Volume 31, Number 12, April 30, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 565-613

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.

- **CRIMINAL LAW—SEARCH AND SEIZURE—STATEMENTS OF DEFENDANT—VEHICLE INVENTORY SEARCH—BLOOD DRAW—MEDICAL RECORDS. A defendant who was involved in a crash that resulted in a fatality raised statutory and constitutional challenges to the admissibility of statements he made to fire and rescue personnel, law enforcement officers, and hospital personnel at the scene of the crash, while the defendant was being transported to the hospital in an ambulance, and in the hospital emergency room. The circuit court rejected challenges based on Article I, Section 23, of the Florida Constitution; sections 456.057(7)(c), 395.3025(4), 316.066, and 401.30(4), Florida Statutes; and the federal Health Insurance Portability and Accountability Act. The court likewise found without merit defendant's contention that law enforcement officers were impermissibly acting outside their jurisdiction. However, the court granted the defendant's motion to suppress the search of his cell phone and any fruits of that search after finding that the inventory search of defendant's vehicle that led to the discovery of his cell phone was not conducted pursuant to any standardized criteria or procedures. Finally, the court denied the defendant's motion to suppress blood test results and medical records obtained through warrants that relied, in part, on statements made by the defendant to fire department personnel and disclosed by fire department personnel to law enforcement. The statements at issue did not qualify as privileged medical information; and, in any event, other statements made by the defendant to law enforcement were sufficient to establish probable cause for the warrants.** *STATE v. PAGAN. Circuit Court, Ninth Judicial Circuit in and for Orange County. Filed February 22, 2024. Full Text at Circuit Courts-Original Section, page 582a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

10CIR 25	**Circuit Court - Appellate** (**Bold** type) (10th Circuit, page 25)
20CIR 10	Circuit Court - Original (20th Circuit, page 10)
CO	County Court
M	Miscellaneous Reports

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CRIMINAL LAW (continued)

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TABLE OF STATUTES CONSTRUED (continued)

* * *

TABLE OF CASES TREATED

* * *

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CIRCUIT COURTS—APPELLATE

Counties—Public officials—Conflict of interest—County ethics commission—Jurisdiction—County ethics commission had jurisdiction over conflict of interest complaint alleging sitting city commissioner interfered with an investigation into an unlawful eviction from an apartment complex by which commissioner was employed, notwithstanding fact that complaint was filed after commissioner had already left office—No merit to argument that ethics commission jurisdiction expired prior to entry of final judgment—18-month time limit for adjudication of ethics complaint was not jurisdictional, and eight-month delay in case processing was attributable to continuances requested by petitioner—State preemption—No merit to arguments that enforcement by county ethics commission is preempted by Florida Constitution and that enforcement lies with state ethics commission—Ethics commission failed to follow essential requirements of ethics code where it assessed petitioner actual costs incurred by commission without finding an intentional code violation—Competent substantial evidence supported findings that petitioner violated code by failing to include his apartment complex employment on his financial disclosure form and holding conflicting employment

JOHN RILEY, Petitioner, v. MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-000050 AP 01. February 5, 2024. On Petition for Writ of Certiorari from a decision of the Miami-Dade Commission on Ethics and Public Trust. Counsel: James H. Greason, for Petitioner. Loressa M. Feliz, Miami-Dade Commission on Ethics and Public Trust, for Respondent.

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

(SANTOVENIA, J.) This matter is before the Court on a petition for writ of certiorari (initially filed as an appeal by Petitioner) from a Final Order rendered by the Miami-Dade Commission on Ethics ("Commission") in an ethics proceeding. Petitioner was charged with violating two provisions[1] of the Ethics Code and adjudicated guilty.

Jurisdiction and statute of limitations

Petitioner argues that the Commission lacked jurisdiction over the complaint. Section 2-1068 of the Ethics Code states: "The jurisdiction of the Ethics Commission shall extend to **any person required to comply** with the County or municipal Code of Ethics Ordinances, Conflict of Interest Ordinances, Lobbyist Registration and Reporting Ordinances, Ethical Campaign Practices Ordinances or Citizens' Bill of Rights." (emphasis added).

Section 2-1074(p) of the Ethics Code states: "[t]he Ethics Commission shall, within **eighteen (18) months** of the filing of a complaint, render a final order disposing of said complaint." (emphasis added).

Petitioner presents two threshold arguments as to why the Commission' had no jurisdiction over the Petitioner. Petitioner first argues that under Section 2-1068 of the Code, jurisdiction extends only to sitting officials and that former officials are not required to comply with the Conflict of Interest and Code of Ethics Ordinance.

Under Section 2-1068 of the Ethics Code, Petitioner argues that jurisdiction only extends to persons "required to comply" with the Code, and because the complaint was filed on February 21, 2019, after Petitioner had already left office, he was not required to comply with the Code. Accordingly, Petitioner argues that the Commission's jurisdiction did not extend to Petitioner. Petitioner cites *Wright v. Fla. Comm'n on Ethics,* 389 So. 2d 662 (Fla. 1st DCA 1980) in support of that proposition. However, *Wright* is distinguishable in that it pertained to a schoolteacher who took a leave of absence without pay, and then was reelected to a position on the school board. *Id.* at 663. The district court held that the teacher was not an employee of the school board, and was thereby not in violation of the statute prohibiting an employee of a state agency or political subdivision of state from holding office as a member of a governing board which is his or her employer. *Id.*

Respondent correctly argues that the Petitioner was a sitting City Commissioner on or about January 12, 2017 when he allegedly interfered or attempted to interfere with an investigation into a possible unlawful eviction. At the time of the alleged violations in 2017, Petitioner was thus required to comply with the County Ethics Ordinances, including the Conflict of Interest Ordinances. Section 2-1074 (x) *Statute of limitations* provides, in pertinent part:

> Unless provided otherwise in a County or municipal Code of Ethics Ordinance, Conflict of Interest Ordinance, Ethical Campaign Practices Ordinance or Lobbyist Registration and Rating Ordinance, **no action may be taken on a complaint filed more than three (3) years after the violation is alleged to have accrued** unless a person, by fraud or other device, prevents discovery of the violation. Where the allegations are the subject of a personnel proceeding or where the complainant is required to exhaust his or her administrative remedies prior to filing a complaint, the statute of limitations shall be tolled until the termination of said personnel proceeding or the exhaustion of administrative remedies.

(emphasis supplied)

The Commission may consider complaints regarding Section 2-11.1 of the Ethics Code as long as the complaint is filed no more than three years after the alleged violation has taken place. See Section C, 3.2(a)(1) & (b)(2), Miami-Dade Commission on Ethics and Public Trust Rules of Procedure; Art. LXXVIII, Sec. 2-1074(x), Miami-Dade County Code. Thus, the Commission's jurisdiction extends to any person required to comply with the county or municipal code of ethics, conflict of interest ordinance, lobbyist ordinances, as well as ethical campaign practices ordinances, and the citizens Bill of Rights. Accordingly, the Commission had jurisdiction over the Petitioner at the time of the filing of the complaint on February 21, 2019.

Second, Petitioner argues that jurisdiction expired before trial and entry of the Final Order. Petitioner contends that the Commission's enabling ordinance imposes a jurisdictional time limit for adjudication of a complaint and that subject matter jurisdiction lapses upon expiration of the time limit in Section 2-1074(p). Petitioner maintains that jurisdiction expired because the 18-month period from the date of filing of the complaint ended on August 21, 2020. Petitioner maintains that the Final Order which was entered June 9, 2021 is therefore untimely and is void.

Respondent argues that Section 2-1074(p) is intended to avoid unnecessary delay in the prosecution of a complaint and to avoid any prejudice to the Petitioner. The language of that section supports that conclusion as the text does not specifically refer to jurisdiction or to a loss of jurisdiction.

Moreover, Petitioner requested five continuances, as follows:

- March 10, 2019—Petitioner filed a Motion to Continue Probable Cause Hearing (set for March 13, 2019) (R. at 21);
- April 3, 2019—Petitioner filed a Motion to Continue the Probable Cause Hearing (set for April 10, 2019) (R. at 25);
- May 1, 2019—Petitioner filed a Motion to Continue Probable Cause Hearing (set for May 8, 2019) (R. at 35);
- At the July 17, 2019, Commission Meeting. The Petitioner requested a continuance until the September meeting (Appellee App. at 006);
- A December 11, 2019, email from Petitioner's counsel states that Petitioner was too ill to attend the meeting that morning, and counsel could not attend because he was outside the U.S. (Appellee App. at 107).

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Petitioner's requested continuances led to an eight-month delay in the progression of the case. While there is no dispute as to the good cause for the requested continuances, it seems unreasonable and against estoppel principles that a petitioner would be able to delay a case for such a lengthy amount of time and then benefit from the delay he caused by claiming that the Commission's jurisdiction had ended.

Constitutionality

A petition for writ of certiorari is not the proper procedural vehicle to challenge the constitutionality of the ordinance. *See Somerset Academy, Inc. v. Miami-Dade Cnty. Bd. of Comm'rs,* 314 So. 3d 597, 599 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D18a]; *First Baptist Church of Perrine v. Miami-Dade Cnty,* 768 So. 2d 1114 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1547a]. Therefore, the Court declines to address the constitutionality arguments.

Preemption

While Petitioner argues that enforcement by the Respondent is preempted by the Florida Constitution, and that enforcement lies with the Florida Commission on Ethics, there is no preemption issue here. Petitioner bases his preemption argument on *Scott v. Hinkle,* 259 So. 3d 982 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2664a], which is inapposite as it addressed the issue of whether the Florida Commission on Ethics or the circuit court had jurisdiction to review a complaint, and not whether the state ethics commission or the local ethics commission had jurisdiction. *Id.* at 984-985.

Respondent correctly maintains that there is no preemption and cites to a Florida Attorney General opinion which found that no express preemption existed to preclude local legislation in the area of ethics, so long as the legislation was consistent with the State Ethics Code. *See* Op. Att'y Gen. Fla. 91-89 (1991). I agree.

Standard of Review

"[C]ircuit court review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process is 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." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Procedural due process

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

Here, the Commission filed a sworn complaint and followed procedural rules regarding the disposition of its complaint. The Commission tried Petitioner before a panel of Commissioners where Petitioner was allowed to present witnesses and evidence, to cross-examine witnesses, and to be informed of and dispute all facts upon which the violations were based. Thus, Petitioner was accorded due process.

Essential requirements of law

Having found no procedural due process violation, the second prong of the test to be considered is whether the essential requirements of law were followed. In *Haines, supra.,* 658 So. 2d at 527, the Supreme Court held that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, to warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Id.*

Section 1074(p) [Public order imposing penalty] states, in pertinent part: "[t]he public report and final order shall include a determination as to whether the violation was intentional or unintentional." Regarding costs assessed on both counts, the Final Order fails to make any finding of intentional violation. Code §2-11.1 (cc). Appellee admits in its response brief that lilt is clear through the language of the Final Order, that the Commission did not find that Appellant's [Petitioner's] violations intentional". Also, the Court notes that the Respondent conceded during oral argument that both violations were unintentional.

A finding of intentional conduct—which is wholly missing from the Final Order—is relevant to two elements of costs. See §2-11.1 (cc)[2], County Code. First, on a finding of intentional violation, the fine is increased from $500 to $1000 for a first violation and from $1000 to $2000 for each subsequent violation. In addition, "[a]ctual costs incurred by the Ethics Commission, in an amount not to exceed five hundred dollars ($500.00) per violation, may be assessed where the Ethics Commission has found an intentional violation of this section." It is clear, however, that actual costs incurred by the Ethics Commission are only recoverable upon a finding of an intentional violation. Where no intentional violation was found below, the Commission failed to follow the essential requirements of its own Code and it was improper for the Commission to include the assessment of actual costs incurred by the Ethics Commission in the Final Order.

While Petitioner raises several other issues, none of those issues demonstrates that the essential requirements of law were not followed. With the exception of the assessment of actual costs, the Commission adhered to the essential requirements of law in the issuance of its Final Order.

Competent substantial evidence

The third prong of the test for this Court to consider is whether there is competent, substantial evidence to support the Commission's decision. In *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957), the Florida Supreme Court described competent substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such relevant evidence that a "reasonable mind would accept as adequate to support the conclusion reached."

At the May 7, 2021, hearing, the Advocate presented the testimony of Officer Daniel Kelly, Corporal Darron Chiverton, Corporal Lawrence Holborow, Vivian Smith (Complainant) and Petitioner. At the May 21, 2021, hearing, Petitioner presented the testimony of himself, former Opa-locka City Manager Yvette Harrell, and the former property manager for the Gardens Apartments, Magdiel Rodriguez. The Commission also relied on certified and non-certified copies of Appellant's 2015, 2016, and 2017 financial disclosure forms (State Form 1 forms) as well as a Form 1X, an amendment to Appellant's 2017 financial disclosure form. There was ample competent substantial evidence in the record to support the Commission's decision.

For the foregoing reasons, the Petition is GRANTED, as follows. The Final Order is quashed to the extent that it assesses $1000 for investigative costs incurred by the Ethics Commission. The Petition is DENIED as to the remainder of the Final Order. (ARECES, R., J. concurs in result only)

(PERKINS, J. concurring.) I agree that the Miami-Dade Commission on Ethics and Public Trust ("Commission") had jurisdiction on February 21, 2019 when it filed its Complaint. I also agree that, in light of the Commission's concession that Respondent's violation was unintentional, the Commission departed from the essential requirements of law when it imposed actual costs. I question, however, whether the Commission still had jurisdiction when it entered its June 9, 2021 Final Order. Because the parties did not sufficiently brief this issue, I concur in result only.

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The Commission's jurisdiction extends to individuals "required to comply" with, *inter alia,* Miami-Dade County's Code of Ethics Ordinances:

> The jurisdiction of the Ethics Commission shall extend to any person required to comply with the County or municipal Code of Ethics Ordinances, Conflict of Interest Ordinances, Lobbyist Registration and Reporting Ordinances, Ethical Campaign Practices Ordinances or Citizens' Bill of Rights.

Miami-Dade Code § 2-1068; *accord id.,* § 2-11.1(y). Here, even after Petitioner's term ended in November 2018, Petitioner was still required to comply with financial reporting requirements in the Code of Ethics Ordinances. *See* Miami-Dade Code § 2-11.1(i)(1) (requiring the filing of certain financial information "no later than 12:00 noon of July 1st of each year including the July 1st following the last year that person is in office or held such employment"). Thus, the Commission had jurisdiction to file its complaint on February 21, 2019.

The Miami-Dade Code does not detail, however, what happens to the Commission's jurisdiction when, while a complaint is pending, a person stops being a person required to comply with the ordinances referenced in § 2-1068. The Statute of Limitations in Section 2-1074(x) certainly does not confer jurisdiction. *See State v. Smith,* 241 So. 3d 53 (Fla. 2018) [43 Fla. L. Weekly S177a], *affirming* 211 So. 3d 176, 182 (Fla. 3d DCA 2016) [42 Fla. L. Weekly D27c] (discussing the difference between statutes of limitations and subject matter jurisdiction).

Rule 3.2(b) of the Commission's Rules of Procedure also does not confer jurisdiction. First, as the Commission acknowledged at oral argument, the Commission is a creature of County ordinance and does not have the power to confer subject matter jurisdiction on itself. *Cf. WHS Trucking LLC v. Reemployment Assistance Appeals Com'n,* 183 So. 3d 460, 462 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D182a] ("Florida agencies are creatures of statute and only have the authority and jurisdiction conferred by statutes."); *Agency for Persons With Disabilities v. Meadowview Progressive Care Group Home,* 340 So. 3d 547, 551 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1251a] ("An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction."). Second, Rule 3.2(b) does not even purport to confer jurisdiction:

> b) The Commission will not consider a Complaint regarding
>
> 1) An allegation involving a matter outside of the jurisdiction of the Ethics Commission;
>
> 2) An allegation based on facts that occurred more than three (3) years before the date the sworn Complaint is filed. (Art. LXXVIII, Sec. 2-1074(x), M-D County Code)

The plain text of this Rule establishes that the Commission will not consider a complaint unless it has jurisdiction and the complaint is timely. That is, Rule 3.2(b)(2) contemplates that there can be a circumstance when a complaint is timely but the Commission will not consider it because it lacks jurisdiction.

Because no one raised the issue of whether the Commission is divested of jurisdiction under § 2-1068 when a person is no longer "required to comply" with the ordinances listed in that section, it is not appropriate for the Court to address it.[3]

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[1]Count One of the complaint charged a violation of Section 2-11.1(g) and was dismissed on May 21, 2021 as a result of a directed verdict for Respondent. Count Two of the complaint alleged a violation of Section 2-11.1(i)(2) of the Ethics Code entitled "Financial disclosure" by failing to disclose approximately $7500 from Petitioner's work as a consultant to Gardens Apartments on his 2017 Financial Disclosure Form. (Petitioner's Financial Disclosure Form required him to disclose the source of all income received that exceeds $2500).

Section 2-11.1(i)(2) states:

> Compliance with the financial disclosure provisions of Chapter 112 (Part III), Florida Statutes, as amended, or with the provisions of Article II, Section 8 of the Florida Constitution, as amended by the voters on November 2, 1976, and any general laws promulgated thereunder, shall constitute compliance with this section.

Count Three alleged a violation of Section 2-11.1(j) of the Ethics Code entitled "Conflicting employment prohibited" because Petitioner was a Commissioner with Opa-locka while simultaneously being employed by Gardens Apartments to resolve problems with local government.

Section 2-11.1(j) states:

> Conflicting employment prohibited. No person included in the terms defined in subsections (b)(1) through (6) and (b)(13) shall accept other employment which would impair his or her independence of judgment in the performance of his or her public duties.

[2]§2-11.1 (cc) *Proceeding before Ethics Commission,* provides that:

> A finding by the Ethics Commission that a person has violated this section shall subject said person to an admonition or public reprimand and/or a fine of five hundred dollars ($500.00) for the first such violation and one thousand dollars ($1,000.00) for each subsequent violation. Where the Ethics Commission finds that a person has intentionally violated this section and determines that a fine is appropriate, said person shall be subject to a fine of one thousand dollars ($1,000.00) for the first such violation and two thousand dollars ($2,000.00) for each subsequent violation. **Actual costs incurred by the Ethics Commission, in an amount not to exceed five hundred dollars ($500.00) per violation, may be assessed where the Ethics Commission has found an intentional violation of this section**. The Ethics Commission may also order the person to pay restitution when the person or a third party has received a pecuniary benefit as a result of the person's governed by an administrative order adopted by the County Commission and rules of procedure promulgated by the Ethics Commission.

(emphasis added).

[3]Respondent did argue that Miami-Dade Code § 2-1074(p) creates an 18-month jurisdictional window starting upon the filing of the Complaint. The text of that provision, however, contained in an ordinance titled "Procedure on Complaint of Violation or Request for Advisory Opinion Within Ethics Commission's Jurisdiction," does not purport to impose any jurisdictional limits.

* * *

Municipal corporations—Zoning—Overlay district—Demolition permit—Waiver—Appeals—Certiorari challenge by county to city planning and zoning appeals board resolution denying demolition waiver—Board erred in denying waiver where county had satisfied all applicable regulations entitling it to waiver—Further, board unlawfully extended scope of hearing to consider matters over which it had no authority

MIAMI-DADE COUNTY, Petitioner, v. CITY OF MIAMI, ANTHONY VINCIGUERRA, and COURTNEY BERRIEN, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 23-31-AP-01. April 12, 2024. Counsel: James Edwin Kirtley, Jr., for Petitioner. Kerri L. McNulty, for Respondent, City of Miami. David J. Winker, for Respondents, Anthony Vinciguerra and Courtney Berrien.

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

OPINION[1]

(ARECES, R., J.) Petitioner Miami-Dade County ("Petitioner") filed a Writ of Certiorari wherein it contends this Court should quash Resolution No. PZAB-R-23-037, issued by the City of Miami Planning and Zoning Appeals Board (the "Resolution"). This Court agrees. Petitioner's Writ of Certiorari is GRANTED.

On a petition for writ of certiorari, this Court must determine "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings are supported by competent substantial evidence." *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a]. In this case, Respondent City of Miami's Planning and Zoning Appeals Board (the "PZAB") applied the wrong law, made a decision unsupported by competent substantial evidence and deprived Petitioner of due process.

This case is not complicated.

Pursuant to sec. 3.3 of the Coconut Grove Neighborhood Conservation District NCD-3, "[a]ll demolition permits shall require a Waiver and be referred to the Planning Department *for review under the Tree Preservation Ordinance*."[2] *See* Miami, FL., Code Appx. A at 3.3 (emphasis added). Section 3.3 also requires "[a]ll submittals

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shall contain a *tree survey* by a certified arborist." *Id.* (emphasis added).

Section 7.1.2.5 of the Miami Code sets forth the review criteria and approval process for the aforementioned waiver. *See* Miami, FL., Code at § 7.1.2.5. Importantly, sec. 7.1.2.5(d) provides, in part,

> Approvals **shall** be granted when the application complies with all applicable regulations.

Id. (emphasis added). The "applicable regulations," in the context of the particular Waiver sought here, quite obviously do not encompass regulations *inapplicable* to trees and their preservation. If this was not immediately apparent from the plain text of the code provisions at issue, then it should have been following this Court's 2019 Opinion in *Cube 3585, LLC v. City of Miami, et. al.,* Case No. 18-050, 44 Fla. L. Weekly D2248b (Fla. Cir. Ct. App. Jan. 31, 2019) [26 Fla. L. Weekly Supp. 939a] ("The NCD is very specific to the nature of what this Waiver was for to make certain that the tree canopy is not being affected and is protected."). The City of Miami, in fact, appears to agree and has filed a Confession of Error wherein it "admits that, based on the pertinent code provisions and this court's prior decision in the *Cube 3585, LLC. . .,* the Planning and Zoning Appeals board erred when it granted the appeal at issue."

The two individual respondents, Anthony Vinciguerra and Courtney Berrien (collectively, the "Individual Respondents"), however, continue to argue that the Writ of Certiorari should be denied because, among other things, Petitioner is merely asking this Court to reweigh the evidence.[3] The Individual Respondents are mistaken.

There is no *competing* evidence to reweigh.

The only relevant, competent and substantial evidence in this case established that Petitioner had satisfied all applicable regulations and was entitled, by the City's own Code, to the Waiver. The PZAB, having heard from the City's own Zoning Administrator that Petitioner had satisfied all applicable requirements and was entitled to the Waiver, nevertheless proceeded to debate the merits of historic preservation, demolition, the existence (or lack thereof) of a lien that had been released in 2014, a certificate of appropriateness and even the definition of the term "minor." These matters have no bearing on the Waiver at issue in this case, and the PZAB deprived Petitioner of due process when, without notice, it unlawfully expanded the scope of the hearing to include matters over which it had zero authority.

In summary, the PZAB (1) applied the incorrect law and, in so doing, ignored this Court's prior precedent; (2) rendered a decision that was unsupported by competent, substantial evidence; and (3) deprived Petitioner of the due process of law.[4]

Accordingly, the Petition for Writ of Certiorari is GRANTED. Resolution No. PZAB-R-23-037, issued by the City's Planning and Zoning Appeals Board is QUASHED. (TRAWICK and SANTOVENIA, JJ., concur.)

(TRAWICK, J., specially concurring.) Contrary to the arguments made in Respondent's motion for rehearing which was filed prior to this corrected opinion being issued, the record contains competent substantial evidence addressing and demonstrating the County's compliance with the tree preservation standards. First, Planning Director Daniel Goldberg testified before the PZAB that the County's Waiver Applications included the required tree survey and arborist report and complied with the tree standards. Mr. Goldberg told the PZAB that: "in my review of the waiver, what I always check for every demolition waiver, is to make sure that the required arborist report is there, and it is. And to make sure that the—aside from the arborist report, that it has been reviewed by environmental resources, which it is—which it has been." (App. at 1183). Mr. Goldberg explained that the hearing is "just a review of tree protection" (App. at 1177), and "the demolition waiver was reviewed by HEP staff and environmental resource for tree protection which is the standard for this waiver." (App. at 1182). The record is bereft of any relevant competing evidence to counter Mr. Goldberg's testimony.

Individual Respondents argue that Petitioner included materials in the Appendix which were not part of the Record on Appeal—specifically Exhibits C, F, G, and H.[6] Individual Respondents further argue that the tree survey was not part of the record below and was submitted for the first time as part of Petitioner's Appendix. I disagree. The County submitted all of the application materials for a demolition waiver, including an extensive fifty-one page report from certified arborist Jeff Shimonski, and that Petitioner's exhibits C, F, G, and H were properly included in the Appendix.

Additionally, it must be noted that nowhere in the record do Individual Respondents argue that Petitioner failed to include a tree survey/ arborist report. Accordingly, Individual Respondents failed to preserve that objection. The Third District Court of Appeal has held that "the rule of preservation, which is a keystone in our appellate process, dictates that in the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal. *Vorbeck v. Betancourt,* 107 So. 3d 1142, 1147-48 (Fla. 3d DCA 2012) [38 Fla. L. Weekly D57a].

As a result, the arguments made in Respondent's motion for rehearing are not well taken. From my perspective, this is why the motion for rehearing is being denied.

I also write separately to express my concern regarding the failure of the Acting Chairperson of the Planning and Zoning Appeals Board to recuse himself. This issue was not preserved, and as a result is not addressed in the majority opinion. However, the conflict and bias, or at the very least the appearance of a conflict and bias, raised in the record below is so startlingly apparent that it cannot be ignored. Acting Chair Parrish disclosed that he had been directly involved with and gave support to objectors of the County's plan for the restoration of the Coconut Grove Playhouse. At the March 15, 2023 appeal hearing before the PZAB, the Acting Chair stated the following:

> My involvement with the Coconut Grove Playhouse began when I was chair of the HEPB Board on October 5, 2005, when the Board voted 8 to zero to designate the entire exterior of the Playhouse historic.
>
> Since then, I have written letters to the editor of the Herald and many others, some of which have been published, recounting my memories of that HEPB Board meeting, for which I have the court reporter transcript showing conclusively that the entire exterior of the Playhouse was designated and not just a so-called front building.
>
> I got directly involved in [sic] again when I spoke to the Miami City Commission on May 8th, 2019, when I testified as to the HEPB Board vote designating the entire exterior of the Playhouse as historic.
>
> I also attended the May 2019 mayor's veto rally at the Playhouse, where Mayor Suarez recounted his reasons for vetoing the City commission's vote to demolish most of the Playhouse except for the front façade.
>
> In the fall of 2021, a half dozen Groveites, including me, who were in favor of preventing the demolition of all but the façade of the Playhouse raised 55,000 to pay for a billboard on U.S. 1 protesting the proposed demolition of most of the Playhouse.
>
> My company, Wind & Rain Properties, offered to collect the $5,000 for the billboard because that company already had a bank account, was able to segregate and keep track of the monies collected. My contribution was $15, one—[sic] $15.
>
> In August of 2022, I was one of the 14 original plaintiffs in a lawsuit based upon a 2004 voter-approved bond issue to restore the Playhouse. This lawsuit was brought by the attorney here tonight, David Winker. My wife and I are social friends with Attorney Winker

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and his wife Christina, although we have not met with them at least for the last six months.

Then in September 2022, with the billboard collection mechanism as a precedent, I was requested by other Groveite citizens in favor of saving the Playhouse to again allow my company, Wind & Rain Properties, to collect GoFundMe donations in a segregated account. I agreed to that, but contributed no funding whatsoever myself. That segregated account no longer has any funds in it, having been dispersed to the citizen's group that started it.

I can certainly appreciate and applaud Acting Chair Parrish's sacrifice of his time and effort to participate on a volunteer civic board. I also agree with his statement that "civic activism should not automatically result in disqualification from participation on [the PZAB] or any other City Board . . . ." However, the level of civic participation here, as well as his relationship with counsel for the Individual Respondents, crossed the line to the point that the Acting Chair in a quasi-judicial proceeding had passed from a neutral arbiter to an interested party. While the PZAB rejected a motion requiring Acting Chair Parrish to recuse himself, such a vote should not have been necessary. Given the concerns raised by his activities related to the Playhouse, actual conflict and bias, or at least the appearance of conflict and bias, should have resulted in the Acting Chair Parrish recusing himself.[7] *See Int'l Ins. Co. v. Schrager,* 593 So. 2d 1196, 1197 (Fla. 4th DCA 1992); *Junior v. LaCroix,* 263 So. 3d 159, 168 (Fla. 3d DCA 2018) [44 Fla. L. Weekly D115a] (Rothenberg, C.J., specially concurring) ("[T]he trial court impermissibly crossed the line between neutral arbiter of the facts to that of an advocate. . . ."). Had the issue of the Acting Chair's recusal been properly preserved, I believe that this issue would have been another basis to quash the PZAB's decision due to a procedural due process violation.[8]

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[1]This Court's prior Opinion filed on February 9, 2024 is withdrawn and replaced with this Opinion.

[2]"Tree Preservation Ordinance" can be found in Chapter 17 of the City Code of Ordinances. *See* Miami, FL., Code at §§ 17-1—17.77.

[3]Individual Respondents' other arguments for denying the Writ of Certiorari are entirely without merit. For example, the Individual Respondents inexplicably maintain that the property has an open lien despite overwhelming evidence that there is not, in fact, an open lien. Individual Respondents' remaining arguments for denying the Writ of Certiorari, therefore, are rejected without further discussion.

[4]This majority opinion does not address whether the Acting Chair should have recused himself from the proceedings below. Petitioner failed to preserve that issue.

[5]Mr. Goldberg's Memo (the Final Decision regarding the Waiver) stated that the Office of Zoning received a Wavier Application that included. . . . "[a]n Existing Tree Disposition Plan and Tree Inventory dated October 3, 2022, signed and certified by Surveyor of Record, Oria J. Suarez". . . and "an Arborist Report and Tree Inventory dated August 10, 2021, by Certified Arborist, Jeff Shimonski." (App. at 1437-1438).

[6]Exh. C is the Petitioner's Application materials for an administrative demolition waiver which includes the arborist report. Exh. F is an email exchange between Code Compliance Supervisor Michael R. Lytel and Code compliance staff, Mr. Goldberg and the staff, and related emails between staff. Exh. G is a composite exhibit pertaining to lien and Code enforcement documents—(proof of lien satisfaction, estoppel report). Exh. H is an email exchange regarding the tolling of the certificate of appropriateness.

[7]My concern regarding the Acting Chair's partiality in this matter is further borne out by his expressed disagreement with a precedent of this Court, *Cube 3585.* He apparently felt that the PZAB could disregard that opinion and act in direct contravention of it. While anyone, including board members, may disagree with a decision of this Court, a Board such as the PZAB is not free to ignore a precedent which interprets the same code provision that is at issue in a pending case before the Board.

[8]While the Court chose not to address alleged ethical lapses of counsel for the Individual Respondents, they are also a cause for concern. One glaring example is counsel's presentation of a City code enforcement report to the PZAB in support of his argument that there were ongoing enforcement proceedings against the subject property. In presenting that report, counsel omitted the fifth and final page of the document which directly refuted counsel's argument. That page was not presented by counsel until a board member asked him about the missing page. Such conduct is troubling to say the least.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop and arrest—Hearing officer's findings that licensee was lawfully stopped for expired tag and was lawfully arrested after he exhibited multiple signs of impairment were supported by competent substantial evidence in form of police reports and officer's testimony—No entitlement to relief on claim that officer's testimony did not constitute competent substantial evidence because it did not align with video from officer's dash camera where video was not submitted to hearing officer or to reviewing court

JOHN ALLEN FURLOW, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 23-CA-014416. Division A. January 7, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHERYL K. THOMAS, J.) This case is before the court on John Allen Furlow's Petition for Writ of Certiorari. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner contends that the Department's decision to suspend his driving privileges was not supported by competent, substantial evidence of a lawful arrest. After reviewing the petition, response, appendices, and applicable law, the court finds that the hearing officer in this case relied on competent, substantial evidence when determining that Petitioner's refusal to submit to a breath alcohol test was incident to a lawful arrest. Petitioner's arguments that he was denied due process and that the hearing officer failed to observe the essential requirements of the law are without merit. Accordingly, the petition is denied.

On April 29, 2023, Petitioner was arrested by Officer Baar of the Tampa Police Department (TPD) for driving under the influence (DUI). Officer Baar initiated a traffic stop because Petitioner's vehicle registration was expired. Upon making contact with Petitioner, Officer Baar observed multiple signs of impairment. Petitioner also stated that he had consumed an alcoholic beverage. Officer Baar requested that Petitioner submit to a field sobriety test and Petitioner agreed, displaying additional signs of impairment. Petitioner refused to submit to a breath test, and his driver's license was suspended. Petitioner timely requested an administrative hearing, which was held on July 7, 2023, to challenge the lawfulness of the suspension of his driving privilege. The Hearing Officer reviewed the relevant police report and Officer Baar testified at the hearing. At the hearing, Counsel for the Petitioner mentioned the police dash camera footage, but neither the Petitioner nor the Respondent have asserted that the footage was submitted for the Hearing Officer's review. The Hearing Officer determined that Officer Baar initiated a valid traffic stop based on Petitioner's expired vehicle registration. The Hearing Officer additionally found, based on Petitioner's signs of impairment and statements, that Officer Baar had probable cause to arrest Petitioner and Petitioner's refusal to submit to a breath test was incident to a lawful arrest.

Petitioner asserts that the hearing officer lacked competent, substantial evidence to support a finding of refusal to submit to a breath test incident to a lawful arrest. Petitioner supports this assertion by alleging that Officer Baar's testimony did not include certain facts and did not align with the video footage from the police vehicle dash camera. Petitioner also argues that the alleged lack of competent, substantial evidence abridged his right to due process and that the hearing office departed from the essential requirements of the law. It is important to note here that the dash camera footage was submitted to neither the hearing officer nor the Court.

In a DUI license suspension case, the hearing officer is limited to reviewing whether there was probable cause for the DUI arrest, whether the driver refused to submit to an alcohol or controlled

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substance test, and whether the driver was told that refusal to submit to the test would result in a one-year suspension of their driver license. § 322.2615(7)(b), Fla. Stat. In reviewing this Petition, the Court is limited to considering "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). In doing so, the Court is not permitted to reweigh evidence; "[c]ontrolling case law is clear that the circuit court [is] not permitted to scour the record for evidence which contradict[s] the hearing officer's conclusion." *DHSMV v. Baird*, 175 So. 3d 363, 365 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2160a] (citing *DHSMV v. Porter,* 791 So. 2d 32, 35 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1161a]). The Florida Supreme Court has carved out a specific exception in DUI license suspension cases where "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." *Wiggins v. DHSMV*, 209 So. 3d 1165, 1175 (Fla. 2017) [42 Fla. L. Weekly S85a]. This exception, however, does not extend to discrepancies between a police report and officer testimony, nor does it cover minor differences. *Id.*

Officer Baar's police report and testimony are not hopelessly in conflict. Even if the *Wiggins* exception applied to conflicts between an officer's report and testimony, in this case neither "is contrary to and refuted by" the other. *Id.* Given that the hearing officer considered the police report and Officer Baar's testimony, which both detailed expired tags and multiple signs of impairment, and that neither is confirmed untruthful, the Court finds that the hearing officer relied on competent, substantial evidence when determining that there was a reasonable suspicion for the stop and probable cause for the arrest.

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

* * *

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CIRCUIT COURTS—ORIGINAL

Torts—Premises liability—Fall from defective deck—Jurisdiction—Service of process—Motion to dismiss for improper service is denied—Substitute service on adult co-occupant of defendant's residence was proper, and return of service was regular on its face—Motion to amend complaint to correct name of individual defendant is granted—Motion to strike order setting trial and joint motion for continuance are denied where good cause for continuance has not been shown, amendment of complaint changes nothing except to correct misnomer, and any outstanding discovery that remains is due to parties' lack of diligence

TRAVIS PEARSON, Plaintiff, v. EVOLVE VACATION RENTAL NETWORK, INC., and SCOTT ANDRE, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2023-000298-CAA. December 30, 2023. David Frank, Judge. Counsel: Thomas D. Roebig, Jr., Palm Harbor, for Plaintiff. Christian M. Gunneson, Tampa, for Defendants.

ORDER ON PENDING MOTIONS

THIS CAUSE came before this Court on the plaintiff and defendant Evolve's joint motion to continue trial, plaintiff's motion for leave to amend, and defendant Evolve's motion to strike order setting trial, and after having reviewed the motions and the court file, and being otherwise fully advised, the Court finds

"Judges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so. . . . The trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. . . . All judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge. All motions for continuance shall be in writing unless made at a trial and, except for good cause shown, shall be signed by the party requesting the continuance." Fla. R. Gen. Prac. & Jud. Admin. 2.545. *See also* Florida Supreme Court directives on active case management.

Parties may not fail to take the next step in the litigation of the case or fail to call up a pending matter for hearing and expect to sit without activity for months as the case withers. *Totura & Co. v. Williams,* 754 So.2d 671 (Fla. 2000) [25 Fla. L. Weekly S141a].

A party may not ignore the time requirements imposed by the rules of civil procedure, file a motion, then allowing it to languish. *Brooks v. Brooks,* 340 So.3d 543, 546 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1222a]. Litigants have an affirmative obligation to move their cases to resolution and not sit back and rely on the trial court to set their hearings for them. *Id.* (citation and internal quotation omitted). "Trial judges should not be expected to unilaterally review the hundreds of files assigned to them in search of motions which have been filed but have not been set for hearing or otherwise brought to the court's attention. Litigants have an affirmative obligation to move their cases to resolution." *Erickson v. Breedlove*, 937 So.2d 805, 807 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2380a] (citations omitted).

A party will not be granted a continuance if it has caused its own problems by failing to diligently move the case forward, even if it means the party will not have certain witnesses or evidence at trial. *HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1293 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a]. This means discovery difficulties must be brought to the Court and resolved when they arise, not months later. Also, the fact that a party has overextended itself with work is not good cause for a continuance. *Id.* at 1292. This includes situations where an attorney has recently taken over a case. As the Fifth District so aptly put it, "When a lawyer steps into a case in this posture, he or she should expect to proceed to trial immediately. If that is unacceptable, he or she should not take the case. *Merino v. Powell,* 325 So.3d 960, 961-62 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1507a].

The present lawsuit was filed on March 24, 2023. There is one plaintiff and two defendants. Plaintiff alleges that he fell through defective boards on defendant's deck on August 18, 2022.

The case does not involve numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve; does not require management of a large number of separately represented parties; does not require coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; does not require pretrial management of a large number of witnesses or a substantial amount of documentary evidence; does not require substantial time to complete the trial; will not require special management at trial of a large number of experts, witnesses, attorneys, or exhibits; will not require substantial post-judgment judicial supervision; and there are no other analytical factors identified by the Court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

In other words, the present case does not qualify for treatment as complex litigation under the rules. This case is either a streamlined case or general case. *See* this Circuit's Uniform Order for Active, Differential Civil Case Management previously issued in this case.

Plaintiff did not serve initial process on defendant Evolve Vacation Rental Network, Inc., until June 20, 2023, an unexplained and excessive delay of this case.

On July 13, 2023, at the four-month limit for serving initial process, plaintiff filed a motion asking for an additional 60 days to complete service of process on defendant "Scott Andre." The Court granted the motion in part, giving plaintiff an additional 30 days.

Then, finally, on August 11, 2023, plaintiff filed a return of service representing that defendant "Scott Andre" was served via substitute service on August 6, 2023. In the complaint, plaintiff described defendant Andre's status as, "At all times material herein, the Defendant, SCOTT ANDRE, owned the property located at [Editor's note: Address redacted], Quincey, Gadsden County, Florida [hereinafter 'The Evolve Rental']." Plaintiff never explained why it took so very long to serve the owner of the premises where he allegedly fell.

Unfortunately, the parties then let the case sit again with no apparent activity until the Court issued its September 26, 2023 Order Requiring Action After the Filing of the Complaint. In the order, the Court noted, "This cause came before the Court in compliance with active case management directives, and the Court having reviewed the court file, and being otherwise fully advised in the premises, finds It appears that the complaint/petition in this case has been filed, but the parties have done little or nothing else to responsibly move the case toward resolution. The case has been sitting inactive for an excessive amount of time." The order required the parties to do the following:

1. If all the defendants/respondents have not been served initial process, the plaintiff/petitioner will have ten (10) days from the date of this order to complete proper service of initial process, file the returns, and begin to diligently prosecute the case. Failure to do so will be deemed an abandonment of the case and it will be dismissed.

2. Any defendant/respondent who has been served initial process but who has not responded by the operative deadline will have five (5) days from the date of this order to respond. Failure to do so may lead to sanctions to include the entry of a default.

3. If a motion to dismiss is filed, a courtesy copy will be emailed to the Judicial Assistant within two (2) days from service of the motion, along with a request for an expedited hearing.

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4. Plaintiff will file a notice for trial and email a courtesy copy to the Judicial Assistant along with a request for a trial date no later than twenty days after the reply, or if there is no reply, twenty days after the answer.

5. Motions for extension of time to serve the complaint/petition or to respond to the complaint/petition are without merit at this point and DENIED.

The order also warned the parties that, "Failure to comply with any provision of this order may result in sanctions to include dismissal of the case or the entry of a default."

The court file reflects that, finally, the day after the order described above, the parties engaged in discovery. Defendant Evolve finally answered the complaint on September 27, 2023. However, there still was no movement regarding defendant Andre.

On October 10, 2023, plaintiff filed a "Motion to Set Case for Jury Trial," in which he stated the case was at issue and ready to be set for trial, appearing to have abandoned his claim against defendant Andre.

On October 11, 2023, the Court issued its Order Setting Pretrial Conference and Jury Trial, setting the case for trial on March 4, 2024.

With little additional activity showing in the court file and having already requested the setting of their jury trial, the parties filed a "Joint Stipulation to Continue Trial" on December 6, 2023. Apparently, the parties were confused and thought that they could simply ignore the Florida Supreme Court's active case management directives, appellate case law, the Florida Rules of General Practice and Judicial Administration, the Florida Rules of Civil Procedure, and this Court's scheduling order and decide by themselves when they will go to trial.

On December 11, 2023, the Court issued an order stating, "that the Joint Stipulation to Continue Trial is deemed to be an inadequate motion for continuance and is DENIED with leave to file a proper motion for continuance that sets forth good cause pursuant to Florida's current active case management directives."

On December 18, 2023, defendant Andre filed a motion to dismiss on the ground that service of process was legally insufficient. Once again, a motion was filed and there was no effort to call the matter up for hearing or otherwise dispose of it. Once again, the Court will actively case manage and rule on the motion, despite the inaction of the parties. Inexplicably, this defendant *waited five months respond to the complaint* without requesting an extension and without objection from the plaintiff.

In his motion to dismiss, defendant Andre has mistakenly attributed the phrase "substitute service" exclusively with the procedure used to obtain service on non-residents, Florida Statutes 48.161 and 48.171. Substitute service also is the phrase used to describe service pursuant to Florida Statute 48.031(1)(a). *Baker v. Stearns Bank, N.A.,* 84 So.3d 1122, 1126 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D716a]. The statute provides:

> Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper ***or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.*** Minors who are or have been married shall be served as provided in this section.

Fla. Stat. 48.031(1)(a) (2023) (emphasis added).

It is obvious that the process server was relying on this provision when she documented "substituted service" with the name of the person served; her address; her status as "co-occupant;" and her age "25+."

Relying on Section 48.031(a) was not fatally improper. *See Tuscan River Estate, LLC v. U.S. Bank Tr. Nat'l Ass'n as Tr. of Greene St. Funding Tr.,* 351 So. 3d 1233, 1238 FN3 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D2508a] ("That Losken's purported address is an out-of-state address makes no difference because 'service of process on persons outside of this state shall be made in the same manner as service within the state.' § 48.194(1), Fla. Stat.").

The return of service attached to defendant Andre's motion was "valid on its face." *Koster v. Sullivan,* 160 So.3d 385, 389 (Fla. 2015) [40 Fla. L. Weekly S63a] ("There is no question that the return of service in Koster satisfies the express statutory requirements of section 48.21. The return of service specifies the date and time that the process server received the summons and complaint, the date and time of service, that the manner of service was substitute service, and that the person served was Pat Hassett, Koster's sister-in-law and co-resident.").

"If the return of service is shown to be regular on its face, the court can presume that service was valid and that it has lawfully obtained personal jurisdiction over the party served, unless that party proves by clear and convincing evidence that service was not valid. *Rodriguez v. HSBC Bank USA, N.A. as Tr. for Deutsche Alt-A Sec. Inc., Mortgage Pass Through Certificates Series 2006-AR2,* 352 So.3d 8, 13 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2424a]. "Evidence must be submitted that corroborates the defendant's denial of service." *Morales Law Group, P.A. v. Rodman,* 305 So.3d 759, 761 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1213a].

Defendant Andre's motion has no affidavits or other evidence to warrant the setting of a hearing. *See Thompson v. State, Dept. of Revenue*, 867 So.2d 603, 605 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D566b]. It does not even identify the evidence he relies upon. As such, the motion will be denied, and defendant will be ordered to answer within ten days.

On December 18, 2023, after the parties were unable to get a continuance, defendant Evolve filed a "motion to strike" the Court's order setting trial, stating:

> Simply put, trial was set in violation of Florida Rule of Civil Procedure 1.440 because the action is not yet at issue. . . . For example, Defendant Scott Andre currently has a Motion to Dismiss pending before this Court.

This motion is nothing more than an attempt, now by defendant Evolve, to use any excuse to prompt a continuance, other than actual good cause. This motion also will be denied as defendant Andre will be answering the complaint and the case will be well at issue well before the trial commences.

On December 19, 2023, plaintiff filed a motion to amend the complaint to correct the misnomer of defendant Andre. Specifically, plaintiff, "seeks to amend the Complaint to substitute ANDRE D. SCOTT, as a named Defendant in this action instead of the Defendant named SCOTT ANDRE." It is obvious that the motion's purpose is simply to correct the order of the name of the same person who has been the subject of the lawsuit from the beginning. Neither defendant objected to the motion. "Where there is no doubt regarding the identity of the party intended to be named, it is not unfair or unjust to permit a plaintiff to correct its pleading particularly because the defendant suffers no prejudice." *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So.3d 487, 491 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D640a]. The motion will be granted.

And finally, on December 22, 2023, plaintiff and defendant Evolve filed yet another motion to continue the trial. Their grounds are 1) there is a pending motion to amend the complaint, and 2) they have a lot of discovery to do. Neither meets the new standard of good cause required for the continuance of a trial under active case management guidelines. The amendment changes nothing; it only corrects a misnomer. Regarding the parties' contention that they have a lot of work to do at this point, that easily could have been avoided by the diligence of the parties rather than letting the case sit for months, see above.

Accordingly, it is ORDERED and ADJUDGED that

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1. Defendant Andre's (Scott's) motion to dismiss for improper service is DENIED.

2. Plaintif's motion to amend the complaint to correct the name of the individual defendant is GRANTED. The amended complaint, (attached to the motion), is deemed filed as of the date of this order. Defendants will have ten (10) days from the date of this order to answer the amended complaint.

3. Defendant Evolve's motion to strike the order setting trial is DENIED.

4. The parties' joint motion to continue the trial of this case is DENIED.

5. The parties and counsel are advised that any further violation of the Court's scheduling order, dilatory tactics and attempts to delay the resolution of this case, or the filing of specious motions, will result in an order to show cause why sanctions should not be entered against the parties and/or attorneys.

* * *

Civil procedure—Service of process—Substitute service—Failure to strictly comply with procedure for substitute service or allege sufficient facts to support use of substitute service—Service of process quashed—Clerk's default and order setting trial are vacated

KESHUNMYIAA JONES, Plaintiff, v. MATTINGLY MANSIONS, LLC, d/b/a FLINT GARDEN APARTMENTS, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2022-CA-000701-AXXX-XX. January 3, 2024. David Frank, Judge. Counsel: Jonathan J. Rotstein, Daytona Beach, for Plaintiff.

ORDER QUASHING SERVICE OF PROCESS, VACATING ORDER SETTING TRIAL, AND VACATING THE ENTRY OF CLERK DEFAULT

This cause came before the Court upon active case management, and the Court having reviewed the court file, and being otherwise fully advised in the premises, finds

"A judgment against one who was not given notice in the manner required by law of the action or proceeding in which such judgment was rendered lacks all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered." *Bussey v. Legislative Auditing Comm. of Legislature,* 298 So.2d 219, 221 (Fla. 1st DCA 1974) (citation omitted). "Because valid service of process is necessary to vest jurisdiction in the trial court, the court lacks personal jurisdiction over [a defendant] until service is perfected." *Tuscan River Estate, LLC v. U.S. Bank Tr. Nat'l Ass'n as Tr. of Greene St. Funding Tr.,* 351 So.3d 1233, 1236 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D2508a]. A trial court must first determine personal jurisdiction before entering a default against a defendant. *JG Contracting Co., Inc. v. Tower Innovations Distribution, LLC,* 333 So.3d 1139, 1142 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D444b] ("Thus, we conclude that the trial court erred in entering the default judgment before determining if it had jurisdiction over the defendant.").

"Perfection of substituted service requires strict compliance with the statutory prerequisites because such service is an exception to personal service." 351 So.3d at 1237.

"The supreme court has stated that the reasonable diligence a plaintiff must exhibit before effecting substituted service consists of employing knowledge that is at the plaintiffs command, making diligent inquiry, and exerting an honest and conscientious effort that is appropriate to the circumstances to acquire the information necessary to effect service on the defendant." *Grammer v. Grammer,* 80 So.2d 457, 460-61 (Fla.1955)." *Twin Oaks Villas, Ltd. v. Joel D. Smith, L.L.C.,* 79 So.3d 67, 71 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2661b]. "Proof of a few attempts at service of process are insufficient to prove diligent search. . . . Courts have also held that reasonable diligence was not exercised where the plaintiff failed to follow an 'obvious' lead.' " 351 So.3d at 1238.

Plaintiff has not strictly complied with the procedure for the substitute service she has employed, nor has she alleged sufficient facts to support the use of substitute service in the first place.

Accordingly, it is ORDERED and ADJUDGED that

1. Service of process is QUASHED.

2. The order setting the trial of this case is VACATED.[1]

3. The entry of the clerk default is VACATED.

4. Plaintiff will have thirty (30) days from the date of this order to complete proper service of process or the case will be dismissed. There will be no more extensions of time.

[1]The Court would note that the plaintiff requested a jury trial and therefore may not convert that to a bench trial without the agreement of the defendant. *Jayre Inc. v. Wachovia Bank & Tr.* Co., *N.A.,* 420 So.2d 937, 938 (Fla. 3d DCA 1982).

* * *

Taxation—Ad valorem—Challenge to ad valorem tax assessment for timeshare resort is denied—Property appraiser satisfied its burden to prove by preponderance of evidence that use of methodology utilizing sales comparison described as "developer sale" methodology in making 2018 assessment of timeshare resort was appropriate and complied with all governing statutes, legal standards, and professionally accepted appraisal practices—Resort failed to satisfy its burden of proving by preponderance of evidence that 2018 assessment does not represent property's just value—No merit to argument that property appraiser violated section 192.037(10), which requires appraiser to look first to resale market in making assessment, by not using brokered resales of unit weeks to value timeshares where appraiser determined that there was inadequate number of resales to provide basis for value conclusions and exercised judgment to use developer sales instead—No merit to argument that property appraiser violated section 192.037(11)'s requirement to deduct usual and reasonable fees and costs of sale from original purchase price of developer sales by failing to deduct prices of first sales of timeshares in 1990s and 2000s—Argument relies on strained reading of statute that is inconsistent with property appraiser's responsibility to annually value property

GRANDE VISTA OF ORLANDO CONDOMINIUM ASSOCIATION, INC., and MARRIOTT RESORTS HOSPITALITY CORPORATION, Plaintiffs, v. RICK SINGH, as Property Appraiser; SCOTT RANDOLPH, as Tax Collector; and LEON M. BIEGALSKI, as Executive Director of the Florida Department of Revenue, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-013570-O. September 1, 2023. Denise Kim Beamer, Judge. Counsel: John W. Little, III, Gunster, Yoakley & Stewart, P.A., West Palm Beach; Juan M. Muniz, Gunster, Yoakley & Stewart, P.A., Miami; and Derek E. Bruce, Gunster, Yoakley & Stewart, P.A., Orlando, for Plaintiffs. Kenneth P. Hazouri and Ryan H. Wisneski, deBeaubien, Simmons, Knight, Mantzaris & Neal, LLP, Orlando; and Ana C. Torres, Orange County Property Appraiser, Orlando, for Amy Mercado, Defendant.

FINAL JUDGMENT

This action came before the Court on a bench trial conducted from April 3 to 12, 2023, and the Court, having considered the Second Amended Joint Pretrial Statement of Plaintiffs, Grande Vista of Orlando Condominium Association, Inc. ("Association"), and Marriott Resorts Hospitality Corporation ("MRHC")("Plaintiffs"), and Defendant, Amy Mercado, as successor to Rick Singh, as Orange County Property Appraiser ("OCPA"),[1] the trial evidence, all trial briefs, oral arguments at trial, and parties proposed orders, hereby makes the following findings of fact and conclusions of law:

I. Introduction

A. Nature of this Action and the Subject Property

1. Plaintiffs filed this action under section 194.171, Florida Statutes (2018), to challenge OCPA's 2018 assessment of the Marriott Grande Vista timeshare resort ("Marriott Grande Vista") in Orange County, Florida, for ad valorem taxation purposes. AT issue is the methodology used by OCPA to appraise the timeshare estates owned by

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individual owners of the deeded timeshare weeks.

2. Marriott Grande Vista is timeshare real property established under the Florida Vacation Plan and Timesharing Act, section 721.01, Florida Statutes, *et seq.* It is undisputed Marriott Grande Vista has 900 residential units with the following mix of one, two, and three bedrooms: 10 one-bedrooms, 752 two-bedrooms, and 138 three-bedrooms. The resort also has restaurants, pools, recreational facilities, and other amenities. Marriott Grande Vista's developer, Marriot Ownership Resorts, Inc. ("MORI"), created a total of 46,800 individual timeshare estates in the property by subdividing each of its residential units into 52 unit weeks (*i.e.*, 900 x 52 = 46,800).

3. In or about June 2010, MORI largely stopped selling unit weeks in Marriott Grande Vista and its other North American properties and began selling timeshare estates in the form of "beneficial interests" in a Florida land trust entitled the "MVC Trust." The MVC Trust acquires and holds unit weeks in various Marriott timeshare resorts, including Marriott Grande Vista. Section 2.30 of the MVC Trust Agreement defines the beneficial interests sold to consumers as follows:

> Section 2.30 Interest means a beneficial interest in the [MVC] Trust created pursuant to this Trust Agreement, Section 689.071, *Florida Statutes* (2010), and Chapter 721. Each Interest entitles the owner of such Interest to reserve, use and occupy the Trust Property in accordance with the Trust Plan Documents. Each Interest shall constitute a "timeshare estate" as that term is defined by Section 721.05, Florida Statutes.

Jnt. Tr. Ex. 2, p. 4, § 2.30 (underlined emphasis in original). The Court previously entered an agreed partial summary judgment herein, which ruled the beneficial interests in the MVC Trust "are 100% real property interests and do not include any intangible value under Florida law." *Order rendered June 11, 2022.*

4. Purchasers receive 250 "points" for each beneficial interest in the MVC Trust. *Jnt. Tr. Ex. 2,* p. 13, § 5.2(a). Marriott annually publishes its "Vacation Club Points Charts," which list the number of points required for a week's stay at the MVC Trust's resorts for each week of the year. Marriott's 2017 Vacation Club Points Charts were admitted into evidence. *Jnt. Tr. Ex. 6.* The number of points required to stay at Marriott Grande Vista and the other timeshare resorts is driven by three factors: **a)** the desirability of the particular resort; **b)** whether a one, two, or three bedroom unit is selected; and **c)** the desirability of the chosen week. *Id.* Generally, the more desirable the resort, the larger the bedroom count of the unit, and the more desirable the week, the more points (*i.e.*, beneficial interests) required to reserve a stay. *Id.*

B. Florida Law Governing Ad Valorem Taxation

5. Article VII, Section 4, of the Florida Constitution (1968) mandates a "just valuation" of property for purposes of assessing annual ad valorem taxes thereon. Those valuations are made as of January 1st of the tax year, in this case January 1, 2018. § 192.042(2), Fla. Stat. (2017). Under the Constitution, "[n]o assessment shall exceed just value." Art. VII, § 4.(d)(2), Fla Stat. (1968).

6. Florida law holds that just value is legally synonymous with fair market value, which is "the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." *Walter v. Schuler*, 176 So. 2d 81, 86 (Fla. 1965); *see also* F.A.C. Rule 12D-1.002(2) (defining "fair market value" and quoted *infra* ¶ 14).

7. Section 192.037, Florida Statutes (2017) ("§ 192.037"), governs ad valorem taxation of timeshare properties. Together, Plaintiffs are the managing entity responsible for operating and maintaining Marriott Grande Vista and are, therefore, the "taxpayer" for purposes of ad valorem taxation under § 192.037(1).

8. Subsection (2) of § 192.037 instructs that "[t]he assessed value of each timeshare development shall be the value of the combined individual timeshare periods or timeshare estates contained therein."

9. Subsections 10 and 11 of § 192.037 set forth the following procedures for determining the just value of timeshare properties:

> (10) In making his or her assessment of timeshare real property, the property appraiser shall look first to the resale market.
>
> (11) If there is an inadequate number of resales to provide a basis for arriving at value conclusions, then the property appraiser shall deduct from the original purchase price "usual and reasonable fees and costs of the sale." For purposes of this subsection, "usual and reasonable fees and costs of the sale" for timeshare real property shall include all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange network of resorts. For timeshare real property, such "usual and reasonable fees and costs of the sale" shall be presumed to be 50 percent of the original purchase price; provided, however, such presumption shall be rebuttable.

10. Timeshare properties must also be assessed in accordance with section 193.011, Florida Statutes (2017) ("§ 193.011"). *Gilreath v. Westgate Daytona, Ltd.,* 871 So. 2d 961, 966 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D819c]. This statute lists eight factors that an appraiser "shall take into consideration" when valuing property for ad valorem taxation purposes. § 193.011, Fla. Stat. (2017). Consistent with this clear statutory language, Florida case law holds that appraisers must consider, but not necessarily use, each of the eight factors listed in § 193.011. *E.g., Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989); *Muckenfuss v. Miller*, 421 So. 2d 170, 173 (Fla. 5th DCA 1982).

11. This is the third challenge to a Property Appraiser's assessment of a timeshare property tried by Ninth Circuit Courts since 2016. The two prior cases are *Cypress Palms Condo. Assoc., Inc., et al. v. Katrina A. Scarborough, as Osceola County Property Appraiser, et al.,* No. 2012-CA-1383-OC ("*Cypress Palms*") and *Star Island Vacation Ownership Assoc., Inc., et al. v. Katrina S. Scarborough, as Property Appraiser, et al.*, No. 2016-CA-1006-OC ("*Star Island*"), *aff'd per curiam* 313 So. 3d 1168 (Table) (Fla. 5th DCA 2021). The bench trials in *Cypress Palms* and *Star Island* resulted in the Courts' entry of Final Judgments in favor of the Property Appraiser. The *Cypress Palms* and *Star Island* judgments have been reviewed by the Court.

C. The Parties' Proposed Valuations of Marriott Grande Vista

12. OCPA's 2018 just valuation of Marriott Grande Vista is $463,669,300. Plaintiffs contend the valuation should range from $234,141,120 to $390,235,000, less an additional reduction for the value of tangible personal property.

II. The Requirement of Using Arms-Length Transactions to Value Marriott Grande Vista

13. There are three approaches to valuing property, the sales comparison approach, income-capitalization approach, and cost-less-depreciation approach. The parties agreed that § 192.037 calls for timeshare properties to be valued under a sales comparison approach. In a sales comparison approach, the appraiser: **a)** identifies sales of properties comparable to the subject property; **b)** makes any appropriate adjustments to the sales prices for the comparable properties to account for differences between them and the subject property; and **c)** uses the (adjusted or unadjusted) sales prices of the comparable properties to value the subject property.

14. The parties agreed, and the evidence was uncontradicted, that for an appraiser to use a timeshare resale or developer sale to value Marriott Grande Vista under either subsection (10) or subsection (11) of § 192.037, respectively, the sale must constitute an "arms-length transaction," which is one meeting the definition of "fair market

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value" in Florida Administrative Code Rule 12D-1.002(2) ("Rule 12D-1.002(2)"):

> [T]he price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other.

See also Cypress Palms Judgment, p. 11 (noting both parties' agreement that timeshare resales must satisfy Rule 12D-1.002(2)'s definition of fair market value to be used to value the subject property); *Star Island Judgment*, p. 15 (same).

15. As further discussed below, the challenges associated with verifying owner-to-owner resales of timeshares as arms-length transactions under Rule 12D-1.002(2), such that they may be used to value timeshare property under § 192.037(10), are central to the valuation dispute in this case.

III. The Parties' Burdens of Proof under Section 194.301, Florida Statutes

16. Section 194.301, Florida Statutes (2022) ("§ 194.301"), establishes the parties' respective burdens of proof in a taxpayer's challenge to a property appraiser's tax assessment of value. All cases setting forth different burdens of proof in such a challenge decided before § 194.301's enactment in 2009 are preempted and overruled by this statute. *See* §§ 194.301(1) and 194.3015, Fla. Stat. (2022).

17. Prior to closing arguments, counsel for Plaintiffs and OCPA had a bench conference with the Court, in which both parties mutually agreed to adopt and follow the six-step framework (the "Framework") for applying § 194.301's burdens of proof set forth on page 8 of the Florida Department of Revenue's Corrected Amended Trial Memorandum filed herein on March 30, 2023. Additionally, the Court reviewed the applicable statues and believes the parties' agreement reflects the proper statutory analysis.

18. The Framework's first step involves subsection (1) of § 194.301, which: **a)** sets forth governing standards for appraisal methodologies used to value properties for ad valorem taxation purposes; and **b)** states that taxpayers challenging their assessments are entitled to a determination of the "appropriateness of the appraisal methodology used in making the assessment." § 194.301(1), Fla. Stat. (2022). The Framework states that "step 1" for the Court under § 194.301(1) is to "[d]etermine whether [OCPA] proved by a preponderance [of the evidence] that [its] appraisal methodology is appropriate (complies with all legal standards)." *DOR Trial Memo.*, p. 8 (parenthetical in original).

19. Under the Framework, "[i]f the answer to step 1 is yes," then Plaintiffs' "burden lies in both § 194.301(2)(a) and (2)(b)." *Id.* In this regard, § 194.301(2)(a)1. states as follows:

> (2) In an administrative or judicial action in which an ad valorem tax assessment is challenged, the burden of proof is on the party initiating the challenge.
>
> (a) If the challenge is to the assessed value of the property, the party initiating the challenge has the burden of proving by a preponderance of the evidence that the assessed value:
>
> 1. Does not represent the just value of the property after taking into account any applicable limits on annual increases in the value of the property;[2]

§ 194.301(2)(a)1., Fla. Stat. (2022). Step 2 of the Framework states that "if the answer to step 1 is yes and [Plaintiffs do] not meet the burden under Section 194.301(2)(a), the assessment stands." *DOR Trial Memo.*, p. 8 (underlined emphasis in original).

20. For the reasons detailed below, the Court finds that: **a)** OCPA satisfied its initial burden of proving by a preponderance of the evidence that the appraisal methodology OCPA used in making its 2018 assessment of Marriott Grande Vista complied with all governing statutes, legal standards, and professionally accepted appraisal practices, as set forth in § 194.301(1) and step 1 of the Framework; **b)** the appraisal methodology OCPA used in making its 2018 assessment of Marriott Grande Vista is appropriate, as set forth in § 194.301(1) and step 1 of the Framework; and **c)** Plaintiffs have failed to satisfy their burden of proving by a preponderance of the evidence that OCPA's 2018 assessment of Marriott Grande Vista does not represent the property's just value as of January 1, 2018, as set forth in § 194.301(2)(a) and step 2 of the Framework. Accordingly, OCPA's "assessment stands."

IV. OCPA Satisfied Its Initial Burden under § 194.301(1)

21. The evidence of OCPA's appraisal methodology in making its 2018 assessment of Marriott Grande Vista was provided by two of the office's employees, Andres Ayala and his supervisor, Ana Arroyo.

22. Mr. Ayala and Ms. Arroyo testified that OCPA made its 2018 assessments of the approximately 70 timeshare properties in Orange County at the time, including Marriott Grande Vista, by using a sales comparison approach under subsection (11) of § 192.037, which they described as a "developer-sale" methodology.

A. Mr. Ayala's Testimony Regarding OCPA's Developer-Sale Methodology

23. Mr. Ayala is a 14-year appraisal professional. Under Ms. Arroyo's supervision and assistance, he began valuing timeshare properties as an employee of OCPA in 2018. Mr. Ayala testified that Ms. Arroyo directed him to use a developer-sale methodology under § 192.037(11). He deferred to Ms. Arroyo the actions OCPA took to "look first to the resale market," as required by § 192.037(10) when valuing Marriott Grande Vista in 2018.

24. Mr. Ayala provided detailed and credible testimony describing the developer-sale methodology OCPA used to value Marriott Grande Vista, a summary of which is as follows:

a) Mr. Ayala compiled data on the purchase prices of over 21,000 sales of beneficial interests (points) in the MVC Trust occurring in 2017 and calculated a median, per-point value for those sales of $11.65.

b) Using Marriott's 2017 Vacation Club Points Chart, Mr. Ayala next compiled the number of points needed to stay at Marriott Grande Vista's one, two, and three bedroom units for each of the 52 weeks in 2017. Upon totaling those points and deducting one week's worth of the points to account for a maintenance week on each unit, he calculated the total, annual points attributable to each of the one, two, and three bedroom units, which were 84,150, 138,100, and 185,578, respectively.

c) Mr. Ayala then multiplied those respective point totals by the median price-per-point of $11.65 to arrive at a gross value (before mandatory deductions) of the individual timeshare estates within each of the one, two, and three bedroom units. For example, Mr. Ayala multiplied the 138,100 points attributable to each of the two-bedroom units by the $11.65 per-point value and arrived at a gross value of $1,608,865 for each of the two-bedroom units.

d) To arrive at a total, gross sellout of all the timeshare estates in Marriott Grade Vista as required by § 192.037(2), Mr. Ayala then multiplied the value of the combined individual timeshare estates within each one, two, and three bedroom units by the total number of each of those units in the resort. Using the same example of two-bedroom units, Mr. Ayala multiplied their gross value of $1,608,865 by 752 units, which resulted in a product of $1,224,346,265. Mr. Ayala then added together these gross sellout figures for all of the one, two, and three bedroom units, which resulted in a total, gross sellout of the timeshare estates in Marriott Grande Vista of $1,513,045,637.

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e) The final step in OCPA's developer-sale methodology was to deduct from the $1,513,045,637 gross-sellout figure the "usual and reasonable fees and costs" of the 21,000+ sales of beneficial interests in the MVC Trust that OCPA used to value Marriott Grande Vista, as required by § 192.037(11). This statute establishes a presumption that the "usual and reasonable fees and costs of the sale" comprise 50% of the purchase prices of the timeshare interests sold by developers. *See supra* ¶9. OCPA, however, applied a 65% deduction—larger than the presumed 50% in § 192.037(11). Applying OCPA's 65% deduction to the total gross sellout of $1,513,045,637, Mr. Ayala arrived at a proposed 2018 just valuation of Marriott Grande Vista equal to $529,565,973.

25. At trial, Mr. Ayala also: **a)** went individually through the eight factors listed in § 193.011 and explained how OCPA considered, and where appropriate used, each of them to value Marriott Grande Vista;[3] and **b)** testified that OCPA's developer-sale methodology complied with professionally accepted appraisal practices.

26. Mr. Ayala (and Ms. Arroyo) testified to an additional step OCPA took to arrive at its initial 2018 assessment of Marriott Grande Vista. He explained that OCPA made an administrative decision to place a 10% limitation on year-over-year increases of its assessments of all timeshare properties in Orange County for the benefit of timeshare owners.

27. Applying this internal limitation, Mr. Ayala arrived at a recommended 2018 assessment of Marriott Grande Vista equal to $510,013,000. After Ms. Arroyo approved it, Mr. Ayala entered the $510,013,000 assessment into OCPA's computer-assisted mass appraisal system to be included in the 2018 Real Property Tax Roll.

B. Ms. Arroyo's Testimony Regarding OCPA's Appraisal Methodology and Final Assessment of $463,669,300

28. Ms. Arroyo is a 25-year appraisal professional who holds an MAI designation from the Appraisal Institute, which is generally recognized as the highest credential in the appraisal profession. She first began working on OCPA's valuation of timeshare properties in December 2016.

29. Ms. Arroyo provided detailed and credible testimony regarding OCPA's actions in examining the 2017 owner-to-owner timeshare resale market as required by § 192.037(10), the conclusions drawn from that examination, and the institutional knowledge OCPA has acquired regarding the resale market. Ultimately, Ms. Arroyo testified that based on her examination of the resale market and OCPA's institutional knowledge of it, she determined there were an inadequate number of timeshare resales satisfying the elements of Rule 1.002(2) to arrive at reliable and credible value conclusions for Marriott Grande Vista. This decision was the basis for her instructing Mr. Ayala to use the developer-sale methodology under § 192.037(11) to value those properties. A summary of Ms. Arroyo's testimony on these topics is as follows:

a) In 2018, OCPA obtained data on timeshare sales occurring in 2017, including developer sales, owner-to-owner resales, owner-to-developer transfers, which Ms. Arroyo referred to as "takebacks," and sales involving "resellers" who are in the business of trading timeshares. Ms. Arroyo imported this data into spreadsheets to facilitate her analysis of the owner-to-owner resale market. In performing the analysis, Ms. Arroyo ascertained that the developer-to-owner market was by far the largest in 2017, followed by owner-to-developer takebacks.

b) More importantly, owner-to-owner resales comprised only a very small portion of the overall timeshare market. Ms. Arroyo was also unable to ascertain any trend or pattern in the sales prices for the owner-to-owner resales, which she stated is necessary for an appraiser to be confident that using them in a sales comparison approach will result in a reliable and credible valuation of a timeshare property.[4]

c) OCPA consistently examines the owner-to-owner resale market based upon Value Adjustment Board ("VAB") petitions challenging OCPA's assessments of timeshare properties. Based on her continual examination of the resale market has resulted in its conclusion that it is very unreliable, dysfunctional, and not liquid.

d) From either 2013 or 2014 into 2016, OCPA's employees called participants in owner-to-owner resales of timeshares to verify them as arms-length transactions. Ms. Arroyo testified that these efforts were not fruitful because: **i.** it was difficult to get in touch with buyers and sellers; **ii.** when contact was made, most of them did not want to talk about the resales; and **iii.** a significant number of sellers who did speak to OCPA's employees indicated the resales had elements of distress in them.

e) Ms. Arroyo testified that she also considered the *Cypress Palms* Judgment when examining the 2017 owner-to-owner resale market for timeshares. She explained that the Osceola County Property Appraiser's observations and conclusions regarding the dysfunction and unreliability of the timeshare resale market set forth in the *Cypress Palms* Judgment were consistent with those of OCPA, including the observation that resale prices were "all over the place." *Cypress Palms Judgment,* p. 16.

30. With respect to OCPA's developer-sale methodology, Ms. Arroyo testified that OCPA did not attempt to contact participants in the developer sales it used to value Marriott Grande Vista under § 192.037(11) to confirm the sales satisfied Rule 1.002(2) because they did so on their face. Ms. Arroyo explained that MORI is in the business of selling the beneficial interests and was not influenced by any form of distress, duress, or personal exigency. With regard to the buyers, Ms. Arroyo explained that: **a)** prospects are under no compulsion to buy a timeshare interest from MORI; and **b)** those who do enter purchase contracts with MORI are given substantial documentation regarding the purchase, including a legally required and state-approved Public Offering Statement, and buyers have a 10-day rescission period in which they can cancel their purchase contracts for any reason without penalty. *See also* §§ 721.07(6) and § 721.10 Fla. Stat. (2017).

31. Ms. Arroyo explained that OCPA arrived at its 65% deduction for the "usual and reasonable fees and costs" of the developer sales under § 192.037(11) by performing its own research, which included reviewing: **i.** past decisions from Florida courts addressing the issue, including the *Cypress Palms* Judgment upholding the Property Appraiser's reduction of the developer-sale prices by approximately 63%; and **ii.** an Arizona regulation (which is comparable to Orange County, Florida) recommending a 65% deduction for the fees and costs of developer sales when valuing timeshare properties. Ms. Arroyo also testified that OCPA's 65% reduction included the value of Marriott Grande Vista's tangible personal property, which had to be removed from the real property valuation and assessment.

32. Ms. Arroyo testified that the appraisal methodology OCPA used to make its 2018 assessment of Marriott Grande Vista, as described by her and Mr. Ayala, in all respects complied with § 192.037, § 193.011, and professionally accepted appraisal practices.

33. Finally, Ms. Arroyo explained why OCPA lowered its initial assessment of $510,013,000 to the $463,669,300 figure it is defending in this case. To summarize: **a)** the Association filed four lawsuits against OCPA challenging its assessments of Marriott Grande Vista for the 2014-2017 tax years; **b)** in June 2018, after the $510,013,000 figure had been entered into OCPA's system but before finalization of the tax roll, the Association and OCPA globally settled those four lawsuits, which resulted in a lowering of OCPA's 2014-17 assessments; **c)** OCPA's 2018 assessment of $510,013,000 would have been more than a 10% increase over its lower assessment of Marriott

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Grande Vista for 2017 resulting from the settlement; and **d)** Ms. Arroyo conferred with other management-level personnel at OCPA regarding these developments, and a decision was made to lower OCPA's 2018 assessment of Marriott Grande Vista from $510,013,000 to $463,669,300, which was OCPA's original, pre-settlement assessment for 2017. Ms. Arroyo made that change in OCPA's system, and the $463,669,300 assessment was included in OCPA's 2018 tax roll. The $463,669,300 assessment effectively results in a 70% reduction (up from 65%) of the developer-sales prices OCPA used to value Marriott Grande Vista under § 192.037(11).

C. OCPA Satisfied Its Initial Burden under § 194.301(1) and the Framework

34. In closing argument, Plaintiffs made two arguments in opposition to a finding that OCPA satisfied its initial burden of proving by a preponderance of the evidence that the appraisal methodology OCPA used to value Marriott Grande Vista in 2018 is appropriate and complies with all governing statutes, legal standards, and professionally accepted appraisal practices.

35. Plaintiffs first argued that OCPA violated § 192.037 by not using the same MRHC-brokered resales of unit weeks in Marriott Grande Vista that Plaintiffs' valuation expert, Dr. Barry Diskin, used in his appraisal. But, Dr. Diskin, Ms. Arroyo, and OCPA's outside valuation expert, Steven Marshall, all testified that after first looking to the resale market as required by § 192.037(10), the determination of whether there is "an inadequate number of resales to provide a basis for arriving at value conclusions," as stated in § 192.037(11), is a question of appraisal judgment.

36. Based on the evidence of Ms. Arroyo's diligent and objective inquiry into the 2017 timeshare resale market and OCPA's substantial institutional knowledge regarding that market, the Court finds that OCPA's decision to use developer sales under § 192.037(11) to value Marriott Grande Vista: **a)** was a sound exercise of appraisal judgment; **b)** was an appropriate appraisal methodology; **c)** did not violate any of the governing statutes or legal standards; and **d)** complied with professionally accepted appraisal practices. These findings are corroborated by Dr. Diskin's unsuccessful attempt to use the "external resale market" to value Marriott Grande Vista, which resulted from his inability to find a reliable pattern in the sales prices that would allow him to do so. *See infra* ¶s 73 & 74. The question of whether Dr. Diskin's appraisal methodology—in which he exercised his appraisal judgment and used MRHC-brokered resales under § 92.037(10)—results in a more reliable valuation than OCPA's appraisal methodology is appropriately examined and decided in the context of determining whether Plaintiffs proved by a preponderance of the evidence that OCPA's valuation of Marriott Grande Vista does not represent its just value.

37. Plaintiffs next argued that OCPA violated § 192.037(11)'s language requiring the usual and reasonable fees and costs of the sale to be deducted from the "original purchase price" of the developer sales because OCPA's valuation methodology did not use the prices of MORI's first sales of the unit weeks in Marriott Grande Vista occurring the 1990s and 2000s. The Final Judgments in *Cypress Palms* and *Star Island* both rejected this same argument on the grounds that it "relies on a strained reading of [§ 192.037(11)] that is inconsistent with" property appraisers' responsibility to annually value property as of January 1st of the tax year. *Cypress Palms Judgment*, p. 27; *Star Island Judgment*, p. 28. The Court agrees with these rulings. Moreover, if the only developer sales under § 192.037(11) are MORI's initial sales of unit weeks in the 1990s and 2000s, then MORI's 2017 sales of beneficials interest in the MVC Trust are, by definition, resales because the developer market and resale markets are the only two markets in which timeshare sales transact.

38. The Court additionally agrees with Ms. Arroyo's testimony that MORI's sales of beneficial interests in the MVC Trust are, on their face, arms-length transactions satisfying Rule 1.002(2) and finds that the overwhelming weight of the evidence supports OCPA's decision to apply a 65% reduction to the prices of those sales to account for their "usual and reasonable fees and costs" under § 192.037(11).

39. For these reasons, and after considering and weighing the evidence, the Court finds that OCPA satisfied its initial burden under § 194.301(1) of proving by a preponderance of the evidence that the appraisal methodology OCPA used to value Marriott Grande Vista in 2018 is appropriate and complies with all governing statutes, legal standards, and professionally accepted appraisal practices.

40. Accordingly, Plaintiffs have the burden under § 194.301(2)(a) of proving by a preponderance of the evidence that OCPA's $463,669,300 assessment of Marriott Grande Vista does not represent the property's just value as of January 1, 2018.

V. OCPA's Additional Evidence in Support of Its Valuation and Assessment

A. Ms. Arroyo's Retrospective Analysis of the 2017 Timeshare Market

41. In addition to examining the timeshare resale market in 2018, Ms. Arroyo performed a retrospective analysis of the entire market for all timeshare sales in calendar year 2017 during this lawsuit. Her findings are documented in two summaries that were admitted into evidence (*D's Comp. Tr. Ex. 11)*. They include the following:

a) 66.7% of the 2017 owner-to-owner resales of unit weeks in Marriott Grande Vista transacted for documentary stamps of $100, which reflect a transfer of ownership for no consideration.

b) In 2017, the volume of MORI's sales of beneficial interests in the MVC Trust dwarfed the volume of owner-to-owner resales of unit weeks in Marriott Grande Vista. In terms of dollars transacted: **i.** MORI's sales of beneficial interests comprised 91.4% of the market; **ii.** owner-to-developer takebacks comprised 8% of the market; and **iii.** owner-to-owner resales transacted for more than $100 in documentary stamps comprised a scant .6% of the market.[5] In terms of number of transactions (as opposed to dollars transacted): **i.** MORI's sales of beneficial interests comprised 82.3% of the market; **ii.** owner-to-developer takebacks comprised 11.8% of the market; and **iii.** owner-to-owner resales of unit weeks in Marriott Grande Vista transacted for more than $100 in documentary stamps comprised 1.9% of the market.

c) On a countywide basis, the volume of developer sales also dwarfed that of owner-to-owner resales. In terms of dollars transacted, the respective market percentages were: **i.** developer sales: 77%; **ii.** owner-to-developer takebacks: 20.3%; and **iii.** owner-to-owner resales transacted for more than $100 in documentary stamps: 2.5%. In terms of the number of transactions, the respective market percentages were: **i.** developer sales: 62.5%; **ii.** owner-to-developer takebacks: 21.8%; and **iii.** owner-to-owner resales transacted for more than $100 in documentary stamps: 4.1%.

d) 73% of the 2017 owner-to-owner resales of timeshare interests in all of Orange County transacted for documentary stamps of $100.

B. OCPA's Documentary Evidence Regarding the Timeshare Resale Market

42. Documents drafted by or for MORI and its parent company, Marriott Vacations Worldwide Corporation, for the purpose of providing truthful and accurate information regarding their timeshare products were admitted into evidence and contain the following disclosures:

a) MORI's April 2013 Public Offering Statements for its sale of

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unit weeks in Marriott Grande Vista plainly state: "Owners attempting to resell or rent their Unit or Unit Week would have to compete, at a substantial disadvantage, with the developer in the sale or rental of its unsold Units or Unit Weeks. Generally, there is no established market for the resale of Units or Unit Weeks or for the rental of Units and Unit Weeks in the Condominium." *Jnt. Tr. Ex. 3,* p. 30; *Jnt. Tr. Ex. 4,* p. 26.

b) MORI's December 2016 Public Offering Statement for its sale of beneficial interests in the MVC Trust states: "Generally, a Beneficiary [*i.e.*, purchaser] should expect substantial competition from Developer and **no established resale market in the event a Beneficiary desires to resell an Interest**." *Jnt. Tr. Ex. 5,* p. 12 (emphasis added).

c) Marriott Vacations Worldwide Corporation's 10-K Report for calendar year 2017 filed with the United States Securities and Exchange Commission discloses Risk Factors "that could have a negative effect on our financial results or operations . . . ." *D's Tr. Ex. 1*, p. 17 One of the Risk Factors states as follows:

> *The sale of vacation ownership interests in the secondary market by existing owners could cause our sales revenues and profits to decline.*
>
> Existing owners have offered, and are expected to continue to offer, their vacation ownership interests for sale on the secondary market. The prices at which these interests are sold are typically less than the prices at which we would sell the interests. As a result, these sales can create pricing pressure on our sale of vacation ownership products, which could cause our sales revenues and profits to decline. In addition, **if the secondary market for vacation ownership interests becomes more organized and liquid than it currently is**, the resulting availability of vacation ownership interests (particularly where the vacation ownership interests are available for sale at lower prices than the prices at which we would sell them) could adversely affect our sales and our sales revenues. Further, unlawful or deceptive third-party vacation ownership interest resale schemes involving interests in our resorts could damage our reputation and brand value and adversely impact our sales revenues.
>
> **Development of a viable secondary market may also cause the volume of vacation ownership interests that we are able to repurchase to decline, which could adversely impact our development margin, as we utilize this lower cost inventory source to supplement our inventory needs and reduce our cost of vacation ownership products.**

Id., p. 18 (italicized emphasis in original; bold emphasis supplied).

43. OCPA also admitted into evidence a web page marketing MRHC's brokerage services with a heading that states "Marriott Vacation Club® Exit Specialists are Here to Help." *D's Tr. Ex. 2.* The content below it references the type of personal exigencies that will tend to disqualify a sale from being an arms-length transaction under Rule 1.002(2): "[E]ven long-time Owners need to sell their timeshare due to life circumstances. Reduced finances, fixed incomes, declining health, and other reasons may make it difficult for Owners to get out and use their timeshare to explore the world."

C. Steven Marshall's Appraisal of Marriott Grande Vista

44. OCPA retained an outside appraiser, Steven Marshall, to appraise Marriott Grande Vista as of January 1, 2018. Mr. Marshall has been an appraisal professional for nearly 50 years and holds an MAI designation. He has substantial experience in valuing timeshare properties, which include appraising the resorts at issue in *Cypress Palms* and *Star Island*, where he served as an expert for the Property Appraiser.

45. With his vast experience in examining the timeshare resale market, he observed an illegitimate and corrupt market rife with fraud and scams. He provided a specific example of a timeshare scam occurring in central Florida that resulted in the imprisonment of its promoters. Mr. Marshall further explained that the timeshare resale market is internet-driven, unregulated, and has nothing comparable to the Multiple Listing Service (MLS[6]). He also testified that title insurance is generally unavailable for owner-toowner resales, which often results in buyers not receiving what they bargained for. Mr. Marshall also testified that the number one reason owners look to sell a timeshare is financial hardship. Like Ms. Arroyo, Mr. Marshall prepared charts demonstrating that the volume of developer sales in 2017 dwarfed that of owner-to-owner resales, and a large portion of the resales transacted for $100 in documentary stamps.

46. Mr. Marshall testified that for these reasons, he does not believe there is an adequate number of resales to arrive at credible and reliable value conclusions for Marriott Grande Vista, and, therefore, he used developer sales under § 192.037(11) to value the property. The Court finds this was a sound exercise of appraisal judgment based on Mr. Marshall's diligent, persuasive, and objective inquiry into the resale market.

47. Mr. Marshall performed two different appraisal methodologies under § 192.037(11). The first was a sales comparison approach using 2017 developer sales of unit weeks in three Orange County timeshare properties he determined were comparable to Marriott Grande Vista, which is summarized as follows:

a) Using the comparable unit-week sales, Mr. Marshall calculated the value of the unit weeks in Marriott Grande Vista's one, two and three bedroom units.

b) He then reduced those unit-week values by 63% to account for the "usual and reasonable fees and costs" of the developer sales under § 192.037(11).

c) Mr. Marshall then multiplied his net unit week values for one, two, and three bedroom units by the number of each unit type in Marriott Grande Vista (*i.e.*, 10 one-bedroom, 752 two-bedroom, 138 three-bedroom), and then multiplied those products by 51 weeks (deducting one week for maintenance), to arrive at a net sellout figure of $486,147,810 for Marriott Grande Vista.

d) Mr. Marshall deducted an additional $11,999,938 for furniture, fixtures, and equipment, which was OCPA's 2018 tangible personal property tax assessment for Marriott Grande Vista. This resulted in a figure of $474,147,872, which Mr. Marshall rounded down to a value of $474,000,000.

48. Mr. Marshall's second methodology was a points-based valuation based on MORI's sales of beneficial interests in the MVC Trust, which is similar to OCPA's methodology. *See supra* ¶ 24. Instead of using 21,000+ of those sales, Mr. Marshall pulled 30 deeds for 2017 sales of the beneficial interests and used them to arrive at an estimated price per-point value of $11.50 based on sales prices reflected by the deeds' documentary stamps. Using Marriott's 2017 Vacation Club Points Chart, Mr. Marshall calculated a gross sellout for Marriott Grande Vista in the same manner as Mr. Ayala. Mr. Marshall then reduced his gross sellout figure by 63% to account for the "usual and reasonable fees and costs" of the sales, and then deducted the additional $11,999,938 for OCPA's 2018 tangible personal property assessment for Marriott Grande Vista. This resulted in a figure of $540,595,448, which Mr. Marshall rounded down to a value of $540,000,000.

49. Mr. Marshall stated that while he believes both of his methodologies resulted in reliable, well-supported valuations, he selected the $474,000,000 valuation because it is the product of quality data and an ample number of unit-week sales, which gives him a high level of confidence in the valuation.[7]

50. Mr. Marshall explained how he considered, and where appropriate used, each of the eight factors listed in § 193.011 to value Marriott Grande Vista. He also testified that his appraisal methodology in all respects complies with § 192.037 and professionally accepted appraisal practices. Based on this evidence, the Court finds

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that Mr. Marshall's appraisal methodology is appropriate and complies with the governing statutes, legal standards, and professionally accepted appraisal practices.

D. The Opinions of Dr. Sean Malone

51. OCPA elicited testimony from another expert, Dr. Sean Malone, who holds a doctorate degree in finance. His testimony can be divided into two categories.

52. First, Dr. Malone prepared two regression models, one using a sample of data from MORI's 2017 sales of beneficial interests in the MVC Trust, and one using 500 owner-to-owner resales of unit weeks in Marriott Grande Vista occurring in 2017, 456 or 91% of which were brokered by MRHC. Dr. Malone explained that: **a)** he designed these regression models to determine how well sales prices in the developer and resale markets reflect the fundamental drivers of value of the timeshare interests, which he described as the number of bedrooms in the unit and the desirability of the particular week of the year; **b)** these fundamental drivers of value were reflected by the points needed to stay at a particular unit, for a particular week, in Marriott Grande Vista under the Vacation Club Points Chart. To make an "apples to apples" comparison, Dr. Malone converted the 500 resales of unit weeks in Marriott Grande Vista into their points equivalents under the Vacation Club Points Chart.

53. Dr. Malone's developer-sale regression model found that 96.9% of the variation in sale prices for MORI's sales of beneficial interests in the MVC Trust is explained by the variation in the number of points transacted, which again, reflect the fundamental drivers of value. By comparison, his regression model for the 500 owner-to-owner resales in Marriott Grande Vista found that only 21.2% of the variation in sale prices for the resales is explained by the variation in the number of points transacted, with the balance of 78.8% being explained by other factors. Based on these findings, Dr. Malone opined that transaction prices in the developer market are vastly superior at reflecting information about the timeshare estates' fundamental drivers of value than transaction prices in the owner-to-owner resale market.

54. Second, Dr. Malone opined on the market effects of high transaction costs—here, MRHC's 40% commission for brokering resales of unit weeks in Marriott Grande Vista. He testified that the typical brokerage commission on the sale of a single-family home is 5% - 6%. Dr. Malone further explained that: **a)** owners of timeshares make an ongoing calculation of whether to keep or sell them; **b)** in order to decide to sell, an owner must expect to receive net sales proceeds greater than his or her own personal valuation of the timeshare; and **c)** with a 40% brokerage commission, the owner must be prepared to accept net sales proceeds that are no more than 60% of the gross sales proceeds. In light of this fact, Dr. Malone opined that the sub-market of MRHC-brokered resales is more likely to be biased toward owners who are unhappy with their unit weeks at Marriott Grande Vista and/or are seeking to merely exit them.

VI. Plaintiffs' Evidence in Support of Their Proposed Valuation of Marriott Grande Vista

A. John Miller's Testimony

55. Plaintiffs' first witness was MRHC's representative, John Miller. He testified about Marriott Grande Vista, the unit weeks MORI previously sold therein, and the beneficial interests in the MVC Trust sold by MORI since June 2010.

56. Mr. Miller also provided detailed testimony regarding MRHC's operations, including its administration of MORI's right of first refusal to repurchase unit weeks in Marriott Grande Vista and brokering of resales of those unit weeks.

57. Mr. Miller explained that MORI has a right of first refusal to repurchase any unit week in Marriott Grande Vista that goes under contract for sale at the contracted-for price. Upon execution of a sales contract, the unit's owner/seller must submit it to MORI, which then has 30 days to decide whether to exercise its right of first refusal. Through this process, MRHC gathers data on what Mr. Miller and other witnesses called the "external resale market," which is the universe of resales of unit weeks in Marriott Grande Vista not brokered by MRHC. Plaintiffs admitted into evidence a list of such resales. *Ps.' Tr. Ex. 3.* Mr. Miller testified on cross examination that MRHC had not taken any actions to determine if those resales were arms-length transactions under Rule 1.002(2).

58. Mr. Miller also testified about communications he had with Plaintiff's valuation expert, Dr. Diskin. Mr. Miller stated that Dr. Diskin once told him he was having difficulty verifying unit-week resales as arms-length transactions. Subsequently, on May 21, 2021, Dr. Diskin sent Mr. Miller an email asking him for data on MRHC-brokered resales of unit weeks in Marriott Grande Vista. On May 24, 2021, Mr. Miller emailed Dr. Diskin a spreadsheet listing 534 MRHC-brokered resales of unit weeks in Marriott Grande Vista occurring in 2017, including sale dates, sale prices, and the contracting parties. Plaintiffs admitted this spreadsheet into evidence. *Ps.' Tr. Ex. 4.* Mr. Miller testified that this spreadsheet was the product of a data pull from MRHC's records, and MRHC did not analyze the unit-week resales listed therein for the purpose of determining if they are arms-length transactions under Rule 1.002(2). As discussed further below, Dr. Diskin used 472 of the 534 MRHC-brokered resales to value Marriott Grande Vista.

59. On direct examination, Mr. Miller testified that his best estimate was that 75% of the owners who seek to exit their timeshares do so for two "buckets" of reasons: **a)** financial considerations, including an inability or lack of desire to continue paying the annual maintenance fees required by the timeshare; and **b)** an inability to use the timeshare as they have in the past due to age, health, changed travel patterns, or other personal circumstances.

60. OCPA's counsel followed up on this testimony in cross examination. He asked Mr. Miller about the content of the web page marketing MRHC's brokerage services, which states "even long-time Owners need to sell their timeshare due to life circumstances," including "reduced finances, fixed incomes, [and] declining health." Mr. Miller agreed that the web page's stated reasons for why owners look to exit their timeshare interests were entirely consistent with his experience. OCPA's counsel then referred Mr. Miller back to his testimony on direct examination that 75% of the owners seeking to exit their timeshares do so for financial reasons or an inability to use the timeshare as they had in the past. On further questioning, Mr. Miller agreed that based on this testimony, his best estimate was that 75% of the sellers in the 534 MRHC-brokered resales of unit weeks in Marriott Grande Vista he provided to Dr. Diskin sought to exit those timeshares for one or both of those reasons.

61. On redirect examination, Mr. Miller testified that MRHC will not broker resales for owners experiencing more extreme forms of financial distress associated with their timeshares, including those who are behind on their timeshare mortgage payments or annual maintenance fees or upside down on their timeshare mortgages. On recross examination, Mr. Miller confirmed that in providing this testimony on redirect, he did not intend to state or imply that MRHC's brokerage/exit program turns away all people who are experiencing life circumstances such as reduced finances, fixed incomes, or declining health. He in fact confirmed that MRHC's brokerage program exists to help owners experiencing these types of life circumstances to exit their timeshare interests.

62. Mr. Miller also testified that when brokering resales of unit weeks in Marriott Grade Vista, MRHC does not put the unit-week listings: **a)** on any internet platform accessible by the public; **b)** in any

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form of print media, such as newspapers or magazines; or **c)** in any form of television or radio advertisement or infomercial.

63. Mr. Miller explained that in lieu of any such marketing activities, MRHC makes the unit weeks it is brokering available to prospects in MORI's sales galleries who are receiving a presentation on beneficial interests in the MVC Trust, but who also express an interest in buying a unit week at a particular Marriott resort. Given this fact, Mr. Miller's best estimate was that 90% or more of the 534 MRHC-brokered resales of unit weeks in Marriott Grande Vista he provided to Dr. Diskin were coupled with a sale of beneficial interests in the MVC Trust to the buyers.

B. Dr. Barry Diskin's Appraisal of Marriott Grande Vista

64. Dr. Diskin provided Plaintiffs' proposed valuation of Marriott Grande Vista as their expert. He has a doctorate degree in land economics and was a professor at Florida State University for 35 years where he taught classes in real estate valuation. He has also operated an appraisal firm for over 30 years and holds an MAI designation.

65. As discussed above, Dr. Diskin used 472 of the 534 MRHC-brokered resales from 2017 listed in the spreadsheet delivered to him by Mr. Miller to value Marriott Grande Vista under a sales comparison approach. His appraisal methodology and conclusions are summarized as follows:

a) Dr. Diskin divided the 52 weeks in each of Marriott Grande Vista's 900 units into either Gold or Platinum weeks as previously designated by MORI, with Platinum weeks being more desirable and, therefore, more valuable.

b) Using the sales prices of the 472 Marriott-brokered resales of unit weeks in Marriott Grande Vista, Dr. Diskin arrived at values for the Gold and Platinum weeks in the resort's one, two, and three bedroom units. He then multiplied those values by 52 weeks to arrive at the full value of a one, two, and three bedroom unit.

c) Dr. Diskin then multiplied those values by the number of each unit type in the resort and added those products together to arrive at a total value of all the unit weeks in Marriott Grande Vista of $390,235,200. Dr. Diskin rounded this figure to $390,235,000, which is his opinion of Marriott Grande Vista's just value as of January 1, 2018.

d) Dr. Diskin also testified that if the Court were to determine that § 193.011's eighth factor requires a reduction to his just value opinion of $390,235,000 for costs associated with the Marriott-brokered resales (on which he expressed no opinion), then he believes a 40% reduction would be appropriate based on MRHC's charging of the 40% brokerage commission.[8] Such a 40% reduction would result in a value of $234,141,120 for Marriott Grande Vista.

66. On direct examination, Dr. Diskin described his initial efforts to value Marriott Grande Vista using owner-to-owner resales in the "external resale market," which again, is the universe of resales of unit weeks in Marriott Grande Vista not brokered by MRHC. Dr. Diskin explained that upon researching the "external resale market," he could not identify a reliable pattern of resales that could be used to arrive at a reliable and credible valuation of Marriott Grande Vista.

67. On cross examination, Dr. Diskin agreed that the prices for unit weeks in Marriott Grande Vista he observed in the "external resale market" were all over the place and unreliable. On further questioning, Dr. Diskin explicitly testified that he agreed with OCPA's position that the "external resale market" was not sufficiently reliable for valuing Marriott Grande Vista in 2018.

68. The timeline of Dr. Diskin's work on this assignment was also the subject of cross examination. This line of questioning established that: **a)** the Association retained Dr. Diskin for the assignment in February 2018; **b)** by May 21, 2022, the date Dr. Diskin emailed Mr. Miller asking for data on the MRHC-brokered resales, he had still not been able to verify a sufficient number of resales of Marriott Grande Vista unit weeks as arms-length transactions under Rule 1.002(2) to use them to value the property; and **c)** in order to comply with a litigation deadline in this case, Dr. Diskin issued his appraisal report on June 1, 2022, one week after receiving the MRHC-brokered resales from Mr. Miller.

69. Dr. Diskin also admitted on cross examination that he did not know the motivations of the sellers in the 472 MRHC-brokered resales of unit weeks in Marriott Grande Vista he used to value the property, including whether they were seeking to exit their timeshares for financial reasons, age or health reasons, or other personal exigencies. Additionally, Dr. Diskin testified on cross examination that at the time he performed his appraisal, he did not know that 90% or more of the MRHC-brokered resales he used to value Marriott Grande Vista were coupled with MORI's sales of beneficial interests in the MVC Trust to the buyers.

70. Dr. Diskin's stated bases for having verified the 472 resales as arms-length transactions under Rule 1.002(2) were that: **a)** they were brokered by MRHC, which is knowledgeable about the timeshares and market; and **b)** MRHC would not reduce its list prices for the resales after setting them. On this latter point, it's unclear to the Court where Dr. Diskin obtained this information.

VII. Plaintiffs Did Not Satisfy Their Burden of Proving that OCPA's 2018 Assessed Value of Marriott Grande Vista Does not Represent Its Just Value

71. The Court begins by analyzing whether Plaintiffs satisfied their burden under § 192.037(10), which states the appraiser "shall look first to the resale market" when valuing a timeshare property. § 192.037(10), Fla Stat. (2017).

72. Based upon the presentation of witnesses and the evidence offered in this trial, the Court finds that the "external resale market" is unreliable and inappropriate for valuing Marriott Grande Vista in 2018 for the following reasons:

a) OCPA's appraiser, Ms. Arroyo, reached this conclusion after examining the 2017 resale market and based on years of institutional knowledge OCPA has obtained through its continuous analysis of the resale market.

b) OCPA's outside valuation expert, Mr. Marshall, reached this conclusion based on his 30 years of experience in valuing timeshares and his look to the resale market in appraising Marriott Grande Vista.

c) Even Plaintiffs' own valuation expert, Dr. Diskin, testified that: **i)** he first tried to use sales of unit weeks in the "external resale market" to value Marriott Grande Vista, but he was unable to verify enough of them as arms-length transactions under Rule 1.002(2); and **ii)** he agrees with OCPA that the "external resale market" was not sufficiently reliable to value Marriott Grande Vista for 2018.

73. The research performed by Ms. Arroyo and Mr. Marshall shows that MORI's developer sales dominated the overall market in 2017. MORI exercises a substantial element of control over the entire resale process through its right of first refusal, under which MORI is authorized to unilaterally block the closing of any contract for an owner-to-owner resale of a unit week in Marriott Grande Vista and purchase it for the contracted-for price.

74. The Court finds that as of January 1, 2018, an appraiser could not use the resale market to arrive at a credible and reliable valuation of Marriott Grande Vista under subsection (10) of § 192.037.

75. Plaintiffs have attempted to overcome these material problems with the resale market by asserting Dr. Diskin valued the property using arms-length transactions under Rule 1.002(2). However, the Court finds that OCPA's and Mr. Marshall's valuations of Marriott Grande Vista are more reliable and credible than Dr. Diskin's valuation.

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76. As an initial matter, cross examination of Dr. Diskin revealed multiple instances of impeachment and bias in favor of Plaintiffs, which significantly diminished the credibility and reliability of his value opinions and conclusions in this case.

77. Additionally, for an appraiser to use timeshare resales to value Marriott Grand Vista, timeshare resales must meet the definition of "fair market value," which requires, in part, both the buyer and seller seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other. But here, approximately 75% of the MRHC-brokered resales were sellers looking to get out of their timeshare financial obligations, instead of trying to maximize his or her gain. Also, as explained by Dr. Malone, because MRHC's charges a 40% brokerage commission, owners who are willing to accept only 60% of the proceeds from the sale of their timeshares are more likely to be unhappy with them, and/or primarily motivated to just "exit," rather than maximizing their gains in the sale. This conclusion is also consistent with Dr. Malone's regression model which found that only 21.2% of the variation in sale prices for the resales is explained by the unit weeks' fundamental drivers of value—desirability of the resort, the unit's bedroom count, and desirability of the week. These characteristics do not establish that the sellers of the MRHC-brokered unit weeks were seeking to maximize their gains as required by Rule 1.002(2), instead of merely seeking to exit them due to personal exigencies.

78. Marriott's sales/brokerage model casts substantial doubt on whether the MRHC-brokered resales of unit weeks in Marriott Grande Vista that Dr. Diskin used to value the property are arms-length transactions under Rule 1.2002(2). With few exceptions, the availability of MRHC-brokered unit weeks in Marriott Grande Vista was made known to prospects receiving sales presentations for beneficial interests in the MVC Trust only after they expressed an interest in buying a unit week. Also, Marriott would not allow those prospects to purchase a MRHC-brokered unit week in Marriott Grande Vista unless they also purchased beneficial interests in the MVC Trust.

79. But, Dr. Diskin was unaware of Marriott's sales/brokerage model when performing his appraisal, including the fact that 90% or more of the resales he used to value the property were coupled with MORI's sales of beneficial interests in the MVC Trust to the buyers. On the other hand, OCPA's expert, Mr. Marshall opined that an appraiser should consider the buyers' total purchase price for the beneficial interests in the MVC Trust and the MRHC-brokered unit weeks together in order to arrive at the effective sales price for the entire transaction.

80. Instead, Marriott kept the MRHC-brokered resales in-house and used them to incentivize prospects to move forward with purchasing beneficial interests in the MVC Trust, which was the primary product being offered and sold to them. These unit-week resales were not stand-alone transactions made in the open market, as contemplated by this rule.

81. Marriott's keeping of the MRHC-brokered resales in-house and out of the "external resale market" would also tend to keep that market from becoming more liquid, organized, and viable, which, as stated in the 10-K report, is in Marriott's best business interests. The Court notes that it does not find this sales/brokerage model to be improper, and respects this business practice as a sophisticated, publicly traded company seeking to maximize returns for its shareholders.

82. Based on all the above evidence, the Court finds that MRHC's brokering of the unit-week resales Dr. Diskin used to value Marriott Grande Vista and setting of firm list prices for them do not convert those resales into arms-length transactions under Rule 1.002(2), as asserted by Dr. Diskin and Plaintiffs.

83. For these reasons, and after considering and weighing the evidence admitted at trial, the Court finds that Plaintiffs did not satisfy their burden under § 194.301(2)(a) of proving by a preponderance of the evidence that OCPA's 2018 assessed value of Marriott Grande Vista does not represent its just value.

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. OCPA's $463,669,300 just valuation of Marriott Grande Vista for the 2018 tax year is **UPHELD** and **AFFIRMED**.

2. Plaintiffs shall take nothing from this action, and OCPA shall go hence without day.

3. The Court reserves jurisdiction to determine and award OCPA its taxable costs in this action.

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[1]Defendants Orange County Tax Collector and Florida Department of Revenue were excused from attending, and did not attend, the trial.

[2]Subparagraphs 2. and 3. of 194.301(2)(a) set forth alternative burdens of proof a taxpayer may satisfy when challenging an assessment. At the aforementioned bench conference, both parties agreed that Plaintiffs have not admitted evidence to support those alternative burdens of proof and are traveling exclusively under § 194.301(2)(a)1.

[3]Plaintiffs' and OCPA's appraisers both testified that § 193.011's fifth and seventh factors referencing the property's cost, and the income generated by it, are not relevant to valuing Marriott Grande Vista under § 192.037.

[4]This testimony is consistent with that of Plaintiffs' expert appraiser, Dr. Barry Diskin, who testified he could not find a reliable pattern of prices in what he called the "external resale market," which is comprised of all owner-to-owner resales of unit weeks in Marriott Grande Vista that were not brokered by MRHC. *See infra* ¶s 73 & 74.

[5]The MRHC-brokered resales Dr. Diskin used to value Marriott Grande Vista fall within this latter category comprising .6% of the overall timeshare market.

[6]MLS is a centralized hub where licensed realtors provide standard information regarding single-family homes listed for sale.

[7]Mr. Marshall also testified that if he were valuing a timeshare property sold under a points/trust model as of today instead of January 1, 2018, he would likely use a point-based methodology because the national timeshare developers have transitioned from selling unit weeks to selling points/trust based products.

[8]Based on its rulings below, the Court does not reach this issue.

* * *

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Criminal law—DUI manslaughter—Evidence—Statements of defendant—Suppression of body camera video shot by officer who accompanied defendant to hospital in ambulance and officers in emergency room and statements made by defendant in ambulance and emergency room is not required by Fourth Amendment of U.S. Constitution or Article I, section 23, of Florida Constitution because defendant had no reasonable expectation of privacy in ambulance or emergency room—No merit to argument that statements made by defendant to officers in ambulance and hospital room were result of pre-*Miranda* custodial interrogation where there was no behavior by officers that could reasonably have led defendant to believe that he was restrained by or in custody of police, and defendant spoke with officers willingly and voluntarily—Statements made by defendant to fire department personnel in ambulance are not privileged medical information protected by section 456.057(7)(c) or confidential patient records protected from disclosure under section 395.3025(4), which apply only to health care practitioners—Further, statutes do not protect statements made to hospital personnel in presence of police officers, statements to medical personnel that did not concern medical treatment, statements made with no medical personnel present, and statements made to officers in presence of medical personnel—Section 401.30(4), which protects records of emergency calls containing patient examination or treatment information, protects only written records and does not require suppression of statements made by defendant to officers at hospital—Health Insurance Portability and Accountability Act does not prohibit patient from disclosing own medical information to third parties, as defendant did to officers—Accident report privilege does not apply to defendant's statements where no officer ever gave defendant any indication that he was required to answer any questions or provide any information—Officer acting outside jurisdiction—Color of law doctrine does not require suppression of statements where officers did not perform any function that utilized police powers while outside their jurisdiction in ambulance and at hospital, and any exercise of extra-jurisdictional police power was authorized under mutual aid agreement—Defendant does not have standing to challenge authority of police department to act in another jurisdiction based on non-compliance with notice requirement of mutual aid agreement—Moreover, extra-jurisdictional acts of officers were permitted where subject matter of their investigation originated within their jurisdiction—Vehicle search—Where inventory search of defendant's vehicle that led to finding his cell phone was not conducted pursuant to any standardized criteria or procedures, results of search of cell phone and any fruits of that search are suppressed—Blood draw—Medical records—No merit to argument that results of warrants for defendant's blood and medical records should be suppressed because warrants were based in part on statements made by defendant to fire department personnel and disclosed by fire personnel to law enforcement—Statements were not privileged medical information—Moreover, other statements made by defendant to officers were sufficient to establish probable cause for warrants

STATE OF FLORIDA, Plaintiff, v. DENNIS PAGAN, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CF-9426-A-O. February 22, 2024. Joshua A. Mize, Judge.

ORDER ON PENDING MOTIONS TO SUPPRESS

THIS CAUSE having come before the Court at hearings on January 4, 2024 and January 29, 2024[1], and the Court, having heard testimony, evidence, and arguments of counsel, having considered the pending motions and the parties' respective briefs filed with respect thereto, and being otherwise duly apprised in the premises, the Court hereby finds:

I. Background

On May 1, 2021, a two-car accident occurred at or near the intersection of Osceola Avenue and Ollie Avenue in Winter Park, Florida. The accident resulted in the death of Wanda Dudzinski. The other driver, Dennis Pagan ("Mr. Pagan"), survived the crash and is the defendant in this case. At the scene, Mr. Pagan was pinned behind the steering wheel of his vehicle. Emergency personnel involved in his rescue noted that he showed visible signs of impairment. Further, he made statements to emergency personnel at the scene, including members of the Winter Park Fire Department ("Fire Department") that were involved in administering emergency medical care to him. Among the statements he made at the scene were that he had been drinking and that he was inebriated. Fire Department personnel conveyed their observations of Mr. Pagan as well as the statements he made to members of the Winter Park Police Department that were also on scene.

After removing Mr. Pagan from his vehicle, emergency medical personnel loaded Mr. Pagan in an ambulance and drove him to Advent South Hospital ("Hospital") in Orlando, Florida. A member of the Winter Park Police Department, Officer Kiara O'Hara, entered into the ambulance at the scene and rode in the ambulance with Mr. Pagan to the Hospital. While she was in the ambulance, Officer O'Hara's body-worn camera was activated and recording. During the ambulance ride and in the presence of Officer O'Hara, Mr. Pagan made a number of incriminating statements. These statements were heard by Officer O'Hara and recorded on her body-worn camera. Emergency medical personnel were also present when Mr. Pagan made these statements.

When the ambulance arrived at the hospital, Officer O'Hara accompanied Mr. Pagan to his emergency hospital room and remained with him in the room for a period of time. During her time in the hospital room, Officer O'Hara's body-warn camera was activated and recording. Mr. Pagan made additional incriminating statements in the hospital room. These statements were heard by Officer O'Hara and recorded on her body-worn camera. For some of these statements, hospital personnel were also present when Mr. Pagan made the statements.

At some point, another Winter Park Police Officer, Officer Craig Campbell, arrived at the Hospital and entered Mr. Pagan's emergency hospital room. At some time after Officer Campbell arrived, Officer O'Hara left, leaving Officer Campbell in the hospital room with Mr. Pagan. While in the hospital room with Officer Campbell, Mr. Pagan made additional incriminating statements. These statements were heard by Officer Campbell and recorded on his body-worn camera. For some of these statements, hospital personnel were also present when Mr. Pagan made the statements.

Within hours of the accident and while Mr. Pagan was in the emergency room at the Hospital, Officer Anthony Fairbanks of Winter Park Police Department obtained a warrant to draw a blood sample from Mr. Pagan. Officer Fairbanks executed the warrant at the Hospital by requesting that hospital staff perform the blood draw. Officer Campbell was still in the emergency hospital room with Mr. Pagan when Officer Fairbanks executed the search warrant for the blood draw. Other than Officer Fairbanks and Officer Campbell, no other law enforcement officers were present for or participated in the execution of the warrant for Mr. Pagan's blood.

Winter Park Police Officers also found Mr. Pagan's cell phone in his vehicle that was impounded at the scene of the accident. In the days following the accident, Officer Fairbanks obtained a search warrant to search the cell phone and was successful in executing the warrant and obtaining the contents of the phone.

Officer Fairbanks also obtained a search warrant for Mr. Pagan's medical records at the Hospital. He executed that warrant within the City of Orlando and obtained Mr. Pagan's medical records pertaining to the accident from the Hospital. Other than Officer Fairbanks, no

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other law enforcement officers were present for or participated in the execution of the warrant for Mr. Pagan's medical records.

Based on all of the information gathered, the State Attorney eventually charged Mr. Pagan with DUI manslaughter.

II. Pending Motions to Suppress

The following motions to suppress filed by Mr. Pagan are pending before the Court[2]:

(1) Defendant's Motion to Suppress, filed August 24, 2022 (the "Original Motion to Suppress");

(2) Defendant's Amended Motion to Suppress Confessions, Statements and Admissions, filed April 11, 2023 ("Admissions Motion");

(3) Defendant's Motion to Suppress Pertaining to Search Warrant for Alleged Blood of Defendant, filed August 24, 2022 ("Blood Motion");

(4) Defendant's Amended Motion to Suppress Search Warrant for Medical Records of the Defendant filed January 25, 2024 ("Medical Records Motion");

(5) Defendant's Motion to Suppress All Evidence Derived from Electronic Devices Pursuant to a Search Warrant Dated May 5, 2021 Issued by the Honorable Luis Calderon, filed August 24, 2022 ("Cell Phone Motion"); and

(6) Defendant's Motion to Suppress Facebook Information Seized Pursuant to a Search Warrant, filed August 24, 2022 ("The Facebook Motion").

(a) The Admissions Motion

The pending motions to suppress make overlapping arguments. In the Admissions Motion, Mr. Pagan seeks to suppress: (1) the statements made by Mr. Pagan in the presence of Officer O'Hara in the ambulance and the emergency hospital room; and (2) the statements made by Mr. Pagan in the presence of Officer Campbell and Officer Fairbanks in the emergency hospital room. Mr. Pagan argues that these statements were privileged pursuant to Florida Statute Sections 401.30(4), 395.3025(4), and 456.057(7)(c), and pursuant to HIPPA, the Fourth Amendment to the U.S. Constitution, and Article I, Section 23 of the Florida Constitution.

Mr. Pagan asserts that he was in the custody of the Winter Park Police Department when these statements were made, that these statements were made during a custodial interrogation, and that because the police officers did not read him his *Miranda* rights, these statements were obtained in violation of the Fourth and Fifth Amendments to the U.S. Constitution. He also maintains that he maintained a reasonable expectation of privacy in both the ambulance and the emergency hospital room and so, under the Fourth Amendment and Article 1, Section 23 of the Florida Constitution, the police were not permitted to enter the ambulance or the emergency hospital room and were not permitted to listen to or record his statements made in the ambulance and the emergency hospital room without his permission. Mr. Pagan also maintains that these statements were made pursuant to Florida's Accident Reporting Privilege (Section 316.066, Fla. Stat.) and that, therefore, these statements cannot be used against him for criminal prosecution. Mr. Pagan also asserts that the Winter Park Police officers were outside the city limits of Winter Park when they questioned him and that, therefore, the officers acted without legal authority in questioning him. Lastly, Mr. Pagan asserts that Officer Campbell lied to Mr. Pagan in the emergency hospital room regarding the status of the Winter Park Police Department's investigation concerning Mr. Pagan in order to convince Mr. Pagan to make incriminating statements.

(b) The Blood Motion

In the Blood Motion, Mr. Pagan argues that Officer Fairbanks' affidavit in support of the application for the warrant was based, in part, on medical information given to the Winter Park Police by Fire Department medical personnel. Specifically, the affidavit was based, in part, on statements made by Mr. Pagan to the Fire Department personnel and subsequently reported by the Fire Department personnel to the Winter Park Police. Mr. Pagan asserts that this information could not be used as the basis to obtain a search warrant because the information was privileged under Florida Statute Sections 401.30(4), 395.3025(4), and 456.057(7)(c), and pursuant to HIPPA, the Fourth Amendment to the U.S. Constitution, and Article I, Section 23 of the Florida Constitution.

Officer Fairbanks' affidavit in support of the application for the warrant was also based on the statements Mr. Pagan made to Officer Campbell in the emergency hospital room. Mr. Pagan argues, like he does in the Admissions Motion, that these statements: (a) resulted from an illegal custodial interrogation and (b) were protected by Florida's Accident Reporting Privilege. For these reasons, Mr. Pagan argues that these statements could not serve as a proper basis to obtain the warrant for Mr. Pagan's blood sample.

Also as to the Blood Motion, Mr. Pagan argues that Officer Fairbanks was without authority to execute the warrant outside the city limits of Winter Park and that, for this additional reason, the results of the blood test must be suppressed.

(c) The Medical Records Motion

Mr. Pagan argues that the results of the warrant for his medical records must be suppressed for the same reasons that the results of the warrant for his blood sample must be suppressed.

(d) The Cell Phone Motion

In support of the Cell Phone Motion, Mr. Pagan argues, like he does in the Blood Motion and the Medical Records Motion, that Officer Fairbanks' affidavit in support of the application for the warrant was based, in part, on medical information given to the Winter Park Police by Fire Department medical personnel. Specifically, the affidavit was based, in part, on statements made by Mr. Pagan to the Fire Department personnel and subsequently reported by the Fire Department personnel to the Winter Park Police. Mr. Pagan asserts that this information could not be used as the basis to obtain a search warrant because the information was privileged under Florida Statute Sections 401.30(4), 395.3025(4), and 456.057(7)(c), and pursuant to HIPPA, the Fourth Amendment to the U.S. Constitution, and Article I, Section 23 of the Florida Constitution.

Officer Fairbanks' affidavit in support of the application for the warrant was also based on the statements Mr. Pagan made to Officer Campbell in the emergency hospital room. Mr. Pagan argues, like he does in the Admissions Motion and the Blood Motion, that these statements: (a) resulted from an illegal custodial interrogation and (b) were protected by Florida's Accident Reporting Privilege. For these reasons, Mr. Pagan argues that these statements could not serve as a proper basis to obtain a warrant.

Mr. Pagan also argues in the Cell Phone Motion that the warrantless search of his vehicle was illegal and that, therefore, the results of the search of his cell phone that was found in the vehicle must be suppressed.

(e) The Facebook Motion

The State has informed the Court that the State does not oppose the Facebook Motion. Therefore, that motion will be granted by stipulation of the parties.

(f) The Original Motion to Suppress

The Original Motion to Suppress appears to have been a general motion filed by Mr. Pagan pertaining to the same subject matter and making the same arguments as the other motions listed above, which are each narrower and targeted to more specific issues than the Original Motion to Suppress. The only additional argument contained

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in the Original Motion to Suppress that is not in the other motions to suppress is that Officer Fairbanks used the location history information that he obtained from Mr. Pagan's cell phone to determine the establishments that Mr. Pagan visited on the day of the accident and to then obtain receipts of Mr. Pagan's transactions at those establishments from the establishments. Mr. Pagan argues that because the results of the search of his cell phone must be suppressed, the fruits of that search, including the receipts, must also be suppressed.

III. Findings of Fact

At the hearings[3], the undersigned received evidence, heard the testimony and observed the demeanor of all witnesses, and heard argument of counsel. Having weighed the credibility of the witnesses and assessed all of the evidence, the Court makes the following findings of fact:

(1) Prior to the date of the accident at issue in this case, the Winter Park Police Department entered into a Municipal Inter-Local Voluntary Cooperation Mutual Aid Agreement (the "Mutual Aid Agreement") with a number of other law enforcement agencies within the Ninth Judicial Circuit, including the Orlando Police Department. The Mutual Aid Agreement was admitted at the hearing as State's Exhibit 2. The Court credited the testimony of Officer Campbell and Officer Fairbanks and finds this agreement to be a true copy of the Mutual Aid Agreement entered into by the agencies listed in the agreement.[4]

(2) When Officer O'Hara was in the ambulance and in the emergency hospital room with Mr. Pagan, she was continuing an ongoing investigation that she and the Winter Park Police Department began within the City of Winter Park.

(3) When Officer Campbell was in the emergency hospital room with Mr. Pagan, he was continuing an ongoing investigation that he and the Winter Park Police Department began within the City of Winter Park.

(4) When Officer Fairbanks was in the emergency hospital room with Mr. Pagan, he was continuing an ongoing investigation that he and the Winter Park Police Department began within the City of Winter Park.

(5) When Officer Fairbanks executed the search warrants for Mr. Pagan's blood sample and Mr. Pagan's medical records, he was continuing an ongoing investigation that he and the Winter Park Police Department began within the City of Winter Park.

(6) On the date of the accident at issue in this case, the Winter Park Police Department notified the Orlando Police Department that personnel from the Winter Park Police Department would be entering the City of Orlando to continue conducting the Winter Park Police Department's investigation of the accident at issue in this case. *See* Transcript of Jan. 4, 2024 Hearing at p. 195-97.

(7) Having reviewed the video from Officer O'Hara's body-worn camera and heard the testimony of and assessed the credibility of Officer O'Hara and Mr. Pagan, the Court finds that Mr. Pagan did not have a subjective expectation of privacy in the ambulance. At all times, he was fully aware that Officer O'Hara was in his ambulance and could hear any statements that he made. Mr. Pagan never asked Officer O'Hara not to enter the ambulance or to leave to ambulance. Mr. Pagan never asked for Officer O'Hara to allow him any privacy with the medical personnel inside the ambulance. Mr. Pagan never attempted to speak to any medical personnel in such a manner that his statements would not be heard by Officer O'Hara. Mr. Pagan did not believe he was in a private location when he was in the ambulance. Mr. Pagan knew that he was in a place where a Winter Park Police Officer was present and could hear any statements that he made.

(8) Having reviewed the video from the body-worn cameras of Officer O'Hara and Officer Campbell and heard the testimony of and assessed the credibility of Officer O'Hara, Officer Campbell, Officer Fairbanks and Mr. Pagan, the Court finds that Mr. Pagan did not have a subjective expectation of privacy in the emergency hospital room. At all relevant times, Mr. Pagan was fully aware that Officer O'Hara and, later, Officer Campbell and Officer Fairbanks, were in his hospital room and could hear any statements that he made. Mr. Pagan never asked any police officer not to enter his hospital room. Mr. Pagan never asked Officer O'Hara or Officer Campbell to leave his hospital room. Mr. Pagan never asked any police officer to allow him any privacy with the medical personnel inside the hospital room. Mr. Pagan never attempted to speak to any medical personnel in such a manner that his statements would not be heard by the police officers present in his room. In fact, at one point, Mr. Pagan told Officer Campbell, "I feel safe around y'all," indicating that he was glad that Officer Campbell was in his hospital room. Mr. Pagan also repeatedly initiated conversations with the police officers. Mr. Pagan simply did not believe he was in a private location when he was in the emergency hospital room. Mr. Pagan knew that he was in a place where one or more Winter Park police officers was present and could hear any statements that he made.

(9) Additionally, aside from his complete awareness that Winter Park police officers were present in his emergency hospital room, Mr. Pagan did not believe that his emergency hospital room was even generally a private space. The door to the hospital room was a sliding door and was wide open the vast majority of the time that Winter Park police officers were present in his room. Mr. Pagan never asked anyone to close the door to his emergency hospital room. Various medical personnel walked in and out of the room and Mr. Pagan gave no indication that he believed he had any right to control who entered the room. Moreover, when speaking to the Winter Park police officers in his hospital room, Mr. Pagan spoke at such a volume that his voice could have been heard outside of the emergency hospital room in the hospital hallway, which is indisputably not a private place. In fact, at one point, Mr. Pagan was taken to a different room in the Hospital for a CT scan. Officer Campbell accompanied him to the testing room but remained in the hallway and did not enter the testing room. From the hallway, Officer Campbell heard statements that Mr. Pagan made in the testing room and the statements were recorded clearly on Officer Campbell's body-worn camera. The volume at which Mr. Pagan spoke while in the testing room did not appear materially different than the volume at which he spoke in his hospital room, and his voice was clearly understood from the hallway when he spoke in the testing room. For all of these reasons, it is clear that Mr. Pagan did not have a subjective expectation of privacy in his emergency hospital room.

(10) Mr. Pagan was not in custody in either the ambulance or the emergency hospital room and he did not believe that he was in custody in either the ambulance or the emergency hospital room. No police officer detained or arrested Mr. Pagan on the day of the accident. No police officer gave Mr. Pagan any indication that Mr. Pagan was under arrest or detained. No police officer ever handcuffed or restrained Mr. Pagan in any way. No police officer ever told Mr. Pagan that he was not free to leave.

(11) All statements that Mr. Pagan made in the presence of Officer O'Hara in the ambulance, Mr. Pagan made knowingly, willingly, and voluntarily. Many of his statements in the ambulance were spontaneous and unprompted by Officer O'Hara.

(12) All statements that Mr. Pagan made in the presence of Officer O'Hara, Officer Campbell and Officer Fairbanks in the emergency hospital room, Mr. Pagan made knowingly, willingly, and voluntarily. Many of his statements in the emergency hospital room were spontaneous and unprompted by any police officer. Mr. Pagan repeatedly asked questions and tried to engage in conversation with Officer O'Hara and later with Officer Campbell. Mr. Pagan was very active in his conversations with Officer O'Hara and Officer Campbell.

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He did not appear like he believed he was under interrogation or that he was being forced to answer any questions or make any statements. Many of his statements to Officer O'Hara and Officer Campbell did not concern his medical care.

(13) On the date of the accident, no police officer ever told Mr. Pagan that he was required to answer any questions. On the date of the accident, no police officer ever told Mr. Pagan that he was required to provide any information about the accident. On the date of the accident, no police officer ever told Mr. Pagan that he was required to provide any information whatsoever to anyone.

(14) At the hearing, the State provided no evidence that the purported inventory search of Mr. Pagan's vehicle that led to the police finding Mr. Pagan's cell phone was conducted pursuant to any standardized criteria or procedures. The State did not introduce any standard inventory search procedures or establish that the police followed any standard inventory search procedures in conducting the search of Mr. Pagan's vehicle.

IV. Analysis

(a) Fourth Amendment to the U.S. Constitution and Article 1, Section 23 of the Florida Constitution

As discussed above, Mr. Pagan asserts that he had a reasonable expectation of privacy in both the ambulance and the emergency hospital room and, therefore, under the Fourth Amendment and Article 1, Section 23 of the Florida Constitution, the police were not permitted to enter the ambulance or the emergency hospital room and were not permitted to listen to or record his statements made in the ambulance and the emergency hospital room without his permission.

"To invoke the Fourth Amendment, a criminal defendant must establish standing by demonstrating a legitimate expectation of privacy in the area searched or the item seized." *Strachan v. State*, 199 So. 3d 1022, 1024 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1533a] (quoting *Peraza v. State*, 69 So.3d 338, 340 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1988a] (internal quotations omitted)); *see also State v. Butler*, 1 So. 3d 242, 246-47 (Fla. 1st DCA 2008) [34 Fla. L. Weekly D40b] ("An individual's Fourth Amendment protections crystallize when he or she can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotations omitted))).

Similarly, Florida's Right to Privacy as codified in Article 1, Section 23 of the Florida Constitution applies only where a person possesses a legitimate expectation of privacy. *S & A Plumbing v. Kimes*, 756 So. 2d 1037, 1041 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D832a]; *Varricchio v. St. Lucie Cnty. Clerk of Courts*, 271 So. 3d 1206, 1211 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1117a]; *Nucci v. Target Corp.*, 162 So. 3d 146, 153 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D166a].

Under the Fourth Amendment, "[a] legitimate expectation of privacy consists of both a subjective expectation and an objectively reasonable expectation, as determined by societal standards." *Strachan*, 199 So. 3d at 1024 (quoting *Peraza*, 69 So. 3d at 340 (internal quotations omitted)); *see also McClelland v. State*, 255 So. 3d 929, 932 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1391c]; *Butler*, 1 So. 3d at 246-47; *Brown v. State*, 152 So. 3d 619, 623-24 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2051a] ("A search violates an individual's Fourth Amendment rights only if: (1) a defendant demonstrates that he or she had an actual, subjective expectation of privacy in the property searched; and (2) a defendant establishes that society would recognize that subjective expectation as objectively reasonable.").

The first question in Fourth Amendment analysis "is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. . . ." *Butler*, 1 So. 3d at 246-47 (quoting *Smith*, 442 U.S. at 740 (internal quotations omitted)); *see also United States v. Robinson*, 62 F.3d 1325, 1328 (11th Cir. 1995) ("The subjective component requires that a person exhibit an actual expectation of privacy. . ."). "By failing to have a subjective expectation of privacy, a defendant can be without standing before the reasonableness analysis even begins." *Strachan*, 199 So. 3d at 1024. "The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable." *Butler*, 1 So. 3d at 246-47 (quoting *Smith*, 442 U.S. at 740 (internal quotations omitted)); *see also Brown*, 152 So. 3d at 623-24.

Under Article 1, Section 23, "[w]hether an individual has a legitimate expectation of privacy is determined by considering all the circumstances, especially objective manifestations of that expectation." *A.H. v. State*, 949 So. 2d 234, 237 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D243a] (citing *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) [20 Fla. L. Weekly S170a]). "Although a person's subjective expectation of privacy is one consideration in deciding whether a constitutional zone of privacy exists, the final determination of an expectation's legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster." *Daniel v. Daniel*, 922 So. 2d 1041, 1045 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D731a] (quoting *State v. Conforti*, 688 So.2d 350, 358-59 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D144a]). "A protected expectation of privacy is one that society is prepared to consider as reasonable." *Daniel*, 922 So. 2d at 1045.

In this case, the Court finds that Mr. Pagan did not have a legitimate expectation of privacy either in the ambulance or in his emergency hospital room. First, for all of the reasons stated above *supra* in Findings of Fact Nos. 7, 8 & 9, Mr. Pagan did not have an actual, subjective expectation of privacy either in the ambulance or in his emergency hospital room. At all times in both of these locations, Mr. Pagan was fully aware that he was in a place where one or more Winter Park police officers were present and could hear any statements that he made. He never displayed, by his words or conduct, a belief that he was in a private area or that he had the right to control who entered these areas. Mr. Pagan has not provided any legal authority that would have given him the right to control who could enter the ambulance or his emergency hospital room. Mr. Pagan did not have a legal right to control who entered these areas and he in fact knew that police officers were present in these areas when he made the statements that he now seeks to suppress.

Even if Mr. Pagan had a subjective expectation of privacy, the Court also finds that any such expectation would not have been objectively reasonable. First, as to the ambulance, Mr. Pagan was in fact aware that Officer O'Hara was in the ambulance and could hear his statements. Second, Officer O'Hara entered the ambulance at the accident scene, which was a chaotic environment with one person seriously injured and another person seriously injured and either dead or in the process of dying. Multiple first responders were operating in the immediate vicinity to address the emergency situation and the first responders were in no way under the control of Mr. Pagan as they responded to the emergency. It would simply not be reasonable for a person in that situation to believe he had a right to control which first responders entered the ambulance or accompanied him to the hospital.

As to the emergency hospital room, again, Mr. Pagan was in fact aware when Officer O'Hara, Officer Campbell and Officer Fairbanks were in the room and could hear his statements. Second, as detailed above in Findings of Fact Nos. 8 & 9, the door to Mr. Pagan's emergency hospital room was a sliding door that was wide open the vast majority of the time that Winter Park police officers were present in his room. Various medical personnel walked in and out of the room and no one gave Mr. Pagan any indication that he had a right to control

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who entered the room. *See Buchanan v. State*, 432 So. 2d 147, 148 (Fla. 1st DCA 1983) (finding no objectively reasonable expectation of privacy in an emergency hospital room). Moreover, when speaking to the Winter Park police officers in his hospital room, Mr. Pagan spoke at such a volume that his voice could have been heard outside of the emergency hospital room in the hospital hallway, which is indisputably not a private place.

In *Jones v. State*, the Florida Supreme Court held that an admitted hospital patient reasonably expected that police officers would not enter his room and collect his clothing and personal effects. 648 So. 2d 669, 677 (Fla. 1994). However, *Jones* concerned a defendant that had been admitted into the hospital and was in a private, non-emergency hospital room. Additionally, *Jones* pertained only to the defendant's reasonable expectation that his personal belongings would not be physically searched. *Id.* The Court found that Jones had no reason to believe that third parties would enter his hospital room to look for and seize his personal property. *Id.* The Court specifically noted, however, that "Jones could expect that hospital personnel would enter his room to perform routine hospital procedures, *and that members of the public would be allowed to visit him in his room if he did not object. . .*" *Id.* (emphasis added).

Here, Mr. Pagan did not object to Officer O'Hara or Officer Campbell being in his room and he never asked that his room be cleared of police officers. In fact, as noted above, at one point, Mr. Pagan told Officer Campbell, "I feel safe around y'all," indicating that he was glad that Officer Campbell was in his hospital room.

Generally, "[t]he more private the treatment space, the more reasonable the patient's expectation of privacy with respect to official activity." *Butler*, 1 So. 3d at 247. "[T]he objective reasonableness of an expectation of privacy in a hospital setting turns on the particular circumstances of each case." *Id.* at 247-48. Here, this was a busy, emergency hospital room with multiple medical personnel frequently coming and going to attend to Mr. Pagan's substantial critical injuries on an emergency basis. The sliding door was wide open the vast majority of the time. Even if Mr. Pagan arguably had a reasonable expectation that his personal belongings in the hospital room would not be searched (which the Court does not decide), it was not objectively reasonable for Mr. Pagan to believe that he had an expectation of privacy in statements he made within the busy emergency hospital room. *Id.* at 248 ("Patients who are drugged or comatose, patients who are in critical condition or attached to life-support systems, patients who are frightened or depressed or young or old require monitoring. Indeed, any person who needs to be hospitalized requires monitoring. No one who had ever spent any time in a hospital room could continue to harbor any false expectations about his personal privacy or his ability to keep the world outside from coming through the door." (quoting *People v. Courts*, 517 N.W. 2d 785, 786 (1994))).

Because Mr. Pagan did not have a legitimate expectation of privacy as to statements he made in the ambulance or in his emergency hospital room, the Winter Park police officers did not violate the Fourth Amendment to the U.S. Constitution or Article 1, Section 23 of the Florida Constitution by entering the ambulance and his emergency hospital room and listening to and recording the statements he made therein. Mr. Pagan's statements made in the ambulance and in his hospital room in the presence of Winter Park police officers and the video from the officers' body-worn cameras containing these statements will not be suppressed.

(b) Custodial Interrogation

As noted above, Mr. Pagan asserts that he was in the custody of the Winter Park Police Department when he made statements in the presence of Winter Park police officers in the ambulance and in his hospital room. Mr. Pagan argues that because these statements were made during a custodial interrogation and the police officers did not read him his *Miranda* rights, these statements were obtained in violation of the Fifth Amendment to the U.S. Constitution.

"[T]he safeguards provided by *Miranda* apply only if an individual is in custody and subject to interrogation. Where either the custody or interrogation prong is absent, *Miranda* does not require warnings." *State v. Bender*, 357 So. 3d 697, 701 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D102a] (quoting *Gordon v. State*, 213 So. 3d 1050, 1052 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D559a]); *see also State v. Burns*, 661 So. 2d 842, 844 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a], *cause dismissed*, 676 So. 2d 1366 (Fla. 1996) [21 Fla. L. Weekly S327a].

"[C]ustody for purposes of *Miranda* encompasses not only formal arrest, but any restraint on freedom of movement of the degree associated with formal arrest." *Myers v. State*, 211 So. 3d 962, 972 (Fla. 2017) [42 Fla. L. Weekly S214a] (quoting *Ramirez v. State*, 739 So. 2d 568, 573 (Fla. 1999) [24 Fla. L. Weekly S353a]). "[T]he standard for 'custody' is whether, based on the totality of the circumstances, a reasonable person would feel that his freedom of movement has been restricted to a degree associated with an actual arrest." *Myers*, 211 So. 3d at 972 (quoting *Caldwell v. State*, 41 So. 3d 188, 197 (Fla. 2010) [35 Fla. L. Weekly S425b]). "The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation." *Myers*, 211 So. 3d at 973 (quoting *Ramirez*, 739 So. 2d at 573). The Florida Supreme Court has adopted a four-factor test for determining whether a reasonable person in the suspect's position would consider himself in custody:

> (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; and (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Myers, 211 So. 3d at 972 (quoting *Ramirez*, 739 So. 2d at 574 (internal alterations omitted)). Explaining these factors, the Court has stated that "[i]t must be evident that, under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police." *Myers*, 211 So. 3d at 972 (quoting *Ross v. State*, 45 So. 3d 403, 415 (Fla. 2010) [35 Fla. L. Weekly S501a]).

Additionally, while the Court has approved the foregoing four-factor test to provide lower courts with guidance and frame the analysis, the Court also made clear that "the ultimate inquiry is twofold: (1) the circumstances surrounding the interrogation; and (2) given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Myers*, 211 So. 3d at 973 (quoting *Ross*, 45 So. 3d at 415).

On the day of the accident, Mr. Pagan was not in custody either in the ambulance or in the hospital room. As discussed above, no police officer detained or arrested Mr. Pagan on the day of the accident. No police officer gave Mr. Pagan any indication that Mr. Pagan was under arrest or detained. No police officer ever handcuffed or restrained Mr. Pagan in any way. No police officer ever told Mr. Pagan that he was not free to leave. There was simply no behavior by any police officer that could reasonably have led Mr. Pagan to believe that he was restrained by or in the custody of the police.

As to the four-factors enunciated by the Florida Supreme Court, the police did not summon Mr. Pagan to the ambulance or to the Hospital. He was taken to the ambulance and then to the Hospital by the Fire Department due to his critical injuries. No police officer told Mr. Pagan that he was required to be in the ambulance or at the

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Hospital. As to the purpose, place, and manner of the questioning, it took place at locations (the ambulance and the hospital room) that no police officers forced Mr. Pagan to be at. Mr. Pagan was at these locations to receive medical care for his injuries, not because he was required to be there by police. Further, all of his conversations with police appeared to be voluntary. Mr. Pagan appeared to be speaking with the police willingly and voluntarily. Many of his statements were spontaneous and unprompted by police officers. In multiple instances, it was Mr. Pagan that asked questions and otherwise tried to engage in conversation with Officer O'Hara and later with Officer Campbell. Mr. Pagan was very active in his conversations with Officer O'Hara and Officer Campbell. He did not appear like he believed that he was under interrogation or that he was being forced to answer any questions or make any statements.

As to the third factor, Mr. Pagan was not confronted with evidence of his guilt or told that he was guilty of anything. As to the fourth factor, no police officer ever told Mr. Pagan that he was free to leave, but no police officer ever told Mr. Pagan that he was not free to leave. Mr. Pagan never asked any police officer if he was free to leave the ambulance or the Hospital.

Of course, Mr. Pagan's physical injuries may have prevented him from leaving the Hospital. But being unable to leave a location because of a physical injury is very different from not being *free to leave* or being held in custody by the police. There is nothing *the police did* that should have led Mr. Pagan to believe that his freedom of movement was being restrained to the degree associated with a formal arrest. Under the totality of the circumstances in this case, a reasonable person in Mr. Pagan's position would not have felt that his freedom of movement was restrained *by the police* or that he was not *free* to leave (even if he was not physically able to leave) or to terminate his encounter with the police. Mr. Pagan was in the ambulance and later the Hospital due to his serious physical injuries and, while in those locations, he voluntarily chose to speak with police officers that were present.

Because Mr. Pagan was not in custody on the date of the accident, the statements he made to Winter Park police officers in the ambulance and in his hospital room were not obtained in violation of the Fifth Amendment to the U.S. Constitution. Mr. Pagan's statements made in the ambulance and in his hospital room in the presence of Winter Park police officers and the video from the officers' body-worn cameras containing these statements will not be suppressed.

(c) Medical Privileges

In Judge Madrigal's Order dated January 3, 2024 [31 Fla. L. Weekly Supp. 466a], Judge Madrigal already determined that statements made to law enforcement by medical personnel at the Hospital will be suppressed. Judge Madrigal also ruled that statements made to law enforcement by emergency medical personnel, including the Fire Department, will not be suppressed. At issue in the pending motions are statements made by Mr. Pagan in the presence of Winter Park police officers. These statements can be broken down into four subcategories: (1) statements that Mr. Pagan made to medical personnel in the presence of Winter Park police officers that concerned Mr. Pagan's medical treatment; (2) statements that Mr. Pagan made to medical personnel in the presence of Winter Park police officers that did not concern Mr. Pagan's medical treatment; (3) statements made only in the presence of Winter Park police officers with no medical personnel present; and (4) statements that were made *to* Winter Park police officers but with medical personnel present.

There are several statutes at issue. First, Mr. Pagan asserts that these statements were privileged medical information under Section 456.057(7)(c). Section 456.057(7)(c) provides:

> Information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, if allowed by written authorization from the patient, or if compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

However, as stated in Judge Madrigal's January 3, 2024 Order, for purposes of this statute, "health care practitioner" does not include emergency medical personnel. Therefore, this statute does not apply to the Fire Department personnel that were present in the ambulance with Officer O'Hara. No personnel covered by this statute were in the ambulance.

Second, as to both the Fire Department Personnel and the Hospital personnel, the statements at issue were disclosed to the police by Mr. Pagan himself when he made the statements in the presence of police officers. The fairest reading of Section 456.057(7)(c) is that it protects information disclosed to a health care practitioner by a patient in a manner where it is not also disclosed to third parties. A person who knowingly and willfully discloses his own medical information in the presence of third parties, including police officers, cannot claim the information is privileged. Otherwise, a person could speak about the person's healthcare treatment loudly to the person's doctor in a crowded hospital elevator or lobby and expect those statements to be confidential. The Court finds that that Mr. Pagan's statements made in the presence of police officers are not protected by Section 456.057(7)(c).

Lastly, Section 456.057(7)(c) protects only "[[i]nformation disclosed *to a health care practitioner* by a patient *in the course of the care and treatment of such patient*." (emphasis added). For statements that fall into subcategories 2, 3 and 4 described above, those statements were not made "to a health care practitioner. . .in the course of the care and treatment" of Mr. Pagan. Specifically, for statements in subcategory 2 (statements that Mr. Pagan made to medical personnel in the presence of Winter Park police officers that did not concern Mr. Pagan's medical treatment), those statements were not made "in the course of the care and treatment" of Mr. Pagan. Statements unrelated to a patient's health care or treatment cannot be protected by Section 456.057(7)(c). *See State v. Carter*, 177 So. 3d 1028, 1030 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2445b]; *State v. Sun*, 82 So. 3d 866, 872-73 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1149a]. For statements in subcategories 3 and 4 (statements that Mr. Pagan made to the Winer Park police officers either with or without medical personnel present), those statements were not made "to a health care practitioner" and were also not made "in the course of the care and treatment" of Mr. Pagan.

As to Section 395.3025(4), this section provides that "Patient records are confidential and must not be disclosed without the consent of the patient or his or her legal representative," except to certain persons that do not include law enforcement. However, as stated in Judge Madrigal's January 3, 2024 Order, Section 395.3025 does not apply to the Fire Department Personnel that were present in the ambulance.

Additionally, Section 395.3025(4) states that patient records "must not be disclosed *without the consent of the patient*." (emphasis added). As to statements that Mr. Pagan made at the Hospital to Hospital medical personnel, Mr. Pagan's statements were disclosed to the police by Mr. Pagan himself when he made the statements in the presence of police officers. Mr. Pagan cannot claim that he did not consent to the disclosure of statements that he himself disclosed. A person that knowingly and willfully discloses his own medical information in the presence of third parties, including police officers, cannot claim the information is privileged. Additionally, for statements that Mr. Pagan made to police officers when no medical personnel were present, such statements also could not be "patient

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records" because they did not pertain to Mr. Pagan's health care or treatment. For these reasons, the Court finds that that Mr. Pagan's statements made in the presence of police officers are not protected by Section 395.3025(4).

As to Section 401.30(4), Judge Madrigal's January 3, 2024 Order already determined that this statement protects only written documents. Even if Section 401.30(4) applied to oral statements made by a patient, none of the statements at the Hospital would be a "record of an emergency call" as contemplated by the statute. Additionally, just as with Sections 395.3025(4), and 456.057(7)(c), Mr. Pagan cannot claim privilege in information that he himself disclosed to the police. Section 401.30(4) provides that: "Records of emergency calls which contain patient examination or treatment information are confidential. . .and may not be disclosed *without the consent of the person to whom they pertain*." (emphasis added). Mr. Pagan cannot argue that he did not consent to the disclosure of information to the police when he himself disclosed the information to the police.

As to HIPPA, this statute was addressed in Judge Madrigal's January 3, 2024 Order. Additionally, HIPPA does not prohibit a patient from disclosing his own medical information to third parties, as Mr. Pagan did in this case.

For all of the foregoing reasons, none of the statements that Mr. Pagan made in the ambulance and his emergency hospital room in the presence of Winter Park police officers are covered by any medical privilege. Mr. Pagan's statements made in the ambulance and in his hospital room in the presence of Winter Park police officers and the video from the officers' body-worn cameras containing these statements will not be suppressed.

(d) Accident Reporting Privilege

Florida's Accident Reporting Privilege is contained in Section 316.066(4), Florida Statutes, which provides:

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

Because the statute does not protect any statement made to a police officer "if that person's privilege against self-incrimination is not violated," the statute protects only compelled statements. *State v. Marshall*, 695 So. 2d 719, 721 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1085a], *approved*, 695 So. 2d 686 (Fla. 1997) [22 Fla. L. Weekly S308b]; *see also State v. Bender*, 357 So. 3d 697, 701 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D102a] ("[S]tatements made pursuant to the *requirement* to give information for a crash report required by section 316.066 may not be used as evidence in civil, criminal or administrative proceedings." (emphasis added)). If a person is not given any indication that he is required to provide information sought by law enforcement officers, then the accident reporting privilege does not apply. *Vedner v. State*, 849 So. 2d 1207, 1213 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1721b]. If the person is not given any indication that he is required to provide information sought by law enforcement officers, the usual rules and precepts associated with *Miranda* apply. *Bender*, 357 So. 3d at 701.

In this case, no police officer ever gave Mr. Pagan any indication that he was required to answer any questions or provide any information whatsoever. Accordingly, the accident reporting privilege is not applicable.

(e) Color of Law Doctrine

As discussed above, Mr. Pagan argues that Officer O'Hara acted without legal authority when she spoke with Mr. Pagan outside of the City of Winter Park, which included the time period that Officer O'Hara was in Mr. Pagan's emergency hospital room and part of the time that Officer O'Hara was in the ambulance (whenever the ambulance crossed over the line from the city limit of Winter Park into the city limit of Orlando). Mr. Pagan argues that Officer Campbell acted without legal authority when he spoke with Mr. Pagan in his hospital room. Mr. Pagan argues that Officer Fairbanks acted without legal authority when Officer Fairbanks heard Mr. Pagan's statements in Mr. Pagan's hospital room and when Officer Fairbanks executed the search warrants for Mr. Pagan's blood draw and medical records.

"Generally, municipal law enforcement officers can exercise their law enforcement powers only within the territorial limits of the municipality." *Knight v. State*, 154 So. 3d 1157, 1159 (Fla. 1st DCA 2014) [40 Fla. L. Weekly D58b]. However, Officer O'Hara and Officer Campbell did not perform any function that utilized their power as police officers. They merely engaged in voluntary conversations with Mr. Pagan. The Color of Law doctrine does not prevent police officers from engaging in actions outside of their jurisdiction that any normal citizen could engage in. *Phoenix v. State*, 455 So. 2d 1024, 1025 (Fla. 1984); *State v. Phoenix*, 428 So. 2d 262 (Fla. 4th DCA 1982); *State v. Sills*, 852 So. 2d 390 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1943c].

Second, even if Officer O'Hara and Officer Campbell acted under color of law, their actions, and the actions of Officer Fairbanks, were authorized by the Mutual Aid Agreement. One exception to the Color of Law doctrine is "if the officer acts in accordance with a voluntary cooperation agreement pursuant to section 23.121, Florida Statutes." *Knight*, 154 So. 3d at 1160. Here, as shown by the Mutual Aid Agreement, Officer O'Hara and Officer Campbell were authorized to enter into the City of Orlando to continue their investigation. Officer Fairbanks was authorized to continue his investigation and to execute the warrants for Mr. Pagan's blood sample and medical records.

Mr. Pagan argues that the Winter Park Police Department did not comply with the notice requirement in Section III(G) of the Mutual Aid Agreement for their interviewing of Mr. Pagan in the ambulance and his hospital room within the City of Orlando. However, Section III(G) does not require notice for the interviewing of witnesses or suspects or the collection of evidence unless an arrest is made. Mr. Pagan was not arrested on the date of the accident. Even if notice was required, Mr. Pagan does not have standing to challenge the authority of the Winter Park Police Department to act in the City of Orlando based on non-compliance with a notice requirement in the Mutual Aid Agreement. *State v. Walker*, 852 So. 2d 863, 865 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1372a]. Even if notice were required and even if Mr. Pagan had standing to challenge the authority of the Winter Park Police Department to act in the City of Orlando based on non-compliance with a notice requirement in the Mutual Aid Agreement, the Court found above that the Winter Park Police Department did in fact provide notice to the Orlando Police Department that personnel from the Winter Park Police Department would be entering the City of Orlando to continue conducting the Winter Park Police Department's investigation of the accident at issue in this case.

Mr. Pagan also argues that the Winter Park Police Department did not comply with the notice requirement in Section III(H) for the execution of the warrants for Mr. Pagan's blood sample and medical records. However, even if the Winter Park Police Department did not comply with any notice requirement in Section III(H), Mr. Pagan does not have standing to challenge the authority of the Winter Park Police Department to act in the City of Orlando based on non-compliance with a notice requirement in the Mutual Aid Agreement. *Walker*, 852

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So. 2d at 865.

Lastly, even if the actions of Officer O'Hara, Officer Campbell and Officer Fairbanks were taken under color of law and even if such actions were not authorized under the Mutual Aid Agreement, their actions were permitted because the subject matter of their investigation originated within the city limits of Winter Park. *See Knight*, 154 So. 3d at 1159-60; *Nunn v. State*, 121 So. 3d 566 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1297a]; *State v. Torres*, 350 So. 3d 421 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2241a].

For all of these reasons, none of the actions of Officer O'Hara, Officer Campbell or Officer Fairbanks were improper under the Color of Law doctrine.

(f) Inventory Search

In order for the inventory search exception to the warrant requirement to apply, the inventory search must be conducted according to standardized criteria. *Kilburn v. State*, 54 So. 3d 625, 627 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D394b]. "[A] trial court must find that police conducted their inventory search according to standardized criteria before declaring that search valid." *Patty v. State*, 768 So. 2d 1126, 1127-28 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1966b].

At the hearing, the State did not establish that the purported inventory search of Mr. Pagan's vehicle that led to the police finding Mr. Pagan's cell phone was conducted pursuant to any standardized criteria or procedures. The State did not introduce any standard inventory search procedures or establish that the police followed any standard inventory search procedures in conducting the search of Mr. Pagan's vehicle. Accordingly, the search of Mr. Pagan's cell phone violated the Fourth Amendment and the results of such search must be suppressed, along with the fruits of any such search.

V. Disposition of the Pending Motions

(a) The Admissions Motion

As noted above, in the Admissions Motion, Mr. Pagan seeks to suppress: (1) the statements made by Mr. Pagan in the presence of Officer O'Hara in the ambulance and the emergency hospital room; and (2) the statements made by Mr. Pagan in the presence of Officer Campbell and Officer Fairbanks in the emergency hospital room. Based on the foregoing, the Admissions Motion is DENIED.

(b) The Blood Motion

In the Blood Motion, Mr. Pagan argues that Officer Fairbanks' affidavit in support of the application for the warrant was based, in part, on privileged medical information given to the Winter Park Police by Fire Department medical personnel. Specifically, the affidavit was based, in part, on statements made by Mr. Pagan to the Fire Department personnel and subsequently reported by the Fire Department personnel to the Winter Park Police. Officer Fairbanks' affidavit in support of the application for the warrant was also based on the statements that Mr. Pagan made to Officer Campbell in the emergency hospital room.

As noted above, Judge Madrigal already ruled in his Order dated January 3, 2024 that statements made to law enforcement by emergency medical personnel, including the Fire Department, were not improper and should not be suppressed. Accordingly, the results of the search warrant for Mr. Pagan's blood sample will not be suppressed based on the fact that the application for the warrant was based in part on the statements made to law enforcement by emergency medical personnel. However, even if the statements made to law enforcement by emergency medical personnel had been improper and subject to suppression, the remaining portions of the affidavit supporting the application for the search warrant—specifically the statements Mr. Pagan made to Officer Campbell in the emergency hospital room—independently established probable cause for the warrant even without the statements made to law enforcement by emergency medical personnel. For this additional reason, the results of the search warrant for Mr. Pagan's blood sample will not be suppressed.

As also noted above, Mr. Pagan also argues that Officer Fairbanks was without authority to execute the warrant for Mr. Pagan's blood sample outside the city limits of Winter Park. For the reasons above, Officer Fairbanks was not without authority to execute the warrant outside the city limits of Winter Park.

Based on the foregoing, the Blood Motion is DENIED.

(c) The Medical Records Motion

Mr. Pagan argues that the results of the warrant for his medical records must be suppressed for the same reasons that the results of the warrant for his blood sample must be suppressed. For the same reasons that the results of the search warrant for Mr. Pagan's blood sample will not be suppressed, the results of the warrant for his medical records will not be suppressed. Accordingly, the Medical Records Motion is DENIED.

(d) The Cell Phone Motion

As noted above, Mr. Pagan argues in the Cell Phone Motion that the warrantless search of his vehicle was illegal and that, therefore, the results of the search of his cell phone that was found in the vehicle must be suppressed. The State argues that the cell phone was found in his car in the course of a proper inventory search. For the reasons stated above, the State did not establish that the cell phone was found in the course of a proper inventory search. Therefore, the results of the search of Mr. Pagan's cell phone will be suppressed and will not be admissible at trial. Accordingly, the Cell Phone Motion is GRANTED.

(e) The Facebook Motion

As noted above, the State has informed the Court that the State does not oppose the Facebook Motion. Accordingly, that motion is GRANTED by stipulation of the parties.

(f) The Original Motion to Suppress

As noted above, the only additional argument contained in the Original Motion to Suppress that is not in the other motions to suppress is that Officer Fairbanks used the location history information that he obtained from Mr. Pagan's cell phone to determine the establishments that Mr. Pagan visited on the day of the accident and to then obtain receipts of Mr. Pagan's transactions at those establishments from the establishments. Mr. Pagan argues that because the results of the search of his cell phone must be suppressed, the fruits of that search, including the receipts, must also be suppressed. Based on the Court's above ruling regarding the search of Mr. Pagan's cell phone, the fruits of that search, including the receipts that the Winter Park police obtained using the location history from Mr. Pagan's cell phone, will be suppressed and will not be admissible at trial. Accordingly, the Original Motion to Suppress is GRANTED to the extent stated in this paragraph and is otherwise DENIED.

Accordingly, it is hereby **ORDERED and ADJUDGED** that:

(1) Defendant's Motion to Suppress, filed August 24, 2022, is hereby GRANTED IN PART AND DENIED IN PART as stated herein.

(2) Defendant's Amended Motion to Suppress Confessions, Statements and Admissions, filed April 11, 2023, is hereby DENIED.

(3) Defendant's Motion to Suppress Pertaining to Search Warrant for Alleged Blood of Defendant, filed August 24, 2022, is hereby DENIED.

(4) Defendant's Amended Motion to Suppress Search Warrant for Medical Records of the Defendant filed January 25, 2024, is hereby DENIED.

(5) Defendant's Motion to Suppress All Evidence Derived from Electronic Devices Pursuant to a Search Warrant Dated May 5, 2021 Issued by the Honorable Luis Calderon, filed August 24, 2022, is

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hereby GRANTED.

(6) Defendant's Motion to Suppress Facebook Information Seized Pursuant to a Search Warrant, filed August 24, 2022, is hereby GRANTED.

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[1]Some of the motions decided herein were noticed for hearing on January 4, 2024 and the remaining motions were noticed for hearing on January 29, 2024. At the January 29, 2024 hearing, the parties stipulated that all evidence pertaining to all of the motions is the same and that the Court could consider all evidence heard and received at the January 4, 2024 hearing in deciding all of the motions. Closing arguments for all motions decided herein occurred at the January 29, 2024 hearing.

[2]On January 3, 2024, the division judge, Judge Diego M. Madrigal, III, entered an Order on Amended Motion to Suppress and/or Motion in Limine with Regard to Paramedic, Fire Department and Hospital Treatment Medical Information of the Defendant filed on November 16, 2023.

[3]See note 1, *supra*.

[4]The Mutual Aid Agreement was admitted into evidence pursuant to both Section 90.901, Florida Statutes, based on the testimony of Officers Campbell and Fairbanks and pursuant to Section 90.902(2), Florida Statutes, based on the fact that the document purported to bear the signature of multiple officers and employees of political subdivisions of the State of Florida that were affixed in such officers' and employees' official capacities.

* * *

Criminal law—First-degree murder—Plea—Withdrawal—Motion to withdraw guilty plea is denied where court colloquied defendant extensively, ascertaining that he was competent and understood rights he was waiving and knew that trial would continue to penalty phase where penalty imposed could be death, and defendant and counsel made strategic decision to plead guilty and use acceptance of responsibility as mitigator in penalty phase

STATE OF FLORIDA, Plaintiff, v. JOSE ROJAS, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F12-10603. Section 60. January 25, 2024. Miguel M. de la O, Judge. Counsel: Abbe Rifkin and Justin Funck, for Plaintiff. G. P. Della Fera and Richard Houlihan, for Defendant.

ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA

THIS CAUSE is before the Court on Defendant, Jose Rojas' ("Rojas"), Motion to Withdraw his guilty plea entered on December 8, 2023. This Court has reviewed the Transcript of the plea colloquy ("Plea Transcript") (attached as Exhibit "A"), held an evidentiary hearing on January 4, 2024 at which four witnesses testified ("Hearing"), and heard the argument of counsel. The Motion is **DENIED**.

I. BACKGROUND.

A. THE TRIAL.

Rojas was indicted in 2012 for first degree murder (two counts), kidnapping (two counts), armed robbery, and fraudulently obtaining a credit card or property. The State is seeking the death penalty. Rojas' trial began over 11 years later—on November 27, 2023. After six days of large group, small group, and individual voir dire, a twelve-person jury (plus six alternates) was sworn on December 5, 2023. Testimony commenced on December 6, 2023.

At lunchtime on December 7, 2023, Rojas handed his counsel and his mitigation specialist an undated letter Rojas had written to this Court ("First Letter"). The First Letter was not provided to the Court, however.[1] Rather, when the Court took an afternoon break, defense counsel, G. P. Della Fera, informed the Court that Rojas was contemplating pleading guilty to the indictment without an agreed to sentence and waiving a jury for the penalty phase. Without knowing that Rojas had written the Court a three-page, single spaced letter, detailing his desire to plead guilty and to be executed promptly, the Court expressed great reluctance to a bench trial in the penalty phase. After some discussion about the procedure for such a proceeding, the Court informed the parties it would not accept a plea that day, and recessed court so that Rojas could speak to his defense team. December 7, 2023 Transcript at 17, 20 ("I wouldn't want to do anything today anyway, no matter what he decides. I'd rather he think about it overnight and we'll proceed in the morning."). The Court made it clear that Rojas did not need to decide the next day, but that testimony would continue until the jury reached a unanimous verdict or until Rojas pled guilty. *Id.* at 17.

Mr. Della Fera then asked the Court about how the next day would proceed if Rojas pled guilty to the Indictment. The exchange with Mr. Della Fera strongly suggested to the Court that Mr. Della Fera was making a strategic decision to support Rojas' resolve to plead guilty to the indictment because it would help avoid a death sentence.

MR. DELLA FERA: Your Honor, I have a question.

THE COURT: Yes, sir.

MR. DELLA FERA: And that is, if Mr. Rojas pleads guilty to the indictment.

THE COURT: Right.

MR. DELLA FERA: And found guilty, obviously, and the jury then is going to inform that—you would inform the jury that the reason that we're going to the penalty phase, if that's where we go, would be because Mr. Rojas pled guilty; is that right?

THE COURT: Right.

MR. DELLA FERA: You would have to tell them that, right?

THE COURT: Yes, because they wouldn't deliberate. They would know that.

MR. DELLA FERA: Very well. Then that's what I want to know.

THE COURT: That goes into your strategic decision.

MR. DELLA FERA: Yes, sir, it does.

THE COURT: I understand that.

MR. DELLA FERA: It does.

MR. HOULIHAN: Would you accept a nolo plea of first? Abbe's saying no.

MS. RIFKIN: No. No. Judge, the family deserves—

THE COURT: Yeah, I don't think so. I'll hear you out, but I don't think so.

MR. DELLA FERA: Your Honor, we're not accepting a nolo plea. We'll plead guilty to the indictment, Your Honor. If he's going—

MR. DELLA FERA: If Mr. Rojas is going to go to penalty and that's where we're going to go, we're going to plead guilty to the indictment and the Court is going to tell the jury that Mr. Rojas pled guilty to the indictment.

THE COURT: Sure. If you're going to accept responsibility, you accept responsibility.

MR. DELLA FERA: Exactly.

THE COURT: I get it. I understand that.

MR. DELLA FERA: That's as lead counsel.

December 7, 2023 Transcript at 18-19 (cleaned up).

After he expressed a desire to plead guilty, Rojas was counseled by both his lawyers on this critical issue. Mr. Houlihan (and Ms. Lopez) advised Rojas not to plead guilty, but his mind was made up. Mr. Della Fera told Rojas he agreed that pleading guilty was a good idea because then the defense could argue his acceptance of responsibility as a mitigating factor to the jury.

B. THE PLEA AND THE LETTER ASKING TO WITHDRAW IT.

Rojas entered a plea of guilty to the indictment on December 8, 2023. The complete plea colloquy is attached as Exhibit "A." During the colloquy, he swore to tell the truth, and denied anyone had forced or coerced him into pleading guilty. After the colloquy was finished, all 18 jurors were brought into the courtroom and informed that Rojas had plead guilty to the indictment. The jurors were advised they would return in January for the penalty phase, and the Court admonished them not to read any news accounts of the case, do any research, or discuss the case with anyone.

At the time Rojas pled guilty, he was still contemplating waiving a jury for the penalty phase. The Court scheduled a hearing for

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December 15th to allow Rojas time to discuss this issue at length with his lawyers and to coordinate a date for starting the penalty phase in January 2024.

On December 15, 2023, the Court asked the defense whether Rojas wished to proceed to a penalty phase with a jury. Defense counsel confirmed that Rojas wanted a jury, but when the Court asked Rojas if this was his desire, Rojas dropped a bombshell. Rojas informed the Court he had written another letter ("Second Letter") that he wished the Court to read. December 15, 2023 Transcript at 4 (attached as Exhibit "B"). The existence of the Second Letter was unbeknownst to Rojas' defense team. *Id*.

The Court read the letter which made serious accusations against his counsel, G.P. Della Fera, and asked to withdraw his guilty plea. *Id.* at 6. As a result, the Court appointed conflict-free counsel, Antonio Tomas, and scheduled an evidentiary hearing on the motion to withdraw. *Id*. at 6, 10.

C. THE HEARING ON THE MOTION TO WITHDRAW.

On January 4, 2024, this Court held an evidentiary hearing on the motion to withdraw guilty plea.[2] Because there was no written motion to withdraw, the Court imposed no limits on the arguments Rojas could raise or the testimony he could introduce to support his request to withdraw his guilty plea. Rojas' counsel called four witnesses: second chair defense counsel Richard Houlihan, mitigation specialist Samantha Lopez, first chair defense counsel G.P. Della Fera, and Rojas.

The hearing took nearly all day. Many, *many* topics were discussed. When the smoke cleared, the Court concluded that no one forced or coerced Rojas into pleading guilty. No one suggested he write the First Letter. Nor did anyone write the First Letter for him or suggest what he should say in that letter. In short, Rojas unilaterally decided to write the First Letter, decided to plead guilty, and later—for reasons known only to him—changed his mind.

During the hearing, it became obvious there were different thoughts amongst the defense team as to how the trial should be conducted. There certainly was a lack of communication at times between defense counsel. This issue had been previously raised by the Assistant State Attorneys prosecuting Rojas and a meeting was held in chambers where both counsel advised this Court there was no issue between them that would prevent them from adequately representing Rojas.

II. THE LAW.

A. DEFENDANTS ARE BOUND BY THEIR STATEMENTS DURING A PLEA COLLOQUY.

The decision to plead guilty and the plea colloquy that follows such a decision is a grave matter of the utmost seriousness, regardless of the charges a defendant faces. Because of the consequences that flow from the decision to admit to criminal charges, a defendant is placed under oath and asked a series of questions so that the Court can satisfy itself that the defendant is knowingly and intelligently admitting guilt. Especially when a defendant chooses to plead guilty during a jury trial, after jeopardy has attached, statements made under oath during a plea colloquy are binding upon the defendant.

> [A] defendant is bound by the statements he makes under oath during a plea colloquy. As the Fourth District Court of Appeal stated in *Scheele v. State*, 953 So. 2d 782, 785 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1243a], "[a] plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in a case."

Rodriguez v. State, 223 So. 3d 1095, 1097 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1324a] (citation omitted), *rev. denied,* 2019 WL 413717 (Fla., Feb. 1, 2019). *See Henry v. State*, 920 So. 2d 1245, 1246 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D625b] ("This motion presents the all-too-common occurrence where defendants, in an attempt to invalidate their pleas, contend they committed perjury when they sought to have their pleas accepted. Defendants are bound by the statements made by them under oath . . ."); *Alfred v. State*, 71 So. 3d 138, 139 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1639a] ("A defendant is bound by his sworn answers during a plea colloquy and cannot later disavow those answers by asserting that he lied during the colloquy at counsel's direction.").

Even where a defendant claims coercion, his plea colloquy answers will bind him.

> Allowing a defendant to ignore the oath and lie to the court only to later claim that he did so at counsel's instruction is against public policy as it condones perjury. The waiver of rights form used when taking a plea, the oath to tell the truth, and the plea colloquy conducted by the court would be rendered meaningless if a defendant could later claim that he was purposefully lying to the court because counsel advised him to do so. A defendant is not entitled to rely on an attorney's advice to commit perjury above the solemn oath that the defendant makes to the court to tell the truth.

Iacono v. State, 930 So. 2d 829, 830-31 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1558a].

Likewise, defendants cannot later disavow statements that they were satisfied with counsel's service and advice when they have a change of heart about pleading guilty.

> Because the defendant in the instant case clearly stated under oath during his plea colloquy that he was satisfied with the services of his attorney, he was not being pressured or coerced to accept the State's offered plea, and he was pleading guilty because he was guilty and for no other reason, he cannot now claim that his plea was the product of coercion. Thus, the defendant's claim of coercion should have been summarily denied.

Rivero v. State, 121 So. 3d 1175, 1178 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2053a]; *see Davis v. State*, 938 So. 2d 555, 557 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2202c] ("In the instant case, the appellant clearly states on record that he was satisfied with his attorney's services. Thus, he cannot now assert that at the time of the plea's entry he had serious doubts about his attorney's effectiveness.").

B. WITHDRAWING PLEA BEFORE SENTENCING.

A motion to withdraw a plea before sentencing is governed by Florida Rule of Criminal Procedure 3.170(f), which provides in relevant part:

> The court may in its discretion, and shall on good cause, at any time before a sentence, permit a plea of guilty or no contest to be withdrawn . . . .

Fla. R. Crim. P. 3.170(f) (2023). Although the Court may in its discretion allow Rojas to withdraw his plea, it is only required to do so if Rojas establishes good cause.

> The burden is upon a defendant to establish good cause under the rule, and use of the word "shall" indicates that such a showing entitles the defendant to withdraw a plea as a matter of right. Use of the word "may," however, suggests that the rule also allows, in the discretion of the court, withdrawal of the plea in the interest of justice, upon a lesser showing than good cause.

Robinson v. State, 761 So. 2d 269, 274 (Fla. 1999) [24 Fla. L. Weekly S393a] (quoting *Yesnes v. State*, 440 So. 2d 628 (Fla. 1st DCA 1983)). *See Harris v. State*, 347 So. 3d 72, 75 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2103d] ("Only where a defendant shows that there is 'good cause' to withdraw a plea is a trial court *required* to grant such a presentence motion.") (emphasis in original).

To establish good cause, Rojas "must offer proof that the plea was not voluntarily and intelligently entered." *Robinson*, 761 So. 2d at

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274. Courts have found that defendants can meet this burden if they "prove[ ] that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." *Baker v. State*, 408 So. 2d 686, 687 (Fla. 2d DCA 1982).

III. FINDINGS

Based on the testimony introduced at the Hearing, and Florida law, the Court makes the following findings.

A. ROJAS KNOWINGLY AND INTELLIGENTLY PLED GUILTY TO THE INDICTMENT.

First, Rojas was competent to stand trial and engage in a plea colloquy with this Court. *See* Forensic Psychological Evaluation by Dr. Lina Haji, Psy D. (attached as Exhibit "C"); Transcript at 6. In addition, he had taken his medication (non-psychotropic) the night before the plea colloquy. Plea Transcript at 5 - 7.

Second, Rojas swore to testify truthfully during the plea colloquy.

> THE COURT: Let's go ahead and while we wait for the next of kin, let's go ahead and swear in Mr. Rojas please.
>
> THE CLERK: Do you solemnly swear or affirm the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?
>
> THE DEFENDANT: I do.

Plea Transcript at 4.

Third, Rojas is well-educated, having earned a bachelor's degree in computer science. *See* Forensic Psychological Evaluation at 2.

Fourth, no one promised Rojas any particular result in exchange for his guilty plea. Plea Transcript at 9 - 10. Nor was he forced or coerced into pleading guilty. *Id.* at 10.

Fifth, Rojas expressed satisfaction with his "lawyers' services and advice." *Id.* at 13.

Sixth, Rojas had sufficient time to speak with his lawyers about his decision to plead guilty. *Id.* at 12 ("THE COURT: Have you discussed this plea with your lawyers? THE DEFENDANT: Yes. THE COURT: Have you had enough time to talk to them about the ramifications, about the results, of you pleading guilty today? THE DEFENDANT: Enough time, yes.").

In *Robinson*, the Florida Supreme Court addressed eerily similar facts—a defendant charged with first degree murder, facing the death penalty, who plead guilty during the penalty phase because he wanted to be executed quickly—followed by a motion to withdraw the guilty plea. In affirming the trial court's denial of Robinson's motion to withdraw his guilty plea, the Court focused on his motivation for pleading guilty, the trial court's colloquy, and Robinson's competence to enter the plea.

> The record reflects that Robinson's plea was only accepted after an extensive inquiry. At the plea colloquy, the trial court asked Robinson whether he intended to plead guilty to first-degree murder and informed Robinson that the only possible sentences upon conviction for first-degree murder were death and life in prison. The trial court then questioned Robinson extensively about his background and the factual circumstances of the murder. Robinson explained to the trial court that he would rather be punished by death than sentenced to life in prison. Further, defense counsel notified the court that Robinson had been examined by medical experts and it was their opinion that Robinson was competent to proceed. . . . Finally, the state attorney told Robinson that he intended to seek the death penalty in this case. The record thus indicates that Robinson voluntarily and intelligently waived his right to a trial.

Robinson, 761 So. 2d at 274-75.

There is little, if any, daylight between the facts in *Robinson* and in the instant case. This Court colloquied Rojas extensively, ascertaining that Rojas was competent and understood the rights he was waiving, and Rojas acknowledged that the trial would continue to a penalty phase where the ultimate sentence imposed could be death. The Court even advised Rojas against pleading guilty and waiving a jury in the hopes that this Court would preside over the penalty phase.

> THE COURT: I did want to warn you of one other thing. I cannot guarantee you that I will be the judge. Especially, if you decide to waive the jury in the next phase. I can't guarantee I'll be the judge in the penalty phase. I think 99 percent chance I will but a lot of things could happen. I could say something that gets me recused. I could resign from the bench. I could be moved to another division. What else did I come up with? I could decide to retire. I could die. A lot of things could happen between now and the penalty phase. So if you're making this decision thinking well, I want to be in front of you Judge de la O, I can't guarantee you that that will happen. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

Plea Transcript at 14.

B. ROJAS' GUILTY PLEA WAS A SOUND STRATEGIC DECISION.

Prior to pleading guilty, Rojas invoked the affirmative defense of insanity. But even his lawyers conceded at the Hearing that the evidence supporting the insanity defense was weak. The evidence of motivation and premeditation was so powerful that Rojas himself testified at the Hearing that the "State was going to win." Considering the strength of the State's case, his counsel has a duty to try and avoid imposition of a death sentence. To that end, Rojas and his counsel made a reasonable strategic decision to plead guilty and use acceptance of responsibility as a mitigator in the penalty phase. *See Brant v. State*, 197 So. 3d 1051, 1065 (Fla. 2016) [41 Fla. L. Weekly S307a] (seasoned criminal trial attorney's advice that defendant plead guilty is reasonable in light of the strength of the State's case and the ability to use the guilty plea as a mitigator).

Although conflict-free counsel argued at the Hearing that it was bad advice, he conceded he had not reviewed the defense expert's reports or depositions, or even spoken to them. Thus, he is in no position to evaluate the advice given by Mr. Della Fera to Rojas.

Moreover, it was Rojas' decision to plead guilty, not Mr. Della Fera's. Although Mr. Della Fera supported the decision, Mr. Houlihan and Ms. Lopez advised against the idea. Rojas nevertheless decided on his own to plead guilty.

> It was the appellant's burden to prove that his plea was not voluntary, *see Robinson v. State,* 761 So. 2d 269 (Fla. 1999) [24 Fla. L. Weekly S393a], and the record in this case supports a conclusion that the appellant made an informed strategic decision in deciding to plead.

Combs v. State, 39 So. 3d 548, 549 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1586a] (citation omitted).

C. THERE IS NO FACTUAL OR LEGAL BASIS FOR GRANTING THE MOTION

Rojas has failed to provide this Court with any legal or factual basis for allowing him to withdraw his guilty plea. Even Rojas' counsel, Mr. Della Fera, conceded at the Hearing that Rojas entered the guilty plea knowingly.

At the Hearing, Rojas expressed frustration and surprise that Mr. Della Fera "would want him to throw in the towel if he was so prepared." This is an amazing statement given that it was Rojas who first raised the idea of pleading guilty, without prompting from his counsel. He alone wrote the First Letter without input from anyone. He alone made the decision to end the guilt phase of the trial. He alone stated under oath that he understood the repercussions and was nevertheless pleading guilty. It makes a mockery of the judicial system to allow it to be manipulated in the way Rojas seeks.

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The Court understands the impulse to think the Court should bend over backwards to give Rojas the benefit of the doubt because this is a death penalty case. But there is no doubt as to Rojas' guilty, there is no doubt as to his intention to plead guilty, and there is no doubt that this Court should not be a party to Rojas' gamesmanship. He pled guilty after being given time to consider his decision (with no imposition of a deadline), he did so voluntarily, free of coercion, and of his own volition.

There is no good cause to allow him to withdraw the plea and this Court declines to exercise its discretion to allow him to do so.

---

[1]Nor was the Court made aware there was such a letter. The Court was told that Rojas had given a note to his Counsel, not that he had written a letter to the Court. December 7, 2023 Transcript at 14. The Court learned about the existence of the letter on December 9, 2023, after it was published by a Miami television station. *See* "Kill me quickly": Man writes letter to judge after pleading guilty in 2012 double murder in Coral Gables (https://www.nbcmiami.com/news/local/kill-me-quickly-man-writes-letter-to-judge-after-pleading-guilty-in-2012-double-murder-in-coral-gables/3179807/) (last visited January 11, 2024).

[2]There was never a written motion to withdraw. Rojas indicates his desire to withdraw his guilty plea in the Second Letter. The Court encouraged conflict-free counsel to supplement the Second Letter with a written motion, but conflict-free counsel chose not to do so.

* * *

Torts—Defamation by implication—Jurisdiction—Non-residents—Tortious act within state—Plaintiff who failed to allege that website that published news article about her being kicked off Airbnb and Booking.com was accessible and accessed in Florida failed to meet requirements of long-arm statute—Any amendment of complaint to cure defect would be futile where plaintiff has failed substantively to state cause of action for defamation by implication or tortious interference with business relationship and claim for injunctive relief has no merit—Further, plaintiff has failed to plead or prove that defendant, which avers that it has no presence in Florida and has not transacted any business in Florida, had sufficient minimum contacts with state to satisfy due process—Claims dismissed

BIROL OZYESILPINAR, Plaintiff, v. THE MISFITS MEDIA COMPANY PTY, LTD. et al., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-015399-CA-01. Section CA32. February 22, 2023. Ariana Fajardo Orshan, Judge. Counsel: Birol Ozyesilpinar, Pro se, Miami Beach, Plaintiff. Dana J. McElroy and Daniela B. Abratt, Thomas & LoCicerco, PL, Fort Lauderdale, for Defendant Entertainment Studios Digital Media, LLC. Amanda E. Preston and Andrew R. Kruppa. Squire Patton Boggs, Miami, for Defendant Essence Communications, Inc. Brian W. Toth and Freddy Funes, Toth Funes, P.A., Miami, for Defendants DMG Media Ltd., Daily Mail and General Trust, PLC, Associated Newspapers, Ltd., Reach PLC, and MGN Limited. Ryan Roman and Eric D. Coleman, Akerman, LLP, Fort Lauderdale, for Defendant Black Entertainment Television, LLC.

ORDER DISMISSING CLAIMS AGAINST ENTERTAINMENT STUDIOS DIGITAL MEDIA, LLC

THIS CAUSE having come before the Court on February 16, 2023 upon Defendant Entertainment Studios Digital Media, LLC's ("ESDM") Motion to Dismiss Plaintiff's Complaint (the "Motion"), filed May 18, 2022, and this Court having reviewed ESDM's Motion and exhibits, ESDM's Supplemental Memorandum of Law, filed February 13, 2023, Plaintiff *pro se* Birol Ozyesilpinar's ("Plaintiff") response to the Motion, and other relevant filings, having heard argument of counsel and Plaintiff, and being otherwise being fully advised in the premises, the Court hereby finds as follows:

1. ESDM's Motion alleged with a supporting affidavit that Plaintiff failed to properly serve ESDM with process. At the hearing on the Motion, ESDM advised the Court that ESDM was waiving Plaintiff's subsequent correction of improper and/or insufficient process in order to allow the Court to consider its Motion. Accordingly, ESDM withdrew this portion of its Motion.

2. ESDM further moved to dismiss Plaintiff's complaint asserting the Court lacked personal jurisdiction over ESDM. The Court finds ESDM's Motion should be granted on this ground.

3. In her complaint, Plaintiff attempts to state three causes of action against ESDM arising from the digital publication of a news article entitled " 'You made me famous Monkey': Miami Beach condo owner taunts Black guest after being kicked off Airbnb and Booking.com" on "theGrio" website ("the Grio"). Specifically, Plaintiff asserts claims for defamation by implication in Count VIII, permanent injunction in Count XIV and tortious interference with business relationships in Count XV.

4. Plaintiff seeks to invoke this Court's jurisdiction over ESDM, a California limited liability company which publishes the Grio, by essentially alleging that ESDM committed a tortious act, i.e., defamation by implication in Florida pursuant to Fla. Stat. § 48.193(1)(b). *See generally* Compl. ¶ 2.

5. When determining whether a court may exercise personal jurisdiction over a defendant, a court must first determine whether the complaint alleges sufficient jurisdictional facts to bring the action within the scope of the long-arm statute, and if it does, whether sufficient "minimum contacts" are demonstrated. *See Estes v. Rodin*, 259 So. 3d 183, 190 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2313a] (quoting *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989)).

6. Plaintiff failed to meet either prong. As an initial matter, Plaintiff failed to allege that ESDM's digital publication was accessible *and* accessed in Florida as required to meet the requirements of Florida's long-arm statute.

7. Even if Plaintiff could theoretically cure this defect by amending her complaint, any such amendment would be futile because Plaintiff has failed substantively to state a cause of action for defamation by implication and related claims (injunctive relief and tortious interference). Because the "threshold" question of personal jurisdiction turns on whether ESDM committed an intentional tort in Florida, the Court has properly reviewed the complaint to determine whether it states a cause of action for the torts alleged. *See Internet Solutions Corp. v. Marshall*, 39 So. 3d 1209, 1214 (Fla. 2010) [35 Fla. L. Weekly S349a] (citation omitted).

8. Having done so, the Court finds as a matter of law that Plaintiff cannot state a claim for defamation by implication because the news article and statements about which Plaintiff complains are non-actionable opinion, are true or substantially true, and are otherwise not defamatory. The Court also finds that ESDM's publication is privileged and protected by the "wire service defense" because the article at issue facially relies upon content originally published by other news agencies or sources. Because Plaintiff's claim for tortious interference arises from a failed defamation claim, it is similarly prohibited by Florida's single publication rule. And finally, Plaintiff's claim for injunctive relief has no merit because such relief is unavailable under well-established Florida law to prohibit the publication of allegedly defamatory statements.

9. Plaintiff additionally has failed to plead or prove that that ESDM has sufficient minimum contacts with the state of Florida to satisfy the due process requirements of the Fourteenth Amendment. In this regard, ESDM filed an affidavit in support of its Motion which established, among other things, that ESDM has no presence whatsoever in Florida, and has not transacted any business in the state. Despite having more than eight months prior to the hearing on ESDM's Motion, Plaintiff failed to controvert or refute ESDM's affidavit in any manner, and therefore has failed to meet her burden. Moreover, Plaintiff's unsworn allegations of injury and reputational damage in Florida do not, on their own, meet the required constitutional standard. *See Rodin*, 259 So. 2d at 193 (citation omitted).

10. For these reasons, and those additionally reflected in the record, it is:

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ORDERED AND ADJUDGED:

ESDM's Motion to granted. Counts XVIII, XIV and XV against ESDM are hereby dismissed with prejudice.

* * *

Public records—Attorney's fees—Where final judgment on newspaper publisher's complaint against Department of Children and Families found that DCF unlawfully refused publisher access to non-exempt public records regarding deceased child, publisher is entitled to attorney's fees and costs

McCLATCHY COMPANY, LLC (THE), et al., Plaintiffs, v. FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-003289-CA-01. Section CA23. August 24, 2022. Barbara Areces, Judge.

ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT TAXING THEIR ATTORNEYS' FEES AND COSTS

THIS CAUSE, having come before the Court at a hearing conducted on August 22, 2022 on Plaintiffs' Motion for Judgment Taxing Their Attorneys' Fees and Costs ("Plaintiffs' Motion"), filed March 29, 2022, and the Court, having reviewed the relevant filings and having heard argument of counsel, it is hereby:

ORDERED and ADJUDGED as follows:

1. Plaintiffs' Motion is granted. Plaintiffs are entitled to an award of reasonable attorney's fees and costs. The Court reserves jurisdiction to determine the amount.

2. Specifically, on March 8, 2022, the Court entered final judgment in favor of Plaintiffs on the First Amended Complaint to Enforce the Public Records Act for Access to Non-Exempt Florida Department of Children and Families Records Related to Deceased Child ("First Amended Complaint"), and against the Defendant Florida Department of Children and Families ("DCF"). In entering final judgment, the Court found that DCF's failure to timely release its records concerning R.B., with appropriate redactions, was an unlawful delay of access under Article I, Section 24 of the Florida Constitution and Chapter 119 of the Florida Statutes. The Court reserved jurisdiction to determine entitlement to, and amount of, taxable costs and attorney's fees.

3. Having again reviewed the record and considered DCF's opposition, the Court reiterates its previous finding that DCF unlawfully refused access to DCF's records concerning R.B, at issue in the First Amended Complaint. Accordingly, pursuant to Section 119.12, Florida Statutes (2022), Plaintiffs are entitled to award of their reasonable attorney's fees and costs from DCF incurred in the trial court, in an amount to be determined by the Court. Plaintiffs additionally are entitled to award of their costs under Section 57.041, Florida Statutes (2022), because final judgment was awarded in their favor on the First Amended Complaint.

4. Similarly, because the Court holds and has previously held that DCF unlawfully refused access to the records at issue in the First Amended Complaint, Plaintiffs additionally are entitled to award of their appellate attorney's fees pursuant to the order of the Third District Court of Appeal, dated November 29, 2021, in an amount to be determined by the Court.

5. Finally, the Court finds that Plaintiffs provided the requisite notice under Section 119.12(1)(b) or that none was required under Section 119.12(2), and that Plaintiffs did not request access to the records at issue or participate in this action for an improper purpose.

* * *

Criminal law—Driving under influence—Discovery—Intoxilyzer simulator solutions and dry gas standards—Motion for production of simulator solutions and dry gas standards used to conduct monthly and annual inspections of Intoxilyzer used to test defendant's breath is denied—No evidence was presented to support allegations that solutions or standards produced inaccurate alcohol vapor concentrations, and it would be impossible to inspect or test actual solutions and standards used to inspect Intoxilyzer prior to defendant's test because of short shelf and use life

STATE OF FLORIDA, Plaintiff, v. WILLIAM VINCE HARPER, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CF-000781-A. February 13, 2024. Melissa D. Souto, Judge.

ORDER DENYING DEFENDANT'S MOTION TO PRODUCE II

THIS CAUSE came before the Court on Defendant's "Motion to Produce II" filed on September 10, 2020, pursuant to Florida Rule of Criminal Procedure 3.220. Having reviewed the Motion and the court file, having heard the testimony and arguments of counsel and considered the evidence presented at the hearings held on September 24, 2021, December 9, 2021, June 24, 2022, March 2, 2023, and December 13, 2023, and being otherwise fully advised, the Court finds as follows:

On February 20, 2020, Defendant was issued citations for running a red light and driving under the influence. After he was arrested, he submitted to a breath test and the results were 0.151 and 0.158. On March 26, 2020, he was charged with felony driving under the influence pursuant to section 316.193(2)(b), Florida Statutes.

In the instant Motion, Defendant requests an order requiring the State to produce for inspection and testing all simulator solutions and dry gas standards used to conduct the monthly agency inspections and annual inspections on the breath testing device upon which he was tested. He claims that samples of the solutions and dry gas standards are required to test their actual alcohol content, which allegedly produced alcohol vapor concentrations of 0.05, 0.08, and 0.20. He contends that "in the event" these alcohol concentrations were not accurate, the breath testing device will not operate accurately.

Shayla Platt, the Program Manager for the Florida Department of Law Enforcement Alcohol Testing Program, testified that monthly inspections of the Intoxilyzer 8000 instruments are conducted by law enforcement agencies in the field while annual inspections of the instruments are conducted by FDLE. The instruments are sent by the agencies to FDLE for the annual inspections. The annual inspections involve a series of tests on the instruments to confirm that the instruments are able to read breath alcohol levels accurately within a specified range. During those tests, alcohol solutions and dry gas standards are used. The solutions and standards come to FDLE from their manufacturers with a certificate of analysis, and then FDLE approves the solutions and standards for use and issues the same certificate of analysis. In reviewing the records regarding the Defendant's breath test in this case, Ms. Platt testified that diagnostic checks were done at the beginning and end of the breath test to ensure the instrument was reading accurately at the time of the test, and the dry gas standard control tests fell within the acceptable range.

Defendant has not presented any evidence to suggest that the alcohol solutions or dry gas standards that were used to inspect the instrument upon which he was tested ever produced inaccurate alcohol vapor concentrations, or that there were any issues with the certificates of analysis for the standards or solutions completed by either the manufacturers or FDLE. In fact, he alleges that the instrument will not operate accurately "in the event" the alcohol concentrations are not accurate. However, this allegation appears to be based on pure speculation as no testimony was presented regarding the operation of the instrument where inspections were conducted utilizing solutions or standards with accurate versus inaccurate alcohol concentrations. Also, based on Ms. Platt's testimony that the solutions and standards only have a two-year shelf life after being

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purchased and each container must be used within a day of opening, it would be impossible to inspect and test the solutions and standards that were actually used to inspect the instrument prior to the Defendant's breath test. The Court therefore finds that the Defendant has failed to make a showing of materiality as required by Florida Rule of Criminal Procedure 3.220(f) to compel the inspection and testing of the solutions and standards.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's "Motion to Produce II" is **DENIED**.

* * *

Criminal law—Driving under influence—Discovery—Intoxilyzer eeproms or chips—Motion for production of eeproms and chips from Intoxilyzer used to test defendant's breath is denied—Items are excluded from "full information" that must be made available to defendant under section 316.1932(1)(f)(4)—Items are owned and possessed by manufacturer, not state, and defendant has not shown materiality of items

STATE OF FLORIDA, Plaintiff, v. WILLIAM VINCE HARPER, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CF-000781-A. February 14, 2024. Melissa D. Souto, Judge.

ORDER DENYING DEFENDANT'S MOTION TO PRODUCE III

THIS CAUSE came before the Court on Defendant's "Motion to Produce III" filed on September 10, 2020, pursuant to Florida Rule of Criminal Procedure 3.220. Having reviewed the Motion and the court file, having heard the testimony and arguments of counsel and considered the evidence presented at the hearings held on September 24, 2021, December 9, 2021, June 24, 2022, March 2, 2023, and December 13, 2023, and being otherwise fully advised, the Court finds as follows:

On February 20, 2020, Defendant was issued citations for running a red light and driving under the influence. After he was arrested, he submitted to a breath test and the results were 0.151 and 0.158. On March 26, 2020, he was charged with Felony Driving Under the Influence pursuant to section 316.193(2)(b), Florida Statutes.

In the instant Motion, Defendant requests an order requiring the State to produce for inspection, copying, and testing the eeproms or chips, programs, and CDs located *in* the Intoxilyzer 8000 instrument upon which he was tested as well as those which were subject to any approval or evaluation conducted by the Florida Department of Law Enforcement. He alleges that the instrument contains eeproms or chips which contain the bit and byte patterns of the software inside the instrument, and that those patterns will establish that the software in that instrument was substantially modified and different than any eeproms or chips located in approved intoxilyzer instruments. He claims that the contents of the eeproms in the instrument upon which he tested is version 8100.27 as compared to the approved version of 8100.10, and that there appears to now be various versions of 8100.27.

Florida Rule of Criminal Procedure 3.220(f) provides: "On a showing of materiality, the court may require such other discovery to the parties as justice may require." Section 316.1932(1)(f)(4), Florida Statutes, provides: "Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney." However, "full information" is limited to the following: (1) the type of test administered and procedures followed; (2) the time of the collection of the breath sample analyzed; (3) the numerical results of the test indicating the breath alcohol content; (4) the type and status of any permit issued by FDLE which was held by the person who performed the test; and (5) if the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument. § 316.1932(1)(f)(4), Fla. Stat. It does *not* include "manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state." *Id.* "Additionally, full information does not include information in the possession of the manufacturer of the test instrument." *Id.*

The Court finds that the requested items are excluded from the "full information" that shall be made available to Defendant under section 316.1932(1)(f)(4). Furthermore, the Defendant has not made a showing of materiality as to the requested items under Rule 3.220(f) as there is no record evidence that there has been any modification to the software since 2006, or that any such modification affected the instrument or his breath test results.

Patrick Murphy, who worked for the Florida Department of Law Enforcement Alcohol Testing Program for fourteen years, testified that any modifications to the software were done by the manufacturer, CMI, Inc., and that there was only one modification during that time. Defense expert Dr. Harley Myler testified that software version 8100.26 had an issue with two instructions missing from the source code, but that those instructions were not needed for the instrument to run and were only discovered during certain operations with the instrument. That version was fixed by upgrading to version 8100.27, which is the only version used in Florida. Keith Betham, who has worked for the Seminole County Sheriff's Office as an agency inspector, DUI technician, and custodian of records since 1997, testified that all Intoxilyzer 8000 instruments were upgraded to version 8100.27 by the end of November 2006, more than thirteen years before Defendant's breath test was conducted. Also, Shayla Platt, the Program Manager for the FDLE ATP, testified that software version 8100.27 is the only version that has been used in Florida since she began working for FDLE in 2015, that there have been no updates to the software during her employment, and that she is unaware of any subversions of 8100.27. In addition, the testimony presented at the hearings established that CMI, not the State, owns and possesses the intoxilyzer software.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Defendant's "Motion to Produce III" is **DENIED**.

* * *

Criminal law—Driving under influence—Discovery—Third party—Intoxilyzer manufacturer—Motion for issuance of subpoena duces tecum requiring Intoxilyzer manufacturer to produce various documents regarding machine is denied—Items are excluded from "full information" that must be made available to defendant under section 316.1932(1)(f)(4)—Statute expressly excludes items in manufacturer's possession from being discoverable, and defendant has not shown materiality of items

STATE OF FLORIDA, Plaintiff, v. WILLIAM VINCE HARPER, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CF-000781-A. February 16, 2024. Melissa D. Souto, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM TO C.M.I.

THIS CAUSE came before the Court on Defendant's "Motion for Issuance of Subpoena Duces Tecum to C.M.I. the Manufacturer of the Intoxilyzer 8000 Machine" filed on September 10, 2020, pursuant to Florida Rule of Criminal Procedure 3.220 and section 316.1932(1)(f)(4), Florida Statutes. Having reviewed the Motion and the court file, having heard the testimony and arguments of counsel and considered the evidence presented at the hearings held on September 24, 2021, December 9, 2021, June 24, 2022, March 2, 2023, and December 13, 2023, and being otherwise fully advised, the Court finds as follows:

On February 20, 2020, Defendant was issued citations for running a red light and driving under the influence. After he was arrested, he

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submitted to a breath test and the results were 0.151 and 0.158. On March 26, 2020, he was charged with felony driving under the influence pursuant to section 316.193(2)(b), Florida Statutes.

In the instant Motion, Defendant requests an order allowing the issuance of a subpoena duces tecum requiring CMI, Inc., to provide fourteen categories of various documents regarding the Intoxilyzer 8000, including the following: software and source codes, instrument specification documents/manuals, operational guides, schematics, communications between FDLE and CMI, repair invoices, documentation of modifications to Intoxilyzer 8000s, operator's manuals, maintenance manuals, sales literature, contracts between the State and CMI, and eeproms of software in the instruments. He alleges that the Intoxilyzer 8000s did not work properly and were constantly the subject of modifications to their electrical and computer components, and that the machine upon which he was tested utilized software version 8100.27 while other approved instruments utilized versions 8100.09 and/or 8100.10.

Florida Rule of Criminal Procedure 3.220(f) provides: "On a showing of materiality, the court may require such other discovery to the parties as justice may require." Section 316.1932(1)(f)(4), Florida Statutes, provides: "Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney." However, "full information" is limited to the following: (1) the type of test administered and procedures followed; (2) the time of the collection of the breath sample analyzed; (3) the numerical results of the test indicating the breath alcohol content; (4) the type and status of any permit issued by FDLE which was held by the person who performed the test; and (5) if the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument. § 316.1932(1)(f)(4), Fla. Stat. It does *not* include "manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state." *Id.* "**Additionally, full information does not include information in the possession of the manufacturer of the test instrument**." *Id.* (emphasis added).

CMI, Inc., is the manufacturer of the Intoxilyzer 8000 and is based in Owensboro, Kentucky. The Florida Supreme Court has held that "in criminal cases, in order to subpoena documents located in another state that are in the possession of an out-of-state nonparty, the party requesting the documents must utilize the procedures of the Uniform Law, as set forth in chapter 942." *Ulloa v. CMI, Inc.*, 133 So. 3d 914, 916 (Fla. 2013) [38 Fla. L. Weekly S804a]. Chapter 942, known as the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," sets forth the procedure to compel the attendance of an out-of-state witness or production of out-of-state documents. Utilizing that procedure, this Court would have to issue a certificate providing the basis for a finding of materiality of the requested documents, and present the certificate to a judge in the court of the county where CMI's documents are located. That court would then have to make its own independent determination as to whether the documents are material and necessary. §§ 942.02, 942.03, Fla. Stat.; *Ulloa*, 133 So. 3d at 921-22 ("This process guarantees that both sovereign states are coordinating their efforts, that the witness has the opportunity to be heard by his or her own state court, and that the witness does not need to travel to another state unless his or her own state's court has also determined that he or she is material and necessary to the case.").

First, none of the items the Defendant requests that CMI be required to produce fall within the "full information" that shall be made available to a defendant regarding the results of a breath test under section 316.1932(1)(f)(4). More importantly, that statute expressly excludes any information in CMI's possession from being discoverable.

Second, as the Court found in the February 14, 2024, Order Denying Defendant's Motion to Produce III, the Defendant has not made a showing of materiality as to the requested documents under Rule 3.220(f). There is no record evidence of any modification to the Intoxilyzer 8000 software since 2006 when the software was upgraded from version 8100.26 to 8100.27, and testimony established that version 8100.27 is the only version used in Florida. Also, there is no record evidence that the only software versions approved for use by the State were 8100.09 and/or 8100.10, and that 8100.27 was not approved. Furthermore, Keith Betham, who has worked for the Seminole County Sheriff's Office as an agency inspector, DUI technician, and custodian of records since 1997, testified that the instrument upon which the Defendant was tested was sent out for repairs in April 2020, after the instrument displayed "memory full" and became inoperable during an agency inspection. However, that occurred *after* the Defendant was tested using the instrument in February 2020. Finally, there is no record evidence establishing that the Intoxilyzer 8000 used in this case "did not work properly" or was "constantly" modified. Therefore, since the Court finds that the requested documents are not material and necessary, the Court declines to issue a certificate of materiality to present to the Kentucky court to subpoena the documents under Uniform Law.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's "Motion for Issuance of Subpoena Duces Tecum to C.M.I. the Manufacturer of the Intoxilyzer 8000 Machine" is **DENIED**.

* * *

Criminal law—Driving under influence—Discovery—Intoxilyzer software and source code—Motion for production of software and source code for Intoxilyzer is denied—Items are excluded from "full information" that must be made available to defendant under section 316.1932(1)(f)(4)—Items are owned and possessed by manufacturer, not state; defendant has not shown materiality of items; and there is nothing in record to support claim that state misrepresented or concealed evidence that it owns or possesses items

STATE OF FLORIDA, Plaintiff, v. WILLIAM VINCE HARPER, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CF-000781-A. February 16, 2024. Melissa D. Souto, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR PRODUCTION OF SOFTWARE AND SOURCE CODE OR DISMISSAL

THIS CAUSE came before the Court on Defendant's "Motion for Production of the Software and Source Code or Dismissal and in the Alternative Motion for Exclusion of the Breath Test Results" filed on September 10, 2020. Having reviewed the Motion and the court file, having heard the testimony and arguments of counsel and considered the evidence presented at the hearings held on September 24, 2021, December 9, 2021, June 24, 2022, March 2, 2023, and December 13, 2023, and being otherwise fully advised, the Court finds as follows:

On February 20, 2020, Defendant was issued citations for running a red light and driving under the influence. After he was arrested, he submitted to a breath test and the results were 0.151 and 0.158. On March 26, 2020, he was charged with felony driving under the influence pursuant to section 316.193(2)(b), Florida Statutes.

In the instant Motion, Defendant requests an order requiring the State to produce the source code of the software program on the Intoxilyzer 8000 used in this case, the source code for all versions of the 8100 software tested by FDLE, and the software and source code of the program that was approved for use in FDLE Rule 11D-8.003. He claims that software flaws have been discovered based on the

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instrument's ability or inability to measure breath volume and that since the instrument is not designed to measure the accuracy of breath volume when simulators are used to test the instrument's accuracy, all inspections are "useless and irrelevant." Defendant also claims that he is unable to question the accuracy of the instrument's operations and "fail safe" procedures without the source code, which calls into question the scientific validity of any breath test result.

In the alternative, Defendant seeks dismissal and/or exclusion of the breath test results "since admission of the results without production of the source code would violate the Defendant's right to due process." He argues that the State has concealed evidence of its possession of the software and source code for the Intoxilyzer 8000.

Florida Rule of Criminal Procedure 3.220(f) provides: "On a showing of materiality, the court may require such other discovery to the parties as justice may require." Section 316.1932(1)(f)(4), Florida Statutes, provides: "Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney." However, "full information" is limited to the following: (1) the type of test administered and procedures followed; (2) the time of the collection of the breath sample analyzed; (3) the numerical results of the test indicating the breath alcohol content; (4) the type and status of any permit issued by FDLE which was held by the person who performed the test; and (5) if the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument. § 316.1932(1)(f)(4), Fla. Stat. It does *not* include "manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state." *Id.* "Additionally, full information does not include information in the possession of the manufacturer of the test instrument." *Id.*

The Court finds that the requested items are excluded from the "full information" that shall be made available to Defendant under section 316.1932(1)(f)(4). Also, because the testimony presented at the hearings established that CMI, not the State, owns and possesses the intoxilyzer software and source code, the statute expressly excludes those items from being discoverable.

The Court also finds that Defendant has not made a showing of materiality as to the software or source code under Rule 3.220(f). There is no record evidence that the Intoxilyzer 8000's ability or inability to measure breath volume is based on any "software flaws" or "computer glitches." To the contrary, when questioned about specific anomalies regarding breath volume measurements, Keith Betham from the Seminole County Sheriff's Office and Shayla Platt from the Florida Department of Law Enforcement Alcohol Testing Program explained the potential causes of such anomalies. They testified that they were able to recreate, or duplicate, those results in the laboratory and that such causes included lower versus higher lung capacity, instrument operator error, subjects providing breath samples at the wrong times, and calibrations not being performed on flow sensors prior to 2012.

Furthermore, there is nothing in the record to establish that the State misrepresented or concealed any evidence that it owns or possesses the software and source code in this case. Thus, dismissal or exclusion of the breath test results is not warranted.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's "Motion for Production of the Software and Source Code or Dismissal and in the Alternative Motion for Exclusion of the Breath Test Results" is **DENIED**.

* * *

Criminal law—Driving under influence—Discovery—Inspection and disassembly of Intoxilyzer—Motion to inspect, photograph, or videotape exterior and interior of Intoxilyzer is denied—Type of inspection requested is not included in "full information" that must be made available to defendant under section 316.1932(1)(f)(4), no evidence was presented to indicate that purpose of inspection is based on anything more than mere suspicion that Intoxilyzer used to test defendant's breath may have been different from others, and machine has been repaired since defendant's testing four years ago

STATE OF FLORIDA, Plaintiff, v. WILLIAM VINCE HARPER, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CF-000781-A. February 20, 2024. Melissa D. Souto, Judge.

ORDER DENYING DEFENDANT'S MOTION TO INSPECT, PHOTOGRAPH AND/OR VIDEO TAPE INTOXILYZER 80-0001272

THIS CAUSE came before the Court on Defendant's "Motion to Inspect, Photograph and/or Video Tape Seminole County Sheriff's Office Intoxilyzer 80-0001272" filed on September 10, 2020. Having reviewed the Motion and the court file, having heard the testimony and arguments of counsel and considered the evidence presented at the hearings held on September 24, 2021, December 9, 2021, June 24, 2022, March 2, 2023, and December 13, 2023, and being otherwise fully advised, the Court finds as follows:

On February 20, 2020, Defendant was issued citations for running a red light and driving under the influence. After he was arrested, he submitted to a breath test and the results were 0.151 and 0.158. On March 26, 2020, he was charged with felony driving under the influence pursuant to section 316.193(2)(b), Florida Statutes.

In the instant Motion, Defendant requests an order allowing him and his counsel to "cause to be opened the intoxilyzer machine number 80-0001272" upon which he was tested for visual inspection and photographing to determine if that Intoxilyzer 8000 is the "same electrical and computer component configuration as the Intoxilyzer Model 8000 Series" approved for use in Florida. He seeks to photograph and/or video tape the exterior of the instrument to include the serial number as well as the interior of the instrument for evidentiary purposes. Specifically, he requests that maintenance persons be ordered to open the side and top panels of the instrument, asserting such "disassembly" is no more than the disassembly normally required by Florida Department of Law Enforcement personnel in training classes and symposiums. He argues that he is entitled to "full information" concerning his breath test under section 316.1932(1)(f)(4), Florida Statutes.

Section 316.1932(1)(f)(4) provides: "Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney." However, "full information" is limited to the following: (1) the type of test administered and procedures followed; (2) the time of the collection of the breath sample analyzed; (3) the numerical results of the test indicating the breath alcohol content; (4) the type and status of any permit issued by FDLE which was held by the person who performed the test; and (5) if the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument. § 316.1932(1)(f)(4), Fla. Stat. It does *not* include "manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state." *Id.* "Additionally, full information does not include information in the possession of the manufacturer of the test instrument." *Id.*

The Court finds that the type of inspection the Defendant requests is not included in the "full information" that is required to be disclosed under the statute. Furthermore, Defendant has provided no legal basis

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to demonstrate his entitlement to the disassembly and inspection of the Intoxilyzer 8000 utilized in this case. No evidence was presented to this Court to indicate that the Defendant's purpose for such inspection was based on anything more than a mere suspicion that the Intoxilyzer 8000 used in this case may have been different from any other Intoxilyzer 8000 approved for use in Florida. "The mere possibility that information may be helpful to the defense in its own investigation does not establish materiality." *Demings v. Brendmoen*, 158 So. 3d 622, 625 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D815a]. There was also no evidence to suggest that the internal configuration of the instrument used in this case differed from the configuration in other instruments, or that any such difference affected the results of the Defendant's breath test. Additionally, four years have passed since Defendant's breath test in February 2020. Testimony from Seminole County Sheriff's Office agency inspector Keith Betham established that the instrument upon which Defendant was tested was sent out to be repaired after it became inoperable in April 2020 and was not returned to the agency until February 2021. Thus, an inspection of the instrument in its current repaired condition would presumably reveal different results than an inspection conducted around the time Defendant was tested.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's "Motion to Inspect, Photograph and/or Video Tape Seminole County Sheriff's Office Intoxilyzer 80-0001272" is **DENIED**.

* * *

Criminal law—Driving under influence—Scientific evidence—Intoxilyzer—Motion to conduct *Daubert* hearing regarding scientific reliability and admissibility of Intoxilyzer and its test results is denied—Court is bound by Florida Legislature's statutory scheme for determining reliability and admissibility of results of tests conducted in substantial compliance with statutes and administrative rules

STATE OF FLORIDA, Plaintiff, v. WILLIAM VINCE HARPER, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CF-000781-A. February 22, 2024. Melissa D. Souto, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR DAUBERT HEARING

THIS CAUSE came before the Court on Defendant's "Motion for Daubert Hearing" and "Supplemental Memorandum in Support of Motion for Daubert Hearing" filed on September 11, 2020. Having reviewed the Motion and the court file, having heard the testimony and arguments of counsel and considered the evidence presented at the hearings held on September 24, 2021, December 9, 2021, June 24, 2022, March 2, 2023, and December 13, 2023, and being otherwise fully advised, the Court finds as follows:

On February 20, 2020, Defendant was issued citations for running a red light and driving under the influence. After he was arrested, he submitted to a breath test and the results were 0.151 and 0.158. On March 26, 2020, he was charged with felony driving under the influence pursuant to section 316.193(2)(b), Florida Statutes.

In the instant Motion, Defendant requests a *Daubert* hearing regarding the scientific reliability and admissibility of the Intoxilyzer and its test results in this case. He contends that "this Court has misapprehended or overlooked that it is required to be the gatekeeper of the scientific reliability and sufficiency of scientific principles and expert testimony pertaining to the Intoxilyzer 8000 and cannot delegate that gatekeeping authority in a criminal case to an Administrative agency or the Administrative Procedure Act." He argues that deferring his Intoxilyzer motions to agency interpretation under the Florida Administrative Procedure Act would violate his rights under Article V, Section 21 of the Florida Constitution. He also claims that the results of his breath test "are nothing more than a conclusion and cannot be accepted under *Daubert*."

The Intoxilyzer instruments and their test results are specifically regulated by the Florida Legislature through rules promulgated by the Florida Department of Law Enforcement. *See State v. Bender*, 382 So. 2d 697, 700 (Fla. 1980) (finding that the statutory authority empowering the agency to approve testing methods for implementation of breath-testing equipment "is proper and allowable"). The Florida Supreme Court held in *Bender* that "the legislature properly exercised its authority in assigning to these agencies the responsibility of establishing uniform and reliable testing methods in this scientific area, particularly under the circumstances where the tests are part of a statutory scheme which prescribes the implied consent of all drivers to take these tests and where the tests and procedures are always subject to judicial scrutiny." *Id.* at 700.

Under section 316.1932(1)(a)(2.), Florida Statutes, the Florida Department of Law Enforcement Alcohol Testing Program is responsible for regulating the operation, inspection, and registration of breath test instruments. FDLE has statutory authority to approve or disapprove breath test instruments and accompanying paraphernalia, and to specify techniques and methods for breath alcohol testing. § 316.1932(1)(a)(2.)(g.), (o.), Fla. Stat. (2020). To be considered valid, an analysis of a person's breath must be performed substantially according to the methods approved by FDLE. "For this purpose, the department may approve satisfactory techniques or methods. Any insubstantial differences between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid." § 316.1932(1)(b)(2.), Fla. Stat. "To require legislative supervision of the administration of these scientific testing methods would require constant legislative hearings to develop the necessary expertise, which is neither practically possible nor required by our constitution." *Bender,* 382 So. 2d at 700.

The rules promulgated by FDLE pursuant to its legislative authority are contained in Florida Administrative Code Chapter 11D-8. Under Rule 11D-8.003(2), FDLE "approves breath test methods and new instrumentation to ensure the accuracy and reliability of breath test results," and the "approved breath test instrument make and model is the CMI, Inc. Intoxilyzer 8000 using software evaluated by the Department." An FDLE inspection performed in accordance with Rule 11D-8.004 "validates the approval, accuracy and reliability of an evidentiary breath test instrument." Fla. Admin. Code R. 11D-8.003(3).

Defendant has not cited, and the Court has not found, any binding case law that requires this Court to hold a *Daubert* hearing in this case.[1] As noted above, the Florida Legislature specifically regulates the Intoxilyzer instrument and its test results through FDLE's promulgation of administrative rules which establish procedures to ensure the reliability of the Intoxilyzer 8000, its methods, and its test results. The Court finds that it is bound by the legislature's statutory scheme in determining the reliability and admissibility of evidence. As such, a *Daubert* hearing regarding the scientific reliability and admissibility of the Intoxilyzer and its test results is neither required.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's "Motion for Daubert Hearing" is **DENIED**.

[1]The Eleventh Circuit Court of Appeal has held that although a *Daubert* hearing may be helpful in complicated cases involving multiple expert witnesses, "*Daubert* hearings are not required." *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.,* 402 F.3d 1092, 1113 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C298a].

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COUNTY COURTS

Insurance—Property—Conditions precedent—Ten-day notice—Insureds' presuit notice of intent to initiate litigation did not comply with statute where notice did not state with specificity alleged acts or omissions of insurer, did not state that copy of notice was provided to claimant, and did not itemize damages and provide disputed amount—Complaint dismissed without prejudice

CHRISTOPHER BRYCEN WRIGHT and LACY NICOLE WRIGHT, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 1st Judicial Circuit in and for Santa Rosa County. Case No. 23001484CCMXAX. January 3, 2024. Jose A. Giraud, Judge. Counsel: Max Blackman, Kanner and Pintaluga, P.A., Boca Raton, for Plaintiffs. Andrew L. Bickford, Bickford & Chidnese, LLP, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

This cause, having come before the Court on December 6, 2023, at the hearing on Defendant's Motion to Dismiss Plaintiffs' Complaint, and the Court having reviewed the filings of the parties and otherwise being fully advised, it is:

ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss is **GRANTED** without prejudice. The Court finds that Plaintiffs' Notice of Intent to Initiate Litigation failed to comply with Section 627.70152(3)(a), Fla. Stat. Specifically, the Notice failed to state with specificity the alleged acts or omissions of the Insurer, failed to state that a copy of the Notice was provided to the Claimant, and failed to itemize damages and provide a disputed amount.

2. Should Plaintiffs wish to re-file this lawsuit, Plaintiffs are directed to first comply with the Statute's requirement to provide a compliant written Notice of Intent to Initiate Litigation.

* * *

Consumer law—Florida Motor Vehicle Repair Act—Claim that mechanic entrusted with restoration of plaintiff's vehicle failed to perform contract and violated FMVRA and mechanic's counterclaim that plaintiff breached contract when he retrieved vehicle after 5 months had passed without any work performed and failed to pay storage fees and financial expenditures—Defendant is not entitled to payment for sandblasting of vehicle by subcontractor that occurred after plaintiff advised that he was coming to retrieve vehicle where there is no evidence that plaintiff ever agreed to use of subcontractor, and any agreement was revoked when plaintiff notified defendant that he was coming to retrieve vehicle and demanded return of deposit—Defendant is not entitled to storage fees—Storage fees were only compensable after customer had been notified that work had been completed, and work was never completed—Defendant is not entitled to expenditures made in anticipation of job where he retained items purchased, and plaintiff derived no benefit from items—Defendant is not entitled to retain "nonrefundable" deposit where defendant performed no work on vehicle, and term "nonrefundable" does not appear on plaintiff's copy of estimate

GEORGE WEYMOUTH, Plaintiff, v. PHILLIP SIMPSON, d/b/a CLASSIC CUSTOMS, Defendant. County Court, 2nd Judicial District in and for Wakulla County. Case No. 2021 SC 141. August 18, 2022. Jill C. Walker, Judge. Counsel: Robert G. Churchill, Jr., Churchill Law Group, PLLC, for Plaintiff. Jeffrey S. Richardson, for Defendant.

FINAL JUDGMENT

This consumer action was heard at trial, with the Court sitting as the trier of fact. Plaintiff alleged failure to timely perform the contract and violations of the Florida Motor Vehicle Repair Act (Fla. Stat. § 559.901 et seq.) by a mechanic—the Defendant in this case—entrusted with the restoration of a motor vehicle. Defendant denied all liability, and counter-claimed alleging Plaintiff had breached the contract when he retrieved his car and failed to pay storage fees and related financial expenditures. There were no contested issues of material fact. The Court finds for the Plaintiff and against the Defendant as to each party's claims, as set forth below.

Uncontested Testimony

In late December 2020, George Weymouth contracted with Phillip Simpson, d/b/a Classic Customs, to repair and restore his 1961 Jeep. Plaintiff paid Defendant $5,000 and Defendant took possession of the vehicle. Approximately five months later in May 2021, after no appreciable work had been performed on the Jeep, the Plaintiff called the Defendant multiple times demanding return of his Jeep and his $5,000 payment. Plaintiff notified Defendant that he would be picking up the Jeep on May 20, 2021. On May 24, 2021, Defendant subcontracted the work of sandblasting the Jeep to Extreme Carpet Care. Plaintiff retrieved his vehicle from Defendant's place of business on May 25, 2021. When Defendant failed to return the payment of $5,000, Plaintiff filed suit. Defendant counterclaimed that the contract had a minimum charge of $5,000 and deposits are *nonrefundable.* Further, Defendant alleges that he is owed $25.00 per day in storage fees and reimbursement for the cost of the sandblasting and supplies purchased for the job.

Plaintiff's Claim

Plaintiff's case in chief included lengthy testimony from the Defendant and from the Plaintiff, which established that Defendant agreed that he had not complied with several requirements imposed by the Florida Motor Vehicle Act with regard to Plaintiff's vehicle and his interactions with the Plaintiff, specifically involving written disclosures and notifications that are required before work may be undertaken on a motor vehicle for compensation. Defendant also specifically acknowledged that he had not complied with the material notifications required by the Act with respect to claims for storage fees and with respect to undertaking work on the motor vehicle without providing a written estimate and written disclosures pursuant to Florida Statute §559.905. Additionally, Plaintiff had waited approximately five months for the restoration and as of May 2021 no appreciable work had been completed.

Defendant's Claim

Defendant's claim on the $5,000 payment is based on several premises. First, the Court examines the claim for reimbursement for sandblasting. With a receipt dated May 24, 2021, the Defendant testified he had subcontracted with Extreme Carpet Care to sandblast the Jeep for $2,000.[1] This work was done *after* Plaintiff notified Defendant that he would pick up the Jeep on May 20, 2021.[2] Repair work that is subcontracted must be with the *knowledge and consent* of the customer. Fla. Stat. § 559.920 (14). Defendant must show compliance with the Florida Motor Vehicle Repair Act to prove his claim and be compensated. Plaintiff did not give his consent and/or had revoked any previously given consent[3] when he notified Defendant that he was coming to pick up his car and demanded his $5,000.00 payment back. Plaintiff also testified that the mechanic that subsequently restored the Jeep had to re-sandblast the vehicle because the first sandblasting job had been so poorly done.

Second, Defendant claims he is entitled to storage fees and expenditures. Storage fees are only compensable after the customer has been "notified that the repair work has been completed" Fla. Stat. §559.905 (1) (n). The repair work was never completed hence no storage fees are legally due or owing under the law. As to any expenditures in anticipation for the job, Defendant relies on Exhibit

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23, a bill from SSI-Albany to Classic Customs for numerous parts/supplies. There is nothing on the bill indicating the job/customer it was intended for and even more troubling to the Court, the document is a copy not an original. The copy reflects the original was tampered with before copying as there are broken straight black lines and/or other information on the left-hand side that shows evidence of erasure. Further, the items purchased remained with the Defendant after Plaintiff picked up the car. Plaintiff derived no benefit from the items when Defendant failed to timely complete the restoration.

Lastly, as to the nonrefundable[4] $5,000 payment—it defies all logic and common sense that Defendant could fail to follow the law and fail to timely complete the restoration and then claim a right to a "nonrefundable" $5,000. Under such logic there would be no incentive for the Defendant to do any work inasmuch as the deposit was guaranteed to him.

Documentary Evidence at Trial

There were numerous documents disclosed by the Defendant during discovery and referenced during the trial. Of grave concern to the Court, all were *copies,* no *original* documents were presented by the Defendant. Fla. Stat. §559.915 **requires** motor vehicle repair shops to maintain original repair records including estimates and invoices for a period of at least 12 months. Many documents appeared to be prepared in anticipation of trial showing dates of creation after the complaint filing date or showing dates that appear doctored on the copy[5]. In comparison, Plaintiff presented one original document, the "estimate"[6]. Notably, Defendant's black and white copy of the "estimate" had added writing at the bottom stating, "Nonrefundable deposit $25 a day storage" that was clearly *not* on the original. By law and best evidence rules, Defendant should be relying on and presenting original documents.

After providing proof of damages, and at the close of Plaintiff's evidence, Plaintiff moved for Judgment as a Matter of Law, asserting that all relevant material facts were presented through evidence and acknowledged by both parties, and were dispositive of all the claims then before the Court, and entitled Plaintiff to judgment. This Court having heard the motion, having heard testimony of the witnesses, having heard arguments of counsel, and being otherwise fully advised in the premises, finds that the evidence and acknowledgments before the Court were dispositive, and entitle Plaintiff to judgment as a matter of law as to all of the claims asserted in this action.

THEREFORE, IT IS ORDERED AND ADJUDGED:

As to the Plaintiff's claim, Defendant is indebted to Plaintiff in the principal sum of $5,000.00. Plaintiff GEORGE WEYMOUTH recovers from Defendant PHILLIP SIMPSON, d/b/a CLASSIC CUSTOMS the sum of $5000.00, which shall accrue interest hereafter pursuant to Florida Statute §55.03, for which let execution issue.

The Court reserves jurisdiction as to the entitlement to and amount of attorney fees and costs.

As to the Defendant's Counterclaim, the Court finds for the Plaintiff GEORGE WEYMOUTH. Defendant shall take nothing by the counterclaim and Plaintiff shall go hence without day.

It is further ordered and adjudged that the Defendant shall complete Florida Small Claims Rules Form 7.343 (Fact Information Sheet) and return it to the Plaintiff's attorney within 45 days from the date of this final judgment, unless the final judgment is satisfied or a motion for new trial or notice of appeal is filed.

Jurisdiction of this case is retained to enter further orders that are proper.

[1]Exhibit 25 is an invoice from Extreme Carpet Care & Restoration dated 5/24/21 for $2,000.

[2]Exhibit 31 entitled "Invoice" shows on its face the handwritten note that Plaintiff was "picking up 5/20/2021". Based on the evidence it is apparent that Defendant preceded with the sandblasting on 5/24/2021 despite being on notice that the Plaintiff intended to pick up the vehicle.

[3]There is no evidence that Plaintiff at any time gave his consent for any subcontracted work to be done nor is it stated in any document.

[4]Defendant's Exhibit #22 entitled "Estimate" has a handwritten notation at the bottom of the document, "Nonrefundable deposit". Defendant's exhibit is a copy, but Plaintiff produced the original document that has no such notation on it.

[5]Exhibit # 31 entitled "INVOICE" has a date of 12/31/2020. An invoice of total charges including storage fees dated in 2020 is nonsensical.

[6]The "estimate" failed to meet the minimum required information pursuant to Fla. Stat. § 559.905. Defendant claims an exception/partial waiver under (5) when the customer leaves the vehicle at the repair shop after hours. Under such scenario, the customer is unavailable to sign because he has left the vehicle for the shop to begin the work upon reopening. The estimate in the case at bar was prepared and SIGNED by the Plaintiff. If the estimate was prepared for Plaintiff's signature and he signed the estimate there is no blanket exception that permits the Defendant from meeting the requirements of Ch. 559, Fla. Stat. because the vehicle had originally been left after hours. Plaintiff thereafter came into the shop, paid the $5,000 and signed the estimate.

* * *

Attorney's fees—Prevailing party—Entitlement—Prevailing defendants' request for attorney's fees is denied where defendants failed to request fee award in any pleading—Request for attorney's fees contained in motion for summary judgment was insufficient to place plaintiff on notice that defendants were claiming attorney's fees

BARNHARDT CONSTRUCTION, LLC, Plaintiff, v. STEVEN C. HILDRETH; SANDRA S. HILDRETH; and CURTIS A. HILDRETH, Defendants. County Court, 5th Judicial Circuit in and for Hernando County, Civil Division. Case No. H-27-2022-CC-000644. February 6, 2024. Barbara-Jo Bell, Judge. Counsel: Jason S. Lambert, Hill Ward Henderson, Tampa, for Plaintiff. Joseph M. Mason, Jr., McGee & Mason, P.A., Brooksville, for Defendants.

ORDER DENYING DEFENDANTS' MOTION TO AWARD ATTORNEYS' FEES

THIS CAUSE came before the Court on Defendant's Motion to Award Attorneys' Fees, and the Court, having reviewed the Motion, heard the argument of counsel, and being otherwise advised in the premises, the Court finds as follows:

Procedural Background

1. On June 17, 2022, Plaintiff Barnhardt Construction, LLC ("Barnhardt") filed its Complaint against Defendants Steven Hildreth, Sandra Hildreth, and Curtis A. Hildreth.

2. On July 13, 2022, the Defendants, through counsel, filed a Motion for Enlargement of Time to Respond to the Complaint.

3. On July 15, 2022, this Court entered an order granting the Motion for Enlargement of Time, and gave Defendants 20 days to respond to the Complaint.

4. Pursuant to the July 15th order, Defendants were required to answer the Complaint on or before August 4, 2022.

5. Defendants never filed a response to the Complaint.

6. On June 27, 2023, Defendants filed a Motion for Summary Judgment.

7. The following day, Barnhardt filed a Notice of Voluntary Dismissal, dismissing its lawsuit with prejudice and withdrawing the lis pendens filed in this action. Barnhardt also released its construction ien that was the subject of this lawsuit.

8. On June 29, 2023, Defendants filed their Motion to Award Attorneys' Fees.

The Claims for Attorneys Fees

9. The Defendants never filed a responsive pleading to the Complaint, and therefore never asserted a claim for attorneys' fees in a responsive pleading.

10. The Defendants also never requested an award of any attorneys' fees in any other document filed in this case, until they filed their Motion for Summary Judgment.

Legal Standard

11. The Defendants seek an award of attorneys' fees pursuant to § 713.29, *Florida Statutes.*

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12. A claim for attorneys' fees, whether based on contract or statute, must be pled. *Stockman v. Downs,* 573 So.2d 835, 837 (Fla. 1991). The failure to plead a claim for attorneys' fees "constitutes a waiver of the claim." *Id.* at 838. Only "complaints, answers, and counterclaims are pleadings pursuant to Florida Rule of Civil Procedure 1.100(a)." *Green v. Sun Harbor Homeowners' Ass'n, Inc.,* 730 So. 2d 1261, 1263 (Fla. 1998) [23 Fla. L. Weekly S438a].

13. "The purpose of the pleading requirement is notice—by pleading a claim to attorney's fees, a party notifies the opposing party of the claim and prevents unfair surprise." *Sardon Found. v. New Horizons Serv. Dogs, Inc.,* 852 So. 2d 416, 421 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1969a]. "The existence or nonexistence of a claim for attorney's fees may often affect the decision whether to pursue, dismiss or settle a claim." *Id.* "For these reasons, a party may not recover attorney's fees unless he has put the issue into play by filing a pleading seeking fees." *Id.* "If not pled, the claim for attorney's fees is waived." *Id.*

14. The only exceptions to this rule are (1) where a party, through conduct or otherwise, waives the requirement that an award of attorneys' fees be pled, or (2) where a motion to dismiss is pending, such that a responsive pleading where a request for attorneys' fees could be pled is not yet required. *See Nathanson v. Morelli,* 169 So. 3d 259, 261 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1579b]; citing *Stockman,* 573 So.2d at 838 and *Green,* 730 So. 2d at 1263.

15. However, Florida's Courts have also held that "[a] motion is not a pleading," and asserting a claim for attorneys' fees in a motion, rather than a pleading cannot result in an award of attorneys' fees. *See Sardon Found.,* 852 So. 2d at 421 (striking an award of attorneys' fees where it was not pleaded but was instead asserted in a pre-trial motion). *See also Lopez v. Bank of America, N.A.,* 153 So.3d 922 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D620a] (holding that mortgagors that failed to request an award of attorney's fees in their answer were not entitled to recover attorney's fees after action was voluntarily dismissed).

16. Moreover, Florida's Courts, including the Fifth District Court of Appeal which is binding on this Court, have specifically recognized that setting forth a claim for attorneys' fees in a motion for summary judgment does not satisfy the requirements of *Stockman v. Downs. See Taylor v. T.R. Properties, Inc. of Winter Park,* 603 So. 2d 1380, 1381 (Fla. 5th DCA 1992).

17. In *Taylor,* a contractor filed a lawsuit to foreclose a construction lien against a property owner and other lienholders on the property. *Id.* at 1380. One of the lienholders answered the complaint but failed to include a demand for attorneys' fees in its answer. *Id.* Later in the litigation, that lienholder filed a motion for summary judgment that did include a request for attorneys' fees. *Id.* The trial court granted the motion and awarded the lienholder its attorneys' fees, and the contractor appealed the fee award. *Id.*

18. On appeal, the Fifth District Court of Appeal first recognized that *Stockman v. Downs* "is the case controlling disposition of the issue whether attorney's fees in a mechanic's lien foreclosure may be awarded to a prevailing defendant in the absence of a request for fees in that defendant's pleadings." *Id.* The appellate court then went on to reverse the award of attorneys' fees, holding that the first time the lienholder raised the issue of attorneys' fees was in its motion for summary judgment and that there was no evidence of waiver of the pleading requirement in the record. *Id.* at 1381. Accordingly, the court concluded that the lienholder had failed to comply with the requirements set forth in *Stockman.*

19. Similarly, in *Vickers v. Malpeli,* a defendant filed an answer to a lawsuit, but failed to include a request for attorneys' fees in her answer. 48 Fla. L. Weekly D594b, 2023 WL 2543466 at *1 (Fla. 6th DCA March 17, 2023). The defendant filed a motion for summary judgment, which did include a request for attorneys' fees, but was never heard by the court. *Id.* Following a non-jury trial, the defendant filed a motion for attorneys' fees, which the trial court denied. *Id.* The defendant appealed, and on appeal, Florida's Sixth District Court of Appeal affirmed the denial of the fee award, finding that the motion for summary judgment was not sufficient to comply with the requirements of *Stockman. See also Am. Exp. Bank Intern. v. Inverpan, S.A.,* 972 So. 2d 269, 271 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D193a](reversing an award of attorneys' fees where party seeking fees failed to plead entitlement and only requested attorneys' fees in its motion for summary judgment).

20. **Accordingly, it is hereby ORDERED and ADJUDGED as follows:**

21. Defendants' Motion for Attorneys' Fees is hereby DENIED.

* * *

Insurance—Personal injury protection—Summary judgment—Motion to strike, as untimely, an affidavit filed in support of insurer's motion for summary judgment is denied—Medical provider was not prejudiced by filing of affidavit almost two months after motion for summary judgment where affidavit was filed six months prior to date set for summary judgment hearing—Summary judgment is entered in favor of insurer where provider did not present any evidence in opposition

COLONIAL MEDICAL CENTER, INC., a/a/o Donald King, Plaintiff, v. USAA GENERAL INDEMNITY COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022-12789-CODL (73). January 16, 2024. Rachel D. Myers, Judge. Counsel: Joseph William Engel Jr., Kimberly Simoes P.A., Deland, for Plaintiff. Nicholas A. Ferreiro, Marshall Dennehey, Tampa, and Oner J. Kiziltan, Marshall Dennehey, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING PROPER PAYMENT AND PLAINTIFF'S MOTION TO STRIKE DEFENDANTS UNTIMELY FILINGS

THIS CAUSE came before the Court for consideration of the Defendant's Motion for Summary Judgment regarding Proper Payment and Plaintiff's Motion to Strike Defendant's Untimely Filings and the Court having reviewed the motions, the entire record, argument of both counsel, and having been sufficiently advised in the premises, it is hereby ORDERED AND ADJUDGED, as follows:

(1) Defendant's Motion for Summary Judgment regarding Proper Payment is **GRANTED;**

(2) Plaintiff's Motion to Strike Defendant's Untimely Filings is **DENIED;**

For the reasons set forth below:

PROCEDURAL HISTORY

Plaintiff is a medical provider whom rendered treatment to Defendant's insured, Donald King. Plaintiff has filed a one count breach of contract claim alleging Defendant refused/failed to timely pay benefits in accordance with the terms of the policy of insurance and Florida Statute §627.736 which is the Florida No-Fault Act.

Defendant filed its Answer and Affirmative defenses and alleged as its Second Affirmative Defense that all dates of service were paid in accordance with the Florida Statutes and the terms and conditions of the Defendant's policy which gives rise to the Motion for Summary present before this court.

Defendant's Motion for Summary Judgment regard Proper Payment was filed May 19, 2023. Defendant incorporated the affidavit of Barbara Hicks into its Motion for Summary Judgment. The affidavit of Barbara Hicks was not filed until July 6, 2023.

The motion was then set for hearing to occur on August 17, 2023. Subsequently, the hearing was cancelled and reset to occur on January

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11, 2024.

Plaintiff timely filed its reply to Defendant's Motion for Summary Judgment on December 21, 2023 in accordance with Florida Rule of Civil Procedure 1.510. Plaintiff's reply alleged Defendant did not properly reimburse the claim for CPT Code 97140 because a Budget Neutrality Adjustment ("BNA") was used to calculate the reduced reimbursement for the services rendered. Additionally, Plaintiff alleged the affidavit of Barbara Hicks was insufficient on the grounds the affidavit was untimely, contained hearsay, and was conclusory.

Subsequently, Defendant filed its Supplemental Memorandum of Law regarding Proper Payment, Budget Neutrality Adjustments, and Limiting Charge and three separate Request for Judicial Notice pertaining to the Plaintiff's BNA argument on January 9, 2024. In response, Plaintiff filed its Motion to Strike Defendant's Untimely Filings on January 10, 2024. Although Plaintiff's Motion to Strike was not set for hearing, the parties agreed to argue Plaintiff's Motion.

FINDINGS OF FACT

1. The Parties are in agreement the only CPT code in dispute is CPT Code 97140 which was billed on multiple dates of service. The parties also agree CPT code 97140 was adjusted and reduced consistently throughout the present claim.

2. CPT Code 97140 was billed on multiple dates of service. Defendant allowed $55.98 for each instance of CPT Code 97140. Defendant then reimbursed eighty percent (80%) for that amount for a total of $44.78 for each instance of CPT code 97140.

SUMMARY JUDGMENT STANDARD

Florida Rule of Civil Procedure, Rule 1.510(a), as Amended April 30, 2021, states "A party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought. The court shall grant summary judgment if the movant shows there is no genuine **dispute** as to any material fact and the movant is entitled to judgment as a matter of law."

The movant "bears the initial responsibility of informing the [court] of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *Morrison v. Quality Transps. Servs.,* 474 F. Supp. 2d 1303, 1307 (S.D. Fla. 2007). To satisfy its burden, the movant "must point out to the Court that there is an absence of evidence to support the nonmoving party's case." *Id.* After the movant has met its burden, the burden of production shifts and the nonmoving party. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id. quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 586 (1986). The nonmoving party cannot merely rely on the allegations or denials of the pleadings, but instead "must come forward with specific facts showing that there is a genuine issue for trial." *Id.* at 1308. The nonmoving party must come forward with affirmative evidence to support its claim. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice, there must be a sufficient showing that the jury could reasonably find for that party." *Morrison* at 1308 quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

FINDINGS OF LAW

1. Having reviewed the Defendant's affidavit and the filings of both parties, this court finds Plaintiff has not been prejudiced by the Defendant filing its affidavit after its Motion for Summary Judgment. There was a period of roughly six months between the filing of the affidavit and the time affixed for hearing for Plaintiff to adequately prepare its response to Defendant's Motion for Summary Judgment regarding Proper Payment.

2.This court finds the affidavit of Defendant's Adjuster Barbara Hicks to be sufficient to meet its burden of production in accordance with Florida Rule of Civil Procedure 1.510.

3. Plaintiff did not present evidence in opposition to Defendant's Motion for Summary Judgment.

4. This court finds no need to rule on Plaintiff's position on "BNA" since there was no argument or evidence regarding "BNA" presented at the hearing. As such, this court does not need to rule on Defendant's three Request for Judicial Notice filed January 9, 2024.

CONCLUSION

Based on the foregoing, Defendant's policy properly elects the fee schedule as required under *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]. Furthermore, Defendant properly reimbursed $44.78 for each instance of CPT code 97140 representing 80% of 200% of fee schedule in accordance with the Florida No-Fault Act and the Defendant's policy of insurance.

Final Judgment in accordance with this order shall be reserved for a later date and scheduled by the parties.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Insurer paid PIP benefits in accordance with statute by paying 80% of fee schedule amount for each bill as received—No merit to medical provider's argument that insurer was required to pay 80% of fee schedule amount for total of all bills received over one-and-half-month period, which would result in additional $0.01 in benefits

SUN LIFE CHIROPRACTIC AND INJURY CENTER, LLC, d/b/a DAVENPORT CHIROPRACTIC & INJURY CENTER, a/a/o Paola Reyes, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 18579 CODL. Division 73. July 22, 2022. Rachel D. Myers, Judge. Counsel: Jefferson Hester, Simoes Davila, PLLC, Ocala, for Plaintiff. Scott Dutton and Katy Melchiorre, Dutton Law Group, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court at the June 30, 2022 hearing on Defendant's Motion for Summary Judgment, and the Court being fully advised, it is **ORDERED and ADJUDGED**, as follows:

1. The subject action involves a claim for Personal Injury Protection ("PIP") benefits filed by the Plaintiff against the Defendant for alleged unpaid PIP benefits.

2. Plaintiff filed a Statement of Particulars which lists all the dates of service of treatment, May 4, 2020 through June 15, 2020, and lists $0.01 owed.

3. Plaintiff's charges for dates of service May 4, 2020 to May 11, 2020 were applied to the deductible at billed amount. The same is reflected in Plaintiff's Statement of Particulars and no issue with these dates of service were raised at the hearing on June 30, 2022.

4. Defendant paid the remainder of Plaintiff's charges at 80% of 200% of the Medicare Part B fee schedule or at 80% of the Workers' Compensation fee schedule.

5. The No-Fault PIP Statute, Fla. Stat. 627.736(4)(b), states that Insurers have 30 days after the insurer receives written notice of a covered loss to issue payment before benefits are overdue. Pursuant to this, Defendant issued payments as the bills were received. Both the policy and the PIP Statute provide for coverage of 80%. *See* Fla. Stat. § 627.736(1)(a). This is not disputed.

6. Bill for dates of service May 5, 2020 through May 14, 2020 were received on May 28, 2020. The total for these dates, which listed on the Explanation of Benefits (EOB), is $1,347.80. Plaintiff did not dispute that this is the correct amount. After the deductible of $724.76, $623.04 in fee schedule amount remains. Plaintiff did not dispute the deductible nor the amount allowed at fee schedule. 80% of $623.04 is

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$498.43. EOB and PIP log reflect that $498.43 was paid.

7. Bill for dates of service June 1, 2020 through June 2, 2020 were received on June 24, 2020. The total fee schedule amount listed on the EOB is $465.46. Plaintiff did not dispute that this is the correct amount. 80% of $465.46 is $372.368. EOB and PIP log reflect that $372.37 was paid.

8. Bill for date of service June 4, 2020 was received on June 24, 2020. The total fee schedule amount listed on the EOB is $273.54. Plaintiff did not dispute that this is the correct amount. 80% of $273.54 is $218.83. EOB and PIP log reflect that $218.83 was paid.

9. Bill for date of service June 9, 2020 was received on July 1, 2020. The total fee schedule amount listed on the EOB is $273.54. Plaintiff did not dispute that this is the correct amount. 80% of $273.54 is $218.83. EOB and PIP log reflect that $218.83 was paid.

10. Bill for date of service June 11, 2020 was received on July 1, 2020. The total fee schedule amount listed on the Reconsideration EOB is $273.54. Plaintiff did not dispute that this is the correct amount. 80% of $273.54 is $218.83. EOB and PIP log reflect that $218.83 was paid.

11. Bill for date of service June 15, 2020 was received on July 14, 2020. The total fee schedule amount listed on the Reconsideration EOB is $424.00. Plaintiff did not dispute that this is the correct amount. 80% of $424.00 is $339.20. EOB and PIP log reflect that $339.20 was paid.

12. As the evidence put forth by Defendant in the EOBs clearly demonstrates how benefits were calculated, there is no question of fact. The EOBs show Defendant paid 80% of the undisputed fee schedule amount for each EOB. Plaintiff produced no evidence that Defendant did not pay in accordance with Florida Statutes or the terms of the policy.

13. Plaintiff's Statement of Particulars rounds up to a cent owed because it lists 80% of the fee schedule for all the dates of service, not taking into account when each bill was received and when each bill would become overdue.

14. To find a cent is owed, as Plaintiff has put forth in the Statement of Particulars, the Court would have to find the Defendant needed to wait past the 30 days prescribed by the PIP statute, after benefits are overdue, to see if by rounding each separate batch of bills, an additional cent would be owed. This is clearly not the intention of the PIP Statute, which specifically lists a time frame for bills to be paid.

15. The Court finds that Defendant's payment of 80% of the total amount of fee schedule on each EOB is proper.

16. The Court finds the Defendant's method of payments of the bills to Plaintiff do not violate the holding in *Hands on Chiropractic PL a/a/o Justin Wick v. Geico General Insurance Co.,* 327 So.3d 469 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a].

17. To the extent that the Court heard argument on De Minimus Non Curat Lex, the Court agrees that de minimus would apply. Plaintiff did not provide any persuasive argument as to why the $0.01 claimed would not be "a trifling amount" and therefore is de minimus. *See Loeffler v. Roe,* 69 So. 2d 331, 338 (Fla. 1953) and *Precision Diagnostic, Inc. v. Progressive Am. Ins. Co.,* 330 So. 3d 32, 35 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2282d]. However, the Court does not have to reach a decision as Defendant paid properly.

18. Therefore it is ORDERED:

a. Defendant's Motion for Summary Judgment is GRANTED.

* * *

Criminal law—Stalking—Constitutionally protected activity—Jury instructions—Defendant charged with cyberstalking police officer by posting harassing message regarding officer on Twitter—State's request for special jury instruction stating that defamation is not protected by First Amendment is denied where proposed instruction would apply civil standard for defamation in prosecution of criminal stalking offense—Posting about police officer is constitutionally protected activity excluded from meaning of "course of conduct" under stalking statute and, absent posting incident, state would not have two incidents of stalking needed for conviction—Stalking charge dismissed

STATE OF FLORIDA, Plaintiff, v. WILLIAM JOHN HARTNETT, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. M22-024028. February 2, 2024. Betsy Alvarez-Zane, Judge. Counsel: Leonard Thompson, Jr. and Andres Perez, Assistant State Attorneys, for Plaintiff. Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., for Defendant.

ORDER

THIS CAUSE, having come to be heard by me on the Defendant's Sworn Motion to Dismiss, filed pursuant to Florida Rules of Criminal Procedure, Rule 3.190, and the Court, being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED, that the Defendant's Motion to Dismiss is hereby **GRANTED** and this Court hereby orders the dismissal of the stalking charge filed against him in the prosecution's Information. This Court also denies the special request for the jury instruction.

AS GROUNDS THEREFORE, this Court makes the following findings of law and fact:

This case involves an *amended* Information filed by The Miami-Dade State Attorneys' Office on January 13, 2023, against Mr. Hartnett. In that Information, the prosecution *alleged* that "on or between August 16, 2022 and December 03, 2022, in the County and State aforesaid, [Mr. Hartnett] did willfully, maliciously and repeatedly follow, harass, or cyberstalk another person, to wit: OFFICER KRISTOPHER CLUTE, in violation of s. 784.048(2), Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." *See* AMENDED INFORMATION. *And see* SWORN MOTION TO DISMISS at paragraph #1.

The basis of this prosecution was stated in the Statement of Particulars that this Court ordered the prosecution to file. In their responsive pleading, the prosecution *alleged* that "on August 16, 2022, the defendant William Hartnett did willfully and maliciously harass or cyberstalk another person, to wit: Officer Kristopher Clute[,] by posting a harassing message on social media. The message read as follows: '@CoralGablesPD CRIMINAL TERRORIST PUSSIE MIGET (sic) CLUTE CANT EVEN PLAY BASEBALL HE HAD TO BECOME A CRIMINAL TERRORIST THAT THREATENS MY LIFE & GETS ALL PIGS IN THE BUILDING TO MAKE FUN OF MY DISABILITIES. WE GOT AWAY WITH KILLING RASHARD BROOKS[1] & CAN GET AWAY WITH KILLING U ANYTIME.' The posting occurred on Twitter and tagged .@CoralGablesPD.' " *See* PROSECUTION'S STATEMENT OF PARTICULARS, ELECTRONICALLY FILED ON MAY 3, 2023, at p. 1 (all caps in original).

On May 26, 2023, Mr. Hartnett filed a Sworn Motion To Dismiss the Stalking charge filed against him by the Miami-Dade State Attorney's Office. In that motion, he noted that "[m]aking complaints directed at the police, or a particular police officer, is conduct constitutionally protected under Fla. Const. art. I, '23 and Fla. Const. art IV,' 1. *See Curry v. State,* 811 So.2d 736, 742 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D485a] (Constitutionally protected activity is not included within the meaning of "course of conduct" for the purposes of Fla. Stat. 784.048 (1)(b))." *See* SWORN MOTION TO DISMISS at paragraph #5.

Additionally, in this sworn motion to dismiss, Mr. Hartnett asserted that the Fourth District Court of Appeals decision in *Curry v. State,* 811 So.2d 736, 742 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D485a]

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protected him from prosecution. *See* SWORN MOTION TO DISMISS at paragraph #7. As the court in *Curry* wrote, "Curry's conduct in this case was clearly knowing, willful, and repeated—and it may even be thought by some as weird and obsessive, with more than a tinge of spite to it—but it did not qualify as a violation of the anti-stalking statute. Viewed objectively, Curry's conduct had a 'legitimate purpose' under section 784.048(1)(a); also, it did not amount to a 'course of conduct,' defined by section 784.048(1)(b), because it [a 'course of conduct'] excludes 'constitutionally protected activity.' " *Id.*

After initially considering this motion at a July 12, 2023, motion hearing, this Court verbally announced on August 10, 2023, that it was denying the motion, as it had determined that the issues raised in Hartnett's motion were issues for a jury to decide. And, but for further litigation and the admissions of Assistant State Attorney Andres Perez at a later hearing on those motions, that is what this Court would have done. But that further litigation, and the hearing which occurred on December 5, 2023, changed the complexion of the case, and it has caused the Court to reconsider its initial ruling denying the sworn motion to dismiss. An explanation of that further litigation and how it affected the Court's view on the sworn motion is explained below:

On September 20, 2023, the prosecution filed a request for special jury instructions. In that pleading, the prosecution sought an instruction that stated the following:

> **Defamation is not protected by the First Amendment of the Constitution of the United States. Defamation occurs if: (1) the Defendant published a false statement about Kristopher Clute to a third party; (2) the statement was made with actual malice; and (3) the falsity of the statement caused injury to Kristopher Clute. Actual malice exists if the statement was made knowing that it was false or with reckless disregard as to its falsity. A statement is defamatory per se when they charge a person with a felony. Terrorism is a felony in the State of Florida. If you find that the Defendant's statement was defamatory per se, then you do not have to find that the Defendant's statement caused injury to Kristopher Clute.**

See STATE'S REQUEST FOR SPECIAL JURY INSTRUCTIONS, at pp. 2-3 (emphasis in the original).

This request by the prosecution led to Hartnett's lawyer to file a responsive motion *in limine* on October 18, 2023. In that responsive motion, Hartnett's counsel noted that "[d]efamation is a civil concept. It is not mentioned in the Stalking statute, *see* 784.048, Fla. Stat., and it would be inappropriate to apply a civil standard in its prosecution of a criminal offense." *See* MOTION *IN LIMINE* at p. 2. Hartnett's counsel also cited to *Lozano v. State,* 584 So. 2d 19, 24 (Fla. 3d DCA 1991), *Pitts v. State,* 473 So. 2d 1370, 1373-1374 (Fla. 1st DCA 1985) and *Chastain v. Civil Service Board of Orlando,* 327 So. 2d 230, 232 (Fla. 4th DCA 1976) for the proposition that such an instruction would create a "false standard" for the criminal offense charged.

A hearing was held on this and several other pending issues on December 5, 2023, beginning at 10:00 a.m. At that time, argument was had with presentations made by both sides. This is where the issue that caused this Court to reconsider its prior ruling occurred. At that time, Assistant State Attorney Andres Perez stated the following:

> So that's why that [the prosecution's proposed jury on defamation] instruction is so crucial to the case. Um ***Otherwise essentially it would be a directed verdict and there'd be no point in having a trial because practically speaking, people know you can criticize cops.***

See RECORDED HEARING at 40:55 (emphasis added).

Counsel for Hartnett immediately pointed out to this Court that "they just conceded why I filed a sworn motion to dismiss . . . They have no case unless they can try to convince a jury that the civil standard applies. And it doesn't, it just doesn't, the state cannot refer to one single case that refers to defamation being a criminal action . . . They're conceding that defamation is improper under stalking. They're saying it's now permissible because we could have charged him with something else that we have not charged him with." *Id.* at 42:20.

As this Court stated at that time in response to the prosecution's request to instruct a jury on the defamation standard, "I'm not convinced about the state's position. Um, and if it's a, I'm not convinced with this argument of the state . . . I'm not, I'm not seeing it the way that the state is arguing, it. It almost seems like I am imposing an external requirement to the elements of stalking." *Id.* at 50:21.

Counsel for Hartnett then stated that "**I appreciate Mister Perez's candor that if you are in fact going to grant this [Hartnett's motion *in limine*] as you should, then you need to reevaluate the defense's sworn motion to dismiss, which your honor had denied on August 10th, 2023.**" *Id.* at 50:55 (emphasis added). Assistant State Attorney Perez then further conceded that "***I agree actually*, because I believe the basis of your honor's ruling** [in denying the sworn motion to dismiss] **was very much in line with what the state is seeking to do here, which is to introduce the defamation concept in order to show that this is not constitutionally protected speech.**" *Id.* at 51:48 (emphasis added).

At that time this Court stated that "I actually have to make a determination on this very crucial point and then from there, we'll move on. I'll either reconsider my order on the motion to dismiss or we'll proceed to trial depending on how I am going to rule . . . Do you [ASA Perez] agree that if you don't, if you're not allowed to have that as an instruction that the jury might come back with, you only have one event of stalking?" *Id.* at 52:10. The prosecution's response to that question, that they could "possibly" find some way to then convict Mr. Hartnett of stalking, is unconvincing to this Court. *Id.* at 53:14.

The request for the special jury instruction is hereby **DENIED**, as this Court finds that the instruction would create a "false standard" for the criminal offense of stalking charged.

As such, after further review of the file, the pleadings, the admissions by and the argument of counsel, this Court reconsiders its previous denial of Hartnett's sworn motion to dismiss, and that motion is hereby **GRANTED**. The State admitted that without the proposed instruction being granted, they would in fact not have the two incidents of staking needed for them to convict Mr. Hartnett. Therefore, this Court hereby orders the **DISMISSAL** of the stalking charge filed against the Defendant, Mr. Hartnett.

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[1]This Court notes that the Rashard Brooks case involved the fatal beating of an individual *by* the police in the Atlanta, Georgia area. *See* https://www.nytimes.com/article/rayshard-brooks-what-we-know.html ("Killed by an Atlanta police officer just weeks after George Floyd's death touched off nationwide protests, Mr. Brooks became a potent symbol").

* * *

Landlord-tenant—Public housing—Eviction—Noncompliance with lease—Landlord cannot proceed with eviction for noncompliance with lease where eviction action was not commenced within 45 days of obtaining actual knowledge of noncompliances and did not give required notice to cure for all noncompliances that could be remedied—No merit to argument that statutory requirements for termination of residential tenancies is not applicable to eviction based on nonrenewal of lease of holdover tenant—Complaint dismissed

GARDEN VISTA PRESERVATION, L.P., Plaintiff, v. TAROLYN REMBER, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-118200-CC-23. Section ND03. Linda Singer Stein, Judge. Counsel: Jorge Torres-Puig, Barfield, McCain P.A., Palm Beach Gardens, for Plaintiff. Michael

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Angelo Tata, Legal Services of Greater Miami, Miami, for Defendant.

ORDER OF DISMISSAL OF CASE

THIS CAUSE, having come before the Court on the Defendant's Motion to Dismiss, and the court having held a hearing on January 12, 2024, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff filed a holdover eviction action against Defendant for alleged "other good cause" as outlined in a May 8, 2023 Notice of Nonrenewal attached to its Complaint. The notice of nonrenewal alleged specific noncompliances which served as the basis for the refusal to renew the lease. The lease agreement attached to the Complaint expired on September 1, 2023. The Complaint was filed on September 12, 2023, which is 127 days after the date of the notice of nonrenewal.

2. Since this property is subsidized, Plaintiff would have to prove the good cause alleged in its notice and complaint in order to evict the tenant.

3. Defendant argued that the action should be dismissed based on Florida Statute 83.56(5)(c), which states that a subsidized landlord waives the right to evict a tenant if it does not file a lawsuit to evict within 45 days of having knowledge of the noncompliance. Specifically, a landlord who waits more than 45 days waives the right to "terminate the rental agreement or bring a civil action based on that non-compliance." *See* Fla. Stat. § 83.56(5)(a).

4. Defendant also asserted that Plaintiff could not proceed with its eviction for unauthorized boarder or changing the locks since no notice to cure was served as required by Florida Statute § 83.56(2)(b).

5. Plaintiff did not give Defendant a Notice to Cure prior to serving the May 8th Notice of Nonrenewal.

6. Plaintiff also did not institute the present action within 45 days of having knowledge of the alleged noncompliances, which constitutes the "other good cause" needed to evict from a subsidized tenancy.

7. Plaintiff argued that Florida Statute § 83.56 is inapplicable because Ms. Rember had become a holdover tenant and it was proceeding with an eviction based not on a termination of the tenancy but based on a nonrenewal and expiration of the lease.

8. The court finds Florida Statute § 83.56 does apply to this action. Plaintiff did not satisfy the statutory requirements of instituting its action within 45 days of obtaining actual knowledge of any material noncompliance and also did not give the requisite Notices to Cure for all noncompliances that could have been remedied.

9. As a result, Defendant's motion to dismiss is granted and the present action is dismissed pursuant to Florida Statute § 83.56(2) and (5).

The trial scheduled for the week of March 4 is cancelled.

* * *

Insurance—Res judicata—Medical provider's second suit against insurer is barred by res judicata where first suit involving same parties, same cause of action, same subject matter, and same claim was dismissed with prejudice

DOC SCHROEDER, INC., a/a/o Lolita Cohen, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 23-CC-102561. Division I. February 19, 2024. Miriam Valkenburg, Judge. Counsel: Marc J. Semago, Tampa, for Plaintiff. S. Nicholas Cruz Encinas IV, Law Office of Gabriel O. Fundora & Associates, Tampa, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION TO DISMISS PLAINTIFF'S COMPLAINT

THIS CAUSE, having come before this Honorable Court for a hearing on Defendant's Amended Motion to Dismiss Plaintiff's Complaint on January 30, 2024. Having considered the motion, argument of counsel, the record, and applicable law, the Court finds as follows:

1. The Plaintiff filed this instant suit in Hillsborough County and served the Defendant on September 14, 2023.

2. Prior to service of this instant lawsuit, the Plaintiff, by and through a separate attorney's office, filed the original lawsuit and served the Defendant on April 26, 2023.

3. The original lawsuit was dismissed with prejudice on October 12, 2023.

4. The Defendant filed an Amended Motion to Dismiss based on this instant lawsuit being a duplicate of the original lawsuit, where *res judicata* has attached.

5. This Court, having reviewed a copy of the original complaint and dismissal with prejudice, finds that this instant lawsuit is barred by the doctrine of *res judicata* because both this instant lawsuit and the original lawsuit involve (1) the same parties, (2) the same cause of action, (3) the same subject matter, and (4) the same claim.

6. The Plaintiff argued that res judicata did not apply, but provided no evidence that res judicata did not apply notwithstanding that the original suit was previously filed and dismissed with prejudice.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that Defendant's Amended Motion to Dismiss Plaintiff's Complaint is hereby **GRANTED**. This case is **DISMISSED** without prejudice.

* * *

Insurance—Evidence—Hearsay—Exceptions—Business records—Striking of insurer's declaration and certification of business records—Inadequacy of declaration and certification

AJ THERAPY CENTER, INC., a/a/o Richard Miguel De Armas, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-033010. February 3, 2024, Melissa C. Black, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DECLARATION AND CERTIFICATION OF BUSINESS RECORDS

THIS MATTER having come before the court on January 24, 204 on Plaintiff's Motion to Strike Defendant's Declaration and Certification of Business Records and Memorandum of Law in Support Thereof. The Court, having reviewed the record, considered the motion, the arguments of counsel, and the applicable law, and being otherwise advised in the premises, finds:

1. On June 29, 2023, Defendant filed its Notice of Filing Second Amended Declaration and Certification of Business Records in support of its Second Amended Motion for Final Summary Disposition/Judgment.

2. In support of Plaintiff's Motion, Plaintiff attached the transcript of the deposition of Defendant's Corporate Representative, Nicolette Martin, conducted on October 4, 2022.

3. Plaintiff's motion asserts that this declaration is deficient, containing primarily inadmissible hearsay. For an affidavit to be admissible, it: [M]ust be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts therein referred to in an affidavit must be attached thereto or served therewith. Fla. R. Civ. P. 1.510(e) (2021).

4. Plaintiff's Motion to Strike Defendant's Declaration and Certification of Business Records is **HEREBY GRANTED**.

* * *

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Civil procedure—Defendant waived objection to court's failure to enter order fixing date for trial and setting date not less than 30 days from service of notice of trial, as required by rule 1.440, where counsel advised court that they were prepared to go to trial at status conference, parties were present and testified at trial, and neither side raised objection to proceeding with bench trial that same day—Motion for reconsideration/rehearing is denied

ALMA ROBINSON, Plaintiff, v. JANET ROBINSON, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO23003291, Division 71. February 1, 2024. Louis H. Schiff, Judge. Counsel: James G. Levin, Boca Raton, for Plaintiff. Chad T. Van Horn, Van Horn Law Group, P.A., Fort Lauderdale, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION/REHEARING

THIS CAUSE came before the Court on Defendant, Janet Robinson's Motion for Reconsideration/Rehearing of this Court's Final Judgment entered on October 4, 2023 (the "Motion"). The Court, having reviewed the Motion and the October 4, 2023 Final Judgment, having considered the record and the applicable law, and being otherwise duly advised in the premises, hereby finds as follows:

This matter involved a dispute between a mother and daughter concerning certain monies the Plaintiff (mother) loaned the Defendant (daughter). A bench trial was held on October 3, 2023. Thereafter, this Court issued a detailed written Final Judgment in favor of Plaintiff, determining that Plaintiff was entitled to damages, court costs, and prejudgment interest. On October 17, 2023, Defendant filed the instant Motion for Reconsideration/Rehearing of this Court's Final Judgment entered on October 4, 2023.

Defendant raises five (5) grounds for reconsideration/rehearing. After careful consideration, the Motion is hereby **DENIED** in its entirety. The Motion is **DENIED** without comment as to the arguments made in subsections (b)-(e) of the Motion. As to subsection (a) of the Motion, concerning the argument that the Court failed to follow the requirements set forth in Florida Rule of Civil Procedure 1.440(c), the Motion is **DENIED** on this basis as well and the Court provides the following detailed reasoning for the denial.

Among the various arguments raised in the Motion, Defendant contends that reconsideration/rehearing is warranted on the basis that the Court failed to follow the requirements set forth in Florida Rule of Civil Procedure 1.440(c). Rule 1.440(c) requires that "[i]f the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial." Additionally, "[t]rial shall be set not less than 30 days from the service of the notice fortrial." Fla. R. Civ. P. 1.440(c). While the Court is mindful and aware of the mandatory nature of the rule, the Court finds that based on the circumstances in this case, Defendant has waived her objection to the requirements of Rule 1.440(c).

The First District Court of Appeal in *Bennett v. Continental Chemicals, Inc.*, 492 So. 2d 724 (Fla. 1st DCA 1986) established the bright line rule in that strict compliance with Rule 1.440 is mandatory. See *Grossman v. Fla. Power & Light Co.*, 570 So. 2d 992, 993 (Fla. 2d DCA 1990). However, as recognized in *Grossman*, less than a year later, the *Parrish* court "receded from that position, finding that automatic reversal is not required in every case where there has not been strict compliance with rule 1.440. Rather, depending upon the circumstances, the mandatory provision of the rule may be waived." *Id.*

As noted in *Parrish,* Rule 1.440(c) is "designed to safeguard the parties' rights to procedural due process." *Parrish v. Dougherty,* 505 So. 2d 646, 648 (Fla. 1st DCA 1987). In *Parrish,* the Court found that appellants had waived the requirements of Rule 1.440 based on their conduct, specifically the record indicated that appellants' attorney was prepared to go to trial, appeared at the trial, and raised no objection to the method by which the case was set for trial. *Id.*

The *Parrish* court further recognized that "*Bennett* did not hold that in every case where a court fails to issue an order setting trial failure to comply with rule 1.440 is automatically reversible error regardless of the circumstances." *Id.* Specifically, the Court determined that "[t]he error may be waived if the aggrieved party appears at trial and raises no objection to the noncompliance." *Id.* "*Bennett* held that because compliance with rule 1.440 is mandatory it is reversible error, when the aggrieved party does not appear or raises an objection to noncompliance with the rule, to compel that party to proceed to trial." *Id.* The *Parrish* court acknowledged that "**[t]he *Bennett* decision was not intended to give nonobjecting litigants who voluntarily proceed with trial a free ride.**" *Id.* (emphasis added).

Here, there was no order of record entered by this Court fixing the date for trial as required by Rule 1.440(c). Notwithstanding, the Court finds that this mandatory provision of the rule has been waived. At the October 3, 2023 conference, counsel advised the Court that they were prepared to go to trial, the parties were present (and testified) at the trial, **and** neither side raised an objection to the Court proceeding with the bench trial that same day. Based on this conduct and the additional circumstances discussed below, the Court finds that Defendant has waived the requirements of Rule 1.440(c).

In this case, the Court recognizes that a status conference was set on October 3, 2023. At that time, the Court asked the parties if they were ready to proceed to trial. Both sides agreed they were ready for trial. Neither party objected to the Court holding a bench trial that same day. The following facts are also relevant and pertinent: (1) the pleadings had been closed as of June 13, 2023—the case was at issue; (2) the docket did not reflect any outstanding discovery or motions pending at the time of the bench trial; and (3) the parties had attempted to resolve their dispute via mediation as evidenced by the Mediation Report filed on September 7, 2023. At the October 3, 2023 conference, counsel confirmed they were ready for trial, the parties/clients were present, neither the attorneys nor the clients objected to the trial, both sides proceeded to trial and presented evidence and testimony, neither attorney made an argument that the trial should not proceed because of outstanding discovery or that they needed more time to gather and prepare evidence/witnesses, and lastly, neither side moved to continue the trial.

Based on the Court's understanding that both sides were ready for trial and as there was no objection by either side or motion to continue made, the Court held the trial. The Court was clear at that time that the matter was proceeding to trial. Neither side objected or moved to continue. Both sides presented evidence and live testimony. Both Plaintiff and Defendant testified. The parties emailed exhibits to the Court's judicial assistant to print for the Court's consideration during the bench trial. After considering the evidence and upon hearing live testimony, the Court issued its ruling in favor of Plaintiff. It is imperative to note that the Court made its initial pronouncement from the bench. At no time during the trial or at the conclusion of the trial or during the Court's oral ruling did Defendant make an argument that there was a violation of Rule 1.440(c). Instead, it appears that Defendant waited until after the outcome of the bench trial to raise this issue for the first time. The Court must reiterate that when asked whether they were ready to proceed to trial, counsel for the parties answered in the affirmative. *The Court tried the case without objection.*

As recognized by the Second District Court of Appeal in *Grossman,* to permit Defendant to proceed through trial, have the Court make a determination on the issues and then seek to raise an objection and argue a violation of the rule (for the first time) in a motion for reconsideration/rehearing would be to permit exactly what the court in *Parrish* was saying should not occur—a free ride. See

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Grossman, 570 So. 2d at 993. Here, this Court was presented with nonobjecting litigants who voluntarily proceeded to trial, and accordingly, and for all the reasons stated herein, the Court finds that the October 4, 2023 Final Judgment must stand.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED that Defendant, Janet Robinson's Motion for Reconsideration/Rehearing is hereby **DENIED**.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Although PIP policy stated that insurer has right to recompute premium based on subsequently obtained information and allow policy to continue, nothing in policy required insurer to exercise that right rather than rescind the policy—Cancellation provision of policy that requires insurer to afford insured an opportunity to pay additional premium before it can cancel policy is not applicable to insurer's rescission of policy for material misrepresentation that occurred when insured failed to disclose existence of household resident

SPINE CHIROPRACTIC CENTER, INC., a/a/o Berry Charles, Plaintiff, v. THE RESPONSIVE AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County, Civil Division. Case No. COINX-22-043825(100). January 17, 2024. Jackie Powell, Judge. Counsel: Josh Costello, Demesmin and Dover, PLLC, Fort Lauderdale, for Plaintiff. Phillip F. Thomas, The Vaccaro Law Firm, Davie, for Defendant.

ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This cause, having come before the Court for hearing on January 5, 2024, for the Plaintiffs' Motion for Summary Judgment and the Defendant's Motion for Summary Judgment, and the Court having reviewed the motions and affidavits, evidence and case law filed by the parties is support of their respective motions, heard the argument of counsel and being otherwise duly advised in the premises, it is hereupon ORDERED AND ADJUDGED as follows:

The action is a claim for PIP benefits and the only pending issue was coverage.

The underlying facts of the matter were undisputed. The subject policy of insurance was initially issued to Berry Charles by The RESPONSIVE AUTO INSURANCE COMPANY (hereinafter "RESPONSIVE") pursuant to an application for insurance signed by himself on October 22, 2021. On page 1 of the application, Berry Charles was asked to "*List all persons 14 years or older, licensed or not, residing with the applicant(s), whether or not they drive/operate the listed vehicle. ... Failure to provide this information may constitute a material misrepresentation, which may result in all insurance coverage being void.*" In response to this question, Berry Charles listed only himself. Additionally, on page 3 of the application, Berry Charles was asked the following questions:

> *Are there any residents of your household that are 14 years or older that have NOT been disclosed on this application.*
>
> *Have you failed to list any drivers such as children away from home or in college, who operate your vehicle(s) at any time. This includes anyone who may be away for military service.*

Berry Charles answered "No" in response to both questions and signed the following declaration attesting to the truthfulness of his answers:

> I have read each of the questions (numbered 1-12) above and answered all questions truthfully. I realized that any incorrect information may constitute a material misrepresentation, which may result in my insurance coverage being voided or my claim denied.

Immediately after the questions on page 3 of the application, Berry Charles signed the following declaration stating:

> I understand this application is not a binder unless indicated as such on this form by the brokering agent. I acknowledge my responsibility to inform the company, by signed endorsement, of anyone in the future that becomes eligible as an operator described above and of any change or use of my vehicle from personal use to business use. I further acknowledge my responsibility to inform the company by signed endorsement of anyone in the future that becomes a resident of my household and eligible for benefits if involved in an accident. I understand that a resident of my household includes but is not limited to anyone who lives in my home, including relatives, friends, tenants, or anyone else who lives at my place of residence, whether licensed to drive or not. I acknowledge my obligation to notify the company of any changes identified in this paragraph within 30 days of such change.

Following the subject accident, Berry Charles admitted for the first time that Delano Domenville did in fact did reside with him on the date of the application. It was also discovered that Delano Domenville had an active driver's license on the date of the application and had his own vehicle. Had RESPONSIVE known that Delano Domenville lived with Berry Charles at the time of policy inception, the policy would have increased by $144.00. It is undisputed that the failure to disclose Delano Domenville on the application was a material misrepresentation. As a result of the material misrepresentation, RESPONSIVE rescinded the policy voiding it ab intio and returned all premiums to Berry Charles.

Plaintiffs argued Defendant's Policy requires the insured shall be given notice of any alleged misrepresentation and an opportunity to cure before any cancellation or rescission of the policy occurs. Plaintiffs further argued RESPONSIVE was required to provide Berry Charles an opportunity to pay the additional premium before it could rescind the policy. In support of its argument, Plaintiffs' cited to RESPONSIVE'S Policy and a number of cases which involved the interpretation of a policy of insurance and application issued by other insurance companies. There were specifically two provisions in RESPONSIVE'S policy, which Plaintiffs claimed supported their argument.

The first provision is found on page 18 of the policy under the section titled **"OUR" RIGHT TO RECOMPUTE PREMIUM**, and states in relevant part:

> *The premium for this policy has been established in the reliance upon the statements made by "you" in the application for insurance. "We" shall have the right to recompute the premium payable for this policy if information material to the development of the final premium is subsequently obtained.*

The second provision relied upon by Plaintiffs is found on page 19, paragraph 3 under the sub-heading **"Termination; A. "Cancellation"**, which states:

> In the event "we" determine that "you" have been charged an incorrect premium for coverage requested in "your" application for insurance, "we" shall immediately mail "you" notice of any additional premium due "us." If within 10 days of the notice of additional premium due (or a longer time period as specified in the notice), "you" fail to either:
>
> a. Pay the additional premium and maintain this policy in full force under its original terms; or
>
> b. Cancel this policy and demand a refund of any unearned premium;
>
> Then this policy shall be canceled effective fourteen days from the date of the notice (or a longer time period as specified in the notice).

The Court finds Plaintiffs' arguments unpersuasive. This exact argument was previously rejected by a Miami Dade County Court in *Ceda Health of South Miami, LLC., v. The Responsive Auto Insurance Company*, 28 FLW Supp. 79a (Miami County Court 2020). Although RESPONSIVE does have a right to re-compute the premium and allow the policy to continue, there is nothing in the policy that requires RESPONSIVE to exercise that right. Instead, RESPONSIVE chose

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to rescind the policy, which it was also permitted to do under the policy and Florida Statute 627.409. The Policy Provisions, which are found on page 17 of the policy under the section titled **"Misrepresentation and Fraud"** states:

MISREPRESENTATION AND FRAUD.

Any claim may be denied or this policy may be void if an "insured":

. . .

A. Conceals or misrepresents any material facts or circumstances concerning this insurance or the subject thereof.

Further, the Court notes that in this matter, RESPONSIVE did not "cancel" the policy. Rather RESPONSIVE "rescinded" the policy. The terms "cancellation" and "rescission" refer to two separate and distinct actions that operate to create different legal consequences. *United Automobile Insurance Company v. Salgado,* 22 So.3d 594, 603 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a]. The term "cancellation" has been defined to mean "the termination by the insured or by the insurer or both of insurance in accordance with the specific terms of a policy." The term "rescission," however, has been defined to mean "[a]nnulling or abrogation or unmaking of [a] contract and the placing of the parties to it in status quo." *Id*. at 604.

Since the policy was not cancelled but rather was rescinded, the policy language relied upon by Plaintiff set out in the Cancellation provisions on page 18-19 of the policy do not apply. *See, Ceda Health of South Miami, LLC.,, supra*. Moreover, an insurance company's alleged failure to rescind a policy in accordance with any cancellation procedures, including the cancellation provisions Plaintiff is relying on in support of its argument, does not preclude or abrogate an insurer's ability to void the policy ab initio. *United Automobile v. Salgado, supra* at 602.

In this matter, the policy was rescinded pursuant to F.S. 627.409 and that section on page 17 of RESPONSIVE'S Insurance Policy which states:

MISREPRESENTATION AND FRAUD.

Any claim may be denied or this policy may be void if an "insured":

. . .

A. Conceals or misrepresents any material facts or circumstances concerning this insurance or the subject thereof.

The rescission provision in RESPONSIVE'S policy is clear and unambiguous, and is line with the language of F.S. 627.409. After having discovered Berry Charles made a material misrepresentation in the application, there is nothing in that section of the policy that required RESPONSIVE to provide her an opportunity to pay the additional premium before RESPONSIVE could rescind the policy. It is well-settled that a Court is powerless to re-write a contact to make it more reasonable or advantageous for one of the contracting parties. *Hill v. Deering Bay Marina Ass'n, Inc.,* 985 So.2d 1162, 1166 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1654d]; *Fernandez v. Homestar at Miller Cove, Inc.,* 935 So.2d 547, 551 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1756a]. Therefore, pursuant to F.S. 627.409 and the terms of the policy, RESPONSIVE was well within its right to rescind the subject policy based upon the incorrect and false statements made by Berry Charles at the time of the application.

The Court further finds that the other Insurance Company Policies and applications for insurance are substantially different than RESPONSIVE'S policy and application, and therefore, those cases cited by Plaintiffs were inapplicable to this matter.

Accordingly, based on the forgoing, it is hereby ***ORDERED*** and ***ADJUDGED*** that Plaintiffs' Motion for Summary Judgment be and the same is hereby ***DENIED***. It is further hereby **ORDERED** and **ADJUDGED** that Defendant's Motion for Final Summary Judgment be and the same is hereby ***GRANTED***.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Insurer is entitled to award of attorney's fees where medical provider did not provide evidence to support allegation that it had written assignment of benefits and refute insurer's lack-of-standing defense, and provider did not voluntarily dismiss action until after expiration of safe harbor period—No merit to provider's argument that insurer's motion for sanctions was itself frivolous, entitling provider to award of fees, because insurer failed to assert lack of standing as affirmative defense—Provider was on notice of insurer's position on its standing from outset of case, and insurer made it abundantly clear that lack of standing was issue in case

PARK PLACE SURGERY CENTER, LLC, a/a/o Joseph Hatley, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE17007847. Division 81. August 10, 2021. Phoebee Francois, Judge. Counsel: Matthew Emanuel, Landau & Associates, P.A., Sunrise, for Plaintiff. Siona Bieber and Jessica Martin, Roig Lawyers, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTITLEMENT AND DENYING PLAINTIFF'S MOTION FOR SANCTIONS

THIS CAUSE having come before the Court upon Defendant's Motion for Entitlement to Attorney's Fees and Costs Pursuant to Fla. Stat. § 57.105, and Plaintiff's Motion for Sanctions Pursuant to Fla. Stat. § 57.105, and the Court, having heard argument of counsel on May 4, 2021, reviewed the record, and been fully advised in the premises, finds as follows:

BACKGROUND, PROCEDURAL HISTORY FACTS

Plaintiff filed its Complaint on April, 19, 2017 alleging a dispute over Personal Injury Protection ("PIP") benefits. The only document attached to the Complaint is titled "Visit Charge Detail", which reflects a $0 balance is due and owing. The Complaint alleges that Plaintiff performed all statutorily required conditions precedent to entitle it to recover benefits. ***See*** **Plaintiff's Complaint, ¶10**. Plaintiff's Complaint specifically states "[c]laimant equitably assigned to Plaintiff and/or also executed a written assignment of benefits, assigning to Plaintiff certain benefits payable pursuant to the policy of insurance issued by Defendant." ***See*** **Plaintiff's Complaint, ¶11**. The Complaint also states that"[p]ursuant to said assignment, Plaintiff gave notice of the covered losses and Plaintiff made demand for PIP benefits for reasonable, necessary and related medical treatment." ***See*** **Plaintiff's Complaint, ¶12**. On July 20, 2017, Defendant denied Plaintiff's allegations as to standing, and denied that Plaintiff complied with all conditions precedent. ***See*** **Defendant's original Answer**. Defendant asserted the affirmative defenses of proper payment, exhaustion, and inconvenient venue.

The records reflects that on April 8, 2020, Defendant filed several pleadings directed at the issue of Plaintiff's lack of standing, which included a Motion for Leave to Amend Defendant's Answer and Affirmative Defenses, seeking leave to assert two (2) additional affirmative defenses:

> Plaintiff's Pre-suit Demand Letter failed to comply with Florida Statute 627.736(10). Under Fla. Stat. § 627.736(10)(b)(1), a demand letter must include "a copy of the assignment giving rights to the claimant if the claimant is not the insured." In this instance, the Plaintiff failed to provide an assignment of benefits from the Insured or list damages that are due and owing. The intent of Fla. Stat. § 627.736(10) is to provide the insurer with sufficient notice of outstanding medical bills or risk potential litigation. Plaintiff's statutory demand letter pursuant to Fla. Stat. §627.736 (10) is defective and has failed to meet the necessary condition precedent to filing this action. *See Fountain Imaging of West Palm Beach, LLC (a/a/o Charlotte Jennings) v. Progressive Express Insurance*

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Company, 14 Fla. L. Weekly Supp. 614a (15th Judicial Circuit Appellate, March 30th, 2007); *Sun Coast Health Care Center #1, Inc. (Pamela Segal) v. Progressive Express Insurance Company*, 12 Fla. L. Weekly Supp. 803c.

Plaintiff lacks standing to bring the instant lawsuit as it failed to submit to the Defendant a properly executed Assignment of Benefits from Joseph Hatley.

***See* Defendant's Motion for Leave to Amend**.

In conjunction with its Motion for Leave to Amend, also on April 8, 2020, Defendant filed a Motion to Compel the Deposition of Plaintiff and served a Request for Production to Plaintiff, seeking, among other things:

A copy of all documents indicating JOSEPH HATLEY assigned his rights and benefits to Plaintiff to file suit against State Farm.

A copy of all documents purporting to represent a valid assignment of benefits regarding JOSEPH HATLEY and Plaintiff.

Any and all documents signed by the subject patient/insured, at the instruction or request of Plaintiff, or contained in the Plaintiff's medical and billing files).

***See* Defendant's Request for Production, #4, #5, and #6.**

Plaintiff failed to respond to Defendant's Request for Production, did not file a motion for protective order, and did not at any time seek a motion for enlargement of time to respond to these discovery requests propounded by Defendant. Notably, Plaintiff also failed to respond to Defendant's previous Request for Production served in March 2019.

Also on April 8, 2020, Defendant properly served a 21 day safe-harbor letter to Plaintiff and its counsel enclosing its proposed Motion to Dismiss and Motion for Sanctions pursuant to Fla. Stat. § 57.105, asserting Plaintiff lacked standing in this lawsuit. To wit:

(1) State Farm has not received from Plaintiff any assignment of benefits.

(2) There is no assignment of benefits attached to Plaintiff's purported pre-suit demand letter.

(3) There is no assignment of benefits attached to Plaintiff's Complaint.

Plaintiff took no action within the 21 day safe harbor period; Plaintiff did not dismiss the case, amend its pleadings, or provide any documentation or information to refute Defendant's allegations, through discovery or otherwise. As a result, on May 4, 2020, Defendant timely filed its Motion to Dismiss and for Sanctions pursuant to Florida Statute section 57.105 with the Court.

The parties appeared before the Court on September 21, 2020 for a Court ordered status conference. On the eve of the status conference, and over four (4) months after Defendant filed its Motion for Sanctions, Plaintiff served its own Motion for Sanctions pursuant to Florida Statute 57.105, asserting that Defendant's Motion to Dismiss and for Sanctions, which was now long expired and already filed with the Court, was frivolous. The crux of Plaintiff's argument is that Defendant's Motion for Sanctions is without merit because the defense of lack of standing was not pled as an affirmative defense.

The Court finds it also notable, that at the September 21, 2020 status conference, the Court ordered Plaintiff to respond to outstanding discovery within twenty (20) days and directed the parties to schedule prompt hearings on pending Motions, acknowledging that the issue of standing would be heard prior to the issue of exhaustion. The record reflects that instead of complying with the Court's order, on October 12, 2020, Plaintiff filed its Motion for Sanctions Pursuant to Florida Statute 57.105 with the Court and then issued a Voluntary Dismissal on October 20, 2020, which was prior to Defendant obtaining a hearing date on its Motion for Leave to Amend. On October 28, 2020, Defendant timely moved for entitlement to attorney's fees and costs after Plaintiff voluntarily dismissed this action.

DEFENDANT'S MOTION FOR ENTITLEMENT PURSUANT TO F.S. 57.105 SANCTIONS

Pursuant to Florida Statute § 57.105(1),

(1) Upon the court's initiative or motion of any party, the court **shall** award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party **in equal amounts by the losing party and the losing party's attorney** on any claim or defense **at any time during a civil proceeding or action** in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense **when initially presented to the court or at any time before trial**:

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

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

(Emphasis added).

"In general, when plaintiff voluntarily dismisses action, defendant is prevailing party for purpose of awarding attorney's fees." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (1990). "A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party." *Id.* There need not be a determination of liability on the merits in order for a party to pursue fees under Fla. Stat. § 57.105, and such a motion is cognizable where a voluntary dismissal has been taken. *Tobin v. Bursch*, 934 So. 2d. 493, 2005 WL 714050 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D873a]; *Davis v. Bill Williams Air Conditioning and Heating, Inc.*, 765 So.2d 114 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1403b]. *See also Pino v. Bank of N.Y.*, 121 So. 3d 23 (Fla. 2013) [38 Fla. L. Weekly S78a] ("If the plaintiff does not file a notice of voluntary dismissal or withdraw the offending pleading within twenty-one days of a defendant's request for sanctions under section 57.105, the defendant may file the sanctions motion with the trial court, whereupon the trial court will have continuing jurisdiction to resolve the pending motion and to award attorney's fees under that provision if appropriate, regardless of the plaintiff's subsequent dismissal.").

An assignment of PIP benefits "is not merely a condition precedent to maintain an action. . . [r]ather, it is the basis of the claimants standing to invoke the process of the court in the first place." *Progressive Express Ins. Co. v. McGrath*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. "For a medical care provider to bring an action for PIP benefits, the insured must assign his or her right to such benefits under the policy to the medical care provider." *Id. See also Ins. Corp. of New York v. M & J Health Center, Inc.*, 13 Fla. L. Weekly Supp. 682a (11th Jud. Cir. App., April 4, 2006) (Trial court abused its discretion in failing to award fees pursuant to section 57.105, Florida Statutes, because an equitable assignment is specifically prohibited in personal injury protection claims).

The record in this case establishes that Plaintiff had every opportunity to provide evidence to prove its allegation that it had a written assignment of benefits, and refute Defendant's defense that Plaintiff lacked standing, or to dismiss this case during the safe harbor period and avoid fees. It failed to do so. Plaintiff chose to ignore Defendant's efforts to engage in discovery and failed to provide any documentation or evidence that it possesses or ever possessed a valid written assignment of benefits conferring standing upon Plaintiff to proceed with this lawsuit. "If, as here, a plaintiff chooses to voluntarily dismiss its suit at a point when no record evidence supports the factual or legal basis for . . . claim, then a defendant is entitled to recover attorney's

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fees and costs expended in challenging the action." *Nodal v. Infinity Auto Ins. Co.*, 50 So.3d 721 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2869a].

The language of Fla. Stat. § 57.105 is mandatory: "**shall** award fees." (Emphasis added). *Insurance Corporation of New York v. M & J Health Center, Inc. a/a/o Julio Ruiz*, 13 Fla. L. Weekly Supp. 682a (Fla. 11th Cir. App. Ct. 2006). *See ACN Baromedical LLC a/a/o Ulysse Saint-Jilus v. State Farm Mut. Auto. Ins. Co.*, 27 Fla. L. Weekly Supp. 95a (Fla. Broward Cty. Ct. 2018) (insurer was entitled to fees and costs when the medical provider failed to provide an assignment of benefits to refute the defense of lack of standing until after it voluntarily dismissed complaint). "Because the policy of encouraging voluntary dismissals and the termination of unnecessary litigation would be severely disserved were more time and labor spent after dismissal in an effort to show that the case would or would not have resulted in judgment for the defendant, the showing is to be based on the record made and discovery completed as of the moment of the dismissal." *Englander v. St. Francis Hosp., Inc.*, 506 So.2d 423 (Fla. 3d DCA 1987).

Upon review of the record as of the date of filing of Plaintiff's voluntary dismissal, this Court finds that Plaintiff and/or its counsel knew or should have known that the subject lawsuit was not supported by the material facts necessary to establish the claim. Furthermore, Plaintiff had 21 days to dismiss this case during the safe harbor period, and upon that period's expiration, Plaintiff's continued litigation in this case was done at its own peril.

PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO FLA. STAT. §57.105

Plaintiff asserts that Defendant was required to assert lack of standing as an affirmative defense. Without having an order entered on Defendant's Motion for Leave to Amend, and without having pled lack of standing as an affirmative defense in its original answer, Plaintiff argues that Defendant's Motion to Dismiss and for Sanctions pertaining to this issue is frivolous.

However, under Florida Statute § 57.105(1), the Court may award sanctions "**at any time during a civil proceeding or action** in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial." (Emphasis added). Further, as to the defense of standing, Florida Courts have ruled that, while standing may not be raised for the first time on appeal, a defendant does not necessarily need to raise the defense of standing only by means of an affirmative defense. *See Schuster v. Blue Cross and Blue Shield of Fla., Inc.*, 843 So.2d 909 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D505a] (finding that, despite no affirmative defense of standing pled, the issue of standing was denied by the outset; *Cutler v. U.S. Bank Nat'l Ass'n*, 109 So.3d 224 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2251a] (holding that the Cutlers' allegations in their Motion to Dismiss pertaining to lack of standing were sufficient to bring the issue to the attention of the trial court, despite having no affirmative defense pled and not seeking leave to amend to include standing as a defense). "The pertinent question is whether the issue was raised at the trial court, not how it was raised." *Maynard v. Fla. Bd. of Educ.*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D176a].

Plaintiff and the Court were on notice of Defendant's position pertaining to Plaintiff's lack of standing from the outset of this case. Defendant took the position that Plaintiff lacked standing through its responses to discovery and in its denials to the Complaint, as asserted in its original Answer. Furthermore, prior to dismissal, Defendant moved to amend its Answer to include lack of standing as an affirmative defense and made it abundantly clear by its pleadings and its Motion for Sanctions that lack of standing and invalid demand were issues presented in this case.

It is therefore **ORDERED AND ADJUDGED as follows:**

· Defendant's Motion for Entitlement to Reasonable Fees and Costs is **GRANTED** pursuant Fla. Stat. §57.105. The Court reserves jurisdiction to determine the amount of reasonable fees and costs to be awarded to Defendant and to determine the responsibility of payment of Plaintiff versus Plaintiff's counsel.

· Plaintiff's Motion for Sanctions Pursuant to Florida Statute §57.105 is **DENIED**.

* * *

Civil procedure—Discovery—Defendant ordered to produce sales contracts redacted to prevent disclosure of personal information of third-party buyers and list of its employee salespersons and managers

LEE AMENYA, et al., Plaintiff, v. TRANSCONTINENTAL CAR USA CORP., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21065057. Division 48. September 12, 2023. Order of Clarification, Filed October 10, 2023. Jennifer Wigand Hilal, Judge. Counsel: Jerard C. Heller, The Law Offices of Jerard C. Heller, Tallahassee, for Plaintiff. Avi M. Zwelling, Boca Raton, for Defendant.

ORDER ON PLAINTIFFS' MOTION TO COMPEL BETTER RESPONSE TO REQUEST FOR PRODUCTION

THIS CAUSE came before the Court on August 21, 2023, upon Plaintiffs' Motion to Compel Better Response to Request for Production (the "Motion to Compel"), and the Court having examined same, heard argument of counsel via Zoom, reviewed documents and case-law submitted, and being otherwise fully advised in the premises, it is thereupon:

ORDERED AND ADJUDGED that the Motion is hereby GRANTED in part and DENIED in part, as follows:

1. Prior to the Hearing on the Motion to Compel, Defendant, TRANSCONTINENTAL withdrew its "General Objections" and its specific objections to the requests in paragraphs 1, 7, 8, 9, 11, 12, 13, 15, 18, 19, 23, and 25 of Plaintiffs' Request for Production. As such, the Motion to Compel is granted as to these paragraphs.

2. With respect to the requests contained in paragraph 2 of Plaintiffs' Request for Production, the Court grants in part and denies in part. The Defendant shall produce all sales contracts for the period of July 22, 2018 through July 22, 2021, however they should all be redacted to prevent any personal information of the third party buyers from being turned over. If it is found that personal information is needed for a particular contract, the parties should come before the Court to make the request.

3. With respect to the requests contained in paragraph 3 of Plaintiffs' Request for Production, the Court denies Plaintiffs' Motion and sustains the Defendant's objections.

4. With respect to the request contained in paragraph 4 of the Plaintiffs' Request for Production, the Court limits same and orders the Defendant to produce for the period of July 22, 2018 through July 22, 2021.

5. With respect to the requests contained in paragraphs 5 and 6 of Plaintiffs' Request for Production, the Court limits same and orders the Defendant to produce a list of its employees and non-employee salespersons and managers for the period of July 22, 2018 through July 22, 2021, to include names and last known addresses for each.

6. With respect to the request contained in paragraph 16 of Plaintiffs' Request for Production, the Court denies Plaintiffs' Motion and sustains the Defendant's objections.

7. With respect to the request contained in paragraph 17 of Plaintiffs' Request for Production, the Court grants Plaintiffs' Motion and overrules the Defendant's objections.

8. Defendant shall produce documents as ordered herein within 15 days of the date of this Order at Defendant's place of business or at

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such other location as agreed to by the Parties.

ORDER OF CLARIFICATION

THIS CAUSE came before the Court on Defendant's Motion for Reconsideration and/or Clarification of Order on Plaintiffs' Motion to Compel Better Responses to Request for Production (the "Motion"), and the Court having examined same and Plaintiffs' Opposition to same, and being otherwise fully advised in the premises, it is thereupon:

ORDERED AND ADJUDGED that the Motion is hereby GRANTED in part and DENIED in part, as follows:

1. Defendant's request for Reconsideration is Denied and Defendant's Request for Clarification is Granted as follows:

2. With respect to the requests contained in paragraph 2 of Plaintiffs' Request for Production, the Court clarifies the Order as follows: The Defendant shall produce all bills of sale contracts (whether financed or cash purchases) for the period of July 22, 2018 through July 22, 2021, however they should all be redacted to prevent any personal information of the third party buyers from being turned over, aside from name and phone numbers. If it is found that personal information is needed for a particular contract, the parties should come before the Court to make the request.

3. Plaintiff's counsel is prevented from using the information obtained through discovery provided by Defendant to solicit (directly or indirectly) other clients.

4. Defendant shall produce the documents as ordered herein within 15 days of the date of this Order at Defendant's place of business or at such other location as agreed to by the Parties.

* * *

Landlord-tenant—Rent—Motion to determine—Timeliness

4TH AVE LAND HOLDINGS, LLC, d/b/a ZONA VILLAGE, Plaintiff, v. HALANA BLACKSHEAR, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24005293. Division 53. February 19, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DETERMINE RENT

The Defendant's Motion to Determine Rent is DENIED as untimely. See *Stephens-Williams v. Johnson*, 181 So.3d 577 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D141a] (request to determine rent filed six days after service was untimely; request must be filed no later than 5 days after service of process).

* * *

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Proposals for settlement are not permitted in claims filed under FCCPA—Motion to strike is granted

BRADLEY REANO, Plaintiff, v. SPECIALIZED LOAN SERVICING, LLC, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2023-CC-2556. February 22, 2024. Wayne Culver, Judge. Counsel: Bryan A. Dangler and Shawn Wayne, The Power Law Firm, for Plaintiff. Joseph Apatov, McGlinchey Stafford, for Defendant.

ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION TO STRIKE PROPOSAL FOR SETTLEMENT

THIS CAUSE came before the court during a hearing on February 20, 2024, regarding the Plaintiff's Emergency Motion to Strike Proposal for Settlement or Alternatively Motion for Extension of Time to Respond to Proposal for Settlement, and the Court having reviewed the motion together with the record, heard argument from counsel, and being otherwise fully advised in the premises, finds the following:

1. This action arises out of alleged violations of the Florida Consumer Collection Practices Act, Fla. Stat. §559.72 ("FCCPA").

2. The provisions of Fla. R. Civ. P. 1442(d), Fla. Stat. §768.79(3), and/or the inherent authority of this Court, provide authority for this Court to consider and grant the relief sought by the Plaintiff.

3. This Court is persuaded by the litany of cases cited by the Plaintiff where multiple courts throughout the state have concluded that proposals for settlements are not applicable to and are invalid in claims filed under the FCCPA. *Clayton v. Bryan*, 753 So.2d 632 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D505a]; *Townsend v. Asset Acceptance Corp.*, 12 Fla. L. Weekly Supp. 189a (6th Cir. App. Pinellas. Co. Fla. 2004); *Barnes v. Rittenhouse,* 15 Fla. L. Weekly Supp. 919c (Fla. Polk Cty. 2006); *Tamborello v. Radiology Assoc. of Clearwater, LLC, and Receivable Mgmt. Group, Inc.*, 31 Fla. L. Weekly Supp. 322a (Fla. Hills. Cty. 2023); *Bartle v. Allied Interstate, LLC*, 25 Fla. L. Weekly Supp. 517a (Fla. 5th Jud. Cir. 2017).

It is therefore **ORDERED AND ADJUDGED** that:

1. The Plaintiff's Emergency Motion to Strike Defendant's Proposal for Settlement is hereby **GRANTED**.

2. The Proposal for Settlement served by the Defendant in this cause is hereby declared to be invalid and ineffective and is stricken from these proceedings.

3. Pursuant to the above ruling, the Plaintiff's alternative request for an enlargement of time to respond to the Defendant's proposal for settlement is hereby deemed moot.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Extrajudicial activities—Gifts—A judge may attend an event hosted by a non-partisan business organization featuring a speech by the Attorney General—Judge may accept a complimentary ticket to event from non-lawyer, though disclosure may be required

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-01. Date of Issue: January 29, 2024.

ISSUES

1. May a judge attend an event featuring the Attorney General hosted by a non-partisan organization?

ANSWER: Yes.

2. May the judge accept a ticket to the event from a non-lawyer that will not appear before the judge?

ANSWER: Yes, but disclosure may be required.

3. May a judge attend future events hosted by the same non-partisan organization?

ANSWER: The Committee is unable to provide guidance on events that this organization may or may not hold in the future.

The Committee is unable to comment on hypothetical future events.

FACTS

The inquiring judge was invited by a non-lawyer to attend an event hosted by a "non-profit, non-partisan business membership-based organization." The specific event will feature a speech by the Attorney General.

The inquiring judge asks three questions:

1. Am I able to accept the ticket as a gift and disclose it (value is $65.00)?

2. If I am not able to accept the ticket as a gift, if I pay the $65.00 to the person, would I be able to attend?

3. Based on the foundation's vision/mission statement, am I able to go to events put on by this foundation?

DISCUSSION

In Fla. JEAC Op. 1995-19 [3 Fla. L. Weekly Supp. 302b], the inquiring judge asked whether the judge "and several other judges may accept complimentary $250.00 dinner tickets to attend the American Jewish Committee Dinner." We explained that "[s]ince the dinner is an '. . . activity devoted to the improvement of the law, the legal system or the administration of justice,' the majority of the Committee believes that you may accept the complimentary ticket and attend the dinner with the understanding that you comply with the gift reporting requirements of Canon 6."

Our understanding of the event described by the inquiring judge is that the organization is non-partisan and it is not a fundraising event. So our response is the same as it was in our earlier opinion. The inquiring judge may attend the event and accept the gift. If the inquiring judge receives more than $100 in gifts from the person or entity giving the gift, the inquiring judge must report the gift as required by Canon 6. We note that in Fla. JEAC Op. 1995-19 [3 Fla. L. Weekly Supp. 302b], the Committee recommended that the inquiring judge pay for the ticket or otherwise offer to reimburse the person or entity providing the ticket.

Finally, the Committee is unable to provide guidance on events that this organization may or may not hold in the future; our authority to issue advisory opinions is limited to specific conduct that an inquiring judge or candidate is contemplating. *In re: Comm. on Stds. of Conduct for Judges*, 327 So. 2d 5 (Fla. 1976).

REFERENCES

In re: Comm. on Stds. of Conduct for Judges, 327 So. 2d 5 (Fla. 1976)
Fla. Code of Judicial Conduct, Canon 6
Fla. JEAC Op. 1995-19

* * *