in accordance with experience or interest in the subject matter jurisdiction of the respective code enforcement board. *See* § 162.05(2), Fla. Stat.

[5]This type of board has few requirements as to composition; it must be "composed of not fewer than three residents of [the] county or municipality." *See* § 489.105(12), Fla. Stat.

[6]The board consists of seven members, each serving three-year terms, with "knowledge and experience in the technical codes, such as architects, civil engineers, mechanical engineers, electrical engineers, licensed contractors, and building industry representatives." § 22-34(108.2.1-2.2), Sarasota Code.

[7]Specifically, appeals may be entertained "[w]henever the Building Official shall reject or refuse to approve the mode or manner of construction proposed to be followed or materials to be used in the erection or alteration of a building or structure, or when it is claimed that the provisions of this code do not apply, or that a particular form of construction, which is an acceptable alternative to the code, can be employed in any specific case, or when it is claimed that the true intent and meaning of this code of any of the regulations hereunder have been misconstrued or wrongly interpreted. . . ." § 22-34(108.4.1), Sarasota Code. The Board of Adjustments and Appeals is also authorized to hear appeals from determinations by the Building Official that a structure is unfit or unsafe, and regarding variances from floodplain management regulations and regulations applicable to conservation districts. *See id.*

[8]Sarasota County also created the General Contractors Licensing and Examining Board with authority over general, building, residential, roofing, pool/spa, and specialty contractors; the Mechanical Contractors Licensing Board has authority over electrical, plumbing, and mechanical contracting. *See* § 22-127(1), Sarasota Code.

[9]The Board is comprised of thirteen members, including an architect, a civil or structural engineer, four general or building contractors, two residential contractors, two trade alternative members, and three citizens of the county to serve as consumer representatives, and each member serves a three-year term. § 22-127(1)-(4), Sarasota County Code.

[10]*See* Amended Appendix [DIN 24] at Appendix 5.

[11]*See* Amended Appendix [DIN 24] at Appendix 6E-F.

[12]*See* Amended Appendix [DIN 25] at Appendix 12, p. 72. Paizes contended before the Board that his installing the whip was within the purview of his air conditioning contractor's license and not electrical work. Neither the Board nor the County disputed this claim.

[13]*See* Amended Appendix [DIN 25] at Appendix 12, pp. 67, 80, 88-89.
[14]*See* Amended Appendix [DIN 25] at Appendix 12, p. 80.
[15]*See* Amended Appendix [DIN 25] at Appendix 12, pp. 92-93, 103.
[16]*See* Amended Appendix [DIN 25] at Appendix 12, pp. 119,123.
[17]*See* Amended Appendix [DIN 24] at Appendix 6V-W.
[18]*See* Amended Appendix [DIN 25] at Appendix 12, pp. 129, 139; Amended Appendix [DIN 24] at Appendix 9L and M.
[19]*See* Amended Appendix [DIN 25] at Appendix 12, p. 129.
[20]*See* Amended Appendix [DIN 24] at Appendix 5.
[21]*See* Amended Appendix [DIN 24] at Appendix 10.
[22]*See* Amended Appendix [DIN 25] at Appendix 12, p. 37.
[23]*See* Amended Appendix [DIN 25] at Appendix 12, pp. 36, 41.
[24]*See* Amended Appendix [DIN 25] at Appendix 12, p. 43.
[25]*See* Amended Appendix [DIN 25] at Appendix 12, pp. 62-63, 158-159.
[26]**Sec. 22-127.—Contractors Licensing and Examining Boards.**

...

*(5) Duties.* It shall be the duty and responsibility of the Boards to:

...

(h) Following the same hearing procedures set forth in this section, above, the Boards may suspend or revoke permitting privileges of State Certified Contractors for: committing fraud; committing a willful building code violation; having been found guilty in another county or municipality within the last 12 months of fraud or a willful building code violation if such fraud or violation would have been a violation if committed in Sarasota County; or failing or refusing to provide proof of public liability and property damage insurance coverage as required by F.S. § 489.115(5), and workers' compensation insurance coverage as required by F.S. § 489.114. . . .

* * *

LAKESHORE MOBILE HOME PARK, LLC, Plaintiff, v. TOWN OF PEMBROKE PARK, FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22007626. Division AP. February 14, 2023.

## ORDER ADOPTING JOINT STIPULATION FOR DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the Stipulation of Dismissal with Prejudice, dated February 6, 2023. Upon review of the stipulation and Court file, this Court finds as follows:

The Stipulation of Dismissal with Prejudice is hereby **ACCEPTED** by this Court. The Broward County Clerk of Courts is **DIRECTED** to close this case as "disposed" of by way of joint stipulation for dismissal.

* * *

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# CIRCUIT COURTS—ORIGINAL

**Insurance—Property—Discovery—Failure to comply—Sanctions—Failure of insured and counsel to attend hearing on order to show cause why insured should not be held in contempt for failure to comply with order compelling discovery responses because, as explained by counsel at second contempt hearing, counsel's legal assistant inadvertently failed to schedule the hearing—Insured's counsel ordered to pay assessment of $20 per day for five-month period from date of order compelling production to date of second contempt hearing**

ROBBIE A. MILLER, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-293. March 19, 2023. David Frank, Judge. Counsel: Leo A. Manzanilla, MSPG Law Group, P.A., Coral Gables, for Plaintiff. Adrianna M. Spain, Wilson, Harrell, Farrington, Ford, Wilson, Spain & Parsons, P.A., Pensacola, for Defendant.

## ORDER ON SANCTIONS

This cause came before the Court on a defense motion to compel discovery responses, an order granting the same, a subsequent motion for sanctions, and two hearings to show cause, and the Court having reviewed the motions, responses, and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

### Procedural History

On June 21, 2022, defendant served plaintiff with interrogatories and a request for production of documents.

On July 21, 2022, and pursuant to the Florida Rules of Civil Procedure, the deadline for plaintiff's responses to these discovery requests came and passed with no responses.

Defendant's counsel attempted to confer with plaintiff's counsel to resolve the matter without court intervention, but plaintiff's counsel effectively refused to engage on the matter.

On August 22, 2022, defendant filed a motion to compel responses to these discovery requests.

On October 21, 2022, the Court issued the order granting defendant's motion to compel. The Court ordered plaintiff to deliver the items responsive to defendant's discovery requests no later than two weeks (14 days) from the date of the order.

On November 4, 2022, the court deadline for plaintiff's delivery of the requested items came and passed with no delivery.

On January 16, 2023, defendant filed a motion for sanctions pursuant to plaintiff's failure to comply with the Court's October 21, 2022 order in which defendant requested dismissal of the case or other appropriate relief.

On February 28, 2023, the Court issued its first order to show cause and set the hearing for March 10, 2023. The Court instructed the plaintiff and her attorney to appear live in the courtroom to explain or otherwise defend against the allegations of discovery abuse and to show cause why sanctions should not be entered to include dismissal of the lawsuit and civil contempt.

On March 10, 2023, neither plaintiff's counsel nor plaintiff appeared in person for the hearing as ordered; nor did they make any attempt to participate via remote technology.[1] They made no attempt whatsoever to contact the Court or opposing counsel to explain why they would not come to or participate in the hearing.

At the hearing, the Court heard evidence and legal argument from defendant on each of the six *Kozel* factors. *See Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993). Plaintiff, having failed to appear, offered no rebuttal and there was no effective way to determine the extent of involvement of the party plaintiff herself. Although *Kozel* instructs that a party should not be unduly punished for the acts of her attorney, the party's (client's) active involvement, "…cannot be the sole factor if we are to properly administer a smooth flowing system to resolve disputes." *Ham v. Dunmire*, 891 So.2d 492, 497 (Fla. 2004) [30 Fla. L. Weekly S6a]. Pursuant to its application of the factors, the Court verbally ruled that a dismissal would be entered, and it reserved jurisdiction to address other sanctions once the presence of plaintiff's counsel had been successfully compelled. The dismissal was later rescinded, see below.

On March 12, 2023, the Court issued its second order to show cause and set the hearing for March 17, 2023. Plaintiff's counsel and plaintiff were again instructed to appear in person and show cause why they should not be further held in contempt for recklessly failing to appear at the hearing on the first order to show cause. The possible sanctions included a compensatory fine pursuant to indirect civil contempt of court, Rule 1.380 sanctions, and attorney's fees and other relief pursuant to the Court's inherent authority to sanction bad faith litigation.

On March 17, 2023, plaintiff's counsel appeared in person in the courtroom as ordered for the hearing on the second order to show cause. Pursuant to plaintiff's counsel's request, the plaintiff herself was excused from appearing at the hearing. Defense counsel requested leave to appear remotely, which was granted, and she appeared via Zoom.

Responses to the subject discovery requests have never been served.

### Findings of Fact

At the hearing on the second order to show cause, plaintiff's counsel presented the following facts to show cause why sanctions should not be entered.[2]

- Regarding the failure to appear for the hearing on the first order to show cause, a legal assistant with plaintiff's counsel's firm received and internally filed the order to show cause, but "inadvertently did not calendar the hearing."
- The legal assistant had been at the firm for a while but was covering for the normal "scheduler" who was on maternity leave since November.
- Plaintiff's counsel's firm had been trying to contact their client, the plaintiff Ms. Miller, since July of 2022 and only reached her sister on March 13, 2023, after the Court issued its second order to show cause.
- By "trying to contact," plaintiff's counsel means several telephone calls and one letter that was returned.
- Ms. Miller's sister told plaintiff's counsel that Ms. Miller for some amount of time had been placed in a facility of some sort, not identified, because of a mental health or incompetency issue.

Importantly, at this second hearing, plaintiff's counsel accepted responsibility for the neglectful handling of the case and acknowledged several important points, with a sincere promise to rectify the deficiencies. He acknowledged that he should have provided better training and supervision to his staff. Regarding the specific legal assistant, he stated that he was having issues with her and should have taken stronger personnel action. He admitted that he should have informed opposing counsel and the Court of the situation long before he did. He admitted that his hesitancy to do so was at least in part due to an intentional delay with hope that the case would eventually settle rendering the issues moot.

Nonetheless, plaintiff's dilatory conduct delayed the case for eight months, deprived the defendant of key evidence needed for its defenses, and took the case dangerously close to a jury trial at which defendant would have been prejudiced or an unnecessary continuance would have had to have been granted and now will be. Moreover, plaintiff's conduct unnecessarily expended the time and attention of

the Court, depriving other litigants of the same at a time when there are large caseloads and an ominous backlog of jury trials caused by the pandemic.

**Conclusions of Law**

The present lawsuit is one of the Hurricane Michael first party property damage cases currently inundating Gadsden and Liberty Counties. Anyone who lives in or frequents these counties knows too well how profound the damage was from that storm. It devasted the area. It wreaked havoc on the lives of the residents, many of whom were propelled into foreclosure or otherwise lost their homes and jobs. You can still see blue tarps on the roofs of some houses and immense damage to forests and fields. Hurricane damage cases should be resolved on their individual merits and according to Florida law either by settlement or by decision of a jury or court. The last thing these residents need is to have their lawsuit thrown out because the law firm that accepted their case dropped the ball.

When the ball is dropped, "the dog ate my homework" will not suffice when attorneys are called on the carpet to explain excessive delay and discovery abuses. Simply pointing to a mistake of an employee is not cause shown to avoid sanctions. It cannot be. There often is some action by a staff person that arguably contributed to the problem. Lawyers must accept responsibility for their employees. *See Fla. Bar v. Strems*, No. SC20-806, 2022 WL 17839513, at *1 (Fla. Dec. 22, 2022) [47 Fla. L. Weekly S301a], reh'g denied, No. SC20-806, 2023 WL 1999558 (Fla. Feb. 15, 2023) (Plaintiff's counsel knew that there were issues with the management of his firm, but he took insufficient action to rectify the situation.).

A lawyer also must know when to withdraw from a case. It is of course preferrable that lawyers maintain contact with clients, to include using aggressive efforts to locate and communicate with them when necessary. But sometimes a client simply will not respond to the best efforts. At that point, not months and months later, a lawyer should move to withdraw. Otherwise, the lawyer is accepting responsibility for the unavailability of the client.

The days when cases could sit for months on end with no action (and in hope of a settlement) are over. The Florida Supreme Court has directed trial judges to take charge and actively manage civil cases toward a timely trial while employing a higher threshold for continuances. *Florida Supreme Court Administrative Order No. AOSC21-17, Amendment 2, In Re: Covid-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts*, November 4, 2021 (The goal is to ". . .maximize the resolution of all cases. . .to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown."). Litigants should not doubt the resolve with which trial judges will implement this directive.

We are confident that the expected amendments to rules and support from our appellate courts will give trial judges the tools necessary to accomplish the task. One could argue that the existing tools of compensatory or coercive indirect civil contempt, and Rule 1.380 and other attorney's fees measures fall short. For example, here, defendant made the decision to not request attorney's fees. Should the Court then be left with no means of vindicating its authority or ensuring the efficient administration of justice short of criminal contempt?[3]

To the contrary, "[c]learly, 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." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606, 608-09 (Fla. 1994) (citation omitted). This includes taking strong action to make it clear that violations of court orders, discovery abuses, and excessive unnecessary delays will not be condoned or tolerated.

An example of how trial courts are managing this task is found in a recent order issued by the Honorable Eric C. Roberson in the Fourth Circuit. *See Order Imposing Sanctions*, *James Buzzard and Helen Buzzard v. Jessica Cox and State Farm Mutual Automobile Insurance Company*, Case No. 2021-CA-148, Fourth Judicial Circuit in and for Nassau County (March 2, 2023). Judge Roberson ordered:

> (i) a per diem sanction of $20 per day shall be imposed for the 138 day delay between the filing of the Motion for Extension and the date of the hearing; and (ii) for each day the discovery responses remain outstanding, an additional sanction of $20 per day shall accrue. The initial sanction total of $2,760.00 shall be payable to The Nassau County Bar Association c/o Brett Steger, President, 1869 S. 8th Street, Fernandina Beach, FL 32034 within 20 days of this Order.

This Court must find similar solutions. Accordingly, it is ORDERED and ADJUDGED that

1. Plaintiff's counsel will be responsible for all sanctions, not the party plaintiff herself.

2. Given the status of the plaintiff, Ms. Miller, and plaintiff's counsel's motion to withdraw, the Court reserves on the matter of a civil contempt purge pending delivery of the discovery responses.

3. Plaintiff's counsel will pay a per diem assessment of $20 a day for the period from the issuance of the order compelling production to the date of the hearing on the second order to show cause. That delay was five months or 150 days, which yields a total sanction of $3,000. The amount of $2,000 will be suspended upon compliance with payment of $1,000 within 20 days from the date of this order.

4. Payment of the assessment will be made to the Tallahassee Bar Association, and sent to PO Box 813, Tallahassee, FL 32302. The assessment will be used to support the Association's professionalism initiatives. Plaintiff's counsel will enclose a copy of this order with the payment.

5. This case is removed from the May 2023 jury trial docket.

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[1]Counsel for defendant drove from her office in Pensacola to attend the hearing in person as instructed.

[2]Although the better course would have been to present evidence, the Court gave the plaintiff the benefit of the doubt and accepted the facts as outlined by her counsel and as set forth in a one-page affidavit from the firm's "scheduler." This section is a summary of the major points. *See* transcript for greater detail.

[3]Initially, the case was dismissed pursuant to *Kozel* so there was no reason to pursue coercive measures.

* * *

**Dissolution of marriage—Child custody—Time-sharing plan—Child support—Modification—Mother's supplemental petition seeking modification of parenting plan and child support based on former husband's failure to comply with current visitation or parenting plan/time-sharing schedule failed to allege sufficient facts for modification where petition provided no details as to former husband's alleged noncompliance**

In re: the former marriage of ALANA M. AARON, n/k/a ALANA M. DERBY, Petitioner, and ANTHONY M. EVERETT, Respondent. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 10-2018-DR-1524. Division F. February 17, 2023. Gary L. Wilkinson, Judge. Counsel: Alana M. Derby, Pro se, Petitioner. Steven C. Fraser, Steven C. Fraser, P.A., Hallandale Beach, for Respondent.

**ORDER DISMISSING SUPPLEMENTAL PETITION**

This cause came on for a hearing before General Magistrate Gina M. Stewart on February 16, 2023. Both parties were provided notice of the hearing. The Respondent appeared remotely via Zoom video conferencing, along with counsel for the Respondent. The Petitioner failed to appear. The proceedings were recorded electronically. The

Magistrate's recommended order was submitted to the Court on February 16, 2023. Based upon the recommended order of the Magistrate, the Court makes the following findings of fact and conclusions of law:

A. A Consent Final Judgment of Dissolution of Marriage with incorporated Parenting Plan was entered herein on October 8, 2018. The parties have two minor children, ages 8 and 7 as of the date of this hearing. Pursuant to the Parenting Plan, the parties have shared parental responsibility and the Petitioner is designated as the majority time-sharing parent. The Parenting Plan indicates that the parties have an equal time-sharing schedule, but the actual schedule affords the Petitioner four overnights per week and the Respondent three overnights per week. Neither party was ordered to pay child support.

B. The Petitioner filed her Supplemental Petition Modifying Parental Responsibility, Visitation, or Parenting Plan/Time-Sharing Schedule and Other Relief on August 12, 2022, seeking modification of the Parenting Plan and child support. The only factual allegation contained in her Supplemental Petition as a basis for modification is: "The Respondent/Former Husband has failed to comply with the current visitation or parenting plan/time-sharing schedule."

C. The Respondent was served with the Supplemental Petition on August 22, 2022. Counsel for the Respondent filed a notice of limited appearance on September 4, 2022. The Respondent filed his Motion for Extension of Time on September 4, 2022, seeking additional time to file a response to the Supplemental Petition. The Respondent filed his Motion to Dismiss on October 20, 2022, alleging that the Supplemental Petition fails to allege sufficient facts for modification.

D. The purpose of a motion to dismiss is to test the legal sufficiency of a complaint, not to determine factual issues. *The Florida Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S171a]. "When ruling on a motion to dismiss for failure to state a cause of action, the trial court must accept the allegations of a complaint as true." *Noack v. Blue Cross & Blue Shield of Florida, Inc.,* 742 So. 2d 433, 434 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D2153a].

E. The Petitioner did not appear for the hearing to defend against the Motion to Dismiss. She was provided proper notice of the hearing at her e-mail address designated for service in this matter, and the Respondent testified that they spoke about the hearing and she was aware of it.

F. The Petitioner's Petition gives no details as to the alleged failure to exercise timesharing such, as to what extent the Respondent has allegedly failed to exercise time-sharing, for what period of time, whether it was due to no fault of the Petitioner, or specifics as to how a modification would be in the best interest of the children. The Court finds that as pled, the Petitioner has failed to state a cause of action and her Supplemental Petition should be dismissed without prejudice.

It is therefore, **ORDERED**:

1. The Respondent's Motion to Dismiss, filed October 20, 2022, is hereby granted.

2. The Petitioner's Supplemental Petition Modifying Parental Responsibility, Visitation, or Parenting Plan/Time-Sharing Schedule and Other Relief, filed August 12, 2022, is hereby dismissed without prejudice for failure to state a cause of action.

3. The Respondent's Motion for Extension of Time, filed September 4, 2022, is rendered moot.

* * *

**Insurance—Bad faith—Failure to settle—Excess carrier's action alleging that primary carrier acted in bad faith by failing to settle insured's claim within policy limits and incurring excess verdict—Affirmative defenses—Failure to mitigate damages—Absent showing that excess carrier would have, rather than should or may have, reduced its damages by pursuing post-trial or appellate relief in underlying lawsuit, primary carrier cannot argue that excess carrier abandoned or waived bad faith claim or failed to mitigate damages by failing to pursue that relief—Voluntary payment—Excess carrier's payment of its portion of settlement of lawsuit does not bar it from pursuing bad faith action where excess carrier put primary carrier on notice that any settlement with insured would not release primary carrier from any subsequent bad faith claim—No merit to argument that excess carrier failed to mitigate damages by agreeing to settlement before fully litigating issue of late notice—Excess carrier was not required to expose itself to additional liability by forcing insured to sue it for excess liability solely for purpose of litigating highly doubtful notice defense**

COMMERCE & INDUSTRY INSURANCE COMPANY, Plaintiff, v. ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CA-004784. Division CV-A. March 10, 2023. Waddell A. Wallace, III, Judge. Counsel: Irene Porter and Diana Sun, for Plaintiff. James Kaplan, Daniel M. Hirschman, Alan S. Wachs, Steven E. Brust, and Nicole L. Kalkines, for Defendant.

## ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSES

THIS CASE is before the Court on the Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses, filed March 15, 2022, on behalf of Plaintiff, Commerce & Industry Insurance Company ("Commerce"). The Court reviewed the motion and other memoranda and authorities submitted in support of and opposition to the motion, and concludes as follows:

In its Amended Answer and Affirmative Defenses, Defendant, Endurance American Specialty Insurance Company, raises the following:

**First Affirmative Defense**

Endurance states that Commerce & Industry failed to mitigate its damages by, among other things, failing to file and pursue post-verdict motions and appeals in the underlying lawsuit.

**Second Affirmative Defense**

Endurance states that Commerce & Industry abandoned any and all claims against Endurance by refusing to file and pursue post-verdict motions and appeals in the underlying lawsuit.

**Third Affirmative Defense**

Endurance states that Commerce & Industry is estopped from prosecuting any and all claims against Endurance by refusing to file and pursue post-verdict motions and appeals in the underlying lawsuit.

**Fourth Affirmative Defense**

Endurance states that Commerce & Industry made the settlement payment under a claim of right with knowledge of the facts such that payment was voluntary and, thus, Commerce & Industry has waived any right to reimbursement under the voluntary payment doctrine.

**Fifth Affirmative Defense**

Endurance states that Commerce & Industry failed to mitigate its damages by, among other things, voluntarily abandoning its coverage position in the underlying lawsuit which would have excused it from the duty to indemnify the insured for the reasons set forth in the coverage position letters that it sent to its insured in the underlying lawsuit.

In response, Commerce argues that it is entitled to summary judgment on the following grounds: (1) Failure to Mitigate is Not a Valid Affirmative Defense in a Bad Faith Case; (2) Endurance Had a Duty to Pursue Post-Verdict Motions on Appeal—Not Commerce & Industry; (3) Commerce & Industry's Excess Payment was Not Voluntary—Endurance's Bad Faith Refusal to Settle Required Commerce & Industry to Pay.

Courts have held that failure to mitigate damages is not an

affirmative defense to a Florida bad faith case. See *MI Windows & Doors, LLC v. Liberty Mut. Fire Ins.* Co. Case Number 8:14-cv-3139-T-23MAP, 2018 WL 2288288 (M.D. Fla. May 18, 2018) (granting summary judgment on the ground that failure to mitigate is not an affirmative defense to a Florida bad faith claim). In a typical bad faith case, proof of damages already exists in the form of an excess verdict or judgment. See *Sowell v. GEICO Cas. Ins. Co.,* Case Number 3:12cv 226-MCR/EMT, 2015 WL 3843803 (N.D. Fla. June 20, 2015). In *Sowell,* the defendant in a third-party bad faith case sought a special instruction that the damages claimed by the plaintiff must be caused by the carrier's bad faith. The plaintiff argued that a special causation instruction is not appropriate in the context of an excess verdict bad faith case. The court agreed that the jury would not have to decide the issue of damages because the excess judgment "will serve as the measure of damages if plaintiff prevails improving bad faith." *Id.* at*3. In so holding, the court relied on *Nationwide Property & Casualty Ins. Co. v. King,* 568 So.2d 990 (Fla. 4th DCA 1990), for the proposition that the law does allow any type of comparative bad faith analysis that would permit the jury to reduce the amount of an excess judgment.

In this action, Endurance cannot rely on any alleged comparative behavior on Commerce's part that would allow the jury to reduce the amount of damages; there is no jury issue related to damages. The sole issue in this case is whether Endurance acted in bad faith by failing to settle the Harris claim within the policy limits when it had an opportunity to do so.

As a rule, a party's failure to seek post-trial or appellate relief does not constitute a failure to mitigate damages. *See e.g., Eastman v. Flor-Ohio, Ltd.,* 744 So. 2d 499, 501-02 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D2148b]; *see also Coble v. Aronson,* 647 So. 2d 968 (Fla. 4th DCA 1994); *Porter v. Ogden, Newell & Welch,* 241 F.3d 1334, 1339-40 (11th Cir. 2001).[1] Though this rule has ordinarily been applied in claims of legal malpractice, this Court finds that the same policy concerns outlined by the Fifth District Court of Appeal in *Eastman* equally apply to the case at hand:

> Before concluding our discussion of the abandonment theory, we comment on the serious policy reasons which militate against liberalizing the abandonment theory beyond the narrow parameters set forth in *Sikes.* Perhaps the least compelling reason is the negative effect such a ruling would have on the workload of the appellate courts. If we were to issue a ruling that appeals are required in all cases in order to preserve the client's right to subsequently pursue a claim for legal malpractice, meritless appeals would be prosecuted by litigants solely for the purpose of preserving their right to later assert a malpractice claim. Of course, such a ruling would also discourage parties from settling pending appeals and would be inconsistent with the party's legal duty to mitigate their damages. *See Zinn v. GJPS Lukas, Inc.,* 695 So.2d 499, 501 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1448a] (holding that where business suffers from act of negligence, the amount of lost profits recoverable will depend, in part, upon whether the plaintiff discharged their duty to mitigate their damages). A more important reason is that such a ruling would require litigants to spend yet more of their resources prosecuting an appeal to judicial conclusion even though they may disagree with the theory of the appeal they would be required to maintain. For example, here the park owner would have been first required to pursue its appeal arguing that the trial court erred in ruling that the law firm had improperly prepared and delivered the rental increase notices. Thereafter, in its legal malpractice case, the park owner would have been required to argue that the law firm was negligent in preparing and delivering the notices.

*Id.* at 504. If an excess carrier is deemed to have waived, abandoned, or failed to mitigate its claims against a primary carrier by failing to pursue post-verdict motions or appellate review, then it must expend additional resources to recoup its original losses. Because Commerce suffered a "redressable harm" when its insured suffered an excess verdict, it was not required to seek post-trial or appellate relief in order to pursue a bad faith claim against Endurance. Absent some showing that Commerce necessarily *would as opposed to should or may* have reduced its damages by pursuing post-trial or appellate relief, Endurance cannot argue that Commerce abandoned its claim or failed to mitigate its damages.[2]

Endurance also argues that Commerce cannot recover because of the voluntary payment defense. "The voluntary payment defense has existed in Florida for over a century. . . 'money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party, at the time of payment, was ignorant or mistook the law as to his liability.' " *Easter v. City of Orlando,* 249 So. 3d 723, 727 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1306a] (quoting *Jefferson Cty. v. Hawkins,* 2 So. 362, 265 (1887)). Here, both parties were contractually obligated to pay damages suffered by their insured. After the excess verdict, Commerce filed a Civil Remedy Notice of Insurer Violation against Endurance. In doing so, Commerce noted that any payments it made *to the insured* would "be made under reservation of rights to seek reimbursement from Endurance." This is not a case where one party voluntarily made payment and then sought recoupment. Further, equitable subrogation requires a party to make full payment before it can bring a cause of action. *See Holmes Reg'l Med. Cen., Inc. v. Allstate Ins. Co.,* 225 So. 3d 780, 786 (Fla. 2017) [42 Fla. L. Weekly S797a]. If an excess carrier's payment to the insured constituted a *de facto* "voluntary payment," then an excess carrier would never be able to pursue a claim against the primary carrier.[3]

Commerce placed Endurance on notice that any settlement with the insured would not release Endurance from any subsequent claim for bad faith; and Endurance never secured a release with Commerce when it paid its portion of the settlement. Had Endurance wanted to preclude Commerce from filing a bad faith claim, it could have done so. Contrary to Endurance's argument, Commerce's participation in the settlement is not inconsistent with its prior notice of an intent to hold Endurance accountable for the excess liability. By agreeing to settle the underlying case, Endurance reduced its own costs of litigation and reduced its own liability by lowering the excess verdict. Strategically, Endurance may have decided it was better to focus on the pending bad faith litigation. Regardless, based upon the undisputed facts, Commerce is not estopped or barred from pursuing the instant action.

Finally, Endurance argues that by agreeing to the settlement before fully litigating with its insured the coverage defense issue of late notice, Commerce further failed to mitigate its damages. "Under the doctrine of equitable subrogation, an excess insurer has the right to maintain a cause of action for damages resulting from the primary insurer's bad faith failure to settle the claim against their common insured." *Auto-Owners Ins. Co. v. American Yachts, Ltd.,* 492 F.Supp.2d 1379, 1383 (S.D. Fla. 2007) [20 Fla. L. Weekly Fed. D984a] (citations omitted). When an excess insurer files a bad faith claim against a primary insurer under the doctrine of equitable subrogation, the excess insurer effectively "stands in the shoes" of the insured. *Id.*

Equitable subrogation is generally appropriate where: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party. See *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638 (Fla. 1999) [24 Fla. L. Weekly S216a]. Application of the Fifth Affirmative Defense assumes that a determination has been made that Endurance acted in bad faith in resolving the claim against insured

within Endurance's policy limits. The coverage defense of late notice would have been problematic for Commerce for several reasons. The absence of prejudice is an avoidance of the defense of late notice. Considering Endurance's position that there was no reasonable expectation of an excess verdict, what action would Commerce have taken if it had been timely notified of the Harris action? Moreover, Endurance, as a primary carrier, had the exclusive right to control the defense of the litigation. Clearly, a strong showing of absence of prejudice could be made in avoidance of the affirmative defense of late notice. Therefore, when Commerce settled the claim asserted under its excess policy, Commerce was exposed to liability under its policy and acted to protect its own interest and not as a volunteer. Commerce was not required to expose itself to additional liability by forcing its insured to sue it for the excess liability solely for the purpose of litigating a highly doubtful coverage defense of late notice. The remaining requirements for equitable subrogation are clearly met and Commerce therefore stands in the shoes of its insured in asserting the bad faith claims against Endurance in this action. Endurance has no defense of failure to mitigate damages that it can assert against the interests of its insured.

Accordingly, it is **ORDERED**:

1. Commerce's Motion for Summary Judgment is **GRANTED**.

2. Summary Judgment is entered in favor of Commerce and against Endurance on the First, Second, Third, Fourth and Fifth Affirmative Defenses asserted in Endurance's Amended Answer.

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[1]An exception to this general rule occurs when a party's harm is the result of *clear* judicial error, not a party's malfeasance. *See Pennsylvania Ins. Guar. Ass'n v. Sikes,* 590 So. 2d 1051, 1053 (Fla. 3d DCA 1991); *Miller v. Finizio & Finizio, P.A.,* 226 So. 3d 979, 983 n.2 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1856a] (failure to pursue appellate relief only bars subsequent action when "redressable harm can only be determined upon completion of the appellate process").

[2]Unlike a claim of legal malpractice, where the attorney is not a party to the underlying action, there is no reason why a primary insurer and an excess insurer would not have an equal interest in pursuing such relief.

[3]This Court is not finding that an excess carrier's payment would never be a voluntary payment, only that payment in this case was not a "voluntary payment."

* * *

**Insurance—Homeowners—Supplemental claim—Notice—Sufficiency—Correspondence from insureds that stated that valuation of damages paid three years previously was not accurate, but which failed to provide amount or estimate or otherwise specify the benefit to which insureds felt they were entitled, does not constitute a supplemental claim—Insurer is entitled to summary judgment where supplemental claim was not filed within three years of loss**

TERESITA GIL and JOSE GIL, Plaintiffs, v. UNITED PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 5th Judicial Circuit in and for Lake County. Case No. 2021-CA-934. February 27, 2023. Michael Takac, Judge. Counsel: Kenneth Duboff, Duboff Law Firm, for Plaintiff. William M. Mitchell, Sr., Conroy Simberg, for Defendant.

## ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

This matter has come before the Court for consideration after hearing on February 2, 2022, on the Defendant's Motion for Final Summary Judgment. The Court having considered the pleadings, testimony, evidence and supporting cases and memorandum of law, and otherwise being fully advised in the matter finds as follows:

**Facts**

1. Defendant UPC issued a homeowners insurance policy to Plaintiffs Teserita and Jose Gill, effective June 9, 2017 through June 9, 2018.

2. Plaintiffs suffered a loss on or about September 11, 2017 in connection with Hurricane Irma, which they reported to Defendant on September 13, 2017.

3. On October 24, 2017 Defendant accepted full coverage for the loss, and did not deny any part of Plaintiffs' Claim

4. On September 8, 2020, Plaintiffs sent correspondence to Defendant, stating that the valuation of damages, including both the scope and cost of repairs, were not accurate and demanding/requesting a response within 14 days.

5. Defendants responded on September 16, 2020 by acknowledging receipt of Defendant's correspondence, but stating it did not provide sufficient information to act as a notice of supplemental claim, because it did not include any information that would alter the coverage decision and had not identified any dispute with the coverage decision.

6. Plaintiffs filed suit on May 25, 2021.

7. Defendant subsequently filed this Motion for Summary Judgment, arguing that Plaintiffs' claim is barred because it failed to provide timely notice.

**Analysis**

8. A movant is entitled to summary judgment if the motion shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Florida law now interprets such motions in accordance with the federal standard. Fla. R. Civ. P. 1.510.

9. Section 627.70132, Fla. Stat., requires a supplemental claim be filed within three years of a loss.

10. The requirement to provide notice of supplemental claim within three years was reiterated by the Special Provisions—Florida amendment to Section I, Subsection C. Paragraph 1 of the policy.

11. Defendant argues that Plaintiffs failed to provide a notice of supplemental claim within the three-year time limit. Plaintiffs argue that the September 8, 2020 correspondence was a notice of supplemental claim.

12. Thus, the motion turns on whether the September 8, 2020 was sufficient, under the terms of the insurance policy and Section 627.70132 Fla. Stat., to act as a supplemental claim.

12. Thus, the motion turns on whether the September 8, 2020 was sufficient, under the terms of the insurance policy and Section 627.70132 Fla. Stat., to act as a supplemental claim.

13. Plaintiffs point to *American Fire and Casualty Company v. Collura,* (Fla. 2d DCA 1964) for the proposition that the purpose of notice provisions is to enable the insurance company to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it."

14. Plaintiffs argue that by informing Defendant that the valuation, scope and estimated cost were not accurate and that they disagree with the initial claim decision, they have fulfilled that purpose.

15. However, while *Collura* establishes the purpose of a notice provision, it does not define (or establish) what information is actually sufficient to fulfill that purpose.

16. By contrast, *Goldberg v. Universal Property and Cas. Ins. Company,* 302 So. 3d 919 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2118b], cited by the Plaintiff, held that a sufficient supplemental claim is one "setting forth those damages. . .sought in excess of what the insurance company had already paid." It went on to state that a competing estimate would fall within the definition of a supplemental claim, and later that "the insurer should not have been deemed to have breeched the contract where it accepted coverage and paid the only estimate it ever received of the actual cash value of the loss." The DCA noted elsewhere that the plaintiff had never asked for a specific amount, never provided an inventory or an estimate and that paying any additional amount would have required defendant to guess the amount claimed by the plaintiff.

17. Thus, it is clear from *Goldberg* that a valid supplemental claim must, at minimum, provide an amount, estimate, or otherwise specify

the benefit to which a plaintiff believes they are entitled. The September 8, 2020 correspondence fails to do so, and therefore does not constitute a supplemental claim within the meaning of Section 627.70132 Fla. Stat. or the policy. Accordingly,

In view of the foregoing findings, the pertinent portions of the record, and applicable law, it is **ORDERED** and **ADJUDGED** as follows:

A. Defendant's Motion for Final Summary Judgment is **GRANTED**

B. Final judgment is entered for Defendant United Property and Casualty Insurance Company against Plaintiffs Terisita Gil and Jose Gil. Plaintiff shall take nothing by this action and shall go hence without day.

C. The Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees.

* * *

**Insurance—Homeowners—Windstorm loss—Notice of loss—Timeliness—Prejudice to insurer—Presumption of prejudice arose where claim for hurricane damage to roof was not reported for two years and eight months—Affidavit submitted by insured in opposition to insurer's motion for summary judgment was insufficient to rebut presumption of prejudice where affiant examined roof years after date of loss and after undocumented repairs to roof**

OFELIA CASTILLO, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-021710-CA-01. Section CA32. February 21, 2023. Ariana Fajardo Orshan, Judge.

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

THIS MATTER having come before the Court for hearing on February 1, 2023 on Defendant's, CITIZENS PROPERTY INSURANCE CORPORATION, Motion for Summary Judgment, the Court having reviewed the Defendant's motion, read relevant legal authority, considered argument from counsel of each party, and having been sufficiently advised in the premises, it is hereby:

ORDERED AND ADJDUGED that Defendant's Motion for Summary Judgment is GRANTED. Plaintiff shall take nothing by this action, and Defendant shall go henceforth without day.

In support of this Order, the Court provides the following:

**FACTS**

According to the Complaint, on or about September 10, 2017, Plaintiff Ofelia Castillo sustained windstorm damage to roof and interior to her property as a result of Hurricane Irma. Per the affidavit of Defendant's Corporate Representative, this claim was reported on June 2, 2020. Defendant inspected Plaintiff's property on August 7, 2020 which yielded no determination as to the cause of loss due to the considerable passage of time from date of loss.

On August 20, 2020, Defendant issued its coverage determination letter denying coverage due to insufficient evidence to substantiate the loss to Hurricane Irma and due to Defendant's prejudiced ability to properly evaluate the claim as a result of Plaintiff's failure to report in a timely manner. Per the Plaintiff's affidavit, Ms. Castillo discovered a small stain in the living and dining room ceiling one month after the date of loss and that several months later she observed bubbling in the interior of her property. No photographs of the damage were taken. During the deposition of Plaintiff on March 10, 2022, she testified she repaired her roof in 2020 and could not recall the exact date of repair, the name of the repairman, details of the repair and again, did not have photographs of the repairs. Per the Affidavit of Plaintiff's expert witness Engineer Grant Renne, he opined that the documented interior moisture damage was caused by multiple upgradient moisture caused by wind borne debris impacts and uplift pressures (storm induced openings) associated with the reported date of loss and that damages of the property and roof were causally related to Hurricane Irma. The affidavit did not address or acknowledge the repairs made by the plaintiff in 2020 prior to his inspection. Additionally, the roof was subject to a 2005 insurance claim which was not addressed in the affidavit and lastly, as of the date of this order, the roof has been replaced.

**LEGAL AUTHORITY**

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia Cty. v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. Summary judgment may be granted "only if, taking the evidence and inferences in the light most favorable to the non-moving party, and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law." *Moradiellos v. Gerelco Traffic Controls, Inc.*, 176 So. 3d 329, 334-35 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2047b].

In this case, the Court is further bound by *Navarro v. Citizens Prop. Ins. Corp.,* No. 3D22-0032, 2023 Fla. App. LEXIS 267 (3d DCA Jan. 18, 2023) [48 Fla. L. Weekly D152b]., and *Perez v. Citizens Prop. Ins. Corp.*, 343 So. 3d 140 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1451a]. Like the present case, these cases involved first-party breaches of homeowner's insurance contracts for property damages. They held, *inter alia*, that conclusory expert affidavits based on inadmissible evidence are insufficient to defeat a motion for summary judgment. *See id.*

*In Navarro, the Third District Court of Appeal held that "[i]*n determining whether an insured's untimely reporting of a loss is sufficient to support a denial of recovery under a policy, Florida courts have applied a two-step process." The first step in the analysis is to determine whether . . . the notice was timely given." *LoBello v. State Farm Fla. Ins. Co.*, 152 So. 3d 595, 599 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c]. Second, "[i]f the notice was untimely, then prejudice to the insurer is presumed." *Id.* That presumption may nevertheless be rebutted if the insured demonstrates the insurer had not been prejudiced by the untimely notice. *Bankers Ins. Co. v. Macias,* 475 So. 2d 1216, 1218 (Fla. 1985)." *Navarro v. Citizens Prop. Ins. Corp.*, No. 3D22-0032, 2023 Fla. App. LEXIS 267 (3d DCA Jan. 18, 2023) [48 Fla. L. Weekly D152b].

*In Perez, the Third District Court of Appeal establishes "[w]here an insured provides late notice of their loss to the insurer, prejudice to the insurer will be presumed, and the insured must rebut said prejudice. See Stark v. State Farm Fla. Ins. Co.*, 95 So. 3d 285, 287-88 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1446a]; *Kramer v. State Farm Fla. Ins. Co.*, 95 So. 3d 303 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1699a] *(affirming trial court's grant of summary judgment where the insured's expert concluded that foot traffic and a storm event were equally likely to have caused the damage to the property)*." *Perez v. Citizens Prop. Ins. Corp.*, 343 So. 3d 140 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1451a]. *Pursuant to Florida Rule of Civil Procedure 1.510(e) "affidavits must be made on personal knowledge, [and] must set forth such facts as would be admissible in evidence." Per the Third District Court of Appeal, "[t]he purpose of this requirement is 'to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief.'" Gonzalez v. Citizens Prop. Ins. Corp.*, 273 So. 3d 1031, 1036 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D686a] *(quoting Alvarez v. Fla. Ins. Guar. Ass'n, Inc.,* 661 So. 2d 1230, 1232 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2214a]). *"It is well established that affidavits, such as those*

*presented by plaintiff, which are based entirely upon speculation, surmise and conjecture, are inadmissible at trial and legally insufficient to create a disputed issue of fact in opposition to a motion for summary judgment." Morgan v. Cont'l Cas. Co.*, 382 So. 2d 351, 353 (Fla. 3d DCA 1980) *(citing Food Fair Stores, Inc. v. Trusell*, 131 So. 2d 730 (Fla. 1961)). *"[N]o weight may be accorded [to] an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." Div. of Admin. v. Samter,* 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981). *" Id.*

**ANALYSIS**

*In Navarro, the Third District Court of Appeal began their analysis by evaluating whether prompt notice occurred. Navarro v. Citizens Prop. Ins. Corp.*, No. 3D22-0032, 2023 Fla. App. LEXIS 267 (3d DCA Jan. 18, 2023) [48 Fla. L. Weekly D152b]. Notably, the Plaintiff in *Navarro* had testified that "in the days, weeks, and months after Hurricane Irma made landfall, he noticed leaks throughout his residence." *Id.* This is similar to the case at hand wherein Planitiff's affidavit demonstrates knowledge of damage as soon as one month after the date of loss. In *Navarro*, the Plaintiff "waited two years and seven months to report the claim." *Id.* Per the affidavit of Defendant's Corporate Representative, notice of the claim was given on June 2, 2020 which amounts to over 2 years and 8 months from the date of loss. The Third District Court of Appeal ultimately found that "[u]nder these circumstances, it is scarcely debatable Hurricane Irma constituted "an occurrence that should lead a reasonable and prudent man to believe that a claim for damages would arise." *Id*. Thus, Navarro failed to act "with reasonable dispatch and within a reasonable time." *Laquer,* 167 So. 3d at 474 (quoting *Yacht Club,* 599 F.App'x at 879)." Using the rationale in *Navarro*, this Court finds that prompt notice was not provided to Defendant in this case as a matter of law creating a presumption of prejudice.

Next, the court must address if the affidavit filed by Plaintiff overcomes the presumption of prejudice. In *Navarro*, the Court then analyzed whether Plaintiff "adequately rebutted the resulting presumption of prejudice." *Id.* In that case, the Plaintiff testified that he effectuated repairs on his property after the date of loss but did not retain any documentation relating to the repairs. *Id.* In the case at hand, Plaintiff testified that she had repaired her roof in 2020 but did not provide any elucidating information to the Defendant during deposition nor had she provided documentation regarding this repair.

As to the evidentiary weight of an expert's affidavit in rebutting prejudice, *Perez* analyzes an affidavit by engineer Grant Renne, who similarly provided an affidavit in the case at hand, and ultimately found it was "wholly conclusory and not adequately supported." *Perez v. Citizens Prop. Ins. Corp.*, 343 So. 3d 140 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1451a]. *Similarly, this Court finds Grant Renne's affidavit to be conclusory and bereft of factual support in its assertions that hurricane winds caused damage to Plaintiff's property.* In fact, the affidavit in this case was issued before the *Perez* decision was released. It was not until after the *Perez* decision that Mr. Renne revised his affidavit. The affidavit in this case was similar to the affidavit in the *Perez* case which has already been rejected by the courts.

*The Third District Court of Appeal goes onto state that* "Mr. Renne's report and conclusion, coupled with Ms. Perez's statement that some of the water damage began in the days following the Hurricane, may be sufficient to show that some damage may have been caused by Hurricane Irma. However, as in *Hope,* the fact that Mr. Renne's opinion is based on an investigation conducted nearly three years after the claimed date of loss renders it impossible for Citizens to determine which, if any, of the current damage to the roof came as a result of the Hurricane, and which, if any, of the current damage was caused by some other event. This is not a case like *Vega v. Safepoint Ins. Co.*, 326 So. 3d 176 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1877b], in which we determined that an expert report conducted two years after the claimed date of loss was sufficient to create an issue of fact as to whether the damage to the roof was caused by a windstorm. In *Vega,* the insured's expert relied on a report and photographs taken during Safepoint's initial investigation of the claim. This material—compiled immediately after the claimed loss and before any repairs had been conducted—was sufficient to support the expert's conclusion that the windstorm was the probable cause of the damages to Vega's roof." In the case at hand, Grant Renne's affidavit similarly relies on the review of materials created years after the date of loss. As such, this Court finds Grant Renne's affidavit insufficient to rebut the presumption of prejudice to Defendant.

* * *

**Abortions—Injunction—Motion for temporary injunction filed by clerical members of various religious congregations seeking to enjoin enforcement of Reducing Fetal and Infant Mortality Act on grounds that Act criminalizes right of clerics to provide counseling in accordance with their religious beliefs and doctrines in support of person's freedom to choose abortion, family planning, and reproductive health and, in so doing, infringes on clerics' rights of free speech and free exercise of religion, in violation of Establishment Clause and Florida Religious Freedom Restoration Act—Motion denied—Standing—Concrete injury—Plaintiffs cannot demonstrate credible threat of prosecution constituting a concrete palpable injury sufficient to confer standing where, although Act changed the period for prohibited abortions, challenged laws which plaintiffs contend place them at risk of prosecution have existed for decades without any member of clergy every being prosecuted or threatened with prosecution for abortion counseling—Court rejects plaintiffs' argument that prosecution of cleric for counseling congregant on abortion decision would be viable under statute that criminalizes "actively participating in termination of pregnancy"**

LAURINDA HAFNER, a Reverend of The United Church of Christ in Miami-Dade County, Florida, Plaintiff, v. THE STATE OF FLORIDA, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-14370-CA-01. Complex Business Litigation. March 3, 2023. Michael A. Hanzman, Judge. Counsel: Palak V. Patel, Jayaram Law, Inc., Chicago, IL; Danielle Moriber, Spiro Harrison & Nelson, Miami; Marci A. Hamilton, University of Pennsylvania, Philadelphia, PA; and Stevan J. Pardo, Pardo Jackson Gainsburg, PL, Miami, for Plaintiffs. Arthur I. Jacobs, Richard J. Scholz, and Douglas A. Wyler, Jacobs Scholz & Wyler, LLC, Fernandina Beach, for Fernandez Rundle, Defendant. Christopher Sutter, Assistant Attorney General, Ft. Lauderdale; and William Stafford III, Office of Attorney General, Tallahassee, for Intervenor Attorney General of Florida.

**ORDER DENYING PLAINTIFFS' MOTIONS FOR TEMPORARY INJUNCTION**

Presently before the Court are the Motions for Temporary Injunction ("Motions") filed by Plaintiffs Laurinda Hafner, a Reverend of the United Church of Christ in Miami-Dade County, (D.E. 53); Reverend Tom Capo, a Minister of the Unitarian Universalist Congregation in Miami-Dade County, (D.E. 56); Rabbis Gayle Pomerantz, Robyn Fisher and Jason Rosenberg (D.E. 50); Lama Karma Chotso, a Lama of Buddhism in Miami-Dade County (D.E. 55); and John/Jane Doe, a Priest of the Episcopal Church in Miami-Dade County (D.E. 53) (collectively "Plaintiffs").[1] Having carefully reviewed the Parties' submissions, and after entertaining argument, the Court denies the Motions for the reasons stated on the record and as further elaborated herein.

**I. INTRODUCTION/ THE MOTIONS**

Plaintiffs, as clerical members of their respective faiths, seek an order temporarily enjoining "Defendants, their agents, servants, employees, attorneys, and all persons in active concert and participa-

tion with Defendants, from enforcing Sections 3-4 of House Bill 5, Reducing Fetal and Infant Mortality Act (the "Act" or "HB 5")," amending Florida Statute Sections 390.0111(1)(a)-(b) and 390.011(6). Mots., p. 1. Plaintiffs argue that HB 5 criminalizes their right to provide counseling in accordance to their religious beliefs and doctrines, in support of a person's freedom to choose, as it relates to abortion, family planning, and reproductive health. The Motions assert that "the Act contains no exceptions for the psychological health of the mother or family, non-fatal fetal abnormalities, or victims of incest, rape, or trafficking, which are all circumstances in which Plaintiff[s] would, amongst other circumstances, support and/or counsel in favor of a girl or woman's decision to have an abortion before or after 15 weeks." *Id.* at 6.

Plaintiffs insist that because HB 5 places them at "immediate and ongoing risk of prosecution, as someone who aids or abets the crime HB 5 codifies," Mots., p. 2, it: (1) violates their right to freedom of religious speech under the First Amendment of the United States Constitution and Article I, § 4 of the Florida Constitution; (2) infringes on their right to free exercise of religion (targeting "clergy whose faith is burdened by the Act's purpose to serve 'God's will' to elevate the fetus at the expense of the pregnant woman or girl"); (3) violates the Establishment Clause (by the "imposition of a singular religious belief on everyone in the State"); and (4) "fails to adhere to the requirements of the Florida Religious Freedom Restoration Act ("FRFRA"), which requires the State to accommodate religious believers whose religious beliefs and conduct are substantially burdened by a law in the state." *Id.,* p. 3. Plaintiffs then claim that they are entitled to an injunction prohibiting enforcement of the Act because: (a) they have a substantial "likelihood of success on all four of their theories: free speech, free exercise of religion, separation of church and state, and FRFRA" *Id.,* at p. 8; (b) they will suffer irreparable harm and lack remedy at law since they will be "subjected to severe criminal and disciplinary penalties for encouraging, advising, and/or counseling abortions beyond HB 5's severe restrictions"; and (c) will serve the public interest by protecting federal and state constitutional rights.

On February 10, 2023, Intervenor-Defendant, Ashley Moody, the Attorney General of Florida (the "Attorney General" or "Defendant"), filed her "Omnibus Response in Opposition to Plaintiff's Motion for Temporary Injunction." (D.E. 176).[2] Through that Response the Attorney General correctly points out that HB 5's amendment to Section 390.0111 of the Florida Statutes is limited to changing the temporal reach of proscribed pregnancy terminations - previously prohibiting abortions in the third trimester of pregnancy to now, subject to the same existing narrow exceptions, prohibiting abortions where the fetus has a gestational age of more than 15 weeks. HB 5 did not amend Section 390.0111(10), which has always imposed criminal penalties for any person "who performs, or actively participates in, a termination of pregnancy in violation of this section." *Id.* Similarly, Florida Statute Section 777.011, which exposes to prosecution anyone who "aids, abets, counsels, hires, or otherwise procures" a criminal offense, has been on the "books" since 1957, and is not affected at all by HB 5. Put simply, the laws that Plaintiffs say place them at risk of prosecution have been extant for decades, yet no member of the clergy has ever been prosecuted (or threatened with prosecution) for counseling a congregant on the decision of whether to have an abortion—regardless of the stage of the pregnancy.

For this (and other) reasons, the Attorney General says that Plaintiffs lack standing to challenge HB 5 because absent establishing a "credible threat of prosecution," *Pittman v. Cole,* 267 F.3d 1269, 1283-1284 (11th Cir. 2001) [14 Fla. L. Weekly Fed. C1355a], they have not, and cannot, demonstrate "any concrete, palpable injury sufficient to confer standing." *DeSantis v. Fla. Ed. Ass'n,* 306 So. 3d 1202, 1213 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2314a]. The Court agrees and denies the Motion on this narrow ground.[3] *See, e.g., State ex rel. Frazier v. Coleman,* 156 Fla. 413 (Fla. 1945) ("it being well settled that the court will not pass upon the constitutionality of a statute, even when directly challenged on constitutional grounds, if the cause in which the challenge arises can be fully determined on other meritorious grounds"); *NW Austin Municipal Utility Dist. No. One v. Holder,* 129 S. Ct. 2504, 2513 (2009) [21 Fla. L. Weekly Fed. S965a] ("it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *In re Forfeiture of One Cessna 337H Aircraft,* 475 So. 2d 1269, 1270-71 (Fla. 4th DCA 1985) ("[i]t is a fundamental maxim of judicial restraint that 'courts should not decide constitutional issues unnecessarily . . . , [i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable' ").

**II. GOVERNING LAW/ANALYSIS**

As an initial matter, it is well settled the issuance of a temporary injunction, particularly restraining enforcement of a duly enacted law, is an extraordinary remedy which should be granted sparingly, and only when a court is satisfied that the movant has, through competent evidence, satisfied the burden of proving: (1) a substantial likelihood of success on the merits; (2) the unavailability of an adequate remedy at law; (3) irreparable harm absent entry of an injunction; and (4) that the injunction would serve the public interest. *See, e.g., Florida Dep't of Health v. Florigrown, LLC,* 317 So. 3d 1101 (Fla. 2021) [46 Fla. L. Weekly S146a]; *City of Miami Beach v. Clevelander Ocean, L.P.,* 338 So. 3d 16 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D552a]. And a plaintiff that has "simply not demonstrated any concrete, palpable injury sufficient to confer standing" cannot, *a fortiori,* satisfy the burden of showing that "they are likely to succeed on the merits of their claims." *DeSantis,* 306 So. 3d at 1214.

"For a court of law operating as one of the three branches of government under the doctrine of the separation of powers, standing is a threshold issue which must be resolved before reaching the merits of a case." *Solares v. City of Miami,* 166 So. 3d 887, 888 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]. Generally speaking, to establish standing a plaintiff must have a "legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." *Equity Res., Inc. v. Cnty. of Leon,* 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994). To satisfy this exacting standard, a plaintiff must demonstrate: (1) an injury-in-fact that is concrete, distinct and palpable, and actual or imminent; (2) a causal connection between the injury and the conduct complained of and (3) a substantial likelihood that the requested relief will remedy the alleged injury-in-fact. *See, e.g., Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000); *Whitmore v. Arkansas,* 495 U.S. 149 (1990); *Southam v. Red Wing Shoe Co., Inc.,* 343 So. 3d 106 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1483a]; *Cmty. Power Network Corp. v. JEA,* 327 So. 3d 412 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2002a].

In the context of a challenge to legislation, satisfying this first element of standing requires that a plaintiff "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979). As the Attorney General correctly points out, this does not mean that a plaintiff must wait to be prosecuted before challenging a criminal law. "If the injury is certainly impending, that is enough." *Commonwealth of Pennsylvania v. State of W. Virginia,* 262 U.S. 553, 593 (1923). But a plaintiff must demonstrate an injury that is more than abstract, conjectural or speculative.

In cases like that at bar, involving a claim of "self-censorship,"

establishing injury in fact requires a showing that the plaintiff intends "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." *Babbitt,* 442 U.S. at 298. Establishing a "credible threat of prosecution" can be done by showing either: (1) an actual threat of prosecution; (2) that prosecution is likely; or (3) an objectively reasonable credible threat of prosecution. *Pittman v. Cole,* 267 F.3d 1269 (11th Cir. 2001) [14 Fla. L. Weekly Fed. C1355a]; *Am. Civil Liberties Union v. The Fla. Bar,* 999 F.2d 1486 (11th Cir. 1993); *Wilson v. State Bar of Ga.,* 132 F.3d 1422 (11th Cir. 1998). As the Tenth Circuit succinctly put it: "[w]hen a plaintiff [such as this one] challenges the validity of a criminal statute under which [she or he] has not been prosecuted, [she or he] must show a 'real and immediate threat' of [her or his] future prosecution under that statute to satisfy the injury in fact requirement." *D.L.S. v. Utah,* 374 F.3d 971, 974 (10th Cir. 2004).

Turning to the statutes relevant here, Section 390.0111(10)(a), as amended by HB 5, provides that, with certain limited exceptions, any person who "willfully performs" or "actively participates" in a termination of pregnancy after a fetus' gestational age is more than 15 weeks "commits a felony of the third degree." § 390.0111(10)(a), Fla. Stat. Plaintiffs, who are not licensed physicians, obviously have not, and cannot, allege that they intend to "perform" an abortion that would be proscribed by this Statute. They therefore must, and do, claim that the conduct they intend to participate in—counseling their congregants in order to "provide support . . . in making life decisions within the context of the . . . overreaching beliefs in religious freedom and reverence for human life," Verified Comp., ¶ 3, could constitute "actively participat[ing]" in an illegal termination of pregnancy. § 390.0111(10)(a), Fla. Stat.[4] Plaintiffs also claim that the conduct they intend to engage in could expose them to criminal prosecution under Florida Statute Section 777.011, as a "principal in the first degree," because they could be deemed to have "counseled" another congregant to commit a criminal offense "against the state." § 777.011, Fla. Stat. Plaintiffs therefore say that they have an objectively reasonable fear of prosecution for engaging in expressive activity. The Court disagrees.

First, as the Attorney General points out, Section 390.0111 has criminalized active participation in an illegal abortion since at least 1997. § 390.0111(1), Fla. Stat. (1997). Section 777.011—which permits the prosecution of persons that are "principal(s) in the first degree"—has been in the books for decades. And Section 390.0111 has, since 1997, had the same exceptions to the proscribed termination of pregnancy. Yet no member of the clergy has ever been prosecuted (or as far as this record goes even threatened with prosecution) for counseling a congregant to obtain an abortion. This anecdotal absence of evidence strongly suggests that Plaintiffs' fear of prosecution is not objectively reasonable. *Younger v. Harris,* 401 U.S. 37, 42 (1971) ("persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs"); *Wilson,* 132 F.3d at 1428 ("[a] party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable"). *Compare, e.g., Steffel v. Thompson,* 415 U.S. 452 (1974) (found a "credible threat" of prosecution existed because the plaintiff was actually threatened with arrest on two separate occasions for violating law, and because his companion was actually arrested under the same law); *Solomon v. City of Gainesville,* 763 F.2d 1212 (11th Cir. 1985) (finding a "credible threat of prosecution" because city officials sent the claimant letters notifying him he was in violation of the ordinance at issue).

Second, even ignoring the fact that no clergy member has ever been prosecuted for "counseling" a congregant on the issue of whether to abort a pregnancy, the Court, as a matter of statutory interpretation, rejects Plaintiffs' argument that such a theoretical prosecution would be viable.

The "plain meaning of the statute is always the starting point in statutory interpretation." *Alachua Cnty. v. Watson,* 333 So. 3d 162, 169 (Fla. 2022) [47 Fla. L. Weekly S15a], citing *GTC, Inc. v. Edgar,* 967 So. 2d 781 (Fla. 2007) [32 Fla. L. Weekly S546a]. And under the "supremacy-of-text principle"—which our Supreme Court "adheres to," *Boyle v. Samotin,* 337 So. 3d 313, 317 (Fla. 2022) [47 Fla. L. Weekly S111a], words of a governing text are of "paramount concern, and what they convey, in their context, is what the text means." *Ham v. Portfolio Recovery Associates, LLC,* 308 So. 3d 942, 946 (Fla. 2020) [46 Fla. L. Weekly S9a] (quoting Antonin Scalia and Bryan A. Garner, *Reading Law*: *The Interpretation of Legal Texts* 56 (2012)).

Section 390.0111(10)(a) exposes any person who "actively participates" in an illegal abortion to criminal prosecution. The Statute does not define what constitutes active participation and, for that reason, the phrase must be given its "natural and ordinary signification and import." *Lab. Corp. of Am. v. Davis,* 339 So. 3d 318, 323 (Fla. 2022) [47 Fla. L. Weekly S134a] (quoting James Kent, *Commentaries on American Law* 432 (1826), *quoted in* Scalia & Garner, *Reading Law* at 69 n.1). *See also, Metro. Cas. Ins. Co. v. Tepper,* 2 So. 3d 209, 214 (Fla. 2009) [34 Fla. L. Weekly S111a] (when considering statutory terms that are not defined, "this Court looks first to the terms' ordinary definitions . . . definitions [that] may be derived from dictionaries").

While the Parties have not extensively briefed the question, it does not require an authoritative disquisition, a string citation of precedent, or a "study of an acute and powerful intellect," *Lynch v. Alworth-Stephens Co.,* 267 U.S. 364, 370 (1925), to discern that a member of the clergy, who does no more than offer counsel and support to a congregant on the decision of whether to abort a pregnancy, is not an "active participant" in an abortion that their congregant may decide to have after thoughtful deliberation. Actively participating in a termination of pregnancy must involve more—indeed far more—than religious counseling standing alone, and Plaintiffs do not claim that they intend to do "more" than counsel those who seek spiritual guidance regarding this often difficult decision. For the reasons cogently articulated by the First District in *Williams v. State,* 314 So. 3d 775 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D727d], the conduct Plaintiffs intend to participate in here also falls far short of exposing them to criminal prosecution as "principal(s)" under §777.011, Fla. Stat. *See also, Staten v. State,* 519 So. 2d 622, 624 (Fla. 1988) ("to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime").

In sum, and as the Attorney General conceded during oral argument, these statutory provisions cannot be reasonably construed to criminalize mere religious counseling.[5]

**III. CONCLUSION**

The Court fully appreciates that "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views," *Dobbs v. Jackson Women's Health Org.,* 213 L. Ed. 2d 545 (2022), and understands that many on both sides of this debate hold deep and unwavering convictions; unable to even acknowledge (let alone appreciate) any contrary point of view. There is perhaps no more divisive social issue than the question of abortion rights. The Court also has no doubt that these Plaintiffs strongly and sincerely believe that the Act unconstitutionally infringes upon their fundamental rights. The constitutionality of HB 5 will soon be adjudicated by our Supreme Court, via a case brought by other plaintiffs. But the clergy who bring these consolidated cases do not have a reasonably objective fear of criminal prosecution and, for that reason, lack standing to

challenge the Act.

Accordingly, it is hereby **ORDERED**:

Plaintiffs' Motions for Temporary Injunction are **DENIED**.

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[1]This action has been consolidated with the following four cases that advance the same claims asserted here: (1) *Rev. Tom Capo v. State of Florida, et al.,* Case No. 2022-014374-CA-01 (Fla. 11th Cir. Ct.); (2) *Pomerantz v. State of Florida, et al.,* Case No. 2022-14373-CA-01 (Fla. 11th Cir. Ct.); (3) *Lama Karma Chotso v. State of Florida, et al.,* Case No. 2022-014371-CA-01 (Fla. 11th Cir. Ct.); and (4) *Jane/John Doe. v. State of Florida, et al.,* Case No. 2022-014372-CA-01 (Fla. 11th Cir. Ct.). *See* Plaintiff's Motion to Consolidate (D.E. 137), and Order on Case Management Conference (D.E. 150).

[2]Hefner's Complaint originally included as Defendants the state attorney of each Judicial Circuit of Florida. (D.E. 2). On December 8, 2022, Plaintiff voluntarily dismissed without prejudice all claims asserted against the State of Florida, Florida's Attorney General, all of the state attorneys from the different Judicial Circuits of Florida, with the exception of the State Attorney for the Eleventh Judicial Circuit in and for Miami-Dade County. (D.E. 140). Florida's Attorney General was then granted leave to intervene. (D.E. 150). The consolidated cases contain identical filings.

[3]Because the Court finds that Plaintiffs lack standing it need not, and does not, address whether they have demonstrated a substantial likelihood of success on the merits of any substantive claim. *See PDK Labs. Inc. v. U.S. D.E.A.,* 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurs) ("[i]f it is not necessary to decide more, it is necessary not to decide more . . ."). The Court notes, however, that a duly enacted statute arrives with a strong presumption of constitutionality, and that a party mounting a constitutional challenge has the burden of establishing invalidity beyond a reasonable doubt. *State v. Lick,* 390 So. 2d 52 (Fla. 1980).

[4]*See also,* Hafner Verified Comp. ¶ 13 ("Plaintiff intends to engage in counseling regarding abortion beyond the narrow limits of HB 5 and, therefore, risks incarceration and financial penalties").

[5]To support their claim that HB 5 places them in harms way, Plaintiffs point out that Governor DeSantis has made clear that he "expects the law to be enforced." Reply Brief, p. 5. The fact that the Governor expects a law to be enforced hardly demonstrates that these putative Plaintiffs face a credible threat of prosecution.

* * *

**Insurance—Personal injury protection—Coverage—Transportation expenses—Complaint seeking declaration that insurer was placed on actual or constructive notice of claim for transportation expenses by claim for medical expenses and had duty to investigate obligation for transportation expenses irrespective of fact that insured did not submit claim for those expenses is dismissed—Any request for declaration that policy or PIP statute includes coverage for reasonable transportation expenses is moot where issue has been resolved by binding precedent—In seeking declaration that PIP statute or Florida Unfair Insurance Trade Practices Act gives rise to duty for insurer to investigate or pay travel expenses absent a reimbursement request by insured, insured is improperly attempting to maintain prohibited private action for violation of those statutes**

ERIC RIVERA CRUZ, Plaintiff, v. SECURITY NATIONAL INSURANCE COMPANY, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE20-000612 (07). February 24, 2023. Jack Tuter, Judge. Counsel: Lawrence M. Kopelman, Lawrence M. Kopelman P.A., Fort Lauderdale; Howard S. Ehrlich, The Law Offices of Howard S. Ehrlich, P.A., Coral Springs; John J. Shahady, Shahady & Wurtenberger, P.A., Fort Lauderdale; and Stephen G. Grygiel, Grygiel Law, LLC, Baltimore, MD (pro hac vice), for Plaintiff. Marcy Levine Aldrich, Bryan T. West and Scott E. Allbright, Jr., Akerman LLP, Miami, for Defendant.

## FINAL ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

On December 13, 2022, the Court conducted a hearing on Defendant's Motion to Dismiss the Second Amended Complaint (the "Motion"). The Court, having reviewed the Motion and response, having considered the record and applicable law, having heard argument of counsel, and being otherwise duly advised in the premises, hereby rules as follows:

Plaintiff alleges that, while insured under an auto insurance policy issued by Defendant, he was injured in an auto accident in 2018. *See* Second Am. Compl. ("SAC") ¶¶ 4, 6, 12. Plaintiff alleges that he visited medical providers for treatment; traveling about 48 miles for these visits. *Id.* ¶ 13. Plaintiff claims that Defendant failed to inform him that he was entitled to reimbursement for his mileage under the Florida No-Fault ("PIP") benefits portion of the policy; and that Defendant failed to pay such mileage expenses. *Id.* ¶¶ 7-9, 15, 26. Plaintiff claims Defendant should have processed and paid reimbursement for his mileage without his making a reimbursement request because it "knew the locations of all medical providers [sic] offices and the residence address of the insured." *Id.* ¶ 26(b).

Rather than bringing a breach of contract claim for PIP benefits under his policy, Plaintiff brings a single claim for declaratory relief, seeking these declarations (SAC ¶ 27):

> a. When the Defendant was presented with a claim for medical expenses in connection with a motor vehicle accident under a policy for No-Fault benefits Defendant was placed on actual and/or constructive notice of a claim for transportation costs.
>
> b. After receiving a claim for these medical expenses Defendant owed a duty to its insureds to have standards adopted and ready for implementation to properly investigate the concurrent obligation towards transportation costs.
>
> c. After receiving a claim for medical expenses Defendant owed a duty to its insureds to promptly acknowledge and act upon the transportation reimbursement portion of the claim.
>
> d. After receiving a claim for medical expenses Defendant owed a duty to its insureds to promptly notify them of any additional information necessary for the processing of a claim for transportation costs.
>
> e. That Defendant, after being placed on actual and/or constructive notice of its insureds claim for transportation costs failed to undertake any of the actions specified in b, c, and d above.
>
> f. That Defendant is required to comply with and remediate the actions which constitute violations of Florida Statute 626.9541 (Unfair Claim Settlement Practices).

As this Court recognized in its Order on Defendant's Motion to Dismiss the First Amended Complaint, entered on June 8, 2020, Plaintiff's sole count for declaratory relief seeks judicial interpretation of two Florida Statutes: the Florida PIP Statute, section 627.736, Florida Statutes, and the Florida Unfair Insurance Trade Practices Act ("UITPA"), section 626.9541, Florida Statutes. *See* the June 8, 2020 Order. The dispute between the parties involves whether Defendant's conduct was inconsistent with a "duty to investigate" under these two Florida Statutes. *Id.* at 4.

The original complaint included nine counts for relief, including a contract claim. The Second Amended Complaint does not include a contract claim. Plaintiff does not identify any provision of Plaintiff's policy that requires interpretation as part of his requested declaratory relief.

Plaintiff brings his sole count for declaratory relief on behalf of the following putative class (SAC ¶ 32):

> [A]ll persons who were insured under policies of insurance issued by Defendant containing coverage for Florida Motor Vehicle No-Fault Law benefits (Personal Injury Protection benefits) and who incurred transportation costs in seeking medical services and who submitted claims to Defendant for these medical services under the PIP policies, excluding, however, such insureds who assigned their claims to medical providers or other third parties.

The Parties do not dispute that a PIP insured may recover reasonable transportation expenses. Controlling case law establishes that reasonable transportation expenses may be recoverable pursuant to a PIP policy if associated with reasonable and medically necessary treatment. *See Malu v. Security Nat'l Ins. Co.,* 898 So. 2d 69, 76 (Fla. 2005) [30 Fla. L. Weekly S145a]. Accordingly, any request for a declaration that Plaintiff's policy or the PIP Statute includes coverage for reasonable transportation expenses is moot because this issue has

already been resolved by *Malu*.

As far as Plaintiff's request for a declaration that the PIP Statute or UITPA give rise to a "duty to investigate" travel expenses or pay them absent a reimbursement request by an insured, case law establishes that Plaintiff does not have a viable claim for declaratory relief under the PIP Statute or UITPA.

As the court noted in *United Automobile Insurance Company v. Buchalter*, the PIP Statute "only authorizes one cause of action: a cause of action for personal injury protection benefits." *Buchalter*, 344 So. 3d 474, 477 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1629a] (quoting *United Auto. Ins. Co. v. A 1st Choice Healthcare Sys.*, 21 So. 3d 124, 128 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2268a]). In *Buchalter*, the plaintiff improperly "relied on sections of the PIP statute that do not create a private remedy. The remedies sought by the Provider are not among those permitted by the legislature. So the county court erred when it denied the Insurer's motion to dismiss those counts . . . ." *Id.* at 478.

Similarly, in *A 1st Choice*, the court reversed a judgment for declaratory relief against a PIP insurer, noting that:

> It is axiomatic that whether a private right of action exists for a violation of a statute is a matter of legislative intent. Absent a specific expression of such intent, a private right of action may not be implied. There is nothing in the text of section 627.736(4)(b) from which one can deduce that the legislature intended an insured have a private right of action against an insurer for failure to provide an EOB. In fact, the statute only authorizes one cause of action: a cause of action for personal injury protection benefits. The circuit court appellate division additionally departed from the essential requirements of law when it afforded a private right of action to A 1st Choice in this case.

*A 1st Choice*, 21 So. 3d at 128-29 (citations omitted); *see also MacNeil v. Crestview Hosp. Corp.*, 292 So. 3d 840, 844-45 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D571a] (affirming dismissal of declaratory action to address payment of PIP charges because there is no private right of action under the PIP Statute). After careful consideration, the Court finds that Plaintiff is improperly attempting to maintain a similarly prohibited private action for declaratory relief for violation of the PIP Statute in this case.

Furthermore, and in *Buchalter*, the court also rejected the plaintiff's attempt to bring a private action premised on alleged violations of UITPA:

> Section 624.155 lists the exact subsections within Florida's Unfair Insurance Trade Practices Act that support a civil remedy. The civil remedy provision allows "any person" to bring a civil action against the insurer for violating section 626.9541(1)(i), (o), or (x)—i.e., unfair claim settlement practices, illegal dealings in premiums, and the refusal to insure. Thus, the legislature limited the sections for which a person has a private remedy. Viability of the Provider's claims requires that the claim be found in the statute. But the Provider relied on sections of the PIP statute that do not create a private remedy.

*Buchalter*, 344 So. 3d at 478 (citations omitted); *see also A 1st Choice*, 21 So. 3d at 127 (rejecting declaratory claim that an insurer did not act fairly or honestly in handling PIP claims). After careful consideration, the Court also finds that Plaintiff is improperly attempting to maintain a similarly prohibited private action for declaratory relief for violation of UITPA in this case.

Accordingly, it is hereby:

**ORDERED and ADJUDGED** that Defendant's Motion to Dismiss the Second Amended Complaint is ***GRANTED*** and Plaintiff's Second Amended Complaint is hereby ***DISMISSED with prejudice***. Plaintiff shall take nothing from this action against Defendant, and Defendant shall go henceforth without day.

**IT IS FURTHER ORDERED** that the court retains jurisdiction to determine issues of entitlement and amount of attorney's fees and costs, if any.

* * *

**Criminal law—Search and seizure—Residence—Odor of marijuana emanating from residence provided probable cause to order defendant to exit residence and to detain defendant while obtaining warrant to search residence—Motion to suppress is denied**

STATE OF FLORIDA, Plaintiff, v. LANCE WYATT, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County. Case No. 21-CF-997. March 6, 2023. Ramiro Mañalich, Judge. Counsel: Amira Fox, State Attorney, and Tammera Wilson, Assistant State Attorney, Naples, for Plaintiff. Donald Day, Naples, for Defendant.

## ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO SUPPRESS

This case is before the Court on Defendant's "Motion for Reconsideration of Motion to Suppress." The Court held a hearing on January 30, 2023 on said motion and took the matter under advisement. The Court hereby denies Defendant's motion and the Court's reasoning is set forth below.

The Defendant's motion is based on the concurring opinion of Judge Bilbrey in the recent case of *Hatcher v. State,* 342 So.3d 807 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1463a]. *Hatcher* involved a warrantless traffic stop and vehicle search.[1] On appeal of a trial court denial of a motion to suppress, the *Hatcher* Defendant argued that the officer who conducted the search lacked probable cause to search based solely on the odor of marijuana. *Hatcher* contended that the odor of marijuana noticed by the officer coming from the inside of the vehicle could have instead come from legal hemp which is indistinguishable from marijuana by sight or smell. The *Hatcher* Court did not rule on that issue explaining that:

> "Even so, we decline to address that scenario here because the smell of marijuana was only one of the factors the officer relied on in making the probable cause determination. Considering the totality of the circumstances, as we must, we conclude that it was objectively reasonable for the officer to conduct the search." *Id.* at 809.

The concurring opinion in *Hatcher* by Judge Bilbrey agreed with the affirmance of the denial of the Defendant's motion to suppress because, under a totality of the circumstances analysis, there was reasonable suspicion for the traffic stop and search, including evidence that *Hatcher* might have been driving under the influence. Judge Bilbrey went on to summarize the development of the law in Florida regarding the odor of marijuana alone as probable cause for a vehicle search. Judge Bilbrey's position as to what the law is and should be on this topic can be found in two quotes from his concurrence. First:

> "Hatcher claims that because of recent changes to Florida and federal law, the sight or smell of a substance presumed to be marijuana can no longer provide probable cause to search a vehicle or its occupants. Since that substance might have been legal hemp, I agree with him. Had the search of Hatcher's vehicle been based solely on the smell of what the arresting officer believed to be marijuana, then we should reverse his conviction for possession of drug paraphernalia. I write to discuss Hatcher's contention and recent cases addressing the issue." *Id.* at 812 (internal footnote omitted).

Second:

> "As in *Kilburn,* an officer's perception of a potentially lawful substance cannot be the sole basis for a search. And the changes in Florida and federal law following the search in *Johnson* have made hemp legal to possess. Accordingly, in the appropriate case I would urge this court to reconsider *Johnson* and *Collie.*" *Id.* at 814.

Regarding the caselaw referenced by Judge Bilbrey, *Kilburn v. State,* 297 So. 3d 671 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1303a], held that an officer could not detain someone because the butt of a handgun

was observed sticking out of the person's waistband in order to investigate if the individual was licensed to carry the firearm. The *Kilburn* Court commented that a potentially lawful activity cannot be the sole basis for detention or else the Fourth Amendment would be eviscerated. *Id*. at 675. *Johnson v. State,* 275 So. 3d 800 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1752a], and *Collie v. State,* 331 So 3d 1240 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D211b], held that the odor of marijuana alone emanating from a vehicle constitutes probable cause to search, despite the legislative changes legalizing hemp and medical marijuana.

These legal issues are not new to this trial court. In *State v. Nord,* 28 Fla. L. Weekly Supp. 511a (Fla. 20th Cir. Ct. Aug. 8, 2020), this Court held that the smell of marijuana alone could not be the sole basis to search a suspicious parked vehicle. This Court relied on the *Kilburn* decision to require "odor-plus" as a basis for a vehicle search post-legalization of medical marijuana and hemp in Florida. This Court reasoned in *Nord* that in this new legal environment the *Kilburn* analysis was controlling as opposed to the common sense probabilities approach to warrantless searches. This Court did not arrive at that conclusion lightly, specifically commenting as follows in a footnote in *Nord* at page 3 of the opinion:

> "This Court is ever mindful that, as a trial court, its role is to follow stare decisis. However, where changes in the law create a question of first impression regarding the subject of search and seizure, the Court must exercise the power of judicial review and legal interpretation of existing case law in a manner that upholds established constitutional limits on warrantless searches."

This Court's decision in *Nord* was reversed on appeal in *Owens v. State,* 317 So.3d 1218 (Fla. 2nd DCA 2021) [46 Fla. L. Weekly D699a]. The eminent three judge panel in *Owens,* in an opinion authored by Judge Villanti, reversed this Court's decision in *Nord.* The *Owens* Court held that an officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana. The opinion further explained that, even if marijuana were legalized for recreational use, the smell of the burning substance will continue to provide probable cause to search a vehicle because the common sense/fair probability probable cause standard would support the officer's belief of impaired driving. *Id*. at 1219. The Court also noted that the legal smoking of medical marijuana under current statutes still prohibits the use of smoked marijuana in vehicles (citing to section 381.986 (1)(j) 5, Florida Statutes). *Id*. at 1220. Judge Villanti concluded by stating:

> "Accordingly, we conclude that the recent legalization of hemp, and under certain circumstances marijuana, does not serve as a sea change undoing existing precedent, and we hold that regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of the vehicle." *Id*. at 1220

The two divergent views of the law referenced above (as exemplified by *Owens* and other similar cases from other districts versus the concurrence of Judge Bilbrey in *Hatcher* and this Judge's opinion in *Nord*) raises an interesting question for resolution by our newly created 6th District Court of Appeal upon review of an appropriate case. That question is whether the legalization of medical marijuana and hemp so increases the probabilities of a legal substance being the source of the odor of marijuana coming from a vehicle or a residence so as to no longer establish a common sense, reasonable and reliable probability of finding illegal marijuana in a vehicle or home search. On that question, this Court respectfully disagrees with existing case law and joins concurring Judge Bilbrey in *Hatcher* that the better view, under the *Kilburn* analysis, is that marijuana odor alone cannot establish probable cause, because other substances that smell exactly like unlawful marijuana have recently been legalized in Florida and could be the source of the odor. An odor-plus standard should now be the law. It appears that the 6th District Court of Appeal can require this new standard because, unlike a trial court, it is not bound by precedents in other districts. *See, Pardo v. State,* 596 So. 2d 665, 667 (Fla. 1992) (another district's opinion is only persuasive).

In conclusion, this Court denies the motion to reconsider its denial of Defendant Wyatt's motion to suppress because, as a trial court, it is bound by existing precedents from several districts, including the decision of the 2nd District Court of Appeal in *Owens v. State,* 317 So 3d 1218 (Fla. 2nd DCA 2021) [46 Fla. L. Weekly D699a], which is directly on point.

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[1]The case sub judice, as alleged in the Defense suppression motion, involves law enforcement conducting a welfare check and ordering Defendant to exit a residence and detaining him outside due to the odor of marijuana emanating from inside the home. Subsequent to questioning of the Defendant, officers applied for and obtained a search warrant for the residence and seized contraband found therein.

* * *

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# COUNTY COURTS

**Insurance—Homeowners—Standing—Assignment of benefits—Validity—Assignment of benefits that does not contain a written, itemized per-unit cost estimate of services to be performed by assignee does not comply with statutory requirements and is invalid and unenforceable—General list of services that could be performed is not an estimate of services to be performed**

THE KIDWELL GROUP LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Debra Nichols, Plaintiff, v. UNITED PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 35-2021-CC-002353. January 25, 2023. Emily Currington, Judge. Counsel: Hans Kennon, Morgan & Morgan, for Plaintiff. William M. Mitchell, Sr., Conroy Simberg, for Defendant.

ORDER

THIS CAUSE came on to be heard on Defendant's Motion to Dismiss and/or Motion for Summary Disposition filed on May 20, 2022. The Court held a hearing on the motion on December 29, 2022. The Court, having heard the arguments of Counsel, reviewed the court file, the pleadings, pertinent case law and otherwise being fully advised in the premises, makes the following findings:

Attached to the amended complaint is a document with headings labeled, "Contract for Services" and "Assignment of Insurance Claim Benefits & Direct Pay Authorization." This document is an assignment of benefits. See *Kidwell Group LLC v. American Integrity Insurance Company of Florida,* 347 So. 3d 501 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1910a]. This document does not contain a written, itemized per unit cost estimate of services to be performed by the Plaintiff. The list contained in the assignment is a general list of services that could be performed, not an estimate of services to be performed. Thus, the assignment of benefits in the instant case fails to comply with Fla. Stat. 627.7152(2)(a)4. See *Air Quality Experts Corporation v. Family Security Insurance Company,* 351 So. 3d 32 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c]. See also *Black Diamond Funding Ventures (LLC) v. First Protective Insurance Company,* 2023 WL 27717 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D73e].

An assignment of benefits that violates Fla. Stat. 627.7152 is "invalid and unenforceable." See Fla. Stat. 627.7152(2)(d). Therefore, it is ORDERED and ADJUDGED the Defendant's Motion to Dismiss is GRANTED.

* * *

**Insurance—Property—Attorney's fees—Insurer that obtained summary disposition of plaintiff assignee's complaint is not entitled to attorney's fees under section 627.7152(10)(a)1, which provides that insurer is entitled to fees if judgment obtained is less than 25% of difference between assignee's presuit demand and insurer's settlement offer, where insurer made no presuit settlement offer—Claim or defense not supported by material facts or applicable law—Plaintiff is entitled to attorney's fees where insurer's argument that its complete denial of liability for insurance claim was equivalent of zero-dollar settlement offer was completely without merit in law and cannot be supported by a reasonable argument for extension, modification, or reversal of existing law**

INTERACTIVE ENGINEERING, INC., a/a/o Kolin Calderwood, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY, d/b/a SECURITY FIRST FLORIDA, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2022 SC 000559. Division 61. February 6, 2023. Andrea K. Totten, Judge. Counsel: Mark Ibrahim, Kanner & Pintaluga, P.A., Boca Raton, for Plaintiff. Ashley J. Arends, Security First Insurance Company, Ormond Beach, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR ENTITLEMENT AND MOTION TO TAX ATTORNEY'S FEES AND COSTS
AND
GRANTING PLAINTIFF'S MOTION FOR SANCTIONS BASED ON SECTION 57.105, FLORIDA STATUTES

THIS CAUSE came on to be heard before the Court on January 24, 2023, on Plaintiff's and Defendant's respective motions. The Court, having heard the argument of counsel, having reviewed the court file, and being otherwise advised in the premises, finds as follows:

**Defendant's Motion for Entitlement and Motion to Tax Attorney's Fees and Costs**

This Court entered summary disposition in favor of Defendant on September 15, 2022. On October 19, 2022, Defendant filed the instant motion for entitlement to attorney's fees and costs, pursuant to section 627.7152, Florida Statutes (2021).[1]

Section 627.7152(1)(g) defines a "presuit settlement offer as "the offer made by the insurer in its written response to the notice of intent to initiate litigation as required by paragraph (9)(b)".

Section 627.7152(10), states that:

> Notwithstanding any other provision of law, in a suit related to an assignment agreement for post-loss claims arising under a residential or commercial property insurance policy, attorney fees and costs may be recovered by an assignee only under s. 57.105 and this subsection.
>
> (a) If the difference between the judgment obtained by the assignee and the presuit settlement offer is:
>
> 1. Less than 25 percent of the disputed amount, the insurer is entitled to an award of reasonable attorney fees.
>
> 2. At least 25 percent but less than 50 percent of the disputed amount, no party is entitled to an award of attorney fees.
>
> 3. At least 50 percent of the disputed amount, the assignee is entitled to an award of reasonable attorney fees.

§ 672.7152(10), Fla. Stat. (2021). The "disputed amount" is defined as the difference between the assignee's presuit settlement demand and the insurer's presuit settlement offer. § 627.7152(1)(d), Fla. Stat. (2021).

Based on subsection (10), Defendant reasons that "since Plaintiff's presuit demand was $2500 and Defendant made no settlement offer, the 'disputed amount' in this case was $2500." (Def. Mtn. para. 7). Notwithstanding its admission that it made no presuit settlement offer, Defendant concludes that since $0.00 is less than 25 percent of $2500, Defendant is entitled to reasonable attorney's fees and costs,.

The exhibits to Defendant's motion support Defendant's concession that it did not make a presuit settlement offer to Plaintiff, and instead contended that the assignment of benefits upon which Plaintiff relied was invalid and unenforceable. Defendant later relayed to Plaintiff's attorneys that since the Interactive Engineering report was ordered independently of Defendant's investigation, and not requested by Defendant, it was not Defendant's responsibility to pay for the service.

In response to Defendant's motion, Plaintiff argues that Defendant is not entitled to relief under section 627.7152(10) because Defendant did not include a presuit settlement offer of any description in its written response to Plaintiff's notice of intent to initiate litigation. Instead, Defendant simply asserted that the assignment of benefits was invalid.

Defendant's position invites the Court to set aside the common understanding of the phrase "settlement offer," and instead assume that in defining "presuit settlement offer," the legislature had an additional, (albeit unstated) intention to encompass not only the commonly understood meaning of "settlement offer," but also complete denials of liability. Defendant would then have the Court undergo the fiction of equating a denial of liability with a plea offer of $0.00, and use subsection (10) to "calculate" the difference between $0.00 and the recovery sought by a plaintiff.

When called upon to resolve a dispute over statutory interpretation, the plain meaning of the statute is always the starting point, and the Court normally seeks to afford the law's terms their ordinary meaning at the time the legislature adopted them. *See Alachua Cnty. v. Watson,* 333 So. 3d 162, 169 (Fla. 2022) [47 Fla. L. Weekly S15a] (citing *Niz-Chavez v. Garland,* 141 S.Ct. 1474, 1480 (2021) [28 Fla. L. Weekly Fed. S764a]. Here, the Court finds no occasion for interpretation of the legislature's definition of "presuit settlement offer," and its application in section 627.2152(10), because its meaning is clear. The plain language of section 627.7152, Florida Statutes, in no way supports Defendant's position that a complete denial of liability and a settlement offer are one in the same. What Defendant appears to truly seek is prevailing party attorney's fees, which are simply not offered by section 627.7152(10).

Therefore, Defendant's Motion for Entitlement and Motion to Tax Attorney's Fees and Costs is DENIED.

**Plaintiff's Motion for Sanctions Based on Section 57.105, Florida Statutes**

Plaintiff argues that it is entitled to attorney's fees under section 57.105, Florida Statutes, because Defendant's arguments in favor of attorney's fees "lack any meritorious foundation and are grounded in frivolity." (Plaintiff Mtn. para. 5).

Section 57.105(1), Florida Statutes provides:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then- existing law to those material facts.
>
> (2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

§ 57.105, Fla. Stat. (2023).

Section 57.105 "must be strictly construed as it awards attorney's fees in derogation of the common law." *Anchor Towing, Inc. v. Florida Dept. of Transp.,* 10 So. 3d 670, 672 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D826a]. "The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." *MC Liberty Express, Inc. v. All Points Services, Inc.,* 252 So. 3d 397, 402-03 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1808a]. Therefore, trial courts must be careful to apply the statute in a manner that ensures its intended purpose of deterring frivolous pleadings. *See Bridgestone/Firestone, Inc. v. Herron,* 828 So. 2d 414, 417 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2173a]; *Mullins v. Kennelly,* 847 So.2d 1151, 1154 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1507b]. Fees should only be awarded, "where there is a total or absolute lack of justiciable issues of either law or fact, this being tantamount to a finding that the action is frivolous or completely untenable." *Vasquez v. Provincial S., Inc.,* 795 So. 2d 216, 218 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2329a]. Such a finding by the court must be supported by substantial, competent evidence. *Id.*

Appellate courts have recognized that the definition of "frivolous" is, to some extent, incapable of precise definition. *de Vaux v. Westwood Baptist Church,* 953 So. 2d 677, 683 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D991c]. As noted by *de Vaux,* however, the Restatement offers some guidance by explaining that a frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." *Id.* (quoting Restatement (Third) of Law Governing Lawyers § 110, cmt. d. (2000)).

> In addition, under Florida law, there are established guidelines for determining when an action is frivolous. These include where a case is found: (a) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) to be contradicted by overwhelming evidence; (c) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (c) [sic] as asserting material factual statements that are false.

*de Vaux,* 953 So. 2d at 683 (quoting *Wendy's of N.E. Florida, Inc. v. Vandergriff,* 865 So. 2d 520, 524 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2664c].

Further, it has been repeatedly held that if the trial court finds that the award of attorney's fees is otherwise appropriate under the statute, it has no discretion to decline to award them. *See e.g. Wright v. Acierno,* 437 So. 2d 242, 244 (Fla. 5th DCA 1983) ("We agree that the use of the word "shall" in the statute evidences the legislative intention to impose a mandatory penalty in the form of a reasonable attorney's fee once the determination has been made that there was a complete absence of a justiciable issue raised by the losing party.").

For the reasons discussed in its denial of Defendant's claim for attorney's fees and costs, the Court finds that Defendant's argument was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law." *de Vaux,* 953 So. 2d at 863. The Court finds specifically that Defendant's claim for attorney's fees was not supported by the application of then-existing law to the material facts. § 57.105(1)(b). Therefore, attorney's fees are awarded against Defendant's counsel. § 57.105(3)(c).

It is therefore ORDERED AND ADJUDGED that Plaintiff's motion for attorney's fees and costs pursuant to section 57.105 is GRANTED.

Jurisdiction is reserved to determine the reasonable amount of attorney's fees and costs.

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[1]Plaintiff and Defendant agree that the version of section 627.7152 effective July 1, 2019, is the operative version of the statute due to the timing of the insurance contract. Therefore, all references herein to section 627.7152 are to the July 1, 2019, version, unless otherwise stated.

* * *

**Insurance—Discovery—Depositions—Insurer's motion to compel deposition of an unnamed representative of plaintiff regarding hiring of legal representation is denied—Information is not in dispute and is irrelevant and immaterial to contested issues, which centered around claim that insurer underpaid plaintiff for services rendered**

PROFESSIONAL RADIOLOGY ASSOCIATES, P.A., d/b/a ADVANCED IMAGING PARTNERS, a/a/o Joann Clark, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 15384 CODL. Division 71. March 1, 2023. Angela A. Dempsey, Judge. Counsel: Keith Petrochko, Keystone Insurance Law, DeLand, for Plaintiff. David Gagon, Taylor, Day, Grimm & Boyd, Jacksonville, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO COMPEL DEPOSITION AND PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

THIS CAUSE having come before the Court on Defendant's Motion to Compel Deposition (Dkt. No. 9) and Plaintiff's Motion for Protective Order (Dkt. No. 17), and the Court having considered the same and being otherwise fully informed finds as follows:

1. Florida Rule of Civil Procedure 1.280(b)(1) states in pertinent part that "Parties may obtain discovery regarding any matter, not privileged, that is *relevant to the subject matter of the pending action. . .*"

2. The Florida Supreme Court has held that "Discovery in a civil matter must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to the discovery of admissible evidence." *Allstate v. Langston,* 655 So. 2d 91 (Fla. 1995) [20 Fla. L. Weekly S217a]; *Friedman v. Heart Institute of Port St. Lucie, Inc.,* 863 So. 2d 189 (Fla. 2003) [28 Fla. L. Weekly S808a] (the constitutional right of privacy expresses that compelled disclosure through discovery be limited to that which is necessary for the Court to determine contested issues.)

3. This case revolves upon Plaintiff's contention that a previously received, adjusted, and reimbursed medical claim was adjusted incorrectly, creating an alleged underpayment to the Plaintiff for services rendered. However, Defendant seeks to depose an unnamed representative of the Plaintiff regarding the hiring of their legal representation.

4. Defendant has requested information which is (1) not in dispute; and (2) is irrelevant and immaterial in relation to the contested issue and under the applicable case law.

CONSIDERED, ORDERD and ADJUDGED:

A. Plaintiff's Motion for Protective Order is **GRANTED**.

B. Defendant's Motion to Compel Deposition is **DENIED**.

* * *

**Landlord-tenant—Public housing—Eviction—Complaint for eviction and possession of premises is denied—Disbursement of disputed rent that was paid into court registry—Because landlord has never accurately calculated rent based on tenant's income and deductions and adjustments to tenant's income, rent for remainder of rental year is set by court**

LAKE BUTLER APARTMENTS, Plaintiff, v. DEANDRA THOMPSON, Defendant. County Court, 8th Judicial Circuit in and for Union County. Case No. 63-2022-CC-000174-CCAM, County Civil Division. January 26, 2023. Mitchell D. Bishop, Judge. Counsel: Conrad C. "Sonny" Bishop, The Bishop Law Firm, Perry, for Plaintiff. Richard S. Hatch, Three Rivers Legal Services, Gainesville, for Defendant.

**FINAL ORDER DENYING COMPLAINT FOR EVICTION**

**THIS CAUSE** having come before the Court this day for a final eviction hearing on Plaintiff's Complaint for Eviction filed on August 23, 2022. The Court heard testimony from the parties, additional witnesses, and received evidence. Being fully advised in the premises, for the reasons stated on the record, it is,

**ORDERED AND ADJUDGED** as follows,

1. Landlord/Plaintiff's Complaint for Eviction and possession of the premises is **DENIED**.

2. Landlord/Plaintiff is, however, entitled to the disputed rent that Tenant/Defendant paid into the Clerk's Registry. The Clerk of Court previously issued a check to Plaintiff in the amount of $788.35 on October 13, 2022, the remaining $1,872.00 in the Court Registry shall be disbursed to the Plaintiff, for a total of $2,660.35.

3. The Court's prior non-final order determining rent at $936 per month during the pendency of the litigation is **VACATED**.

4. The Court finds that Landlord/Plaintiff never accurately calculated Tenant/Defendant's rent based on her actual income throughout the calendar year of 2022.

5. The Court finds that Landlord/Plaintiff never accurately calculated Tenant/Defendant's deductions and adjustments to her gross income during 2022.

6. The Court further finds that Landlord/Plaintiff's methods and conduct in calculating rent was arbitrary and capricious.

7. Based on the evidence presented at the hearing, Tenant/Defendant shall pay rent in the amount of **$655.80** monthly, beginning February 1, 2023, until the annual recertification is due, which, according to the testimony, is July 1st of the calendar year, or her employment or pay status changes, in which the Defendant then shall follow the policy for providing the supporting documentation requested by the Landlord.

8. This order is **FINAL**. The Clerk of Court is directed to close this case.

* * *

**Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Venue—Forum selection clause—Insurer presented improper venue defense that it knew or should have known was not supported by application of existing law to material facts where same clause had been determined by district court of appeal to be ambiguous and not to restrict venue to Miami-Dade County—Insured is entitled to attorney 's fees**

ALLIANCE CHIROPRACTIC GROUP, INC., a/s/o Polande Rither, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-017663-O. December 20, 2022. Carly S. Wish, Judge. Counsel: Coretta Anthony-Smith, Anthony-Smith Law, P.A., Ocoee, for Plaintiff. Wallace Richardson, for Defendant.

**ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO FLA. STAT. SECTION 57.105 AS TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE**

THIS CAUSE having come before the Court on Plaintiff's Motion for Sanctions pursuant to Florida Statute Section 57.105 as to Defendant's Second Affirmative Defense and after hearing argument from counsel and the Court file, it is hereby **ORDERED AND ADJUDGED**:

**FACTS**

1. On or about May 29, 2019, Plaintiff filed a two-count Complaint against the Defendant, United Automobile Insurance Company. Count I is a claim for Declaratory Relief and Count II is a claim for Breach of Contract. Both counts revolved around United Automobile Insurance Company's (United) failure to pay personal injury protection benefits (PIP) for treatment provided by the Plaintiff to Polande Rither.

2. In response, on or about July 12, 2019, United filed a Motion to Dismiss Plaintiff's Complaint for improper venue pursuant to the venue selection clause in the policy of insurance. In support of its' Motion to Dismiss, United filed the affidavit of adjuster, Karen Diaz.

3. On August 11, 2020, Plaintiff amended its Complaint and withdraw the Count for Declaratory Relief.

4. On or about September 14, 2020, the Plaintiff took the deposition of Ms. Diaz as it pertains to the affidavit filed in support of United's Motion to Dismiss for improper venue.

5. On September 17, 2020, Defendant withdrew the affidavit of Ms. Diaz; and, filed an Answer and Affirmative Defenses to Plaintiff's Amended Complaint on November 11, 2020.

6. Despite withdrawing its' Motion to Dismiss, in its Answer, Defendant raised improper venue as an affirmative defense.

7. On or about November 18, 2020, Plaintiff sent the Defendant correspondence requesting the Defendant to withdraw its' second affirmative defenses asserting improper venue.

8. Defendant did not withdraw the defense.

9. More than nine months later, on August 27, 2021, Plaintiff served the Defendant with a Motion for Sanctions pursuant to Florida Statute Section 57.105 relating to the venue affirmative defense.

10. Defendant still did not withdraw the venue affirmative defense.

11. Accordingly, on September 26, 2021, the Plaintiff filed its Motion for Sanctions with the Court.

12. Approximately, a year after serving the Defendant with its Motion for sanctions, and Defendant failing to withdraw same, on August 26, 2022, Plaintiff filed a Motion for Summary Judgment as to Defendant's venue defense.

13. On November 30, 2022, the day before the hearing on Plaintiff's Motion for Sanctions, the Defendant filed withdrew its venue affirmative defense.

14. The Court finds that the late withdrawal of Defendant's second affirmative defense asserting improper venue was not timely withdrawn and grants Plaintiff's Motion for Sanctions.

**RULING**

Florida Statute Section §57.105, directs the courts to award a reasonable attorney fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense, at any time during the action in which the court finds that the losing party or the losing party's attorney knew or shown have known that a claim or defense was:

(a) Not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the4 application of then-existing law to those material facts.

On or about November 11, 2020, Defendant filed its Answer and Affirmative Defenses to Plaintiff's Amended Complaint. Specifically, Defendant's Second Affirmative Defense asserts the following:

> As and for its Second Affirmative Defense, Defendant states that Venue is improper in Orange County, Florida. Per part G, Section 3 of the subject policy, titled as, LEGAL ACTION AGAINST US" states that: "Any legal action against "us". . . under this policy should be filed and maintained in the county where the policy was issued. Initially, prior to recession (sic), the policy at issue in this case was issued in Miami-Dade County by Defendant. Therefore, Plaintiff's choice of venue is improper. Pursuant to the contract at issue, this action may only be filed and litigated in Miami-Dade County.

Florida law is clear that venue is proper in an action for breach of contract in the county where payments should have been made. *Florida Forms, Inc. v. Barkett Computer Services, Inc.*, 311 So. 2d 730 (Fla. 4d DCA 1975); *see also*, *Sheffield Steel Products, Inc. v. Powell Brothers, Inc.*, 385 So. 2d 161 (Fla. 5th DCA 1980).

Moreover, the First District Court of Appeal, recently addressed this exact same issue, policy and argument made by the Defendant in *Robles v. United Auto. Ins. Co.*, No. 1D20-1335, 2021 WL 1743606, at *1 (Fla. Dist. Ct. App. May 4, 2021) [46 Fla. L. Weekly D1009a]. In *Robles*, the First DCA held that the term "issued" in an insurance contract can have many different meanings and that an insurer may not attempt to narrowly define the term through the testimony of a corporate representative *after* formation of the contract. *Id.* (Emphasis added). The Court pointed out that if a term can have more than one meaning, it is ambiguous. *Id.,* citing, *Travelers Ins. Co. v. C.J. Gayfer's & Co., Inc.,* 366 So. 2d 1199, 1201-02 (Fla. 1st DCA 1979). In short, the Court held that the trial court erred in transferring the case to Escambia County based upon the ambiguous forum-selection clause

The forum-selection clause in the instant case is the exact same clause that was at issue in *Robles.* As such, the Defendant has presented a defense that it knows is not supported by the current existing law. Accordingly, Defendant presented its' Second Affirmative Defense to this Court even though Defendant knew or reasonably should have known that the defense was not supported by the application of the existing law to the material facts. *See Fla. Stat. §57.105.* The Court finds that the Plaintiff complied with the notice provision of Section 57.105(4); however, Defendant did not timely withdraw its Second Affirmative Defense.

Accordingly, Plaintiff is entitled to reasonable attorney's fees pursuant to Fla. Stat. §57.105. The amount of the reasonable attorney's fees will be determined at a later date.

* * *

**Insurance—Automobile—Windshield repair—Confession of judgment—Repair shop's motion for partial summary judgment/confession of judgment determining that insurer had presuit notice of claim is denied—Computer screen image submitted as evidence that shop submitted invoice to insurer before suit was filed does not constitute competent substantial evidence—Even if shop presented admissible evidence of presuit submission of invoice to insurer, insurer's declaration that it first learned of invoice when it was served with complaint and cannot locate any presuit communication of invoice precludes entry of partial summary judgment—Insurer did not confess judgment by partially paying claim after suit was filed—Shop is not entitled to award of attorney's fees because it cannot establish that it needed to sue to obtain payment of claim**

AT HOME AUTO GLASS, LLC, a/a/o James Franks, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-002807-O. March 20, 2023. Elizabeth Gibson, Judge. Counsel: Imran Malik and John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT/CONFESSION OF JUDGMENT**

This matter came before the Court on March 17, 2023, at 10:00 a.m. on Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment and the Court, having reviewed the motion and responses, considered the argument of counsel, and being otherwise fully advised of the premises, hereby sets forth the following undisputed facts and conclusions of law:

**UNDISPUTED FACTS**

1. State Farm issued an automobile insurance policy to its insured.

2. The windshield of the insured's vehicle was damaged, and Plaintiff, At Home Auto Glass LLC, repaired the damage.

3. Plaintiff filed a lawsuit against State Farm under the insured's policy with State Farm and attached an invoice to the Complaint for the repair work totaling $2,259.79.

4. After State Farm received the Complaint with Plaintiff's $2,259.79 invoice, State Farm ultimately determined the coverage amount of the damaged vehicle's windshield was $370.47 and issued

a payment to Plaintiff, which included interest, in the amount of $433.98.

## CONCLUSIONS OF LAW

### Summary Judgment Standard

5. Pursuant to the Florida Supreme Court's opinion in *In re: Amendments to Florida Rule of Civil Procedure 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a], Florida's summary judgment standard is to be construed and applied in accordance with the federal summary judgment standard.

6. Per newly amended rule 1.510(a), the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

7. As the Florida Supreme Court held, 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." 317 So. 3d at 75 (quotation omitted). The new standard asks whether there is competent substantial record evidence that could support a verdict for the non-moving party. *See Lindon v. Dalton Hotel Corp.,* 49 So. 3d 299, 303 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D2598a]. "Competent, substantial evidence" is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957).

### Summary Judgment Evidence

8. Here, in support of Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment, Plaintiff filed three unauthenticated documents, Exhibit A—an At Home Estimate with no pricing information, Exhibit B—a computer screen image and Exhibit C—a copy of State Farm's $433.98 check to Plaintiff.

9. Plaintiff argued its Exhibit B, the computer screen image, was undisputed evidence of Plaintiff's pre-suit submission of its invoice to State Farm. However, Exhibit B is nothing more than an unauthenticated, incomplete computer screen image from an unknown source, which does not identify when it was created or by whom. The computer screen image contains no message of any kind in the "Message Body" portion of the document. An invoice is checked on the computer screen, but Plaintiff failed to provide the invoice. Moreover, the screen image references an email that had been previously "sent," but Plaintiff did not present a copy of the "sent" e-mail. The Court, therefore, cannot identify what may be contained in the invoice, or whether an e-mail was ever sent.

10. Plaintiff has not established State Farm ever had to pay Plaintiff for an insured loss under the insured's policy before Plaintiff filed this lawsuit. Plaintiff has failed to present any competent admissible evidence to satisfy its burden under Fla. R. Civ. P 1.510. Accordingly, the Court denies Plaintiff's Motion for Partial Summary Judgment/ Confession of Judgment.

11. Even if Plaintiff had submitted material in a form that would be admissible evidence (which it did not), State Farm's declaration creates a genuine dispute of material fact about whether Plaintiff provided pre-suit notice of the invoice.

12. In opposition to Plaintiff's motion, State Farm filed the declaration of Mark Hansen. Mr. Hansen stated, "State Farm first learned about Plaintiff's $2,259.79 windshield repair invoice when it was served with the complaint on February 19, 2020." He also stated, "State Farm has been unable to locate an e-mail or any other communication of Plaintiff's invoice before receiving documents as part of this litigation."

13. State Farm's declaration shows State Farm had no evidence of receiving any pre-suit notice of the invoice from the insured or his assignee before State Farm was served with the lawsuit.

14. Thus, a genuine issue of material fact remains in dispute regarding whether Plaintiff submitted its invoice to State Farm pre-suit. Accordingly, the Court denies Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment on this ground as well.

### Attorneys' Fees Under Fla. Stat. §627.428

15. In order to recover attorney's fees under Florida Statute § 627.428, "[a]n insured moving for attorney's fees must prove 'the suit was filed for a legitimate purpose, and whether the filing acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." *People's Tr. Ins. Co. v. Polanco,* ___ So. 3d , ___ 2023 WL 151310, at * 2, 48 Fla. L. Weekly D120b (Fla. 4th DCA Jan. 11, 2023) (citing *State Farm Fla. Ins. Co. v. Lime Bay Condo., Inc.,* 187 So. 3d 932, 935 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D730a]). "[T]here must have been 'some dispute as to the amount owed by the insurer' *before* the insured filed suit.' " *Id.* (emphasis added) (citing *Lewis v. Universal Prop. & Cas. Ins. Co.,* 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1104a]).

16. "Florida's cases have uniformly held that a section 627.428 attorney's fee award may be appropriate where, following some dispute as to the amount owed by the insurer, the insured files suit and, *thereafter,*... the insured recovers substantial additional sums." *Lewis v. Universal Prop. & Cas. Ins. Co.,* 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1104a]. "Underlying these decisions is the notion that the insureds were entitled to fees as the insureds 'did not 'race to the courthouse,' the suit was not filed simply for the purpose of the attorney's fee award, but rather to resolve a legitimate dispute, and the filing of the suit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." *Id.* (internal citations omitted).

17. This case is the same as *Polanco,* where the insured "never informed People's Trust that he disputed its estimate or coverage determination" and never "completed [a] sworn proof of loss[.]" *Polanco,* 2023 WL 151310, at *1. Instead, "[t]he first indication of disagreement was when the insured filed the complaint." *Id.* at *2. Because "[t]he insured in this case made no effort to resolve the dispute without court intervention," the court held that "he cannot recover attorney's fees" as "the insured's lawsuit was not a necessary catalyst to his recovery." *Id.* at *2-*3. *See also Nationwide Prop. & Cas. Ins. v. Bobinski,* 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D368a] (reversing trial court that awarded fees against insurer for resolving dispute in arbitration before filing suit); *People's Tr. Ins. Co. v. Farinato,* 315 So. 3d 724, 728 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D787a] (reversing trial court that awarded fees because "the confession-of-judgment doctrine should not be applied 'where the insureds were not forced to sue to receive benefits' " where insurer demanded appraisal before suit).

18. The Court rejects Plaintiff's argument that State Farm "confessed" judgment in voluntarily making a payment to Plaintiff after this litigation began. To argue that State Farm "confessed" error, Plaintiff relied on authorities in entirely different circumstances, where an insurer fully paid a claim that had been *actually* filed and denied before litigation began. In *Ivey v. Allstate Insur. Co.,* 774 So. 2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a], cited by Plaintiff, the insured "timely applied to Allstate for personal injury protection (PIP) benefits" and a "health insurance claim form . . . was timely and properly forwarded to Allstate." *Id.* at 681. That did not occur here.

19. Similarly, in *Clifton v. United Casualty Insurance Co. of America,* 31 So. 3d 826 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D364e], cited by Plaintiff, the insured "promptly filed a claim with United Casualty for the damage." *Id.* at 827. Plaintiff's other cited cases follow the same pattern.[1]

20. State Farm did not confess judgment by partially paying the

claim after suit to resolve wasteful litigation because State Farm never had an obligation to make a payment under the policy.

21. Plaintiff cannot obtain attorney's fees because it cannot establish that it needed to sue to obtain payment under the policy. Indeed, if Plaintiff had provided a pre-suit notice of the invoice, it may have received payment without incurring any fees. Because it failed to do so, Florida law does not allow it to recover fees for unnecessary litigation.

22. In this case, Plaintiff did not met its burden under the summary judgment rule. Moreover, a genuine dispute exists about whether Plaintiff provided its invoice to State Farm before filing the lawsuit and whether, as a result, State Farm's post suit payment breached the contract.

**WHEREFORE**, it is **ORDERED** and **ADJUDGED**:

1. Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment is DENIED.

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[1]*Johnson v. Omega Insurance Co.,* 200 So. 3d 1207, 1208 (Fla. 2016) [41 Fla. L. Weekly S415a], "arose from a claim for insurance benefits Kathy Johnson, the insured, submitted to Omega." In *Pepper's Steel & Alloys, Inc. v. United States,* 850 So. 2d 462, 464 (Fla. 2003) [28 Fla. L. Weekly S455a], "[a]fter the United States sued to recover remediation costs arising from an allegedly polluted site, [Pepper's Steel] demanded coverage from United States Fidelity and Guaranty Company (USF & G), which had issued an insurance policy covering the site." This is not a case like *Wollard v. Lloyd's & Companies of Lloyd's,* 439 So. 2d 217, 218 (Fla. 1983), where the insurer agreed to settle a case and "in effect, declined to defend its position in the pending suit." And in *Barreto v. United Services Automobile Ass'n,* 82 So. 3d 159, 161 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D571a], the insured "had to resort to the judicial process to obtain the benefits owed to them under the policy" after the insurer refused to pay part of their submitted claim. Likewise, the insured sued in *De Leon v. Great American Assurance Co.,* 78 So. 3d 585, 591 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2250a], because "there was no other way to be paid" after the insurer denied his claim. Finally, unlike in this case, in *Goff v. State Farm Florida Ins. Co.,* 999 So. 2d 684, 686 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2833a], the insured "filed a claim after their house sustained hurricane damage[.]"

* * *

**Insurance—Automobile—Windshield repair—Where policy permits insurer to use "bid or repair estimate approved by [insurer] to determine cost to repair windshield," and insurer exercises that option by paying highest amount determined in two bids obtained from other repair shops and own estimate for work, insurer complied with policy terms—Insurer did not breach policy by paying invoice after suit was filed where evidence indicates that insurer first received notice of invoice when complaint was served—No merit to arguments that limits of liability section of policy that provides for means of determining reasonable repair cost is not applicable where windshield was replaced rather than repaired or that insurer's estimate based on secret proprietary price-setting formula is not valid estimate—Summary disposition is entered in favor of insurer**

LCO AUTOGLASS, INC., a/a/o Wykerria Dukes, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2020SC-000447-0000-00. March 22, 2023. John Flynn, Judge. Counsel: Michael Brehne, Altamonte Springs, for Plaintiff. Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

## ORDER GRANTING STATE FARM'S MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

THIS MATTER having come before the Court on February 9, 2023, at 1:00 pm on State Farm's Motion for Summary Disposition and Plaintiff's cross Motion for Summary Disposition and, the Court, having reviewed the motion, evidence and responses filed by the parties, considered the argument of counsel, and being otherwise fully advised of the premises, hereby sets forth the following background information, undisputed facts, and conclusions of law:

### BACKGROUND

1. This matter involves a first party breach of contract claim asserted by Plaintiff, who repaired the windshield of a vehicle owned by State Farm's insured, Wykerria Dukes.

2. Plaintiff demanded no money from the insured, took an assignment of her insurance benefits, and sent State Farm a bill for $981.56 for the windshield repair.

3. State Farm determined the loss amount under the policy to be $480.23 and sent Plaintiff that amount. Plaintiff claims State Farm breached the policy by failing to pay the claim before suit was filed and by not paying the full amount Plaintiff charged.

### UNDISPUTED FACTS

4. State Farm issued an automobile insurance policy to its insured.

5. The insured's vehicle developed a cracked windshield, and Plaintiff, LCO Auto Glass, Inc. replaced it with a new windshield.

6. The insured paid Plaintiff nothing and instead assigned Plaintiff her benefits under State Farm's policy.

7. Plaintiff filed a lawsuit against State Farm under the insured's policy with State Farm and attached an invoice for the repair work totaling $981.56.

8. Following receipt of the Complaint with Plaintiff's $981.56 invoice, State Farm exercised its right under the policy to settle the loss and determine the coverage amount by using an approved bid or approved estimate.

9. Specifically, State Farm obtained bids from two other glass repair shops—a $315 bid from Auto Glass Fitters and a $323.76 bid from Harmon Autoglass. State Farm also approved its own estimate for the work, in the amount of $480.23.

10. State Farm chose to use its own estimate, the highest of the three. State Farm issued payment to Plaintiff in the amount of $480.23, plus interest.

### The Insurance Contract

11. State Farm's policy (the "Contract") is an insurance contract.

12. The Contract sets forth different types of coverage, including the type at issue here, Comprehensive Coverage:

**PHYSICAL DAMAGE COVERAGES**

> The physical damage coverages are Comprehensive Coverage, Collision Coverage, Emergency Road Service Coverage, and Car Rental and Travel Expenses Coverage.

Contract at 30.

13. The Contract's insuring agreement for Comprehensive Coverage provides:

> **Insuring Agreements**
>
> **1. Comprehensive Coverage**
>
> a. ***We*** will pay for ***loss***, except ***loss caused by collision***, to a ***covered vehicle***.
>
> . . .
>
> c. The deductible does not apply to damage to the windshield of any ***covered vehicle***.

*Id.* at 31 (emphasis in original).

14. For comprehensive coverage, the Contract expressly sets forth multiple methods by which State Farm, at its option, can determine the amount of loss. This language is key for purposes of this case. The Contract states, in pertinent part:

> **Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage**
>
> *We* have the right to choose to settle with ***you*** or the owner of the ***covered vehicle*** in one of the following ways:
>
> a. Pay the cost to repair the ***covered vehicle*** minus any applicable deductible.
>
> (1) ***We*** have the right to choose one of the following to determine the cost to repair the ***covered vehicle***:
>
> (a) The cost agreed to by both the owner of the ***covered vehicle*** and ***us***;

(b) A bid or repair estimate approved by ***us***; or
(c) A repair estimate that is written based upon or adjusted to
(i) the prevailing competitive price
(ii) the lower of paintless dent repair pricing established by an agreement we have with a third party or the paintless dent repair price that is competitive in the market; or
(iii) a combination of (i) and (ii) above.

*Id*. at 32 (emphasis in original).

## CONCLUSIONS OF LAW

### Summary Disposition in Insurance Contract Cases

15. Disputes arising from the meaning of a contract are generally questions of law. As such, they are to be determined by the courts. *See e.g., Palm Beach Cnty. v. Trinity Indus., Inc.*, 661 So. 2d 942, 944 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2379a] ("Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment"); *Langford v. Paravant, Inc.*, 912 So. 2d 359, 306 (Fla. 5th DCA 2005) [35 Fla. L. Weekly D2243a] ("Contract interpretation is generally a question of law for the court, rather than a question of fact"); *Gen. Tool Indus., Inc. v. Premier Machinery, Inc.*, 790 So. 2d 449, 451 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1026b] ("If the terms of a written contract are clear and undisputed, the construction of the contract is a question of law, and therefore, can be resolved by summary judgment").

16. The parties' intent must be discerned from the four corners of the document, and courts must give the contract's language, which is the best evidence of the parties' intent, its plain meaning. *Zimmerman v. Olympus Fidelity Trust, LLC*, 936 So. 2d 652, 655 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1822a]; *Dows v. Nike, Inc.*, 846 So. 2d 595, 601 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1130a] ("It is fundamental that where a contract is clear and unambiguous in its terms, the court may not give those terms any meaning beyond the plain meaning of the words contained therein"); *Barakat v. Broward Cnty. Hous. Auth.*, 771 So. 2d 1193, 1194-95 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2474a]. ("[I]t is a well-settled principle of contract law that where the terms of a contract are unambiguous, the parties' intent must be determined from within the four corners of the document"). Courts may not rewrite the parties' contract; rather, they must honor the terms and enforce them. *Dows*, 846 So. 2d at 601.

17. These points are true for an insurance contract just as with any other contract. *See, e.g., Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Underwriters at Lloyds, London*, 971 So. 2d 885, 889 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2827b] ("The construction of an insurance policy is a question of law for the court and may be appropriately decided on motions for summary judgment"). Where an insurance policy's contractual language is clear, courts may not indulge in construction or modification, and the express terms of the contract control. *Security Ins. Co. of Hartford v. Puig*, 728 So. 2d 292, 294 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D456a].

18. Further, "[p]articularly with respect to insurance policies, a court needs to view the contract provisions in light of the character of the risks assumed by the insurer." *South Carolina Ins. Co. v. Heuer*, 402 So. 2d 480, 481 (Fla. 4th DCA 1981).

### State Farm's Payment of the Windshield Repair

19. The Contract permits State Farm to choose among various methods to determine the cost to repair the windshield and thus the amount of loss that State Farm must pay.

20. Here, State Farm chose to use "[a] bid or repair estimate approved by us." Contract at 32 (emphasis omitted).

21. In doing so, State Farm obtained and approved two bids from other glass repair shops: a bid of $315 bid from Auto Glass Fitters and a $323.76 bid from Harmon Autoglass.

22. State Farm also obtained and approved its own estimate for the work in the amount of $480.23.

23. By the Contract's clear and unambiguous terms, State Farm had the contractual right to choose among the bids obtained and its approved estimate to determine the amount of loss. State Farm made its choice and selected the highest amount—$480.23. In doing so, State Farm complied with the Contract's terms.

24. No record evidence supports that State Farm made an unreasonable choice.

25. The record evidence includes State Farm's confidential, proprietary, and trade secret formula for setting pricing of windshield-only claims. That data reflected, *inter alia,* the total number of windshield repair invoices State Farm reviewed to set its windshield repair pricing and the percentage of those repairers who accepted State Farm's pricing in those claims. The data State Farm reviewed to set its prices included the pricing accepted by windshield repairers who participated in State Farm's Offer & Acceptance Program and repairers who did not participate in State Farm's O&A Program.

26. Based on the forgoing, State Farm established that its payment, based on the estimate State Farm created and approved, was reasonable. Plaintiff has failed to present counter evidence upon which a reasonable jury could return a verdict for Plaintiff.

27. State Farm did not breach the Contract, and neither State Farm's insured nor Plaintiff has suffered any damages under the agreed-upon contractual language.

28. State Farm's payment of the invoice after suit was filed is also not a breach of the Contract. The record includes testimony from two State Farm employees that State Farm first received notice of Plaintiff's invoice when State Farm received Plaintiff's lawsuit. Moreover, State Farm did not deny Plaintiff's claim for payment, and Plaintiff has not shown that State Farm breached any requirement to pay within a particular time following receipt of Plaintiff's claim for payment. This Court is not free to rewrite the parties' contract to impose time restrictions that do not exist. *Dows*, 846 So. 2d at 601.

### Plaintiff's Motion for Summary Disposition and Opposition to State Farm's Motion for Summary Disposition

29. In opposition to State Farm's motion for summary disposition, Plaintiff filed its own Motion for Summary Disposition which attached an unrelated case (*Quality Counts Auto Glass a/a/o Overturf's Floor and Fabric Care v. State Farm Mut. Auto Ins. Co.*, Hillsborough County, Florida, Case No.17CC25939). Plaintiff argued the Contract's Limit of Liability provision was both inapplicable and ambiguous because it applied only to" repaired" windshields, as opposed to the windshield Plaintiff "replaced" on the insured's vehicle. Plaintiff also argued that State Farm's payment was based on "program price," which is not an "estimate" or "bid" that State Farm could "approve" under the express terms of the contract.

30. Plaintiff's arguments are not supported by evidence or controlling case law and are contradicted by the plain language of the Contract.

31. First, Plaintiff argues that the Contract's references to both repair and replacement render the Limit of Liability provision inapplicable to a windshield replacement (as occurred here) or create an ambiguity which must be construed against State Farm. Both arguments are without merit.

32. The Contract explicitly provides State Farm with options when a vehicle has been damaged:

***We*** have the right to choose to settle with ***you*** or the owner of the ***covered vehicle*** in one of the following ways:
a. Pay the cost to repair the ***covered vehicle*** minus any applicable deductible.

***

(3) If the repair or replacement of a part results in betterment of that part, then ***you*** or the owner of the ***covered vehicle*** must pay for the amount of the betterment.

(4) If ***you*** and ***we*** agree, then windshield glass will be repaired instead of replaced;

[or]

***

b. Pay the actual cash value of the ***covered vehicle*** minus any applicable deductible.

Contract at 33 (emphasis in original).

33. Subsection a. above refers to the cost to repair a covered vehicle. Subsection b., by comparison, refers to payment of a totaled vehicle and State Farm's obligation to pay the actual cash value of a totaled vehicle. Plaintiff shows no ambiguity in this language.

34. Nor does Plaintiff show any ambiguity in subsections a.(3) or a.(4). Plaintiff argues that the references to "repair or replacement" of a part indicate that replacing a windshield is not a repair under the Contract and thus the entire Limit of Liability provision has no application where a windshield is replaced. Plaintiff's interpretation is not a reasonable reading of the relevant language, which discusses repair of a vehicle, on one hand, and repair or replacement of a part, on the other hand. Repair of a vehicle may involve repair or replacement of a part. Plaintiff's contrary interpretation is not reasonable and is therefore rejected. *See, e.g.*, *Vyfvinkel v. Vyfvinkel*, 135 So. 3d 384. 385 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D254a] ("[W]here one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." (*quoting BKD Twenty-One Mgmt. Co. v. Delsordo*, 127 So. 3d 527 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2541c]); *Lambert v. Berkley South Condo. Ass'n*, 680 So. 2d 588, 590 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2015a] ("Whether a document is ambiguous depends upon whether it is reasonably susceptible to more than one interpretation. However a true ambiguity does not exist merely because a document can possibly be interpreted in more than one manner."). Accordingly, the Court finds there is no ambiguity within the Limit of Liability provision.

35. Second, Plaintiff argues that State Farm approved and paid "Program Price," as opposed to approving a bid or estimate. However, State Farm's Corporate Representative testified that State Farm's payment was based on an "estimate approved by State Farm." State Farm also filed the estimate it approved and relied on to issue payment. State Farm's estimate is titled "Estimate Summary" and provides an itemized breakdown of prices for the windshield part, kit, labor and tax, as well as an "Estimate Total" at the bottom of the document. No evidence supports that State Farm did not pay based on an approved estimate.

36. During the hearing, Plaintiff argued summary disposition is warranted in its favor based on the sword and shield doctrine because State Farm objected to questions as to how it created its estimate during State Farm's corporate representative's deposition. The Court finds no merit or evidentiary support for this argument. State Farm disclosed the names of the confidential and trade secret documents reflecting its pricing formulas and processes that it intended to rely on prior to the close of discovery. State Farm was not obligated to file those proprietary documents until the Court ruled on State Farm's motion to file the confidential, proprietary, and trade secret information under seal.

37. Plaintiff appears to claim that the Contract requires State Farm to pay any amount billed by Plaintiff, so long as the amount comes within a reasonable range of charges. That position has no support in the Contract's language. Were it otherwise, then State Farm could be subject to suit every time a repair is performed, on grounds that some additional amount would still have been a reasonable payment, unless State Farm paid what would be the maximum charge for the repair. No language in the Contract calls for such a result. *See Siegle*, 819 So. 2d at 739 ("In contract interpretation cases, the issue to be addressed is not what this Court or the petitioner would prefer the policy cover, but what losses the mutually agreed-upon contractual language covers."); *South Carolina Ins. Co.*, 402 So. 2d at 481 ("Particularly with respect to insurance policies, a court needs to view the contract provisions in light of the character of the risks assumed by the insurer.").

38. In sum, the record shows without dispute that State Farm exercised its option to pay its insured's claim based on an estimate or bid approved by State Farm, obtained three such figures, and paid the claim based on the one it selected. State Farm also provided record evidence of the reasonableness of its selection. The record taken as a whole cannot lead a rational trier of fact to find for the Plaintiff, and therefore the Court's inquiry is at an end. State Farm complied with the terms of the Contract and is entitled to summary disposition as a matter of law.

**WHEREFORE**, it is **ORDERED** and **ADJUDGED** that:

1. State Farm's Motion for Summary Disposition is GRANTED;
2. Plaintiff's Motion for Summary Disposition is DENIED.
3. Full and final judgment is hereby ENTERED in favor of State Farm.
4. Plaintiff shall take nothing in this action and Plaintiff shall go henceforth without day.
5. The Court reserves jurisdiction to consider any timely filed motion for fees or costs.

* * *

**Insurance—Homeowners— Attorney's fees—Claim or defense not supported by material facts or applicable law—Assignment—Plaintiff-assignee knew or should have known that assignment which omitted provision allowing for rescission of assignment by written notice failed to strictly comply with section 627.7152 and was, therefore, invalid and unenforceable—Attorney's fees awarded to insurer**

SUNSHINE MOLD SOLUTIONS, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-007788-SP-25. Section CG01. March 17, 2023. Linda Melendez, Judge.

## ORDER ON DEFENDANT'S MOTION TO TAX COSTS AND AWARD ATTORNEY'S FEES

THIS CAUSE having come before the Court on February 27, 2023 on Defendant's Motion for Sanctions seeking attorney's fees pursuant to Florida Statute § 57.105 and having heard arguments of the parties and otherwise being fully advised as to the premises thereof finds:

The subject cause of action was brought by Plaintiff, SUNSHINE MOLD SOLUTION for payment of insurance benefits under section 627.7152 on behalf of the Insured, LUIS VACA, against Defendant, CITIZENS PROPERTY INSURANCE CORPORATION, for an alleged date of loss November 18, 2021. At the time of the subject accident, the insured was covered under a Homeowners Policy, issued by Defendant, that provided homeowners coverage for the subject property. The Insured, LUIS VACA, reported a claim to Defendant with a date of loss November 18, 2021. After the claim was reported, Defendant completed its inspection of the property and subsequently denied the Insured's claim.

Thereafter on December 8, 2021, the Insured executed a purported Assignment of Benefits (also referred to herein as "AOB") in favor of Plaintiff to provide mitigation services to the property. The Assignment of Benefits was signed on December 8, 2021. The AOB was executed after July 1, 2019 and was therefore subject to section 627.7152. *See* § 627.7152(13), *Florida Statutes* (2020). Critically, the alleged Assignment of Benefits did not meet the statutory require-

ments of § 627.7152.

Florida Statute § 627.7152(2)(a) required the AOB provide notice that written notice was required to rescind the assignment, providing in relevant part as follows:

> (2)(a)An assignment agreement must:
>
> 1.Be in writing and executed by and between the assignor and the assignee.
>
> 2.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** within 14 days after the execution of the agreement, at least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed, or at least 30 days after the execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property.

An assignment agreement that does not comply with section 627.7152(2) is "invalid and unenforceable" as a matter of law. *See* § 627.7152(2)(d). The AOB executed by Plaintiff failed to include notice of the written rescission requirement, instead stating:

> YOU ARE AGREEING TO GIVE UP CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY TO A THIRD PARTY, WHICH MAY RESULT IN LITIGATION AGAINST YOUR INSURER. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING IT. YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHOUT PENALTY WITHIN 14 DAYS AFTER THE DATE THIS AGREEMENT IS EXECUTED, AT LEAST 30 DAYS AFTER THE DATE WORK ON THE PROPERTY IS SCHEDULED TO COMMENCE IF THE ASSIGNEE HAS NOT SUBSTANTIALLY PERFORMED, OR AT LEAST 30 DAYS AFTER THE EXECUTION OF THE AGREEMENT IF THE AGREEMENT DOES NOT CONTAIN A COMMENCEMENT DATE AND THE ASSIGNEE HAS NOT BEGUN SUBSTANTIAL WORK ON THE PROPERTY. HOWEVER, YOU ARE OBLIGATED FOR PAYMENT OF ANY CONTRACTED WORK PERFORMED BEFORE THE AGREEMENT IS RESCINDED. THIS AGREEMENT DOES NOT CHANGE YOUR OBLIGATION TO PERFORM THE DUTIES REQUIRED UNDER YOUR PROPERTY INSURANCE POLICY.

Defendant, in consideration of its denial of the Insured's claim and after finding the purported Assignment of Benefits to be invalid, denied Plaintiff's claim for benefits. In its denial letter issued on December 14, 2021, Defendant informed Plaintiff that the assignment provisions "do not comply with the requirements necessary to make it valid and enforceable." Defendant noted specifically that the agreement "does not contain a provision that allows the insured to rescind the assignment without penalty or fee within the time frames prescribed by Florida law." ***See* Exhibit "A" attached to Defendant's Motion to Dismiss.** Defendant then informed Plaintiff again before suit that the assignment was improper. On March 11, 2022, Defendant sent correspondence in response to Plaintiff's 10-day notice of intent to litigate under section 627.7152. *See* Exhibit "B" attached to Defendant's Motion to Dismiss. Nonetheless, Plaintiff filed suit for breach of contract on March 29, 2022.

On June 15, 2022, Defendant filed its Motion to Dismiss based upon the Plaintiff's Assignment of Benefit's failure to comply with § 627.7152 (2020). The Motion to Dismiss indicated that the Plaintiff's Assignment of Benefits failed to adhere to the mandatory statutory language of § 627.7152(a) regarding written notice. On September 8, 2022, Defendant sent Plaintiff's counsel a proposed Motion for Sanctions and safe harbor letter as required by Florida Statute § 57.105, requesting Plaintiff's counsel dismiss the claim given that the Assignment of Benefits forming the basis of Plaintiff's standing to bring suit was unenforceable per § 627.7152(2)(a). Plaintiff refused to dismiss the claim and after the twenty-one (21) safe harbor period passed, Defendant filed its Motion for Sanctions Pursuant to § 57.105 on October 4, 2022, prior to the hearing on Defendant's Motion to Dismiss.

Defendant's Motion to Dismiss was heard before this Court on October 4, 2022. At the hearing, Plaintiff's counsel argued that the Assignment of Benefits essentially complied with the requirements of the statute as the Assignment provided the timelines required for rescission of the Assignment of Benefits, even though the contract failed to provide that the rescission had to be in writing. The Court, having heard arguments for the Motion to Dismiss, found for Defendant and dismissed the case with prejudice.

On February 27, 2023, the parties came before this Court for a hearing on Defendant's Motion for Entitlement to Reasonable Attorney's Fees and Costs Pursuant to Previously Filed Section 57.105 Motion for Sanctions. At the hearing, Defendant argued that at the time suit was filed Plaintiff's counsel and Plaintiff knew that the subject Assignment of Benefits failed to strictly comply with section 627.7152. Plaintiff argued that it substantially complied with the Assignment of Benefits requirements and therefore should not be subjected to the sanctions under § 57.105 despite its failure to strictly comply with section 627.7152. Additionally, Plaintiff argued that Defendant bore the burden of proving Plaintiff's assignment of benefits was not supported by existing law and had not satisfied the "substantial burden" of section 57.105.

This Court finds Plaintiff's arguments are unsupported by law and the facts of the case. Section 627.7152 very clearly states that its provisions *must* be complied with, and that failure to comply renders the assignment *invalid* and *unenforceable* under the law. Section 627.7152(2)(a) identifies seven requirements that must be included in an AOB for post-loss insurance benefits, each **fatal** to the validity of the assignment agreement if absent. Under section 627.7152, "[t]he statute contains a 'checklist' of terms that must be included within any such assignment agreement." *Adjei v. First Cmty. Ins. Co.*, 47 Fla. L. Weekly D2116a, at *4-5 (Fla. 3d DCA October 19, 2022).

The statutory requirements of section 627.7152 are clear and unambiguous. When a statute is clear and unambiguous, the Court must enforce the plain language of the statute. *See Daniels v. Florida Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a]. Where the statute is clear and unambiguous and contains its own conditions and requirements, **it must be strictly construed**. *Dwork v. Exec. Estates of Boynton Beach Homeowners Ass'n,* 219 So. 3d 858, 861 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1158a]. Section 627.7152 uses mandatory language to require that assignment of benefits include certain and specific language for the assignment to be valid and enforceable, which is also cause for strict compliance and interpretation. *Kidwell Grp. v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b]. "The language of section § 627.7152(2), Florida Statutes is mandatory and not permissive." *Water Dryout LLC v. First Protective Ins. Co.*, 29 Fla. L. Weekly Supp. 321a (Fla. 19th Cir. Ct. 2021).

Thus, the Assignment must comport with *all* the provisions of § 627.7152 in order to be valid and enforceable, and for Plaintiff to have standing. *See e.g., Webb Roofing & Construction, LLC a/a/o Felix Niespodziewanski v. First Protective Insurance Co.,* 2020 Fla. Cir. LEXIS 2651 Case No.: 2019-CA-4280 (Fla. 20th Cir. Ct. Sept. 7, 2020)(granting insurers motion to dismiss for plaintiff's failure to strictly comply with AOB statute requirements prior to filing suit); *Kidwell Grp.*, 343 So. 3d 97 (holding an assignment of benefits that did not strictly comply with statutory requirements to be invalid as a matter of law, and accordingly "the trial court's dismissal . . . was proper."). Regarding the assignment of post-loss insurance benefits under a residential or commercial insurance policy, Florida Statute

section 627.7152(2)(a)(1) clearly and unambiguously outline limitations and requirements for a written assignment of benefits contract, including notice provisions, amount limitations, and procedural issues. Accordingly, Florida Statute section 627.7152 must be strictly construed as it is in derogation of Florida Common law recognizing equitable assignments. *Carlile v. Game & Fresh Water Fish Com.,* 354 So. 2d 362, 364 (Fla. 1977) ("Statutes in derogation of the common law are to be construed strictly . . ."); *Fla. Dep't of Health and Rehabilitative Servs. v. S.A.P.,* 835 So. 2d 1091 (Fla. 2002) [27 Fla. L. Weekly S980a]; *Goersch v. City of Satellite Beach,* 252 So. 3d 309 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1629b] (holding that when statute employs mandatory language delineating procedure and abrogating other common law applications, statute must be strictly construed).

The intent of the Legislature shows that these types of assignment agreements that do not comply with section 627.7152 are invalid and unenforceable. As succinctly stated by the Fourth District in *Air Quality Experts Corp. v. Fam. Sec. Ins. Co.*, 351 So. 3d 32:

> Section 627.7152(2)(d) provides that an assignment which does not comply with the terms of the statute is "invalid and unenforceable." Because the assignment failed to comply with the statute, it is invalid. Therefore, the assignee cannot attempt to enforce any claim to insurance proceeds based upon an invalid assignment.

Plaintiff knew at the time it executed the AOB that the contract had to comply with the mandatory terms of section 627.7152. At the time Plaintiff and Plaintiff's counsel filed the instant lawsuit, they were aware that the purported AOB did not strictly comply with section 627.7152(2)(a)2. Moreover, Defendant notified Plaintiff's counsel and Plaintiff on numerous occasions both before and after suit was filed that the Assignment of Benefits did not strictly comply with § 627.7152(2)(a) and was invalid and unenforceable.

During the pendency of the lawsuit, there were numerous decisions from Florida courts across the state ruling that Assignment of Benefits must strictly comply with section 627.7152, of which Plaintiff was well aware. Specifically, Plaintiff and Plaintiff's counsel were aware of the decision in *Kidwell Grp. v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b]. Despite Plaintiff and Plaintiff's counsel knowing the AOB did not strictly comply with section 627.7152 and that Florida required strict compliance, they steadfastly refused to dismiss the suit. Plaintiff furthermore failed to dismiss the lawsuit within the safe harbor period of § 57.105 and prior to this Court's Order dismissing the lawsuit with prejudice October 4, 2022. Pursuant to section 57.105, Defendant is entitled to reasonable attorney's fees and costs under Florida law.

This Court has already found in favor of Defendant and dismissed Plaintiff's lawsuit with prejudice based on its determination that Plaintiff's AOB was invalid and unenforceable under section 627.7152 and that thus Plaintiff lacked standing to bring suit. Defendant is clearly the prevailing party. *See* § 57.105. Plaintiff's lawsuit was meritless from its inception and needlessly litigated.

Florida Statutes § 57.105 provides as follows:

> ***Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.***—
>
> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that **the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial**:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> 4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

It is undisputed that Defendant complied with the "safe harbor" conditions of Fla. Stat. §57.105(4) by serving the Plaintiff at least twenty-one (21) days prior to filing of the same to give Plaintiff opportunity to withdraw, dismiss, or appropriately correct the above issues. Plaintiff was given ample opportunity to dismiss the case and Plaintiff's failure to dismiss the case within the safe harbor period gives rise to sanctions under §57.105. Defendant incurred attorneys' fees and costs in regard to defending against this lawsuit that is not supported by the material facts necessary to establish Plaintiff's claim in accordance with the application of then-existing law to those material facts. See § 57.105, Fla. Stat. The requisite conditions of section 57.105 have been met and thus Defendant is entitled to reasonable attorney's fees and costs, and Plaintiff is subject to sanctions.

Accordingly, based upon the findings of the Court Defendant's Motion to Tax Costs and Entitlement to Attorney Fees under Florida statute §57.105 is **Granted**.

* * *

**Injunctions—Ex parte—Dissolution of marriage—Dissipation of marital assets—Former husband's ex-parte motion for temporary injunction prohibiting company established by former husband and ex-wife for purpose of purchasing Florida real estate from selling corporate properties until divorce proceedings in Argentinian court are finalized and requiring that 50% of proceeds of property sale already conducted be deposited in court registry is denied—Former husband has failed to establish substantial likelihood of success on merits of underlying claim for injunctive relief by strong and clear evidence where corporation was not party to divorce proceeding that resulted in foreign court order that purportedly enjoins ex-wife from disposing of assets of corporation, corporate assets are not titled in former husband's name and he has not presented documentation of his ownership interest in corporation or alleged status as corporate manager, and there has been no final determination by foreign court regarding distribution of corporate assets as marital assets—Further, former husband has adequate legal remedy of seeking enforcement of foreign court order against ex-wife in that court**

JONATHAN GRYNSZPANCHOLC, Plaintiff, v. SOUTH PROPERTIES, LLC, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-001057-CC-20. Section CL02. March 17, 2023. Christopher Green, Judge.

## ORDER DENYING EX PARTE MOTION FOR TEMPORARY INJUNCTION

This matter came before the Court on Plaintiff's Ex Parte Motion for a Temporary injunction. For the following reasons, the Court finds Plaintiff is not entitled to the extraordinary remedy of an ex parte temporary injunction against this corporate defendant and the motion is DENIED.

### Facts and Procedural Background

The following facts are taken from Plaintiff's verified complaint for injunctive relief and Plaintiff's affidavit filed in support of the motion for temporary injunction. Plaintiff and his ex-wife, Vanessa K. Wechselblatt, are both Argentinian citizens domiciled in Argentina. The couple married in 2008. According to Plaintiff, the couple jointly established Defendant South Properties LLC (a Delaware corporation) for the purpose of purchasing real estate properties in South Florida. However, Wechselblatt was assigned as the sole managing

member of the corporation ". . .due to business and financial planning. . ." Plaintiff alleged the business was created with joint marital funds, and he managed the corporation which included his evaluation of real estate purchases and his selection of a management company for the properties. Attached to Plaintiff's affidavit was a table identifying 14 properties owned by the Defendant corporation. None of the properties are titled in Plaintiff's name, or his ex-wife's name. In addition, the Court notes Plaintiff did not present any documentation along with his affidavit which reflect either his ownership interest or management responsibilities with the Defendant corporation.

In June 2022, Plaintiff divorced Wechselblatt, but the proceeding for the final distribution of marital assets remains pending before the Argentinian court. Plaintiff asserts that the Argentinian Court has determined Defendant's assets are presumed marital assets and subject to the division of marital assets that has yet to take place in that foreign divorce proceeding. At the hearing on Plaintiff's motion, Plaintiff's counsel acknowledged that there has been no final, foreign order adjudicating the distribution of marital assets and therefore no foreign judgment to domesticate in the Florida courts.

Attached to Plaintiff's verified complaint is a purported order from the Argentinian Court with an English translation. According to Plaintiff's affidavit and the English translation, the Argentinian Court enjoined Wechselblatt, in her capacity as holder, owner, proprietor, shareholder, or manager, from ". . .executing, performing, or carrying out. . .any and all acts of disposition in relation to the company South Properties LLC. Plaintiff contends Wechselblatt has violated the foreign divorce court's order by withdrawing all funds from one of the corporate bank accounts and closing the account. Plaintiff contends Wechselblatt was required to maintain the bank account at 50% of its value pursuant to the foreign divorce court's order. Plaintiff further contends Wechselblatt violated the foreign order by closing that bank account, selling one of the corporate properties, and failing to disclose the sale in the Argentine divorce proceeding. In sum, Plaintiff claims Wechselblatt is depleting the marital asset in contravention of the Argentinian divorce court order.

Plaintiff filed a verified complaint for injunctive relief and an ex parte motion for temporary injunction. The injunctive relief sought in Plaintiff's motion includes the following: 1) prevent the defendant corporation from selling or transferring any interest in the corporate properties until the Argentinian divorce proceeding is finalized; 2) reinstate a management company for the Defendant corporation's properties; 3) deposit 50% of the proceeds of the sale of the one property into the Court registry; 4) deposit 50% of the rent received for each of the properties from the date of the foreign order (September 2022) into a corporate bank account; and 5) provide complete bank statements from all corporate bank accounts.

**Legal Analysis**

We begin with an analysis of this Court's subject matter jurisdiction. "Judges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court. . ." Fla. Stat. § 34.01. "County and circuit courts have concurrent jurisdiction over equitable matters, including those requesting injunctive relief, regardless of the amount in controversy." *Mitchell v. Beach Club of Hallandale Condo. Ass'n, Inc.,* 17 So. 3d 1265, 1266 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1935a]. Here, Plaintiff's counsel acknowledged (and the complaint reflects) that Plaintiff is not seeking damages. Thus, the Court has subject matter jurisdiction over the complaint for injunctive relief and the instant ex parte motion. Having determined the Court has subject matter jurisdiction, we now turn to the procedural history.

Rule 1.610 of the Florida Rules of Civil Procedure governs the issuance of temporary injunctions and states that a temporary injunction may be granted without written or oral notice to the adverse party only if it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required. Fla. R. Civ. P. 1.610(a). Here, Defendant did not appear for the hearing on Plaintiff's motion, but Plaintiff's counsel certified in the motion that she gave notice by service of the complaint on Defendant. In addition, Plaintiff's counsel asserts that notice of the motion should not be required because ". . .Defendant has already sold a property and concealed the proceeds of its sale, and it is likely to accelerate the dissipation of assets if notice of this motion is given." [Attorney certification to Plaintiff's Ex Parte Motion for Temporary Injunction]. Accordingly, we now turn to address the merits of Plaintiff's motion.

"A temporary injunction is an extraordinary remedy which should be granted only sparingly." *City of Miami v. AIRBNB, Inc.,* 260 So. 3d 478, 481 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2700a]. "A party moving for the temporary injunction must therefore demonstrate: (1) the likelihood of irreparable harm if the temporary injunction is not entered; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) entry of the temporary injunction will serve the public interest." *Id.* "If the party seeking a temporary injunction fails to meet any of these requirements, the motion must be denied." *Id.* In addition, ex parte orders are antithetical to precious due process rights, requiring a 'strong and clear' showing before a temporary injunction without notice may issue." *Smith v. Knight,* 679 So. 2d 359, 361 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2054a].

However, Florida Courts have entered ex parte injunctions in divorce proceedings to prevent a spouse from dissipating marital assets subject to equitable distribution. Specifically, Plaintiffs cite *Lerner v. Dum,* 220 So. 3d 1202 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1389a], for this proposition. But the factual scenario in *Lerner* is remarkably distinct from this case, and does not support the issuance of a temporary injunction when the defendant is not a party to the underlying divorce and a corporation. In *Lerner,* the wife in a divorce proceeding obtained an ex parte temporary injunction prohibiting the husband from conducting specified financial transactions without a court order or consent of his wife. *Id.* The wife in *Lerner* claimed the couple owned several properties in Florida and abroad and the husband previously had dissipated marital assets in Venezuela and used marital funds to acquire assets solely in his name. *Id.* The District Court of Appeal affirmed the temporary injunction but remanded the case to allow the trial court to set a bond. *Id.* Notably, the *Lerner* court had both personal and subject matter jurisdiction over the parties. Moreover, there was no issue involving purported marital assets titled in the name of a non-party corporation as in the instant case.

Plaintiff has cited no authority squarely on point which would direct this Court to award ex parte injunctive relief solely against a corporate entity to prevent the dissipation of marital assets where both spouses are not present before the Court in a divorce proceeding. Notably, there is authority in this jurisdiction upholding a temporary injunction freezing the assets of one party to a divorce proceeding based on the order of a Guatemalan court. *See Cardenas v. Solis,* 570 So. 2d 996 (Fla. 3d DCA 1990). In *Cardenas,* the Guatemala Family Court entered an ex parte injunction freezing the husband's bank accounts in Guatemala and Miami, and the wife filed suit in Miami-Dade Circuit Court to enforce the order of the Guatemalan court. *Id.* The appellate court affirmed the temporary injunction entered in favor of the wife. *Id.* But again, the Court notes the critical factual distinction between *Cardenas* and this case is that the assets at issue in

*Cardenas* were in the name of the husband, not a third-party corporation. *Id.* Unlike *Cardenas,* there is no identity of parties here with the foreign court order which would support the principle of comity to recognize the foreign order.

The facts here are more akin to those in *Lanigan v. Lanigan,* 353 So. 3d 1188 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D167a], where a husband in a divorce proceeding appealed an order partially granting his motion to dissolve an ex-parte injunction precluding the sale of real property owned by a non-party. In that case, the husband claimed the trial court failed to make the requisite four-findings to warrant the injunctive relief, and that the court erred when it enjoined a non-party, a limited liability company controlled by his mother. *Id.* The District Court of Appeal reversed the trial court's order and remanded the case because the court had failed to set forth a factual basis showing the wife was entitled to relief. *Id.* In a footnote to the opinion, the Court noted that the non-party corporation was later added as a party to the action, but unfortunately the Court did not address the sufficiency of this amendment because it reversed the injunction on other grounds. *Id.*

Based on the foregoing, the Court finds the Plaintiff's verified complaint and affidavit failed to establish by "strong and clear" evidence that Plaintiff has established a substantial likelihood of success on the merits of the underlying claim for injunctive relief. First and foremost, while Plaintiff claims the Defendant "violated" the foreign court's order, the Defendant corporation was never a party to the divorce proceeding. Secondly, the assets at issue are not titled in the Plaintiff's name and he has presented no documentation reflecting his ownership interest in the corporation, or documentation reflecting his purported management status. For example, Plaintiff has not shown he owns shares in the corporation which would tend to support his standing as a shareholder. Granting the Plaintiff's ex parte motion would essentially amend the articles of incorporation giving management power to Plaintiff which, by his own admission, was never explicitly provided. Although Plaintiff claims the Argentinian court has determined the Defendant's assets are marital assets, there has been no final determination in that regard distributing the assets.

Finally, it appears to the Court that Plaintiff may have an alternate, adequate legal remedy which is seeking the enforcement of the Argentinian divorce court's order against his ex-wife in that proceeding. Plaintiff has failed to assert any facts showing he has first sought relief in the Argentinian divorce court and has been unsuccessful. Although this Court has no familiarity with Argentinian law, it is reasonable to assume the foreign judiciary would have the inherent authority to enforce its own orders like the contempt powers given to Florida courts.

Accordingly, at this stage of the proceedings, the Court finds Plaintiff has failed to establish his entitlement to the extraordinary remedy of an ex parte temporary injunction.

* * *

**Insurance—Personal injury protection—Coverage—Eligibility for benefits—Resident of state—Motion for summary judgment in favor of plaintiff is denied where there is genuine issue of material fact as to whether plaintiff is "resident," as required by PIP statute to be eligible for benefits, and where plaintiff has not addressed affirmative defenses**

SASA ZIVULOVIC, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-041262. Division J. February 16, 2023. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, Tampa, for Plaintiff. Stephen B. Farkas, Dutton Law Group, Tampa, for Defendant.

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

BEFORE THE COURT is Plaintiff's Amended Motion for Final Summary Judgment (Doc. 166). Defendant timely responded (Doc. 173), and the parties appeared for a hearing on February 16, 2023.

Upon consideration of the filings and argument of counsel, and for the reasons stated on the record, the motion is DENIED. Plaintiff's "Application for Benefits—Florida" (Doc. 173 at 18) and his "Affidavit of No Insurance" (Doc. 173 at 20) create a genuine issue of material fact as to whether Plaintiff is a "resident," as required by section 627.736(4)(e)(4) to be eligible for PIP benefits. *See generally Maldonado v. Allstate Ins. Co.,* 789 So. 2d 464 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1619a] (explaining the test for residency under section 627.736(4)(e)(4)).

Moreover, Plaintiff has not satisfied his burden to overcome Defendant's affirmative defenses, which are not mentioned in the motion. *See In re Amends. to Fla. R. Civ. P. 1.510,* 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a]; *Bedford v. Doe,* 880 F.3d 993, 996 (8th Cir. 2018); *Eli Research, LLC v. Must Have Info Inc.,* 2015 WL 5934632, at *3 (M.D. Fla. Oct 6, 2015) (quoting *United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Counties in the State of Ala.,* 941 F.2d 1428, 1438 n.19 (11th Cir. 1991); *Schoen v. Underwood,* W-11-CA-16, 2012 WL 13034044, at *2 (W.D. Tex. May 15, 2012) ("*Celotex* requires plaintiffs moving for summary judgment to address any affirmative defenses raised by the defendant and demonstrate that there is no genuine issue of material fact on those defenses."); *State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., Inc.,* 2008 WL 11337326, at *3 (M.D. Fla. Dec. 18, 2008) ("A plaintiff must address the undisputed facts regarding affirmative defenses asserted in the defendant's answer, and a failure to do so should result in denial of the motion for summary judgment.").

* * *

**Insurance—Automobile—Windshield replacement— Appraisal—Failure of repair shop to satisfy appraisal provision of policy prior to filing suit for balance of reduced claim for windshield replacement—Complaint dismissed without prejudice**

CORNERSTONE MOBILE GLASS, INC., d/b/a FLORIDA MOBILE GLASS, a/a/o Erik Fernandez, Plaintiff, v. INFINITY ASSURANCE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 21-CC-111835. Division I. November 13, 2022. Leslie Schultz-Kin, Judge. Counsel: Chris Thibodeaux, United Law Group of Florida, P.A., Largo, for Plaintiff. Esteban Santana, Law Offices of Gabriel O. Fundora & Associates, Tampa, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO ENFORCE APPRAISAL CLAUSE OR IN THE ALTERNATIVE MOTION TO STAY PROCEEDINGS AND MOTION TO ENFORCE APPRAISAL CLAUSE**

This cause came on to be heard before me on the 01st day of November 2022, special set hearing on the Defendant's Motion To Dismiss Plaintiff's Complaint And Motion To Enforce Appraisal Clause Or In The Alternative Motion To Stay Proceedings And Motion To Enforce Appraisal Clause; and after argument of counsel and the Court being advised of its premise, the Court makes the following findings of fact and law:

1. Plaintiff filed the instant lawsuit to recover monies allegedly due for work involved in Windshield Replacement.

2. Plaintiff alleged that Defendant improperly reduced the invoice prior to issuing payment.

3. Paragraph four (4) of the Complaint references the Policy, hence the Policy is within the four corners of the Complaint.

4. The Insurer and the insured agreed the Appraisal Condition included in the Policy would be satisfied before suit may be filed. As an Assignee of the insured, Plaintiff therefore stands in the shoes of the insured and implicitly accepts the Appraisal Condition Precedent.

5. Plaintiff did not satisfy the Appraisal condition precedent prior to filing the instant case, as required by the Policy at issue.

6. Plaintiff agreed that Defendant did not waive the Appraisal Condition Precedent, by responding to this lawsuit or filing the Motion to Dismiss, per recent binding appellate decisions.

Accordingly, it is hereby ORDERED as follows:

1. This suit is DISMISSED without prejudice and may not be refiled until the Appraisal Condition contained in the policy at issue is satisfied.

* * *

**Insurance—Personal injury protection—Attorney's fees—Amount**

DRESNER CHIROPRACTIC CENTER, P.A., a/a/o Samir Rezkalla, Plaintiff, v. SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502020SC016572XXXXMB (RL). Februray 28, 2023. Edward A. Garrison, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck & Baxter P.A., West Palm Beach, for Plaintiff. Jo-Anna Enriquez, Boca Raton, for Defendant.

**FINAL JUDGMENT AWARDING PLAINTIFF'S ATTORNEY'S FEES AND COSTS**

**THIS CAUSE CAME ON TO BE HEARD** upon DRESNER CHIROPRACTIC CENTER, P.A. (AAO Samir Rezkalla), Motion to Tax Attorney's Fees and Costs seeking a determining from the Court as to the amount of reasonable attorney's fees and taxable costs to be awarded to the Plaintiff and this Court having considered the motions and Affidavits submitted by Plaintiff and Plaintiff's expert witness, and having considered evidence regarding entitlement to, and amount of attorney's fees; and having utilized the criteria set forth in the Rules regulating the Florida Bar, the Rules of Professional Conduct, Rule 4-1.5(B) and as mandated by the Florida Supreme Court (See *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985) and *Standard Guaranty Insurance Company v. Quanstrom,* 555 So.2d 828 (Fla. 1990) for determining reasonable attorney's fees and in determining whether the application of a Contingency Risk Factor to the "loadstar" figure is appropriate in awarding reasonable attorney's fees, and the Court being otherwise fully advised in the premises, it is hereby:

**ORDERED AND ADJUDGED** as follows:

This action was brought by DRESNER CHIROPRACTIC CENTER, P.A. (AAO Samir Rezkalla),) seeking additional PIP benefits, in the amount of $860.30 and was filed in Palm Beach County on October 16, 2021.

On January 22, 2021, Honorable Judge Garrison, sent an Order Resetting Pretrial Conference (hereinafter "Pretrial Order") that was currently scheduled for January 25, 2021, and rescheduled the Pre-Trial Conference for February 4, 2021, at 9:30 am. The Pretrial Order clearly stated in bold "**Failure to appear could result in Plaintiff's claim being dismissed or Default Judgement against the Defendant."**

On February 4, 2021, only the Plaintiff appeared at the rescheduled PIP Pre-Trial Conference, resulting in Honorable Judge Garrison issuing an Order for Default against the Defendant which was entered on February 4, 2021.

On February 9, 2021, upon receiving the PIP Pre-Trial Conference Disposition Order of Default, Plaintiff filed its Motion for Final Default Judgment which was executed the same day.

Thereafter, on February 9, 2021, Plaintiff filed its Motion to Tax Attorney's Fees and Costs as to the Amount of Attorney's Fees and Costs Owed to the Plaintiff. On January 19, 2023, the Court entered an Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees (hereinafter "Order Preliminary") setting forth therein specific deadlines in which the parties are to comply.

On January 24, 2023, in accordance with the Order Preliminary, Plaintiff filed with the Court and served the Defendant with a copy of its time records and cost sheets. Pursuant to the Order Preliminary, Defendant, as the nonmoving party, was required to respond in writing to each item of cost and fees, within ten (10) days of the Order Preliminary, stating whether Defendant agrees or objects to said item. Then for each objection, Defendant was required to state the basis and cite the supporting authority. Defendant's last day to respond in writing to each item of cost and fees and state whether counsel agrees or objects to said item was **January 30, 2023.**

Defendant failed to file any response setting forth any objections to Plaintiff's time records or cost records for any of the time or cost entries being sought by the Plaintiff. Additionally, Defendant has failed to even contact the Plaintiff and/or file any motion requesting an extension from the Court.

On February 6, 2023, the Plaintiff was forced to file its Motion to Strike any Objections to Plaintiff's Timesheets/Costs to be filed by the Defendant and for Sanctions or in the Alternative Motion to Compel Defendant's Response to Plaintiff's Timesheets and for Sanctions.

Additionally, on February 6, 2023 the Plaintiff also filed its Motion to Dispense with and/or to Continue Mediation, in accordance with the Preliminary Order regarding the hearing on Plaintiff's Motion to Tax Attorney's Fees and Costs and for Sanctions

The attorney's fees awarded by the Court, as set forth in this Judgment, took into account the time the Plaintiff was seeking to be awarded as set forth in both the first set of timesheets and costs filed by the Plaintiff as well as the additional timesheets filed by the Plaintiff for the additional work caused by Defendant's multiple failures to comply with Court Orders.

The Court has considered the time and labor required for this case, the fee customarily charged, the results obtained, and the experience, reputation, and ability of the lawyer performing the services in this matter. The Court has also weighed the Affidavit and evidence filed of the Plaintiff's expert witness, Russel Lazega. In addition to Mr. Lazega' s evaluation of the skill and reputation of the Plaintiff's attorney, Tara L Kopp, Esq., the Court also considered the evidence filed regarding the fees awarded to other attorneys in the community who have similar levels of skill and experience and fees awarded for similar work. A range of fees would be appropriate; and the evidence filed, along with the Court's own evaluation, has led the Court to conclude that the fees awarded as described below are reasonable.

**FEE AWARD FOR TARA L. KOPP, ESQ.**

1. The issues, for consideration by this Court are to determine the reasonable hours expended by **Tara L. Kopp, Esq.**, and at what hourly rates.

2. This Court determines, sitting in its factual finding capacity, that the reasonable hours expended by **Tara L. Kopp, Esq**, in the representation of the Plaintiff in this case are **16.6 hours**. These findings are based upon *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom.*

3. This Court determines, sitting in its factual finding capacity, that the reasonable hourly rate for the work performed by counsel, **Tara L. Kopp, Esq.**, is **$600.00** per hour; these findings are based upon all factors enumerated both in the Florida Bar Code of Ethics 4-1.5, and in the cases of *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom*.

4. Accordingly, this Court finds that the reasonable hourly rate times the reasonable (respective) hours equal **$9,960.00** which represents the "lodestar" for the attorney's fees to be awarded to **Tara L. Kopp, Esq.**, in this matter.

5. The Court further finds that **Tara L. Kopp, Esq.,** is entitled to prejudgment interest on the above "lodestar" fee at a rate of **4.81 %** as determined by s. 55.03 Fla. Statute.

**FEE AWARD FOR SUPPORT STAFF**

6. This Court determines, sitting in its factual finding capacity, that the reasonable hours expended by **Support Staff (Paralegals and Legal Assistants)** in the assisting of the representation of the Plaintiff in this case are **3.4 hours**. These finding are based upon *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom.*

7. The Defendant stipulates and this Court finds that Plaintiff's Support Staff (Paralegals and Legal Assistants) reasonable hourly rate for the work performed by the **Support Staff (Paralegals and Legal Assistants)**, is **$150.00** hour; these findings are based upon all factors enumerated both in the Florida Bar Code of Ethics 4-1.5, and in the cases of *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom.*

8. Accordingly, this Court finds that the reasonable hourly rate times the reasonable (respective) hours equal **$510.00** which represents the "lodestar" for the Support Staff (**Paralegals and Legal Assistants)** fees to be awarded, in this matter.

9. The Court further finds that **Support Staff (Paralegals and Legal Assistants)**, is entitled to prejudgment interest on the above "lodestar" fee at a rate of **4.81 %** as determined by s. 55.03 Fla. Statute.

**COSTS**

10. The Defendant stipulates to the Plaintiff's costs and Plaintiff is awarded taxable costs in the amount of **$205.00**.

**EXPERT WITNESS FEES**

11. The Court finds that a reasonable hourly rate for the time expended by Plaintiff's expert**, Russel Lazega, Esq.,** to be **$625.00** hour. The Court finds that **1.7** hours were reasonably expended by Plaintiff's expert, **Russel Lazega, Esq**., for a total expert witness fee of **$1,062.50**, which is taxed against the Defendant as a cost.

12. The Court finds that the fees awarded: (a) Comply with prevailing professional standards; (b) Do not overstate or inflate the number of hours reasonably necessary for a case of comparable skill or complexity; and (c) Represent legal services that are reasonable and necessary to achieve the result obtained. (Florida Statute §627.736(8) (2013)).

**FINAL JUDGMENT**

In the view of the foregoing, it is hereby:

**ORDERED AND ADJUDGED** that the Plaintiff shall recover from Defendant the sum of **$10,675.00** representing reasonable attorney's fees and costs, plus prejudgment interest at the rate of **4.81%** and the Defendant shall issue said payment to the Plaintiff made payable to: **Schuler, Weisser, Zoeller, & Overbeck, PA. and delivered to 1615 Forum Place, Suite 4D, West Palm Beach, FL 33401** and Plaintiff's expert witness, Russel Lazega, shall recover from Defendant the sum of **$1,062.50**, and the Defendant shall issue said payment made payable to**: Russel Lazega PA and delivered to 45 E Sheridan St., Dania Beach, FL 33004**, all of which shall accrue post judgment interest at the rate of **5.52%** a year and shall continue to accrue at the legal rate of interest, for which amount let execution issue.

This Court reserves jurisdiction for purposes of enforcement of this Final Judgment, including the award of additional attorney's fees should it become necessary to expend additional time on the enforcement of this Final Judgment, and for purposes of appellate attorney's fees to be determined, if any.

The March 23, 2023 hearing is **CANCELLED.**

* * *

**Criminal law—Driving under influence—Evidence—State and its witnesses are precluded from referring to field sobriety exercises by term "test" or related terms or stating that officer was "certified" to administer exercises—State is precluded from having officer give opinion on impairment of defendant—State is required to remove improper gratuitous statements from body-cam video—State is precluded from offering evidence of civil penalties for defendant's alleged refusal to submit to breath test in trial on DUI charges**

STATE OF FLORIDA, Plaintiff, v. JAMES EDWARD JACKSON, JR., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Criminal Traffic Division. Case No. 22001956MU10A. March 1, 2023. Deborah Carpenter-Toye, Judge. Counsel: Jackson Lubin, State Attorney's Office, for Plaintiff. Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., Miami, for Defendant.

**ORDER**

**THIS CAUSE,** having come on to be considered by me on Mr. Jackson's motion, pursuant to the FLORIDA RULES OF CRIMINAL PROCEDURE, Rule 3.190 and FLORIDA RULES OF EVIDENCE 90.401, 90.402 and 90.403, *respectively*, to enter an order, *in limine*, as to several issues, and the Court being otherwise fully advised in the premises and the fact that the prosecution has no objection to the granting of several portions of the motion, it is hereby

**ORDERED AND ADJUDGED**, that the Motion is **GRANTED** as noted below and this Court hereby:

1. precludes the prosecution or any of their witnesses from employing the term *test*, as well as other related terms such as *pass, fail,* or *points*, when offering evidence of any physical sobriety exercises that may have been performed in this case, or that Officer Holloway was allegedly *certified* to administer these exercises;

2. precludes the prosecution from commenting or having Officer Holloway give his "opinion" concerning Mr. Jackson's *alleged* impairment or that any of his actions are consistent with that of someone who is impaired due to alcohol.

3. orders the prosecution to remove certain improper gratuitous statements made by the officers and recorded on their body-worn cameras as noted more fully below; and,

4. offering evidence of the civil penalties for Mr. Jackson's *alleged* refusal to submit to a breath test.

As grounds for the this order, the Court makes the following finds of fact and law:

Counsel for Mr. Jackson has argued against the prosecution introducing evidence of Mr. Jackson *alleged* poor performance of some or the *physical* sobriety exercises in order to prove that he drove while impaired and, thereby, is guilty of DUI.

Additionally, counsel seeks to preclude the State Attorney's Office from attempting to elicit from Officer Holloway, the officer that administered the exercises to Mr. Jackson, that he has been "certified" in the administration of these exercises, even though such "certification" means nothing more than the fact that the officer attended a course concerning field sobriety exercises at the police academy.

This Court finds that, as noted in their 2015 instructor training materials, "**NHTSA is *not* a certifying agency for impaired driving courses**". *See* NHTSA INSTRUCTOR MANUAL at p. 2 (emphasis in the original). The officer has admitted that he has not ever been qualified as an expert by any court as to any aspect of DUI investigations and that he does not consider himself to be an expert in this field. This Court finds that it would be improper for the prosecution to bolster or "festoon[] with the ornaments of science and scientific expertise" an officer's credentials in a DUI case. *See Garcia v. State,* 27 Fla. Law Weekly Supp. 791c (Fla. 11th Jud. Cir. 2019).

A prosecution witness' ability to testify as to his or her lay opinion that a DUI defendant is impaired carefully was addressed in *State v. Meador,* 674 So.2d 826 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a]. In *Meador,* the defendant challenged the admissibility of his

performance of the physical sobriety exercises administered because they lacked scientific reliability and probative value of impairment and, alternatively, were otherwise highly prejudicial. After reviewing myriad scientific data and precedent from across the country, and hearing from experts in the field, the court determined that "[i]t is entirely appropriate for the jury to consider the simply physical tasks which comprise the field-sobriety tests." *Id.* at 831, quoting *People v. Sides,* 556 N.E.2d 778, 779-80 (Ill. App. 3d 1990). *See also State v. Ybanez,* 1 Fla. Law Weekly Supp. 547a (Fla. St. Johns County Ct. 1993) (sobriety exercises are not scientific tests); *State v. Thompson,* 1 Fla. Law Weekly Supp. 463a (Fla. Polk County Ct. 1993) ("[the] ordinary experiences of jurors will allow them to examine th[e] evidence and make a proper determination as to whether or not the defendant is impaired"). This is so because "[j]urors do not require any special expertise to interpret performance of these tasks." *Meador* at 831.

The *Meador* court found that "evidence of the police officer's *observations* of the results of the defendant's performing the walk-and-turn test, the one-legged stand test, the balance test and the finger-to-nose test should be treated no differently than testimony of lay witnesses (officers, in this case) concerning their observations about the driver's conduct and appearance . . . The police officer's *observations* of the field sobriety exercises, other than the HGN test, should be placed in the same category as other commonly understood signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns." *Id.* at 831-32 (emphasis added). The defendant's argument that the utterly unusual exercises do not test one's "normal faculties" was deemed to go to "the weight of the evidence and not its admissibility." *Id.* at 832.

However, because of the significance a jury may attach to a police officer's testimony, in particular an officer's lay observation as to signs of impairment in a DUI case, the court limited such testimony in two important respects.[1] *First*, the court precluded any reference to the sobriety exercises by using terms such as "test," "pass," "fail," or "points," because they "create[] a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity. Therefore, such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment." *Id.* at 833 (citations omitted).

*Second,* the court limited the officers' testimony in another significant respect as well.

> While the psychomotor tests are admissible, we agree with defendants that any attempt to attach significance to defendants' performance of these exercises beyond that attributable to any of the other observations of a defendant's arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value.

*Id.* at 832. Therefore, "[t]he likelihood of unfair prejudice does not outweigh the probative value *as long as the witnesses simply describe their observations*." *Id.* (emphasis added). "As long as the testimony by the officers is restricted to lay observations . . . the probative value of the psychomotor testing is not outweighed by the danger of unfair prejudice." *Id.*

This Court also notes that in the case of *Warmington v. State,* 2014 Fla. LEXIS 3070 [ 39 Fla. L. Weekly S630a] , the Florida Supreme Court reaffirmed that testimony elicited by the prosecution during a criminal trial involving a defendant's failure to produce exculpatory evidence impermissible shifts the burden of proof from the prosecution to the defendant, and is therefore inadmissible. *Id.* at p. 22. One of the portions of the testimony that the Supreme Court found especially egregious was the lead investigator's statement that part of what he was doing "was to allow [the defendant] to dispel any alarms that [the officer] may have or concerns that he did anything wrong." *Warmington,* at p. 4. This objectionable language is almost identical to Officer Holloway's request for the sobriety exercises in order for Mr. Jackson to prove that he was not impaired. Just as the Florida Supreme Court felt that "[the detective's] testimony may have led the jury to believe that Warmington had a duty to produce exculpatory evidence", *id.* at p. 15, a jury might believe that Mr. Jackson might have a duty to perform such exercises in order to exculpate himself.

In sum, the Fourth District Court of Appeals held that officers are to be prevented from testifying as to their ultimate opinion that a DUI defendant is "impaired" based upon any of the investigation conducted, for such lay testimony invades the jury's province with misleading, scientific-appearing, but unscientific information.[2] *See Floyd v. State,* 569 So.2d 1225, 1231-32 (Fla. 1990) ("[g]enerally, a lay witness may not testify in terms of an inference or opinion"). Testimony concerning the results of field sobriety exercises are thus to be treated as "lay *observations* of intoxication" and not as "scientific evidence of impairment." *Id.* at 831 (emphasis added). *And see Chesser v. State,* 30 So. 3d 625 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D589b] (improper for lay witnesses in DUI Manslaughter case to render opinions as to crucial issue concerning impairment) *and Jones v. State,* 95 So.3d 426 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1960b] (officer's subjective interpretations of defendant's statements, while not an ultimate opinion regarding guilt, still improperly bolstered the prosecution's case).

By the same token, Officer Holloway shall not be permitted to testify as to his *opinion* that Mr. Jackson was "impaired" or "under the influence to the extent that his normal faculties are impaired". *See Thorp v. State*, 777 So.2d 385, 395 (Fla. 2000) [25 Fla. L. Weekly S1056d] ("[a]s a general rule, lay witnesses may not testify in the form of opinions or inferences; it is the function of the jury to draw those inferences."). Such lay testimony beyond mere observations by the officer will impart precisely the same danger of unfair evidence upon and present the same aura of scientific reliability to the jury as that precluded in *Meador. See McKeown v. State,* 16 So.3d 247 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1689a] (improper for arresting officer to state that he only arrests half of the DUI suspects that he investigates; conviction reversed). Additionally, the officer is not permitted to testify that any of Mr. Jackson's actions are consistent with that of someone who is impaired due to alcohol. *See Reynolds v. State* 74 So.3d 541 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2427b] (trial court erred in allowing officer's testimony that the defendant's behavior was "consistent" with a general pattern of illegality).

The Fourth District Court of Appeals held in *Fino v. Nodine,* 646 So.2d 746 (Fla. 4th DCA 1994) that the kind of opinion testimony by lay witnesses admissible under section 90.701 is limited to things related to perception: e.g., "distance, time, size, weight, form and identity." *Id.* at 748-49. *See also Kolp v. State,* 932 So.2d 1283 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1921a] (lay witness' testimony that hollow-point are used for killing impermissible). *And cf. Sankar v. State,* 928 So.2d 1265 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1452a] (officer's opinion that the evidence was "consistent with what took place" improper); *Hunt v. State,* 284 So.3d 1092, 1095 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2785a] (reversible error to permit the prosecution to ask the detective whether, "based on your training and experience, was self-defense used in this case by the defendant"); *Lopiano v. State,* 164 So.3d 82, 84 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1063a] ("[a] police officer's testimony or comments suggesting a defendant's guilt invades the province of the jury to decide guilt or innocence").

The ultimate determination as to whether Mr. Jackson was under

the influence of alcohol to the extent his normal faculties were impaired is the jury's alone. *See Martinez v. State,* 761 So.2d 1074, 1078-1081 (Fla. 2000) [25 Fla. L. Weekly S471a]; *Sosa-Valdez v. State,* 785 So.2d 633 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1145b]; *Rivera v. State,* 807 So.2d 721 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D343c].

As noted in *Martinez, supra,* "there is an increased danger of prejudice when the investigating officer is allowed to express his or her opinion about the defendant's guilt. In this situation, an opinion about the ultimate issue of guilt could convey the impression that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant." *Id.* at 1080. *And see Milla v. State,* 8 Fla. Supp 756c (Fla. 11th Cir. Ct. 2001) (officer's testimony in DUI case constituted impermissible expert opinion of an individual not qualified as an expert witness); *Roundtree v. State,* 2014 Fla. App. LEXIS 13410 [39 Fla. L. Weekly D1805a] (the trial court erred in admitting an interrogation of the defendant which primarily consisted of the officer expressing his personal opinion as to the defendant's guilt).

In *Sheppard v. State,* 2014 Fla. LEXIS 2717 [39 Fla. L. Weekly S551a], Justice Pariente wrote in her concurring opinion that "I also write to emphasize that, although we affirm the convictions in this case, we strongly condemn the admission of police interrogation into evidence where the detective expresses an opinion about the defendant's guilt . . . exposing the jury to an investigating officer's opinion about the defendant's guilt is particularly troublesome because it 'could convey the impression that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant.' " *Id.* at 58-59, *citing to Martinez v. State,* 761 So.2d 1074, 1080 (Fla. 2000) [25 Fla. L. Weekly S471a].

In the case of *Alvarez v. State,* 147 So.3d 537 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D197a], the court noted that "[w]hen factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury." *Id.* at p. 5, *quoting with approval to Ruffin v. State,* 549 So.2d 250, 251 (Fla. 5th DCA 1989).

**IT IS FURTHER ORDERED THAT** the prosecution shall remove any gratuitous, hearsay, or improper statements made by the officers and recorded on their body-worn cameras. These improper statements include:

- "let's not act as if this is your first time." [HOLLOWAY BWC VIDEO at 06:35:49]
- "Holloway's arrested him like two times already for DUI." [DE LOS RIO BWC VIDEO at 05:32:45].
- And she's like, that man asleep. I tried to knock on his window, but that man asleep and then, ah, I guess the guy is . . . *Id.*

The prosecution shall also be precluded from using any of the Axon_Body_3_Video_2022-02-13_0513_X60A0416R, which contains only improper observations of an unknown witness.

**IT IS ALSO ORDERED THAT** any mention of the potential driver's license suspension penalties for declining to submit to a breath test may not be argued by the prosecution. While FLORIDA STATUTE 316.1932(1)(a) provides that "[t]he refusal to submit to a chemical or physical breath test or to a urine test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding", *see, e.g., State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b] (refusal is relevant to show consciousness of guilt and defendant is free to offer innocent explanation for not taking test) and *South Dakota v. Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (admission of defendant's refusal to submit to blood-alcohol test does not offend Fifth Amendment right against self-incrimination), neither the plain meaning of the statute nor any Florida case law interpreting it permits, in essence, the addition of a new provision to the statute providing for the admissibility of the civil penalties of a refusal as evidence of guilt.

Accordingly, any admission into evidence of the *potential* driver's license penalties attendant to a breath test refusal would constitute an inappropriate and unlawful expansion of FLORIDA STATUTE 316.1932(1)(a). *See Rockford v. Elliott,* 721 N.E.2d 715, 718 (Ill. 2d DCA 1999). As in *Rockford,* had the Florida legislature intended "that evidence of the civil penalties a defendant faced be admissible in addition to his refusal to submit to a breath test, [it] could have so provided in the statute." *Rockford,* 721 N.E.2d at 719. Indeed, to the contrary, the *Florida* legislature went so far as to expressly *exclude* any civil penalty under section 322.2615(14) at the defendant's criminal trial when it wrote that "[t]he decision of the department . . . shall not be considered in any trial for a violation of s. 316.193, nor shall any written statement submitted by a person in his or her request for departmental review under this section be admissible into evidence against him or her in any such trial." In turn, nor does "[t]he disposition of any related criminal proceedings . . . affect a suspension imposed pursuant to this section.

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[1]The *Meador* court also felt it necessary to limit the officers' testimony in light of the fact that the studies it reviewed "revealed that there is no reliable numerical correlation between performance on the field sobriety tests and breath alcohol concentration, let alone impairment." *Id.* at 832. While sobriety exercises may tend to increase the accuracy of the decision-making process, "[w]hat the studies do not show . . . is that the tasks have any enhanced scientific reliability not readily observable by the average lay person. Further, the tests' flaws prevent the State from accurately quantifying the relevancy of the tasks." *Id.*

[2]In so ruling, the court implicitly overruled *City of Orlando v. Newell,* 232 So.2d 413 (Fla. 4th DCA 1970), which had permitted officers to testify not only as to their "observations of a defendant's acts, conduct, appearance and statements, but also to give opinion testimony of impaired based on their observations." *Meador* at 831.

* * *

**Criminal law—Severance—Charge for driving under influence is severed from charge for refusal to submit to breath test**

STATE OF FLORIDA, Plaintiff, v. JAMES EDWARD JACKSON, JR., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Criminal Traffic Division. Case No. 22001956MU10A. March 1, 2023. Deborah Carpenter-Toye, Judge. Counsel: Jackson Lubin, State Attorney's Office, for Plaintiff. Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., Miami, for Defendant.

**ORDER**

**THIS CAUSE,** having come on to be considered by me on Mr. Jackson's motion, pursuant to the Florida Rules of Criminal Procedure, Rule 3.152, to sever the offenses of driving under the influence and unlawfully refusing to submit to a breath test, and the Court being otherwise fully advised in the premises and the fact that the prosecution has no objection to the granting of this motion, it is hereby

**ORDERED AND ADJUDGED**, that the Motion is **GRANTED** and this Court hereby severs the refusing to submit to a breath test, pursuant to FLORIDA STATUTE 316.1939 (1)(E), from the driving while under the influence charge, pursuant to FLORIDA STATUTE 316.193. *See Allen v. State,* 125 So.3d 191 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D190a] failure to sever DUI charge from refusal to submit to testing charge ineffective behavior by defense counsel).

* * *

**Criminal law—Driving under influence—Evidence—Field sobriety exercises—Pre-arrest—Voluntariness—Based on totality of circumstances, officer did not have reasonable suspicion to request that defendant, who was found asleep in vehicle at traffic light and had odor of alcohol and bloodshot eyes, submit to field sobriety exercises—Defendant did not voluntarily consent to performance of exercises—Body-camera footage shows that defendant was surrounded by five uniformed and armed officers, patrol vehicles were blocking off roadway around defendant's vehicle with their overhead lights flashing, and officer unholstered taser in show of authority when defendant resisted performing exercises—Officer lacked probable cause to arrest defendant for DUI—Motion to suppress pre-arrest field sobriety exercises, resulting arrest, and refusal to submit to breath test is granted**

STATE OF FLORIDA, Plaintiff, v. JAMES EDWARD JACKSON, JR., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 22001956MU10A. March 30, 2023. Deborah Carpenter-Toye, Judge. Counsel: Jackson Lubin, Assistant State Attorney, for Plaintiff. Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., for Defendant.

## ORDER

**THIS CAUSE**, having come to be considered on a Motion filed pursuant to Fla. R. Crim. Pro. 3.190, 316.193, Fla. Statute., the Fourth and Fourteen Amendments to the United States Constitution, Article I, Section 23 of the Florida Constitution, and *Wong Sun v. United States,* 371 U.S. 47 (1963), to enter an order suppressing and any all evidence illegally obtained by the police,[1] and this Court, being otherwise fully advised in the premises, having heard and evaluated the testimony of Officer Devarious Holloway, and having watched the officer's body-worn camera video [hereafter referred to as "BWC"], and having read and considered the Motion and the cases submitted, it is Hereby

**ORDERED AND ADJUDGED**, that the Motion is ***GRANTED*** and this Court hereby suppresses any statements made by Jackson, any descriptions or observations made of him before, during and after the administration of the field sobriety exercises, any evidence of a breath test, and any *alleged* refusal thereof. As grounds for the foregoing, the Court makes the following findings of fact and law:

On February 13, 2022 at approximately 5:30 a.m., James Edward Jackson, Jr. was discovered asleep at a traffic light at the intersection of Fairmont Avenue and Miramar Parkway. While the reason why he fell asleep was subject to dispute, the Court finds that the initial contact with him by Officer De Los Rios of the Miramar police department was both lawful and proper. Thereafter, Officer Holloway, and three (3) other officers responded to the scene as back up.

After hearing the testimony and having watched the "BWC" video, this Court finds that officer Holloway's behavior and demeanor was particularly aggressive. His tone of voice and his questions and comments were also very aggressive.

Mr.Jackson turned off his vehicle when instructed to do so by the officers and he produced the documents requested of him without difficulty.

The officers never inquired if Jackson was suffering from a medical issue or if he was in need of any assistance. The officers instead, ordered him to step out of his car. Mr. Jackson did so without difficulty or delay, and, as the officer testified and the "BWC" video confirmed, he walked in a normal and prudent manner away from the vehicles as he was directed to do. See *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a] (proper for the court to review and evaluate video evidence to see if it contradicts an officer's testimony). The officer then conducted a pat-down search of Mr. Jackson.

Mr. Jackson then told the officer that he needed to use the bathroom. *See* HOLLOWAY BWC beginning at approximately 05:23:50. The officer appeared to become agitated with Mr. Jackson after he placed his hands inside his pants. The officer commented that Mr. Jackson was, "an adult" and stated he should have, "used the restroom" before he got into his car. The officer is then observed on video unhoistering his department-issued taser. The officer removes the taser from his left hip with his right hand, in a manner that implied that he might use it against the defendant. *See* HOLLOWAY BWC at 05:24:30.

It is clear to this Court that Mr. Jackson did not want to perform the exercises at that time. The Court also notes that he appeared "scared" that the officer might use his taser on him.

During his cross-examination the officer made several statements that were concerning to the Court. The officer incorrectly stated that, "it is illegal in the State of Florida to consume any alcohol and drive a vehicle". He further stated that it was *Jackson's* obligation to, "prove his innocence." The Court finds that he also correctly testified that he did not believe he had probable cause to arrest Jackson prior to the exercises being performed.

The Court also notes that there was no testimony from the officer that he observed *any* specific indicators of impairment prior to ordering the defendant to get out of the car. Upon speaking with Mr. Jackson, the officer testified that he smelled an odor of alcohol and his eyes were bloodshot.

The officer also testified that he could tell the type of alcohol consumed by an individual from the odor on their breath. It is common knowledge, and most experienced officers regularly testify before this Court, that an individual cannot determine the type of alcohol consumed based solely on the odor.

After Mr. Jackson performed the exercises the officer advised him that he was being placed under arrest for Driving Under the Influence.

A review of the BWC evidence introduced into evidence at the hearing contradicts the officer's testimony regarding Mr. Jackson's performance on the exercises. The Court notes that the BWC established that Mr. Jackson performed the exercises without difficulty.

The defense submitted three (3) separate grounds for this Court to suppress the evidence obtained. The Court addresses the facts and the law as to each individual ground argued:

### 1. THE OFFICER LACKED REASONABLE SUSPICION TO REQUEST JACKSON TO PERFORM SOBREITY EXERCISES.

A law enforcement officer may request a citizen to perform field sobriety exercises if that officer has a **reasonable suspicion** to believe that the driver may be DUI. *See, e.g., Jones v. State,* 459 So.2d 1068, 1080 (Fla. 2d Dist. Ct. App. 1984), *affirmed,* 483 So.2d 433 (Fla. 1986); *Department of Highway Safety & Motor Vehicles v. Guthrie,* 662 So. 2d 404 (Fla. 1st Dist. Ct. App. 1995) [20 Fla. L. Weekly D2480b]. A lawful investigative detention and request of a citizen to perform field sobriety tests cannot occur unless the officer has some objective manifestation that the person stopped is driving under the influence. *State v. Ameqrane,* 2010 Fla. App. LEXIS 7037. *See also Jones v. State,* 459 So.2d 1068, 1080 (Fla. 2d DCA 1984), *affirmed,* 483 So.2d 433 (Fla. 1986).

As the mere odor of an alcoholic beverage on an individual's breath is *not* consistent with the ability to operate a motor vehicle, an odor of alcohol from a suspect is not, in and of itself, sufficient legal grounds to request the performance of such exercises. *See State v. Kliphouse,* 2000 Fla. App. LEXIS 12347, 15, 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f].

In *State v. Taylor,* 648 So.2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b], the Florida Supreme Court provided an example of what constitutes reasonable suspicion sufficient to detain a citizen and then conduct a DUI investigation:

> When [the defendant] exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [the officer] with reasonable suspicion that a crime was being committed, i.e., . The officer was entitled under *section* 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [The officer's] request that [the defendant] perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights.

The Court finds that in this case based on the totality of the circumstances the officer did *not* have the necessary reasonable suspicion to request that Jackson submit to field sobriety exercises. This Court has previously noted that an unlawful driving pattern and the odor of an alcoholic beverage alone are not legal grounds for a DUI investigation. *See State v. Zavala,* 27 Fla. L. Weekly Supp. 204a (Fla. 17th Jud. Cir. Cty Ct. 2019). And *State v. Jacobs,* 22 Fla. L. Weekly Supp. 831a (Fla. 7th Jud. Cir. County Court) (where officer who stopped defendant for driving in without headlights did not observe any indicia of impairment other than a slight odor of alcohol and slightly slurred speech, officer did not have reasonable suspicion to detain defendant for a DUI investigation).

**2. THE OFFICER UNLAWFULLY COMPELLED JACKSON TO THE PERFORM SOBRIETY EXERCISES.**

All searches and seizures by government agents are controlled by the Fourth Amendment of the United States Constitution, which protects against unreasonable seizures of persons and property.

Since a warrant is the constitutionally preferred means of law enforcement, all warrantless searches " are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). The United States Supreme Court has established these exceptions to the general rule that a search or arrest warrant must be based on probable cause to satisfy the Fourth Amendment. In the present case, the applicable exception is for investigatory detentions—a brief seizure by police based on probable cause or reasonable suspicion of criminal activity—and a "narrowly drawn" exception to the probable cause requirement of the Fourth Amendment. *United States v. Sharpe,* 470 U.S. 675, 689 (1985).

"The well-established test is that if, by physical force or show of authority, a reasonable citizen would not believe that he is free to ignore police questioning and go about his business, he has been unconstitutionally seized." *Id.; Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968) ("[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred").

Mr. Jackson's initial detention was the product of a routine traffic-related investigation, prompted by his falling asleep as he waited at a traffic light. This contact with Jackson was appropriate and lawful. However, once the officer proceeded to conduct a DUI investigation, and compelled him to perform sobriety exercises, by a show of force with his taser, he was "seized" under the Fourth Amendment.

The U.S. Supreme Court in *U.S. v. Mendenhall*, 446 U.S. 544 (1980) specifically stated, "examples of circumstances that might indicate a seizure, even when the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 550.

As all warrantless searches are presumptively unlawful, where the state relies on an individual's consent, it must establish that the individual consented voluntarily. If not "voluntary," the Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits the government from using the coerced conduct against him or her. *Brewer,* 386 So.2d at 235; *Brown v. Mississippi,* 297 U.S. 278 (1936).

As shown on the BWC and confirmed by his testimony, the officer in this case said to Mr. Jackson, "You are **suspected** of driving under the influence. Okay. I have a couple of exercises that **I want you to perform to** make sure that you are okay to continue to drive." *See* HOLLOWAY BWC, beginning at approximately 05:23:00. (emphasis added). Mr. Jackson asked the officer if he could use the bathroom and he was told to begin performing the exercises. *Id.* The officer became agitated with Mr. Jackson and he **unholstered his department-issued taser**. *See* HOLLOWAY BWC at 05:24:30 (emphasis added).

There is no provision under Florida law that a person under investigation for DUI has impliedly consented to perform physical, roadside sobriety exercises. Indeed, as noted on all driver licenses, "[o]peration of a motor vehicle constitutes consent to any sobriety test required *by law*." (emphasis added). In Florida, the only "sobriety test required by law" is the post-arrest breath-test. *See* 316.1932, Fla. Stat.

In *State v. Lynn,* 11 Fla. L. Weekly Supp. 798b (Fla. 17th Jud. Cir. 2004), the court was asked to address just such an issue. In *Lynn,* the appellate court noted that, "there is nothing in the record to support the finding that the Defendant's performance of roadside exercises was voluntary. The language used by the arresting officer in instructing the Defendant to perform the exercises is consistent with a finding that the Defendant was acquiescing to the apparent authority of the officer." *Id., citing with approval to Smith v. State,* 753 So.2d 713, 715 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D678a]. *See also State v. Zalis,* 12 Fla. L. Weekly Supp. 884a (Fla. 15th Cir. 2005); *State v. Shaprio,* 7 Fla. L. Weekly Supp. 149a (Brwd. Cty. Court 1999); *State v. Tuinen,* 7 Fla. L. Weekly Supp. 221a (Brwd. Cty. Court 1999); *State v. Ryan,* 8 Fla. L. Weekly Supp. 517a (Brwd. Cty. Court 2001); *State v. Zalis,* 14 Fla. L. Weekly Supp. 567a (Fla. 2nd Cir. 2007); *State v. Barbary,* Miami Dade Case No. 050587-W (Miami Dade Court 2003); *State v. Esper,* Miami Dade Case No. 412716-X (Miami Dade Court 2004). *See also Bautista v. State,* 902 So.2d 312 (Fla. 2d. DCA 2005) [30 Fla. L. Weekly D1347a] (defendant's act of producing driver's license and alien card in response to officers' "requests" was presumptively involuntary).

In distinguishing the State's reliance on *State v. Liefert,* 247 So.2d 18 (Fla. 2d DCA 1971), the *Lynn* court noted that "[u]nlike in *Taylor* and *Liefert,* the Defendant in this case was not asked, but rather instructed to perform the exercises." *Id.*

This Court is very familiar with this legal issue. In *State v. McFarland,* 27 Fla. L. Weekly Supp. 200a (Fla. 17th Jud. Cir. 2017), *affirmed at* 26 Fla. L. Weekly Supp. 546a, a case that came before this Court, the deputy asked Mr.McFarland to get out of [his] vehicle. The Deputy then said, **'I'm gonna have you do some field sobriety exercises'**. *Id.* (emphasis added). This statement [was] captured on the video tape introduced as evidence at the Hearing. Mr.McFarland submitted to the pre-arrest sobriety exercises. Following the exercises, he was placed under arrest for DUI." *Id.*

As this Court wrote in its opinion in the McFarland case, "[t]he Defense argue[d] that the Defendant 'acquiesced' to the authority of the Deputy. The Defense further argues that if this Court finds that the Deputy had "reasonable suspicion" and not "probable cause", at the time he instructed Mr.McFarland to perform the exercises, the Court must grant the Motion to Suppress." *Id.* In so doing, this Court further noted the following:

> There is a factual dispute as to whether the defendant voluntarily agreed to perform the field sobriety exercises in this case. The video recording established that Deputy Carotti said, "I'm gonna have you do some field sobriety exercises". At the hearing Deputy Carotti

testified that his statement was not a command, but rather a question. He further testified that the defendant responded to him by saying "yes". The evidence in this case is clear. As a factual matter, this Court finds that the defendant's performance of the field sobriety exercises was not voluntary. The defendant was instructed to perform the exercises, and he complied with Deputy Carotti's command.

Having found that the exercises were not voluntary, it is necessary to determine whether Deputy Carotti had probable cause at the time he made the statement to the defendant. This Court adopts the line of cases holding that an officer must have probable cause for a DUI arrest before he can compel performance of the field sobriety exercises.

*Id.* at p. 2.

While this Court found that the facts of the McFarland case "gave rise to reasonable suspicion to conduct a DUI investigation", *id.,* it also found "that based on the above facts and the totality of the circumstances and evidence presented in this case [the traffic infraction of disobeying a red light, the strong odor of alcohol, bloodshot red eyes, the admission to drinking three vodka and cranberry drinks in an unspecified amount of time], [the deputy] did not have probable cause to believe the defendant had violated Fla. Statute §316.193, at the time he made the statement to the Defendant" and therefore granted the Motion to Suppress. *Id.* at p. 3. This Court found that the offending language in McFarland was when the officer said, "I'm gonna have you do some field sobriety exercises."

In another case that came before this Court [*State v. Barone,* Broward County Case No. 21-009514MU10A], the deputy conducted a traffic stop for speeding and drifting outside of his lane of travel. This Court wrote the following about that case:

Upon making contact with the Defendant the Deputy observed the following signs of impairment: an odor of an alcoholic beverage on the Defendant's breath, an admission to consuming one alcoholic beverage, red/glassy eyes, slurred speech with an accent. The Defendant immediately provided her registration to the Deputy, however, she had difficulty producing her license and proof of insurance, the Deputy directed Ms.Barone to step out of her car, to submit to Field Sobriety Exercises. The Deputy's specific words were, 'why don't you step on out. . . come on out. Yeah, we're. . .going to make sure you're ok.' After Ms.Barone got out of the car, the deputy said, "what I **would like to do is just to ask you a few questions and have you do a few roadside sobriety exercises so I can make sure you are ok. Would you be willing to do that?** The Defendant responded 'yea."

*Id.* (emphasis added).

This Court found in Barone that "[t]he testimony presented and the totality of all of the evidence, including the language used by the Deputy that the Defendant, "needed to do some sobriety exercises", caused Ms. Barone to acquiesce to police authority. Ms.Barone appeared to this Court to feel compelled to perform the exercises. . . This Court holds, consistent with McFarland, that the Deputy could not compel Ms. Barone to perform the exercises by a show of police authority. The Defendant, in this case, clearly acquiesced to a show of police authority and did not voluntarily perform the exercises." This Court found that the offending language in Barone was that the officer stated, "we're going to make sure you're ok [to drive]."

In this case, the testimony and the BWC clearly shows that Mr. Jackson was surrounded by five uniformed police officers, all of whom were armed, and their individual police vehicles had closed off the roadway around Mr. Jackson's car with their overhead lights flashing. It is clear to this Court that in this case, Jackson acquiesced to the authority of the officers.

While the court in *State v. Whelan,* 728 So.2d 807 (Fla. 3d. DCA 1999) [24 Fla. L. Weekly D640b] held that a person need not be advised of his "right to refuse" to submit himself to such exercises, *id.* at 811, that does not mean that these exercises can be compelled by a law enforcement officer. While the *Whelan* court found that "[n]either the Taylor decision nor the Fourth Amendment requires the officer at roadside to warn the motorist of a right to refuse to perform roadside sobriety [exercises]", *id.,* that does not mean that such exercises can be compelled. This Court finds that the officer's behavior, tone of voice and removal of his taser from his holster clearly had a coercing effect on Mr. Jackson.

The officer, in his testimony, admitted that he was taught, and in fact uses, his taser as a tactic of intimidation. This was an important fact considered by the Court in this case.

While this Court is mindful of the societal importance of enforcing DUI laws, the fact remains that Mr. Jackson's arrest was based on the officer's conclusion that the defendant performed poorly on the exercises. After the arrest, the officer requested a breath test. The performance of these exercises, the resulting arrest, and the refusal to submit to a breath test are therefore suppressed as the "fruit of a poisonous tree". *Wong Sun v. United States,* 371 U.S. 471 (1963).

**3. THE OFFICER LACKED PROBABLE CAUSE TO ARREST JACKSON.**

A warrantless DUI arrest, as in this case, is considered unreasonable for Fourth Amendment purposes unless there is probable cause to believe the driver is under the influence of alcohol to the extent that his or her "normal faculties" are impaired. *See* 316.193(1)(a), Fla. State. It is because of the very personalized assessment of a suspect's level of impairment that probable cause arises in perhaps its most unique context here. Indeed, in no other crime does the arresting officer's opinion count so much. To be "impaired" under the law, an officer must necessarily engage in a purely subjective evaluation of whether the suspect's "ability to see, hear, walk, talk, make judgments, and, in general, to normally perform the many mental and physical acts of our daily lives" have been affected by alcohol in some material respect.

The Florida Supreme Court defines probable cause 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). The constitutional validity of a warrantless arrest turns on "whether at *that* moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). *Accord D'Agostino v. State,* 310 So.2d 12 (Fla. 1975) (probable cause must exist prior to arrest). Such cautionary criteria are especially important where arrests are based on sheer *opinion.* Thus, irrespective of DUI's peculiarly subjective underpinnings, "probable cause must be based on objective facts and circumstances, not on personal opinions or suspicions." *Jackson v. State,* 456 So.2d 916, 918 (Fla. 1st DCA 1984).

Consequently, "[p]robable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a *probability* that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *State v. Kliphouse,* 2000 Fla. App. LEXIS 12347, 15, 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f].

In essence, while probable cause "[w]hether a person has consumed sufficient alcohol to be deemed 'under the influence' or impaired to an appreciable degree. . .is a judgement call made by a police officer," *State v. Brown,* 725 So.2d 441, 444 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a] (*i.e.,* by a "person of reasonable caution"), the circumstances must nevertheless evince a "*clear*

*indication*" of guilt. *State v. Kliphouse,* 2000 Fla. App. LEXIS 12347, 12.

**CONCLUSION**

The Court finds based on the totality of the circumstance, in light of the evidence and testimony produced at the Hearing on the Motion to Suppress, Officer Holloway's testimony lacked credibility as to several issues raised, his words, actions and tone of voice caused the Defendant to acquiesce to police authority in performing the exercises. Further, the officer did not have probable cause to arrest the Defendant prior to compelling the exercises.

Accordingly, for the foregoing reasons, the Defendant's Motion to Suppress is HEREBY GRANTED.

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[1]Upon the motion of Jackson's counsel, this Court has taken judicial notice of the fact that the seizure of Jackson was conducted without a warrant signed by a neutral magistrate by reviewing the court file in this case. *See* 90.202(6), Fla. Stat. (court may take judicial notice of the court file). *See also State v. Hinton,* 305 So.2d 804 (Fla. 4th DCA 1975) (court may review court file to take judicial notice of the fact that no warrant has been filed, thereby placing burden on the prosecution to prove the validity of the police's actions under the Fourth Amendment).

* * *

**Insurance—Insurer's agreement to cease investigation of insured's claim is valuable consideration for insured's withdrawal of claim**

GADY ABRAMSON, DC, P.A., a/a/o Brandi Hoffman, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO21006729. Division 60. March 22, 2023. Allison Gilman, Judge.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTFF'S MOTION FOR SUMMARY JUDGMENT**

**THIS CAUSE** having come on to be heard on Defendant's Motion forSummary Judgment and Plaintiff's Motion for Summary Judgment, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion for Summary Judgment is hereby GRANTED. For the reasons stated on the record, the Court finds that Infinity's agreement to cease investigation of Brandi Hoffman's claim is valuable consideration in exchange for Brandi Hoffman's claim withdrawal via signing a Claim Withdrawal Form, as both parties (Infinity and Brandi Hoffman) to the agreement gave up rights they were entitled to under the policy.

2. Plaintiff's Motion for Summary Judgment is hereby DENIED for the reasons listed above.

* * *

**Insurance—Homeowners—Standing—Assignment—Assignment that did not contain all signatures of all insureds as required by policy and which was not provided to insurer within three business days as required by section 627.7152(2)(a)3 is invalid and unenforceable**

I & D RESTORATION INC., a/a/o John Reilly, Plaintiff, v. ASI PREFERRED INSURANCE CORP., Defendant. County Court, 19th Judicial Circuit in and for St. Lucie County. Case No. 2021-SC-004509, Civil Division. January 5, 2023. Edmond W. Alonzo, Judge. Counsel: Siury Rodriguez, Global Law Group, Miami, for Plaintiff. Joseph G. Murasko, Law Offices of Deidrie Buchanan, Riverview, for Defendant.

**ORDER GRANTING SUMMARY JUDGMENT AND CONTAINING FINAL JUDGMENT FOR DEFENDANT, ASI PREFERRED INSURANCE CORP.**

THIS MATTER, having been heard by the Court January 05, 2023 on Defendant's Motion for Final Summary Judgment, having heard the argument of counsel and considered Defendant's Motion, supporting Affidavit with Exhibits, the Notice of Filing the Certified Insurance Policy, the Notice of Filing Plaintiff's Responses to Interrogatories and, the Notice of Filing the Plaintiff's Production of Documents in Response to Defendant's Request to Produce the Court makes the following findings pursuant to Fla. R. Civ. Pro. 1.510:

1. Defendant issued a homeowners property insurance policy to John Reilly and Leigh A Reilly for property located at [Editor's note: Address redacted] Port Saint Lucie, FL 34983 for a policy period July 19, 2019 to July 19, 2020. The policy endorsement "Special Provisions for Florida" contains the following provision:

> **18. Assignment of Claim Benefits. No assignment of Claim benefits, regardless of whether made before Loss or after loss, shall be valid without *the written Consent of all "insureds"*, all additional insureds and All mortgagee(s) named in this policy.**

2. Plaintiff has sued as an alleged assignee of the insurance policy. However, the assignment attached to the original complaint and the amended complaint do not contain the signature of Leigh A Reilly. As such, the Assignment is invalid. *Restoration 1 of Port St. Lucie a/a/o John and Liza Squitieri v. Ark royal Insurance Company,* 255 So. 3d 344, (4th Dist., 2018) [43 Fla. L. Weekly D2056a].

3. Further, Defendant's Affiant and Exhibits and the aforementioned discovery responses of Plaintiff and filed by Defendant demonstrate the document of assignment signed by John Reilly and dated April 30, 2020 was not provided within 3 business days to Defendant as required by Fla. Stat. Sec. 627.7152(2)(a)3. As such, the assignment is invalid pursuant to Fla. Stat. Sec. 627.7151(2)(d) and Plaintiff lacks standing to sue. *Air Quality Experts (a/a/o Brian and Tricia Gerard) v. Family Security Insurance Company,* 2022 WL 17479945; 4D21-2516 [December 07, 2022] [47 Fla. L. Weekly D2592c]; *The Kidwell Group, LLC, et al., v. United Property & Casualty Insurance Company,* 343 So. 3d 97 (4th DCA, June 15, 2022) [47 Fla. L. Weekly D1295b].

WHEREFORE, IT IS ADJUDGED that Plaintiff, I&D RESTORATION INC. (A/A/O JOHN REILLY), takes nothing by its action and that Defendant, ASI PREFERRED INSURANCE CORP., shall go hence without day.

* * *

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# MISCELLANEOUS REPORTS

**Criminal law—Search and seizure—Social media accounts—Warrant—Application—Court denies warrant application seeking to require social media provider to produce "all records" pertaining to a suspect's social media account to allow law enforcement to comb through the data to decide what is germane to their investigation—Warrants requiring social media sites to disclose every kind of data that could be found in a social media account are unconstitutionally overbroad and inconsistent with Fourth Amendment's particularity requirement**

IN RE SEARCH WARRANT APPLICATION RECEIVED MARCH 13, 2023. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Criminal Division. March 13, 2023. Milton Hirsch, Judge.

## MEMORANDUM IN SUPPORT OF DENIAL OF SEARCH WARRANT

On March 13, 2023, in my capacity as the warrant-duty judge for the week, I denied a warrant application of a very common sort. For my better correction by the Court of Appeal, and because the issues raised by the warrant application recur with increasing frequency, I state my reasons for having done so.

The application in question, like so many warrant applications for Facebook, Instagram, and other "social media" accounts, proceeds on the premise that one-hundred percent of account information is to be produced to the police, and that the police will then winnow down what is received to get to what is of value to them. The warrant application includes the following language:

> [B]ecause the . . . service provider [in this case, Meta, for Instagram] has no reasonable means to distinguish evidence of the crimes from any other records contained within the sought-after account, your affiant seeks to compel the service provider to seize a copy of all records pertaining to the account and provide the entirety of the records to your affiant. Once your affiant has obtained those records, law enforcement shall conduct an actual search of the items obtained from the . . . service provider in order to sort the evidence of the crimes articulated . . . which may be intermingled with innocent or innocuous documents or records.

Thus the warrant application, and the warrant itself, contemplate two steps. In the first step, I am to order the social-media service provider to produce to the police "all records pertaining to [a given social media] account," *i.e.*, to produce "the entirety of the records." Concededly, this will include "innocent or innocuous documents or records;" it will likely include documents or records that, apart from being innocent or innocuous, contain intensely personal and even intimate data. In the second step the police, and not a judge, will comb through "the entirety of the records" thus produced, determining which ones, in the searching police officers' judgment, tend to show some evidence of the crime of which the social-media account-holder is suspected (or perhaps of crimes of which the social-media account-holder had not heretofore been suspected, but now should be).

I well recognize that the advent of social media,[1] a brave new world that exists not in physical space but only in cyberspace,[2] poses questions and involves circumstances beyond the contemplation of even the most prescient of those far-sighted statesmen who drafted the Fourth Amendment in 1791. But it is not the responsibility of judges to cause the Fourth Amendment to conform to the neoteric requirements of social media. It is the responsibility of those of us who have sworn to preserve, protect, and defend the Constitution to cause law-enforcement conduct directed at social media to conform to the requirements of the Fourth Amendment. I denied the warrant application presented to me because it was inconsistent with the Fourth Amendment requirements of probable cause and particularity.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause . . . particularly describing . . . the things to be seized."[3] The purpose of the particularity requirement is to "stand[ ] as a bar to exploratory searches by officers armed with a general warrant . . . [and to] limit[ ] the searching officer's discretion in the execution of a search warrant, thus safeguarding the privacy and security of individuals against arbitrary invasions of governmental officials." *Carlton v. State*, 449 So. 2d 250, 252 (Fla. 1984). The requirement of particularity is not met if the warrant vests the officers executing it with discretion to determine what to search or what to seize. On the contrary: American courts have long been adamant that "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States* 275 U.S. 192, 196 (1927). "The particularity requirement is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description leaves nothing to the discretion of the officers executing the warrant." *United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010). Compliance with the particularity requirement "is accomplished by removing from the officer executing the warrant all discretion as to what is to be seized." *United States v. Torch*, 609 F. 2d 1088, 1089 (4th Cir. 1979). *See also Pezzella v. State*, 390 So. 2d 97, 99 (Fla. 3d DCA 1980) ("if a warrant fails to adequately specify the material to be seized, thereby leaving the scope of the seizure to the discretion of the executing officer, it is constitutionally overbroad").

*Polakoff v. State*, 586 So. 2d 385 (5th DCA 1991) (Cowart, J.) involved allegations of usury and related crimes. The provision of a warrant purporting to authorize, in connection with the prosecution of those crimes, the search for and seizure of "documents recording the extension of credit to Haya Bigloo" was grossly lacking in particularity.

> The documents, if any, as might constitute evidence of the charging, taking, or receiving of usurious interest . . . should have been so "particularly" and specifically described as to have permitted any document, found and examined by an officer executing the search warrant, to have been readily recognized as being, or not being, a document described in the warrant. Nothing should be left to the discretion of the officers executing the warrant as to what should be seized or taken.

*Polakoff*, 586 So.2d at 392. *See also Bloom v. State*, 283 So. 2d 134 (Fla. 4th DCA 1973).

I respectfully submit that the warrant application that prompts the writing of this memorandum; and the identical or all-but-identical applications and warrants that are presented to me and my colleagues frequently, perhaps increasingly so; stand the notions of probable cause and particularity on their heads. On the basis of probable cause to believe that the holder of a social-media account has committed or is committing a crime, and that the social-media account may have some evidence bearing upon that crime, the social-media provider is ordered to produce, not any particular or specific item in the account, but "all records pertaining to the account," "the entirety of the records." The police are then to comb through the data thus produced, deciding for themselves what is germane to their investigation—or what might invite the opening of another investigation. This is in diametric opposition to the command of the Fourth Amendment, which does not "countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979). So far from divesting the police of discretion to determine what to keep and what to use, this procedure divests the judiciary of

discretion, rendering us completely inert while the police examine, search, and decide what use to make of the entirety of a suspect's social media account. Once a judge has decided that there is a probable-cause basis to believe that a suspect has engaged or is engaging in crime, and that the suspect's social-media account likely contains evidence of that crime, the judge's sole role is to order the account provider to pack up the entire account, the whole kit and caboodle, and deliver it to the police. The police will take it from there. They will decide which documents and artifacts offer the probable cause that enabled them to obtain a warrant in the first place. The judge is to have no further involvement. This is nothing less than a reprise of those general warrants visited upon our colonial forebears that spurred the enactment of the Fourth Amendment. *See United States v. Irving*, 347 F.Supp.3d 615, 624 (D. Kan. 2018) (recognizing that a search of "Defendant's entire Facebook account" is "akin to a general warrant").

I realize that the migration of human behavior into cyberspace poses challenges to law enforcement that were unimagined and unimaginable even a few years ago. But I realize too that law-enforcement access to cyberspace poses challenges to Fourth Amendment-protected privacy that were unimagined and unimaginable even a few years ago. What Chief Justice Roberts had to say about cell phones is equally true, perhaps even truer, about social-media accounts:

> The United States asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of . . . physical items. . . . That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones . . . implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.

*Riley v. California*, 573 U.S. 373, ___; 134 S.Ct. 2473, 2488-89 (2014) [24 Fla. L. Weekly Fed. S921a]. *See also United States v. Shipp*, 392 F. Supp. 3d 300, 308 (E.D.N.Y. 2019) (describing social media accounts such as Facebook as providing "a single window through which almost every detail of a person's life is visible"). The challenges to privacy, to freedom from the unseen but all-seeing eye of government, to the protection of that small and diminishing measure of life that is entirely one's own, to that "right to a private enclave where [one] may lead a private life . . . [a] right [that] is the hallmark of our democracy," *United States v. Grunewald*, 233 F. 2d 556, 579, 581-82 (Frank, J., dissenting) *rev'd*, 353 U.S. 391 (1957), are more minatory than ever in connection with searches of social-media accounts. In connection with those searches, courts must apply the traditional principles of the Fourth Amendment as carefully and sedulously as ever.

Although there are no Florida cases directly on point, there is ample federal precedent in this area. The warrant application in *United States v. Chavez*, 423 F.Supp.3d 194 (W.D.N.C. 2019) sought to cast its net as broadly as the application at bar: it demanded the seizure of 16 enumerated categories of records and data from the defendant's Facebook account—in effect, it asked for the entirety of the account. Again as in the application at bar, the application in *Chavez* contemplated that once this seizure was completed, law enforcement would conduct a search of the entire account, determining for itself what was reflective of the probable cause that engendered the search in the first place. Citing *United States v. Blake*, 868 F.3d 960 (11th Cir. 2017) [27 Fla. L. Weekly Fed. C102a], the *Chavez* court found this procedure to be unconstitutionally overbroad and inconsistent with the Fourth Amendment particularity requirement. *Chavez*, 423 F.Supp.3d at 206-07.[4]

Although the warrant application in *United States v. Mercery*, 2022 WL 585144 (M.D. Ga. 2022) sought Instagram, and not Facebook, account data, it was in other respects substantially identical to the warrant application in *Chavez*, in that it "require[d] Instagram to disclose virtually every type of data to be found in a social media account." *Id*. at 4. But "warrants requiring social media sites like Facebook to disclose 'virtually every kind of data that could be found in a social media account' are overbroad and unconstitutional." *Id*. at 6 (quoting *Blake, supra*, at 974). In *Mercery*, "the Instagram warrant [wa]s necessarily overbroad. The compelled disclosure [wa]s not tailored to evidence of the crimes under investigation . . . . Instead, the warrant amounts to a general rummage of Mercery's entire Instagram account." *Id*. at 7.[5] To the same effect *see United States v. Harvey*, 2022 WL 684050 (E.D.N.Y. 2022).

The warrant in this case provides that, "This court finds that it is impractical for [Meta] to sort the evidence of the articulated crimes specifically sought herein from innocent or innocuous documents or records intermingled therewith." When, and upon what factual predicate, did I make this finding? I conducted no hearing. I received no evidence. I took no testimony. This entirely conclusory statement is offered without a shred of support. I claim no expertise whatever with respect to computers or social media, but I find it impossible to believe that Meta (formerly Facebook), one of the largest and certainly one of the most "tech-savvy" businesses in the world, is utterly without reasonable means to conduct word searches or other specific searches of account data that would make possible a much narrower and more particularized seizure than the one sought here.

For the foregoing reasons, I denied the warrant application presented to me herein. For the same reasons, I will deny future warrant applications suffering from the same infirmities. If in so doing I err, the publication of this memorandum in support of my order of denial will afford prosecution and law enforcement an opportunity to seek my prompt correction by the appellate court.

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[1]"Social media" refers to "communications on the Internet (such as on websites for social networking and microblogging) through which users share information, ideas, personal messages, and other content (such as videos)." https://www.britannica.com/topic/social-media

[2]"Cyberspace" is "a global domain within the information environment consisting of the interdependent network of information systems infrastructures including the Internet, telecommunications networks, computer systems, and embedded processors and controllers." https://csrc.nist.gov/glossary/term/cyberspace

[3]The same language appears in Florida's constitution at Art. I § 12, and in Florida statute law at § 933.04.

[4]The court found that law enforcement acted in good-faith reliance on the search warrant, and denied the remedy of suppression. *Id*. at 208. That portion of the *Chavez* opinion bears not at all on the issue before me. I am asked before the fact to grant a search warrant; not to decide after the fact whether the fruits of the search conducted pursuant to that warrant may be properly received in evidence.

[5]And in *Mercery*, unlike *Chavez,* the court found that law-enforcement reliance on the warrant in question was so entirely unjustifiable that the good-faith exception to the exclusionary rule did not apply.

* * *

**Judges—Judicial Ethics Advisory Committee—Fundraising—Guest speaker—County judge may serve as keynote speaker for non-partisan victims' rights event presented by district attorney's office, police departments, county sheriff's office and victims' shelter so long as judge refrains from giving legal advice or making comments on pending matters, and presents in a dignified manner with no suggestion of bias**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-03. Date of Issue: March 24, 2023.

**ISSUE**

May a county judge serve as keynote speaker for a non-partisan victims' rights event presented by the district's state attorney's office, police departments, county sheriff's office and victims' shelter?

ANSWER: Yes.

**FACTS**

The inquiring judge has been asked to serve as keynote speaker for a local victims' rights event during the week designated as National Crime Victims' Rights Week by the U.S. Department of Justice's Office for Victims of Crime. The event is to honor victims and recognize the professionals who support them. There is no indication that the event is a fundraiser. The non-partisan event is open to the public and hosted by the district's state attorney's office, county's sheriff's office, local police departments and a local victim's shelter. The judge currently handles a civil docket but expects future criminal cases involving appearances by the state attorney's office and local law enforcement.

**DISCUSSION**

The event, as described, is related to the law, the legal system and the administration of justice. Canon 4B of the Code of Judicial Conduct provides:

> A judge is encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government, subject to the requirements of the Code.

On the other hand, Canon 4A warns:

> A. A judge shall conduct all of the judge's quasi-judicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
>
> (2) undermine the judge's independence, integrity, or impartiality;
>
> (3) demean the judicial office;
>
> (4) interfere with the proper performance of judicial duties;
>
> (5) lead to frequent disqualification of the judge; or
>
> (6) appear to a reasonable person to be coercive.

In Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b], we provided the following "laundry list" of eight factors a judge should consider before agreeing to speak:

1. Whether the activity will detract from full time duties;
2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;
3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;
4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;
5. Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;
6. Whether the activity will create any other conflict of interest for the judge;
7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and
8. Whether the activity will lack dignity or demean judicial office in any way.

With regard to factor 2, listed above, as in past opinions, the Committee cautions the inquiring judge to refrain from giving legal advice and "to be careful not to comment on pending cases, not to answer hypothetical questions in a way that appears to commit to a particular position, and not to make any other remarks that could lead to disqualification, or be construed as an indication as to how the judge would rule in a particular case." *See* Fla. JEAC Op. 2006-30 [14 Fla. L. Weekly Supp. 193b] and opinions cited therein. In addition, although the facts indicate that the event is non-partisan, as reiterated in Fla. JEAC Op. 2010-19 [18 Fla. L. Weekly Supp. 120a], "the inquiring judge needs to be 'constantly on guard not to be placed in a partisan position or act for the political advantage of a person or party.' " (quoting from Fla. JEAC Op. 1995-01) [3 Fla. L. Weekly Supp. 79b].

The only other factor implicated from the above-list is number 7, namely, whether the activity will cause an entanglement with members of the state attorney's office or local law enforcement agencies which frequently appear before the court.

On that factor, even though it involved teaching as opposed to giving a speech, Fla. JEAC Op. 2020-20 [28 Fla. L. Weekly Supp. 561a] is instructive. There, the inquiry was whether a judge could continue to make educational presentations to law enforcement agents on a subject the judge mastered while serving as a prosecutor. In approving the presentations, we observed:

> With respect to educational presentations primarily geared toward prosecutors or law enforcement agents, this Committee has interpreted Canon 4 as allowing a judge to teach in a police academy at a local junior college, though cautioning the judge to "be careful not to answer hypothetical questions, not to comment on pending cases, and not to make remarks that could result in disqualification." Fla. JEAC Op. 2005-04 [12 Fla. L. Weekly Supp. 507a]. It is safe to assume that the inquiring judge in Op. 2005-04 would be teaching police trainees who might someday appear in court before that same judge. In the present case no federal prosecutors will be handing cases before the judge and, in the event federal agents (such as FBI agents) were to appear as witnesses it would be in connection with local or state personnel and would not involve the federal statute that was the judge's specialty. This lessens the likelihood that the judge's educational efforts will lead to motions to disqualify, but the judge should remain mindful of the opinion's guidance.
>
> We have also approved of a judge teaching law and trial skills at the annual Dependency Summit sponsored by the Florida Department of Children and Families. *See* Fla. JEAC Op. 2008-21 [15 Fla. L. Weekly Supp. 1238b]. Dependency is a subject that would come before a state court judge. We recommended that "the judge should ensure that the course is intended to provide an educational benefit for all attendees. The course should not be designed or taught in a manner that would appear to constitute a training session for DCF attorneys. To tailor the course solely for the benefit of DCF attorneys would tend to cast reasonable doubt on the judge's capacity to act impartially as a judge." Again, this may be less of a concern when the judge is instructing federal officials on federal statutory and case law and procedure.
>
> In sum, this Committee has generally indicated that judges may participate in educational offerings by groups even if those groups may be perceived as advocates, such as the Academy of Florida Trial Lawyers, so long as the judge does so in a properly dignified manner and betrays no suggestion of bias. Fla. JEAC 1987-3.
>
> Finally, we find no impediment to the judge participating in functions designed to provide legal education, either as a participant or as an attendee earning CLE credit for the judge's personal benefit.

*Cf.* Fla. JEAC Op. 1992-34 (judge's attendance or speaking at ceremonies held by law enforcement agencies during Law Enforcement Recognition Week would not significantly undermine public confidence in the integrity or impartiality of the judiciary); *see also* Fla. JEAC Op. 2006-30 [14 Fla. L. Weekly Supp. 193b] (listing a number of JEAC opinions approving judges' speaking to a variety of non-partisan groups).

Further, while the facts do not indicate fundraising activities, if they did, the Commentary to Canon 4(D)(2), in pertinent part, provides the following guidance:

> *A judge may be a speaker or guest of honor at an organizations' fund-raising event if the event concerns the law, the legal system, or the administration of justice, and the judge does not engage in the direct solicitation of funds. However, judges may not participate in or allow*

*their titles to be used in connection with fund-raising activities on behalf of an organization engaging in advocacy if such participation would cast doubt on the judge's capacity to act impartially as a judge.*

In sum, within the constraints of the Canons, Commentary, factors, and opinions listed above, the inquiring judge may participate as a keynote speaker in the upcoming event.

One Committee member concurs with the majority but further cautions that the inquiring judge must maintain within their keynote address the dignity appropriate to judicial office, the integrity and independence of the judiciary, and not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of judicial office.

Three members of the Committee cannot concur in the advice provided, having the opinion that serving as the keynote speaker at a victims' rights event presented by the district's state attorney's office, police departments, county sheriff's office and victims' shelter would potentially undermine public confidence in the integrity or impartiality of the judiciary.

**REFERENCES**

Fla. Code of Judicial Conduct, Canons 4A; 4B; and Commentary to Canon 4D(2)

Fla. JEAC Ops. 1992-34, 2006-30, 2010-19, 2019-02, and 2020-20.

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