Volume 31, Number 2, June 30, 2023

FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 51-95

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **INSURANCE—ASSIGNEE'S ACTION AGAINST INSURER—CONDITIONS PRECEDENT—FAILURE TO COMPLY—REMEDY. A county court judge granted an insurer's motion to dismiss which asserted, specifically and with particularity, that the plaintiff failed to comply with the mandatory appraisal provision of the underlying policy, a condition precedent to suit. The court certified the following questions to the district court: 1. Is a complaint filed by a plaintiff alleging satisfaction of, or waiver of conditions precedent, sufficient to survive a motion to dismiss when the defendant specifically and with particularity denies its satisfaction or waiver in a motion to dismiss? 2. Is the motion to dismiss stage the appropriate stage to analyze whether a condition precedent has been fulfilled, or is it more appropriately addressed at summary judgment or trial where evidence may be presented?** *NUVISION AUTO GLASS, LLC v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. County Court, Ninth Judicial Circuit in and for Orange County. March 31, 2023. Full Text at County Courts Section, page 83a.*

- **CONDOMINIUMS—CONSTRUCTION DEFECTS—DAMAGES—APPORTIONMENT OF FAULT. In an action seeking damages for construction defects, the court found that the defendant general contractor, by signing permit applications and receiving permits, had assumed a non-delegable duty to comply with applicable construction laws and to supervise, direct, manage, and control construction work. Because the general contractor's duty was non-delegable, it was directly liable for any breach of that duty and apportionment of fault among any other entities involved in the construction project was not applicable.** *SUMMER KEY CONDOMINIUM ASSOCIATION, INC. v. D.R. HORTON, INC.—JACKSONVILLE. Circuit Court, Fourth Judicial Circuit in and for Duval County. November 14, 2022. Full Text at Circuit Courts-Original, page 59c.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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

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Bold denotes decision by circuit court in its appellate capacity.

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INSURANCE (continued)

LICENSING

REAL PROPERTY

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TRAFFIC INFRACTIONS

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TABLE OF CASES REPORTED

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* * *

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Volume 31, Number 2
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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Implied consent warning—Consequences of refusal—Claim that suspension for breath test refusal was invalid because licensee was not advised that he would be subject to increased penalties for refusal if he had previously been fined for refusing breath test after being suspected of boating under influence was not preserved for appellate review where issue was not raised before hearing officer—Moreover, hearing officer found that licensee was advised that his license would be suspended for 12 months for refusal or 18 months if he had previously refused, and this warning was sufficient

JOSEPH SAUCER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2022-AP-21. Division AP-A. March 17, 2023. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen, for Petitioner. Michael Lynch, Assistant General Counsel, DHSMV, for Respondent.

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

The hearing officer found as follows:

> On June 11, 2022, Jacksonville Sheriff's Officer Miller responded to 1000 Hammond Blvd. in Duval County, Florida to investigate a traffic crash with injuries. When Ofc. Miller arrived, she observed a Chevrolet Silverado pickup truck blocking the middle lanes. While directing traffic, fire and rescue officials advised her of an individual in the back of an ambulance who was being very belligerent. Ofc. Miller went to investigate the belligerent individual, who was later identified as the Petitioner. Upon Ofc. Miller's appearance before the Petitioner, the Petitioner grew very aggravated and combative with fire and rescue officials. Ofc. Miller was close enough to the Petitioner to detect that he had a distinct odor of alcoholic beverages emanating from his breath.
>
> When attempting to exit the ambulance, the Petitioner stumbled and was unable to keep his balance. He continued to be aggressive and spoke with a mumbled speech pattern. Ofc. Miller then searched the Petitioner found a small bottle of an alcoholic beverage in one of his pockets. She then placed the Petitioner in the back of her patrol car. When she placed the Petitioner in the back of a patrol car, Ofc. Miller smelled the odor of an alcoholic beverage that was not present in the vehicle prior to the entrance of the Petitioner.
>
> Sometime thereafter, Ofc. Durham of the Jacksonville Sheriff's Office arrived on the scene. When Ofc. Durham arrived, he spoke with a witness to the crash. The witness conveyed that he was inside of his residence when he heard a collision. He then went outside and to the Chevrolet Silverado pickup truck that was blocking the middle lanes and observed the Petitioner behind the wheel, unconscious. The witness also smelled the odor of alcohol coming from the Petitioner's vehicle.
>
> Office Durham then went to speak with the Petitioner. Officer Durham escorted the Petitioner to the front of his patrol vehicle to discuss what happened in the crash. As they were walking to Ofc. Durham's patrol vehicle, the Petitioner walked with a visible sway that required officer Durham to assist him while walking to ensure the Petitioner did not fall. The Petitioner advised that he did not know what happened and cannot explain any of the circumstances surrounding the crash. During his interaction with the Petitioner, Ofc. Durham was able to observe that Petitioner's eyes were watery, his eyelids were droopy, and there was a strong odor of alcoholic beverages emanating from his breath. Moreover, the Petitioner spoke with a very mumbled and heavily slurred speech pattern. Further, the Petitioner's movements were also very slow and lethargic. At that point Ofc. Durham advised Petitioner that a DUI investigation was starting and Ofc. Durham informed the Petitioner of his constitutional rights under Miranda.
>
> Ofc. Durham asked the Petitioner how much he had to drink, and the Petitioner responded, "not enough." On a scale of 1 to 10, where zero is sober and 10 is being too drunk to stand, Petitioner indicated he was at a "4." The Petitioner then refused to participate in field sobriety exercises and was ultimately arrested based on the totality of the circumstances. He was then taken to the Duval County Jail where he was read Florida's Implied Consent warning but refused to submit to a breath test.
>
> . . .
>
> After consideration of the foregoing, I conclude, as a matter of law, that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if he refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

As his only ground for relief, Petitioner argues the suspension is invalid because he was not properly informed of the consequences he would face if he refused to consent. Specifically, Petitioner argues he was not informed that he would be subject to an increased penalty for refusal if he had previously been fined for refusing to submit to a test pursuant to section 327.35215, Florida Statutes.

Effective October 1, 2021, the Florida Legislature amended the implied consent warning to also inform individuals that they would be subject to increased penalties if they had previously been fined under section 327.35215(1) Florida Statutes. That section deals with the penalties for failing to submit to a test after being suspected of boating under the influence.

Based on the hearing officer's findings, Petitioner knew his license would be suspended for twelve months for a refusal or eighteen months if he had previously refused. This warning was sufficient.[1] *See generally Dep't of Highway Safety and Motor Vehicles v. Nader,* 4 So. 3d 705, 709 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D657e] (when an officer asks a driver to take a required test, suspension not invalid unless the driver was misled). Further, Petitioner did not make this argument before the hearing officer, so it is not preserved for review.

Accordingly, the Petition is **DENIED.** The Petitioner's Motion for Oral Argument is DENIED. (WALLACE, FELTEL, and FAHLGREN, JJ., concur.)

[1]Petitioner does not allege that he has a prior arrest or conviction for boating under the influence or that he had previously been fined under s. 327.35215 (1) as a result of his refusal to submit to a blood, breath, or urine test in a boating under the influence investigation. He only argues that any deviation from the implied consent warning renders the suspension unlawful.

* * *

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

ZACHARY PULITZER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 21-000027-AP. UCN Case No. 522021AP000027XXXXCI. March 28, 2023. Petition for Writ of Certiorari for relief from a final administrative order of the Department of Highway Safety and Motor Vehicles. Counsel: Keeley R. Karatinos, for Petitioner. Kathy A. Jimenez-Morales, for Respondent.

(**PER CURIAM**.) Petitioner, Zachary Pulitzer, seeks certiorari review of a final administrative order, Findings of Fact, Conclusions of Law and Decision, entered on August 27, 2021 by the hearing officer for the State of Florida Department of Highway Safety and Motor Vehicles (hereafter, "DHSMV"). This Court has appellate jurisdiction pursuant to Art V § 5(b), Fla. Const., Fla. Stat. 322.31, Fla. Admin. Code R. 15A-6.019, and Fla. R. App. P. 9.030(c). Following review, we affirm the decision of the lower tribunal.

STATEMENT OF FACTS

On July 26, 2021, Petitioner, Zachary Pulitzer, was the subject of a traffic stop on suspicion of driving under the influence. Petitioner was placed under arrest for driving under the influence and subsequently transported to the DeSoto County Jail. At the facility, Petitioner refused to submit to a breath analysis test. Petitioner signed an implied consent warning apprising him of the consequences for refusing to provide a breath sample. Much of Petitioner's concern involves the alleged "conflict" between the time entries in the documentary evidence and the narrative sequence of events in the same.

Pursuant to Fla. Stat. § 322.2615(a), the Department of Highway Safety and Motor Vehicles suspended Petitioner's driving privileges. Petitioner requested a formal review, and a hearing was held on August 23, 2021. The hearing officer affirmed the suspension of the Petitioner's driving privileges by final administrative order dated August 27, 2021.

STANDARD OF REVIEW

Fla. Stat. § 322.31 provides a right of review for the final orders and rulings of the DHSMV when the department denies, cancels, suspends, or revokes such license. The appellate court shall review the decision "in the manner and within the time provided by the Florida Rules of Appellate Procedure only by a writ of certiorari issued by the circuit court in the county wherein such person shall reside, in the manner prescribed by the Florida Rules of Appellate Procedure." *Id*.

The Supreme Court of Florida, in *City of Deerfield Beach v. Vaillant,* 419 So.2d 624 (Fla. 1982), held that where full review of administrative action is given in the circuit court as a matter of right, the circuit court must determine: (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.

ANALYSIS

Petitioner's sole argument for review is whether competent, substantial evidence supports a finding that Petitioner's implied consent warning and subsequent refusal to submit to a breath analysis test was sufficiently incidental to his arrest, as required by Fla. Stat. §§ 316.1932, 322.2615. *See* Pet. Writ of Cert. at 1, 5, 6.

First, the requirements of procedural due process pursuant to the United States Constitution, as well as the Florida Constitution, are fair notice and a reasonable opportunity to be heard. *Housing Authority of City of Tampa v. Robinson,* 464 So.2d 158,164 (Fla. 2d DCA 1985). "[T]here is . . . no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met." *Hadley v. Department of Administration,* 411 So.2d 184, 187 (Fla.1982). These are flexible concepts to be discerned from the facts of each case. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

While Petitioner does not dispute whether due process was accorded to him, this Court notes that a notice of hearing does not appear on the appellate record. However, Petitioner admits that "Petitioner requested a formal review, which was timely held on August 23, 2021." Pet. Writ of Cert. at 6. The hearing officer's Findings of Fact, Conclusions of Law and Decision, signed on August 27, 2021 also states that "[t]he hearing was held as noticed on August 23, 2021 at 9:00 am" with counsel for Petitioner present. Thus, the Court must conclude that due process was accorded to Petitioner.

Second, whether the essential requirements of law have been observed hinges upon the lower tribunal's application of the correct law. *Haines City Community Development v. Heggs,* 658 So.2d 523, 531 (Fla. 1995) [20 Fla. L. Weekly S318a]. A deviation from the essential requirements of law entails a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id*.

Pursuant to Fla. Stat. § 316.1932(1)(a) (emphasis added):

> "[t]he chemical or physical *breath test must be incidental to a lawful arrest*. . .[t]he person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle. . ."

The hearing officer applied the correct law when the issue on appeal was addressed at the hearing on August 23, 2021:

> Motion #1: To invalidate the suspension of the driver license of Petitioner based on an improper implied consent warning. Specifically, the Petitioner was read the Implied Consent prior to arrest. (See DDL #6 & DDL #8).
>
> Ruling: Denied. The officer's Arrest Report (DDL #5) was entered into evidence without objection. The arrest report contains details of the timing of the arrest and the actions taken afterwards to include transportation to the jail, prior to the reading Implied Consent warning (DDL #8).

In making this ruling, the hearing officer concluded that the law enforcement officer's narrative sequence of events: (a) the Petitioner's arrest on SW Highway 17, (b) the transportation to the DeSoto County Jail, (c) the reading of the Implied Consent Warning, and (d) the Petitioner's subsequent refusal; was sufficient to overcome any conflict with the time entries on the documents submitted by law enforcement. Other jurisdictions have arrived at the same conclusion using a narrative sequence of events. *See Labuda v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 208a (Fla. 7th Jud. Cir. Ct. 2012); *see Soles v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Jud. Cir. Ct. 2008); *see Jones v. Dep't of Highway Safety & Motor Vehicles,* 3 Fla. L. Weekly Supp. 534c (Fla. 7th Jud. Cir. Ct. 1995). Thus, the hearing officer concluded that the implied consent warning and subsequent refusal was incidental to a lawful arrest. We conclude that the lower tribunal applied the correct law.

Third, whether the administrative findings and judgment are supported by competent substantial evidence demands an honest look at the evidence. *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a]. The evidence cannot be untruthful or nonexistent. *Id*. Competent, substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957).

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In making a ruling on "Motion #1," the hearing officer referred to DDL #5 (DeSoto County, Florida Officer's Arrest Report (Probable Cause Affidavit)), DDL #6 (DeSoto County Shemin Office Influence Report), and DDL #8 (Implied Consent Warning: State of Florida). Pursuant to Florida law, such documentary evidence as submitted by law enforcement is broadly considered "self-authenticating" and shall be in the record for consideration by the hearing officer. Fla. Stat. § 322.2615(2)(b); *see also* Fla. Admin. Code R. 15A-6.013(2). Notwithstanding the lack of testimony to corroborate the narrative sequence of events, the evidence is admissible on its own and forms a sufficient basis of fact upon which the hearing officer based its ruling in the Findings of Fact, Conclusions of Law and Decision, as entered on August 27, 2021.

DISPOSITION

Affirmed. (SHERWOOD COLEMAN, GEORGE JIROTKA, and PATRICIA A. MUSCARELLA, JJ.)

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Breath test—Evidence regarding issues breath test operator had getting Intoxilyzer to go into start mode and with radio frequency interference, all of which were successfully resolved, does not satisfy licensee's burden to demonstrate unreliability of breath test results—No merit to argument that statute requiring law enforcement to forward results of any breath or blood test to Department of Highway Safety and Motor Vehicles within five days after issuing notice of suspension also requires that law enforcement submit documents related to detection of RFI and that failure to do so constitutes a due process violation—Statute does not clearly require submission of RFI material—Even if statute required that RFI material be sent, law enforcement's failure to do so cannot be considered willful given vagueness of statute, and statute clearly provides that failure to submit materials within five days does not affect department's ability to consider evidence submitted at or prior to hearing—Lawfulness of stop and arrest—Finding that stop was lawful was supported by competent substantial evidence—One officer's testimony that licensee was driving without headlights and fellow officer's testimony that licensee was driving without taillights are not hopelessly in conflict—No merit to argument that officers lacked probable cause for arrest because majority of indicia of impairment were observed after DUI investigation began

AARON HOPKINS, Petitioner, v. STATE OF FLORIDA and DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-8073. Division F. March 10, 2023. Counsel: Keeley Rae Karatinos, Karatinos Law, PLLC, Dade City, for Petitioner. Elana J. Jones, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JENNIFER GABBARD, J.) **THIS CAUSE** is before the Court on Petitioner's Amended Petition for Writ of Certiorari filed November 4, 2020. Petitioner seeks to quash the order upholding the suspension of his driving privilege arguing that the record lacks competent, substantial evidence that there was reasonable suspicion to justify the stop or initiate the DUI investigation. Petitioner also claims the breath test results should be excluded because the breath test operator failed to dissipate the effects of multiple readings of radio frequency interference (RFI) before he provided samples for analysis. Further, Petitioner claims that law enforcement's failure to provide the Department of Highway Safety and Motor Vehicles (the "DHSMV") with documents related to the RFI violated his due process rights. The Petition must be denied because competent, substantial evidence supports that an objective basis for the stop existed, and section 322.2615(2)(a), Florida Statutes, expressly states that failures to provide required documents within five days of the issuance of the administrative suspension do not preclude the hearing officer from considering any evidence submitted at or prior to a formal review hearing.

JURISDICTION

Jurisdiction to review a decision of the DHSMV upholding a driver's license suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. Therefore, this Court has jurisdiction to review the petition.

STANDARD OF REVIEW

On a petition for certiorari, which challenges a decision by an administrative agency such as the DHSMV, the circuit court's review is limited. The court may only determine whether procedural due process was afforded, whether the essential requirements of law were observed, and whether there was competent, substantial evidence supporting the findings and judgment. *Dep't of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084,1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. A reweighing of the evidence is not permitted upon review by the circuit court. *Id.* at 1085-86. The circuit court may deny the petition or grant it and quash the order being reviewed. However, the court cannot order the lower tribunal to enter any contrary order. *Tynan v. Dep't of Highway Safety and Motor Vehicles,* 909 So, 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a].

PROCEDURAL HISTORY

On July 26, 2020, Petitioner was arrested for driving under the influence ("DUI") and taken to the New Port Richey Police Department. Petitioner provided breath samples, which were above the legal limit of 0.08 g/210L. As a result, Petitioner's driving privilege was administratively suspended for six months.

Petitioner requested a formal review hearing, which was held September 2, 2020. Officers Dennison, who conducted the traffic stop, and Pennell, who conducted the DUI investigation, testified at the hearing. After the evidence was presented, Petitioner moved to set aside the suspension based on a lack of competent, substantial evidence. More specifically, Petitioner claimed a lack of evidence showing that law enforcement possessed reasonable suspicion for the traffic stop or probable cause to arrest. In addition, Petitioner argued that the breath test results were unreliable based on instances of RFI. In the proceeding below, Petitioner argued that Officer Pennell, who conducted the breath tests, did not demonstrate sufficient knowledge of the machine's operation to get an accurate reading. The hearing officer considered the evidence, the law, the arguments of counsel, and entered an order upholding the suspension.

FACTS

On July 26, 2020, Officer Dennison of the New Port Richey Police Department saw Petitioner's vehicle at an intersection with its taillights out. Officer Dennison initiated her emergency lights and siren, but Petitioner did not immediately pull over. Several blocks and a bridge-crossing later, Petitioner stopped. Petitioner provided his driver's license, but not his insurance information. Because the car was a rental, Petitioner was unable to provide its registration. During this interaction, Officer Dennison noted that Petitioner's speech was slurred. Fellow officer Pennell arrived shortly thereafter, in response to Officer Dennison's call for backup. He conducted a DUI investigation. He observed the same initial indicators of impairment that Officer Dennison had. When Petitioner refused to perform the requested field sobriety exercises, Officer Pennell placed Petitioner under arrest for DUI.

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Petitioner was then asked to submit to a breath test, which he ultimately agreed to do. The breath test was delayed because the breath test machine needed to be restarted and by radio frequency interference caused by Officer Pennell's cell phone.[1] After the RFI was cleared and completing the required observation period, Officer Pennell successfully administered the breath test. The two results obtained revealed a breath alcohol level of 0.176 and 0.184 g/210 L. Drivers are presumed impaired at 0.08 g/210 L.

LEGAL ANALYSIS

Petitioner seeks to invalidate the suspension of his driver's license on several grounds. In order to have a valid driver's license suspension based on an unlawful blood or breath alcohol level of .08 or higher, the preponderance of the evidence must show that:

> 1. the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; and
>
> 2. the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 g/210L or higher as provided in section 316.193.

See §322.2615(7)(a)1-2, Fla. Stat. Petitioner contends that his breath test results were unreliable because the breath test machine had a variety of issues the night it was used on him. The breath test operator, Officer Pennell, admitted that he had some issues with the machine, that he received assistance from other officers to resolve these issues, and that he did not discover what caused the issues. More specifically, the breath test machine initially was not in standby mode and would not start a test. After receiving advice from the officer that certifies the breath test machine, Officer Pennell did a restart of the machine by turning it off and back on. After the restart, the machine worked as intended. Thereafter, Officer Pennell received notice that there was RFI, which was resolved prior to the two breath test results obtained from Petitioner. Ultimately, Officer Pennell obtained breath test results of 0.176 and 0.184 g/210 L.

To the extent Petitioner contends the RFI and alleged operator error caused the results to be unreliable, it is Petitioner's burden to demonstrate their unreliability. *Velte v. Dep't of Highway Safety and Motor Vehicles,* Case No. 12-CA-016995 (Fla. 13th Jud. Cir. Oct. 4, 2013) [21 Fla. L. Weekly Supp. 235a] (absent evidence showing machine was malfunctioning at the time of the breath test, hearing officer does not depart from essential requirements of law in upholding license suspension). *See also Aaron Brewster v. Florida Dept. of Highway Safety & Motor Vehicles,* 14-CA-1897 (Fla. 13th Jud. Cir. July 27, 2015). Other than Officer Pennell's testimony as to the initial issues he had getting the machine to go into start mode and the RFI, which were all successfully resolved, Petitioner did not provide any evidence to cast doubt on the results or otherwise show that the machine was not operating properly.

Petitioner also alleges that his due process rights were violated when Officer Pennell deliberately concealed the instances of RFI that the machine detected before Petitioner's breath test was performed. Petitioner contends the RFI message is a "result" under section 322.2615(2)(a), Florida Statutes, which must be provided to the Department before a hearing, and, failing that, requires invalidation of the suspension. Neither Petitioner nor the Department provided any authority that defines "results" as used in this statute. Instead, each relies upon the statute's language.

Section 322.2615(2)(a), Florida Statutes requires law enforcement to forward to the Department, within five days after issuing the notice of suspension, a specific list of items, including the "results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit." *Id.* The statute never uses the term "radio frequency interference" or references the forwarding of materials related to RFI. However, section 322.2615(2)(a) provides that the failure of the officer to submit the materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing."[2]

Petitioner contends that law enforcement deliberately did not provide the documents showing the RFI, thereby causing Petitioner's due process right to be violated. Therefore, Petitioner argues that this court should grant the writ. Again, the statute does not specifically reference the forwarding of documents related to the detection of RFI. For the sake of argument, if this court construes the statute as Petitioner would have it, law enforcement's failure to provide the documents related to the RFI cannot be considered willful or deliberate because the statute is not clear that they were intended for inclusion. Officer Pennell's testimony did not demonstrate that he willfully did not forward these documents. Rather, it showed that he did not think they were relevant or that it was required by the statute. Moreover, the statute clearly provides that "the failure of any officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the Department's ability to consider any evidence submitted at or prior to the hearing." §322.2615(2)(a), Fla. Stat. Accordingly, failure to forward the documents related to the RFI did not constitute a due process violation. *See Richardson v. Dep't of Highway Safety & Motor Vehicles,* 21 Fla. L. Weekly Supp. 299a (Fla. 9th Cir. Ct. Dec. 10, 2013) (holding that the absence of the breath test print card is not a basis to invalidate a suspension); *Runyon v. Dep't of Highway Safety & Motor Vehicles*, 10 Fla. L. Weekly Supp. 588a (Fla. 13th Cir. Ct. June 13, 2003)(holding that the absence of the video evidence and traffic citation were insufficient grounds for invalidation).

Petitioner also contends that the Department lacked competent, substantial evidence to find that the law enforcement officers had a legal basis for stopping Petitioner, or probable cause for the arrest. Petitioner argues that portions of the officers' testimony are hopelessly in conflict because one officer saw the vehicle operating without headlights and the other officer saw the vehicle operating without taillights. Petitioner also points to the officers' observations of signs of intoxication up to and around the DUI investigation, arguing that the majority of the signs of impairment were observed after the investigation began and that the officers lacked probable cause as a result. The Department lacks competent, substantial evidence when evidence is hopelessly in conflict, to the point where the hearing officer's decision could have resulted from the flip of a coin. *Wiggins v. Florida Dept. of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1172 (Fla. 2017) [42 Fla. L. Weekly S85a] (stating that neutral video evidence directly conflicted with and refuted the officer's testimony); *Florida Dept. of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1086 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] (stating that documented inconsistences regarding the time of petitioner's arrest, nearly one day apart, and the absence of testimony to determine which documents were correct, supported a finding that the hearing officer lacked competent substantial evidence). Here, the testimony of one officer does not flatly contradict or totally refute the testimony of the other. The officers provided live testimony, and the hearing officer had the opportunity to weigh the testimony and the documents provided by law enforcement, as well as judge the credibility of the witnesses and evidence. This amounts to competent, substantial evidence that the initial stop and subsequent arrest were lawful.

It is therefore **ORDERED** that the Amended Petition for Writ of Certiorari is **DENIED** in Tampa, Hillsborough County, Florida, on

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the date imprinted with the Judge's signature.

[1]Initially, the breath test machine was not operating properly. Officer Pennell had his cell phone in the breath testing room to call for assistance with the machine. He learned that he simply needed to restart the machine by turning it off and back on.

[2]In this case, the documentation was considered by the hearing officer as it was submitted by the defense.

* * *

Appeals—Dismissal—Failure to comply with court order

CNB WAREHOUSE MANAGEMENT LLC, Plaintiff, v. CITY OF FORT LAUDERDALE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22016936. Division AP. March 27, 2023.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated February 7, 2023. Appellant was directed by this Court to file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. Appellant has failed to comply with this Court's February 7, 2023, Order.

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

* * *

Appeals—Dismissal—Failure to comply with court order

ROLLAND JEAN, Plaintiff, v. BROWARD COUNTY, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22016998. Division AP. March 27, 2023.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated February 7, 2023. Appellant was directed by this Court to file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. Appellant has failed to comply with this Court's February 7, 2023, Order.

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

* * *

MICHAEL MORELL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No: CACE22-015725(AW). March 30, 2023. Petition for Writ of Certiorari for review of a decision rendered by the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles. Counsel: Leonard Feuer, West Palm Beach, for Petitioner. Michael Lynch, Orlando, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition, Response, Reply, Appendix, and the applicable law, without oral argument, the Petition for Writ of Certiorari is hereby **DENIED** on the merits. (BOWMAN, KOLLRA, and WEEKES, JJ., concur.)

* * *

LAKESHORE MOBILE HOME PARK, LLC, Plaintiff, v. TOWN OF PEMBROKE PARK FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22013999. Division AP. March 27, 2023.

STIPULATION & ORDER OF DISMISSAL W/PREJUDICE

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the Stipulation of Dismissal with Prejudice, dated March 23, 2023. Upon review of the stipulation and Court file, this Court finds as follows:

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

* * *

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Volume 31, Number 2
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CIRCUIT COURTS—ORIGINAL

Child custody—Deceased parent—Temporary custody of minor children by extended family—Temporary custody of minor children whose mother is deceased awarded to maternal grandmother—Father ordered to have no contact with children because of conditions detrimental to welfare of children—Paternal grandparents entitled to supervised visitation with children—Children referred to Department of Children and Family Services for critical services

NORMA NOHEMI ALONSO, Petitioner, and JUAN NAJERA-SANTANA, Respondent. Circuit Court of the Second Judicial Circuit in and for Gadsden County. Case No. 2023-DR-000143, Family Law Division. April 7, 2023. David Frank, Judge. Counsel: T. Alexander Richmond, Legal Services of North Florida, Inc., for Plaintiff. Derrick McBurrows, Tallahassee, for Respondent.

ORDER GRANTING PETITION FOR TEMPORARY CUSTODY BY EXTENDED FAMILY AND REFERRAL TO DCF FOR SERVICES

THIS CAUSE came before this Court for a hearing on April 5th, 2023, on Petitioner's Amended Petition for Temporary Custody by Extended Family. Both parties were represented by counsel. The Court, having reviewed the file and based on the matters currently before the Court, and by agreement of the parties, makes these findings of fact and reaches these conclusions of law:

The Court has jurisdiction over the subject matter and the parties.

The Minor Children at issue in this matter are:

NAME: D.O.B.

[Editor' note: Name and D.O.B. are redacted]

[Editor' note: Name and D.O.B. are redacted]

The Petitioner, Norma Alonso, is the Maternal Grandmother of the Minor Children, and currently resides with the children at [Editor' note: Address redacted].

The mother of the minor children, Adelaida Alonso, is deceased.

Respondent/Father, Juan Najera-Santana agrees with the petition and that the Petitioner should have temporary custody of the Minor Children.

Pursuant to §751.05(2), Fla. Stat. (2022), it is in the best interest of the Minor Children for the Petitioner to have temporary custody.

A transition plan is not required for the best interests of the Minor Children prior to restoring full custody.

The Petitioner did not request the establishment of child support.

It is therefore, ORDERED AND ADJUDGED that:

TEMPORARY CUSTODY

The Petitioner is granted temporary custody of the Minor Children until further order of the Court.

The Petitioner shall have all the rights and responsibilities of a legal parent over the Minor Children.

The Petitioner, pursuant to this Order, shall have full power to exercise all the rights and powers set forth in Chapter 751, Florida Statutes (2022).

The Petitioner is authorized to make all reasonable and necessary decisions for the minor children, including but not limited to:

Consent to all necessary and reasonable medical and dental care for the child, including nonemergency surgery and psychiatric care;

Secure copies of the children's records, held by third parties, that are necessary for the care of the child, including, but not limited to: medical, dental, and psychiatric records, birth certificates and other records; and educational records;

Enroll the children in school and grant or withhold consent for the child to be tested or placed in special school programs, including exceptional education; and

Do all other things necessary for the care of the Minor Children.

VISITATION WITH MINOR CHILDREN

Respondent/Father, Juan Najera-Santana, shall have no contact with the Minor Children until further order of the Court, due to existing conditions that are detrimental to the welfare of the minor children.

It is in the best interest of the minor children for the paternal grandparents, Juan Najera-Cervantes and Marcela Najera, to exercise visitation with the minor children according to the following specified visitation schedule:

Beginning on April 15, 2023, until May 15, 2023, paternal grandparents shall be entitled to supervised visitation, every other Saturday, from 12:00 p.m. to 5:00 p.m. Said supervised visitation will be supervised by Nohemi Alonso and conducted at [Editor' note: Address redacted]. If the designated supervisor is not available, an appropriate location and supervisor shall be chosen by the Petitioner.

Beginning on May 20, 2023, until June 19, 2023, paternal grandparents shall be entitled to supervised visitation, every Saturday, from 12:00 p.m. to 5:00 p.m. Said supervised visitation will be supervised by Nohemi Alonso and conducted at [Editor' note: Address redacted]. If the designated supervisor is not available, an appropriate location and supervisor shall be chosen by the Petitioner.

After June 19, 2023, paternal grandparents shall be entitled to regular, unsupervised, visitation with the minor children every Saturday from 12:00 p.m. to 5:00 p.m.

In addition to the above specified visitation scheduled, the Petitioner is encouraged to facilitate additional reasonable visitation between the paternal grandparents and Minor Children, at the discretion and availability of the Petitioner.

OTHER PROVISIONS GOVERNING CUSTODY

Petitioner shall take all reasonable and necessary steps to facilitate a positive relationship between the minor children and the paternal family.

Any relocation of Minor Children must comply with the provisions of § 61.13001, Florida Statutes.

The Court reserves jurisdiction to modify and enforce this Order for Temporary Custody.

The Respondent/Father may petition the Court to modify or vacate this Order at any time.

The Court may modify this Order if the Parties consent or it is in the Minor Children's best interest.

This Order shall be vacated upon a finding that the Parent is fit parents, or by consent of the parties; however, the Court may require the parties to comply with provisions approved in the Order which are related to a reasonable plan for transitioning custody to the parent or parents before terminating the Order.

REFERRAL OF MINOR CHILDREN TO THE DEPARTMENT OF CHILDREN AND FAMILIES FOR CRITICAL SERVICES BY COPY OF THIS ORDER

Whereas the Florida Department of Children and Families Office of Child Welfare coordinates In-Home Services designed to keep children safe with their own families whenever possible to do so. In-home services are intended to support families with strengthening caregiver protective capacities while at the same time implementing in-home, agency directed and managed safety plans.

Whereas the department's child welfare program works in partnership with six regions, 17 community-based care lead agencies and seven sheriff's offices to provide child protective investigations,

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prevention services, and case management services in their local communities for children who are at risk of or have been abused, neglected, or abandoned.

Whereas In-Home Protective Services permit the child to remain in the family setting with safety plan services in place. Safety plan services include, but are not limited to, supervision and monitoring, stress reduction, behavior modification, crisis management, and parenting assistance.

Whereas the children are, at a minimum, in ***critical*** need of grief counseling, physical health services, other mental health services, financial assistance and case management, and educational services, *see* Gadsden County Sheriff's report for Case No. GCSO22O-FF001712.

IT IS FURTHER ORDERED that

The two minor children identified above are REFERRED to the Department of Children and Families for the provision of services pursuant to its statutory obligations and responsibilities.

* * *

Civil procedure—Case management—Motion to modify trial term is denied—Case does not qualify for treatment as complex litigation—Parties' decision to conduct limited discovery during six months that case has been pending does not constitute good cause for modification of trial term

STARESA SMITH, as Personal Representative of the Estate of WILLIE MAE SMITH, Deceased, Plaintiff, v. RIVERCHASE OPERATIONS, LLC, d/b/a RIVERCHASE HEALTH AND REHABILITATION CENTER, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-686. April 13, 2023. David Frank, Judge. Counsel: William Dean, Ford, Dean & Rotundo, P.A., North Miami Beach, for Plaintiff. James B. Morrison, West Palm Beach, for Defendant.

ORDER DENYING JOINT MOTION TO MODIFY TRIAL TERM

This cause came before the Court on the parties' joint motion to modify the trial term, and the Court having reviewed the motion and court file, and being otherwise advised in the premises, finds

This 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.

Our Florida Supreme Court's directives on active differential case management require trial court judges "To maximize the resolution of all cases. . .to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown." Florida Supreme Court Administrative Order No. AOSC21-17, Amendment 2, *In Re: Covid-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts*, November 4, 2021. See also the Judicial Management Council's draft Final Report Workgroup on Improved Resolution of Civil Cases.

The case has been pending since October 25, 2022. ***Despite having six months to litigate this case, the parties complain that "only limited discovery has been completed."*** The days when continuances might be granted where the parties sat on a case without explanation are over. The decision to only conduct limited discovery is squarely on the parties, not the Court, or anyone else. It does not constitute ***good cause*** for a modification of the trial term. A year to get this case to trial is plenty.

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED.

* * *

Civil procedure—Motion for modification of order setting pretrial conference and jury trial granted given pendency of court-ordered mediation—Continuance—Court notes that fact that attorney has prepaid vacation planned is not good cause for continuance of trial without additional factors being present—Further, a plaintiff's difficulty in getting discovery responses from defendant is not good cause for continuance where plaintiff has not brought motion to compel discovery before the court for hearing

CYNTHIA ROBERTS and MAX ALLEN ROBERTS, individually and as husband and wife, Plaintiffs, v. GADSDEN COUNTY, FLORIDA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2022CA000632. March 31, 2023. David Frank, Judge. Counsel: Andrei Antohi, Fonvielle Lewis Messer & McConnaughhay, Tallahassee, Plaintiff. Jason C. Taylor, The Krizner Group, Tallahassee, for Defendant.

ORDER ON PARTIES JOINT MOTION FOR MODIFICATION OF COURT'S ORDER SETTING PRETRIAL CONFERENCE AND JURY TRIAL

THIS CAUSE, having come before the Court on the Parties Joint Motion for Modification of Court's Order Setting Pretrial Conference and Jury Trial and the Court having reviewed the Motion, the court file, and being otherwise duly informed, it is

ORDERED and ADJUDGED that the motion is GRANTED IN PART.

First, a few words of caution to the parties. The Court is concerned that the tone and content of the motion reflects a misunderstanding of the new post-active case management environment in which we operate today.

First, the fact that an attorney has a vacation planned, in and of itself, is not good cause for the continuance of a trial. That is true whether the opposing parties think it's a good thing or not. Instead, a party seeking a continuance of a trial based on an attorney having a prepaid vacation would have to address the following factors: 1) the exact dates of the trip (not provided here), 2) whether the attorney is the lead counsel in the case, 3) how many other attorneys are in that attorney's law firm, 4) what unique characteristics of the case make it untenable for another attorney in the firm to step in at an early stage, 5) how long the case has been pending and 6) how many delays have already occurred.

Next, there is reference to plaintiff having difficulty getting discovery responses from the defendant. Here, there would not be good cause for a continuance unless the party seeking discovery brought a motion to compel to the Court for hearing or ruling immediately when the dispute arose and, of course, after a meaningful good faith effort to confer and resolve the dispute directly. The court file indicates the discovery was served with the complaint on September 30, 2022. To this day there has been no attempt to call up a motion to compel.

Finally, a plaintiff is the master of her case. She decides when to file the lawsuit. If important evidence has not yet come to fruition,

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then it might be best to wait until it is available. Regardless, the progress of an injured plaintiff's recovery from injury, or the dates a medical office has provided for future surgeries, do not dictate a court's case management scheduling. The bottom line is that, today, once a lawsuit is filed, the parties will be actively managed. The days when attorneys could decide or agree to pause the progress of a case, look for a more convenient later trial date, or just let a case sit, regardless of the reason, are over in Florida.

The Court assures the parties that it will fix problems with discovery and other delay issues. But it cannot do so if it is not made aware that they are happening. Today, parties who cannot get information and evidence because of an opposing party's non-compliance with court rules and court orders, but do nothing to address the problem, will more likely be ordered to trial without the information before they are given a continuance.

That is the environment in which we operate today.

Regarding the "opportunity to mediate," the parties were referred to court ordered mediation on March 20, 2023, and they have several months to complete it.

Accordingly, the trial of this case will be re-set from July 2023 to September 2023; not to November 2023 as requersted.

* * *

Civil procedure—Non-binding arbitration—Request that court reconsider its referral of case to non-binding arbitration because case is not "at issue" is denied

STEVEN VENCLAUSKAS, Plaintiff, v. B AND T FENCING, INC., Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2020-CA-000422-AXXX-XX. Marcy 29, 2023. David Frank, Judge. Counsel: Steven E. Sellers, Quincy, for Plaintiff. Matthew S. Scanlan and Davisson F. Dunlap, III, Dunlap & Shipman, P.A., Tallahassee, for Defendant.

ORDER DENYING B&T FENCING, INC.'S MOTION FOR RECONSIDERATION OF ORDER REFERRING CASE TO MANDATORY NON-BINDING ARBITRATION

This cause came before the Court on defenbdant's March 29, 2023 request that the Court reconsider its referral to non-binding arbitration because the case is "not at issue."

It will be interesting to see if the "at issue" rule survives the rule changes now necessary for trial courts to comply with active case management directives. Regardless, that rule does not expressly prohibit referral to arbitration prior to a certain point, or implicitly as defendant suggests. Other than the scope or constitutionality of an arbitration agreement, which we do not have here, the only pre-referral matter that must be resolved is personal jursidiction. *Fountainbleau, LLC v. Hire Us, Inc*., 273 So.3d 1152, 1157 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1454a]. "A court, pursuant to rules adopted by the Supreme Court, may refer any contested civil action filed in a circuit or county court to nonbinding arbitration." Fla. Stat. 44.103(2) (2022). ". . .[T]he presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration." Fla.R.Civ.P. 1.700(a). The only matters outside of the reach of an arbitrator are 1) authority to hold a person in contempt, and 2) imposing sanctions on a person. Fla.R.Civ.P. 1.820(a). accordingly, it is ORDERED and ADJUDGED that

The motion is DENIED.

* * *

Civil procedure—Discovery—Depositions—Non-parties are ordered to appear for deposition or show cause why they should not be held in indirect civil contempt

TERAN SMITH and DWAYNE SMITH, Plaintiffs, v. TALQUIN ELECTRIC COOPERATIVE, INC., M. MCPHERSON, et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2022-CA-000251-AXXX-XX. April 7, 2023. David Frank, Judge. Counsel: Stephen G. Webster, Tallahassee, for Plaintiff. Joshua C. Canton, Tallahassee, for Defendants.

AMENDED ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL AND ORDER TO SHOW CAUSE (as to time for show cause hearing)

This cause came before the Court on PLAINTIFFS' MOTION FOR CONTEMPT OR IN THE ALTERNATIVE FOR AN ORDER DIRECTING NON-PARTY WITNESSES DICK LOCKE AND MICHAEL McPHERSON TO APPEAR FOR DEPOSITION AND TO ANSWER QUESTIONS, and the Court having reviewed the motion and the court file, and being otherwise fully advised in the premises, it is ORDERED and ADJUDGED that

Non-party witnesses Dick Locke and Michael McPherson, having been properly subpoenaed for deposition and refusing to appear and/or answer questions, will appear for their depositions within ten (10) days from the date of this order, at the time and place to be noticed by plaintiffs' counsel, and will answer all non-privileged questions. If either fails to appear and answer as ordered, he will appear at the Courtroom 3, Guy A. Race Judicial Complaex, 13 North Monroe Street, Quincy Florida, on Monday, April 17, 2023, at 12:00 p.m., to show cause why he should not be immediately remanded to the Gadsden County Jail for indirect civil contempt and incarcerated until the proper completion of his deposition to be conducted at the Jail, or for six (6) months, whichever is sooner, and/or other sanctions, to include assessment of attorney's fees, pursuant to Florida Rule of Civil Procedure 1.380. Plaintiffs' counsel will use his best efforts to coordinate the date and time of the depositions with counsel of record and the deponents. Plaintiffs will promptly deliver a copy of this order to the non-party witnesses and file proof of service with the court.

In accordance with the Americans with Disabilities Act, persons needing special accommodations to participate in this proceeding should contact Court Administration no later than seven days prior to the proceeding at (850) 606-4401.

* * *

Condominiums—Construction defects—Damages—Apportionment of fault—Association's action against general contractor related to defects in construction of condominium buildings—Non-delegable duty of general contractor—By signing permit applications and receiving permits, general contractor assumed non-delegable duty to comply with laws regulating construction of condominiums, including Florida Building Code—Neither performance of inherently dangerous activity nor contractual privity is prerequisite to establishing general contractor's non-delegable duty—Because general contractor has non-delegable duty to comply with construction law and to supervise, direct, manage and control construction work, it is directly liable for any breach of that duty, and apportionment of fault among any other entities involved in condominium construction is not applicable

SUMMER KEY CONDOMINIUM ASSOCIATION, INC., a Florida Corporation, Plaintiff, v. D.R. HORTON, INC.—JACKSONVILLE; et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CA-000652. November 14, 2022. Michael S. Sharrit, Judge. Counsel: Brett J. Roth and Keegan Berry, Ball Janik, LLP, Orlando, for Plaintiff. Ian Gillan, Koeller, Nebeker, Carlson & Haluck, LLP, for D.R. Horton, Inc.—Jacksonville, Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT, D.R. HORTON, INC.—JACKSONVILLE'S, NON-DELEGABLE DUTY AND ITS NINTH AFFIRMATIVE DEFENSE

THIS CAUSE came before the Court on October 17, 2022, on Plaintiff's Motion for Partial Summary Judgment on Defendant, D.R. Horton, Inc.—Jacksonville's, Non-Delegable Duty and its Ninth Affirmative Defense (Dkt. No. 3340) ("Plaintiff's Motion"), and the Court, having considered the pleadings, the record evidence, the

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parties' arguments and briefings, and being otherwise fully advised in the premises, hereby ORDERS that Plaintiff's Motion is hereby **GRANTED** as follows:

1. Plaintiff asserts there is no factual dispute that D.R. Horton, Inc.—Jacksonville ("Horton"), through its licensed qualifying agent (Raymond Crosby, the "Qualifier"), was the licensed general contractor who applied for and was issued the permits to construct the 25 condominium buildings within the "Summer Key Condominiums" from the City of Jacksonville's Building Department.

2. As the general contractor who applied for and was issued the permits for construction, Horton had a non-delegable duty to ensure compliance with the Florida Building Code, and further to supervise, direct, manage, and control the construction toward that end.

3. The Court finds that this duty arises out of common law, statute, and the permits themselves.

4. Horton argues, *inter alia,* that Florida Statutes do not impose a non-delegable duty upon Horton and, even if they did, that there is no specific statute imposing a non-delegable duty upon Horton which *also* provides for a cause of action and therefore it does not have a non-delegable duty.

5. Horton also argues that common law does not create a non-delegable duty absent performance of an inherently dangerous activity, privity of contract, or personal injury.

6. Lastly, Horton contends it should be entitled to apportionment of fault, pursuant to Fla. Stat. § 768.81, as to any entity or individual involved in the original construction of the 25 condominium buildings within the Summer Key Condominiums.

7. The Court accepts Plaintiff's arguments for the following reasons.

8. First, the Court notes that for every Permit Application for each of the Buildings within the Summer Key Condominiums, Horton, through its Qualifier, submitted and signed certifications as follows:

> ***I certify that*** *no work or installation has commenced prior to the issuance of permit and that* ***all work will be performed to meet the standards of all laws regulating construction in the jurisdiction.***

Ex. C to Plaintiff's Motion. (emphasis added).

9. The Florida Building Code is a set of laws and rules which regulates construction in the jurisdiction where the Summer Key Condominiums were constructed.

10. Indeed, this language in the Permit Applications is mandatory for construction permits under Florida law. *See* Fla. Stat. § 713.135(6)(a) (2006-2020).

11. Additionally, Florida's common law holds that, "[t]he duty of care, with respect to the property of others, imposed by a city building permit upon a general contractor cannot be delegated to an independent sub-contractor." *Bialkowicz v. Pan Am. Condo. No. 3, Inc.,* 215 So. 2d 767, 771 (Fla. 3d DCA 1968); see also *Mastrandrea v. J Mann, Inc.,* 128 So.2d 146, 148 (Fla. 3d DCA 1961) ("a duty imposed by Statute or Ordinance, such as the building code involved in this case cannot be delegated to an independent contractor.")

12. "The qualifying contractor, which executes the building permit application, is not discharged from the above described non-delegable duty to comply with its terms and conditions by hiring an independent contractor to perform work on the Subject Property." *Rangel v. Northstar Homebuilders, Inc.,* 2018 WL 7019103, at *1-2 (Fla. 11th Cir. Ct. 2018) (citing *Mastrandrea, Bialkowicz,* and *Mills v. Krauss,* 114 So.2d 817 (Fla. 2d DCA 1959)).

13. "Because the non-delegable duty arises by virtue of the qualifying contractor's execution of the application for permit and the resulting issuance of the permit in reliance thereon, the non-delegable duty to comply with the terms of the permit application does not depend upon whether the qualifying contractor is the entity which also hired or contracted with the contractors and subcontractors performing work on the Subject Property." *Id.* (citing *Bialkowicz,* 215 So.2d 767).

14. The Court notes that numerous Florida Statutes cited by Plaintiff provide language indicating that there is a non-delegable ultimate responsibility of the general contractor, including Fla. Stat. § 713.135(6)(a), *supra*; *see also* Fla. Stat. § 553.79(10) ("the named contractor to whom the building permit is issued shall have the responsibility for supervision, direction, management, and control of the construction activities on the project for which the building permit was issued."); Fla. Stat. § 553.79(5)(a) (general contractor's "statutory obligations are not relieved by any action of the special inspector."); Fla. Stat. § 489.105(3) (defining "Contractor" as "the person who is qualified for, and is only responsible for, the project. . ."); Fla. Stat. § 489.105(4) (defining "Primary qualifying agent" as the person "who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit;"); and Fla. Stat. § 489.113(2) (providing that unlicensed subcontractors "may perform construction work under the supervision of a person who is certified or registered, provided that . . . the supervising contractor ***is responsible for the work*** . . .") (emphasis added).

15. More specifically, the Court notes that it is not just Chapter 489, Florida Statutes, which imposes these duties upon licensed contractors like Horton and the Qualifier.

16. The Court finds that the absence of a specific subsection within Florida law providing both a non-delegable duty and a private cause of action is not determinative of whether or not Florida Statutes impose a non-delegable duty.

17. The Court also finds that neither performance of an inherently dangerous activity nor contractual privity is a pre-requisite to establishing a general contractor's non-delegable duty. *See Biscayne Roofing Co. v. Palmetto Fairway Condo. Ass'n, Inc.,* 418 So. 2d 1109, 1110 (Fla. 3rd DCA 1982) (finding general contractor liable to condominium association for subcontractor's negligence, despite the absence of a contract or performance of an inherently dangerous activity).

18. The Court also finds that Horton's non-delegable duty of supervision, direction, management, and control of the construction work, and for compliance with the Florida Building Code under the permits for construction makes Horton ultimately liable for any breach of those duties, and any actions or inactions of any entity or individual involved in the original construction of the 25 condominium buildings within the Summer Key Condominiums. *Armiger v. Associated Outdoor Clubs, Inc*., 48 So. 3d 864, 875 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2194a]

19. As a result, as between Plaintiff and Horton, "apportionment of fault under *Fabre* does not apply." *Cont'l Florida Materials v. Kusherman,* 91 So. 3d 159, 165 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D973a] (citing to *Grobman v. Posey,* 863 So.2d 1230 (Fla. 4th DCA 2003) [29 Fla. L. Weekly D115a]; *Suarez v. Gonzalez,* 820 So.2d 342 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D730d]; *Nash v. Wells Fargo Guard Services, Inc.,* 678 So.2d 1262 (Fla.1996) [21 Fla. L. Weekly S292b]); and *Armiger,* 48 So. 3d 874-76.

21. For all these reasons, there is no genuine dispute of material fact that, as the general contractor that pulled the permits for the construction of all 25 condominium buildings within Summer Key Condominiums, Horton has a non-delegable duty to supervise, direct, manage, and control the construction work, including the construction work of any entity or individual involved in the original construction of the 25 condominium buildings within the Summer Key Condominiums, and to ensure compliance with the Florida Building Code in the construction of the buildings within Summer Key Condominiums.

22. This Order strictly pertains to Horton's Ninth Affirmative

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Defense as asserted in its Answer to Plaintiff's operative Complaint, and Horton's duty to the Plaintiff for the claims Plaintiff has raised against Horton. Nothing in this Order shall affect any claims or Causes of Action Horton has against any other party.

23. Accordingly, Plaintiff's Motion is **GRANTED**.

* * *

Condominiums—Construction defects—Evidence—Expert—Scientific evidence—Expert witness for contractor is precluded at trial from offering opinions on condition, construction defects, code violations, or identity of person causing such conditions in any buildings in condominium project other than specific building about which expert testified in his depositions—Expert precluded from offering opinions on scope of repair necessary in any buildings

SUMMER KEY CONDOMINIUM ASSOCIATION, INC., a Florida Not For Profit Corporation, Plaintiff, v. D.R. HORTON INC.-JACKSONVILLE; et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CA-000652. January 24, 2023. Michael S. Sharrit, Judge. Counsel: Brett J. Roth, Bell Janik, LLP, Orlando, for Plaintiff. Sean C. Barber, Conroy Simberg, Jacksonville, for G&T Contractor Services, LLC, Defendant.

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE AS TO THE TESTIMONY OF G&T CONTRACTOR SERVICES, LLC'S EXPERT GEORGE F. MAYFORTH (Docket No. 3882)

THIS CAUSE came before the Court on January 18, 2023, on Plaintiff's Motion in Limine as to the Testimony of G&T Contractor Services, LLC's Expert George F. Mayforth (Docket No. 3882) ("Motion"), and the Court having considered the Motion, the relevant legal authority, the record evidence, and having heard arguments of counsel, and being otherwise fully advised in the premises, it is hereby:

ORDERED as follows:

1. The Plaintiff's Motion in Limine as to the Testimony of G&T Contractor Services, LLC's Expert George F. Mayforth (Docket No. 3882) is GRANTED.

2. It is undisputed that G&T Contractor Services, LLC ("G&T") was responsible for the installation of the house wrap, siding, gutters, soffits, and fascia on at least 13 of the 25 buildings at the Summer Key Condominium Project, including buildings numbers, 7, 8, 9, 10, 11, 12, 13, 15, 6, 17, 23, 24, and 25.

3. This Court's Case Management Order required G&T to provide its final expert disclosure by March 15, 2021, and required that "[a]ll expert disclosures shall contain all information required by Fla. R. Civ. P. 1.280(b)(5), as well as a copy of the expert's written report." *See Docket No. 973.*

4. On April 16, 2021, G&T filed its Amended Expert Disclosure designating George F. Mayforth, P.E. as its sole expert witness and included a copy of Mr. Mayforth's report dated April 15, 2021.

5. No subsequent reports have ever provided by Mr. Mayforth or G&T in this case.

6. Trial is scheduled to begin on February 27, 2023.

7. Mr. Mayforth clearly and repeatedly testified in his depositions dated November 7, 2021, and May 10, 2022, that his sole written report produced in this case was limited to an evaluation of the conditions at building 17 (address - 4917 Key Lime Drive), and that he had no opinions concerning the conditions at any other building.

8. Mr. Mayforth also testified that he did not have any opinions relating to the scope of repair proposed by Plaintiff's expert Richard Slider, P.E. for any of the buildings, did not prepare his own repair protocol for any building, and did not provide any evaluation of the cost to repair the construction deficiencies for any of the buildings at the subject property.

9. Accordingly, Mr. Mayforth is hereby precluded from offering any opinions at trial regarding the following matters:

a. Any opinions or testimony concerning the conditions of any building other than building 17 including:

i. Whether there is or is not a construction defect in any other building.

ii. The presence of code violation or lack thereof in any other buildings.

iii. The extent or cause of damage at any other building.

iv. Identity of the party responsible for causing such conditions at any other building.

v. Opinions relating to the performance of private provider inspections/code official inspections for any building other than building 17.

vi. Whether the Association (or anyone else) failed to maintain the other buildings at the project.

b. Any opinions or testimony concerning any photographs, plans, or other documents relating to or taken at the subject property for any building other than building 17.

c. Any opinions as to the scope of repair necessary to correct any defects or code violations, or the costs necessary to perform such work on any of the buildings (including as to building 17).

10. Counsel for G&T Contractor Services, LLC is instructed that it may not ask Mr. Mayforth any question regarding the above areas which have been excluded by this Court.

11. Counsel for G&T Contractor Services, LLC is directed to immediately provide a copy of this order to Mr. Mayforth to ensure that this order in limine is not violated at trial.

* * *

Torts—Contracts—Construction defects—Damages—Action by homeowners association against general contractor for violation of Florida Building Code, negligence, and breach of implied warranties related to defects in construction of townhouses and common areas—Non-delegable duty of general contractor—By signing permit applications and receiving permits, general contractor assumed non-delegable duty to comply with laws regulating construction of townhouses and common areas, including Florida Building Code—Issue of whether association is owner of property alleged to be defective is outside scope of determination of whether non-delegable duty attached to general contractor as matter of law—However, law provides that homeowners association may institute actions on behalf of members—Because general contractor has non-delegable duty to comply with construction law and to supervise, direct, manage, and control construction work, it is directly liable for any breach of that duty, and apportionment of fault among employees and subcontractors is not applicable

PLANTATION VILLAGE TOWNHOUSE ASSOCIATION, INC., a Florida Not-For-Profit Corporation, Plaintiff, v. ADVANTAGE HOME BUILDERS, INC., a Florida Profit Corporation, et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2020-CA-000509, Division B. April 5, 2023. Don H. Lester, Judge. Counsel: Brett J. Roth, Ball Janik, LLP, for Plaintiff. Anthony S. Wong, Wood Smith Henning & Berman, LLP, for Dream Finders Homes, LLC, Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DREAM FINDERS HOMES, LLC'S NON-DELEGABLE DUTY AND MOTION TO STRIKE EVIDENCE AS UNTIMELY

This matter came before the Court for a hearing on October 31, 2022, on the Plaintiff's Motion for Summary Judgment on Dream Finders Homes, LLC's Non-Delegable Duty, the Defendant's Response in Opposition of Plaintiff's Motion for Summary Judgment Re: Non-Delegable Duty, and the Plaintiff's Reply in Support of its Plaintiff's Motion for Summary Judgment on Dream Finders Homes, LLC's Non-Delegable Duty, and Motion to Strike Evidence As Untimely. The Court has considered the parties' written submissions and arguments, the record, and being otherwise duly advised in the

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premises finds as follows.

FACTS AND PROCEDURE

The Plaintiff is a corporation created for the operation of Plantation Village, a community of townhouses. Dream Finders Homes, LLC (DFH) served as the general contractor for the construction of certain townhouses and common areas at Plantation Village. DFH used contractors, Tobi McGuigan and Mark Conner, as qualifying agents, to pull the permits to construct the townhouses and common areas. DFH, through its qualifying agents, submitted permit applications and signed certifications as part of the permit application that stated "I certify that no work or installation has commenced prior to the issuance of a permit and that all work will be performed to meet the standards of all laws regulating construction in the jurisdiction."

In this action, Plaintiff sues DFH for violation of the Florida building code, negligence, and breach of implied warranties related to alleged defects in the construction of the townhouses and common areas. In its defense, DFH, among other things, contends that any alleged defects were the result of deficiencies in the work of others that it justifiably relied upon and are not the result of its work.

ANALYSIS

Effective May 1, 2021, Florida now applies the federal standard and its essential procedure governing summary judgment. Because of the recent adoption of the federal standard and relative paucity of Florida decisions after the effective date, the Court looks to federal law to evaluate the defendant's motion. *Simmons v. Public Health Trust of Miami-Date County,* 338 So.3d 1057 (Fla. 3rd DCA 2022) [47 Fla. L. Weekly D977a] (when conducting statutory interpretation, cases dealing with a federal statute are instructive in interpreting a state statute modeled after a federal statute.)

Summary judgment is mandated when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).; *Kent v. Walgreen Co.,* No. 05-80753-CIV, 2007 WL 486706, at *1 (S.D. Fla. Feb. 9, 2007).

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The plain language of Rule 56 (c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Dadeland Depot, Inc. v. St. Paul Fire,* 483 F.3d 1265, 1268 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C505a] (quoting *Johnson v. Bd. of Regents,* 263 F.3d 1234, 1243 (11th Cir. 2001) [14 Fla. L. Weekly Fed. C1232a] (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986))) (internal quotation marks omitted). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *See Celotex Corp.,* 477 U.S. at 323. Thus the movant "bears the initial responsibility of informing the district 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." *Id.* To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the non-moving party's case. *Id.,* at 325.

Once the movant has met its burden under Rule 56(c), this burden shifts to the non-moving party, who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). Rather, the non-moving party "must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). If "the non-moving party fails to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof, then the court must enter summary judgment for the moving party." *Dadeland,* 483 F.3d at 1268 (quoting *Gonzalez v. Lee County Hous. Auth.,* 161 F.3d 1290, 1294 (11th Cir. 1998) (quoting *Celotex Corp.,* 477 U.S. at 323)) (internal quotation marks omitted); *Adega v. State Farm Fire & Cas. Ins. Co.,* No. 07-20696-CIV, 2008 WL 11333855, at *1 (S.D. Fla. May 9, 2008).

A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When the non-moving party bears the burden of proof on an issue at trial, the moving party need not "support its motion with affidavits or other similar material *negating* the opponent's claim," *Id.* at 323, 106 S.Ct. at 2553, in order to discharge this initial responsibility. Instead, the moving party simply may " 'show [ ]'—that is, point[ ] out to the district court—that there is an absence of evidence to support the non-moving party's case." *Id.* at 325, 106 S.Ct. at 2554 (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970)).

Plaintiff argues that, under Florida law and as a matter of law, DFH had a non-delegable duty as the general contractor to ensure the construction of the townhouses and common areas was in compliance with the Florida building code. Further, Plaintiff argues that as a result of this non-delegable duty, DFH cannot apportion fault to others for any breach of that duty.

DFH contends that Plaintiff has not established any contractual non-delegable duty because Plaintiff has not presented any evidence that it is the owner of the property claimed to be defective nor that it has a contract with DFH for the performance of any specific work.

Further, DFH contends that Plaintiff fails to establish that it owes Plaintiff a non-delegable duty because of the permit applications. DFH asserts that the permit applications were agreements between the county and the general contractor and there was no evidence shown here that Plaintiff was an intended third-party beneficiary of the agreement. Additionally, DFH contends that Plaintiff cannot establish that it has a non-delegable duty arising from section 489.105 of the Florida Statutes because that argument has been foreclosed in *Murthy v. N. Sinha Corp.,* 644 So. 2d 983 (Fla. 1994). Finally, DFH asserts that because Plaintiff has failed to establish that a non-delegable duty exists, apportionment of fault remains a viable defense in this case.

Generally, a non-delegable duty arises out of the common law, statutes or regulations, or contract. *Pope v. Winter Park Healthcare Group, Ltd.,* 939 So. 2d 185, 188 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2504b]. DFH, through its qualifying agents, signed permit applications certifying that all work on the construction of the townhouses and the common areas would meet the standards of all the laws regulating construction in the jurisdiction. The Florida Building Code is a law regulating the construction where the townhouses and common areas were located.

Contrary to DFH's contentions, by signing the permit applications and ultimately receiving the requested permits, it assumed the non-delegable duty to comply with the laws regulating the construction of the townhouses and common areas, including the Florida Building Code. *See Bialkowicz v. Pan Am. Condo. No. 3, Inc.,* 215 So. 2d 767, 771 (Fla. 3d DCA 1968) ("The duty of care, with respect to the property of others, imposed by a city building permit upon a general contractor cannot be delegated to an independent sub-contractor."); *Mastrandrea v. J. Mann, Inc.,* 128 So. 2d 146, 148 (Fla. 3d DCA

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1961) ("a duty imposed by Statute or Ordinance, such as the building Code involved in this case cannot be delegated to an independent contractor."); see also . Further, pursuant to the Florida Statutes, including section 489.105, DFH assumed the non-delegable duty to supervise, direct, manage, and control the construction work. *See, e.g.,* §489.105(4), Fla. Stat. (providing that a primary qualifying agent "has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit"); §553.79(10), Fla. Stat. ("The named contractor to whom the building permit is issued shall have the responsibility for supervision, direction, management, and control of the construction activities on the project for which the building permit was issued."). The Court does not find that *Murthy* foreclosed reliance on section 489.105 to establish DFH's non-delegable duty. In fact, the Florida Supreme Court in *Murthy* agreed "that a qualifying agent for a corporation has a duty to supervise a corporation's construction projects," *Murthy,* 644 So. 2d at 985, and cited to *Gatwood v. McGee,* 475 So. 2d 720 (Fla. 1st DCA 1985) where that court found that "the qualifying agent's duty of supervision [was] nondelegable." *Gatwood,* 475 So. 2d at 723.

With respect to whether Plaintiff is the owner of the property alleged to be defective in this case, that issue is outside the limited scope of the Court's determination of whether, as a matter of law, a non-delegable duty attached to DFH relating to the construction of such property. The Court recognizes however that section 720.303 of the Florida Statutes provides that after an association is obtained by its members other than the developer,

> the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members, including, but not limited to, the common areas; roof or structural components of a building, or other improvements for which the association is responsible; mechanical, electrical, or plumbing elements serving an improvement or building for which the association is responsible; representations of the developer pertaining to any existing or proposed commonly used facility; and protesting ad valorem taxes on commonly used facilities.

§ 720.303(1), Fla. Stat.; *see also* Fla. R. Civ. P. Rule 1.221.

Additionally, because the Court finds that there is no genuine dispute of material fact that DFH had the non-delegable duty to comply with the laws regulating the construction of the townhouses and common areas or to supervise, direct, manage, and control the construction work, DFH is directly liable for any breach of that non-delegable duty regardless of whether it or any other created that breach. *See Armiger v. Associated Outdoor Clubs, Inc.,* 48 So. 3d 864, 875 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2194a] ("[T]he party subject to the nondelegable duty is directly liable for the breach of that duty, and the assignment of liability based on the tortious acts of another is not a consideration."). Therefore, apportionment of fault is not applicable here. *See Cont'l Florida Materials v. Kusherman,* 91 So. 3d 159, 165 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D973a] ("apportionment of fault under *Fabre*[1] does not apply when liability is vicarious in nature"). Based on the above, it is

ORDERED as follows

1. Plaintiff's Motion for Summary Judgment on Dream Finders Homes, LLC's Non-Delegable Duty is GRANTED to the extent that (1) Dream Finders Homes, LLC's had a non-delegable duty to ensure the construction of the townhouses and common areas complied with the Florida Building Code and to supervise, direct, manage, and control the construction work; and (2) Dream Finders Homes, LLC is directly liable from any breach of its non-delegable duty regardless of whether an employee or subcontractor committed the breach.

2. Plaintiff's Motion to Strike Evidence As Untimely is DENIED.

[1]*Fabre v. Martin,* 623 So. 2d 1182 (Fla. 1993), *receded from on other grounds, Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.,* 659 So. 2d 249, 254 (Fla. 1995) [20 Fla. L. Weekly S278a].

* * *

Insurance—Homeowners—Coverage—Exclusions—Policy's exclusion for damage caused by "surface water" does not apply to water damage to home resulting from accumulation of rainwater on defectively constructed concrete pool deck

JONATHAN HORN and ALAINYA HORN, Plaintiffs, v. FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY, a Florida for-profit corporation, Defendant. Circuit Court, 7th Judicial Circuit in and for St. Johns County. Case No. CA21-0270, Division 55. March 28, 2023. Howard M. Maltz, Judge. Counsel: William L. Flournoy, III, Hair Shunnarah Trial Attorneys, LLC, Jacksonville, for Plaintiffs. Liana P. Jackson, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT & GRANTING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE having come on to be heard upon Defendant's Motion for Final Summary Judgment [DIN 67] and Plaintiff's Cross-Motion for Partial Summary Judgment [DIN 85] on March 7, 2023. The Court having considered the Motions, having reviewed the summary judgment evidence, having heard the legal arguments of counsel for the parties, and being otherwise fully advised in the premises, finds as follows:

1. The Court finds that certain material facts are not in dispute. Those undisputed material facts include:

a. Plaintiffs are the owners of their home located at 2840 C H Arnold Road, St. Augustine, Florida 32092 (hereinafter Plaintiffs' "Property" or "home").

b. Plaintiffs purchased an HO3 "all-perils" insurance policy from Defendant, bearing policy number P000315558, (the "Policy") for their Property.

c. The Policy was in full effect from June 29, 2020 through June 29, 2021, and at the time of the loss on July 4, 2020.

d. On or around July 4, 2020, Plaintiffs' Property was damaged due to an ensuing water loss event (the "Loss") as rainwater from a heavy rainstorm infiltrated through the rear exterior of the home.

e. Rainwater fell from the sky and landed on top of a pool patio deck that borders and runs adjacent to the rear of Plaintiffs' home.

f. Plaintiffs and Defendant agree the pool patio deck was defectively constructed. The deck was constructed at a height equal to or above the concreate slab foundation of Plaintiffs' home. The deck did not slope away from the house which allowed water to pond against the rear of the home, which resulted in water infiltrating Plaintiffs' home and the ensuing loss.

g. The rainwater that infiltrated the home did not come in contact with the surface of the earth.

h. Plaintiffs made an insurance claim with the Defendant. By letter dated November 17, 2020, Defendant denied the Plaintiffs' Claim. This lawsuit ensued.

i. Plaintiffs do not seek damages for the defectively constructed patio pool deck. Plaintiffs only seek damages for the ensuring damages to their home.

2. During the hearing, the following legal arguments were made:

a. Defendant's Motion is based on three policy exclusions. Defendant categorized two of the exclusions as being exclusions which carve out an exception and provide coverage for ensuing damages, unless the ensuing damages are otherwise excluded elsewhere in the Policy. Those two exclusions are the latent defect exclusion and the construction defect exclusion.

b. The third exclusion was categorized as a "catch-all" exclusion that Defendant relies on to bar coverage for the claim altogether and specifically the ensuing damages to Plaintiffs' home. The third exclusion is the surface water exclusion.

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c. In light of the undisputed fact that Plaintiffs are not seeking damages for the defectively installed pool deck and only seek coverage for the ensuing damages to their home and the former two exclusions do not exclude coverage for ensuing damages, the parties and the Court focused primarily on whether the surface water exclusion bars coverage for Plaintiffs' damages.

d. The Policy specifically excludes coverage for damages caused by "surface water." The Policy does not define the meaning of "surface water." The Plaintiffs contend the surface water exclusion does not bar coverage here, while Defendant contends it is applicable.

e. Defendant primarily relies on *Florida Residential Property & Cas. Joint Underwriting Ass'n v. Kron,* 721 So. 2d 825, 826 (Fla. 3d DCA 1998) [24 Fla. L. Weekly D12a]. In *Kron,* the Court determined the "uncontroverted evidence established that the water damage to Kron's property was caused by falling rain that pooled on the surface of the *ground* and then came into the home through cracks and separations caused by a neighbor's tree roots." (emphasis added). Because the water in *Kron* intruded through the ground, rather than another surface such as a concrete deck, the Court finds *Kron* to be dissimilar from the instant case.

f. Plaintiffs and Defendant both cite to Black's Law Dictionary to define surface water. Black's Law Dictionary defines surface water to mean "Water lying on the surface of the earth but not forming part of a watercourse or lake; [s]urface water most commonly derives from rain . . ." *Black's Law Dictionary,* (11th ed. 2019).

g. Plaintiffs argue that not all rainwater is surface water. Plaintiffs used an example of rainwater collecting upon a roof and that such water would not be considered surface water because the water had not come into contact with the surface of the earth.

h. Plaintiffs further argued that the undisputed facts show the source of the water that caused the ensuing damages here was rainwater that fell from the sky and collected on top of a man-made concrete pool deck, that was above the surface of the earth. According to experts on both sides, the pool deck was at or above the concrete slab foundation of the home. Plaintiffs further argued the water that caused the damage cannot be surface water because the water never came into contact with the surface of the earth. The water fell from the sky, collected on top of the pool deck and pooled against the home.

i. Plaintiffs rely on *Flamingo South Beach I Condominium Assoc., Inc., v. Selective Ins. Co. of Southeast,* 492 Fed. Appx. 16, 20 (11th Cir. 2012). In *Flamingo,* that insurance policy likewise did not define "surface water." The Court further explained that "surface water" is not an ambiguous term and legal treatises uniformly define "surface waters" as waters that "fall on the land from the skies or arise in springs and diffuse themselves over the surface of the ground, following in no defined course or channel." *Id.* at 20 (citing *93 C.J.S. Waters* § 254 (2012); *78 Am.Jur.2d Waters* § 174 (2012)). The Court ultimately held that pooled rainwater running from an elevated deck into the insured's condominium lobby, causing damage during a heavy rainstorm, did not constitute "surface waters." *Id*. This Court finds this decision persuasive.

j. Plaintiffs further relied on a certified copy of an engineer report from Addison Riley, LLC wherein it was concluded from an engineering standpoint that the ensuing damages were not the result of flood or surface waters. The Addison Riley report is part of the court record.

3. The Court finds that "surface water" includes rainwater that pools on the surface of the earth but does not include rainwater that pools on the surface of improved earth or other man-made improvement such as the concrete pool deck in the instant case.

4. Accordingly, the Court finds the surface and flood water exclusion doesnot apply to bar coverage for Plaintiffs' subject damages.

5. The Court finds that the construction defect exclusion and the latent defect exclusion do not bar coverage for the ensuing damages, and likewise, do not operate to bar coverage in this matter.

Therefore, it is ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Judgment is DENIED.

2. Plaintiffs' Cross-Motion for Partial Summary Judgment is GRANTED.

* * *

Civil procedure—Discovery—Depositions—Failure to attend—Sanctions—Attorney's fees—Rehearing—Motion for rehearing of defendant's motion for sanctions is denied—Plaintiff did not allege that court committed an error, omission, or oversight at first hearing, or that plaintiff was presenting newly discovered evidence—Court was permitted to consider affidavit submitted by defendants in support of amount of attorney's fees requested—Plaintiff waived the requirement that an attorney and expert testify as to the amount of attorney's fees by failing to object to the affidavits filed with court

DIEUVELLA MORICETTE, Plaintiff, v. ELAYNE CONRIQUE, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CA-005300-O. Division 40. March 7, 2023. Rehearing denied May 17, 2023. Emerson R. Thompson, Jr., Judge. Counsel: Jerry Girley, The Girley Law Firm, P.A., for Plaintiff. Jose G. Oliveira, Parti and Oliveira, PLLC, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS FOR FAILURE TO APPEAR AT DEPOSITION

THIS ACTION was heard on March 2, 2023, on Defendant, Elayne Conrique's ("**Defendant**") Motion For Order Imposing Sanctions For Plaintiff's Failure To Appear At Deposition ("**Motion**"). Plaintiff, Dieuvella Moricette ("**Plaintiff**"), was represented at the hearing by Jerry Girley, Esq., of The Girley Law Firm, PA. Defendant was represented at the hearing by Jose G. Oliveira, Esquire, of Parti and Oliveira, PLLC. Upon hearing and review of the motion and the Court file, and being fully advised in the premises, the Court finds the motion to be well founded, and hereby rules in favor of Defendant for the reasons below.

Facts And Procedural History

On December 15, 2021, Plaintiff, through her counsel, confirmed to Defendant that Plaintiff was available for deposition on January 19, 2022 (the "**Deposition**"). On December 23, 2021, Defendant properly served Plaintiff with a Notice of Taking Deposition for January 19, 2022. The Plaintiff requested that a Creole translator be available at the Deposition because the Plaintiff's first language is Creole. The Defendant hired the services of a court reporter and a Creole translator for the Deposition, but the Plaintiff failed to attend the Deposition.

The Plaintiff was eventually deposed on January 26, 2022, and the complete deposition transcript was filed with the Court on February 10, 2022. The transcript shows that when the Plaintiff was asked if she received the Notice of Deposition for January 19, 2022, she answered "Yes." When the Plaintiff was asked why she didn't attend the January 19, 2022 deposition, she stated: "I spoke to my attorney that morning, but I—that was my error. I didn't realize the time. I was scheduled to work and I was rushing to get out and get to work. It wasn't until I missed the appointment and received the call that I realized the time that it was set for." The Defendant incurred expenses due to Plaintiff's failure to appear at the Deposition in the amount of $371.00, plus attorney's fees.

Legal Standard

Fla.R.Civ.P. 1.380(d) allows imposition of sanctions against a party deponent without a showing that a specific court order has been violated. It is designed to handle situations in which there has been a complete failure to appear for deposition.

Fla.R.Civ.P. 1.380(d) states in pertinent part that if a person fails "to appear before the officer who is to take the deposition after being served with a proper notice . . . Instead of any order or in addition to it, the court shall require the party failing to act to pay the reasonable

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expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Parties or nonparties who fail to appear for deposition after receiving proper service can be sanctioned under Rule 1.380(d). See *Garfinkel v. Katzman,* 76 So.3d 40 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2679b]. A party that unjustifiably fails to appear at her deposition is liable for fees and costs incurred under Rule 1.380(d). See *Wilcoxon v. Moller,* 132 So. 3d 281, 289 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D99a] ("For the foregoing reasons, we reverse the entirety of the court's order except for the portion awarding Former Husband $4,657.50 in fees and costs related to Former Wife's failure to attend her deposition."). See also *H. K. Dev. LLC v. Greer,* 32 So.3d 178, 183 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D792a] ("The amount of 'reasonable expenses caused by the failure' defines the lawful extent of any sanction under the rule."). Excuses like there was a "mutual miscommunication" regarding the time and place of the deposition was not a satisfactory explanation or justification for the non-appearance at the deposition." *Consultech of Jacksonville Inc. v. Dep't of Health,* 876 So.2d 731 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1647d].

Analysis

The Plaintiff admitted at her January 26, 2022, deposition that she was properly served with a Notice of Taking Deposition for January 19, 2022. Fla.R.Civ.P. 1.380(d) states if a person fails to appear at the deposition after being properly notice, the court "shall require the party failing to act to pay the reasonable expenses caused by the failure . . . unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

The Plaintiff's stated in her January 26, 2022, deposition that she did not attend the Deposition because it was her "error," she "didn't realize the time," and "she was rushing to get to work." The Court finds that none of the reasons stated by the Plaintiff substantially justify her failure to attend the Deposition, and therefore, the Court agrees that the Plaintiff should pay the reasonable expenses caused by her failure to attend the Deposition, including reasonable attorney's fees according to Fla.R.Civ.P. 1.380(d).

Defendant provided evidence of the cost spent by the Defendant in the amount of $371.00. Defendant's attorney spent 0.5 hours waiting for the Plaintiff to attend the deposition, 0.5 hour preparing the Motion, and charged 0.5 hour attending this hearing for a total of 1.5 hours at $350.00 per hour, for a total attorney's fees of $525.00. Defendant properly provided an Affidavit of Attorney's Time and Affidavit of Attorney's Fees to justify the attorney's fees. Plaintiff did not file a response in opposition to the Motion prior to the hearing. At the hearing, Plaintiff did not raise an objection to the entitlement to attorney's fees, the affidavits, or the amount of attorney's fees claimed at the hearing.

It is thereupon, ORDERED AND ADJUDGED that Plaintiff, Dieuvella Moricette Celestin, shall pay Defendant, Elayne Conrique, the total amount of $921.00 by making a check payable to Parti and Oliveira Trust Account, and send it to Jose G. Oliveira, Esq., Parti & Oliveira, PLLC, 7380 W Sand Lake Rd, Suite 500, Orlando, FL 32819, within 30 days from the date of this Order.

ORDER DENYING PLAINTIFF'S MOTION TO REHEAR DECISION AWARDING ATTORNEY'S FEES

On April 3, 2023, the Court held a pre-trial hearing, and the parties asked the Court to rule solely on the Court file, without a hearing, on Plaintiff, Dieuvella Moricette ("**Plaintiff**"), Motion to Rehear Decision Awarding Attorney's Fees ("**Motion**") in favor of Defendant, Elayne Conrique ("**Defendant**"). Upon review of the motion and the Court file, the Court finds that Defendant's arguments are well founded, and hereby rules against the Plaintiff and in favor of Defendant for the reasons below.

Facts of the Case

On March 2, 2023, this Court held a 45-minute hearing, and after reviewing the evidence and hearing the arguments by both parties, the Court granted Defendant's Motion for Sanctions for Failure to Appear at Deposition, which included attorney's fees as authorized by Fla.R.Civ.P. 1.380(d) based on the affidavits filed with the Court. The Court noted in its Order that Plaintiff did not file a motion in opposition prior to the hearing, and that Plaintiff failed to object to the lack of testimony or the use of affidavits to determine the amount of attorney's fees at the hearing.

Legal Standard for Granting a Motion for Rehearing

"The importance of finality in any justice system . . . cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end." *Witt v. State*., 387 So.2d 922, 925 (Fla.1980). Under *Fla.R.Civ.P. 1.530(a),* a party may move for rehearing of final orders "to give the trial court an opportunity to consider matters which it overlooked or failed to consider." *Carollo v. Carollo*, 920 So.2d 16, 19 (Fla. 3d DCA 2004) [30 Fla. L. Weekly D99a]. The purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it overlooked or failed to consider, and to correct any error if it becomes convinced that it has erred. *Francisco v. Victoria Marine Shipping, Inc*., 486 So.2d 1386 (Fla. 3d DCA 1986).

"A rehearing is a second consideration of a cause for the sole purpose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration. Upon the timely filing of a petition for rehearing, the court may reopen the case and reconsider any or all of the provisions of its final decree." *Langer v. Aerovias, S.A.*, 584 So.2d 175, 176 (Fla. 3d DCA 1991) (citations omitted); See also *Balmoral Condo. Assn v. Grimaldi*, 107 So.3d 1149 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D174b].

Analysis

Plaintiff did not allege a legally valid reason for the Court to Grant Plaintiff's Motion for Rehearing

In order for the Court to grant a motion for rehearing, the Plaintiff must allege that the Court committed an error, omission, oversight at the first hearing, or that it was presenting newly discovered evidence. Plaintiff alleges in her motion that the Court must grant a rehearing because the Court awarded attorney's fees although "[n]o expert witness testimony was presented at the hearing. Instead, the Defendant offered an affidavit from an attorney who purported to have knowledge regarding the reasonableness of attorney fees. The parties did not have an agreement in advance that would permit an affidavit to be substituted for the testimony of a fee expert." See Motion, Page 1.

Plaintiff did not allege in her Motion to Rehear that the Court committed an error, omission, oversight at the first hearing, or that it was presenting newly discovered evidence, and therefore, Plaintiff has not provided the Court with a legally valid reason to grant Plaintiff's motion to rehear Defendant's Motion for Sanctions for Failure to Appear at Deposition.

The Court did not err when it awarded attorney's fees to Defendant

Plaintiff claims in her motion that the award of attorney's fees was in error because "[t]he Defendant supported the amount of fees requested by an affidavit from someone who he represented as an expert in this area," and because "the Plaintiff did not agree to substitute expert testimony for an affidavit." Plaintiff relies on *Cooper v. Cooper*, 406 So. 2d 1223, 1224 (Fla. 4th DCA 1981) to argue that

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"[f]ee awards must be supported by 'a predicate of substantial competent evidence in the form of testimony by the attorney performing services and by an expert as to the value of those services.' " Although the Court does not contest the validity of *Cooper,* Plaintiff failed to recognize that there is an exception to the requirement of testimony by attorneys.

Courts have consistently ruled that an opposing party's failure to object to the lack of attorney testimony at a hearing waives the requirement of the attorney to testify. See *Newell v. Newell*, 464 So. 2d 222 (Fla. 3d DCA 1985); See also *Rokicki v. Rokicki*, 660 So.2d 362 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2081b] (Since husband did not object to the lack of counsel's testimony to the fee arrangement at the hearing, he is precluded from asserting it on appeal.); *Carol Mgt. Co. v. Baring Indus.*, 257 So. 2d 270 (Fla. 3d DCA 1972) (A letter introduced into evidence for attorney's fees without the objection from opposing party was reasonable under the circumstances.)

The failure of the losing party to timely object to the use of affidavits to determine attorney's fees in a Fla. Stat. § 57.105(1) (1987) case waived its right to require live testimony. See *Hatcher v. Roberts*, 538 So. 2d 1300 (Fla. 1st DCA 1989) (The Court awarded attorney's fees based solely upon affidavits in circumstances revealing that opposing counsel did not object.); *Insurance Co. of North America v. Julien P. Benjamin Equipment Co.*, 481 So.2d 511, 11 Fla. L. Weekly 80 (Fla. 1st DCA 1985) (The Court construed opposing party's silence and lack of objection as acquiescence in handling the attorney's fee issue by affidavit and concluded that the trial court's award of attorney's fees based thereon was not an abuse of discretion.)

In the instant case, the Court noticed that Defendant offered Plaintiff the option to simply pay for the expense of the deposition and that no attorney's fees would be assessed against Plaintiff, but she refused. The Plaintiff forced Defendant to use the Court's judicial resources to obtain relief from the expenses caused by Plaintiff's failure to appear at the deposition.

In addition, Plaintiff waived the requirement of the attorney and an expert to testify as to the value of the attorney's fees by failing to object to the affidavits filed with the Court with the intention to serve as evidence as to the value of the services provided. The Court noted in its March 7, 2023, Order that "Plaintiff did not file a response in opposition to the Motion prior to the hearing. At the hearing, Plaintiff did not raise an objection to the entitlement to attorney's fees, the affidavits, or the amount of attorney's fees claimed at the hearing."

It is therefore ORDERED AND ADJUDGED that Plaintiff's Motion to Rehear Decision Awarding Attorney's Fees is **DENIED**.

* * *

Evidence—Expert—Scientific evidence—Causation—Expert may not testify to opinion on causation—Expert may not use analogies to bootstrap biomechanical analysis regarding causation, but may use analogies to help jury to understand principles and opinions on which expert is qualified to testify

NAVENDRA RAMNARACE, Plaintiff, v. JAMES FITZER and JONATHAN W. FITZER, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CA-002946-0 [consolidated with Case No. 2021-CA-3005-O for discovery purposes only]. April 11, 2023. A. James Craner, Judge. Counsel: Andrew B. Pickett, Tara Couture, and Jessica Hicks, Andrew Picket Law, PLLC, Melbourne, for Plaintiff. Jason Breslin, for Defendants.

ORDER ON PLAINTIFF'S MOTION IN LIMINE AND *DAUBERT* MOTION TO LIMIT REGARDING DEFENDANT'S RETAINED EXPERT DR. DANIEL COUSIN

THIS CAUSE, having come before this Court for hearing on March 17, 2023, and this Court having reviewed the Plaintiff's motion, considered the testimony of Dr. Daniel Cousin, considered the arguments of counsel, and considered the relevant law and statutes, and being otherwise fully advised in the premises, it is hereby ADJUDGED:

1. The Court rules as follows:

a. CAUSATION

Regarding the issue of causation, the Plaintiff's Motion in Limine and *Daubert* Motion to Limit Regarding Defendant's Retained Expert Dr. Daniel Cousin is **GRANTED**, as follows:

i. With respect to Dr. Cousin's opinions on causation in this matter, the Court finds that the Defense has not satisfactorily met the *Daubert* standard that must be applied in this case and will **GRANT** the Plaintiff's motion as it relates to Dr. Cousin's opinion on causation, **SUSTAIN** the objection, and exclude any testimony from Dr. Cousin regarding causation in this case.

b. **ANALOGIES**

Regarding the issue of Dr. Cousin's use of analogies involving twigs, carrots, celery, twigs, pens thrown at someone's head, and circus performers, the Plaintiff's Motion in Limine and *Daubert* Motion to Limit Regarding Defendant's Retained Expert Dr. Daniel Cousin is **GRANTED** in part and **DENIED** in part, as follows:

i. There shall be no testimony regarding a biomechanical analysis, and there shall be no opinions related to such analysis. Dr. Cousin may not use his analogies to bootstrap a biomechanical analysis.

ii. More specifically, Dr. Cousin will not be allowed to testify to his opinion that multi-level changes are not consistent with a single traumatic event and are more likely caused by chronic degeneration as opposed to a being caused by an acute or traumatic injury. To allow Dr. Cousin to provide this opinion would be allowing him to testify about biomechanical principles for which he does not have the requisite knowledge, training, and experience. Further, the Court finds that this opinion goes to the issue of causation which the court has excluded under *Daubert.*

iii. Finally, subject to the caveats above, the Court DENIES Plaintiff's motion and overrules the objection to the above-mentioned analogies as a whole, as long as they are used for the purpose of helping the jury to understand the testimony, as well as the various principles and opinions for which Dr. Cousin is qualified to testify and opine.

* * *

Insurance—Travel—Coverage—Exclusions—Foreseeable event—Hurricane—Travel policy for flight booked to escape approaching hurricane was ambiguous where policy specifically provided coverage for services cancelled because of natural disasters, but policy also excluded coverage for natural disasters like hurricanes and any problem or event that could have reasonably been foreseen or expected when policy was purchased—Applying exclusions would render coverage illusory—Ambiguous or illusory policy must be interpreted in favor of insured

SARAH AL HASSID, Plaintiff, v. AGA SERVICE COMPANY, d/b/a ALLIANZ GLOBAL ASSISTANCE, and JEFFERSON INSURANCE COMPANY, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-21199-CA-41. April 7, 2023. Lisa S. Walsh, Judge. Counsel: Reuven T. Herssein, Herssein Law Group; and Maury Udell, Beighly, Myrick, Udell and Lynne, P.A., for Plaintiff. Timothy Maze Hartley, Hartley Law Offices, PLC, for Defendants.

ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AS TO COUNT I OF COMPLAINT

THIS CAUSE came before the Court on February 22, 2023, on Plaintiff's Motion for Summary Judgment as to Count I of the Second

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Amended Complaint ("Plaintiff's Motion"), and on AGA Service Company D/B/A Allianz Global Assistance ("Allianz") and Jefferson Insurance Company's ("Jefferson") (collectively, "Defendants") Motion for Final Summary Judgment as to Count I of the Second Amended Complaint ("Defendants' Motion"). At the hearing, the Court granted Plaintiff's motion for summary judgment as to Defendants' Third Affirmative Defense of unclean hands for the reasons stated on the record. The parties agreed at the hearing that the Court would not address the other affirmative defenses related to whether Plaintiff suffered damages, but rather the Court would address the application of a single policy exclusion argued by the Defendant. After a full hearing and review of all material parts of the record, the Court GRANTS Plaintiff's Motion for Summary Judgment on the Defendant's claimed policy exclusion of a foreseeable event and makes the following findings and conclusions:

Background

Findings

1. Plaintiff alleges that Defendants wrongly denied her claim for trip cancellation benefits pursuant to a travel insurance policy purchased from Defendants on September 5, 2017, for a trip to leave South Florida to escape the approaching Hurricane Irma. DE 63 at ¶ 6-30 (References to "DE" are references to docket entry numbers)

2. It is uncontested that an airline ticket and a travel insurance policy offered through the American Airlines website (aa.com) were purchased in Plaintiff's name on September 5, 2017, and that Defendants issued a policy to Plaintiff as the named insured under Policy #AMR00019760622 (the "Policy"). DE 254 at Page 2. It is also uncontested that the purpose of Plaintiff's trip was to leave South Florida to escape the approaching Hurricane Irma. *Id.*

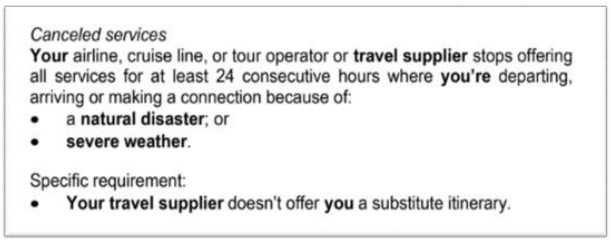
3. On September 4, 2017, the day before Plaintiff purchased her ticket and Policy, Florida's Governor issued an Executive Order declaring Hurricane Irma to be a "major hurricane," expected to make landfall in South Florida, and announcing a state of emergency "in every county in the State of Florida." DE 254 at Page 10.

4. Plaintiff alleges, and Defendants contest, that her flight was in fact cancelled by American Airlines early in the morning on September 7, 2017 due to Hurricane Irma and that no alternative itinerary was offered. See DE 254, at ¶ 5-6.

5. On or about September 17, 2017, Plaintiff's counsel submitted a claim for damages under the Policy for losses incurred due to American Airlines' cancellation of her flight, for which Defendant Allianz acknowledged receipt and issued Claim Number: 0004724198. DE 254 Exhibit A (Paragraph 13).

6. Defendant Allianz issued a denial letter to the claim stating the following: "Travel insurance doesn't cover everything. It's designed to protect you when there's a sudden, unexpected problem or event. Specifically excluded is any problem or event that could have reasonably been foreseen or expected when you purchased your plan." DE 63 at ¶ 27-29, Exhibit B. Defendants' corporate representative testified that Defendants denied Plaintiff's claim on grounds that "her loss was foreseeable at the time the plan was purchased." DE 261 at Page 14 (citing Mills Deposition at Page 13, In. 11-15). This was the sole reason given for denial of Plaintiff's claim.

7. Section 2 of the Policy (the "Trip Cancellation Coverage") states that coverage is provided under the following section:

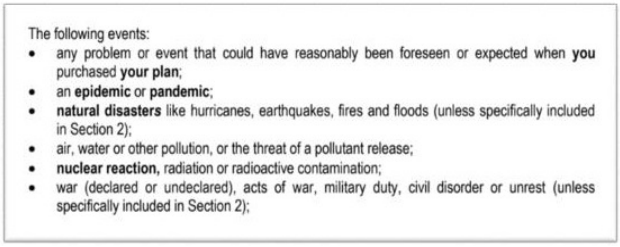


Canceled services
Your airline, cruise line, or tour operator or **travel supplier** stops offering all services for at least 24 consecutive hours where **you're** departing, arriving or making a connection because of:
- a **natural disaster**; or
- **severe weather**.

Specific requirement:
- **Your travel supplier** doesn't offer **you** a substitute itinerary.

DE 63 at 30, and Pages 5-7 of the Policy attached as Exhibit A.

8. Section 3 of the Policy, however, provides a general list of exclusions stating that "there is no coverage for any loss that results directly or indirectly from the following general exclusions":



The following events:
- any problem or event that could have reasonably been foreseen or expected when **you** purchased **your plan**;
- an **epidemic** or **pandemic**;
- **natural disasters** like hurricanes, earthquakes, fires and floods (unless specifically included in Section 2);
- air, water or other pollution, or the threat of a pollutant release;
- **nuclear reaction**, radiation or radioactive contamination;
- war (declared or undeclared), acts of war, military duty, civil disorder or unrest (unless specifically included in Section 2);

Id. at Page 16 of the Policy attached as Exhibit A.

9. The Policy also provides coverage for other types of unforeseen events, including emergency medical or dental care, emergency medical transportation, travel delay, and lost baggage coverage. *Id.* at Pages 9-14 of the Policy attached as Exhibit A.

Pleadings

Plaintiff alleges that Defendants wrongly denied her claim for trip cancellation benefits pursuant to the Policy purchased from Defendants. Plaintiff filed her Second Amended Class Action Complaint on May 24, 2020, on behalf of herself and "[a]nyone who purchased a travel insurance policy from [Defendants] in the past five (5) years, prior to the filing of the instant Complaint, and submitted a claim to Allianz and/or Jefferson Insurance Co. and had their travel insurance claims denied on the grounds that the problem or event could have been reasonably foreseen when the travel insurance plan was purchased." *Id.* at ¶ 31. In Count I, Plaintiff charges Defendants with breach of contract for Defendants' failure to reimburse Plaintiff for the Claim pursuant to Section 2 of the Policy. *Id.* at ¶ 61-65 and Page 14. Plaintiff's Second Amended Class Action Complaint also includes counts for unjust enrichment and fraud in the inducement that are not subject to the Motions for Final Summary Judgment addressed in this Order.

Defendants individually filed their Second Amended Answers and Affirmative Defenses to Count I of the Second Amended Complaint on October 27, 2021, which contained nearly identical affirmative defenses. *See* DE 151 and 152. The remaining non-class affirmative defenses to Count I are Defendant Allianz's First, Second, Fifth, and Sixth affirmative defenses, and Defendant Jefferson's First Second, and Fourth Affirmative Defenses. This Order exclusively addresses Defendants' First Affirmative Defense, as the remaining affirmative defenses listed above relate to damages.

Plaintiff's Motion was filed on Dec. 8, 2022, and seeks judgment as a matter of law on Defendants' non-class affirmative defenses to Count I. Defendants joint Motion was filed on Dec. 16, 2022, and moves for judgment as a matter of law as to Count I.

Analysis

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Trip Cancellation Coverage Rendered Illusory by Exclusion for "Reasonably Foreseeable Events"

Defendants' first argument in their Motion is that Plaintiff failed to meet her burden of proof for a breach of contract claim where the Policy exclusion for reasonably foreseeable events was enforceable against Plaintiff. The court agrees that it was reasonably foreseeable at the time Defendants issued the Policy to Plaintiff that Plaintiff's flight could be cancelled due to the approaching Hurricane Irma. DE 243, Pages 9-11, 13-14. As a general matter, it is *reasonably foreseeable* that regardless of when the ticket is purchased, any flight departing from Miami, Florida during the height of hurricane season could be cancelled due to a hurricane or severe weather. However, as stated by Plaintiff, "the entire point of buying the trip cancellation coverage is that in the event of cancellation due to severe weather or natural disaster, i.e., a hurricane, the insured will be compensated for the ticket where the airline cancels the flight and does not offer an alternate itinerary due to severe weather or natural disaster." DE 235, Page 15.[1] The Court also notes that Defendants, as the drafter and offeror of the contract, were equally on notice of the impending hurricane. Defendants point to language posted on their website advising the public that coverage may not be available for losses related to Hurricane Irma. DE 243 at Page 10. But language on a website is not part of the policy. Any conflict between policy language and language on a website must be resolved in favor of enforcing policy language. The language of the Policy appears to grant coverage in the event of a cancellation due to a hurricane.

The language cited in paragraphs 6 and 7 above demonstrates a conflict regarding hurricane coverage. Section 3 states that "natural disasters like hurricanes. . ." are not covered "unless specifically covered in Section 2." And Section 2 specifically provides coverage for cancelled services due to natural disasters when the travel supplier suspends services for at least twenty-four hours and does not offer a substitute itinerary. However, Defendants' First Affirmative Defense to Plaintiff's breach of contract claim is that the general exclusion at the beginning of Section 3 for "any problem or event that could have reasonably been foreseen or expected when you purchased your plan" removes any coverage that would have been provided for Plaintiff's claim under Section 2 due to the foreseeability of the Hurricane. *See* DE 151 at Page 9; DE 152 at Page 10.

Under Florida law, when limitations or exclusions completely contradict the insuring provisions, insurance coverage becomes illusory. *Purrelli v. State Farm Fire and Casualty Co.*, 698 So. 2d 618, 619 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D2099d]. An insurance policy cannot grant rights in one paragraph and then retract the very same right in another paragraph called an 'exclusion.' " *Tire Kingdom, Inc. v. First S. Ins. Co.*, 573 So.2d 885, 887 (Fla 3d DCA 1990). Further, when an insurance policy is illusory or ambiguous, the ambiguity must be resolved liberally in favor of the insured. *See Prudential Property & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993).

Defendants could have avoided this issue altogether by clearly stating in the Policy that there is no coverage for losses caused by hurricanes that are a known risk such as during a watch or warning at the time of purchase or by not offering the policy during such time period. It would be unjust for Defendants to profit from the sale of a policy and then be wholly excused from providing coverage for risks of which both parties were fully aware on the date of sale. The Court finds that the Defendant's argument applying the general exclusion to the coverage under Section 2 for cancelled services due to natural disasters (which is defined under Section 3 to include hurricanes) would render policy coverage illusory at the time of sale.

Moreover, there is a specific exclusion for natural disasters such as hurricanes under section 3, which would exclude coverage from "**natural disasters** like hurricanes, earthquakes, fires and floods (unless specifically included in Section 2)." But this exclusion refers the policyholder back to coverage section 2, which specifically covers 24-hour cancellation of services because of "a natural disaster" or "severe weather." These provisions apply specifically to the circumstances surrounding Plaintiff's cancellation due to Hurricane Irma. To swallow them up by a general provision that bars coverage for any "reasonably foreseeable" event would appear to render the specific policy language applying to hurricanes meaningless. For these reasons, the Court finds that Defendants' First Affirmative Defense fails as a matter of law.

Defendants also argue in their Motion that the Policy terms are regulated by the Florida Insurance Code and approved by the Office of Insurance Regulation and, therefore, should be enforced and afforded deference. The Court disagrees. Defendants fail to cite any legal precedent that would require the Court to give deference to an insurance policy on a breach of contract claim merely because the Policy was reviewed by the Office of Insurance Regulation.[2]

Plaintiff's Motion for Summary Judgment on the Defendant's claimed policy exclusion of a foreseeable event is GRANTED. The court reserves jurisdiction on the issues of damages and any entitlement to attorney's fees and costs.

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[1]The Defendants make much of the fact that the Governor declared a state of emergency before the Plaintiff bought the ticket. Pursuant to Section 252.36(1)(a), by Executive Order, the Governor "may assume direct operational control over all or any part of the emergency management functions within this state, and she or he shall have the power through proper process of law to carry out the provisions of this section." Declaring a state of emergency is about enabling Executive power. Such a declaration does not dictate when flights will or will not be cancelled. In fact, all other major airlines continued to operate after American grounded its flights.

[2]Although not argued by either party, Article V, Section 21 of the Florida Constitution prohibits this Court from deferring to the opinions of a state agency on the enforceability of an insurance policy exclusion.

* * *

Dissolution of marriage—Hearing—Continuance—Husband's ore tenus motion for continuance, made when he arrived late for final hearing, and two subsequent written motions for continuance are denied where husband argued that he needed continuance to obtain court-appointed attorney—There is no right to court-appointed counsel in civil proceedings, and husband had almost four years to retain counsel—Husband's further argument that he has not been receiving notices of proceedings is refuted by his own testimony and fact that he has appeared at proceedings at which he wished to appear—Argument that observance of Ramadan is ground for husband to not attend hearing is rejected in light of fact that wife, who was also fasting, testified credibly that she could continue with hearing without violating her religious tenets—Marriage is dissolved, and equitable distribution of marital assets and liabilities is ordered—Husband's request for rehabilitative alimony is denied where he failed to prove his need and wife's ability to pay—Child custody and support—Parenting plan with shared parental responsibility is established—Where testimony suggests that father has unstable lifestyle and living conditions, mother is awarded all time-sharing except some daytime time-sharing awarded to father—Current and past due child support ordered

IN RE: THE MARRIAGE OF RAIYAN FARHANA ISLAM, Petitioner/Wife/Counterrespondent, and ABRAHAM ABDUL SHAIKH, Respondent/Husband/Counterpetitioner. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502019DR002494XXXXSB. March 31, 2023. Rosemaria Scher, Judge. Counsel: Harry Hipler, Dania Beach, for Petitioner. Abraham Abdul Shaikh, Pro se, Pembroke Pines, for Respondent.

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

THIS CAUSE came before the Court on March 24, 2023 for final hearing on the Petitioner/Wife's Petition for Dissolution of Marriage

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with Dependent or Minor Child(ren), D.E. 3, filed March 15, 2019, Respondent/Husband's Answer to Petition and Counterpetition for Dissolution of Marriage with Minor Child(ren), D.E. 17, filed May 23, 2019 and Answer to Counterpetition filed on May 23, 2019 (D.E. 20).

HUSBAND'S ORE TENUS MOTION FOR CONTINUANCE AND PRO SE MOTIONS FOR CONTINUANCE OF HEARING OR TRIAL, D.E. 74 AND D.E. 76

On **December 2, 2022** this court issued Order Setting Trial and Imposing Pretrial Procedures setting this matter for final evidentiary hearing on March 24, 2023 at 10:15 a.m. The order was emailed and mailed to Respondent at his email designated with the clerk and the address on file with the clerk. The Court waited until 10:25 a.m. to begin the trial since Respondent failed to appear timely. Prior to beginning to hear testimony, the Court reviewed the file and did see Respondent / Husband had filed a financial affidavit with the Court on March 15, 2023, D.E. 73. Despite prior Court orders mandating the same, this is the first time Respondent / Husband filed a financial affidavit. No continuances were filed filed with the Court. After Petitioner was sworn and began to testify, Respondent appeared late.

Upon arriving at the final hearing, Respondent / Husband for the first time ore tenus ("by word of mouth") requested a continuance of this matter and as grounds argued that he wanted the Court to appoint an attorney to represent him in these matters. Husband claimed that he had not received notices of these proceedings on account of the inadequacies of his computer. He admitted he had not filed a motion to continue with the Court. Husband indicated he was having a foot issue (although he was wearing shoes and walked in under his own power). Finally, he claimed that Ramadan's fasting requirements should preclude him from proceeding.

On March 24, 2023 following the hearing and docketed by the Clerk at 5:11 p.m. Husband filed a hand written Pro Se Motion for Continuance of Hearing or Trial, D.E. 74. On March 27, 2023 Husband filed a typed Pro Se Motion for Continuance of Hearing or Trial, D.E. 76.

For the reasons set forth below, the Court DENIES the Husband's ore tenus and subsequent written requests for a continuance.

Fla R. Fam. L. Pr. 12.460, civil counterpart Fla. R Civ. L. Pr. 1.460 and Fla. R. Jud. Admin. 2.550 (e) provide that a motion for continuance shall be in writing, it shall be signed by the party, and it shall state all of the facts that the movant contends entitle the movant to a continuance that shall be filed before trial. Husband's main argument was that he wanted a court appointed attorney to represent him in these proceedings, even though these proceedings have been pending since **March 15, 2019,** and he has represented himself during the entire course of these proceedings, including the date of final hearing where he testified and cross-examined the Wife. He admitted that he had contacted Legal Aid in the past without success, yet he claimed he wanted an attorney to represent him in these proceedings.

It is axiomatic that there is no right to court appointed counsel in civil proceedings, nor to have counsel represent a party in civil cases, therefore, this argument is rejected. Husband has had since March, 2019 to retain counsel. Husband testified he is gainfully employed. Therefore, the Court rejects this argument.

As to Husband's claim that he has not been receiving notices of these proceedings, this was totally refuted by the fact that he listed himself on the Florida e-filing portal with an email address. Moreover, on March 15, 2023 Husband filed for the first time his financial affidavit. Husband has in fact filed pleadings; Husband did attend a hearing that he chose to attend, where he acknowledged that he used the email address provided and that he could be served by hard copy and email that included his residence address and email on the Florida e-filing portal, hearing held on July 12, 2022 (D.E. 52). Further, Husband has also been served by regular mail as per the statement of the Wife's attorney at trial, and he has been served by email as well, even though the Court merely required that the Husband be served by email.

The evidence contradicted Husband's claims that he has received no notices. Specifically, Husband's own testimony contradicted his argument. Husband testified he received emails, but he had difficulty in loading them. In summary, Husband's demeanor and arguments were not credible. If in fact this was the case, Husband had options including contacting counsel for the Wife, presenting to the clerk of court, or going to a public library wherein he could obtain emails and attachments. The Court reviewed emails including Husband on copy providing notices and documents in preparation of trial. He also admitted at the proceeding that he was "intelligent" and he "understood the process." Additionally, Husband studied organic chemistry and computer related studies. It was clear to the Court Husband simply did not want to go forward with these proceedings after four years of a pending case.

Finally, on July 12, 2022, this Court entered Order Incorporating Rulings Made at Status Conference Including Order of Referral to Family Court Mediation and Order that Respondent / Husband shall be Served by Email, D.E. 52, filed July 13, 2022. On July 12, 2022 Husband appeared via zoom at the hearing. Husband participated when he so desired. On January 29, 2021 the Court mediator filed a Mediation Conference Report, stating Husband appeared by phone and the mediation was rescheduled for April 5, 2021, D.E. 27. On April 5, 2021, D.E. 30 the Court Mediator filed a mediation report wherein no agreement was reached. Husband has chosen when he wishes to appear. Therefore, the Court rejects this claim.

As a final attempt to continue the hearing, Husband claimed that Ramadan is a ground for him not to attend this final hearing.[1] Again, this matter was set by Court order on December 2, 2022 (Doc. 66), and it was served by hard copy and email as per the court order on December 2, 2022. Wife, who was also fasting, vehemently opposed the continuance. Wife, a physician, testified she could continue without violating her religious tenets and it was her request that the matter go forward. She too was fasting. Wife testified the parties were aware of the exact day the holiday would begin at the latest in January 2023. The Court found Wife to be very credible and by all account it appeared this was not in violation of the holiday.

Requests for continuance must be timely made in accordance with Florida law before trial and set before trial. It was incumbent on the Husband to file a Motion for Continuance and advise the Court of all reasons why the case should not be heard and have it heard before trial, including Ramadan fasting. Husband admitted that he had only fasted for one day. As set forth, Wife was also fasting, was prepared, and ready to proceed without objection. Wife testified Ramadan did not preclude one from working, and that participants may feast at night while they work and fast during the day, as both are of the Muslim faith. The claim that the Husband was ill is also questionable at best based upon the Court's observations of the Husband's demeanor during testimony and the questions he asked during the course of the proceeding. Further, Husband produced no medical documents or records supporting any claims he may have for a continuance due to his health or physical condition. Finally, there was no unforeseeable events shown by the movant, as this case has been pending for four years, and the Court finds that the Husband's ore tenus motion and subsequent motions are a result of continual dilatory practices as he has the ability to communicate by email if he wishes.

Additionally, Husband attended with his computer in hand during the course of the proceeding and continued to reference and research while in court. The evidence demonstrated Husband was served with all notices and documents. The Court finds and states that the sole

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reason Husband does not want to proceed is to hinder conclusion of this matter and due to dilatory practices, and he knew of Ramadan for months ahead of time and did nothing, which was his choice. See *Cole v. Heritage Communities, Inc.,* 838 So. 2d 1237 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D659a]. As such, the Court rejects Husband's argument.

The ore tenus motion was previously denied. For clarity, the Court also DENIES the two written subsequent motions for continuance, D.E. 74 and 76.

DISSOLUTION

The Court having heard the testimony of the parties, the evidence presented, having considered the demeanor and appearance of the parties, and reviewed the court file and relevant case law and being otherwise duly advised makes the following findings of fact and conclusions of law:

1. The Court has jurisdiction over the subject matter and the parties.

2. The Husband and Wife were married on December 10, 2010. The Petition for Dissolution of Marriage was filed by the Wife on March 15, 2019 (D.E. 3). Husband filed an Answer and Counterpetition on May 3, 2019 (D.E. 17). The Wife filed her Answer on May 23, 2019 (D.E. 20). The Husband and Wife physically separated on or about May 1, 2017 (D.E. 3).

3. The Wife appeared at the hearing and was represented by Harry Hipler, Esq.

4. The Husband appeared at the hearing pro se.

5. The Wife has been a resident of the State of Florida for more than six (6) months immediately before filing the Petition for Dissolution of Marriage.

6. The Wife is not now pregnant and the marriage between the parties is dissolved, and the parties are restored to the status of being single.

7. Both parties are over the age of 18, and neither is, nor has been within a 30 day period immediately prior to this date, a person in the military service of the United States or any of its allies as defined by the Amended Sailors' and Soldiers' Civil Relief Act of 1940.

8. The marriage between the parties is irretrievably broken, and the bonds of marriage between the parties are hereby dissolved. The parties are restored to the status of being single.

9. There is one minor child of the marriage, SAS, who was born on November 2, 2013.

EQUITABLE DISTRIBUTION OF MARITAL ASSETS AND LIABILITIES

After considering the testimony and evidence presented, Wife shall receive as her equitable distribution of assets and liabilities as listed in her Financial Affidavit, which was admitted as Composite Exhibit 1: her post petition non-marital Roth IRA in the amount of $6,000.00, admitted into evidence Exhibit 5; her Lexus and the debt and lien on her Lexus as listed on her Financial Affidavit and admitted into evidence Exhibit 3; and, her Student Loans[2] in the amount of $245,000.00 and any interest due thereon which continues to grow as she is still in college attempting to further her education post in evidence admitted as Exhibit 2,.

Husband did not present any evidence of any assets or liabilities, marital or non-marital. Husband did not present his affidavit filed March 15, 2023 into evidence, or testify to any loans. Moreover, Husband failed to cooperate in producing his financial discovery despite prior Court order dated September 1, 2022, D.E. 56.

Wife has attended Nova Southeastern and has become a Doctor of Osteopathic Medicine, or D.O.; therefore, the Wife stated in open court that she will assume all of her assets and liabilities she owns and her liabilities that she has incurred during the marriage that are in her name, and the Husband will assume all assets and liabilities in his name. See § 61.075(1), Florida Statutes.

The Husband late filed a Financial Affidavit that was never placed into evidence, but the Wife has indicated as did the Husband that any assets and liabilities in the name of the Husband shall be his share of the equitable distribution of assets and liabilities, and any assets and liabilities in the name of the Wife shall be her responsibility. The Court is not unmindful that equitable distribution begins as a 50/50 division, but in this case as per the evidence and parties' testimony, the aforementioned division of assets and liabilities shall be the equitable distribution here, which the Court deems as fair and equitable.

HUSBAND'S CLAIM FOR ALIMONY

Husband claimed in his Counterpetition, and the Court read the same to Husband in trial, he seeks $11.00 per month in rehabilitative alimony (D.E. 17, Section II, paragraph 2). Rehabilitative alimony requires a plan in writing for an award and proof of need and ability to pay. See *Clance v. Clance,* 576 So. 2d 746 (Fla. 1st DCA 1991). No plan was ever presented by him, nor did he ever testify to his need for alimony or the Wife's ability to pay. See *Broemer v. Broemer,* 109 So. 3d 284 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D536a]. At the final hearing, the Husband merely requested $11.00 per month without presenting any evidence of his need and the Wife's ability to pay, nor did he present an expert or any testimony and evidence of a plan. The Husband failed to meet his burden of proof, and on that ground alone, the Court rejects the Husband's claim. Further, as is evidenced by the equitable distribution plan, the Wife has agreed to assume any debts in her name, which are substantial, while the Husband pays for his liabilities thereby supporting the Court's finding and ruling that the Husband is not entitled to any form of alimony by virtue of his failure to present any evidence to support his claim, and the conclusion reached that the Wife does not have the ability to pay. Therefore, the Court rejects the Husband's claim for rehabilitative alimony or any other form of alimony as the Husband failed to prove his need and the Wife's ability to pay.

PARENTING PLAN AND PARENTAL RESPONSIBILITY

Utilizing all of the factors under Florida Statute §61.13 and considering the best interest of the child in this proceeding, the Court herein sets forth a Parenting Plan, both parties are directed to follow that Parenting Plan as provided by the Court. The Court makes the following findings of facts and rulings:

Shared Parental Responsibility: Both parties shall have shared parental responsibility. Accordingly, the parties are to confer jointly on all major educational and non-medical decisions regarding the child. Pursuant to Florida law, either parent may consent to mental health treatment for the child.

Parties Communication: The **parties are not to communicate through the minor child**. Each party may make usual daily decisions when the child is with them during their timesharing. **Neither party may disparage or accuse the other party of acts in the presence of the child. The parties are to encourage a healthy relationship with the other parent.** The parties both request that they confer regarding the child only via Our Family Wizard (OFW). Both parties are to download the application within 24 hours of this Court's order.

Child Communication: Father is entitled to Facetime / Skype or other video chat at 7 pm Monday, Wednesday, and Friday for 15 minutes. Father shall initiate the call. Mother shall provide a phone number to father via OFW to be utilized and shall update the number if necessary. The father may have liberal reasonable text and calls outside of school hours when school is in session.

Tax Credit / Exemption: Mother may claim the child for any tax credit or exemption. Father shall cooperate in executing any documents in this regard.

Mediation: The parties shall attend mediation prior to filing any supplemental proceedings involving the minor child, including child

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support.

Timesharing: The Husband claims that he resides at [editor's note: address redacted], Pembroke Pines, FL, which he says is owned by his parents and which is being used for his crypto company where he is self-employed. He primarily stays at this particular residence. This is an over 55 community; accordingly, minor children are not allowed to reside in the community. Husband testified he also has another residence he rents from a friend that is ready for him to live to accommodate his daughter. Husband failed to present a lease or any other proof of this second adequate residence. Moreover, the testimony raised questions regarding whether the husband has air conditioning, stable food requirements, and other needs of a child in the second residence.

The testimony of the Husband as to where he lives, his work, and any place he rents is inconsistent and contradictory and suggests that he has an unstable lifestyle. However, Mother was clear in that she even allowed Husband to stay with her parents following the decision for them to end the marriage, to allow Husband time with his daughter. Husband would just leave for extended weeks. Mother testified it is not her intent or plan to interfere with time sharing between the child and the Husband, rather, she simply requests Husband to obtain a safe and satisfactory place of residence before he has overnights with the child. It is very clear to the Court Father loves the child as does the Mother. Therefore, shared parental responsibility has been approved and is in the best interests of the child.

One rare consistency with the parties' testimony is that the parties resided the majority of their intact marriage with Wife's parents who have been the primary caretakers of the child. Wife's education and current employment have required long hours. Husband has been sporadic in moving in and out of the parents' house. Wife's parents have been the one consistent in this child's life. Even after the parties were no longer in an intact marriage, Husband lived with her and her parents in 2021 so the father was involved in the child's life.

Husband presented no evidence of being aware of the child's doctors or teachers. Wife testified the child is not presently enrolled in any extracurricular activities. The child's school is very close to the parents' house. Husband testified the child was previously enrolled in an Islamic school. Mother testified as to why the child was now in public school.

Based on all the evidence and testimony and the Court's determinations of credibility, Mother shall have all timesharing except the following:

Husband shall have timesharing every Thursday after school until 7 pm. Husband shall pick the child up from school and return the child to Wife's residence. Husband shall also have every other Sunday from 12-4 pm.

Wife suggested she would be amenable assuming her parents are amenable to allowing Father to again spend overnights at her parents' house to spend time with the father. Nonetheless, the Court cannot order Wife's parents to allow the same.

At this time the husband shall absolutely be entitled to every Thursday night as set forth above and every other Sunday 12- 4 pm. If Husband can demonstrate proof of a stable adequate residence, this shall serve as an unanticipated, substantial change in circumstances and, if the parties are unable to reach an agreement at mediation, Husband may file a supplemental petition to modify timesharing.

Holiday Schedule:

Father's Day every year with Father from 9 am to 7 pm.

July 4th, Monday of President's Day, Monday of Memorial Day, Monday of Martin Luther King Day, Child's birthday: While Father is not exercising overnight timesharing, on odd years the Father is entitled to the enumerated from 9 am to 7 pm if school is not in session. On days wherein the child is attending a school mandated session, after school until 7 pm.

Thanksgiving, Veteran's Day: While Father is not exercising overnight timesharing, on even years the Father is entitled to the enumerated from 9 am to 7 pm if school is not in session

Based on the testimony that both parties adhere Islam tradition, and the fact that father has no overnight timesharing at this time, the parties shall adhere to the regular schedule for all other holidays.

Exchanges: Father shall pick the child up from school when school is in session with drop off at Mother's residence. If school is not in session, pick up and drop off is at Mother's residence.

INFORMATION SHARING. Unless otherwise indicated or ordered by the Court: Unless otherwise prohibited by law, each parent shall have access to medical and school records and information pertaining to the child and shall be permitted to independently consult with any and all professionals involved with the child. The parents shall cooperate with each other in sharing information related to the health, education, and welfare of the child and they shall sign any necessary documentation ensuring that both parents have access to said records. Each parent shall be responsible for obtaining records and reports directly from the school and health care providers. Both parents have equal rights to inspect and receive governmental agency and law enforcement records concerning the child. Both parents shall have equal and independent authority to confer with the child's school, day care, health care providers, and other programs with regard to the child's educational, emotional, and social progress. Both parents shall be listed as "emergency contacts" for the child.

Each parent has a continuing responsibility to provide a residential, mailing, and contact address and contact telephone number to the other parent. Each parent shall notify the other parent in writing within 24 hours of any changes. Each parent shall notify the court in writing within seven (7) days of any changes.

Education: Mother's address shall be used for determination and registration for school boundary purposes.

CHANGES OR MODIFICATIONS OF THE PARENTING PLAN Temporary changes to this Parenting Plan may be made informally without a written document; however, if the parties dispute the change, the Parenting Plan shall remain in effect until further order of the court. Any substantial changes to the Parenting Plan must be sought through the filing of a supplemental petition for modification.

RELOCATION Any relocation of the child(ren) is subject to and must be sought in compliance with section 61.13001, Florida Statutes.

CHILD SUPPORT

During the course of these proceedings, Husband has not paid any child support. Wife testified the parties lived together on and off following the filing of this petition. The parties differed in their testimony as to when Husband last resided with her and her parents. However, it was clear by September 1, 2021 the parties were no longer living with each other and the child.

Wife has filed all necessary financial documents pursuant to Mandatory Disclosure. Wife's Affidavit and 2022 W2 is in evidence as Composite 1. Husband has failed to provide any documents as per Mandatory Disclosure and the Wife's Request for Production as required up to the date of the final hearing. Husband filed a financial affidavit March 15, 2023 **but it was not offered into evidence,** D.E 73. No supporting documents have ever been provided by the Husband in violation of prior court orders. Husband was court ordered to provide all documents pursuant to the Wife's Request for Production and Mandatory Disclosure filed and served on May 17, 2022 (D.E. 36) and served again thereafter to the Husband. By virtue of the court's order entered on September 1, 2022 (D.E. 56) and Fla. Stat. §61.30 (2)(b), the income imputed to the Husband was determined to be $44,225.00 per year.

The Husband acknowledged that he has owned and/or been related

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to and/or worked for four corporations upon cross-examination by the Wife's counsel based upon the Division of Corporations that lists numerous corporations in the name of the Husband. Further, Husband admitted that he is capable of doing computer programming, he has served as a DJ, worked in construction, paint and handyman work, waiter, pickup and delivery, tutor, and is now involved with a crypto company business. The Husband also acknowledged that he had an A.A in Science and was knowledgeable in organic chemistry and engineering. Therefore, based upon his prior work history and Fla. Stat. §61.30 (2)(b), he is capable of earning $44,225.00 per year and that income is imputed to him.

The Husband also can and does work. Husband works out of his parents' residence and primarily lives at the same residence, the 55 and older community as set forth above. Yet, he also testified that he leases a place in Pembroke Pines at [editor's note: address redacted], Ft. Lauderdale, Florida 33316. Husband has employees that he pays. Based upon the Husband's prior work history, demeanor and observations of him at trial, and his failure to comply with financial disclosure after a multitude of orders and four years of litigation, the Court finds that his failure to comply was intentional and dilatory.

The Wife's income as stated on her Financial Affidavit and 2022 W-2 is $56,435.00 per year. In accordance with the statutory child support guidelines and the Child Support Worksheet filed (D.E. 70) and attached hereto, the Court orders the Husband to pay $555.00 per month relating back to the date of ultimate separation of September 1, 2021 (18 months), which amounts to an arrearage of $9,990.00 due as of March 30, 2023. The accrued child support in the amount of $9,990.00 shall be paid at the rate of $100.00 per month, until paid in full in addition to the current child support in the amount of $555.00 per month that shall be paid each and every month, until the child turns age 18 or graduates from high school, whichever shall occur later (Doc. 70 Child Support Worksheet). The Wife shall continue to cover the minor child with medical insurance, and any uncovered medical expenses shall be divided according to the income percentage of the parties.

If one party pays the entire uncovered medical expenses of the child, the other shall reimburse him or her within 30 days of receipt of the charge and payment. All child support payments shall be paid directly to the Wife on the 10th of each and every month.

Husband shall directly pay the Wife by check or money order or Zelle all child support (at request of the Wife and the Court grants, no cash or products as a substitute for child support).

If Husband becomes more than one month delinquent, all further payments shall be made via the Florida State Disbursement Unit (F.S.D.U.):
https://floridarevenue.com/childsupport/make_payments/Page/default.aspx

Wife shall provide notification of the same via OFW, and establish the F.S.D.U. account. Husband shall cooperate with the same. This Court will enter an Income Deduction Order (IDO) in favor of the Wife for the current and accrued amounts of child support and for which this Court reserves jurisdiction to enter. Any costs associated with child support and the F.S.D.U. shall be paid by the Husband in addition to child support.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

A. The Court adopts each and every finding and conclusion of law made herein above as its order of the Court.

B. Husband's ore tenus motion and subsequent written motions for continuance are hereby DENIED.

C. The marriage between the parties is irretrievably broken, and the bonds of marriage between the parties are hereby dissolved. The parties are restored to the status of being single.

D. The Court's equitable distribution plan is as set forth above. Any inequity between the plan is strictly at the Wife's request to assume her own liabilities in addition to Husband's failure to participate in any financial disclosure.

E. The Husband's request for rehabilitative alimony, or any other form of alimony is hereby DENIED.

F. The Court's Parenting Plan is set forth herein.

G. The Court's determination of current and past due child support is hereby GRANTED in part as stated herein above and as per the Child Support Worksheet, which is attached.

OTHER CLAIMS AND JURISDICTION

H. All other claims for relief not discussed herein are DENIED.

I. The Court reserves jurisdiction to enforce this Final Judgment of Dissolution of Marriage, and the parties are ordered to comply with this Final Judgment of Dissolution of Marriage and the Parenting Plan.

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[1]During Ramadan, consistent with Wife's testimony regarding the holiday she also honors, employees who are fasting will usually attend work as normal, but can be encouraged to tell their employer that they are fasting. Muslims may decide to fast during the day, but share a meal after daylight hours with friends and family. See *Ramadan at work: HR best practice | HRZone*. The Court respects all religious holidays of all religious groups, yet requesting a continuance on the day of trial when the Husband knew for months that Ramadan would occur in March suggests that the Husband has not taken these proceedings seriously, but rather his claims for a continuance including this one are being used as a way to hinder reaching a conclusion to a long standing case that he has been party to and which he has failed to produce any documents in violation of a multitude of court orders as and for dilatory tactics by the Husband.

[2]See *Smith v. Smith*, 934 So.2d 636 (Fla. 2nd DCA 2006) [31 Fla. L. Weekly D2119c], which provides that student loans incurred during a marriage are marital debts. The Husband has a much smaller amount of student loans and liabilities, and whatever amount he has incurred will be his responsibility, including any credit card obligations in his name as mentioned during the trial.

* * *

Insurance—Homeowners—Discovery—Photographs—Insurer is ordered to produce unredacted photographs from insurer's home inspection and meta-data where material is sought to allow insured to identify individuals who conducted inspection on behalf of insurer

SHANE WHITE, Plaintiff, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21005485, Division 12. April 11, 2023. Keathan B. Frink, Judge. Counsel: Alexander L. Avarello, Wind Law Group, PLLC, Bay Harbor Islands, for Plaintiff. Tiya Rolle, Fort Lauderdale, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR CONTEMPT AND IN THE ALTERNATIVE MOTION TO COMPEL PRODUCTION OF ORIGINAL ADJUSTER PHOTOS AND CLAIM FILE MATERIALS FOR EXAMINATION BY PLAINTIFF'S META-DATA EXPERT

This Cause came before this Court on PLAINTIFF'S MOTION FOR CONTEMPT AND IN THE ALTER NATIVE MOTION TO COMPEL PRODUCTION OF ORIGINAL ADJUSTER PHOTOS AND CLAIM FILE MATERIALS FOR EXAMINATION BY PLAINTIFF'S META-DATA EXPERT on April 6, 2023. At that time, Plaintiff requested the unredacted photos of the home taken by Universal at the time of the inspection on December 28, 2020 in order to identify the person whose hand is seen in photographs. The field adjuster who Universal claims conducted in the inspection was Carlos Castillo, a male; however the hand of the person seen in the Universal's photographs of the home taken during the inspection is apparently a woman's hand. Plaintiff seeks to obtain the identity of that person's hand through depositions of Universal's corporate representative and field adjuster, interrogatories and requests for production, however Defendant has not been able to state the identity of the hand in the photographs. Plaintiff now seeks the unredacted photographs

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taken during the inspection of December 28, 2020 and the meta-data from the photographs. Universal objects to Plaintiff's discovery request asserting privilege and relevance, as they are part of the claims file. Plaintiff's Motion is **GRANTED**.

"A specifically-articulated document request for "photographs of the alleged property damage"may require either (a) production of such photographs, or (b) disclosure on a privilege log with a specifically-articulated basis for protection from discovery, even if those photographs have been filed with other non-discoverable, claim-related documents in the insurer's "claims file and coverage remains in dispute. We further observe that the Fourth District adopted a more specific approach to the various types of records that may be in an insurer's claims file in *State Farm Florida Insurance Co. v. Aloni*, 101 So.3d 412, 414 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2737a] (recognizing that an insured may, in a specific case and as to a specific record in an insurer's claims file, establish the necessity/good cause exception to the work product doctrine as provided by Florida Rule of Civil Procedure 1.280(b)(4))." *Homeowners Choice v. Avila*, 248 So. 3d 180, 184-185 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D885a]. Here, Plaintiff made a specific request for photographs of the property. These photographs are relevant and specifically limited to allow Plaintiff to identify individuals from Universal who inspected the home. The Court conducted an in camera inspection of documents Universal deemed responsive to the request.

Based on the in camera inspection it is **ORDERED** and **ADJUDGED** that: Universal shall produce the unredacted photographs from Universal's inspection of the home in its native format and the meta-data within 10 days of entry of this Order.

* * *

Criminal law—Possession of firearm by felon—Search and seizure—Vehicle—Stop—Traffic infraction—There is no competent substantial evidence from which court could find reasonable suspicion for stop where arresting officer testified that he had no independent recollection of observations that led him to conclude that defendant committed two traffic infractions and that his recollection would not be refreshed by reviewing his report or body camera video, and there are no other witnesses or evidence regarding traffic stop—Motion to suppress granted

STATE OF FLORIDA, Plaintiff, v. ALFONIA LEONARD JOHNSON, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 22-1031CFA. April 17, 2023. Melissa D. Souto, Judge. Counsel: Donovan Wagner, Office of the State Attorney, Sanford, for Plaintiff. Matthews R. Bark, Matthew R. Bark, P.A., Altamonte Springs, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

The Defendant is charged with Possession of a Firearm by a Convicted Felon. On February 7, 2023, the Defendant filed his "Amended Motion to Suppress Evidence Pursuant to F.S. § 901.15 and 901.151(6) and Motion to Suppress Confessions, Statements and Admissions." In his motion, Defendant seeks to suppress all statements he made, the firearm and any other evidence obtained subsequent to the Defendant's seizure.

An evidentiary hearing was conducted on March 27, 2023. At the evidentiary hearing, former Officer Andrew Desmond testified that he came into contact with Defendant on April 29, 2022, when he stopped Defendant for two traffic violations: failing to stop behind stop bar at a stop sign and crossing a double yellow line. Former Officer Desmond also testified that he had no independent recollection regarding his observations that led him to conclude that Defendant committed those traffic infractions. When the prosecutor attempted to refresh his recollection, former Officer Desmond stated that neither the report, nor the bodycam would refresh his recollection. No other witnesses testified at the hearing. The State introduced into evidence a copy of former Officer Desmond's body camera video as State's Exhibit 1. The video was not published during the hearing, but this Court reviewed the video in chambers. The video does not show any observations former Officer Desmond made of Defendant's vehicle prior to the traffic stop. It does show former Officer Desmond making contact with Defendant and informing him of the reasons for the stop.

Defendant challenges the legality of the stop based on former Officer Desmond not being able to provide reasonable suspicion for the stop because his testimony at the hearing was incompetent as a matter of law. He argues that pursuant to *K.E.A. v. State,* 802 So.2d 410 (3rd DCA 2001) [26 Fla. L. Weekly D2851c], this officer was incompetent to testify to refreshed recollection because upon review of his report and body cam he stated that the items would not refresh his present recollection, and he had no independent recollection of the stop. The Defendant also argues that in *Carter v. State,* 120 So. 3d 207 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1802a], the Fifth District Court of Appeal similarly held that there was no competent, substantial evidence to support a finding of reasonable suspicion for a traffic stop because the officer admitted that he could not independently recall observing the traffic infraction. The State argues that the case comes down to the former officer's credibility, and that since he informed the Defendant of the reason for the stop, there was competent, substantial evidence that there was reasonable suspicion of a traffic infraction.

Former Officer Desmond candidly admitted that he had no independent recollection of observing the traffic infractions, and when asked if his recollection could be refreshed by reviewing his report or body camera video, he testified that it would not. No other witnesses were presented, preventing use of the fellow officer rule, and there was no offer by the State of any other possible evidence as was suggested by the court in *K.E.A.* Therefore, pursuant to the *K.E.A.* and *Carter* cases there is no competent, substantial evidence for this Court to find that there was reasonable suspicion for the traffic stop. Accordingly, all evidence seized and Defendant's statements are fruit of the poisonous tree and must be suppressed.

Therefore, it is

ORDERED AND ADJUDGED that the Defendant's motion is granted. The evidence seized after the stop of Defendant, including the firearm, and all of Defendant's statements to law enforcement are suppressed.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Conditions precedent to suit—Demand letter that includes itemized statement specifying dates of service and charges for each date complies with presuit requirements—PIP statute does not require that demand letter state exact amount owed—Inconsistencies between amounts sought in demand letter and amounts alleged in lawsuit do not invalidate demand letter—Demand letter requirement must be construed narrowly so as not to unduly restrict access to courts

ZALUSKI CHIROPRACTIC & BOND FAMILY MEDICINE a/a/o Jasmine Montgomery ("Zaluski"), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("State Farm"), Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2022 SC 3188. March 30, 2023. R. Scott Ritchie, Judge. Counsel: Adam Saben, Shuster, Saben & Estevez, Jacksonville, for Plaintiff. David Gagnon, Taylor, Day, Grimm & Boyd, Jacksonville, for Defendant.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AS TO COMPLIANCE WITH F.S. 627.336(10) (DEMAND LETTER)

THIS CAUSE came before the Court for hearing on February 7, 2023 on Cross-Motions for Summary Judgment on compliance with Florida Statutes §627.736(10). The Court, having reviewed the motions and entire Court file, read relevant legal authority, heard argument, and been sufficiently advised in the premises, finds as follows:

The issue before the court involves the level of sufficiency needed to place an insurer on notice of an intent to initiate litigation for unpaid personal injury protection ("PIP") benefits pursuant §627.736(10), Florida Statutes. This notice is referred to as a Presuit Demand Letter ("PDL"). The enumerated requirements of a PDL are contained within §627.736(10), which states, in pertinent part:

> DEMAND LETTER.—
>
> (a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice required shall state that it is a "demand letter under s. 627.736(10)"and shall state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; *and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due.* A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary. (emphasis added).

A plain reading of the statute shows that if the Plaintiff attaches an itemized statement to its PDL, it has complied with the requirement of the condition precedent. An itemized statement containing the information above (underlined) gives the insurance carrier all the information it needs to confirm the dates and services at issue as well as each exact amount for that treatment, service, accommodation, or supply. Once the carrier is sent a PDL by a potential litigant, the Plaintiff cannot initiate litigation for thirty days. This "safe harbor" gives the insurance carrier a second opportunity to review the bills sent in by the provider during the treatment period and confirm that the bills were all properly received and adjusted by the insurance carrier. In this case, the facts are not in dispute. The Plaintiff attached an itemized statement giving the insurance carrier the requisite information it needed to confirm the dates at issue, the services rendered, and the exact charge for each service.

The burden to adjust the claim is on the insurance company, not the provider. The medical provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the medical provider supplied this information to the carrier a second time in the form of an itemized statement stating each exact amount for each date of service, it complied with the requirements of §627.736(10). See, *MRI Associates of America, LLC a/a/o Ebba Register v. State Farm Fire & Casualty Company,* 61 So.3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b].

In its Motion, the Defendant alleged that the failure to include prior payments made by State Farm or the exact amount of benefits claimed to be due fails to place the insurance carrier on proper notice. Further, Defendant states that alleged inconsistencies between the PDL and the amount ultimately being sought by the Plaintiff in its lawsuit render the PDL defective, thus, not placing the Defendant on notice and this lawsuit unripe. Finally, the Defendant alleges that the fact that the medical provider noted a "zero balance" at the end of its ledger created an insufficient itemized statement.

The purpose of the PDL is to give the insurance carrier a second opportunity to review the bills and dates of service at issue; eliminating the opportunity for "gotcha litigation" on the part of the Plaintiff in case the insurer missed a charge or date of service when initially submitted. The insurance company can then: a) make a supplemental payment; or, b) stand on its original adjustment of the claim. The requirement of "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due" assures the insurer that the parties are litigating over the same bills and services.

This Court notes that many sister courts have rejected the argument the PDL must enumerate the exact amount *owed.* Recently in *Angels Diagnostic Group, Inc. v. Allstate Insurance Company,* 29 Fla. L. Weekly Supp. 211a (Fla. Miami-Dade Cty., April 20, 2021), the trial court held that there is no requirement to state the exact amount *owed,* stating that a court cannot:

> [R]ead into the statute what it does not say. Defendant is asking this Court to read into the statute that Plaintiff is required to provide an "exact amount owed," but such language simply does not exist in the statute. This Court cannot impose requirements upon the Plaintiff that are not set forth in the statute. If the legislature intended for the Plaintiff to essentially adjust the claim or conduct "an accounting" as the Defendant surmises, the legislature would have stated as such in the statute. However, despite several reiterations and amendments to the No-Fault Statute, the legislature has essentially left Section 627.336(10), Fla. Stat, untouched. *Angels Diagnostic Group, Inc. v. Allstate Insurance Company,* 29 Fla. L. Weekly Supp. 211a (Fla. Miami-Dade County, Order of April 20, 2021).[1]

Besides the fact that the statute does not require the PDL to state an exact amount *owed,* it is difficult to understand how a Plaintiff (usually a medical provider) would be able to account for such an amount. Again, many sister courts have rejected such an attack. *In Advanced MRI Diagnostics a/a/o Richard Avendano v. State Farm*

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Mut. Auto. Ins. Co., 22 Fla. L Weekly Supp. 357a (Fla. Duval Cty. August 15, 2014), the court wrote:

> [T]he Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount *owed.* When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible. A strict construction of the statute *only* says that a pre-suit demand must specify "[t]o the extent applicable . . . an itemized statement specifying each exact amount . . ." With the various factors that must be considered by the carrier when determining the exact amount to pay on a claim, and the fact that this information is readily available to the carrier and virtually never readily available to the medical provider submitting a claim, it is not reasonable to expect the provider to know the "exact amount owed" since said amount could vary amongst PIP applicants (depending on the language of each individual policy). Further, the Defendant fails to convince this Court of the consequence of failing to list the exact amount owed. This Court could surmise endless scenarios where the provider (or claimant) would need to know certain information in order to properly compute the exact amount owed based on a multitude of factors, including the ones listed above." *Id.* citing, *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a.

Again, the burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736(10).

Regarding mathematical inconsistences, again, the Defendant's arguments have been rejected by sister courts. In *Neurology Partners a/a/o Scott Bray v. State Farm Mut. Auto Ins. Co.,* 22 Fla. L. Weekly Supp. 101b, the Court rejected the argument of "mathematical inconsistencies" creating an insufficient PDL for three reasons:

> 1) The duty to adjust the claim rests solely on the insurance carrier, not the provider. Therefore, even assuming the provider included incorrect mathematical calculations, such information does not shift the non-delegable duty from the carrier to the provider.
>
> 2) A sister court already addressed this exact issue. In *Robert J. Indelicato, D.C. a/a/o Ruby Kish v. State Farm Mutual Automobile Insurance Company,* 21 Fla. L. Weekly Supp 184b, the Plaintiff attached a ledger sheet to its PDL that contained more than the requisite information which was required under §627.736(10), Further, there were mathematical inconsistencies between the ledger totals and the calculations on the front of the PDL. However, Judge Mark Singer correctly stated and explained:
>
> > "The Court was made aware of the calculation discrepancy between the total on the ledger sheet and the page 1 of the Notice of Intent. But, as stated above, the statute does not require an exact *total* of the amount claimed to be due. A total included in the Notice or attached ledger sheet, *even if miscalculated or misstated*, as in this case, is immaterial to the issue of whether or not the Notice is compliant with the statutory requirements."
> >
> > *Kish,* at 184, footnote 2 (emphasis in original and emphasis added).
>
> This Court agrees with its sister Court in *Kish,* for to rule otherwise would allow an insurance carrier to look for any technical defect or miscalculation as a ground to attack an otherwise compliant PDL, especially when the itemized statement already contains the information needed to evaluate the claim.
>
> 3) The insurance carrier, not the provider, is the only party in a position to accurately determine the exact amount owed. When an adjuster must account for numerous factors, such as whether there is a deductible, whether the policy contains MedPay, whether other providers submitted bills that must be accounted for; and, which payment methodology the carrier intends to rely on for payment, it is virtually impossible for a provider to calculate the exact amount owed. If such a calculation is futile and not mandated by statute, the Plaintiff should not be penalized for gratuitously attempting to include additional information.
>
> Therefore, based on all the above reasons, the Court finds that any mathematical errors or inconsistencies on the Plaintiff's PDL do not void the otherwise compliant PDL.
>
> See, *Bray.*

This Court concurs with the sound reasoning from these sister courts and finds that the alleged inconsistencies between amounts in the PDL and amounts ultimately alleged in the lawsuit do not create an inadequate PDL.

Defendant, STATE FARM, relies on *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA Feb. 24, 2021) [46 Fla. L. Weekly D447a] ("*Rivera*") wherein the Third District found that the insured's PDL did not meet the specificity requirements of §627.736(10). In *Rivera,* a named insured sought reimbursement for his mileage to and from medical providers for treatment related to a covered loss. The Third DCA found that Rivera's failure to attach a proper itemized statement flawed his PDL; thus suit was premature and not ripe. In our case, unlike *Rivera,* Plaintiff, ZALUSKI, attached a proper itemized statement, listing each exact amount, date of treatment, service or accommodation. Therefore, *Rivera* is factually dissimilar from the case at bar.

This Court is also mindful of its constitutional duty to allow litigants access to courts. In *Pierrot v. Osceola Mental Health, Inc.,* 106 So.3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a], the Fifth District mandated that conditions precedent must be construed narrowly in order to allow Florida citizens access to courts. A PDL is a condition precedent to filing a lawsuit pursuant to §627.736. Therefore, when examining a potential litigant's burden in complying with a condition precedent, "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System,* 871 So.2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. Requiring the Plaintiff to *calculate* the exact amount *owed* or include prior payments made is nowhere listed as a requirement to satisfy §627.736(10). Moreover, any inconsistencies between the ledger and the amount allegedly owed, as noted in a PDL, do not nullify the fact that the Plaintiff supplied the Defendant with the information noted in §627.736 (10)[2]. For the court to hold a potential litigant to any standard higher than that enumerated in the PIP statute is to add or edit requirements that the legislature did not include. Further, the Defendant's position would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostolico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostolico*, at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to *deny access to courts on the basis of technicalities*") (emphasis added), citing, *Archer v. Maddox,* 645 So.2d 544 (Fla. 1st DCA 1994). With respect to actions brought at common law, such as a PIP suit, which is an action brought as a breach of contract, a court must construe any condition precedent requirements in §627.736(10) narrowly so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts. Thus, this Court disagrees with the compliance

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standard argued by the Defendant, which sets the bar unduly high regarding § 627.736 (10).

THIS COURT FINDS that by attaching its itemized statement to its PDL, the Plaintiff met the requirements of §627.736(10), Florida Statutes. Therefore, it is ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

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[1]Also see, *EBM Internal Medicine a/a/o Jasmine Gaskin v. State Farm Mutual Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 382a (Fla. Duval Cty. Ct. Dec. 9, 2011) (finding no requirement to include prior payments made or exact amount owed in a demand letter)*; First Coast Medical Center, Inc. a/a/o Barbara Derouen v. State Farm Mut. Auto. Ins. Co.,* 17 Fla. L. Weekly Supp. 118a (Fla. Duval Cty. Ct. November 12, 2009); *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct. February 8, 2012); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mut. Auto. Ins. Co*.,, 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. August 7, 2014); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Wendy Brody v. State Farm Mutual Automobile Insurance Company,* Case No.: 2012-SC-4885(Fla. Duval Cty. Ct., July 23 2014: *Physicians Medical Center Jax a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 359a (Fla. Duval Cty. Ct. August 25, 2014); and, *Ruth Beck v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly. Supp. 454b (Fla. Leon Cty. Ct. October 14, 2014). All of these sister courts found no requirement to include prior payments made or an accounting for the exact amount owed in order to comply with the requirements of §627.736(10).

[2]This Court recognizes that many businesses may reduce or write off a debt on their ledgers for internal accounting or business purposes. This is a separate issue from releasing an unpaid debt allegedly owed by a third-party. There is no evidence that the Plaintiff, ZALUSKI, released the Defendant, STATE FARM, from its contractual obligation pursuant to §627.736. To the contrary, such unpaid debt is the gravamen of this lawsuit. Thus, the mere fact that Plaintiff had a "zero balance" at the end of its ledger does not create an inadequate itemized statement for purposes of notice.

* * *

Insurance—Personal injury protection—Demand letter—Sufficiency

GLOBAL DX IMAGING ONE, LLC, a/a/o Bjorn Brown, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2022-SC-09939. Division CC-O. April 18, 2023. Julie K. Taylor, Judge. Counsel: Adam Saben, Shuster, Saben & Estevez, Jacksonville, for Plaintiff. David Gagnon, Taylor, Day, Grimm & Boyd, Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: DEMAND LETTER COMPLIANCE AND DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT ON PLAINTIFF'S FAILURE TO COMPLY WITH SECTION 627.736(10), FLORIDA STATUTES

This matter came on to be heard on April 11, 2023, on Plaintiff's Motion for Partial Summary Judgment re: Demand Letter Compliance filed on March 29, 2023, and Defendant's Motion for Final Summary Judgment on Plaintiff's Failure to Comply with Section 627.736(10), Florida Statutes filed on November 17, 2023, Defendant waiving any objections contained in Defendant's Motion to Strike Plaintiff's Motion for Partial Summary Judgment filed on March 31, 2023, based upon the arguments by the parties at the hearing and the Court being fully advised upon the premises, the Court finds as follows:

1. Plaintiff filed the Complaint in this matter on May 20, 2022, alleging that Defendant "denied full payment for medically necessary treatment provided to Bjorn Brown. . . ."

2. On August 18, 2022, Defendant filed Defendant's Answer to Plaintiff's Complaint.

3. During the hearing, the parties addressed the issue of whether the demand letter in this matter meets the requirements of section 627.736(10)(b)(3), Florida Statutes. Specifically, Defendant argues in their motion that "the demand letter does not include the mandatory 'itemized statement specifying each exact amount. . .and the type of benefit claimed to be due."

4. Most recently in case number 16-2021-SC-017862-XXXX [31 Fla. L. Weekly Supp. 79a], the Honorable Jonathan Sacks addressed issues similar to the issues in this matter, and in case number 16-2013-SC-002069-XXXX [22 Fla. L. Weekly Supp. 101b], the Honorable Scott Mitchell addressed issues similar, if not identical to, the issues argued here by the same counsel for both Plaintiff and Defendant. The orders entered by Judge Sacks and Judge Mitchell fully address and resolve those issues.

5. Based upon the issues and the arguments made in the case at hand in both the motions and during the hearing, and the issues and the arguments addressed by the orders entered in case numbers 16-2021-SC-017862-XXXX and 16-2013-SC-002069-XXXX, this Court hereby adopts the analysis in the orders entered by Judge Sacks and Judge Mitchell in those cases.

Therefore, it is hereby

ORDERED AND ADJUDGED:

1. That Plaintiff's Motion for Partial Summary Judgment re: Demand Letter Compliance is **GRANTED**.

2. That Defendant's Motion for Final Summary Judgment on Plaintiff's Failure to Comply with Section 627.736(10), Florida Statutes is **DENIED**.

* * *

Insurance—Personal injury protection—Notice of loss—Claim form that omitted medical provider's professional license number was substantially complete and provided insurer notice of covered loss—Insurer that made payment on claim without objecting to missing license number cannot argue that number was material element of claim—Argument that 2012 amendment to PIP statute that changed word "shall" to "must" regarding placement of physician's signature and license number on claim form changed standard for claim form from "substantial compliance" to "strict liability" is rejected

SMITH FAMILY CHIROPRACTIC, a/a/o Marshal White, ("Smith Family"), Plaintiff, v. AUTO CLUB SOUTH INSURANCE COMPANY, ("Auto Club"), Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2020-SC-024972. March 28, 2023. Eleni Derke, Judge. Counsel: Adam Saben, Shuster, Saben & Estevez, Jacksonville, for Plaintiff. James C. Rinaman, Dutton Law Group, Jacksonville, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION /JUDGMENT

THIS MATTER comes before this Court for hearing on March 15, 2023 on Defendant's Motion for Summary Dispotion/Judgment. This Court, having reviewed the Court file and having heard argument of counsel and being otherwise advised in the premises DENIES the Defendant's Motion for Summary Judgment and finds as follows:

The facts are not in dispute. Plaintiff, SMITH FAMILY, treated assignor, Marshal White, for injuries sustained in a motor vehicle accident on November 9, 2018. Plaintiff submitted its bills to Defendant, AUTO CLUB, for payment and all bills were paid, albeit the payments were short based on the allegations made by the Plaintiff. Defendant, AUTO CLUB, now alleges, that because Smith Family failed to place the treating physician's license number in Box 31 of the submitted CMS-1500 form that it was never placed on written notice of a covered loss, pursuant to Florida Statute 627.736(5)(d)(2016).

Florida courts have now addressed this exact issue, at least, three times, providing this Court with guidance on the proper standard for determining whether an insurance company has been placed on written notice of a covered loss, pursuant to section 627.736(5)(d), Florida Statutes (2016). In *United Automobile Ins. Co. v. Professional Medical Group, Inc.,* 26 So.3d 21 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a]("*Professional Medical*"), the insurer argued that it

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was not placed on written notice of a covered loss because, *inter alia,* the medical provider did not place the physician's license number in Box 31 of the CMS-1500 forms. The relevant section of the PIP statute states:

> For purposes of paragraph (4)(b), an insurer shall not be considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph, and unless the statements or bills are properly completed in their entirety as to all material provisions, with all relevant information being provided therein. Fla.Stat. 627.736(5)(d)(2009).

The Third District focused on the words "properly completed", referencing the pip statutes definition of same in section 627.732(13), Florida Statutes (2004):

> "Properly completed" means providing truthful, *substantially complete,* and *substantially accurate* responses as to all *material elements* to each applicable request for information or statement by a means that may lawfully be provided and that complies with this section, or as agreed by the parties. *Id.* at 24. (emphasis in original).

The Third District concluded that "based on the statute's plain language, a bill or statement need only be 'substantially complete' and 'substantially accurate' as to relevant information and material provisions in order to provide notice to an insurer." *Id.* The Court found that the bills submitted to United Auto were "substantially complete" as to all relevant and material information as required by section 627.736(5)(d).[1] Important to the Court's decision were the additional facts that, at no time did United Auto object to the missing physician's license number. In the case at bar, Defendant, AUTO CLUB, never took issue with the missing number in Box 31. Therefore, AUTO CLUB cannot argue that the missing number was a material provision since it in no way prevented the Defendant in its ability to adjust the claim.

In *USAA Cas. Ins. Co. v. Pembroke Pines MRI, Inc.,* 31 So.3d 234 (Fla 4th DCA 2010) [35 Fla. L. Weekly D613b] ("*Pembroke Pines MRI*"), USAA argued that it was not placed on written notice of a covered loss because the MRI center did not place a professional license number in Box 31 of its CMS-1500 form. The Fourth DCA affirmed the trial court in finding that Pembroke Pines MRI substantially complied with section 627.736(5)(d) because it "provided substantially accurate responses to all relevant information and material elements." *Id.* at 238.

In *Geico General Ins. Co. v. Tarpon Total Health Care,* 86 So.3d 585 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D1027a] ("*Tarpon Total*"), the Second DCA adopted the reasoning from the above two cases in finding that the medical provider's failure to include the professional license number in Box 31 was not fatal and that an insurer is placed on written notice of a covered loss by a substantially completed CMS-1500 claim form. Therefore, three Florida District courts concluded that the proper standard to apply is "substantial compliance" in determining whether a submitted CMS-1500 form places an insurer on written notice of a covered loss. More specifically, all three concluded that the failure to include a professional license number in Box 31 is not fatal to an otherwise properly submitted claim form.[2] Following the guidance of the discussed, binding case law, the Court concludes that the claim forms submitted by Plaintiff, SMITH FAMILY, substantially complied with section 627.736(5)(d) and AUTO CLUB was placed on proper notice of a covered loss for said date.

Defendant argues that *Professional Medical, Pembroke Pines MRI* and *Tarpon Total* do not apply to the analysis of this case because all three cases involved a version of section 627.736(5)(d) that predate 2012. AUTO CLUB notes that the Legislature amended Florida Statute 627.736(5)(d) in 2012 changing the word "shall" to "must" regarding the placement of a physician's signature and license number in Box 31. AUTO CLUB argues that changing the word "shall" to "must" changes the standard from "substantial compliance" to "strict liability", wherein the mere omission of the license number in Box 31 constitutes failure to provide the insurer of written notice of a covered loss. The Court rejects the Defendant's argument for the following reasons. One, none of the three opinions from the District Courts of Appeal (*Professional Medical, Pembroke Pines MRI* or *Tarpon Total*) focus on the word "shall" in their analysis. All three focus on the application of the definition of "properly completed" from section 627.732(13); a definition that remains the same before *and* after 2012. "Properly completed" is found to mean "substantially complete" and "substantially accurate", which aligns with a standard of substantial compliance. Therefore, to focus on the distinction between "shall" and "must" (words that are close in meaning anyway) is to divert from the analysis of three appellate decisions on the same issue as the issue before this Court. Two, although the three noted opinions analyze the pre-2012 version of the stature, sister courts faced with the same or similar legal issue after 2012 applied these same Opinions in support of the theory of substantial compliance. In *Spinal Health & Rehab of Punta Gorda, Inc. v. Star Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 120a (Broward Cty. Ct., February 12, 2017), Judge Fry relied on *Pembroke Pines MRI* to discredit the opinions of the defense medical expert as to Box 31, calling them "contrary to established law". In *North Broward Health & Rehab, Inc. v. State Farm Fire & Cas. Company,* 21 Fla. L. Weekly Supp. 838b (Broward Cty. Ct., March 25, 2014)("*North Broward Health*"), Judge Levy relies on *Professional Medical* to discount attacks on alleged errors in Box 31 from the insurance company, finding that the "Defendant's interpretation. . .does not comport with *substantial compliance precedent* including other examinations of Box 31 defects." (emphasis added), also see, *Healing Hands Pain Relief Center, Inc. v. Star Casualty Ins. Co.,* 20 Fla. L. Weekly Supp. 182a (Polk Cty. Ct., December 7, 2012) (applying the "substantial compliance" standard to alleged defects in the CMS-1500 form, relying on *Professional Medical*). Therefore, the analysis of *Professional Medical, Pembroke Pines MRI* and *Tarpon Total* with respect to the "substantial compliance" standard applies after 2012. Three, written notice of a covered loss only applies to the proper completion of "material provisions" of the CMS-1500 form. In this case, AUTO CLUB paid the submitted claim without the need to have the physician's license number in Box 31. The form contained the physician's name and all other relevant information needed to adjust the claim. An adjuster can quickly look up the license number of any physician on the Florida Department of Regulation website, if needed. Therefore, it is hard for this Court to accept that the omission of the license number from Box 31 is a "material" provision that prevented AUTO CLUB from being able to adjust the claim at issue. Four, while AUTO CLUB argues that the change in terms from "shall" to "must" shows a legislative intent to denote a mandatory provision regarding the license number in Box 31, it is difficult to reconcile the suggested intent with the established legislative intent of the no-fault statute to provide "swift and virtually automatic" payment of medical claims. See, *North Broward Health,* citing, *Gov't Employees Ins. Co. v Gonzalez,* 512 So.2d 269 (Fla. 3rd DCA 1987). Such a strict liability standard as suggested by AUTO CLUB would result in the "wholesale denials of otherwise valid bills for services that were rendered." See *North Broward Health* at 3. Furthermore, if the intent of the legislature were truly to replace the substantial compliance standard with a strict liability standard, it is difficult to understand how that would be achieved by replacing "shall" with "must". The two terms are, essentially, synonyms. Accepting AUTO CLUB'S argument as true, it would be reasonable to assume that the legislature would replace "shall" with some term other than "must" to differenti-

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ate the stark change in the notice standard suggested by AUTO CLUB.

Therefore, the Defendant's Motion for Summary Dispostion/ Judgment is DENIED.

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[1]Additionally, the medical provider failed to submit the disclosure and acknowledgment form as described in section 627.736(5)(e), Florida Statutes (2004). The Third District still found that the medical provider substantially complied with section 627.736(5)(d).

[2]This Court notes and agrees with the practical commentary in the concurring opinion of Judge Altenbernd who notes: "On that form, line 31 is at the bottom of the page. It calls for the signature of the physician or supplier including degrees or credentials. It does not ask for his professional license number or provide any designated space for this number. It has a designated space for his signature that is 1 1/8″ in length and a space for the date that is 3/8″ in length. The box barely has enough space for the doctor to type his name, much less date and sign it. The likelihood that a physician would omit his or her unrequested professional license number when filling out this box seems very high." *Tarpon Total,* at 589. (J. Altenbernd, concurring).

* * *

Insurance—Personal injury protection—Demand letter that included itemized statement specifying dates of service and charges for each date complied with presuit requirements—PIP statute does not require that demand letter state exact amount owed or account for inconsistencies with prior demand letter—Demand letter requirement must be construed narrowly so as not to unduly restrict access to courts

NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS, a/a/o Danny Whitener, Plaintiff, v. MERCURY INDEMNITY COMPANY OF AMERICA ("MERCURY"), Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2021-SC-017862. December 9, 2022. Jonathan Sacks, Judge. Counsel: Adam Saben, Shuster, Saben & Estevez, Jacksonville, for Plaintiff. Hillary Lovelady, Kubicki Draper, Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO COMPLIANCE WITH F.S. 627.736 (10) (DEMAND LETTER)

THIS CAUSE came before the Court for hearing on October 5, 2022 on Cross-Motions for Summary Judgment on compliance with Florida Statutes § 627.736 (10). The Court, having reviewed the motions and entire Court file, read relevant legal authority, heard argument, and been sufficiently advised in the premises, finds as follows:

The issue before the court involves the level of sufficiency needed to place an insurer on notice of an intent to initiate litigation for unpaid personal injury protection ("PIP") benefits pursuant § 627.736(10), Florida Statutes. This notice is referred to as a Presuit Demand Letter ("PDL"). The enumerated requirements of a PDL are contained within § 627.736 (10), Fla. Stat. which states, in pertinent part:

DEMAND LETTER.—

(a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice required shall state that it is a "demand letter under s. 627.736(10)"and shall state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary. (emphasis added).

The Defendant's position is that the Plaintiff's Presuit demand letter is defective because it "fails to account for all prior payments" and fails to "state an amount due and owing in order to cure the demand" as required by §627.736(10)(b)3, Fla. Stat.

A plain reading of the statute shows that if the Plaintiff attaches an itemized statement to its PDL, it has complied with the requirement of the condition precedent. An itemized statement containing the information above (underlined) gives the insurance carrier all the information it needs to confirm the dates and services at issue as well as each exact amount for that treatment, service, accommodation, or supply. Once the carrier is sent a PDL by a potential litigant, the Plaintiff cannot initiate litigation for thirty days. This "safe harbor" gives the insurance carrier a second opportunity to review the bills sent in by the provider during the treatment period and confirm that the bills were all properly received and adjusted by the insurance carrier. In this case, the facts are not in dispute. The Plaintiff attached an itemized statement giving the insurance carrier the requisite information it needed to confirm the dates at issue, the services rendered, and the exact charge for each service. The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement stating each exact amount for each date of service, it complied with the requirements of § 627.736(10). See, *MRI Associates of America, LLC a/a/o Ebba Register v. State Farm Fire & Casualty Company,* 61 So.3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b].

The purpose of the PDL is to give the insurance carrier a second opportunity to review the bills and dates of service at issue; eliminating the opportunity for "gotcha litigation" on the part of the Plaintiff in case the insurer missed a charge or date of service when initially submitted. The insurance company can then: a) make a supplemental payment; or, b) stand on its original adjustment of the claim. The requirement of "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due" assures the insurer that the parties are litigating over the same bills and services.

This Court notes that many sister courts have rejected the argument the PDL must enumerate the exact amount *owed.* Recently in *Angels Diagnostic Group, Inc. v. Allstate Insurance Company,* 29 Fla. L. Weekly Supp. 211a (Fla. Miami-Dade Cty., April 20, 2021), the trial court held that there is no requirement to state the exact amount *owed,* stating that a court cannot:

[R]ead into the statute what it does not say. Defendant is asking this Court to read into the statute that Plaintiff is required to provide an "exact amount owed," but such language simply does not exist in the statute. This Court cannot impose requirements upon the Plaintiff that are not set forth in the statute. If the legislature intended for the Plaintiff to essentially adjust the claim or conduct "an accounting" as the Defendant surmises, the legislature would have stated as such in the statute. However, despite several reiterations and amendments to the No-Fault Statute, the legislature has essentially left Section 627.736(10), Fla. Stat., untouched. *Angels Diagnostic Group, Inc. v. Allstate Insurance Company,* 29 Fla. L. Weekly Supp. 211a (Fla.

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Miami-Dade County, Order of April 20, 2021).[1]

Besides the fact that the statute does not require the PDL to state an exact amount *owed* or to account for alleged inconsistencies with a prior PDL, it is difficult to understand how a Plaintiff (usually a medical provider) would be able to account for such an amount. Again, many sister courts have rejected such an attack. *In Advanced MRI Diagnostics a/a/o Richard Avendano v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L Weekly Supp. 357a (Fla. Duval Cty. August 15, 2014), the court wrote:

> [T]he Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount *owed.* When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible. A strict construction of the statute *only* says that a pre-suit demand must specify "[t]o the extent applicable . . . an itemized statement specifying each exact amount. . . ." With the various factors that must be considered by the carrier when determining the exact amount to pay on a claim, and the fact that this information is readily available to the carrier and virtually never readily available to the medical provider submitting a claim, it is not reasonable to expect the provider to know the "exact amount owed" since said amount could vary amongst PIP applicants (depending on the language of each individual policy). Further, the Defendant fails to convince this Court of the consequence of failing to list the exact amount owed. This Court could surmise endless scenarios where the provider (or claimant) would need to know certain information in order to properly compute the exact amount owed based on a multitude of factors, including the ones listed above." *Id.,* citing, *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a.

Again, the burden to adjust the claim is on the insurance company, not the provider. Therefore, once the provider supplied the relevant information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736.[2]

Defendant, MERCURY, relies on *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA Feb. 24, 2021) [46 Fla. L. Weekly D447a] ("*Rivera*") wherein the Third District found that the insured's PDL did not meet the specificity requirements of § 627.736 (10). In *Rivera,* a named insured sought reimbursement for his mileage to and from medical providers for treatment related to a covered loss. The Third DCA found that Rivera's failure to attach a proper itemized statement flawed his PDL; thus suit was premature and not ripe. In our case, unlike *Rivera,* Neurology Partners attached a proper itemized statement, listing each exact amount, date of treatment, service or accommodation. Therefore, *Rivera* is factually dissimilar from the case at bar.[3]

This Court is also mindful of its constitutional duty to allow litigants access to courts. In *Pierrot v. Osceola Mental Health, Inc.,* 106 So.3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a], the Fifth District mandated that conditions precedent must be construed narrowly in order to allow Florida citizens access to courts. A PDL is a condition precedent to filing a lawsuit pursuant to §627.736. Therefore, when examining a potential litigant's burden in complying with a condition precedent, "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System,* 871 So.2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. Requiring the Plaintiff to *calculate* the exact amount owed or include prior payments made is nowhere listed as a requirement to satisfy §627.736(10). For the court to hold a potential litigant to the high standard suggested by the Defendant would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostolico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostolico,* at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to *deny access to courts on the basis of technicalities*") (emphasis added), citing, *Archer v. Maddux,* 645 So.2d 544 (Fla. 1st DCA 1994). With respect to actions brought at common law, such as a PIP suit, which is an action brought as a breach of contract, a court must construe any condition precedent requirements in § 627.736(10) narrowly so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts. Thus, this Court disagrees with the compliance standard argued by the Defendant, which sets the bar unduly high regarding § 627.736 (10).

THIS COURT FINDS that by attaching its itemized statement to its PDL, the Plaintiff met the requirements of §627.736(10), Florida Statutes. Therefore, it is ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED and the Defendant's Motion for Summary Judgement is DENIED.

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[1]Also sec, *EBM Internal Medicine a/a/o Jasmine Gaskin v. State Farm Mutual Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 382a (Fla. Duval Cty. Ct. Dec. 9, 2011) (finding no requirement to include prior payments made or exact amount owed in a demand letter)*; First Coast Medical Center, Inc. a/a/o Barbara Derouen v. State Farm Mut. Auto, Ins. Co.,* 17 Fla. L. Weekly Supp. 118a (Fla. Duval Cty. Ct. November 12, 2009); *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct. February 8, 2012); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. August 7, 2014); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Wendy Brody v. State Farm Mutual Automobile Insurance Company,* (Fla. Duval Cty. July 23, 2014); Case No.: 2012-SC-4885, Fla. Duval Cty. Ct. July 23, 2014); *Physicians Medical Center Jax a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 359a (Fla. Duval Cty. Ct. August 25, 2014); and, *Ruth Beck v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly. Supp. 454b (Fla. Leon Cty. Ct. October 14, 2014). All of these sister courts found no requirement to include prior payments made or an accounting for the exact amount owed in order to comply with the requirements of F.S. 627.736(10).

[2]Also see, *Whole Health Clinic d/b/a Healthsource of Tallahassee a/a/o Joshua Thomas v. State Farm Mut. Auto. Ins. Co.,* 26 Fla. L. Weekly Supp. 831a (Fla. Leon Cty. Dec. 13, 2018).

[3]Defendant also relies on *Thompson v. Geico Indem., Co.,* (Fla. Dist. Ct. App. Jul. 27, 2022) [47 Fla. L. Weekly D1588b], which this Court finds non-persuasive insofar as the opinion doesn't address the accessibility to courts argument nor does it cite to any provision of §627.736(10) stating that the amount alleged in the Complaint is a factor to consider when determining the sufficiency of the Presuit demand letter.

* * *

Insurance—Property—Appraisal—Waiver—Insurer waived right to invoke appraisal or compel insureds to participate in appraisal where insurer provided insureds with written itemized documentation of items being disputed by insurer in comparison with insureds' estimate of damages ten days after its appraisal demand rather than ten days prior to demand, as required by policy, and also failed to notify insureds of right to participate in mediation program under section 627.7015

JON T. HOECHERL and KARON L. HOECHERL, Plaintiffs, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. County Court, 5th Judicial Circuit in and for Marion County. Case No. 42-2022-CC-001645-CCA. March 29, 2023. Leann Mackey-Barnes, Judge. Counsel: Mark Ibrahim, Kanner & Pintaluga, P.A., Boca Raton, for Plaintiffs. Morgana L. Alderman, Kelley Kronenberg, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S DEFENDANT'S MOTION TO ABATE THE LITIGATION, STAY DISCOVERY, AND COMPEL APPRAISAL

THIS CAUSE having come before the Court on the DEFEN-

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DANT'S MOTION TO ABATE THE LITIGATION, STAY DISCOVERY, AND COMPEL APPRAISAL by Zoom on Thursday March 16, 2022, the Court having reviewed said Motion, Plaintiffs Response in Opposition, argument from both parties and being otherwise advised in the premises, it is, therefore,

ORDERED AND ADJUDGED that the DEFENDANT'S MOTION TO ABATE THE LITIGATION, STAY DISCOVERY, AND COMPEL APPRAISAL, is hereby DENIED without prejudice because State Farm failed to comply with its own expressed policy and Florida Statute Section 627.7015 and therefore waived it's right to invoke appraisal and/or require the Plaintiff to participate in an appraisal.

State Farm failed to comply with its own policy.

State Farm acknowledges and concedes that on December 1, 2022, Plaintiffs filed its Notice of Intent to Initiate Litigation containing, for the first time an estimate from Next Dimension Construction & Roofing for total roof replacement totaling $20,914.24. In response, State Farm responded to Plaintiffs Notice of Intent on December 6, 2022, *demanding appraisal* pursuant to Fla. Stat. 627.70152(4)(b).

State Farm invoked appraisal pursuant to the following provision in the subject policy:

4. Appraisal. If you and we fail to agree on the amount of any loss under SECTION I—PROPERTY COVERAGES, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. You must comply with SECTION I—CONDITIONS, Your Duties After Loss before making a demand for appraisal. At least 10 days before demanding appraisal, the party seeking appraisal must provide the other party with written, itemized documentation of a specific dispute as to the amount of the loss, identifying separately each item being disputed.

State Farm further acknowledges and concedes, that on *December 16*, State Farm sent the Plaintiffs a letter (Differences Letter) outlining the differences in the scope of damages because of the disagreement over the amount of loss.

This "Differences Letter" was sent ten (10) days after the Defendant made its initial demand for appraisal in violation of its own policy that requires the demanding party to provide the other party with written, itemized documentation of a specific dispute as to the amount of the loss, identifying separately each item being disputed ***10 days before demanding appraisal***.

State Farm failed to comply with Florida Statute Section 627.7015

The plain and unambiguous language of section 627.7015, Florida Statutes, establishes that State Farm Florida Insurance Company failed to timely comply with the notice requirement in subsection (2), which requires an insurer to notify the policyholder of the right to enter into statutory mediation at the time of the dispute; therefore, pursuant to subsection (7), State Farm Florida Insurance Company waived any contractual requirement that the Plaintiffs submit to an appraisal process. See *State Farm Florida Ins. Co. v. Lime Bay Condo., Inc*., 187 So. 3d 932, 936 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D730a]; *Fla. Ins. Guaranty Ass'n, Inc. v. Shadow Wood Condo. Ass'n*, 26 So. 3d 610, 613 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2481a].

Section 627.7015(2), Florida Statutes, states:

At the time of issuance and renewal of a policy or at the time a first-party claim within the scope of this section is filed by the policyholder, the insurer shall notify the policyholder of its right to participate in the mediation program under this section. The department shall prepare a consumer information pamphlet for distribution to persons participating in mediation.

Here a first party claim was initiated on December 1, 2022, when Plaintiff filed its Notice of Intent to Initiate Litigation containing, an estimate from Next Dimension Construction & Roofing for total roof replacement totaling $20,914.24. Requiring at that time State Farm to notify the policy holder of its right to participate in the mediation program under this section.

Here, State Farm Florida Insurance Company, provided no notice of the right to "participate in the mediation program under this section" pursuant to subsection (2) at the time there was "a claim within the scope of the section," and because State Farm Florida Insurance Company, "did not comply with the requirements of section 627.7015, 'the Plaintiffs shall not be required to participate in the contractual loss appraisal process as a precondition to legal action.' *Colosimo*, 61 So. 3d at 1245 (quoting section 627.7015(7)).

According to 627.7015(7), Florida Statutes:

If the insurer fails to comply with subsection (2) by failing to notify a policyholder of its right to participate in the mediation program under this section or if the insurer requests the mediation, and the mediation results are rejected by either party, the policyholder is not required to submit to or participate in any contractual loss appraisal process of the property loss damage as a precondition to legal action for breach of contract against the insurer for its failure to pay the policyholder's claims covered by the policy.

Accordingly, section 627.7015's plain and unambiguous language mandates that State Farm Florida Insurance Company's motion to abate and compel appraisal be denied.

For all the foregoing reasons, the Court finds that Defendant State Farm also failed to comply with its own express term of the policy by failing to provide the Plaintiff with a written itemized documentation of each and every item being disputed by State Farm in comparison to the Plaintiff's estimate of damages at least 10 days before demanding appraisal and Defendant failed to strictly comply with Florida Statute section 627.7015, therefore, waiving its right to invoke appraisal and/or compel Plaintiffs to participate in appraisal.

Defendant, State Farm Florida Insurance Company, shall respond to the Plaintiff's Complaint within 20 days of the date of this Order, and respond to the Plaintiff's outstanding discovery within 30 days of the date of this Order.

* * *

Attorney's fees—Debt collection—Credit card debt—Conflict of laws—Plaintiff waived ability to rely on choice of law provision in credit card agreement with regard to issue of entitlement to attorney's fees by failing to give reasonable notice of its intent to rely on that provision

CITIBANK, N.A., Plaintiff, v. JO ANN LYCANS, Defendant. County Court, 6th Judicial Court in and for Pinellas County. Case No. 52-2020-SC-005707-XXSCSC. March 29, 2023. Edwin Jaggers, Judge. Counsel: Drew Linen, RAS Lavrar, Plantation, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTITLEMENT TO PREVAILING PARTY ATTORNEY FEES

THIS ACTION came before the Court on Defendant's Motion for the Court to Determine Entitlement to an Award of Attorney Fees and Costs and Then to Tax Same Against Plaintiff at which counsel for both parties appeared and presented argument and the Court being informed in the premises, it is HEREBY ORDERED AND ADJUDGED:

1. The Court finds that Plaintiff waived its ability to rely upon the choice of law provision in the underlying credit card agreement because it failed to give reasonable notice of its intent to rely upon said provision with regards to the issue of entitlement to prevailing party attorney fees.

2. As a result, Defendant's Motion for the Court to Determine Entitlement to an Award of Attorney Fees and Costs and Then to Tax Same Against Plaintiff is hereby GRANTED.

3. The Court shall determine a reasonable amount of attorney fees and costs to award to Defendant.

* * *

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Insurance—Personal injury protection—Coverage—Medical expenses—There is no basis in policy or PIP statute for argument that insurer was required to calculate 80% of fee schedule amount for each charge individually and round up the amount payable for each charge rather than paying 80% of total approved fee schedule amount

CENTRAL FLORIDA MEDICAL & CHIROPRACTIC CENTER, INC. d/b/a STERLING MEDICAL GROUP, a/a/o Paul Farruggio, Plaintiff, v. AUTO CLUB SOUTH INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 39787 COCI. November 29, 2022. Robert A. Sanders, Jr., Judge. Counsel: Greg F. Tayon, Simoes Reeves, Deland, for Plaintiff. Timothy R. Weaver, Cole, Scott & Kissane, P.A., Orlando, for Defendant.

ORDER ON DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND FINAL JUDGMENT FOR DEFENDANT

THIS CAUSE having come before the Court on September 22, 2022 on Defendant's Amended Motion for Summary Judgment on Proper Payment and Defendant's Motion for Summary Judgment on De Minimis Non Curat Lex, and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED that:

1. On or about May 23, 2020, Paul Farruggio, ("Claimant"), was involved in a motor vehicle accident.

2. Defendant issued a policy of insurance that inured to the benefit of the Claimant, and pursuant to the policy of insurance and the Florida No Fault Statute, said policy afforded up to $10,000.00 of Personal Injury Protection benefits to the Insured for reasonable, related, and medically necessary care.

3. In this action, Claimant received medical treatment from the Plaintiff on dates of service 5/27/2020 through 7/31/2020.

4. Plaintiff submitted to Defendant bills for reimbursement for treatment rendered to Claimant, and said bills were processed for payment pursuant to the policy of insurance and Fla. Stat. § 627.736.

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

6. Bill for dates of service dates of service 5/27/2020 through 7/31/2020 were received by Defendant and processed for payment. Plaintiff does not dispute the fee schedule amounts that were approved for each charge.

7. As the evidence put forth by Defendant in the Explanation of Benefits, ("EOB"), clearly demonstrates how benefits were calculated, there is no question of fact.

8. The Florida PIP Statute provides for coverage of eighty percent of reasonable medical expenses:

> 627.736 Required personal injury protection benefits; exclusions; priority; claims.—
>
> (1) Required Benefits.—An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to the named insured . . . as follows:
>
> (a) Medical benefits.—Eighty percent of all **reasonable expenses** for medically necessary medical, surgical, X-ray, dental, and rehabilitative services . . . if the individual receives initial services and care pursuant to subparagraph 1, within 14 days after the motor vehicle accident. . . .
>
> Fla. Stat. § 627.736(1)(a) (2013) (emphasis added).

9. Upon election and notice to its insured, an insurance company can limit reimbursement of eighty percent of medical expenses to eighty percent of the schedule of maximum charges in Fla. Stat. § 627.736(5)(a).

10. Defendant has specifically written its policy to include an unambiguous election of the permissive fee schedule option, which Plaintiff did not dispute.

11. Plaintiff's only dispute as to payment is an allegation that the insurer must pay 80% of each individual charge/line item individually rather than 80% of the approved amount on Defendant's Explanation of Benefits. Plaintiff alleges each charge should be calculated at 80% of the applicable fee schedule and then rounded up, without any basis in Defendant's policy of insurance, case law, or Fla. Stat. § 627.736.

12. 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. Plaintiff simple is challenging that Defendant should make the 80%/20% split for co-insurance to each charge rather than the total approved amount for each EOB or bill.

13. Fla. Stat. § 627.736(5)(d) requires all bills to be submitted on either a CMS 1500 form or UB 92 form. Plaintiff submitted all of its bills on a CMS 1500 form, which contains six (6) charge boxes, Box #24 F, and a "total charge" box, Box #28.

14. Nothing in the PIP statute or Defendant's policy require Defendant to pay each individual charge manually, rather than using the total charge box or using a total on its explanation of benefits.

15. Nothing in the PIP statute or Defendant's policy mentions "order of operations" as Plaintiff alleges, which would deplete the insured's limited PIP benefits even quicker by rounding up each individual charge. By Plaintiff's theory, this would be similar to applying a sales tax to each individual item at the grocery store, rather than apply the sales tax rate to the total charges at the bottom of a receipt—a methodology that is not only impractical, but has no basis in policy or statute.

16. Plaintiff's argument amounts to rounding issue claim for **one cent** ($0.01) across twenty-three (23) dates of service, for a total of **twenty-three cents** ($0.23).

17. The Court finds that Defendant's payment of 80% of the total amount of the fee schedule on each EOB is proper. Nothing in the PIP statute or Defendant's policy require Defendant to pay each individual charge manually, rather than 80% of the total fee schedule amount for each EOB that was issued.

18. The Court also heard argument on De Minimis Non Curat Lex. The Defendant filed its Motion for Summary Judgment on De Minimis Non Curat Lex asking this Court to hold that the damages the Plaintiff is seeking, i.e., $0.23, "should be barred from adjudication based on the legal principle of 'de minimis non curat lex' or 'the law does not concern itself with trifles." The Defendant supports its position by supplying the Court with holdings from various courts that have applied the doctrine "de minimis non curat lex" to the facts in those cases. *See Precision Diagnostic, Inc. v. Progressive Am. Ins. Co.*, 330 So. 3d 32, 35 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2282d]. (finding $4.17 to be de minimis). *See also Liberty Mut. Ins. Co. v. Pan Am Diagnostic Services, Inc.,* 47 Fla. L. Weekly D1724a (Fla. 4th DCA Aug. 17, 2022) (finding 14 cents to be de minimis).

19. The Plaintiff has two positions on whether the Court can dismiss its case using "de minimis non curat lex". Although the Plaintiff admits that "whether the doctrine 'de minimis non curat lex" applies to this case is a matter of law appropriate for this Court to decide, Plaintiff contends that whether the Defendant's underpayment of $.23 in benefits is, in fact, "de minimis", is a question reserved for a jury sitting its capacity as the trier of fact.[1]

20. In the case of *Precision Diagnostic, Inc. v. Progressive American Insurance* Co., 330 So. 3d 32 (Fla. 4th DCA 2021), that court held that $4.17 of unpaid interest was "de minimis" despite upholding the basis for such damages. Ironically, Plaintiff claims that the appellate court's decision to uphold the trial court's holding that $4.17 of unpaid interest is "de minimis" is being used by carriers, like Defendant, to justify dismissing PIP cases claiming benefits to be owed, which goes against the trial court's position that "de minimis" could not be applied to benefits, even if the underpayment equaled 3

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pennies![2] Though Judge Fry was adamant that "de minimis" only applied to unpaid interest, it is the Plaintiff's position that Judge Fry was prohibited from using "de minimis" at all.

21. This Court does not have to reach a decision regarding the "de minimis" issue in this case, because this Court finds Defendant paid all bills properly.

Therefore it is **ORDERED**:

Defendant's Amended Motion for Summary Judgment on Proper Payment is **GRANTED**. Final Judgment is hereby entered in favor of AUTO CLUB SOUTH INSURANCE COMPANY. It is adjudged that Plaintiff shall take nothing by this action and Defendant shall go hence without day.

This court retains jurisdiction as to Defendant's entitlement to attorney's fees and costs.

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[1]When challenged at the September 22, 2022 hearing by the Court's prediction that a jury would find $.23 to be "de minimis", counsel for Plaintiff immediately disagreed and predicted that a jury would not find the Defendant' $.23 underpayment of PIP benefits to be "de minimis" but, instead, find $.23 to be "material" based on how the Defendant would treat the same $.23 underpayment if its named insured underpaid the required premiums by the same amount.

[2] In the transcript of the trial court hearing in *Precision Diagnostic*, Judge Fry and plaintiff's counsel have a back-and-forth discussion as to whether Judge Fry was restricting "de minimis" to only interest or whether it could be applied to benefits.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Assignee steps into shoes of insured and is bound by mandatory appraisal language in policy—No merit to arguments that non-binding appraisal would be waste of resources, that there is no disagreement as to cost of repair, and that appraisal provision is unenforceable under prohibitive cost doctrine—When defendant denies performance of condition precedent specifically and with particularity, court may address issue at hearing on motion to dismiss—Dismissal of claim without prejudice, rather than stay, is appropriate remedy—Questions certified: 1. Is a complaint filed by Plaintiff alleging satisfaction of, or waiver of conditions precedent, sufficient to survive a motion to dismiss when Defendant specifically and with particularity denies its satisfaction or waiver in a motion to dismiss? 2. Is the motion to dismiss stage the appropriate stage to analyze whether a condition precedent has been fulfilled, or is it more appropriately addressed at summary judgment or trial where evidence may be presented?

NUVISION AUTO GLASS, LLC, a/a/o Cristian Rodriguez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-014976-O. March 31, 2023. Brian S. Sandor, Judge. Counsel: Imran Malik, Malik Law, P.A., Maitland, for Plaintiff. Lisa M. Lewis, Cole, Scott, & Kissane P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STAY LITIGATION AND COMPEL APPRAISAL

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss or in the Alternative Motion to Abate or Stay Litigation to Compel Appraisal and the Court having reviewed the file,

IT IS ORDERED AND ADJUDGED:

Plaintiff in this case argues the Court should deny Defendant's request to enforce the appraisal provision in the subject policy for a few reasons. First, the subject policy is different than the policy analyzed by this court in its previous orders of dismissal and is different than the policy contained within the holding in *NCI, LLC, a/a/o Dora Noe v. Progressive Select Ins. Co.,* 350 So.3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2366c].

Plaintiff argues the following, first there is no appraisable issue between the parties as the Plaintiff is not contemplated by the language in the policy. Second, appraisal is not binding and requiring the parties to complete appraisal would be a waste of resources. Third, there is no disagreement as to the cost to repair the vehicle. Fourth, appraisal is not a condition precedent to filing suit and dismissal would be improper. Finally fifth, prohibitive costs doctrine renders the appraisal provision unenforceable.

Defendant argues in reply that the assignment of benefits places the Plaintiff in the same shoes as the insured, transferring not just the benefits but also the obligations to the Plaintiff as well. The policy does not need to mention third party beneficiaries, as they essentially become the "owner" under the policy through the assignment. Next, Defendant argues the entire bargain between the parties is for appraisal to be the remedy to resolve disputes. The retained rights provision does not terminate the Defendant's right to seek appraisal. Third, the Defendant does believe there is a dispute as to the amount in this case and while it did not handle its disagreement in the manner in which Plaintiff desires does not waive its rights. Fourth, Defendant states appraisal is a condition precedent based on the terms of its policy. Defendant did not raise a response to Plaintiff's prohibitive costs doctrine argument as it was not raised in the oral arguments.

For the foregoing reasons, this court finds the Plaintiff's arguments fail. First, the court agrees with Defendant that Plaintiff steps into the shoes of the insured and becomes bound by the policy language. Plaintiff's argument that the policy states "owner and we" with regard to the appraisal does not excuse Plaintiff from stepping into the shoes of the owner through its assignment of benefits which gave Plaintiff standing to file suit. A strict reading of the policy that only the owner could be bound into appraisal would lead to an absurd result allowing to the owner to always assign away its right to circumvent policy language. The second and third arguments are somewhat intertwined. Florida courts have long held that appraisal provisions and the appraisal process are the preferred methods to resolve disputes. Plaintiff believes it was underpaid or undervalued. There in lies a disagreement. The retained rights provision allows for the Plaintiff to bring a cause of action (among other things) should it believe the appraisal decision is incorrect or for a multitude of other reasons. Plaintiff's argument that the retained rights provision leads to a waste of resources is unconvincing. Lastly, the *NCI* decision addressed a similar prohibitive costs doctrine argument made by Plaintiff and denied it in a similar auto glass case setting and this court finds that holding to be binding. *Id.* at 809.

Now that the court has determined appraisal is a condition precedent, the next analysis is whether dismissal without prejudice or a stay is the appropriate follow up action to the appraisal process. The appellate court in *NCI,* did not ultimately reach the issue of whether dismissal or a stay is the appropriate remedy as Plaintiff failed to preserve one of its arguments for appeal. The issue not preserved concerns the sufficiency of Plaintiff's Complaint when it alleges all conditions precedent have previously been met or waived.

In reviewing the remaining arguments, the Court found dismissal to be *an* appropriate remedy but not *the* appropriate remedy, leaving an opening for Plaintiff to argue for a stay. As noted by the Defendant, the Court however did potentially give guidance to the trial courts with its sentence "NCI raises several arguments on appeal, which mostly attack the appraisal clause's validity. One is unpreserved, and **none have merit**." *Id.* at 806 (emphasis added).

Plaintiff argues it should survive this Motion to Dismiss as its Complaint alleges "[p]laintiff has performed all conditions precedent and necessary to entitle Plaintiff to recover benefits for said reasonable and necessary automotive glass services provided pursuant to the above mentioned insurance contract, or the same have been waived by Defendant. This Court must accept all well-pleaded allegations as

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true. *City of Gainesville v. State, Dept. of Transp.,* 778 So.2d 519 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D674b]. Plaintiff further argues the *Glassmetics* decision shows Plaintiff should be granted a stay under the policy's retained rights provision allowing Plaintiff to seek attorneys" fees if it receives a judgment at appraisal in excess of Defendant's initial payment. "For example, to the extent the appraisal process results in a determination that Progressive underpaid Glassmetics, Glassmetics would be entitled to pursue any rights it may have against Progressive due to the underpayment in accordance with the provisions of the policy and the applicable law." *Progressive Am. Ins. Co. v. Glassmetics, LLC,* 343 So. 3d 613, 626 (Fla. Dist. Ct. App. 2022) [47 Fla. L. Weekly D1106b]

Plaintiff rightfully argues the court should not and cannot take into consideration the written demand for appraisal from Defendant to Plaintiff in pre-suit as it is not referenced or attached to in the Plaintiff's complaint and therefore outside the four corners. In some of Plaintiff's Complaints, it references an improper pre-suit appraisal demand in a declaratory action count. Following arguments made by Defense counsel concerning its reference, Plaintiff dismissed many that count in many if not all of its cases. It is important to note, this court did not consider the pre-suit appraisal demand letter from Defendant. The court relies solely on the complaint, motion to dismiss, oral arguments, and any responses filed by the parties.

The Defendant argues its policy language states "[w]e may not be sued unless there is full compliance with all terms of this policy" requires Plaintiff to complete appraisal before initiating litigation in court and if already commenced, it must be complied with to maintain a cause of action. Defendant points to numerous holdings across the state showing courts agree that these issues are best resolved in arbitration and appraisal when the policy outlines it. Defendant points to the *NCI* decision which analyzed this exact policy. Defendant argues the specific reasoning for this provision is to avoid costly and protracted litigation and that it is prejudiced by having to repeatedly seek protection in court from litigation by plaintiffs who are attempting to circumvent the appraisal process to obtain large attorney fee awards. Simply stated, the insured bargained for a policy requiring appraisal for this type of loss and the court should enforce it and dismiss this case until it is completed.

This leaves the court to determine, whether specifically at the motion to dismiss stage, is the Plaintiff's Complaint, containing an alleged satisfaction of conditions precedent sufficient to survive a motion to dismiss when the Defendant has specifically and with particularity denied its performance? There is somewhat conflicting case law that does not directly address the issue at bar in an automotive glass case. Therefore, the court will look at the cases of *NCI, Bettor, Nelson,* and *Maynard* for guidance on how to tackle stay versus dismissal. As the Court previously noted, the holding of *NCI* makes it clear to all parties appraisal is a condition precedent and must come before this suit moves any further. Defendant's now argues *NCI* along with the reading in *Bettor* directs this court to awarding dismissal without prejudice.

In *Bettor,* the federal court grappled with the issue of Florida's automotive glass law in the wake of defendant's 12(b)(6) motion to dismiss and demand for appraisal. *Bettor v. Esurance Prop. & Cas. Ins. Co.,* No. 18-61860-CIV, 2019 WL 2245564, (S.D. Fla. Mar. 28, 2019). The *Bettor* court stated, "Fed. R. Civ. P. 9(c) requires a plaintiff to allege that 'all conditions precedent have occurred or have been performed' prior to initiating a cause of action. 'But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.' 'Should a defendant make that denial, the plaintiff then bears the burden of proving that the conditions precedent, which the defendant has specifically joined in issue, have been satisfied.' *Myers v. Cent. Fla. Inv., Inc.,* 592 F.3d 1201, 1224 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C372a] (*quoting Jackson v. Seaboard Coast Line R.R. Co.,* 678 F.2d 992, 1010 (11th Cir. 1982)). When a party fails to meet the requirements of Rule 9(c), his claim is **subject to dismissal**. *Bettor* at 2 (emphasis added).

Again, a court goes to great length to analyze the process by which a condition precedent is addressed at the motion to dismiss stage of litigation and but then states the claim is "subject to dismissal" but does not state the claim should be or more importantly, that it must be dismissed. This is akin to *NCI* where the court stated dismissal is *an* appropriate remedy as opposed to *the* appropriate remedy. Two separate courts relied upon by Defendant both seem to suggest that the decision to dismiss or stay remains with the trial court but is clear that dismissal is not error.

In contrast, the Second District Court of Appeal in *Nelson* reached a different conclusion with more specific findings, albeit it a personal injury protection benefits context. The court analyzed a situation where the pleading requirement of a condition precedent faced off against a specific denial of its satisfaction. While not under a similar set of facts or statute at issue in the case at bar, the analysis is similar and provides more guidance to this court.

> "The notice requirement is a condition precedent to maintaining the action, § 768.28(6)(b), and compliance must be alleged in the complaint." *Commercial Carrier Corp. v. Indian River Cty.,* 371 So.2d 1010, 1022-23 (F1a.1979). "The giving of such notice may be alleged generally in accordance with rule 1.120(c), Florida Rules of Civil Procedure," after which the burden shifts to the defendant to specifically deny such compliance. *McSwain v. Dussia,* 499 So.2d 868, 870 (Fla. 1st DCA 1986); see Fla. R. Civ. P. 1.120(c). Provided such compliance is specifically denied by the defendant, the burden shifts "to the plaintiff to prove the allegations concerning the subject matter of the specific denial." *Sheriff of Orange Cty. v. Boultbee,* 595 So.2d 985, 987 (Fla. 5th DCA 1992). **This proof, however, does not take place at the motion to dismiss phase of proceedings**. See *Scullock v. Gee,* 161 So.3d 421, 423 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D533a] (*emphasis added*).

Nelson v. Hillsborough County., 189 So. 3d 1037, 1039 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D953a]. Furthermore, in the context of a civil rights claim, the Second DCA also held that as long as the plaintiff sufficiently alleges compliance with conditions precedent, the trial court cannot investigate that compliance on a motion to dismiss. See *Maynard v. Taco Bell of Am., Inc.,* 117 So. 3d 1159, 1161 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1192a].

"[A] denial under rule 1.120(c) requires more than mere notice of a potential condition precedent. Rather, to construct a proper denial under the rule, a defendant must, at a minimum, identify both the nature of the condition precedent and the nature of the alleged noncompliance or nonoccurrence. As the Fifth District explained in *Godshalk v. Countrywide Home Loans Servicing, L.P.,* 81 So.3d 626, 626 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D601b]: The purpose of Florida Rule of Civil Procedure 1.120(c) is to put the burden on the defendant to identify the specific condition that the plaintiff failed to perform—so that the plaintiff may be prepared to produce proof or cure the omission, if it can be cured. The rule is intended to force a defendant to show his hand in advance to avoid surprise. See also *Bank of Am., N.A. v. Asbury*, 165 So.3d 808, 811 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1230a] (observing that rule 1.120(c) apprises the parties and the court **whether a condition precedent will be an issue at trial** "and that the party that is presumably in a better position to identify a noncompliance or nonoccurrence does so within its pleading"). *Deutsche Bank Nat. Tr. Co. v. Quinion,* 198 So. 3d 701, 704 (Fla. Dist. Ct. App. 2016) [41 Fla. L. Weekly D177a] (*emphasis added*).

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Where the courts of *NCI* and *Bettor* state dismissal of the claim is not error, the court in *Nelson* states this court should leave Plaintiff's burden of proving its compliance with a condition precedent for some day after the motion to dismiss stage, such as summary judgment or trial. This circuit and county now finds itself as part of the newly formed Sixth District Court of Appeal. The new District comprises itself of circuits formerly found in the Fifth and Second District Courts of Appeal, the very courts deciding *NCI, Nelson,* and *Maynard.* All of this while the holding by the Fifth in *Deutsche Bank* predating *NCI* suggests the purpose of the rule is in line with the holding of *Nelson* as compliance with condition precedent is an issue for trial. This court faces a dilemma as to which competing precedent to follow.

"[T]rial courts be required to follow the holdings of higher courts—District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive." *Pardo v. State,* 596 So. 2d 665, 666-67 (Fla. 1992).

The Sixth District Court of Appeal recently issued its ruling in *CED Capital,* where it dove deeper and stated "[i]n addressing this disagreement among Florida's intermediary courts, we begin by repeating a well-known rule—that an appellate court is not bound by any of the decisions issued by its sister appellate courts. *Point Conversions, LLC v. WPB Hotel Partners, LLC,* 324 So. 3d 947, 960 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1591c]. This rule of Florida jurisprudence applies equally to the newly created Sixth District Court of Appeal. *E.g., Bunkley v. State,* 882 So. 2d 890, 924 (Fla. 2004) [29 Fla. L. Weekly S251a] (Pariente, J., dissenting) ("A district court [of appeal] decision is never binding on [the Supreme Court of Florida] or another district court"); *Va. Ins. Reciprocal v. Walker,* 765 So. 2d 229, 233 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D1821a] (noting that the decision of a sister district court of appeal was binding on the trial court following diagonal authority principles but stating that "the decision does not have the same binding effect in this court"); *State v. Hayes,* 333 So. 2d 51, 53 (Fla. 4th DCA 1976) ("[A]s between District Courts of Appeal, a sister district's opinion is merely persuasive."). As a result, the Sixth District Court of Appeal is not bound by the precedent of any of its sister courts, including the Second and Fifth District." *CED Cap. Holdings 2000 EB, LLC v. CTCW-Berkshire Club, LLC,* No. 6D23-1136, 2023 WL 1487713, at 3 (Fla. App. 6 Dist. Feb. 3, 2023) [48 Fla. L. Weekly D261c].

This trial court now finding itself in the Sixth holds the decisions in *NCI, Nelson,* and *Maynard* to all be persuasive and not binding as they are from sister DCAs. This court believes the holdings of *NCI* and *Nelson* are in conflict and cannot be harmonized. It cannot stand that a trial court cannot dismiss on an issue concerning a condition precedent at a motion to dismiss hearing as in *Nelson* but that it also is not an error to do so as in *NCI.* As this very issue was not preserved on appeal with the *NCI* court, an appeal of this issue may be the only way trial courts in the newly formed DCA will know if it must stay or dismiss these cases, as this issue that arises thousands of times per year per county, taking up numerous hours of hearing time per week on court dockets. This court shall therefore certify a question to the Sixth District Court of Appeal pursuant to Florida Statute §34.017.

This court determines that when Defendant denies the performance of a condition precedent specifically and with particularity in accordance with Florida Rules of Civil Procedure 1.120(c), it may be addressed at a hearing on a motion to dismiss and further that dismissal of a claim without prejudice is an appropriate result. This court determines that the denial may come in the form of a motion to dismiss a complaint. This court finds the holding of *NCI* to be the most persuasive as it is most recent in time, concerned a case from this very county, and concerned this same policy language. The Complaint in this case is therefore **DISMISSED WITHOUT PREJUDICE** for the parties to complete appraisal. The court encourages the appellate court to review this case and these types of cases and provide guidance to the trial courts with clear guidance on the appropriate review of a complaint at a motion to dismiss where failure to comply with a condition precedent is the basis of the motion to dismiss.

Finally this court certifies the following two questions to the appellate court:

1. Is a complaint filed by Plaintiff alleging satisfaction of, or waiver of conditions precedent, sufficient to survive a motion to dismiss when Defendant specifically and with particularity denies its satisfaction or waiver in a motion to dismiss?

2. Is the motion to dismiss stage the appropriate stage to analyze whether a condition precedent has been fulfilled, or is it more appropriately addressed at summary judgment or trial where evidence may be presented?

* * *

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

UNIVERSAL X RAYS CORPORATION, a/a/o Jasiel Portales, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-016150-SP-23. Section ND03. April 17, 2023. Linda Singer Stein, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSE AND DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT RE: NO COVERAGE DUE TO MATERIAL MISREPRESENTATION

THIS CAUSE came before the Court on March 3, 2023 upon Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation, and the Court having reviewed the motion and the summary judgment evidence, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses is GRANTED and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation is DENIED, for the reasons set forth below:

UNDISPUTED FACTS

On March 14, 2018, Alain Portales submitted an application (the "Application") for an automobile insurance policy (the "Policy") to United Automobile Insurance Company ("United Auto"). United Auto rescinded the Policy, based upon its assertion that Alain Portales had committed a material misrepresentation of fact, in failing to disclose Jasiel Portales as a household resident in the Application.

According to Section 14B of United Auto's Underwriting Manual (the "United Auto Underwriting Manual"), 'coverage will be

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rescinded/rejected if a risk is materially misrepresented and unacceptable by the rules in this manual.' " The United Auto Underwriting Manual sets forth the following 19 categories of Unacceptable Risks:

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

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

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

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

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

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

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

H. Vehicles with ACV over $65,000 (NADA) or ISO Symbol 60 or higher (26 or higher for Model Years 2010 and prior) for Comprehensive/Collision.

I. Students attending school outside Florida.

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

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

L. The following occupations are unacceptable: real estate salespersons, chauffeur, valet parkers, taxi cab drivers, jitney drivers, day care drivers, patient transporter or any other occupation which requires more than 4 hours per work day in any vehicle.

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

N. Vehicles garaged outside the state of Florida.

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

P. Vehicles with a garaging address greater than 50 miles from the producing agent's address.

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

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

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

According to the summary judgment evidence, had Alain Portales disclosed Jasiel Portales as a household resident on the Application, United Auto would have charged an additional premium in the amount of $1,490.00. Defendant's underwriting supervisor, Mr. Jorge de la O attested in an affidavit that "United Auto determined that had the insured disclosed his daughter as a resident of his household on the insurance application as required, such representation would have resulted in an unacceptable risk *at the premium paid.* The additional individual would have created an additional premium in the amount of $1,490; thus, at the premium amount quoted and paid, the risk would not have been acceptable." (Emphasis added).

SUMMARY JUDGMENT STANDARD

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

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

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

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

3. The correct test for the existence of a genuine factual dispute is "whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Under the new rule, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a].

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex,* 477 U.S. at 323-324.

LEGAL ANALYSIS

Defendant's position as to why summary judgment should be granted in its favor is that the application filled out by its insured requires the applicant to list all persons residing with the insured. The application further states that failure to provide this information may constitute a material misrepresentation, which may result in a denial of coverage. It is undisputed that the insured did not list all household residents on the application. It is also not disputed by Plaintiff that such failure to do so constitutes a material misrepresentation. However, as clearly and unambiguously set forth in Defendant's underwriting manual, in order for Defendant to deny coverage, Defendant must demonstrate that it satisfies two prongs. Section 14B mandates that "coverage will be rescinded/rejected if a risk is materially misrepresented ***AND*** unacceptable by the rules in this manual." (Emphasis added). Nowhere in the list of unacceptable risks is the failure to disclose a household resident in the application.

Defendant's underwriting supervisor, Mr. Jorge de la O attested in an affidavit at paragraph 13 that the disclosure of an additional household resident "would have created an additional premium in the amount of $1,490; thus, at the premium amount quoted and paid, the risk would not have been acceptable." This statement, however, is "blatantly contradicted by the record" (*Scott v. Harris,* 550 U.S. at 380), as the Defendant's own underwriting manual, which is exhaus-

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tive in listing 19 very specific categories of unacceptable risks, does not list the failure to disclose a household resident as an "unacceptable risk".

This Court is persuaded by the holding in the analogous case of *Universal X Rays Corp. (a/a/o Carlos Marchan) v. United Auto. Ins. Co.,* 30 Fla. L. Weekly Supp. 574a (Miami-Dade County, Oct. 26, 2022). In considering the categories listed in defendant's underwriting manual, and that the disclosure of an additional household resident would have resulted in an additional policy premium, Judge Chiaka Ihekwaba reasoned that "a risk cannot be unacceptable if the insurer is able to quantify the premium it would charge in order to assume that risk."

Here, the evidence demonstrates that United Auto would have charged an additional policy premium in the amount of $1,490.00, had Alain Portales disclosed Jasiel Portales as a household resident. Therefore, this Court finds that the risk could not have been unacceptable.

Based upon the foregoing, the evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of whether United Auto was entitled to rescind the Policy. It is therefore,

ORDERED that Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses is GRANTED and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation is DENIED.

* * *

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

PRESGAR IMAGING OF CMI NORTH (LC), a/a/o Lashura Fair, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-019835-SP-23. Section ND05. January 29, 2023. Chiaka Ihekwaba, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT D

THIS CAUSE came before the Court on December 2, 2022 upon Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation, and the Court having reviewed the motion and the summary judgment evidence, having heard argument of counsel and being otherwise fully advised, it is

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

There are no genuine issues as to any material fact. According to the summary judgment evidence, on August 16, 2016, Lashura Fair submitted an application (the "Application") for an automobile insurance policy (the "Policy") to United Automobile Insurance Company ("United Auto"). United Auto rescinded the Policy, based upon its assertion that Lashura Fair had committed a material misrepresentation of fact, in failing to disclose a Memorial Highway address in Miami (the "Memorial Highway Address") as her correct garage address at the time of submission of the Application. More particularly, Lashura Fair had disclosed a NW 4th Avenue address in Miami (the "NW 4th Avenue Address") as her garage address. According to the sworn statement given by Lashura Fair on September 25, 2017, the NW 4th Avenue Address was her mother's address at which Lashura Fair had once lived and which Lashura Fair had used as her mailing address for approximately seven years.

According to ¶14B of United Auto's Underwriting Manual (the "United Auto Underwriting Manual"), 'coverage will be rescinded/rejected if a risk is materially misrepresented and unacceptable by the rules in this manual.' " The United Auto Underwriting Manual sets forth the following 19 categories of Unacceptable Risks:

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

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

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

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

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

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

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

H. Vehicles with ACV over $65,000 (NADA) or ISO Symbol 60 or higher (26 or higher for Model Years 2010 and prior) for Comprehensive/Collision.

I. Students attending school outside Florida.

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

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

L. The following occupations are unacceptable: real estate salespersons, chauffeur, valet parkers, taxi cab drivers, jitney drivers, day care drivers, patient transporter or any other occupation which requires more than 4 hours per work day in any vehicle.

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

N. Vehicles garaged outside the state of Florida.

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

P. Vehicles with a garaging address greater than 50 miles from the producing agent's address.

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

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

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

According to the summary judgment evidence, had Lashura Fair disclosed the Memorial Highway Address as the correct garage address, Lashura Fair's premium would have increased by $532.00. The summary judgment evidence further shows that the failure to disclose the Memorial Highway Address as the correct garage address did not present an unacceptable risk by the rules in the United Auto Underwriting Manual.

ANALYSIS

The Florida Supreme Court amended Rule 1.510, Fla. R. Civ. P. to "align Florida's summary judgment standard with that of the federal courts and of the supermajority of states that have already adopted the federal summary judgment standard." *In re Amendments to Florida*

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

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

> 1. There is a fundamental similarity between the summary judgment standard and the directed verdict standard. Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury".
>
> 2. A moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under the new rule, such a movant can satisfy its initial burden of production in either of two ways: "If the nonmoving party must prove X to prevail at trial, the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X. A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial."
>
> 3. The correct test for the existence of a genuine factual dispute is "whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Under the new rule, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." It will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised."

UNITED AUTO IMPROPERLY RESCINDED THE POLICY, WHERE THE DISCLOSURE OF THE NW 4th AVENUE ADDRESS INSTEAD OF THE MEMORIAL HIGHWAY ADDRESS DID NOT PRESENT AN UNACCEPTABLE RISK UNDER UNITED AUTO'S UNDERWRITING MANUAL

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

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

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

In *Universal X Rays Corp. (a/a/o Carlos Marchan) v. United Auto. Ins. Co*., Miami-Dade County Case No. 2019 016137 SP 23 (05) (Oct. 26, 2022) [30 Fla. L. Weekly Supp. 574a], United Auto had similarly rescinded an auto insurance policy based upon the named insured's failure to disclose two household residents. In that case, as here, the United Auto Underwriting Manual required an unacceptable risk in addition to a material misrepresentation in order to permit rescission of the United Auto Policy. In that case, the named insured's failure to disclose household residents constituted material misrepresentations of fact, but did not present an unacceptable risk. In that case, this Court denied United Auto's motion for final summary judgment and granted the plaintiff's cross-summary judgment motion, stating as follows:

> even if the failure on the part of Iris Marchan to disclose Jason Marchan and Jordan Marchan as household residents constituted a material misrepresentation, that material misrepresentation did not give rise to an unacceptable risk. Had the addition of Jason Marchan and Jordan Marchan to the policy presented an unacceptable risk, Jorge de la O would have so testified, instead of testifying that had Iris Marchan listed Jason Marchan and Jordan Marchan in her insurance application as household residents, the additional policy premium would have amounted to $1,877.00. Clearly, a risk cannot be unacceptable if the insurer is able to quantify the premium it would charge in order to assume that risk. In addition, the United Auto Underwriting Manual clearly spells out eighteen (18) categories of unacceptable risks, none of which include the additional risk created as a result of the addition of previously undisclosed household residents.

In the case now before this Court, the affidavit of Jorge de la O attached to Defendant's summary judgment motion shows that United Auto would have charged an additional policy premium in the amount of $532.00, had Lashura Fair disclosed the Memorial Highway Address as the correct garage address, instead of the NW 4th Avenue Address, Lashura Fair's mother's address which Lashura Fair had been using as her mailing address for approximately seven years. As noted in *Carlos Marchan*, "a risk cannot be unacceptable if [United Auto] is able to quantify the premium it would charge in order to assume that risk."

In addition, the applicable United Auto Underwriting Manual spells out nineteen (19) categories of unacceptable risks, none of which include the additional risk created as a result of the applicant's disclosure of the street address where she receives mail. To the contrary, the United Auto Underwriting Manual provides that an application without the Insured's street and/or residence address constitutes an unacceptable risk. In this case, the application does include Lashura Fair's street address where, according to her sworn statement, Lasura Fair had been receiving her mail for approximately seven years.

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

ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses is GRANTED and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation is DENIED.

* * *

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Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident—Where insurer's underwriting manual provides that there must be both material misrepresentation and unacceptable risk for policy to be rescinded, and failure to disclose household resident is not listed as unacceptable risk in manual, insurer could not rescind policy—Summary judgment is granted in favor of medical provider on material misrepresentation affirmative defense

UNIVERSAL X RAYS CORPORATION, a/a/o Mariam Gonzalez, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-024266-SP-23. Section ND02. March 29, 2023. Natalie Moore, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for the Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSE AND DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT RE: NO COVERAGE DUE TO MATERIAL MISREPRESENTATION

THIS CAUSE came before the Court on January 12, 2023 upon Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation. The Court has reviewed the motions and the summary judgment evidence, heard argument of counsel, and considered the applicable law. It is

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

According to the summary judgment evidence, on September 19, 2018, Mariam Gonzalez submitted an application for an automobile insurance policy to United Automobile Insurance Company ("United Auto"). After Ms.Gonzalez received treatment for injuries related to an accident, she assigned her benefits to Plaintiff, Universal XRays Corp. ("Universal"). Universal sought payment of personal injury protection benefits. United Auto rescinded the Policy, based upon its assertion that Mariam Gonzalez had committed a material misrepresentation of fact by failing to disclose Maria Lisette Porta Pargas as a household resident in the Application.

According to ¶14B of United Auto's Underwriting Manual, "coverage will be rescinded/rejected if a risk is materially misrepresented and unacceptable by the rules in this manual." The United Auto Underwriting Manual sets forth eighteen categories of Unacceptable Risks. Failing to disclose an additional household resident is not listed as an unacceptable risk. The affidavit of Jorge de la O attached to Defendant's summary judgment motion indicates that, had Mariam Gonzalez disclosed Maria Lisette Porta Pargas as a household resident, United Auto would have charged an additional policy premium in the amount of $168.00. A risk cannot be unacceptable if United Auto is able to quantify the premium it would charge in order to assume that risk. no where in the summary judgment evidence does United Auto ever indicate that the presence of an additional household resident, or specifically the presence of the Maria Lisette Porta Pargas as resident in Ms. Gonzalez's home was an unacceptable risk.

The failure to list an additional household resident is a material misrepresentation, and were that the only issue, that would be the end of the analysis. But the Court concludes that United Auto is bound to follow it's own policies and procedures. Those policies and procedures state that there must be both a material misrepresentation AND an unacceptable risk for for a policy to be rescinded. Here, there was a material misrepresentation, but not an unacceptable risk, and therefore United Auto could not, according to it's own policies, rescind the policy. As there is no issue of material fact with regards to United Auto's right to rescind the policy, Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses is GRANTED and Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation is DENIED. Because the parties have stipulated that no other issues exist, Plaintiff is entitled to final judgment. Plaintiff shall consult with Defendant's counsel and submit a proposed final judgment to this court within 15 days of this order.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Summary judgment—Motion to strike affidavit filed by insurer in support of summary judgment on defense that medical provider's assignor is not entitled to PIP coverage is denied—Ambiguous, noncompliant, pending motion to compel deposition of "person swearing to authenticity of documents and facts in motion for summary judgment," which provider never sought to enforce, is not sufficient to warrant striking affidavit or delaying summary judgment—Even if provider sufficiently demanded deposition of affiant, pending discovery would not create issue of material fact barring summary judgment where discovery sought concerned calculation of benefits and motion for summary judgment is based solely on lack of coverage—Objection to police report attached to affidavit was untimely where objection was first made at hearing—Moreover, affidavit and policy are sufficient to shift burden to provider even without police report—Summary judgment is entered in favor of insurer where insurer proved that policy does not cover assignor or her vehicle, and provider has produced no contrary evidence

HESS SPINAL & MEDICAL CENTERS OF WINTER HAVEN, LLC, a/a/o Tionna Autery, Plaintiff, v. THE STANDARD FIRE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-077168. Division J. April 14, 2023. J. Logan Murphy, Judge. Counsel: Joe Shafer, for Plaintiff. Stephen B. Farkas, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment. Doc. 37. Plaintiff did not respond, filing instead a "motion in limine" to strike Defendant's supporting affidavit "as hearsay." Doc. 39. Defendant responded to the "motion in limine," and the parties appeared for a hearing on January 17, 2023.

I. INTRODUCTION.

Hess Spinal sued Standard Fire for failing to pay PIP benefits allegedly owed for medical care rendered to Tionna Autery. Standard Fire answered, alleging that Autery is not a Standard Fire policyholder, nor is she otherwise entitled to PIP coverage from Standard Fire. It then moved for summary judgment on the same defense. Doc. 37. In support of the motion, Standard Fire referred to the policy (Doc. 21) and Lauren Moore's affidavit (Doc. 30). Hess Spinal did not respond to the motion for summary judgment. Instead, it moves to strike Moore's affidavit. The parties appeared for a hearing on January 17, 2023.

II. STANDARD.

Florida applies the federal summary judgment standard. *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a]. To obtain summary judgment, the movant must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). The moving party bears the initial burden of showing, by reference to materials on file, that there are no genuine disputes of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the movant adequately supports its motion, the burden shifts to the nonmoving party to "show that

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specific facts exist that raise a genuine issue for trial." *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 813, 815 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C602a].

The court must decide whether the parties' evidence "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). *See In re Amends.*, 317 So. 3d at 75. If there is a genuine dispute as to facts presented by the parties, those facts must be viewed in the light most favorable to the nonmoving party, " 'but only to the extent that it would be reasonable for a jury to resolve the factual issues that way.' " *Perez v. Citizens Prop. Ins. Corp.*, 345 So. 3d 893, 895 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1677a] (quoting *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1296 n.38 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1135a]). *See Ricci v. DeStefano*, 557 U.S. 586 (2009) [21 Fla. L. Weekly Fed. S1049a]; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Inferences based on speculation are not reasonable and need not be indulged in favor of the nonmovant. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1301 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1556a].

Indeed, a court "need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the nonmovant relies, are implausible." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574, 587 (1986)). It is no longer sufficient for the nonmovant to raise the "slightest doubt" to survive summary judgment. *In re Amends.*, 317 So. 3d at 76.

III. HESS SPINAL'S MOTION TO STRIKE MOORE'S AFFIDAVIT IS DENIED.

Instead of filing the required response to the motion for summary judgment, Fla. R. Civ. P. 1.510(c)(5), Hess Spinal moves to strike Moore's affidavit "as hearsay." Preliminarily, affidavits supporting summary judgment are not objectionable merely because they are presented in that form. As long as they are made on personal knowledge, affidavits and declarations are expressly permitted as support for a movant's factual position. Fla. R. Civ. P. 1.510(c)(1)(A), 1.510(c)(4). Moore avers that she has personal knowledge of the facts in the affidavit, and paragraphs 4 and 5 of the affidavit support her contention.[1]

Hess Spinal's real objection is not that the affidavit is hearsay; its real objection is not taking Moore's deposition. Hess Spinal argues that it "requested that the Defendant provide deposition dates for the affiant." Doc. 39 ¶ 6. There are several letters from Hess Spinal's attorney on the docket seeking the deposition of Standard Fire's "pre-litigation adjuster" (Docs. 10, 19),[2] and one requesting a deposition of "the person swearing to the authenticity of documents and facts contained within Defendant's Motion for Summary Judgment." Doc. 36. Hess Spinal also filed a motion to compel the deposition of the "pre-suit adjuster." Doc. 31. But Hess Spinal never moved to compel Moore's deposition, never set its other motion to compel for hearing,[3] and never noticed Moore's deposition. I am not required to delay summary judgment or strike Moore's affidavit because of an ambiguous, noncompliant, pending motion to compel that Hess Spinal never sought to enforce. *See Teague v. Pepsi Co.-Frito Lay*, 270 So. 3d 528, 529 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1175b]; *Kjellander v. Abbott*, 199 So. 3d 1129, 1131 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2155b]; *Martins v. PNC Bank Nat'l Ass'n*, 170 So. 3d 932, 936-37 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1813a]; *Allen v. Shows*, 532 So. 2d 1304, 1305 (Fla. 2d DCA 1988).

Even if Hess Spinal's efforts sufficiently demanded Moore's deposition, "[s]ummary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact." *Estate of Herrera v. Berlo Indus., Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b]. Hess Spinal argues that a deposition was necessary to "obtain essential details regarding how the amount paid by Defendant was determined." Doc. 39 ¶ 12. Discovery on this topic would not create a disputed issue of fact because Standard Fire's motion for summary judgment is based entirely—and only—on whether Autery is covered by the policy. The amount paid is not at issue. There is, therefore, no reason to delay summary judgment for Moore's deposition or to strike it.

IV. STANDARD FIRE IS ENTITLED TO SUMMARY JUDGMENT.

A party facing a motion for summary judgment "*must* serve a response that includes the nonmovant's supporting factual position" at least "20 days before the time fixed for the hearing." Fla. R. Civ. P. 1.510(c)(5) (emphasis added). This rule "**requires** the nonmovant to serve a response to a motion for summary judgment at least twenty days prior to the hearing." *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1135 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a] (emphasis in original). "There is no wiggle room" in the rule; a response is "mandatory." *Id.*; *Full Pro Restoration v. Citizens Prop. Ins. Corp.*, __ So. 3d __, No. 3D21-2312, Slip Op. at 8, 48 Fla. L. Weekly D537a, 2023 WL 1506157 (Fla. 3d DCA Mar. 15, 2023). *See 1433 Massaro, LLC v. One Net Enters., LLC*, No. 22-CC-010151, Doc. 104 at 4-8 (Hillsborough Cnty., Fla. Mar. 16, 2023) (Murphy, J.) (explaining in detail the law governing a non-movant's obligation to respond).

Because Hess Spinal has elected not to file a response to the motion for summary judgment, I will consider Standard Fire's facts undisputed for the purposes of the motion. Fla. R. Civ. P. 1.510(e)(2). Those facts establish that Standard Fire's policy does not cover Autery. Moore's affidavit attests that Standard Fire never covered Autery, nor was her car covered by a Standard Fire Policy. Doc. 30 at 3 ¶¶ 8, 10-11. The policy confirms these averments. Doc. 30 at 6. By statute, PIP benefits need only be provided to "the named insured, relatives residing in the same household . . . , persons operating the insured motor vehicle, passengers in the motor vehicle, and other persons struck by the motor vehicle." § 627.736(1), Fla. Stat. Moore's affidavit excludes this possibility, and now with the burden, Hess Spinal has not produced any evidence that Autery is entitled to PIP benefits or coverage, or "show[n] that specific facts exist that raise a genuine issue for trial." *Dietz*, 598 F.3d at 815. Standard Fire is therefore entitled to judgment as a matter of law.

At the hearing, Hess Spinal raised a new objection to the motion: The police report attached to Moore's affidavit is inadmissible. A nonmovant may object that "material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fla. R. Civ. P. 1.510(c)(2). But like evidence in opposition to the motion, this argument must be raised 20 days before the hearing. *See Design Neuroscience Ctrs., P.L. v. Preston J. Fields, P.A.*, __ So. 3d __, No. 3D20-1048, Slip Op. at 4-5 (Fla. 3d DCA Apr. 5, 2023) [48 Fla. L. Weekly D695a] (rejecting movant's ability to raise at summary judgment hearing arguments that were not timely raised in the motion for summary judgment). But, even discarding the affidavit's reliance on the policy report, the affidavit and the policy sufficiently shift the burden to Hess Spinal, which has produced no evidence to raise a genuine issue for trial. *See In re Amends.*, 317 So. 3d at 75 (describing burden-shifting when the movant does not have the burden of proof); *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018) ("[I]f the nonmoving party must prove *X* to prevail, the moving party at summary judgment can either produce evidence that *X* is not so or point out that the nonmoving party lacks the evidence to prove *X*.").

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Accordingly,

1. Defendant's Motion for Summary Judgment (Doc. 37) is GRANTED.

2. All pending motions are DENIED without prejudice as moot.

3. The Court will enter final judgment separately.

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[1]Hess Spinal also argues that an affidavit is the "weakest form of evidence." Hess Spinal cites no authority for this proposition, nor is there a single reported Florida case that agrees.

[2]As an aside, no Rule of Civil Procedure, local rule, or administrative order permits these letters to be filed.

[3]This motion did not comply with the good-faith conference requirement of Rule 1.380(a).

* * *

Insurance—Automobile—Windshield repair—Appraisal—Waiver—Insurer did not waive right to invoke appraisal by acting inconsistently with those rights—Neither invocation of rules of civil procedure nor demand for jury trial waives right to appraisal—Motion to dismiss is granted

NUVISION AUTO GLASS LLC, a/a/o Dennis Ford, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No: 22-CC-006807. Division J. March 28, 2023. J. Logan Murphy, Judge. Counsel: Christopher K. Leifer, FL Legal Group, Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss Plaintiff's Amended Complaint or in the Alternative, Motion to Stay and Compel Appraisal. Doc. 36. Plaintiff filed authority in opposition (Doc. 38), and the parties appeared for a hearing on March 28, 2023.

Plaintiff agrees that appraisal is ripe and appropriate under the policy. *See Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC*, 349 So. 3d 965, 971 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]; *People's Trust Ins. Co. v. Marzouka*, 320 So. 3d 945, 947-48 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a].

But it contends that State Farm waived its right to appraisal by (1) demanding a jury trial, and (2) moving to invoke the Rules of Civil Procedure. As an aside, the latter motion is moot, because the rules apply to all glass repair, replacement, and recalibration cases by administrative order. 13th Cir. Admin. Order S-2022-032 para. 11 (eff. Jan. 1, 2023). In any event, State Farm has not acted inconsistently with its appraisal rights, so it has not waived them. Invoking the Rules of Civil Procedure does not contest the merits of the case and is not inconsistent with the right of appraisal, which must be sought through vehicles available under those rules. And demanding a jury trial has been rejected as a basis for waiver. I agree the demand is not inconsistent with the remedy of appraisal. *Fla. Ins. Guar. Ass'n v. Lustre*, 163 So. 3d 624, 629 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D968a]. *See Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814, 817 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D390a] ("There is no basis for a claim of waiver here, where the appraisal clause was invoked at the state of the litigation."); *Riverfront Props., Ltd. v. Max Factor III*, 460 So. 2d 948 (Fla. 2d DCA 1984) (no waiver where motion to dismiss did not contest the merits of the case); *Concord at the Vineyards Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, No. 2:21-cv-380-SPC-KCD, 2022 WL 4125041, at *1 (M.D. Fla. Aug. 10, 2022) (rejecting argument that demanding a jury trial waives right to appraisal and citing other cases).

Accordingly,

1. Defendant's motion to dismiss is GRANTED.

2. This case is DISMISSED without prejudice pending compliance with the policy's appraisal provision. *NCI, LLC v. Progressive Select Ins. Co.*, 350 So. 3d 801, 810 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f]; *Hillsborough Ins.*, 349 So. 3d at 971.

3. The Court retains jurisdiction to enforce the terms of this order. *United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59, 60 (Fla. 3d DCA 1994).

* * *

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 there was no evidence that insured received services within 14-day window after accident, and medical provider was alerted to that fact 21 months before filing case but refused to dismiss case until day of summary judgment hearing—Attorney's fees to be paid equally by provider and provider's attorney—Fact that provider has refiled case does not preclude sanctions

HESS SPINAL & MEDICAL CENTERS OF PALM HARBOR, LLC, a/a/o Donna Juhl, Plaintiff, v. THE STANDARD FIRE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-085231. Division J. April 5, 2023. J. Logan Murphy, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., Tampa, for Plaintiff. Victoria Posada and Christopher S. Dutton, Dutton Law Group, Tampa, for Plaintiff.

ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS

BEFORE THE COURT are two motions filed by The Standard Fire Insurance Company: (1) Defendant's Motion to Tax Attorney's Fees and Costs,[1] and (2) Defendant's Motion for Sanctions Pursuant to Florida Statute § 57.105.[2] Standard also filed a memorandum in support of the motion for sanctions. Doc. 61. Hess Spinal did not file a response, presenting instead a "notice of filing evidence," which included several points of authority. Doc. 64. The parties appeared for a hearing on December 13, 2022.

I. INTRODUCTION.

Hess Spinal filed a statement of claim alleging Standard failed to pay PIP benefits owed under Donna Juhl's policy for an October 26, 2018 accident. Doc. 3 ¶¶ 7-8. Standard's answer alleged it did not owe benefits because Juhl did not receive care within 14 days of the accident.[3] Doc. 15 at 4, 5. About four months later, Standard moved for § 57.105 sanctions because "treatment was not initiated in a timely manner by statute." Doc. 26 ¶ 8. Standard argues that it had informed Hess Spinal of this problem in its explanation of benefits and in a response to Hess Spinal's demand letter. *Id.* ¶ 9. Its November 2, 2020 letter to Hess Spinal's attorney is attached to the motion. It declines coverages because Juhl "did not seek care from a medical doctor within 14 days following the date of accident." Doc. 26 at 11.

Standard then moved for summary judgment on the same grounds. Filed with the motion was Erica Heltzel's affidavit, explaining that Standard denied benefits because Juhl received services on December 5, 2018—more than 14 days after the accident. Doc. 30 at 2 ¶ 7. The affidavit attached Juhl's claim forms, listing the date of service as December 5, 2018. Doc. 30 at 6-7. No other dates of service are listed. Confirming the date of service is the demand letter from Hess Spinal's attorney, which identifies the date of treatment as "12/5/2018." Doc. 30 at 15. Juhl's assignment of policy benefits to Hess Spinal is also dated December 5, 2018, and countersigned by a Hess Spinal representative the same day. Doc. 30 at 18. Hess Spinal's account entries list December 5, 2018, as the only date of service. Doc. 30 at 19.

The only exception to the common thread of December 5, 2018 service was noted in Heltzel's affidavit. She confirmed that Standard was also on notice of services provided November 26, 2018[4]—still more than 14 days after the accident. Doc. 30 at 3 ¶ 9. Other than that, however, "Standard [was] not on notice of any other information by any means or medium indicating that Donna Juhl received services and care within the initial 14 days after the motor vehicle accident . . . ." Doc. 30 at 3 ¶ 10.

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Hess Spinal never responded to the motion for summary judgment, as required by Rule 1.510(c)(5).[5] Instead, it moved to continue the hearing and to strike Heltzel's affidavit "as hearsay." Docs. 37, 38. The day before the May 10, 2022 hearing, I deferred consideration of the motion to continue until the hearing, to allow both parties to address it. Doc. 45. No action was taken on the motion to strike.

Instead of arguing its position at the hearing, Hess Spinal voluntarily dismissed the case without prejudice. Doc. 47. Standard timely moved for fees under § 57.105. The motion incorporated a new affidavit from Heltzel, which supported her earlier one, but provided more detail. In particular, Heltzel averred that the bills received by Standard "indicate that [Juhl's] treatment commenced November 26, 2018." Doc. 50 at 3 ¶ 9. Attached were other claims forms, all of which show November 26, 2018 dates of service. Doc. 50 at 43, 44. The affidavit also confirmed Standard was not on notice of any earlier services, and that it had informed Hess Spinal of this deficiency in its explanation of benefits dated January 11, 2019. Doc. 50 at 3-4 ¶¶ 13, 15; Doc. 50 at 55, 59. Despite receiving this information, Hess Spinal sent a demand letter 21 months later and filed suit.

Hess Spinal did not file any evidence suggesting that services may have been rendered to Juhl within 14 days. Instead, Hess Spinal filed a certificate of non-appearance indicating that Standard's corporate representative did not appear for a November 18, 2022 deposition. Doc. 64 at 4. But there is no notice of deposition in the record, nor did Hess Spinal provide one.

Hess Spinal did not present any evidence at the December 13, 2022 hearing, despite the opportunity to do so. Instead—without citing any authority—Hess Spinal argued there are exceptions to the 14-day rule, and that it dismissed the case because it was "forced" to hold a hearing on Standard's motion for summary judgment, even though it chose not to argue its motion to continue. It also argued that I am precluded from awarding sanctions because it has since refiled the case. Standard relied on its filings and argued that Hess Spinal failed to conduct a reasonable presuit investigation before filing suit.

II. STANDARD.

Because the motion for sanctions is based on a statute, we start with the statute's text. *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946-47 (Fla. 2020) [46 Fla. L. Weekly S9a].

> (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 of 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.
>
> . . . .
>
> (3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
>
> (a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
>
> (b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

§ 57.105, Fla. Stat.

The statute "mandates a court to award fees to the prevailing party" when its standard is met. *de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 684 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D991c]. *See Albritton v. Ferrera*, 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2099a] (holding the Legislature intended "to impose a mandatory penalty" in § 57.105 to discourage baseless claims). But, it is ultimately " 'intended to address frivolous pleadings,' " so orders should not "cast a chilling effect on use of the courts." *Soto v. Carrollwood Village Phase II Homeowners Ass'n, Inc.*, 326 So. 3d 1181, 1184 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1974a] (quoting *Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D462a]); *Stevenson v. Rutherford*, 440 So. 2d 28, 29 (Fla. 4th DCA 1983). To that end, "section 57.105 should not be construed to discourage a party from pursuing a colorable claim . . . ." *Swan Landing Dev., LLC v. First Tenn. Bank Nat'l Ass'n*, 97 So. 3d 326, 328-29 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2225a]. And it must be applied with restraint "to ensure that it serves the purpose for which it was intended." *Bridgestone/Firestone, Inc. v. Herron*, 828 So. 2d 414, 419 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2173a].

Awarding § 57.105 sanctions is within the trial court's discretion. *Swan Landing*, 97 So. 3d at 328. But a finding of entitlement must be based upon "substantial, competent evidence presented at the hearing. . . or otherwise before the court and in the record." *Mason v. Highlands Cnty. Bd. of Cnty. Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1061a]. The same holds true for any finding of good faith under subsection (3). *Ferdie v. Isaacson*, 8 So. 3d 1246, 1250 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D898a]. Standard has the burden to prove entitlement to fees; Hess Spinal has the burden to prove good faith. *MCLiberty Express, Inc. v. All Points Servs.*, 252 So. 3d 397, 403 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1808a]; *Andzulis v. Montgomery Rd. Acquisitions, Inc.*, 831 So. 2d 237, 239 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D142d].

III. DISCUSSION.

The PIP statute mandates medical payments only if the insured receives "services and care . . . within 14 days after the motor vehicle accident." § 627.736(1)(a). Juhl's policy contains the same restriction. Yet, there is no evidence in the record that Juhl received any services or care within that 14-day window. In fact, the evidence is to the contrary. All of it reflects services provided on November 26, 2018, and December 5, 2018. Hess Spinal was alerted to this fact 21 months before filing suit, yet it forged ahead. And when presented with the evidence in this case, it refused to dismiss the case until the day of the summary judgment hearing.

Hess Spinal has made no effort to provide any competing evidence, nor has it even suggested that such evidence exists. Instead, it argues that exceptions to the 14-day rule exist. But it could not cite any authority for an exception to the statute's plain language. Hess Spinal also argues that sanctions are precluded because it has refiled this case. But that fact is simply irrelevant to my determination of whether the claim filed in *this case* is supported by material fact or law.

I find Hess Spinal and its attorneys knew or should have known that its claim when initially presented to the court was not supported by the material facts necessary to establish it and would not be supported by then-existing law. § 57.105(1). Based on the competent, substantial evidence filed by Standard, this case was frivolous when filed. *See Van Sant Law, LLC v. Air Isaac, LLC*, 353 So. 3d 106, 108 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2560a] (noting a trial court must "render findings of frivolity as a prerequisite to awarding fees") (quoting *Sans Souci Gated Homeowners Ass'n v. Lukov*, 317 So. 3d 243, 243 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D532a]). Because there is no evidence of good faith in the record, the fees must be split between Hess Spinal and its attorneys.

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Accordingly,

1. Defendant's Motion for Sanctions Pursuant to Florida Statute § 57.105 is GRANTED.

2. Defendant The Standard Fire Insurance Company is ENTITLED to recover from Plaintiff Hess Spinal & Medical Centers of Palm Harbor, LLC a reasonable attorney's fee, including prejudgment interest, incurred in this case. § 57.105(1). This fee must be paid to Standard in equal amounts by Plaintiff Hess Spinal & Medical Centers of Palm Harbor, LLC, and its attorney, Irvin & Petty, P.A.

3. Within **21 days** of this order, the parties shall confer by telephone or videoconference concerning the amount of Standard's fee. If the parties cannot agree on the amount of the fee to be paid, the matter shall be set for an evidentiary hearing. Failure to participate in this conference in good-faith will result in the Court awarding additional fees and may result in a finding of contempt.

---

[1]Ordinarily, "[a] trial court lacks jurisdiction to hear a motion for sanctions under section 57.105 that is filed after the case is voluntarily dismissed." *Buckingham Estates Homeowners Ass'n, Inc. v. Metcalf*, 207 So. 3d 966, 967 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2794d] (citing *Pomeranz & Landsman Corp. v. Miami Marlins Baseball Club, L.P.*, 143 So. 3d 1182, 1182 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1704b]). Since the Court indisputably has jurisdiction to resolve the § 57.105 motion filed before the case was dismissed, I will treat Defendant's Motion to Tax Attorney's Fees and Costs—filed after the dismissal—as a supplemental memorandum in support of the pre-dismissal motion for sanctions. *See generally Pino v. Bank of N.Y.*, 121 So. 3d 23, 41-43 (Fla. 2013) [38 Fla. L. Weekly S78a] (holding trial court has continuing jurisdiction to consider a § 57.105 motion filed before a voluntary dismissal).

[2]The motion to tax fees and costs also seeks fees for Defendant's proposal for settlement, but Defendant did not raise that ground at the evidentiary hearing.

[3]*See* § 627.736(1)(a), Fla. Stat. (2018) ("An insurance policy . . . must provide personal injury protection to the named insured . . . as follows: (a) *Medical benefits.*—Eighty percent of all reasonable expenses for medically necessary . . . services . . . *if the individual receives initial services and care pursuant to subparagraph 1. within 14 days after the motor vehicle accident*.") (emphasis added).

[4]Heltzel's first affidavit identifies the date of this service as November 26, *2019*, but that appears to be a typo. Her later affidavit identifies it as November 26, *2018*, and the parties seemed to agree at the hearing that the earlier services were rendered in 2018.

[5]*See Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1135 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a].

* * *

Insurance—Default—Motion to set aside default on ground that notice of impending default was served on only one of two email addresses designated by insurer on e-filing portal is denied—Although second email address was designated in filing, insurer failed to update portal to reflect second address—Excusable neglect—Where insurer does not contest that it received notice of impending default, but claims that it was unaware of notice because it does not monitor email address to which it was sent, excusable neglect is not established

TRINITY HEALTH & REHAB INC., Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22057117. Division 53. April 18, 2023. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S VERIFIED MOTION TO SET ASIDE DEFAULT

THIS CAUSE came before the Court on April 17, 2023 for hearing of the Defendant's Verified Motion to Set Aside Default, and the Court's having reviewed the Motion, the entire Court file, and the relevant legal authorities; having heard argument; and having been sufficiently advised in the premises, the Court finds as follows:

Background. A court default was entered against the Defendant after notice pursuant to Rule 1.500(b). The Defendant takes the position that the default was not properly entered because the Notice of Impending Default sent to the parties was served on the Defendant only at its "secondary" email address. The Defendant argues that before the default was entered, it had filed a document that designated two email addresses, and further claims that the Clerk made a mistake when it did not update the docket to provide for service on both email addresses. Finally, the Defendant concedes that the Notice of Impending Default was sent to an email address that it designated, but because it was only a "secondary" email address, it is not monitored by the Defendant's office.

The Court finds that the Defendant's argument to be unavailing.

Conclusions of Law. The Defendant apparently misunderstands the process by which documents, including court orders, are electronically served. When a party files its initial document in the case through the e-portal, it is asked to designate at least one email address for electronic service of later documents. Neither the Clerk nor the Court does this for a party. Therefore, when documents are later generated by another party or the Court, the documents are automatically e-served on the parties at the email addresses they registered. If a party later wants to change its email address, or add additional email addresses, it can do so through the e-portal. In this case, the e-portal records reflect that the Defendant updated its e-service addresses on March 2, 2023, a date after the Notice of Impending Default and Order of Default were served by the Court.

In this case, at the time the Court issued its Notice of Impending Default, the Defendant had registered only one email address for e-service. The fact that it had filed a paper that designates a second email address is irrelevant if the Defendant does not also update its e-service information on the e-portal. The Court's Notice was properly served on the Defendant, and the Defendant does not contest that it received the Notice. Rather, the Defendant states that it does not monitor that email address, so it was unaware the Notice had been issued.

Assuming this is instead an "excusable neglect issue," the Defendant must, at a minimum, establish that the failure to act in this cause is due to "excusable neglect." *See Credit General Ins. Co. v. Thomas,* 515 So.2d 336, 337 (Fla. 3d DCA 1987). The Court concludes that the allegations set forth in the Motion and at the hearing simply do not establish excusable neglect. The Defendant does not contest that it received the Notice of Impending Default. Rather, the Defendant asserts that it was received at an email address that it provided, but that it does not monitor. Indeed, to this day, while the Defendant has now registered its "primary" email address, it continues to have a registered, but unmonitored, "secondary" email address. In the Court's view, this is not excusable.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Defendants' Motion to Set Aside Default is DENIED.

* * *

Traffic infractions—Failure to yield—Sentencing—Where court found defendant guilty of noncriminal traffic infraction of failure to yield but found insufficient evidence that fatality was result of infraction, court did not have authority to impose one-year suspension of defendant's driver's license

STATE OF FLORIDA, Plaintiff, v. CINDY SANABRIA, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2022-TR-45468. Citation No. AGS98BE. March 9, 2023. John L. Woodard, III, Judge. Counsel: Matthews R. Bark, Matthews R. Bark, P.A., Altamonte Springs, for Defendant.

ORDER ON DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTION TO THE IMPOSITION OF A ONE (1) YEAR DRIVER LICENSE SUSPENSION

THIS CAUSE, having come on to be heard before this Court upon the Defendant's Memorandum of Law in Support of Defendant's Objection to the Imposition of a One (1) Year Driver License Suspension, and the Court having reviewed the law, listened to the facts, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED

That the Defendant's request to remove the one (1) year driver license

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suspension from her Judgment and Sentence is hereby **GRANTED** for the reasons set forth below:

1. On November 11, 2022, the Defendant was involved in a traffic accident and was subsequently issued a citation for Failure to Yield—Approaching / Entering Intersection, in violation of Section 316.121, Florida Statutes, by Officer Christopher French of the Sanford Police Department.

2. On December 14, 2022, Officer French filed an amended citation to include that a fatality occurred as a result of the traffic accident.

3. On February 17, 2023, a civil infraction hearing was held for the above referenced citation before the Honorable John L. Woodard, III.

4. At the conclusion of said hearing, this Court found that the Defendant had failed to yield, but also found that there was insufficient evidence that a fatality occurred as a result of the traffic accident and thus found that it was not proven beyond a reasonable doubt that the fatality was a result of the accident.

5. The Court adjudicated the Defendant guilty, ordered her to pay a fine of $500.00 and complete the advanced DUI Improvement School (12 hours), and suspended her license for a period of one (1) year.

6. The Defendant objected to the license suspension.

7. A violation of section 316.121, Florida Statutes, "is a noncriminal traffic infraction, punishable as a moving violation as provided in chapter 318." Section 318.14, Florida Statutes, sets forth the penalties for noncriminal traffic infractions. Subsection (5) of that statute states in relevant part:

> Any person electing to appear before the designated official or who is required so to appear shall be deemed to have waived his or her right to the civil penalty provision of s. 318.18. The official, after a hearing, shall make a determination as to whether an infraction has been committed. If the commission of an infraction has been proven, the official may impose a civil penalty not to exceed $500, except that in cases involving unlawful speed in a school zone or involving unlawful speed in a construction zone, the civil penalty may not exceed $1,000; or require attendance at a driver improvement school, or both. If the person is required to appear before the designated official pursuant to s. 318.19(1) and is found to have committed the infraction, the designated official shall impose a civil penalty of $1,000 in addition to any other penalties and the person's driver license shall be suspended for 6 months.

8. Thus, the above quoted portion of Section 318.14, Florida Statutes, grants the Court authority to suspend a person's driver license for six (6) months if they are required to appear before the court due to the infraction resulting in a death and are found to have committed the infraction. However, if the infraction did not result in a death or serious bodily injury, section 318.14 does not authorize any suspension of the driver license.

9. The Court further finds that the language "and found to have committed the infraction" is vague and ambiguous, in that it does not spell out whether the legislature meant that a person's driver license should be suspended solely if the infraction was committed or if the infraction was committed and it was proven the infraction results in causing a death or serious bodily injury. Thus, the rule of lenity must be applied. "In Florida, the rule [of lenity] is not just an interpretive tool, but a statutory directive. *See s. 775.021(1),* Fla. Stat. (2007)[.] ('The provisions of this code and offenses defined by other statute shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.'). The rule requires that '[a]ny ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense.' *State v. Byars,* 823 So.2d 740, 742 (Fla. 2002) [27 Fla. L. Weekly S625a]. '[O]ne of the most fundamental principles of Florida law is that the penal statutes must be strictly construed according to their letter.' (Citation omitted)." *Kasischke v. State,* 991 So.2d 803, 814 (Fla. 2008) [33 Fla. L. Weekly S481a]. The statutory language at issue here is susceptible to differing constructions and thus must be resolved in favor of the Defendant.

10. Thus, in applying the rule of lenity in favor of the Defendant, and because the Defendant was not found to have committed an infraction that resulted in a death or serious bodily injury, the Court finds that it does not have the authority to impose a one (1) year suspension of the Defendant's driver license.

11. Accordingly, it is hereby ordered and adjudged that the one (1) year license suspension is removed from the Defendant's judgment and sentence. The Defendant is therefore sentenced as follows:

ADJUDGED GUILTY OF FAILURE TO YIELD;

PAY THE TOTAL OF $500.00 BY 05/18/2023;

COMPLETE ADVANCED DRIVER IMPROVEMENT SCHOOL (12 HOURS) BY 05/18/2023.

* * *

Real property—Homeowners' associations—Records—Audio recording of association's board of directors meeting was the official minutes of the meeting until minutes were reduced to an official written form approved by board and, accordingly, was subject to record request under section 720.303(5)—Association is permanently enjoined from destroying recordings of meetings until reduced to official written form

KATHRYN FAVATA, Plaintiff, v. TENNIS VILLAGE HOMEOWNERS ASSOCIATION, INC., Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-SC-026729-XXXX-XX. March 31, 2023. Kenneth Friedland, Judge. Counsel: George Gingo, George M. Gingo, P.A., Titusville, for Plaintiff. Bryan McLaughlin, Williams, Leininger & Cosby, P.A., Stuart; and Scott Kiernan, Becker & Poliakoff, Orlando, for Defendant.

FINAL CONSENT JUDGMENT FOR PLAINTIFF

THIS CAUSE came before the Court on the parties stipulated consent for final judgment.

FINDINGS OF FACT:

1. Plaintiff Kathryn Favata is a member of the Tennis Village Homeowners Association, Inc.

2. Defendant Tennis Village Homeowners Association, Inc. ("TVHA") is subject to Florida Statutes § 720, et seq.

3. On October 11, 2021, Defendant TVHA held a Board of Directors meeting wherein the audio of the meeting was recorded.

4. On October 28, 2021, Plaintiff Kathryn Favata made a written demand for a copy of the October 11, 2021, Board of Directors meeting to Defendant TVHA's agent, Dennis G. Collins of Collins Realty Group, Inc.

5. On November 8, 2021, Defendant TVHA's agent, Dennis G. Collins denied Plaintiff Kathryn Favata's records request contending that tape recordings are not official records subject to Florida Statutes § 720.303(5).

6. On November 24, 2021, Plaintiff Kathryn Favata requested Defendant TVHA's agent Dennis G. Collins who was acting on behalf of Defendant TVHA, to not destroy the requested tape recording.

7. On February 1, 2022, Defendant TVHA memorialized the minutes of the October 11, 2021, Board of Directors meeting, and thereafter destroyed the tape recording of the Board of Directors meeting.

8. Florida Statutes § 720.303(3) provides in relevant part "Minutes of all meetings of the members of an association and of the board of directors of an association must be maintained in written form or in another form that can be converted into written form within a reasonable time." The audio recording of Defendant TVHA's October 11, 2021, Board of Directors meeting were the official minutes of the

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meeting until the minutes were reduced to a written form approved by the Board of Directors.

9. Until the audio recording of Defendant TVHA's October 11, 2021, Board of Directors meeting was reduced to a written form approved by the Board of Directors, it was subject to Plaintiff Kathryn Favata's record request according to Florida Statutes § 720.303(5).

Based on the foregoing, it is ADJUDGED AND ORDERED:

1. As to Plaintiff's Count I for violation of Florida Statutes § 720.303(5), judgment is granted for Plaintiff Kathryn Favata.

10. Defendant TVHA is permanently enjoined from destroying tape recordings of Board of Directors meetings until reduced to an official written form.

11. Defendant TVHA shall pay Plaintiff Kathryn Favata $500.00 for damages and costs of $794.63, for a total of $1,294.63, for which the parties agree and stipulate has already been paid and satisfied.

12. Plaintiff is not entitled to any further relief in this matter.

* * *