Volume 31, Number 11, March 29, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 513-564

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.

- **ATTORNEY'S FEES—TIMELINESS OF MOTION. Section 501.2105, which provides for prevailing party attorney's fees to be awarded in cases raising claims under the Florida Deceptive and Unfair Trade Practices Act after judgment in the trial court and exhaustion of all appeals, does not extend the time for filing a motion for attorney's fees set forth in rule 1.525.** *E.L. ABUSAID v. FLORA GROWTH CORP. Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed January 23, 2024. Full Text at Circuit Courts-Original Section, page 545a.*

- **MUNICIPAL CORPORATIONS—ORDINANCES—NOISE CONTROL. The circuit court, acting in its appellate capacity, held that an ordinance that not only proscribes noise that is plainly audible at a distance of 100 feet from a building or vehicle and sound that would disturb the peace of neighboring inhabitants, but also prohibits sound that at any time is played at a volume louder than necessary for convenient hearing for persons voluntarily listening to the sound in homes or in vehicles, is unconstitutionally vague. The court further held that the vague language of the ordinance is severable from the remaining provision of the ordinance.** *KWARTIN v. CITY OF MIAMI BEACH. Circuit Court, Eleventh Judicial Circuit (Appellate) in and for Miami-Dade County. Filed January 22, 2024. Full Text at Circuit Courts-Appellate Section, page 520a.*

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FLW SUPPLEMENT

CASES REPORTED.

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Implied consent warning—Although paperwork submitted by arresting trooper contains some errors and inconsistencies, finding that licensee refused to submit to breath test after being informed of implied consent law was supported by competent substantial evidence in form of arrest report and incident report that were signed by trooper with appropriate attestations

CHRISTOPHER GLEN MURPHY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2023-CA-000225-WS. December 20, 2023. Petition for Writ of Certiorari. Counsel: Curtis M. Crider, for Petitioner. Michael Lynch, Former Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYNG PETITION FOR WRIT OF CERTIORARI

(LINDA BABB, KIMBERLY BYRD, and JOSHUA RIBA, JJ.) **THIS CAUSE** came before the Court on Petition for Writ of Certiorari, filed January 26, 2023, by Christopher Glen Murphy ("Petitioner"), represented by Curtis M. Crider, Esquire. In response to the Court's Order to Show Cause, a Response to Petition for Writ of Certiorari was timely filed, on April 21, 2023, by the State of Florida, Dept. of Highway Safety and Motor Vehicles ("Respondent"). Petitioner did not file a reply. Upon review of the briefs, record, and being otherwise fully advised, the Court finds that the Petition for Writ of Certiorari must be denied.

BACKGROUND FACTS

Petitioner appeals the Findings of Fact, Conclusions of Law and Decision ("DMV Order"), entered December 28, 2022, by James S. Garbett, Jr., Field Hearing Officer ("Hearing Officer"), affirming the license suspension imposed by the Respondent after the Petitioner refused to submit to a breath test. The Hearing Officer upheld the Petitioner's 18-month license suspension, effective November 18, 2022, for driving under the influence after Petitioner failed to submit to a breath test.

The Florida Highway Patrol ("FHP") Arrest Report shows that FHP Trooper Kelley Starling arrived at a traffic accident, at U.S. Highway 19 and Fox Hollow Drive[1] in Port Richey, at 4:02 p.m. on November 18, 2022. As set forth in Trooper Starling's sworn FHP Arrest Report, the following events transpired:

> "Upon my arrival, I observed a Green Chevy 4 door car, (FL Tag—[Editor's note: redacted]), with heavy front-end damage and Grey Cadillac CTS, (FL Tag [Editor's note: redacted]) with heavy rear end damage. I identified the driver of the green car as Christopher Glen Murphy (FL DL—[Editor's note: redacted]). I asked Mr. Murphy what happened, and he stated that he was driving and failed to slow for traffic ahead. As Mr. Murphy spoke, I observed the odor commonly associated with alcohol coming from his breath as he spoke, he had blood shot eyes and slurred speech at times."

At approximately 4:15 p.m., Trooper Starling informed Petitioner that he'd concluded the crash investigation and was switching to the criminal DUI investigation. Trooper Starling read Petitioner the Miranda warning, after which Petitioner refused to complete Standardized Field Sobriety Exercises. Trooper Starling informed Petitioner that failure to complete the Exercises would result in a decision based on Trooper Starling's observations, training, and experience. After again refusing to complete the Standardized Field Sobriety Exercises, Petitioner was placed under arrest for DUI. Petitioner was transported to the Pasco County Jail, where he twice refused to provide a breath sample, the second refusal after Trooper Starling informed Petitioner of Florida's Implied Consent Law.[2] Petitioner was then processed into the Pasco County Jail.

Petitioner timely requested an administrative hearing before the DMV's Bureau of Administrative Reviews ("BAR") to challenge the lawfulness of his license suspension. A telephonic hearing was held on December 19, 2022. Only the Hearing Officer, attorney Curtis M. Crider, and the court reporter were present. The Hearing Officer admitted fifteen documents received from the FHP into evidence, without objection. As set forth in the transcript of the administrative hearing, the following exhibits were admitted:

DDL1—Florida DUI Uniform Traffic Citation (A77947E);
DDL2—Florida Uniform Traffic Citation (AFSKDPE);
DDL3—Florida Uniform Traffic Citation (AFSKDOE);
DDL4—Florida Citation Transmittal Form;
DDL5—Surrendered Driver's License Form;
DDL6—FHP Arrest Report;
DDL7—Breath Alcohol Test Affidavit;
DDL8—Affidavit of Refusal to Submit to Breath and/or Urine Test;
DDL9—FHP Incident Report;
DDL10—FHP Alcohol and Drug Influence Report;
DDL11—Florida Traffic Crash Report;
DDL12—FHP Vehicle Tow Form;
DDL13—FHP Notification of Driver License Hearing;
DDL14—FHP Law Enforcement Affidavit of True Copy; and,
DDL15—FHP DUI Investigation Case Report Coversheet.

Petitioner did not personally appear for the hearing, but was represented by counsel, Mr. Crider, who did not present additional evidence or call any witnesses. Mr. Crider orally motioned the Hearing Officer to invalidate Petitioner's license suspension, first arguing that there was no proof that Petitioner was informed of the Implied Consent Law as the Affidavit of Refusal to Submit to Breath and/or Urine Test (DDL8) was not notarized or attested to. Next, Mr. Crider argued that the documents did not establish a "wheel witness" to support Petitioner's DUI. The Hearing Officer reserved ruling on the oral motions and the hearing was concluded. The Hearing Officer entered, on December 28, 2022, its DMV Order from which Petitioner timely sought certiorari review.

ISSUE RAISED

Petitioner has raised only one issue for appellate review: Whether the Field Hearing Officer lacked competent substantial evidence to uphold the suspension of Petitioner's driver's license where the Affidavits do not say whether Implied Consent was read by law enforcement or read pursuant to Fla. Stat. § 316.1932(1)(a)?

STANDARD OF REVIEW

The Circuit Court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent substantial evidence. *Haines City v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citations omitted*). The Circuit Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dept. of Highway Safety & Motor Vehicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*). "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.,* 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

LAW AND ANALYSIS

Initially, the Court finds that the Hearing Officer was charged with

determining, by a preponderance of the evidence, whether there was sufficient cause to sustain, amend, or invalidate the license suspension, based on three criteria:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. *See* § 322.2615(7)(b)1.-3., Fla. Stat.

Petitioner takes issue with the third prong, arguing that the Affidavit of Refusal to Submit to Breath and/or Urine Test (DDL8) was not sworn by an attesting officer, and that the FHP Alcohol and Drug Influence Report (DDL10) was not signed by Trooper Starling. Petitioner also argues that FHP Arrest Report (DDL6) and FHP Incident Report (DDL9) fail to affirmatively show that Trooper Starling read the Implied Consent Law warning and requested Petitioner to submit to a breath test.

Initially, the Court finds that the Hearing Officer was statutorily required to admit all documents submitted by FHP, which are considered self-authenticating. *See* § 322.2615(2)(b), Fla. Stat. (stating "[m]aterials submitted to the department by a law enforcement agency or correctional agency shall be considered self-authenticating and shall be in the record for consideration by the hearing officer"); *see also,* Rule 15A-6.013(2), Fla. Admin. Code. The Hearing Officer may then assign whatever weight, relevance, and credibility he deems appropriate. *See* Rule 15A-6.013(7)(c)(stating "[t]he hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented").

The Court finds that the paperwork submitted by Trooper Starling has errors and omissions, to include that the Affidavit of Refusal to Submit to Breath and/or Urine Test (DDL8) is not sworn by an attesting officer; and, Trooper Starling did not sign the FHP Alcohol and Drug Influence Report (DDL10).[3] However, both the FHP Arrest Report (DDL6) and the FHP Incident Report (DDL9) are signed by Trooper Starling, with the appropriate attestation, and affirmatively show that Petitioner was asked, following his arrest, to provide a breath sample twice, with the second request after the Implied Consent Law warning was read. While some of the exhibits were defective, the Hearing Officer was charged with assigning the appropriate weight, relevance, and credibility to support his decision. *Id.*

The test for competent substantial evidence is whether there exists any competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *Dusseau,* 794 So.2d at 1276; *Stenmark,* 941 So.2d at 1249. This Court is prohibited from reweighing the evidence and substituting its judgment for that of the Hearing Officer. *Dept. of Highway Safety and Motor Vehicles v. Silva,* 806 So.2d 551, 553 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (*citations omitted)*. The Court finds that the sworn FHP Arrest Report (DDL6) and the FHP Incident Report (DDL9) are competent substantial evidence to support the Hearing Officer's decision that Petitioner refused to provide a breath sample after being informed of the Implied Consent Law. *Dept. of Highway Safety and Motor Vehicles v. Perry*, 751 So.2d 1277, 1280 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a] (finding that the arrest affidavit was sufficient to show that the implied consent warnings were given and that the driver refused to submit to the breath test). Hence, the Court finds that the DMV Order is supported by competent substantial evidence and that there is no basis to grant certiorari relief under the facts of this case.

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

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[1]The Court notes that the DUI Uniform Traffic Citation (A77947E) and Florida Traffic Crash Report state that the accident occurred at U.S. 19 and Butch Street, a short distance from U.S. 19 and Fox Hollow Drive. This discrepancy has no bearing on the outcome of this appeal.

[2]*See* § 316.1932(1)(a), Fla. Stat. (explaining that "[t]he person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended. . ." for refusing to submit to a lawful breath test).

[3]It's unclear how this document was sworn without Trooper Starling's signature. The Court also notes that, while Trooper Starling's name is printed on the Breath Alcohol Test Affidavit (DDL7), its clearly not Trooper Starling's signature that was notarized.

* * *

Licensing—Driver's license—Suspension—Evidence—Blood test—Blood draw at hospital, chain of custody of blood sample, and blood test results were fatally flawed where blood vial was not labeled with licensee's name, date and time of collection, and initials of person who collected sample; chain of custody had gaps as to where blood vial was located and whether it was refrigerated; and description of blood vial by trooper who received it from hospital was inconsistent with that of analyst who tested blood—Finding that licensee was driving under influence was not supported by competent, substantial evidence—Certiorari granted

DIANE BROWN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2022-CA-900120-WS. December 20, 2023. Petition for Writ of Certiorari. Counsel: Mustafa Ameen, Tampa, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, Tampa, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(LINDA BABB, KIMBERLY BYRD, and JOSHUA RIBA, JJ.) **THIS CAUSE** came before the Court on Petition for Writ of Certiorari, filed January 14, 2022, by Diane Brown ("Petitioner"), represented by Mustafa Ameen, Esquire. In response to the Court's Order to Show Cause, a Response to Petition for Writ of Certiorari was timely filed, on September 11, 2023, by the State of Florida, Dept. of Highway Safety and Motor Vehicles ("Respondent").[1] Petitioner did not file a reply. Upon review of the briefs, record, and being otherwise fully advised, the Court finds that the Petition for Writ of Certiorari must be granted.

BACKGROUND FACTS

Petitioner appeals the Findings of Fact, Conclusions of Law and Decision ("DMV Order"), entered December 16, 2021, by Bethany Connelly, Field Hearing Officer ("Hearing Officer"), affirming the license suspension imposed by the Respondent after the Petitioner was found to be driving or in actual physical control of a motor vehicle while under the influence of alcohol or controlled substances. The Hearing Officer upheld the Petitioner's license suspension, effective August 12, 2021, for driving under the influence with an unlawful breath/blood alcohol level of .08 or higher.

The record shows that on March 15, 2021, at approximately 8:43 p.m., Florida Highway Patrol ("FHP") Trooper Runner responded to the scene of a traffic crash on S.R. 54 and Meadowbrook Drive in Pasco County. Upon arrival, Trooper Runner observed a grey Chevy Silverado and black Chevy Equinox, both with severe front-end damage. Trooper Runner observed Petitioner as the sole occupant of the Silverado, sitting in the driver's seat. The driver of the Equinox had already been transported to the hospital and no other occupants

were observed.

Trooper Runner spoke with a witness, Jasmine Chancey, who stated that the Silverado was traveling east bound on S.R. 54 and made a left turn, on a flashing yellow arrow, onto Meadowbrook Drive crossing into the west bound path of the Equinox, which had a green light, resulting in a collision. Ms. Chancey's description of the collision was consistent with Trooper Runner's observations of the accident scene. Trooper Runner did not interview the driver of the Equinox.

As Trooper Runner was conducting his accident investigation, he "very briefly" interacted with Petitioner and detected several signs of impairment to include slurred speech, the strong odor of alcohol emitting from her breath, and bloodshot, watery, and glassy eyes. Petitioner was then transported to St. Joseph's Hospital in Tampa, where Trooper Runner later made contact with her again and observed the same signs of impairment. Petitioner spontaneously stated that she had left a restaurant where she had been drinking before the accident. A nurse advised Trooper Runner that Petitioner would be admitted to the hospital for an unknown period of time.

Trooper Runner submitted a Letter of Preservation for Petitioner's blood sample. Thereafter, Trooper Runner secured and served a warrant for Petitioner's blood sample, and then retrieved the blood sample on April 23, 2021. Trooper Runner dropped off the blood sample, which was in a vial sealed and labeled by the hospital and placed in a clear plastic zippy bag, at the FHP Tampa station in an unattended secure, locked storage facility. On April 26, 2021, Heidi Hisler submitted Petitioner's blood sample to the Tampa FDLE office. On May 17, 2021, the blood sample was then boxed and transported from the Tampa FDLE office, by Thomas Carlson, who delivered the blood sample to Kelsey Olson, who in turn delivered the blood sample to FDLE Analyst Kristie Shaw, who kept it in her personal cold storage.

On May 19, 2021, Ms. Shaw tested the blood sample, which was in a hospital lavender-stopped vial labeled "Trauma 2021—T-151."[2] Trooper Runner testified that, on June 6, 2021, he was notified by email that the blood test came back with a blood alcohol level of .104 per .008 grams per milliliter of Petitioner's blood. Ms. Shaw issued her Laboratory Report, dated June 10, 2021, verifying Petitioner's blood alcohol level of .104 per .008 grams. On August 12, 2021, Trooper Runner issued a DUI Traffic Citation resulting in the suspension of Petitioner's driving privilege for a period of six months. At no time did Trooper Runner commence a DUI investigation or read Petitioner her Miranda rights, and Petitioner was not arrested for DUI.[3] Trooper Runner forwarded the DUI Traffic Citation to the State Attorney's office to consider a direct file.[4]

Petitioner timely requested an administrative hearing before the DMV's Bureau of Administrative Reviews ("BAR") to challenge the lawfulness of her license suspension. A telephonic hearing was commenced on October 28, 2021, and continued to December 9, 2021. The following witnesses appeared and testified: Jasmine Chancey, accident witness; Kristie Shaw, FDLE Sr. Crime Laboratory Analyst, Toxicology Section; and, FHP Trooper Runner. Petitioner did not appear for either hearing, but was represented by Mustafa Ameen, Esquire. The Hearing Officer admitted twelve documents received from the FHP into evidence, without objection. As set forth in the transcript of the administrative hearing, the following exhibits were admitted:

DDL1—Florida Highway Patrol DUI Investigation Case Report;
DDL2—Florida Highway Patrol Warrant Affidavit (3 pgs.);
DDL3—Florida Highway Patrol Incident Report (5 pgs.);
DDL4—Personal Data Information Sheet;
DDL5—FL Citation Transmittal Form;
DDL6—FL Uniform Traffic Citation AD5JZPE;
DDL7—FL DUI Uniform Traffic Citation A771B0E;
DDL8—Florida Traffic Crash Report (4 pgs.);
DDL9—Witness List;
DDL10—FDLE Laboratory Report;
DDL11—Search Warrant (4 pgs.); and,
DDL12—Release of Specimen Form (BayCare Laboratories).

Following the hearing, Mr. Ameen emailed several "motions"[5] to invalidate the Petitioner's license suspension, to include that the Petitioner's blood results should be excluded as the blood sample was not taken in accordance with the Fla. Admin. Code Rule 11D-8.012, Blood Samples, Labeling and Collection. The Hearing Officer entered, on December 28, 2022, its DMV Order denying Petitioner's motions and upholding her license suspension, from which Petitioner timely sought certiorari review.

ISSUE RAISED

Petitioner has raised two issues for appellate review: Whether the Petitioner was afforded due process and whether there is competent substantial evidence to support the Hearing Officer's finding that the Petitioner's blood alcohol level was .08 or higher?

STANDARD OF REVIEW

The Circuit Court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent substantial evidence. *Haines City v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citations omitted*). The Circuit Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dept. of Highway Safety & Motor Vehicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*). "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.,* 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

LAW AND ANALYSIS

Initially, the Court finds that the Hearing Officer was charged with determining, by a preponderance of the evidence, whether law enforcement had probable cause to believe that Petitioner was driving, or in actual physical control of, a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; and, whether Petitioner had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in § 316.193, Fla. Stat. Petitioner takes issue with the second prong, arguing that Petitioner's blood sample was not collected, stored, transferred, and tested in accordance with the requirements of the Florida Administrative Code, 11D-8.012.

Initially, the Court finds that Petitioner was afforded due process in the proceedings below as she received notice and was given the opportunity to be heard. "Procedural due process has been afforded to a driver at a formal administrative review hearing where the driver has received notice and has been given the opportunity to be heard." *Dept. of Highway Safety and Motor Vehicles v. Corcoran,* 133 So.3d 616, 620 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D507a] (*citations omitted)*. The Hearing Officer continued the hearing to allow Petitioner to subpoena witnesses and take testimony, and considered each argument Petitioner made to set aside her DUI license suspension.

Turning to the issue of competent, substantial evidence, the Court finds that the Hearing Officer was statutorily required to admit all documents submitted by FHP, which are considered self-authenticating. *See* § 322.2615(2)(b), Fla. Stat. (stating "[m]aterials submitted to the department by a law enforcement agency or correctional agency

shall be considered self-authenticating and shall be in the record for consideration by the hearing officer"); *see also,* Rule 15A-6.013(2), Fla. Admin. Code. The Hearing Officer may then assign whatever weight, relevance, and credibility she deems appropriate. *See* Rule 15A-6.013(7)(c)(stating "[t]he hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented").

Notwithstanding the self-authentication of the admitted documents, the Court finds under the specific facts of this case that the Petitioner's blood draw, the chain of custody of the blood sample, and blood test results, are fatally flawed. *Goodman v. Fla. Dept. of Law Enforcement,* 238 So.3d 102, 114 (Fla. 2018) [43 Fla. L. Weekly S61a] (explaining that the requirements of Fla. Admin. Code Rule 11D-8.012 facially ensures reliable blood test results and any question as to the accuracy of a particular blood test is determined on a case-by-case basis). Florida Administrative Code, 11D-8.012, sets forth the following requirements for the collection and labeling of blood samples:

> (1) Before collecting a sample of blood, the skin puncture area must be cleansed with an antiseptic that does not contain alcohol.
>
> (2) Blood samples must be collected in a glass evacuation tube that contains a preservative such as sodium fluoride and an anticoagulant such as potassium oxalate or EDTA (ethylenediaminetetraacetic acid). Compliance with this section can be established by the stopper or label on the collection tube, documentation from the manufacturer or distributor, or other evidence.
>
> (3) Immediately after collection, the tube must be inverted several times to mix the blood with the preservative and anticoagulant.
>
> (4) Blood collection tubes must be labeled with the following information: name of person tested, date and time sample was collected, and initials of the person who collected the sample.
>
> (5) Blood samples need not be refrigerated if submitted for analysis within seven (7) days of collection, or during transportation, examination or analysis. Blood samples must be otherwise refrigerated, except that refrigeration is not required subsequent to the initial analysis.
>
> (6) Blood samples must be hand-delivered or mailed for initial analysis within thirty days of collection, and must be initially analyzed within sixty days of receipt by the facility conducting the analysis. Blood samples which are not hand-delivered must be sent by priority mail, overnight delivery service, or other equivalent delivery service.
>
> (7) Notwithstanding any requirements in Chapter 11D-8, F.A.C., any blood analysis results obtained, if proved to be reliable, shall be acceptable as a valid blood alcohol level.

There is not competent substantial evidence to support the Hearing Officer's conclusion that these requirements were adhered to. While there was some testimony regarding the refrigeration of the blood sample at different points along the chain of custody and that the blood sample was tested within an aggregate 90 days, the sample was critically missing the Petitioner's name, the date and time of collection, and the initials of the person who collected the sample. Taken together with the mishandling of the blood sample, this missing information is not a minor deviation from the Rule. *See, e.g., State v. Kleiber,* 175 So.3d 319, 321 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1944a] (finding that the use of dry gauze, instead of an antiseptic to clean defendant's arm, was a minor deviation that did not render the blood test invalid); *Bedell v. State,* 250 So.3d 146, 149 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1216a] (explaining that blood vials, which were incidentally tipped and moved, and not "inverted several times," was a minor deviation from the rule).

As explained in *Bedell:*

> "Unquestionably, blood alcohol tests must be conducted in conformity with the rules governing collection and handling of the samples. Where there is "virtually no adherence" to the applicable rules—for instance, where only the labeling requirement is met but none of the other procedures are followed—suppression is required. But the standard is "substantial compliance" with the rules, so as to produce reliable scientific evidence." *Id. (citations omitted).*

The chain of custody also has gaps as to where the blood sample was, and whether it was refrigerated, between the time that Trooper Runner dropped it off at the unattended storage facility at FHP Tampa station, on April 23, 2021, and when Heidi Hisler presumably retrieved the blood sample to deliver it to the Tampa FDLE office on April 26, 2023.[6] The testimony presented was that the blood sample was not refrigerated while in route to the various drop points, and that the blood sample was unattended at room temperature for an unknown amount of time after Trooper Runner dropped off the sample in the early morning hours of April 23, 2021. Trooper Runner had no knowledge as to whether the sample was refrigerated while at the FHP Tampa station. Outside of transport, the blood sample had to remain refrigerated since it was not submitted for analysis within 7 days of collection.

The testimony of Trooper Runner and Ms. Shaw was also inconsistent as to the description of the blood vial and its container. Trooper Runner testified that "the blood was in vials, sealed and labeled by the hospital, that was also in a clear plastic zippy bag." Ms. Shaw testified that the blood sample arrived in a box in a "lavender stopper vial" and was marked "Trauma 2021—T-151" without anyone's name on the vial. The Release of Specimen Form, from BayCare Laboratories, is equally unclear. The name and date of birth of the patient isn't printed, rather "Trauma 2021, T-157," is written down as the patient's name. There is no other identifying information, even though the Form states "please use 2 patient identifiers."[7]

The test for competent substantial evidence is whether there exists any competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *Dusseau,* 794 Sold at 1276; *Stenmark,* 941 So.2d at 1249. In this case, the record lacks such competent substantial evidence that the blood sample tested is reliable as it failed to comply with the requirements of Florida Administrative Code, 11D-8.012. *Fla. Rate Conference v. Florida R.R. & Pub. Util. Comm'n,* 108 So.2d 601, 607 (Fla. 1959)(explaining that "although the terms 'substantial evidence' or 'competent substantial evidence' have been variously defined, past judicial interpretation indicates that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient"); *Goodman,* 238 S o.3d at 106 (reiterating the necessary procedures articulated by Rule 11D-8.012).

Hence, the Court finds that the DMV Order is not supported by competent substantial evidence and must be quashed. This matter is remanded for action consistent with this order and opinion. *Broward County v. G.B.V. Int'l, Ltd.,* 787 So.2d 838, 844 (Fla. 2001) [26 Fla. L. Weekly S389a] (explaining that, when an order is quashed on certiorari review, it leaves the subject matter pending before the administrative authority as if no judgment had been entered)(*citations omitted).*

WHEREFORE, it is hereby, **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is hereby GRANTED and this cause is remanded for action consistent with this order and opinion.

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[1]The Court entered, on June 27, 2022, an Order Staying Petition, et al., pending the outcome of decisions from the Second District Court of Appeal which may have impacted this appeal. The Court entered, on July 28, 2023, its Order Setting Aside Stay and Order to Show Cause, to which Respondent timely filed its Response.

[2]Ms. Shaw initially testified that the vial was labeled "Trauma 2020—T-151," but immediately corrected herself.

[3]While the FL DUI Uniform Traffic Citation states that Petitioner was "Arrested," Trooper Runner testified that Petitioner was not arrested. A search of jail records confirms that Petitioner was not arrested for DUI.

[4]The Court notes that the State Attorney's office filed its Felony Information for DUI on May 24, 2022. Those charges remain pending, Pasco County Case No. 2022-

CF-002176.

[5]The emails were not in motion format, but the Hearing Officer considered and ruled on each argument presented.

[6]Ms. Shaw testified that the blood sample was received into the Tampa FDLE laboratory on April 26, 2021. In her Laboratory Report, dated June 10, 2021, Ms. Shaw stated that Heidi Hisler submitted the evidence to FDLE on April 26, 2021.

[7]Petitioner's name at the time of the accident was Diane Marie Brown.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Welfare check—Officers responding to 911 call reporting what appeared to be a Dodge Charger traveling at high rate of speed on Interstate highway and then pulling over "probably at mile marker 283" with woman "bolting" from vehicle—It was objectively reasonable for officers to conduct welfare check on Jeep parked on side of highway at mile marker 282 with a person standing outside of vehicle in the rain—Request that licensee exit vehicle and decision to conduct DUI investigation were justified where, immediately upon contact, officers noted that both licensee and her companion showed signs of impairment and observed open liquor bottle in vehicle—Use of emergency lights when pulling up to licensee's vehicle was appropriate and did not result in unlawful detention

MINDY GALE SCHNEIDER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2023-CA-003290-WS. December 20, 2023. Petition for Writ of Certiorari. Counsel: Randall C. Grantham, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(LINDA BABB, KIMBERLY BYRD, and JOSHUA RIBA, JJ.) **THIS CAUSE** came before the Court on the Petition for Writ of Certiorari, filed April 27, 2023, by Mindy Gale Schneider ("Petitioner"), represented by Randall C. Grantham, Esquire. In response to the Court's Order to Show Cause, a Response to Petition for Writ of Certiorari was timely filed, on June 14, 2023, by the State of Florida, Dept. of Highway Safety and Motor Vehicles ("Respondent"). After an extension of time was granted, the Petitioner timely filed her Reply on July 18, 2023. Upon review of the briefs, record, and being otherwise fully advised, the Court finds that the Petition for Writ of Certiorari must be denied.

BACKGROUND FACTS

Petitioner appeals the Findings of Fact, Conclusions of Law and Decision ("DMV Order"), entered March 29, 2023, by James S. Garbett, Jr., Field Hearing Officer ("Hearing Officer"), affirming the license suspension imposed by the Respondent after the Petitioner refused to submit to a breath test. The Hearing Officer upheld the Petitioner's one year license suspension, effective February 12, 2023, for driving under the influence after Petitioner failed to submit to a breath test.

The record shows that on February 12, 2023, at approximately 3:05 a.m., Trooper Aziz and Sergeant Howard, both of the Florida Highway Patrol (collectively "FHP"), responded to the area of northbound I-75 and the newly-constructed Overpass Road located at approximately mile marker 282. Trooper Aziz and Sergeant Howard, driving separate vehicles, were dispatched following a 911 call from a male individual traveling north on I-75 who reported seeing what he thought was a Dodge Charger driving "really, really, really fast," then pulling over wherein a lady was observed bolting out of the vehicle and disappearing. The 911 caller stated that the incident "probably" occurred around Mile Marker 283. The 911 dispatcher provided Mile Marker 283.5, on the right shoulder of northbound I-75, to FHP.

FHP came to a stop behind a Jeep Cherokee with their overhead lights on. It was raining. Trooper Aziz and Sergeant Howard each observed a male outside the Jeep on the passenger side and a female, later identified as the Petitioner, sitting in the driver's seat while the vehicle was running. The male stated that he and Petitioner had argued, so he exited the vehicle with the intent to walk home, stating that the Petitioner would drive herself home. The male confirmed that there were only two people in their vehicle and that a third person had not run away. The male showed several signs of impairment to include an odor of alcoholic beverage coming from his breath, bloodshot watery eyes, orbital sway, and constantly repeating statements.

Trooper Aziz and Sergeant Howard then made contact with the Petitioner, who also showed several signs of impairment to include bloodshot eyes, dilated pupils, the strong smell of alcohol coming from her breath, and slurred speech. Trooper Aziz and Sergeant Howard observed an open bottle of Captain Morgan in the front passenger seat and a Styrofoam cup with what appeared to contain the same brown liquid as Captain Morgan. Petitioner admitted to drinking.

Trooper Aziz and Sergeant Howard then briefly stepped away from the Jeep to talk. Out of his peripheral vision, Sergeant Howard observed Petitioner moving the Captain Morgan bottle (later located under her seat) and dumping the contents of the Styrofoam cup on the ground. Trooper Aziz asked Petitioner to exit the Jeep, and she was observed to have a wet area in the rear from urinating. Petitioner was unsteady on her feet and swayed as she stood. Petitioner subsequently refused to complete field sobriety exercises and was arrested for DUI. Upon arrival at the Pasco County Jail, Petitioner refused twice to submit to a breath test, even after being advised of Florida's implied consent law. Petitioner was booked into the Pasco County Jail and her driving privilege was suspended for a period of one year, effective February 12, 2023.

Petitioner timely requested an administrative hearing before the DMV's Bureau of Administrative Reviews ("BAR") to challenge the lawfulness of her license suspension. An in-person hearing was held at the BAR Tampa office on March 21, 2023. Petitioner was present with her attorney, Mr. Grantham, and testified on her own behalf. The arresting officer, Trooper Aziz, appeared telephonically and also testified.[1] The Hearing Officer admitted fifteen documents received from the FHP into evidence, without objection. The Hearing Officer also admitted three exhibits offered by the Petitioner. As set forth in the transcript of the administrative hearing, the following documents and exhibits were admitted:

DDL1—Florida DUI Uniform Traffic Citation (A779NME);
DDL2—Florida Uniform Traffic Citation (AGJW4FE);
DDL3—Florida Citation Transmittal Form;
DDL4—FL DL (S536547868700);
DDL5—FHP Arrest Report;
DDL6—Breath Alcohol Test Affidavit;
DDL7—Affidavit of Refusal to Submit to Breath and/or Urine Test;
DDL8—FHP Incident Report FHP Vehicle Tow Form;
DDL9—FHP Alcohol and Drug Influence Report;
DDL10—TBRCC Call History Record;
DDL11—FHP Affidavit of Investigative Costs;
DDL12—FHP Notification of Driver License Hearing;
DDL13—FHP DUI Case Report Checklist;
DDL14—FHP DUI Investigation Case Report Coversheet;
DDL15—DUI Videos (provided by law enforcement via emailed link);
Driver Exhibit 1—Photos of Incident Scene (4);
Driver Exhibit 2—Google Earth Photo (1); and,
Driver Exhibit 3—911 Audio (DVD format).

At the conclusion of the hearing, Petitioner's counsel orally motioned to invalidate the license suspension arguing that FHP did not conduct a lawful traffic stop of Petitioner, as her vehicle and location did not meet the description of the 911 call. Further, assuming

FHP was conducting a lawful welfare check, Petitioner's counsel argued that such welfare check should have ended upon determining that the Petitioner and her male companion were not in need of assistance and that there was not a third individual that had run from the car. The Hearing Officer reserved ruling on the oral motions and the hearing was concluded. The Hearing Officer entered, on March 29, 2023, its DMV Order affirming the Petitioner's license suspension, from which she timely sought certiorari review.

ISSUE RAISED

Petitioner has raised only one issue for appellate review: Whether there is competent and substantial evidence to support the Hearing Officer's finding that Petitioner was lawfully stopped for a welfare check?

STANDARD OF REVIEW

The Circuit Court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent substantial evidence. *Haines City v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citations omitted*). The Circuit Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dept. of Highway Safety & Motor Vehicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*). "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.,* 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

LAW AND ANALYSIS

Initially, the Court finds that the Hearing Officer was charged with determining, by a preponderance of the evidence, whether there was sufficient cause to sustain, amend, or invalidate the license suspension, based on three criteria:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. *See* § 322.2615(7)(b)1.-3., Fla. Stat.

Petitioner takes issue with the first prong, arguing that FHP's welfare check violated the Fourth Amendment leading to Petitioner's unlawful search and search, and subsequent arrest for DUI and license suspension. Petitioner argues that the location of the stop, around Mile Marker 282, did not match that the 911 call that placed a purported Dodge Charger around Mile Marker 283 such that a welfare check at the location of the Jeep was unjustified. Further, assuming the initial welfare check was justified, it should have ended once FHP determined that no one was in distress or in need of assistance. Respondent counters that FHP had justification to conduct a traffic stop as the Jeep was illegally parked or, in the alternative, argues that the community caretaking doctrine, under which a welfare cheek falls, applies to the facts of this case to justify the traffic stop and Petitioner's subsequent arrest.

Initially, the Court finds that it is undisputed that FHP was responding to a 911 call generated in the middle of the night, while it was raining, and that FHP necessarily had to pass Mile Marker 282 to reach Mile Marker 283. Given the uncertainty of the 911 caller as to the make and model of the vehicle traveling at a very high rate of speed, coupled with the uncertainty as to the Mile Marker where a woman "bolted" from the car on the right side of I-75, it was objectively reasonable for FHP to conduct a welfare check on the Jeep parked along the right shoulder of I-75, with an individual observed standing outside in the rain.

The well-settled law is that welfare checks fall under the community caretaking doctrine and that law enforcement can conduct such checks when necessary without constitutional implications. *Daniels v. State,* 346 So.3d 705, 708 (Fla. 2nd DCA 2022) [47 Fla. L. Weekly D1870b] (*citations omitted).* Once law enforcement has satisfied their concern for the welfare of the person, a continued detention is not permissible unless there is a reasonable suspicion that the person has committed, or is committing, a crime. *Id.* As held by the Second DCA in *Daniels*, "[w]hen determining whether reasonable suspicion exists, the totality of the circumstances must be considered from the 'standpoint of an objectively reasonable officer.' " *Id.* at 709 (*citations omitted); see also, R.A. v. State,* 355 So.3d 1028, 1034 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D288a] (explaining that any warrantless seizure of an individual by law enforcement, including those involving only a brief detention short of arrest, must be based on a reasonable suspicion that the individual is engaged in wrongdoing)(*citations omitted).*

Under the facts of this case, FHP had an objectively reasonable basis to conduct a welfare check on the Petitioner and her male companion. Next, immediately upon contact, both individuals showed several signs of impairment which was reinforced by the observation of the open Captain Morgan bottle. Once FHP observed signs of criminal activity, impairment and an unlawful open container, FHP was justified in requesting Petitioner to exit the Jeep. *State v. Bodrato,* 346 So.3d 65, 66-67 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1774a] (explaining that officer was justified in asking defendant to exit his vehicle because he was observed committing a traffic infraction)(*citations omitted); see also, Daniels,* 346 So.3d at 708. FHP then lawfully continued its investigation resulting in Petitioner's arrest for DUI.

Lastly, the Court finds that FHP's use of its emergency lights was appropriate and did not result in an unlawful detention. *See, e.g., Baxter v. State,* 2023 WL 7096645 (Fla. 5th DCA Oct. 2023) [48 Fla. L. Weekly D2084a] (finding that defendant was not initially detained without reasonable suspicion, even though sheriff activated his emergency lights). As in *Baxter,* by the time the interaction between FHP and Petitioner became a detention, there was a factual basis to establish an objective, reasonable suspicion that a crime had occurred.

Hence, the Court finds that the DMV Order is supported by competent substantial evidence and that there is no basis to grant certiorari relief under the facts of this case. *Dusseau,* 794 So.2d at 1276 (explaining the test for competent substantial evidence is whether there exists any competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant; *Stenmark,* 941 So.2d at 1249 (same).

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

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[1]While Sergeant Howard was lawfully subpoenaed, Petitioner decided against enforcing the subpoena and went forward without his testimony.

* * *

Licensing—Driver's license—Revocation—Early reinstatement—No merit to licensee's argument that hearing officer failed to consider his testimony and hardship—Final order expressly states that hearing officer considered those matters—Driving record supports denial of early reinstatement based on belief that licensee could not be trusted to lawfully operate motor vehicle

RICARDO NEHRU GARRETT, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Division of Driver Licenses-Hardships Bureau of Administrative Reviews, Respondent. Circuit Court, 10th Judicial Circuit (Appellate) in and for Highlands County. Case No. 28-2023-CA-000090-GCAM. December 4, 2023. Counsel: Kathy Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

FINAL ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

(JAMES YANCEY, J.) This matter came before the Court on the Petitioner's Amended Petition for Writ of Certiorari (hereinafter "Amended Petition"), filed on May 18, 2023, and Respondent's Response to Amended Petition for Writ of Certiorari, filed on June 21, 2023. The Petitioner seeks review of the Final Order Denying Early Reinstatement issued by The Florida Department of Highway Safety and Motor Vehicles (hereinafter "the Department") on January 31, 2023. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(c).

Findings of Fact

The Petitioner's driver's license was revoked for a period of five (5) years. The Petitioner applied for a restricted license pursuant to § 322.271(1)(b), Florida Statutes. The hearing was held on January 27, 2023. On January 31, 2023, the Department Hearing Officer issued a Final Order Denying Early Reinstatement.

Standard of Review

When reviewing an administrative proceeding on a petition for writ of certiorari, a circuit court acting in its appellate capacity must determine "whether procedural due process is afforded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Whether the administrative findings and judgment are supported by competent substantial evidence:

> The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Analysis and Conclusions

The Petitioner makes a general argument that the Department "Hearing Officer erred by relying solely on the Driving Record and the Statute to deny Petitioner's request for a Hardship Driver's license." This is an evidentiary issue. Accordingly, the Court finds that the Petitioner is arguing that the Final Order Denying Early Reinstatement (hereinafter "Order") is not supported by competent, substantial evidence. Based on the Petitioner's citation to *Department of Highway Safety and Motor Vehicles v. Bailey*, 870 So. 2d 47, 49 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2384a], the Petitioner also appears to be arguing that the Department Hearing Officer abused his discretion in light of his findings.[1]

The Petitioner's Petition is centered primarily on a lack of findings pertaining to his alleged hardship and his disagreement with findings related to his driving record. The Petitioner contends that because the Order lacks findings regarding his alleged hardship, it is unclear whether his testimony or other evidence was given any weight or consideration by the Hearing Officer. The Petitioner raises three other issues that he feels should have been considered and noted by the Department's Hearing Officer: 1) that there should have been a finding that his driving record lists that his "license was suspended between 3/15/21 and 04/0/21 [sic] and yet two of the three dates that . . .[he] was cited for [d]riving on a suspended license were outside of that time frame"; 2) that he lives in a county without a public transportation system; and 3) that his adjudications for driving with a suspended license without knowledge were because he paid the citations instead of pleading no contest. The Petitioner did not cite any legal authority for any of the issues that he raised.

The Department does not contend that the Petitioner did not demonstrate his need for a driving privilege. Instead, the Department argues that need is not the only factor to be considered. The Department cites *Bosecker v. Dep't of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 404a (Fla. 6th Cir. Ct. June 14, 2016), which found competent, substantial evidence supported the hearing officer's denial of a hardship license to a person who had approximately 17 driving violations, two of which were obtained after her driver's license had been suspended. The *Bosecker* court noted the hearing officer's citation to the legislative intent found in § 322.263, Florida Statutes, which provides:

> **Legislative intent.**—It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state.
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.
>
> (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state, its political subdivisions, and its municipalities and impose increased and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

The Department argues that like in *Bosecker*, separate and apart from the issue of "eligibility for a limited license is the question of whether a person can be trusted to lawfully operate a motor vehicle." As additional support, the Department cites *Ware v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 791a (Fla. 12th Cir. Ct. Apr. 12, 2004), which held that despite eligibility for a hardship license, "the Hearing Officer relied on his discretion to deny relief based on his belief that Petitioner could not be trusted to operate a motor vehicle based on his driving history." *See also Sawyer v. Dep't of Highway Safety and Motor Vehicles*, 30 Fla. L. Weekly Supp. 2a (Fla. 5th Cir. Ct. Feb. 14, 2022) (Section 322.271, Fla. Stat., vests broad discretion to Department hearing officers to determine the qualification, fitness and need to drive in the context of allowing restricted licenses); *Brown v. Dep't of Highway Safety and Motor Vehicles*, 29 Fla. L. Weekly Supp. 697a (Fla. 2nd Cir. Ct. Dec. 6, 2021) (continued driving under a suspended license is a lawful basis for denial of a restricted license). Here, the Department points out that Hearing Officer stated that the decision was based on the Petitioner's driving record and § 322.264, Florida Statues, legislative intent. The Department also points out that the Petitioner's driving record and affidavit show that the Petitioner was arrested for driving under the influence and driving while license suspended or revoked six months after he learned that his license was revoked.

The Department also addresses the Petitioner's statement that he never received the Department's notice of revocation because it was sent to his former address. This was part of the Petitioner's general argument of testimony and evidence that he felt should have been weighed and considered by the Hearing Officer. The Department states that § 322.251(1), Florida Statutes, requires that revocation orders be mailed to the licensee at their last known mailing address that they furnished to the Department and points out that as of the date of filing its response, the Petitioner's old address was still on record because the Petitioner had not updated it in compliance with § 322.19(2), Florida Statutes. *See Anderson v. Florida*, 48 So. 3d 1015, 1016 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D2668b] (submission of driving record is sufficient proof that the Department mailed notice to last known address); *see also State v. Miller*, 830 So. 2d 214, 215 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2418b] (notation in DMV records under § 322.251(2), Florida Statutes, that notice provided was sufficient proof of notice). Here, the Department points out that notice of revocation was sent to the Petitioner's last known mailing address; the same address that was on his driving record. The Department also points out that no other addresses are listed on the Petitioner's driving record.

Importantly, the Final Order Denying Early Reinstatement starts off: "After considering your driving record, *your testimony during the hearing, and your qualification[s], and fitness and need to drive*, during the Hardship Hearing, I find as follows . . ." (emphasis added). Thus, the Petitioner's argument that certain testimony and evidence was not considered is directly contradicted by the beginning of the Final Order Denying Early Reinstatement, as the Hearing Officer expressly stated that he considered the Petitioner's testimony. The Petitioner's argument that his hardship or need was not considered is also directly contradicted because the Hearing Officer also expressly stated that he considered the Petitioner's "qualification[s], fitness and need to drive". The Petitioner's arguments regarding the lack of findings appear to be a request that the Court reweigh the evidence. However, ". . . the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

It is clear from the Final Order Denying Early Reinstatement that after considering the Petitioner's testimony, qualifications, fitness, and need, the Hearing Officer based his denial of the restricted license on the Petitioner's driving record and the legislative intent of §322.263, Florida Statutes. The Court is persuaded by the legal authority cited by the Department that supports that eligibility for a restricted license is separate and apart from the question of whether a person can be trusted to lawfully operate a motor vehicle based on the legislative intent found in §322.263, Florida Statutes. Therefore, the Court finds that the Final Order Denying Early Reinstatement is supported by competent, substantial evidence and the Hearing Officer did not abuse his discretion in light of his findings.

Accordingly, based on the record before the Court, and for the reasons stated herein, the Petitioner's *Amended Petition for Writ of Certiorari*, filed on May 18, 2023, is hereby **DENIED.**

[1]The Petitioner does not argue that the Department's Hearing Officer failed to afford due process or observe the essential requirements of the law.

* * *

Municipal corporations—Ordinances—Noise—Constitutionality—Vagueness—Ordinance that not only proscribes noise that is plainly audible at distance of 100 feet from building or vehicle and sound that would disturb peace of neighboring inhabitants, but also prohibits sound that at any time is played at louder volume than is necessary for convenient hearing for persons who are voluntarily listening to sound in homes or vehicles is unconstitutionally vague—Unconstitutionally vague provision is severed from ordinance—Provision can be separated from noise ordinance's remaining provisions without affecting remainder of ordinance, legislative purpose of ordinance can be accomplished independently of vague provision, vague provision is not so inseparable from remainder of ordinance that it can be said that city would not have passed ordinance without that provision, and ordinance remains complete without vague language

STEVE KWARTIN, Appellant, v. CITY OF MIAMI BEACH, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-10-AP-01. January 22, 2024. On appeal from a decision by the Special Magistrate of the City of Miami Beach affirming two noise violations issued by the Miami Beach Code Compliance Department. Counsel: Steven Kwartin, Steven Kwartin, P.A., for Appellant. Rafael A. Paz, City Attorney, City of Miami Beach, Freddi Mack, Senior Assistant City Attorney, and Henry J. Hunnefeld, First Assistant City Attorney, for Appellee.

(Before TRAWICK, SANTOVENIA, and ARECES, R., JJ.)

(ARECES, R., J.) Appellant contends section 46-152(b) of the City of Miami Beach Code of Ordinances (the "Noise Ordinance") is unconstitutionally vague. This Court agrees.

The Florida Supreme Court has held "[t]he standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994); *see also Montgomery v. State*, 69 So. 3d 1023, 1025 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D2046a] ("A vague statute is one that fails to give a person of common intelligence fair and adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement."); *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1271 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C645a] ("The traditional test for whether a statute or regulation is void on its face is if it is so vague that 'persons of common intelligence must necessarily guess at its meaning and differ as to its application. . . .' Courts apply this test even more strictly to statutes that inhibit free speech.")[1] (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

The Florida Supreme Court has, moreover, addressed the void for vagueness doctrine in the context of noise ordinances. *See State v. Catalano,* 104 So. 3d 1069 (Fla. 2012) [37 Fla. L. Weekly S763a]. In *Catalano,* the Florida Supreme Court determined that a noise ordinance which banned sound plainly audible from a distance of twenty-five feet from a vehicle was not unconstitutionally vague. *Id.* at 1075-77. In its analysis, the Court noted,

> [T]he 'plainly audible' standard provides persons of common intelligence and understanding adequate notice of the proscribed conduct: individuals operating or occupying a motor vehicle on a street or highway in Florida cannot amplify sound so that it is heard **beyond twenty-five feet** from the vehicle. . . .[T]he 'plainly audible' beyond twenty-five feet standard provides fair warning of the prohibited conduct and **provides an objective guideline—distance—to prevent arbitrary and discriminatory enforcement so that basic policy matters are not delegated to policemen, judges and juries for resolution on an ad hoc and subjective basis.**

Id. at 1076 (emphasis added); *see also Montgomery*, 69 So. 3d at 1028 ("The distance standard provides an explicit guideline to those charged with enforcing the standard."). The *Catalano* Court distinguished laws with *objective* guidelines, like the "plainly audible beyond twenty-five feet standard," from those "that call[ ] for police officers to judge whether sound is excessive, raucous, disturbing, or offensive." *Catalano*, 104 So. 3d. at 1076.

In this case, the Noise Ordinance at issue does not provide an objective guideline. Instead, the Noise Ordinance prohibits—not only

music (and other sound) that would disturb the peace of neighboring inhabitants, *but also*—music (or other sound) that "at any time [is played at a] louder volume than is necessary for convenient hearing for the person or persons" who are *voluntarily* listening to said music (or other sound) in their homes or vehicles. Specifically, the Noise Ordinance provides, in pertinent part,

> Radio, televisions, phonographs, etc. The using, operating or permitting to be played, used or operated any radio receiving set, television set, musical instrument, phonograph, or other machine or device for the producing or reproducing of sound in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants, **or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such machine or device is operated and who are voluntary listeners thereto.** The operation of any such set, instrument, phonograph, machine or device between the hours of 11:00 p.m. and 7:00 a.m. in such manner as to be plainly audible at a distance of 100 feet from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this section.

City of Miami Beach, Fla., Code § Sec. 46-152(b) (emphasis added).

It is, therefore, possible for someone playing music at home to be in violation of this Noise Ordinance *even if* they do not disturb the "peace, quiet and comfort of the neighboring inhabitants." *Id.* In fact, to avoid playing music at an unlawful volume, someone would have to determine the absolute minimum volume at which they could conveniently listen to their music and hope their subjective opinion aligns with that of the Government.

The City of Miami Beach (hereinafter the "City" or "Appellee") has not, in its brief or at oral argument, adequately explained how a police officer should go about determining whether a resident's music that is not disturbing a neighboring inhabitant is nevertheless being played at a "louder volume than is necessary for convenient hearing." If there was ever a law that lent itself to arbitrary enforcement, it would appear to be one where the responding officer is permitted to determine, not whether some objective standard has been violated, or whether the peace has been measurably disturbed, but whether any one particular resident, in the opinion of the responding officer, *could have* enjoyed his/her music equally well at a lower volume.

The City nevertheless contends the Noise Ordinance is not vague for three reasons. First, the City contends that, like *Catalano*, the Noise Ordinance "proscribes [noise]. . .in such manner as to be plainly audible at a distance of 100 feet from the building."[2] The City's interpretation of the Noise Ordinance is incomplete.

Contrary to the City's interpretation, the Noise Ordinance does not merely proscribe noise that is plainly audible at a distance of 100 feet from the building under all circumstances. Instead, the Noise Ordinance provides that noise that is plainly audible at a distance of 100 feet, strictly between *"the hours of 11:00 p.m. and 7:00 a. m.*," is prima facie evidence of a violation. This language would not protect someone who was playing music that was plainly audible at a distance of 99, 50 or even 3 feet, if the responding officer believed it was being played at a "louder volume than is necessary for convenient hearing." *See* City of Miami Beach, Fla., Code § 46-152(b).[3]

Second, the City contends the vague language does, in fact, provide for some objective measurement because the offending noise has to be "unreasonable" for it to run afoul of the Noise Ordinance. This is a misreading of the Noise Ordinance. The Noise Ordinance declares that "louder volume than is necessary for convenient hearing" is, by definition, "unreasonably loud, excessive, unnecessary, or unusual noise." *See* City of Miami Beach, Fla., Code § 46-152(b). Specifically, the Noise Ordinance provides,

> "The following acts. . . are declared to be unreasonably loud, excessive, unnecessary or unusual noises in violation of this section. . .: . . .The using, operating, or permitting to be played, used or operated any radio receiving set, television set, musical instrument, phonograph, or other machine or device for the producing or reproducing of sound. . . at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room. . .and who are voluntary listeners thereto."

Id.

Finally, the City argues the Noise Ordinance is not vague because the Eleventh Circuit previously found that a substantially similar (if not identical) ordinance was not void for vagueness. Specifically, Appellee, like the dissent, relies on *DA Mortg., Inc.,* 486 F.3d at 1270-72.[4] Appellee goes as far as to say that Appellant's claim is "doom[ed]" by the mere existence of the Eleventh Circuit case. Reliance on *DA Mortg., Inc.,* however, is misplaced.

Other than the United States Supreme Court, the opinions of federal courts, including the Eleventh Circuit, are not binding on this Court. While the decisions of the Eleventh Circuit are, of course, afforded respectful consideration, the Eleventh Circuit's *DA Mortg., Inc.* opinion predates *Catalano*—a Florida Supreme Court decision concerning void by vagueness challenges to noise ordinances—by approximately five years. *Catalano,* which indisputably binds this Court, holds that noise ordinances need some form of objective guideline in order to avoid arbitrary enforcement. *Catalano,* 104 So. 3d. at 1076.[5]

Catalano is consistent with United States Supreme Court precedent on the vagueness of noise ordinances. *See Grayned v. City of Rockford,* 408 U.S. 104 (1972). While *Grayned* certainly contains a number of quotes that can be cherry-picked by either side in purported support of their respective arguments, the only reasonable reading of the case, as a whole, is that the noise ordinance at issue, which proscribed "the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof," contained an objective guideline—namely, the measurable impact on a school's normal activities. *Id.* at 108. The United States Supreme Court, in fact, stated as follows:

> Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where *the prohibited disturbances are easily measured* by their impact on the normal activities of the school.

Grayned, 408 U.S. at 112 (emphasis added). The United States Supreme Court was, moreover, persuaded that the *Grayned* ordinance was not a "broad invitation to subjective or discriminatory enforcement" because the ordinance at issue "define[d] boundaries sufficiently distinct." *Id.* at 114. Specifically, the U.S. Supreme Court stated,

> The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the 'noise or diversion' be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the 'noise or diversion', and (3) the acts be 'willfully done'. . . . [T]here must be demonstrated interference with school activities.

Id. at 113.

Unlike *Grayned*, in this case the "prohibited disturbances" are not even disturbances. The instant Noise Ordinance criminalizes the *voluntary* listening of music (or other noise) that does not disturb the peace, or your neighbor, but is nevertheless played at a volume that the responding officer happens to believe is louder than necessary for a person's convenient listening pleasure.

This case is closer to *Coates v. Cincinnati,* 402 U.S. 611 (1971). In *Coates,* the ordinance at issue "punished the sidewalk assembly of three or more persons who 'conduct themselves in a manner annoying to persons passing by.' " *Grayned,* 408 U.S. at 113 (discussing

Coates). The United States Supreme Court found the *Coates* ordinance unconstitutionally vague "because enforcement depended on the completely subjective standard of 'annoyance.' " *Id.* Like the ordinance in *Coates,* the ordinance in this case allows a person to be punished "at the whim of any police officer." *Id.* at 114.

Noise ordinances do not require mathematical precision, nor do they require a decibel reader.[6] They do, however, require some objective guideline. In this case, the Noise Ordinance at issue lacks an objective guideline and invites arbitrary enforcement. The Court, therefore, finds the Noise Ordinance to be unconstitutionally vague.

Our analysis, however, does not end here. The Florida Supreme Court, has recognized that a court has an "an obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions." *Searcy, Denney, Scarola Barnhart & Shipley, etc. v. State,* 209 So. 3d 1181, 1195 (Fla. 2017) [42 Fla. L. Weekly S92a]. "The rule is well-established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act." *Id.* This doctrine of "severability" is "designed to show deference to the Legislature in enacting laws but still respect the judicial branch's role in separation of powers." *Id.*

When determining whether to sever an unconstitutional provision, Florida courts have held that the "[p]art of a statute that is declared unconstitutional will be severed if "(1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken." *Id.* at 1196.

In this case, the unconstitutional portion of the Noise Ordinance reads as follows,

> . . .or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such machine or device is operated and who are voluntary listeners thereto.

City of Miami Beach, Fla., Code § 46-152(b). This invalid provision can be easily separated from the Noise Ordinance's remaining provisions without affecting the rest of the Noise Ordinance. The legislative purpose, to proscribe "unreasonably loud, excessive, unnecessary or unusual noises" can be accomplished independent of the impermissibly vague provision. The above-quoted provision is not so inseparable from the remaining language that it can be said the City would not have passed the Noise Ordinance without the vague language. Finally, the Noise Ordinance remains complete in itself even without the impermissibly vague language.

Accordingly, this Court holds the Noise Ordinance is unconstitutionally vague, severs the impermissibly vague language quoted above and remands this matter to the lower tribunal for proceedings consistent with this Opinion. (TRAWICK, J., concurs.)

(SANTOVENIA, J., dissents.) Appellant was issued two notices of noise violations by the Miami Beach Code Compliance Department ("Department") on July 31, 2020, and August 8, 2020. Appellant was cited for violating section 46-152[7] of the Code of the City of Miami Beach (City Code"). Appellant appealed those violations to the Special Magistrate, and an administrative hearing was held on February 24, 2022 on both violations. The Special Magistrate issued two final orders dated February 24, 2022 ("Orders") upholding each of the violations. The fine was reduced for the second violation from $1,000 to $250.

Appellant challenges the constitutionality of the Noise Ordinance. Appellant contends that the Special Magistrate did not address below the constitutional arguments raised by the Appellant in his Initial Brief; however, the Orders neither confirm nor refute Appellant's contention as they are silent on this point.

Standard of Review

"A court's decision regarding the constitutionality of a statute is reviewed *de novo* as it presents a pure question of law." *State v. Catalano,* 104 So. 3d 1069, 1075 (Fla. 2012) [37 Fla. L. Weekly S763a].

Discussion

Appellant filed a timely appeal, but failed to comply with Fla. R. App. P. 9.200(e) which requires the preparation and submission of a record.[8] *See Cyrus v. Cyrus,* 324 So. 3d 590, 591 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1662f] (holding that "it is Appellant's responsibility to ensure that an adequate record to resolve the issues raised on appeal is provided to the appellate court."). Appellant also failed in his duty to furnish a transcript of the hearing held in front of the Special Magistrate or proper substitute from which the Court can review the facts. *See* Fla. R. App. P. 9.200(b); *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1151-52 (Fla. 1979)(affirming fact-based rulings where appellant did not bring forward any proper substitute for a trial transcript).

In the absence of a record, I decline to accept Appellant's factual characterizations of his Declaration, witness testimony, the parties' use or non-use of decibel meters or similar technology, and the neighbor's motives for his complaints. Based on *Applegate* alone, Appellant's arguments based on those alleged facts must be rejected because the merits of those arguments cannot be addressed without a record or hearing transcript.[9]

As to Appellant's argument pertaining to the constitutionality of the Noise Ordinance, Appellant argues that:

> A careful reading of the Section [Section 30—73 of the City Code, "Powers of the special master"] makes it clear that what is being prohibited is the Special Master deciding whether "actions, decisions or interpretations" are unconstitutional. The Appellant is not arguing that any such actions, decisions or interpretations are unconstitutional: He is arguing that **the Ordinance itself is unconstitutional**, something not within the very limited, well-defined sphere of matters which the Special Master is proscribed from deciding.

Initial Brief at pp. 11-12. Appellant thus argues that he is asserting a facial challenge to the constitutionality of the Noise Ordinance as failing to meet state and federal Constitutional tests, as well as controlling decisions of the United States Supreme Court and the Florida Supreme Court. Moreover, Appellant posits that the Noise Ordinance is void for vagueness because the City failed to adopt an ordinance containing specific, scientifically-measurable sound levels. As such, Appellant avers that the Noise Ordinance fails to apprise a reasonable person as to what sound levels violate the Noise Ordinance.

The Florida Supreme Court has held that a constitutional challenge of a statute or ordinance can only succeed if a statute or ordinance does not sufficiently convey "definite warnings of the proscribed conduct when measured by common understanding and practice." *D'Alemberte v. Anderson,* 349 So. 2d 164, 166 (Fla. 1977) (citing *Roth v. United States,* 354 U.S. 476 (1957). In order to withstand a vagueness challenge, "a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct". *See Catalano, supra.,* 104 So. 3d at 1075. A reviewing court must find a statute unconstitutionally vague if the statute fails to give adequate notice or the requisite definite warning of what conduct is prohibited. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

Interestingly, both Appellant and Appellee argue that *Catalano, supra.* supports their arguments. Appellant cites *Catalano* for the

proposition that the Noise Ordinance is vague. However, *Catalano* does not support Appellant's vagueness argument as the Florida Supreme Court held therein that a noise control statute was unconstitutionally overbroad, but specifically determined that the statute was not unconstitutionally vague. In its analysis, the *Catalano* court noted that several jurisdictions in Florida and around the country had upheld similar statutes in the face of vagueness challenges and held that the "plainly audible" standard in the statute was not unconstitutionally vague:

> "plainly audible" beyond twenty-five feet standard provides fair warning of the prohibited conduct and provides an objective guideline—distance—to prevent arbitrary and discriminatory enforcement so that basic policy matters are not delegated to policemen, judges, and juries for resolution on an ad hoc and subjective basis. *See Grayned,* 408 U.S. at 108-09, 92 S.Ct. 2294. This is not a standard that calls for police officers to judge whether sound is excessive, raucous, disturbing, or offensive; if the officer can hear the amplified sound more than twenty-five feet from its source, the individual has violated the statute.

104 So. 3d at 1076-1077.

In an attempt to distinguish the Noise Ordinance from the noise control statute that was found to be not unconstitutionally vague in *Catalano,* **Appellant conveniently omits from his citation of the relevant Noise Ordinance provision the entire last sentence of § 46-152(b) of the City's Noise Ordinance** pursuant to which Appellant was cited. The omitted sentence provides that:

> The operation of any such set, instrument, phonograph, machine or device between the hours of 11:00 p.m. and 7:00 a.m. in such manner as to be **plainly audible at a distance of 100 feet** from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this section.

See Appellant's Initial Brief at pp. 19-20 (emphasis added). Significantly, the omitted language is the provision similar to the "plainly audible at a distance of 25 feet or more from the motor vehicle" provision of section 316.3045(1)(a), Fla. Stat. which was held to be not unconstitutionally vague in *Catalano.* Thus, acceptance of Appellant's constitutional vagueness argument requires the court to interpret in isolation part of the text of § 46-152(b) of the Noise Ordinance without considering the full text of § 46-152(b). The court declines Appellant's invitation to do so. When the entire text of § 46-152(b) is considered, it is clear that the Noise Ordinance in question here provides the same objective measure—distance—as the noise control statute which withstood vagueness scrutiny in *Catalano.*

Moreover, the statute in *Catalano* did not mandate that police officers utilize any decibel meters or devices to record noise violations when stopping a car for playing a radio too loudly. Indeed, the Supreme Court in *Catalano* specifically rejected Appellant's argument in this appeal that the Noise Ordinance lacks "any easily expressed mathematical standards", stating that: "[t]o withstand constitutional scrutiny, however, statutes do not have to set determinate standards or provide mathematical certainty". *Id.* at 1076 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (observing that we cannot expect mathematical certainty from the use of words)). Accordingly, it is clear that there is no requirement that devices be issued to code enforcement officers to measure sound levels in order for the Noise Ordinance here to pass constitutional muster. If scientifically-measurable sound standards were required, as Appellant posits throughout its Initial Brief, enforcement would be contingent on availability and functionality of technology and municipalities could be required to re-write their ordinances to accompany any changes to or upgrades in available technology.

The language of the Noise Ordinance is unambiguous and provides a clear and definite warning of proscribed conduct to a potential violator. *DA Mortg., Inc. v. City of Miami Beach,* cited by Appellee, is persuasive on this point. *See Id.*, 486 F. 3d 1254, 1270-72 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C645a] (upholding Miami-Dade County Code section 21-28(b), which is substantively identical to City Code section 46-152(b), against vagueness challenge). Therefore, I find that the Noise Ordinance is not unconstitutionally vague.

For the foregoing reasons expressed in this dissenting opinion, the Final Orders of the Special Magistrate should be **AFFIRMED**.

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[1]A compelling argument can be made that the Noise Ordinance inhibits free speech. *See DA Mort., Inc.*, 486 F.3d at 1265 ("As a threshold matter, we must ask whether the First Amendment protects the conduct at issue in the challenged ordinance—playing or broadcasting recorded music. It does."). This Court, however, need not reach the issue of whether the test should be applied strictly here because the Noise Ordinance is unconstitutionally vague under even an ordinary application of the test.

[2]The dissent claims Appellant conveniently failed to mention the 100-foot standard. However, Appellant very clearly referenced the 100-foot standard as evidence that the City Commission knew how to create objectively measurable restrictions and chose not to. *See* Initial Brief at 21.

[3]This Court is fairly certain that if the standard for a noise violation is, as Appellee and the dissent states, "plainly audible from 100 feet," this matter would not be before this Court.

[4]The other cases upon which Appellee relies are from outside of Florida.

[5]This Court, in any event, finds the analysis in *DA Mortg., Inc.* unpersuasive for at least two reasons. First, after noting that the term "convenient" was "somewhat abstract," the Eleventh Circuit found the term acceptable because it was no more abstract than terms like "loud" or "raucous"—terms that the U.S. Supreme Court has found unobjectionable. The Eleventh Circuit then created, seemingly from whole cloth, its own definition of "convenient hearing." *DA Mortg., Inc.*, 486 F.3d at 1272 ("Convenient hearing means the 'listening comfort' of those assembled."). The Eleventh Circuit's definition, instead of providing clarification, is itself inherently vague. It is far easier to imagine an objective assessment of whether a noise is "loud" than it is to imagine an objective assessment of when a noise is at its least convenient volume. Second, the Eleventh Circuit read an objective "reasonable person[ ] standard" into the Noise Ordinance. For the reasons stated in footnote 7, *infra,* the Noise Ordinance does not adopt an objective reasonableness test, but, rather, defines what is *unreasonable* in a manner that includes noise played a volume louder than necessary for convenient hearing.

[6]On this, we all agree. This Court would note however that Appellant's suggestion is not extraordinary or novel. Many Florida counties and municipalities provide for decibel readings in a variety of circumstances and do not appear to share the dissent's concern of having to periodically update their technology. *See, e.g.,* Broward County, Fla., Code § 27-235 (2023) (using sound level meters and a chart with various decibel limits); Citrus County, Fla., Code § 21-22 (2023) (using decibel levels); Jacksonville, Fla., Code § 368.203 (2023) ("The measurement of sound shall be made with a sound level meter. . . Recorded measurements shall be taken so as to provide a proper representation of the noise source."); Baker County, Fla., Code § 24-146 (2018) ("Noise levels shall not exceed 55 decibels when measured at the property line of any abutting landowner."). The above is not an exhaustive list.

[7]Section 46-152 ("Noise Ordinance") Noises; unnecessary and excessive prohibited states in pertinent part:

> It shall be unlawful for any person to make, continue or cause to be made or continued any unreasonably loud, excessive, unnecessary or unusual noise. The following acts, among others, are declared to be unreasonably loud, excessive, unnecessary or unusual noises in violation of this section, but this enumeration shall not be deemed to be exclusive, namely:
>
> * * *
>
> (b) *Radios, televisions, phonographs, etc.* The using, operating, or permitting to be played, used or operated any radio receiving set, television set, musical instrument, phonograph, or other machine or device for the producing or reproducing of sound in such manner as to disturb the peace, quiet and comfort of the neighboring inhabitants, or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle, or chamber in which such machine or device is operated and who are voluntary listeners thereto. The operation of any such set, instrument, phonograph, machine or device between the hours of 11:00 p.m. and 7:00 a.m. in such manner as to be plainly audible at a distance of 100 feet from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this section.

[8]On May 20, 2022, Appellant filed a Designation of Record on Appeal, but failed to file the actual record.

[9]Appellee, the City of Miami Beach ("City") correctly argues that any argument of Appellant in its Initial Brief challenging the constitutionality of the Noise Ordinance as applied to Appellant must necessarily be rejected in light of Appellant's failure to

include a factual record of the Special Master hearing for this Court's review of any factual findings below. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1151-52 (Fla. 1979).

* * *

Counties—Animal control—Dangerous dogs—Due process—Dog owners were denied due process in hearing on whether to classify their dogs as dangerous where hearing officer unfairly denied owners the opportunity to present opening and closing arguments, limited owners' ability to cross-examine witnesses and present their case, and, despite earlier ruling that dog bite victim's attorney could not participate in proceeding, allowed county attorney to rely on that attorney in presenting case and relied heavily on post-hearing submission from victim's attorney in preparing order—Because section 767.12(2) allows consideration of context that may negate dangerous dog designation, hearing officer erred in preventing owners from presenting evidence that victim intervened in fight between her own dog and owners' dogs—Where victim made inconsistent statements regarding incident and identity of dog that attacked her, hearing officer erred in finding that she was not untruthful and attributing inconsistencies to trauma based on studies not in evidence—Further, hearing officer erred in accepting testimony of victim's son regarding cause of breach in fence as expert opinion without verifying son's qualifications and in finding that owners' dogs are dangerous without any competent substantial evidence as to identity of dog or dogs that caused victim's injuries—Where evidence is insufficient to support decision despite numerous due process violations, reversal rather than remand is appropriate remedy

JOHNNIE WILLIAMS and JANICE WILLIAMS, Appellants, v. HILLSBOROUGH COUNTY, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appeal. Case No. 22-CA-6291, Division G. L.T. Case No. 22-DD-0310. December 22, 2023. Counsel: Christopher L. DeCort, Johnson, Cassidy, Newlon & DeCort, P.A., Tampa, for Petitioner. Ricardo Cox, Hillsborough County Attorney's Office, Tampa, for Respondent.

APPELLATE OPINION

(CHRISTOPHER C. NASH, J.) This case is before the Court seeking review of a decision declaring Appellants' dogs to be "dangerous dogs" under section 767.12, Florida Statutes, and section 6-27, Hillsborough County Code. The Order is reviewable pursuant to Florida Rules of Appellate Procedure 9.030(c)(1)(A), (C) and 9.110(a)(1) & (2), (c), (d); Florida Statutes § 767.12(4). In their appeal, Appellants ask this court to reverse the decision of the hearing officer and remand the case back for a new hearing. Appellants contend that they were denied due process, and, flowing from that violation, no competent, substantial evidence supports the decision such that the judgment departs from the essential requirements of law. From a thorough review of the record, and the fact that the County does not mount any challenge to Appellants' due process assertions in its answer brief, the Court agrees with Appellants that, although any single occurrence recounted by Appellants would not amount to a violation of their right to due process, the proceeding was fraught with rulings that, taken together denied them due process, and the conclusions resulting from that denial appear to be unsupported by the evidence as presented such that the resulting judgment departs from the essential requirements of law. Accordingly, the decision of the hearing officer is reversed.

FACTS

The undisputed facts are that the Williamses (Appellants) and Ms. Redd (the complainant/victim) are neighbors in a rural community of Hillsborough County. Three dogs were involved in the incident that took place shortly after midnight on January 16, 2022. One dog, Gunny, belongs to Ms. Redd. The other two dogs, Stump and Zoey, belong to Appellants. Ms. Redd was well-acquainted with the Williamses' dogs, and, by her own admission, unafraid of them. She routinely permitted her stepson to climb a ladder over the fence to visit with the Williamses' grandson. There had never been a biting incident involving the Williamses' dogs before the night of the incident, but there was a history of "fence fighting" between the dogs.

The Williamses' and Ms. Redd's properties are separated by a very strong fence. According to the record, Ms. Redd had returned from an evening out with her husband during which time she admitted to having consumed a few drinks. She let her dog Gunny out to relieve himself and readied herself for bed. Within a minute or two, she heard growling and barking, so she went outside to investigate. There was a breach in the fence where a panel had been pushed toward the Williamses' property. At least one of the Williamses' dogs was on Ms. Redd's side of the fence. When she grabbed her dog by the collar to bring him inside, she was subjected to significant aggression, having been pulled to the ground by a dog whose identity she "assumed" as being one of the Williamses' dogs because she had her own dog by the collar. However the events transpired, she was, admittedly, severely injured. During the attack Mr. Williams was alerted by his wife. He appeared at the scene, firing a .38 caliber pistol to scare the dog. The gunshot stopped the aggression, and Ms. Redd's dog ran off. Thereafter, Mr. Williams spotted his dog Zoey laying on the ground on Ms. Redd's side of the fence. Zoey had injuries indicative of involvement in a dog fight. Her snout showed she had been bitten. Neither the Williamses' other dog Stump, nor Ms. Redd's dog Gunny, had any injuries.

Beyond these undisputed facts, details become murky at best. Ms. Redd initially reported that the dogs had been fighting when she went to retrieve her dog. She later said that they had not been fighting and denied saying otherwise. Several witnesses testified that the fence appeared to have been pushed from Ms. Redd's property, suggesting that Ms. Redd's dog Gunny caused the breach. Ms. Redd's son testified that it was at least possible for it to have been pulled from the Williamses' property, implicating one of their dogs. A veterinarian testified that neither of the Williamses' dogs had injuries consistent with having pulled the fence toward their property, however. Ms. Redd said initially that both of the Williamses' dogs were responsible for the attack, but she admitted that she did not know which dog inflicted her injuries. She also indicated in her deposition that she had been attacked on her left side. Later, in an affidavit submitted after the hearing, she said she was grabbed on her right waist and pulled to the ground. Mr. Williams testified that he told Ms. Redd to "let go of the dog [Gunny]" but that she did not. She did not hear this command and did not release her dog until the gunfire scared him off. Mr. Williams attempted to testify that Ms. Redd's dog had a history of aggression toward his dogs and engaged in significant "fence fighting," but he was largely prohibited from elaborating on Gunny's behavior by repeated, sustained objections. Mr. Williams further testified that Gunny was "flailing on" Ms. Redd, and that Gunny broke loose at the sound of gunfire. After Ms. Redd stood up, Mr. Williams saw his own dog Zoey lying on the ground. It is not known where in relation to Ms. Redd Zoey was seen. Mr. Williams never saw Stump on Ms. Redd's property or his own. Stump was later found in the Williamses' garage. Mr. Williams testified that although Zoey was on Ms. Redd's property, he did not see her involved in any fighting.

THE HEARING

In code enforcement proceedings, the burden is on the government to prove by a preponderance of the evidence a violation of the law or local ordinance, in this case section 767.11(1)(a), Florida Statutes, and 6-27, Hillsborough County Code. At the start of the hearing, the hearing officer described the order of proceeding. She indicated that the County would give an opening statement, then present its case. Following that, Respondent (Appellants) would have the opportunity

to present their case. She did not mention affording Appellants an opportunity to present an opening statement. When Appellants' attorney inquired whether they would be allowed to give an opening statement *at the start of their case*, the hearing officer responded affirmatively. The County waived opening and was directed to proceed with its case without Appellants' counsel having been afforded an opportunity to give their opening. Later, when it was time for Appellants to present their case and counsel attempted to make an opening statement, the hearing officer denied them that opportunity, indicating that it should have been given at the outset of the case. In addition, her order erroneously faulted Appellants' counsel for not advising her at the appropriate time that they wanted to give an opening statement when, in fact, counsel had inquired about giving an opening statement at the beginning of the hearing.

The hearing progressed, and the County was given time to call several witnesses including Ms. Redd, her son, various animal control officers, and a veterinarian. At the conclusion of the County's case, the hearing officer advised Appellants' counsel that the hearing would conclude at 5:00pm regardless of where Appellants were in their case. In addition, because the hearing officer, in strictly applying the rules of procedure regarding questioning of witnesses, denied Appellants the ability to use any time-saving shortcuts in their presentation,[1] Appellants were afforded significantly less time to present their case. Regarding time management, the Court notes that the County took up significant time in this administrative proceeding with frequent objections, oftentimes without a sound legal basis.

Further complicating matters, the victim was herself represented by counsel, Mr. Lopez. The hearing officer assured Appellants that Ms. Redd was not a party and that Mr. Lopez would not be permitted to participate because his participation was prohibited by the rules.[2] Mr. Lopez was nonetheless permitted to and did interrupt the proceedings 11 times, of which at least two interfered with Appellants' counsel's questioning of witnesses. In addition, Mr. Lopez, not the County's attorney, argued for the admissibility of Ms. Redd's son's testimony as to the construction of the fence as being "expert," despite failing to satisfy requirements for the admission of expert opinion testimony based on training and experience. Specifically, the hearing officer took no testimony as to the witness's qualifications to support the opinion. Appellants' attorney was not even allowed to ask about the witness's licensor status. In another instance, Mr. Lopez, not the County's attorney, argued for the admissibility of evidence. At times, it appeared that Mr. Lopez was acting in a supervisory capacity over the County's case, rather than as an observer, at times prompting Mr. Cox to make objections or ask a specific question. Rather than admonish Mr. Lopez to refrain from participating, the hearing officer repeatedly sustained objections Mr. Lopez was not authorized to make. More significantly, at one point the hearing officer suggested an objection for Mr. Cox to make, utterly compromising her neutrality in the proceeding.

Finally, the hearing officer ended the hearing before Appellants had an opportunity to present their case, depriving them of the opportunity to call several witnesses and present an in-person closing, after having already been denied the opportunity to present an opening statement.

THE ORDER

Although the hearing concluded without Appellants being fully able to present their case during the scheduled hearing, the hearing officer allowed the parties to make post-hearing submissions. These, however, were not limited to the parties—Mr. Lopez was also permitted to make submissions on behalf of the victim even though his participation was not permitted. Indeed, Mr. Lopez submitted a motion to exclude Appellants' expert's testimony, which was effectively granted since the Order expressly struck the testimony in relation to the motion. Mr. Lopez also included an affidavit of Ms. Redd, with photographs, even though she testified in person at the hearing. The County did not enter any submissions of its own, rather, it simply adopted the memorandum Mr. Lopez filed on Ms. Redd's behalf. These submissions by Mr. Lopez were expressly admitted and considered by the hearing officer, again despite her earlier statement that doing so violated the rules.

If the foregoing violations were not serious enough, the Order resolves several inconsistencies in the victim's testimony with the hearing officer's subjective belief that those inconsistencies were the result of "[the victim] experiencing a traumatic event, which may have impacted her hippocampus." In so doing the hearing officer referred to unnamed, unadmitted "numerous studies" implicating the effect of trauma on victims' recall as a result of "damage to their hippocampus," which she opined affects how information is stored and recalled. None of these "numerous studies" were discussed or entered in evidence, nor was even a single specific study cited, much less analyzed, for this court to review. The Order states that the hearing officer "does not find that [the victim] was being untruthful." Even if trauma affects a person's recall, when, as here, a single witness's testimony is inconsistent, at least one statement is inaccurate, even if the inaccuracy is unintentional. Here, there was not just one, but three sets of inconsistencies. It is not clear how the unnamed studies assisted the hearing officer in determining which statement was and was not truthful under these circumstances or how she was able to determine the victim was not being untruthful despite making inconsistent statements.

Finally, despite evidence from two witnesses with no stake in the matter that a breach in the fence that allowed at least one of Appellants' dogs onto the victim's property was caused by the victim's own dog, the hearing officer's conclusions were based solely on testimony from the victim's son, whose testimony was elevated to "expert" status without evidence admitted of his expertise over Appellants' counsel's objection. He opined only that it was *possible* for Appellants' dogs to have pulled the fence open, despite that he did not see the damaged fence before it was repaired, and in contrast to significant testimony that, although such a scenario was theoretically possible, it was highly unlikely. From the foregoing evidence the hearing officer determined that both of the Williamses' dogs were "dangerous" under state law and the Hillsborough County Code.

STANDARD OF REVIEW

A circuit court reviews an administrative agency decision to determine (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. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla.1995) [20 Fla. L. Weekly S318a]. Appellants contend that the proceedings below were so unfair that it denied them procedural due process. Flowing from the denial of due process, they contend that contextual evidence that could negate a "dangerous dog" finding under sections 767.11 and 767.12, Florida Statutes, was not considered. Moreover, where three dogs were involved, and there is no clear identification as to the dog responsible for the victim's injuries, Appellants maintain that the decision is unsupported by competent, substantial evidence.

DISCUSSION

DUE PROCESS

Procedural due process requires both fair notice and a real opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth'ty,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. Parties must be provided an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* "The

specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. *Keys,* 795 So. 2d at 948, citing *Gilbert v. Homar,* 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed.2d 120 (1997). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts . . ." *Hormilla v. Miami-Dade Cnty., Code Enf't—Animal Serv. Dep't*, No. 2021-30 AP01, 2022 WL 2800966, at *2 (Fla. Cir. Ct. July 16, 2022) [30 Fla. L. Weekly Supp. 266a] (quoting *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991)). "When assessing whether or not a violation of due process has occurred, 'a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest.' " *Joshua v. City of Gainesville*, 768 So. 2d 432, 438 (Fla. 2000) [25 Fla. L. Weekly S641a] (quoting *Econ. Dev. Corp. v. Stierheim*, 782 F.2d 952, 953-54 (11th Cir. 1986)).

Appellants contend that their due process rights were violated for myriad reasons. The Court agrees. Notably, although the County filed an answer brief, its answer brief does not dispute or even respond to Appellants' due process argument in any way. "It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties." *Polyglycoat Corp. v. Hirsch Distributors, Inc.,* 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (internal citations omitted). When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived. *Id.* The want of due process alone requires that the decision be reversed. Even if the County had not effectively conceded this point, the record supports this conclusion. The hearing officer unfairly denied Appellants the opportunity to present opening argument, and she limited their ability to cross examine witnesses, present their own case, and ultimately, present a closing statement. As this was an evidentiary hearing in a contested proceeding, the matter should have been tried as is customary in a bench trial. *Fernandez v. Guardianship of Fernandez,* 36 So.3d 175, 176 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1248a]. Even if evidence wouldn't have impressed the court, party had a right to present it, and their inability (or significantly reduced ability) to do so is a denial of due process. *Minakan v. Husted,* 27 So. 3d 695, 699 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D192c] (internal citations omitted). Moreover, although it is not inherently violative of due process to set a goal of completing trial in one day, summarily shortening proceedings as the hearing officer did here can give rise to a due process violation when it results in the failure to afford a party a full, fair, and meaningful opportunity to be heard. *Julia v Julia*, 146 So. 3d 516, 520 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1792b]. Finally, despite the hearing officer stating early in the proceeding that Ms. Redd's attorney was not permitted to participate, she allowed the County's attorney to rely heavily on Ms. Redd's counsel in prosecuting the case. Related to this, and as will be explained below, the hearing officer accepted and appears herself to have relied heavily on submissions by Ms. Redd's attorney after the close of the hearing.

ESSENTIAL REQUIREMENTS OF LAW

Application of the wrong law or legal standard is reversible error. *Nader v. Dept. of Highway Safety and Motor Vehicles,* 87 So. 3d. 712, 725-26 (Fla. 2d DCA 2012) [37 Fla. L. Weekly S130a] (failure to follow the plain language of the statute merited second-tier certiorari review). Here, dangerous dogs are addressed under section 767.11 and 767.12, Florida Statutes. In relevant part, section 767.11 says:

> 767.11 Definitions.—As used in this act, *unless the context clearly requires otherwise*:
>
> (1) "Dangerous dog" means any dog that according to the records of the appropriate authority:
>
> (a) Has aggressively bitten, attacked, or endangered or has inflicted severe injury on a human being on public or private property;
>
> (b) Has more than once severely injured or killed a domestic animal while off the owner's property; or
>
> (c) Has, when unprovoked, chased or approached a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, provided that such actions are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority.
>
> (2) "Unprovoked" means that the victim who has been conducting himself or herself peacefully and lawfully has been bitten or chased in a menacing fashion or attacked by a dog.
>
> (3) "Severe injury" means any physical injury that results in broken bones, multiple bites, or disfiguring lacerations requiring sutures or reconstructive surgery. (Emphasis added.)

The hearing officer appears to have relied on subsection (1)(a).[3] The injury was severe, and it is undisputed that the incident occurred on private property. The hearing officer also concluded that no evidence suggests that Ms. Redd had conducted herself in a manner other than "peacefully." At first blush, the statute appears to impose strict liability on dog owners, meaning that, regardless of the reason, if a dog inflicts a serious bite, the dog may be declared "dangerous." A closer review, however, shows that the statute intends for a factfinder to take the context of a given situation into account. Moreover, section 767.12 states in relevant part that:

> (2) A dog may <u>not</u> be declared dangerous if:
>
> (a) The threat, injury, or damage was sustained by a person who, at the time, was unlawfully on the property or who, while lawfully on the property, was tormenting, abusing, or assaulting the dog or its owner or a family member.
>
> (b) The dog was protecting or defending a human being within the immediate vicinity of the dog from an unjustified attack or assault.

Although it is not clear what constitutes "tormenting" under the statute, Appellants attempted to, but were largely prevented from presenting evidence of context, including, but not limited to, that Ms. Redd may have intervened in a dog fight between her dog and the Williamses' dogs, and that dogs generally, and her dog specifically, may have reacted aggressively in response to being grabbed by the collar. According to the hearing officer, this information was "irrelevant."[4] Because the text of the statute allows consideration of context that could negate a "dangerous dog" finding, the information was not irrelevant.

COMPETENT, SUBSTANTIAL EVIDENCE

"Competent substantial evidence is tantamount to legally sufficient evidence." *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]. The Florida Supreme Court has explained that competent substantial evidence is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The evidence relied upon should be "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *State v. Desange*, 294 So. 3d 433, 437 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D898b] (citing *Dausch v. State*, 141 So. 3d 513, 517-18 (Fla. 2014) [39 Fla. L. Weekly S415a]) (internal citations omitted). In determining whether competent, substantial evidence supports the order under review, the court is not permitted to reweigh the evidence. *Dusseau,* 794 So. 2d at 1275. This court is mindful of that mandate.

In contrast, appellate review of an alleged *insufficiency* of evidence is reviewed under the de novo standard of review. *Mace v. M&T Bank*, 292 So. 3d 1215, 1219 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D719a] (appellate court may review the sufficiency of the evidence in

a civil, nonjury trial without the issue being preserved with a motion in the trial court.) *See also Wells Fargo v. Sawh*, 194 So. 3d 475, 480 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1320b] *citing Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) [35 Fla. L. Weekly S137a]; *Meyers v. Shontz*, 251 So. 3d 992, 1000 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1602a]. Given these considerations, several matters stand out here. One is that the victim made inconsistent statements regarding events leading to the attack. The record indicates that Ms. Redd initially told law enforcement that the dogs had been fighting. She later denied that they had been fighting and that she had ever said otherwise. She also gave inconsistent statements as to the side of the body she was attacked from. In addition, although she initially implicated Zoey as the dog who attacked her, she later admitted she did not know which dog attacked her. This evidentiary conflict is key to the case, and it emanates from a single witness. To resolve the conflicts, the hearing officer not only relied on her belief regarding the supposed impact of trauma on the brain—because no facts were put in evidence on this—but she expressly found that Ms. Redd had not been untruthful, an almost impossible conclusion given that she made inconsistent statements on key facts—whether the dogs were fighting and the identity of the dog that attacked her. It is black letter law that a factfinder cannot consider matters outside of evidence. *R.J. Reynolds Tobacco Co. v. Schleider*, 273 So. 3d 63, 69 (Fla. 3d DCA 2018) [44 Fla. L. Weekly D425c]. Another is that the hearing officer seemed opposed to considering evidence that Ms. Redd's own dog may have caused the breach that led to the dogs interacting. To that end, the hearing officer accepted as expert testimony the opinion testimony of the victim's son as an expert contractor, without having required or even allowed a proper foundation for accepting such testimony. The hearing officer went so far as to prevent Appellants' attorney from verifying the witness's license, sustaining an objection by the County. As noted previously, the hearing officer also prevented Appellants from developing evidence of Ms. Redd's dog's aggression and history of fence fighting. In effect, she short-circuited Appellants' ability to present evidence of the *context* that section 767.11, Florida Statutes, expressly requires a hearing officer to consider in making a dangerous dog finding if such context exists. In addition, the Court agrees with Appellants that there is no *competent* evidence as to the identification of the dog or dogs inflicting Ms. Redd's injuries.

Generally, the remedy for due process violations is to remand the cause for a new hearing. See *Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So. 3d 616, 623 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D507a]. Because, however, the court also finds the evidence to be insufficient to support the decision below despite myriad due process violations, a remand for another hearing would be tantamount to giving the County a forbidden second bite at the apple. "A party does not get the proverbial 'second bite at the apple' when it fails to satisfy a legal obligation the first time around." *Bartolone v. State,* 327 So. 3d 331, 336 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2286a], citing *Richards v. State,* 288 So. 3d 574, 576 (Fla. 2020) [45 Fla. L. Weekly S8a]. It is therefore

ORDERED that the judgment is REVERSED with directions to enter judgment for Appellants.

[1]The hearing officer sustained a number of the County's objections to Appellants' cross examination of its witnesses as being outside the scope of direct, despite appearing to this court to be valid lines of questioning, forcing Appellants to recall those witnesses in the presentation of their case, and despite Appellants' counsel's plea that he was doing so to save time.

[2]This court has not been provided a citation as to the rule the hearing officer referred to. This court assumes the hearing officer was familiar with the rules governing the underlying proceeding.

[3]The Court disagrees with Appellant that it is limited to review of the matter under 767.11(1)(c), Florida Statutes. The citation appears to cite Appellants under both (1)(a) and (1)(c). The Court agrees that the requirements of subsection (1)(c) are not met here.

[4]The possibility that Ms. Redd's injuries were inflicted by her own dog is relevant and is suggested by testimony that Mr. Williams, upon witnessing Ms. Redd on her knees facing the ground to "let go of your dog." Although there is no doubt Ms. Redd suffered a serious injury by a dog, the record before this court contains no positive identification of the dog that attacked her and suggests at least the possibility that her own dog could have been responsible.

* * *

Counties—Zoning—Rezoning—Appeals—Certiorari petition challenging board of county commissioners' denial of application to rezone residential property to planned development to allow use as professional residential drug treatment facility—Resolution denying rezoning quashed—No merit to argument that applicant was denied due process by board's entry of written resolution after hearing on rezoning application where resolution merely reduced to writing the decision made at hearing—Board departed from essential requirements of law by concluding that proposed use of property was commercial use because land development code defines use as residential—Applicant demonstrated that proposed rezoning is consistent with comprehensive plan, and record contains no competent substantial evidence that denial of proposed rezoning advances legitimate public purpose

STEPHEN J. DIBBS, Petitioner, v. HILLSBOROUGH COUNTY BOARD OF COUNTY COMMISSIONERS, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 22-CA-004891, Division B. L.T. Case No. RZ-PD 21-0962. April 13, 2023. Counsel: Kristen M. Fiore, Akerman LLP, Tallahassee; and Jason L. Margolin, Akerman LLP, Tampa, for Petitioner. Cameron S. Clark, Senior Assistant County Attorney, Mary J. Dorman, Senior Assistant County Attorney, Office of the Hillsborough County Attorney, Tampa, for Respondent.

AMENDED ORDER
GRANTING PETITION FOR WRIT OF CERTIORARI[1]

(MARK R. WOLFE, J.) This case is before the Court on Petitioner Stephen Dibbs's petition for writ of certiorari (Doc. 5), filed June 9, 2022, seeking to review the Board of County Commissioners' denial of his application to rezone his property. The petition alleges that Respondent failed to afford him due process, departed from the essential requirements of law, and failed to support its decision by competent substantial evidence. The Court agrees that the Board applied the wrong law when it determined the use was a commercial one, where the code defines the specific use as residential. In addition, the Board's determination that a legitimate public interest in maintaining the current zoning to protect neighborhoods from "commercial encroachment," is unsupported by competent, substantial evidence. Accordingly, the petition must be granted.

Background

This case arises out of the Hillsborough County Board of Commissioner's May 10, 2022 denial of Petitioner Stephen Dibbs's application to rezone a 2.67 acre parcel of real property in Hillsborough County, Florida. The 2.67-acres of property ("the Property") at issue is located on Hoedt Road in the Greater Carrollwood Northdale area, within the county's urban service area. The Property is located less than a quarter mile east of Dale Mabry Highway, a state arterial highway, and less than a mile north of Bearss Avenue. An existing 11,024-square-foot single-family home and a 2,000-square-foot detached garage are on the Property. The Property contains wetlands on and around it which act as a buffer separating low-density residential neighborhoods to the east from more intense commercial uses located to the west. According to the Comprehensive Plan and Future Land Use Map, the Property is within the Residential-4 ("RES-4") Future Land Use ("FLU") designation. According to the comprehensive plan, the intent of the RES-4 classification is "[t]o designate areas that are suitable for low-density residential development. In addition, suburban scale commercial, office, multi-purpose and mixed-use projects serving the area may be permitted subject to the Goals,

Objectives, and Policies of the Land Use Element and applicable development regulations and conforming to established locational criteria for specific land use."

In 2021, Petitioner filed an application with the County to rezone the Property from its current zoning classification of RSC-3 to Planned Development. Petitioner sought to use the Property as an 8500 square-foot Professional Residential Facility Type C to provide lodging and on-site treatment for a maximum of 25 placed residents. Petitioner received conditional approvals from the County Planning Commission and the County Development Services Department. Thereafter, on March 14, 2022, Hearing Master Susan M. Finch, an American Institute of Certified Planners (AICP) certified county land use hearing officer held a duly noticed evidentiary hearing on Petitioner's application. Several witnesses testified at the hearing. Petitioner's AICP certified planner and county staff spoke in support of the application; residents who objected to the application also spoke. On April 4, 2022, the Hearing Master issued a comprehensive and detailed recommendation to the Hillsborough Board of County Commissioners. Consistent with the recommendations of county staff, the Hearing Master concluded that Petitioner's rezoning request was consistent with the comprehensive plan and recommended approval with certain conditions.

Following the issuance of the Hearing Master's written recommendation, the Hillsborough County Board of Commissioners held a duly noticed hearing on Petitioner's application. Petitioner appeared with his attorney, AICP certified planner, and project engineer. After hearing argument from Petitioner, local citizens, and county staff, Respondent proceeded to open the matter for discussion on record.

Only Commissioner Hagan provided conclusions on the record. The commissioner stated his belief that, being "commercial," the proposed rezoning classification was not compatible with the residential neighborhoods adjacent to the Property. He added that the development would negatively impact the traffic on the road, which the commissioner recognized as the only way in and out of the neighborhood using Hoedt Road. He also expressed concern that property values would decrease if the application were approved. The commissioner recognized the strong opposition to the application by the local citizens but commended Petitioner on holding three community meetings. The commissioner then stated he was "standing with the residents" and made a motion to deny the application.

The Board of County Commissioners denied Petitioner's application by a 4-2 vote. On May 24, 2022, Hillsborough County Development Services Department sent Petitioner a letter stating that Respondent had denied his request for rezoning. This timely petition followed.

DISCUSSION

Scope of Review (Reviewable Issues) under First-Tier Certiorari Review

Under Florida law, the scope of issues that are reviewable under first-tier certiorari review of quasi-judicial rezoning decisions is strictly limited as to whether: (1) the local government afforded Petitioner due process; (2) the local government observed the essential requirements of law; and (3) the decision is supported by competent and substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Additionally, in *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); the Florida Supreme Court further defined the scope of review under the third prong of the *Vaillant* test. It provides that if the application is determined to be consistent with the comprehensive plan and applicable zoning ordinances, the burden shifts to the government to show by competent, substantial evidence that there is a legitimate public purpose behind maintaining the existing zoning classification. *See also Sarasota Cnty. v. BDR Investments, LLC*, 867 So. 2d 605, 608 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D552a].

Due Process.

A private party owner seeking to rezone property is entitled to due process before a local government renders a decision. *See Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991) (setting forth the basic due process requirements for quasi-judicial proceedings). In administrative proceedings, the requirements of due process are met if the parties are afforded notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (internal citations omitted).

Petitioner contends he was denied due process when Respondent entered a post-decision written resolution at the June 2022 hearing without notice to him. The Court disagrees. Petitioner received notice, appeared, and, with the assistance of counsel, participated in all aspects of the proceedings leading to the resolution. The issuance of the written resolution is not unlike the issuance of a court order or opinion after hearing or oral arguments; it simply reduces to writing the decision the Board made in the noticed hearing. No further opportunity to address the Board is provided under the land development code, and no notice is required for the issuance of a written resolution memorializing the earlier proceedings.

The essential requirements of law.

A private property owner is entitled under Florida law to have the correct law applied to their application for rezoning. *See. Haines City Comm'ty Dev'mt. v. Heggs*, 658 So. 2d 523, 530 (concluding that "'applied the correct law' is synonymous with 'observing the essential requirements of law.' "). Application of the wrong law or legal standard is reversible error. *See Bd. of Cnty. Com'rs of Clay Cnty. v. Qualls*, 772 So. 2d 544, 546 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2094c], *as amended* (Dec. 6, 2000) [25 Fla. L. Weekly D2804c] (granting writ and quashing order after lower court failed to apply correct law).

Petitioner asserts that Respondent's justification for denying the rezoning failed to observe the essential requirements of law because it was based on the belief that the nature of Petitioner's proposed rezoning was "commercial." Petitioner contends that this characterization of the proposed use as commercial is inconsistent with the land development code and the comprehensive plan. Although the comprehensive plan does not define "residential support," its Objective 17 considers residential support as generally "non-residential," but it adds that such uses shall be allowed in residential neighborhoods if they are compatible to the surrounding residential development pattern. The plan's Policy 17.1 states that residential support uses are an allowable use in any residential, commercial, and industrial land use category as long as they are compatible with the neighborhood in terms of design, intensity and scale. Here, no exterior changes are contemplated to the existing residence, there would be no changes to the landscape, and no increase to impervious surfaces.

A comprehensive plan is similar to a constitution for all future development within its boundaries. *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC,* 189 So. 2d 312, 313 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D950d]. The land development code is how the plan is implemented. *Citrus Cnty. v. Halls River Dev'mt, Inc.*, 8 So. 3d 413, 420-21 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D613a]. Constitutions rarely define terms; that is a job for implementing authorities. Turning to Hillsborough County's Land Development Code, it provides that the proposed use is allowable in residential areas, if it meets certain criteria. For example, no community residential home type "B" or "C" may be located within a radius of 1,200 feet

of another existing Type B or C community residential home in a multi-family zone, nor within a radius of 500 feet of an area of non-agricultural (RSC) single-family zoning. § 6.11.75, Land Dev. Code (setting forth requirements for professional residential facilities). The property meets this requirement. Significantly, a large single-family home currently exists on the property. According to the application to rezone the property, no alterations to the exterior structure are contemplated. It is not visible from the street. It provides a transition between the single-family residential uses to the property's east, and more intense commercial uses to the property's west, consistent with the plan's Future Land Use Element Policy 16.2.

The County argues that the sale of a service such as professional residential treatment constitutes a commercial use. Although the Court agrees that it is commonly understood that the sale of services constitutes commerce, there is no indication that any residential support uses must be provided free of charge. In short, were the exchange of money the sole criterion to distinguish commercial from residential support uses, day care centers would be commercial, too.

The County suggests that so-called "residential support" uses are limited to uses that support the neighborhood but also contends that, unlike the use contemplated here, people do not reside in them. Examples of such uses include churches and day care centers for children and adults. The Court notes that the list was not an exhaustive one. Although not specifically argued by the County, the Court also notes that the County's land development code specifically provides that lower density community residential homes (Type A) shall be considered a "single-family unit and non-commercial residential use" for purposes of the code. §6.11.28 A., Land Dev. Code. The code is, however, silent as to the residential-vs.-commercial status of Type B and C facilities. It might be argued that the exclusion of Type C community residential homes from being expressly classified as residential suggests the intent to designate them as commercial.

But designating Type B and C homes as commercial might be a strained conclusion. First, section 6.11.28A does not expressly designate them as "commercial," it simply does not expressly designate them as residential. A fair reading of the comprehensive plan considers such uses as residential support. In addition, although the County is correct that the comprehensive plan does not define "residential support," the land development code does define it, along with "residential uses." The land development code's section 12.01.00 defines "residential support uses" as "the use of land, buildings or structures for uses which include *but are not limited to* child care centers, home-based businesses, and places of worship." Significantly, it defines "residential use" as: "the use of land, buildings or structures for uses which include but are not limited to *community residential facilities*, dwelling units, fraternity and sorority houses, *life care treatment facilities*, private pleasure craft used as a residence, *professional residential facilities* and *temporary living facilities*. Under the code's definitions, the proposed use appears more clearly described under the definition of "residential use," than it is under "residential *support* use." In other words, the proposed use is not merely a residential *support* use, it *is* a residential use, albeit one that it must comply with additional regulations. These requirements are based on the maximum number of residents that could be housed in the home. The major criteria for the placement of such facilities are 1) that it not be placed in a manner as to create a concentration of similar uses in an area, and 2) that the design be compatible with the surrounding area. Here, there is no evidence of a similar use within the required 1200-ft. separation requirement, and the existing residence, which, because the existing residence will not undergo any exterior alteration, cannot be deemed anything other than consistent with the surrounding residential development. In concluding that the proposed use is commercial, the county commission applied the wrong law. *See, e.g. Broward Cnty. v. G.B.V. Intern., Ltd.,* 787 So. 2d 838, 845 (Fla. 2001) [26 Fla. L. Weekly S389a] (application by circuit court of independent standard of review in lieu of the standard espoused in *Vaillant* departed from the essential requirements of law).

Competent, substantial evidence/Burden-shifting

Based on the foregoing, county staff correctly concluded that the proposal met the criteria for approval under the comprehensive plan and land development code. Respondent implicitly concluded as much by declining to provide an opposite conclusion on the record. The Planning Commission and the Development Services Department, as well as the Hearing Master, all concluded that the proposal was consistent with the comprehensive plan.

Where, as here, a petitioner demonstrates that the proposed rezoning is consistent with the comprehensive plan, the burden shifts to the government to show by competent, substantial evidence in the record that a legitimate public interest in maintaining the current zoning exists. *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996, 1007 (Fla. 2d DCA 1993); *BDR Invests.*, 867 So. 2d at 607 (citing *Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder*, 627 So. 2d at 476).

Although the County Commission concluded that a public interest would be served by maintaining the current zoning, it did not cite to any evidence to support that conclusion. It merely expressed the opinion that denial would prevent *commercial* encroachment to a residential area, and, without any evidence to support it, a belief that the proposal would lower property values and lead to an increase in crime. The record contains no competent evidence that such uses lead to an increase in crime, and purported evidence by way of a reference to an eight-year-old article, which was not placed in the record, to support that such uses lower property values is neither competent, nor substantial. There would be no additional building density, there is no proposed exterior change to the existing home, landscape, or impervious surfaces on the property, and significant buffering would separate the use from surrounding residential development. The project would generate no significant additional traffic, according to the traffic study. Fact-based testimony of homeowners opposing the proposed rezoning may be considered by an administrative body and by reviewing courts. *Marion Cnty. v. Priest,* 786 So. 2d 623, 626-27 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1098b] (citizen testimony perfectly admissible if it is fact based). Conversely, unsupported, conclusory statements do not constitute competent evidence. *BML Invs. v. City of Casselberry*, 476 So. 2d 713, 715 (Fla. 5th DCA 1985) (citing *Conetta v. City of Sarasota*, 400 So. 2d 1051 (Fla. 2d DCA 1981); *City of Apopka v. Orange Cty.*, 299 So. 2d 657 (Fla. 4th DCA 1974)). There is a sense that the neighbors found the nature of the proposed *use*—a residential drug treatment facility—to be distasteful, but they did not provide the necessary evidence to support denial. Commissioner Hagan, in moving to deny the rezoning declared that he "stood with the residents." In *Conetta*, the Court concluded that denying proposed development based on a "popularity poll of the neighborhood" is impermissible. 400 So. 2d at 1053.

CONCLUSION

Because the County Commission departed from the essential requirements of law, and the record contains no competent, substantial evidence for the determination that denial of the proposed rezoning advances a legitimate public purpose, the petition is GRANTED, and the Resolution is QUASHED. The Court notes that this decision does not automatically entitle Petitioner to the proposed use, as additional regulatory criteria must be met.

[1]The opinion is amended to correct two scrivener's errors. The result is unchanged, and the time for rehearing is not extended.

* * *

MALCOLM KLEIN and ZELDA MUSSON, Petitioners, v. TAMPA PORT AUTHORITY, d/b/a PORT TAMPA BAY and MIRASOL DAVIS ISLAND, LLC, Respondents. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 23-CA-12198. Division C. November 7, 2023.

DISMISSAL

(MELISSA POLO, J.) The petition for writ of certiorari is DISMISSED for lack of jurisdiction. *Charles M. Schayer & Co. v. Board of County Commissioners of Dade County*, 188 So.2d 871, 871 (Fla. 3d DCA 1966); *City of St. Pete Beach v. Sowa*, 4 So.3d 1245, 1247 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D380c]. The dismissal is without prejudice; Petitioners may file a civil action, or a petition upon conclusion of proceedings related to the minor work permit.

* * *

EDGEWOOD GREENS CONDOMINIUM B, INC., Plaintiff, v. CITY OF LAUDERHILL, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23017037. Division AP. January 22, 2024.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon Appellant's Notice of Stipulation for Dismissal, dated January 11, 2024. Upon review of the notice and Court file, this Court finds as follows:

The Notice of Stipulation for Dismissal is hereby **ACCEPTED** by this Court.

The Broward County Clerk of Courts is **DIRECTED** to close this case as "disposed" of by way of stipulation for dismissal.

* * *

SAM HOLDINGS 2021, LLC, Plaintiff, v. CITY OF HOLLYWOOD, FL, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23016310. Division AW. January 22, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order Granting Motion to Strike dated November 28, 2023. Petitioner was directed by this Court to file an Amended Petition for Writ of Certiorari through a Florida Bar licensed Attorney within 30 days. As of the date of this Order Petitioner has failed to comply with this Court's November 28, 2023, Order.

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

* * *

MAGAZY BARTOLI, Plaintiff, v. CITY OF MIRAMAR, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23017650. Division AP. January 22, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated November 28, 2023. Appellant was directed by this Court to file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. As of the date of this Order Appellant has failed to comply with this Court's November 28, 2023, Order and file an Initial Brief and Appendix.

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

* * *

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

DANIEL WESLEY WINGATE, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 23AP2. December 21, 2023. Counsel: Kathy Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JOSEPH G. FOSTER, J.) THIS CAUSE comes before the Court on Petitioner's "Petition for Writ of Certiorari," filed January 12, 2023, pursuant to Fla. Stat. §322.2615(13) and Fla. Stat. §322.31. Having reviewed the petition, the response, Petitioner's reply, the record provided and attached to the petition, and the applicable law, and upon due consideration, the Court finds as follows:

1. Petitioner is challenging Respondent's Final Order of License Suspension issued after a formal review hearing, which sustained the suspension of Petitioner's driving privilege pursuant to Fla. Stat. §322.2615 for refusal to submit to a breath, blood, or urine test. (See copy of Final Order of License Suspension attached to the petition).

2. On or about August 11, 2023, Collier County Sheriff's Deputy Lockhart was concluding another traffic stop, when he heard the sound of another vehicle's brakes locking up and tires skidding on the pavement. DDL 4. He looked up and saw a Corvette skidding for twenty to fifty yards towards the rear of his patrol vehicle, and only stopping about a foot from his bumper. DDL 4. He followed the Corvette, pulled it over, and observed signs of impairment in Petitioner. DDL 2, p. 3. Collier County Sheriff's Deputy Williams arrived soon after to conduct a DUI investigation. DDL 2, 4-5. Petitioner was asked to perform field sobriety exercises, failed them, and was arrested for DUI. DDL 2, 5. When asked if he would submit to a breath test, he refused. DDL 2, p. 3.

3. A formal review hearing was held on December 7, 2022. The documents reviewed by the Hearing Officer included the Florida DUI Uniform Traffic Citation (DDL 1), the Probable Cause Affidavit (DDL2), the Refusal Affidavit (DDL 3), the Sworn Statement of Corporal Lockhart (DDL 4), and Florida Uniform Traffic Citation AFUGQ7E (DDL 5).

4. No testimony was presented at the hearing and no transcript exists.

5. In the Final Order of License Suspension, dated December 22, 2022, the Hearing Officer found that: (1) the arresting officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or controlled substances; (2) Petitioner was lawfully arrested and refused to submit to a breath test; and (3) Petitioner had been informed that refusal to submit to such a test would result in the suspension of his license. The Hearing Officer denied Petitioner's motion to invalidate the suspension.

6. The applicable standard of review by a circuit court of an administrative agency decision is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]. *See also Dusseau v.*

Metro. Dade County Bd. of County Comm'r, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] ("Instead of simply reviewing the Commission's decision to determine whether it was *supported* by competent substantial evidence, the court also reviewed the decision to determine whether it was *opposed* by competent substantial evidence. The circuit court then substituted its judgment for that of the Commission as to the relative weight of the conflicting evidence. The circuit court thus usurped the fact-finding authority of the agency.").

7. In his petition, Petitioner argues that there was no competent substantial evidence to support the Amended Order Findings of Fact that Petitioner was placed under lawful arrest, asked to submit to a breath test and refused, and then was read Implied Consent and still refused. It appears that it is the timing of the reading of Implied Consent which Petitioner finds problematic. He alleges that there was a conflict in the evidence regarding his refusal to undergo a breath test and relies on two times listed on Refusal Affidavit (DDL 3) reflecting that he was arrested on August 11, 2022 at 1:09 a.m., while the Implied Consent warning was given at 00:35 a.m. Petitioner argues that there is no other record evidence that "provides a detailed and specific timeline of the sequence of events leading up to the Implied Consent Warnings being conveyed to Petitioner." Petition, p. 5.[1] He asserts that no testimony was provided at the formal review hearing and "only documentation was entered into the record as evidence." Petition, p. 2. He maintains that this is contrary to the law because Section 316.1932(1)(a) requires that the breath test must be administered incidental to a lawful arrest. He also argues that the inconsistencies in the evidence must be explained by sworn testimony. He cites as support to *DHSMV v. Trimble,* 821 So. 2d 1084 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] and *Dep't of Highway Safety and Motor Vehicles v. Colling,* 178 So. 3d 2, 4 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1195b]. These cases will be discussed below. He concludes that Respondent was required to explain the inconsistency with sworn testimony but failed to do so.

8. Respondent argues that there was competent substantial evidence to support the suspension and that the Hearing Officer correctly determined that Petitioner refused a lawful request for a blood test after he had been placed under arrest. It cites to several cases as support, which will be addressed below.

9. In *Trimble,* the appellate court reviewed a circuit court's conclusion that "the documentary evidence presented" at the suspension hearing "was the only evidence submitted to prove its case," and "was legally insufficient to constitute [competent substantial evidence] on the warning issue, because the documents were hopelessly in conflict and the discrepancies on the critical facts went unexplained." *Trimble,* 821 So. 2d at 1086. Specifically, there were three different times given in the documents for the time when informed consent had been read to the defendant. *Id*. Given this fact, and the lack of any explanation by the arresting officer, the appellate court held that the "the critical determination of when or whether the motorist was given the consent warning required by law . . . was supported only by evidence that gives equal support to inconsistent inferences," and consequently, that such evidence could not be "deemed so sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached." *Id*. at 1087.

10. However, "not every conflict in documents must be resolved against the Department." *Colling,* 178 So. 3d at 5. "When the documents conflict on a material issue, however, the hearing officer cannot simply throw a dart to decide which one is correct. This [however] does not necessarily mean that live testimony is always needed to resolve such conflicts. *Id*. In *Jones v. Dep't of Highway Safety and Motor Vehicles,* the circuit court upheld a hearing officer's decision because her order revealed "that she considered all of the evidence presented at the Hearing prior to making the required statutory findings . . ." 3 Fla. L. Weekly Supp. 534c (Fla. 7th Jud. Cir. Ct. 1995). It further noted that "[a]lthough this finding contradicted the Refusal Affidavit . . . the Hearing Officer explained" how she made her determination. *Id*. *See also Soles v. Dep't of Highway Safety and Motor Vehicles,* 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Jud. Cir. Ct. 2008) ("Though the Refusal Affidavit reflects that the arrest occurred at 2:30 and Implied Consent was read at 2:30 and the DUI citations reflect that the offenses occurred at 4:37 a.m. and 4:41 a.m., the times contained in the Driving Under the Influence Report as well as the sequence of events narrated in the Officer's sworn statement provide competent substantial evidence for the findings made by the Hearing Officer, and . . . [she] did not depart from the essential requirements of the law in relying on such documents in making her findings."); *Strang v. Dep't of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 208a (Fla. 12th Cir. Ct. June 23, 2016) (upholding hearing officer's findings despite some discrepancies in the documents because the majority of the documents supported her conclusion).

11. Additionally, many circuit courts, examining the issue in the light of *Trimble* have noted that the *Trimble* court "did not have the benefit of a sworn statement relating the sequence of events that occurred." *Labuda v. Dep't of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 208a (Fla. 7th Jud. Cir. Ct. 2012) (internal marks and cites omitted). *See Worley v. Dep't of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 758b (Fla. 9th Cir. Ct. 2011) (distinguishing *Trimble* because "a sworn statement was lacking [in *Trimble*] and the documents admitted as evidence presented a hopeless conflict because they equally supported two inconsistent conclusions as to the time when the motorist refused to take the breath test."). A sister court in this Circuit considered a similar claim in 2020, and found in that case the documents consistently reported the time of the stop and arrest, and that the "arrest report establishe[d] that the arrest occurred prior to the reading of the implied consent warning and any breath test refusal." *Tuorto v. Dep't of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 1007d (Fla. 20th Cir. Ct. 2020).

12. In the instant case, the Hearing Officer had the benefit of the arrest report (DDL 2), the Refusal Affidavit (DDL 3), and the sworn statement of Deputy Lockhart (DDL 4). DDL 2 reflects that Deputy Williams conducted a DUI investigation at 00:05 and that Petitioner was arrested at 00:25; and DDL 3 reflects that Petitioner refused to submit to a blood test at 00:35. While DDL 3 also states that Defendant was arrested at 1:09, it is clear from the other documents that Defendant was under arrest for DUI before he was asked to provide a breath sample. There is consequently no "hopeless discrepancy" in these documents. Moreover, to the extent that Petitioner is challenging how the Hearing Officer assessed the individual documents and what relative weight she gave them, this Court is unable to determine that claim as there is no transcript. On certiorari review, this Court cannot substitute its findings for that of the Hearing Officer and cannot reweigh the evidence. Having considered the record, and being mindful of the limited scope of review, the Court finds that Petitioner has failed to demonstrate that there was no competent substantial evidence to support the decision of the Hearing Officer to uphold the suspension. Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

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[1]While Petitioner has not numbered his pages, this Court shall refer to his petition as if he had.

* * *

Volume 31, Number 11
March 29, 2024
Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Mandamus—Hospitals—Petition for writ of mandamus is not appropriate remedy for involuntarily committed patient who seeks to compel state mental hospital to provide specific medical treatment for alleged health issues because there is no clear ministerial duty to provide specific health treatment—Appropriate remedy for patient's complaint is petition for writ of habeas corpus—On rehearing of order denying petition, court orders that petition will be deemed a habeas petition and directs hospital to show cause why it should not be granted

J.H., SR., Plaintiff, v. JOHN POLISKNOWSKI, ADMINISTRATOR FSH, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2023-CA-000800-AXXX-XX. December 20, 2023. David Frank, Judge. Counsel: Jason Hunter, Pro se, Chattahoochee, Plaintiff. John Polisknowski, Florida State Hospital Administrator, Pro se, Chattahoochee, Defendant.

ORDER GRANTING REHEARING ON ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND REOPENING CASE and ORDER TO SHOW CAUSE

This cause came before the Court on the pro se plaintiff's now three post-disposition motions, together deemed to be a motion for rehearing, and the Court having reviewed the motions and the court file, and being otherwise fully advised in the premises, finds

Procedural History

Plaintiff is currently involuntarily committed at Florida State Hospital ("defendant"). What is not clear is whether the commitment is a criminal commitment under Florida Statute 916.107, or a civil commitment under Florida Statute 394.459. Mr. Hunter does refer to "charges" but otherwise does not clarify his status.

On October 30, 2023, Mr. Hunter filed a petition for writ of mandamus seeking a court order compelling defendant to provide specific treatment and specific medications for alleged health issues, including a mild traumatic brain injury, tachycardia, insomnia, overactive immune system, excessive urination, stomach problems, hypertension, lack of appetite, and more. He also alleges that the defendant should have sent him to a trauma center or other more appropriate medical facility. The Court denied the petition. After the case was closed, Mr. Hunter filed three post-disposition motions which simply restated his petition.

The Concern

An easy reaction to the additional pro se motions would be to deny them, close the case again, and prohibit further filings based on its determination that they had no merit. But the Court realized that, if not handled with appropriate safeguards, the limitations on remedies for those who are involuntarily committed could result in an unacceptable deprivation of rights. It is pursuant to that concern that the Court is granting rehearing and looking more closely at Mr. Hunter's situation.

To begin, we should remind ourselves of the seriousness of the matter at hand. It doesn't take a legal scholar to know that a person with a mental health illness is one of the most vulnerable among us and deserving of protection. "[A] deprivation of liberty by commitment to a mental institution cannot be accomplished without due process of law." *Jordan v. State*, 597 So.2d 352, 353 (Fla. 1st DCA 1992) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Shuman v. State*, 358 So.2d 1333 (Fla. 1978); *In re Beverly*, 342 So.2d 481 (Fla. 1977))." *Doe v. State,* 217 So.3d 1020, 1025 (Fla. 2017) [42 Fla. L. Weekly S553b].

Of course, there is the Eighth Amendment to the United States Constitution. In 1976, the Supreme Court held that the Eighth Amendment's proscription against cruel and unusual punishment requires prison officials to provide inmates with medical care. *See Estelle v. Gamble,* 429 U.S. 97, 103-05 (1976).

The standard for this remedy, however, is quite stringent. "The deliberate indifference standard involves both an objective and a subjective component. The objective component is met by evidence of serious medical need which includes, in relevant part, the existence of chronic and substantial pain. ... The subjective component requires an official to know the facts that could have shown the prisoner's health was in danger and the official must actually believe the prisoner's health is in danger." *Davis v. Bay Cnty. Jail,* 155 So.3d 1173, 1175 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2143a] (citations and internal quotations omitted).

". . .[A] mere difference of opinion between an inmate and prison medical staff does not give rise to an Eighth Amendment violation. However, some types of situations where courts have found prison medical staff to be deliberately indifferent, and not just exercising differences of professional opinion, include failure to provide treatment for diagnosed conditions and failure to investigate the medical situation enough to make an informed judgment—including reviewing medical records." *Id.* (citations and internal quotations omitted).

Subsequently, the Supreme Court took a slightly less stringent approach for those who have been involuntarily committed in a civil case. "In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court held that involuntarily committed mental patients enjoy a liberty interest in 'safe conditions' and freedom from undue restraint." *Hall v. Adm'r, Florida Civil Commitment Ctr.,* 21-13160, 2022 WL 4100705, at *2 (11th Cir. Sept. 8, 2022). "The Court balanced the constitutional rights of an institutional patient with the legitimate interests of the state and concluded that, if the State identifies a legitimate reason for its action, 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised.' " *Id.* "Under that standard, a 'decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.' " *Id.*

The analysis and application of these remedies post *Youngberg,* however, are inconsistent at best. *See* the discussion and footnotes in *Morel v. Wilkins,* 84 So.3d 226, 236 (Fla. 2012) [37 Fla. L. Weekly S161c].

Nonetheless, our Eleventh Circuit has recognized that, ". . .without out-of-cell time and *effective treatment*, housing severely mentally ill prisoners in a mental-health unit is tantamount to 'warehousing' the mentally ill. *See Wyatt v. Aderholt*, 503 F.2d 1305, 1309 n.4 (5th Cir. 1974) (affirming the district court's finding that a state mental hospital was functioning as a 'warehousing institution . . . wholly incapable of furnishing treatment to the mentally [ill] and . . . conducive only to the deterioration and debilitation of the residents.'). . . ." *Braggs v. Dunn,* 257 F.Supp. 3d 1171, 1214 (M.D. Ala. 2017) (emphasis added); *see also Georgia Advocacy Office v. Labat,* 1:19-CV-1634-WMR-RDC, 2021 WL 12102910, at *6 (N.D. Ga. Sept. 13, 2021).

Here is the second concern. A trial court must walk carefully down the path of reviewing a state hospital's procedures. A court can issue orders to correct constitutional deficiencies, but, unless authorized, it may not tell a state institution how to do its job. *Forney v. Crews ,* 112 So.3d 741, 743 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1036a] (". . . operation of the state prison system is within the province of the executive and legislative branches of government, the judicial branch has no authority to dictate how the detaining authority or its private

designates carry out the duty to provide health care to prisoners, so long as no statute or constitutional requirement is violated."). (citations and internal quotations omitted).

This is not an idle concern. It emanates from our country's separation of powers doctrine, a bedrock principle of American democracy. It is important because:

> . . .there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *The Spirit of the Laws* (1748).

Taking the allegations of the present complaint as true, they do not set forth a legally sufficient claim under *Youngblood.* The question then is what valid options, that do not offend the separation of powers doctrine, remain for Mr. Hunter?

Forced Medication and Treatment

To start, Mr. Hunter does not allege in any of his filings that the defendant hospital is actually forcing medication or specific treatment upon him. To do so over his refusal would require a court order and the satisfaction of several prerequisites. Fla. Stat. 916.107 (2023); *Sell v. United States,* 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) [16 Fla. L. Weekly Fed. S359a]. Even if that were the case, the legal remedy would be an appeal of the order, not a writ of mandamus. *Hicks v. N. Florida Reg'l Evaluation & Treatment Ctr.,* 285 So.3d 405, 407 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D3048a].

Rather, Mr. Hunter contends that defendant is simply not providing adequate medical care, similar to the allegations one would see in a medical malpractice action.[1]

Mandamus

"In order for a court to issue a writ of mandamus, a petitioner must show that he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him. When a petitioner files a petition for mandamus, the court has the initial task of assessing the legal sufficiency of the allegations. If the court finds the allegations insufficient, it will deny the petition, or dismiss those claims that are factually insufficient." *Holcomb v. Dep't of Corr.,* 609 So.2d 751, 753 (Fla. 1st DCA 1992) (citations and internal quotations omitted); *see McKee v. Jacobo,* 127 So.3d 857, 858 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2536a]; *but see Hadi v. Cordero,* 955 So.2d 17, 21 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D3051a].

Plaintiff does not cite any authority, nor is there any, that requires the defendant to provide whatever treatment and medications a resident demands or desires. Consequently, there is no clear, ministerial duty. By its very nature, medical care involves varying approaches and inevitable discretion.

Statutory Remedies

Another possibility would be statutory rights the Legislature has bestowed upon persons who have been involuntarily committed. Here, we have no separation of powers issue because a court does intrude upon the legislative or executive branches when it acts pursuant to express authority given by the Legislature.

"Namely, section 916.107(9)(b) grants a trial court the 'authority to conduct a judicial inquiry and to issue an appropriate order to correct an abuse of this chapter' if appellant is being 'unjustly denied a right or privilege granted herein.' " *Kendrick v. State,* 21 So.3d 122, 123-24 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2249a].

The "rights" and "privileges" granted in the statute include:[2]

> (2)(c) Every forensic client shall be afforded the opportunity to participate in activities designed to enhance self-image and the beneficial effects of other treatments or training, as determined by the facility.
>
> (4)(a) Each forensic client shall receive treatment or training suited to the client's needs, which shall be administered skillfully, safely, and humanely with full respect for the client's dignity and personal integrity. Each client shall receive such medical, vocational, social, educational, and rehabilitative services as the client's condition requires to bring about a . . . return to the community. . . .

Kendrick v. State

In *Kendrick v. State,* 21 So.3d 122, 122-23 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2249a]:

> Appellant, a committed defendant, request[ed] th[e] court review the trial court's denial of her Petition for Writ of Habeas Corpus, filed pursuant to section 916.107(9)(b), Florida Statutes (2008). In the petition, appellant sought enforcement of the recommendation made by her multidisciplinary treatment and recovery team at Florida State Hospital regarding her care and treatment. Without an evidentiary hearing, the trial court denied appellant's request. The trial court noted:. . . . "Petitioner has not presented case law directly on point which would demonstrate that the court has the authority to direct Defendant's placement within a particular facility. . . ." Based on this assumption, the trial court determined it lacked authority to grant appellant's requested relief. This would appear to be a ruling of law that no relief was available to a petitioner who alleges that her rights guaranteed pursuant to section 916.107(9), Florida Statutes, have been violated. We determine the trial court prematurely determined it could not fashion an order requiring compliance with the statutory dictates that would not impermissibly invade the province of an executive agency.

The Kendrick court cited *Dep't of Children & Families v. Harter,* 861 So.2d 1274, 1275 (Fla. 5th DCA 2003) [29 Fla. L. Weekly D41a] for the proposition that a "court [ ] may not direct that a defendant be placed in a particular facility or receive a specialized treatment." The court then distinguished *Harter* by concluding, "However, these cases do not address the specific right of habeas corpus afforded appellant through section 916.107(9)(b), which provides in pertinent part:

> (9) Habeas corpus.-
>
> (b) A client or his or her legal guardian or representatives or attorney may file a petition in the circuit court in the county where the client is committed alleging that the client is being unjustly denied a right or privilege granted herein or that a procedure authorized herein is being abused. Upon the filing of such a petition, the circuit court shall have the authority to conduct a judicial inquiry ***and to issue any appropriate order to correct an abuse of this chapter***."

21 So.3d at 123 (emphasis added in original).

The First District noted that in *State, Dep't of Health & Rehab. Servs. v. Stoutamire,* 602 So.2d 564, 567 (Fla. 2d DCA 1992), "the Second District intervened in the placement of a committed defendant based in part on the application of section 916.107(9)(b)," holding:

> In subsection 916.107(4), the legislature has specifically dictated that "each patient committed pursuant to this chapter shall receive treatment suited to his needs," including "such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community." The legislature has . . . specified . . . [a method] for judicial implementation of these goals. . . . [S]ection 916.107(9) confers the right of a patient (extending to a guardian, representative, friend, and parties similarly situated) to petition for habeas corpus.

Id.

The First District noted that, ". . .no prior Florida case has clearly established a trial court's authority to intervene where a committed defendant files a writ of habeas corpus pursuant to section 916.107(9)(b)," but then concluded, ". . .the strict application of the

statute's wording allows intervention if there is a determination that a defendant's rights or privileges afforded in the committed defendant's bill of rights have been denied." *Id.* The court held:

> Due to the trial court's erroneous legal conclusion that no relief was available to the petitioner, there is no record evidence to support the assertions of appellant to explain the reasoning behind the team's recommendation or to assess the reasonableness of the Department's actions in refusing to implement the team's recommendation. The trial court made no factual findings as to any of these issues because of the erroneous belief that it lacked authority to grant any relief to appellant. Based on the foregoing, we reverse the order denying appellant's petition and remand for further proceedings consistent with this opinion.

Id. at 124. *See also Dahl v. State,* 139 So.3d 944, 945-47 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1099c].

Reviewing the Sufficiency of the Complaint

The specific remedy for Mr. Hunter's complaint is a petition for writ of habeas corpus, not mandamus. *McKee v. Jacobo,* 127 So.3d 857, 858-59 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2536a]. The pleading deficiency is not fatal. *Stokes v. Florida Dept. of Corr.,* 948 So.2d 75, 76 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D242b] ("While the petitioner styled his circuit court petition as a petition seeking certiorari relief, the trial court properly construed it as a petition for mandamus relief."). Assuming the complaint had been properly filed as a petition for writ of habeas corpus, ". . . it must be reviewed for facial sufficiency." 127 So.3d at 858-59.

Although the circuit court in *McKee* did not reach this step, the appellate court concluded that the allegations pled were facially sufficient "so as to require a response from DCF." *Id.* The petitioner in *McKee,* ". . .had a myriad of complaints pertaining to both the quality and quantity of the rehabilitative services and treatment that the for-profit operator of the facility provides him. . . ." *Id.* at 858.

Accordingly, it is ORDERED and ADJUDGED that

1. Plaintiff's post disposition motions are deemed a motion for rehearing which is GRANTED.

2. The clerk will REOPEN the case.

3. Plaintiff's complaint for writ of mandamus will be deemed a petition for writ of habeas corpus pursuant to Section 916.107(9)(b), Florida Statutes.

4. The allegations of the petition are legally sufficient to require a response from the respondent hospital.

5. The respondent will show cause why the writ should not be issued within twenty (20) days from the date of this order.

6. The respondent will address:

a. The commitment status of the petitioner.

b. The course of treatment and diagnoses provided by the hospital to date.

c. Any actions taken by respondent to rule out or treat the conditions listed in the petition.

d. Any treatment or medication appropriate for petitioner that are not currently available at the hospital.

e. The name, email address, and mail address of any guardian or guardian advocate.

7. Respondent will serve a copy of its response on any attorney currently representing petitioner or who has previously represented petitioner regarding his involuntary commitment.

[1]The complaint also fails to cover the elements of common law negligence and all of the various statutory requirements that regulate medical malpractice lawsuits, such as those that govern sovereign immunity and pre-suit screening. It also is logical to assume that competent medical malpractice lawyers are not lining up at the door to FSH to provide consultations to prospective clients. Another possible option is an ADA claim. *Alex A. by & through Smith v. Edwards,* CV 22-573-SDD-RLB, 2023 WL 5984280, at *8 (M.D. La. Sept. 14, 2023) ("The ADA recognizes a 'methods of administration' claim that prohibits public entities from using "criteria or methods of administration . . . [that] have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."). The same caveat applies.

[2]Florida Statute 394.459 (8)(b) and (4)(a) have the same provisions for Baker Act civil commitments.

* * *

Torts—Negligence—Automobile accident—Rear-end collision—By operation of section 337.195(1), plaintiff is presumed to be sole proximate cause of injuries she sustained when she drove her vehicle into rear of cement truck as it drove away from highway construction zone in which defendants were acting as contractors or agents of Florida Department of Transportation where plaintiff was under influence of alcohol at time of crash and action of truck driver in misjudging speed and distance of oncoming traffic into which he merged was not grossly negligent—Defendants are also entitled to summary judgment on alternative ground that plaintiff rear-ended truck and failed to rebut presumption of rear-driver negligence

TIFFANY LAUREN JACKSON, Plaintiff, v. A.A. PITTMAN & SONS CONCRETE COMPANY, INC., LEROY KEMP, PRINCE CONTRACTING, LLC, ACME BARRICADES L.C., DRAGADOS USA, INC., GOSALIA CONCRETE CONSTRUCTORS, INC., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CA-001268-XXXX-MA. Division CV-A. August 23, 2023. Waddell A. Wallace, Judge. Counsel: Arlen Weintraub, for Plaintiff. Steven M. Puritz, Shannon Schott, Esther Erkan, Jackeline Rodriguez, and Jan Buyers, for Defendants.

ORDER GRANTING MOTIONS FOR AND ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

On June 1, 2023, the Court conducted a hearing on the following duly noticed motions for summary judgment:

1. Defendants A.A. Pittman & Sons Concrete Company, Inc.'s ("Pittman") and Leroy Kemp's Amended Motion for Summary Judgment, filed March 6, 2023;

2. Defendant Acme Barricades, L.C.'s Joinder in the Motion for Summary Judgment filed on behalf of Pittman and Kemp, filed May23, 2023;

3. Defendant Gosalia Concrete Constructors, Inc.'s Motion for Summary Judgment, filed April 14, 2023; and

4. Defendants Dragados USA, Inc.'s and Prince Contracting, LLC's Motion for Summary Judgment, filed April 21, 2023.

Each of the motions raises substantially the same arguments. All Defendants argue that the claims asserted by Plaintiff, Tiffany Jackson, are barred under Section 337.195, Florida Statutes, for the reason that the motor vehicle collision from which Plaintiff's claims arise occurred within a construction zone and, at the time of the collision, all Defendants were agents or contractors of the Florida Department of Transportation ("FDOT"). These Defendants further argue that, at the time of the collision, Plaintiff was under the influence of alcohol and that the record does not support a finding of gross negligence by any Defendant.

Defendants also argue they are entitled to summary judgment because Plaintiff drove her vehicle into the rear end of the truck driven by defendant LeRoy Kemp and Plaintiff has not overcome the rebuttable presumption that the rear driver was negligent and the sole cause of the accident.

A motion for summary judgment should be granted if there is "no genuine dispute as to any material fact and the moveant is entitled to judgment as a matter of law." Rule 1.510, Florida Rules of Civil Procedure. In ruling on a motion for summary judgment, the Court must view the facts in a light most favorable to the nonmoving party and draw all inferences in that party's favor. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The movant initially bears the burden of proof and must demonstrate the absence of a disputed fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The movant also must show no reasonable jury could

find for the nonmoving party on any of the essential elements of the claim. See *Fitzpatrick v. City of Atlanta,* 2 F. 3rd 1112 (11th Cir. 1993). If the movant carries its burden, the nonmoving party must present evidence showing a dispute of material fact. See *id*. at 1116. A dispute is genuine if "a reasonable trier of fact could return judgment for the nonmoving party." *Miccosukee Tribe of Indians of Florida v. United States,* 516 F.3rd 1235, 1243 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C401a]. A fact is material if "it would affect the outcome of the suit under the governing law." *Id*.

Applying these principles to the summary judgment record, the Court determines that there are no genuine issues of material fact and that the moving Defendants are entitled to judgment on Plaintiff's claims, as a matter of law.

At the time of the collision, Defendant Kemp was employed by Pittman as a cement truck driver. Pittman was a contractor performing work for FDOT on a roadway construction project. Kemp poured concrete from his truck for the construction of a contract wall adjacent to the northbound roadway of Interstate 295 on the south side of the City of Jacksonville. After Kemp had finished the pour, he backed his truck along the shoulder to the highway and then moved forward, first traveling in the rightmost lane, which was blocked to traffic by large barrels, and then merging into the rightmost of the travel lanes. Plaintiff was traveling in the same direction behind Kemp and her vehicle collided into the rear end of Kemp's truck, causing Plaintiff to suffer significant injuries.

The parties offer different interpretations of the meaning of Section 337.195 (1). However, the undisputed facts establish that at the time of the collision, Kemp was performing work on a highway. His removal of his truck from the location of the concrete pour was part of the work required of his employer, Pittman, in order to perform its obligations as a contractor or subcontractor with the FDOT. It is also undisputed that the crash at issue occurred within a construction zone in which Pittman and the other Defendants were acting as contractors or agents of FDOT.

The evidence further establishes that Plaintiff was under the influence of alcoholic beverages at the time of the collision. The affidavit of Bruce A. Goldberger, Ph.D. was timely filed and unrebutted by any factual record evidence. The affidavit establishes that Goldberger is an expert in Forensic Toxicology and competent to opine as to the effect alcohol has on the functioning and faculties of human beings. The affidavit explains the factual bases for Goldberger's conclusion that Plaintiff was under the influence of alcohol at the time of the collision. Moreover, the affidavit establishes that less than an hour after the collision, a blood specimen was drawn from Plaintiff and tested for blood alcohol concentration. The serum alcohol test result was 244 mg/dL, which corresponds to a blood alcohol concentration of approximately 0.212 grams of alcohol per 100 millimeters of blood. Under Section 316.1934 (1) (c), Florida Statutes, a driver with blood alcohol concentration of 0.08 grams of alcohol per 100 millimeters of blood is presumed to be impaired. For these reasons, Dr. Goldberger's affidavit is sufficient to establish that, at the time of the collision, Plaintiff was driving under the influence of alcohol. The sworn statements in the affidavit are unrebutted in the record and Plaintiff's argument regarding the lack of foundation for or competency ofDr. Goldberg's sworn statements are without merit.

Plaintiff argues that she needs additional time to conduct further discovery into the alleged intoxication of Plaintiff and other issues relating to the Defendants added in the Amended Complaint, filed December 8, 2021. However, Plaintiff failed to file, timely or otherwise, any affidavit or declaration stating facts showing why Plaintiff has been unable to conduct such discovery during the course of this civil action, including the entire 2022 calendar year. See Rule 1.510(d), Florida Rules of Civil Procedure. *See State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc.,* 48 Fla. L. Weekly D1555a (Fla. 1st DCA August 9, 2023).

Having determined that Plaintiff's claims are subject to Section 337.195(1), Florida Statutes, Plaintiff's operation of her vehicle is presumed to be the sole proximate cause of her injuries unless Plaintiff can overcome the presumption by evidence showing that gross negligence of any defendant was a proximate cause of her injuries. Even when viewing the record evidence in a light most favorable to her, Plaintiff has failed to present record evidence that would permit a reasonable jury to find that any Defendants committed an act of gross negligence that was a proximate cause of her injuries.

Defendants' argue persuasively that the record reflects no negligence by Defendant Kemp, as the driver of the cement truck, and that Plaintiff's actions in colliding into the rear of Kemp's truck was the sole proximate cause of the collision. Plaintiff's theory of the case is essentially that Kemp did not allow enough room between his truck and oncoming traffic as he changed lanes and merged into the first open lane of travel. There are three elements required to prove gross negligence: "(1) circumstances constituting an imminent or clear and present danger amounting to a more than normal or usual peril, (2) knowledge or awareness of the imminent danger on the part of the tortfeasor, and (3) an act or omission that evinces a conscious disregard of the consequences." *Electric Boat Corporation v. Fallen,* 343 So.3d 1218, 1220 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1325c]. *See also Moradiellos v. Gerelco Traffic Controls, Inc.,* 176 So.3d 329, 335 (Fla. 3rd DCA 2015) [40 Fla. L. Weekly D2047b], and *Vallejos v. Lan Cargo, S.A.,* 116 So.3d 545, 551-54 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1360a]. The actions of Defendant Kemp, even when viewed in a light most favorable to Plaintiff, at most amount to ordinary negligence, consisting of misjudging the speed and distance of oncoming traffic when he accelerated his truck and merged into the lane of travel. The evidence falls far short of showing more than a normal or usual peril on the highway, knowledge or awareness of imminent danger, or an act that evinces a *conscious* disregard of the consequences.

Accordingly, the undisputed facts in the record shows that Plaintiff was the sole proximate cause of the collision and that Defendants are entitled to summary judgment as a matter of law.

In support of their motions for summary judgment, Defendants also rely on the rear-driver presumption well established in Florida case law. *See Birge v. Charron,* 107 So. 3d 350, 362 (Fla. 2012) [37 Fla. L. Weekly S735a]. Florida law presumes that the rear driver's negligence is the sole cause of a rear-end motor vehicle collision and thus, at least initially, Plaintiff is presumed to be negligent, and her negligence is presumed to be the sole cause of the collision. However, Florida courts have recognized three specific fact patterns that may rebut this presumption. These are: (1) a mechanical failure, (2) a sudden and unexpected stop or unexpected lane change by the car in front, and (3) when a vehicle has been illegally and, therefore, unexpectedly stopped. *See Department of Highway Safety and Motor Vehicles v. Saleme,* 963 So.2d 969, 972 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2176c]. There is no evidence of a mechanical failure in Plaintiff's vehicle and Defendant Kemp was not stopped on I-295. Therefore, Plaintiff may only overcome the rear-driver presumption with evidence of a sudden and unexpected lane change by Kemp. There is no record evidence of such a lane change. On the contrary, record evidence shows that Kemp's merger into the open travel lane was neither sudden nor unexpected. It is undisputed that Kemp was accelerating in a closed lane, well ahead of Plaintiff, with his left turn signal on. He began merging into the travel lane well ahead of Plaintiff. Indeed, enough time elapsed for a third-party driver, who was traveling immediately behind Plaintiff, to see Kemp coming "from the cones to the road," slowdown, process the fact that Plaintiff

was not applying her brakes, and conclude that an accident was likely to occur because Plaintiff was not paying attention. Plaintiff has not adduced any material facts that dispute this evidence, which is necessary for Plaintiff to overcome the presumption. Defendants are therefore entitled to summary judgment on the alternative, additional ground that because Plaintiff rear-ended Defendant Kemp and has failed to rebut the presumption of negligence, Plaintiff's negligence is deemed to be the sole cause of the collision as a matter of law.

Accordingly, for the reasons stated, it is

ORDERED:

1. Defendants A. A. Pittman & Sons Concrete Company, Inc.'s and Leroy Kemp's Amended Motion for Summary Judgment, filed March 6, 2023, is GRANTED.

2. Defendant Acme Barricades, L.C.'s Joinder in the Motion for Summary judgment filed on behalf of Pittman and Kemp, filed May23, 2023, is GRANTED.

3. Defendant Gosalia Concrete Constructors, Inc.'s Motion for Summary Judgment, filed April 14, 2023, is GRANTED. and

4. Defendants Dragados USA, Inc.'s and Prince Contracting, LLC's Motion for Summary Judgment, filed April 21, 2023, is GRANTED.

5. Plaintiff, Tiffany Lauren Jackson, shall take nothing by this action and Defendants, A.A. Pittman & Sons Concrete Company, Inc., Leroy Kemp, Prince Contracting, LLC, Acme Barricades, L.C., Dragados USA, Inc., and Gosalia Concrete Constructors, Inc., shall all go hence without day.

6. This order does not adjudicate the Counterclaim filed by Defendant Leroy Kemp against Plaintiff, Tiffany L. Jackson, and that claim remains pending.

* * *

Torts—Contracts—Releases—Exculpatory clause—Negligence action against operator of truck driver training program and trucking company, which provided trucks and contracted with program to train its drivers, alleging injury stemming from a failure to install proper safety restraints for students who rode in back seat of cab —Defendants' motions for summary judgment on basis of release are denied—Release between plaintiff and program operator, in which plaintiff accepted all risks inherent in participating in training program, did not clearly and unequivocally inform plaintiff that she was releasing program operator from liability for type of negligence claim she brought because alleged cause of injury was not inherent in training of student drivers—Release between plaintiff and trucking company is ambiguous and did not clearly release company from liability for failure to provide safety restraints within its control—Motion for summary judgment arguing that training program operator is not vicariously liable for trucking company's negligence based on trucking company's status as an independent contractor is denied—There is substantial factual dispute over degree of control company exercised over operation of trucks used in training program

JENNIFER RUCKMAN, Plaintiff, v. CRST EXPEDITED, INC., COMPASS ROSE FOUNDATION, INC, doing business as J TECH INSTITUTE, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CA-007707-XXXX-MA. Division CV-A. August 14, 2023. Waddell A. Wallace, Judge. Counsel: Laurence C. Huttman, for Plaintiff. Abby R. Dyal and Clarence H. Houseton, for Defendants.

ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This case is before the Court on the Motions for Summary Judgment filed on behalf of Defendants, CRST Expedited, Inc. ("CRST") and Compass Rose Foundation, Inc., doing business as Jones Technical Institute ("J-Tech").

In support of its motion, CRST argues that Plaintiff, Jennifer Ruckman, released her claims against CRST in paragraph 13 of the Pre-Appointment Driver Training Agreement which she signed with CRST. J-Tech argues that Plaintiff released her claims against J-Tech under the terms of the J-Tech Student Waiver and Release Form, also signed by Plaintiff.

Exculpatory clauses, such as the ones at issue in this action, "that purport to deny an injured party the right to recover damages from another who negligently causes injury are strictly construed against the party seeking to be relieved of liability. *Gillette v. All Pro Sports, LLC,* 135 So.3d 369, 370 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D223d]. In addition, courts are required to read such clauses *in pari materia,* giving meaning to each of its provisions, to determine whether the intention to be relieved was made clear and unequivocal in the contract, such that an ordinary person would know what he was contracting away. *See Fresnedo v. Porky's Gym III, Inc.,* 271 So.3d 1185, 1186 (Fla.3d DCA 2019) [44 Fla. L. Weekly D1029a].

In *Fresnedo,* the plaintiff brought a negligence action against a gym seeking damages for serious injury sustained when he was knocked unconscious by another customer who was also using the gym. The release signed by plaintiff stated that gym members would assume full responsibility for any risk of bodily injury. . . due to the negligence of any of the clubs. The release also listed specific types of injuries included within the release, all of which related to the use of the gyms' facilities. The Third District held that, in giving meaning to all provisions of the release, the release was ambiguous because a reasonable person could believe that the release covered the types of injuries listed and that were related to the use of gym equipment, a distinctly different type of injury from that sustained by plaintiff. Accordingly, the intent to release the claim at issue was not "clear and unequivocal" and therefore would not support a summary judgment for the defense.

In this action, the release of CRIS provides that "Student hereby releases CRST from all liability for any injury, loss, claim or other damage Student may sustain except for injuries and losses caused by the gross negligence of CRST." However, contained in the same paragraph of the release document is the statement that, "Student understands that truck driving can be dangerous, and Student accepts all risks inherent in participating in Phase 1 and Phase 2."

Based on record evidence, the injury alleged by Plaintiff is not inherent in the training for which Plaintiff enrolled. Inherent risks would include the operation of a large truck on roads and highways and the operation of such a truck by student drivers. The negligence alleged by Plaintiff is the failure to install proper safety restraints for students occupying the truck while riding on the back seat area of the cab. There are disputed issues of fact as to whether any safety restraints on passengers in the rear were required by law. However, there is no issue that additional or different restraints could have been provided. Accordingly, the alleged cause of the injury was not inherent in the training of student drivers. For this reason, the CRST did not "clearly and unequivocably" inform Plaintiff that she was releasing CRST for the type of negligence claim she now brings in this civil action.

A similar analysis applies to the release between Plaintiff and J-Tech. One provision of the release Plaintiff signed on behalf of of J-Tech reads in pertinent part, "I release J-Tech from any and all liability for claims arising from the negligence of the Released Parties." The next provision in the same document, entitled "Assumption of the Risk," provides: "[J-Tech] does not knowingly approve "Hands On" training that pose[s] undue risk to their participants. However, any "Hands On" training carries with it potential hazards, which are beyond the control of [J-Tech] and its agents or employees." Reading these two provisions of the release together, it is neither clear nor unequivocal that an ordinary person would understand she would be releasing J-Tech for negligence in the failure to provide proper seat

belt or other safety restraints to persons riding in the rear of the truck. The outfitting of safety belts or other restraints would have been something within the control of J-Tech. The juxtaposition of these provisions creates "an ambiguity or confusion for a reasonable reader, rendering the exculpatory clause unenforceable." See *Fresnedo,* 271 3d at 1189.

CRST also moves for summary judgment based on the argument that J-Tech provided training as an independent contractor and thus CRST is not vicariously liable for any negligence on the part of J-Tech. The roles of agent and independent contractor are not mutually exclusive. *Stoll v. Noel,* 694 So.2d 701, 703 (Fla. 1997) [22 Fla. L. Weekly S177a]. A party's status as an independent contractor does not preclude a finding of agency. *Gradia v. Baptist Hospital, Inc.* 345 So.3d 385, 387 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1698b], *quoting from Villazon v. Prudential Health Care Plan, Inc.,* 843 So.2d 842, 854 (Fla. 2003) [28 Fla. L. Weekly S267a].

The issue turns on the degree of control the principal has over the work of the independent contractor. It is the right to control, rather than actual control that determines whether an agency relationship exists. *Gradia,* 345 So.3d at 387. The existence of an agency relationship is normally one for the trier of fact to decide. *Villazon,* 843 So.2d at 853.

In determining a motion for summary judgment, the Court must view the facts in the record in the light most favorable to the nonmoving party. *Matsushita Electric Co., Ltd. v. Zenith Radio Corporation,* 475 U.S. 574, 587 (1986). In doing so, the Court finds that a substantial fact dispute remains over the degree of control retained or exercised by CRST over the operation of the trucks operated by J-Tech. These trucks were owned by CRST and provided to J-Tech for use exclusively in training potential employees then under contract with CRST. These trucks were outfitted for and used by CRST in its on-the-road-operations. When provided to J-Tech, the vehicles were outfitted with safety belts for the front seats and a netting or some form of restraint for objects located in the rear of the driver compartment, which is the location where Plaintiff alleges she was injured. There is record evidence that CRST reserved the right to recall any of its trucks from the J-Tech training whenever needed by CRST for its own operations. This right of control thus arguably restricted J-Tech from making any modifications to the safety belts or other safety restraints in the cab. During the training, CRST provided an orientation speaker at J-Tech's location and screened all students for admission to the training program. Combined with CRST's actual and right to control the cab design, CRST's general oversight and participation in the training program renders the issue of agency one properly left for the trier of fact.

Accordingly, it is

ORDERED:

1. The Motion for Summary Judgment filed on behalf of Defendant CRST Expedited, Inc. on or about April 10, 2023, is **DENIED.**

2. The Motion for Summary Judgment filed on behalf of Defendant Compass Rose Foundation, Inc., doing business as J-Tech Institute, on or about February 3, 2023, is **DENIED.**

* * *

Insurance—Homeowners—Insured's action against insurer—Conditions precedent—Presuit notice—Section 627.70152 does not apply retroactively to insurance policy entered into before the statute's effective date

GREGORY and LISA KRNJAICH, Plaintiffs, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 6th Judicial Circuit in and for Pasco County. Case No. 22-CA-002763. January 16, 2024. Declan Mansfield, Judge. Counsel: Alexa Battisti, Battisti Law Group, Miami, for Plaintiffs. Jesse Peterson, Groelle & Salmon, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND PLAINTIFFS' 57.105 MOTION FOR SANCTIONS

THIS CAUSE having come before the Court this January 11, 2024 by phone, regarding the Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Cause of Action Pursuant to *Cole v. Universal Pro. & Cas. Ins. Co.*, (Fla. 6d DCA 2023) [48 Fla. L. Weekly D916a], and Plaintiff's 57.105 Motion for Sanctions, and the Court having considered the record, heard argument from counsel, and otherwise considered all relevant matters, it is hereby ORDERED AND ADJUDGED that:

1. The subject matter involves a homeowner's insurance policy dispute resulting after a plumbing loss.

2. The issue at hand is the applicability of Fla. Stat. §627.70152 to the subject case where the foregoing statute was amended after the issuance of the subject insurance policy.

3. In formulating its ruling, this Court relies on *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b], *Hughes v. Universal Property & Casualty Ins. Co.*, Case No. 6D23-296 (Fla. 6d DCA 2023) [49 Fla. L. Weekly D153a], *Sulzer v. Am. Integrity Ins. Co. of Florida*, 6D23-391, 2024 WL 79882 (Fla. App. 6 Dist. Jan. 8, 2024) [49 Fla. L. Weekly D132a].

4. The insurance policy at issue pre-dates the amendment of §627.70152.

5. Pursuant to *Menendez* and *Hughes*, §627.70152 does not apply retroactively to an insurance policy issued prior to the enactment of the statute because the statute does not include clear evidence of intent for the statute to apply retroactively and because the statute is substantive and cannot constitutionally apply retroactively.

6. Consequently, the Defendant's Motion Dismiss is hereby **DENIED.**

7. Plaintiff's 57.105 Motion for Sanctions is hereby **DENIED**.

8. The Parties are ordered to attend mediation within the next sixty (60) days.

* * *

Criminal law—Possession of controlled substances and paraphernalia—Driving under influence—Evidence—Statements of defendant—Search and seizure—Vehicle—Accident report privilege does not apply to statements to officer who did not conduct crash investigation—Defendant's pre-*Miranda* statements are admissible where she was not in custody or subject to any restraint at time she made statements—Officer had probable cause to search vehicle console after defendant admitted to having cannabis in console—Officer had probable cause to search entire vehicle where, upon opening car door to search console, officer smelled odor of cannabis in vehicle that was not confined solely to console—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. CRYSTALLINE GONCALVES, Defendant. Circuit Court, 10th Judicial Circuit in and for Polk County. Case No. 53-2023CF-003233-A000-XX. Section F4. December 13, 2023. Jalal A. Harb, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

THIS MATTER is before the Court upon Defendant's *Motion To Suppress Statements And Evidence* ("motion"), filed on September 18, 2023, pursuant to Florida Rule of Criminal Procedure 3.190(g). After review of the allegations, the applicable law, and observing and evaluating the testimony presented at the evidentiary hearing, the Court finds as follows:

I. PRELIMINARY MATTERS

Defendant was charged by information with possession of 3, 4 methylenedioxymethamphetamine (MDMA) (count one), possession of cocaine (count two), possession of drug paraphernalia (count three)

and driving under the influence (person/property damage) (count four) arising out of an incident on April 17, 2023. In her motion, Defendant seeks to suppress statements she made to law enforcement officers, "including that she had marijuana in her vehicle" and evidence found in her car, including, but not limited to, cannabis, cocaine, MDMA and drug paraphernalia. As grounds therefor, Defendant contends her statements about having cannabis in her vehicle are protected by the accident report privilege under § 316.066, Fla. Stat. or, alternatively, were obtained in violation of her *Miranda* rights, and the evidence was illegally seized without a warrant and is "the tainted fruit of the poisonous tree," having been obtained as a result of illegally-obtained statements and a search exceeding the scope necessary to follow up thereon. The Court held a hearing on the motion on November 1, 2023. Present at the hearing were Defendant and her attorney, Amy Thornhill, Esquire. Avedis Chris Kotchounian, Esquire appeared on behalf of the State. At the hearing, the State presented testimony from Bartow Police Department Officer Robert Hamilton. Defense counsel presented no witnesses.

II. FINDINGS OF FACT

Having weighed the credibility of the witness at the hearing, the Court will make the following findings of fact:

Officer Robert Hamilton ("Hamilton") has been employed with the Bartow Police Department for over one year and has almost ten years' experience total with law enforcement. While hired with a previous agency, he was assigned to the DUI unit for two years.

Hamilton testified that on April 17, 2023, he responded to the scene of an accident at Highway 17, in Bartow, Florida, involving Defendant's vehicle for assistance. Officer John Girgis ("Girgis"), the first officer on site, was the primary officer at the scene. Girgis conducted the traffic crash investigation. Girgis authored the crash report. Hamilton did not speak to Defendant about the vehicles involved in the incident, the names of the other vehicle's occupants, possible witnesses to the incident or any insurance information.

At some point, Hamilton asked Defendant whether she was "okay." At the hearing, Hamilton could not recall whether when he first started talking with Defendant, Girgis had Defendant's driver's license. While they were conversing, Hamilton detected the odor of alcohol, noticed her pupils were dilated and observed she could not stand still. Defendant denied consuming any alcohol when Hamilton inquired; when Hamilton said he could smell alcohol, Defendant replied it was hand sanitizer. When Hamilton asked Defendant whether she had used any narcotics, she stated that she had used cannabis and that cannabis was in the vehicle's center console. Hamilton then told Girgis that Defendant had advised there was cannabis in the "center console area" and that he "might want to retrieve it."

Hamilton testified Girgis said that as soon as he opened the car door, he smelled the odor of cannabis. Girgis then proceeded to search the vehicle and found a plastic bag with white, powder residue; the cannabis; a crystallized rock and an open container of alcohol. Hamilton admitted Girgis found the cannabis in the center console and kept searching other areas of the car. He also testified that he was standing with Defendant, so he did not witness everything searched inside the vehicle.

After the items tested positive, Hamilton advised Defendant that based on the substances testing positive for narcotics and his belief she was intoxicated, he was going to *Mirandize* her, because he was going to conduct a criminal investigation thereof. Hamilton read Defendant her *Miranda* rights at the scene.

Hamilton testified that he conducted the DUI investigation, including a field sobriety test, at the Bartow Police Department, explaining since Defendant was being arrested for the narcotics, he thought it would be a safer environment. Girgis did not participate in the DUI investigation. Hamilton authored the DUI report.

Lastly, Girgis was not present at the evidentiary hearing.

III. CONCLUSIONS OF LAW

A. The accident report privilege does not apply to Defendant's statements

Admissibility of the statements at issue in the present case turns on the applicability of the accident report privilege, which states, in relevant part:

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

§ 316.066(4), Fla. Stat. (2023). Hamilton testified that he did not conduct the crash investigation, he did not ask Defendant questions pertaining to the investigation of the crash and he did not author the crash report. Consequently, there are no statements by Defendant that qualify as a "crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report. . . ." *See id.*

At the evidentiary hearing, defense counsel argued Hamilton failed to "utter the words" to signal the "changing of the hats" from a crash investigation to a criminal investigation until after Defendant had already stated that she had used cannabis and that it was in the vehicle's center console, relying on *State v. Blocker,* 360 So. 3d 742 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a]. The Court finds counsel's reliance on *Blocker,* however, is misplaced. Hamilton was never involved in the crash investigation. Therefore, "[b]y telling [Defendant he was going to *Mirandize* her and conduct a criminal investigation based on the substances testing positive and his belief she was impaired, Hamilton] adequately informed [Defendant] that the [ ] encounter had moved to a new phase. It was not necessary for [Hamilton] to say he was 'switching hats' because he never wore the hat of an accident investigator" in the first place. *See id.* at 746 (holding deputy, who was called later to crash scene to investigate suspected impaired driver that announced he was conducting a criminal DUI investigation, adequately advised driver that a criminal investigation had started). Accordingly, the Court finds that the protections of the accident report privilege are inapplicable to Defendant's statements.

B. Defendant's statements are admissible because she was not in custody

The Court finds Hamilton was not required to give *Miranda* warnings because Defendant was not in custody at the time she made any statements about using marijuana or cannabis being located in the vehicle.

To protect a suspect's Fifth Amendment right against self-incrimination during a custodial interrogation, that person must be informed of his or her *Miranda* rights. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *see also Bannister v. State,* 132 So. 3d 267, 275 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D117a]. "*Miranda* warnings apply whenever a person is in the *custody* of the police and the police subject him or her to express questioning, or its functional equivalent, to a degree that the police should reasonably expect to elicit an incriminating response." *Bannister*, 132 So. 3d at 275 (emphasis in the original) (citation omitted). "Where . . . the custody . . . prong is absent," however, "*Miranda* does not require warnings." *Id.* (citations omitted); *see also*

Blocker, 360 So. 3d at 749 (observing the safeguards provided by *Miranda* apply only if an individual is in custody and subject to interrogation—i.e., where either the custody or interrogation prong is absent, *Miranda* does not require warnings) (citation omitted).

The Court finds the *Blocker* case particularly instructive on this issue. In *Blocker*, the defendant was involved in an accident with a police vehicle. *Id.* at 744. The deputies at the scene conducted a crash investigation; a different deputy, Sapp, was later called to the scene to conduct the DUI investigation. *Id.* at 744-45. After finding the accident report privilege inapplicable to Defendant's statements as to Sapp since he was never involved in the accident investigation, *id.* at 746-47, the *Blocker* court also found that Sapp was not required to give *Miranda* warnings because the defendant was not in custody during the DUI investigation. *Id.* at 749.

The *Blocker* court noted that " '[p]ersons temporarily detained' in a roadside stop 'are not 'in custody' for purposes of *Miranda.*' " *Id.* (quoting *State v. Whelan*, 728 So. 2d 807, 809 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D640b] (citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The court in *Blocker* then reviewed the *Berkemer* decision, observing the United States Supreme Court in *Berkemer* "held that the roadside questioning of a motorist detained pursuant to a traffic stop did not constitute 'custodial interrogation' for *Miranda* purposes." *Id.* at 749 (citing *Berkemer,* 468 U.S. at 442, 104 S.Ct. 3138). There, the driver was stopped after being seen weaving on the interstate. *Id.* at 749 (citing *Berkemer,* 468 U.S. at 423, 104 S.Ct. 3138). When the driver exited the car, the officer observed he had difficulty standing and concluded the driver "would be charged with a traffic offense" and his "freedom to leave the scene was terminated" but he "was not told that he would be taken into custody." *Id.* After performing a field sobriety test, upon being asked by the officer if he had used any intoxicants, the driver stated that "he had consumed two beers and had smoked several" marijuana joints. *Id.* The driver was then placed under arrest, transported to jail and subsequently "charged with operating a motor vehicle while under the influence of alcohol and/or drugs." *Id.* (citing *Berkemer,* 468 U.S. at 423-24, 104 S.Ct. 3138). The *Blocker* court noted that the *Berkemer* Court determined the driver was not in custody for *Miranda* purposes "and that nothing in the record indicated 'that [the defendant] should have been given *Miranda* warnings at any point prior to the time [the officer] placed him under arrest.' " *Id.* (citing *Berkemer,* 468 U.S. at 441, 104 S.Ct. 3138) (alterations in *Blocker*). The court in *Blocker* observed that the *Berkemer* Court found the driver " 'failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest[.]' " *Id.* (citing *Berkemer,* 468 U.S. at 442, 104 S.Ct. 3138). The court in *Blocker* also remarked that the *Berkemer* Court noted that although the officer decided to take the driver into custody at the time he exited the vehicle, that intent was never expressed to the driver and such an "unarticulated plan has no bearing on the question [of] whether a suspect was 'in custody' at a particular time." *Id.* at 750 (citing *Berkemer,* 468 U.S. at 442, 104 S.Ct. 3138).

The *Blocker* court then turned to *State v. Burns,* 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a], as an example of a Florida case applying *Berkemer. Id.* The court in *Blocker* observed that in *Burns*, where the officer viewed erratic driving and detected signs of alcohol once the vehicle was stopped and the driver exited the car, the district court concluded the case concerned a routine traffic stop in which the driver "was asked for his license and registration and to perform field sobriety tests[,] [t]he stop was short . . ., occurred in a public area, only one officer was present, and the tests were simple[,]" and therefore the driver was not in custody, because though "his freedom of action was curtailed, as it is in any detention, [the defendant] did not bring forth any evidence that he was subjected to any restraints comparable to those found in a formal arrest." *Id.* (citing *Burns,* 661 So. 2d at 842-44). The court in *Blocker* also observed that it similarly concluded in *State v. Bender*, 357 So. 3d 697 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D102a], "that the defendant was 'not subject to the restraints of a formal arrest' where the defendant was told the officer was conducting a DUI investigation and was transported in a patrol vehicle to a nearby parking lot to safely conduct field sobriety exercises[.]" *Id.*

The *Blocker* court determined that the defendant, like the defendants in *Berkemer, Burns,* and *Bender,* was not "in custody" for the purposes of *Miranda* when the deputy conducted his DUI investigation. *Id.* The *Blocker* court reasoned the deputy never told the defendant he was in custody or otherwise not free to leave, and the defendant was not subject to the restraints of formal arrest, as the deputy repeatedly told the defendant that he did not have to answer questions, the deputy did not accuse the defendant of committing any crime and the fact that the defendant walked a short distance to a safer location that was open to the public to perform field sobriety exercises did not transform the stop into a de facto arrest. *Id.* at 750-51.

Applying the principles expressed in *Berkemer, Blocker, Burns* and *Bender* to the instant case, the Court finds Defendant was not in custody for *Miranda* purposes when she spoke with Hamilton and expressed that she used cannabis and that marijuana was in the vehicle. First, no evidence was presented to the Court that Defendant was ever told she was in custody or otherwise not free to leave the scene. Also, though defense counsel argued at the evidentiary hearing that Girgis had taken Defendant's driver's license, no evidence was presented to the Court showing Girgis possessed Defendant's license at the time she spoke with Hamilton. Second, Defendant was not subject to the restraints of a formal arrest when she made the statements to Hamilton. Two officers were at the scene, an open, public area; Hamilton, however, was the only officer present when he was speaking with Defendant. He also merely asked Defendant whether she consumed any alcohol, which she denied and blamed any odor on hand sanitizer, and further asked whether she had used any narcotics, to which she freely admitted and said was in the vehicle. Such questions cannot be viewed as Hamilton confronting Defendant with evidence of guilt. As such, Defendant's statements are admissible.

C. Law enforcement had probable cause to search Defendant's vehicle

At the hearing, defense counsel argued that law enforcement did not have Defendant's permission to search her vehicle, and assuming, *arguendo,* that Defendant's remark that cannabis was in the center console is construed as consent to search, her consent was limited to the console and the search should have stopped once the cannabis was found therein. The State asserted all the evidence in the car would have inevitably been discovered, because Defendant was arrested for driving under the influence and the vehicle was subject to an inventory search.

The Court finds that, based on the totality of the circumstances, the officers had probable cause to search Defendant's vehicle. "A police officer has probable cause to conduct a search when the facts available to [the officer] would warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present." *Florida v. Harris,* 568 U.S. 237, 243, 133 S.Ct. 1050, 1055, 185 L.Ed.2d 61 (2013) [24 Fla. L. Weekly Fed. S18a] (alterations in original; internal quotations marks and citation omitted). Probable cause is a familiar concept in the law. As the name suggests, probable cause "deals with probabilities." *Maryland v. Pringle,* 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) [17 Fla. L. Weekly Fed. S83a] (citation omitted). It " 'is a fluid concept—turning on the assessment of

probabilities in particular factual contexts—not readily, or even usefully reduced to a neat set of legal rules.' " *Id.* at 370-371, 124 S.Ct. 795 (quoting *Illinois v. Gates,* 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). "The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *Id.* at 371, 124 S.Ct. 795 (citations omitted). "[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt[.]" *Id.* at 371, 124 S.Ct. 795 (citation omitted). Thus, the totality of the circumstances test for probable cause is an "all-things-considered approach" that calls for consideration of any and all facts that a reasonable person would consider relevant to a police officer's belief that contraband or evidence of a crime is present. *See Harris,* 568 U.S. at 244, 133 S.Ct. at 1055-56.

There are three ways by which law enforcement officers may validly conduct a warrantless search of a motor vehicle: 1) incident to a lawful arrest of a recent occupant of the vehicle; 2) under the "automobile exception," which is based on probable cause to believe the vehicle contains contraband or other evidence of a crime; and 3) pursuant to an inventory search. *State v. Clark,* 986 So. 2d 625, 628 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D580a] (citations omitted). The "automobile exception" holds that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron,* 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (citation omitted). The odor of marijuana can satisfy the probable cause requirement to search a vehicle. *See Owens v. State,* 317 So. 3d 1218, 1220 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D699a].

Turning to the instant case, while Hamilton was speaking with Defendant, she admitted to using cannabis and to having cannabis in the center console of her vehicle, which Hamilton then advised Girgis thereof. Thus, Defendant's admissions gave Girgis sufficient probable cause to conduct, at a minimum, a search of the automobile's center console, because the facts available to him, and Hamilton, at the time, warranted a reasonable belief that evidence of a crime was present therein. In the course of carrying out the search of the vehicle's console and to gain access thereto, it was necessary and appropriate for Girgis to open the car door. And at the evidentiary hearing, Hamilton testified that when Girgis opened the door, he detected the odor of cannabis. At that juncture, Girgis had smelled, but not yet located, any marijuana, and the odor of cannabis was not confined to a particular location within the vehicle. The Court finds Girgis' detection of the smell of marijuana was an independently sufficient basis for probable cause to search the entire vehicle, acquired during the course of conducting the search of the car's console. *See Owens.* 317 So. 3d at 1220 (holding that "regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell . . . from a vehicle continues to provide probable cause for a warrantless search of the vehicle.") (citations omitted); *see also Baxter v. State,* No. 5D23-118, 2023 WL 7096645, at *4 (Fla. 5th DCA Oct. 27, 2023) [48 Fla. L. Weekly D2084a] (observing *Owens* holds that plain smell is still probable cause); *Johnson v. State,* 275 So. 3d 800, 802 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1752a] (noting that "the possibility that a driver might be a medical-marijuana user would not automatically defeat probable cause"); *State v. Sarria,* 97 So. 3d 282, 284 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2187a] (finding "[o]nce [officer] detected the distinct odor of raw cannabis, he had probable cause to search the car and arrest [defendant]); *State v. Williams,* 967 So. 2d 941, 941 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2188a] (finding "the odor of burnt cannabis emanating from a vehicle constitutes probable cause to search all occupants of that vehicle"); *Kimball v. State,* 951 So. 2d 35, 37 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D618c] (holding that the odor of raw marijuana coming from a vehicle provided probable cause to search it); *State v. T.P.,* 835 So. 2d 1277, 1278 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D385a] (holding "upon approaching T.P.'s car and smelling previously burnt marijuana, the officer had probable cause, based upon the smell alone, to detain and search T.P. and his vehicle for contraband.") (citations omitted). As such, probable cause was present for the search of Defendant's vehicle.

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED** that Defendant's *Motion To Suppress Statements And Evidence* is hereby **DENIED.**

* * *

Criminal law—Probation revocation—Domestic violence—No merit to argument that defendant's probation should not be revoked because victim consented to battery—Victim could not consent to battery as matter of law and did not freely, knowingly, and voluntarily consent to being battered

STATE OF FLORIDA, Plaintiff, v. KIERSTON HUNT, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F19-12595B. January 12, 2024. Milton Hirsch, Judge.

OMNIBUS ORDER

At a time when he was on probation, Kierston Hunt, by his own admission, "slapped [his girlfriend] like that . . . you know, backhand. . . . I pushed her. I pulled her wig off. I kicked her when she was running up the stairs. . . . Yeah . . . I did that. I can't lie." Transcript of hearing of Nov. 20 at 91. In making this admission, Hunt told the police nothing they didn't already know. Mr. Hunt did his slapping, pushing, and kicking in front of the apartment complex in which he and his victim lived at the time. The entire course of conduct was recorded on video by a surveillance camera. The State seeks a finding that Mr. Hunt, by his admitted and video-recorded acts of domestic abuse, violated his probation.

The victim of the demised misconduct is Mr. Hunt's girlfriend, Gwen Maise. Ms. Maise, in her testimony, was clearly reluctant to inculpate Hunt. When the videotape was played for her and she was asked the foundational question whether it fairly and accurately depicted that which it purported to depict, transcript of hearing of Dec. 18 at 13, she replied that it did not. What she meant by her answer, however, was not that the video was flawed or distorted, but that it reflected only a brief portion of her interaction with Mr. Hunt in the context of a larger course of dealing. "I mean, it was a lot of things that happened aside from that area right there." *Id.* The direct examination then proceeded as follows:

Q: Is that a recording of what happened on that day?

A: Some of it, yeah.

Q: Okay. Now I'm understanding, Ms. Maise, that there may be other parts of your relationship and fights that may have happened before this incident by the staircase. And after—

A: Correct.

Q: Or the history of your relationship. But is this a fair and accurate representation of what happened at the staircase?

. . .

A: At that night, I wouldn't say its fair and accurate only because it only shows, right, that area by the stairs, not leading up—

BY THE COURT: I think that's what she—ma'am, that's what she's asking. Just as far as what it shows, is it accurate? Is that what happened?

Q: Is that what happened at that staircase on December 30 of 2022, irrespective of what happened before and after?

A: I would still say no. I mean—

. . . I would still say no, that's not accurate.

Q: Why is it not accurate?

A: Because there was things done that's not in the view of this

video in particular . . .

Id. at 14-15. The prosecutor was, eventually and with much pulling of teeth, able to establish what was perfectly obvious to begin with: that for purposes of the evidentiary requirement that a photograph or videotape fairly and accurately depict that which it purports to depict, *see* Fla. Stat. § 90.901; *see, e.g., Dolan v. State*, 743 So. 2d 544, 545 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1708a], the videotape was entirely admissible. Transcript of hearing of December 18 at 16. The pulling of teeth was made necessary by Ms. Maise's great reluctance to inculpate Mr. Hunt.

But it went further than that. At the conclusion of a lengthy cross-examination, defense counsel asked, "Mr. Hunt did not hit you against your will on December 30, 2022?" Ms. Maise replied that he did not. *Id.* at 29-30. She could not by that answer have intended to deny that Hunt hit her—it was more than clear from the videotape that he had done so. What she intended to deny was that it was against her will.

That denial was consistent with the testimony that preceded it. Ms. Maise described her relationship with Mr. Hunt as a tempestuous one in which each was in the habit of fighting, verbally and physically, with the other. *Id.* at 20 *et. seq.*[1]

Thus there are two issues posed by the present status of this case: As a matter of law, *could* Ms. Maise consent to the beating she received at Mr. Hunt's hands, thus rendering his conduct less than wrongful? And as a matter of fact, *did* Ms. Maise so consent?[2]

I. As a matter of law, can Ms. Maise consent to be beaten?

In *State v. Conley*, 799 So. 2d 400 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2684a], Judge Warner, in her concurrence, states the general rule: consent is not a defense to battery. *Conley*, 799 So. 2d at 402 (Warner, J., concurring) (citing *Lyons v. State*, 437 So. 2d 711, 712 (Fla. lst DCA 1983)). Because "the offense in question involve[s] a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense." W. E. Shipley, *Consent as Defense to Charge of Criminal Assault and Battery,* 58 A.L.R. 3d 662 § 2(a) (1974). Battery, pursuant to Fla. Stat. § 784.03, may be committed one of two ways: either by actually and intentionally touching another person without the consent of that person, *see* § 784.03(1)(a)1; or—as was the case here—by intentionally causing harm to another person, *see* § 784.03(1)(a)2. The latter subsection, unlike the former, makes no reference to consent or the absence of consent. Consent is not a defense to battery as defined under that subsection.

The testimony of the victim in *Conley* was remarkably similar to the testimony of Ms. Maise:

> BY THE COURT: Who, which one of you initially had physical contact?
>
> THE WITNESS: I did.
>
> THE COURT: And if you were struck in the process it was in retaliation for what you did?
>
> THE WITNESS: Yes.

The trial court later asked the victim, "So are you consenting to the action that he took that morning?" The victim answered, "yes." *Conley*, 799 So. 2d at 403. The Fourth District did not accept that theory of defense in *Conley*. I cannot accept it here.

In *Lyons*, *supra*, the court cited with approval the following language from the Supreme Court of New Mexico: "Whether or not the victims of crimes [of domestic violence] have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in prohibiting and preventing such acts as this." *Lyons*, 437 So. 2d at 712 (quoting *State v. Fransua*, 510 P.2d 106 (N.M. 1973)). *See also* Fla. Stat. § 741.2901(2) ("It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter").

I conclude that, as a matter of law, Ms. Maise could not consent to being battered as she was in this case. Although that resolves the matter at bar, for completeness of the record in the event of appeal I consider the second question, *viz.*, whether as a matter of fact Ms. Maise gave her consent to be battered.

II. As a matter of fact, did Ms. Maise consent to be beaten?

Consent can come in the form of a written document, but the law does not and indeed could not require a writing, signed and notarized, for every consent to be effective. The overwhelming majority of valid consents given in everyday life are given orally, or manifested by a course of conduct. Ms. Maise appears to take the position—at least she did during her testimony—that she and Mr. Hunt have, by an ongoing course of conduct between them, manifested their mutual consent to the use of violence in their relationship.

Of course the law distinguishes between consent and mere acquiescence. Acquiescence is assent, but not consent. It is passive, not active. It is an act of submission, not of volition.[3] Cases illustrating this distinction are often found in the search and seizure context, *see, e.g.*, *State v. Hall*, 201 So. 3d 66 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1868a], but they are by no means confined to that context. The issue in *Stevenson v. Brosdal*, 813 So. 2d 1046 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D888a] was "whether a nonresident who consents to the operation of his motor vehicle in [Florida] has sufficient 'minimum contacts' with the state for its courts to have jurisdiction over the nonresident." *Stevenson,* 813 So. 2d at 1047. In resolving that issue, the *Stevenson* court distinguished *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). *Kulko* involved a suit over child support between an ex-wife domiciled in California, and her ex-husband domiciled in New York. Regarding the presence or absence of minimum contacts sufficient to enable California to exercise jurisdiction over the ex-husband, the California courts seized upon what they termed the ex-husband's "consent" in permitting a child of the marriage to live with the ex-wife. But the Supreme Court found "that the act of the father was more an acquiescence in the interests of family harmony, rather than consent." *Stevenson*, 813 So. 2d at 1049 (citing *Kulko*, 436 U.S. at 94).

Gwen Maise testified in the tiny courtroom over which I preside, seated scarcely beyond arm's-reach of the defendant. It was clear from her demeanor that she was concerned, not only with what had gone before, but also with what lay ahead. She benefits from any financial contribution that Mr. Hunt can make toward their mutual support, and toward that of her children. She benefits from the care, such as it is, that he provides to her and to those children. Apparently an occasional beating is the price of those benefits. She submits to the price. She does not consent to the beatings.

One who consents makes, willingly, what seems to her the most desirable of all available choices. One who acquiesces makes, grudgingly, what seems to her the least undesirable of all available choices. However much they may appear to be the same or similar, these are different things.

I was carefully attentive to Ms. Maise's testimony. I am not in the least persuaded that she consented—freely, knowingly, voluntarily—to be beaten. I am persuaded that, like many a battered wife or girlfriend, she views the alternative to abuse as worse than the abuse itself. I am persuaded that, like many a battered wife or girlfriend, she views the consequences of testifying fully and candidly about the abuse as more abuse, and worse abuse. Whatever that is, it is not what the law knows as consent.

Defendant's motion to suppress his statement is denied. I find the defendant in violation of his probation. Sentencing will be set by further order.

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[1]No doubt to the great disappointment of readers of this order, I note that the

fighting was not a form of foreplay or otherwise sexual in nature. Mr. Hunt and Ms. Maise simply have a violent relationship.

[2]Despite defense counsels' unrelenting and entirely commendable efforts to create other issues, there are none. The videotape, notwithstanding repeated objections to its admission, was admissible. So, too, was Mr. Hunt's confession—although I have made, and will make, little use of it in resolving the matters before me. Defense counsel argued that Hunt was wrongfully arrested, and that therefore his confession should be excluded. There was nothing remotely wrongful about Mr. Hunt's arrest. But even if there had been, his confession was admissible. Yes, as a general rule a confession obtained during custodial interrogation after an illegal arrest is inadmissible at trial; but it can be rendered admissible if intervening events between time of arrest and time of confession purged the taint of the unlawful arrest. *See*, *e.g.*, *Adams v. State*, 830 So. 2d 911 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2502a] (citing *Brown v. Illinois*, 422 U.S. 590 (1975); *Roman v. State*, 475 So. 2d 1228 (Fla. 1985)). Having heard the audiotape of the interrogation of Mr. Hunt, and having received his own testimony and that of the police officers, I am entirely satisfied that any taint associated with a hypothetically wrongful arrest was purged, and the ensuing confession properly received.

[3]At the margins, the distinction between acquiescence and consent is drawn only with difficulty. Although he uses the word "consent," Polonius is clearly referring to acquiescence when he informs the king that his son Laertes, "hath, my lord, wrung from me my slow leave/By laborsome petition, and at last/Upon his will I sealed my hard consent." Wm. Shakespeare, *Hamlet,* Act I sc. 2.

* * *

Trusts—Revocable trust—Bond—Requirement to post—Action by beneficiary of trust against trustee alleging breach of fiduciary duty, constructive trust, undue influence, and lack of mental capacity related to purchase of certain trust assets by trustee and seeking determination of whether trust's bond provision is enforceable under Florida law—Trust provision that requires beneficiary to post $200,000 bond to ensure payment of attorney's fees in event beneficiary does not prevail in litigation over sale of asset is lawful where provision does not purport to penalize beneficiary for litigation by loss of legacy or devise—Further, bond requirement does not impermissibly restrict beneficiary's access to court—Beneficiary is required to post bond or suffer dismissal of complaint

WILLIAM L. RAMOS, Plaintiff, v. MICHAEL HALPERN (TR), et al., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-034890-CA-01. Section CA22. May 19, 2022. Beatrice Butchko, Judge. Counsel: Hugh J. Morgan, Law Office of Hugh J. Morgan; Nichole J. Segal, Burlington & Rockenbach, P.A., West Palm Beach; and Dale Noll, Akerman LLP, for Plaintiff. Glen H. Waldman and Marlon Weiss, Armstrong Teasdale LLP, for defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant Michael Halpern's Motion for Summary Judgment as to Count IV of the Amended Complaint of William L. Ramos, Jr. The Court has reviewed the motion and response thereto (albeit untimely), including the record in this case. The Court also heard argument on April 25, 2022. Being fully advised in the premises, it is **ORDERED AND ADJUDGED** that the Motion is **GRANTED**.

FINDINGS OF FACT

1. This litigation was initiated by Ramos, a beneficiary of the Matilde Generosa Ramos Revocable Trust ("the Trust"), following the purchase of certain trust assets by Michael Halpern, Esq., an attorney who was also designated as a successor trustee to the Trust.

2. Under the terms of the Trust, after Matilde Ramos' ("the Grantor") death, Halpern was authorized to purchase, at fair market value, the Grantor's interest in specifically identified assets. Article VI, Section L.2. of the Trust provided:

> Finally, **no beneficiary under Article IV may contest the purchase price of any interest to be sold to MICHAEL HALPERN, ESQ.**, under the terms of this subparagraph **unless** such beneficiary can demonstrate by clear and convincing evidence that (i) the appraiser did not use a justifiable fair market value for such interest based upon valuation guidance used by the Internal Revenue Service, tax authorities, the Tax Court and other courts in valuing such closely-held interests for Federal estate tax purposes, (ii) that MICHAEL HALPERN, ESQ., improperly influenced the appraisers through improper communications with them and (iii) **the challenging beneficiary places a bond of Two Hundred Thousand Dollars ($200,000) with the court to ensure payment of attorneys' fees** under Fla. Stat. §§ 733.106 and 736.1001 et seq. in the event that the beneficiary is not the prevailing party for such proceedings**; it being GRANTOR's intent to minimize any litigation** unless it can be shown that the appraiser was improperly influenced by MICHAEL HALPERN, ESQ., and did not value such interest utilizing applicable tax principles then existing; and this subparagraph shall be construed in accordance with GRANTOR's stated intent.

(Emphasis added).

3. Following the Grantor's death, Ramos filed a complaint (and later, an amended complaint) against Halpern, alleging claims for: (1) breach of fiduciary duty; (2) constructive trust; (3) undue influence and lack of mental capacity; and (4) declaratory judgment (which existed only in the Amended Complaint).

4. Halpern filed a motion to dismiss, citing Ramos' failure to comply with the Trusts provision requiring a challenging beneficiary to post a $200,000 bond. Thereafter, Ramos failed to post the mandatory bond and the action was initially dismissed without prejudice, giving Ramos a further opportunity to post the bond, and when that did not happen, it was dismissed with prejudice. At that time, consistent with prevailing law, the Court did not asses the viability of the clause requiring the posting of the $200,000 bond and simply determined that a condition precedent of contesting the claims asserted by Ramos, as contained in the Trust documents sued on, was not complied with.

5. Ramos took an appeal of that order. On review, the Third District remanded for further proceedings on Count 4 regarding the enforceability of the $200,000 bond, "because the declaratory judgment count did not 'contest the purchase price of any interest to be sold' to Halpern, and thus did not trigger the Trust's bond requirement." *Ramos v. Halpern,* 2021 WL 5617440, at *1 (Fla. 3d DCA Dec. 1, 2021) [46 Fla. L. Weekly D2582a].

6. The issue of whether the $200,000 bond provision is appropriate under Florida law or alternatively constitutes an unenforceable penalty under Florida law is now squarely before this Court. The parties stipulate that there are no disputed facts precluding summary judgment.[1]

CONCLUSIONS OF LAW

1. Pursuant to Section 736.1108, Fla. Stat., "a provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable." Fla. Stat. § 736.1108(1).

2. This statute codifies the public policy that a determination of an instrument's validity is essential to the estate disposition process and, therefore, "a beneficiary cannot be forced to choose between the right to contest an instrument and the right to take under it . . . ." *Dinkins v. Dinkins,* 120 So. 3d 601, 602-03 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1607a].

3. Whether a provision in a trust instrument can be characterized as an unenforceable penalty depends on whether the beneficiary under the instrument "is penalized by the loss of his interest in the legacy or devise" when he contests it. *See Porter v. Baynard,* 28 So. 2d 890, 899-900 (1946) (emphasis added) (Buford, J., concurring in part) (quoting Wills and Administration of Estates in Florida, 2d Ed., page 301, § 180).

4. Consistent with these general precepts, the Court finds that *Dinkins* is highly persuasive and compels the conclusion that the $200,000 bond requirement at issue in this case does not "purport to penalize" as that phrase is understood in the trust code.

5. In *Dinkins,* the Fifth District found that a trust provision that was substantially more onerous that the bond requirement here was appropriate and comported with the law. The challenged provision in *Dinkins* forced the beneficiary to choose between forfeiting her right to contest the trust in exchange for $5 million, or allowing her to contest the trust and receiving a less valuable statutory minimum instead of the $5 million. The court upheld the provision, reasoning that it was not a penalty because the beneficiary was guaranteed to receive an option "at least as valuable as the statutory minimum" in exchange for her forfeiture of her right to contest the trust. *Id.* at 603.

6. Here, with even greater reason than the challenged clause in *Dinkins,* the bond requirement cannot be construed as a penalty because it ***does not force any forfeiture whatsoever***.

7. Indeed, irrespective of whether Ramos contests any asset sale pursuant the Trust, Ramos is still guaranteed one-third of the Trust residue. Ramos is not required to forfeit any of legal rights to obtain it. All he has to do is post a bond "to ensure payment of attorneys' fees" in the event that he is not the prevailing party in the litigation.

8. If Ramos wins the litigation, he gets the bond back. If he never brings litigation, he does not need to post the bond. If he loses, he is still subject to the same fee-shifting provision,[2] and is no worse off. In these circumstances, the Court finds that the bond provision does not purport to penalize him because it does not threaten his legacy or devise in any fashion.

9. The Court notes Ramos's untimely and newly-asserted argument[3] that a potential Trust challenge would require Ramos to pay a bond premium which would be non-refundable, however, this argument is not persuasive, initially, because there is no evidence of such matters before the Court. And even if Ramos submitted such evidence,[4] his choice to pay a premium rather than the post the full bond amount merely reflects a choice between alternatives, as in *Dinkins,* which still guarantees Ramos his legacy and therefore does not constitute a penalty as that term is understood in the Trust Code, even if the beneficiary's choice results in taking less under the Trust instrument by one alternative instead of the other.

10. The Court's conclusion is fortified by *Metz v. Metz,* 108 So. 2d 512, 514 (Fla. 3d DCA 1959), in which the Third District found in a distinct but related context that a bond is not a penalty when the purpose of the bond is to protect other parties from suffering losses resulting from another's conduct.

11. In affirming the trial court's imposition of a bond requirement on a father in a child custody dispute, the Third District reasoned that the bond was "not penal but remedial in nature" because the purpose of the bond was to ensure that the mother would not be unable to pursue remedies against him the father if he took the couple's child out of state and refused to return. *Id.* The Third District also noted that the bond amount had a "relationship to the expenses which the mother [might] incur." *Id.*

12. Here, based on the reasoning of *Metz,* the $200,000 bond requirement cannot be fairly construed as a penalty given its clear remedial objectives, which the Court finds bears a reasonable relationship to the expenses that could be anticipated from unsuccessful litigation.[5]

13. Here, as expressed in the Trust, the testator simply did not want parties not involved in the litigation to be penalized and get less because of the actions of one of the beneficiaries to pursue litigation and then become unable to reimburse prevailing party fees to the Trust. This interest inures to the benefit of all beneficiaries, including Ramos.

14. Furthermore, the Court finds that the Florida Trust Code allows courts to impose bond requirements, whether or not expressly incorporated into a trust instrument. In pertinent part, Section 736.08165, Florida Statutes provides:

> (2)Upon motion of a party and after notice to interested persons, a court, on good cause shown, may . . . authorize the trustee to act or to distribute trust assets to a beneficiary subject to any conditions the court, in the court's discretion, may impose, ***including the posting of bond by the beneficiary***.

See id. (emphasis added).

15. Thus, the bond provision simply mirrors the protections already built into the Florida Trust Code, including the salutary assurances that a wrongful challenge by one beneficiary will not result in injury to other beneficiaries. Although this provision deals with early distributions pending a trust challenge, as Ramos noted at the hearing (for the first time), the Court finds that the purpose of the bond is consistent in both cases, which is to guarantee that the funds destined for the other beneficiaries is not depleted by the improvident acts of one person, and this interest does not purport to penalize anybody in the process.

16. The Court further concludes that the bond condition Ramos must follow in order to challenge aspects of the Trust instrument does not impermissibly restrict his access to the courts.

17. Indeed, Florida courts regularly enforce provisions and agreements that condition a benefit on the relinquishment of a right—even a constitutional right. *See Kaplan v. Kimball Hill Homes Fla., Inc.,* 915 So.2d 755, 761 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2787a] ("[T]he rights of access to courts . . . may be contractually relinquished." (quoting *Global Travel Mktg., Inc. v. Shea,* 908 So.2d 392, 398 (Fla. 2005) [30 Fla. L. Weekly S511a]); *see also Gren v. Gren,* 133 So. 3d 1066, 1068 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D134b] (enforcing a trust's arbitration provision requiring beneficiary to waive his constitutional right to a jury trial in order to claim a bequest under the instrument); *Hartwell v. Blasingame,* 564 So. 2d 543, 545 (Fla. 2d DCA 1990) (acknowledging the ability of a party to a prenuptial agreement to relinquish her constitutional right to homestead as a condition of the agreement); *see also Leach v. State,* 914 So. 2d 519, 521 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2642a] ("A defendant may waive constitutional, statutory, or procedural rights during the criminal process.")

18. Finally, the Court rejects Ramos's suggestions that the phrase "purports to penalize" is broad enough to encompass anything and everything that could potentially be construed as a "disadvantage." The Court concludes that "purports to penalize" has a specific and particular meaning within the context of the Trust Code as indicated by *Dinkins* and well-established tenets of trust law, which is the loss of interest in a devise. Furthermore, the type of disadvantage referred to by Ramos is, essentially, his inability to freely run up a large legal bill for the trustee and leave the other beneficiaries to pay for it if he loses. This is not a cognizable legal interest.

CONCLUSION

Accordingly, for the reasons set forth above, Defendant's motion for summary judgment is **GRANTED**. The Court concludes that the bond requirement of the Trust set forth in Article VI, Section L.2 does not "purport to penalize" Ramos and is not otherwise unenforceable under Florida law. The bond requirement does not force a beneficiary to choose between the right to contest and the right to take under the instrument. The Court adopts Halpern's oral arguments at the hearing, as well as the case law and argument set forth in his papers. The Court further incorporates its oral rulings at the hearing as if fully set forth herein. This Order further incorporates and supplements the short-form Order granting summary judgment dated April 26, 2022. As previously set forth, Ramos is required to post the requisite bond of $200,000 no later than May 16, 2022. Ramos is reminded that the failure to post the required bond will result in the dismissal of Counts 1-3 of the Amended Complaint and the entry of final judgment.

This Court reserves jurisdiction to enter a Final Judgment and to enter further orders as appropriate and consistent with this ruling, including but not limited to the consideration of attorney's fees and costs.

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[1]Defendants failed to file a response to the summary judgment motion, which was filed 80 days before the hearing, within the prescribed period set forth in Rule 1.510(b). Three days before the hearing and two days before the hearing, Defendant filed submittals, which the Court struck as untimely as set forth in an Order dated May 5, 2022. Notwithstanding, in his papers and at the hearing, counsel for Ramos, Hugh Morgan, Esq. stipulated that there were no questions of fact that would preclude summary judgment.

[2]Indeed, in a related litigation involving Halpern's co-trustee Blake Connell, the Court found Ramos responsible for fees pursuant to the Court's authority under Fla. Stat. 736.1005(2).

[3]By Order dated May 5, 2022, the Court has stricken Ramos's untimely and newly-asserted arguments due to Ramos's failure to timely respond to the motion for summary judgment in violation of procedural rules. The Court further sustained Halpern's objections on this issue at the hearing. Notwithstanding, the Court alternatively considers and rejects the arguments as more particularly set forth in the record of the hearing. The Court notes that it invited Ramos's counsel to make a fulsome proffer at the end of the hearing as to any additional argument Ramos wished to preserve that was not already brought to the Court's attention throughout the proceedings, but counsel failed to do so.

[4]As to the bond premium amount, despite submitting no evidence to the Court, Ramos asked the Court to take judicial notice of the general amount of bond premiums. The Court declines to do so.

[5]The Court notes that the amount of attorneys' fees awarded in this case has already surpassed $160,000 before the matter was appealed.

* * *

Attorney's fees—Timeliness of motion—Consumer law—Florida Deceptive and Unfair Trade Practices Act—Section 501.2105, which provides for prevailing party attorney's fees to be awarded in FDUTPA cases after judgment by trial court and exhaustion of all appeals, does not extend time for filing motion for attorney's fees set in rule 1.525—Where judgment does not make clear determination of entitlement to attorney's fees and costs, motion for fees and costs filed more than 30 days after entry of judgment is untimely—Motion is timely as to costs incurred in appellate proceeding but is denied because it does not differentiate appellate costs from trial costs

E.L. ABUSAID, Plaintiff, v. FLORA GROWTH CORP., a Canadian Company, et al., Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, General Civil Division. Case No. 23-CA-12643. Division D. January 23, 2024. Emily A. Peacock, Judge. Counsel: Elias Lou Abusaid, Pro se, Plaintiff. Alex Tirado-Luciano, for Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS AND DIRECTING CLERK TO CLOSE CASE FILE

This matter is before the court on Defendant FLORA GROWTH CORP.'S October 4, 2023 Motion for Prevailing Party Attorney's Fees and Costs (Doc. 39). FLORA seeks fees under the fee shifting provisions in sections 501.2105, (FDUPTA), and 772.104(3) (RICO). Because the motion is untimely under Rule 1.525, the Court must deny the motion.

FLORA argued that the motion was timely because Plaintiff's appeal of the dismissal of his complaint tolled the time in which FLORA was required to file a motion under FDUPTA, based on the following language:

> 501.2105 Attorney's fees.—
>
> (1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party.

The statute contains no provision for staying motions for fees. It does not even address fee *motions*; it addresses *entitlement* only. Nothing about the statute's language extends the time limit set forth in either Rule 1.525, Florida Rules of Civil Procedure, or 9.400(b), Florida Rules of Appellate Procedure.

The law is clear that a motion for fees in state trial courts must be filed within 30 days of the entry of a final judgment. Rule 1.525, Fla. R. Civ. P.[1] A mere reservation of jurisdiction to award fees does not override the 30-day requirement for filing a motion for fees. *See Hovercraft of South Fla., LLC v. Reynolds,* 211 So. 3d 1073, 1076 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D367a]. The strict thirty-day requirement to file a motion under 1.525 may be relaxed if the judgment makes a clear determination of entitlement to attorney's fees and costs and reserves jurisdiction only as to the amount owed. *Id., citing Amerus Life Ins. Co. v. Lait,* 2 So. 3d 203, 207-08 (Fla. 2009) [34 Fla. L. Weekly S49a]. Under *Amerus,* the order must determine entitlement to fees and that the amount would be determined at another hearing. Moreover, "[a] specific finding of entitlement is required." *Nugent v. Michelis,* 312 So. 3d 954, 958 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D533e], citing *Fleming v. Blackwell-Gomez,* 290 So. 3d 961, 962 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2578a]. Here, the dismissal order's language does not effect a clear determination of entitlement to attorney's fees and costs for the trial court proceeding.[2]

Only Defendant's motion for *costs* incurred in the appellate proceeding is timely. Rule 9.400(a), Fla. R. App. P. Defendant, did not, however, present to the court an amount of costs incurred in the appeal. Although FLORA provided a total sum of costs incurred, it did not differentiate those items incurred in trial from those incurred in the appeal.

It is therefore ORDERED that Defendant FLORA GROWTH CORP.'S motion for prevailing party attorney's fees and costs (Doc. 39) is DENIED. It is FURTHER ORDERED that Plaintiff's Motion to Compel (Doc. 53) is DENIED as moot. The Clerk is directed to close the case file.

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[1]The procedure for seeking attorney's fees in appellate courts is addressed in Rule 9.410, Fla. R. App. P.

[2]On the issue of attorney's fees and costs, the dismissal order, which was drafted by Defendant's counsel and provided to the court, states: "This Court shall retain jurisdiction to consider the award of costs and attorney's fees to be hereinafter awarded taxed by separate Order of the Court" (punctuation omitted in original).

* * *

Condominiums—Construction defects—Evidence—Expert—Association's action against developer for construction defects—Motion to exclude expert testimony on construction defects and necessary remediation is denied—Association met burden to show that its witness was qualified to render opinion, witness's methodology comports with industry standards and is scientifically valid and reliable, witness's opinions are based on sufficient facts or data, and witness's testimony is relevant and will aid trier of fact—No merit to argument that witness's testimony is inadmissible because his report failed to apportion blame for defects between developer and other parties to action—Association brought action solely against developer and its primary claim against developer is for breach of implied warranties—To extent developer wishes to "pass through" its liability or argue that other parties are culpable for any of association's damages, such arguments are not relevant to hearing on admissibility of association's expert witness testimony

PASEO CONDOMINIUM ASSOCIATION, Plaintiff, v. STOCK DEVELOPMENT, LLC, Defendant/Third-Party Plaintiff, v. BROOKS & FREUND, LLC, et al., Third-Party Defendants/Fourth Party Plaintiffs, v. ACTION GLASS, INC., et al., Fourth-Party Defendants. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 2018-CA-4742 (Consolidated). February 15, 2022. Keith Kyle, Judge. Counsel: John Campo and Ryan P. Sullivan, Niesen Price Worthy Campo, P.A., for Plaintiff. Edmond E. Koester, Coleman, Yovanovich & Koester, P.A.; and R. Baron Ringhofer, Wicker, Smith, O'Hara, McCoy & Ford, P.A., for Stock Development, LLC, Defendant/Third-Party Plaintiff .

ORDER DENYING DEFENDANT STOCK DEVELOPMENT, LLC'S MOTION TO EXCLUDE THE TESTIMONY OF TOM MILLER AND ANY ASSOCIATED EXPERT REPORTS

Defendant Stock Development, LLC ("Stock") has filed its *Motion to Exclude the Testimony of Tom Miller and any Associated Expert Reports* (the "Motion") (Doc. # 862). After considering the Motion, the *Response in Opposition* (the "Response") filed on January 25, 2022 by Plaintiff Paseo Condominium Association, Inc. ("Paseo") (Doc. # 918), having heard, on January 28, 2022 and February 4, 2022 (the "Hearing"), argument of counsel and live testimony from Thomas E. Miller, P.E., W. Ronald Woods, P.E., and Felix Martin, P.E. on behalf of Plaintiff Paseo, and Carl Nutter and Joao Dos Santos on behalf of Defendant Stock, and otherwise being fully advised in the premises, it is hereby **ORDERED**:

1. The testimony of Plaintiff Paseo's expert witness, Thomas E. Miller, P.E., is admissible under § 90.702, Fla. Stat. and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); and

2. Defendant Stock's Motion is **DENIED.**

Introduction

Stock's primary argument against the admissibility of Mr. Miller's testimony is that Mr. Miller has failed to render an admissible opinion as to the presence and cause of water intrusion at the Paseo Condominium buildings due to a perceived failure to comply with the American Society for Testing and Materials ("ASTM") E2128 guide titled "Standard Guide for Evaluating Water Leakage in Building Walls." Additionally, Stock argues that Mr. Miller has failed to render an admissible opinion as to the presence and cause of water intrusion through the buildings' roofs, because it alleges that ASTM E2128 is inapplicable to evaluating the presence and cause of water intrusion through the buildings' roofs. Lastly, Stock argues that Mr. Miller's testimony will not aid the trier of fact, because Mr. Miller's report does not apportion fault among Stock as the developer, Brooks & Freund, LLC ("B&F") as the general contractor, or any of the various subcontractors who performed work on the project. Defendant's arguments, to the extent they are even appropriate for a *Daubert* hearing, are insufficient to merit the exclusion of Mr. Miller's testimony.

Standard

As the proponent of the expert testimony, Paseo bears the burden to show, by preponderance of the evidence, that Mr. Miller's testimony is admissible and complies with the requirements of § 90.702, Fla. Stat. *Royal Caribbean Cruises, Ltd v. Spearman,* 320 So. 3d 276, 289-90 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D969a] (citing *Baan v. Columbia Cnty.,* 180 So. 3d 1127, 1131-32 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2707a]). Paseo has met its burden.

Section 90.702, Fla. Stat. expressly provides for the admission of scientific, technical, or other specialized testimony from a qualified expert witness if it assists the trier of fact in determining a fact in issue and:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

Under *Daubert* and its progeny, courts engage in a three-prong inquiry when determining the admissibility of expert testimony:

(1) Whether the expert is qualified to testify competently regarding the matters he intends to address;

(2) Whether the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and

(3) Whether the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

U.S. v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C1132a].

"While this test may seem exacting, rejection of expert testimony under *Daubert* is the exception rather than the rule. The trial court's gatekeeper function is not intended 'to serve as a replacement for the adversary system.' " *Vitiello v. State,* 281 So. 3d 554 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2480e]. The evidence and testimony presented by Plaintiff Paseo at the Hearing satisfied the elements for admissibility of Mr. Miller's testimony under both § 90.702, Fla. Stat. and *Daubert.*

Prong 1—Whether the Expert is Qualified

Stock challenged Mr. Miller's qualifications in its Motion, however, Stock did not pursue this argument before the Court at the Hearing.

Mr. Miller has over 20 years of experience in the field of structural engineering and holds Professional Engineering licenses in ten states, including Florida. Mr. Miller is also a member of multiple relevant professional organizations, including, but not limited to the American Architectural Manufacturers Association, the American Concrete Institute, The American Institute of Architects, the American Society of Civil Engineers, the ASTM C11 (Stucco) Committee, and others, more exhaustively listed in Mr. Miller's Curriculum Vitae, which was admitted into evidence at the Hearing. Mr. Miller has been qualified as an expert in multiple cases involving defective construction in the state of Florida and compliance with applicable Florida Building Codes. The Court has no difficulty concluding that Mr. Miller is qualified to render opinions in this matter.

Prong 2—Whether the Expert's Methodology is Reliable

Stock focuses most of its arguments on the second prong, relating to the reliability of the methods used by Mr. Miller in conducting his investigations. Specifically, Stock argues that although Mr. Miller claims to have conducted his intrusive testing at the Paseo Condominium buildings in accordance with ASTM E2128, Mr. Miller failed to comply with the tenets of ASTM E2128 for various reasons, including by not performing controlled water tests and by not adequately recording/documenting the procedures utilized during his inspections.

ASTM E2128 describes methods for determining and evaluating causes for water leakage of exterior walls. ASTM E2128's methodology makes use of the scientific method, whereby hypotheses about the causes of the suspected water leakage are initially formed, and are then tested through inspections and/or testing, using controlled and reproducible procedures. Most of the activities described in ASTM E2128 are described using permissive language (such as "should" or "may") rather than mandatory language (such as "must" or "shall"). In this sense, ASTM E2128 is quite like a "buffet," despite Stock's arguments to the contrary. One such example is controlled water testing, which both parties' experts have testified is not required by ASTM E2128. Additionally, there is a high level of discretion allowed to the expert conducting the investigation, which includes making decisions about whether to make use of controlled water testing and other activities described in ASTM E2128.

Stock has also argued that Mr. Miller's method of "pictorially" documenting his inspections does not meet the standards of ASTM E2128. Again, however, Stock's arguments are belied by the actual text of ASTM E2128 which describes documentation methods using permissive language. Further, Paseo presented evidence through peer-review testimony that the method of pictorial documentation employed by Mr. Miller is in accordance with the "requirements" of ASTM E2128, and that this method of documentation is accepted in

the relevant scientific community. Stock also provided competing testimony via its non-engineer expert, Mr. Nutter, that this method of documentation was unacceptable under ASTM E2128 and non-replicable. However, upon considering the testimony from Mr. Miller demonstrating exactly how his pictorial documentation of his methodology was organized, and the testimony of Messrs. Woods and Martin, two professional engineers in Florida with extensive experience on other similar projects who peer-reviewed Mr. Miller's report and specific methodology, the Court concludes that Mr. Miller's method of documentation is sufficient for the purposes of admissibility under § 90.702, Fla. Stat.

Stock also contends that the activities described in ASTM E2128 are not applicable to evaluating water leakage through the buildings' roofs. While ASTM E2128 does state that it "does not address leakage through roofs," Stock provided no alternative method for such an evaluation, and the testimony from both parties' experts was that any evaluation of roof leakage would be "similar" to the methodology described in ASTM E2128. Additionally, Mr. Woods (the only licensed roofer and general contractor to testify at the hearing) testified that ASTM E2128 was "instructive" in performing roof evaluations and that someone with similar expertise or experience could "use the methodology of E2128 to evaluate a roof as well." The Court therefore concludes that Mr. Miller's methodology with regard to the roofs is sufficient for purposes of § 90.702, Fla. Stat.

Stock also argues that Mr. Miller's methodology was deficient to the extent that he did not employ a "random sampling" methodology. Stock presented evidence on this issue via the testimony of Mr. dos Santos, and concludes in its Motion that "[Mr.] Miller's conclusions are improper generalizations of nonrandom selected data. Because the data points used by Mr. Miller were specifically selected for their visible distress or their association with a reported leak occurring near to the area, Miller's conclusion that there are widespread construction defects requiring a fullscale replacement of the roofs and stucco over framed areas at the subject properties is purely speculative and unreliable."

This issue has previously been litigated concerning strikingly similar circumstances in other jurisdictions. Particularly, the trial court in *Heron's Landing Condominium Ass'n of Jacksonville, Inc. v. D.R. Horton, Inc.,* No. 2013-CA-005882, (Fla. 4th Cir. Ct. Apr. 14, 2016) while addressing a similar *Daubert* motion filed by a developer/contractor defendant, wrote that "it is clear that the E2128 protocols merely require qualitative testing or sampling such as that which was performed in this case. The literature rejects the idea that quantitative or statistically valid sampling is necessary to appropriately analyze the cause of moisture intrusion into a building envelope, what might prevent it, and the potential for moisture-related damage." This Court agrees with the analysis of the trial court in *Heron's Landing,* as affirmed by the First District Court of Appeal of Florida in *D.R. Horton, Inc.—Jacksonville v. Heron's Landing Condo. Ass'n of Jacksonville, Inc.,* 266 So. 3d 1201, 1205 (Fla. 1st DCA 2018) [44 Fla. L. Weekly D109b].

In the instant case, Mr. Miller selected the locations to perform destructive testing based on a multitude of factors, including unit owner complaints, vertical to horizontal plane interfaces, and visual inspection. It is clear from Mr. Miller's testimony, the testimony of Messrs. Woods and Martin, and the text of ASTM E2128 and accompanying literature that Mr. Miller's methodology in this regard comports with the industry standards, and is scientifically valid and reliable for purposes of § 90.702, Fla. Stat.

Defendant has also argued that Mr. Miller's opinions are not based on sufficient facts or data, while also arguing that Mr. Miller's report and accompanying appendices include *too much* data for Defendant or its experts to reasonably be able to discern the basis for his opinions. To the extent Stock contends that Mr. Miller didn't perform "enough" destructive testing to support his conclusion that the roofs and all of the stucco over frame require replacement, such an argument goes to the persuasiveness of Mr. Miller's testimony and not its admissibility, and it is not the role of the Court to make ultimate conclusions as to the persuasiveness of expert testimony. *U.S. v. Reddy,* 534 Fed. Appx. 866, 871 (11th Cir. 2013). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596.

Stock has also argued that Mr. Miller failed to account for certain variables when rendering his opinions, such as building maintenance, the effects of hurricanes on the buildings, and "wear and tear." Again, however, these perceived issues are not appropriate for the Court's consideration as to whether Mr. Miller's testimony is admissible; these arguments go to the persuasiveness of Mr. Miller's testimony and are left to the trier of fact. *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1346 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C503a] (stating that, "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility").

Mr. Miller testified that he visually inspected 100% of the stucco over frame portions of the condominiums. He also testified that his destructive testing performed was in accordance with ASTM E2128 and that the locations were selected in the interest of examining information-rich samples. While Stock argues that Mr. Miller only destructively tested a small percentage of the overall total of stucco and roofs on the buildings, Mr. Miller noted the anecdotal "1% rule," which is described in the literature accompanying ASTM E2128 as asserting "that 99 % of the sources of water infiltration are found at 1 % of the building envelope." The Court has no trouble concluding that Mr. Miller's opinions are based upon sufficient facts or data, that they are the product of reliable principles and methods, or that Mr. Miller has applied the principles and methods reliably to the facts of the case.

Prong 3—Whether the Testimony will Aid the Trier of Fact

Stock last argues that Mr. Miller's conclusions will not assist the trier of fact. This prong goes primarily to relevance. As stated by the *Daubert* court, "[e]xpert testimony which does not relate to any issue in the case is not relevant, and, ergo, non-helpful." *Daubert,* 509 U.S. at 591. Stock's primary argument in this regard is that Mr. Miller's report does not apportion fault among Stock as the developer, B&F as the general contractor, or any of the various subcontractors who performed work on the project.

This Court finds that Mr. Miller's testimony is relevant and will aid the trier of fact. At trial, the trier of fact will require expert assistance in reading and interpreting building plans, identifying construction defects in the plans and as-built conditions, common causes and effects of water intrusion, and the overall design concepts of roofing and stucco-clad systems. Mr. Miller's testimony is relevant to all of the above, and more.

Further, to address Stock's argument that Mr. Miller and/or his report are required to apportion fault among Stock, B&F and the various subcontractors, it is imperative to note what claims Paseo is bringing in this action, and against whom. Paseo has not directly sued any party except Stock. Its primary claim against Stock is for breach of implied warranty under § 718.203, Fla. Stat. As described by the Florida Supreme Court, "[t]he general test for whether a party has breached the implied warranties of fitness and merchantability 'is whether the premises meet ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality.' More succinctly, a warranty is breached if the residence is rendered not reasonably fit for the ordinary or general purpose intended." *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n,* 127 So.

3d 1258, 1268 (Fla. 2013) [38 Fla. L. Weekly S859a] (citations omitted); *see also D.R. Horton, Inc.—Jacksonville v. Heron's Landing Condominium Ass'n of Jacksonville, Inc.,* 266 So. 3d 1201, 1210 (Fla. 1st DCA 2018) [44 Fla. L. Weekly D109b] (applying *Maronda* to a breach of warranty claim under § 718.203(1), Fla. Stat.).

Additionally, Mr. Miller testified that he could, in fact, point to specific elements in the construction of the buildings and determine what defects contributed to water intrusion. Specifically, when asked what trades would be responsible for various observed construction defects on a specific photo depicting water damage, Mr. Miller opined with specificity what aspects of the construction were deficient and contributed to the damage, as well as what trades typically performed such work. Mr. Miller's testimony is clearly relevant to the facts at issue in this case, and therefore, his testimony will aid the trier of fact. Stock's argument that Mr. Miller's testimony is inadmissible because his report fails to apportion fault to the other parties in this action is irrelevant; to the extent Stock wishes to "pass through" its liability or argue that other parties are culpable for any of Paseo's damages, such arguments should be made by Stock's own counsel and experts before the trier of fact, not at a hearing on the admissibility of Paseo's expert witness testimony.

Conclusion

The Court finds that (1) Mr. Miller is qualified to offer the opinions given; (2) that his opinions and conclusions are derived from sufficient fact and data, and accordingly that his methodology is reliable and scientifically accepted; and (3) that his opinions will be helpful to the trier of fact.

Finally, the Court finds that the arguments raised by Stock go to the probative value of Mr. Miller's testimony, not its admissibility, and are therefore more appropriately addressed through cross-examination and impeachment at trial. As such, Stock's *Motion to Exclude the Testimony of Tom Miller and any Associated Expert Reports* is hereby **DENIED.**

* * *

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COUNTY COURTS

Landlord-tenant—Public housing—Eviction—Notice—Defects—Failure to give thirty-day notice to vacate—Landlord given opportunity to cure deficiency and amend complaint—Failure of tenant to deposit rent into court registry will constitute absolute waiver of all defenses to eviction other than payment, but will not authorize landlord to execute writ of possession prior to expiration of thirty-day notice period

DENTON COVE, LTD, Plaintiff, v. COURTNEY J. GURGES, Defendant. County Court, 2nd Judicial Circuit in and for Franklin County. Case No. 2023-000074-CC. January 2, 2024. J. Gordon Shuler, Judge. Counsel: Elwin R. Thrasher, III, Thrasher Law Firm, Tallahassee, for Plaintiff. Daniel Clibbon, Legal Services of North Florida, Tallahassee, for Defendant.

ORDER DENYING MOTION TO DISMISS AND DIRECTING DEFENDANT TO DEPOSIT RENT INTO COURT'S REGISTRY

This action was heard on Defendant's Motion to Dismiss and Defendant's Motion to Determine Rent. The Court received evidence of the rent due and considered the arguments of the parties.

IT IS ORDERED that:

Motion to Dismiss Denied. Defendant's Motion to Dismiss is denied. Defendant correctly argues 15 U.S.C. 9058(e)(1) for covered dwellings is still in effect and did not sunset with subsection (b) and 15 U.S.C. 9058(c)(1) required the Plaintiff to give Defendant a 30-day notice. However, Florida Statute Section 83.60(1)(a) provides in pertinent part, "[t]he landlord must be given an opportunity to cure a deficiency in a notice or in the pleadings before dismissal of the action." Plaintiff is given leave to amend its complaint after it has issued a corrective 30-day notice.

Determination of Rent. 15 U.S.C. 9058(c)(1) by its terms refers only to notices to vacate, not to pay. Section 83.60(2)'s requirement to pay into the registry accrued rent still applies as does its waiver of defenses if that money is not deposited.

Current rent due. For purposes of determination of rent under Florida Statute §83.60(2), the rent currently due from Defendant is $2,010.00 "current rent". The current rent calculation was determined only for purposes of determining the amount that Defendant needs to deposit into the Court's registry. It may not include late fees or other charges that may be due to Plaintiff under the lease. Defendant shall deposit the current rent into the Court's Registry no later than 5:00 PM on December 27, 2023.

Monthly rent. The monthly rent due under the lease between the parties is $1,005.00 "monthly rent" which is due under the lease on or before the first day of each month. Beginning and for as long as this action for eviction remains pending before this Court, Defendant shall deposit the monthly rent into the Court's Registry no later than the third day of the month.

Effect of Posting Rent. If Defendant posts the rent required by this order, it does not end the eviction. Posting of rent is merely a requirement under Florida Statute 83.56(5) before the court may set a date for hearing on Plaintiffs eviction claim.

Payment method. All deposits into the Court's registry shall be made by Cash, Cashier's Check, money order, or by other certified funds. No personal checks will be accepted by the Clerk.

Failure to pay. Pursuant to Florida Statute §83.60(2), Defendant's failure to promptly make any deposit required by this Order constitutes an absolute waiver of the Defendant's defenses other than payment, and the Plaintiff will be entitled to an immediate default judgment for removal of the Defendant with a writ of possession to issue forthwith without further notice or hearing thereon. The waiver of defenses, however, does not change 15 U.S.C. 9058(c)(1)'s substantive requirement that a lessor "may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate." A tenant may waive her defenses by failing to pay into the Court registry but remain in possession of the property until 30 days after the date they are provided with a notice to vacate. Therefore, Plaintiff may not execute any writ of possession until Plaintiffs 30-day notice to Defendant has expired.

* * *

Criminal law—Boating under influence—Search and seizure—Detention—Officer had reasonable suspicion to conduct BUI investigation after observing defendant's bloodshot and glassy eyes, odor of alcohol, and beer cans in vessel—Arrest—Probable cause—Inconsistencies between video evidence and officer's testimony lead court to conclude that video evidence is more reliable basis for determining whether there was probable cause for arrest—Probable cause for arrest did not exist—Evidence seized after defendant's arrest is suppressed

STATE OF FLORIDA, v. DANIEL JOHN FRENTRESS, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2022-MM-008517-AXXX. Division O. March 31, 2023. Julie K. Taylor, Judge.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO SUPPRESS EVIDENCE

This matter came on to be heard upon the Defendant's Amended Motion to Suppress Evidence filed on February 23, 2023. At the hearing held on March 8, 2023, the State was represented by Assistant State Attorney Shaina Ruth who presented the testimony of Officer W. Sapp and Lieutenant B.G. Givens of the Florida Fish and Wildlife Conservation Commission. The Defendant was represented by Susan Cohen, Esquire. No testimony was presented by the Defendant, however the Defendant entered video footage into evidence by stipulation with the State. The Court listened to an audio recording captured by body worn camera and viewed portions of body worn camera and other video during the hearing. By agreement of the parties, the recordings in evidence were provided to the Court following the hearing for further review prior to hearing arguments by the parties on March 17, 2023. Based upon the evidence presented, the Court's review of all evidence provided to the Court, and the arguments of the parties, the Court finds as follows:

1. On May 29, 2022, Officer Sapp and Lt. Givens came into contact with the Defendant who was operating a vessel in the Intracoastal waterway in Duval County. The officers were involved in the stop of another vessel then decided to stop the Defendant's vessel based upon their observations of the operation of that vessel. Officer Sapp testified that while conducting the other stop, the Defendant drove his vessel within fifty (50) feet of the officer's vessel, the Defendant was "plowing" and his bow was very high in the water. The wake caused by the Defendant's vessel was significant enough, in the officer's opinion, to potentially cause damage to the persons or property involved in the other stop.

2. Officer Sapp testified that while conducting the other stop, he had blue lights activated on his vessel and he was tied up to the other vessel. During the hearing, defense counsel stipulated that Officer Sapp had reasonable suspicion to stop the Defendant's vessel.

3. After contacting the Defendant, Officer Sapp observed the Defendant driving and in control of his vessel. Officer Sapp testified that he initially conducted a safety inspection by requiring the Defendant to retrieve certain items required to be on the vessel including safety vests. Officer Sapp stated that during the safety

inspection he was observing the Defendant as he moved throughout the vessel.

4. Officer Sapp testified that the Defendant's eyes were red and glassy and that the Defendant had some problems with balance. Officer Sapp specifically stated the Defendant grabbed the railing to balance and when he asked the Defendant for either his horn or whistle the Defendant provided cords with a USB attached. Officer Sapp also stated he observed empty beer cans in the boat, and he smelled the odor of an alcoholic beverage coming from the Defendant.

5. Officer Sapp testified emphatically that considering all of these observations together he possessed probable cause to effectuate an arrest for the charge of Boating Under the Influence (hereinafter "BUI") prior to requesting the Defendant to perform field sobriety exercises. However, at that time Officer Sapp informed the Defendant that he would be performing a BUI investigation and asked the Defendant if he was willing to perform field sobriety exercises.

6. Officer Sapp testified the Defendant initially refused to participate in the exercises, but after the officer informed the Defendant of his Miranda warnings the Defendant did agree to participate.

7. Officer Sapp testified the Defendant first completed the eye exercise, however the officer did not make any lay observations regarding the Defendant's performance on that exercise such as swaying or a failure to follow instructions. Officer Sapp has not been listed as an expert witness in this matter and was not qualified as an expert witness during the hearing such that he could testify to any information regarding any other observations during this exercise.

8. Officer Sapp then testified that the Defendant completed the finger to nose exercise. During the exercise, the officer noted that the Defendant was not closing his eyes and his inability to follow that instruction may have been a sign of impairment. He testified that he observed a total of ten (10) clues on this exercise including the Defendant's failure to follow instructions, using the pad of his finger, hesitating, searching for his nose and missing his nose.

9. Officer Sapp testified that the Defendant also completed the palm pat exercise and the Defendant failed to follow the instructions for that exercise.

10. Last, Officer Sapp testified that the Defendant completed the hand coordination exercise where only one clue was exhibited. In fact, the officer testified that the Defendant "killed it."

11. Officer Sapp testified that the investigation took place during a holiday weekend and there were a significant number of boats on the water. As a result, he would pause at times during the exercises to wait for any wake to subside and the water to calm.

12. During his testimony, Officer Sapp stated that he accidentally recorded only the audio portion of his interaction with the Defendant and did not use the video function of his body worn camera. This issue is the subject of the Defendant's Amended Motion for Sanctions which was addressed during the hearing as well.

13. During cross examination, Officer Sapp confirmed that he assisted the Defendant onto the officer's vessel because he had witnessed the Defendant swaying and did not want the Defendant to be injured while crossing over into the other boat. The officer also confirmed that he felt probable cause existed for an arrest prior to the Defendant's performance of the field sobriety exercises.

14. Lt. Givens testified he observed this investigation but was primarily concerned with the passengers on the Defendant's boat. He stated he was aware that one of the passengers was recording the investigation and he never discouraged the recording. Lt. Givens took photographs of the beer cans in the Defendant's vessel which were entered into evidence, and recalled a beer can inside of the console and beer cans in buckets in the vessel.

15. Due to Officer Sapp mistakenly recording only the audio portion of his interaction with the Defendant, the Court carefully considered the video recording entered into evidence by the Defendant and weighed that evidence in conjunction with the testimony of Officer Sapp. The Court emphasizes that there is no evidence to suggest, and no argument has been made, that Officer Sapp intentionally failed to video record his interaction with the Defendant.

16. As stated above, defense counsel stipulated that Officer Sapp possessed reasonable suspicion to conduct a stop of the Defendant's vessel. As a result, the initial question this Court must answer is whether Officer Sapp possessed reasonable suspicion to conduct a BUI investigation. "The United States Supreme Court has determined that any warrantless seizure of an individual by law enforcement officers must be based on reasonable suspicion that the individual is engaged in wrongdoing. . . . Whether suspicion is 'reasonable' will depend on the existence of 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " *Caldwell v. State,* 41 So.3d 188, 195 (Fla. 2010) [35 Fla. L. Weekly S425b] (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

17. The Court finds that based upon the factors described by Officer Sapp during the hearing including the Defendant's operation of the vessel, the Defendant's bloodshot and glassy eyes, the odor of alcoholic beverage, and beer cans located on the vessel, Officer Sapp did in fact possess reasonable suspicion to conduct a BUI investigation.

18. Therefore, the next question the Court must answer is whether Officer Sapp possessed probable cause to effectuate an arrest for the charge of BUI. Probable cause "exists 'where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed.' " *Department of Highway Safety and Motor Vehicles v. Smith,* 687 So.2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] (citing *City of Jacksonville v. Alexander,* 487 So.2d 1144, 1146 (Fla. 1st DCA 1986)).

19. In doing so, the Court must necessarily weigh the testimony of Officer Sapp against the video evidence that has been presented to the Court. The Defendant argued that the Court should find that the testimony of the officer is not competent when compared to the video evidence, and therefore the Court should rely on the video evidence in order to determine whether probable cause existed.

20. In *Wiggins v. Florida Department of Highway Safety and Motor Vehicles,* the court noted "that the real-time video evidence totally contradicted and refuted the testimony and arrest report of [the arresting officer)." *Wiggins v. Florida Department of Highway Safety and Motor Vehicles,* 209 So.3d 1165, 1169 (Fla. 2017) [42 Fla. L. Weekly S85a]. The court later held "that in the limited context of section 322.2615 first-tier review of a DUI license suspension, a circuit court applies the correct law by rejecting officer testimony as being competent, substantial evidence when that testimony is contrary to and refuted by objective real-time video evidence." *Id.* at 1175.

21. Although this matter is in a different posture, this Court is in a similar position here and must now determine whether to find that the officer's testimony is not competent and substantial in light of the inconsistencies between that testimony and the video evidence.

22. This Court does not find, as the *Wiggins* court found, that the "video evidence totally contradicted and refuted the testimony and arrest report of [the arresting officer]," however inconsistences certainly exist and those inconsistencies affect the determination of probable cause. *Id.* at 1169.

23. One inconsistency involves Officer Sapp's testimony that as the Defendant moved around his vessel during the safety inspection he grabbed onto the railing for balance and that when the Defendant moved onto the officer's vessel the officer had to assist him onto the

vessel. Based upon the Court's review of the video, the Defendant appears to move normally around his vessel and did not need any assistance while moving into the officer's vessel nor did the officer provide any assistance.

24. An additional inconsistency involves Officer Sapp's testimony that the Defendant provided him with USB cords rather than the horn or whistle that the officer requested. Based upon the Court's review of the video, Officer Sapp requests that the Defendant provide his registration, not a horn or whistle, the Defendant had both the registration and the USB cords in the same location at the time of the request, and was talking to multiple officers when he appears to mistakenly hand the USB cords to the officer which were located immediately next to the registration.

25. These inconsistencies, among others, lead this Court to find that the video evidence is more reliable overall in the determination of whether probable cause existed at the time of the Defendant's arrest. Furthermore, based upon this determination and the consideration of all evidence presented to the Court, the Court cannot find that probable cause for the Defendant's arrest existed.

26. The Defendant also raises the issue of whether the Defendant knowingly and voluntarily waived his *Miranda* warnings prior to any statements being given to the officers. The Court finds that the evidence presented during the hearing demonstrated that the *Miranda* warnings were provided to the Defendant by Officer Sapp and that a knowing and voluntary waiver was given.

27. The Defendant further raised the issue of the admissibility of the Defendant's refusal of the breath test, however due to the Court's finding in regard to probable cause, that issue is now moot.

28. The Defendant's Amended Motion for Sanctions will be addressed by the Court in a separate order.

Therefore, it is hereby

ORDERED AND ADJUDGED:

1. That the Defendant's Amended Motion to Suppress is **GRANTED** in part.

2. Any evidence seized after the arrest of the Defendant is hereby suppressed.

* * *

Insurance—Attorney's fees—Settlement agreement—Enforcement—Where insurer entered into agreement to settle medical provider's claim for attorney's fees, section 627.4265 required that payment be tendered no later than 20 days after agreement was reached—Where payment was not tendered within 20 days of settlement, provider is entitled to 12% interest on settlement amount—Tender of settlement amount conditioned on provider waiving claim for interest or further fees did not halt accrual of interest on settlement amount—Provider is entitled to attorney's fees associated with claim to recover interest

RENEGADE RECOVERIES, INC., a/a/o Jose Gonzalez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-SC-048394-O. December 19, 2023. Cherish Adams, Judge. Counsel: Michael B. Brehne, Law Offices of Michael B. Brehne, P.A., Altamonte Springs, for Plaintiff. Blair T. Jackson and Cameron S. Frye, de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Tampa, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND FOR ATTORNEY'S FEES AND COSTS

This cause came before the Court on December 13, 2023 on PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND FOR ATTORNEY'S FEES AND COSTS, the Court having reviewed the file and otherwise been advised in the premises, **ORDERS AND ADJUDGES** as follows:

1. Plaintiff is a windshield repair company that replaced a windshield on behalf of Defendant's insured, José González.

2. Upon receipt of Plaintiff's bill for services, Defendant made a partial payment and this lawsuit followed.

3. Defendant confessed judgment on August 29, 2023 and tendered payment of the benefits alleged to be due and owing by the plaintiff, as well as interest. On this date Defendant additionally conceded Plaintiff's entitlement to reasonable attorney's fees.

4. The Plaintiff filed its Motion to Tax Attorney's Fees and Costs on September 9, 2023, which confirmed receipt of the funds, and acknowledged Defendant's confession of judgment.

5. The parties then came to a written agreement to settle the claim for attorney's fees for $2,000 on September 11, 2023.

6. Plaintiff included language in the settlement agreement advising Defendant that the check must be received within 20 days "pursuant to the statute." There were no other conditions or stipulations associated with the settlement offer on the claim for attorney's fees.

7. Defendant did not make payment for the attorney's fees within 20 days as required by Florida Statute 627.4265 which states:

> "That in any case which a person and an insurer have agreed in writing to the settlement of a claim, the insurer shall tender payment according to the terms of the agreement no later than 20 days after such settlement is reached. . . . [I]f the payment is not tendered within 20 days or such other date as the agreement may provide, it shall bear interest at a rate of 12% per year from the date of the agreement."

8. Having not received payment by October 10, 2023, Plaintiff then filed a motion to enforce the settlement agreement requesting 12% interest plus attorney's fees and costs related to the prosecution of their motion to enforce settlement.

9. On October 19, 2023 Defendant sent Plaintiff a check for the agreed upon $2,000 in attorney's fees for the underlying claim, without adding any interest, and conditioned it upon Plaintiff agreeing to waive any further claims for interest, fees or any other benefit beyond the tender of the fees.

10. Defendant denies that any interest or fees are owed beyond the settlement agreement.

11. At the hearing, Plaintiff argued that Fla. Stat. 627.4265 is applicable to this claim for interest and contains mandatory language requiring the penalty payment of 12% of the outstanding amount.

12. Plaintiff argues that if the Court should award interest on the outstanding fee payment, Plaintiff would be entitled to attorney's fees and costs pursuant to Florida Statute 627.428 for obtaining the interest.

13. Plaintiff also argues that because the late payment was conditioned on a waiver of Plaintiff's statutory right to seek interest and attorney's fees, that this was a conditional payment and not an actual payment. As such, Plaintiff claims that interest continues to accrue as they have not yet been paid their attorney's fees as agreed upon September 11th, 2023.

14. Defendant argues that Plaintiff is attempting to litigate "fees for fees" or litigating the "amount" of fees and therefore is not entitled to interest or fees because they conceded the entitlement to attorney's fees on August 29, 2023.

15. Defendant further argues that Fla. Stats. 627.4265 and 627.428 do not apply to this case because Plaintiff's request for interest for the outstanding fees is not a "claim".

FINDINGS OF FACT AND CONCLUSIONS OF LAW

16. The Court finds that Fla. Stat. 627.4265 applies to this claim for interest on the settlement agreement for attorney's fees. Nothing in the plain language of section 627.4265 excludes a claim for attorney's fees in an insurance contract dispute. Instead, the statute provides that "*In any case in which a person and an insurer have agreed in writing to the settlement of a claim*, the insurer shall tender payment according to the terms of the agreement no later than 20 days after such settlement is reached." Fla Stat. 627.4265. The plaintiff and the insurer

agreed in writing to settle a claim for attorney's fees. Thus, payment was required to be tendered by October 2, 2023 (20 days after the agreement on September 11, 2023).

17. The parties agree that payment was not tendered by October 2, 2023. Therefore, under section 627.4265 Plaintiff is entitled to 12% interest on the $2,000.00 settlement agreed upon by the parties.

18. The payment that Defendant sent was conditioned upon a waiver of interest and attorney's fees which was not contained in the original settlement agreement and therefore, is currently outstanding.

19. The Court finds that 93 days have passed from the date of settlement to the hearing date and that Plaintiff is entitled to 12% interest on the $2,000.00 fee agreed upon by the parties.

20. The Court calculates the interest at $.66 per day. The outstanding interest is therefore $61.15 and continues to accrue daily until unconditional payment is tendered.

21. The finding of entitlement to interest on the claim for outstanding attorney's fees also entitles Plaintiff to their reasonable attorney's fees and costs associated with the enforcement of the settlement agreement. The claim for interest is a separate and distinct claim from the underlying benefits or the claim for attorney's fees that Plaintiff was entitled to as a result of Defendant agreeing to pay the outstanding difference for the windshield.

22. The Court finds that Plaintiff has succeeded in their claim to recover interest on the outstanding payment of the settlement funds and that this Order acts as a judgment in favor of an insured against their insurer and subject to Fla. Stat. 627.428 (2022)[1] which provides:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

23. Contrary to the Defendant's argument, this is not a prohibited attempt to get "fees for fees". Under Florida law, a party is not entitled to recover attorney's fees for litigating the amount of attorney's fees that should be awarded. *See State Farm Fire & Casualty Co. v. Palma,* 629 So. 2d 830, 833 (Fla. 1993) ("[w]e do not agree with the district court below that attorney's fees may be awarded for litigating the amount of attorney's fees. The language of the statute does not support such a conclusion. Such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment.") However, the parties in this case are not litigating the amount of attorney's fees due on the underlying claim—they have in fact agreed to settle that claim for $2,000. Plaintiff now is litigating a new claim: the entitlement to interest for an unpaid settlement. Although Defendant confessed the entitlement to attorney's fees on the underlying claim, they did not confess the entitlement to interest for the unpaid settlement.

24. This Court reserves jurisdiction to determine the amount of said fees and costs.

[1]Although this statute has since been repealed it was in effect at the time of this policy and both parties agree that it applies to this case.

* * *

Insurance—Automobile—Windshield replacement—Discovery—Trade secrets—Objections to insurer's subpoena for documents from windshield replacement shop's supplier regarding price supplier charges for windshield glass are sustained—Documents contain confidential business information, and there is no reasonable necessity to warrant their production

DR CAR GLASS, LLC, a/a/o Jennifer Nalbach, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-016604-SP-26. Section SD06. January 9, 2024. Laura Maria Gonzalez-Marques, Judge. Counsel: Martin I. Berger, Berger | Hicks, Miami, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO OVERRULE PLAINTIFF'S OBJECTION TO SUBPOENA FOR PRODUCITON OF DOCUMENTS

THIS CAUSE came before the Court on Defendant's Motion to overrule Plaintiff's objections to Defendant's subpoena for documents from third party PGW Auto Glass LLC ("PGW") (DE 62). The Court having heard the argument of the parties, reviewed the case file, and reviewed the documents from PGW, it is hereby

ORDERED and ADJUDGED

Defendant's Motion is **DENIED**, and Plaintiff's Objections to the production of documents from PGW is **SUSTAINED**.

This Court previously detailed the procedural history of the dispute at issue here in her September 7, 2023 Order (DE 124). That history is incorporated into this Order, for the sake of brevity.

PGW is one of Plaintiff's suppliers, providing Plaintiff with the windshield glasses it then uses to perform repairs. Defendant seeks documents from PGW regarding, among other things, the price for the windshield glass it provides Plaintiff. Plaintiff has objected to the production of these documents as trade secret, arguing that its relationship with its supplier is proprietary information protected under Florida Law. Plaintiff additionally argued at the first hearing on this issue, which took place on August 14, 2023, that the documents were not relevant to the case.

Trade secrets area defined by Florida Statutes as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) derives independence economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) is subject to efforts that are reasonable under the circumstances to maintain its secrecy.

§ 688.002(4), Fla. Stat. Confidential business information has been found to be protected as trade secret. *Sea Coast Fire*, 170 So. 3d at 808 (citing *Kavanaugh v. Stump*, 592 So. 2d 1231, 1232 (Fla. 5th DCA 1992); *E. Colonial Refuse Serv., Inc. v. Velocci*, 416 So. 2d 1276, 1278 (Fla. 5th DCA 1982)).

Florida Statute 90.506 considers trade secrets to be privileged. ("A person has privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice."). However, "the privilege is not absolute." *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804, 807 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2480a]. "[T]rade secret [information] is discoverable, based on a reasonable necessity for such documents." *Bank of Am. v. Bank of New York Mellon*, 338 So. 3d 338, 340 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D659a]. In determining whether circumstances that require the production of trade secret information exists, a three-step process is generally followed: 1) determination of whether the documents requested constitute trade secret information; 2) if so, determining whether the information is necessary for production; and 3) setting forth findings if production is necessary. *Sea Coast Fire*, 170 So. 3d at 807-808. A trial court should conduct "the requisite *in camera* analysis or evidentiary hearing" to determine whether the documents at issue are considered trade secrets. *Bank of Am.*, 338 So. 3d at 340.

As has been previously noted, discovery from PGW should not have been obtained without this Court holding a hearing and making

the determination on the trade secret issue. (DE 124). Defendants filed some of the documents obtained on August 28, 2023 (DE 105), and as such, the Court has had the opportunity to review the documents and finds that the documents fall under protected trade secrets as confidential business practices.

The next issue for the Court to determine is whether there is a reasonable necessity to warrant the documents' production in this matter. This Court finds that there is not.

Plaintiff filed a single count breach of contract Complaint, alleging that Defendant failed to reimburse Plaintiff properly under the terms of the policy for its windshield repair work done on behalf of the Insured. (DE 2). As the Defendant detailed in its affirmative defenses, the relevant portion of the policy provides three methods of reimbursement: "a) a 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 based upon or adjusted to the prevailing competitive price." (DE 19 at 3-4). The Court does not find that what Plaintiff paid its supplier is relevant to whether State Farm reimbursed properly under its policy methods. The prevailing competitive price is defined by Defendant as the price charged by a majority of the repair market in the area where the repair took place. In none of the payment methodologies outlined in State Farm's policy does the Plaintiff's cost of supplies and relationship to its vendors come into play.

The Court is unpersuaded that the documents sought are relevant to the issues in this case, and accordingly, Plaintiff's objections are **SUSTAINED** and Defendant's Motion is **DENIED**.

* * *

Insurance—Automobile—Windshield replacement—Discovery—Depositions—Independent contractor employed by plaintiff to install new windshield in insured's vehicle—Insurer precluded from inquiring about or requesting documents concerning financial arrangement between plaintiff and its installer—Confidential business information is protected by trade secret privilege, and insurer has not demonstrated reasonable necessity for that information

DR CAR GLASS, LLC, a/a/o Patrick Hulbert, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-016951-SP-26. Section SD06. January 18, 2024. Christopher Green, Judge. Counsel: Martin I. Berger, Berger|Hicks, for Plaintiff.

ORDER GRANTING PLAINTIFF'S LIMITED MOTION FOR PROTECTIVE ORDER REGARDING DEPOSITION OF PLAINTIFF'S TECHNICIAN

THIS CAUSE, having come before this Court on January 17, 2024, upon Plaintiff's Motion for Protective Order Regarding Deposition of Plaintiff's Technician, and the Court having heard argument on same and being otherwise advised in the premises, it is hereby:

CONSIDERED, ORDERED, and ADJUDGED:

The Motion for Protective Order is hereby **GRANTED**. Defendant seeks to depose the Plaintiff's technician who installed the windshield in this matter. Plaintiff does not object to the deposition and only objects to the discovery of or any testimony regarding the financial arrangement between Plaintiff and its installer. Plaintiff alleges that the financial matters between Plaintiff and its installer/independent contractor are protected by trade secret, proprietary and confidential privileges. Plaintiff further alleges that the information is irrelevant based on the policy language of the Defendant.

"Trade secrets are privileged under section 90.506, Florida Statutes, but the privilege is not absolute." *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804, 807 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2480a]. "Information constituting trade secrets can be obtained in discovery under certain circumstances. To determine if those circumstances exist, a trial court generally must follow a three-step process: (1) determine whether the requested production constitutes a trade secret; (2) if the requested production constitutes a trade secret, determine whether there is a reasonable necessity for production; and (3) if production is ordered, the trial court must set forth its findings." *Id.*

With respect to the first step, the Court finds guidance in Magistrate Edwin Torres' Order on Post-trial Motions in *Marlite, Inc. v. Eckenrod,* 2011 WL 39130, (S.D. Fla. Jan. 5, 2011), *aff'd sub nom. Marlite, Inc. v. Am. Canas,* 453 F. App'x 938 (11th Cir. 2012). *Marlite* was a federal case involving claims of misappropriation of trade secrets which resulted in a favorable jury verdict for Plaintiff. *Id.* Magistrate Torres denied the Defendant's post-trial motions finding there was sufficient evidence to support the jury's verdict on the misappropriation claim. *Id.*

Magistrate Torres wrote:

> "Similarly, pricing information such as expenses, costs, profit margins, and run rates have been held to constitute trade secrets. *See, e.g., Thomas v. Alloy Fasteners, Inc.,* 664 So.2d 59, 60 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2684a] (temporary injunction issued where trade secrets included pricing and profit structure as this type of information "would obviously be important for a competitor in deciding how much it could undercut Alloy's prices."); *Stoneworks, Inc. v. Empire Marble & Granite, Inc.,* No. 98-2017-CIV-HIGHSMITH, 1998 WL 998962, at *4 (S.D.Fla. Nov. 20, 1998) (under FUTSA, "a company's manufacturing techniques, customer lists, supplier lists, pricing information, and accounting data [ ] all [ ] qualify for protection as trade secrets."); *APC Filtration, Inc. v. Becker,* 646 F.Supp.2d 1000, 1010 (N.D.Ill.2009) (customer-specific information, such as product preferences and deviated pricing, and cost and profit margin information, constituted trade secrets under Illinois' uniform trade secrets statute); *Bridgestone/Firestone, Inc. v. Lockhart,* 5 F.Supp.2d 667, 681 (S.D.Ind.1998) ("Knowledge of financial information indicating the company's strengths and weaknesses, its production and marketing costs, its sales information and profit margins broken down by product, by customer, by salesperson, and by region could all be helpful to another manufacturer of competing products, especially in markets for highly competitive, relatively fungible products like commercial roofing products . . . [and in Indiana have been] protected as trade secrets.")." *Marlite, Inc. v. Eckenrod,* 2011 WL 39130, at *5 (S.D. Fla. Jan. 5, 2011), *aff'd sub nom. Marlite, Inc. v. Am. Canas,* 453 F. App'x 938 (11th Cir. 2012).

The Court finds that payments to Plaintiff's installer/independent contractor are constitute evidence of Plaintiff's costs and profit margins protected by the trade secret privilege under Florida Statutes ss. 90.506 and 688.002(04). Further, the Court finds that the confidential business information at issue is protected by the trade secret privilege. See generally, *Sea Coast Fire, Inc. v. Triangle Fire, Inc.,* 170 So. 3d 804 (Fla. 3D DCA 2014) [39 Fla. L. Weekly D2480a].

Having determined the requested information is a trade secret, the Court must next determine whether Defendant has demonstrated a reasonable necessity for the information. The Court finds Defendant has not met its burden at the second step. Based on the allegations in the Complaint, the Court finds that what Plaintiff paid its installer/independent contractor is not relevant to whether State Farm properly reimbursed Plaintiff under the contractually required prevailing competitive price nor is the information reasonably necessary under the standard for discovery of designated trade secret information. *Bank of America v. Bank of New York Mellon*, 338 So. 3d 338 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D659a].

Therefore, the Court grants the limited protective order. Defendant shall not ask questions or request documents regarding the financial relationship between Plaintiff and its installer/independent contractor.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to compel arbitration is granted—There is valid written appraisal agreement, amount of loss is the only issue in dispute, and insurer made timely demand for appraisal and has not acted inconsistent with its right to appraisal—Plaintiff failed to state cause of action for declaratory relief—Questions whether appraisable issue exists, whether appraisal has been triggered despite lack of previous negotiations between parties over amount of loss, and whether insurer failed to properly invoke appraisal because it did not name specific appraiser have been addressed and resolved by appellate courts

DR. CAR GLASS, LLC, a/a/o Victor Herrera Silva, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-003831-SP-26. Section SD03. October 31, 2023. Lissette De la Rosa, Judge. Counsel: Faith D. Everett, North Miami Beach, for Plaintiff. Jill D. Carabotta, Carabotta | Steakley, P.L.L.C., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT, OR ALTERNATIVELY, MOTION TO ABATE OR STAY AND RENEWED MOTION TO COMPEL APPRAISAL

THIS CAUSE having come before the Court on the 23rd day of October, 2023 on Defendant's Motion to Dismiss Plaintiff's Amended Complaint, or in the Alternative, Motion to Abate or Stay and Renewed Motion to Compel Appraisal, and this Court being fully advised in the premises, and having heard argument of counsel, the Court finds as follows:

I. **BACKGROUND**

Plaintiff, Dr. Car Glass, LLC, filed suit against Defendant, Progressive Select Insurance Company (hereinafter "Progressive") for insurance benefits related to a windshield glass claim stemming from a January 15, 2021 date of loss under the insured's policy. Dr. Car Glass submitted an invoice for alleged repairs rendered to the insured's vehicle as a result of the loss. On March 23, 2021, Progressive sent a letter to the insured, Dr. Car Glass and Plaintiff counsel invoking appraisal under the policy and issued an undisputed payment, thereby, affording coverage for the claim at issue. The appraisal language contained in the policy states as follows:

APPRAISAL

If we cannot agree with you on the amount of a loss, then **we or you** may demand an appraisal of the loss. However, mediation, if desired, must be requested prior to demanding appraisal. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraisers will determine the amount of loss. If they fail to agree, the disagreement will be submitted to an impartial umpire chosen by the appraisers, who is both competent and a qualified expert in the subject matter. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record, in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. We will pay our appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal.

Two years after Progressive's March 23, 2021 letter, Plaintiff filed the instant lawsuit on February 7, 2023 without first contacting Progressive and/or complying with the policy's appraisal condition.

On October 20, 2023, Plaintiff filed an Amended Complaint alleging two Petition for Declaratory Judgment Counts and one Breach of Contract Count, which is the subject of Progressive's Motion to Dismiss. Progressive argues that Plaintiff failed to fulfill a condition precedent to bringing the instant lawsuit by failing to participate in appraisal as required by the policy. Progressive also argues that Plaintiff fails to state a cause of action for Declaratory Relief and Breach of Contract. As such, Progressive moves to dismiss this matter and compel compliance with the appraisal provision of the policy.

II. **ANALYSIS**

Case law allows the Court to exercise its gatekeeping function to avoid entanglement in matters that appraisal renders moot and dismiss Plaintiff's claim as the matters could be resolved in appraisal. (*State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D99b]. Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits." *First Protective Ins. Co. v. Hess*, 81 So. 3d 482 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2705d]. The appraisal process provides a mechanism to resolve claims promptly and discourages insureds from racing to the courthouse to file needless lawsuits. *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 So. 2d 1121 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2672a].

Before compelling appraisal, a trial court must evaluate (1) whether a valid written agreement for appraisal exists; (2) whether an appraisable issue exists, and (3) whether a party has waived its right to appraisal. *NCI v. Progressive Select Ins. Co*., 350 So.3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f]. There is no dispute that a valid written agreement exists. In this case it is clear that the issue in dispute is one of the amount of loss and not one of coverage. Defendant has admitted that there is a covered loss, thus any dispute on the amount of loss is appropriate for appraisal. Progressive made a timely demand for appraisal and has not acted inconsistent with its right to appraisal.

Progressive argues that Plaintiff has failed to state a cause of action for declaratory relief. A complaint for declaratory relief under Chapter 86 must allege that: (1) there is a bonafide dispute between the parties; (2) the plaintiff has a justiciable question as to the existence or nonexistence of some right, status, immunity, power or privilege, or as to some fact upon which existence of such a claim may depend; (3) the plaintiff is in doubt as to the claim; and (4) there is a bonafide, actual, present need for the declaration. *Ribaya v. The Board of* 9. Case No: 2022-028015-SP-26 Page 2 of 5 *Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa*, 162 So.3d 348 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D820b].

A claim for declaratory relief is moot once a prior appellate decision settles a question of law as to which declaratory relief is sought. *See, Brown-Peterkin v. Williamson*, 307 So.3d 45 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2518a]. *Also see Vazquez v. Citizens Prop. Ins. Corp*., 304 So. 3d 1280, 1286 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a] (holding a declaratory judgment action is moot when it raises a settled question of law).

Count I—Petition for Declaratory Judgment—Right to Appraisal Has Not Been Triggered

The allegations made in Count I of Plaintiff's complaint have been squarely addressed by the District Courts and as such, this Court finds that Count I of Plaintiff's Amended Complaint is moot and the claim at hand is ripe for appraisal. *See Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC*, 349 So. 3d 965, 971 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a] and *NCI v. Progressive Select Ins. Co*., 350 So.3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f]. Once Progressive disagreed with Plaintiff on the amount of loss, it could demand appraisal, and there was no need for negotiations. *Id*.

Whether an appraisable issue existed and whether appraisal had been triggered was the exact issue decided in the NCI case which held that the subject appraisal provision allows either party to initiate appraisal proceedings if there is a disagreement on the loss amount. The NCI Court found that Plaintiff's argument that there was no disagreement or exchange of information to trigger appraisal, the exact argument Plaintiff makes here, had zero merit.

District Courts have also found that a review and reformation of the limits of liability provision is futile when reviewing enforcement of the appraisal provision as the appraisal provision is not subject to the limits of liability provision. *See State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1203 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D99b]; *See Kelner v. Woody*, 399 So. 2d 35, 37-38 (Fla. 3d DCA 1981). The appraisers are not bound by the method of valuation. The only issue is the amount of the loss. In the subject case, Progressive admitted that there is a covered loss, thus any dispute as to the amount of loss is appropriate for appraisal. The subject Policy provides express language dictating the appropriate appraisal process that should occur in the event one of the parties demands an appraisal. Plaintiff must fully comply with all the terms of the Policy before Plaintiff may sue Defendant for any matter related to the Policy.

Numerous District Courts have also held that the appraisal provision at issue is not ambiguous and that it contains sufficient procedures and methodologies. *See, Progressive American Ins. Co., v. Glassmetics*, 343 So.3d 613 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b]; *Progressive American Ins. Co. v. Hillsborough Recovery Ctr.*, 349 So.3d 965 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]; *NCI v. Progressive Select Ins. Co.*, 350 So.3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f] (noting the "policy's appraisal provision contains numerous processes characteristic of an enforceable arbitration agreement, much less a more informal appraisal provision.") In concluding the appraisal provision provides sufficient detail, the Court noted caselaw has already addressed these questions. *Hammond*, 343 So. 3d at 623 (citing *Allstate Ins. v. Suarez*, 833 So. 2d 762 (Fla. 2002) [27 Fla. L. Weekly S1028a] & *Citizens Prop. Ins. v. Mango Hill #6 Condominium Ass'n*, 117 So. 3d 1226 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1507c].

In *Progressive Am. Ins. Co. v. Glassmetics, LLC, a/a/o Devan Hammond*, 343 So. 3d 613, (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b], the trial court's denial of the insurer's motion to dismiss was reversed and concluded that the same appraisal provision as the one in this case was not invalid based on a lack of procedures or methodologies. The Court reasoned that appraisal is an informal process and intended to allow the parties to resolve the dispute as to an amount of loss without litigation. The Court further explained that the procedures as outlined in the provision were sufficiently detailed for this informal process. The *Glassmetics* case held that an insurer's policy appraisal provision requires an insured to comply with the appraisal process prior to filing a lawsuit against the insurer.

In *NCI v. Progressive Select Ins*., 350 So.3d 801, (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f], the Court, in affirming an order of dismissal in favor of Progressive, also found that the appraisal provision is binding upon the parties once invoked and Plaintiff was aware of the policy's nature when it stepped into the insured's shoes. ("appraisal provision does not violate its fundamental rights of access to the court system, jury trial, and due process."). The *NCI* case is synonymous to the issue in this case. It involves a similar Progressive policy; in response to a Declaratory Judgment Petition, Progressive filed a Motion to Dismiss in response to NCI's lawsuit stating that Progressive invoked appraisal. The Court also found that an appraisable issue existed because the only issue in dispute is the amount of the loss.

Count II—Petition for Declaratory Judgment—Defendant Has Failed to Properly Invoke Appraisal by Failing to Select a Competent and/or Impartial Appraiser

The allegations made in Count II of Plaintiff's Amended Complaint have similarly been addressed and ruled upon by the District Courts. Plaintiff refutes that Progressive properly invoked appraisal because the March 23, 2021 letter to Plaintiff did not specifically state the name of a person who was going to be the appraiser.

Even if Progressive improperly selected an appraiser, that choice "does not waive Progressive's right to appraisal." *See, Progressive American Ins. Co., v. Glassmetics*, 343 So.3d 613 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b]; *Travelers of Florida v. Stormant*, 43 So. 3d 941, 945 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2059a]. Dismissal upheld in *NCI v. Progressive Select Ins. Co.*, 350 So.3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f].

Although Progressive did not name an individual appraiser, the Court finds that the policy does not require them to do so. Even if the insurer appointed an appraiser who was not competent or impartial, that is not conduct which is inconsistent with the right to appraisal. *See Travelers of Fla. v. Stormont*, 43 So. 3d 941 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2059a].

III. **CONCLUSION**

This Court finds that the issues raised in Plaintiff's counts for Declaratory Relief have been considered and addressed by the District Courts of Appeal in *Progressive Am. Ins. Co. v. Glassmetics*, 343 So.3d 613 (Fla. 2nd DCA 2022) [47 Fla. L. Weekly D1106b], *Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Cty., LLC*, 349 So. 3d 965 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a], and *NCI v. Progressive Select Ins. Co.*, 350 So.3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f], et al. As such Plaintiff cannot be in doubt as to these issues nor is there a bona fide, actual, present need for declaration.

In consideration of the Facts and analysis above, it is:

ORDERED AND ADJUDGED

1. Defendant's Motion to Dismiss Amended Complaint, or Alternatively, Defendant's Motion to Abate or Stay and Renewed Motion to Compel Appraisal is hereby **GRANTED.**

2. The instant matter is hereby dismissed without prejudice, pending completion of appraisal pursuant to the terms of the subject policy.

3. Should the appraisal process prove unsuccessful, Plaintiff may then seek other available remedies.

4. The Clerk is instructed to close out this matter.

* * *

Insurance—Automobile—Windshield replacement— Appraisal—Insurer's motion to dismiss or stay and compel appraisal of windshield replacement dispute is denied where, during pendency of hearing on motion, plaintiff participated in appraisal process by notifying insurer of its chosen appraiser and appraiser's opinion on amount of loss, but insurer chose not to respond to that notice

ADAS WINDSHIELD CALIBRATIONS, LLC, a/a/o Cassandra Vidal, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-025700-SP-26. Section SD03. October 26, 2023. Lissette De la Rosa, Judge. Counsel: Martin I. Berger, Berger | Hicks, Miami, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, DEFENDANT'S MOTION TO ABATE OR STAY AND MOTION TO COMPEL APPRAISAL

THIS CAUSE, having come before this Court on October 24,

2023, on Defendant's Motion to Dismiss or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal, and the Court, having heard argument on same, and being otherwise advised on the premises, it is:

CONSIDERED, ORDERED, and ADJUDGED:

The Motion is hereby DENIED. In this windshield replacement dispute, Progressive filed the within Motion asking the Court to either dismiss the matter or to stay the matter and compel Plaintiff to attend appraisal. During the pendency of the hearing, Plaintiff participated in the appraisal process by sending an email to Defense counsel, not only setting forth the name and address of Plaintiff's chosen appraiser, but also delineating the appraiser's opinion on the amount of loss, pursuant to the appraisal clause in Defendant's policy.

In response to Plaintiff's correspondence, Defendant chose not to respond, instead choosing to wait until the within hearing to again ask the Court to dismiss this action. This inaction on the part of Defendant was inapposite of its prayer for relief, namely that the parties partake in the appraisal process. Plaintiff partook in the process and Defendant chose not to respond. Therefore, Defendant's Motion to Dismiss is denied.

Plaintiff shall withdraw Declaratory Counts I, II, and III of its Amended Complaint, and the matter shall move forward on the remaining Breach of Contract claim.

* * *

Insurance—Automobile—Windshield replacement— Appraisal—Appraisal provision that provides no means for court to select umpire when parties disagree on umpire selection lacks essential terms and is unenforceable—Motion to dismiss or stay and compel appraisal is denied

DR CAR GLASS, LLC, a/a/o Anaris Denis, Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-029117-SP-26. Section SD03. December 6, 2023. Lissette De la Rosa, Judge. Counsel: Martin I. Berger, Berger | Hicks, Miami, for Plaintiff.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS, OR ALTERNATIVELY MOTION TO STAY AND COMPEL APPRAISAL

This Matter, having come up for hearing on the 5th day of December, 2023, on Defendant's Amended Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal, and the Court, having heard argument on same and being otherwise advised on the premises, it is hereby

ORDERED AND ADJUDGED:

Defendant's Motion is DENIED.

Defendant's policy provides no avenue for this Court to select an umpire where the parties disagree on the umpire selection. "Courts are powerless to rewrite a contract to make it more reasonable or advantageous to one of the parties . . . or to substitute their judgment for that of the parties to the contract in order to relieve one of the parties from the apparent hardships of an improvident bargain." *World Finance Group, LLC. v. Progressive Select Ins. Co.*, 300 So. 3d 1220, 1222 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D120d]. Accordingly, the Court finds the appraisal provision to be lacking essential terms and is therefore unenforceable.

Defendant shall have thirty (30) days to file its response to Plaintiff's Complaint and its discovery responses to all outstanding discovery.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household residents—Independent insurance agency was acting within scope of its authority as agent of insurer when it gathered information from insured about household residents for policy application and communicated that information to insurer—Motion for summary judgment on issue of whether insurer is estopped from raising material misrepresentation defense by insured's alleged disclosure of household residents to agent is denied because there is material factual dispute as to what information was communicated to agent

FLORES MEDICAL CENTER, INC., a/a/o Ada Paz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-006605. January 19, 2024. Marc Makholm, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Scott Distasio, Distasio Law Firm, Tampa, for Plaintiff. Matthew Chamoff, for Defendant.

ORDER ON PLAINTIFF'S SECOND AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER came before the court on January 16, 2024 on Plaintiff's Second Amended Motion for Final Summary Judgment. The court having reviewed the Motion, the court file, applicable law, having taken argument of the parties, and being otherwise fully advised, makes the following findings and conclusions of law:

AGENCY

An insurance broker may act in a dual capacity of broker for the insured and agent of the insurer. *Almerico v. RLI Ins.*, 716 So.2d 774, 776-777 (Fla. 1998) [23 Fla. L. Weekly S431a] citing *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, 74 Fla. 130, 151, 77 So. 168, 174 (1917); accord *Steele v. Jackson Nat'l Life Ins. Co.*, 691 So.2d 525, 527 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D817a] (acknowledging that "an independent insurance agent can be the agent of the insurance company for one purpose and the agent of the insured for another"); see also Johnny C. Parker, *Does Lack of an Insurable Interest Preclude an Insurance Agent From Taking an Absolute Assignment of His Client's Life Policy?*, 31 U. Rich. L.Rev. 71, 98 (1997) (explaining "dual agency" principle as limited exception to general rule that insurance agent cannot serve two masters). There are 3 basic ways an insurance broker can act as agent for the insurer. Those ways are actual agency, statutory agency, and apparent agency. In this case, there is record evidence of all three.

The evidence of actual agency present is the Agency Agreement between the Broker, Univista Insurance Company, and the insurer, Direct General. The Agency Agreement "Appoints" Univista as the Agent of Direct General. In addition, the scope of authority of the agency agreement authorizes Univista on behalf of Direct General to:

> Receive and accept proposals for insurance. . .;
>
> Collect and receive premiums;
>
> Issue binders as authorized by the Company; and Administer all customary, usual and/ or necessary services to assist the policyholder and the company which may include processing of endorsements, collection of premium payments and answering general questions concerning the policyholders account. . .

Based on the above provisions in the Agency Agreement among others, Univista was acting within the scope of its agency agreement when it was gathering information from Ada Paz for the insurance application and communicated that information to Direct General.

The second way agency can be established involves statutory agency when a broker solicits business for an insurer but is not "appointed". *See* gen. Fla. Stat. 626.342 and 626.752. See also, *Almerico v. RLI Ins.*, 716 So.2d 774, 781-782 (Fla. 1998) [23 Fla. L. Weekly S431a]. Section 626.342(2) makes the insurer liable to the insured in the same way that it would be liable had it expressly appointed the broker as its agent. *Id*. Similarly, section 626.752 makes an insurer liable to the insured for coverage for the acts of the agent in producing that business. Both statutes require the insurer to provide the broker with the insurer's application. In this case Direct General provided Univista with its application with Direct General's logo on

it. Therefore, to the extent Univista was not officially "appointed" pursuant to Florida law, Univista was still acting within the scope of its authority under section 626.342 and 626.752 when it was gathering information from Ada Paz for the insurance application and communicated that information to Direct General.

The third way agency can be established involves apparent agency. Florida case law provides that an insurer may be held accountable for the actions of those whom it cloaks with "apparent agency". Further, a review of the case law on agency indicates that evidence of indicia of agency may be demonstrated if the insurer furnishes an insurance agent or agency with "any blank forms, applications, stationery, or other supplies to be used in soliciting, negotiating, or effecting contracts of insurance." *Almerico v. RLI Ins.*, 716 So.2d 774, 777 (Fla. 1998) [23 Fla. L. Weekly S431a] citing § 626.342(1); see *Fidelity & Casualty Co. v. D.N. Morrison Constr. Co.*, 116 Fla. 66, 156 So. 385 (1934). In this case the Direct General application with Direct General's logo on it creates that indicia of agency required for apparent agency. Based on the above, Univista was acting within the scope of its apparent agency when it was gathering information from Ada Paz for the insurance application and communicated that information to Direct General.

MATERIAL MISREPRESENTATION

Notice to a broker acting as an agent to the insurer at the time of the application for insurance of facts material to the risk is notice to the insurer and will prevent the insurer from insisting upon a forfeiture for cause within the knowledge of the agent." *Fresh Supermarket Foods, Inc. v. Allstate Ins. Co*. 829 So.2d 1000, 1001 (Fla. 2nd DCA 2002) [27 Fla. L. Weekly D2477c] citing *Poole v. Travelers Ins. Co*., 130 Fla. 806, 179 So. 138, 143 (1937). See *United Servs. Auto. Ass'n v. Clarke*, 757 So.2d 554 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1022c]. Put another way, when the agent of an insurance company fills in an application for insurance, his act in doing so is the act of the company. If the applicant fully states the facts to the agent at the time and the agent writes the answers incorrectly or contrary to the facts stated by the applicant, the company is estopped from making a defense in an action on the policy by reason of the false answer. *Stix v. Continental Assur. Co*. 3 So.2d 703 (Fla. 1941); citing *Continental Life Insurance Company v. Chamberlain*, 132 U.S. 304, 10 S.Ct. 87, 33 L.Ed. 341. See also *Casamassina v. U.S. Life Ins. Co*. 958 So.2d 1093 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1522a]; *Guaranty Life Insurance Company v. Feigley* 120 So.2d 804 (Fla. 1960); *Woodmen of the World Life Ins. Soc. v. Jackson* 243 F.2d 558 (5th Cir. 1957).

In this case, Ada Paz testified in her affidavit as follows:

> "I spoke with an agent named Yaneli. I specially told the agent that my brother, Estevan Paz Lopez, my father, Estaban Paz Vargas and my aunt, Rose Vargas, lived with me at [Editor's note: Address redacted] , Tampa, FL 33607. The agent asked whether anyone else drove my 2014 Hyundai Sonata. I replied that I was the only person who drove my car. As such, the agent made the decision not to list anyone else on the application for insurance. The agent knew that I could not read the application, which she had typed up."

On January 12, 2024, Direct General filed an affidavit from Univista agent Mirthea Perez. Perez states that she spoke to Paz and Paz did not inform her of any other household members. It is unclear from the record whether Perez and Yanelli are really the same person. In addition, to the extent Perez and Yanelli are different people, it is unclear whether Yanelli was a secretary without authority to gather information for the application. Based on this conflict, there remains a question of act regarding what information was communicated to Univista.

Based on all of the above, the Court hereby ORDERED AND ADJUDGED the following:

1. Plaintiffs Second Amended Motion for Final Summary Judgment on the issue of agency is granted. Univista was acting within the scope of its authority when it was gathering information from Ada Paz for the insurance application and communicated that information to Direct General.

2. Plaintiffs Second Amended Motion for Final Summary Judgment on the issue of estoppel is denied.

* * *

FLORES MEDICAL CENTER, INC., a/a/o Ada Paz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-006605. January 19, 2024. Marc Makholm, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Scott Distasio, Distasio Law Firm, Tampa, for Plaintiff. Matthew Chamoff, for Defendant.

ORDER ON PLAINTIFF'S ORE TENUS MOTION IN LIMINE

COMES NOW Defendant, by and through the undersigned counsel, who hereby submits an Ore Tenus Motion in Limine Regarding EUO Transcript of Ada Paz, along with any testimony regarding undisclosed household members from anyone other than Ada Paz, as follows:

1. Plaintiff moved in limine regarding an EUO transcript taken of Ada Paz, a non-party, along with any testimony regarding undisclosed household members from anyone other than Ada Paz.

2. If any such testimony might possibly be elicited from any witness other than Ada Paz, the party must first approach the bench and advise the Court so that the Court can make a ruling on relevance and admissibility. As such, at this time, the Court reserves on Plaintiff's Ore Tenus Motion in Limine.

* * *

Insurance—Personal injury protection—Coverage—Passenger—Owner of vehicle for which security was required by law—Partial summary judgment as to coverage for passenger injured in insured vehicle is entered in favor of medical provider—Provider carried its burden to show that passenger was presumptively entitled to benefits, and insurer failed to offer any evidence in support of its defense that coverage did not exist because passenger owned her own vehicle—Insurer's motions for leave to amend affirmative defenses to assert defense of failure of passenger to attend examination under oath and to continue summary judgment hearing are denied—Insurer had ample time to seek to compel discovery from passenger or to obtain information regarding passenger's residency and vehicle ownership from other sources prior to expiration of discovery deadlines and failed to do so

MANASOTA ACCIDENT AND INJURY CENTER, LLC., a/a/o Ginny Harlan, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 23-CC-023348 (L). January 26, 2024. Richard H. Martin, Judge. Counsel: Alexander D. Licznerski, Morgan & Morgan, St. Petersburg, for Plaintiff. David S. Dougherty, Law Offices of David S. Dougherty, Tampa, for Defendant.

[Editor's note: Motion for Reconsideration pending. Hearing set for 4-22-2024 as of date this order published.]

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COVERAGE

THIS CAUSE came before the Court on January 2, 2024, at 10:00 a.m., concerning Plaintiff's Motion for Summary Judgment as to Coverage (DN 45) and Defendant's Second Motion for Leave to Amend Answer and Affirmative Defenses and Continue Plaintiff's Summary Judgment Hearing Unilaterally Scheduled for January 2, 2024 (DN 53). For the reasons stated below, Plaintiff's Motion for Summary Judgment as to Coverage is hereby **GRANTED** and Defendant's Second Motion for Leave to Amend Answer and Affirmative Defenses and Continue Plaintiff's Summary Judgment Hearing Unilaterally Schedule for January 2, 2024, is hereby **DE-**

NIED:

BACKGROUND

The following facts appear to be undisputed. On August 27, 2021, Ms. Ginny Harlan was involved in a motor vehicle accident. She was a passenger in a 2014 Hyundai that was owned and driven by Ms. Lisa M. Wade. The vehicle was insured by Defendant, Geico Indemnity Company. Ms. Wade and her husband, Wille C. Wade, were the only named insureds on the policy. The policy contained personal injury protection (PIP) coverage in the amount of $10,000.00 per insured. After the accident, Ms. Ginny Harlan received medical treatment with Plaintiff, Manasota Accident and Injury Center, LLC. Ms. Harlan assigned her right to PIP benefits under the Wades' policy to Plaintiff. (DN 46, at 139.) Plaintiff sent Defendant all medical bills for Ms. Ginny Harlan's treatment. Defendant denied these bills upon receiving them. On January 10, 2021, Plaintiff's counsel submitted a demand letter to Defendant asking for reimbursement in the amount of $9,723.65 in medical benefits. (DN 46, at 133.) Defendant responded to Plaintiff's demand letter by stating that its records indicated that Ms. Harlan did not qualify for PIP coverage as she allegedly owned a vehicle at the time of loss. (DN 46, at 142.) Defendant's PIP log shows no PIP benefits were paid for the claim. (DN 46, at 131.)

Plaintiff filed suit on March 14, 2023, claiming Defendant breached the Wades' policy of insurance. Plaintiff argues Defendant breached its policy by not providing required PIP coverage to Ms. Harlan pursuant to Florida Statute 627.736(1), which requires motor vehicle insurers in Florida to provide PIP coverage to passengers of automobiles involved in motor vehicle accidents. Defendant asserted as defenses that Plaintiff failed to state a cause of action because Plaintiff's assignor did not qualify for PIP coverage under the policy and that Plaintiff failed to strictly comply with the provisions of Section 672.736(10) with respect to its demand letter. (See DN 24, at 6 and DN 29.)

During discovery, on June 28, 2023, Plaintiff deposed Defendant's Litigation Adjuster, Nerissa Grimshaw. (DN. 46) Ms. Grimshaw testified PIP coverage was denied because Ms. Harlan was not a resident relative of Defendant's insured and owned her own vehicle at the time of the loss. (DN 46, at 26, 29.) However, Ms. Grimshaw was unable to point to any documentation in the claim file or other evidence in Defendant's possession which supported that conclusion.

PROCEDURAL HISTORY

Shortly after the Plaintiff filed its lawsuit, this Court entered its Differentiated Case Management Order Establishing Deadlines which included deadlines for completion of fact discovery of December 11, 2023, and a deadline of December 27, 2023, to file a motion to compel. These deadlines expired before the summary judgment hearing without any party seeking to extend them prior to expiration.

On August 29, 2023, Plaintiff filed its motion for summary judgment as to coverage which argued that, pursuant to Section 627.736(1), Florida Statutes, Defendant was required to provide personal injury protection (PIP) insurance coverage to Ms. Harlan as she was a passenger in the insured vehicle. Plaintiff's summary judgment motion included all applicable evidence showing that Defendant was responsible for providing coverage to Ms. Harlan, including the Litigation Adjuster deposition transcript, police report, demand letter, demand response, PIP Log, etc.

Three months later, on November 29, 2023, Plaintiff filed its Notice of Hearing which set Plaintiff's Motion for Summary Judgment as to Coverage for hearing to be heard on January 2, 2024, at 10:00am. Defendant did not file a response to Plaintiff's motion for summary judgment or any evidence in opposition. Instead, on December 28, 2023, just one business day before the summary judgment hearing, Defendant filed its Second Motion for Leave to Amend Answer and Affirmative Defenses and Continue Plaintiff's Summary Judgment Hearing Unilaterally Scheduled for January 2, 2024. (DN 53.) Although Defendant did not notice the motion for hearing, Defendant argued the motion at the summary judgment hearing and the Court entertained the argument and considered the motion.

ANALYSIS

"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." Fla. R. Civ. Proc. 1.510(a). In applying the summary judgment standard, courts are to construe and apply the rule "in accordance with the federal summary judgment standard." *Id.* Where the nonmoving party bears the burden of proof on a dispositive issue at trial, the moving party need only demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986). In adopting the new standard, the Supreme Court of Florida noted, "In Florida, it will no longer be plausible to maintain that 'the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *In re Amendments to Fla. Rule of Civil Procedure 1.510*, 317 So. 3d 72, 76 (Fla. 2021) [46 Fla. L. Weekly S95a] (quoting Bruce Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.)).

"[A]n issue of fact is 'genuine' only if a reasonable jury could return a verdict for the nonmoving party." *Brevard Cnty. v. Waters Mark Dev. Enters., LC,* 350 So. 3d 395, 399 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1863c] (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986)). "A fact is 'material' if the fact could affect the outcome of the lawsuit under the governing law." *Id.*

"The moving party bears the initial burden of identifying those portions of the record demonstrating the lack of a genuinely disputed issue of material fact." *Waters Mark Dev.*, 350 So. 3d at 398. "If the movant does so, then the burden shifts to the non-moving party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law." *Id.* "To satisfy its burden, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (*quoting Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) (internal quotations omitted)). The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322, 106 S. Ct. 2458. "To do so, the non-moving party must go beyond the pleadings and 'identify affirmative evidence' that creates a genuine dispute of material fact." *Id.* (quoting *Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)). If the nonmovant's evidence "is merely colorable, or not sufficiently probative, summary judgment may be granted." *In re Amendments to Fla. Rule of Civil Procedure 1.510*, 309 So. 3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a]. The trial court must determine whether the nonmovant's evidence presents sufficient disagreement to require submission to a finder of fact "or whether it is so one sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52, 106 S. Ct. 2505. "That is to say, the nonmovant's evidence must be of sufficient weight and quality that 'reasonable jurors could find by a preponderance of the evidence that [the nonmovant] is entitled to a verdict." *Rich v. Narog*, 366 So. 3d 1111, 1118 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1933a].

In determining whether a genuine issue of material fact exists, the trial court "must view the evidence and draw all factual inferences therefrom in a light most favorable to the non-moving party and must resolve all doubts in that party's favor." *Waters Mark Dev. Enters., LC*, 350 So. 3d at 398.

A plaintiff moving for summary judgment need not preemptively tackle all of the defendant's affirmative defenses. *G & G In-Between Bridge Club Corp. v. Palm Plaza Assocs., Ltd.*, 356 So. 3d 292, 299 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D275a]. Instead, the defendant bears the initial burden of showing an affirmative defense is applicable because the defendant bears the burden of proof on its affirmative defense at trial. *Id.* Only when a defendant does so (through pointing to record evidence), does the burden shift to the plaintiff regarding the affirmative defense. *Id.*

Rule 1.510 requires a nonmoving party to serve a response to the motion for summary judgment. Fla. R. Civ. Proc. 1.510(c)(5). "[B]y requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion." *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a]. Where a nonmoving party fails to file a response to a motion for summary judgment, the court may consider the facts set forth in the movant's motion for summary judgment as "undisputed for purposes of the motion." *Id.* (quoting Fla. R. Civ. Proc. 1.510(e)(2)).

The applicable statute at issue here is Section 627.736(1), Florida Statutes, which states:

> REQUIRED BENEFITS.—An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to the named insured, relatives residing in the same household unless excluded under s. 627.747, persons operating the insured motor vehicle, **passengers in the motor vehicle**, . . .

§ 627.736(1), Fla. Stat. (*emphasis added*).

Therefore, under Section 627.736(1), Florida Statutes, Defendant was required to provide personal injury protection to any passenger in the insured motor vehicle that was involved in the subject motor vehicle accident. Plaintiff established through its motion for summary judgment and supporting evidence, which was uncontested, that Ms. Harlan was a passenger in the insured motor vehicle of the Wades when the accident occurred and that the Wades' vehicle was covered by Defendant. Thus, Plaintiff carried its burden to show Ms. Harlan was presumptively entitled to PIP benefits. The burden of proof as to any defense to coverage rests with Defendant.

Pursuant to Florida Rule of Civil Procedure 1.510, the deadline for Defendant to file a response and all applicable evidence in opposition to Plaintiff's motion for summary judgment was December 13, 2023, 20 days before the hearing date. Defendant failed to file any response, failed to offer any evidence and failed to timely seek to extend its deadline to file a response. Defendant failed to meet its burden to come forward with sufficient evidence demonstrating a genuine issue of material fact as to its coverage defenses. More to the point, Defendant bore the burden to show a genuine issue of material fact existed as to its defenses that coverage did not exist because Ms. Harlan allegedly owned her own vehicle (and presumably was covered by another carrier). Defendant failed to offer any evidence in opposition. Thus, there is no record evidence before the Court on this defense. At the hearing on the motion for summary judgment, counsel for Defendant conceded that Defendant was not in possession of any admissible evidence to dispute coverage.

Instead, on December 28, 2023, just one business day before the summary judgment motion hearing, Defendant filed a motion for leave to amend its affirmative defenses and motion to continue the summary judgment hearing. (DN 53.) Defendant contended in its motion that it had subpoenaed Ginny Harlan for deposition on August 29, 2023 and September 25, 2023, but Ms. Harlan had failed to appear. Defendant also contended it had attempted to get Ms. Harlan (who was not a GEICO policyholder) to sit for an examination under oath unsuccessfully on December 11, 2023 and December 28, 2023. Defendant contended that the failure to appear for the examination under oath—the last time of which had occurred that day—gave rise to a new applicable defense. Defendant's motion attached a proposed amended answer asserting a new defense relating to the failure to attend the examination under oath. The motion also attached an affidavit from Defendant's claims representative attesting to the attempts to obtain the testimony of Ms. Harlan.

The Court is not persuaded by Defendant's arguments. The fact discovery deadline in this case was December 11, 2023, and the motion to compel discovery deadline was December 27, 2023. Defendant allowed these deadlines to lapse and failed to seek to extend them. Defendant had eight months between when it appeared in this case and its response to the motion for summary judgment was due. Defendant thus had ample time to investigate Ms. Harlan's residence and insurance coverage. Defendant had more than adequate time to raise Ms. Harlan's failure to attend the depositions noticed for August and September 2023 before the January 2, 2024, hearing but did not. Indeed, those facts were available to Defendant months before the hearing. Defendant made no effort to obtain court intervention to enforce its subpoenas. Prior to the close of fact discovery, Defendant could have moved to extend the discovery cutoff but did not. Defendant had ample opportunity to compel discovery prior to the December 27, 2023, deadline to file a motion to compel. Defendant's motion states "Ginny Harlan is the one person that can testify to and authenticate evidence with regard to her residency and vehicle ownership at the time of the loss." (DN 53, at 2.) Yet, Defendant could have obtained admissible evidence with respect to such information from public records or other available sources. The police report attached to Plaintiff's motion contains Ms. Harlan's address. (DN 46, at 128.) Defendant could have deposed its own insured to confirm Ms. Harlan did not reside with them, but did not. Defendant's own lack of diligence in conducting discovery is the reason it was unable to offer any evidence in opposition to the motion for summary judgment. Continuing the summary judgment hearing would serve no purpose because the discovery period it now closed.

CONCLUSION

For these reasons, Plaintiff's Motion for Summary Judgment as to Coverage is **GRANTED**. Defendant is entitled to partial summary judgment as to coverage. Defendant, GEICO INDEMNITY COMPANY, is required to provide coverage with respect to the claim at issue in this case.[1]

Defendant's Second Motion for Leave to Amend Answer and Affirmative Defenses and Continue Plaintiff's Summary Judgment Hearing Unilaterally Schedule for January 2, 2024, **DENIED.**

[1]Plaintiff submitted a final judgment to the Court for entry. However, because Plaintiff only moved for partial summary judgment as to coverage, the amount due remains in dispute. Plaintiff's complaint seeks damages that do not exceed $8,000. (DN 4, at 4.)

* * *

Insurance—Personal injury protection—Attorney's fees—Confession of judgment—Insurer's payment of amount demanded in civil remedy notice after suit was filed but before insurer was served with complaint is not confession of judgment as matter of law—Lawsuit of which insurer had no notice was not "necessary catalyst" for payment—Medical provider's reference to declaratory action in CRN was not legally sufficient notice of suit

OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC, a/a/o Dena Ballew, Plaintiff, v. GEICO CASUALTY COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23015334. Division 83. November 3, 2023. Ellen Feld, Judge. Counsel: Henry Crouser, Crouser & Storani,

PLLC, Pembroke Pines, for Plaintiff. Retta Rico, Dutton Law Group, Fort Lauderdale, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR ENTRY OF AN ORDER THAT DEFENDANT HAS CONFESSED JUDGMENT

THIS CAUSE was before the Court for hearing on the Plaintiff's Motion for Entry of Order Finding Defendant has Confessed Judgment and Determining Plaintiff's Entitlement to Attorney's Fees and Costs on October 23, 2023. The Court, having reviewed the Motion, Defendant's Response to the Motion, the entire court file, and the relevant legal authorities, having heard argument and evidence; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, finds as follows:

FACTUAL BACKGROUND

1. This is an action for Declaratory Relief involving a claim for entitlement to Personal Injury Protection ("PIP") benefits filed by the Plaintiff, OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC a/a/o DENA BALLEW, against the Defendant.

2. On May 6, 2022, the Assignor sought treatment from Plaintiff for injuries sustained in a motor vehicle accident.

3. On May 16, 2022, Defendant received bills from Plaintiff for its treatment rendered to the Assignor. Defendant adjusted the bills and issued reimbursement in the amount of $1,901.34 to Plaintiff for date of service May 6, 2022.

4. Plaintiff never served a pre-suit demand letter pursuant to section 627.736(10), Florida Statutes, nor any other documentation to notify Defendant that it disputed the amount reimbursed.

5. On March 8, 2023, Plaintiff filed the instant lawsuit alleging that it was in "doubt" as to the rights and obligations of the parties under the insurance policy and Florida law, and that Plaintiff was entitled to declaratory relief to section 86.011, Florida Statutes, to have those doubts and uncertainties answered by this Court.

6. On March 18, 2023—ten days after Plaintiff filed its Petition for Declaratory Relief—Plaintiff filed a Civil Remedy Notice ("CRN") with the Florida Department of Financial Services involving the same claim.

7. On May 15, 2023, Defendant responded that it disagreed with all allegations contained within the CRN, agreed to pay the demanded monetary amount pursuant to the cure provision of section 624.155, Florida Statutes, that required payment within 60 days of notice. See § 624.155(3)(c), Fla. Stat.

8. On May 12, 2023, over two months after Plaintiff filed its action for declaratory relief and just three days before Defendant paid in response to the CRN, Plaintiff filed the Summons and a Copy of the Complaint/Petition for Declaratory Relief to be served upon Defendant.

9. On May 26, 2023, Defendant was served with the Complaint and jurisdiction was obtained over the Defendant.

10. On May 17, 2023, Plaintiff filed its Motion to Tax Attorney's Fees and Costs Together With Interest, asserting that Defendant's May 15, 2023 payment was a confession of judgment in the declaratory action and entitled Plaintiff to attorney's fees and costs for time spent both before and after the time suit was filed.

LEGAL ANALYSIS

The issue before this Court is whether Defendant's payment made after suit was filed, but before service of process, constitutes a confession of judgment as a matter of law. When an insurer pays policy proceeds after suit is filed, but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or a verdict in favor of the insured, thereby entitling the insured to attorney's fees. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684-85 (Fla. 2000) [25 Fla. L. Weekly S1103a]; *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983). However, not every situation where an insurer's payment occurs after suit has been filed, but before judgment, qualifies as a confession. That is, the confession of judgment doctrine is not absolute. *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 829 (Fla. 2d DCA) [35 Fla. L. Weekly D364e], *rev. denied*, 49 So. 3d 746 (Fla. 2010). The confession rule operates to penalize an insurance company for wrongfully withholding benefits, causing its insured to resort to litigation to resolve the conflict when it was in the company's power to resolve it. *Id.* Confession should only be applied where the insurer incorrectly withholds benefits and the insured was forced to file suit to act as a necessary catalyst for the insurer to make payment. *Id.*

This Court finds that Defendant's "post-suit" payment is not a confession of judgment as a matter of law. Defendant had not been served with the lawsuit at the time of payment, and thus had no notice of the pending declaratory action at the time it paid the CRN. There is no evidence to suggest Defendant paid the CRN because of the lawsuit, or that the lawsuit had any impact on its decision. The lawsuit was not the "necessary catalyst" for payment, as Defendant paid in response to the CRN, not the lawsuit.

The prerequisite factual conditions for confession of judgment have not been met. Plaintiff was not forced to sue to receive the benefits paid, and the filing of the lawsuit did not result in Defendant's change of heart as required by the confession of judgment doctrine. The timeline of the record evidences that Plaintiff's Civil Remedy Notice was the impetus for Defendant's payment and there is no evidence produced to the contrary by Plaintiff to suggest otherwise.

Due process mandates a litigant have sufficient notice and an opportunity to be heard. It would violate Defendant's due process rights to find that Defendant had given up its defense in this lawsuit by virtue of a "confession of judgment" made when Defendant had not been served with, nor even had read, the allegations against it, and without the opportunity to defend itself in court. Confession of judgment cannot occur before service of the lawsuit on the defendant, and any judgment entered upon such a confession is void for lack of jurisdiction and due process.

Entering Confession of Judgment Would Violate Defendant's Due Process Rights

The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Scull v. State*, 15 Fla. L. Weekly S369 (Fla. June 28, 1990) (citations omitted). "In observing due process of law, the opportunity to be heard must be full and fair, not merely colorable or illusive. Fair notice and a reasonable opportunity to be heard shall be given interested parties before a judgment or decree is rendered." *Zelman v. Zelman*, 175 So. 3d 871, 878 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D2033b] (citations omitted).

Due process contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him. *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991) (quoting *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (Fla. 1936)). Due process guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

The United States Constitution, the Florida Constitution, and Florida's service of process statutes all require that the Defendant must be afforded with proper notice and an opportunity to be heard. Entering a confession of judgment on grounds before the Court has jurisdiction and before granting Defendant its due process rights to be made aware of the suit are simply improper and inviolate. To find Defendant confessed judgment prior to service of process would deprive the Defendant of its property without due process of law.

Notice of Suit Requires Service of Process

This Court finds that Defendant did not have notice of the suit prior to service of process of the Complaint. "[T]here can be no notice in the legal sense without receipt of process." *Home Life Ins. Co. v. Regueira,* 243 So. 2d 460, 461 (Fla. 2d DCA 1970); *White v. Pepsico,* 568 So. 2d 886 (Fla. 1990).

It is axiomatic to say that Defendant must be served with the Complaint in order to confess to the relief requested. See *Lighthouse Medical Group Florida, Inc. v. United Auto. Ins. Co*., 29 Fla. L. Weekly Supp. 616a (Fla. Miami-Dade Cty. Ct. Oct. 4, 2021) ("[W]hen a party Confesses Judgment it decline[s] to defend its position in the pending suit and admits to the allegations of Plaintiff's Complaint.") (citations omitted; emphasis added); *Alliance Spine & Joint, III, LLC v. GEICO Gen. Ins. Co*., 321 So. 3d 242, 244-45 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1149a] ("[W]hen a party confesses judgment up to the maximum amount of damages alleged in the complaint, the confessing party has, in fact, agreed to the precise relief sought in the complaint. In such a situation, the issue between the parties, as framed by the pleadings, becomes moot as the court can provide no further substantive relief other than entering the confessed judgment.") (citation omitted) (emphases added).

The common law doctrine of confession of judgment has not changed. Judgments by confession "had to be entered after action had been brought and process had been regularly served." *Info. Buying Co. v. Miller*, 173 Ga. 786, 790 (1931) (emphasis added). "[N]o confession of judgment, made before suit is commenced, can be entered in a cause commenced after the confession is made, and that no valid judgment can be rendered upon such confession so made and entered. A confession of judgment is the substitute for a verdict . . . As the verdict can not be taken until the suit is filed, it seems clear that a confession of judgment, which takes its place, can not be made prior to the institution of the suit." *Id*. at 791 (emphasis added). "By clear implication the confession of judgment must be made after 'the cause hath been regularly sued out and docketed in the usual way, as in other cases. . ." *Id*. at 792.

In *Scheb v. Shalam Imps*., 656 So. 2d 956, 957 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D1482b], the Second District explained that the defendant is only bound to confess to the issues raised in the pleadings after service of process, and that anything more would be a violation of due process:

> When process is served upon a defendant, he is thus brought into court to answer only the case made by the preceding pleadings. Adjudication of any other claim would be outside the issues and beyond the jurisdiction of the court. Hence, if a defendant upon whom process has been served decides to confess the complaint by failure to plead, he has the right to assume that only the claim thus confessed will be decided. If a different claim is decided, there is a lack of due process of law.(emphasis added).

The record evidence shows that Defendant was not put on notice of the lawsuit by the CRN. The CRN contained a single, generic reference to a purportedly pending declaratory action against Defendant, without any reference to a case number, the county in which it was filed, or any other identifying information to verify and locate the alleged lawsuit. Defendant was never given an opportunity to be heard, to respond, and to address the Plaintiff's claims on the merits during the period it received and paid the CRN. Defendant had no way to ascertain the allegations against it or defend itself in the underlying lawsuit prior to curing the CRN. Pursuant to the CRN statute, Defendant only had sixty (60) days to cure the CRN. See § 624.155(3)(c), Fla. Stat., yet *Plaintiff waited over 60 days after filing its Complaint before filing its Summons*.

Furthermore, Defendant specifically stated that "by making the payment of additional insurance benefits, as stated above, and by curing your CRN, *GEICO does not waive any of the defenses that GEICO may have now or in the future in relation to any claims arising out of the subject loss*, including, but not limited to, any and all claims sounding in breach of contract, tort, bad faith, *declaratory relief*, breach of fiduciary duty, unfair claim practices, attorney's fees, costs, interest, and any and all causes of action pursuant to section 624.155, Florida Statutes." See Exhibit A (emphases added).

This Court is not persuaded by Plaintiff's position that Defendant was on notice because Plaintiff, "under no obligation to do so," alluded to a pending declaratory action in its CRN. This is legally insufficient to establish notice of a lawsuit under the law.

The Court Lacks Jurisdiction to Enter Judgment on Confession of Judgment that Occurred Prior to Service of Process

This Court deems it improper to enter judgment upon a confession that occurred prior to this Court gaining jurisdiction over Defendant. This Court did not have jurisdiction over the Defendant at the time that payment was made on May 15, 2023 because no service of process had been properly served upon Defendant.

This Court did not gain jurisdiction over the Defendant until proper service of process was completed. See *Mills Corp. v. Amato,* 72 So. 3d 814, 815 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2396b] (citations omitted). *Seymour v. Panchita Inv., Inc*., 28 So. 3d 194, 196 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D460a] ("A summons properly issued and served is the method by which a court acquires jurisdiction over a defendant"). "[T]he court has no jurisdiction to proceed to judgment against a defendant until proper notice is given to that defendant of the action or proceedings against him." *Bussey v. Legis. Audit. Comm.*, 298 So. 2d 219, 221 (Fla. 1st DCA 1974). Accordingly, this Court declines to enter final judgment based on an alleged confession that occurred prior to this Court gaining jurisdiction over Defendant.

The Prerequisites to Finding Confession of Judgment Doctrine Have Not Been Satisfied

This Court has discretion on whether to find confession of judgment. Specific requirements must be met in order to enter confession of judgment, and such conditions have not been satisfied in the instant action. The confession of judgment doctrine provides an important protection for an insurer or other defendant. When an insured never gives the insurer a chance to incorrectly deny the benefits before filing a lawsuit, the confession of judgment doctrine does not apply. *Castro*, 351 So. 3d at 132-33 (citing to *Goldman v. United Servs. Auto. Ass'n*, 244 So. 3d 310, 312 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D854a].

Confession of judgment is not found in cases where the insureds never gave their insurer the opportunity to incorrectly deny the benefits before filing a lawsuit. See, e.g., *Goldman v. United Servs. Auto. Ass'n*, 244 So. 3d 310, 311-12 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D854a]; *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 960 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1041a]; see also *Castro*, 351 So. 3d at 132-33.

The insurer must be given some notice that the insurer/assignee disputes that amount reimbursed. See *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 831 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D364e]:

> [I]f an insurer is not on notice that the claim or payment is disputed, the insured generally will be unable to show that he or she was "forced" to file suit, and a subsequent post-suit payment by the insurer may not constitute a confession of judgment. . . . [T]he insured must, at a minimum, clearly notify his or her insurer in a timely fashion of his or her dissatisfaction with the amounts paid.

The Court finds Defendant's payment was in response to a Civil

Remedy Notice, an entirely separate proceeding from the pending declaratory action. The lawsuit was not a "necessary catalyst" for payment as Defendant's payment was in response to the CRN, not the lawsuit.

.

THEREFORE, based upon the above:

It is hereby ORDERED and ADJUDGED that:

Plaintiff's Motion for Entry of Order Finding Defendant has Confessed Judgment and Determining Plaintiff's Entitlement to Attorney's Fees and Costs is DENIED.

* * *

Insurance—Personal injury protection—Standing—Assignment—Medical provider/assignee does not have standing to bring actions for equitable or declaratory relief where assignment of benefits expressly grants medical provider standing to bring only actions for PIP benefits, med pay benefits, and bad faith claims—Complaint is dismissed with prejudice

OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC, a/a/o Dena Ballew, Plaintiff, v. GEICO CASUALTY COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23015334. Division 83. November 2, 2023. Ellen Feld, Judge. Counsel: Henry Crouser, Crouser & Storani, PLLC, Pembroke Pines, for Plaintiff. Retta Rico, Dutton Law Group, Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

THIS CAUSE was before the Court for hearing on the Defendant's Motion to Dismiss the Complaint on October 23, 2023. The Court, having reviewed the Complaint, the Motion, the entire court file, and the relevant legal authorities, having heard argument and evidence; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, finds as follows:

1. Plaintiff, OPEN MAGNETIC SCANNING OF BOCA-DELRAY, LLC D/B/A WINDSOR IMAGING BOCA-DELRAY ("Plaintiff"), as the assignee of DENA BALLEW ("Assignor"), filed the instant declaratory action for Personal Injury Protection ("PIP") benefits pertaining to a policy of automobile insurance issued by the Defendant, upon which the assignor seeks PIP benefits. See Petition for Declaratory Relief (hereinafter the "Complaint").

2. Plaintiff's Petition for Declaratory Action alleges claims for statutory violations of Florida's No-Fault Law ("the PIP Statute"), section 627.736, Florida Statutes, and the Unfair Insurance Trade Practices Act ("the Unfair Trade Practices Act"), section 626.9541, Florida Statutes. See *id*. at ¶¶ 25-26.

3. Plaintiff purports to have standing to file this declaratory action based upon an Assignment of Benefits ("AOB") executed by the Assignor, attached as Exhibit 2 to the Complaint. *Id*. at Ex. 2.

4. The subject AOB gives Plaintiff authority to seek payment for PIP and/or Medical Payment benefits provided under a policy of insurance, and the possibility of a common law or statutory bad faith claim. See *id*. at Ex. 2. It does not provide authority to bring suit for equitable or declaratory relief.

5. Plaintiff alleges that the action should be maintained solely on an AOB that only grants the Plaintiff standing to bring actions for PIP benefits, Medical Payment ("Med Pay") benefits, and/or bad faith claims. All of these actions are actions for legal relief and contemplate money damages. The AOB does not provide standing to bring an action for equitable relief.

6. The Complaint fails to state a cause of action for declaratory relief for which relief can be granted because the pleadings and attached assignment of benefits fail to establish Plaintiff has standing to file suit.

Legal Standard for Motion to Dismiss

This Court may consider the legal sufficiency of Plaintiff's assignment of benefits in ruling on Defendant's motion to dismiss as the assignment is both an exhibit attached to the Complaint and a legal document impliedly incorporated by reference into the Complaint. See *McKey v. D.R. Goldenson & Co.*, 763 So. 2d 409, 410 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1270e]. "[I]f an attached document negates a pleader's cause of action, the plain language of the document will control." *Striton Prop., Inc. v. City of Jacksonville Beach*, 533 So. 2d 1174, 1179 (Fla. 1st DCA 1988); see also *K.R. Exch. Serv., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 894 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2317a] ("It is well settled that the court must consider an exhibit attached to the complaint together with the complaint's allegations, and that the exhibit controls when its language is inconsistent with the complaint's allegations."); *Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97, 98 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b] (same).

Likewise, the assignment of benefits is the vehicle that the Plaintiff is purportedly using to exercise standing to bring this, or any, cause of action. *Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b] ("Standing is . . . that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." (quoting *Gen. Dev. Corp. v. Kirk*, 251 So. 2d 284, 286 (Fla. 2d DCA 1971))). If the assignment of benefits does not grant the plaintiff standing to pursue the cause of action, the court should dismiss with prejudice because the plaintiff cannot maintain the action by retroactively seeking standing after the lawsuit was filed. *Progressive Express*, 913 So. 2d at 1285-86.

There is No Standing Under the Partial Assignment of Benefits that Expressly Allows Only Claims for Benefits

Plaintiff's purported action for declaratory relief requests relief that it does not have standing to request based upon the terms and conditions of its Assignment of Benefits. "We must begin with the question of standing, if there is no standing, we must end there, too." *A&M Gerber Chiropractic LLC v. Geico Gen. Ins. Co.*, 925 F.3d 1205, 1209 (U.S. 11th Cir. 2019) [27 Fla. L. Weekly Fed. C2031a] (internal citations omitted). While Plaintiff alleges to be the assignee of the insured's rights to PIP benefits, the assignment did not include the right to bring an action for declaratory relief.

Here, Plaintiff's "Assignment of Benefits" operates merely as direction to pay and to allow Plaintiff to bring a cause of action for payment and/or bad faith only. Its express terms state:

> [Assignor] knowingly, voluntarily and intentionally assign the benefits of my No-Fault Policy of automobile insurance, also known as Personal Injury Protection (PIP) and Medical Payments Policy of insurance. . . This assignment of benefits includes overdue interest payments and any potential claim for common law or statutory bad faith.
>
> . . .
>
> The insurer is hereby placed on notice that this provider reserves the right to seek the full amount of the bills submitted. Suit may be filed by the provider, as the assignee of the patient, against the insurer for PIP benefits.
>
> . . .
>
> The health care provider is not the agent of the insurer or the patient for any purpose.
>
> . . .
>
> The above health care provider is hereby given a limited power of attorney by the undersigned to sign my name on any checks for payment for services rendered, to me by the above provider.

See Compl. at Ex. 2.

The assignment does not include the right to bring a declaratory action or to seek equitable relief. The terms are clearly limited to the

collection of PIP benefits and policy proceeds. Since the assignment of benefits was drafted by Plaintiff, it is axiomatic that any ambiguity or uncertainty that may exist in the interpretation of the contract will be strictly construed against the Plaintiff. See e.g. *Goodwin v. Blu Murray Insurance Agency, Inc.*, 939 So. 2d 1098, 1102 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2375c].

The issue of standing "is resolved when all of the language of the document is considered as a whole". *Sidiq v. Tower Hill Select Ins. Co.*, 276 So. 3d 822 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1969a] *("Sidiq")*. One must not forget that the Plaintiff stands in the shoes of the Assignor.

[I]t is black letter law that an assignment transfers to the assignee only the interest and rights of the assignor in and to the thing assigned, and the assignee stands in the shoes of the assignor. *Prescription Partners, LLC v. State*, 109 So. 3d 1218 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D715a]. *Allen v. Helms*, 293 So. 3d, 572, 580 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D686a] (citing *Hough v. Huffman*, 555 So. 2d 942 (Fla. 5th DCA 1990) (emphasis added). It follows then, that if the right to benefits is assigned, Plaintiff only has a right to file causes of action that will result in benefits, which is not the result of an action for declaratory relief.

In *Sidiq*, the insureds brought an action for declaratory relief against their insurer, Tower Hill in relation to a water leak. *Id*. at 523. The trial court granted Tower Hill's motion for summary judgment finding that the Sidiqs did not have standing to sue for declaratory relief because they assigned all their rights and benefits under the policy to a water mitigation company, United. *Id*. at 824. On appeal, the Fourth District reviewed the scope of the assignment of benefits to the water mitigation company and found "that the scope of the assignment in the AOB Contract is the right to collect payment 'for services rendered or to be rendered.' " *Id*. at 826-827. Therefore, the assignment did not transfer to the water mitigation company the right to bring an action for declaratory relief. The right to bring an action for declaratory relief remained with the insured.

Although the first sentence of the assignment in *Sidiq* appeared to grant all forementioned rights to the assignee, the Fourth District looked to the contractual language as a whole to "scale back" the otherwise seemingly carte blanche grant of rights. The Court stated:

> [C]onsidering the surrounding text and all of the language of the assignment paragraph, we determine that whatever facial ambiguity that may have existed by looking at the contested sentence in isolation is resolved when all of the language of the document is considered as a whole. Thus, we conclude it was the unambiguous intent of the parties to limit the scope of the assignment to the work performed, rather than all of the rights under the insurance contract. *Id*. at 827 (emphases added).

The same conclusion was found by the Second District in the case of *Nicon Constr., Inc. v. Homeowner Choice Prop. & Cas. Ins. Co.*, 249 So. 3d 681 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1076a]. There, the insured, executed two (2) assignments of benefits, one to B&M Clean, for water and debris removal, and one to Nicon, for asbestos remediation. *Id*. at 682. Both assignees filed suit for breach of the insurance contract for underpayment of benefits. The trial court held that because the insured first assigned to B&M Clean "any and all insurance rights, benefits and causes of action under my property insurance policy" nothing further remained to be assigned to Nicon, who therefore lacked standing. *Id*.

On appeal, the Second District reversed, stating that:

> When the phrase 'any and all insurance rights, benefits, and causes of action under my property insurance policy' is read in the context of the entire assignment and the purpose for which it was entered into, it is evident that [the insured] was assigning all his rights under the policy to payment for the services performed by B&M Clean—not all his rights to payment for the entire covered claim. Accordingly, the assignment to Nicon was valid, and it was error for the trial court to enter summary judgment in favor of [the insurer]. *Id*. at 683.

An assignment of benefits relating to a specific service only assigns benefits relating to the specific work performed and does not assign all of the insured's benefits for the entire claim, nor does it assign all of the insured's rights under the policy. See also *Salyer v. Tower Hill Select Ins. Co.*, 2023 Fla. App. LEXIS 3705, 48 Fla. L. Weekly D1118a (Fla. 5th DCA 2023).

While "[u]nder Florida law, an insured may assign his right to benefits under a contract of insurance," *Schuster v. Blue Cross & Blue Shield of Fla., Inc.*, 843 So. 2d 909, 911 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D505a], it does not follow that every right may be assignable under the policy to a third party. Any standing that is not conferred to the third party under an AOB contract remains with the insured. *Massey Constr. Grp., Inc. v. Edison Ins. Co.*, 336 So. 3d 443, 445 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D898a] (citing *Brown v. Omega Ins. Co.*, 322 So. 3d 98, 102 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1218a]); see also *MRI Radiology Network, PA v. United Services Auto. Assoc.*, COINX-22-073604 (Fla. Broward Cty. Ct., May 2, 2023) (Cohen, J.) (Order Granting Motion to Dismiss); *Radiology Regional Center, PA v. USAA Casualty Insurance Company*, COINX-22-072509 (Fla. Broward Cty. Ct., June 5, 2023) (Feld, J.) (Amended Order Granting Motion to Dismiss); *Next Generation MRI v. State Farm Mut. Auto. Ins. Co.*, COINX-23-025750 (Fla. Broward Cty. Ct., August 24, 2023) (Miller, J.) (all holding the assignment of benefits to medical providers did not assign the right to maintain an action for declaratory relief)

Plaintiff received an AOB from the Assignor on clear and definite terms: the Assignor gave its right to seek PIP benefits to Plaintiff in exchange for the agreement that Plaintiff would not seek payment from the Assignor. Plaintiff's AOB does not give it authority to bring this suit. Florida caselaw and the language of the AOB are clear—the Plaintiff has standing to bring a breach of contract claim for PIP benefits and/or Medical Payment benefits, and/or bad faith action under 624.155. There is no authority granted under the AOB to bring the instant declaratory action for equitable relief.

THEREFORE, the Court, having been fully advised in the premises:

It is hereby ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss the Complaint is GRANTED with prejudice.

* * *

Public records—Court records—Confidentiality—Motion to determine confidentiality of video of patrons at public casino that defendant casino operator would like to rely upon in support of motion for summary judgment is denied with prejudice—Defendant has failed, for the second time, to set forth specific legal authority and any applicable standards for determining such records to be confidential, as required by rule 2.420(e)

KERRIA ASHLEY, Plaintiff, v. SEMINOLE TRIBE OF FLORIDA, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE23048957. Division 53. January 15, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORDS

This cause came before the Court for consideration of the Defendant's Motion to Determine Confidentiality of Court Records, and the Court having reviewed the Motion, matters of Court record, and relevant legal authorities, rules as follows:

The Motion is DENIED.

On December 12, 2023, the Defendant filed its Motion for

Summary Judgment. In support of its Motion, the Defendant would like to rely on a video that it asserts "could impinge on the safety and operational mannerisms of the casino and hotel itself." The Defendant claims that the video should be filed under seal as confidential "to protect the privacy rights of the patrons," and further because the Defendant's "security measures are confidential and constitute trade secrets." The same day, the Defendant filed its Motion to File Video Footage Designated as Confidential Under Seal. On December 20, 2023, the Defendant noticed its Motion for Summary Judgment for hearing on February 5, 2024. It also sought a hearing on its confidentiality motion.

On December 28, 2023, the Court entered its Order Denying Defendant's Motion to File Video Footage Designated as Confidential for failure to the Defendant to comply with the requirements of Rule 2.420(e) for determining confidentiality of court records. The denial was without prejudice. As a result, on January 12, 2024, the Defendant filed the instant motion. Nevertheless, the Motion continues to fail to comply with the requirements of the Rule.

Rule 2.420(e)(1)(c) mandates that a motion to determine confidentiality of court records "set forth the specific legal authority and any applicable legal standards for determining such records to be confidential." The Defendant's Motion does neither. The Motion contains no legal authority that a video of individuals in a public place impinges these same people's "privacy rights," nor does the Motion provide any support for the proposition that a video taken in a public place could constitute a trade secret. It is not sufficient to wait until the hearing to make these arguments—the "specific legal authority and any applicable legal standards" must be set forth in the motion itself.

The Defendant's having had two bites at the proverbial apple, and having been directed by the Court itself to the precise Rule that sets forth the requirements for a confidentiality motion, the Court's ruling is with prejudice for purposes of the summary judgment motion and hearing. The Defendant either must proceed with the video being part of the public record, or the Defendant will have to proceed without the video.

* * *

Insurance—Venue—Mandatory forum selection clause

SOUTHSIDE CHIROPRACTIC CENTRE, INC., a/a/o Paul Yeoman, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23070040. Division 80. November 29, 2023. Olga Gonzalez Levine, Judge. Counsel: Mac S. Phillips, Phillips Tadros, P.A., Fort Lauderdale, for Plaintiff. Patrick Calixte, Marshall Dennehey, Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE

THIS CAUSE having come before the Court on November 21, 2023 for hearing on Defendant's Motion to Transfer Venue, and the Court, having reviewed the entire record including the motion and response thereto, having heard argument of counsel and being otherwise fully advised in the premises,

ORDERS AND ADJUDGES that the motion is DENIED as it relates to Defendant's argument that Broward County is an inconvenient forum but GRANTED because the forum selection clause in the subject insurance policy is mandatory rather than permissive.

It is further

ORDERED AND ADJUDGED that this case will be transferred to Duval County, and Plaintiff shall pay the transfer fee within 30 days from the date of this order, failing which this action will be dismissed without prejudice.

* * *

Insurance—Property—Assignment—Validity—Assignments that contain conditional language in hold harmless clause are invalid

SHRINK WRAP ULTIMATE RESTORATION, a Florida Corporation, a/a/o Erick Mayor, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 20th Judicial Circuit in and for Lee County, Civil Division. Case No. 2023 CC 004599. December 11, 2023. Lindsay S. Garza, Judge. Counsel: Andres J. Correa, for Plaintiff. Dustin Sjong, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER GRANTING CITIZENS PROPERTY INSURANCE CORPORATION'S MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE having come before this Court on the Motion for Judgment on the Pleadings filed by Defendant, CITIZENS PROPERTY INSURANCE CORPORATION ("Citizens"), and the Court, having heard arguments from both parties at the Hearing on November 28, 2023, having reviewed the Motion and memorandum in opposition to, having reviewed the court file, and being otherwise advised, it is **ORDERED and ADJUDGED** that:

1. Citizens' Motion for Judgment on the Pleadings is hereby **GRANTED**.

2. The Assignments contain a hold harmless clause that provides conditional language, to wit: "should the policy subject to the assignment agreement prohibit, in whole or in part, the assignment of benefits." As such the assignments in this matter do not comply with sections 627.7152(2)(a)(8) and 627.7152(2)(d), Florida Statutes.

3. The Assignments attached as Exhibit A to the Complaint are invalid and unenforceable thus the Plaintiff lacks standing and this case is **dismissed with prejudice**.

* * *