Volume 31, Number 3, July 31, 2023


# FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

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**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.*

- **TORTS—DAMAGES—PAST AND FUTURE MEDICAL EXPENSES—EVIDENCE. Recently-enacted section 768.0427, Florida Statutes, addresses the evidence admissible to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action. A circuit court judge ruled that the statute is applicable to cases pending at the time the statute was enacted.** *SAPP v. BROOKS. Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County. May 19, 2023. Full Text at Circuit Courts-Original Section, page 123a.*

- **INSURANCE—PERSONAL INJURY PROTECTION—BAD FAITH. A county court judge denied an assignee's motion to amend its complaint against a PIP insurer to add a claim for statutory bad faith pursuant to section 624.155. The court concluded that the amendment would be futile because the plaintiff's civil remedy notice, a condition precedent to suit, was lacking the specificity required by the statute. The court's order included an extensive discussion of the specific information required by the statute.** *HESS SPINAL & MEDICAL CENTERS, INC. v. INFINITY AUTO INSURANCE COMPANY. County Court, Thirteenth Judicial Circuit in and for Hillsborough County. May 8, 2023. Full Text at County Courts Section, page 163a.*

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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:

| | |
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| ***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. |

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| CO | County Court |
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**Bold** denotes decision by circuit court in its appellate capacity.

**INSURANCE (continued)**



**INSURANCE (continued)**

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**TABLE OF CASES REPORTED**

**TABLE OF CASES REPORTED (continued)**



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**TABLE OF STATUTES CONSTRUED**

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**TABLE OF STATUTES CONSTRUED (continued)**



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**TABLE OF CASES TREATED (continued)**



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46 NW 17 Ct LLC v. City of Miami. Circuit Court, Eleventh Judicial Circuit (Appellate), Miami-Dade County, Case No. 2022-16 AP 01. Original Opinion at 30 Fla. L. Weekly Supp. 535a (January 31, 2023). Certiorari Denied at 48 Fla. L. Weekly D1401a

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# CIRCUIT COURTS—APPELLATE

**Licensing—Driver's license—Suspension—Driving under influence—Due process—Procedural due process requirements were satisfied where licensee was provided notice of formal review hearing and afforded meaningful opportunity to be heard—Evidence—Breath test affidavit that contained all information required by section 316.1934(5) was admissible—No merit to argument that separate agency breathalyzer inspection report was necessary for affidavit to be admissible—Lawfulness of detention—Although there is lack of clarity in record as to when deputy observed that licensee had bloodshot and watery eyes, any error in hearing officer's reliance on this observation in finding that there was reasonable suspicion for detention was harmless given deputy's additional observations that licensee was driving at night without headlights lit and had odor of alcohol and raspy voice**

ROBERT FARRIS, 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. 22-000004-AP-88B. March 21, 2023. Counsel: Mark L. Mason, Former Assistant General Counsel, DHSMV, for Respondent.

## ORDER AND OPINION

(**PER CURIAM**.) **THIS MATTER** came before the Court on Petitioner's Amended Petition for Writ of Certiorari dated March 15, 2022 ("Petition"); Respondent's Response to Amended Petition for Writ of Certiorari dated May 23, 2022 ("Response"); and Petitioner's Reply to Response to Amended Petition for Writ of Certiorari dated June 10, 2022. Petitioner seeks certiorari review of Respondent's decision to uphold the suspension of Petitioner's driver's license. For the reasons set forth below, **the Petition is DENIED.**

### I. Jurisdiction

This Court has jurisdiction to issue a writ of certiorari pursuant to article V, section 5(b), Florida Constitution; section 322.2615(13), Florida Statutes (2022); section 322.31, Florida Statutes (2022); and Florida Rule of Appellate Procedure 9.030(c)(2).

### II. Relevant Facts and Procedural History

On January 15, 2022, Pinellas County Sheriff's Deputy Levi Blake stopped Petitioner, ROBERT FARRIS ("Petitioner") in Pinellas County around 1:03 a.m. for operating his vehicle without headlamps. Upon making contact with Petitioner, Deputy Blake observed indications of impairment and detained Petitioner to conduct a driving under the influence ("DUI") investigation. Petitioner was placed under arrest after he failed field sobriety exercises. Petitioner then submitted two breathalyzer[1] samples at the scene measuring at .153 and .146, well over the legal limit of .08. Upon notification of Petitioner's DUI citation, Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("the Department") suspended Petitioner's driver's license pursuant to section 322.2615.

Per Petitioner's timely request, the Department conducted a formal administrative hearing on February 15, 2022 ("hearing") to review the suspension of Petitioner's driver's license. Counsel appeared on behalf of Petitioner. The hearing officer introduced several documents into the record at the hearing, including a Florida DUI Uniform Traffic Citation and Notice of Suspension, a Breath Alcohol Test Affidavit ("Affidavit"), and an Agency Inspection Report. Deputy Blake appeared and testified at the hearing that he detected the odor of alcohol on Petitioner's breath and noticed that Petitioner had a raspy voice upon making initial contact with Petitioner. He further testified that a raspy voice can be an indicator of "certain drug impairment." App. at 35, line 22 to App. at 36, line 6. The following exchange occurred between Deputy Blake and Petitioner's counsel at the hearing:

> **Mr. Sullivan:** So based upon the driving without headlights, the odor of alcohol, and the raspy voice, you elected to detain [Petitioner] for the purpose of conducting a DUI investigation?
>
> **Deputy Blake:** Yeah, I mean, that would be fair to say at that point. ***The contact with him went further on, and once I was finally able to see his eyes, I noted that they were bloodshot and watery, but that was a little further on in his speaking.***
>
> **Mr. Sullivan:** Okay. At the point where you were either going to issue him a ticket, give him a warning, or detain him for the purpose of doing a DUI investigation, the information that you had was that he was driving without headlights, that he had an odor of alcohol on his breath, and his speech was raspy?
>
> **Deputy Blake:** That's correct.
>
> **Mr. Sullivan:** Okay. And what happened from there? You had him get out of his car?
>
> **Deputy Blake:** Yeah. A little bit further on, I had him get out of the vehicle, and that's when we began FSTs.

App. at 36, line 7 to App. at 37, line 1. (Emphasis added).

At the conclusion of Deputy Blake's testimony, Petitioner objected to the introduction of the Affidavit. Petitioner also formally moved to invalidate the license suspension on two bases: 1) the lack of an appropriate inspection report corresponding to the breathalyzer identified in the Affidavit[2] and used to obtain Petitioner's breath samples; and 2) unlawful detention of Petitioner for the purpose of conducting a DUI investigation. Per Petitioner's request, the hearing officer withheld ruling on February 15, 2022 and allowed Petitioner's counsel to submit a written memorandum concerning his motions to invalidate the suspension.

Ultimately, the hearing officer denied Petitioner's motions and upheld the license suspension in her Findings of Fact, Conclusions of Law and Decision dated February 23, 2022 ("Order"). Over Petitioner's objection, the hearing officer relied upon the Affidavit in upholding the suspension. The Order also found that Deputy Blake had reasonable suspicion to detain Petitioner for a DUI investigation. In doing so, the hearing officer relied upon Deputy Blake's testimony about Petitioner's bloodshot and watery eyes. App. at 25. Petitioner subsequently filed a timely petition for writ of certiorari.

### III. Standard of Review

A circuit court's review of an administrative proceeding on a petition for writ of certiorari is limited to a three-prong analysis: 1) whether procedural due process was afforded; 2) whether the essential requirements of the law have been observed; and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The instant Petition only raises issues as to the first two prongs, and thus we need not address whether the administrative findings and judgment are supported by competent substantial evidence.

### IV. Procedural Due Process

Due process is a flexible concept and requires only that the proceeding be essentially fair. *Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) [39 Fla. L. Weekly S421a] (cleaned up). The quality of due process required in a quasi-judicial hearing is not the same as a full judicial hearing. *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (cleaned up). Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. *Id.* A quasi-judicial hearing generally meets basic due process

requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Id.*; *see also Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So. 3d 766, 771 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D583a] (stating "[p]rocedural due process requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner.") (cleaned up).

The Petition asserts that the Department deprived Petitioner of his procedural due process rights in the following ways: 1) admitting the Affidavit into the record over Petitioner's objection (Am. Pet. at 9-10); 2) denying Petitioner's Motion to Invalidate the Suspension due to the lack of a proper agency inspection report (*Id.*); and 3) denying Petitioner's Motion to Invalidate the Suspension for a lack of reasonable suspicion to detain the Petitioner (Am. Pet. at 12). However, Petitioner does not provide any support for these arguments. The Petition completely fails to identify any legal authority or facts in the record which substantiate these bare assertions.

Based on the record and the legal authority cited above, we are convinced that Petitioner was afforded procedural due process in the proceeding below. Petitioner's Appendix includes a document entitled Notice of Formal Review Hearing/Prehearing Order dated January 19, 2022 ("Notice") which includes the date, time, and additional details for the hearing on February 15, 2022. App. at 2. The Notice is addressed to Petitioner's counsel and signed by the hearing officer who presided over the hearing. There is no evidence in the record that Petitioner objected to the Notice in any way. Petitioner's counsel appeared at the hearing and did not place an objection on the record concerning any notice issue. Accordingly, we do not find any issue with the notice provided by the Department.

Now we turn to the issue of whether Petitioner was afforded a meaningful opportunity to be heard. At the hearing, Petitioner had the opportunity to question Deputy Blake and to submit documents for the record. When counsel for Petitioner raised issues of law, the hearing officer agreed to keep the record open to allow for counsel to supplement the record with written argument and case law. App. at 48. Such factors demonstrate that the hearing bore the hallmarks of procedural sufficiency. *See, e.g.*, *Green Emerald Homes, LLC v. 21st Mortgage Corp.*, 300 So. 3d 698, 704 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1449b] (stating that "the right to be heard includes the right to meaningfully introduce evidence, cross-examine witnesses, and be heard on questions of law.") (cleaned up). Petitioner was undoubtedly afforded the opportunity to introduce evidence, to question Deputy Blake, and to raise issues of law during and after the hearing. As such, we find no basis to conclude that the Department failed to provide Petitioner with a meaningful opportunity to be heard.

Because Petitioner has failed to identify deficiencies pertaining to notice or the opportunity to be heard in this case, there is no basis for any of Petitioner's procedural due process arguments, and we deny the Petition on such grounds.

**V. Departure from the Essential Requirements of the Law**

A departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. *Housing Authority of City of Tampa v. Burton*, 874 So. 2d 6, 8 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1142a] (citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]). In *Haines City Cmty. Dev. v. Heggs*, the Florida Supreme Court stated:

> The required departure from the essential requirements of law means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

*Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527-28 (Fla. 1995) [20 Fla. L. Weekly S318a] (cleaned up).

A ruling constitutes a departure from the essential requirements of the law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice. *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1655a] (citing to *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983)). Clearly established law can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003) [28 Fla. L. Weekly S287a]; *see also DecisionHR USA, Inc. v. Mills*, 341 So. 3d 448, 453 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1334a]. A decision made according to the form of the law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, does not rise to the level of a departure from the essential requirements of the law. *Barker*, 909 So. 2d at 337-38 (citing to *Heggs*, 658 So. 2d at 525).

**a. Breath Alcohol Test Affidavit**

Petitioner argues that the Department departed from the essential requirements of the law by upholding the suspension of Petitioner's driver's license without a proper agency inspection report in the record, as such rendered the Affidavit inadmissible. In response, the Department asserts that there is no statute or rule which requires the submission of an agency inspection report to validate a breath alcohol test affidavit in an administrative proceeding. We agree with the Department.

The admissibility of the subject Affidavit turns on section 316.1934(5), Florida Statutes (2022). This statute does not apply to administrative proceedings on its face. However, the Second District Court of Appeal made section 316.1934(5) applicable to administrative proceedings in *Dep't of Highway Safety & Motor Vehicles v. Falcone*, 983 So. 2d 755, 757 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1504a]. *See also Yankey v. Dep't of Highway Safety & Motor Vehicles*, 6 So. 3d 633, 638 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D418a] (applying section 316.1934(5) to an administrative review of a license suspension for a DUI citation after noting the court had done the same in *Falcone*). Section 316.1934(5) states in pertinent part:

> An affidavit containing the results of any test of a person's blood ***or breath*** to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. ***Such affidavit is admissible without further authentication*** and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath ***if the affidavit discloses***:
>
> (a) The type of test administered and the procedures followed;
>
> (b) The time of the collection of the blood or breath sample analyzed;
>
> (c) The numerical results of the test indicating the alcohol content of the blood or breath;
>
> (d) The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; ***and***
>
> (e) ***If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.***

§ 316.1934(5), Fla. Stat. (emphasis added).

A breath alcohol test affidavit "is presumptive proof of the results" and "admissible without further authentication" if the affidavit discloses all the information required by section 316.1934(5), including "the date of performance of the most recent required maintenance on the intoxilyzer." *Falcone*, 983 So. 2d at 757. Once a breath test affidavit is admitted into evidence, the record then contains

competent, substantial evidence of impairment. *Dep't of Highway Safety & Motor Vehicles v. Alliston*, 813 So. 2d 141, 144 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D610a]. Per *Falcone* and *Alliston*, the key inquiry is whether the breath test affidavit in the record satisfies all the requirements of section 316.1934(5).

The Affidavit in the instant case meets every one of the requirements contained in section 316.1934(5). Petitioner does not argue that these requirements were not met. Instead, Petitioner argues that a separate agency inspection report for the subject breathalyzer is necessary for the Affidavit to be admissible. This is not the law. As the Department identifies in its Response, section 322.2615 provides all the documentation which law enforcement ***must*** submit to the Department following a DUI offense. Notably absent from the list is any mention of a breathalyzer inspection report.[3]

Here, the dispositive issue is whether the Department provided the date of the last inspection for the relevant breathalyzer—not whether law enforcement introduced a separate inspection report. Indisputably, the Affidavit includes an inspection date for the breathalyzer—January 15, 2022. App. at 12. We find that the Affidavit satisfied all the criteria provided in section 316.1934(5), and therefore the Affidavit was admissible in the proceeding below.

Lastly, Petitioner argues that Florida Administrative Code Rule 15A-6.013(2) requires the admission of an agency inspection report to authenticate a breath test affidavit. The regulation reads, in pertinent part:

> The hearing officer ***may*** consider any report or photocopies of such report submitted by a law enforcement officer, correctional officer or law enforcement or correctional agency relating to the suspension of the driver, the administration or analysis of a breath or blood test, ***the maintenance of a breath testing instrument***, or a refusal to submit to a breath, blood, or urine test, which has been filed prior to or at the review. Any such reports submitted to the hearing officer shall be in the record for consideration by the hearing officer.

Fla. Admin. Code R. 15A-6.013(2) (emphasis added). As the Department indicates in its Response, the language of the regulation is entirely permissive, as indicated by the word "may," and does not ***require*** the introduction of the agency inspection report. Thus, Petitioner's argument fails here as well.

We conclude that the hearing officer observed the essential requirements of the law as she correctly applied section 316.1934(5) and binding case law on the issue of the Affidavit's admissibility. Although the Agency Inspection Report provided by law enforcement added confusion to the proceedings, such a report was not required by law in the first place to authenticate the Affidavit in the proceeding below. As such, we also deny the Petition on these grounds.

**b. Reasonable Suspicion**

Petitioner further asserts that the Department departed from the essential requirements of the law due to the hearing officer's determination that Deputy Blake had reasonable suspicion to detain Petitioner to conduct a DUI investigation. Here, Petitioner raises two points of error: 1) the hearing officer should not have relied upon Deputy Blake's observation of bloodshot, watery eyes because it occurred post-detention; and 2) the other DUI indicators—driving without headlights on at 1:03 a.m., a raspy voice, and the odor of alcohol—were insufficient on their own to give rise to reasonable suspicion.

A law enforcement officer may stop a driver and request that the driver perform field sobriety tests based on a reasonable suspicion that the crime of driving while intoxicated is being committed. *Dept. of Highway Safety & Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2730a] (citation omitted). Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than a preponderance of the evidence. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

As to Petitioner's first contention, we find that the record is unclear as to whether Deputy Blake's observations of Petitioner's eyes occurred prior to or after detention. The Order provides: "Deputy Blake requested the Petitioner exit his vehicle and the Petitioner complied. As Deputy Blake's contact with the Petitioner continued, Deputy Blake was able to see the Petitioner's eyes and observed them to be bloodshot and watery." App. at 23. However, Deputy Blake's testimony, provided above, does not clearly establish when the detention began or whether he observed Petitioner's eyes before or after Petitioner was asked to step out of his vehicle.

Although the lack of clarity on this issue suggests it was erroneous for the hearing officer to rely upon the observation of Petitioner's eyes, such error, if any, is harmless. The dispositive issue here is whether the hearing officer could properly base her reasonable suspicion determination on the three remaining and undisputed indicators of impairment.[4]

Other than citing *State v. Delgado* for the general rule pertaining to reasonable suspicion during a DUI traffic stop, Petitioner otherwise relies exclusively on opinions from two Florida circuit courts—the Seventh Circuit and the Seventeenth Circuit—for his reasonable suspicion arguments. Petitioner cites these cases for the proposition that reasonable suspicion does not exist where an officer detains a DUI suspect solely on the basis of: 1) the underlying traffic offense; 2) the odor of alcohol emanating from the driver or the vehicle, and 3) some other third indicator. However, the Department also cites non-binding authority which defies the alleged principle that Petitioner attempts to establish. *See, e.g.*, *State v. Dunkle*, 29 Fla. L. Weekly Supp. 604a (Fla. 7th Cir. Ct. Oct. 7, 2021). The *Dunkle* court held that reasonable suspicion for a DUI investigation existed based on only three indicators of impairment: 1) driving at night without headlights; 2) an odor of alcohol; and 3) an admission to having just left a bar. *Id.*

As outlined above, we may only grant a writ of certiorari for a departure of the essential requirements of the law if a clearly established principle of law has been violated. We agree with the position outlined in the Department's Response on this issue.[5] The Florida circuit court opinions cited by Petitioner do not demonstrate a clearly established principle of law as they are not binding upon this Court. Moreover, the Department has cited additional Florida opinions which contradict the authority cited by Petitioner—another clear indicator that the hearing officer did not violate a clearly established principle of law in rendering her reasonable suspicion determination.

Petitioner's inability to identify a clearly established principle of law which was violated by the Department further leads us to deny the Petition as to Petitioner's reasonable suspicion argument.

**VI. Conclusion**

In conclusion, the Court finds that the Department afforded procedural due process to Petitioner and the Department observed the essential requirements of the law in the proceeding below.

Accordingly, it is

**ORDERED AND ADJUDGED** that Petitioner's Amended Petition for Writ of Certiorari dated March 15, 2022 is hereby **DENIED.** (AMY M. WILLIAMS, PAMELA A.M. CAMPBELL, and STEVE BERLIN, JJ.)

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[1]The terms "breathalyzer" and "intoxilyzer" are used synonymously in this Opinion.

[2]The Affidavit at issue is included in the Appendix attached to Petitioner's Amended Petition. *See* App. at 12. The Affidavit identifies the type of test performed, the time the two breath samples were collected, the results of the test, the serial number for the breathalyzer used to obtain Petitioner's breath samples, and the date of the last agency inspection. The Affidavit identifies the serial number for the breathalyzer used at the scene on Petitioner as 80-005290. However, the Agency Inspection Report provided by law enforcement corresponds to a breathalyzer with serial number 80-005338. App. at 13.

[3]The statute calls for the transmission of the following documents from law enforcement to the Department: the driver's license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; 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; the officer's description of the person's field sobriety test; the notice of suspension; the crash report; and a copy of a video recording of the field sobriety test or the attempt to administer such test.

[4]These three indicators are: 1) driving without headlights on at 1:03 a.m.; 2) a raspy voice; and 3) the odor of alcohol on Petitioner's breath. Petitioner does not dispute the validity of these observations as indicators of impairment for a reasonable suspicion determination.

[5]The heading in the Response associated with the Department's reasonable suspicion argument erroneously invokes the competent substantial evidence standard, which is not at issue in this matter. However, this appears to be a scrivener's error as the substance of the argument associated with the incorrect heading addresses whether the essential requirements of the law were observed in the proceeding below. *See, e.g.*, Resp. at 36 (stating "the hearing officer's finding that there was reasonable suspicion was not a departure from such a clearly established principle of law.").

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing—Failure of witness to comply with subpoena duces tecum—No due process violation resulted from arresting officer's failure to bring video footage of stop and arrest to hearing where licensee declined hearing officer's offer to continue hearing to enable licensee to obtain the missing footage—Competent, substantial evidence supported hearing officer's findings and decision even without missing video**

DAVID JAMES RINALDO, 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. 22-000013-AP. UCN Case No. 522022AP000013XXXXCI. April 21, 2023. Petition for Writ of Certiorari for relief from a final administrative order of the Department of Highway Safety and Motor Vehicles. Counsel: Curtis M. Crider, Clearwater, for Petitioner. Michael Lynch, Orlando, for Respondent.

(**PER CURIAM**.) Petitioner, David James Rinaldo, seeks certiorari review of a final administrative order, Findings of Fact, Conclusions of Law and Decision, entered on June 9, 2022 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 April 30, 2022, Petitioner, David James Rinaldo, was the subject of a traffic stop on suspicion that Petitioner had been operating his motor vehicle under the influence of alcoholic beverages or chemical or controlled substances. When requested by law enforcement, Petitioner refused to perform field sobriety exercises. It was determined that Petitioner had been driving under the influence and he was placed under arrest for driving under the influence. Law enforcement transported Petitioner to a holding facility, where Petitioner refused to submit to a breath analysis test.

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 June 1, 2022. Petitioner had served the arresting law enforcement officer with a subpoena duces tecum to testify at the formal review hearing. The law enforcement officer appeared at the hearing to testify but failed to bring the documents requested within the subpoena duces tecum: namely, video footage of the traffic stop and arrest. The hearing officer with the Department of Highway Safety and Motor Vehicles provided Petitioner with the opportunity to continue the hearing so that Petitioner could obtain the documents. The Petitioner declined to continue the hearing. Subsequently, the hearing officer affirmed the suspension of the Petitioner's driving privileges by final administrative order dated June 9, 2022.

**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 issue for review is whether Petitioner was accorded procedural due process when, after having received a subpoena duces tecum, the arresting law enforcement officer appeared but failed to bring the documents requested by the Petitioner to the hearing held on June 1, 2022.

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).

This Court notes that a notice of hearing does not appear on the appellate record. However, the record reflects that the hearing was held on June 1, 2022, that the Petitioner was provided an opportunity to examine the witness, and that the hearing officer provided Petitioner with an opportunity to continue the hearing to obtain the missing documentary evidence. Hr'g Tr. In re: David James Rinaldo at 12. Petitioner declined to exercise his option to continue the hearing. App. To Resp. to Pet. For Writ of Cert. at Ex. R.A. 1. On these facts alone, this Court may conclude that Petitioner was accorded procedural due process.

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. Admin. Code R. 15A-6.013(5), Petitioner had a right "to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver." Further, Petitioner had a right to enforce the subpoena duces tecum to obtain the documents. Fla. Stat. § 322.2615(6)(c). It is clear from the record that the hearing officer provided Petitioner with the opportunity to continue the hearing and retrieve the documents by lawful means, but Petitioner declined.

This Court, and others, have reasoned that the failure of a witness to bring to the administrative hearing the documents requested pursuant to a lawful subpoena is not always a violation of due process[1]. *See Dep't of Highway Safety and Motor Vehicles v. Lankford,* 956 So.2d 527 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a]; *see Keeven v. Dep't of Highway Safety and Motor Vehicles,*

No. 99-7928 CI-88B (Fla. 6th Cir. Ct. Mar, 27, 2000); *see Lewis v. Dep't of Highway Safety and Motor Vehicles,* 12 Fla. L. Weekly Supp. 550a (Fla. 20th Cir. Ct. Mar. 9, 2005). This reasoning is particularly salient when, as in this case, a litigant is informed of his or her right to enforce the production of evidence by the hearing officer and declines to exercise it. *Keeven,* 99-7928 CI-88B; *Lewis*, 12 Fla. L. Weekly Supp. 550a. We conclude that the lower tribunal accorded procedural due process and 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).

Notwithstanding the law enforcement officer's failure to provide the documents pursuant to a lawful subpoena duces tecum, the majority of the law enforcement officer's documentary evidence is self-authenticating and sufficient on its own to provide a basis of fact. *See* Fla. Admin. Code R. 15A-6.013(2). Petitioner had a right to present relevant evidence, examine witnesses, etc., but Petitioner did not take advantage of the opportunity to continue the hearing and obtain such evidence. Even without the video evidence, competent, substantial evidence on the record supports the hearing officer's Findings of Fact, Conclusions of Law and Decision, entered on June 9, 2022.

**DISPOSITION**

Affirmed. (COLEMAN, JIROTKA, and MEYER, JJ.)

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[1]Florida's Second District Court of Appeal certified a very similar issue as one of "great public importance" in *Department of Highway Safety and Motor Vehicles v. Robinson,* 93 So.3d 1090 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1542a] but failed to resolve the conflicting rulings within its district. The Supreme Court of Florida declined to exercise jurisdiction. *Florida Department of Highway Safety and Motor Vehicles v. Robinson,* 112 So.3d 83 (Fla. 2013) [38 Fla. L. Weekly S198a].

* * *

**Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Misdemeanor committed in presence of law enforcement—Warrantless misdemeanor DUI arrest was not lawful where officer did not observe licensee in actual physical control of vehicle, but instead observed licensee seated in vehicle obstructing traffic with engine turned off after private citizen had confiscated licensee's keys—Citizen's action of confiscating licensee's keys, without more, did not effect citizen's arrest—Hearing officer's order is quashed**

ROGER WILLIAMS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2022 10553 CIDL. Division 01. April 21, 2023. Counsel: Fleming K. Whited III, Whited Law Firm, Daytona Beach, for Petitioner. Michael Lynch, Assistant General Counsel, DHSMV, Orlando, for Respondent.

**ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

(MICHAEL S. ORFINGER, J.) THIS CAUSE came before the Court on a Petition for Writ of Certiorari filed by Petitioner, ROGER WILLIAMS [Doc. 2]. The Court has carefully considered the Petition, the Response [Doc. 7], the Reply [Doc. 8], and being otherwise fully advised in the premises, finds that the Petition should be granted.

Statement of the Facts

Petitioner's driver's license was administratively suspended by Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("the Department") on December 13, 2021, because Petitioner refused to submit to a breath test in alleged violation of Florida's Implied Consent Law, section 316.1932, Florida Statutes. Petitioner requested a formal review hearing pursuant to section 322.2615(7), Florida Statutes. That hearing was held on March 4, 2022, before Department Hearing Officer Christopher Wright. *See* Petition, Exhibits A, C. The hearing officer admitted seven exhibits into evidence (marked as "DDL 1-7" in the record), all of which are attached to the Petition as Exhibit B. Neither party offered live testimony at the hearing. Petitioner moved to invalidate the suspension, arguing there was no evidence that any law enforcement officer observed him driving or in "actual physical control" of his vehicle. Petitioner argued that this rendered his arrest unlawful, and that therefore, he could not have been required to submit to a breath test.

The Hearing Officer issued his written "Findings of Fact, Conclusions of Law and Decision" on March 23, 2022 (the "Written Order"), which found that the following facts were established by a preponderance of the evidence. On December 13, 2021, Deputy Micah Stoltz responded to the intersection of West Beresford Avenue and Louise Lane in DeLand concerning a report of an intoxicated person. At the scene, Deputy Stoltz encountered a private citizen, Alexandra Mullis. Ms. Mullis told Deputy Stoltz that she found Petitioner sitting in his car blocking the intersection. He was in the driver's seat, the engine was running, and his foot was on the brake. Petitioner admitted to Ms. Mullis that he had been drinking. Ms. Mullis took possession of Petitioner's car keys. Petitioner tried to drive away but could not because Ms. Mullis had his keys. *See* Petition, Exhibit A at 3.

Deputy Stoltz observed Petitioner sitting inside his vehicle. Petitioner had glassy eyes and the odor of alcoholic beverage on his breath. There was likewise a strong odor of alcohol in the vehicle. Petitioner admitted to Deputy Stoltz that he had been drinking. He exhibited a hard time walking, fell, and was unable to get up. Petitioner was unable to perform field sobriety tests. He did not know what city he was in and told Deputy Stoltz that the year was 1981. *Id.* at 3-4.

The Hearing Officer found that Petitioner was then "lawfully arrested" for driving under the influence. *Id.* at 4. Petitioner was then read the implied consent warnings to Petitioner, after which he refused to take a breath test. *Id.* at 4.

The Hearing Officer denied Petitioner's motion to invalidate the license suspension. The Written Order states, in pertinent part:

> The motion to set aside the suspension citing that the Petitioner was not observed driving or in actual physical control of a motor vehicle by a law enforcement officer is denied. In support of his motions Attorney Whited provided various case law and after considering that case law this Hearing Officer was not moved.

*Id.* The Hearing Officer found as a matter of law that all elements necessary to sustain the license suspension were supported by a preponderance of the evidence. *Id.* at 5.

Petitioner timely filed the instant Petition, pursuant to section 322.31, Florida Statutes. Petitioner disputes the Hearing Officer's denial of his motion to invalidate the suspension and the underlying conclusion that Petitioner had "actual physical control" of the vehicle. Petitioner contends that his arrest was illegal because the alleged act of driving under the influence was not committed in the presence of the arresting officer, as required by section 901.15, Florida Statutes. He therefore requests that the Court grant his Petition and set aside the Hearing Officer's Order. This Court ordered the Department to show cause why the Petition should not be granted [Doc. 5], and the Department filed a Response to the Petition on July 20, 2022 [Doc. 6]. Petitioner filed a Reply on July 25, 2022 [Doc. 8]. This Court heard oral argument on March 6, 2023.

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). This Court cannot reweigh the evidence or substitute its judgment for the findings of the Department's hearing officer. *See Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20 (Fla. 5th DCA 1989); *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether Smith's driver's license should have been suspended."). In the instant case, Petitioner challenges the third element of review, *i.e.,* whether the Hearing Officer's administrative findings and judgment are supported by competent substantial evidence.

"Competent substantial evidence" has been defined as "evidence in the record that supports a reasonable foundation for the conclusion reached." *Trimble,* 821 So. 2d at 1087. Evidence contrary to the Department's conclusion at the Formal Hearing should not be considered on certiorari review because the Court is only to decide whether the decision is *lawful,* not rightly or wrongly decided. *Dusseau v. Metro. Dade County. Bd of County Comm'rs,* 794 So. 2d 1270, 1275-1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. *See also Dept. of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] ("The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact [citation omitted] unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings."). Contrary evidence is "outside the scope of inquiry," and once the Court finds evidence in the record that supports the agency's conclusion, the inquiry into competent substantial evidence is concluded. *Dusseau,* 794 So. 2d at 1275-1276.[1]

Legal Analysis

Petitioner argues that the Hearing Officer erred in sustaining the driver's license suspension because the Department failed to put forth competent substantial evidence that Deputy Stoltz witnessed each element of a *prima facie* case of driving under the influence, as required by section 901.15, Florida Statutes.

Section 316.193, Florida Statutes, defines driving under the influence ("DUI") as follows:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:
>
> (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
>
> (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
>
> (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

Thus, a lawful DUI arrest requires the arresting officer to have probable cause to believe that a person is driving or in actual physical control of a vehicle, and that the person is under the influence of alcoholic beverages to the extent that his normal facilities are impaired. Section 316.193, Florida Statutes. "Probable cause" is established "where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Dept. of Highway Safely & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (quoting *Dept. of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]).

A person who is lawfully arrested for any offense allegedly committed while driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages is deemed to have given consent to a breath test for the purpose of detecting the alcoholic content of his or her breath. *See* section 316.1932(1)(a), Florida Statutes. The breath test "***must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle*** within this state while under the influence of alcoholic beverages." *Id.* (emphasis added). *Accord, Dept. of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070, 1073 (Fla. 2011) [36 Fla. L. Weekly S243a] (Department can only predicate a license suspension on a failure to submit to a breath test if the refusal is incident to a lawful arrest).

DUI is a misdemeanor offense under Florida law. *See* section 316.193(2)(a); section 775.08(2), Florida Statutes. Section 901.15(1), Florida Statutes, states that "[a] law enforcement officer may arrest a person without a warrant when: the person has committed . . . a misdemeanor . . . in the presence of the officer." The officer must witness every element of the offense. *See Steiner v. State,* 690 So. 2d 706, 709 (Fla. 4th DCA 1997 [22 Fla. L. Weekly D850a]); *Maher v. Dep't Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 121a (Fla. 7th Cir. Ct. Nov. 18, 2005). Similarly, a law enforcement officer may arrest someone without a warrant if that person has committed a violation of Chapter 316, Florida Statutes, in the officer's presence. Section 901.15(5), Florida Statutes.

Thus, the issue before this Court is whether the Hearing Officer was presented with competent, substantial evidence establishing that Deputy Stoltz witnessed Petitioner driving or in actual physical control of his vehicle. If this element of the offense of DUI was not committed in Deputy Stoltz's presence, then his arrest of Petitioner was unlawful, and Petitioner could not be required to submit to a breath test. This Court finds that no such competent substantial evidence exists to support the Hearing Officer's ruling.

The record is devoid of any evidence that Deputy Stoltz witnessed Petitioner driving his vehicle. As such, Deputy Stoltz must have witnessed Petitioner in actual physical control of his vehicle for the arrest to be lawful. In order to have actual physical control of a vehicle, the driver "must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether he is actually operating the vehicle at the time." Florida Std. Jury Instr. 28.1 (Criminal). "Capability" means practical ability. *State v. Fitzgerald,* 63 So. 3d 75, 77 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1076a]. "Actual physical control" is evaluated by a totality of the circumstances, including such things as (1) actual or constructive possession of the key to the vehicle or proof that it could be operated without the key, (2) the presence of the defendant in the driver's seat, and (3) proof that the vehicle was operable to some extent. *Id.* at 77-78; *Jones v. State,* 510 So. 2d 1147, 1148 (Fla. 1st DCA 1987); 11 Fla. Prac., DUI Handbook sec. 1:3 (2022-2023 ed.).

*Maher v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 121a (Fla. 7th Cir. Ct. Nov. 18, 2005) presented facts quite similar to the instant case. In *Maher,* a private citizen observed

a driver slumped over the steering wheel of a car in the middle of a residential roadway. The citizen turned off the vehicle, removed the keys from the ignition, and placed the keys on the hood of the car. *Id.* The driver was ultimately arrested for DUI and his driver's license was suspended. Although the hearing officer upheld the license suspension, the circuit court granted certiorari and quashed the hearing officer's order, finding that the warrantless arrest was unlawful because not all elements of the misdemeanor DUI were committed in the arresting officer's presence. *Id.* The location of the keys was found to be determinative: "No case has stretched the concept of physical control to encompass a situation where the vehicle is not running and the keys are not even inside the vehicle." *Id. Accord, State v. Hill,* 27 Fla. L. Weekly Supp. 725(a) (Fla. 2d Cir. Ct. Sept. 26, 2019); *State v. Alfson,* 21 Fla. L. Weekly Supp. 343a (Fla. 7th Cir. Ct. Oct. 24, 2013).

In the instant case, the evidence shows that Petitioner was sitting in his vehicle when Deputy Stoltz came upon him. By that time, however, Ms. Mullis had already taken Petitioner's car keys. Petitioner could not drive the vehicle by the time Deputy Stoltz arrived because, as the Hearing Officer found, Ms. Mullis told Deputy Stoltz that (i) she had taken Petitioner's keys, and (ii) he subsequently "tried to drive away but was unable to because she had his keys." Petition, Exhibit A at 3. Thus, the Hearing Officer's factual findings expressly contradict the notion that Petitioner was ever in actual physical control of the vehicle while in Deputy Stoltz's presence.

The Department's sole argument in response to the Petition for Writ of Certiorari is that Mullis's confiscation of Petitioner's car keys "constituted a lawful citizen's arrest of Petitioner." Response at 7. Preliminarily, the Court notes that this issue was never presented to or addressed by the Hearing Officer. However, counsel for the Department acknowledged at oral argument that absent a valid citizen's arrest, Petitioner's arrest by Deputy Stoltz was improper. The Department relies on *Harr v. Dep't of Highway Safety & Motor Vehicles,* 17 Fla. L. Weekly Supp. 70(a) (Fla. 9th Cir. Ct. Sept. 17, 2009). In *Harr,* a paramedic came upon a pick-up truck stopped in a right turn lane with its lights off. The paramedic went to the vehicle and saw the driver slumped over the wheel. The truck was running and the engine was in neutral. The paramedic opened the door and noticed a strong odor of alcohol, at which point she turned off the engine and took the keys. The driver told the paramedic that he did not need medical attention, that he was tired, and that he had been drinking. A sheriff's deputy arrived on the scene and the paramedic gave the responding officer the keys. The driver refused to take a breath test, and his license was suspended. The administrative hearing officer and the circuit court upheld the suspension, thereby rejecting the driver's argument that the deputy had not witnessed him in actual physical control of his vehicle because he did not have possession of his keys. The circuit court found that the paramedic, as a private citizen, had the "right to arrest a person who commits a misdemeanor in their presence when said misdemeanor amounts to breach of the peace." (Internal quotes and citation omitted). Citing *State v. Furr,* 723 So. 2d 842, 844 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2514a] for the proposition that DUE constitutes a breach of the peace, the *Harr* court found the "citizen's arrest" sufficient to uphold the validity of the request for a breath test and the subsequent license suspension.

To reiterate, the Department conceded at oral argument that unless Ms. Mullis effected a citizen's arrest of Petitioner, then his arrest by Deputy Stoltz was unlawful, and the license suspension was therefore improper. Notwithstanding the decision in *Harr* (which is not binding on this Court), the Court finds that Ms. Mullis did not make a citizen's arrest.

The Supreme Court of Florida set forth the elements of an arrest almost 70 years ago in *Melton v. State,* 75 So. 2d 291 (Fla. 1954):

> It is uniformly held that an arrest, in the technical and restricted sense of the criminal law, is 'the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.' [Citation omitted.] When used in this sense, an arrest involves the following elements: (1) A purpose or intention to effect an arrest under a real or pretended authority; (2) An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3) A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him.

*Id.* at 294. The *Melton* requirements likewise apply to a citizen's arrest. *See, e.g., McAnnis v. State,* 386 So. 2d 1230 (Fla. 3d DCA 1980).

The Supreme Court recently cited *Melton* with approval in *Davis v. State,* 286 So. 3d 170 (Fla. 2019) [44 Fla. L. Weekly S305a]. In *Davis,* deputies investigating a robbery and shooting handcuffed five males at the scene, placed them into individual squad cars, transported them to the sheriff's department, and placed them in separate rooms in a secure area of the building. After uncuffing the individuals and advising them of their *Miranda* rights, the same detective interviewed them sequentially. *Id.* at 172-173. One of the five men, Petitioner Davis, was at the sheriff's office for four to six hours. He was never told he was free to leave, and in fact the uniformed deputy outside the door of his interview room would not have allowed him to leave. Davis was never told he was under arrest, that he was suspected in the robbery, or that he was charged with a crime. *Id.* at 173. At the end of the interview, Davis was told he was not under arrest and was free to leave. However, over a year after this interview, Davis was arrested for crimes related to the incident about which he was interviewed. An information charging Davis was filed two days later. *Id.*

Davis filed a notice of expiration of speedy trial and a motion for discharge, arguing that his detention as described above on the day of the crime constituted an arrest, thereby triggering the 175-day speedy trial period in Fla. R. Crim P. 3.191. He contended that because the State did not file the information until after the 175-day period expired, he was entitled to discharge. *Id.* Both the trial court and the Fifth District Court of Appeal ruled against Davis on this point, finding that under *Melton,* Davis's "investigatory detention did not constitute an arrest for purposes of starting the speedy trial period in rule 3.191." *Id.*

The Supreme Court agreed with the lower courts and held that Davis had not been arrested for purposes of the speedy trial rule. *Id.* at 172. Despite being handcuffed, transported to the sheriff's office, being detained for four to six hours of questioning, never being informed he was free to leave, and being placed in an interview room with a deputy outside the door who would not have let him leave, the *Davis* court concluded that Davis had been subjected to an "investigatory detention" and not a "formal arrest." *See id.* at 172-173.

In the instant case, all Ms. Mullis did was remove Petitioner's keys from his vehicle. The Hearing Officer made no factual findings supporting the requisite elements of an arrest set forth in *Melton.* The Hearing Officer did not find that Ms. Mullis had a purpose or intention to effect an arrest, or that Ms. Mullis communicated to Petitioner that she intended then and there to arrest him. Likewise, the Hearing Officer made no findings that Petitioner understood that Ms. Mullis had an intention to then and there arrest him. *See Melton*, 75 So. 2d at 294. At the very most, there is evidence from which the Hearing Officer could have found (but did not) that Ms. Mullis actually or constructively detained Petitioner by taking his car keys, given the additional finding that Petitioner attempted to drive away but was unable to do so for lack of his keys. *See* Petition, Exhibit A at 3. In

fact, this is the only element of an arrest that the Department points to in its response. *See* Response at 12. *Melton* and *Davis* make clear, however, that this one element standing alone is insufficient to establish an arrest. To put it as simply as possible, this Court finds that if the facts in *Davis* are insufficient to constitute an arrest, then Ms. Mullis's act of taking Petitioner's keys certainly cannot constitute an arrest.

The instant case does not present a situation in which this Court is reweighing the evidence before the Hearing Officer. Instead, this Court has properly confined its role to examining whether there was competent, substantial evidence (as opposed to conflicting evidence) that Deputy Stoltz observed Petitioner in actual physical control of his vehicle. This Court finds that the Department failed to present any such evidence, and the Hearing Officer erred in concluding otherwise. As a result, this Court grants Petitioner's writ.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Petitioner's Petition for Writ of Certiorari is GRANTED.

2. The "Findings of Fact, Conclusions of Law and Decision" upholding Petitioner's license suspension is QUASHED.[2]

3. This matter is remanded to the Hearing Officer for further proceedings consistent with this Order.

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[1]The *Trimble* court recognized a limited exception to the *Dusseau* holding where the hearing officer's decision is based solely on a paper record and the evidence lends support to inconsistent inferences. "If the department is going to choose to present no live testimony but to rely exclusively on written documents, then clearly it cannot ask [the circuit court] to ignore discrepancies and inconsistencies in the written documentation where the cause for such discrepancies and inconsistencies is not explained by sworn testimony." *Trimble,* 821 So. 2d at 1086; *accord, Dept. of Highway Safety & Motor Vehicles v. Wiggins,* 151 So. 3d 457, 469-70 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a], *affirmed,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a].

[2]Quashing the Written Order does not invalidate the suspension of Petitioner's license. Instead, " 'it leaves the subject matter, that is, the controversy pending before the tribunal, commission, or administrative authority, as if no order or judgment had been entered . . The appellate court has no power in exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration nor to direct the respondent to enter any particular or judgment.' " *Broward Cty. v. G.B.V. Int'l, Ltd.,* 787 So. 2d 838, 844 (Fla. 2001) [26 Fla. L. Weekly S389a] (quoting *Tamiami Trail Tours, Inc. v. R.R. Comm'n,* 174 So. 451, 454 (Fla. 1937)).

* * *

**Licensing—Driver's license—Suspension—Obtaining license by fraud—There is no prescribed limitation period in which Department of Highway Safety and Motor Vehicles must take action to suspend or revoke license for fraud—Decision affirming license suspension is supported by competent substantial evidence showing that licensee had two licenses with different names, dates of birth, and social security numbers—Argument that department violated licensee's due process rights by failing to return license to him after he obtained court-ordered name change on advice of department staff is beyond scope of certiorari review—Request to order department to cancel licensee's original license is denied because such order would be beyond scope of certiorari review, and cancellation of license would not alter fact that licensee submitted false information to obtain second license**

CHANDLER ALEXANDER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 22-CA-10285. Division J. May 2, 2023. Counsel: Chandler Alexander, Pro se, Atlanta, Georgia, Petitioner. Kathy A. Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(REX M. BARBAS, J.) This case is before the court on Chandler Alexander's Amended Petition for Writ of Certiorari filed January 9, 2023. The petition is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner seeks review of a November 22, 2022, final order upholding the suspension of his driving privilege for obtaining a driver license by fraud. Petitioner advances four arguments in support of the petition: (1) the Department departed from the essential requirements of law by failing to yield to the statute of limitations; (2) the Department did not have competent, substantial evidence to determine he committed fraud because he did not have two driver's licenses at the time of the investigation; (3) the Department violated his right to due process by refusing to return his driver's license after he obtained a court ordered name change; and (4) the Department failed to comply with § 322.251, Fla. Stat., by not cancelling his license when he requested the Department to do so in 2016 and 2019. Having reviewed the petition, response, reply, appendices, and relevant case law, the Court finds that there is no statute of limitations applicable to the underlying administrative proceeding. Moreover, substantial competent evidence contradicts Petitioner's claim that he cancelled his license following his name change and that facts warranted its cancellation such that the Department was required to do so. Finally, the record reflects that Petitioner received notice and an opportunity to be heard, such that his due process rights were not violated.

FACTS

On January 6, 2022, a suspected fraud was communicated to the Department by Senior United States Probation Officer Jessica Spohn ("Officer Spohn"). Officer Spohn stated in an email that she was presently supervising Kellis Dion Jackson on a term of parole in the Middle District of Florida, and that she wanted to report to the Department that Petitioner had two driver licenses, in two different names, with two different dates of birth and two different social security numbers. One license was under the name Kellis Dion Jackson, while the other was under the name Chandler Dante Alexander. Upon receiving this information, the Department opened an administrative investigation on the Petitioner. The investigation included searches of a biometric facial analysis system on images contained in the Department's driver license records of Chandler Alexander and Kellis Jackson, which returned images that matched. After confirming that Kellis Jackson and Chandler Alexander were the same person, the Department contacted Petitioner. Petitioner responded with a "Certificate of Name Change" dated April 23, 2019, as proof that he had legally changed his name to Chandler Alexander. The Department also contacted the social security division, which found that Kellis Jackson had not legally changed his name with the social security administration nor obtained a new social security number.

On March 15, 2022, the Department sent Petitioner a "Notice of Order of Suspension and Final Order" informing him that his driving privileges would be suspended for one year, beginning on April 13, 2022, for obtaining a driver license by fraud pursuant to §§ 322.12, and 322.27, Fla. Stat. Upon receiving notice of the suspension of his license, Petitioner contacted the Department's Fraud Department and spoke with Regulatory Specialist Linda Jana. Petitioner explained that he had undergone a common law name change and was issued a new social security number. Jana informed Petitioner that he would have to obtain a court ordered name change. Petitioner subsequently filed and received a Final Judgment of Change of Name on September 23, 2022, changing Petitioner's name from Kellis Dion Jackson to Chandlar [sic] Dante' Alexander.

On November 2, 2022, a formal review hearing was held at Petitioner's request. Prior to the hearing, Petitioner was provided with a "Fraud Packet" that outlined the complaint by Probation Officer Spohn, as well as the findings of the Department's investigation. Following the hearing, Department Hearing Office James Garbett

issued a final order affirming the suspension of Petitioner's driver license for fraud.

STANDARD OF REVIEW

This court reviews the administrative decision upholding the suspension to determine whether petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). The circuit court in this process performs a "review" to address those issues, however, it does not sit as a trial court to consider new evidence or to make additional findings. *See Mellon v. Cannon,* 482 So. 2d 604, 607 (Fla. 5th DCA 1986) (Cowart, J. dissenting).

DISCUSSION

Petitioner first contends that the Department departed from the essential requirements of law by failing to yield to the statute of limitations, which places a four-year limitation on "[a] legal or equitable action founded on fraud." § 95.11(3)(j), Fla. Stat. Petitioner's driver's license with the name Chandler Alexander was issued on November 16, 2016, nearly six years prior to the notice of suspension. However, there is no prescribed time limitation or period in which the Department must take action to suspend or revoke an individual's driving privileges. *Department of Highway Safety and Motor Vehicles v. Hagar,* 581 So. 2d 214, 217 (Fla. 5th DCA 1991). In *Landes v. Department of Professional Regulation,* 441 So. 2d 686 (Fla. 2d DCA 1983), the court stated that "in the absence of specific legislative authority, civil or criminal statutes of limitations are inapplicable to administrative license revocation proceedings. (quoting *Donaldson v. Department of Health & Rehabilitative Services,* 425 So. 2d 145, 147 (Fla. 1st DCA 1983).

Petitioner cites to *Mari Beth Fury v. State Department of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 421a (Fla. 13th Cir. Ct. June 14, 2017), in which the circuit court found that § 95.11, Fla. Stat., applied to the suspension of a driver license by fraud. However, in *Fernando Hincapie Escobar v. Department of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 346a (Fla. 13th Cir. Ct., June 15, 2018), the circuit court declined to apply the *Fury* decision. The court in *Escobar* noted that neither *Sarasota County v. National City Bank of Cleveland, Ohio,* 902 So. 2d 233, 234 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1244b] nor *Landes,* which caution against equating an administrative proceeding with a civil action, were presented to the *Fury* Court. This Court is mindful of the *Fury* decision and declines to apply it to the present case. Thus, the Department complied with the essential requirements of law by not applying the statute of limitations.

Petitioner further argues that the hearing officer lacked competent, substantial evidence to support the decision affirming the suspension of his license. Petitioner asserts that, at the time of the fraud investigation, he did not have two valid licenses as he had voluntarily surrendered his license with the name Kellis Dion Jackson twice: once in 2016 and again in 2019. The Petition's appendix contains a scanned document titled "REQUEST FOR CANCELLATION OR SURRENDER OF A DRIVER LICENSE OR IDENTIFICATION CARD," dated November 12, 2019, as well as what appears to be a letter from the Department, dated November 14, 2019, acknowledging receipt of Petitioner's license and stating that his license had been cancelled. However, when the Department conducted its administrative investigation, its records showed that the license with the name Kellis Dion Jackson had not been cancelled, and that Petitioner had two licenses, in two different names, with two different dates of birth, and two different social security numbers. Additionally, the record shows that, even though Petitioner did not legally change his name from Kellis Dion Jackson to Chandlar [sic] Dante Alexander until September 23, 2022, he had a social security card with the name Chandler Dante Alexander dated October 24, 2016. The Department contacted the social security division, who verified that at the time of the investigation, Petitioner had not legally changed his name nor obtained a new social security number.

"It is the role of the fact finder to resolve conflicts in evidence and to weigh the credibility of witnesses." *Porzio v. Porzio*, 760 So. 2d 1075 fn 1 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1515b]. When the certiorari jurisdiction of the circuit court is invoked to review a quasi-judicial decision of an administrative agency, the "court functions as an appellate court and . . . is not entitled to reweigh the evidence or substitute its judgment for that of the agency." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. This is because the hearing officer, as the trier of fact, is in the best position to evaluate the evidence and make a determination about Petitioner's license suspension. *Dep't. of Highway Safety and Motor Vehicles v. Satter,* 643 So. 2d 692, 695 (Fla. 5th DCA 1994), *rev. denied,* 651 So. 2d 1195 (Fla. 1995). Here, the record contains evidence that establishes a substantial basis of fact from which the hearing officer could reasonably infer that Petitioner provided the Department with information that was not true and correct when applying for a license. *See De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). Therefore, the decision is supported by competent, substantial evidence.

Petitioner's third argument is that the Department violated his due process rights by failing to return his driver's license once he obtained a court ordered name change. Petitioner argues that Linda Jana, a Regulatory Specialist with the Department, created a protected liberty interest when she informed him that he would need to get a court ordered name change to get his license back. Petitioner maintains that "once a State actor creates a predicate upon which an action and/or thing will be provided, that action and/or thing cannot be taken without due process of law." This argument is beyond the scope of certiorari review. The Court's review is limited to whether Petitioner was afforded procedural due process by the Department in making the decision to uphold the license suspension. Here, the Department was not required to hold a hearing before suspending Petitioner's license. *Dep't of Highway Safety and Motor Vehicles v. Davis,* 775 So. 2d 989, 990 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2744b]. And after receiving notice of the suspension, Petitioner requested and received a hearing where he was able to present evidence to argue against the suspension. Thus, Petitioner was afforded due process.

Petitioner's final argument is that the Department failed to comply with § 322.251, Fla. Stat., because the Department did not cancel the Kellis Jackson license after he voluntarily surrendered it in 2016 and 2019. The Petitioner maintains that the Department had and has a legal duty to cancel the license, and requests that this Court enter an order directing the Department to comply with § 322.251, Fla. Stat. The Department asserts that this argument should be denied because the cancellation of the Kellis Jackson license would not have granted Petitioner the liberty to establish a new name, date of birth, and social security number. The Court agrees. Even if Petitioner's Kellis Jackson license had been cancelled when he submitted his requests to the Department, the record still contains ample evidence that Petitioner provided the Department with false information when applying for his Chandler Alexander license. Additionally, an order directing the Department to comply with § 322.251, Fla. Stat. would be beyond the scope of this Court's certiorari review. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

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

* * *

**Municipal corporations—Zoning—Rezoning—City council did not depart from essential requirements of law by rezoning property to allow single lot with one home to be split into two lots for construction of two homes—Although newly-created lots do not meet minimum lot dimensions established in city code, code provides council with flexibility to effect development that recognizes an area's changing needs and development patterns—City's decision was supported by competent substantial evidence**

MICHAEL J. MCNABB, Petitioner, v. CITY OF TAMPA, CITY COUNCIL and GHASSAN MANSOUR, Respondents. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 22-CA-8307. Division D. L.T. Case No. REZ 22-23. May 2, 2023. Counsel: Michael J. McNabb, Pro se, Tampa, Petitioner. Toyin Aina-Hargrett, City Attorney's Office, Tampa, for Respondents.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMILY A. PEACOCK, J.) This matter is before the Court on Petitioner Michael McNabb's petition for writ of certiorari (Doc. 6), filed on June 9, 2022, seeking review of a Respondent Tampa City Council's decision to rezone Respondent Ghassan Mansour's real property. The rezoning effectively allows the placement of single-family homes on each of two 55-ft. lots on what was a single lot previously zoned RS-75 comprised of 110 feet of street frontage and a single residence. The Court has reviewed the petition, response, and appendices. Intervenor Ghassan Mansour did not file a response, and Petitioner did not file a reply. Petitioner asks the Court to quash Respondent Tampa City Council's rezoning determination for several reasons. The only ground that merits discussion, however, is Petitioner's allegation that City Council departed from the essential requirements of law because it based its decision on properties within a "block face," a term that does not appear in the City's land development code. Although Petitioner is correct that the term "block face" is not a listed factor in the code for consideration of the rezoning application, the Court determines that the City did not depart from the essential requirements of law because, although section 27-11, Tampa, Fla. Code, establishes minimum lot requirements which exceed the dimensions of the newly created lot, the code's section 27-136 provides staff and Council flexibility to effect development that recognizes an area's changing needs and development patterns. This allows for development that would otherwise not be allowed in a particular zoning classification. §27-136, Tampa, Fla. Code.

**BACKGROUND**

The case arises from the City Council of Tampa's September 1, 2022 decision to rezone property located at 4111 West San Carlos Street, Tampa, Florida ("the Property") from Residential Single-Family-75 ("RS-75") to Planned Development ("PD") Residential Single-Family Attached, as requested by the owner of the property, Ghassan Mansour. The Property is located at the northeast intersection of South Cameron Avenue and West San Carlos Street in Tampa, Florida. The Property has 110 feet of frontage on South Cameron Avenue and 139 feet of frontage on West San Carlos Street.

The Tampa Comprehensive Plan designates the future use of the Property as Residential-6, which is classified for use as low-density residential development with a minimum lot size of 7,260 square feet and 75 feet of street frontage. The Property was zoned RS-75 prior to September 1, 2022. The properties surrounding the Property are also primarily zoned RS-75. Historically, the property was two platted lots measuring 55 x 139 feet and was zoned accordingly. Under the current zoning, a property zoned as RS-75 is required to have at least 75 feet of street frontage. Of the 214 lots in the area around the Property, 151, or 70 percent, of the lots have a width greater than 75 feet and 63 lots representing 30 percent of the lots have been developed with a width equal to or less than 74.999 feet. Additionally, of the seven lots on South Cameron Avenue near the Property, three, or 43 percent, of the lots have been developed with a width equal to or less than 74.99 feet.

On May 3, 2022, Mr. Mansour petitioned the City Council of Tampa to rezone his property from RS-75 to Planned Development so to allow the splitting of the Property back in to the two 55′ x 139′ lots. The City Council of Tampa held public hearings on Mr. Mansour's petition on June 9, 2022, July 14, 2022, August 14, 2022, and September 1, 2022. Petitioner Michael J. McNabb, who resides within 250 feet of the Property, appeared at the hearings and objected to the rezoning. The City Council of Tampa ultimately granted Mr. Mansour's application on September 1, 2022, after much debate. City Council's September 1, 2022 rezoning decision, allows the Property to be split in to two 55′ x 139′ lots of 7,645 square feet each, for development of two single-family homes.

**ANALYSIS**

**Standard of Review**

The circuit reviews petitions for writ of certiorari directed to the review of quasi-judicial rezoning decisions to determine whether: (1) The local government afforded due process; (2) the local government observed the essential requirements of law; and (3) the local government's decision is supported by competent and substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). In determining evidentiary support for an administrative decision, courts are not permitted to reweigh the evidence; they may determine only the sufficiency of evidence. *Broward Cnty. v G.B.V. Intern., Ltd.*, 787 So. 2d 838, 845 (Fla. 2001) [26 Fla. L. Weekly S463a].

**Due Process**

When a neighboring property owner seeks to challenge a rezoning petition, the requirements of due process are met if the neighbor was afforded notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (internal citations omitted). Petitioner received the necessary due process in the underlying proceeding.

**Essential Requirements of Law**

Like the applicant for the rezoning, Petitioner, a neighboring property owner, is entitled under Florida law to have the correct law applied to his challenge to the rezoning. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (concluding that " 'applied the correct law' is synonymous with 'observing the essential requirements of law.' "). Application of the wrong law is reversible error. *See Bd. of Cnty. Com'rs of Clay Cnty. v. Qualls*, 772 So. 2d 544, 546 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2094c], *as amended* (Dec. 6, 2000) [25 Fla. L. Weekly D2804c] (granting writ and quashing order after lower court failed to apply correct law).

Petitioner asserts that the Tampa City Council decision departed from the essential requirements of law on several grounds. First, he contends that the determination failed to give effect to the criteria set forth in section 27-80, Tampa, Fla. Code, particularly regarding demonstrating hardship on the property owner's part. Section 27-80, which applies to requests for *variances*, and requires that a property owner demonstrate hardship such that a departure from strict application of the code is warranted, is not applicable to this rezoning dispute. Thus, there was no departure from the essential requirements of law on this ground.

Petitioner also contends that in evaluating development patterns in the vicinity of the subject property, staff considered "block face" to establish a development pattern that would support the rezoning. Petitioner contends, correctly, that "block face" appears nowhere in the code. Petitioner adds that under section 27-11, Tampa, Fla. Code, "no division of an existing zoning lot or lot of record may occur that

is a configuration which is inconsistent with existing lot development pattern in a radius of 1320 feet." Petitioner contends that when viewed as required under section 27-11, far fewer lots are less than 60 feet wide, such that the subject rezoning is incompatible with existing development. Although Petitioner makes a valid point, he overlooks the code's section 27-136, which gives the city flexibility to adjust to changing needs and promote redevelopment. Section 27-136 contains no rigid patterns for staff to follow; among other things, it requires that staff evaluate the impact of the proposed development on. . .surrounding uses and zoning patterns. . .and the surrounding neighborhood." §27-136(3)a., Tampa, Fla. Code. Because Petitioner has not adequately shown that City Council applied the incorrect law, the court is constrained to conclude that there was no departure from the essential requirements of law. *Cf. Manatee Cnty. v. City of Bradenton*, 828 So. 2d 1083, 1084 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2320a].

**Competent Substantial Evidence**

Under Florida law, "[a]s long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful" and, as a result, the reviewing court must deny the petitioning party's request to quash the underling decision. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Com'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. Staff reports, the application, maps, diagrams, correspondence, and testimony constitute record evidence for City Council to consider in making its decision. Governing bodies are often presented with two alternatives, either of which is defensible given the applicable law and the available evidence. If the decision made is supported by competent, substantial evidence, it must be affirmed. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993).

Petitioner contends that remarks made by several city councilmembers did not rise to the level of competent, substantial evidence necessary to approve the rezoning. Petitioner is again correct that remarks made by a councilmember explaining his vote was not competent, substantial evidence; he simply explained his reasoning in selecting one of two alternatives, which is City Council's decision to make if the evidence supports it. *See City of Ft. Lauderdale v. Multidyne Medical Waste Management, Inc.*, 567 So.2d 955, 957-58 (Fla. 4th DCA 1990). Here, a cautious and careful review of the record reveals that there is adequate evidence supporting the City Council of Tampa's decision. A member of the planning commission testified from its report that its staff found the proposed development to be consistent with the comprehensive plan. Similarly, a staff member of the city's Land Development Coordination Department testified before City Council that he found the rezoning application to be consistent with the comprehensive plan. Attention was given to architectural details to ensure aesthetic compatibility with the surrounding neighborhood. Although there may have been some adjustment made to the development pattern used by staff in an effort support the request, it bears noting that the request restores the configuration to the original two lots. Moreover, City Council's numerous hearings and votes, along with the vigorous debate on the proposal, further support the conclusion that the underlying decision here was not arrived at lightly. Although the court is not unsympathetic to Petitioner's view, and even though a prior council denied a similar rezoning in 2012,[1] the standard of review requires a party challenging the rezoning to show that the decision was not supported at all. *Dusseau,* 794 So. 2d at 1276. This Court cannot determine whether the agency's decision is the best decision or the or a wise decision. *Id.* Where Petitioner has not met his burden to establish that City Council's underlying decision was not supported by competent substantial evidence, this Court must affirm the decision.

It is therefore ORDERED that the Petition for Writ of Certiorari is DENIED on the date imprinted with the Judge's signature.

[1]City Council is not bound by a prior decision of the same governing body, particularly one made over 10 years earlier and related to a different parcel.

* * *

**Counties—Code enforcement—Mandamus—Petition for writ of mandamus directing county to dismiss code enforcement case against petitioner on ground that county staff entered adjacent private property to conduct inspection of petitioner's property is denied—Petitioner has not shown that alleged entry on private property was not permitted by person with authority to do so or that he exhausted administrative remedies—Petitioner is entitled to hearing in his case but not to a particular determination by magistrate**

JAMES SELLERS, Petitioner, v. HILLSBOROUGH COUNTY (Code Enforcement), Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 23-CA-12184. Division K. May 2, 2023. Counsel: James Sellers, Pro se, Thonotosassa, Petitioner.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

(CAROLINE TESCHE ARKIN, J.) This case is before the Court on Petitioner James Sellers's Petition for Writ of Mandamus filed April 28, 2023. Petitioner alleges that Respondent Hillsborough County Code Enforcement entered private property on three occasions to conduct an inspection of his property to determine his property's compliance with county codes. Petitioner does not contend that the property entered was his property, only that it was private property adjacent to or near his property. Petitioner seeks a writ directing that the County dismiss its case against him. For reasons explained below, the Court must deny the petition.

Mandamus is the recognized remedy to require a public official to discharge his or her duty. *Dante v. Ryan,* 979 So. 2d 1122, 1123 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D981b]. Mandamus will lie only to enforce a clear legal right to performance of the requested act, however. *Fla. League of Cities v. Smith,* 607 So. 2d 397, 400-401 (Fla. 1992). Here, Petitioner contends, without evidence, that county staff illegally entered onto private property. Even if the property were private, Petitioner has not shown that the County's entry was not permitted by someone with authority to do so. Petitioner has a right to have his case determined by the code enforcement board or magistrate. *Town of Manalapan v. Rechler,* 674 So. 2d 789, 790 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1046d] (mandamus is appropriate to compel performance of ministerial duties by public officers). Petitioner, is not, however, entitled to a *particular* determination, such as dismissal, because that determination involves the exercise of the board or magistrate's discretion. *Id.* (internal citations omitted). Moreover, Petitioner does not indicate that he has exhausted his administrative remedy before filing his petition. *Dante v. Ryan,* 979 So. 2d 1122, 1123 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D981b].

It is therefore ORDERED that the petition is DENIED on the date imprinted with the Judge's signature.

* * *

**Mandamus—Public records—Motion to compel sheriff's office to produce videotaped therapy session of petitioner's child collected as part of child abuse investigation is granted—Public records exemption for records of active criminal investigations is not applicable where investigation is closed—Section 39.202(1) exemption for reports of child abuse is not applicable because exemption authorizes disclosure to child's parents, and petitioner is child's mother**

SEANNA GALARZA, Petitioner, v. HILLSBOROUGH COUNTY SHERIFF'S OFFICE, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 23-CA-871. Division B. April 25,

2023. Counsel: Richard Anthony Harrison, Richard A. Harrison, P.A., Tampa, for Petitioner. Kimberly Fischbach, Hillsborough County Sheriff's Office, Tampa, for Respondent.

ORDER ON PETITION FOR WRIT OF MANDAMUS

(MARK R. WOLFE, J.) THIS MATTER is before the Court on Petitioner's January 31, 2023 Petition for Writ of Mandamus (Doc. 3) seeking the writ to compel Respondent to produce certain records in its custody, specifically a videotaped therapy session of Petitioner's child that was collected by Respondent as part of a child abuse investigation. The Court has reviewed the petition (Doc. 3), response (Doc. 11), reply (Doc. 15), appendices, and applicable law. Respondent cites two exemptions from disclosure. The first is that the record is part of an active investigation of child abuse, where section 119.071(2)(c), Florida Statutes, exempts "active criminal investigative information," and section 39.202(1) exempts reports of child abuse from disclosure. Because it is undisputed that the investigation is closed, this Court concludes the "active criminal investigative information" exemption does not apply. *State Attorney's Office of Seventeenth Judicial Circuit v. Cable News Network, Inc.*, 251 So. 3d 205, 211 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1685a] *quoting Woolling v. Lamar*, 764 So.2d 765, 768 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1647a]. Because section 39.202(2)(d) authorizes disclosure of child abuse records to parents, and Petitioner is the child's mother, it also does not exempt the record from disclosure in this case.

A second ground cited for Respondent's nondisclosure is that the record allegedly contains information relating to security systems or plans, and is, therefore, exempt from disclosure under sections 119.071(3) and 281.301, Florida Statutes. Respondent concedes that such information may be disclosed upon a showing of good cause. §§ 119.071(3)(a)3.d., and 281.301(2)(d), Fla. Stat. Accordingly, the Court finds that the requested record must be disclosed.

It is therefore ORDERED that Respondent provide Petitioner with the requested video within seven (7) days.

The Court reserves jurisdiction regarding Petitioner's costs.

* * *

**Taxation—Refund—Denial—Appeals—Timeliness—Appeal filed more than 30 days after notice of proposed denial of refund became a final order is untimely—Motion to restore right to appeal based on Department of Revenue's alleged inaction after dismissal of appeal to district court is denied for lack of factual and legal basis**

FUR SYSTEMS, LLC, Plaintiff, v. FLORIDA DEPARTMENT OF REVENUE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23001577. Division AP. May 3, 2023.

**FINAL ORDER OF DISMISSAL AND ORDER DENYING MOTION TO RESTORE RIGHT TO APPEAL**

(JOHN BOWMAN, J.) **THIS CAUSE** came before the Court, in its appellate capacity, upon this Appellee's Response to the February 15, 2023, Order to Show Cause and Motion to Dismiss Appeal, dated March 13, 2023. This Court, after review of the Motion to Dismiss, Appellant's Objection to the Appellee's Motion to Dismiss and Motion to Restore the Right to Appeal, dated March 21, 2023, the case file and applicable law, and being otherwise duly advised finds as follows:

Appellee argues that this appellate proceeding should be dismissed as it was untimely filed pursuant to Florida Rules of Appellate Procedure 9.110(b) and Florida Statutes section 120.68. Appellant was required to initiate this appellate proceedings no later than 30 days from the rendition of Order being challenged. The Order being challenged, the Notice of Proposed Refund Denial ("Notice") was entered on October 5, 2022. Appellant argues that the October 5, 2022, Notice did not become a final order until 60 days thereafter on December 5, 2022. The Court notes that this date would still require this appeal to have been filed within 30 days of December 5, 2022, or no later than January 4, 2023. The Appellant's noticed of appeal was not filed until February 7, 2023. Accordingly, the notice of appeal was filed greater than 30 days from the rendition of the Order and therefore untimely filed.

Appellant, through the filing of a Motion to Restore the Right to Appeal, requests this Court allow the untimely filed appeal to go forward. Appellant cites to the case of *Nr. V. Kg. (In Re Adoption of O.R.), No. 21S01-1409-AD-592 (Ind. Sep. 25, 2014)* and claims this appeal was untimely because of the inaction of Appellee post dismissal of an appeal to the Fourth District Court of Appeal. No other reasoning to explain or excuse the untimely filing has been forwarded by Appellant. After review of the Motion to Restore the Right of Appeal, the Court declines to so on account of an insufficient factual and legal basis by which to grant the request.

Accordingly, it is **ORDERED** that Appellee's Motion to Dismiss is **GRANTED** and this appellate proceeding is hereby **DISMISSED**. The Broward County Clerk of Courts is **DIRECTED** to close this case.

**FURTHER ORDERED** that Appellant's Motion to Restore the Right to Appeal is hereby **DENIED**. Appellant's Motion to be Treated as Pro-Se is hereby **DENIED** as **MOOT**.

* * *

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# CIRCUIT COURTS—ORIGINAL

**Torts—Automobile accident—Discovery—Failure to comply—Sanctions—Defendants' failure to comply with discovery and pretrial orders does not warrant severe sanction of default—However, exhibits and witnesses other than bus driver known to the plaintiff from outset of case are stricken—Defendants' non-privilege discovery objections are waived—Deposition of bus driver will be conducted, and all discovery is to be delivered 48 hours prior to deposition—Defendants' motion for extension of court-ordered deadlines or for continuance is denied**

LOUIS MILLER, Plaintiff, v. FLORIDA TRAILS, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-785. May 8, 2023. David Frank, Judge. Counsel: Christopher Nicholas, Tallahassee, for Plaintiff. Ciera Gainey, Jacksonville, for Defendants.

[Editor's note: See subsequent order at 31 Fla. L. Weekly Supp. 111a (this issue).]

## ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SANCTIONS

This cause came before the Court on plaintiff's Motion to Show Cause and/or for Sanctions for Failure to Comply with Discovery and this Court's Orders, and the Court having reviewed the papers filed in support and opposition and the court file, heard evidence and argument of counsel at the hearing on May 5, 2023, and being otherwise fully advised in the premises, finds

### Procedural History and Facts

On December 26, 2021, plaintiff Louis Miller was operating his pickup truck on eastbound Interstate 10 in Gadsden County, Florida when it was struck from behind by a commercial passenger bus. The bus was owned by the defendant Florida Trails, Inc., and operated by the defendant Bridgett Hardy. Plaintiff's complaint was filed on December 12, 2022, and the defendants filed their Answer and Affirmative Defenses on December 15, 2022.

The plaintiff encountered significant problems obtaining defendants' cooperation with the discovery process and ensuring compliance with this Court's orders.

On December 13, 2022, the Court issued its Uniform Order for Active, Differential Civil Case Management which required the parties to file a Joint Notice that the Cause is at Issue "no later than 15 days after the pleadings are closed."

The second paragraph of the Court's uniform order states that the, "failure to appear at the pretrial conference or failure to comply with the terms of this order may result in such sanctions as are just and lawful including: an immediate ex parte hearing and entry of final judgment of default or dismissal, limitation of witnesses or other evidence, striking of claims or defenses, or imposition of attorney fees or costs."

Plaintiff's counsel documented their efforts seeking defendants' compliance with this requirement on January 10, January 13, and January 18, 2023. When it was clear that defendants were unwilling to provide a projected trial date, plaintiff unilaterally filed "Plaintiff's Notice that Cause Is at Issue," rather than a joint notice.

On January 20, 2023, plaintiff filed a motion to expedite the trial due to the advanced age of the plaintiff (currently 95 years old). The court granted the motion without opposition from defendants.

On February 13, 2023, the Court issued its Order Setting Pretrial Conference and Jury Trial, setting the trial of the case for June 12, 2023.

The order setting the trial contains the following provision: "Any party with good cause to request a modification to the above-stated trial term must file a motion requesting the modification within ten (10) days of the date of this order and email a courtesy copy to the Judicial Assistant. The motion must include a detailed description of the reasons for the request and an explanation why the amount of time, or specific dates, given above would be inadequate. . . ."

Defendants did not file a motion to modify the trial term.

Defendants then completely ignored an entire set of interrogatories, two requests for the production of documents, and a request for admissions. Defendants' inaction violated the Florida Rules of Civil Procedure governing timelines for discovery responses. Even worse, defendants inexplicably were not persuaded to comply with the rules even after plaintiff began the sanctions process. *As of the show cause hearing itself, defendants had not served a single response to discovery*.

Plaintiff also documented the numerous times his attempt to take the deposition of the defendant driver was thwarted, and the defendants' refusal to coordinate mediation, another court-ordered requirement.

Furthermore, there can be no valid reason, even to this day, that defendants haven't served their witness and exhibit lists, which were due on March 27, 2023. This stands as a clear and unexplained second violation of an order, specifically this Court's Order Setting Pretrial Conference and Jury Trial, which reads:

> **Eighty (80) days prior to the pretrial conference for plaintiff(s) and Seventy (70) days prior to the pretrial conference for defendant(s)**
>
> The following disclosures will be filed with the Clerk of the Court and served on all opposing parties:
>
> ***A complete list of all lay and expert witnesses***, including rebuttal witnesses, who may be called at trial. The disclosure must include telephone number and address of the witness and a summary description of the witness' expected testimony and identify the retained experts.
>
> ***A complete list of all exhibits*** which may be introduced at trial, with a sufficient description to identify each.
>
> The following ***expert disclosures*** will be filed with the Clerk of the Court and served on all opposing parties:
>
> The subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion;
>
> The scope of employment in the pending case and the compensation for such service; The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants and the identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial;
>
> An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; and
>
> ***Five (5) dates*** within forty-five (45) days of disclosure on which the expert is available for deposition.

Order Setting Pretrial Conference and Jury Trial at 2-3. The order clearly warned, "***Documents, witnesses, and expert opinions not disclosed as stated above will not be admitted at trial***."

Defendants have violated every single pretrial requirement noted above.

The arguments offered by defendants for their abusive discovery conduct and non-compliance with Court orders do not constitute good cause. Attempting to consolidate the case with other pending cases, promptly denied by the Court, and that one attorney took over for another, does not explain, much less justify the conduct.

Plaintiff filed his Motion for Order to Show Cause and/or for

Sanctions for Failure to Comply with Discovery and This Court's Orders on April 14, 2023.

Defendants were given proper and reasonable notice of the hearing on plaintiff's sanctions motion and the order to show cause. The date for the hearing was set for May 5, 2023 without objection and attended by defendants' counsel. At the hearing, plaintiff admitted various emails and correspondence as his composite exhibit 1, and defendants admitted various emails as their composite exhibit 1. At the plaintiff's request, and without objection, judicial notice was taken of various documents in other cases currently before the Court.

**Determining the Appropriate Sanction**

It is important to acknowledge the current environment in which civil trial courts in the state of Florida must operate. After an enormous backlog of jury trials, thanks to COVID, with an accompanying intensification of workloads in general, and a carefully studied conclusion that civil cases were moving too slowly, Florida trial courts were given new marching orders. The Florida Supreme Court issued directives that require trial courts to set cases for trial promptly, grant continuances sparingly, and generally to actively manage cases so that they resolve more efficiently.

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

This Court agrees with the rationale and the purpose of these directives. However, it does not matter whether the Court agrees or disagrees, the directives are mandatory. They are not inspirational goals. In case anyone still wonders, the trial courts of this state, including this one, will be faithfully implementing all of these directives.

Unfortunately, litigants, often after unsuccessfully pursuing a continuance, are waiting until close to trial and then upsetting the apple cart with discovery issues and pretrial compliance issues.

Paramount to the trial court's ability to actively case manage is the authority to enforce its orders and control its docket. In other words, to keep the cart from tipping over when these situations arise. That is a long inherent authority only buttressed by the recent directives. In a concurrence, Judge Thomas said it well:

> . . .[W]e cannot and do not countenance actions in which litigants disregard discovery deadlines, file meaningless objections, insert boilerplate responses, and file repeated motions for additional time to respond, only to provide insufficient information or documents. When legal decisions are unduly delayed because one party refuses to perform their legal obligations to comply with discovery rules, it is entirely appropriate for a trial court to carefully consider sanctions when raised by the non-offending party. It is critical to remember that discovery abuses are not merely private matters between private litigants, but are public abuses that violate citizens' proper expectation that the judiciary will ensure that cases are timely resolved. Civil cases lingering in courts for years without final resolution because of lengthy discovery disputes should not be tolerated in courts of law. All involved, judges and litigants, have a solemn responsibility to ensure that inexcusable delays in civil legal proceedings do not occur, and where such are documented, that the delays are appropriately punished."

*Bank of New York Mellon v. Clark*, 183 So.3d 1271, 1272 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D302a].

In pronounced situations, trial courts must consider the severe sanction of dismissal, but are required to first determine and issue six explicit written findings, commonly referred to as the "*Kozel* factors."[1] *Id*. at 1271, citing *Kozel v. Ostendorf*, 629 So.2d 817 (Fla.1993).

Courts equate the striking of a defendant's pleadings, and the concomitant default on liability, to the dismissal of a plaintiff's case with prejudice, requiring the application of the *Kozel* factors. *Montage Grp., Ltd. v. Athle-Tech Computer Sys., Inc.,* 889 So.2d 180, 189-90 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2804a].

Discovery abuses and violations of orders, the complaint in the present case, can warrant the sanction. *Id*. (The appellate court noted, "We recognize that the sanction imposed by the trial court was the most severe available and that the consequences to the Defendants were grave. Nevertheless, the Defendants' discovery abuses and violations of the trial court's orders were egregious. The Defendants were responsible for creating the situation on the eve of the trial that made striking their pleadings and determining liability against them the only practical alternative available to the trial court.").

After hearing the evidence and argument of counsel at the hearing, the Court would have stricken the pleadings of the defendants and entered a default on liability, except that the strictures of *Kozel* do not permit it.

Although a close call, the facts here fall short of the findings required to trigger the most severe sanction. The Court is hopeful that the standard will be loosened in the near future by statute, rule, or appellate decision, but until then, it must apply the factors as they currently stand. Accordingly, plaintiff's request for a default must be denied.

This conclusion means the Court must look for a less severe sanction. The less severe sanction would be the limitation of certain evidence. Specifically, the Court will consider limiting witnesses and exhibits that have not been properly disclosed by defendants in accordance with the Court's orders.

Although the district courts are split on whether *Kozel* applies to a dismissal without prejudice, *see Fed. Nat. Mortg. Ass'n v. Linner*, 193 So.3d 1010, 1013 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1348a], there does not appear to be any appellate court that has insisted or even suggested that *Kozel* applies to sanctions less than dismissal.

The applicable factors to consider for the present case, therefore, are the "*Binger* factors," not the *Kozel* factors. *2K S. Beach Hotel, LLC v. Mustelier*, 291 So.3d 158, 160 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D111c], citing, *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981). The *Binger* court held:

> It follows, of course, that a trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order.8 *1314 The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party.9 Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases).10 If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the

witness should be allowed to testify.

*Id*. at 1313-14.

Our First District in *Mustelier* addressed the application of the *Binger* factors. Rather than grant a continuance, the court precluded the evidence because the "Claimant was prejudiced by surprise and [ ] the prejudice was incurable, . . .even though the record [supported the] finding that there [was] no allegation the E/C acted in bad faith, the primary inquiry [was] whether there [was] prejudice to the objecting party." *Id*. Importantly, the court affirmed the denial of the continuance requested by the offending party because it would have "work[ed] against efficiency." 291 So.3d at 160.

This is important because it could be argued in every case that the situation is curable because the trial simply could be continued. The Fourth District reached a similar conclusion when it struck the plaintiff's only witness rather than grant a continuance in *HSBC Bank Mortg. Corp. (USA) v. Lees*, 201 So.3d 699 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2020a]. Responding to the dissent's retort that a continuance would have been the proper course, the majority noted:

> While the dissent's suggestion that Judge Oftedal could have granted the homeowner's alternative motion for a continuance is true, making that suggestion coupled with the dissent's de facto requirement that Judge Oftedal exercise that option unacceptably subjugates his efforts at docket control to the bank's inexplicable non-compliance and would have the affect of removing any force from Judge Oftedal's pre-trial order. Just because as the dissent characterizes it, this matter "after all . . . was a mortgage foreclosure", a trial court's pre-trial order does not carry any less weight. To suggest otherwise would cast a pall over a trial court's inherent duty of steadfast case management and demean the sanctity of a trial court's pre-trial order that sets forth pretrial procedures which, unless the trial court orders otherwise, is not optional.

*Id*. at 703-04.

**Conclusions of Law and Findings**

Day one of the jury trial of this case is Monday, June 12, 2023. Jury selection is Friday, June 09, 2023. The pretrial conference is on Monday, June 05, 2023.

Even if defendants were to produce the overdue materials now, voluminous documents would still need to be provided to plaintiff's experts in an expedited fashion, requiring their immediate review and forced last second assessments and evaluations. The discovery cutoff is May 16, 2023. That would give plaintiff eight (8) days from the date of this order to react to the pile of discovery they would receive. There would be a literal frenzy of activities in an attempt to conduct last minute depositions, prepare and subpoena witnesses, and all when plaintiff should be doing his trial preparation and not last-minute frantic discovery to accommodate the noncompliance of defendants.

Any witness or exhibit disclosures by defendants at this point would not only be unacceptable surprise, but also would be uncurable prejudice in fact to the plaintiff. The only witness that would not be a surprise would be the defendant driver, Ms. Hardy. Also, a continuance of the trial at this point, given the path this case has followed, is an unacceptable option that would prejudice the plaintiff, award the defendants for their non-compliance, and unduly interfere with this Court's responsibility to manage its cases.

Finally, the suggestion that striking all of defendants' witnesses, except Ms. Hardy, and exhibits is equivalent to a default against defendants is unavailing. Defendants will be permitted to present the testimony of Ms. Hardy, give opening statement and closing argument, cross examine each of plaintiff's witnesses, object to plaintiff's exhibits, and to argue trial motions.

Accordingly, it is ORDERED and ADJUDGED that

1. Plaintiff's motion is GRANTED IN PART.

2. Although a default will not be entered against defendants, the witnesses and exhibits that they may have intended to present at trial are STRUCK. The only exception is the defendant driver, Ms. Hardy, about whom the plaintiff has been aware since the beginning of the case. Defendants may call her to testify.

3. Defendants have WAIVED all non-privilege objections to plaintiff's discovery requests.

4. The deposition of the defendant driver, Ms. Hardy, will be CONDUCTED by Zoom as currently set, whether a consolidated deposition with the other pending cases is arranged or not.

5. Defendants will DELIVER answers to plaintiff's February 1, 2023 interrogatories, and documents responsive to the February 1 and 15, 2023 requests for production of documents, no later than 48 hours prior to Ms. Hardy's deposition.

6. Defendants' April 10, 2023 motion for extension of court-ordered deadlines, or in the alternative, motion to continue, is DENIED.

7. Plaintiff's motion for attorney's fees for the time expended pursuing his motion for sanctions is GRANTED. The parties will use their best efforts to agree on the amount. If there is no agreement, the plaintiff will set a hearing on the amount to be awarded.

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[1]The factors are: "1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative." *Kozel v. Ostendorf*, 629 So.2d 817, 818 (Fla. 1993).

* * *

**Torts—Automobile accident—Discovery—Failure to comply—Sanctions—Partial final judgment of default on liability entered as sanction for defendants' continued failure to comply with discovery obligations and violations of court's prior sanction orders**

LOUIS MILLER, Plaintiff, v. FLORIDA TRAILS, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-785. June 5, 2023. David Frank, Judge. Counsel: Christopher Nicholas, Tallahassee, for Plaintiff. Ciera Gainey, Jacksonville, for Defendants.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS**

This cause came before the Court on June 2, 2023, on Plaintiff's Motion for Entry of Default and Sanctions for Failure to Comply with This Court's Order Granting in Part Plaintiff's Motion for Sanctions, and the Court having reviewed the papers filed in support and opposition and the court file, considered evidence presented, heard argument of counsel, and being otherwise fully advised in the premises, finds

**INTRODUCTION**

*In the interest of an efficient judicial system and in the interest of clients, it is essential that attorneys adhere to filing deadlines and other procedural requirements.*
- Florida Supreme Court in *Kozel v. Ostendorf*

*The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day.*
- Abraham Lincoln

On December 26, 2021, plaintiff Louis Miller was operating his pickup truck on eastbound Interstate 10 in Gadsden County, Florida when it was struck from behind by a commercial passenger bus. The bus was owned by Florida Trails, Inc. and operated by Bridgett Hardy.

Plaintiff sued the company and driver for negligence. The complaint was filed on December 12, 2022, and the defendants filed their Answer and Affirmative Defenses on December 15, 2022.

Defendants then ignored discovery deadlines and obligations, violated the Court's scheduling order, and refused to cooperate with plaintiff in what only can be described as a prolonged pattern of disregard for rules of procedure and the administration of justice. It was so bad that the Court sanctioned defendants by striking witnesses and exhibits while stopping short of entering a default.

One would believe that a party in the position of defendants at this point would have heard the wake-up call and made every move with the utmost care and caution to not violate any rules or orders. Unfortunately, that did not happen. Instead, defendants further ignored their discovery obligations and violated another court order, this time the sanctions order.

When is enough enough? When does litigation misconduct finally trigger the ultimate sanction—dismissal for a plaintiff, default for a defendant? The answer to the question today is different than the answer pre-active case management (pre-pandemic).

It is important to acknowledge the current environment in which civil trial courts in the state of Florida must operate. After an enormous backlog of jury trials, thanks to COVID, with an accompanying intensification of workloads in general, and a carefully studied conclusion that civil cases were moving too slowly, Florida trial courts were given new marching orders. The Florida Supreme Court issued directives that require trial courts to set cases for trial promptly, grant continuances sparingly, and generally to actively manage cases so that they resolve more efficiently.

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.

This Court agrees with the rationale and the purpose of these directives. However, it does not matter whether the Court agrees or disagrees, the directives are mandatory. They are not inspirational goals. In case anyone still wonders, the trial courts of this state, including this one, will be faithfully implementing all of these directives.

Paramount to the trial court's ability to actively case manage is the authority to enforce its orders and control its docket. In other words, to keep the cart from tipping over when these situations arise. That is a long inherent authority only buttressed by the recent directives. In a concurrence, Judge Brad Thomas said it well:

> . . .[W]e cannot and do not countenance actions in which litigants disregard discovery deadlines, file meaningless objections, insert boilerplate responses, and file repeated motions for additional time to respond, only to provide insufficient information or documents. When legal decisions are unduly delayed because one party refuses to perform their legal obligations to comply with discovery rules, it is entirely appropriate for a trial court to carefully consider sanctions when raised by the non-offending party. It is critical to remember that discovery abuses are not merely private matters between private litigants, but are public abuses that violate citizens' proper expectation that the judiciary will ensure that cases are timely resolved. Civil cases lingering in courts for years without final resolution because of lengthy discovery disputes should not be tolerated in courts of law. All involved, judges and litigants, have a solemn responsibility to ensure that inexcusable delays in civil legal proceedings do not occur, and where such are documented, that the delays are appropriately punished.

*Bank of New York Mellon v. Clark*, 183 So.3d 1271, 1272 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D302a].

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

"Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606, 608-09 (Fla. 1994) (citation omitted). This includes taking strong action to make it clear that violations of court orders, discovery abuses, and excessive unnecessary delays will not be condoned or tolerated.

Importantly, Florida law has never required a trial court exerting its inherent powers to eviscerate a non-offending party's trial preparation to cure the offending party's misconduct. That is exactly what happens when the court orders last minute discovery and disclosures to avoid a continuance. The truth is that neither option—last minute discovery nor continuance—is the proper course. They reward bad behavior and defeat everything for which the rules of procedure, Florida Supreme Court guidance, trial court policies, procedures, and orders stand.

Unfortunately, and often after unsuccessfully pursuing a continuance as here, some litigants are waiting until close to trial and then upsetting the apple cart with discovery issues and pretrial compliance issues. The hope is that the court will not enforce the rules, will not enforce its orders, and instead will reward the offending party with a continuance. That, of course, simultaneously denies the non-offending party its day in court. Florida law does not require such a result.

Our First District addressed a similar scenario and affirmed a trial court's preclusion of evidence because the "Claimant was prejudiced by surprise and [ ] ***the prejudice was incurable***, . . .even though the record [supported the] finding that there [was] no allegation the E/C acted in bad faith, the primary inquiry [was] whether there [was] prejudice to the objecting party." *2K S. Beach Hotel, LLC v. Mustelier*, 291 So.3d 158, 160 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D111c], citing, *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981) (emphasis added). Importantly, the court affirmed the denial of the continuance requested by the offending party because it would have "work[ed] against efficiency." 291 So.3d at 160.

This is important because it could be argued in every case that the situation can be cured by simply continuing the trial. The Fourth District agreed with our First District when it struck the plaintiff's only witness rather than grant a continuance in *HSBC Bank Mortg. Corp. (USA) v. Lees*, 201 So.3d 699 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2020a]. Responding to the dissent's retort that a continuance would have been the proper course, the majority noted:

> While the dissent's suggestion that Judge Oftedal could have granted the homeowner's alternative motion for a continuance is true, making that suggestion coupled with the dissent's de facto requirement that

> Judge Oftedal exercise that option unacceptably subjugates his efforts at docket control to the bank's inexplicable non-compliance and would have the affect of removing any force from Judge Oftedal's pre-trial order. Just because as the dissent characterizes it, this matter "after all . . . was a mortgage foreclosure", a trial court's pre-trial order does not carry any less weight. To suggest otherwise would cast a pall over a trial court's inherent duty of steadfast case management and demean the sanctity of a trial court's pre-trial order that sets forth pretrial procedures which, unless the trial court orders otherwise, is not optional.

*Id*. at 703-04.

Earlier, the Fourth District said it well when it outlined its rational for declining to continue a trial due to a discovery violation:

> *Binger* gives the trial court discretion to strike those witnesses to prevent the objecting party from being forced to choose between frantic last-minute discovery and an unjustified delay of her trial. This is not a fair manner in which to "cure the prejudice" caused by the defendants' failure to timely prepare their case, and we hold that *Binger* does not require such a result here.
>
> In the instant case, the trial court properly found that unfair prejudice to Plaintiff existed because she would be unable to counter testimony offered so late in the game. *See Grau v. Branham*, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993) ("Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party.").
>
> *Binger* does not mean that trial courts are obligated to automatically grant last minute continuances to parties who choose not to timely prepare their cases for trial. The trial court's discretion under *Binger* includes the power to appropriately enforce pretrial orders.

*Fla. Marine Enterprises v. Bailey*, 632 So.2d 649, 652-53 (Fla. 4th DCA 1994).

What is required is a determination and explicit written findings, commonly referred to as the "*Kozel* factors." *Kozel v. Ostendorf*, 629 So.2d 817 (Fla.1993). The factors are: "1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration." *Id*. at 818 (Fla. 1993).

Even under the strict parameters of *Kozel*, discovery abuses and violations of orders similar to those in the present case can warrant the default sanction. The Second District affirmed the result in *Montage Grp., Ltd. v. Athle-Tech Computer Sys., Inc.*, 889 So.2d 180, 187-88 (2004) [29 Fla. L. Weekly D2804a]. The behavior of the offending party was described as follows:

> In the three-week period immediately preceding the scheduled trial, the course of events revealed that the Defendants were guilty of multiple discovery abuses and other misconduct related to the discovery process. It would unduly lengthen this opinion to recite the details of the Defendants' discovery violations and other misconduct here. However, it is fair to say that these violations were serious and had a substantial adverse impact on Athle-Tech's ability to meet the defenses on the liability issues mounted by Montage and DES. Athle-Tech moved for sanctions, and the trial court held two lengthy hearings on the motion. After the conclusion of the second hearing, the trial court struck the Defendants' answers and affirmative defenses, determined the liability issues to be established against the Defendants, and ordered the trial to proceed on the issue of damages only.

The appellate court discussed the trial court's application of the *Kozel* factors and explained the rationale for the severe sanction:

> We recognize that the sanction imposed by the trial court was the most severe available and that the consequences to the Defendants were grave. Nevertheless, the Defendants' discovery abuses and violations of the trial court's orders were egregious. The Defendants were responsible for creating the situation on the eve of the trial that made striking their pleadings and determining liability against them the only practical alternative available to the trial court. We find no abuse of discretion and affirm the sanctions order.

*Id*. at 190.

Indeed, the rules of procedure themselves support the entry of a default when warranted. According to Rule 1.380(b)(2)(C), the Court may enter "An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party."

## PROCEDURAL HISTORY AND FACTS

On December 13, 2022, the Court issued its Uniform Order for Active, Differential Civil Case Management which required the parties to file a joint notice that the cause is at issue "no later than 15 days after the pleadings are closed."

The second paragraph of the Court's uniform order states that the "failure to appear at the pretrial conference or failure to comply with the terms of this order may result in such sanctions as are just and lawful including: an immediate ex parte hearing and entry of final judgment of default or dismissal, limitation of witnesses or other evidence, striking of claims or defenses, or imposition of attorney fees or costs."

Plaintiff's counsel documented their efforts seeking defendants' compliance with this requirement on January 10, January 13, and January 18, 2023. When it was clear that defendants were unwilling to provide a projected trial date, plaintiff unilaterally filed "Plaintiff's Notice that Cause Is at Issue," rather than a joint notice.

On January 20, 2023, plaintiff filed a motion to expedite the trial due to the advanced age of the plaintiff (currently 95 years old). The court granted the motion without opposition from defendants.

On February 13, 2023, the Court issued its Order Setting Pretrial Conference and Jury Trial, setting the trial of the case for June 12, 2023.

The order setting the trial contains the following provision: "Any party with good cause to request a modification to the above-stated trial term must file a motion requesting the modification within ten (10) days of the date of this order and email a courtesy copy to the Judicial Assistant. The motion must include a detailed description of the reasons for the request and an explanation why the amount of time, or specific dates, given above would be inadequate. . . ."

Defendants did not file a motion to modify the trial term.

On April 14, 2023, plaintiff filed his Motion for Order to Show Cause and/or for Sanctions for Failure to Comply with Discovery and This Court's Orders.

The Court conducted a long and comprehensive evidentiary hearing on the motion on May 5, 2023. A comprehensive listing of everything considered by the Court at the hearing would be excessive for this order and, therefore, the Court relies on the evidence and findings as set forth in the transcript. The following is a summary of the most salient evidence and findings.

### A. Defendants' Misconduct Prior to the First Sanctions Order

Starting early in the litigation, the plaintiff encountered significant problems obtaining defendants' cooperation with the discovery process and ensuring compliance with this Court's orders.

Defendants completely ignored an entire set of interrogatories, two requests for the production of documents, and a request for admis-

sions. Defendants' inaction violated the Florida Rules of Civil Procedure governing timelines for discovery responses. Even worse, defendants inexplicably were not persuaded to comply with the rules even after plaintiff began the sanctions process. *As of the show cause hearing itself, defendants had not served a single response to discovery*.

Plaintiff also documented the numerous times his attempt to take the deposition of the defendant driver was thwarted, and the defendants' refusal to coordinate mediation, another court-ordered requirement.

Further, defendants failed to serve their lay and expert witness and exhibit lists and disclosures, and to provide five dates on which their expert would be available for deposition, all of which were due on March 27, 2023, in a clear and unexplained second violation of an order, specifically this Court's Order Setting Pretrial Conference and Jury Trial. The order clearly warned, "Documents, witnesses, and expert opinions not disclosed as stated above will not be admitted at trial."

The arguments that were offered by defendants for their abusive discovery conduct and non-compliance with court orders do not constitute good cause. Attempting to consolidate the case with other pending cases, promptly denied by the Court, and that one attorney took over for another, does not explain, much less justify the conduct.

After carefully reviewing the evidence and considering the argument of counsel, the Court entered its Order Granting in Part Plaintiff's Motion for Sanctions on May 8, 2023 [31 Fla. L. Weekly Supp. 109a]. The Court's findings included:

> Defendants were given proper and reasonable notice of the hearing on plaintiff's sanctions motion and the order to show cause.
>
> The date for the hearing was set for May 5, 2023 without objection and attended by defendants' counsel. At the hearing, plaintiff admitted various emails and correspondence as his composite exhibit 1, and defendants admitted various emails as their composite exhibit 1. At the plaintiff's request, and without objection, judicial notice was taken of various documents in other cases currently before the Court.
>
> Day one of the jury trial of this case is Monday, June 12, 2023. Jury selection is Friday, June 09, 2023. The pretrial conference is on Monday, June 05, 2023. Even if defendants were to produce the overdue materials now, voluminous documents would still need to be provided to plaintiff's experts in an expedited fashion, requiring their immediate review and forced last second assessments and evaluations. The discovery cutoff is May 16, 2023. That would give plaintiff eight (8) days from the date of this order to react to the pile of discovery they would receive. There would be a literal frenzy of activities in an attempt to conduct last minute depositions, prepare and subpoena witnesses, and all when plaintiff should be doing his trial preparation and not last-minute frantic discovery to accommodate the noncompliance of defendants.
>
> Any witness or exhibit disclosures by defendants at this point would not only be unacceptable surprise, but also would be uncurable prejudice in fact to the plaintiff. The only witness that would not be a surprise would be the defendant driver, Ms. Hardy. Also, a continuance of the trial at this point, given the path this case has followed, is an unacceptable option that would prejudice the plaintiff, award the defendants for their non-compliance, and unduly interfere with this Court's responsibility to manage its cases.

The Court's rulings included: "Defendants have WAIVED all non-privilege objections to plaintiff's discovery requests; and "Defendants will DELIVER answers to plaintiff's February 1, 2023 interrogatories, and documents responsive to the February 1 and 15, 2023 requests for production of documents, no later than 48 hours prior to Ms. Hardy's deposition."

Upon defendants' continued disregard for court orders and rules, plaintiff filed his Motion for Entry of Default and Sanctions for Failure to Comply with This Court's Order Granting in Part Plaintiff's Motion for Sanctions. The Court conducted a long and comprehensive evidentiary hearing on the motion on June 2, 2023. A comprehensive listing of everything considered by the Court at the hearing would be excessive for this order and, therefore, the Court relies on the evidence and findings as set forth in the transcript. The following is a summary of the most salient evidence and findings.

**B. Defendants' Misconduct After the First Sanctions Order**

Defendants were required to produce documents in response to two production requests served by plaintiff in February 2023. Defendants failed to provide a response to or produce any documents whatsoever in response to Plaintiff's Second Request for Production as ordered. The order required delivery of the materials forty-eight hours before the deposition of Defendant Hardy, scheduled to take place on May 11, 2023.

Defendants did serve a response and produce limited documents in response to the Plaintiff's First Request for Production. However, defendants asserted a bewildering blanket response of "None in the possession, custody, or control of Defendants or its counsel" to 36 requests.

It is hard to imagine that defendants would not have "possession, custody or control" of many of the documents/materials requested, especially as they relate to the subject collision, the defendant driver, and the business operations of the defendant corporation. For instance, defendants should certainly have the accident register for Bridgett Hardy (request 39) as 49 CFR 390.15(b) provides, "Motor carriers must maintain an accident register for 3 years after the date of each accident."

Regarding the documents defendants did produce, credible and unrebutted evidence presented at the hearing indicated that they were incomplete.

For example, on May 11, 2023, plaintiff deposed Bridgett Hardy, the defendant driver of Florida Trails, Inc.'s bus. During her deposition, Ms. Hardy, testified that she was involved in an accident approximately five or six years ago when her bus struck and killed a pedestrian. The incident required that she take a drug/alcohol test "right then and there." No documents were produced regarding defendants' mandatory investigation of this fatality or even the fact that the accident occurred.

There also was credible and unrebutted evidence that a videographer was hired by defendants who filmed the actions and even audio of plaintiff's expert's extensive inspection of the subject vehicle. *See* hearing transcript of plaintiff's expert's testimony. Despite this, defendants claimed they did not possess or have access to any such video and instead produced a short video of the vehicle and nothing else.

Despite being required to produce the personnel file of Paul Schwartz (defendant's Safety and Training Director) by May 9, 2023, defendants failed to do so by that deadline or ever.

Defendants asserted at least one "privilege" objection to a document request but failed to comply with the rule requiring a privilege log with enough detail that plaintiff, and the Court, if necessary, could determine whether the objection is valid.

**CONCLUSIONS OF LAW AND FINDINGS (*KOZEL* FACTORS)**

**1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;**

As the Court ponders its almost 25 years practicing law prior to taking the bench and the likely thousands of witness interviews, depositions, and cross examinations it conducted, it cannot remember more than a few occasions when a witness spilled his or her guts,

admitting to wrongdoing. There were no memorable lines like, "you can't handle the truth," followed by a spectacular confession. Counsel for offending parties are not expected to respond by saying they willfully violated court orders. The analysis is more akin to a constructive willfulness. The Court's task really is to determine whether the misconduct was mere carelessness or inexperience at play. To do that, the Court must analyze and weigh the type of evidence being denied or thwarted, the timing of the discovery and responses or failure to respond, whether there was misconduct after it had been made clear that sanctions were being considered, the frequency of the misconduct, and whether the subject requirements would be obvious even to a less than seasoned attorney. The Court must consider the action and inaction of the parties, and not the impassioned speeches of attorneys after the fact.

Another aspect of willfulness is a conscious or subconscious attempt to blow up a case close to trial to force a continuance that a party was not able to obtain on the merits for good cause. After generating disputes over discovery and pretrial requirements close to trial a party can respond by requesting a continuance for time to fix the deficiencies or hope that opposing counsel makes the request. Defendants here filed two motions for continuance that were denied for failure to substantiate good cause.

Following its own guidance (above), the Court finds that defendants' misconduct was willful and contumacious. Their disregard for obvious discovery requirements and basic court ordered pretrial requirements was consistent and frequent over a long period of time and denied plaintiff critical evidence needed for a fast-approaching jury trial. Most importantly, defendants continued to ignore rules and orders even after the sanctions process began, and the credible unrebutted evidence established the improper withholding of evidence and improper assertion of objections.

**2) whether the attorney has been previously sanctioned;**

Defendants were sanctioned twice, and the same attorney attended the hearing to show cause for defendants on both occasions.

**3) whether the client was personally involved in the act of disobedience;**

Here we have no answer because the parties presented no evidence, or even information, in this regard. We just do not know if the defendant driver or the defendant company's corporate representatives engaged in the dilatory and obstructive conduct or whether it was exclusively the call and decisions of the attorneys. We do know, however, that this factor is not a mandatory element of the criteria. It is but one of the several factors that must be considered. Although *Kozel* notes that a party should not be unduly punished for the acts of her attorney, the party's (client's) active involvement, ". . .cannot be the sole factor if we are to properly administer a smooth flowing system to resolve disputes." *Ham v. Dunmire*, 891 So.2d 492, 497 (Fla. 2004) [30 Fla. L. Weekly S6a].

**4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;**

Today is the day of the pretrial conference. Jury selection for the trial of this case begins at 8:30 a.m. ***in four days***. The jurors have been summoned. The plaintiff and the Court expended considerable resources trying to manage the evidentiary needs of the parties. Nonetheless, given defendants' prolonged non-compliance, we sit here today and the plaintiff still does not have crucial evidence that should have been produced weeks and months ago.

Even if the court were to order a firestorm of last-minute discovery and disclosures, there physically is not enough time for plaintiff's counsel and experts to consume the information, react to the information, and prepare for trial. It also would be exceptionally expensive. At a minimum, plaintiff's experts would charge a pretty penny for the additional, no notice added workload. *See also* plaintiff's motion for attorney's fees for the first sanctions motion and hearing. Regardless, even if it were possible, it would be unfair to the non-offending plaintiff and an unacceptable solution, *see* discussion in the Introduction above.

Nor would a continuance be a fair resolution for the plaintiff or an acceptable remedy, *see* discussion in the Introduction above. A non-offending party is entitled to his or her day in court. Here, even more so. The plaintiff moved for an expedited trial date due to the advanced age of the plaintiff. The Court then gave the parties a prompt trial date, without any objections or complaints from the defendants.

**5) whether the attorney offered reasonable justification for noncompliance;**

Although the parties acknowledged that they were on notice that both hearings on sanctions were evidentiary hearings, defendants did not present any witnesses and offered only a few unconvincing exhibits. The response from defendants has been a conclusory statement by counsel that nothing was done "willfully," a reference to the medical condition of another attorney in the defense law firm, an irrelevant attempt to consolidate cases, and assurances that they are trying their best to comply. There was nothing provided by defendants that could even remotely constitute reasonable justification for their significant non-compliance.

**6) whether the delay created significant problems of judicial administration.**

The action and inaction of defendants has caused significant problems of judicial administration. The Court has devoted an enormous amount of time and energy to the matters of defendants' noncompliance—two exhausting hearings, a case management conference, an extended pretrial conference, a mountain of motions, responses, and memoranda, extensive research and order drafting, emails and correspondence. All of this did not occur in a vacuum. Attention that should have gone to other cases pending before the Court was suctioned off and re-directed to this case.

Accordingly, it is ORDERED and ADJUDGED that a partial final judgment of default against defendants on liability is ENTERED. The trial of this case will proceed as scheduled on damages only.

* * *

**Civil procedure—Discovery—Extension of time—Motion for extension of time to serve late discovery, which was filed only seven days before end of discovery period set in pretrial order, is denied**

FIGGERS COMMUNICATION INC., Plaintiff, v. GADSDEN COUNTY BOARD OF COUNTY COMMISSIONERS, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2022-CA-000500. May 17, 2023. David Frank, Judge. Counsel: Ryan P. Molaghan and Paul M. Aloise, Jr., Tallahassee, for Plaintiff. Zachery Scharlepp, Tallahassee; and Clayton Ford Knowles, Quincy, for Defendant.

**ORDER DENYING MOTION FOR ENLARGEMENT OF TIME TO COMPLETE FACT DISCOVERY**

THIS CAUSE came before the Court, on the Defendant's Motion to Enlarge Time to Complete Fact Discovery, Plaintiff's response in opposition to the same, and Defendant's Reply. Upon consideration of the Motion, Response, and Reply, and being otherwise fully advised in the premises, the Court finds

**Procedural History and Facts**

Defendant requests an extension for discovery matters that will either 1) force a continuance of the trial, or 2) engulf the plaintiff with last-minute discovery activities at the expense of his preparation for a fast-approaching trial. Specifically, defendant seeks leave to serve the following late discovery:

- Subpoenas for Production of Documents & Things without

Deposition from three non-parties;

• A Request to Inspect Tangible Things Pursuant to Rule 1.350;

• A Request for Entry Upon Land for Inspection and Other Purposes Pursuant to Rule 1.350; and

• Defendant's First Request for Production to Plaintiff.

Defendant's legal argument is that the Court should accept "cause," rather than "good cause," as a valid grounding to extend discovery. Such an argument demonstrates a severe misconception of the current landscape in which we operate.

We begin with two key deadlines clearly stated in the Court's January 17, 2023 order setting the trial:

**Twenty (20) days prior to the pretrial conference**

**Fact and expert discovery will be completed.**

**All motions directed to discovery must have been filed and heard by the Court.**

The trial of this case starts June 9th. The pretrial conference is June 5th. That means discovery ends, and motions related to discovery must have been heard by, May 16, 2023. Defendant waited until May 9, 2023, seven days before the end of discovery, to file its motion. In fact, the present motion is the first time defendant brought any discovery matter to the attention of the Court.

It appears that defendant and its counsel have been aware of the circumstances giving rise to plaintiff's claim since August of 2020. Even assuming defendant only became cognizant of the fraud defense and materials needed to support it on November 6, 2022, when it filed its answer, (more likely before), from November 6, 2023 to April 26, 2023, the only written discovery propounded by defendant to plaintiff was defendant's First Set of Interrogatories.

**Finding the Appropriate Remedy**

It is important to acknowledge the current environment in which civil trial courts in the state of Florida must operate. After an enormous backlog of jury trials, thanks to COVID, with an accompanying intensification of workloads in general, and a carefully studied conclusion that civil cases were moving too slowly, Florida trial courts were given new marching orders. The Florida Supreme Court issued directives that require trial courts to set cases for trial promptly, grant continuances sparingly, and generally to actively manage cases so that they resolve more efficiently.

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.

This Court agrees with the rationale and the purpose of these directives. However, it does not matter whether the Court agrees or disagrees, the directives are mandatory. They are not inspirational goals. In case anyone still wonders, the trial courts of this state, including this one, will be faithfully implementing all of these directives.

Unfortunately, litigants, often after unsuccessfully pursuing a continuance, are waiting until close to trial and then upsetting the apple cart with discovery issues and pretrial compliance issues. Their argument goes like this: "Well Judge, as you can see, the other side was dragging its feet and did not get us the stuff we need to prepare for trial. We need an extension of discovery and/or continuance; that's the only way to fix this." The Court would then grant an extension or continuance and reward bad behavior. Those days are decisively over.

Paramount to the trial court's ability to actively case manage is the authority to enforce its orders and control its docket. In other words, to keep the cart from tipping over when these situations arise. That is a long inherent authority only buttressed by the recent directives. In a concurrence, Judge Thomas said it well:

> . . .[W]e cannot and do not countenance actions in which litigants disregard discovery deadlines, file meaningless objections, insert boilerplate responses, and file repeated motions for additional time to respond, only to provide insufficient information or documents. When legal decisions are unduly delayed because one party refuses to perform their legal obligations to comply with discovery rules, it is entirely appropriate for a trial court to carefully consider sanctions when raised by the non-offending party. It is critical to remember that discovery abuses are not merely private matters between private litigants, but are public abuses that violate citizens' proper expectation that the judiciary will ensure that cases are timely resolved. Civil cases lingering in courts for years without final resolution because of lengthy discovery disputes should not be tolerated in courts of law. All involved, judges and litigants, have a solemn responsibility to ensure that inexcusable delays in civil legal proceedings do not occur, and where such are documented, that the delays are appropriately punished."

*Bank of New York Mellon v. Clark*, 183 So.3d 1271, 1272 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D302a].

In addition to the inherent authority to enforce their orders and control their dockets, trial courts have *Binger*. *2K S. Beach Hotel, LLC v. Mustelier*, 291 So.3d 158, 160 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D111c], citing, *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981).

Our First District in Mustelier addressed the application of the *Binger* factors. Rather than grant a continuance, the court precluded the evidence because the, "Claimant was prejudiced by surprise and [ ] the prejudice was incurable, . . .even though the record [supported the] finding that there [was] no allegation the E/C acted in bad faith, the primary inquiry [was] whether there [was] prejudice to the objecting party." *Id*. Importantly, the court affirmed the denial of the continuance requested by the offending party because it would have "work[ed] against efficiency." 291 So.3d at 160.

This is important because it could be argued in every case that the situation is easily curable by granting extensions and continuing the trial. However, recently more and more appellate courts are rejecting the notion that delaying a case and rewarding bad behavior is the answer. Instead, they are limiting the evidence of the offending party and giving the non-offending party their timely day in court.

For example, the Fourth District struck the plaintiff's only witness rather than grant a continuance in *HSBC Bank Mortg. Corp. (USA) v. Lees*, 201 So.3d 699 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2020a]. Responding to the dissent's retort that a continuance would have been the proper course, the majority noted:

> While the dissent's suggestion that Judge Oftedal could have granted the homeowner's alternative motion for a continuance is true, making that suggestion coupled with the dissent's de facto requirement that Judge Oftedal exercise that option unacceptably subjugates his efforts at docket control to the bank's inexplicable non-compliance and would have the affect of removing any force from Judge Oftedal's pre-trial order. Just because as the dissent characterizes it, this matter "after all . . . was a mortgage foreclosure", a trial court's pre-trial order does not carry any less weight. To suggest otherwise would cast a pall over a trial court's inherent duty of steadfast case management and demean the sanctity of a trial court's pre-trial order that sets forth pre-trial procedures which, unless the trial court orders otherwise, is not optional.

*Id*. at 703-04.

The Fourth District said it well when it outlined its rational for declining to continue a trial due to a discovery violation:

> *Binger* gives the trial court discretion to strike those witnesses to prevent the objecting party from being forced to choose between frantic last-minute discovery and an unjustified delay of her trial. This is not a fair manner in which to "cure the prejudice" caused by the defendants' failure to timely prepare their case, and we hold that *Binger* does not require such a result here.
>
> In the instant case, the trial court properly found that unfair prejudice to Plaintiff existed because she would be unable to counter testimony offered so late in the game. *See Grau v. Branham*, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993) ("Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party.").
>
> *Binger* does not mean that trial courts are obligated to automatically grant last minute continuances to parties who choose not to timely prepare their cases for trial. The trial court's discretion under *Binger* includes the power to appropriately enforce pretrial orders

*Fla. Marine Enterprises v. Bailey*, 632 So.2d 649, 652-53 (Fla. 4th DCA 1994).

If such an approach is proper for the more drastic sanction of excluding a witness, then it surely applies to denying an extension of the discovery period to search for potential, not certain, evidence.

**Conclusions of Law and Findings**

The Court started this order by stating, "Defendant requests an extension for discovery matters that will either 1) force a continuance of the trial, or 2) engulf the plaintiff with last-minute discovery activities at the expense of his preparation for a fast-approaching trial." Neither is acceptable.

The Court finds that plaintiff would be prejudiced if he were forced to gather, vet, analyze and deliver documents and things this late after the discovery cutoff and possibly have to deal with them at trial. The non-offending party is entitled to prepare his case for trial without such distraction and consumption of resources.

It is doubtful the Court is even required to invoke and analyze the *Binger* factors for a requested extension of the discovery period. The Court's inherent authority to enforce its orders and control its docket should suffice. In any event, if *Binger* were applicable, the facts outlined above meet the standard.

Finally, as discussed above, parties have a responsibility to diligently move their cases to final resolution. The price paid for waiting until the eve of trial to bring matters to the court is not a continuance. It is going to trial without the evidence or information sought. The defendant here did not diligently or timely pursue discovery matters about which it now complains.

Accordingly, it is ORDERED and ADJUDGED that

1. Defendant's motion for extension of the discovery period is DENIED, and this case will be tried on June 9, 2023 as currently set. There will be no defense subpoenas for non-party records, inspection of things, entry upon land, or document requests at this late point in time.

2. Plaintiff, however, will provide the emails, letters, and text messages he agreed to produce during his deposition, that have not already been delivered.

* * *

**Civil procedure—Voluntary dismissal—Extension of time within which to file motion**

FAMILY DOLLAR STORES OF FLORIDA, LLC, a limited liability corporation, f/k/a FAMILY DOLLAR STORES, INC., a Florida corporation, Plaintiff, v. JACK RICHARDSON, LYNN RICHARDSON BURGESS, and JAN RICHARDSON RIPPETOE, as Trustees of the Jack Richardson Living Trust U/A/D December 4, 2012, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2018-CA-000879-CAA. May 19, 2023. David Frank, Judge. Counsel: Lee D. Wedekind, III, Tanya L. Courtney, and John P. McDermott, Jr., Jacksonville, for Plaintiff. Davisson F. Dunlap, III, Dunlap & Shipman, P.A., Tallahassee, for Defendants.

**ORDER GRANTING IN PART JOINT MOTION FOR ADDITIONAL TIME TO FILE A NOTICE OF VOLUNTARY DISMISSAL**

THIS MATTER came before the Court without a hearing upon the parties' Joint Motion for Additional Time to File a Notice of Voluntary Dismissal, and the Court having reviewed the motion and being otherwise fully advised in the premises, it is

**ORDERED AND ADJUDGED** that the motion is GRANTED IN PART. The Court is not a way station where a case can sit for months waiting for the parties to feel comfortable that all actions related to a settlement have been accomplished to their satisfaction. The choices are to either file a dismissal, and a later breach of contract if there is a failure to comply, or to submit a proposed order adopting the settlement and reserving jurisdiction to enforce. The parties have twenty (20) days from the date of this order to do so.

* * *

**Mortgages—Foreclosure—Pro se filings—Prohibition—Because defendant has abused right to pro se access to courts by filing frivolous pleadings, court will no longer accept pro se legal documents filed by defendant**

U.S. BANK NATIONAL ASSOCIATION, Plaintiff, v. TAMICA JACKSON, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2019-CA-000716. May 5, 2023. David Frank, Judge. Counsel: Ivy Taub, Boca Raton, for Plaintiff. Tamica Jackson, Pro se, Defendant.

**ORDER PROHIBITING TAMICA JACKSON FROM FILING PRO SE IN THE SECOND JUDICIAL CIRCUIT**

This cause came before the Court on PLAINTIFFS MOTION TO STRIKE ALL PENDING MOTIONS AND FILINGS FILED BY DEFENDANT TAMICA JACKSON AND RENEWED MOTION TO RESTRICT FUTURE PRO SE FILINGS, and the Court having reviewed the papers filed in support and opposition and the court file, conducted a duly noticed hearing, and being otherwise fully advised in the premises, finds

"Article I, section 21 of the Florida Constitution protects the right of access to courts. However, this right does not include the unlimited ability to appear pro se. When a litigant abuses the right to pro se access by filing repetitious and frivolous pleadings, he necessarily diminishes the ability of the courts to devote their finite resources to the consideration of legitimate claims. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *Clark v. Baney*, 355 So.3d 976, 978 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D210a] (citations, quotations, and parenthesis omitted).

Plaintiff filed its foreclosure action against defendant Tamica Jackson on July 10, 2019.

Jackson was served initial process on July 23, 2019.

In response to the complaint, on July 25, 2019, Jackson filed a 10-page document titled, "Defendant's Affidavit," in which she rambled through scores of boiler plate matters, some tangentially related to generic foreclosure defenses, some not even that, all with little or no connection to the facts of the case at hand. It appears she googled "foreclosure" and just started writing. She then purported to "counterclaim" by listing the following:

COUNT I Florida Statutes 817.535 Unlawful filing of false documents or records against real or personal property (presenting an instrument for recording in an official record or to cause an instrument to be presented for recording in an official record)with the intent to defraud and/or harass.
COUNT II Civil and Criminal Fraud Action
COUNT III Fraudulent Practices & Misrepresentation
COUNT IV Mail Fraud
COUNT V Conspiracy/organized scheme to commit fraud against ``real property
COUNT VI Fraud activity in connection with computer
COUNT VII Extortion
COUNT VIII Forgery
COUNT IX Slander/Libel/Defamation
COUNT X Intentional Infliction of Emotional Distress
COUNT XI Foreclosure Fraud/Wrongful Foreclosure
COUNT XII Civil Harassment
COUNT XIII Dodd-Frank Act amendments to RESPA and TILA
COUNT XIV Dodd-Frank Wall Street Reform and Consumer Protection Act, Titles X and XIV Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 12 U.S.C. § 5301, §§ 5481-5603, and in laws amended (Title X); and 12 U.S.C. § 5481 note, 15 U.S.C. § 1601 note, § 1602, and § 1631 et seq. (Title XIV)
COUNT XV Violation of Florida Statutes Chapter 702 Mortgage Foreclosure
COUNT XVI Federal Trade Commission Act 15 U.S.C. §§ 41-58, as amended
COUNT XVII Fair Debt Collection Practices Act 15 U.S.C. §§ 1692-1692p
COUNT XVIII Consumer Rights Law
COUNT XIX Negligence Florida Statutes 768.041-768.81
COUNT 2a. Florida Business Corporation Act
COUNT XXI Restatement, Third, Restitution and Unjust Enrichment
COUNT XXII Restatement, Second, Torts
COUNT XXIII Florida Statutes 817.2341 False or misleading statements or supporting documents; penalty.
COUNT XXIV Florida Statutes 817.235 Personl property; removing or altering identification marks.
COUNT XXV Florida Statutes 817.38 Simulated process.
COUNT XXVI Florida Statutes817.39 Simulated forms of court or legal process, or official seal or stationery; publication, sale or circulation unlawful; penalty.
COUNT XXVII Florida Statutes817.569 Criminal use of a public record or public records information; penalties.
COUNT XXVIII Florida Statutes 817.03 Making false statement to obtain property or credit.
COUNT XXIX Abuse of Process
COUNT XXX 12 U.S.C. § 5538 Mortgage-Related Provisions of the Omnibus Appropriations Act of 2009, Title VI, Section 626.
COUNT XXXI Florida Statutes 817.034 Florida Communications Fraud Act. 4) OFFENSES.—

Affidavit at 4-7.

*This began an almost four-year diatribe of frivolous and vexatious filings by Jackson which had the effect of thwarting a valid foreclosure action while consuming court and clerk time, energy, and resources that were denied to the other legitimate litigants seeking justice in this circuit. See* Docket Entries ## 17, 22, 23, 25, 30, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 82, 83, 86, 87, 88, 90, 92, 93, 94, 95, 143, 150, 151, 152, 155, 156, 158, 160, 161, 162, 163, 167, 169, 170, 174, 175, 176, 177, 178, 179, 180, 183, 184, 186, 187, 188, 189, 190, 191, 194, 195, 198, 199, 200, 201, 203, 205, and 206.

The plaintiff and the Court tried on multiple occasions to curb or stop these litigation abuses and frivolous filings. *See* Docket Entries ## 84, 85, 89, 91, 96, 102, 108, 111, 120, 122, 132, 139, 146, 164, and 185.

The Clerk has had to close and then re-open the case several times. *See* Docket Entries ## 144, 157, 172, and 198.

Although Jackson could not be bothered to attend the show cause hearing today, even after the Court accommodated her request to appear remotely, she still was able to file a rambling, frivolous 32-page response to the amended order to show cause just one hour prior to the hearing. This has been her pattern—clog the system with frivolous papers that generate unnecessary work and then fail to appear for hearings.

Jackson was properly noticed for the show cause hearing today and was given reasonable time to prepare. She ignored the notice and did not attend. The Court did, however, read and consider the papers she filed in response to the order to show cause. They are completely without merit.

The Court concludes by unrebutted, overwhelming evidence that Jackson is a vexatious litigant by any definition or standard, common law or statutory.

Accordingly, it is ORDERED and ADJUDGED that

1. The motion is GRANTED.

2. Tamica Jackson is PROHIBITED from filing any paper in the Second Judicial Circuit without the signature of an attorney licensed to practice law in Florida and who is in good standing with the Florida Bar, effective immediately. The Clerk will not accept any filing that does not comply with this requirement.

* * *

**Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household members—Constructive knowledge of insurer—Insurer waived right to rescind policy where unrebutted evidence shows that insured disclosed additional non-driving household members to insurer's agent, who decided not to list members on application**

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DESTANEE MARTINEZ, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 22-000732-CI. May 23, 2023. Thane Covert, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant.

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

THIS MATTER having come before the court on May 1, 2023 on Defendant's Motion for Final Summary Judgment. The Court, having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, it is hereby ORDERED AND ADJUDGED as follows:

1. Direct rescinded the subject policy and then filed this declaratory action. In support of its rescission, Direct claims that Defendant Martinez made a material misrepresentation on the application for insurance by failing to disclose all drivers and/or household members.

2. Defendant Martinez moved for final summary judgment and attached affidavits from Martinez, as well as Martinez' mother, Diana Inostroza. Per said affidavits, Martinez contends that on September 29, 2020, she specifically called the Direct General Insurance Agency and during the application process, she told Direct's agent that she was living with her mother and her sister. Direct's agent then asked if any of the household members drove the insured vehicle. Martinez responded that no one else drove her vehicle and that Direct's agent made the decision not to list any of the household members anywhere on the application for insurance.

3. Martinez' affidavits were unrebutted by Direct. As such, this Court finds that there is no genuine issue of material fact. Direct waived their right to rescind the subject policy as Direct had actual and/or constructive knowledge of the household members, which is

the basis of the alleged misrepresentation. *Johnson v. Life Ins. Co.,* 52 So.2d at 813 (Fla. 1951).

4. As such, Defendant's Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

**Dissolution of marriage—Equitable distribution—Real property—Business—Valuation—Court does not have jurisdiction to partition foreign vacation property but does have authority to order that wife execute quitclaim deed in favor of husband—Most equitable date for valuation of corporations that flip properties is date of trial, not date of filing petition for dissolution—Where corporations have more liabilities than assets, value is zero, not a negative value—All shares in corporations are distributed to husband at value of $0 for purposes of equitable distribution—Debts incurred by husband for attorney's fees associated with litigation against corporation and himself are not included in equitable distribution calculation—Debt owed to law firm is corporate debt, not husband's personal debt, and personal loan that husband took out to pay fees was taken out after filing of petition—Alimony not awarded to wife—Husband has no ability to pay alimony, and monthly deficit in wife's living expenses will be covered by significant amount she will receive from equitable distribution—Child support and retroactive support payments calculated**

In re: the Marriage of: PATRICIA ELVIRA MEDRANO DIAZ, Petitioner, v. ROBERT MICKEL MEDRANO DIAZ, Respondent. Circuit Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019-DR-2856 DC. May 8, 2023. Eric J. Netcher, Judge. Counsel: Adam H. Sudbury, Apellie Legal, Orlando, for Petitioner. Michelle Lebron, Lebron Law PLLC, Kissimmee, for Respondent.

**Final Judgment of Dissolution of Marriage**

This action came before the Court on March 24, 2023 and March 27, 2023 for trial on the Petition for Dissolution of Marriage (filed 7/11/2019) and the Counter-Petition (filed 8/15/2019). The parties and their respective counsel appeared. The Court heard testimony from both parties, Petitioner's expert CPA (Gary Kane), Respondent's expert CPA (Robert Crews), and an attorney and real estate agent from the Dominican Republic (Dioneris Castillo). The Court has also reviewed the documentary evidence admitted. The Court finds and concludes as follows.[1]

**1. Jurisdiction and Dissolution**

The parties were married on November 18, 2000 in California. The Court has jurisdiction as the parties were residents of Florida for more than six months prior to the filing of the petition. The marriage between the parties is irretrievably broken, and the legal bond of marriage between the parties is dissolved.

**2. Agreed Parenting Plan**

There were three children born of the marriage. Only one is still a minor—[Editor's note: Name and birth date omitted]. Before trial, the parties agreed to a Parenting Plan. Attached as Exhibit A to this Final Judgment is the parties' agreed Parenting Plan. The Parenting Plan is in the best interest of the child. The Court adopts the agreed Parenting Plan. Both parties are ordered to comply with its terms.

**3. Equitable Distribution**

The parties have several marital assets and liabilities. The Court "must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors." § 61.075(1), Fla. Stat. Here, there is no justification for an unequal distribution. The various assets and liabilities are addressed in turn.

**a. Stone Acres Circle Property**

The parties' marital home was located at [Editor's note: Address redacted] Saint Cloud, Florida 34771. The home was titled in the names of the Husband and third-party Respondent Richard A. Smith. The parties reached an agreement to sell the home, and the total proceeds ($195,555.74) were held in trust. Before trial, the parties (including Smith) reached a settlement agreement regarding the distribution of the funds. *See* (Settlement Agreement filed 3/8/2023). Smith received a third, and the other two-thirds is the marital portion. To effectuate an equitable distribution (as will become more apparent below), the total amount of $130,370.50 is distributed to the Wife. The Wife is entitled to the entire amount being held in trust.

**b. Dominican Republic Property**

The parties own a vacation home in the Dominican Republic located at Camino 5, Finquitas Gloria, Sabana Uvero, Paya, Bani, Provinia Peravia. The property is owned free and clear. It is titled in the Husband's name alone. The petition originally sought partition of the Dominican Republic property—relief which this Court lacks jurisdiction to grant. *See Polkowski v. Polkowski,* 854 So. 2d 286 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2173a] (trial court lacked *in rem* jurisdiction to order the partition and sale of North Carolina property). The parties agreed (in principle) during this litigation to sell the property and split the proceeds. But the details were not agreed to, and the sale never came to fruition. For a history of the parties' dispute in this regard, the Court refers to the Court's Order on Second Motion for Temporary Relief and Motion to Direct Sale of Investment Property (filed 9/12/2022) and Order on Multiple Motions Following January 3, 2023 Hearing (filed 1/6/2023).

The history, while instructive, is not particular relevant at this point. What is important now is that the Court has personal jurisdiction over the parties. Thus, the Court can enter an *in personam* decree requiring one party to execute a quitclaim deed. *See Iannazzo v. Stanson,* 927 So. 2d 1005, 1007 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1099a] ("An out-of-state court may render a judgment affecting property located in Florida so long as the out-of-state court has jurisdiction over the parties to the lawsuit."); *Gardiner v. Gardiner,* 705 So. 2d 1018, 1020 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D423a] ("The New York court had jurisdiction over the parties and could order Robert to transfer his interest in the Florida property."); *Hirchert Fam. Tr. v. Hirchert,* 65 So. 3d 548, 551 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1290b] (collecting cases).

The fact that the property at issue is located in another country (and not just another state) does not change the Court's authority to issue *in personam* decrees directed at the parties. The United States Supreme Court has described the following "well-recognized principle":

> [W]hen the subject-matter of a suit in a court of equity is within another state *or country,* but the parties [are] within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted.

*Fall v. Eastin,* 215 U.S. 1, 11 (1909) (emphasis on "or country" added).

The Court's authority comes from the fact that it has personal jurisdiction over the parties. Given that the Court has personal jurisdiction, the Court will fashion *in personam* relief. Within 14 days of the date of this Final Judgment, the Wife must execute a quitclaim deed (or the equivalent document in the Dominican Republic) in favor of the Husband with respect to the Dominican Republic property.

The Court will also value the property for purposes of equitable distribution. The Court can do this, despite the fact that the property is located out of state. *See Marconi v. Erturk,* 293 So. 3d 19, 21 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D639a] (remanding to trial court

to take additional testimony to determine the proper valuation of out-of-state property for purposes of equitable distribution). There was not significant evidence presented regarding the valuation of the property. The evidence the Court has regarding value is the parties' financial affidavits and the Husband's testimony. No expert testimony regarding value was presented.

"In determining the value of assets, a trial court may rely on one spouse's testimony where neither presents expert testimony." *Marquez v. Lopez,* 187 So. 3d 335, 337 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D593a]. A property owner can testify as to the property's value. *Marconi,* 293 So. 3d at 20. "And a party's financial affidavit may constitute competent evidence of value if the party owns the property." *Id.*

The Wife did not testify as a value. But her three financial affidavits (all in evidence) valued the property. Her first (dated 7/11/2019) valued the property at $280,000; her second (dated 1/25/2022) valued it at $240,000; and her third (dated 1/17/2023) valued it at $330,000. The Husband's first affidavit (dated 11/25/2019) valued the property at $180,000; his second affidavit (dated 7/23/2021) valued it at $155,000; and his third affidavit (dated 1/17/2023) valued it at $161,000. The Husband's most recent valuation is based on a contract he entered into for the sale of the property for $161,000. The sale has not occurred due to this divorce litigation and the filing by the Wife of a *lis pendens* in the Dominican Republic.

The Court accepts the valuation of $161,000 for purposes of equitable distribution. On this record, the best evidence of value is what a willing buyer and a willing seller have agreed to. The Court utilizes a date of valuation of January 17, 2023 (the date of the Husband's most recent financial affidavit) and finds that the Dominican Republic property has a value of $161,000. The Husband is assigned the total value of the property in the Court's equitable distribution scheme.

**c. G7 Global Investments, Inc. and Robert Michael & Company, Inc.**

The Husband is the 100% shareholder of two corporate entities that the parties agree are marital—G7 Global Investments, Inc. and Robert Michael & Company, Inc. The Husband is involved in the real estate business, primarily flipping properties. The G7 entity acquires the properties. The Robert Michael & Company entity manages and sells the properties. Each party had an expert CPA testify regarding the valuation for the businesses. The Wife seeks to utilize the date of filing the petition (7/11/2019) as the date of valuation. The Husband argues that the date of trial should be used given the nature of the businesses.

The proper valuation date for marital assets "is the date or dates as the judge determines is just and equitable under the circumstances." § 61.075(7), Fla. Stat. Given that the businesses involve flipping properties, both experts agreed that the best method for valuing the entities was the net asset valuation method (subtracting liabilities from assets to get a net value of the entity). The Wife's expert CPA utilized a date of valuation of July 11, 2019. He opined that, as of that date, the net value of G7 was $278,180. He also concluded that Robert Michael & Co. had a negative valuation. But he opined that the negative value made the actual value of the marital ownership interest to be zero.

The Husband's expert CPA utilized December 31, 2022 (the closest date he could get to trial) as the date of valuation. Both entities had a negative value under his analysis. Robert Michael & Co. was valued at negative $15,869. And G7 was valued at negative $377,284. These negative valuations were based on significant corporate debts and liabilities incurred by the companies.

The Court agrees with the Husband that the more recent date of valuation is more just and equitable under the circumstances. The businesses flip properties. There are frequent fluctuations of properties being purchased and then sold. The snapshot that the Wife's expert attempted to take from July 11, 2019, with limited information, is not reliable.

Notably, the Wife did not argue that the businesses were actually much more valuable at the time of trial. Her position was merely that the date of filing should be used for value. But " 'it is error to include in the equitable distribution scheme assets or sums that have been diminished or depleted during the dissolution proceedings' unless the depletion was the result of misconduct." *Tillman v. Altunay,* 44 So. 3d 1201, 1203 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2155a] (quoting *Bush v. Bush,* 824 So. 2d 293, 294 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1896b]). The evidence does not support a finding of misconduct. The Court will utilize the more recent date of valuation.

That said, the value of the marital property (the 100% ownership interest in the two corporate entities) is not negative simply because the businesses have more liabilities than assets. The value is zero. The lodestar for determining business valuation is the fair market value. "The valuation of a business is calculated by determining the fair market value of the business, which is the amount a willing buyer and a willing seller would exchange assets absent duress." *Christians v. Christians,* 732 So. 2d 47 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1218b]. There is no willing buyer that would pay the Husband to acquire the corporations' significant liabilities.

G7 and Robert Michael & Co. are both corporate entities. The Husband and the Wife are insulated from liability for the corporations' debts. *See Stock v. Stock,* 693 So. 2d 1080, 1085 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1256b] (negative value of corporation owned by parties made no impact on wife's percentage share of marital assets and debts because the parties were insulated from liability for those debts by virtue of its corporate status). The corporate debts are the responsibility of the corporate entities. And there was not sufficient evidence that would permit the piercing of the corporate veil.[2] Nor was there evidence that the Husband had personally guaranteed the various loans and other debts accumulated by the corporate entities.

The corporate debts are not marital debts to be included in the equitable distribution scheme. The marital asset is the 100% ownership interest in the two corporations. And the fair market value of the shares of G7 and Robert Michael & Co. is zero. They are not worth anything given the fact that the corporations' debts outnumber their assets. The Court distributes the shares in the corporations to the Husband, and he is assigned $0 for the purposes of equitable distribution.

**d. Bank Accounts**

The parties had several bank accounts at the time of filing this action (7/11/2019). The parties stipulated to the valuations of these accounts at the date of filing and the distribution of the martial assets. The agreed distributions[3] are as follows [Editor's note: numbers have been omitted]:

- Bank of America account ending in [####] (in the Husband's name) is valued at $5,692 and is distributed entirely to the Husband. He is assigned $5,692.
- Bank of America account ending in [####] (joint account) is valued at $547 and is distributed equally. The Wife is assigned $274, and the Husband is assigned $274.
- Navy Federal Credit Union account ending in [####] (in the Wife's name) is valued at $379 and is distributed entirely to the Wife. She is assigned $379.
- Navy Federal Credit Union account ending in [####] (in the Wife's name) is valued at $5 and is distributed entirely to the Wife. She is assigned $5.

When totaling these numbers, the Husband is assigned $5,966 from the bank accounts; and the Wife is assigned $658 from the bank accounts.

**e. Vehicles (assets and liabilities)**

There are two marital vehicles—a 2009 Mercedes Benz and a 2003 Lexus GX470. The parties stipulated to the date of valuation (10/25/2022), value, and distribution of these vehicles (again, based on the Husband's proposed equitable distribution worksheet). The Mercedes is valued at $5,607 and is distributed to the Husband. The Lexus is valued at $2,000 and is distributed to the Husband.

As of the time of filing, there were outstanding amounts owed for a vehicle loan from Navy Federal Credit Union. The amount owed as of July 9, 2019 was $9,626. This debt is distributed to the Husband. Thus, the total amount assigned to the Husband for the vehicles when factoring in the asset and liability value is a negative value ($2,019). The Husband is assigned negative $2,019 in the equitable distribution scheme for the vehicle assets and debts.

**f. Farmer's Annuity**

The Husband had an annuity from Farmer's which is marital. As of December 31, 2018, the value of the annuity was $67. There was no dispute regarding this value and the date of valuation. This amount is accepted; the annuity is distributed to the Husband; and he is assigned $67 for purposes of the equitable distribution scheme.

**g. Credit Cards**

There are two credit cards that had marital debt at the time of filing. Both the cards were in the Husband's name. The parties agreed regarding the date of valuation and value of these debts. There was a Synchrony credit card ending in [####] with $37 in debt as of July 5, 2019. And there was a Discover card ending in [####] with $22 in debt as of July 15, 2019. These debts are distributed to the Husband, and he is assigned $59 in credit card debt for purposes of the equitable distribution scheme.

**h. IRS Tax Liabilities**

The parties have martial tax liability to the IRS as a result of penalties and back payments for the years 2015, 2016, 2017, 2018, and 2019. There is no dispute that the amounts owed for each year are the following: $2,544.56 for 2015, $6,993.89 for 2016, $6,649.89 for 2018, and $3,121.54 for 2019. This amounts to $19,309.88 that is owed to the IRS for the years 2015 through the end of 2019. The only dispute is whether the entire amount for 2019 should be included as the martial portion because July 11, 2019 is the date of filing. The Wife wants 2019 to be pro-rated, and the Husband wants the entire amount included.

Because the parties did not have a separation agreement, the "cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is . . . the date of the filing of a petition for dissolution of marriage." § 61.075(7), Fla. Stat. In 2019, the Husband filed his taxes as "married filing separately." *See* (Joint Exhibit 11). Thus, the Court agrees that pro-rating 2019 IRS liabilities is the better approach. The marital portion is cut off as of July 11, 2019, and it cannot be said that the debts are joint because the Husband filed separately.

Through July 11, 2019 is 52.6% of the year. Therefore, the marital portion of the 2019 IRS tax liability is $1,642.02. The total amount of marital IRS tax liability from 2015 through July 11, 2019 is $17,830.36. The total amount of the IRS tax liability is distributed to the Husband, and he is assigned the total of this debt for purposes of the equitable distribution scheme.

**i. Cornerstone Law Firm Attorney's Fees**

The Husband incurred debts to pay for attorney's fees associated with the litigation against G7 and himself. The balance owed to the Cornerstone Law Firm as of December 5, 2022 was $17,968.95. *See* (Respondent's Exhibit 2). But this amount was owed by G7 Global Investments, Inc. and not the Husband personally. Thus, it is not a marital debt. It is factored into the business valuation discussed above. Moreover, from the Cornerstone invoice admitted at trial (Respondent's Exhibit 2), these fees were incurred in 2022 (well after the date of filing this action).

The Husband also testified that he personally took out a loan to pay attorney's fees. The loan amount was $32,000 plus interest. The balance as of December 31, 2022 was $35,393.30. This personal loan was taken out after this dissolution action was filed. Thus, it is not a marital debt. None of the debts related to attorney's fees for the lawsuit against G7 and the Husband are included in the equitable distribution scheme.

**j. Equalization Payment**

Section 61.075(10)(a) provides that the court may "order a monetary payment in a lump sum or in installments paid over a fixed period of time" in order to "do equity between the parties." Here, the total value of the marital assets and liabilities being distributed is $278,153.14. An equal distribution would mean each party would receive $139,076.57 in assets and liabilities. The Husband is receiving a value of $147,124.64 in assets and liabilities. The Wife is receiving a value of $131,028.50 in assets and liabilities. Thus, the Husband owes an equalization payment to the Wife in the amount of $8,048.07. A money judgment in the amount of $8,048.07 is entered against the Husband in favor of the Wife, with interest running at the statutory rate of 6.58% per annum.

**4. Alimony**

The Wife pled a claim for alimony. "In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance." § 61.08(2), Fla. Stat. At trial, the Wife conceded that the evidence did not support a finding that the Husband has the ability to pay alimony. However, she still argued that she had a need for alimony and that the Court should therefore award nominal alimony.

The Wife's net monthly income is $3,426.80. She has $2,466.31 in household expenses. This consists of all household expenses listed on her most recent financial affidavit minus the $234.97 expense for a storage unit. The Wife testified that the only thing being maintained in the storage unit is one sofa. That expense will not continue. And if the expense is continued, it is the product of unnecessary imprudence. She has $523.25 in monthly automobile expenses. She has $760 in other expenses. This amount is derived from the expenses included in her financial affidavit under other monthly expenses minus the following expenses which the Wife's testimony illustrated should not be included: $195 for monthly attorney fee retainer, $350 for real estate memberships, $17.99 for electronic key, and $15 for monthly education expenses.

This leaves the Wife with a monthly deficit of $322.76.[4] But, as discussed above, the Wife is receiving a significant amount of money in equitable distribution. She will receive $130,370.50 almost immediately from the funds being held in trust for the sell of the Stone Acres Circle property. And she has a money judgment against the Husband in the amount of $8,048.07 for the equalizing payment. In total, this is $138,418.57 in liquid cash. Even if the money earned no interest at all, these funds from equitable distribution could cover the Wife's $322.76 deficit for almost 36 years.[5]

The parties were in a long-term marriage. The Court appreciates that there is a rebuttable presumption that permanent alimony is appropriate after a long-term marriage. *See Frerking v. Stacy,* 266 So. 3d 273, 275 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D717a]. But that presumption is rebutted here. As conceded by the Wife, the Husband does not have the ability to pay alimony. And the record does not support a finding that the Wife has a need for alimony.

At bottom, the parties are leaving this marriage in roughly equal positions. Their incomes are similar. The Wife is receiving the funds from the sale of the Stone Acres Circle property, and the Husband is receiving the Dominican Republic property. The Wife has the capacity and means to support herself. No alimony is awarded.

**5. Child Support**

The Court finds that there is a need for child support and that the Husband has the ability to pay. Ongoing and retroactive child support are addressed in turn.

**a. Ongoing**

Attached as Exhibit B to this Final Judgment is the Court's child support guidelines worksheet which reflects the Court's findings regarding child support. Based on the Husband's CPA expert, his monthly gross income is $4,203. And after deductions for income taxes ($102), FICA ($143), and Medicare ($33), his net monthly income is $3,924. The Wife did not challenge this net monthly number and accepts it for purposes of child support. The Wife's gross monthly income is $4,304.67. After income taxes ($282.42), FICA ($329), and health insurance premiums for herself ($266.45), her monthly net income is $3,426.80. The Wife pays $115 per month for the child's health insurance. The Wife also pays $53 per week for daycare during the weeks that the child is in school (42 weeks of the year). This amounts to $185.50 per month in child care expenses ($53 x 42 ÷ 12). Under the agreed parenting plan, the Husband has 100 overnights in comparison to the Wife's 265 overnights.

Under the child support guidelines, the Husband's ongoing monthly obligation for the minor child is $643.34. Beginning June 1, 2023, the Husband must pay to the Wife for support of the minor child the sum of $643.34 per month. This monthly ongoing obligation will remain until August 16, 2032 when the child turns 18. The obligation will also terminate if the child becomes emancipated, marries, joins the armed services, dies, or becomes self-supporting. The obligation may continue while the child is 18 and still in high school performing in good faith with a reasonable expectation of graduation before the age of 19 until the child graduates from high school, but in no event past the nineteenth birthday.

The Husband must pay court-ordered child support through the State of Florida Disbursement Unit (FLSDU), together with the applicable 4% of the total payment per month, or $5.25., whichever is less, charged by the Clerk. Under section 61.1301, Florida Statutes, the Court will issue a separate income deduction order for payment of the support. The Husband's counsel will prepare the proposed income deduction order consistent with this Final Judgment, provide to opposing counsel for review, and then provide to the Court for review and execution. Until the income deduction order is in place and income is being deducted, the Husband is responsible for making timely payments directly to the Florida Disbursement Unit.

**b. Retroactive**

As to retroactive child support, the Wife seeks retroactive child support back to July 2021 when the marital home was sold. The Court will calculate retroactive child support from July 2021 through the end of May 2023—a 23-month period. In determining retroactive child support, the Court "shall apply the guidelines schedule in effect at the time of the hearing subject to the obligor's demonstration of his or her actual income . . . during the retroactive period." § 61.30(17)(a), Fla. Stat. When the actual income is not demonstrated, the Court must use "the obligor's income at the time of the hearing in computing child support for the retroactive period."

On this record, the Court concludes that the Husband has not demonstrated his "actual income" during the retroactive period. Thus, the guidelines schedule in effect at trial will be used for the retroactive period. The retroactive child support obligation is the same as the ongoing—$643.34 per month. For the entire 23-month retroactive period, the Husband would owe $14,796.82 in retroactive child support.

But the Court must also consider all "actual payments made" during the retroactive period for the benefit of the child. § 61.30(17)(b), Fla. Stat. A temporary child support order was entered in December 2020 providing that the Husband had a temporary monthly child support obligation of $563.31. The Husband started paying in January 2021. However, his monthly payments were not the complete amount. He was paying $558.06 per month (which is $5.25 less than the temporary order required). *See* (Petitioner's Exhibit 14). It was supposed to be $563.31 per month *plus* the $5.25 fee. Additionally, the December 2020 temporary order made child support effective as of July 1, 2020. This was a product of the fact that the hearing was in June 2020, but the Order was not entered until December. Therefore, an arrearage of the temporary support accrued from July 2020 through the first payment in January 2021.

Beginning in January 2021, the Husband made all payments timely (only $5.25 short each month). The Husband made a July 2021 payment of $558.06 plus an additional payment of $558.06 to begin paying down his arrearage. And from August 2021 through the trial, the Husband was paying $670.75 per month. The additional amount was presumably to pay down the arrearage that had accumulated between the time of the hearing and the order. For purposes of retroactive child support, the Court will credit the Husband $558.06 for July 2021 and $563.31 per month for the period from August 2021 through the end of May 2023.[6] The Court will not credit the Husband for the additional payment of $558.06 in July 2021 or the amounts on top of the Court-ordered $563.31 from August 2021 to present because those amounts were to pay for the arrearage that accrued from July 2020 through December 2020.

In total, the Husband is credited for $12,950.88 in child support payments made from July 2021 through May 2023. When giving this credit, the total amount of retroactive child support owed by the Husband to the Wife is $1,845.94. To pay his retroactive child support obligation, the Husband must pay an additional $100.00 per month on top of his ongoing child support obligation until the retroactive obligation is satisfied. The retroactive support payments will be paid in the same manner as ongoing support and will be included in the income deduction order.

**6. Conclusion**

In sum, the Court concludes as follows:

a. The marriage between the parties is irretrievably broken, and the legal bond of marriage between the parties is dissolved.

b. The Court adopts the agreed Parenting Plan attached as Exhibit A. The Parenting Plan is in the best interests of the minor child, and the parties are ordered to comply with its terms.

c. The following assets and liabilities are distributed to Wife: the entire remaining proceeds from the sale of the Stone Acre Circle property ($130,370.50); the value at the time of filing of Navy Federal Credit Union accounts ending in 9229 and 6648 ($384); and half the value of joint Bank of America account ending in 6349 ($274). The value of assets distributed to the Wife is $131,028.50.

d. The following assets and liabilities are distributed to Husband or assigned to him for purposes of equitable distribution: the Dominican Republic property ($161,000); G7 Global Investments, Inc. and Robert Michael & Company, Inc. ($0); the value of Bank of America account ending in 2095 ($5,692); half the value of joint Bank of America Account ending in 6349 ($274); the 2009 Mercedes Benz and 2003 Lexus GX470, along with the vehicle debt (-$2,019); the Farmer's Annuity ($67); the credit card debt at the time of filing (-$59); and the martial portion of the IRS tax liabilities from 2015 through 2019 (-$17,830.36) The total net value of the assets distrib-

uted to the Husband is $147,124.64.

e. Within 14 days of the date of this Final Judgment, the Wife must execute a quitclaim deed (or the equivalent document in the Dominican Republic) in favor of the Husband with respect to the Dominican Republic property.

f. The Husband owes the Wife an equalization payment in the amount of $8,048.07. This Final Judgment constitutes a money judgment in the amount of $8,048.07 against the Husband Robert Mickel Medrano Diaz in favor of the Wife Patricia Elvira Medrano Diaz, with interest running at the rate of 6.58% per annum.

g.The Wife conceded that the Husband does not have the ability to pay alimony. And the Court concludes that the Wife did not establish the need for alimony, especially in light of the amount she will receive in equitable distribution. No alimony is awarded.

h. Ongoing child support is established at $643.34. per month owed by the Husband beginning June 1, 2023.

i. The Husband owes a total of $1,845.94. in retroactive child support for the period from July 2021 through May 2023. The Husband will pay an additional $100 per month on top of the ongoing child support obligation to pay down his retroactive child support obligation.

j. Payment of child support will be through the State of Florida Disbursement Unit. The Husband's counsel will prepare a proposed income deduction order for the Court's review and execution.

k. Neither party established need or the other party's ability to pay attorney's fees. No attorney's fees are awarded.

l. The parties are ordered to cooperate and to execute any documents necessary to ensure the requirements of this Final Judgment are met.

m. The Court retains jurisdiction over the parties and the subject matter to enforce or modify this Final Judgment.

n. The Clerk is directed to close any pending motions or petitions and close this case.

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[1]The statements of fact in this Final Judgment represent the Court's findings based on the evidence admitted at trial.

[2]The Wife originally sought to pierce the corporate veil in her dissolution petition (presumably for other reasons). She did not press this claim at trial.

[3]These numbers derive from the Husband's proposed equitable distribution worksheet (submitted with his pretrial statement). The Wife's counsel indicated at trial that he agreed to the valuations and distributions.

[4]The Wife's listed expenses for the minor child are not included in the alimony need calculation. Those expenses are covered, in part, by child support which is addressed below. Even if they were included, the Court does not accept the amounts listed for each expense. Day care is actually $185.50 per month (not $251). And the Court rejects the $275 monthly number for clothing and uniforms as unrealistic. This reduces the monthly expenses for the minor child to $646.25. As discussed below, the Husband's monthly child support obligation is $643.34.

[5]This estimate was determined as follows: $138,418.57 ÷ $322.76 ÷ 12 which equals 35.74.

[6]The Court is assuming that the Husband has continued to pay under the temporary order and is crediting the Husband for April and May 2023 (even though these months occurred after the trial). If the Court is wrong in this assumption, the parties may resolve the discrepancy privately or seek rehearing.

* * *

**Insurance—Property—Coverage—Burden of proof—Insured has burden to demonstrate that opening in roof that allowed water to intrude into interior of property was caused by a covered peril—Roofer's statement that he repaired roof damage caused by tropical storm does not satisfy burden**

PATRICIA PINARGOTE, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-013038-CA-01. Section CA15. October 8, 2022. Jose Rodriguez, Judge. Counsel: Mark B. Hart, Jimenez Hart & Mazzitelli LLP, for Plaintiff. Andrea M. Franklin, Cole, Scott & Kissane, Hollywood, for Defendant.

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

THIS CAUSE having come before the Court on Defendant's, CITIZENS PROPERTY INSURANCE CORPORATION, Motion for Final Summary Judgment filed on April 19, 2022 and heard in open court on September 16, 2022.

This Court, having been fully advised on the matter, finds as follows:

It is ORDERED AND ADJUDGED that:

1. Plaintiff has the burden of proving that there was a peril-created opening to the roof caused by a windstorm and/or hurricane;
2. Plaintiff's roofer's statement that he repaired the roof damage that was caused by Tropical Storm Irma is not sufficient record evidence to create a material issue of fact as to causation;
3. Plaintiff's record evidence has not demonstrated that a peril-created opening caused damage to the roof resulting in water intrusion to the interior of the property;
4. Plaintiff has not shown that the damages claimed were caused by a covered peril;
5. Plaintiff has not demonstrated that a duty existed for which the Defendant could have been in breach of.

Based on the foregoing, Defendant's ***Motion for Final Summary Judgment*** is hereby **GRANTED**.

* * *

**Torts—Negligence—Motor vehicle accident—Damages—Past and future medical expenses—Evidence—Retroactive application of statute—Section 768.0427, which addresses admissible evidence of past and future medical expenses, is applicable to case pending at time statute was enacted—No merit to argument that statute impairs plaintiffs' right to contract under letters of protection given to medical providers**

SHARON M. SAPP and STACY M. CHANEY, et al., Plaintiffs, v. JAMES BROOKS and J.B. COACHLINE, INC., Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, General Civil Division. Case No. 17-CA-5664. Division E. May 19, 2023. Anne-Leigh Gaylord Moe, Judge. Counsel: David G. Henry, Christopher Borzell, and Nick T. Smith, Morgan & Morgan Tampa, P.A., Lakeland, for Plaintiffs. Heather L. Stover and Justin T. Saar, Odgen, Sullivan, Stover & Saar, P.A., Tampa, for Defendants.

**AMENDED ORDER GRANTING DEFENDANTS' MOTION IN LIMINE**

THIS CAUSE came before the Court at a hearing on Defendants' Motions in Limine Regarding Evidence of Past and Future Medical Treatment or Services Expenses (the "**Motion**"). The hearing occurred on April 21, 2023 and April 24, 2023. David Henry, Esq. and Christopher Borzell, Esq. of Morgan & Morgan represented Plaintiffs Sharon M. Sapp and Stacy M. Chaney. Heather Stover, Esq. and Susan Wilson, Esq. of Ogden & Sullivan represented Defendants James Brooks and J.B. Coachline, Inc.

**I. Introduction**

**A. The Question Presented**

The Motion presents a question about the temporal reach of recently-enacted section 768.0427, Florida Statutes (the "**Statute**"). At the time of the April 2023 hearing on the Motion, both sides agreed that no trial court in Florida has ruled on the applicability of the Statute to pending cases.

Temporal reach of a new statute is an area covered with some frequency in Florida Supreme Court jurisprudence. So much so that, with the limited time trial courts have available to consider issues like this, it can be challenging to reach an unshakeable conviction that no controlling case could have been overlooked. But no one has produced a case that squarely addresses and disposes of the question raised in the Motion.

The question is this: if a new statute is (1) procedural in nature, (2) and the Legislature has provided direction on temporal reach, (3) does the judicial branch follow its precedent on temporal reach of procedural statutes or (4) does it defer to the Legislature's direction?

**B. The Arguments**

Plaintiffs have the easier argument to digest. So easy that, at first blush, it seems that extensive discussion is unwarranted. Plaintiffs argue that the Statute itself is substantive. The temporal reach of substantive statutes is not a difficult part of the law to understand. When a statute is substantive in nature, there are two questions to ask. First, was there clear evidence of legislative intent to apply it retroactively? If the answer is yes, then the second question is this: is retroactive application constitutionally permissible?

The Statute has an effective date of March 24, 2023. And the enacting legislation says "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." The precedent on retroactivity favors Plaintiffs on this being "game over."

But Defendants contend that the statute is *not* substantive. And the analysis is different with procedural statutes. The judicial branch has shown the Legislature an answer key how it interprets the temporal reach of statutes. The Legislature legislates against that background.

The answer key is this:

There is a core assumption that the Legislature makes law for the future.

If a case comes before the court in which one side asks that a new law apply to past conduct or a pending case, then the court will first consider whether the new law is substantive or something else (the "something else" is procedural, remedial, or some combination of the two).

If it is substantive, there are constitutional reasons why the judicial branch must tread carefully when asked to apply a new law to past conduct or a pending case. For that reason, Florida courts will examine the text and identify whether the Legislature expressed a clear intent that the law be applied retroactively. If the statute is substantive and there is no clear intent expressed by the Legislature, then the basic assumption that the Legislature was making law for the future will apply. If the statute is substantive and there *is* a clear expression from the Legislature that retroactive application was intended, then the court will examine whether the Florida Constitution prohibits retroactive application.

If the statute is *not* substantive, and instead is either procedural remedial (or a combination of both), then the constitutional reasons for caution in applying the new law to pending cases does not apply. If it makes sense to apply the new statute to pending cases, the court will do so.

**C. The Facts**

This case involves a motor vehicle accident that occurred on June 9, 2014, on northbound I-275 in Tampa, Florida. When the accident occurred, Plaintiffs Sharon Sapp and Stacy Chaney were passengers on a shuttle bus operated by Defendant James Brooks and owned by Defendant JB Coachline.

At that time, Plaintiffs were covered by Medicare and/or Medicaid health insurance. That insurance would have covered certain of Plaintiffs' medical costs arising from the accident. Rather than rely on Medicare and/or Medicaid, Plaintiffs executed various agreements to pay providers who did not bill insurance, subject to the outcome of this litigation (the "**Letters of Protection**"). Defendants allege that third-party or factoring companies have since purchased the right to receive payments under the letters of protection, including Cash 4 Crash, LLC, Momentum Fundings, LLC, Certified Legal Funding, Inc., and Oasis Legal Finance, LLC.

**D. The Act**

The Statute took effect on March 24, 2023 when Governor DeSantis signed a tort reform bill called HB 837. HB 837 was enacted as Chapter 2023-15, Florida Laws (the "**Act**"). The Act includes the Statute[1] in Section 6 and provides that, in pertinent part, the Statute will read as follows.

(2) ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES.—Evidence offered to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action is admissible as provided in this subsection.

(a) Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment.

(b) Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment or services shall include, but is not limited to, evidence as provided in this paragraph.

1. If the claimant has health care coverage other than Medicare or Medicaid, evidence of the amount which such health care coverage is obligated to pay the health care provider to satisfy the charges for the claimant's incurred medical treatment or services, plus the claimant's share of medical expenses under the insurance contract or regulation.

2. If the claimant has health care coverage but obtains treatment under a letter of protection or otherwise does not submit charges for any health care provider's medical treatment or services to health care coverage, evidence of the amount the claimant's health care coverage would pay the health care provider to satisfy the past unpaid medical charges under the insurance contract or regulation, plus the claimant's share of medical expenses under the insurance contract or regulation, had the claimant obtained medical services or treatment pursuant to the health care coverage.

3. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, evidence of 120 percent of the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

4. If the claimant obtains medical treatment or services under a letter of protection and the health care provider subsequently transfers the right to receive payment under the letter of protection to a third party, evidence of the amount the third party paid or agreed to pay the health care provider in exchange for the right to receive payment pursuant to the letter of protection.

5. Any evidence of reasonable amounts billed to the claimant for medically necessary treatment or medically necessary services provided to the claimant.

(c) Evidence offered to prove the amount of damages for any future medical treatment or services the claimant will receive shall include, but is not limited to, evidence as provided in this paragraph.

1. If the claimant has health care coverage other than Medicare or Medicaid, or is eligible for any such health care coverage, evidence of the amount for which the future charges of health care providers could be satisfied if submitted to such health care coverage, plus the claimant's share of medical expenses under the insurance contract or regulation.

2. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, or is eligible for such health care coverage, evidence of 120 percent of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

3. Any evidence of reasonable future amounts to be billed to the claimant for medically necessary treatment or medically necessary

services.

The Act included a provision in Section 30 that "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." In Section 31, the Act provides that "[t]his act shall take effect upon becoming law."

**E. The Relief Requested in the Motion**

The ink had not dried on the Governor's signature before this case presented the question whether the Statute applies to pending cases like this one. The Motion seeks to:

> (1) allow Plaintiffs to offer only evidence of the amount actually paid by any payer, pursuant to section 768.0427(2), for past medical expenses already paid;
>
> (2) allow Defendants to offer any evidence specifically permitted by section 768.0427(2)(b) regarding unpaid past medical expenses, including evidence of the amount any third-party loan services were paid in return for the right to receive payment under any letters of protection; and
>
> (3) allow Defendants to offer any evidence specifically permitted by section 768.0427(2)(c) for future medical expenses.

**F. The Present Posture of the Case**

This order is rendered in May 2023, during the period that this case was scheduled to be tried. At the same pre-trial hearing where the Motion was argued, other motions in limine were granted in rulings from the bench. Citing a need for additional discovery due to those rulings, Plaintiffs moved for and were granted a continuance of the May 2023 trial.

**II. Analysis**

Whether it comes about by a change in decisional law, a statute, or administrative regulation, a question frequently arises over whether a new or amended law applies to certain case. Nuances abound in the analysis of that question.

**A. What Do the Words Mean?**

**1. Temporal Reach**

"Temporal reach" is a term of art that refers to an analysis that governs to which period of time (and therefore, to which cases) a new law applies.

**2. Prospective, Retrospective, and Retroactive**

The three words used to categorize temporal reach are prospective, retrospective, and retroactive. They are bandied about enough that it is easy to overlook the importance of understanding what they really mean. Defining the terms and appreciating the fact that the meaning of them may change in the context of different types of proceedings is an important first step.

**a. Definitions**

The word "prospective" means "foresighted, forward-looking" and "concerned with or relating to the future: effective in the future." *Webster's Third New Int'l Dictionary* 1821 (2002). Black's Law Dictionary defines a "prospective law" as "[o]ne applicable only to cases which shall arise after its enactment." *Black's Law Dictionary* 1100 (5th ed. 1979).

The word "retroactive" means "operative, finding, and taking effect prior to enactment, promulgation, or imposition." *Webster's Third New Int'l Dictionary* 1940. A "retroactive law" is defined as "those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past." *Black's Law Dictionary* 1184; *see also Webster's Third New Int'l Dictionary* 1940 (defining "retroactive law" as "a law that operates to make criminal or punishable or in any way expressly affects an act done prior to the passing of the law.").

The word "retrospective" means "contemplative of or relative to past events" or "affecting things past." *Webster's Third New Int'l Dictionary* 1941. A "retrospective law" is one

> which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.

*Black's Law Dictionary* 1184.

**b. Meaning in Context**

Even once the definitions are understood, it is important to appreciate that meaning of the words prospective, retroactive, and retrospective will vary based on whether they are discussed in the context of statutory law or decisional law.

**i. Statutory Law**

"As a general, almost invariable rule, a legislature makes law for the future, not the past." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 261 (2012); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union,* 62-63 (1868) (words in a statute should operate prospectively only "unless the words employed show a clear intention that it should have a retrospective effect.").

While in general, the Legislature makes law for the future, so long as it meets a constitutional test, the Legislature can also make law retroactive. A statute is considered "retroactive" if "it would impair rights a party possessed when he acted, increase a party's liability of past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 280 (1997). Retroactive legislation is often enacted in an effort to "readjust[ ] rights and burdens imposed in the past" or "impose a new duty or liability based on past acts." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729-30 (1984). So long as it does not "offend due process" because it is "particularly 'harsh and oppressive,' " retroactive legislation is lawful. *Id.* at 733.

As an example of explicitly retroactive legislation, in 1980 an ERISA bill was enacted with an effective date five months before it was signed into law. *Id.* The purpose of the retroactive effective date was to prevent "opportunistic employers" from withdrawing from plans while Congress was considering the legislation. *Id.* at 723-24.

While not explicitly retroactive, federal legislation meant to compensate disabled coal miners was considered to have retroactive *effect* when it required employers to compensate former employees who left their work in the industry before the act was passed. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 14-15 (1976) ("To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability on past acts.").

**ii. Decisional Law**

In the context of a decisional change in the law, there is a spectrum of prospective application. In *Linkletter v. Walker,* the United States Supreme Court acknowledged that even within the terminology of "prospective" rulings in court cases, there is a range of meaning. 381 U.S. 618, 621-22 (1965) (recognizing that a "purely prospective" decision "does not apply even to the parties before the court."). A purely prospective application is one so future-looking that it will not even apply to the case before the court. *Id.* The more common use of the term prospective in decisional law, though, means that the

decision will apply to the case before the court and will also apply to future cases.

In Florida, the terms "retrospective" and "retroactive" are generally used interchangeably. *Love v. State*, 286 So. 3d 177, 187 n.5 (Fla. 2019) [44 Fla. L. Weekly S293a]. No clear distinction seems to be drawn between those terms in the federal analysis, either.

But a "retrospective" or "retroactive" application of decisional law will often involve disturbing a settled outcome. For example, in *Linkletter,* the Supreme Court considered whether its prior decision in *Mapp v. Ohio* operated retrospectively upon cases finally decided in the period prior to *Mapp. Id. Mapp* held that exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment. *Id.* at 619. Victor Linkletter was convicted of simple burglary in 1959. *Id.* at 621. At the time of his arrest, officers took his keys and used them to enter his home and business, where various items were seized without a warrant. *Id.* Linkletter lost his various appeals, and the Supreme Court of Louisiana affirmed his conviction in February of 1960. *Id.* Months later, *Mapp* was announced and Linkletter filed an application for *habeas corpus*, which was denied, and then sought the same relief in federal court, where it, too, was denied by the trial court. *Id.* On appeal, the federal appellate court found that the searches were too remote from Linkletter's arrest to be constitutional but *Mapp* was not retrospective; as a result, the trial court's denial of habeas corpus was affirmed. *Id.* In making that determination, the Supreme Court noted that retrospective application of *Mapp* would result in "the wholesale release" of previously convicted defendants. *Id.* at 637.

**3. Substantive, Procedural, and Remedial**

A matter is considered substantive if it "defines, creates, or regulates rights—'those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property, and reputation'." *DeLisle v. Crane Co.,* 258 So. 3d 1219, 1224 (Fla. 2018) [43 Fla. L. Weekly S459a] (citing *Allen v. Butterworth,* 756 So. 2d 52, 59 (Fla. 2000) [25 Fla. L. Weekly S277a]).

A matter is considered procedural if it relates to "the form, manner, or means by which substantive law is implemented." *Id.* (citing *In re Fla. Rules of Criminal Procedure,* 272 So. 2d 65, 65 (Fla. 1972)); *see also Kenz v. Miami-Dade Cnty.,* 116 So. 3d 461, 466 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D922c] (change in section 768.0755, which required plaintiff to produce evidence of defendant's actual or constructive knowledge, was procedural and not substantive); *Litvin v. St. Lucie Cnty. Sheriff's Dep't,* 599 So. 2d 1353, 1355 (Fla. 1st DCA 1992) (statutory amendment that imposed an "actual knowledge" threshold in a workers' compensation claim was procedural); *Stuart L. Stein, P.A. v. Miller Indus., Inc.,* 564 So. 2d 539, 540 (Fla. 4th DCA 1990) ("increasing the burden of proof to a 'clear and convincing' standard did not amount to a substantive change in the statutory scheme" and may be applied retroactively); *Larocca v. State,* 289 So. 3d 492, 493 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D99a] ("We apply *Daubert* to the facts of this case because the amendment implementing *Daubert* is procedural and so the change applies retroactively."). "Stated differently, procedural law 'includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Id.* at 1225 (citing *Allen,* 756 So. 2d at 60); *see also id.* (citing *Haven Federal Savings & Loan Ass'n v. Kirian,* 579 So. 2d 730, 732 (Fla. 1991)) ("It is the method of conducting litigation involving rights and corresponding defenses."); *Bionetics Corp. v. Kenniasty,* 69 So. 3d 943, 948 (Fla. 2011) [36 Fla. L. Weekly S69a] (quoting *Massey v. David,* 979 So. 2d 931, 936-37 (Fla. 2008) [33 Fla. L. Weekly S264a]) (" 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses.") (internal quotations omitted). A new procedural statute is "generally held applicable to all pending cases," *Young v. Altenhaus,* 472 So. 2d 1152, 1154 (Fla. 1985), in part because "no one has a vested interest in any given mode of procedure." *State v. Kelly,* 588 So. 2d 595, 597 (Fla. 1st DCA 1991).

It possible for a statute to have qualities that are a blend of more than one of the substantive, remedial, or procedural categories. *Bionetics Corp.,* 69 So. 3d at 948 ("The distinction between substantive and procedural law, however, is not always clear.") And when this is so[2], the court must identify what aspect dominates. *Id.* (citing *State v. Raymond,* 906 So. 2d 1045, 1049 (Fla. 2005) [30 Fla. L. Weekly S500a]) ("[W]hen procedural aspects overwhelm substantive ones, the law may no longer be considered substantive.").

**B. Florida Has Its Own Analytical Framework, Distinct From the Federal One**

Although Florida courts have begun to trend toward the federal courts in many respects, Florida utilizes an analytical framework of temporal reach that is not identical to the federal analysis. At times, Florida decisions cite to the federal precedents without (a) necessarily adopting them wholesale or (b) flagging the differences between the overall approaches. The analysis was already nuanced to begin with for the reasons identified *supra*; the undistinguished differences between the federal and Florida standards could be a reason why this area continues to be challenging in the Florida system. *See, e.g., Federal Express Corp. v. Sabbah,* 357 So. 3d 1283 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D611a] (Gordo, J., concurring in result only) ("express[ing] concern" that "predictability in application of newly amended rules and statutes remains elusive—if not imprecise under our current precedent.").

**1. The Federal Analysis**

Many of the federal cases analyze the issue of temporal reach of a new law in the context of an appellate case. That is yet another nuance that must be teased out. In the case at bar, we are analyzing a new statute that applies to a case that has not yet been tried and in which no final judgment has been entered. This is unlike the question discussed in many of the federal cases, which ask whether to apply a new law passed during an appellate proceeding, after the entry of a final judgment below. With that distinction identified, a cursory review of the cases is still helpful.

In the context of an appeal, the general rule is that a court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711 (1974); *Thorpe v. Housing Auth. of City of Durham,* 393 U.S. 268, 281 (1969) ("The general rule, however, is that that an appellate court must apply the law in effect at the time it renders its decision."). "The same reasoning has been applied where the change was constitutional, statutory, or judicial." *Thorpe v. Housing Auth. of City of Durham,* 393 U.S. 268, 282 (1969).

*Bradley* involved an award of attorneys' fees in a protracted school desegregation case. The suit was initiated as a class action in 1961, and in 1964 the trial court approved a "freedom of choice" plan and awarded nominal attorneys' fees of $75. *Id.* at 701. The plan was affirmed, the appellate court found no error in the nominal fee award, but the Supreme Court vacated the plan and remanded the case. *Id.* On remand, the trial court approved a revised "freedom of choice" plan that was agreed to by the petitioners. *Id.* That revised plan was in operation for about four years. *Id.* In 1968, while the plan was in effect, in a different case called *Green v. County School Board of New*

*Kent County,* the Supreme Court held that the type of plan established in *Bradley* could not stand. *Id.* In 1970, the *Bradley* petitioners then moved for relief in the trial court in light of *Green. Id.* In addition to seeking a new plan, the petitioners also sought an award of reasonable attorneys' fees. *Id.* The trial court awarded counsel over $43,000 in fees between the date of the 1970 motion for fees and the date of the order, noting the absence of any explicit statutory authorization for fees in school desegregation cases but rooting its decision in its general equity power. *Id.* at 706. While the case was again before the appellate court and prior to its decision, Congress passed the Education Amendments of 1972, which granted federal courts the authority to award reasonable attorneys' fees in school desegregation cases. *Id.* at 709. The appellate court determined that the new law did not sustain the allowance of fees because there were no orders pending or appealable when the trial court initially made its fee award or when the new statute became effective. *Id.* at 710.

The Supreme Court began its analysis by "anchor[ing] [its] holding on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. It then considered concerns raised in prior cases about the application of an intervening change in the law to a pending action, which it found countered on (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Id.* at 719-20. Finding that the nature and identity of the parties and the rights involved weighed in favor of application of the new law to the pending case, the court turned to the nature of the impact of the change in the law on those rights. *Id.* at 720-21. Concluding that the intervening change in the law did not alter the impact of the law on the parties' rights, the Court found (1) that the new statute did not create any new substantive obligation on the school board and (2) there was no indication that the Board would have changed its conduct so as to render the litigation unnecessary, if it could have foreseen the change in the law. *Id.* at 720-21.

Citing *Goldstein v. California,* 412 U.S. 546, 551-52 (1983) as an example, the *Bradley* Court acknowledged that the Legislature can expressly provide that a law has only prospective effect, and when it does so the courts follow that lead. *Id.* at 715 n.21. In *Goldstein,* the Court considered federal copyright statutes that were amended by Congress while a case was pending in state courts. *Goldstein,* 412 U.S. at 552. The Court rejected application of the amendment because the statute specifically provided that it was "to be available only to sound recordings 'fixed, published, and copyrighted' on and after February 15, 1972, and before January 1, 1975, and that nothing in Title 17, as amended is to 'be applied retroactively or (to) be construed as affecting in any way any rights with respect to sound recordings fixed before' February 15, 1972." *Id.* at 552.

After *Bradley,* the Supreme Court decided *Landgraf v. USI Film Products,* which established a two-step analysis for considering the temporal reach of a new statute. 511 U.S. 244 (1994). Then, in *Lindh v. Murphy,* 521 U.S. 320 (1997), the court added an additional step. Shortly after *Lindh* was decided, the Third Circuit summarized the *Landgraf / Lindh* framework in *Matthews v. Kidder, Peabody & Co., Inc.* as follows:

> First, we must look for an "unambiguous directive" from Congress as to the temporal reach of a statute. If one is found, we must follow it and our inquiry is done.
>
> In the absence of a clear statement from Congress, we must use normal statutory construction rules to determine if Congress manifested an intent to only apply a statute to future cases. Again, if we find an intent to not apply a statute retrospectively, our inquiry is done.
>
> If neither an express command in either direction nor an intent to apply a statute prospectively is found, we look at the effect that the statute will have. Does it have "retrospective effect," i.e., does it "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed?" Or, conversely, does the statute affect only prospective relief, or change procedural rules, or simply allocate jurisdiction among fora?
>
> If the statute does not have retroactive effect, we apply the usual statutory construction rules to determine whether it should be applied to pending cases.
>
> However, if the statute does have retroactive effect, we employ the strong presumption against applying a statute with retroactive effect to pending cases: At this point, only Congress's clear intent to apply the statute retrospectively will overcome the presumption.

161 F.3d 156, 161 (3d Cir. 1998) (Becker, C.J.) (internal citations and emphasis omitted).

Notably, the first step in the federal approach is to look for an "unambiguous directive" in the enactment. It is only after doing that that the federal courts consider the character of the new law. The case at bar highlights this as a material distinction in the analysis.

**2. The Florida Approach**

In Florida, the test is different. How the test has been articulated has, at times, created some uncertainty.

In *Arrow Air, Inc. v. Walsh,* the Supreme Court considered whether the private sector Whistle-Blower's Act, which became effective on June 7, 1991, could be applied retroactively to impose liability for an employee termination that occurred before the effective date. 645 So. 2d 422, 423 (Fla. 1994). Walsh, the terminated employee, alleged that he was fired on May 15, 1989, in retaliation for reporting safety violations and delaying a flight. *Id.* The trial court granted a motion to dismiss for failure to state a claim on the basis that Florida recognized no cause of action for retaliatory discharge at the time. *Id.* Walsh appealed and the Third District affirmed, but while it considered a motion for rehearing the private sector Whistle-Blower's Act took effect. *Id.* at 423-24. After asking for supplemental briefing, the Third District vacated its decision, reversed the dismissal of Walsh's complaint, and held that because the act was remedial it should be applied to Walsh's pending case on remand. *Id.* at 424.

On review of the Third District's ruling, the Supreme Court acknowledged that there is no presumption in favor of prospective application for remedial statutes; however, it held that the Whistle-Blower's Act was not properly characterized as remedial because it created a new cause of action. *Id.* In the absence of an express statement of legislative intent, the court underscored as a "well-established rule of statutory construction" that there is a "presumption against retroactive application of a law that affects substantive rights, liabilities, or duties." *Id.* at 425. It also underscored that the presumption against retroactivity cannot be overcome by the "mere fact that 'retroactive application of a new statute would vindicate its purpose more fully.' " *Id.*

In *State Farm Mutual Auto Insurance Company v. Laforet,* the Supreme Court held that the Legislature does not have the last word on characterization of a statute as procedural or remedial. 658 So. 2d 55, 59 (Fla. 1995) [20 Fla. L. Weekly S173a]. More importantly, it held that courts may override even a clear expression of intent about temporal reach if it would violate constitutional protections to give effect to that intent. *Id.* In that case, the Court considered whether newly created section 627.727(10), Florida Statutes, was a remedial statute that should be applied retroactively. *Id.* The enacting legislation provided that:

> [t]he purpose of subsection (10) of section 627.727, Florida Statutes, relating to damages, is to reaffirm existing legislative intent, and as such is remedial rather than substantive. This section and section 627.727(10), Florida Statutes shall take effect upon this act becoming

> a law and, as it serves only to reaffirm the original legislative intent, section 627.727(10), Florida Statutes, shall apply to all causes of action accruing after the effective date of section 624.155, Florida Statutes.

*Id.at* 60 (quoting Ch. 92-318, § 80, Laws of Fla.). Because section 624.155 was originally enacted in 1982 and the amendment passed in 1992, the implementing language was interpreted as a clear intent to apply the statute retroactively. *Id.* at 61.

Though the "general rule [is] that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, [and a] procedural or remedial statute is to operate retrospectively," and despite its recognition that the Legislature labeled the statute as remedial and clearly intended to apply the statute retroactively, the Court nevertheless held that the statute could not be applied retroactively. *Id.* In reaching that conclusion, it opined that the statute was, "in substance, a penalty" and "[j]ust because the Legislature labels something as being remedial" that "does not make it so." *Id*.

In *Smiley v. State,* the Supreme Court underscored the importance of constitutional concerns when analyzing temporal reach. 966 So. 2d 330 (2007) [32 Fla. L. Weekly S303b]. It determined that section 776.013, Florida Statutes (2005) did not apply to cases pending at the time the statute became effective. *Id.* at 332. Section 776.013 expanded the right of self-defense by specifically creating "no duty to retreat" in certain situations where deadly force can be used immediately without the need to first retreat. *Id.* at 334. The bill provided that "[t]his act shall take effect October 1, 2005" and the statute carried an effective date of October 1, 2005. 2005 Fla. Sess. Law. Serv. Ch. 2005-27; Fla. Stat. § 776.013.

The defendant, Smiley, was charged with murder in the first degree following a shooting on November 6, 2004. *Smiley,* 996 So. 2d at 332. Smiley claimed self-defense. *Id.* The trial court granted Smiley's request for certain jury instructions based on the new statute, and the State sought review through an emergency petition for writ of certiorari to the Fourth District. *Id.* at 332. The Fourth District held that section 776.013, Florida Statute, does not apply to conduct committed prior to the October 1, 2005 effective date and for that reason, Smiley was not entitled to the jury instructions he requested. *Id.* It further concluded that because the statute was a substantive amendment to Section 775.01, Florida Statutes, it would violate article X, section 9 of the Florida Constitution if it were given retroactive application. *Id.* at 333. Moreover, it found that section 776.013 "was not remedial, which would permit retroactive application" because it created a new right to self-defense with no duty to retreat. *Id*.

The *Smiley* court acknowledged the distinction between changes in statutory law as opposed to decisional law. *Id.* Recognizing that its precedent in *Witt v. State,* 387 So. 2d 922 (Fla. 1980) did not apply because *Witt* only determines when a change in decisional law applies retroactively, the court explained that "a different analysis must be applied to determine the question of whether a change in the *statutory law*, such as section 776.013, should receive retroactive application." *Id.* at 334.

Next, *Smiley* provided that "[i]n the analysis of a change in statutory law, a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law." *Id.* Because remedial statutes or statutes relating to modes of procedure[3] "do not create new or take away vested rights" and "only operate in furtherance of the remedy or confirmation of rights already existing" they "do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes." *Id.* (citing *City of Lakeland v. Catinella,* 129 So. 2d 133, 136 (Fla. 1961)). In the case of a remedial statute, there is no presumption in favor of prospective application and "whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose." *Id.* Finding that section 776.013 significantly changed the affirmative defense available, the *Smiley* court concluded that the change in the law was substantive. *Id.* at 336.

Because section 776.013 was substantive, a presumption of prospective application arose and led to two interrelated inquiries: (1) was there clear evidence of legislative intent to apply the statute retroactively; and (2) if the legislation clearly expresses an intent that it apply retroactively, whether retroactive application constitutionally permissible. *Id.* at 336. Because article X, section 9 provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed" the *Smiley* court determined that it was not necessary to address whether there was legislative intent to apply the statute retroactively, because it would be "constitutionally impermissible" to do so. *Id.* 336-37.

In *Old Port Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.,* the Supreme Court considered whether a right of first refusal was invalid under the rule against perpetuities. 986 So. 2d 1279 (Fla. 2008) [33 Fla. L. Weekly S478a]. Without addressing the substantive/procedural distinction[4], the court held that because the statute did not evidence an intent that it apply retroactively the statute, it did not operate retroactively. *Id.* 1284.

In *Massey v. David,* the Supreme Court considered the constitutionality of a statute limiting recovery of expert witness fees. 979 So. 2d 931 (Fla. 2008) [33 Fla. L. Weekly S264a]. It recognized its past precedent on whether a matter is substantive or procedural:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their person and property. On the other hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof.' " It is the method of conducting litigation involving rights and corresponding defenses.

*Id.* at 936-37 (quoting *Haven Fed. Sav. & Loan Ass'n v. Kirian,* 579 So. 2d 730, 732 (Fla. 1991)).

In *Menendez v. Progressive Express Insurance Company, Inc.,* the Supreme Court considered whether a 2001 amendment to the Florida's Motor Vehicle No-Fault Law—specifically, the personal injury protection ("**PIP**") statute, which created statutory pre-suit provisions—constituted a substantive change in the statute. 35 So. 3d 873, 874 (Fla. 2010) [35 Fla. L. Weekly S222b]. In that case, Cathy Menendez was injured in a car accident on her way to work. *Id.* at 875. After the date of the accident, the Legislature amended the PIP statute to require the pre-suit notice. *Id.* After a period of negotiation, but without complying with the new pre-suit provision, she sued Progressive when it failed to pay PIP benefits. *Id.* The trial court granted summary judgment in favor of Menendez, but the Third District reversed on appeal because, *inter alia*, Menendez failed to comply with the pre-suit provision. *Id.* at 874.

The Court concluded that the Legislature did intend for the statute to apply retroactively, but "even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Id.* at 877. Comparing the amended statute to the prior version, the amended version imposed a new penalty, implicated attorneys' fees, granted the insurer additional time to pay benefits, and delayed the insured's right to institute a cause of action. *Id.* The Court determined that because the amended statute allowed an insurer to avoid an award of attorneys'

fees and delay payment to the insured were substantive changes to the statute, as was the postponement of the insured's ability to bring suit for overdue benefits. *Id.* at 879. For those reasons, the Court concluded that the statutory pre-suit notice provision was substantive, not procedural, and should not be given retroactive application. *Id.* at 880.

In *Florida Insurance Guaranty Association, Inc. v. Devon Neighborhood Association, Inc.,* the Florida Supreme Court considered whether a 2005 amendment to section 627.7015, Florida Statutes applied retroactively. 67 So. 3d 187, 193 (Fla. 2011) [36 Fla. L. Weekly S311a]. In that case, Devon Neighborhood Association ("**Devon**") made a claim for hurricane damage under a commercial residential insurance policy issued in 2004. *Id.* at 189. Devon timely filed a claim with its insurer after damage during Hurricane Wilma in 2005. *Id.* at 190. Devon's insurer became insolvent, so the Florida Insurance Guaranty Association ("**FIGA**") stepped in and assumed responsibility for the claim. *Id.* After Devon filed suit against FIGA, FIGA answered and demanded an appraisal. *Id.* Devon objected to being required to participate in the appraisal process because it had not been provided a notice of the availability of mediation, which was a requirement imposed by a 2005 amendment to section 627.7015, Florida Statutes. *Id.* FIGA argued that the 2005 amendments could not be applied retroactively to the claims under Devon's 2004 policy, the trial court agreed with Devon and denied FIGA's motion to compel the appraisal. *Id.* FIGA took an appeal to the Fourth District, which affirmed the trial court. *Id.* at 191.

On review of the Fourth District's ruling, the Florida Supreme Court noted that the amendments to the statute made two important changes that were effective July 1, 2005. *Id.* at 192. First, the amendments applied a mediation alternative and notice requirement that, prior to the amendments, had not applied to commercial residential insurance policies. *Id.* Second, the amendments added the requirement that if the insurance company failed to provide notice of mediation, then the insured was not required to participate in the appraisal process. *Id.*

The Supreme Court reversed the Fourth District because it failed to apply the correct two-prong test required by the precedent. *Id.* at 194. In doing so, it elaborated on the proper method for analysis of the temporal reach of a statute that is silent as to retroactivity. First, it considered the fact that the Legislature used differing effective dates for various sections, which "indicat[ed] careful thought by the Legislature as to when the various amendments would be given effect." *Id.* at 196. Despite the inclusion of an effective date, which "is considered to be evidence rebutting intent for retroactive application of a law," the Court found "no 'clearly expressed legislative intent' to apply section 627.7015, as amended, retroactively." *Id.* It further explained that, when there is no express legislative command that the statute be retroactive, it is appropriate to consider both the terms of the statue and its purpose when determining if it should be applied retroactively and "[t]his examination may also include consideration of the language, structure, purpose, and legislative history of the enactment." *Id.* at 196-97. The Court ultimately concluded that neither amounted to a sufficiently clear statement of legislative intent for retroactive application. *Id.* at 197. In reaching that conclusion, it rejected Devon's arguments that (1) the absence of a statement that the amendments were inapplicable to existing contracts constituted clear evidence of retroactive intent and (2) the inclusion of a provision in a separate section that stated that the provisions applied to policies entered into or renewed after October 1, 2005 meant that the Legislature necessarily intended some or all of the other provisions to be retroactive. *Id.*

In *Bionetics Corp. v. Kenniasty,* the Supreme Court considered whether the safe harbor provision of section 57.105(4), Florida Statutes, applied to cases where frivolous claims were filed before the safe harbor provision took effect. 69 So. 3d 943 (Fla. 2011) [36 Fla. L. Weekly S69a]. Concluding that the safe harbor provision did not apply in cases filed before the provision took effect, the Court considered the fact that section 57.105 previously awarded fees when there was "a complete absence of a justiciable issue of either law or fact raised by the losing party." *Id.* at 947. Amended as part of the 1999 Tort Reform Act, section 57.105's purpose was to reduce frivolous litigation and "decrease the cost imposed on the civil justice system by broadening the remedies" available when a claim or defense (but not necessarily the entire action) is meritless. *Id.* The statute was amended again in 2002 to add the safe harbor provision. *Id.* The *Bionetics* case was pending in trial court on July 1, 2002, when the safe harbor provision took effect. *Id.*

Considering the safe harbor provision, the *Bionetics* court determined that because it "does more than require the giving of notice" and "creates an opportunity to avoid the sanction of attorney's fees by creating the safe period for withdrawal or amendment of meritless allegations and claims," the provision was substantive. *Id.* at 948. Because "[s]ubstantive statutes are presumed to apply prospectively absent clear legislative intent to the contrary," and given that the statute contained no clear expression of retrospective intent, the Court determined that the safe harbor provision should not apply. *Id.*

It explained that when a statute is found to be substantive, the analysis is (1) first, as a matter of statutory construction, whether the Legislature provided clear intent to apply it retroactively; (2) second, if the legislation expresses such a clear intent to be applied retroactively, whether retroactive application is constitutionally permissible. *Id.* (citing *Metro. Dade County v. Chase Fed. Hous. Corp.,* 737 So. 2d 494, 499 (Fla. 1999) [24 Fla. L. Weekly S267a]). "[T]o determine legislative intent as to retroactivity, this Court looks to both the purpose behind the enactment of the statute and the terms of the statute." *Id.* at 949. Finding that the purpose of the safe harbor provision "is 'to give a pleader a last clear chance to withdraw a frivolous claim or defense . . . or to reconsider a tactic taken primarily for the purpose of unreasonable delay,' " the court then turned to the language of the statute and its enacting legislation. *Id.* at 949. Because both were silent on the forward or backward reach of the safe harbor provision and the enacting legislation simply provided that "[t]his act shall take effect July 1, 2002," the court concluded that the provision applied prospectively only. *Id.* Because the statute was substantive and did not retroactively, the court found that it should not have been applied in pending cases. *Id.*

In *Love v. State,* the Supreme Court returned to the issue of temporal limits of a newly enacted statute in the context of Florida's Stand Your Ground Law. 286 So. 3d 177 (Fla. 2019) [44 Fla. L. Weekly S293a]. In that case, the trial court applied an analysis akin to the federal one. The Supreme Court's analysis in comparison to the trial court's highlights Florida's departure from the "text first" federal approach.

The question in *Love* was whether section 776.032(4), Florida Statutes (2017), which altered the burden of proof at pretrial immunity hearings, applied to pending cases involving criminal conduct alleged to have been committed prior to the effective date of the statute. *Id.* at 179. The bill provided that "[t]his act shall take effect upon becoming a law" and the statute carried an effective date of June 9, 2017. 2017 Fla. Sess. Law Serv. Ch. 2017-72; Fla. Stat. § 776.032.

The defendant, Love, was charged with attempted second-degree murder following an altercation on November 26, 2015 at a nightclub. *Id.* at 181. At the end of the altercation, Love shot the victim as he was about to hit her daughter. *Id.* When the State charged Love, she moved for immunity arguing that the newly enacted amendment in section

776.032(4) applied to her. *Id.* The State argued that section 776.032(4) did not have retroactive application and even if it did, application to pending cases was violative of article X, section 9 of Florida's Constitution and violated Florida's separation of powers. *Id.* Citing *Landgraf,* the trial court first looked to whether there was a clear expression of legislative intent regarding retroactivity. *Id.* Finding no such expression of intent, the trial court next looked to whether the statute was procedural/remedial or substantive. *Id.* Because burden of proof standards are normally considered procedural, the trial court applied the presumption that procedural/remedial statutes are applied to pending cases. *Id.* At that juncture, the trial court determined that (1) because section 776.032(4) created no substantive rights and merely changed the procedure by which a defendant enforces the statutory right to immunity, the statute was procedural; (2) the statute was not violative of article X, section 9 of Florida's Constitution; but (3) the statute infringed upon the court's rulemaking powers and therefore violated the separation of powers. *Id.* at 181-82. On that basis, the trial court held the defendant to a preponderance of the evidence burden of proof for the immunity hearing, following a prior Florida Supreme Court decision, *Bretherick v. State,* 170 So. 3d 766 (Fla. 2015) [40 Fla. L. Weekly S411a].[5] *Id.* The trial court determined that the defendant did not meet the *Bretherick* burden of proof and was no entitled to immunity. *Id.* at 182.

Love petitioned the Third District for a writ of prohibition. *Id.* The Third District denied the petition, but rejected the trial court's conclusions about the statute. *Id.* Recognizing that its decision conflicted with a decision from the Second District, the Third District certified conflict on the question whether section 776.032(4) applied to cases that were pending at the time the statute took effect. *Id.*

The Florida Supreme Court began by recognizing the sometimes-blurry line between substantive and procedural law. *Id.* at 183 ("At the outset, we recognize that sometimes '[t]he distinction between substantive and procedural law is neither simple nor certain.' ") (citing *Caple v. Tuttle's Design-Build, Inc.,* 753 So. 2d 49, 53 (Fla. 2000) [25 Fla. L. Weekly S76a]). It also acknowledged that "some of this Court's general pronouncements regarding the retroactivity of procedural law have been less than precise. Indeed, we acknowledge having been unclear about what it means to give retroactive application to procedural law." *Id.* at 184.

It thereafter concluded that "properly understood, the caselaw compels the conclusions that section 776.032(4) is procedural, applies to all immunity hearings on or after the statute's effective date, and does not implicate article X, section 9." *Id.* It also explained why *Smiley* did not control, pointed to *State v. Garcia*'s explanation of the concepts of procedural and substantive law in the criminal context, and recognized that in civil cases a statute is considered "substantive" if it "created a new substantive right or interfered with vested rights." *Id.* at 185. Because the substantive right to assert immunity was established in 2005, section 776.032(4) did not create a new substantive right and instead "merely altered the 'method of conducting litigation involving' that right," the statute was not substantive. *Id.* at 186. Moreover, the burden of proof in other contexts had been considered procedural in nature and the Supreme Court had repeatedly referred to Stand Your Ground immunity determinations as matters of procedure. *Id.*

After analyzing the statute as procedural, the Court turned to the issue of retroactivity and clarified that, "properly understood, whether a new statute applies in a pending case will generally turn on the posture of the case, not the date of the events giving rise to the case." *Id.* at 186-87. Importantly, "if the new procedure does apply, that is not in and of itself a retrospective application of the statute." *Id.* at 187 (citing *Landgraf,* 511 U.S. at 269-70) ("*Landgraf* generally explained the concept of a retrospective statute: 'A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.' "). Because section 776.032(4) "in no way 'attaches new legal consequences to events completed before its enactment,' " the statute was not truly retrospective even if applied to a pending case. *Id.* (citing *Landgraf,* 511 U.S. at 275) ("procedural matters generally—but not always—do not 'rais[e] concerns about retroactivity' " because there are diminished reliance interests in matters of procedure and rules of procedure "regulate secondary rather than primary conduct").

The *Love* court then went on to clarify that its holding "does not mean that a new procedure applies in all pending cases. Rather, the 'commonsense' application of a new procedure generally 'depends on the posture of the particular case.' " *Id.* at 187. For example, a new rule that governed the filing of complaints would not apply in a case where the complaint had already been filed. *Id.* at 188 (quoting *Landgraf,* 511 U.S. at 275 n.29). Similarly, a new rule of evidence would not require an appellate remand for a new trial. *Id.* It cited its prior ruling in *Lee v. State,* 174 So. 589, 591 (1937), where it dismissed as untimely an appeal brought outside the period established in a statute that took effect after the alleged date of the crime but before a judgment of conviction was entered, even though the statute was "plainly intended to have a prospective operation only," because the statute was procedural in nature. *Id.* In *Lee,* "prospective operation" meant that the new statutory time limit applied to writs of error rendered after the statute became effective. *Id.* at 188. And its decision in *Pearlstein v. King,* 610 So. 2d 445, 445-46 (Fla. 1992), concluded that a new rule giving a 120-day time limit to serve a defendant after initial filing of the complaint should have "prospective application" because it was a rule of procedure, but that "prospective application" meant that the rule applied to complaints filed before the effective date of the rule, but the 120 days ran from the effective date of the rule rather than the date of filing. *Id.*

**C. Constitutional Logic**

Although *Love* shows that it does, no one has presented a case that details *why* Florida has a different analysis of temporal reach than the federal system. But one explanation for the difference is that the federal judicial branch looks to the United States Constitution, and not the Florida Constitution.

There is no reason to assume that Florida charted its own course by accident. In fact, it is imminently logical for Florida to have chosen to analyze temporal reach differently: Florida courts are considering the Florida Constitution. United States Supreme Court Justices owe fidelity to the United States Constitution alone; typically, they need not even think of the Florida Constitution when they decide federal cases. Only judges in Florida proclaim fidelity to the Florida Constitution. *See* Clint Bolick, *Principles of State Constitutional Interpretation,* 52 Ariz. St. L. J. 771, 780 (2021); *see also id.* (noting that if state court judges do not enforce the protections of the state constitution, "who will?" and "if we subordinate state constitutional protections to federal constitutional jurisprudence, we risk sacrificing liberties that were important to our state constitution's framers."). "By both content and their role in our federalist republic, state constitutions are freedom documents. In addition to containing protections for individual rights and constraints on government power that are similar to the national constitution, they contain additional protections that are completely unknown to the United States Constitution." *Id.* at 773.

Florida can—and does—guarantee greater protections in its Constitution than can be found in the United States Constitution. One example of that is the separation of powers. The United States

Constitution separates powers between the three branches of government, of course, but Floridians took separation of powers one step further. In Florida, "no person belonging to one branch shall exercise any powers appertaining to either of the branches unless expressly provided" by the Florida Constitution. *See* art. II, sec. 3.[6] Put simply, in Florida the conception of separation of powers it is not *just* that three branches have different powers and roles in the government. It is also that each branch is *constitutionally prohibited* from exercising powers that belong to the other two.

Article V, section 1 of Florida's Constitution allocates "judicial power" in the judicial branch. Article V, section 2 explains that the judicial power includes the adoption of "rules for the practice and procedure in all courts." Article II, section 3 then operates as a prohibition on legislative encroachment on those powers. So, as a matter of Florida Constitutional law, the Legislature is *constitutionally prohibited* from trumping the judicial branch on the issue of temporal reach of a statute that is about "practice and procedure in [the] courts." It is not an act of judicial restraint for a Florida judge to meekly comply with the Legislature's direction on temporal reach of a procedural statute. In a case like this one, it would violate the Florida Constitution to do so. The situation is not the same in the federal system, where it is not so clear that there cannot be two cooks in the kitchen.

That is not to say that this is the reason why Florida has a different framework. Perhaps there is some other explanation. But, whatever the reason, there is constitutional logic to Florida's approach.

**D. Application of Florida's Temporal Reach Analysis to This Case**

If Plaintiffs were correct that the Statute is substantive (but they are not), the threshold question would have been whether there is clear evidence of legislative intent to apply retroactively. The answer to that question is, of course, no. We know what it looks like when the Legislature gives the court a clear expression of intent for a statute to apply retroactively, and there is nothing like that in the Act. The effective date itself arguably would tell us all we need to know. *See Devon,* 67 So. 3d at 196 ("the Legislature's inclusion of an effective date for an amendment to be considered to be evidence rebutting intent for retroactive intent of a law."). Add to that the language in the enacting legislation and what more would there be to say?

The problem is that Plaintiffs are wrong about the nature of the Statute. While life was breathed into the Statute by broader tort reform legislation that may have substantive components[7], this is not one of the substantive parts. The Statute is either procedural or a hybrid of procedural/remedial.[8] And the Florida rubric on temporal reach of procedural and remedial statutes is to apply them so long as it makes sense to so do given the case's posture.

A reasonable way to double-check the conclusion that this statute is not substantive is this: If we could give Sharon Sapp and Kristy Chaney a time machine that transports them to the moment in time right after this unfortunate accident occurred, is there some obvious thing that they would have done differently? Plaintiffs have not argued that there is, so this exercise is blind. But if they were injured, they would still get medical care as they in fact did. And they would still ask the jury to award them the cost of their past and future medical care, as they plan to do here. It seems like the only material benefit the time machine would give them is an understanding of the amount and quality of the evidence the jury would have to consider about the reasonableness of the cost of that care. But does the Statute deprive Plaintiffs of an opportunity to address the evidence of medical damages with the jury, and argue to the jury that some evidence should be disregarded or given less weight for one reason or another? Not really. And keep in mind, they have always been required to mitigate their damages.

Further on this effort to double-check the conclusion that the Statute is not substantive, the Statute does not eliminate Plaintiffs' cause of action for negligence. It does not shorten the time for them to file their cause of action. It does not add, delete, or change the core elements of the claim; they are still duty, breach, causation, and harm. It does not prohibit recovery for past medical expenses they have already paid, or prevent them from seeking recovery for unpaid charges for medical treatment or services.

What the Statute really accomplishes is a change in the form, manner, or means by which a plaintiff may prove up their claim for medical expenses, paid and unpaid. And, in a sense, it modifies the form, manner, or means by which the defense can prove up its affirmative defense of failure to mitigate damages. Issues regarding proof are generally procedural. *See*, *e.g.*, *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) [27 Fla. L. Weekly S710a]. And in this instance, it is quite clear that the statute relates to the means and methods to prove (or disprove) the issue of damages. *See DeLisle v. Crane Co.*, 258 So. 3d at 1224; *Bionetics Corp.*, 69 So. 3d at 948.

If the pertinent parts of the Statute are anything other than procedural, they are part procedural and part remedial. The extent to which they are remedial is to the extent to which they clarify or right-size the means and methods by which an existing claim or defense may be proven. Or, they are remedial to the extent to which the statute prevents the jury from being misled about what it takes to make plaintiffs whole.

Because the Statute is either procedural or procedural/remedial, the concept of retroactivity—and the general rule against retroactive application—does not apply, as a matter of law. The precedent tells us that the remaining issue is just whether the posture of the case suggests that it is appropriate to apply the new statute.

The posture of this case is as follows. It was filed on June 15, 2017, just shy of six years before the statute was enacted. The auto accident occurred on June 9, 2014. At the pretrial conference held on April 11, 2023, discovery was complete and the case was ready for trial. However, Plaintiffs moved for a continuance of the trial when the Court granted certain defense motions in limine that also relate to the issue of past medical expenses.[9] The continuance was granted. There is now more time for discovery, if anyone needs it. Because of this posture, common sense weighs in favor of application of the statute. Presentation of evidence consistent with the Statute would not unfairly prejudice either party. And allowing other evidence regarding past medical expenses in the manner allowed by the Statute would not put this case into "reverse" in the manner contemplated by the precedent.

An additional argument made by Plaintiffs must be addressed. They have argued that the Statute impairs their right of contract under the Letters of Protection. They cited to *Manning v. Travelers Ins. Co.* for that proposition. 250 So. 2d 872 (Fla. 1982). There are two reasons why *Manning* does not compel denial of the Motion.

First, the case does not quite stand for the cited proposition. In *Manning,* the Florida Supreme Court said this about the Mannings' argument that a new statute impaired their contractual rights with an insurance company: "[w]e [are not] impressed with appellants' argument that the statute impairs the obligation of the contract between Travelers and appellants. In order for a statute to offend the constitutional prohibition against enactment of laws impairing the obligation of contracts, the statute must have the effect of rewriting antecedent contracts, that is, of changing substantive rights of the parties to existing contract." *Id.* at 874. It went on to say that "[t]he guaranty of liberty of contract *was never intended to* withdraw from legislative supervision the making of contracts or *deny to the govern-*

*ment the power to provide restrictive safeguards.* The instant statute is an example of the Legislature's *legitimate* concern with insurance contracts." *Id.* (emphasis added). And although Plaintiffs characterize *Manning* as dealing with retroactivity, that may have been a typographical error. *Manning* does not address retroactivity. *See generally id.*

Second, looking at what *Manning does* say—which is that statutes that impermissibly impair contractual obligations are ones that "change the substantive rights of the parties to an existing contract"—Plaintiffs have not adequately explained how this statute impairs their substantive contractual rights. And they have not adequately explained how the statute impairs the rights of their providers, either.

A satisfying reality about America's system of laws is that, more often than not, the law is genuinely fair and reasonable when time is taken to really consider it. On temporal reach, that seems to be true. There is constitutional logic behind the exacting analysis of new substantive statutes that simply does not apply to procedural or remedial statutes. Some of that ties to the constitutional prohibition on legislative enactments *ex post facto*. The concept of an *ex post facto* law technically only exists in a criminal context, but we do not shut off our traditional notions of fairness and due process when we consider substantive changes in the civil law. So, though we talk about "retroactive" application of substantive statutes, the law on temporal reach of new substantive civil statutes is the same concept behind the *ex post facto* prohibition in the criminal context.

To illustrate this, let's consider fraud. Fraud is both a civil and criminal construct but we can focus on the civil cause of action. Its elements are generally (1) a representation, (2) made by someone who knows that it's really not true, (3) the representation is intended to induce the listener to rely on the untrue statement, and (4) damages.

Now let's consider a hypothetical. On Monday, when all four elements listed above were required for a cause of action for fraud under Florida law, John has a conversation with Ann and asks Ann to give him money for a friend in need. He tells a very sad story about the friend, and details why the friend desperately needs the money. John knows what he is saying is not true. But Ann does not have any money and, despite her compassion for John's friend, she cannot give John the money he requests. On Tuesday, a new fraud statute takes effect. Under that new statute, proof of damages is no longer required to sustain a cause of action for fraud. Although the statute was enacted on Tuesday, the effective date of the statute is Monday (the day of John's conversation with Ann). And just to be very clear about its intent, the Legislature provides that "this act shall be applied retroactively to any acts of fraud committed on or after Monday." Ann finds out that John's story was false and she brings a claim against John under the new statute, alleging that she was defrauded by his statements on Monday. That is an example of a substantive change in a statute, a clear expression of retroactive intent, and a basis for the Court to refuse to apply the statute retroactively. After all, if Ms. Sapp and Ms. Chaney lent John their time machine, he could have avoided the conversation with Ann. The reason this statute is substantive is that it changes what made John liable for fraud. And the constitutional problem is that people have a right to make decisions knowing what the law is. And if the law of fraud would not have held John liable on Monday, how could he be liable on Tuesday?

Now, let's change the hypothetical. Again, there is a new statute but in this hypothetical the elements of fraud do not change; the new statute modifies what evidence Ann can offer at trial to prove it. John has the very same conversation with Ann on Monday. This time, Ann even gives him the money. On Tuesday, the statute changes. Ann sues John. At trial, the court considers a motion in limine that seeks to apply the new statute. This is an example of a procedural change in a statute, and a situation where the trial court must decide whether it makes sense to apply the statute given the status of the case.

Although imperfect, the hypotheticals demonstrate the difference in substantive and procedural changes. There is a "gotcha" problem in the first hypothetical that does not exist in the second. Perhaps Ann cannot introduce some form evidence that would have assisted in proving up her fraud claim, but she can still use other evidence. It may be frustrating to her, but there is no vested right in procedure.

Because we are not dealing with the same "gotcha" concerns that are the heart of the *ex post facto* prohibition, when we deal with procedural and remedial measures neither the concept of retroactive law nor the rule against retroactive application will apply in those instances.

By definition, a procedural law does not affect rights or behavior that it would be unfair to change after the fact. Because there is not the same specter of unfairness and inconsistency with ordered liberty, when the Legislature passes a law that changes a means or method of procedure, then the court will apply that change to pending cases if the courts decide that it would make sense to do so in the exercise of ordinary common sense.

**III. Conclusion**

People doubt institutions these days, and one of Plaintiffs' arguments asserted that anything but a ruling in their favor would "do violence" to the law. While Plaintiffs' passion is understandable given the moment we are in, the significance of these issues, and the relative ease of comprehending their position, for the reasons stated here Plaintiffs are wrong. No "violence" is done here.

The Court cannot make decisions driven by concern over how the parties will feel. However, when the issues are challenging (and, equally critical, time somehow permits) one way the Court can demonstrate respect for everyone involved is to give a fulsome explanation of its thought process. Without it, someone could be left to wonder if the Court is "ignoring the text" or "legislating from the bench." Both of those things would be wrong to do. The analysis here demonstrates that neither happened.

As a constitutional matter, the judicial branch cannot be led by the legislative branch's direction on temporal application of a procedural law. And it is a fundamental principle of statutory construction that "when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that *preserves* to the meaning that *destroys*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 66 (quoting *Panama Refining Co. v. Ryan,* 293 U.S. 388, 439 (1935) as a preface to the fifth fundamental principle of statutory interpretation)(emphasis added). In the Act, Section 30 is susceptible to the construction that it was the Legislature's effort to make clear that the substantive portions of the Act should not be applied retroactively. After all, the Legislature legislates on the background of judicial branch precedent, which alerts the Legislature that courts will (1) look for direction on retroactivity when the matter is substantive but (2) if the matter is procedural, it will be applied when the court decides it makes sense to do so. This interpretation of the enactment gives it meaning without finding it unconstitutional.

Moreover, this decision is guided by Florida law on temporal reach of a statute. The precedent is replete with examples of the judicial branch saying "not so fast" when the Legislature provides temporal reach direction that, if followed, would be constitutionally violative. Those cases were decided for the same fundamental reason as this one: the Legislature's role in articulating the will of the people is held in check by the judicial branch's role in enforcing constitutional restraints on legislative action.

It is not activism to give the people of the State of Florida the form of government that the Florida Constitution promises them. It is activism to give them anything else.

Accordingly, it is now
**ORDERED** and **ADJUDGED** that:
**1.** The Motion is **GRANTED.**

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[1]As of the rendition of this Order, section 768.0427, Fla. Stat. constitutes only *prima facie* evidence of the law. The enrolled act, Chapter 2013-15, stands as the official and primary evidence of the law as enacted by the Legislature. *See generally, Shuman v. State,* 358 So. 2d 1333, 1338 (1978) (discussing the status of legislation enacted by the Legislature and reduced to statutory form by the statutory revision division, prior to adoption by the Legislature).

[2]And dispositive.

[3]In *Cantinella,* the Court equated "procedural" and "remedial" statutes, at least for analytical purposes:

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or a general rule against retrospective operation of statutes.

129 So. 2d at 136. *Cantinella* involved a controversy between multiple workman's compensation carriers over which was responsible for a claimant's injuries. *Id.* at 134. A newly amended statute, which took effect after the claimant's injuries were suffered but before the controversy between carriers arose, was construed to be procedural and applied to the pending case. *Id.* at 136-37. The text of the enacting legislation was not an issue in *Cantinella.*

[4]Perhaps this was a non-issue in that case.

[5]In enacting section 776.032(4), Fla. Stat., the Legislature responded to the rule laid down by the *Bretherick* majority by, in essence, adopting the *Bretherick* dissent but with a "clear and convincing' burden as opposed to the "beyond a reasonable doubt" burden. The *Bretherick* dissent was authored by Justice Canady, who also authored *Love.*

[6]"The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches: 'Branches of Government—The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.' " *Bush v. Schiavo,* 885 So. 2d 321, 329 (Fla. 2004) [29 Fla. L. Weekly S515a] (quoting the Florida Constitution).

[7]The nature of the entirety of the act—or any component part of it, other than section 768.0427—is not before the Court. The Motion does not call for an analysis of how other various parts of may be characterized, and no effort is made here to do so.

[8]For the purposes of this case, it does not matter whether the Statute is procedural or a hybrid procedural/remedial because the distinction is non-dispositive.

[9]It is important to note something about the posture of this case. In early 2021, the Florida Supreme Court directed all circuit courts to promulgate an administrative order that establishes a plan to differentiate case management for all cases. In compliance with that directive, the Chief Judge of the Thirteenth Circuit entered an Administrative Order that established the Thirteenth Circuit's Differentiated Case Management ("**DCM**") process. For cases like this one that were filed on or before April 30, 2021, counsel were given the choice to either (1) enter into the DCM process by providing an agreed-upon fact discovery deadline that would be used by the court to compute all other deadlines in the case or (2) set the case for trial using the uniform trial order that had been used for quite some time in the Thirteenth Circuit, but was rendered obsolete for cases in the DCM process. The court entered an order directing counsel to set the case for trial or set a case management conference. Counsel set a case management conference and it was held on June 28, 2021. At that case management conference, Plaintiff reported that the case probably required 7-8 days for trial and for that reason, available one-week trial dockets would not accommodate the case. Plaintiff reported, however, that the case could be set for trial in January 2022, which was a longer docket. A trial order for the January 2022 trial docket does not appear in the file, perhaps because Plaintiffs did not submit one. But in any event, in October of 2021, Plaintiffs filed an unopposed motion to continue the trial to September 2022, which was granted. In the December 3, 2021 order granting the continuance, Plaintiffs were directed to upload a new trial order. For whatever reason, Plaintiffs do not appear to have done this until April 2022, and that trial order set the case for trial in May 8, 2022, not September 2022.

* * *

**Insurance—Witnesses—Insurer's independent field adjuster—Exclusion—Failure to appear for deposition or comply with court order—Adjuster stricken as witness at trial—Adjuster is ordered to pay plaintiff's attorney's fees and costs associated with motion to strike**

JOEL SIMMONS, Plaintiff, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Circuit Civil Division AA. Case No. 50-2021-CA-010239-XXXX-MB. April 21, 2023. Gregory M. Keyser, Judge. Counsel: Alexander L. Avarello, The Wind Law Group, PLLC, Miami, for Plaintiff. Marcus Louis, Universal Property & Casualty Ins. Co., Fort Lauderdale, for Defendant.

## ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S WITNESS AND MOTION FOR SANCTIONS, AND IN THE ALTERNATIVE MOTION FOR CONTEMPT

This matter came before the Court at the hearing on April 19, 2023, on Plaintiff's Motion to Strike Defendant's Witness and Motion for Sanctions, and the in Alternative Motion for Contempt, and the Court, having reviewed said Motion and the record, and having heard argument of counsel, it is hereby **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion to Strike Defendant's Witness and Motion for Sanctions is hereby **GRANTED**. Defense counsel had no objection to Plaintiff's Motion to Strike Defendant's Witness and Motion for Sanctions. Plaintiff's Alternative Motion for Contempt is **DENIED**.

2. Defendant's witness, Mike Todd (independent Field Adjuster—SeekNow/LadderNow) failed to comply with this Court's Order dated July 28, 2022, and further has failed to appear for multiple depositions which were coordinated, and subpoenas were issued and served on the witness.

3. Defendant's witness, Mike Todd (independent Field Adjuster—SeekNow/LadderNow), is hereby stricken as a witness at Trial.

4. Mike Todd (independent Field Adjuster—SeekNow/LadderNow) shall pay to Plaintiff's counsel, Alexander L. Avarello, Esq. of the Wind Law Group, PLLC, the reasonable costs and the reasonable attorneys' fees for Plaintiff's counsel, Alexander L. Avarello, Esq., time spent preparing the Motion to Strike Defendant's Witness and Motion for Sanctions, as well as the time spent preparing for and attending the hearing on April 19, 2023, on Plaintiff's Motion to Strike Defendant's Witness and Motion for Sanctions. Plaintiff shall set an evidentiary hearing to determine the reasonable amount of attorney's fees and costs.

* * *

**Insurance—Property—Discovery—Privilege—Misrepresentation to court—Sanctions—Insurer's representation to court that it would not be relying on privileged adjuster photos and would not be introducing the photos at trial was directly contradicted by its introduction of photos during deposition of person who wrote insured's estimate of loss—Insured will be allowed to conduct continued depositions of corporate representative and field adjuster in order to inquire into photos—Monetary sanctions, including expense of the continued depositions, are imposed**

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 15, 2023. Keathan B. Frink, Judge. Counsel: Alexander L. Avarello, Wind Law Group, PLLC, Bay Harbor Island, for Plaintiff. Tiya Rolle, Universal Property & Casualty Ins. Co., Fort Lauderdale, for Defendant.

## AMENDED ORDER ON PLAINTIFF'S MOTION FOR FRAUD ON THE COURT, MOTION FOR SANCTIONS AGAINST DEFENDANT, AND MOTION TO COMPEL

**THIS CAUSE** having come before the Court at the hearing on February 9, 2023, via Zoom video conference, on the Plaintiff's

Motion for Fraud on the Court, Motion for Sanctions against Defendant, and Motion to Compel, and the Court having reviewed the file and Motion, having heard argument of counsel, and being fully advised in the premise, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff, SHANE WHITE's Motion for Fraud on the Court, Motion for Sanctions against Defendant, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, and Motion to Compel, is hereby **GRANTED, in part**. Plaintiff's Motion for Fraud on the Court is hereby **DENIED**. Plaintiff's Motion for Sanctions against Defendant, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, and Motion to Compel, is hereby **GRANTED**.

2. The Court hereby finds that Defendant, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, and Defendant's counsel, have committed discovery violations in this lawsuit, and thus, the Court hereby imposes sanctions on the Defendant, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, as outlined in further detail below.

3. Specifically, defense counsel represented to this Court at the hearing on May 11, 2022, on the Plaintiff's Motion to Compel Production of Evidence Withheld from Discovery and a Proper Privilege Log ("Motion to Compel") that the Defendant is not relying on the Defendant's privileged "Adjuster Photos" in this case and is not utilizing the privileged "Adjuster Photos" as an exhibit at trial. In relying on defense counsel's representation that the Defendant is neither relying on the Defendant's privileged "Adjuster Photos" in this case nor utilizing the privileged "Adjuster Photos" as an exhibit at trial, this Court sustained the Defendant's objection and denied the Plaintiff's Motion to Compel at the hearing on May 11, 2022, without prejudice.

4. Thereafter, on May 12, 2022, the day after this Court heard Plaintiff's Motion to Compel, Plaintiff conducted the deposition of the Defendant's Corporate Representative, Lee T. Ward ("Mr. Ward") without the privilege of the "Adjuster Photos." Throughout the entirety of Mr. Ward's deposition, defense counsel objected to Plaintiff counsel's line of questioning and instructed Mr. Ward not to answer questions concerning (i) the "Adjuster Photos," (ii) Mr. Castillo's involvement in the case; and (iii) Defendant's reliance on the "Adjuster Photos" in the preparation of Mr. Castillo's coverage estimate. When asked who the field adjuster was that inspected Plaintiff's property, Mr. Ward testified under the penalty of perjury that Mr. Castillo inspected the Property on December 28, 2020, and made no mention of any other inspections.

5. At the deposition of Mr. Ward on May 12, 2022, defense counsel (Tiya Rolle, Esq.) stated on the record as follows:

> Plaintiff's counsel: Ms. Rolle, are you instructing your client not to answer my question as to how many photographs were taken?
>
> Ms. Rolle: Yeah, he doesn't need to answer that. You can ask the field adjuster how many photographs he can recall.
>
> And we did file a privilege log, which listed the amount of photographs. If you want to show that to my client, you can, but no. He's not going into the photos of the field adjuster and how many photos were taken because it's privileged.
>
> Plaintiff's counsel: Okay. So the number, the amount of photographs that were taken, it's your position that's privileged?
>
> Ms. Rolle: The amount of photographs are already listed on our file, our served privilege log and we're not getting into the field adjuster's photographs. I explained it to the Court yesterday. We're not relying on those photographs for trial purposes.
>
> So I don't understand the question regarding something the Court literally just ruled on yesterday.

*See pages 33-34 of the deposition transcript of Lee T. Ward.*

6. Thereafter, on June 13, 2022, the Plaintiff conducted the deposition of the Defendant's Field Adjuster, Carlos Castillo ("Mr. Castillo") without the privilege of the "Adjuster Photos." Mr. Castillo testified that he inspected Plaintiff's Property on December 28, 2020, and that the scope of his inspection was to photograph any visible damage at the Property and to provide an estimate if necessary. Like Mr. Ward, Mr. Castillo testified that Ms. Gonzalez simply took a recorded statement of the Plaintiff. Throughout his deposition, Mr. Castillo maintained that he took the "Adjuster Photos" depicting the damages he found during his inspection and that he was the one who provided the photographs to the third-party adjusting firm who provided the photographs to the Defendant.

7. On August 24, 2022, Defendant took the deposition of Mr. Jean Carlos Cancel ("Mr. Cancel"), the individual who wrote Plaintiff's estimate submitted to the Defendant. At this deposition, the Defendant's counsel attempted to introduce the privileged "Adjuster Photos" as an exhibit to Mr. Cancel's deposition and question Mr. Cancel about the photographs.

8. The Court hereby finds that the introduction of the "Adjuster Photos" by defense counsel during the deposition of Mr. Cancel on August 24, 2022, directly contradicts the Defendant's prior representation to the Court that the Defendant is not relying on the Defendant's privileged "Adjuster Photos" in this case and not utilizing the privileged "Adjuster Photos" as an exhibit at trial.

9. This Court hereby rules that Plaintiff shall be allowed to conduct the continued depositions of Defendant's Corporate Representative (Mr. Ward), and Defendant's Field Adjuster (Mr. Castillo) to inquire into the "Adjuster Photos", the inspection(s), and what physically took place at the inspection (including who was present; how many people were present; whom was spoken to; who took the Adjuster Photos; who was in any photographs) at the sole expense of Defendant. Said depositions shall be concluded before the end of March 2023.

10. Further, the parties shall mutually coordinate the deposition of the Defendant's expert witness to occur after the expert's return in March 2023 pursuant to its Notice of Unavailability.

11. This case is removed from the February 2023 trial docket and shall be placed on the May 2023 trial docket, with calendar call on May 1, 2023. The Plaintiff may file an Amended Motion for Summary Judgment, which will be heard during the week of calendar call.

12. As a result of the Defendant's conduct, the Court hereby imposes the following sanctions against Defendant, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY:

a. Defendant shall pay to Plaintiff's counsel, Alexander L. Avarello, Esq. of the Wind Law Group, PLLC, the reasonable attorneys' fees for Plaintiff's counsel, Alexander L. Avarello, Esq., time spent preparing the Motion for Sanctions against Defendant, and Motion to Compel, as well as the time spent preparing for and attending the hearing on February 9, 2023, on Plaintiff's Motion for Fraud on the Court, Motion for Sanctions against Defendant, and Motion to Compel. Payment shall be made to Plaintiff's counsel, the Wind Law Group, PLLC, within thirty (30) days from the date of this Order. The parties shall attempt to resolve the amount of said sanction without further judicial intervention. Should the parties fail to agree on an amount, then the parties must schedule an evidentiary hearing to determine the reasonable amount of attorney's fees.

b. Defendant shall pay to Plaintiff's counsel, Alexander L. Avarello, Esq. of the Wind Law Group, PLLC, the amount for the cost of the court reporter expenses related to the hearing on February 9, 2023, on Plaintiff's Motion for Fraud on the Court, Motion for Sanctions against Defendant, and Motion to Compel. Payment shall be made to Plaintiff's counsel, the Wind Law Group, PLLC, within thirty (30) days from the date of Defendant's receipt of the invoice from the reporter.

c. Defendant shall pay for all costs related to the forthcoming depositions of Defendant's Corporate Representative, and Defen-

dant's Field Adjuster (Mr. Castillo), including the cost for any transcript ordered following these depositions.

d. Further, Defendant shall pay to Plaintiff's counsel, Alexander L. Avarello, Esq. of the Wind Law Group, PLLC, the reasonable attorneys' fees for Plaintiff's counsel, Alexander L. Avarello, Esq., time spent preparing for and attending the depositions of Defendant's Corporate Representative, and Defendant's Field Adjuster (Mr. Castillo). Payment shall be made to Plaintiff's counsel, the Wind Law Group, PLLC, within thirty (30) days from the conclusion of the two (2) depositions. The parties shall attempt to resolve the amount of said sanction without further judicial intervention. Should the parties fail to agree on an amount, then the parties must schedule an evidentiary hearing to determine the reasonable amount of attorney's fees.

* * *

**Criminal law—Evidence—Blood test results—Sufficiency of administrative rules and procedures—Primary jurisdiction—Motions challenging validity and sufficiency of Florida Department of Law Enforcement Alcohol Testing Program rules and procedures are transferred to Division of Administrative Hearings for resolution**

STATE OF FLORIDA, Plaintiff, v. GLENN BRIMMER, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CF-028322-AXXX. March 24, 2023. Samuel Bookhardt, III, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

## ORDER GRANTING STATE'S MOTION TO INVOKE THE DOCTRINE OF PRIMARY JURISDICTION

THIS CAUSE was before the Court on February 15, 2023, upon the State's Motion to Invoke the Doctrine of Primary Jurisdiction, filed on September 2, 2022; the Defendant's Response, filed on January 5, 2023; and the State's Reply to the Defendant's Response, filed on February 13, 2023. The State seeks to transfer three motions filed by the Defendant to the Division of Administrative Hearings (DOAH) for an administrative determination, and defer ruling on these motions pending resolution at the administrative level. These motions challenge the validity/sufficiency of the FDLE Alcohol Testing Program rules or procedures. The motions are: Motion in Limine with Regard to Blood Test and Blood Test Results I, filed on February 8, 2022; Motion in Limine with Regard to Blood Test and Blood Test Results II, filed on February 8, 2022; and Motion to Suppress Blood Test and Blood Test Results Based Upon the Insufficiency of the F.D.L.E. Rules and Regulations and Failure to Meet the Requirements of Daubert and Florida Statutes 90.702 and 90.704, filed on October 13, 2021. The Court has reviewed the motions, the response, the reply, and the official court files, and has considered the authorities submitted and the argument of counsel. Accordingly, it is

**ORDERED AND ADJUDGED:**

The State's Motion to Invoke the Doctrine of Primary Jurisdiction is **GRANTED**. The Court will defer ruling on the motions until after the conclusion of the administrative process.

The parties are directed to contact the undersigned's Judicial Assistant to schedule a status conference regarding preparation of the appropriate order of referral. The parties may appear by TEAMS.

* * *

**Criminal law—Driving under influence—Search and seizure—Field sobriety exercises—Consent—Officer who stopped defendant for speeding and observed multiple indicia of impairment was not required to request defendant's consent before requiring her to perform field sobriety exercises—Motion to suppress is denied**

STATE OF FLORIDA, Plaintiff, v. LACY JUSTINE LINDSAY, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2021-CF-046597-AXXX. April 6, 2023. Samuel Bookhardt, III, Judge. Counsel: Elizabeth Garvey, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Bryan Savy, West Melbourne, for Defendant.

## ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

**THIS CAUSE** came before the Court on April 3, 2023, upon the Defendant's Motion to Suppress, filed on June 22, 2022. The Court has heard and considered the arguments of Counsel and has carefully reviewed this Motion, together with the evidence and authorities presented. Based upon this review, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

The Defendant requests that the Court suppress all information learned and observations made by Officer Edwin Lutz or any other law enforcement officer after the actions of Officer Lutz caused Defendant to acquiesce to his authority and perform field sobriety exercises including, but not limited to: any actions of Defendant during and subsequent to her performance on the field sobriety exercises, any refusal to submit to a breath test, any contraband, such as a white powder that field tested positive for methamphetamine, discovered during a search of Defendant incident to arrest and any statements that Defendant made post-arrest.

The evidence produced at the hearing on the Defendant's motion shows that on September 30, 2021, Officer Edwin Lutz of the Palm Bay Police Department was on patrol duty. Around 1:30 to 2:00 in the morning he was driving northbound on Babcock Street when he observed a southbound motorcycle travelling at a high rate of speed. He focused his radar on the motorcycle and noted a speed of 68 m.p.h., although the posted speed is 45 m.p.h. The officer observed the motorcycle swerve into the median then swerve back into the correct lane. The motorcycle turned onto Foundation Park Boulevard.

Officer Lutz made a U-turn to follow the motorcycle, then he turned onto Foundation Park Boulevard. Once he completed his turn he observed the Defendant's motorcycle parked in the right hand travel lane. He turned on his lights as he approached the Defendant. She began walking toward his vehicle.

The Defendant indicated she had a suspended license. As the officer spoke to her he observed signs of impairment. Officer Lutz explained he has been a DUI officer for many years and is a certified Drug Recognition Expert. The officer testified that he could smell alcohol on her breath as she spoke. She slurred her speech as she rambled on in an exaggerated manner about different subjects. He observed that her eyes were glassy and bloodshot, and her pupils were dilated. The Defendant explained she was coming from a local bar. She also told the officer she had consumed numerous prescription drugs within the last three hours; namely, Adderall, Xanax, and oxycodone.

Based on his personal observations, and on her driving pattern, Officer Lutz had a reasonable suspicion that she might be impaired, or under the influence. Therefore, he began administering field sobriety exercises (FSE). He testified that he did not ask the Defendant for her consent before beginning the FSEs. After the exercises, the officer arrested the Defendant.

The Defendant claims the evidence should be suppressed because her performance of FSEs was rendered involuntary by Officer Lutz's actions of instructing Defendant to perform FSEs. She claims that a police officer must obtain voluntary consent before administering these exercises.

The Court finds the Defendant is mistaken, there is no requirement that an officer request consent before performing field sobriety exercises. The Second District Court of Appeal considered the issue of whether a Defendant must be informed that he had a right to refuse to perform field sobriety tests. In *State v. Leifert,* 247 So. 2d 18 (Fla. 2d DCA 1971), the appellate court found that the question of consent

was immaterial, stating that "we hold that the police officer . . . could require him to take part in such physical sobriety tests . . . the question of consent concerning such physical tests has been held to be immaterial." 247 So. 2d at 18. This Court is bound by that holding. Accordingly, it is

**ORDERED AND ADJUDGED:**

The Defendant's Motion to Suppress is **DENIED.**

* * *

**Insurance—Personal injury protection—Expert witnesses—Billing expert is qualified to testify regarding propriety of CPT codes as billed and whether codes appropriately reflect services rendered—Expert is not qualified to testify with respect to reasonableness of charges where expert did not independently evaluate charges but relied on databases of U.S. government and state workers' compensation division without any analyses to demonstrate that those databases are reliable**

CINDY GRETO, Plaintiff, v. OSCAR DUBON and TOTAL HOME PROPERTIES, INC., a Florida Profit Corporation, Defendants. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-CA-016057. April 28, 2023. Scott Blaue, Judge. Counsel: Andrew Pickett and Jessica Hicks, Andrew Pickett Law, PLLC, Melbourne; and Tara Couture, Couture Law P.A., West Melbourne, for Plaintiff. Cristobal Casal, Conroy Simberg, Fort Myers; and Thomas McCausland, Conroy Simberg, Hollywood, for Defendants.

**ORDER GRANTING PLAINTIFF'S *DAUBERT* MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' PURPORTED BILLING EXPERT, LESLIE NEAL FREEMAN, M.D., AND/OR IN THE ALTERNATIVE MOTION TO EXCLUDE PURSUANT TO 90.403, FLA. STAT.**

The Court has reviewed the Plaintiff's *Daubert* Motion to Exclude Testimony of Defendants' Purported Billing Expert, Leslie Neal Freeman, M.D., and/or in the Alternative Motion to Exclude Pursuant to 90.403, Fla. Stat., filed on March 15, 2023. The motion argues that Dr. Freeman is not qualified to render an expert opinion, and after hearing the arguments of counsel, the Court GRANTS the Plaintiff's motion in part and DENIES Plaintiff's motion in part.

The Court notes that the issue of whether a witness is qualified to render an expert opinion is an evidentiary question, procedural in nature, and governed by the law of the forum. *Morris v. LTV Corp.,* 725 F. 2d 1024, 1030 (5th Cir. 1984). Section 90.702, Florida Statutes, was amended to reflect the *Daubert* standard, which requires that an expert witness be qualified by knowledge, skill, experience, training, or education. *Kumho Tire Co., Ltd. v. Carmichael,* 526, U.S. 137, 119, S. Ct. 1167 (1999) ; *United States v. Frazier,* 387 F. 3d 1244 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C1132a].

The *Daubert* test, as codified in Section 90.702, Florida Evidence Code, requires that the testimony of experts be based upon sufficient facts or data; the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case.

The Court notes that Dr. Freeman is clearly well-educated and credentialed with respect to medical coding and the proper application of the Current Procedural Terminology (CPT) codes to services. As such, he is qualified to testify regarding the propriety of the CPT codes as they were billed in this case and whether they appropriately reflect the services in the medical records.

However, Dr. Freeman does not qualify as an expert with respect to evaluating the reasonableness of the charges, as the Court finds that Dr. Freeman's methodology lacks reliability and has not been demonstrated to be applied reliably. Dr. Freeman does not independently evaluate the charges but relies on the good faith of the United States government, the State of Florida workers' compensation division, and the like. He did not provide any other analysis to demonstrate that the databases he uses are reliable, and he has not reviewed the underlying claims included in those databases. Therefore, Dr. Freeman's methodology is unreliable with respect to the value of the charges. Furthermore, he did not compare the charges in this case to other charges that he had reviewed in the area, such that his methodology has not been reliably applied to the facts in this case.

Therefore, it is hereby ordered that Dr. Freeman's testimony will be limited to the propriety of the CPT codes as they were billed in this case and whether they appropriately reflect the services in the medical records. He may not testify to the usual and customary charges in this particular geographic area or render an opinion as to the reasonableness of the charges in this case.

Accordingly, it is ORDERED and ADJUDGED that the Plaintiff's *Daubert* Motion to Exclude Testimony of Defendants' Purported Billing Expert, Leslie Neal Freeman, M.D., and/or in the Alternative Motion to Exclude Pursuant to 90.403, Fla. Stat., filed on March 15, 2023, is GRANTED in part and DENIED in part, as set forth above.

* * *

**Civil procedure—Default—Vacation—Affidavit in support of motion to set aside default failed to establish excusable neglect—Motion denied**

LINDA MAIKE, Plaintiff, v. CASTLE KEY INDEMNITY COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 22-CA-005322. May 10, 2023. Joseph Fuller, Judge. Counsel: Jake M. Goodman, Wind Law Group, PLLC, Bay Harbor Islands, for Plaintiff. Tino Cimato, Allstate Insurance Company, Coconut Creek, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT, MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND ALTERNATIVE MOTION TO COMPEL APPRAISAL, AND MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY**

**THIS CAUSE** having come before the Court at the hearing on May 8, 2023, via Zoom video conference, on the Defendant's Motion to Set Aside Default Judgment, Motion to Dismiss Plaintiff's Complaint and Alternative Motion to Compel Appraisal, and Motion for Protective Order Regarding Discovery, and the Court having reviewed the file and Motion, having heard argument of counsel, and being fully advised in the premise, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Court hereby finds that the Defendant's Affidavit of Daniel Orwig, in support of Defendant's Motion to Set Aside Default, is insufficient to establish the element of excusable neglect.

2. Therefore, the Defendant, CASTLE KEY INDEMNITY COMPANY's Motion to Set Aside Default is hereby **DENIED**.

3. The Defendant's combined Motion to Dismiss Plaintiff's Complaint and Alternative Motion to Compel Appraisal, and Motion for Protective Order Regarding Discovery were not addressed by the Court as they were deemed moot.

* * *

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# COUNTY COURTS

**Insurance—Homeowners—Standing—Assignment—Validity—Assignment that contains bill or invoice, not estimate required by section 627.7152, is invalid and unenforceable**

THE KIDWELL GROUP, LLC., d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Daniel Maddox, Plaintiff, v. FIRST COMMUNITY INSURANCE COMPANY, Defendant. County Court, 1st Judicial Circuit in and for Santa Rosa County. Case No. 2022-SC-000970. May 17, 2023. Jose A. Giraud, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law, for Plaintiff. Andrea M. Franklin, Rubinton Simms, PA, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE**

**THIS MATTER** coming before the Court on Defendant, FIRST COMMUNITY INSURANCE COMPANY's Motion to Dismiss, and the Court having heard the arguments of both parties, and being otherwise duly advised on the merits, therefore, it is:

**ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss with prejudice is hereby **GRANTED**: with the Court finding as follows:

1. The document attached to the Plaintiff's assignment of benefits is not an estimate; it is a bill.

2. Wherein the statute requires an "estimate," and the assignor is provided a "bill" or "invoice," the "bill" or "invoice" does not *necessarily* constitute an "estimate" for purposes of meeting the statutory requirement under Florida Statute 627.7152.

3. Based on the foregoing, pursuant to Florida Statute 627.7152, the Plaintiff's "invoice" is not an "estimate," and the assignment is, therefore, invalid and unenforceable.

* * *

**Insurance—Personal injury protection—Demand letter—Sufficiency—Demand letter that includes itemized statement specifying dates of service and charges for each date complies with presuit requirements—PIP statute does not require demand letter to state exact amount owed or account for prior payments made**

CHIROPRACTIC SPINE AND INJURY CENTER, a/a/o Darryl Sayas, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Clay County. Case No. 2019-SC-000079. Division C. May 3, 2023. Raymond E. Forbess, Jr., Judge. Counsel: Adam Saben, Shuster Saben & Estevez, Jacksonville, for Plaintiff. David Gagnon, Taylor Day Grimm & Boyd, Jacksonville, for Defendant.

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

**THIS MATTER** having come on to be heard on February 7, 2023, on Plaintiff's Motion for Summary Judgment as to Application of the Medicare Fee Schedule and Memorandum of Law filed on February 16, 2021, Defendant's Motion for Final Summary Judgment on Plaintiff's Failure to Comply with Section 627.736(10), Florida Statutes filed on October 31, 2022, based on the arguments by the parties at the hearing, reviewing authority provided to the Court, and the Court being fully advised, the Court finds as follows:

1. The Plaintiff filed the Complaint in this matter on January 9, 2019, alleging that the Defendant "denied full payment for medically necessary treatment provided to Darryl Sayas. . ."

2. The Defendant filed an Answer and Affirmative Defenses on February 4, 2019.

3. Arguments on the dueling motions were held in full on February 7, 2023.

4. 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 to section 627.736(10), Florida Statutes. The notice is commonly referred to as a Presuit Demand Letter (PDL). The requirements of a PDL are found within section 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 the claim pursuant to paragraph (4)(b).
>
> (b) The notice required shall state that 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.

The Defendant's position is that the Plaintiff's pre-suit demand letter is defective because it "fails to account for all prior payments" 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) [46 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 party 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. Miami-Dade Cty., 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 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 the Rivera's failure to attach a proper itemized statement flawed his PDL; this suit was premature and not ripe. In this case, unlike Rivera, Plaintiff 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 is hereby *GRANTED.* The Court makes the following findings of fact:

1. Plaintiff's Motion for Summary Judgment is *GRANTED*.
2. 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 court 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]Also see, *Whole Health Clinic d/b/a Healthsource of Tallahassee a/a/o Joshua Thomas v. State Farm Mut. Autl. 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.

* * *

**Landlord-tenant—Public housing—Security deposit—Prohibited practices—Florida Consumer Collection Practices Act—Action brought by former tenant against LLC that owns leased premises and manager of premises alleging a failure to return security deposit and prohibited practices—No merit to argument that, because third-party assistance agency paid security deposit on tenant's behalf, tenant is not entitled to return of deposit where agreement between agency and defendants states that deposit may be returned to tenant after damages are lawfully deducted, and law and lease define deposit as property held by landlord on behalf of tenant—Property manager's failure to return deposit after 30-day notice of claim period expired and after tenant demanded its return constituted conversion and civil theft—Manager's act of cutting off utilities to coerce payment of alleged utility debt constitutes prohibited practice—Second utility disconnection due to manager's failure to make timely utility payment also constitutes prohibited practice—Disconnection of utilities in attempt to collect alleged utility debt was violation of FCCPA—Manager is liable for torts and statutory violations that she committed or in which she participated, irrespective of whether or not she acted within scope and authority of her employment—Because manager was LLC's only member, representative, and president and stipulated to acting within the scope of her employment at all relevant times, LLC is also liable for all manager's torts and statutory violations**

CHARLES BOND, Plaintiff, v. SOAR MERGING MARKETS, LLC, and JESSICA PAULO, Defendants. County Court, 4th Judicial Circuit in and for Duval County Case No. 16-2020-SC-027146. Division CC-I. December 29, 2022. Robin Lanigan, Judge. Counsel: James F. Tyer, Jacksonville Area Legal Aid, Inc., Jacksonville, for Plaintiff. Carl D. Barry, The Strategic Legal Group, PLLC, Boca Raton, for Defendants.

## ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

This matter came before the Court for hearing on November 21, 2022, on Plaintiff's Motion for Summary Disposition and Incorporated Memorandum of Law (Dkt. # 55) and Defendants' Opposition (Dkt. #56). All Parties were represented by respective counsel.

The Court has reviewed the file, the summary evidence filed by Plaintiff, the Joint Pre-Trial Statement (Dkt. # 57), deposition transcripts attached to Plaintiff's motion, and heard argument of counsel for the Parties.[1] Based upon the foregoing, the Court finds as follows:

### I. FINDINGS OF FACT

1. Plaintiff was a tenant at 257 Pecan St., Jacksonville, Florida 32211 (the "Property"). The lease period was November 1, 2018 through October 31, 2019. Plaintiff's rent at the property was $733 per month. Plaintiff's tenancy at the property utilized a "Section 8 Housing Choice Voucher" administered by the Jacksonville Housing Authority and the VASH (Veteran's Affairs Supportive Housing) programs.

2. The "Premises" leased by Plaintiff was a one bedroom, one bath unit with a window A/C unit. The unit also had central A/C for which Plaintiff had no control or access. The building was shared with two other units in a "tri-plex." All tenants at the property shared a single utility meter.

3. Utilities at the property were solely in Defendant Jessica Paulo's name; the utilities were not in the name of Soar Merging Markets, LLC. .

4. Defendant SOAR Merging Markets, LLC is a single-member LLC, who owned the subject Property. At all relevant times, Defendant Jessica Paulo was the LLC's only representative, member, and agent. Defendant Jessica Paulo is a licensed real estate agent and professional lessor of property who leased the subject Property and was responsible for all communications on Defendant LLC's behalf. Defendant Paulo used her personal home as Defendant LLC's principal place of business, and frequently communicated with Plaintiff and other parties related to the leasing of the property with her personal email and phone.

5. It is undisputed that a security deposit of $733 was paid for Plaintiff's tenancy with Defendants. The deposit was paid via assistance from a third-party assistance agency, Changing Homelessness for "Supportive Services for Veteran Families." The written agreement memorializing this assistance, signed by Defendant Jessica Paulo, clearly identifies the $733 payment as a "Security Deposit," and states in bold, "I understand that when the tenant vacates the property and after any damages have been deducted, *the remaining security deposit may be returned to the tenant,* in accordance with the funding source allowances." (emphasis added). The security deposit due under the lease, and the requirements of §83.49, Fla. Stat., were described in Section five of the lease, and in accompanying addenda. The lease states, "the landlord must mail you notice, within 30 days after you move out, of the landlord's intent to impose a claim against the deposit. . .If the landlord fails to timely mail you notice, the landlord must return the deposit but may later file a lawsuit against you for damages."

6. On or around September 19, 2019, Defendant Jessica Paulo admits she called JEA and shut off the utilities at the property. Defendant Paulo did this because she believed the tenants at the property, which included Plaintiff as well as other tenants, were not paying enough for utility expenses and owed her a debt for the utilities in her name. Plaintiff's utilities were shut off for approximately twenty-four hours on this occasion, and for not more than around forty-eight hours. Defendant admitted contacting JEA shortly after and instructing the utility company to re-start service at the property.

7. Receipts provided by Plaintiff and attached to his complaint reflect that Plaintiff paid $50 every month for utilities at the Property. Because Plaintiff's unit in the triplex was not sub-metered, it would be difficult to determine his exact use of the utilities for his individual unit. Plaintiff's unit was a smaller unit in the property. Plaintiff had no way to access the central A/C controls for the property from his unit. After Defendants utility bills began to increase with the addition of other renters in the other units, Defendants unilaterally emailed all residents demanding they pay additional amounts for utilities. Plaintiff never agreed to pay additional amounts other than the originally agreed $50 and continued to pay that amount for the duration of his tenancy.

8. On or around October 12, 2019, utilities at Plaintiff's property were again caused to be shut off, and remained off for the remainder of his tenancy, a time period of approximately 20 days. Defendants claim that this shut-off was "merely" due to Defendants failing to pay the utility bill for the property, which resulted in the termination, rather than a direct request to JEA to stop utilities, as in the September shut-off. JEA business records, authenticated through a business records certification, appear to show that Defendants terminated the utilities via JEA's web application, however, Defendants dispute this fact.

9. After Plaintiff vacated the property, his deposit was not returned. When Plaintiff did not receive his deposit, or any other notice, within thirty-days, Plaintiff emailed Defendants pointing out this deficiency and demanding the return of his deposit. In response, Defendants emailed Plaintiff their "findings upon final inspection" email which billed Plaintiff for various fees and charges and demanded he pay the remaining balance after his deposit had been applied to the charges. One of the charges included a $500 "fine" for

"unauthorized storage in garage fine of $100.00 per day." This "fine" was not authorized by the lease agreement. In response to the "findings upon final inspection" email, Plaintiff contested all the of the fees and charges and again requested the return of his deposit and notified Defendants that since they had failed to provide any notice within thirty-days, Defendants had to return his deposit in full.

10. It is undisputed that Defendants did not send any certified letter to Plaintiff's last known address notifying Plaintiff of an intent to impose a claim against his security deposit. Defendants' email was their only communication to Plaintiff about the security deposit. The email did not notify Plaintiff of his right to object to the claim within 15 days, and did not provide Plaintiff an address to send any objections. The email was sent more than thirty days from when Plaintiff vacated the property.

11. The security deposit was purportedly held in the Defendant LLC's account, and Defendant Paulo admits she was the only signatory on the account. Instead of returning the deposit Defendants applied it to various charges, including payment of the utilities, which were Paulo's personal debt. Defendants had exclusive possession and control over the deposit until it was applied by Defendants, at Paulo's sole discretion and direction, to the various charges. There was no claim or evidence presented that Defendants ever tried to return the deposit to Plaintiff or to Changing Homelessness.

12. Plaintiff next, through counsel, sent to Defendants a civil theft demand letter by certified mail pursuant to §772.11(1), Fla. Stat.. The letter set forth the requirements of §83.49, Fla. Stat., explained why Plaintiff believed Defendants had failed those requirements, explained why he believed their acts constituted civil theft of his property, demanded its return again, and demanded treble damages for their failure to return his property. There were no claims, allegations, or evidence presented that Defendants ever responded to this letter.

13. Defendants were thus notified on at least three occasions, in writing, that the security deposit was Plaintiff's property and that he was entitled to its return. The lease agreement incorporated the landlord's obligations under §83.49, Fla. Stat. . Defendants were aware of §83.49, Fla. Stat. and the requirements therein. Rather than return Plaintiff's deposit or respond to his demands for its return, Defendants applied the deposit to various charges they claimed he was responsible for, including for a utility balance for the JEA utility account under Defendant Paulo's name which included service for the subject property and the other two rental units.

## II. LEGAL STANDARD

14. Fl. Sm. Cl. R 7.135 permits a court to summarily dispose of an action or claim at any time prior to trial "if there is no triable issue," and, if so, it "shall summarily enter an appropriate order or judgment."

15. Summary judgment should be entered under the rule where no genuine issue of material fact exists as to a claim. *See, by analogy, Fla. R. Civ. P. 1.510.* However, a Court need not follow the same procedural requirements under the small claims rule for summary disposition as under Fla. R. Civ. P. 1.510. *See, e.g., The Kidwell Group, LLC v. Omega Ins. Co.,* 29 Fla. L. Weekly Supp. 356b (Fla. Bay Cty. Ct. 2021).

16. A fact is material where it is "essential to the resolution of the legal questions raised in the case" and "issues of non-material fact are irrelevant to the summary judgment determination." *Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship,* 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1196a].

## III. ANALYSIS

### *A. Count 1: Action for Return of Security Deposit Under §83.49*

17. When a tenant vacates a rental, Florida law requires certain statutory procedures regarding notice, disposition, and return of the deposit. *See* §83.49, Fla. Stat. Strict compliance with the notice requirements of §83.49 is mandatory before a landlord may retain *any* portion of a tenant's deposit. *See Wootton v. Iron Acquisitions, LLC,* 338 So.3d 425 at 426-427 (Fla. 2DCA 2022) [47 Fla. L. Weekly D965a]. This Court is aware of no decisions contrary to *Wootton* at the District Court of Appeal level.

18. When a statute is clear and unambiguous, a court should apply its plain meaning. *See, e.g., Lopez v. Hall,* 233 So.3d 451, 453 (Fla. 2018) [43 Fla. L. Weekly S11a]. §83.49 repeatedly uses the word "shall" when describing the landlord's duties contained therein, affording the court no discretion to excuse compliance. The Florida Residential Landlord and Tenant Act makes it clear that a security deposit is not the property of the landlord. The security deposit is held for and on behalf of the tenant. *See* §83.43(11), Fla. Stat., (" 'Deposit money' means any money held by the landlord *on behalf of the tenant,* including, but not limited to, damage deposits, security deposits, advance rent deposit, pet deposit, or any contractual deposit agreed to between landlord and tenant either in writing or orally." (emphasis added)); §83.49(1)(a) and (b) ("Hold the total amount of such money in a separate. . .account in a Florida banking institution *for the benefit of the tenant or tenants*." (emphasis added)). *See also Duvall v. Sunshine State Realty & Associates, Inc.,* 20 Fla. L. Weekly Supp. 624a (Fla. Volusia Cty. Ct. 2013).

19. To comply with the statute, if the landlord intends to impose a claim against the deposit it shall, within 30 days of vacating the property, send the tenant a written notice, by certified mail to the tenants last known address, in substantially the form set forth by the statute. In addition to being sent by certified mail, the notice must also inform the tenant that he or she has 15 days to object to the landlords claim and provide an address for the tenant to object. *See* §83.49(3)(a).

20. If the landlord fails to follow the requirements set forth above ". . .he or she forfeits the right to impose a claim upon the security deposit and may not seek a setoff against the deposit but may file an action for damages *after return of the deposit*." §83.49(3)(a) (emphasis added). *See also Wootton,* 338 So.2d at 428.

21. Defendants here do not dispute they failed to comply with §83.49. Rather, Defendants argument is that because Changing Homelessness's Supportive Services for Veteran Families program assisted Plaintiff with the deposit payment, and paid the deposit on his behalf, that Defendants never had any obligation to comply with §83.49 and Plaintiff has no right to its return. Defendants cite no case law in support of this position. Defendants argued at the hearing that the security deposit was more akin to a gift to Defendants from Changing Homelessness that Defendants could treat as income.

22. This Court finds Defendants' arguments without merit. First, the agreement between Changing Homelessness and Defendants itself defines the monies paid as a "Security Deposit" and states that the deposit may be returned to Plaintiff after any damages were lawfully deducted. Plaintiff argued, and this Court agrees, that this language is meant to prevent this exact circumstance from occurring by reassuring Defendants that the agency did not expect the deposit to be returned to it but rather to Plaintiff. The permissive "may" simply meant that should the entire deposit be applied to lawful damages, then it would not have to return the deposit to Plaintiff in that circumstance.

23. Second, Florida law and the lease agreement itself define the security deposit as Plaintiff's lawful property "held by the landlord on behalf of the tenant," that a landlord must "hold. . .for the benefit of the tenant." §83.43(11); §83.49(1)(a) and (b), Fla. Stat. Once a deposit is paid for a tenant's tenancy, regardless of the source, it is to be held on the tenant's behalf for the purposes described under §83.49. Whether the tenant obtained deposit assistance from a third-party and whether or not the deposit sums may even be owed back to that third-

party, are of no concern to the landlord or the requirements of §83.49. To the extent Defendant argues the Changing Homelessness letter purports to augment or modify the lease and requirements of §83.49, any such provision or agreement would be void and unenforceable under §83.47, Fla. Stat.

24. Third, the Court finds the practical effects of Defendants' position untenable. Accepting Defendants argument would allow the $733 paid for Plaintiff's "security deposit" to be immediately treated as pocketed income to Defendants, rather than its stated purpose. For example, every parent who assists their college child by paying the deposit on their behalf, or any local, state, or federal agency that offers deposit assistance to tenants would automatically forfeit any return of the deposit which would instantly become the property of the landlord. This Court cannot adopt that interpretation given the plain wording of the agreement in this case, the written lease, and the requirements of §83.49.

25. Accordingly, this Court finds that Plaintiff has standing to sue for the return of his deposit, that Defendants were required to comply with §83.49, Fla. Stat., and they failed to do so. Plaintiff is therefore entitled to his recovery of the $733.00 deposit, in full.

***B. Count 2: Conversion of Bond's Security Deposit***

26. Plaintiff's Motion for Summary Disposition was uncontested with regard to his Conversion claim against Defendants. To prevail in a conversion action, Plaintiff must show: 1) Defendants had control or dominion over Plaintiff's property, and held or used it without legal right. *See, e.g, United Technologies Corp. v. Mazer,* 556 F.3d 1260, 1270 (11th Cir. 2009 ) [21 Fla. L. Weekly Fed. C1496a] ("conversion is an 'act of dominion wrongfully asserted over another's property inconsistent with his ownership therein,' " citing *Thomas v. Hertz Corp.,* 890 So.2d 448, 449 (Fla. 3DCA 2004) [30 Fla. L. Weekly D93c]).

27. As set forth at length above, Defendants had exclusive control over Plaintiff's security deposit. Because Defendants failed to comply with the statutory requirements of 83.49 in nearly every respect, they forfeited any right to retain the deposit and were required to return it to Plaintiff. *See, e.g., Sipp v. Five Star of Central Florida, Inc.,* 18 Fla. L. Weekly Supp. 1143a (Fla. 7th Cir. Ct. 2011)(holding a landlord who unlawfully withheld a tenant's security deposit liable for conversion and civil theft); *See also Day v. Amini,* 550 So.2d 169 (Fla. 2DCA 1989); *Seymour v. Adams,* 638 So.2d 1044, 1046 (Fla. 2DCA 1994); *City of Cars, Inc. v. Simms,* 526 So.2d 119 (Fla. 5DCA 1988). As a result, this Court finds that Defendants failure to return Plaintiff's security deposit after the thirty-day period expired, and after Plaintiff demanded its return, constituted conversion. Plaintiff is therefore entitled to the recovery of the value of his property, $733.00.

***C. Count 3: Civil Theft of Bond's Security Deposit***

28. Plaintiff's Motion for Summary Disposition was uncontested with regard to his civil theft claim against Defendants. For Plaintiff to prevail on his claim of civil theft, he must prove the elements of conversion, plus intent (in contrast with simple conversion). *Hendenmuth v. Groll*, 128 So.3d 895, 896 (Fla. 4DCA 2013) [38 Fla. L. Weekly D2654a]. Plaintiff must also send Defendants a civil theft demand letter prior to filing suit. *United Technologies Corp. v. Mazer,* 556 F.3d 1260, 1270 (11th Cir. 2009) [21 Fla. L. Weekly Fed. C1496a]; *see also* §812.012-812.037. A defendant still commits a civil theft even when the property was initially lawfully obtained or held for another, if the continued retention was without permission, for unauthorized purposes, or without legal right. *Masvidal v. Ochoa,* 505 So.2d 555 (1987). "Felonious intent" is shown where a defendant *intended* to deprive a plaintiff of their property. *Rhodes v. O. Turner & Company, LLC,* 117 So.3d 872, 875 (2013) [38 Fla. L. Weekly D1527b]; *Daniels v. State,* 587 So.2d 460, 462 (1991).

29. Plaintiff cited at least one case specifically where a landlord was held liable for civil theft for failing to return a tenant's security deposit after not complying with the requirements of §83.49. *See Sipp v. Five Star of Central Florida, Inc.,* 18 Fla. L. Weekly Supp. 1143a (Fla. 7th Cir. Ct. 2011)(". . .[Defendant's] stated knowledge of the requirements of the statute pertaining to the keeping and disbursement of the deposits, its subsequent failure to follow the notice provisions of the statute and its failure to respond to Plaintiffs' written and properly served demand for treble damages in accordance with Fla. Stat. section 772.11, are sufficient to establish the requisite elements for civil theft pursuant to Fla. Stat. section §812.014 as claimed.").

30. Treble damages, like those awarded pursuant to the civil theft statute, are punitive in nature. *Country Manors Ass'n, Inc. v. Master Antenna Sys., Inc.,* 534 So.2d 1187, 1195 (Fla. 4th DCA 1988) (holding treble damages under the civil theft statute are punitive); and *McArthur Dairy, Inc. v. Original Kielbs, Inc.,* 481 So.2d 535, 539-40 (Fla. 3d DCA 1986) (same).

31. Defendants admitted they received the security deposit, and that they had exclusive possession and control over the account in which the deposit was held. As in *Sipp,* Defendants here were aware of the requirements of §83.49, which were was also in the lease drafted by Defendants. Defendant Paulo is a licensed professional real estate agent and landlord and Plaintiff provided Defendants actual notice of the requirement of §83.49 when he demanded return of his deposit. Prior to the institution of this action, Plaintiff sent a civil theft demand letter which Defendants ignored. Defendants then applied Plaintiff's deposit, his lawful property to which Defendants had no then existing legal right, to alleged debts of Defendants. While Plaintiff must show the intent element of his civil theft claim by the clear and convincing evidence standard, this Court finds Plaintiff has met this burden and that Defendants continued refusal to return the deposit clearly evidences that Defendants intended to deprive Plaintiff of his property. Any "mistake of law" by Defendants is not a defense to Plaintiff's civil theft claim as the intent required is not the intent to break the law, but rather the intent to take or refuse to return the property belonging to another.

32. This Court therefore finds Defendants' actions constitute civil theft under §772.11, and that Plaintiff has met all the requisite elements of their claim and has been damaged. Because the remedy of civil theft is punitive in nature, pursuant to §772.11 and §812.014, Plaintiff is entitled to recover as a penalty threefold the actual amount of the security deposit advanced of $733.00, for a total of $2,199.00, in addition to recovery of the security deposit itself.

***D. Prohibited Practice Violations under §83.67, Fla. Stat.***

33. Plaintiff's Motion for Summary Disposition was uncontested with regard to his prohibited practices claims against Defendants. For Plaintiff to prevail on a claim for a Prohibited Practice violation under §83.67, Fla. Stat., he need merely show that Defendants, "directly or indirectly," interrupted his utility services "whether or not the utility service is under the control of, or payment is made by, the landlord." §83.67(1), Fla. Stat. *See also Powers v. Whitcraft,* 325 So.3d 239 (Fla. 4DCA 2021) [46 Fla. L. Weekly D1690a]. If a Plaintiff proves a violation of 83.67, they are entitled to actual damages or treble rent damages, whichever is greater. §83.67(6), Fla. Stat.

34. "Subsequent or repeated violations that are not contemporaneous with the initial violation shall be subject to separate awards of damages." §83.67(6), Fla. Stat.

35. Plaintiff rented the property at issue in this action, Defendant LLC was the owner of the property, Defendant Paulo was the manager and sole representative for SOAR, and Defendant Paulo had exclusive control over Bond's utilities which were in her personal name and the account was under her exclusive control.

36. It is undisputed that Defendant Paulo called JEA and shut off Plaintiff's utilities on or about September 19, 2019, in order to coerce payment for an alleged utility debt which Plaintiff disputed. This Court need not discern whether the alleged debt was owed or not. The Statute is a punitive one, intended to prevent landlords from resorting to self-help evictions by taking the law into their own hands, whether or not a debt is actually owed. If a landlord believes a tenant has breached their lease the remedy is through court process, not self-help.

37. This Court is also unmoved that Plaintiff's utilities may "only" have been disconnected for twenty-four hours before they were restored. Any utility interruption, including for twenty-four hours, is prohibited by statute and can cause harm to a tenant: their groceries may spoil due to no refrigeration; they have no heating or cooling in their unit which may exacerbate existing health issues, and may cause mold and mildew to develop and grow; they have no water to drink, to bath, to sanitize dishes or to use the restroom; and they have no power to work remotely, to place work orders, to order groceries or medication, and to otherwise contact the outside world. Defendants committed the very act the legislature intended to prevent and it is of no consequence in this case the disconnection was for 24 hours.

38. In a separate and subsequent utility disconnection on or about October 12, 2019, Plaintiff and Defendants disagree only about whether the shut off was caused by Defendants *directly* requesting JEA again terminate utility service at the property via web application or whether Defendants *indirectly* caused the disconnection by not timely making payment for the utilities, which were under their control. However, this factual disagreement is immaterial because §83.67 and applicable case law clearly hold that an indirect disconnection due to nonpayment by a landlord of utilities under his or her control, still constitutes a prohibited practice. See §83.67(1); *See also Bella Contessa, LLC v. Jones,* 14 Fla. L. Weekly Supp. 391a (Fla. Volusia Cty. Ct. 2007)(a landlord was found liable under the statute for failing to make utility payment, resulting in the shutoff of the utilities by the utility company); *Smith v. Niederriter,* 18 Fla. L. Weekly Supp. 1051a (Fla. Broward Cty. Ct. 2011).

39. This Court therefore finds Defendants' actions constitute two separate violations of §83.67, Fla. Stat. Because Plaintiff has not sought, nor introduced evidence of actual damages, this Court finds Plaintiff is entitled to statutory damages of treble his rental amount of $733.00 for each of the two violations for a total of $4,398.00.

***E. Florida Consumer Collection Practices Act Violations***

40. Plaintiff's Motion for Summary Disposition was uncontested with regard to his Florida Consumer Collection Practices Act Violation claim against Defendants. The Florida Consumer Collection Practices Act, §559.55-§559.785, Fla. Stat., "FCCPA" is a punitive consumer protection law meant to protect consumers from certain unfair, abusive, harassing, or misleading conduct in the collection of a debt. Unlike the federal Fair Debt Collection Practices Act, the FCCPA applies to any "person" as defined in the statute, not just "Debt Collectors."

41. For Plaintiff to prevail on a claim under the FCCPA he must prove the following elements: 1) they are a "debtor" or "consumer" 2) Defendant(s) is/are a "person," 3) that the "debt" is a "consumer debt" primarily for household or personal use (as opposed to a business debt), 4) that Defendant(s) committed one or more of the nineteen listed prohibited acts proscribed by §559.72, and 5) that Defendants had the requisite intent or knowledge.

42. Landlord tenant debts are "consumer debts" for purposes of the FCCPA, tenants are consumers and debtors, and both individuals and corporations are "persons" as defined under the statute. *See, e.g., Gaughan v. Watkins Realty Services, LLC,* 26 Fla. L. Weekly Supp. 223b (Fla. Pasco Cty. Ct. 2018)(finding a landlord could be held liable under the statute when they demanded money not lawfully owed in a three-day notice); *Wolk v. Goodman,* 22 Fla. L. Weekly Supp. 992a (Fla. 9th Cir. Ct. 2014)(holding a landlord liable under the Act for billing a tenant charges he did not owe).

43. This Court finds the first three elements have been satisfied. As discussed at length above, Defendants purposefully shut-off Plaintiff's utilities on at least one occasion in an attempt to collect an alleged utility debt from Plaintiff. This Court finds this act would "reasonably be expected to abuse or harass" Plaintiff, and constitutes a violation of §559.72(7), Fla. Stat. Although Plaintiff has been awarded statutory treble damages for the Prohibited Practice claim, "the remedies provided by this section are not exclusive and do not preclude the tenant from pursuing any other remedy at law or equity that the tenant may have." §83.67(8), Fla. Stat. This Court therefore finds no issue awarding Plaintiff statutory damages under both statutes.

44. While Defendants' $100 a day fine imposed on Plaintiff for garage storage may have been without legal right, and thus a violation of §559.72(9), and Defendants' communications with the Jacksonville Housing Authority may have been an impermissible disclosure of a disputed debt, and thus a violation of §559.72(5) and (6), this Court need not reach such conclusion since it has determined Defendants' utility shut-off was a prohibited act under the statute, and thus Plaintiff is entitled to an award of statutory damages of up to $1,000.00.

***F. Liability of Defendant Paulo***

45. Other than Defendants' argument that §83.49 did not apply to the security deposit at issue in this case, the only other substantive defense raised in their Opposition was that Defendant Paulo cannot be personally liable for damages arising out of her actions because she was a member of Defendant LLC, and, as she claims, was acting within the scope of her duties for the LLC. Defendant Paulo's position is that only the Defendant LLC can be liable for her actions. Defendant Paulo raised and argued the concept of "privity" throughout the litigation, and also argued the concept of respondeat superior in her Motion in Opposition and during oral argument.

46. First, this Court is unpersuaded that the concept of "privity" has any applicability. Plaintiff's claims all concern torts or statutory violations that he claims Defendant Paulo herself committed. There is no claim for breach of contract.

47. Second, Defendants misunderstand or misconstrue the liability protections afforded by LLC's. Plaintiff does not seek to hold Defendant Paulo vicariously liable for debts, conduct, or liabilities of the Defendant LLC, but rather for her *own* actions.

48. Individuals are liable for their own acts, regardless of whether a corporate entity exists or whether the conduct was in the scope of their duties for the entity. Plaintiff cites *Quail Cruises Ship Mgt., Ltd.* in support of their position. There, the Southern District of Florida surveyed Florida case law regarding individual versus corporate liability for an individual's acts committed in furtherance of corporate business. *Quail Cruises Ship Mgt., Ltd. v. Agencia de Viagens CVC Tur Limitada,* 09-23248-CIV, 2011 WL 5057203, at *8 (S.D. Fla. Oct. 24, 2011). The court held that "Florida law is clear, that 'if an officer, director, or agent commits or participates in a tort, whether or not his actions are by authority of the corporation or in furtherance of the corporate business, that individual will be liable to third persons injured by his actions, regardless of whether liability attaches to the corporation for the tort.' " *Id.* (citing *Buckner v. Luther Campbell,* No. 09-22815-CIV, 2010 WL 5058314, *2 n. 2 (S.D.Fla. Dec.6,2010)). Where an individual is sued for their own acts or intentional conduct, LLC liability shields are inapplicable, and "it is not necessary that the corporate 'veil' be pierced or even discussed."

(quoting *L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc.,* 619 F.2d 455, 457 (5th Cir. 1980)).

49. It is clear that questions regarding "agency," respondeat superior, or whether a person was acting within the scope of their duties for an entity are relevant to the legal question of whether the *entity* is vicariously liable for the acts of the agent, not whether the individual is liable for its own conduct, as argued by Defendants.

50. Much like torts, individuals are liable for their own statutory violations of the law, whether or not those violations occurred during the course of their corporate duties. Case law supports individual liability for statutory violations of the FDCPA, which is the federal analog to the FCCPA, and other statutes such as the Fair Housing Act. *See, e.g, Thorpe v. Gelbwaks,* 953 So.2d 606 (Fla. 5DCA 2007) [32 Fla. L. Weekly D727a] (corporate shield doctrine does not protect corporate officer who commits intentional misconduct, finding member can be liable for violation of Sale of Business Opportunity Act, FDUTPA, and fraud); *First Fin. USA, Inc. v. Steinger,* 760 So.2d 996, 997-98 (Fla. 4DCA 2000) [25 Fla. L. Weekly D1438c] (president of corporation was not shielded from liability for fraudulent conduct); *Kistner v. Law Offices of Michael P. Margelefsky, LLC,* 518 F.3d 433 (6th Cir. 2008) (lawyer sole member of LLC liable as a "debt collector" without piercing the corporate veil, can be individually liable for FDCPA and Ohio state consumer protection law); *Del Campo v. Am. Corrective Counseling Serv., Inc.,* 718 F. Supp. 1116 (N.D. Cal. 2010)(individual can be liable for FDCPA and Cal. FDUTPA); *Sabal Palm Condominiums of Pine Island Ridge Association, Inc. v. Fischer,* 6 F.Supp.3d 1272 (S.D. Fla. 2014)(corporate board members, FHA personal liability if involved) *Falin v. Condominium Association of La Mer Estates, Inc.,* 2011 WL 5508654, at *3 (S.D.Fla. Nov. 9, 2011).

51. One of the three cases cited by Defendants in their Motion in Opposition illustrates the point. In *Peterson v. Cisco Systems, Inc.,* an injured motorist brought a personal injury action against the employer of the employee-driver who caused the incident. 320 So.3d 972 (Fla. 2DCA 2021) [46 Fla. L. Weekly D1248a];. The court held that *only the driver, and not the company,* was liable for the driver's tort, because the action occurred while the driver was acting outside the scope of his employment with his employer.

52. Applying this principle here, the question here is not whether Defendant Paulo is liable for her own action and conduct, but rather whether she was acting within the scope and authority of her employment with the Defendant LLC, thus rendering the LLC vicariously liable. Because Paulo was Defendant LLC's only member, representative, president and stipulated to acting at all relevant time withing the scope of her position with Defendant LLC, Defendant LLC is also liable for all of her torts or statutory violations.

**IT IS THERFORE ORDERED AND ADJUDGED:**

A. Plaintiff's Motion for Summary Disposition is **GRANTED** and Plaintiff is the prevailing party in this action.

B. Defendants are jointly and severally liable for all claims and damages.

C. The Court awards Plaintiff the following damages:

a. Plaintiff may not obtain a "double recovery" of his $733.00 deposit under both his 83.49 and Conversion claims and thus is awarded $733.00 for both claims.

b. $2,199.00 for Plaintiff's Civil Theft claim ($733 x 3).

c. $4,398.00 for Plaintiff's two prohibited practices claims ($2,199 for each).

d. $670.00 as statutory damages for Plaintiff's FCCPA claim. The Court awards less than the statutory maximum of $1,000 available to Plaintiff under the FCCPA in light of the jurisdictional limits of this small claims court action.

D. Defendants shall pay unto Plaintiff the sum of $8,000.00 as damages, the amount of which is fixed and ascertained, and which shall bear interest at the statutory rate from the date of this order, and for which let execution issue.

E. This Court reserves jurisdiction to award reasonable attorney's fees and costs upon timely motion by Plaintiff and to enter an appropriate judgment in accordance with this order.

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[1]Plaintiff's Motion attached twenty-one exhibits, and all of those which were previously attached to Plaintiff's complaint were stipulated as authentic. Plaintiff's attachments included, among other things, the operative lease agreement between the parties, Plaintiff's civil theft demand letter, email communications between the parties including Defendant(s) purported security deposit disposition notice, Plaintiff's money orders showing numerous $50 payments to Defendants for utilities, Defendant Paulo's Responses to Plaintiff's Request for Admission, deposition transcripts from both Defendants, JEA records of the subject property which are supported by affidavit from records custodian previously filed, public property record and business record documents for Defendant(s), several documents produced by Defendants to Plaintiff, including the Supportive Services for Veteran Families Rental Deposit Advisement, and several documents showing Defendants' communications with the Jacksonville Housing Authority and Plaintiff's subsequent voucher termination notice.

Defendants filed their Opposition to Motion for Summary Disposition and to Enter a Judgment of no Liability for Both Defendants and Incorporated Memorandum of Law, which itself attached no supporting documentation or affidavits. Defendants' motion contested liability on only two issues: 1) Defendants claimed they were not obligated to comply with §83.49 since Plaintiff's security deposit was paid with assistance from a third-party; and 2) that Defendant Paulo is not liable for any claims arising from her own actions because she was acting within the scope of her membership with the Defendant LLC. Defendants raised no other defenses in their motion, and the Court considers all remaining of Plaintiff's claims unopposed. The Parties also filed their Pretrial Stipulation, stipulating to the relevant facts in this case.

* * *

**Insurance—Personal injury protection—Attorney's fees—Where insurer confessed judgment for unpaid interest, medical provider is entitled to fee award under section 627.428(1)**

ATM HEALTHCARE, INC., dba INJURY CARE CENTERS, a/a/o Rodney Watson ("ATM"), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("STATE FARM"), Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2022-SC-003560. May 5, 2023. Jonathan Sacks, Judge. Counsel: Adam Saben, Shuster Saben & Estevez, Jacksonville, for Plaintiff. David Gagnon, Taylor Day Grimm & Boyd, Jacksonville, for Defendant.

## ORDER GRANTING PLAINTIFF'S MOTION TO TAX TAX ATTORNEYS FEES AND COSTS WITH INTEREST FOR CONFESSION OF JUDGMENT

THIS CAUSE came before the Court on March 20, 2023 on the Plaintiff's Motion to Tax Attorney's Fees and Costs With Interest for Confession of Judgment. The Court, having reviewed the motion and entire Court file, read relevant legal authority, heard argument, and been sufficiently advised in the premises, finds as follows:

### FACTS

The facts in this case are not in dispute. Plaintiff, ATM, as assignee of Rodney Watson, pursuant to an assignment of benefits, filed a lawsuit for damages for breach of contract pursuant to section 627.736, Florida Statute (2021) against Defendant, STATE FARM arising out of a motor vehicle accident on January 30, 2020. On February 17, 2023, Defendant filed a Notice of Confession of Judgment, admitting that it owed interest in this case but denied that it owed attorney's fees and costs to the Plaintiff and its counsel for litigating Plaintiff's right to said interest. On February 17, 2023, Plaintiff filed a Motion to Tax Fees and Costs based on said confession.

### ANALYSIS

The legal issue in this case involves the Plaintiff's entitlement to attorney fees and costs for litigating unpaid interest owed on a claim for personal injury protection ("PIP") benefits. A proper review of this legal issue requires a review of the relevant statutes and case law. Section 627.736(8), Florida Statutes (2021), provides, in pertinent part,

> APPLICABILITY OF PROVISION REGULATING ATTORNEY FEES.—With respect to *any dispute* under the provisions of ss. 627.730-627.7405 between the insured and the insurer, or between an assignee of an insured's rights and the insurer, the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15). . . *Id.* (emphasis added).

Under the plain language of this section on attorney's fees, the section applies to "any dispute" under section 627.736, and the provisions of section 627.428, Florida Statutes (2021), govern. In the present case, Plaintiff, an assignee of the subject insured's rights, filed suit alleging that the Defendant, STATE FARM, failed to pay statutory interest on a late-paid claim. Section 627.736(10)(d), Florida Statutes (2021), provides a statutory right to interest on any overdue claim.

> If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the *insurer together with applicable interest* and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer. *Id.* (emphasis added).

The statute is written broadly as to "any dispute" and this Court is duty bound to follow the intent of the Legislature in its clear wording of the statute's text. There is nothing in the text that excludes a dispute regarding unpaid interest by the Defendant. Thus, a failure to pay applicable interest constitutes a dispute under section 627.736(8). Having found that section 627.736(8) applies, the Court must next look to any statutory references contained therein. The pertinent referenced statute in section 627.736(8) is section 627.428, Florida Statutes. Section 627.428(1), Florida Statutes (2021), allows the following on attorney fees:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. Section 627.428(1), Florida Statutes (2021).

In the present case, after Plaintiff filed the lawsuit, Defendant filed a Notice of Confession of Judgment for unpaid interest to the Plaintiff. A post-suit payment of a claim in an insurance case is the functional equivalent of a confession of judgment or verdict entitling the claimant to attorney's fees. *Wollard v. Lloyd's & Cos. of Lloyd's,* 439 So. 2d 217 (Fla. 1983); *Losicco v. Aetna Cas. and Sur. Co.,* 588 So. 2d 681 (Fla. 3d DCA 1991). Indeed, on similar facts, binding precedent requires this Court to grant Plaintiff's Motion to Tax Attorney's Fees and Costs. See *Magnetic Imaging Systems v. Prudential Property & Cas. Ins. Co.,* 847 So. 2d 987 (Fla. 3rd DCA 2003) [28 Fla. L. Weekly D679a] ("*Magnetic Imaging*"). *In Magnetic Imaging*, the insurer tendered a post-suit payment of $22.12, the amount purportedly due as outstanding interest to the plaintiff. *Id.* at 989. The Third District Court of Appeal found this payment constituted a confession of judgment, which entitled the plaintiff to a fee award. *Id.* at 989-90.

This Court also relies on *Superior Ins. Co. v. Libert,* 776 So.2d 360 (5th DCA 2001) [26 Fla. L. Weekly D381a] ("*Libert*"). In *Libert,* the medical provider filed suit against a PIP insurer for unpaid benefits and interest. Superior, the Defendant insurance carrier, paid the benefits due but without interest. When the medical provider moved for summary judgment, the trial court ruled in favor of the medical provider and awarded $13,500.00 in attorney's fees. On appeal, the Fifth DCA found that a suit for interest due to an allegedly late claim is a "claims dispute involving medical benefits". *Libert,* at 364. Like in *Libert,* this case involves a claim for unpaid interest and is considered a claim involving medical benefits. Thus, pursuant to Section 627.738(8), this is a valid dispute that entitles the Plaintiff to attorney's fees pursuant to Section 627.428. This Court also relies on *Orion Ins. Co. v. Magnetic Imaging Systems I,* 696 So.2d 475 (Fla. 3rd DCA 1997) [22 Fla. L. Weekly D1595c] ("*Orion*") in which the Third DCA found that a lawsuit for interest qualifies as a "claims dispute involving benefits", thus triggering attorney fees. It is especially worth noting that the party in *Orion,* that argued that interest should be considered a "claims dispute involving medical benefits" was the insurance company, not the medical provider.[1]

The Defendant relies on *Liberty Mutual Ins. Co. v. Pan Am Diagnostic Services,* 347 So.3d 7 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1724a] ("*Pan Am*"), in which the Fourth DCA held that statutory entitlement to interest is not in and of itself a benefit for which attorney's fees are triggered upon rendition of a judgment. However, the Fourth DCA fails to reconcile its holding with *Libert* and *Orion,* which held the exact opposite; that statutory interest was a "claims dispute" and ignores the broad language of Section 627.736(8) involving "any dispute" in a PIP context where there is a judgment in favor of an insured. Thus, this Court follows the precedent in *Libert* and *Orion,* as discussed, *supra.*

This Court also relies on the Fifth DCA's opinion in *Baker Family Chiropractic v. Liberty Mutual Ins. Co.,* 356 So.3d 281 (Fla. 5th DCA, Feb. 6, 2023) [48 Fla. L. Weekly D269a] ("*Baker Family*"), in which the insurance carrier paid overdue PIP benefits during the safe harbor of the 30-day pre-suit demand letter phase but failed to pay the correct amount of interest, so the medical provider filed suit. Through litigation, it was determined that Liberty Mutual paid the incorrect amount of interest by $1.48 and the medical provider was awarded attorney's fees. The Fifth DCA found that the dispute arose under one of the provisions of ss. 627.730-627.7405, so Plaintiff, Baker Family Chiropractic, was entitled to attorney's fees. In our case, Plaintiff, ATM, also filed suit to recover unpaid interest. Thus, like in *Baker Family,* Plaintiff, ATM, is entitled to attorney fees and costs.

## CONCLUSION

The language of Section 627.736(10)(d), Florida Statutes clearly indicates that no action may be brought against the insurer if the insurer timely pays an overdue claim *together with* applicable interest and a penalty. The legislature did not intend to authorize insurers to withhold applicable interest and a penalty with impunity; an action may be brought if they do not pay them and, upon entry of a judgment, applicable fees and costs. Applying the rationale and holdings of *Orion, Libert,* and *Magnetic Imaging,* along with the finding of *Baker Family* regarding the broad definition of "any dispute" of Section 627.736(8) and Section 627.428, this Court finds entitlement to attorney's fees and costs in favor of the Plaintiff, ATM. Plaintiff's Motion to Tax Attorneys Fees and Costs With Interest for Confession of Judgment is GRANTED.

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[1] In 1997, on a PIP claim, if there was a "claims dispute", the parties were required, by statute, to go to mediation. Since the dispute in *Orion* was merely regarding unpaid interest (and not PIP "benefits"), the medical provider argued that it was entitled to attorney fees without the requirement to go to mediation. The insurer, Orion Insurance Company, argued that "mere interest" was a "claims dispute", ergo, Section 627.736(10)(d) applied and mediation was mandated. The insurer in this case, Defendant, STATE FARM, now takes the exact opposite position.

* * *

**Insurance—Homeowners—Standing—Assignment of benefits—Validity—Assignment of benefits that does not contain a written, itemized per-unit cost estimate of services to be performed by assignee does not comply with statutory requirements and is invalid and unenforceable—Plaintiff failed to provide sufficient authority for finding that insurer waived right to contest assignment or that assignment was not needed to bring statutory bad faith claim**

APEX ROOFING & RESTORATION LLC, a/a/o Carole Wheeler, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 5th Judicial Circuit in and for Sumter County. Case No. 2022-CC-000699. April 27, 2023. Paul Militello, Judge. Counsel: Jackson de Souza and Margaret Garner, Katranis, Wald & Garner, PLLC, Fort Lauderdale, for Plaintiff. Stephanie McQueen and Amanda Kidd, Boyd & Jenerette, P.A., Jacksonville, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT**

THIS CAUSE, having come before the Court on April 14, 2023, for a hearing on Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint and this Court having heard arguments of counsel and having been fully advised in the premises, finds as follows:

1. Plaintiff's Third Amended Complaint for Damages asserts one count for Statutory Bad Faith-Violation of Sections 624.155 & 626.9541, Fla. Stat. Plaintiff asserts Defendant failed to attempt in good faith to settle this claim by forcing the claim to appraisal rather than properly paying the claim. Plaintiff attached the Assignment Agreement dated February 7, 2020 to the Third Amended Complaint.

2. In the Motion to Dismiss Third Amended Complaint, Defendant asserts Plaintiff (1) failed to comply with section 627.7152, Florida Statutes; and (2) failed to state a cause of action since the civil remedy notice was defective pursuant to section 624.155, Florida Statutes.

3. In Response, Plaintiff maintains Defendant waived any defects in the Assignment Agreement and that Plaintiff was not required to bring the claim under any Assignment Agreement.

4. Florida law is well-settled that the trial court's standard of review regarding a motion to dismiss is as follows:

> The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

*Huet v. Mike Shad Ford, Inc.,* 915 So.2d 723, 725 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2728b]. Thus, this Court must confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant.

5. Section 627.7152(2)(a)(4), Florida Statutes requires that an Assignment Agreement contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee.

6. Section 627.7152(9)(a), Florida Statutes provides as follows:

> An assignee must provide the named insured, the insurer, and the assignor, if not the named insured, with a written notice of intent to initiate litigation before filing suit under the policy. Such notice must be served at least 10 business days before filing suit, but not before the insurer has made a determination of coverage under s. 627.70131. The notice must be served by certified mail, return receipt requested, to the name and mailing address designated by the insurer in the policy forms or by electronic delivery to the e-mail address designated by the insurer in the policy forms. The notice must specify the damages in dispute, the amount claimed, and a presuit settlement demand. Concurrent with the notice, and as a precondition to filing suit, the assignee must provide the named insured, the insurer, and the assignor, if not the named insured, a detailed written invoice or estimate of services, including itemized information on equipment, materials, and supplies; the number of labor hours; and, in the case of work performed, proof that the work has been performed in accordance with accepted industry standards.

7. This Court finds that the Assignment Agreement attached to the Third Amended Complaint did not include a written, itemized, per-unit cost estimate of the services to be performed by the assignee or a detailed invoice or estimate of services as required, and pursuant to §627.7152(2)(d), is invalid and unenforceable.

8. This Court notes Plaintiff failed to provide sufficient authority for finding Defendant waived its right to contest the Assignment Agreement in this case. As noted above, when an assignment agreement does not conform to the requirements of §627.7152, the assignment agreement is invalid and unenforceable.

9. This Court notes Plaintiff failed to provide sufficient authority to support that an assignment agreement was not needed to bring this statutory bad faith claim. While indeed, "any person" may properly state a cause of action under section 624.155(1), Florida Statutes, Plaintiff has specifically brought its claim against Defendant as the assignee of the USAA policyholder by way of both the Civil Remedy Notice filed and the named Plaintiff in this action.

10. Finally, this Court finds Plaintiff's reliance upon *State Farm Fire & Cas. Co. v. Zebrowski,* 706 So. 2d 275, 275 (Fla. 1997) [22 Fla. L. Weekly S726a] for the proposition that it did not need an Assignment Agreement to bring this action against Defendant unavailing, as this case does not involve an excess judgment.

11. Based upon the foregoing, it is hereby;

**ORDERED AND ADJUDGED:**

1. Defendant's Motion to Dismiss Third Amended Complaint is **GRANTED**.

2. Plaintiff's Third Amended Complaint is hereby **DISMISSED with prejudice**.

* * *

**Insurance—Automobile—Standing—Plaintiff that filed suit against wrong insurer lacks standing and cannot cure defect**

CORNERSTONE MOBILE GLASS, INC., d/b/a FLORIDA MOBILE GLASS, a/a/o Evaluna Delgado, Plaintiff, v. INFINITY INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 41170 COCI. Division 82. April 17, 2023. Wesley Heidt, Judge. Counsel: Jack W. Vasilaros, United Law Group PA, Largo, for Plaintiff. John Mollaghan, Law Offices of Gabriel O. Fundora & Associates, Ruskin, for Defendant.

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

THIS CAUSE, Defendant's Motion to Dismiss, after argument of the parties, and the Court having been sufficiently advised in the premises, the Court Finds as follows:

1. Defendant's Motion is Granted.

2. Plaintiff lacked standing, as Plaintiff filed suit against Infinity Insurance Company, who did not issue the policy of insurance.

3. Therefore, Plaintiff could not correct by amending to name the correct insurance company, Infinity Auto Insurance Company, as standing cannot be cured after the fact.

4. Therefore, this matter is dismissed.

* * *

**Insurance—Automobile—Windshield repair— Standing— Assignment—Where undisputed testimony and evidence show that insured did not intend to assign rights to sue insurer to repair shop, shop lacks standing to sue insurer**

AT HOME AUTO GLASS LLC, a/a/o Kyle Morrell, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-008555-O. May 15, 2023. Eric H. DuBois, Judge. Counsel: Imran Malik and John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

## ORDER GRANTING STATE FARM'S MOTION FOR SUMMARY JUDGMENT AND SUMMARY FINAL JUDGMENT

This Matter having come before the Court on May 3, 2023, at 2:30 pm on State Farm's Motion for Summary Judgment, and the Court, having reviewed the motion and evidence filed in support of the motion, considered the argument of counsel, and being otherwise fully advised of the premises, hereby sets forth the following background information, undisputed facts, and conclusions of law:

### BACKGROUND

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

2. Plaintiff is a stranger to the automobile insurance policy between State Farm and Mr. Morrell.

3. Accordingly, Plaintiff alleged it obtained an assignment of Mr. Morrell's automobile insurance policy benefits and billed State Farm $1,302.26 for the windshield repair.

4. Plaintiff claims State Farm underpaid its bill and filed this breach of contract lawsuit against State Farm as the purported assignee of Mr. Morrell.

5. State Farm asserts Plaintiff lacks standing to pursue this action because Mr. Morrell did not sign an assignment of benefits in Plaintiff's favor, nor did Mr. Morrell intend Plaintiff to file legal action against State Farm under his insurance policy.

### UNDISPUTED FACTS

6. State Farm issued an automobile insurance policy ('the Policy) to its insured, Kyle Morrell, which provided coverage for damage to the insured's vehicle.

7. The windshield on Mr. Morrell's vehicle was damaged during the Policy period and Plaintiff, At Home Auto Glass, LLC ("Plaintiff"), replaced it with a new windshield.

8. Plaintiff submitted a claim to State Farm under Mr. Morrell's Policy and sent State Farm an invoice for $1,30226.

9. Plaintiff contends it is entitled to bring this lawsuit and enforce the Policy as an assignee of Mr. Morrell because Mr. Morrell "executed an assignment of benefits in favor of the Plaintiff" and State Farm breached by the Policy by underpaying Plaintiff for the loss

10. Plaintiff alternatively contends it "and [Mr. Morrell] entered into an equitable assignment for good and valuable consideration, assigning all rights, title, interest and physical damage benefits under said Policy of insurance to the Plaintiff."

11. As it relates to a written assignment of benefits, Plaintiff's Work Order contains the following language:

> I hereby assign At Home Auto Glass LLC all right [sic] which I have against my insurer for collection of monies due for such repairs and/or replacement. This assignment includes, but is not limited to, the right to receive direct payment of the claim from the insurance company, the right to make demand for payment (including the right to make a demand under relevant consumer protection statute or regulation), the right to sue the insurance company in the court of law for payments rightly owed to me, and the right to receive multiple damages, costs, interest, and reasonable attorneys fee if a court determines the insurer was not responsible in withholding payment or if a court determines that the insurer is otherwise liable for such amounts. The assignment to At Home Auto Glass LLC further includes, without limitation, the right to communicate with, and to receive information from my insurance company, on my behalf, relative to any claim I have made with my insurance company for repair or replacement of damaged glass on my insured vehicle(s). I also hereby authorize At Home Auto Glass LLC to do all things necessary or proper to enforce the rights assigned hereunder. I further understand and agree that if my insurance company should ignore this directive to pay, or otherwise fails to pay At Home Auto Glass LLC all amounts due hereafter within a reasonable time, I will directly pay At Home Auto Glass LLC all amounts due if insurance company issues payment to me instead of At Home Auto Glass LLC. I agree to immediately forward payment to At Home Auto Glass LLC.

12. The signature line on the Work Order has "SOI" written on it.

13. Additionally, Plaintiff's Invoice contains the following language:

> I hereby assign any and all insurance rights, benefits, proceeds and causes of action under any applicable insurance policies that I have to At Home Auto Glass LLC. This assignment is given in consideration for the glass replacement services provided by At Home Auto Glass LLC and for not requiring full payment at the time services are provided. I further agree that I shall remain personally liable for the unpaid portion of all charges on this invoice for which no insurance coverage is available.

14. The signature line on the Invoice contains a partially illegible signature.

15. Mr. Morrell testified in a deposition, and executed a Declaration wherein he attested, the signature appearing on Plaintiff's Invoice was not his. He also testified and attested he did not sign Plaintiff's Invoice or Work Order.

16. Mr. Morrell further testified, and attested, he never intended to give Plaintiff the right to sue State Farm under his Policy and he never authorized Plaintiff to file a lawsuit against State Farm under the Policy.

### CONCLUSIONS OF LAW

#### Summary Judgment Standard

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

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

19. As the Florida Supreme Court held, the "correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 317 So. 3d at 75 (quotation omitted). No longer is it 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." *Id.* at 76 (quotation omitted).

#### Standing

Under Florida law, "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *See, LaFrance v. U.S. Bank Nat. Ass'n,* 141 So. 3d 754, 756 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1419a]("A plaintiff's lack of standing at the inception of the case is not a defect that may be cured

by the acquisition of standing after the case is filed and cannot be established retroactively by acquiring standing to file a lawsuit after the fact"); *Progressive Exp. Ins., Co. v. McGrath Comm. Chiropractic,* 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b] (recognizing that the assignment of insurance benefits "is not merely a condition precedent to maintain an action . . . it is the basis for the claimant's standing to invoke the processes of the court in the first place."); *See also VIP Auto Glass, Inc. v. GEICO General Insurance,* 2018 WL 3649638 (M.D. Fla. Jan. 3, 2018) (dismissing case against VIP Auto Glass, a windshield repair company, with prejudice after it failed to show cause why an adverse judgment on the merits due to lack of standing should not be entered against it for its use of a forged assignment of benefits where the insured unequivocally testified that he did not sign the purported assignment of benefits).

"Ultimately, 'the intent of the parties determines the existence of an assignment.' " *QBE Specialty Insurance Company v. United Reconstruction Group, Inc.,* 325 So.3d 57, 60 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1692] (quoting *Citizens Prop. Ins. Corp. v. Ifergane,* 114 So. 3d 190, 195 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a]). "In other words, a third party's ability to bring suit against an insurance company is predicated on it having received a valid assignment of benefits from the insured." *Id.*

**Mr. Morel's Testimony and Plaintiff's Purported Assignment of Benefits**

20. In this case, Mr. Morrell testified under oath that he did not intend to provide an assignment of any rights or benefits to sue State Farm under his Policy. Specifically, Mr. Morrell's Deposition and Declaration both confirm that he did not provide a written assignment of benefits to Plaintiff as the signature on Plaintiff's Work Order and Invoice are not his.

21. Mr. Morrell also testified under oath that it was never his intention to assign Plaintiff the right to sue State Farm under his insurance Policy and that he never authorized Plaintiff to file a lawsuit against State Farm under his Policy.

22. Because the insured had no intention of assigning any rights or benefits to Plaintiff, Plaintiff cannot avoid summary judgment by attempting to claim an equitable assignment exists in this case. *See QBE Specialty Ins. Co.,* 325 So.3d at 60-61 (holding "the intent of the parties determines the existence of an assignment" and noting that making repairs to property "does not give rise to an equitable assignment absent evidence the insured intended to assign her rights.")

23. The undisputed evidence and testimony from the insured himself unequivocally show Mr. Morrell did *not* intend to assign any rights to bring suit against State Farm to Plaintiff. As such, Plaintiff is not an assignee of Mr. Morrell as a matter of law.

24. Because there is no genuine issue of material fact that Plaintiff lacks standing, State Farm is entitled to summary judgment in its favor as a matter of law.

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

1. State Farm's Motion for Summary Judgment is GRANTED.
2. Full and final judgment is hereby ENTERED in favor of State Farm.
3. Plaintiff shall take nothing in this action and Plaintiff shall go henceforth without day.
4. The court reserves jurisdiction to award fees and costs in favor of State Farm.

* * *

**Insurance—Homeowners—Standing—Assignment—Validity—Determination as to whether primary purpose of assignee's services was to protect, repair, restore or replace dwelling or structure or to mitigate against further damage is not appropriate on motion to dismiss—Assignment that provides that assignee will hold insured harmless but does not state that assignee will also indemnify insured fails to comply with section 627.7152(2)(a)7.—Assignment that does not contain a written, itemized per-unit cost estimate of services to be performed by assignee does not comply with statutory requirements and is invalid and unenforceable—List of services with price per day but without indication of number of days of work is not an estimate of services to be performed**

WATER DRYOUT (LLC), Plaintiff, v. FIRST PROTECTIVE INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-028070-SP-23. Section ND06. April 28, 2023. Ayana Harris, Judge. Counsel: Jesse O'Hara, Fort Lauderdale, for Plaintiff. Melissa G. McDavitt, West Palm Beach, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITH PREJUDICE**

THIS CAUSE came before the Court on February 22, 2023, on Defendant's Motion to Dismiss Plaintiff's Amended Complaint with Prejudice, and the Court having reviewed the Motion, heard the arguments of counsel, reviewed the applicable law, and being otherwise fully advised in the premises, finds as follows:

**LEGAL STANDARD**

A motion to dismiss examines the legal sufficiency of the plaintiff's complaint. *Grove Isle Association, Inc. v. Grove Isle Associates, LLLP*, 137 So. 3d 1081 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D648a]. In order to rule on a motion to dismiss, a trial court must limit itself to the four corners of the plaintiff's complaint. *Id.* While examining the four corners of the complaint, the allegations are assumed to be true and must be construed using all reasonable inferences in favor of the non- moving party. *Id.* A motion to dismiss tests the legal sufficiency of the claims being made and not the resolution of any factual disputes. However, "there is no obligation to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Rockledge HMA, LLC v. Lawley,* 2020 Fla. App. LEXIS 7486 (Fla. 5th DCA 2020) [5 Fla. L. Weekly D1282b].

**APPLICABLE LAW**

Section 627.7152(2)(a), Florida Statutes, applies to an assignment agreement executed on or after July 1, 2019, and the assignment agreement in this case was executed on September 12, 2020. Therefore, section 627.7152(2)(a), Florida Statutes applies to the assignment agreement in this case. *See Total Care Restoration, LLC v. Citizens Property Insurance Corporation,* 337 So.3d 74 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D926a].

Florida Stat. 627.7152(2)(a) contains specific requirements as to what an assignment must contain and may not contain. Relevant to the instant matter, an assignment agreement must:

. . . .

4. Contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee.

5. Relate **only** to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.

. . . .

7. Contain a provision requiring the assignee to **indemnify and hold harmless** the assignor from all liabilities, damages, losses, and costs, including, but not limited to, attorney fees, should the policy subject to the assignment agreement prohibit, in whole or in part, the assignment of benefits.

§ 627.7152(2)(a), Fla. Stat.

Any assignment agreement that does not comply with subsection

627.7152(2), Florida Statutes, is invalid and unenforceable. *Id.*; *see also* § 627.7152(2)(d), Fla. Stat.

**ANALYSIS AND FINDINGS**

In this case, Defendant argues that Plaintiff's AOB: (1) does not relate "only to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property;" (2) does not include a provision "requiring the assignee to indemnify and hold harmless" the insured; (3) and that the attached estimate provided in the Amended Complaint was not an itemized per cost estimate of services to be performed.

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

I. **Work Performed to Protect, Repair, Restore, or Replace a Dwelling**

Since the Court is limited to the four corners of the complaint and its attachments, a determination as to whether the primary purpose of Plaintiff's services was to protect, repair, restore or replace a dwelling or structure or to mitigate against further damage to the property cannot be made at this time because it would require additional evidence not appropriate on a motion to dismiss. As such, dismissal pursuant to § 627.7152(2)(a)(5) cannot be granted on these grounds, and the argument regarding the purpose of Plaintiff's services is more appropriate to be heard on a motion for summary judgment.

II. **Requirement to Indemnify and Hold Harmless**

Plaintiff's AOB provides only that Water Dryout will hold the Insured harmless, not that it will also indemnify Insured. AOB, ¶ 8. Defendant argues that per the statute, the AOB must contain both terms. Plaintiff argues that indemnify and hold harmless are completely synonymous and, therefore, the failure to include language that the Plaintiff will indemnity the Insured does not violate the statute.

To agree with Plaintiff's argument would be to suggest the legislature's inclusion of both the term "hold harmless" ***and*** "indemnify" was superfluous. However, the Court must 'presume that a legislature says in a statute what it means and means in a statute what it says there.' " *MRI Associates of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.*, 334 So. 3d 577, 583 (Fla. 2021) [46 Fla. L. Weekly S379a], citing *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 958 (Fla. 2020) [46 Fla. L. Weekly S3a] (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Moreover, the Court is required to give effect "to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005) [30 Fla. L. Weekly S553a] (citation omitted).

Here, the legislature clearly requires the assignor to hold harmless **and** indemnify the Insured. The use of the two terms and in the conjunction is strong evidence that the words have different meanings and that both are required under the statute. *See Carlson v. State*, 227 So. 3d 1261, 1267 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2083a] ("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended."). Therefore, the AOB fails to comply with § 627.7152(2)(a)(7).

III. **Written, Itemized, Per-Unit Cost Estimate**

The invoice attached to the AOB in the Amended Complaint was not a list of itemized services to be performed. Rather, the estimate lists a number of services—some which appear to be totals, others are priced per day. There is nothing in the attachment which indicates the number of days they were to be Insured's home. "The prices did not apprise the insured of the actual estimate for performing any work, as the prices were also dependent on the scope of work based upon unexplained standards." *Air Quality Experts Corp. v. Family Sec. Ins. Co.*, 351 So. 3d 32, 37 (Fla. 4th DCA 2022) [ 47 Fla. L. Weekly D2592c]. Therefore, the invoice fails to meet the requirements of § 627.7152(2)(a)(4).

**CONCLUSION**

"A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2567a]. An assignment of benefits "is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place." *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b].

Since Plaintiff's assignment agreement is invalid and unenforceable, Plaintiff lacks standing to bring this action. *See Kidwell Group, LLC v. United Property,* 2022 WL 2136705 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b].

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

1. Defendant's Motion to Dismiss the Amended Complaint is **GRANTED**.
2. This case is hereby **DISMISSED WITH PREJUDICE.**
3. Plaintiff shall take nothing by this action, and the Defendant may go hence without delay.

* * *

**Criminal law—Traffic infractions—Evidence—Statements of defendant—Accident report privilege—Statements made by defendant reporting crash and how crash occurred are subject to accident report privilege—Statements made by defendant that were neither in response to officer's questions nor for purpose of completing traffic crash report and which did not constitute information relating to crash are not subject to accident report privilege and are admissible**

STATE OF FLORIDA, v. ROY MEJIA DIAZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. AHBZ67E. Jail Division. Cristina Rivera Correa, Judge. Counsel: Matthew McVea, Assistant State Attorney, Miami, for State. Ciaran Foley, Assistant Public Defender, Miami, for Defendant.

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

THIS MATTER having come before the Court on Defendant, Roy Mejia Diaz's ("Defendant") Motion to Suppress Statements pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Fla. Stat. § 316.062(3), and Fla. R. Crim. Pro. Rule 3.190(g) ("Motion") the Court having conducted an evidentiary hearing on April 21, 2023[1] and heard argument of counsel, and the Court otherwise being fully advised in the premises, the Court finds and orders as follows:

FINDINGS OF FACT

On December 21, 2022, Defendant was arrested and charged with Driving without a Valid Driver License, in violation of Fla. Stat. § 322.03, under citation number AHBZ67E.[2] At approximately 9:45pm on December 21st, City of Miami Police Officer Morris was dispatched to the scene of a car accident in the area of N.W. Miami Court and 23rd Street in Miami-Dade County, where he found a disabled white truck parked on the sidewalk and no one behind the wheel.

Upon arrival in his marked police car, Officer Morris was approached by Defendant, who walked up to Officer Morris' lowered driver side window and had the following exchange with Officer Morris:

Defendant: "Hi, officer, so, you already know."

Officer Morris "What am I supposed to know? Just stand over there for me."

Defendant: "Okay, I'm going back and forth, 'cause, um, that light, I was going. . ."

Officer Morris: "Okay, do me a favor. Stand over there for me."

*****

Wanting Defendant out of the roadway, Officer Morris asked Defendant to stand on the sidewalk for his safety. Officer Morris then exited his patrol car and joined Defendant, who was speaking with another City of Miami Police officer, Officer Rodriguez,[3] near the sidewalk, and the following conversation took place:

Defendant: "I don't have anything on me. I, just, was going my way and a car get [sic] in front of me and I hit the light. I mean, it was, I don't know why, I mean, I was going straight and a guy cut me like this, going that way. He cut me like this and then go [sic] that way.

Officer Morris: "What light was that?"

Defendant: "All the way down there. I was trying. . ."

Officer Morris: "Did the post fall down?"

Defendant: "Huh?"

Officer Morris: "Did the light post fall down?"

Defendant: "I'm sorry?"

Officer Morris: "Did the post fall?'

Defendant: "No."

Officer Morris: "It didn't fall?

Defendant: "No."

Officer Morris: "Was it one of those brick posts or the wooden posts?"

Defendant: "Ah, okay. To be honest, I don't know what I hit, but I know I hit something. If you see, I hit something."

Officer Morris: "Alright. Stay seated."

*****

Defendant: "I know I'm not supposed to be working, but. . ."

Officer Rodriguez: "How long have you been living in the, Florida?"

Defendant: "A year, a year and eight months."

Officer Rodriguez: "A year and eight months?"

Defendant: "Since I started my process of political asylum."

Officer Morris: "Who does the car belong to?"

Defendant: "You want the registration?"

Officer Morris: "Is it your car?"

Defendant: "Yeah."

Officer Morris: "Yeah. Let me get the registration real quick [sic]."

Defendant: "Can I stand up?"

Officer Morris: "Sure."

Defendant then proceeded to retrieve the registration from inside the disabled white truck. Officer Morris mutes his body worn camera for some minutes before turning the microphone back on. By this point, Defendant had already returned to his seat on the sidewalk:

Defendant: "Can I stand up?"

Officer Morris: "Yea."

Defendant: "Excuse me."

Office Morris: "Uh-huh."

Defendant: "So, I was coming in this direction where that car is coming."

Officer Morris: "Yeah."

Defendant: "So, one car cut me off, like this. and comes like, uh, ok, I know English, but I also know Spanish. Can I explain myself in Spanish?"

Officer Morris: "No, 'cause I don't speak Spanish."

Defendant: "Oh, sorry." Okay, so, okay, he was coming this way, like this truck."

Officer Morris: "Okay."

Defendant: "I was coming this way, too. But he cut me off, so I turn in this way and I hit the light."

Officer Morris: "Okay."

Defendant: "And, you know I turned. I was trying to go straight, but the truck—since I hit the light—the truck was like, hmm, and I was like hmm. I was, I was trying to hit to handle it, but, as you might see. . ."

Officer Morris: "Alright. Do me a favor. You can hold on to your wallet and your phone and just stand right there. I'm going to turn my vehicle around real quick [sic], okay?"

Officer Morris turned his patrol car around. While Officer Morris was still sitting in the driver seat in his patrol car, using his computer, Defendant waved at Officer Morris, trying to get his attention. In response, Officer Morris gestured with his hand for Defendant to approach; once Defendant arrived at Officer Morris' open passenger window, Officer Morris inquired, "What's up?" During this exchange, Defendant made several statements that are neither in response to any question by Officer Morris nor relevant to the traffic crash investigation.

**Defendant: "The towing company that I work for. . ."**

*****

Officer Morris: "You can't leave until I give you some paperwork, okay?"

**Defendant: "Of course, of course. Don't worry. Um, I just wanted to let you know, you know? Uh, but, the thing is that, well, umm, this is my like, kind of, my first crash and I would like to have advice from you, since you have experience."**

Officer Morris: "Right. So, first, you're going to have to call your insurance company and explain to them what happened. And when I give you my case. . .You'll get a case card and everything."

**Defendant: "Can I put my hands over here?"**

Officer Morris: "Put your hands where?

**Defendant: "Like this** [leaning on the open passenger window ledge]**."**

Officer Morris: "Can you rest? Sure, you can rest. Let me finish all the paperwork and I'll explain everything to you. I just need you to hang tight."

**Defendant: "Thank you, sir."**

After both Officer Morris and Defendant walked around the truck that was involved in the crash, Officer Morris returned to sit in the driver seat of his patrol car. Defendant then came to the open passenger side window.

**Defendant: "I think you know more about parts than me."**

Officer Morris: "Yeah, definitely done mess up [sic] the axel, the, uh. . .possibly the front differential

**Defendant: "Uh, oh! Ah, haha! *Mire,* you just gave me a heart attack. That's why I hate Miami-Dade, you know? Uh, well, you might know Alpine Towing. . .**

*****

**Defendant: "But, the thing is this, though: at the end of the day, it's going to my account."**

Officer Morris did not handcuff or detain Defendant on any charges during the course of Officer Morris' traffic crash investigation. At no point did Officer Morris tell Defendant that he was "switching hats" from crash investigator to criminal investigator, or that he had otherwise completed the traffic crash investigation and would be starting a criminal investigation. Moreover, Officer Morris did not administer Defendant's *Miranda*[4] rights.

CONCLUSIONS OF LAW

Fla. Stat. Section 316.065, "Crashes; reports; penalties," subsection (1), provides:

> The driver of a vehicle involved in a crash resulting in injury to or death of any persons or damage to any vehicle or other property in an apparent amount of at least $500 shall immediately by the quickest means of communication give notice of the crash to the local police department, if such crash occurs within a municipality; otherwise, to the office of the county sheriff or the nearest office or station of the Florida Highway Patrol.

In addition, Fla. Stat. Section 316.066, "Written reports of crashes," Subsection (4), states:

> Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer *for the purpose of completing a crash report* required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal.
> (Emphasis added.)

Pursuant to Section 316.062 of Florida Statutes, "Duty to give information and render aid,"

> (1) The driver of any vehicle involved in a crash resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall give his or her name, address, and the registration number of the vehicle he or she is driving, and shall upon request and if available exhibit his or her license or permit to drive, to any person injured in such crash or to the driver or occupant of or person attending any vehicle or other property damaged in the crash and shall give such information and, upon request, exhibit such license or permit to any police officer at the scene of the crash or who is investigating the crash and shall render to any person injured in the crash reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary, or if such carrying is requested by the injured person.
>
> *****
>
> (3) The statutory duty of a person to make a report or give *information* to a law enforcement officer making a written report *relating to a crash* shall not be construed as extending to information which would violate the privilege of such person against self-incrimination.[5]
> (Emphasis added.)

*State v. Marshall,* 695 So. 2d 719 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1865a] held that for a statement to be admissible, "it is necessary for there to be clear advice to the reporting person at roadside that the criminal investigation has begun and that the reporting person has a right to remain silent." *Id.* at 721.

In *Perez v. State,* 630 So. 2d 1231 (Fla. 2nd DCA 1994), the defendant, who had been drinking and collided with a truck, made a spontaneous statement to the officer who had arrived at the scene of the crash. The court found that the defendant's declaration was not a response to a specific investigatory inquiry and therefore, the crash report privilege did not apply and the statement was admissible.

In *Goodis v.Finklestein,* 174 So. 2d 600 (Fla. 3d DCA 1965), during a civil trial, the defendant sought to exclude her statement, "O my God, I must have passed out again! I thought this would happen!" The court found that this statement, made immediately upon regaining consciousness and while still in a state of shock, was not a report to the officer.

> Further, only the words "I must have passed out" could have had any relevancy to such a report. [. . .] The significant part of the statement was the admission against interest that she [the defendant] had passed out before and she realized that an accident might be caused by her physical condition. This latter portion of *the statement had no relevancy as to how the accident happened.* The circumstances under which it was made negate the application of the statute.

*Id.* at 603 (emphasis added).

In the instant case, Defendant Mejia Diaz was acting in compliance with his statutory obligation when he reported to Officer Morris the fact that he was involved in a crash and the details of how the crash occurred. Defendant's statement made before either officer advised Defendant a criminal investigation had commenced and before Defendant was advised of his *Miranda* rights could be subject to the traffic crash privilege, and therefore suppressible, if they meet the criteria contained in Section 316.066.

The plain reading of Sections 316.066 and 316.062 makes clear that the traffic crash privilege may only be invoked where a statement is made to a law enforcement officer for the purpose of completing a crash report or if the defendant provides information relating to a crash. The *Perez* and *Goodis* opinions, *supra,* apply Section 316.066 as unambiguously written.

Defendant additionally made several statements—in boldface type above—that were neither in response to a law enforcement officer's question or for the purpose of completing a traffic crash report or constitute information relating to a traffic crash. Accordingly, these statements, which were spontaneously made to Officer Morris, and have no bearing on how the crash occurred, do not fall under Defendant's statutory obligation to report a crash; they are unprivileged and admissible.

Accordingly, Defendant's Motion is hereby GRANTED IN PART and DENIED IN PART,

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[1]Wherein City of Miami Police Officer Morris testified and footage from Officer Morris' body worn camera was introduced as State's Exhibit 1.

[2]Defendant was also arrested and charged with Driving Under the Influence, in violation of Fla. Stat. § 316.193, under citation number AHBZ68E and Leaving the Scene of an Accident, in violation of Fla. Stat. § 316.062, under citation number AHBZ66E. The State nolle prosed both of those charges prior to this Motion being heard.

[3]Officer Rodriguez did not testify at the evidentiary hearing, but is seen on Officer Morris' body worn camera footage.

[4]384 U.S. 436 (1966)

[5]See also, U.S. Const. amend. V.

* * *

**Insurance—Personal injury protection—Coverage—Medical expenses—Declaratory action is proper means to resolve dispute concerning insurer's obligation to pay benefits for lower level laser therapy**

GONZALEZ REHAB PROFESSIONALS, LLC., a/a/o Ruby Martinez, Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-033772-SP-25. Section CG03. March 9, 2023. Patricia Marino Pedraza, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Ryan Becker, Kelley Kronenberg, Fort Lauderdale, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT**

THIS CAUSE, having come before the Court for hearing on March 8, 2023, on Defendant's Motion to Dismiss Count II of Plaintiff's Complaint, after hearing argument of counsel for each party, and the Court having reviewed said Motion and being otherwise duly advised in the premises, finds as follows:

The Plaintiff filed suit against the Defendant in connection with a claim for Personal Injury Protection (PIP) benefits related to an automobile accident which occurred on or about May 30, 2022. Count II of Plaintiff's complaint seeks declaratory relief pursuant to Chapter 86, Florida Statutes. Plaintiff contends that there is bonafide dispute or controversy concerning Defendant's failure to tender payment as it relates to lower level laser therapy billed as CPT Code S8948.

In response to Plaintiff's Complaint, the Defendant filed its Motion to Dismiss Count II of Plaintiff's Complaint. Defendant alleges that

Count II must be dismissed as it does not set forth the appropriate grounds for a declaratory judgment and that the appropriate remedy is a breach of contract via Count I of the Complaint. This Court rejects Defendant's position as Courts have long held that declaratory judgments are proper in respect to determine the insurer's obligations. *Higgins v. State Farm Fire and Casualty Company*, 894 So.2d 5 (Fla. 2005) [29 Fla. L. Weekly S533a]. In reviewing the Complaint, this Court finds that the Plaintiff has sufficiently plead the elements to bring forth its count for declaratory relief.

Furthermore, the mere existence of another remedy at law does not preclude a judgment for declaratory relief. *Maciejewski vs. Holland*, 441 So.2d 703 (1983). The Plaintiff, as master of its own pleadings, has the right to choose its legal strategy and the right to pursue its chosen legal path.

Finally, this Court rejects Defendant's assertion that it would be precluded in raising certain defenses if the count for declaratory relief was maintained. There is no case law or statutory basis to support this notion.

Accordingly, it is therefore ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Count II of Plaintiff's Complaint is hereby DENIED.

2. Defendant shall respond to Count II of Plaintiff's Complaint within twenty (20) days.

* * *

**Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Although insurer's in-house counsel had no justification for violating 17 court orders compelling discovery, insurer's conduct was contumacious and egregious, insurer has been sanctioned numerous times for similar conduct, medical provider has been prejudiced by insurer's conduct, and administration of justice has been hampered by insurer's conduct, motion to strike pleadings and enter default is denied—Monetary sanctions are imposed**

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Neuman Harrison, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-002762-SP-24. Section MB01. April 24, 2023. Stephanie Silver, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Carin Levine, United Automobile Insurance Company, Miami, for Defendant.

## ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR ENTRY OF DEFAULT AND/OR FOR SANCTIONS

THIS MATTER, having come before the Court for hearing on April 21, 2023, on Plaintiff's Motion to Strike Defendant's Pleadings, or in the alternative, Motion for Entry of Default and/or for Sanctions, the Court having reviewed the respective motion, read relevant legal authority, heard argument from counsel of each party, and having been sufficiently advised in the premises, finds as follows:

The subject action, filed on April 27, 2021, is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to fully comply with the terms and conditions of the policy, as well as Fla. Stat. 627.736. During the pendency of this action, as reflected per the docket, the Plaintiff served the Defendant with six (6) discovery requests, in the form of Request for Production and Interrogatories. Based on the Defendant's failure to respond to the Plaintiff's discovery requests, and the failure to timely seek an extension of time to respond to discovery, the Plaintiff filed several Motions to Compel Defendant's Responses to Discovery and for Attorney's Fees and Costs pursuant to Rule 1.380(a)(4). In compliance with Administrative Order No. 06-09, after providing the Defendant written notice of the overdue discovery responses, the Plaintiff submitted Ex Parte Orders to the Court for review and execution. As reflected per the docket, the Plaintiff obtained seventeen (17) Ex Parte Orders [1] in which this Court ordered the Defendant to respond to Plaintiff's discovery within a designated time. As the Defendant failed to comply with the Court's Ex Parte Orders, the Plaintiff filed its Motion to Strike Defendant's Pleadings, or in the alternative, Motion for Entry of Default and/or for Sanctions.

The record reflects that the Defendant filed responses to the subject Request for Production one day prior to the hearing on the subject motion.[2] Additionally, Answers to Plaintiff's Interrogatories were filed one hour prior to the start of the hearing on the subject motion.

After hearing arguments from counsel for each party, this Court finds sanctions are appropriate and Plaintiff is entitled to reasonable attorney's fees pursuant to Rule 1.380 of the Florida Rule of Civil Procedure.

Fla. R. Civ. Pro. 1.380 provides in pertinent part:

> (a)Motion for Order Compelling Discovery.
>
> (4) **Award of Expenses of Motion.** If the motion is granted and after opportunity for hearing, t*he court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees*, unless the court finds that the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action, that the opposition to the motion was substantially justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons.
>
> . . .
>
> (b) Failure to Comply with Order.
>
> (2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:
>
> . . .
>
> (C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.
>
> . . .
>
> *Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable 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.

"It is axiomatic that trial courts enjoy broad discretion and flexibility in fashioning sanctions to enforce court orders." *Alvarez v. Citizens Property Ins. Corp.*, No. 3D20-0178 (Fla. 3d DCA July 21, 2021) [46 Fla. L. Weekly D1670a].

In consideration of the subject motion, the Court considered the factors set forth in *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1993). In *Kozel*, the Florida Supreme Court explained the analysis trial judges should employ in determining whether to strike pleadings as a sanction. The *Kozel* Court set forth principles for addressing the matter, and some guidelines for determining whether such a sanction

is appropriate. These principles include whether the purpose of the Florida Rules of Civil Procedure is being upheld, i.e., "to encourage the orderly movement of litigation." *Kozel*, 629 So.2d at 818.

The *Kozel* factors are as follows: 1. Whether the attorney's conduct was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2. Whether the attorney has been previously sanctioned; 3. Whether the client was personally involved in the act of disobedience; 4. Whether the delay prejudiced the opposing party through undo expense, loss of evidence or some other fashion; 5. Whether the attorney offered reasonable justification for noncompliance; and 6. Whether the delay created significant problems of judicial administration.

The Court analyzed the aforementioned factors and hereby finds as follows:

There is no doubt that the Defendant violated numerous Court Orders which graciously extended the time for Defendant to comply with the ordered discovery. The Third District has held that where numerous Court Orders were violated, that trial courts are "entitled to interpret [such] repeated failures to comply with discovery Orders as willful and intentional, justifying the severe sanction of default." *Morales v. Perez*, 445 So.2d 393 (Fla. 3d DCA, 1984). The Court finds the Defendant's conduct to be contumacious and egregious rather than an act of neglect or inexperience. Defendant and its counsel were well aware of the outstanding discovery and this Court's multiple Orders, such that Defendant's failure to comply demonstrates its complete disregard for the Court's authority, the Rules of Civil Procedure and the justice system.

As it pertains to the second factor, the Plaintiff filed numerous Orders showing that the Defendant has been sanctioned numerous times in other matters for similar conduct.

Regarding the third factor, the Court finds that the Defendant itself was directly responsible for these violations because Defendant's own in-house counsel was responsible for brunt of the violations. In *Xtreme Chiropractic & Rehab, Inc. (a/a/o Oscar Hincapie) v. Geico Ins. Co.*, 23 Fla. L. Weekly Supp. 964b (Broward Cty. Ct. 2016)(Lee, J.), the Court was presented with a similar fact pattern as the instant case and Judge Lee held:

> that the misconduct at issue lies at the feet of the Defendant itself, i.e., the client. The attorneys in this case are "in ouse" counsel for the Defendant. Defendant's attorneys work directly for the Defendant and have no clients other than Defendant. See *A-1 Mobile MRI, Inc. v. United Auto. Ins. Co.*, 12 Fla. L. Weekly Supp. 387d (Broward Cty. Ct. 2005). This particular Defendant apparently believes the Court's Orders are not "orders," but rather "suggestions" to which it may comply at its leisure.

Regarding the Fourth *Kozel* factor, the Court finds that Defendant's willful failure to abide by this Court's numerous Orders and the Rules of Civil Procedure, has prejudiced the Plaintiff in its attempt to obtain discoverable evidence and to prosecute this matter in an effort to bring it to a conclusion. A review of the docket will clearly indicate that the Plaintiff was prejudiced as the Plaintiff has incurred a substantial amount of time and expense in simply trying to obtain information, which it has a right to obtain, by way of discovery.

Regarding the fifth factor, at the hearing, counsel for Defendant commendably conceded that the Defendant had violated numerous Orders as noted above and could not offer an explanation for the Defendant's failure to timely comply with same.[3] Regardless, it is difficult for this Court to imagine any circumstances that would sufficiently justify a parties' continued violation of seventeen (17) Court Orders.

As to the final factor, this Court finds that the Court's administration of justice has been hampered as this case involves a claim for underpaid PIP benefits, with a recommended resolution standard of eighteen months. *Fla. Jud. R. Admin. 2.250(a)(1)(b).* The subject action has been pending since April 2021, and despite numerous Orders compelling discovery, the Defendant's unilateral lack of diligence has unduly delayed the progression of this action. Our court system must function efficiently, and a party ignoring Court Orders only causes delays and clogged dockets. This Court expects all parties, Plaintiff and Defendant, to follow the Rules of Procedure and Orders of this Court. The Court cannot function as efficiently if orders are repeatedly ignored.

While the Defendant's violation of seventeen (17) Court Orders may certainly allow for the severe sanction of striking Defendant's pleadings under the factors set forth in *Kozel*,[4] this Court nonetheless elects to exercise its discretion and declines to strike the Defendant's pleadings or enter a default at this juncture.

However, this Court cannot condone or take lightly the violation of seventeen (17) Court Orders. This Court finds that monetary sanctions as authorized under Fla. R. Civ. P. 1.380(b) are appropriate under the facts and circumstances presented here. *Id.* ("if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative"); *see also Alvarez v. Citizens Property Ins. Corp.,* No. 3D20-0178 (Fla. 3d DCA July 21, 2021) [46 Fla. L. Weekly D1670a] (favoring "rule-based alternatives", such as monetary sanctions, over "case determinative sanctions" where same is "readily available to effectively remedy" the violation).

Therefore, it is ORDERED and ADJUDGED that as a matter of law, Plaintiff's Motion to Strike Defendant's Pleadings is Denied, Plaintiff's Motion for Entry of Default is DENIED; and Plaintiff's Motion for Sanctions is hereby GRANTED. The Court will conduct an evidentiary hearing to assess the amount for monetary sanctions against the Defendant. The parties shall mutually coordinate a fee hearing to take place within forty-five (45) days of the execution of this Order. Additionally, Defendant shall be precluded from filing any Motions for Summary Judgment.

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[1]On at least four (4) Orders, the Defendant was expressly advised that the Court would award fees/costs should the Defendant fail to comply with the Court's Orders.

[2]The Plaintiff represented to the Court that although the Defendant responded to Plaintiff's Request for Production, it has failed to produce documents such as Explanations of Review.

[3]Defense counsel advised the Court that he had been assigned to this case for only a few months and was not the original attorney(s) assigned to the case.

[4]Indeed, the sheer number of violations evinces a willful and contumacious disregard of this Court's authority by the Defendant.

* * *

**Insurance—Personal injury protection—Coverage—Medical expenses—Laser therapy—While CPT code billed for low-level laser therapy is not specifically recognized by Medicare Part B or workers' compensation fee schedules, nature of service, not billed CPT code, controls reimbursement under PIP statute—Where low-level laser therapy is payable as unlisted modality if billed to workers' compensation, insurer is required to reimburse for that service**

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Yasser Hernandez, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-000897-SP-24. Section MB01. March 6, 2023. Stephanie Silver, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Andrea Harris, House Counsel United Automobile Insurance Company, Miami, for Defendant.

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

THIS MATTER, having come before the Court for hearing on February 21, 2023, on Plaintiff's Motion for Summary Judgment, the Court having reviewed the respective motion, read relevant legal authority, heard argument from counsel, and having been sufficiently

advised in the premises, finds as follows:

## LEGAL ISSUE

The issue before the Court is whether an insurer is required to issue reimbursement for low-level laser therapy (billed under CPT code S8948) when the CPT code itself does not appear under the Medicare Part B Physician Fee Schedule or the Workers Compensation Fee Schedule but the service itself is still reimbursable under both Medicare Part B and the Workers Compensation Fee Schedules under CPT code 97039 (unlisted modality)?

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On or about September 21, 2020, Yasser Hernandez (hereinafter referred to as "Claimant") was involved in an automobile accident in which he sustained injuries. As a result, the claimant sought medical attention at Lighthouse Medical Group of Florida, Inc. (herein after referred to as "Plaintiff"). Pursuant to an Assignment of Benefits, bills were submitted by the Plaintiff to United Automobile Insurance Company (herein after referred to as "Defendant") for review and consideration of payment pursuant to Fla. Stat. 627.736, as well as the subject policy of insurance. As no payments were issued, a demand letter was subsequently submitted to Defendant. The Defendant responded to said demand and issued partial payment pursuant to the schedule of maximum charges as per Fla. Stat. 627.736(5)(a)(1). The Defendant denied issuing payment regarding low level laser treatment, billed under CPT Code S8948[1], and subsequently, suit was filed. As per Defendant's Answer and Affirmative Defenses, Defendant alleges that "services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer." As such, Plaintiff has filed its Motion for Summary Judgment.

Defendant has filed its Response to Plaintiff's Motion for Summary Judgment alleging, for the first time in this case, that the First Coast Service Options, Inc. Contractor information indicates that CPT Code 97039 is not payable under Medicare Part B as it is a non-covered bill not payable by Medicare. In contrast, Plaintiff argues that although CPT Code S8948 does not appear under the Medicare Part B Physician Fee Schedule or the Workers' Compensation Fee Schedule, the ***service itself*** (low level laser treatment) is reimbursable under the Medicare **and** Workers' Compensation Fee Schedule under CPT Code 97039.

## FLORIDA'S AMENDED SUMMARY JUDGMENT RULE

The Florida Supreme Court recently amended Florida Rule of Civil Procedure 1.510 to conform with the federal summary judgment standard. *See In re Amendments to Fla. R. Civ. P. 1.510*, 309 So. 3d 192, 192 (Fla. 2020) [46 Fla. L. Weekly S6a] (adopting the federal summary judgment standard); *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 74 (Fla. 2021) [46 Fla. L. Weekly S95a] (largely replacing the text of existing rule 1.510 with the text of Federal Rule of Civil Procedure 56).

Subdivision (c)(1) of the amended Florida rule, which is identical to the federal rule, sets forth the requirements for a party's assertion that a "fact cannot be or is genuinely disputed". The moving party must furnish any and all materials relied upon at the time of filing its motion for summary judgment. In contrast, the nonmoving party "must serve a response" no less than (20) days before the time fixed for the hearing.

Despite the requirements set forth as per the amended summary judgment rule, the Defendant attempts to circumvent the rule by filing a response which is untimely. The Defendant further asks this Court to take into consideration evidence which was not timely filed. Specifically, the Defendant alleges that updated Medicare guidelines state that the procedure is considered a non-covered bill not payable by Medicare.

The amended rule required the Defendant to serve a response to the motion for summary judgment. Rule 1.510(c)(5) states that "the nonmovant must serve a response." There is no wiggle room in the word "must." That word makes the filing of the response mandatory. On a motion for summary judgment, by requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion. See *Lloyd S. Meisels, P.A. d/b/a Coral Springs Animal Hospital and Christopher McLaughlin, DVM v. Steven Dobrofsky*, No. 4D21-2397 (June 8, 2022) [47 Fla. L. Weekly D1239a]. The Florida Supreme Court implemented this change in the timing-related aspects of the rule "to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions." *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d at 77. Therefore, the Court cannot consider evidence which is not timely before the Court.

## ANALYSIS

The PIP Statute sets forth the reimbursement method to be utilized by the insurers in determining whether to issue reimbursement for a service and how much the insurer would be required to pay. Specifically, Florida Statute 627.736(5)(a)1.f. states the following:

> "The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> f. For all other services, supplies, and care, 200 percent of the allowable amount under:
>
> I. The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub subparagraphs (II) and (III).
>
> II. Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
>
> III. The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
>
> However, if such **services, supplies, or care is** not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under Workers Compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. ***Services, supplies or care that is not reimbursable under Medicare or Workers Compensation is not required to be reimbursed by the insurer.***

Under the plain language of the statute, it is the nature of the medical service that, not the billed CPT Code. As indicated per *United Auto. Ins. Co. v. Chironex Enter., Inc. a/a/o Emily Echegaray,* No. 4D21-2307 (Fla. 4th DCA Nov. 30, 2022) [47 Fla. L. Weekly D2490a], focusing solely on the CPT code would be contrary to the dictates of the statute, where the relevant subsection does not even reference CPT codes. The *Echegaray* Court further indicated that it is bound by the plain language of section 627.736(5)(a)([1])(f), which does not require a CPT code to be recognized by Medicare Part B or Workers' Compensation if the service is otherwise covered and reimbursable under Medicare Part B or Workers' Compensation. *Id. See also United Auto. Ins. Co. v. Lauderhill Med. Ctr. LLC*, No. 4D21-2308 (Fla. 4th DCA Nov. 9, 2022) [47 Fla. L. Weekly D2285b]; *United Auto. Ins. Co. v. Lauderhill Med. Ctr. LLC*, No. 4D21-3336 (Fla. 4th DCA Nov. 9, 2022) [47 Fla. L. Weekly D2285a]. In *Chironex*, the medical provider sued the Defendant for this same low level laser therapy under CPT code S8948. This CPT code is not reimbursable under the Medicare or Workers' Compensation reimbursement schedules. The appellate code held that while the CPT code may not be reimbursable, the type of service performed controls whether it is reimbursable. Low level laser therapy is reimbursable, the Court held, *supra*, at 345. Therefore, the service should have been

reimbursed. The Defendant in this case (which is the same Defendant as in the *Chironex* case) has not distinguished *Chironex* nor did it cite to the opinion in its response filed in February 2023.

Moreover, as explained by the Court in *Allstate Fire & Cas. Ins. Co. v. Perez*, 111 So.3d 960 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D915a], "While CPT codes help to clearly identify services that may be reimbursable under a PIP statute, the CPT code alone does not dictate whether a service is reimbursable under the statute. As the county court ruled, it is the nature of the medical service that controls. ***This plain reading of the statute is consistent with the well-established rule in Florida that the PIP statute should be liberally construed in favor of the insured***. 111 So.3d at 963 (citing *State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So.3d 105, 108 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]." (emphasis added)

If the Legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute. This Court is not permitted to edit or add words to a statute that were not placed there by the Legislature. *See Gonzalez Rehab Prof'ls., LLC. v. Star Casualty Ins. Co.,* 2021-027178-SP-25-03 relying on *Perez.*

While CPT Code S8948 is not recognized by Medicare or Workers Compensation, the Statute does not require that the Plaintiff submit a bill for a service utilizing a code for the service that is recognized by Medicare or Workers Compensation. The Plaintiff cannot be found to have failed to comply with the statute because CPT code S8948 has not been eliminated from the general CPT coding system used outside of the Medicare system. It was a valid code in the medical community at the time the low-level laser therapy service was rendered and recognized as an HCPCS Level II code.[2] Even though the "code" is not recognized by the current Medicare or Workers Compensation fee schedules, the "services" are still considered properly billed codes. *See Performance Health and Chiropractic Inc. a/a/o Thomas Henghold v. Progressive American Ins. Co.*; 2019SC002319AXXXHC. [28 Fla. L. Weekly Supp. 635a]

Nonetheless, coding guidelines confirm that the type of service represented by CPT code S8948 is still payable as CPT Code 97039 (unlisted modality) if billed to Workers Compensation. *See University Health Center PA, (a/a/o Benjamin Bartlett) v. State Farm Mut. Auto. Ins. Co.*, 27 Fla. L. Weekly Supp. 209a (17th Jud. Cir., May 15, 2019) *("In this case, the Plaintiff has billed for CPT Code 97039, a non-specific code for therapy. The service rendered in this case was laser therapy, for which there is no specific Medicare Code. . .the laser therapy service at issue, represented by CPT Code* 97039, *is "reimbursable".*)

Based upon the above, this Court finds that the low-level laser therapy service was a reimbursable service under both Medicare Part B and the Workers' Compensation fee schedule and therefore this Court finds that the Defendant was required to issue reimbursement for said service.[3]

Therefore, it is ORDERED and ADJUDGED that as a matter of law, Plaintiff's Motion for Summary Judgment is hereby GRANTED.

[1]Defendant's Explanation of Benefits indicates that service was denied as "This procedure/service is not covered by Medicare." The service at issue was billed on (10) occasions at 2 units per occasion.

[2]See the Healthcare Common Procedure Coding System (HCPCS) Code description for S8948, showing that S8948 has been a valid code and in effect since 1/1/2004, attached to Plaintiff's Motion for Summary Judgment as Exhibit "B".

[3]See the Workers Compensation fee schedule rate for CPT code 97039 attached to Plaintiff's Motion for Summary Judgment as Exhibit "C".

* * *

**Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Although insurer's in-house counsel had no justification for violating eight court orders compelling discovery, insurer's conduct was contumacious and egregious, insurer has been sanctioned numerous times for similar conduct, medical provider has been prejudiced by insurer's conduct, and administration of justice has been hampered by insurer's conduct, motion to strike pleadings and enter default is denied—Monetary sanctions are imposed**

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Laura Leiva, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-011923-SP-25. Section ND03. May 10, 2023. Linda Singer Stein, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Nabil Nahlah, United Automobile Insurance Company, Miami, for Defendant.

**ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR ENTRY OF DEFAULT AND/OR FOR SANCTIONS**

THIS MATTER, having come before the Court for hearing on April 24, 2023, on Plaintiff's Motion to Strike Defendant's Pleadings, or in the alternative, Motion for Entry of Default and/or for Sanctions, the Court having reviewed the respective motion, read relevant legal authority, heard argument from counsel of each party, and having been sufficiently advised in the premises, finds as follows:

The subject action, filed on April 8, 2021, is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to fully comply with the terms and conditions of the policy, as well as Fla. Stat. 627.736. During the pendency of this action, as reflected per the docket, the Plaintiff served the Defendant with several discovery requests. The discovery subject to this motion is discovery in the form Interrogatories relating to Claimant's Prior Injuries (filed on May 2, 2022) and Interrogatories regarding the issue of Relatedness and Medical Necessity (filed on July 2, 2022). Based on the Defendant's failure to respond to the Plaintiff's interrogatories, and the failure to timely seek an extension of time to respond to the subject discovery, the Plaintiff filed several Motions to Compel Defendant's Responses to Discovery and for Attorney's Fees and Costs pursuant to Rule 1.380(a)(4). In compliance with Administrative Order No. 06-09, after providing the Defendant with written notice of the overdue discovery responses, the Plaintiff submitted Ex Parte Orders to the Court for review and execution. As reflected per the docket, the Plaintiff obtained eight (8) Ex Parte Orders in which this Court ordered the Defendant to respond to Plaintiff's discovery within a designated time. As the Defendant failed to comply with the Court's Ex Parte Orders, the Plaintiff filed its Motion to Strike Defendant's Pleadings, or in the alternative, Motion for Entry of Default and/or for Sanctions.

As of the date of the hearing, Defendant has failed to provide responses to aforementioned interrogatories. Defendant failed to show good cause for such failure and also did not attempt to resolve the discovery violations amicably with Plaintiff's counsel prior to the hearing. Therefore, the Court was required to expend judicial time to once again compel Defendant to comply and ordered that Defendant has an additional days to do so from the date of the hearing. Plaintiff withdrew the motion to strike but requested sanctions as a result of Defendant's complete lack of responsiveness to the 8 motions to compel.

After hearing arguments from counsel for each party, this Court finds sanctions are appropriate and Plaintiff is entitled to reasonable attorney's fees pursuant to Rule 1.380 of the Florida Rule of Civil Procedure.

Fla. R. Civ. Pro. 1.380 provides in pertinent part:

(a) Motion for Order Compelling Discovery.

(4) **Award of Expenses of Motion.** If the motion is granted and after opportunity for hearing, t*he court shall require the party or*

*deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees*, unless the court finds that the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action, that the opposition to the motion was substantially justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons.

. . .

(b) Failure to Comply with Order.

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

. . .

(C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

. . .

*Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable 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.

"It is axiomatic that trial courts enjoy broad discretion and flexibility in fashioning sanctions to enforce court orders." *Alvarez v. Citizens Property Ins. Corp.*, No. 3D20-0178 (Fla. 3d DCA July 21, 2021) [46 Fla. L. Weekly D1670a].

In consideration of the subject motion, the Court considered the factors set forth in *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1993). In *Kozel*, the Florida Supreme Court explained the analysis trial judges should employ in determining whether to strike pleadings as a sanction. The *Kozel* Court set forth principles for addressing the matter, and some guidelines for determining whether such a sanction is appropriate. These principles include whether the purpose of the Florida Rules of Civil Procedure is being upheld, i.e., "to encourage the orderly movement of litigation." *Kozel*, 629 So.2d at 818.

The *Kozel* factors are as follows: 1. Whether the attorney's conduct was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2. Whether the attorney has been previously sanctioned; 3. Whether the client was personally involved in the act of disobedience; 4. Whether the delay prejudiced the opposing party through undo expense, loss of evidence or some other fashion; 5. Whether the attorney offered reasonable justification for noncompliance; and 6. Whether the delay created significant problems of judicial administration.

The Court analyzed the aforementioned factors and hereby finds as follows:

There is no doubt that the Defendant violated numerous Court Orders which graciously extended the time for Defendant to comply with the ordered discovery. The Third District has held that where numerous Court Orders were violated, that trial courts are "entitled to interpret [such] repeated failures to comply with discovery Orders as willful and intentional, justifying the severe sanction of default." *Morales v. Perez*, 445 So.2d 393 (Fla. 3d DCA, 1984). The Court finds the Defendant's conduct to be contumacious and egregious rather than an act of neglect or inexperience. Defendant and its counsel were well aware of the outstanding discovery and this Court's multiple Orders, such that Defendant's failure to comply demonstrates its complete disregard for the Court's authority, the Rules of Civil Procedure and Rules of Professional Responsibility.

As it pertains to the second factor, the Plaintiff filed numerous Orders showing that the Defendant has been sanctioned numerous times in other matters for similar conduct.

Regarding the third factor, Defendant's in-house counsel was responsible failed to comply with the discovery.

Regarding the Fourth *Kozel* factor, the Court finds that Defendant's willful failure to abide by this Court's numerous Orders and the Rules of Civil Procedure, has prejudiced the Plaintiff in its attempt to obtain discoverable evidence and to prosecute this matter in an effort to bring it to a conclusion. A review of the docket will clearly indicate that the Plaintiff was prejudiced as the Plaintiff has incurred a substantial amount of time and expense in simply trying to obtain information, which it has a right to obtain, by way of discovery.

Regarding the fifth factor, at the hearing, counsel for Defendant indicated that answers to the subject interrogatories were drafted but not filed. Additionally, it was represented to the Court that Defendant could have avoided the subject hearing as Plaintiff reached out to resolve the subject hearing but Defendant's counsel failed to work together with Plaintiff's counsel in an effort to do so, even after the 8th order to compel.

As to the final factor, this Court finds that the Court's administration of justice has been hampered as this case involves a claim for underpaid PIP benefits, with a recommended resolution standard of eighteen months. *Fla. Jud. R. Admin. 2.250(a)(1)(b).* The subject action has been pending since April 2021, and despite numerous Orders compelling discovery, the Defendant's unilateral lack of diligence has unduly delayed the progression of this action. Our court system must function efficiently, and a party ignoring Court Orders only causes delays and clogged dockets. This Court expects all parties, Plaintiff and Defendant, to follow the Rules of Procedure and Orders of this Court. The Court cannot function as efficiently if orders are repeatedly ignored.

While the Defendant's violation of eight (8) Court Orders may certainly allow for the severe sanction of striking Defendant's pleadings under the factors set forth in *Kozel*, this Court nonetheless elects to exercise its discretion and declines to strike the Defendant's pleadings or enter a default at this juncture.

However, this Court cannot condone or take lightly the violation of eight (8) Court Orders. This Court finds that monetary sanctions as authorized under Fla. R. Civ. P. 1.380(b) are appropriate under the facts and circumstances presented here. *Id*. ("if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative"); *see also Alvarez v. Citizens Property Ins. Corp.,* No. 3D20-0178 (Fla. 3d DCA July 21, 2021) (favoring "rule-based alternatives", such as monetary sanctions, over "case determinative sanctions" where same is "readily available to effectively remedy" the violation).

Therefore, it is ORDERED and ADJUDGED that as a matter of law, Plaintiff's Motion to Strike Defendant's Pleadings is Denied, Plaintiff's Motion for Entry of Default is DENIED; and Plaintiff's Motion for Sanctions is hereby GRANTED. Defendant shall provide answers to Plaintiff's Interrogatories regarding Claimant's Prior Injuries and Interrogatories regarding Relatedness and Medical Necessity within ten (10) days. Additionally, the Court will conduct an evidentiary hearing to assess the amount for monetary sanctions. The parties shall mutually coordinate a 30-minute evidentiary hearing.

* * *

**Insurance—Personal injury protection—Demand letter — Sufficiency—Demand letter that included non-compensable charges and failed to account for application of fee schedule incorporated in PIP statute did not satisfy statutory condition precedent**

BOUGIE CENTER FOR CHIROPRACTIC & ALTERNATIVE, a/a/o Ludovic Jeannite, Plaintiff, v. ALLSTATE FIRE & CASUALTY INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001821-SP-23. Section ND06. March 31, 2023. Ayana Harris, Judge. Counsel: Todd J. Herman, Todd J. Herman, PA, Fort Lauderdale, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

## ORDER ON SUMMARY JUDGMENT REGARDING PRE-SUIT DEMAND

THIS CAUSE came before the Court on Allstate's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-suit Demand. Allstate's Motion was duly noticed and set for hearing on November 23, 2022. Defense counsel reached out to Plaintiff's counsel several times in the week preceding the hearing, but was unable to reach Plaintiff's counsel to discuss the case and the summary judgment hearing. On the day of the hearing, the Court tried to reach Plaintiff's counsel at all available numbers but was unable to do so. Having reviewed the Motion, filings in support, and the Court file; having heard argument of defense counsel on November 23, 2022; and being otherwise sufficiently advised in the premises, the Court finds as follows:

## FACTS

The Plaintiff rendered medical services to Ludovic Jeannite from October 17 through December 9, 2014. The charges for all the services rendered by Plaintiff totaled $4,775. See Exhibit B to Affidavit of Adjuster. Allstate reimbursed Plaintiff in the total amount of $1,857.40 in accordance with the fee schedule payment methodology elected in its policy. See *id.* Thereafter, on or about August 31, 2017, Plaintiff submitted its presuit demand letter, demanding payment in the total amount of $1,093.75 on pain of litigation and exposure for attorneys' fees. See Exhibit C to Affidavit of Adjuster. Plaintiff calculated this amount by taking 80% of the total allegedly billed for all services minus what was allegedly paid for all services. However, the total amounts claimed billed and paid in the presuit demand were not the actual total amounts billed and paid.[1]

Plaintiff initiated litigation against the Defendant on January 19, 2018. Plaintiff's Amended Complaint claimed $376.24 in damages related only to denials of second units of CPT Code 97012 and alleged underpayments of CPT Code 98941 and 9920 [sic].[2] Plaintiff did not file any summary judgment motions or evidence in anticipation of the November 23, 2022 hearing, including anything in opposition to Defendant's Motion for Summary Judgment regarding Deficient Demand.

## ANALYSIS

The PIP Statute is designed to ensure the "swift payment of PIP benefits." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.,* 961 So.2d 328, 331-32 (Fla. 2007) [32 Fla. L. Weekly S453a] (*quoting State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So.2d 1067, 1077 (Fla. 2006) [ 31 Fla. L. Weekly S358a]). Section 627.736(10), Fla. Stat. (2014), ("Section (10)") effectuates this purpose by obligating would-be Plaintiffs to submit a letter before they can file suit, providing precise notice to the insurer of any claims that remain overdue so that insurers have one last chance to pay any overdue benefits to avoid a lawsuit and exposure for fees. *MRI Assocs. of America, LLC (Ebba Register) v. State Farm Fire and Casualty Co.,* 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]. The legislature described the obligation imposed on potential PIP Plaintiffs stating their overdue claims within the Demand with the following words: "specificity," "itemized," "specifying," "each" and "exact." *See* Section (10)(b)(3).

The Third District Court of Appeal recently construed the language of Section (10), rejected a "substantial compliance" standard and concluded that a provider must strictly comply with the plain language of Section (10) and provide a precise demand. *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a] ("*Rivera*"). Like the case before the Court, the *Rivera* Court was confronted with a demand and a lawsuit claiming entitlement to different amounts. The *Rivera* Court initially notes:

> The statute is very specific regarding the detailed information the insured is required to furnish to the insurer before the insured can proceed to file a lawsuit. . . . As the statute clearly states, the letter "shall state with specificity. . . an itemized statement specifying ***each* exact amount**. . . ." **[T]he purpose of the demand letter is not just notice of intent to sue. *The demand letter also notifies the insurer as to the exact amount for which it will be sued*** *if the insurer does not pay the claim*.

*Rivera* at 204 (emphasis in original and added). The *Rivera* Court invalidated the demand because it did not provide Defendant the requisite notice of the amount for which it would be sued. To arrive at this conclusion, the Third District Court of Appeal adopted the rationale of the Eleventh Circuit, Appellate Division, in *Venus Health Center (Joaly Rojas) v. State Farm Fire & Cas. Co.,* 21 Fla. L. Weekly Supp. 496a (Fla. 11th Cir. Ct. (App.) Mar. 13, 2014) ("*Venus Health*") and held:

> If the intent of § 627.736(10) is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to **make a precise demand** so that the insurer can pay and end the dispute before wasting the courts and the parties' time and resources. If the provider simply includes in its demand letter a statement of all the charges incurred—as Venus did here—without even deducting the amount the insurer already paid then it is not stating an exact amount that the insurer owes. *If the PIP insurer must guess at the correct amount and is wrong, then the provider sues and exposes the insurer to attorneys' fees. Before being subject to suit and attorney's fees, the insurer is entitled to know the exact amount due as fully as the provider's information allows.*

*Rivera* at 204 (*quoting Venus Health*) (emphasis added). The facts considered and quoted by *Rivera* are the same as before the Court: 1) a demand that did not state the amount sought in the litigation; 2) a demand that merely restated the total billed and paid without itemizing the specific benefits claimed due. The Court is bound by the Third District Court of Appeal's invalidation of demands with these deficiencies.

More recently, the Fourth District Court of Appeal in *Chris Thompson, PA (Elmude Cadau) v. GEICO Indemnity Co.,* Case Nos. 4D21-1820 and 4D21-2310 (Fla. 4th DCA July 27, 2022) [47 Fla. L. Weekly D1588b] ("*Chris Thompson*") considered a situation where the amounts sought in the demand letter did not match the amount sought in litigation. The Fourth DCA adopted the holdings in *Rivera* and *Venus Health* and concluded: **"[T]he purpose of the demand letter is not just notice of intent to sue. The demand letter also notifies the insurer as to the exact amount for which it will be sued if the insurer does not pay the claim."** *Chris Thompson* at p. 2. Like the demand in *Chris Thompson,* the demand before the Court did not advise the Defendant of the amount for which it would be sued and was therefore invalid in violation of Section (10).

This Court is bound by the Third and Fourth District Courts of Appeal's interpretations of Section 10 and finds that both cases are applicable here. In *Rivera* and *Chris Thompson,* as in the case before the Court, the Plaintiff submitted a demand for one amount and then filed suit for a different amount. *Rivera* and *Chris Thompson* interpreted Section 10 to prohibit this practice. The amount in the demand did not match the amount in suit notwithstanding that there was no additional exchange of information between the demand and the filing of the Amended Complaint in this case. When Plaintiff drafted its demand, Plaintiff had at its disposal the same Explanations of Benefits it used to calculate the amount

due more specifically in the Amended Complaint. There is no evidence before the Court to consider that the Plaintiff lacked any information to state the precise amount due at the demand stage.

The demand before the Court as well as the demands in *Rivera* and *Chris Thompson* were confusing or inconsistent as to the amount claimed to be due, thereby depriving Defendant of notice of the amount to pay to avoid litigation. In the case before the Court, the demand included many charges that were not lawfully compensable because they were in excess of the amounts permitted by and incorporated into the statute. Plaintiff's bills were paid in accordance with the fee schedule payment methodology in Section (5) of the PIP Statute. Had Plaintiff itemized its claim and removed from its demand the charges lawfully paid at the fee schedules (as it did in suit), it would have been able to state its claim in suit at the demand stage. Plaintiff failed to do this and instead demanded that Allstate pay in excess of the amounts permitted by the PIP Statute. The Fourth DCA in *Ebba Register* considered such a demand that demanded amounts in excess of that permitted by schedules incorporated into the PIP Statute and found that such a demand violates Section 10 of the PIP Statute. *MRI Assocs. of America, LLC (Ebba Register),* 61 So. 3d at 465.

In the case before the Court, Allstate was not provided an itemized statement of the amount claimed to be overdue. Nor was Allstate provided with notice that this lawsuit would only concern certain CPT Codes. For the reasons set forth herein, the Court finds that the Plaintiff's demand violates Section (10) of the PIP Statute.

**CONCLUSION**

The *Rivera* Court ruled that a demand letter must provide "not just notice of intent to sue. . . but **the exact amount for which it will be sued**." *Rivera* at 204. As set forth herein, Plaintiff had all the information at its disposal to itemize its claim and state "**each exact amount**" claimed overdue. *Rivera* at p. 14 (emphasis in original). Plaintiff failed to do so. Instead the demand included mostly non-compensable charges and failed to account for application of the fee schedules incorporated into the PIP Statute. Such deficiencies almost ensure that litigation will ensue—for a different amount. The purpose of Section (10) is to avoid unnecessary lawsuits. Allstate was not provided an opportunity to avoid the claim at issue in this litigation.

The Court is bound by *Rivera* and *Chris Thompson* to find that the Plaintiff failed to strictly comply with Section 10. The presuit demand was not precise as required by *Rivera.* It failed to provide Allstate notice and an opportunity to avoid this litigation. For the foregoing reasons and consistent with authorities binding on this Court, the Court finds that the Plaintiff's presuit demand is invalid for failure to comply with Section (10).

**THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that**:

1. Allstate's Motion for Summary Judgment regarding Deficient Demand is **GRANTED.**

2. The instant lawsuit was prematurely filed and is therefore herewith dismissed.

3. Plaintiff shall go hence without day.

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[1]Compare claimed billed amount $3,695 with actual billed amount $4,775 and claimed paid amount $1,862.25 with actual paid amount $1,857.40.

[2]This likely refers to CPT Code 99204.

* * *

**Insurance—Personal injury protection—Venue—Venue is proper in Hillsborough or Seminole County where insurer does not have agent or representative in Miami-Dade County, but has an agent or representative in Hillsborough County and cause of action accrued in Seminole County—Motion to transfer venue is granted**

HEATHROW CHIROPRACTIC, INC., a/a/o Nicola Del'Core, Plaintiff, v. FIRST ACCEPTANCE INS. CO., INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-003083-SP-23. Section ND05. March 16, 2023. Chiaka Ihekwaba, Judge. Counsel: Natalie Badillo, Daly & Barber, P.A., Fort Lauderdale, for Plaintiff. August Mangeney, Staff Counsel, First Acceptance Insurance Company, Tampa, for Defendant.

**PROPOSED ORDER ON DEFENDANT'S AMENDED MOTION TO DISMISS, OR IN THE ALTERNATIVE TRANSFER VENUE**

THIS CAUSE, having come before the Court on Defendant's Motion to Dismiss, or in the Alternative Transfer Venue, and this Court having reviewed the Motion, having heard argument of counsel and being otherwise duly advised in the premises, the Court finds as follows:

1. The Plaintiff filed the instant action in Miami-Dade County for breach of contract and for declaratory relief arising out of alleged unpaid PIP benefits.

2. The Defendant, First Acceptance Insurance Company, filed its Amended Motion to Dismiss or in the Alternative Transfer Venue challenging Plaintiff's selection of Miami-Dade County as a proper venue for this action.

3. Defendant filed its Affidavit in support of its Amended Motion establishing that Defendant, First Acceptance Insurance Company, is a foreign corporation that does not have an agent or representative in Miami-Dade County, and that does have an agent/representative in Hillsborough County.

4. Further, the evidence before the Court shows that the Plaintiff, Heathrow Chiropractic, Inc., is located in Seminole County, the treatment at issue was rendered in Seminole County, Plaintiff's billing address is in Seminole County, and the alleged payment due to Plaintiff was to be remitted in Seminole County. Additionally, the assignor lives in Seminole County and the loss that is the basis for this action occurred in Seminole County.

5. The Plaintiff did not file a response in opposition to Defendant's Motion and Affidavit.

6. The Court notes that Fla. Stat. § 47.051 provides that "Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located." *See Burnup & Sims Telcom, Inc. v. McCrone*, 590 So. 2d 1121 (Fla. 3d DCA 1991).

7. When a party establishes that venue is improper in the county in which the suit was filed by way of an affidavit, the burden shifts to the opposing party to rebut the affidavit with sworn evidence. *See Gino Vitiello, M.D., P.A. v. Genovese Joblove & Battista, P.A.*, 123 So.3d 1185 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2206b].

8. The Court finds that Defendant does not have an agent or representative in Miami-Dade County.

9. The Court further finds that the Defendant has agents or representatives in Hillsborough County, and that the cause of action accrued in Seminole County.

10. Therefore, the Court finds that venue is proper in either Hillsborough County or Seminole County.

**IT IS HEREBY ORDERED AND ADJUDGED**:

1. Defendant's Motion to Dismiss is **DENIED**.

2. Defendant's Motion to Transfer Venue is **GRANTED.** At the request of the Plaintiff, this case shall be transferred to Hillsborough County.

3. Plaintiff shall pay the transfer fee within forty-five (45) days from the date of this Order.

* * *

**Criminal law—Search and seizure—Marchman Act detention—It was unreasonable for officers to search defendant's bag after she was already handcuffed and in custody for a mental health assessment, and there was no objective basis to be further concerned for anyone's safety—No merit to argument that search was authorized because officers had probable cause to arrest defendant based on her earlier erratic conduct at store where defendant, who left store when requested, was not trespassing at store and act of pulling down her swimsuit top as she exited store did not constitute misdemeanor indecent exposure**

STATE OF FLORIDA, Plaintiff, v. K.B.T., Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 582021MM014328NC. April 25, 2023. Phyllis R. Galen, Judge. Counsel: Nicholas Lata, Assistant State Attorney, for Plaintiff. Magdalena Wagoner, Assistant Public Defender, for Defendant.

**[Editor's note: The initials "K.B.T." have been substituted for the defendant's name throughout the court's order.]**

**ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE**

**THIS CAUSE** having come before the Court on Defendant's Motion to Suppress pursuant to Fla. R. Crim. P. 3.190(g) and (h). The Defendant is seeking the Court to suppress the evidence and statements obtained from the Defendant, which was the product of the Defendant being placed under the Marchman Act[1], on the grounds that the search of her bag conducted by law enforcement was in violation of the Defendant's rights under the Constitution of the State of Florida, and the Fourth Amendment of the Constitution of the United States of America.

The particular evidence sought to be suppressed is the physical evidence of a glass pipe and metal push rod which was found in the Defendant's bag, and any statements made by the Defendant which arose after the illegal search of the Defendant.

The Court having heard the testimony of Officer Christie of the Sarasota Police Department, the arguments from the State and Defense, the caselaw presented at the motion, supplemental case law from the Defense and proposed Orders from the State and Defense does hereby find as follows:

On December 18, 2021, law enforcement responded to a call at the Publix located at 2031 Bay Street in reference to a white female acting erratic inside the store. The Publix manager, Yadira Gray, called law enforcement after a customer was yelling and screaming incoherent statements and causing an alleged disturbance inside the store. That person was later identified as [K.T.], the Defendant in the case. Prior to calling law enforcement, the Defendant was asked to leave the store, and the Defendant complied. While leaving the store, Yadira Gray stated that [K.B.T.] had pulled her swimsuit down, exposing her breast to other customers.

When law enforcement arrived at Publix, [K.B.T.] was no longer at the store. It was at that time, that Officer Christie received a call that a white female that matched [K.B.T.]'s description, that was being detained around the area of Ringling and Shade. After different law enforcement officers made contact with Ms. [K.B.T.], they decided to place her under a Marchman Act, and detained her to transport her to Sarasota Memorial Hospital. Prior to transporting [K.B.T.], the officers conducted a warrantless search of the Defendant's bag. At the time the search was conducted, [K.B.T.] was handcuffed and in the back of the patrol vehicle, while her bag was still outside of the vehicle. Officer Christie was not present for the detainment or beginning of the search.

The Defense argues that given the circumstances surrounding the arrest, the search of the Defendant's bag was unreasonable, and violated her Fourth Amendment rights. The Defense relies on *S.P. v. State,* 331 So.3d (Fla. 2nd DCA 2022) [47 Fla. L. Weekly D152b], in regards to a Defendant being placed under a Marchman Act, and the permissible search scope that arises from that. The Defense contends that the search of Defendant's bag was unreasonable in the circumstances surrounding the detention. The search was unreasonable because there was no warrant issued to justify the search, and no exception to the warrant requirement existed.

The Defendant was placed under a Marchman Act, and not arrested, therefore the officers were not authorized to search the Defendant by a search incident to arrest. The Defendant was already placed in handcuffs and separated from her bag prior to the search, and there was no probable cause that the Defendant possessed a weapon or any contraband in her bag, therefore making the search more unreasonable. Furthermore, there was no testimony as to potential probable cause from the officers who detained and conducted the search of the Defendant. Lastly, the Defense argues that the Defendant was being temporarily detained and transported to a mental health facility, just as the Appellant in *S.P. v. State,* therefore the bag would not have been inevitably searched like the Appellant in *White v. State,* 170 So.3d 77 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1362a], that was being transported directly to the jail as a result of being placed under a Marchman Act.

Additionally, the Defense cites *K.M. v State,* No. 2D22-564 Apri114,2023 [48 Fla. L. Weekly D788a]. The Second DCA reversed a denial of a dispositive motion to suppress indicating that officers failed to comply with the requirements of the Baker Act when they placed him in custody and handcuffed and searched him. The Defense argued that the search violated his Fourth Amendment rights because there was no probable cause for the search; that even had the officers complied with the Baker Act, a search pursuant to the Baker Act must be reasonable under the circumstances; and that the policy which required the officers to search K.M. after placing him in protective custody pursuant to the Baker Act is unreasonable.

Testimony elicited at the motion hearing from Officer Christie shows that he was the officer that arrived at Publix and collected statements from witnesses and reviewed the camera footage of the Defendant's encounter at Publix. Officer Christie testified that [K.B.T.] was not arrested for any specific offense, and that the officers on the street placed her under a Marchman Act. Officer Christie further testified that at the time he arrived on the scene of Ringling and Shade, that the Defendant had already been detained, and the search in question had already been commenced. Officer Christie also testified that he was asked by the State Attorney's Office to provide a supplemental report that was completed eight days before the hearing on this matter, which was a year after this incident occurred. In the supplemental report, Officer Christie wrote that he decided to place her under a Marchman Act, which is contrary to the testimony he gave at the hearing. On cross examination, it was elicited that the Defendant was already detained and being searched when Officer Christie arrived on scene.

The State attempted to argue that since the law enforcement officers had probable cause to arrest the Defendant based on her actions at Publix, that the search was authorized because they had probable cause to initially arrest her. Based on the evidence presented at the hearing, this Court cannot agree with that argument. The Defendant did not trespass at Publix because she complied with Publix's commands when asked to leave the premises. She also was not committing the misdemeanor act of indecent exposure, because there must be an exhibition involving "an unlawful indulgence in lust, eager for sexual indulgence." *Payne v. State,* 463 So.2d 271 (Fla. 2d DCA 1984). At the hearing, the State only produced evidence in the form of Officer Christie and Yadira Gray's testimony. Neither of which were present at the time of the search at issue of the Defendant. Officer Christie made observations of the Defendant at Publix, but

when he arrived at the scene of the detainment, other officers, not present at the hearing, had already detained and began the search the Defendant's bag. Since they were not present to testify at the hearing, the Court does not have knowledge of any probable cause to justify the warrantless search of the Defendant's belongings.

Further, there was no testimony offered by the State regarding what probable cause the officers who detained the Defendant in the instant case had. There was no testimony of any communication between dispatch and the detaining officers that led to Ms. [K.B.T.]'s detainment, nor any testimony of any communication taking place between Officer Christie and the detaining officers. There was a missing link between the testimony elicited, and meeting the necessary threshold for probable cause to justify the search of the Defendant's bag by the two officers.

The Court understands the need for the temporary detainment of the Defendant due to the multiple reports prior to making contact with her. However, upon being detained under a Marchman Act, the search of the defendant's bag was unreasonable based on the facts of the instant case. Based on the lack of evidence presented at the hearing on the Defendant's Motion to Suppress, the search of the bag, after the Defendant was placed into handcuffs and was being transported to a mental health facility, it was unnecessary to ensure everyone's safety. Ms. [K.B.T.] had no way to access the bag.

Given the holdings in *S.P.* and *K.M.* , this Court finds them to be more controlling and compelling of all cases cited by the parties and as such the Court agrees with the argument of the Defense.

**IT IS THEREFORE ORDERED AND ADJUDGED** that the Defendant's Motion to Suppress is hereby **GRANTED.**

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[1]§ 397.301-.998, Fla. Stat. (2021)

* * *

**Insurance—Personal injury protection—Discovery—Motion for protective order postponing deposition until after hearing on insurer's motion for summary judgment regarding demand letter defense is granted**

BAY AREA INJURY REHAB SPECIALISTS (a/a/o Jake Morrison), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-029236. Division M. May 11, 2023. Lisa Allen, Judge. Counsel: Feras Hanano, for Plaintiff. Stephen Farkas, Hamilton, Miller & Birthisel, LLP, Miami, for Defendant.

**ORDER**

THIS CAUSE having come on to be heard on Defendant's Objection and Motion for Protective Order and Response in Opposition to Plaintiff's Motion to Compel Deposition (filed under certificate of service April 12, 2023), and Plaintiff's Motion to Compel (filed under certificate of service April 7, 2023) the Court being otherwise fully advised in the premises at a hearing on May 9 2023, it is hereby **ORDERED AND ADJUDGED:**

1. Defendant's Motion for Protective Order is GRANTED until such time as Defendant's pending Motion for Summary Judgment For Failure to Serve a Statutorily Compliant Pre-Suit Demand is heard by the Court.

2. The protective order period shall be in-effect for ninety (90) days during which time the Parties are to schedule a 30-minute hearing on Defendant's Motion for Summary Judgment regarding the demand letter defense.

3. The Court will reserve ruling on Plaintiff's Motion to Compel Deposition and makes no ruling at this time.

* * *

**Criminal law—Installation of tracking device—Pursuant to section 934.425, privilege of husband to put tracking device on vehicle jointly owned with wife terminated when wife filed injunction for protection against husband—Motion to dismiss is denied—Further, unsworn motion to dismiss is legally deficient**

STATE OF FLORIDA, Plaintiff, v. MICHAEL ANTHONY MCMANAMEY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Criminal Division. Case No. 22-CM-005560. Division F. April 11, 2023. Michael C. Baggé-Hernández, Judge. Counsel: Morgan Blaine Zwirn, Hillsborough County State Attorney, Tampa, for Plaintiff. Dylan M. Snyder, Tampa, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

THE COURT denies the Defendant's "Motion to Dismiss" (Defendant's motion/motion) filed on January 24, 2023, (Doc. 45) based on novel legal issues presented by the parties, the filing of a Traverse and Demur, and the legal deficiency of the Defendant's motion.

**DISCUSSION**

**A. Statutory Interpretation**

The interplay between section 934.425(4)(e) and section 934.425(2)-(3) is an issue of first impression for Florida courts. It must be analyzed using the principles of statutory construction.[1]

In interpreting a statute, the court's task is to give effect to the words that the legislature has employed in the statutory text. "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) [46 Fla. L. Weekly S9a] (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012) (hereinafter Scalia & Garner, Reading Law)). As it was long ago observed: "The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense." James Kent, Commentaries on American Law 432 (1826), quoted in Scalia & Garner, Reading Law at 69 n.1. "[T]he goal of interpretation is to arrive at a 'fair reading' of the text by 'determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.' " *Ham*, 308 So. 3d at 947 (quoting Scalia & Garner, Reading Law at 33). Such a fair reading will always be mindful of the "fundamental principle of statutoryconstruction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993) (superseded by statute on other grounds). And we interpret the words of a statute based on their meaning at the time of enactment. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) [27 Fla. L. Weekly Fed. S628a]; Scalia & Garner, Reading Law § 7, at 78 ("Words must be given the meaning they had when the text was adopted.").

The Florida Supreme Court has recently changed how Florida courts use the laws of statutory interpretation. *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) [47 Fla. L. Weekly S199a] (overruling *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984), which held that "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction").

Chief Justice Muñiz writing for the majority describes the *Holly* principle as "misleading and outdated." *Id.* at 598. The Court, quoting *Alachua County v. Watson*,[2] stated that "judges must exhaust all the textual and structural clues that bear on the meaning of a disputed text." *Id.*

As stated by the Court, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The Court reasoned that the traditional canons of statutory interpretation can aid the interpretive process from beginning to end and should be "[v]iewed properly as rules of thumb or guides to interpretation, rather than as inflexible rules . . . (recognizing that some canons, like the rule of lenity, by their own terms come into play only after other interpretive tools have been exhausted)." *Id.* The Court concluded its rational by stating:

> It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether a term has a "plain" or "clear" meaning in isolation, without considering the statutory context and without the aid of whatever canons might shed light on the interpretive issues in dispute.

*Id.* As noted by the case law, the appropriate place to start is with the words of the text.

**B. The Statute**

In the instant case, the relevant portions of the statute, effective October 1, 2015, are as follows:

> (2) Except as provided in subsection (4), a person may not knowingly install a tracking device or tracking application on another person's property without the other person's consent.
>
> (3) For purposes of this section, a person's consent is presumed to be revoked if:
>
> (a) The consenting person and the person to whom consent was given are lawfully married and one person files a petition for dissolution of marriage from the other; or
>
> (b) The consenting person or the person to whom consent was given files an injunction for protection against the other person pursuant to s. 741.30, s. 741.315, s. 784.046, or s. 784.0485.
>
> (4) This section does not apply to:
>
> (e) An owner or lessee of a motor vehicle that installs, or directs the installation of, a tracking device or tracking application on such vehicle during the period of ownership or lease, provided that:
>
> 1. The tracking device or tracking application is removed before the vehicle's title is transferred or the vehicle's lease expires. . .

§ 934.425, Fla. Stat. (2022).

The Defendant argues that the inclusion of the words "an owner" in section 934.425(4)(e) means that since he is "an owner," he is not subject to prosecution under this law.[3] The State counters that argument by averring that his ownership interest does not give him that ability to place a tracker in the Victim's car after she has filed for the dissolution of marriage.[4,5] This Court will use the canons of statutory interpretation to assist its ruling.

**1. The Canons of Statutory Interpretation**

The Court finds that there are several canons of statutory interpretation that will assist in interpreting this statute. Those canons are: (1) the prior construction canon; (2) the whole-text canon; (3) the surplusage canon; and (4) the harmonious-reading cannon. *See* Scalia & Garner, Reading Law, §§ 24, 26-27, 54 (2012). Each of these canons of construction are recognized under Florida law. *See Florida Highway Patrol v. Jackson*, 288 So. 3d 1179, 1182-83 (Fla. 2020) [45 Fla. L. Weekly S32a] (recognizing the prior construction canon); *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 324 (Fla. 2022) [47 Fla. L. Weekly S134] (recognizing whole-text); *Sierra Club v. Dep't of Envtl. Prot.*, 1D21-1667, 2023 WL 2007945, at *4 (Fla. 1st DCA Feb. 15, 2023) [48 Fla. L. Weekly D374a] (recognizing the surplusage canons); *Morgan v. State*, 295 So. 3d 833, 836 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1354a] (recognizing harmonious-reading canon).

**i. Prior Construction Canon**

According to the ruling in *Florida Highway Patrol v. Jackson*, the prior construction canon dictates that if prior judicial interpretations have settled the meaning of an existing statutory provision, then the repetition of the same language in a new statute incorporates its previous judicial interpretations as well. 288 So. 3d 1179, 1182-83 (Fla. 2020) [45 Fla. L. Weekly S32a] (internal quotations and citations omitted.).

This canon is closely connected to the interpretive principle that legal terms acquire an expected, ordinary meaning among the experienced audience to which they are addressed. *Id.* "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.*

**a. "Ownership"**

Generally, under Florida law, the common law of England enacted prior to July 4, 1776, has been declared to be "of force" in Florida. § 2.01, Fla. Stat. English common law provided three legal structures for the concurrent ownership of property that have survived into modern times: tenancy in common (not at issue in the instant case), joint tenancy, and tenancy by the entirety. 1 G. Thompson, Real Property § 4.06(g) (D. Thomas ed. 1994) (hereinafter Thompson).

The common law characterized each joint tenant as possessing the entire estate, rather than a fractional share. As the Indiana Supreme Court noted while interpreting English common law:

> In the ancient language of the law, joint tenants were said to hold per my et per tout, or, in plain words, "by the moiety or half and by all"; the true interpretation of this phrase being that these tenants were seised of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest.

*Wilken v. Young*, 144 Ind. 1, 41 N.E. 68, 69-70 (1895) (internal quotations and citations omitted) *See also Johnston v. Eichelberger*, 13 Fla. 230, 234 (1869) (recognizing "per my et per tout" ownership in Florida). Blackstone describes joint tenants as having "one and the same interest . . . held by one and the same undivided possession." 2 W. Blackstone, Commentaries on the Laws of England 180 (1766) (hereinafter Blackstone). Joint tenants possess the right to use, to exclude, and to enjoy a share of the property's income, and have a right of automatic inheritance known as "survivorship." Upon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it. *Id*. at 183; 7 R. Powell & P. Rohan, Real Property §51.01[3] (M. Wolf ed. 2001) (hereinafter Powell). For one tenant to alienate his or her individual interest in the tenancy, the estate must first be severed—that is, converted to a tenancy in common with each tenant possessing an equal fractional share. *Id*. at § 51.04[1].

Additionally, the common law recognized ownership tenancy by the entirety, a tenancy like a joint tenancy but with the additional component that it was created for co-owners who were married. As Blackstone stated, at common law:

> [I]f an estate be given to a man and his wife, they take neither as joint tenants, nor as tenants in common; for, being considered as one person in law, they cannot take by moieties, but both are seised of the entirety; the consequence of which is, that neither of them can dispose of any part, without the assent of the other, but the whole goes to the survivor.

2 Blackstone 183.

The Florida Supreme Court wrote in *First National Bank of Leesburg v. Hector Supply Company*, English common law prior to 1776 recognized a "tenancy by the entirety in [personal property]" regarding certain cases involving mortgages, bequests, and money lent. 254 So. 2d 777, 779 (Fla. 1971) (internal citations omitted) receded from on other grounds, *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45 (Fla. 2001) [26 Fla. L. Weekly S106a]. The Court noted that "the entireties theory was applied to [personal property] in instances where equity chose to support the wife lest she

be unjustly deprived of her personal property, or in instances where profits and moneys derived from land held by the entireties was transformed into choses in action." *Id.*

The issue of the doctrine of tenancy by the entirety in personal property's existence was directly presented to the Florida Supreme Court in *Bailey v. Smith*, 89 Fla. 303 (1925). The *Bailey* Court determined that personal property could be held by a tenancy by the entirety. *Id.* at 834. The Court also remarked that joint tenants could hold personal property, however, the Florida Legislature abolished the right to survivorship. *Id.* at 835. *See also Merrill v. Adkins*, 180 So. 41, 44 (Fla. 1938) Superseded by statute ("The common law in regard to estates by entirety in personal property has not been abrogated by statute in this state.").

The legislature amended section 319.22, effective January 1, 1980, in response to *Roger Dean Chevrolet, Inc. v. Fischer*, 217 So. 2d 355 (Fla. 4th DCA 1969). *See Smith v. Hindery*, 454 So. 2d 663, 664 (Fla. 1st DCA 1984), *disapproved of by In re Forfeiture of 1978 Chevrolet Van VIN: CGD1584167858*, 493 So. 2d 433 (Fla. 1986) In *Fischer*, the Fourth District held that an automobile titled in the name of "James L. or Susann G. Fisher" was owned as an estate by the entireties, given the intention of the parties in that case. 217 So. 2d at 358. As the *Fischer* court wrote, "there is no reason for a departure or contrary view [of traditional concepts in the creation of estates] merely because the personal property in question is an automobile." *Id.*

Section 319.22(2)(a)1, contains the following provisions concerning the proper endorsement for the transfer of automobile titles:

> 1. Proper endorsement shall be:
>
> a. When a motor vehicle or mobile home is registered in the names of two or more persons as co-owners in the alternative by the use of the word "or," such vehicle shall be held in joint tenancy. Each co-owner shall be deemed to have granted to the other co-owner the absolute right to dispose of the title and interest in the vehicle or mobile home, and the signature of any co-owner shall constitute proper endorsement. Upon the death of a co-owner, the interest of the decedent shall pass to the survivor as though title or interest in the vehicle or mobile home was held in joint tenancy. This provision shall apply even if the co-owners are husband and wife.
>
> b. When a vehicle or mobile home is registered in the names of two or more persons as co-owners in the conjunctive by the use of the word "and," the signature of each co-owner or his or her personal representative shall be required to transfer title to the vehicle or mobile home.

§ 319.22(2), Fla. Stat. (2022). Since the motor vehicle is the property at issue in the instant case, it seems logical that the term owner from the motor vehicle section of the Florida Statutes. Thus, transplanting the meaning of "owner" from section 319.22, when section 934.425 uses the term "owner," the Court interprets the usage of the word as a "joint tenancy" in the instant case.

**b. "Another Person's Property"**

Though section 934.425 defines "person" as "an individual but does not include a business entity," it does not define "another person's property." However, "property of another" is defined in section 812.012, which was effective July 1, 2001, and the Court will use the definition from section 812.012 as the intended definition for section 934.425. *See Florida Highway Patrol v. Jackson*, 288 So. 3d at 1182-83. Chapter 812 of the Florida Statutes proscribes the crimes of theft, robbery, and other related crimes.

Section 812.012(5) defines "property of another" as "property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property." §812.012(5), Fla. Stat. (2022).

The common law here plays an important role in shaping the language used by the legislature in Section 812.012(5). The common law rule dictates that a person cannot commit larceny of property that the person holds in common with others. This rule appears to be derived directly from the elements of common law larceny. At common law, larceny required proof of a trespassory taking. R. Perkins & R. Boyce, Criminal Law (3rd edition, 1982), pp. 292, 303-04. Because each co-owner of property normally has equal right to possession of the property, a co-owner's asportation of the property would not constitute a trespass and thus would not constitute common law larceny, even if done with intent to deprive the other co-owners. Perkins & Boyce, *supra*, at 302.

Florida case law agreed with the common law view that a co-owner of property cannot be held guilty of larceny of such property unless the other co-owner has a superior legal interest that authorizes the withholding of the property. *See Escobar v. State*, 181 So. 2d 193, 195 (Fla. 3d DCA 1965). In *Escobar*, the court reversed the defendant's conviction for grand larceny of certain funds in a joint bank account and reasoned that either party to the account had a right to remove the funds therefrom. *Id.* The defendant had conceded that others were entitled to certain sums in the account, but a dispute arose as to the amount. *Id.* The other parties having a beneficial interest refused the amount tendered, and the parties became engaged in litigation to settle their dispute. *Id.* The court ruled that a co-owner of property cannot be held guilty of larceny of the property because they cannot steal their own goods. *Id.* The only exception to this rule is when a second co-owner has a special property interest therein superior to that of the first co-owner. *Id.* The courts reiterated this ruling in *Hinkle v. State*, 355 So. 2d 465, 467 (Fla. 3d DCA 1978), dismissed, 359 So. 2d 1220 (Fla. 1978) and in *Dimuccio v. D'Ambra*, 750 F. Supp. 495 (M.D. Fla. 1990) (applying Florida law). Even *Russ v. State*, 830 So. 2d 268, 270 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2538a] applying the former version of the statute came to the same conclusion.

The only case in Florida analyzing the current version of the statute is *McKenna v. Foley*, No. 8:05CV2200-T-30MSS, 2006 WL 1639663, at *4 (M.D. Fla. June 9, 2006). In *McKenna*, the court granted summary judgment in favor of the plaintiff who had sued for civil theft. *Id*. "In order to establish a claim for civil theft, the claimant need[ed] to prove, by clear and convincing evidence, that he has been injured by a violation of Fla. Stat. § 812.014." *Id.* The defendant had bought stocks on behalf of the plaintiff using the plaintiff's funds. *Id*. The court reasoned that the defendant had the right to buy and hold onto the stocks on the plaintiff's behalf, however, when he sold them without the plaintiff's consent and without giving the proceeds to the plaintiff, the defendant had knowingly obtained and used the plaintiff's property with the intent to, either temporarily or permanently, deprive the plaintiff of the right to stock shares and the benefit of the proceeds in the amount of the funds obtained from their sale. *Id*. Thus, the court found in favor of the plaintiff.

Other states have interpreted this issue as well. In Alaska, under the general definition of theft promulgated in Alaska Stat. Sec. 11.46.100(1), the prosecution must prove, *inter alia*, that the defendant "obtain[ed] the property of another." Alaska defines "property of another" as "property in which a person has an interest which the defendant is not privileged to infringe, whether or not the defendant also has an interest in the property and whether or not the person from whom the property was obtained or withheld also obtained the property unlawfully. . ." Alaska Stat. § 11.46.990.

As an issue of first impression in Alaska, the court in *LaParle v. State* held that money, which was a marital asset, was "property of another," and thus, a husband was not privileged to conceal money from his wife and committed theft by doing so. 957 P.2d 330, 333 (Alaska Ct. App. 1998). The court clarified that the term "another" did not necessarily mean a third party. *Id.* It could also include situations

where the defendant had joint possession or ownership of the property with the victim. *Id.* In such cases, the defendant could still be guilty of theft if he or she took or controlled the property with the intent to deprive the victim of his or her rightful share or interest in the property. *Id.*[6]

Section 812.012(5) contains similar wording as the Alaska statute, particularly the part that states the "interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property." It is clear from the words of the statute that section 812.012(5) criminalizes the unlawful deprivation of an owner the beneficial use of property regardless of the ownership status of the person depriving the property. This Court finds *LaParle* to be persuasive and interprets section 812.012(5) similarly as the *LaParle* court interpreted the Alaska statute. Therefore, by section 934.425(2) using the term, "another person's property" this Court uses the definition from section 812.012(5), and interprets it as such. With that in mind, the Court will employ the whole-text canon, the surplusage canon, and the harmonious-reading canon.

**ii. The Whole-Text canon, The Surplusage Canon, and The Harmonious-Reading Canon**

> As Judge Pryor specified in *Regions Bank v. Legal Outsource PA*: The whole-text canon refers to the principle that a "judicial interpreter [should] consider the entire text, in view of its structure and of the physical and logical relation of its many parts," when interpreting any particular part of the text. Scalia & Garner, *Reading Law* § 24, at 167. "Properly applied, it typically establishes that only one of the possible meanings that a word or phrase can bear is compatible with use of the same word or phrase elsewhere in the statute . . . ."

936 F.3d 1184, 1192 (11th Cir. 2019) [28 Fla. L. Weekly Fed. C256a]. *See also Lab. Corp. of Am. v. Davis,* 339 So. 3d 318,324 (Fla. 2022) [47 Fla. L. Weekly S134a]. The surplusage canon of construction provides that "[i]f possible, every word and every provision is to be given effect (verba cum effectu sunt accipienda). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *See* Scalia & Garner, Reading Law § 26, at 174. *See Sierra Club v. Dep't of Envtl. Prot.*, No. 1D21-1667, 2023 WL 2007945, at *4 (Fla. 1st DCA Feb. 15, 2023) [48 Fla. L. Weekly D374a] ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.") (internal citations and quotations omitted)).

The court in *Morgan v. State* stated that the harmonious-reading canon requires interpreting provisions of a statute in a compatible, not contradictory, manner. 295 So. 3d 833, 836 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1354a]. While citing Scalia & Bryan A. Garner's Reading Law: The Interpretation of Legal Texts (2012), the court detailed that there is no justification for needlessly rendering provisions of a statute in conflict. *Id.* The purpose of this canon is to ensure that "one part of a statute does not defeat another if a reasonable construction can make the two provisions stand together." *Id.* (quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 58 (1868)).

Even if the relevant statutes were ambiguous, which they are not, dismissal would still not be warranted under the canons of construction. Though the Defendant justifies his position by focusing the Court's attention to the word, "owner," the attention to this one word distorts the meaning of the statute. Such focus is preciously the trap that Justice Muñiz warned against in the *Conage* case.

The Court has analyzed the instant case using the whole text canon, surplusage canon, and harmonious-reading canon to interpret the statute in question. The Court finds that the terms "owner" and "another person's property" are legal terms and carry their previously discussed legal meanings. Although the statute starts with various definitions, none of those definitions are relevant to the instant case. The statute prohibits the installation of a tracker on another person's property, and the placement of the tracker's prohibition language near the language dictating where consent has been revoked means that the statute prohibits the conduct at issue in the present case.

As noted previously, joint owners could traditionally do what they wanted with their property, including installing trackers on it, as section 934.025(4) allows. However, the placement of the consent revocation language alerts the reader that the statute now prohibits an activity that was previously permissible. This reading makes sense, especially since section 812.012(5) changed the common law so that courts no longer consider only the ownership interest in the property but also the privilege to infringe on that property, regardless of ownership interest.

Section 934.025 takes away the privilege that a joint owner of a vehicle previously enjoyed to put a tracking device on that vehicle without the other owner's consent when one of the parties has filed for a dissolution of marriage or has filed an injunction, as in the present case. Therefore, the Court denies the Defendant's motion.

**C. Defendant's Motion to Dismiss is Legally Deficient**

Additionally, the Court denies the Defendant's motion because it is legally deficient. Florida Rule of Criminal Procedure 3.190(c)(4) explicitly requires that "[t]he facts on which such motion is based should be specifically alleged and the motion sworn to." Fla. R. Crim. P. 3.190(c)(4).[7] Failure to swear to a "(c)(4)" motion to dismiss is fatal. *E.g.*, *State v. Crafton*, 575 So. 2d 777 (Fla. 5th DCA 1991); *State v. Smith*, 575 So. 2d 314 (Fla. 2d DCA 1991); *State v. Huggins*, 368 So. 2d 119 (Fla. 1st DCA 1979). In the instant case, the Defendant did not swear to the facts contained in the motion, therefore it must be denied.

It is therefore **ORDERED AND ADJUDGED** that "Defendant's Motion to Dismiss" (Doc. 45) is hereby **DENIED**.

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[1]In July 21, 2022, the Office of the State Attorney for the Thirteenth Judicial Circuit (State) filed a two-count Information against Michael Anthony McManamey (Defendant). Doc. 3. The first count alleges that between June 9, 2021, and October 22, 2021, the Defendant "did willfully, maliciously and repeatedly follow, harass or cyberstalk" Ashlee McManamey (Victim). *Id.* The second count alleges that between September 10, 2021, and October 22, 2021, the Defendant "did knowingly install a tracking device or tracking application on the property of [Ashlee Manamey] without consent." *Id.*

[2]333 So. 3d 162, 169 (Fla. 2022).

[3]On January 24, 2023, the Defendant filed the instant motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c). Doc. 45. The Defendant moves to dismiss count two of the Information, claiming that the undisputed facts do not establish a prima facie case of guilt against the Defendant. *Id.* The Defendant claims that the undisputed facts show that the "property of another," referenced in the Information, is a "jointly owned" Volvo vehicle. *Id.* at pg. 1. As support for his claim, the Defendant has incorporated exhibits by reference also filed on January 24, 2023, as a separate docket entry, which are a bill of sale, an insurance policy, and an unknown document. Doc. 46. The Defendant argues that the language of section 934.425(4)(e) exempts him from prosecution under this section because he was "an owner" at the time of the tracker's installation. Doc. 45. at pgs. 1-2. The motion did not include specific allegations of material fact under oath. *Id.*

[4]In its traverse, the State does not deny with specificity any material facts asserted in the Defendant's motion. The State specifically admits to all the allegations contained in the Defendant's motion and asserts that there are additional facts that the Defendant did not include in the motion. *Id.* Specifically, the State alleges that the Victim filed a petition for dissolution of marriage on March 22, 2021, in case 2021-DR-003874. *Id.* Additionally, the State alleges that the Victim solely possessed the vehicle at the time of the divorce filing and installation of the tracker, and that the Defendant placed the tracker in the vehicle without the Victim's consent. *Id.* In its demurrer, the State asserts that section 934.425(4)(e) does not apply to the instant case. *Id.* The State argues that section 934.425(4)(e) must be read in conformity with section 934.425(2) and 934.425(3)(a), and since the Victim has filed for divorce, the Defendant no longer can

legally place the tracker on the vehicle, even if the Defendant is a joint owner of the vehicle. *Id*. at pg. 5. Furthermore, the State suggests that section 934.425(4)(e) only applies to "sole owners" or individual owners of a vehicle, and not to property owned jointly. *Id*.

[5]The documentation provided by the Defendant is not adequate proof of ownership. Nonetheless, since the State has conceded that the Defendant is a "joint owner" of the vehicle, the Court shall rule accordingly.

[6]The *LaParle* court looked to other states in defining what "property of another" meant: "Our conclusion that 'property of another' includes the undivided property rights of co-owners is also bolstered by decisions from other states. *See People v. Llamas*, 51 Cal.App.4th 1729, 60 Cal.Rptr.2d 357, 361-62 (1997) (holding that a spouse can be convicted of theft for taking community property); *Commonwealth v. Mescall*, 405 Pa. Super. 326, 592 A.2d 687, 690-91 (1991) (same); *People v. Kahanic*, 196 Cal.App.3d 461, 241 Cal.Rptr. 722, 723 (1987) (holding that a spouse can be convicted of vandalism for destroying community property); *State v. Webb*, 64 Wash. App. 480, 824 P.2d 1257, 1262-63 (1992) (same). *See also State v. Kuntz*, 265 Mont. 253, 875 P.2d 1034, 1036 (1994) (a partner can commit theft of partnership assets if he uses the assets for non-partnership purposes without the consent of the other partners); *State v. Sylvester*, 516 N.W.2d 845, 849 (Iowa 1994) (a partner can be convicted of embezzling partnership assets); *State v. Larsen*, 834 P.2d 586, 590-91 (Utah App.1992) (same)." *LaParle*, 957 P.2d at 334.

[7]Under Florida Rule of Criminal Procedure 3.190(c)(4), a defendant may move for dismissal by alleging that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Fla. R. Crim. P. 3.190(c)(4). Under this rule, "it is the defendant's burden to specifically allege and swear to the undisputed facts in a motion to dismiss and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion." *State v. Kalogeropolous*, 758 So. 2d 110, 111 (Fla. 2000) [25 Fla. L. Weekly S360a].

When faced with a motion to dismiss, the State may file a traverse pursuant to rule 3.190(d). If the State files a traverse, it must, under oath and in good faith, either specifically dispute the defendant's material facts or allege additional material facts that are sufficient to establish a prima facie case. *Id*. at 112; *State v. Dickerson*, 811 So. 2d 744, 746 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D480d]; *see also State v. Gutierrez*, 649 So. 2d 926, 927 (Fla. 3d DCA 1995) [ 20 Fla. L. Weekly D349a] (noting that any denial of the material facts by the State in a traverse must be made "in good faith, and not based upon speculation, conjecture, presumption or assumption"). In its traverse, the State need not adduce evidence sufficient to support a conviction. *State v. Ortiz*, 766 So. 2d 1137, 1142 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2016a]. Instead, it must only establish the "barest prima facie case." *Dickerson*, 811 So. 2d at 746 (quoting *State v. Hunwick*, 446 So. 2d 214, 215 (Fla. 4th DCA 1984)). In doing so, the State may rely on circumstantial evidence. *Id*. at 746. In addition, the State is entitled to the most favorable construction of the evidence, and all inferences arising from the facts contained in both the motion to dismiss and the traverse must be resolved in favor of the State and against the defendant. *Id*.; *Ortiz*, 766 So. 2d at 1142.

When considering the State's traverse, the trial court is not permitted to make factual determinations or to weigh the State's evidence. *Ortiz*, 766 So. 2d at 1142. Thus, a trial court cannot dismiss criminal charges simply because it concludes that the case will not survive a motion for judgment of acquittal at trial. *State v. Jaramillo*, 951 So. 2d 97, 99 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D696a]; *State v. Burrell*, 819 So. 2d 181, 182 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1142b]; *Dickerson*, 811 So. 2d at 747; *State v. Paleveda*, 745 So. 2d 1026, 1027 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2414a]. Instead, if the State in good faith disputes any material fact, denial of the motion to dismiss is mandatory. *Kalogeropolous*, 758 So. 2d at 112.

* * *

**Insurance—Bad faith—Civil remedy notice—Deficient notice—Motion to file amended complaint for bad faith is denied where amendment would be futile since civil remedy notice is facially invalid—CRN fails to identify any specific policy language at issue in alleged violation, fails to identify specific statutory provision violated, fails to state facts and circumstances giving rise to violation, and fails to provide cure provision**

HESS SPINAL & MEDICAL CENTERS, INC., a/a/o Scott Killian, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 19-CC-050689. Division S. May 8, 2023. Melissa Black, Judge. Counsel: Joseph Shafer, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Gladys Perez Villanueva, Miami Springs; and Gabriel O. Fundora, Law Offices of Gabriel O. Fundora & Associates, Tampa, for Defendant.

## FINAL ORDER OF DISMISSAL

This matter came before the Court on April 26, 2023 upon the Plaintiff's Motion for Leave to Supplement and/or Amend the Complaint and Defendant's Motion to Strike Plaintiff's Correspondence and Plaintiff's Request for Production, Motion for Protective Order, and Motion for Sanctions. Plaintiff, Hess Spinal & Medical Centers, Inc. a/a/o Scott Killian ("Plaintiff"), was represented by Joseph Shafer, Esq., of Irvin & Petty, P.A., and Defendant, Infinity Auto Insurance Company ("Infinity") was represented by Gladys Perez Villanueva, Esq.; and Gabriel O. Fundora, Esq. of Gabriel O. Fundora & Associates. The Court, having heard argument of counsel, reviewed the court file, the written submissions of the parties, legal authorities, and being otherwise duly advised in the matter, DENIES Plaintiff's Motion for Leave and makes the following findings of fact and conclusions of law:

*Background and Material Facts*

In 2019 Plaintiff filed the instant suit against Infinity for PIP benefits under section 627.736, Florida Statutes. Plaintiff asserted a claim for purported "overdue and owing PIP benefits, overdue statutory interest on overdue PIP benefits, overdue statutory penalties, and overdue postage." (Comp. ¶ 1). On October 9, 2020, Infinity confessed judgment for the "full jurisdictional limits as outlined in the Complaint for benefits, and $10.96 for applicable interest to Plaintiff." Infinity further stipulated "that the attorneys for Plaintiff are entitled to reasonable attorney's fees and costs."

On March 30, 2021, Plaintiff moved for leave to file an Amended Complaint for statutory bad faith pursuant to Section 624.155, Florida Statutes. Plaintiff attached, as Exhibit A to its Motion, the Civil Remedy Notice ("CRN") required by section 624.155.[1] (D.E. 24). In response, Infinity filed an Opposition to Plaintiff's Motion for Leave to Amend the complaint. (D.E. 30). Therein, and at the hearing, Infinity argued that Plaintiff's Motion must be denied because Plaintiff's amendment is futile, as the CRN is facially invalid. This Court agrees that the CRN is facially invalid.

*Findings of Fact and Conclusions of Law*

**A. Procedural Considerations/Documents**

The central issue for this Court's determination is whether the Plaintiff's CRN comports with the specificity mandate of section 624.155, Florida Statutes, such that it satisfies the statutory condition precedent requirement that would allow Plaintiff to file a bad faith action against Infinity. In analyzing the issue, this Court considered the Plaintiff's Motion for Leave to Amend and the attached exhibits thereto. Plaintiff attached the CRN (Exhibit A); the Confession of Judgment (Exhibit B); and the Supplemental and/or Amended Complaint for Bad Faith (Exhibit C). Additionally, this Court also considered the insurance Policy, which Infinity filed as an attachment to its Notice of Intent (D.E. 46) and was referenced in both the Complaint and proposed Amended Complaint. *See* F. R. Civ. P. 1.130 ((a)(contract upon which action may be brought must be incorporated or attached to pleading) and ((b) any exhibit attached to a pleading must be considered part thereof for all purposes)); *Franz Tractor Co. v. J.I. Case Co*., 566 So. 2d 524 (Fla. 2d DCA 1990) (exhibit to pleading is part of pleading for all purposes); *One Call Property Serv. Ins. Co. v. Security First Insurance Company,* 165 So. 3d 749 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a] (where terms of legal document are impliedly incorporated by reference into the complaint, trial court may consider contents of reference document in motion to dismiss; proper to consider insurance policy in an insurance dispute); *Veal v. Voyager Prop. & Cas. Ins. Co*., 51 So. 3d 1246 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a].

**B. Legal Standard for Motion for Leave to Amend**

It is well-settled that the Florida Rules of Civil Procedure reflect a clear policy that requests for leave to amend should be granted. *See Thomson v. Jared Kane Co., Inc.*, 872 So. 2d 356 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1020b]. Infinity recognizes Florida's "liberality of amendment," and Plaintiff would have the inquiry end there. The inquiry, however, does not end there. A trial court, in analyzing a

motion for leave to amend, is legally required to determine whether the proposed amendment was prejudicial, an abuse of privilege, or futile. *See Grover v. Karl*, 164 So. 3d 1285 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1388a] (trial court erred "without determining, as our law requires, that the proposed amendment was prejudicial, an abuse of privilege, or futile"). Infinity properly concedes that Plaintiff has not abused the privilege to amend and that it will not be prejudiced by the amendment, as this latter prong revolves around its ability to prepare for a dispositive proceeding. Infinity's argument focuses on the third prong—that the amendment is futile. Infinity maintains that the CRN is facially invalid. Documents in the court record do not change, and the CRN under consideration today will be the same CRN throughout the life of this case. No conceivable amendment or opportunity to amend will change the substance of the CRN. Given binding precedent invalidating strikingly similar CRNs, as more fully set forth below, this Court agrees than any amendment would be futile.

**C. The CRN is Facially Defective and Invalid**

As a condition precedent to an action under section 624.155, Florida Statutes, Florida's "bad faith" law, an insured must provide written notice to the insurer and provide an opportunity to cure any violation as delineated in the statute. *See* § 624.155(3)(a), Fla. Stat. The purpose of the CRN is "to give the insurer one last chance to settle a claim with its insured and avoid unnecessary bad faith litigation. . ." *See Lane v. Westfield Ins. Co.*, 862 So. 2d 774, 779 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2547c]. Because a first-party bad faith claim under section 624.155 is in derogation of common law, the statute's requirements, including the condition precedent of proper notice, must be strictly construed. *See Talat v. Aetna Cas. & Surety Co.*, 753 So. 2d 1278, 1283 (Fla. 2000) [25 Fla. L. Weekly S172a].

The requirements for a valid CRN are set forth in section 624.155(3), Florida Statutes, which provides:

> (3)(a) As a **condition precedent** to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. Notice to the authorized insurer must be provided by the department to the e-mail address designated by the insurer under s. 624.422.
>
> (b) The notice shall be on a form provided by the department and **shall state with specificity** the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the **specific language of the statute**, which the authorized insurer allegedly violated.
>
> 2. The **facts and circumstances** giving rise to the violation.
>
> 3. The name of any individual involved in the violation.
>
> 4. Reference to **specific policy language** that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
>
> 5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

(Emphasis added).

During the pendency of this case, four appellate courts have addressed the validity of CRNs in bad faith cases. *See Julien v. United Prop. Ins. Co.*, 311 So. 3d 875 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D486d]; *Demase v. State Farm Fla. Ins. Co.*, 351 So. 3d 136 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2318c]; *Cassella v. Travelers Home and Marine Ins. Co.*, 352 So. 3d 1290 (Fla. 2nd DCA 2023) [48 Fla. L. Weekly D147b]; and *Boone v. State Farm Ins. Co.*, 2023 WL 2800296 (Fla. 6th DCA April 6, 2023) [48 Fla. L. Weekly D718a]. *Julien* is directly on point and has been followed by the three other appellate courts, all invalidating CRNs for failure to comply with the statutory requirements of subsection (3)(a).

In *Julien*, the Fourth District Court of Appeal began its analysis of the CRN issue by recognizing the cardinal rule of statutory construction in Florida—that statutory analysis begins with the plain meaning of the language of a statute. *See Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So 3d 362 (Fla. 2013) [38 Fla. L. Weekly S17a & 38 Fla. L. Weekly S45a] (statutory analysis begins with plain meaning of actual language of the statute; where language is clear and unambiguous the statute must be given its plain and obvious meaning). The language of 624.155 is clear: the notice "*shall* state with specificity the following information." The word "shall" is mandatory in nature and the only reasonable interpretation is that "shall" is interpreted as "must" or "will." *See Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 978 (Fla. 2017) [42 Fla. L. Weekly S38a]. The *Julien* court applied a second rule of statutory construction: because 624.155 is in derogation of common law, it must be strictly construed. 311 So. 3d at 878. The *Julien* court affirmed the dismissal of the bad faith complaint because the insured's CRN failed to include specific information required by the statute, thereby precluding Julien from proceeding with a statutory bad faith lawsuit for failure of a condition precedent. *Id.* at 879-80.

This case requires the same result for the same reasoning employed by the *Julien* court. A CRN, as the one before this Court, that fails to identify specific policy language that is at issue in any alleged violation, cites every possible statutory violation, fails to provide specific facts and circumstances pertaining to each violation, and fails to specify any meaningful amount or action that would afford the insurer a cure of the purported violation is invalid as a matter of law.

1. Plaintiff's CRN fails to identify specific policy language that is at issue in any alleged violation, as required by section 624.155, Florida Statutes.

Plaintiff's CRN not only fails to identify specific policy language that is at issue in any alleged violation, as required by the plain language of section 624.155, but the language in the CRN does not appear anywhere in Infinity's policy and misconstrues the actual policy language. Section 624.155(3) requires that the complainant provide, "[r]eference to specific policy language that is relevant to the violation. . ." Here, rather than provide the relevant policy language, Plaintiff included the following generic statement: "We will pay . . . 80% of the following schedule of maximum charges . . . (Tracks language of PIP statute)." Plaintiff's statement is not a reference to specific policy language—the statement is simply a "fabricated" policy provision that does not exist in Infinity's Policy. This defect, in and of itself, is fatal to the CRN. An insurer cannot be placed on notice of violating a non-existent provision in its Policy.

Initially, the ellipses and purported incorporation of the entire PIP statute fails to provide any specificity as to purported policy language and leaves the reader guessing as to the actual policy language in Infinity's policy or how the language set forth in the CRN imposes any requirements regarding: 1) payment of interest; 2) paying the charge submitted without reducing 80%; or 3) application of the deductible—the three purported factual circumstances implicated in the many alleged statutory violations. The CRN does not indicate the precise language of the policy or where said language appears. Moreover, the CRN fails to identify what portion of the PIP statute is "tracked" and to what purported violation such a statutory provision would apply. Like in *Julien*, where the insured "referenced the entire policy," 311 So. 3d 875, 878, the Plaintiff attempts to incorporate unknown policy provisions by as expansive a reference as possible to the entire PIP statute. The phrase "[t]racks the language of the PIP statute" is not only incorrect, as the policy does not track the entirety of the PIP statute, but it fails to identify with specificity which provision of the PIP statute that may actually appear in the Policy

Plaintiff is alleging pertains to any purported violation.

Perhaps even more important, the quoted language is not in Infinity's Policy; Infinity's Policy does not provide that it "will pay 80% of the following schedule of maximum charges." Infinity's Policy provides:

> We will pay. . .
>
> 1. 80% of medical expenses;
>
> ***
>
> B. ADDITIONAL DEFINITIONS USED IN PART B ONLY
>
> 3. "Medical expenses" means reasonable expenses for medically necessary medical surgical, e-ray, dental, and rehabilitative services. . .
>
> (a) Reimbursement for medical expenses ***shall be limited to*** and ***shall not exceed*** 80% of the schedule of maximum charges set forth in section 627.736(5)(a)(1), Florida Statutes. . .

The plain language of the Policy is a *limitation* on the reimbursement. This language caps reimbursement and "by its very nature, a limitation based on a schedule of maximum charges establishes a ceiling but not a floor;" the very opposite of what Plaintiff's CRN quotes and in direct contravention of the plain meaning of the text of the Policy's provision. *See MRI Associates of Tampa, Inc. v. State Farm Mutual Auto. Ins. Co.*, 334 So. 3d 577, 583, 585 (Fla. 2021) [46 Fla. L. Weekly S379a] (When interpreting insurance contract, court is bound by the plain meaning of the contract's text; reasoning that the schedule of maximum charges is designed to operate as a cap or limitation on reimbursement). There is absolutely no nexus between the limitation on reimbursement in the Policy and any purported claimed violation in the CRN. In *Julien* and *Demase*, the courts determined that the CRN was not compliant with the statutory requirement to reference specific policy language because the CRNs there referenced every single provision of the policy rather than the specific provisions as required. Here, Plaintiff did not cite an actual policy provision; thus, as in *Julien* and *Demase*, Plaintiff's CRN lacks the specificity required. As previously stated, it is impossible to be on notice of violating a non-existent provision in a policy, and, accordingly, the CRN herein could never provide "sufficient notice" to Infinity of violating its Policy. Given the foregoing, this Court finds that, there is no reference to *any* policy provision, making the CRN before this Court even worse than those invalidated in both *Julien* and *Demase,* 351 So. 3d 136, 137, wherein the CRNs implicated the entire policy. Thus, the misconstruction of any one policy provision, the purported attempt to incorporate all policy provisions and the entire PIP statute, and the lack of specific policy language pertaining to any facts and circumstances, however vague raised in the CRN, violates the strict requirements of section 624.155 and fails to provide the requisite notice. *See Demase*, 351 So. 3d at 141. Thus, the CRN is facially deficient on this point, and not only fails to comply with the plain language of section 624.155, but thwarts the Florida Legislature's intent to provide an opportunity for the insurer to cure. *See Talat*, 753 So. 2d at 1283.

2. Plaintiff's CRN fails to identify specific statutory policy language that is at issue in any alleged violation, as required by section 624.155, Florida Statutes.

The plain language of section 624.155 (3)(b)1. requires that the CRN state the "specific language of the statute" that the insurer purportedly violated. In both *Julien* and *Demase* the appellate courts held that CRNs that list virtually every statutory provision fail under section 624.155's explicit specificity requirement and, consequently, could not legally provide the requisite notice to the insurer of a purported violation, negating Plaintiff's ability to maintain a bad faith suit. In *Demase*, the Fifth District Court of Appeal held that the civil remedy notice was legally insufficient where the insured's CRN alleged that State Farm had violated fifteen statutes and twenty-two administrative regulations. 351 So. 3d at 136-7. Judge Sasso, in a special concurrence, in *Demase* reasoned:

> This "kitchen sink" approach [of citing virtually every statutory and policy provision in a CRN] does not satisfy the specificity requirements of section 624.155. The design of section 624.155 would crumble under the opposite conclusion. For example, the plain language of section 624.155(3)(b) demonstrates that the required information is for the purpose of providing "notice." Section 624.155(3)(d) provides that the insurer may cure after it "receives notice." For either of these provisions to have meaningful operative effect, the CRN must be, as the statute says, "specific." In other words, the substance of the CRN must be stated in a way that enables the insurer to ascertain directly from the notice both the alleged violation and the steps it must take to cure the violation. *See Specific, American Heritage Dictionary of the English Language* (5th ed. 2011) (explicitly set forth; definite; clear or detailed in communicating). A CRN which simply regurgitates every statutory and policy provision fails to meet this requirement. Thus, the trial court properly concluded the Demases' CRN was legally insufficient.

351 So. 3d at 414. Likewise, the CRN in *Julien* listed "every statutory provision and every policy provision available to him as the insured." *Julien*, 311 So. 3d at 878. The *Julien* court said:

> Here, Julien did not substantially comply with the specificity standard and this was more than a mere technical defect. Julien listed nearly all policy sections and cited thirty-five statutory provisions. As a result, we conclude the circuit court correctly determined that Julien failed to satisfy the requirement that the insured identify the specific statute and specific policy provision relevant to Universal [sic] Property's alleged violation.

*Id.* at 879. The court then affirmed the dismissal with prejudice. The *Julien* and *Demase* decisions are binding on this Court. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). Moreover, the Second District Court of Appeal's application of *Julien* in *Cassella v. Travelers*, heralded its adherence to the reasoning of both *Julien* and *Demase*. 352 So. 3d 1290. Turning to the instant case, Plaintiff's CRN contains no meaningful information providing notice of any statutory violation to Infinity. Plaintiff alleges violations of fourteen statutory provisions—in what amounts to a template format of every potential statutory violation available to it. This "kitchen sink" approach has been rejected for the failure to adhere to the plain language of section 624.155 and its purpose of providing "notice." Accordingly, this Court finds that the CRN is also facially deficient for failure to reference specific statutory language.

3. Plaintiff's CRN fails to state with specificity facts and circumstances giving rise to the violation, as required by section 624.155, Florida Statutes.

In the CRN, Plaintiff includes a single convoluted paragraph that purportedly includes three possible violations: wrong interest rate, failure to pay the amount charged; misapplication of the deductible. The CRN provides:

> Infinity's payment in response to Presuit demand included the wrong interest rate. This to formally put Infinity on notice that the amount of interest it paid was insufficient. Also, Physicians Group, LLC provided professional services to the Infinity insured. Physicians Group, LLC submitted charges for an amount lower than the fee schedule before any calculation or reduction. However, Infinity did not pay in the amount of the charge submitted. Infinity has improperly reduced payment to Physicians Group, LLC in derogation of its policy. Infinity is using this system of payment reduction to increase profits and/or cut medical payments to providers like Physicians Group, LLC. The Infinity employees, including management, have a financial incentive to use this system to share in profits and/or systematically reduce payments. Infinity also misapplied the deduct-

ible per the recent case, *Florida Hospital v. Parent* from the Florida Supreme Court. By using the payment reduction system to Physicians Group, LLC, Infinity has violated the following statutes:

This appears to be a general and conclusory attempt to assert possible violations, but this generic attempt fails to provide any facts or circumstances that provide any information or nexus between these statements and any purported statutory or policy violations. In this case, for instance, the CRN claims that Infinity misapplied the deductible. And, apart from the fact that no policy or statutory language pertaining to a deductible has been referenced in the CRN, the Policy herein *did not* have a deductible. Because there was no deductible, there could be no misapplication of $0. The Policy's deductible is apparent on the face of the Policy. The Plaintiff certainly knew whether a deductible had been applied to its bill, as it would not have received payment. Again, Plaintiff has referenced a non-existent provision in the Policy, leading the Court to conclude that the CRN before it is a template format, without reference or consideration of the actual policy or specific underlying facts in any particular case, and negating the specificity requirement of the statute.

4. Plaintiff's CRN fails to provide a "cure" provision.

As discussed, the purpose of the CRN is to give the insurer one last chance to settle a claim and avoid bad faith litigation. *See Lane*, 862 So. 2d at 779. The Legislature intended to provide insurer sixty days to "cure" a violation about which it had been served notice. *See Talat*, 753 So. 2d at 1283-84. A "cure" of the CRN is when the insurer pays a contractual sum due under the Policy. *See Id.* ("It naturally follows that for there to be a 'cure' what had to be 'cured' is the non-payment of the contractual amount due the insured."). The very purpose of the CRN is frustrated when a CRN lacks sufficient specificity, as required by statute, to provide the insurer with meaningful notice and an opportunity to cure the alleged violation. The boilerplate, generic, and conclusory allegations, coupled with the absence of any meaningful basis from which Infinity could determine what Plaintiff believed was still owed under the Policy or any corrective action that it could take, deprived Infinity of any meaningful opportunity to cure.

*Conclusion*

This Court finds that the CRN fails to comply with section 624.155, Florida Statutes, and, is therefore facially invalid. As such, Plaintiff has not satisfied a statutory condition precedent to bringing a first-party bad faith action. The failure of this condition precedent is a bar to the bad faith claim alleged in Plaintiff's proposed amended complaint. Accordingly, the granting of Plaintiff's request for Leave to Amend to assert a bad faith claim would be futile.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion for Leave to Supplement and/or Amend the Complaint is DENIED. The Defendant's Motion to Strike Plaintiff's Correspondence and Plaintiff's Request for Production, Motion for a Protective Order, and Motion for Sanctions is MOOT.

IT IS FURTHER ORDERED AND ADJUDGED that the instant cause is hereby DISMISSED. This Court reserves jurisdiction to determine the amount of attorney's fees and costs with regard to the Confession of Judgement in the underlying suit, and retains jurisdiction to determine entitlement and amount of any fees and costs that may be sought by the Defendant with regard to the bad faith claim.

[1]The CRN is hereby incorporated herein by reference and made part of this Order as if fully set forth herein.

* * *

**Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Medical provider or its attorney knew or should have known that complaint was not supported by application of law to facts where there is no evidence to suggest that provider ever treated insured or received assignment from him—Motions for sanctions based on provider's failure to send representative with full authority to settle to court-ordered mediation and failure to comply with discovery order are granted**

TAMPA BAY ORTHOPEDIC SURGERY GROUP, LLC, a/a/o Abebech Zeleke, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-081110. Division O. May 5, 2023. Joseph M. Tompkins, Judge. Counsel: C. Spencer Petty and Joseph Shafer, St. Petersburg, for Plaintiff. Philip L. Colesanti II, Roig Lawyers, Tampa, for Defendant.

**ORDER GRANTING 1)DEFENDANT'S MOTION TO TAX FEES AND COSTS AGAINST THE PLAINTIFF, 2) DEFENDANT'S MOTION FOR SANCTIONS BASED ON PLAINTIFF'S FAILURE TO APPEAR AT COURT ORDERED MEDIATION, AND 3) DEFENDANT'S MOTION FOR ORDER TO SHOW CAUSE AND FOR SANCTIONS**

THIS CAUSE having come before the Court on 1) Defendant's Motion to Tax Fees and Costs Against the Plaintiff, 2) Defendant's Motion for Sanctions Based on Plaintiff's Failure to Appear at Court Ordered Mediation, and 3) Defendant's Motion for Order to Show Cause and for Sanctions and the Court having heard argument of counsel, and being otherwise advised in the Premises, makes the following findings:

**FACTUAL BACKGROUND**

On July 27, 2021, Plaintiff, a medical provider, filed a breach of contract against Peak Property and Casualty Insurance Corporation ("Peak Property")[1]. The contract in dispute was issued between Peak Property and Abebech Zeleke. Specifically, Policy Number 1140683951 provided personal Injury Protection ("PIP") benefits with a statutory and contractual limit of $10,000.00 per person.

According to the underlying Complaint, Plaintiff purportedly rendered reasonable, related, and medically necessary treatment to Mr. Zeleke in connection with a March 14, 2021 motor vehicle accident, to which Peak Property did not pay. The Complaint failed to specify dates of service in dispute. Plaintiff further purported that it had standing and complied with all conditions precedent to file the lawsuit as the assignee (written and equitable) of Mr. Zeleke. *See* Complaint.

It was not until June 8, 2021 that Peak Property was first put on notice of a claim for benefits from Plaintiff. On that date, Plaintiff mailed a purported pre-suit demand letter as required by § 627.736(10), Fla. Stat. Said letter alleged that Plaintiff provided treatment to Mr. Zeleke from March 31, 2021, through April 30, 2021. The letter did not include an assignment of benefits. It also included an account statement from another, unaffiliated medical provider, Gulf Coast Injury Center. On July 14, 2021, Peak Property served a reply letter to Plaintiff advising the demand letter was defective because there was 1) no assignment of benefits attached to the letter, 2) included a ledger referencing services provided by another medical provider, and 3) acknowledged that to date, Plaintiff never submitted any billings or records on behalf of Mr. Zeleke, making the demand premature. Nevertheless, a lawsuit was still filed by Plaintiff claiming a breach of contract for unpaid No-Fault Benefits.

In addition to the July 14, 2021 demand reply, Plaintiff was put on notice of the fact that Peak Property had no evidence to support treatment between the provider and Mr. Zeleke on several other occasions. A targeted Request to Produce was served on Plaintiff on October 6, 2021 seeking evidence of treatment, the Amended Answer and Affirmative Defenses filed on March 21, 2022 outlined the same concerns regarding lack of billing, lack of standing and defective demand, and via safe harbor letter with a Motion for Sanctions served

pursuant to § 57.05(4), Fla. Stat. on April 22, 2022. Along with the Motion for Sanctions, Peak Property also filed an affidavit of its Corporate Representative (*See* Docket Entry 42), Lisa Etter, that offered the evidence Peak Property relied upon to support its defenses.

Peak Property's Motion for Sanctions pursuant to Sec. 57.105 raised allegations that Plaintiff never provided any medical treatment to Mr. Zeleke, lacked standing by not producing a valid assignment of benefits (or demonstrated an equitable assignment), and failed to comply with necessary condition precedents under § 627.736(10), Fla. Stat. to maintain the suit. The Safe Harbor letter and Motion were served on Plaintiff's Counsel at the designated service email address. Still Plaintiff maintained it had a valid claim by continuing to maintain the action. On May 17, 2022, after the expiration of the safe harbor period, Peak Property filed the Motion for Sanctions.

On April 22, 2022, Peak Property also filed a Motion to Compel Better Answers to the boilerplate objections Plaintiff filed in response to Peak Property's Request to Produce. On September 12, 2022, this Court ordered Plaintiff to produce the requested document (any and all medical bills submitted by Plaintiff on behalf of Mr. Zeleke, proof of mailing said bills and an assignment of benefits). Plaintiff failed to comply with this order by 1) not producing the requested, relevant material and/or 2) not requesting an expansion of time. To date, Plaintiff has yet to produce any of these documents that would support the claims raised in its Complaint regarding medical treatment and standing. On October 11, 2022, Peak Property filed a Motion for Order to Show Cause and for Sanctions based on Plaintiff's conduct.

On October 26, 2023, this Court also ordered the parties mediate as a condition of hearing Peak Property's Motion for Summary Judgment that was scheduled for January 9, 2023. On October 26, 2022 and November 15, 2022, Peak Property provided Plaintiff with twenty seven mediation appointments over a two week period of time in December 2022. Plaintiff failed to agree to any of the proposed dates and times. Upon being advised of same, this Court allowed Peak Property to unilaterally schedule the mediation to comply with its order. On November 28, 2022, mediation was properly noticed for December 13, 2022 at 1:00pm. According to the Mediation Disposition Form prepared by Mediation Services, Counsel for Peak Property, a representative from Peak Property and Counsel for Plaintiff attended. Notably, a representative for Plaintiff failed to appear.

On January 4, 2022, five days before the scheduled hearing on Defendant's Motion for Summary Judgment regarding lack of standing and compliance with conditions precedent, Plaintiff issued a voluntary dismissal without prejudice. Peak Property, as the prevailing party, subsequently filed a Motion to Tax Fees and Costs, based on its expired and perfected Motion for Sanctions.

**LEGAL FINDINGS AS TO DEFENDANT'S MOTION TO TAX FEES AND COSTS AGAINST THE PLAINTIFF**

Peak Property's Motion to Tax Fees and Costs Against the Plaintiff seeking costs under Fla. R. Civ. P. 1.420 and fees pursuant to § 57.105, Fla. Stat, is GRANTED. Said motion was filed timely on January 4, 2023 in response to Plaintiff's Voluntary Dismissal without Prejudice. On April 24, 2023, the Court held an evidentiary hearing regarding same.

§ 57.105(1), Fla. Stat. provides as follows:

> Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.

Here, Peak Property requested monetary sanctions based on § 57.105(1)(a), Fla. Stat. alleging that Plaintiff's Complaint was not supported by the material facts necessary to establish the claim. Monetary sanctions are only permitted once the Court makes findings to determine if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law. *See* § 57.105(3), Fla. Stat. Such a finding requires a full evidentiary hearing where parties for each can have counsel address claims, defenses, examine witness, and offer evidence. *Blue Infiniti, LLC v. Wilson,* 170 So. 3d 136 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1573f]. At the hearing on Peak Property's Motion, Defendant's Counsel offered evidence through an affidavit of claim's representative, Lisa Etter. Plaintiff offered no additional evidence, instead relying only on argument in opposition. Nor did Plaintiff offer any objection to the affidavit of Ms. Etter.

In support of its position that Plaintiff's claim was frivolous, Peak Property relied primarily on Ms. Etter's affidavit that referenced and incorporated 1) Plaintiff's Complaint, 2) Plaintiff's purported June 8, 2021 demand letter, 3) Peak Property's demand reply, 4) SunBiz documents from the Florida Department of State to demonstrate Plaintiff and Gulf Coast Injury Center are separate businesses, and 5) Plaintiff's responses to discovery. The totality of the evidence presented by Peak Property demonstrated that Plaintiff never provided medical treatment to Mr. Zeleke and did not have standing (written or equitable) to maintain the suit. Plaintiff did not provide any argument in opposition to the substantive claims made by Peak Property. The procedural requirements of § 57.105(4) were also met. Plaintiff's argument that a "motion" was not served because the supporting evidence was filed/served separately (though contemporaneously) was not well taken and not supported by case law.

The Court finds that Plaintiff or Plaintiff's attorney should have known that the filing of the Complaint was not supported by the application of existing law to the material facts in this case as there was no evidence to suggest Plaintiff ever treated Mr. Zeleke or was conveyed standing by him. Plaintiff was put on notice of these issues at multiple points through the almost two-year history of this claim beginning with the July 15, 2021 demand reply letter and ending with Peak Property's statutory safe harbor notice. Plaintiff had the opportunity and should have taken appropriate steps to avail itself of the protection of § 57.105(4), Fla. Stat. As such, Peak Property shall be awarded a reasonable attorney's fee, to be paid in equal amounts by Plaintiff and its counsel. All taxable costs shall also be awarded as required by § 57.041, Fla. Stat. If the parties cannot determine a reasonable amount of attorneys' fees and costs, the Court reserves jurisdiction to hold an evidentiary hearing regarding same.

**LEGAL FINDINGS AS TO DEFENDANT'S MOTION FOR SANCTIONS BASED ON PLAINTIFF'S FAILURE TO APPEAR AT COURT ORDERED MEDIATION**

The Court GRANTS Peak Property's Motion for Sanctions based on Plaintiff's failure to appear at Court Ordered Mediation. In Hillsborough County, pursuant to Admin. Ord. S-2022-032(11)(a), the Rules of Civil Procedure apply to claims involving the Florida Motor Vehicle No-Fault Law. Pursuant to Fla. R. Civ. P. 1.720, a party is deemed to appear for mediation if the following people are present:

> (1) The party or a party representative having full authority to settle without further consultation; and
>
> (2) The party's counsel of record, if any; and
>
> (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Plaintiff failure to send a representative with full authority to settle meant it failed to comply with the requirements of Fla. R. Civ. P. 1.720(b) and was deemed not appear. Plaintiff offered no evidence to support good cause why it did not appear. Pursuant to Fla. R. Civ. P. 1.720(f), "If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear." This rule is mandatory, not permissive. As such, the Court finds that Peak Property is entitled to an award of mediation fees and reasonable attorneys' fees and costs to be paid by Plaintiff. If the parties cannot determine a reasonable amount of attorneys' fees and costs, the Court reserves jurisdiction to hold an evidentiary hearing regarding same.

**LEGAL FINDINGS AS TO DEFENDANT'S MOTION FOR ORDER TO SHOW CAUSE AND FOR SANCTIONS**

The Court GRANTS Defendant's Motion for Order to Show Cause and for Sanctions based on Plaintiff's failure to comply with the September 28, 2022 Order Granting Defendant's Motion to Compel Better Responses to Defendant's Request to Produce. Jurisdiction remains to consider this motion even though the suit was previously dismissed. Monetary sanctions for discovery abuses are not an element of damages but constitute a collateral and independent claim for attorney's fees and costs arising from litigation related discovery abuses. *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 704 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D295a].

On September 12, 2022, this Court heard Defendant's Motion to Compel Better Responses to Defendant's Request to Produce. Within ten days of the hearing, Plaintiff was ordered to produce 1) all bills and records submitted by Plaintiff on behalf of Abebech Zeleke, 2) proof of mailing for the documents produced in item one and 3) a written assignment of benefits between Plaintiff and Abebech Zeleke. The Court reserved ruling as to Defendant's entitlement to attorney's fees and costs.

Plaintiff ultimately failed to produce any of the documents requested by Plaintiff and ordered by the Court. An extension of time was never sought nor was good cause presented as to why the documents could not be produced. Plaintiff's failure to comply with the September 28, 2022 Order violated Fla. R. Civ. P. 1.380(b)(2):

> Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable 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.

This rule is also mandatory, not permissive. As such, the Court finds that Peak Property is entitled to an award of reasonable attorneys' fees and costs to be paid by Plaintiff. If the parties cannot determine a reasonable amount of attorneys' fees and costs, the Court reserves jurisdiction to hold a fee hearing regarding same.

[1]Peak Property and Casualty Insurance Corporation was substituted by interlineation upon agreed order on September 21, 2021. Previously, Sentry Select Insurance Company was named. Both underwriters are part of the Sentry Insurance Companies.

* * *

**Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—Insurer properly denied coverage where insured willfully and materially breached policy by failing to attend three EUOs scheduled by insurer without providing any substantive explanation for her nonappearance—Argument that insurer must prove prejudice and lack of any degree of cooperation by insured is rejected where argument was raised for first time during oral argument—Insurer is not required to show prejudice from failure to satisfy condition precedent and, if prejudice was necessary, it is shown—There is no authority for argument that insurer must offer proof of insured's level of cooperation, and record does not show even modicum of cooperation by insured or her counsel—Motion to amend complaint to add additional burden of proving lack of cooperation and reasonableness onto statutory EUO requirement is denied**

HILLSBOROUGH THERAPY CENTER, INC., a/a/o Ainadi Bermudez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-36257. Division Q. April 24, 2023. Monique M. Scott, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Cameron Frye and Kenneth P. Hazouri, De Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Tampa, for Defendant.

**ORDER (1) GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT; AND (2) DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

THIS CAUSE is before the Court on Defendant's Motion for Final Summary Judgment (Doc. 71) and Plaintiff's Motion for Leave to File Amended Complaint (Doc. 75). This is an action for declaratory relief in which Plaintiff seeks a determination concerning personal injury protection ("PIP") benefits under an automobile insurance policy issued by Defendant, and governed by the Florida Motor Vehicle No-Fault Law, Section 627.730 *et seq*., Florida Statutes. Defendant denied PIP benefits under the policy based upon the insured's failure to attend an examination under oath ("EUO") at Defendant's request, which is a condition precedent to receiving PIP benefits under both the applicable statutory provision and the terms of the insurance policy.

The Court held a hearing on both motions on February 1, 2023 and has carefully considered the record, the arguments of the parties, and applicable law. For the reasons set forth below, the Court grants Defendant's Motion for Summary Judgment. Further, the Court finds that Plaintiff's request for leave to amend its complaint should be denied.

**I. FACTUAL AND PROCEDURAL BACKGROUND.**[1]

On August 26, 2018, Ainadi Bermudez ("Ms. Bermudez") was involved in an automobile accident in which the 2012 Mazda she was driving was rear-ended, causing her car to hit the vehicle in front of her. (Villalba Depo., p. 8.) Ms. Bermudez was a named insured under an insurance policy ("the Policy") issued by Defendant, Progressive Select Insurance Company ("Progressive" or "Defendant").[2] Progressive received notice of the accident two days later through Ms. Bermudez's attorney. (*Id*., pp. 8-9.) According to the police report contained in the claims file, there were no injuries at the time of the accident. (*Id*., p. 18.)

Also on August 28, 2018, Ms. Bermudez began receiving treatment at the Hillsborough Therapy Center ("Hillsborough Therapy" or "Plaintiff"), to whom Ms. Bermudez assigned her PIP benefits under the Policy. (Compl., Ex. A.) Ms. Bermudez was evaluated as a new patient and received treatment for sprains of ligaments of the cervical spine and thoracic spine, and for pain in an "unspecified shoulder" and "unspecified hand."[3] The range of treatments billed for the first visit included the application of hot and cold packs, a paraffin bath, mechanical traction, one unit of an "unlisted modality," fifteen minutes of manual therapy techniques,[4] additional therapeutic exercises to develop strength, endurance and range of motion and flexibility, and infrared therapy.

Ms. Bermudez returned to the Hillsborough Therapy Center eleven times over the next three weeks and received a mix of these and other therapies during each visit. The bills for the therapy treatments provided within the first three weeks following the accident totaled $4,292.06. Ms. Bermudez continued to visit the Hillsborough Therapy Center in October, November, and the first part of December, for a total of 42 visits.[5] The final summary of costs incurred for Ms.

Bermudez's therapy treatments between August 26, 2018 and December 5, 2018 shows a total of $12,837.88.[6]

Hillsborough Therapy submitted its first bill to Progressive on October 3, 2018, which covered visits through September 21, 2018. Progressive did not pay the bill. Instead, Stacia Feeney, a representative from Progressive's Claims Department, sent a letter to Ms. Bermudez's counsel on October 17, 2018, stating:

> Please be advised that this notice is being sent to you because as Ainadi Bermudez's insurance carrier we are required under the Florida Personal Injury Protection (PIP) Statute 627.736 to notify you in writing in the event we have a reasonable belief that a potential fraudulent insurance act may have been committed.

(Affidavit of Joel Acevedo in Opposition to Plaintiff's Motion for Summary Judgment ("Acevedo Aff."), Ex. C, Doc. 46.) The letter invited Ms. Bermudez's counsel to contact Progressive with any questions.

On November 23, 2018, Ms. Feeney sent Ms. Bermudez and her counsel a letter to "coordinate a convenient time and place to obtain an Examination Under Oath relating to the accident. (*Id*., Ex. D.)[7] Ms. Feeney offered December 3 and December 11, 2018 as potential dates. Ms. Feeney further indicated that she was prepared to accommodate Ms. Bermudez's schedule should there be a need for a different date apart from the two initial dates offered, but in that event, Ms. Feeney asked that the scheduling be accomplished by the end of the business day on November 28, 2018—which allowed five days for such coordination. Ms. Feeney further noted that if she did not hear back within that timeframe, Ms. Feeney would unilaterally set a date, time and location for the examination under oath ("EUO") and would notify Ms. Bermudez of same. (*Id*.)

Having received no response, Progressive sent Ms. Bermudez and her counsel a letter on December 7, 2018 scheduling the EUO for December 19, 2018—which provided more than 10 days' notice. (*Id*., Ex. E.) Ms. Feeney's December 7 letter included an explanation of the nature of the EUO; a request that Ms. Bermudez bring with her certain documents and information;[8] and a citation to the applicable Policy provision regarding compliance as a condition precedent to receiving benefits.[9] Once again, Ms. Feeney invited Ms. Bermudez to contact Progressive if Ms. Bermudez needed a change of date to accommodate her schedule.

On December 18, 2019—the day before the scheduled EUO—Ms. Bermudez's counsel e-mailed Ms. Feeney a two-sentence letter stating, "due to an unforeseen scheduling conflict we must reschedule." The letter advised that Ms. Bermudez and her counsel would only be available on certain specified dates beginning February 5, 2019, including "February 5-7, 13, and 19-21." Ms. Feeney was told to "choose a date." No information regarding the nature of the "unforeseen scheduling conflict" was included, nor did the communication specify which party had the conflict that prompted the last-minute cancelation, *i.e*., whether it was Ms. Bermudez or her counsel. Further, the letter contained no explanation as to why Ms. Bermudez or her counsel would not be available to appear for an EUO in the 47 days between December 19, 2018 and February 5, 2019. (*Id*., Ex. F.)

On December 20, 2019—the day following Ms. Bermudez's failure to appear for the scheduled EUO—Progressive sent a letter informing Ms. Bermudez that "[e]ffective 12/19/2018 you have breached the policy of insurance and as such Progressive owes no further duties to you under the terms and conditions of the policy." However, Progressive added, "[w]ithout waiving that breach, Progressive is willing to give you an opportunity to 'cure' the breach by appearing on 1/3/19 . . . ." The letter—which also included citation to the Policy's "no-action" clause—contained a further warning regarding the denial of benefits for failure to comply with the condition precedent; *i.e*., submission to an EUO. (*Id*., Ex. G.)

Again, Progressive received no response until one day before the scheduled examination. In a letter dated January 2, 2019, counsel for Ms. Bermudez sent a letter advising Progressive that "January 3, 2019 was not a date provided nor cleared by out [*sic*] office for Examination Under Oath of Ainadi Bermudez." As with the first letter of cancelation, counsel provided the February 2019 dates as the "soonest available dates" for the EUO, with no further explanation or comment. (*Id*., Ex. H.)

On January 7, 2019, Progressive sent a third letter providing one more opportunity for Ms. Bermudez to sit for an EUO, this time on January 10, 2019. (*Id*., Ex. I.) The next day, a paralegal from the Nicholas Law Group representing Ms. Bermudez sent Progressive a letter stating, once again, that an "unforeseen scheduling conflict" necessitated rescheduling to a date in February—which now included only three potential dates for the entire month: February 5, 20, and 21. (*Id*., Ex. J.)

By letter dated January 29, 2019, Andrew Bowlin of Progressive's Claims Department sent a letter to Ms. Bermudez's counsel confirming that Progressive denied coverage based upon Ms. Bermudez's failure to attend the scheduled examinations under oath, and because of her failure to provide a reasonable explanation regarding same. (*Id*., Ex. K.)

In June 2020, Hillsborough Therapy filed this action requesting a declaration of PIP coverage for its treatment of Ms. Bermudez in late 2018. In its original complaint—which contained one count for declaratory relief—Plaintiff asserted that Progressive erroneously denied PIP coverage because Progressive "was already in breach of the policy" when it denied benefits; *see* Compl., ¶ 9, stemming from Progressive's failure to pay the first bill submitted on October 3, 2018 within 30 days. In both its initial discovery responses and answer to the complaint, Progressive repeatedly asserted that Ms. Bermudez breached the Policy by failing to attend the properly noticed and scheduled EUOs and, therefore, no benefits were due and owing under the Policy. (*See, e.g*., Def.'s Interrog. Ans., ¶¶ 8-10, 11-13, Doc. 19; Ans. & Affirm. Defenses, Doc. 37.)[10]

The Court initially granted summary judgment in favor of the Plaintiff, based upon authority supporting Plaintiff's position at the time. Specifically, numerous trial courts, including those sitting in their appellate capacities, reached the conclusion that a failure to pay benefits within 30 days under the statute barred or estopped an insurer from denying coverage based upon a plaintiff's separate breach of the policy.

Following the entry of the Court's Order Granting Plaintiff's Motion for Summary Judgment—but before final judgment was entered—three district courts of appeals issued opinions that construed the statute otherwise. The Court thereafter granted Progressive's amended motion for rehearing and vacated the summary judgment previously entered.

Progressive now moves for summary judgment based upon the language contained in the Policy and Florida Statute Section 627.736(6)(g). Plaintiff did not file a response to the motion. Rather, three months after Progressive moved for summary judgment, Plaintiff filed a motion for leave to amend its complaint.

**II. PROGRESSIVE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

**A. Summary Judgment Standard.**

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See* Rule 1.510(c), Fla. R. Civ. P. Under the federal summary judgment standard now utilized by Florida courts, "summary judgment is warranted if a jury, viewing all facts and any reasonable inferences therefrom in the light most

favorable to plaintiffs, could not reasonably return a verdict in plaintiffs' favor." *Hale v. Tallapoosa Cnty*., 50 F.3d 1579, 1581 (11th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). The moving party bears the initial burden to show, by reference to materials on file, that there are no genuine issues of material fact to be decided. *See Clark v. Coats & Clark, Inc*., 929 F.2d 604, 608 (11th Cir. 1991). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Id.*

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Florida Rule of Civil Procedure1.510(c), the court in its discretion may consider facts undisputed; grant summary judgment if the materials show the moving party is entitled to it; or enter another appropriate order. *See* Fla. R. Civ. P. 1.510(e) (2022); *see also Lloyd S. Meisels, P.A., v. Dobrofsky*, 341 So. 3d 1131, 1134-36 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a].

**B. Progressive Was Entitled to Deny PIP Coverage Pursuant to the Terms of the Policy and Applicable Statutory Provisions.**

The insurance policy under which Ms. Bermudez was a named insured required her to appear for an examination under oath should Progressive so request. The evidence is undisputed that Ms. Bermudez failed to attend the three EUOs scheduled by Progressive without providing any substantive explanation. Moreover, Ms. Bermudez—through counsel—refused to provide any available time for an EUO within the 90-day timeframe the statute permits for an investigation of fraud. *See* Fla. Stat. § 627.736(4)(i); Acevedo Aff., Exs. D, G, & I.[11]

Submission to an EUO is a condition precedent to receiving PIP benefits. *See* Fla. Stat. § 627.736(6)(g).[12] When Ms. Bermudez failed to appear for an examination under oath in the wake of Progressive's repeated requests for same, Ms. Bermudez breached a condition precedent under the Policy, and Progressive was entitled to deny benefits. *See Miracle Health Services, Inc. v. Progressive Select Ins. Co*., 326 So. 3d 109, 114-15 (Fla. 3d DCA Fla. 2021) [46 Fla. L. Weekly D1608a].[13]

Based on the foregoing, the Court finds that Ms. Bermudez breached a condition precedent to receiving PIP benefits by failing to appear for an examination under oath. As a result, Progressive properly denied PIP coverage pursuant to both the statute and the language of the Policy. Plaintiff, Hillsborough Therapy, as Ms. Bermudez's assignee, is therefore barred from recovering PIP benefits from Progressive. Because no genuine issues of material fact exist and no triable issues remain, Progressive is entitled to summary judgment on its affirmative defense surrounding Ms. Bermudez's failure to comply with a condition precedent under the Policy.

**C. Plaintiff's Contention That Progressive Must Prove Both Lack of Prejudice and Lack of Some Degree of Cooperation is Without Merit.**

The Court rejects any argument that summary judgment must be denied because Progressive failed to prove: (1) that it was prejudiced by Ms. Bermudez's failure to appear for the EUOs, or (2) that Ms. Bermudez failed to cooperate to some degree in connection with Progressive's request for an EUO.

To begin, Plaintiff failed to file a response to Progressive's Motion for Summary Judgment in violation of Florida Rule of Civil Procedure Rule 1.510(c) and further failed to submit any memorandum or written brief containing points and authorities in advance of the hearing on Defendant's Motion. The Court shall not consider legal arguments raised for the first time during oral argument, particularly those that urge the Court to extend the law to create additional burdens upon the Defendant, or to construe Section 627.736(6)(g) in a way that has not been previously advanced.

In any event, Plaintiff's arguments have no merit, as they appear to stem from a misapprehension of the principles and analysis surrounding "conditions precedent" versus "conditions subsequent," the latter of which may include a prejudice component, depending on the circumstances. Given Plaintiff's failure to properly raise this argument in the first instance, the Court shall not engage in a lengthy discussion on the subject. Suffice it to say that the court in *Miracle Health* rejected a similar attempt to recast the EUO requirement in the PIP context as a condition subsequent, stating that "[t]he plain language of section 627.736(6)(g) and Progressive's policy clearly and unambiguously require compliance with the policy provision of submitting to an examination under oath as a condition precedent to receiving PIP benefits." *Miracle Health*, 326 So. 3d at 113 (observing that the Florida Legislature addressed the previous holdings in *Custer Medical Center v. United Automobile Insurance Company*, 62 So. 3d 1086 (Fla. 2010) [35 Fla. L. Weekly S640a] and its progeny by enacting legislation that "plainly required compliance with the EUO policy provision as a 'condition precedent to receiving benefits'—meaning the insured's failure to submit to an EUO bars receipt of PIP benefits. . . .").

In addition, Plaintiff has offered no authority to support its argument that an insurer must show prejudice in this context; that is, where an insured fails to submit to an EUO as a condition precedent to receiving PIP benefits under an automobile insurance policy.[14] Moreover, courts to have considered similar arguments in other contexts have reached opposite conclusions. *See, e.g*., *Goldman v. State Farm Fire Gen. Ins. Co*., 660 So. 2d 300, 302-03 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] (failure to submit to EUO under an insurance policy requiring same is *per se* "willful and material" breach that precludes an action on the policy regardless of a showing of prejudice by the insurer); *Rodrigo v. State Farm Fla. Ins. Co*., 144 So. 3d 690, 692 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1760a] (where insured materially breached a condition precedent, insurer's obligation to pay under the policy was discharged without the need to show prejudice); *United Automobile Ins. Co. v. G & O Rehab. Center, Inc*., 347 So. 3d 492 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1877b] (summary judgment reversed where trial court erroneously concluded that insurer must show prejudice based upon insured's failure to appear for IME pursuant to Section 627.736(7)).[15]

Finally, based upon the undisputed facts here, it is clear from the record that Plaintiff could not overcome a presumption of prejudice to Progressive, even if the issue of prejudice were to be considered. As the record demonstrates, Progressive timely notified Ms. Bermudez, through counsel, that it was investigating suspected fraud. Progressive offered several dates for EUOs well within the 90-day timeframe that Section 627.736(4)(i) permits for a fraud investigation before Progressive would be required to pay or deny benefits. Ms. Bermudez failed to appear, and further refused to provide a date within the 90-day period, completely frustrating Progressive's attempt to conduct an EUO in accordance with the Policy and the statute.

In a separate but related vein, Plaintiff has cited no authority that would support the notion that Progressive must offer proof surrounding Plaintiff's "level of cooperation" in connection with the EUO. Even if Plaintiff could offer a colorable argument in this regard, nothing in the record shows even a modicum of attempted cooperation on the part of Ms. Bermudez or her counsel. The short, terse letters sent by Ms. Bermudez's law firm canceling all three EUOs and demanding a date outside of the 90-day investigation window do not reflect "cooperation" in any respect.

Indeed, the record shows just the opposite, as Progressive offered Ms. Bermudez several chances to remedy the situation and cure the breach, but essentially was met with a brick wall. In this regard, the dates offered by counsel for an EUO during February 2019 in no way

support Plaintiff's belated assertion that Ms. Bermudez cooperated to some degree. It bears noting that Ms. Bermudez was able to attend appointments at the Hillsborough Therapy Center on 42 separate days between August and December 2018, but was not able to attend an examination under oath at any time between the first-offered date of December 7 and February 5. In short, the record demonstrates a total failure to cooperate with Progressive concerning its request to conduct an EUO within the 90-day window, and the record contains no evidence—or even an assertion—that Ms. Bermudez or counsel offered any substantive explanation for her inability to appear for an examination on the dates requested.

Finally, at least one trial court to have examined the EUO issue in the PIP context concluded that, unlike other statutory provisions governing property insurance, Section 627.736(6)(g) does not allow for consideration of mitigating factors surrounding the reasons for failure to attend an EUO. (*See* Defendant's Notice of Additional Authority, Ex. A, Doc. 47, attaching *Palmetto Physical Therapy a/a/o Alan Mancia v. Progressive Select Insurance Company*, Fla. 11th Jud. Cir. Ct., Miami-Dade County, Case No. 16-588-CC-26(3), Order Granting Def.'s Mot. Summ. Judg., Mar. 1, 2019, at p. 5, Hon. Gloria Gonzalez-Meyer, County Judge (distinguishing "unreasonable refusal" standard arising under § 627.736(7)(b) in connection with mental and physical examinations and noting that § 627.736(6)(g) concerning examinations under oath does not include language that would permit consideration of mitigating factors for failing to attend an EUO)).[16]

In sum, Ms. Bermudez willfully and materially breached the Policy when she failed to comply with the EUO condition precedent. Based upon the record and undisputed facts supporting Progressive's denial of PIP benefits, Progressive is entitled to judgment as a matter of law.

**III. PLAINTIFF'S PROPOSED AMENDMENT WOULD BE BOTH FUTILE AND PREJUDICIAL TO DEFENDANT.**

Plaintiff seeks leave to file an amended complaint. As an initial matter, Plaintiff's motion is devoid of any argument or information that would apprise the Court of the reason underlying Plaintiff's request. Plaintiff presented no explanatory information regarding, for example, the addition of a cause of action, or that discovery revealed facts supporting an additional claim. Instead, Plaintiff spends its entire motion setting forth the standard surrounding the grant or denial of a motion to leave to amend, leaving it to the Court to conduct a side-by-side comparison of the original and proposed amended Complaints.

To begin, the Court is fully versed in the well-settled principle of law requiring leave to be freely given when justice so requires. *See* Fla. R. Civ. P. 1.190(a). The law is equally clear that a trial court need not allow amendment where to do so would be futile or prejudicial. *See Jain v. Buchanan Ingersoll & Rooney PC*, 322 So. 3d 1201, 1206 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1399a]. The Court finds that—based on the specific facts, circumstances, and evidence presented in this case—amendment would be both futile and prejudicial.

First, the Court finds amendment would be futile because Plaintiff seeks to advance an unsupported, alternative legal theory that finds no basis in the law. The only appreciable difference between the original complaint and Plaintiff's proposed amendment is found in the "Wherefore" clause, in which Plaintiff asks the Court to declare that "Progressive did not prove that Bermudez willfully and materially breached the EUO provisions of the subject policy" and that "Bermudez cooperated to some degree or provided an explanation for any alleged noncompliance with the request for an EUO." (Pl.'s Mot. for Leave to Amend Compl., Ex. A, Proposed Amended Petition for Declaratory Judgment, p. 4.) By virtue of this amendment, Plaintiff essentially asks this Court to engraft additional components onto the clear and unambiguous language of Section 627.736(6)(g), and to ignore the principles of law set forth more fully in Part II.C, above.

As noted above, Plaintiff has advanced no controlling authority for the proposition that Section 627.736(6)(g) can be read to include those additional burdens on the insurer, as Plaintiff's proposed amendment suggests. Also as set forth above, the line of cases cited by Plaintiff during oral argument are inapposite because they involve different and/or pre-amendment statutory provisions; other types of insurance policies not applicable here; policy or statutory language that expressly includes a reasonableness requirement; are factually distinguishable—or involve some combination of these.

Put simply, Progressive may not be put to the task of proving something beyond what the law requires, and the proposed amendment seeks to do just that. Because the relief Plaintiff seeks finds no basis in the law and is further belied by the undisputed record evidence, the Court finds that amendment would be futile such that leave to amend should be denied. *See GE Real Estate Services, Inc. v. Mandich Real Estate Advisors, Inc.*, 337 So. 3d 416, 419 (Fla. 3d DCA 2021) [47 Fla. L. Weekly D49a] (affirming dismissal with prejudice without leave to amend where allegations in proposed amended complaint were legally insufficient and failed as a matter of law); *Vella v. Salaues*, 290 So. 3d 946, 949 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2553a] (affirming the entry of summary judgment and denial of leave to amend where plaintiff sought leave to amend after two years of litigation based upon a newly-invoked theory of liability "not grounded in law"); *Tuten v. Fariborzian*, 84 So. 3d 1063, 1069 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D144a] (trial court did not abuse discretion in denying leave to amend where plaintiff failed to set forth possible amendments that would not be futile); *Brumer v. HCA Health Servs. of Fla., Inc.*, 662 So. 2d 1385, 1387 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2595c] (affirming summary judgment without leave to amend on specific count of complaint where court could not discern how the count could be amended to state a cause of action).

In addition to futility, the Court also finds that Progressive would suffer obvious prejudice if amendment were permitted. Over the course of nearly three years of litigation—and nearly five years since the time of the automobile accident—neither counsel nor Ms. Bermudez offered an explanation as to why Ms. Bermudez could not appear for the three EUOs scheduled in December 2018 and January 2019, and further could not appear for an EUO at any time before February 5, 2019.

Even if Plaintiff's undisclosed "explanation" for her non-compliance with Progressive's EUO-related requests in late 2018 were somehow relevant to Plaintiff's cause of action, it is now too late to provide it. Assuming *arguendo* that Plaintiff or counsel had further information concerning Ms. Bermudez's failure to appear, the time to present that information was *at the time* and in response to Progressive's repeated offers to accommodate Ms. Bermudez's schedule. Plaintiff has also had numerous opportunities to present any evidence it deemed relevant throughout the course of this proceeding.

Plaintiff has been on notice since the pleadings closed—and even before—of Progressive's contention that it had no duty to pay benefits based upon on Ms. Bermudez's non-appearance for three scheduled EUOs. Because information in this regard was always available to Ms. Bermudez and her counsel—who simply chose not to put it forward—denial of leave to amend is warranted and appropriate on that basis. *See San Martin v. Dadeland Dodge, Inc.*, 508 So. 2d 497, 498 (Fla. 3d DCA 1987) (affirming denial of leave to amend where, among other things, plaintiff should have been aware of the alleged basis to amend long before filing the motion).[17]

As observed by the court in *Vella*, a trial court has dual obligations when faced with the decision to allow or deny leave to amend: first, to ensure that a case be concluded on its merits, and second—yet equally

compelling—to see to it that the end of all litigation be finally reached. *See Vella*, 290 So. 3d at 949. The Court finds that denial of Plaintiff's request for leave to amend satisfies both obligations and is appropriate under the facts and circumstances presented by this case.

**IV. CONCLUSION**

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

1. Progressive's Motion for Final Summary Judgment is **GRANTED**.

2. Plaintiff's Motion for Leave to Amend is **DENIED** with prejudice.

3. Progressive is entitled to judgment as a matter of law on Plaintiff's action for declaratory relief. Specifically, Defendant Progressive American Insurance Company properly denied personal injury protection benefits under the subject insurance policy and pursuant to Florida Statute Section 637.736(6)(g), based upon the failure of the insured to comply with a condition precedent to receiving benefits.

4. The Court reserves jurisdiction to consider Progressive's entitlement to, and the amount of, attorneys' fees and costs.

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[1]The facts are drawn from the record, including evidence submitted in connection with Plaintiff's earlier-filed Motion for Summary Judgment (Doc. 23), which attached the full deposition of Progressive's corporate representative, John Villalba (hereinafter, "Villalba Depo."), among other documentary evidence.

[2]The subject insurance policy was issued to Keith Tutt for the period between August 7, 2018 to February 7, 2018; Ms. Bermudez was a named insured thereunder. The policy included $10,000 in PIP benefits coverage with a $1000 deductible and no medical payments benefits. (Def.'s Answers to Interrogatories, ¶¶ 5-6, Doc. 19.)

[3]The information regarding the treatment Ms. Bermudez received from Hillsborough Therapy is taken from a January 29, 2019 Explanation of Benefits ("EOB") issued by Progressive in response to bills submitted by Plaintiff. *See* Exhibits to Pl.'s Mot. Summ. Judg., Doc. 25, Ex. 5.

[4]This included mobilization/manipulation, manual lymphatic drainage, and/or manual traction. (*Id.*, p.6)

[5]The specific dates of the therapy treatments were August 28, 30, 31; September 4, 7, 10, 12, 13, 14, 17, 18, 19, 21, 24, 25, 26, 28; October 1, 2, 4, 5, 8, 9, 11, 15, 18, 19, 22, 23, 29, 31; November 2, 5, 7, 8, 12, 14, 16, 20, 21, 30; and December 5. (*See* Def.'s Notice and Identification of Summ. Judg. Evidence, Ex. A, Doc. 49.)

[6]The Court notes an apparent discrepancy regarding the total amount for therapy treatments provided to Ms. Bermudez. A demand letter from Ms. Bermudez's counsel for all treatments between August 28, 2018 and December 5, 2018 includes a final total of $12,837.88. (*Id.*) Elsewhere, a spreadsheet attached as Exhibit 2 to Plaintiff's Motion for Final Summary Judgment states that the total amount billed was $25,675.76. (*See* Doc. 25, Ex. 2.)

[7]For each letter concerning the scheduling of the EUO discussed herein, Progressive submitted evidence that the correspondence was sent, either by fax to counsel, or by FedEx to Ms. Bermudez. (Acevedo Aff., Exs. D-J.) Plaintiff raises no argument regarding non-receipt of the letters, and it is clear from the response letters sent by the Nicholas Law Group that counsel for Ms. Bermudez received the correspondence from Progressive with respect to each of the three scheduled EUOs. (*Id.*)

[8]This included photo identification, copies of prescriptions and medical supplies/equipment supplied to Ms. Bermudez for injuries sustained in the accident, and any photos taken at the scene of the accident.

[9]The pertinent Policy language states:

> **Duties in Case of an Accident or Loss.** As a condition precedent to obtaining Personal Injury Protection Coverage, a person must:
>
> * * *
>
> 3. allow us to take signed and recorded statements, including sworn statements and examinations under oath . . . and answer all reasonable questions we may ask and provide any documents, records, or other tangible items that we request, when, where, and as often as we may reasonably require . . . .
>
> * * *
>
> **Examination under Oath.** An insured seeking benefits must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath . . . . Compliance with this paragraph is a condition precedent to receiving benefits.

(Acevedo Aff., Ex. A, Policy, pp. 12-13.)

[10] Progressive's First Affirmative Defense states, in relevant part, that "[Ms. Bermudez] failed to comply with the policy requirements by failing to attend scheduled Examinations Under Oath and failed to notify Progressive of any reason for that failure" and therefore Defendant had a reasonable basis to deny benefits to Plaintiff. (Ans. & Affirm. Defenses, ¶ 16.)

[11]Contrary to Plaintiff's assertion, Progressive provided timely notification of the suspicion of fraud, and attempted to schedule Ms. Bermudez for an examination under oath within 90 days of receiving the first bill from Plaintiff, in accordance with the language of Section 627.736(4)(i).

[12]Section 627.736(6)(g), which became effective on January 1, 2013, provides:

> An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. ***Compliance with this paragraph is a condition precedent to receiving benefits.*** An insurer that, as a general business practice as determined by the office, requests an examination under oath of an insured or an omnibus insured without a reasonable basis is subject to s. 626.9541.

*Id.* (emphasis added).

[13]As discussed more fully in the Court's Order Granting Defendant's Amended Motion for Rehearing, entered July 28, 2022, Plaintiff's initial argument that Progressive was not entitled to deny PIP coverage under Section 627.736(4)(b) based upon Progressive's initial nonpayment of benefits has been foreclosed by *Century-National Insurance Company v. Regions All Care Health Center, Inc.*, 336 So. 3d 445 (Fla. 2d DCA 2022)[47 Fla. L. Weekly D896a]; *United Auto. Ins. Co. v. AFO Imaging*, 323 So. 3d 826 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1570a]; and *Miracle Health Services, Inc. v. Progressive Select Insurance Company*, 326 So. 3d 109 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1608a]. Each of those decisions relied upon *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 86 (Fla. 2001) [26 Fla. L. Weekly S747a] in concluding that an insured is not otherwise barred from contesting a claim because the payment became overdue. *See Miracle Health*, 326 So. 3d at 114 (harmonizing Sections 627.736(4)(b) and (6)(g) so as to give effect to the importance of swift payments prescribed by the thirty-day provision while ensuring that insurers can investigate claims and discover facts by requiring insureds to comply with policy conditions precedent to receiving PIP benefits).

[14]In this regard, the cases cited by Plaintiff's counsel during oral argument are inapposite for various reasons; *i.e.,* they arise in different contexts or involve facts that are distinguishable from the instant case. *See, e.g.*, *American Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 913 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a] (case involving post-loss obligation under homeowner's policy in which court concluded that prejudice is presumed where plaintiff fails to comply with obligation, subject to insured's proof showing otherwise); *Himmel v. Avatar Property & Casualty Ins. Co.*, 257 So. 3d 488 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2351b] (involving property insurance post-loss obligation where insured made substantial effort to cooperate and provided an explanation for noncompliance at the time); *Haiman v. Fed. Ins. Co.*, 798 So.2d 811, 812 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a] (involving partial but substantial compliance with post-loss condition under property insurance policy governed by different statutory provision that incorporates reasonableness standard where insured had appeared for the EUO and brought substantial documentation).

[15]Moreover, even in cases arising outside the automobile PIP context that consider prejudice to the insurer, a defendant is entitled to judgment as a matter of law where, as here, the plaintiff failed to attend the EUO and adduced no evidence that a reasonable justification for the lack of attendance was offered to the insurer at the time. *See, e.g.*, *Edwards v. SafePoint Ins. Co.*, 318 So. 3d 13, 17 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1086a] (summary judgment entered where plaintiff "never offered any legitimate explanation for her noncompliance"); *Nunez v. Universal Property & Casualty Ins. Co.*, 325 So. 3d 267 (Fla. 3d DCA 2021) [ 46 Fla. L. Weekly D1747b] (trial court properly entered directed verdict where plaintiff "wholly failed to comply with her post-loss obligation to attend an EUO, and likewise failed to offer evidence of compliance or attempted compliance—or even a reasonable justification for the failure to attend . . . .").

[16]The parties dispute whether the Third District's opinion affirming the trial court's order may be relied upon as binding precedent. *See Palmetto Physical Therapy Inc. v. Progressive Select Ins. Co.*, 320 So. 3d 213 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D332a]. Even if Plaintiff were correct in its assertion that the brief *per curiam* opinion issued in *Palmetto* lacks precedential force, the Court's analysis would remain the same based upon the facts and law cited herein.

[17]Progressive makes the separate argument that Plaintiff's attempt to amend was designed to defeat Progressive's summary-judgment motion and should be denied for that reason. The Court notes that Plaintiff did not respond to Defendant's summary-judgment motion and instead moved for leave to amend—perhaps because Plaintiff saw the "handwriting on the wall," as was the case in *Jain*. *See Jain*, 322 So. 3d at 1206. Because the Court finds that leave to amend should be denied for the reasons stated herein, it need not determine whether denial of leave to amend on that additional ground would be appropriate. The Court also notes Plaintiff's assertion that leave should be granted as a matter of course because this is Plaintiff's first request to amend. That Plaintiff has requested leave to amend only once in this matter does not overcome the other grounds that militate against granting leave.

* * *

**Criminal law—Speedy trial—Constitutionality of rules allowing chief justice of Florida Supreme Court to suspend speedy trial procedures—County court does not have authority to find rule or administrative order of supreme court to be unconstitutional—No merit to argument that it is unconstitutional for administrative order that extends recapture period to remain in effect after emergency caused by pandemic is over where rule authorizes chief justice to extend speedy trial deadlines as long as emergency continues to have effect on courts—No merit to argument that issuance of administrative order by chief justice alone violates Article V, Section 2, which vests authority to adopt court rules in entire court—Administrative order does not violate separation of powers clause**

STATE OF FLORIDA, Plaintiff, v. JAMIE CHRISTINE VOGEL, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-CT-56803-XXXX-XX. April 24, 2023. Judy Atkin, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. R. Scott Robinson, Viera, for Defendant.

**ORDER DENYING DEFENDANT'S AMENDED MOTION FOR FINAL DISCHARGE/MOTION TO DECLARE FLA. R. CRIM. P. 3.191(i)(5) UNCONSTITUTIONAL**

**THIS CAUSE** came to be heard before the Court on April 19, 2023 upon the Defendant's Amended Motion for Final Discharge/Motion to Declare Fla. R. Crim. P. 3.191(i)(5) Unconstitutional, filed on April 11, 2023. The Defendant filed a Memorandum of Law on April 18, 2023 and the State filed a Response on April 19, 2023. The Court has heard and considered the arguments of counsel and has carefully reviewed the motion along with the memorandum of law and the response. Based upon this review, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

a. The Defendant claims that Rule 3.191(i)(5), Florida Rules of Criminal Procedure is unconstitutional. Under Rule 3.191(i)(5), the periods of time established by the speedy trial rule may be extended by an administrative order issued by the Chief Justice of the Supreme Court of Florida suspending speedy trial procedures under Rule 2.205(a)(2)(B)(iv) or (v), Florida Rules of General Practice and Judicial Administration. Rule 2.205(a)(2)(B)(iv) and (v) gives the Chief Justice:

> (iv) the power, upon request of the chief judge of any circuit or district, or sua sponte, in the event of natural disaster, civil disobedience, or other emergency situation requiring the closure of courts or other circumstances inhibiting the ability of litigants to comply with deadlines imposed by rules of procedure applicable in the courts of this state, to enter such order or orders as may be appropriate to suspend, toll, or otherwise grant relief from time deadlines imposed by otherwise applicable statutes and rules of procedure for such period as may be appropriate, including, without limitation, those affecting speedy trial procedures in criminal and juvenile proceedings, all civil process and proceedings, and all appellate time limitations;
>
> (v) the power, upon request of the chief judge of any circuit or district, or sua sponte, in the event of a public health emergency that requires mitigation of the effects of the emergency on the courts and court participants, to enter such order or orders as may be appropriate: to suspend, extend, toll, or otherwise change time deadlines or standards, including, without limitation, those affecting speedy trial procedures in criminal and juvenile proceedings; suspend the application of or modify other requirements or limitations imposed by rules of procedure, court orders, and opinions, including, without limitation, those governing the use of communication equipment and proceedings conducted by remote electronic means; and authorize temporary implementation of procedures and other measures, including, without limitation, the suspension or continuation of civil and criminal jury trials and grand jury proceedings, which procedures or measures may be inconsistent with applicable requirements, to address the emergency situation or public necessity.

On March 13, 2020, Chief Justice Charles T. Canady of the Supreme Court of Florida issued *In-Re: COVID-19 Emergency Procedures in the Florida State Courts,* Fla. Admin. Order No. AOSC20-13 (March 13, 2020), suspending all time periods involving speedy trial from the close of business on March 13, 2020 until the close of business on March 30, 2020. The administrative order has been amended several times to further extend the suspension of time periods involving speedy trial. The most recent administrative order affecting speedy trial is *In Re: COVID-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts,* Fla. Admin. Order No. AOSC21-17 Amendment 3 (January 8, 2022) which put into place an end to the speedy trial suspension. However, the administrative order extended the recapture period under Rule 3.191(p)(3), Florida Rules of Criminal Procedure, from 10 days to 30 days.

b. The Defendant was arrested on December 18, 2022 and her 90 day speedy trial period expired on March 18, 2023. The Defendant filed a Notice of Expiration of Time for Speedy Trial on March 20, 2023. A hearing was held on March 27, 2023 and the Defendant's trial was scheduled for April 24, 2023, which is within the 30 day recapture period provided under Fla. Admin. Order No. AOSC21-17 Amendment 3, but exceeds the 10 day recapture period under Rule 3.191(p)(3). The Defendant claims that it was unconstitutional for the chief justice of the Supreme Court to extend the recapture period and to continue to extend it after the Covid-19 emergency has ended. Therefore, the Defendant contends that her case should be discharged because she was not brought to trial within 10 days after the hearing on her Notice of Expiration of Time for Speedy Trial.

c. The Court finds that it does not have the authority as a lower court to find a rule or administrative order of the Supreme Court of Florida, a higher court, to be unconstitutional. Under the basic common law of stare decisis, a lower court must follow the dictates of a higher court. In *State v. McCall,* 301 So. 2d 774 (Fla. 1974), the Supreme Court of Florida held that a county court does not have the authority to find a procedural rule established by the Supreme Court of Florida to be unconstitutional. Therefore, the Court does not have the authority to find Rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v) to be unconstitutional. The Defendant claims that the Court has the authority to find Fla. Admin. Order No. AOSC21-17 Amendment 3 unconstitutional, arguing that a trial court has the authority to find an executive order to be unconstitutional and an administrative order is similar to an executive order. However, an executive order is issued by a different branch of government. The Court finds that the reasoning of *McCall* would apply to an administrative order issued by the Chief Justice of the Supreme Court of Florida as well as a procedural rule established by the Supreme Court of Florida.

d. Furthermore, the Court finds that Rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v) and Fla. Admin. Order No. AOSC21-17 Amendment 3 are constitutional. The Defendant first claims that it is unconstitutional for Fla. Admin. Order No. AOSC21-17 Amendment 3 to remain in effect now that the emergency situation caused by the Covid-19 pandemic is over. However, as the State points out in their response, Rule 2.205(a)(2)(B)(v), gives the chief justice the power to extend deadlines under the speedy trial rule "in the event of a public health emergency that requires mitigation of the effects of the emergency on the courts and court participants". It is entirely possible that a public health emergency could continue to have an effect on the courts and its participants after the emergency has ended. Therefore, the mere fact that the Covid-19 pandemic has ended does not divest the Chief Justice of authority to extend deadlines to mitigate the effects on the courts.

e. The Defendant next claims Admin. Order No. AOSC21-17 Amendment 3 violates Article V, Section 2(a) and (b) of the Florida Constitution which states:

(a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to 4 the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Aimed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

(b) The chief justice of the supreme court shall be chosen by a majority of the members of the court; shall be the chief administrative officer of the judicial system; and shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in that circuit.

The Defendant claims that Article V, Section 2 does not give the Chief Justice the power to adopt rules of court on his or her own. It grants this power to the Supreme Court as a whole. Therefore, she claims, that Admin. Order No. AOSC21-17 Amendment 3 in which the Chief Justice unilaterally extends the recapture period and rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v), which grant the Chief Justice the authority to extend the deadlines under the speedy trial rule in emergency situations, are unconstitutional.

f. Rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v) were established by the Supreme Court of Florida as a whole in accordance with the authority to establish court rules granted to them by Article V, Section 2 of the Florida Constitution. The justices of the Supreme Court knew that emergency situations could arise making it impossible for the courts to comply with the speedy trial rule and other deadlines. In order to plan for these situations, the Supreme Court established rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v), authorizing the Chief Justice to extend deadlines when necessary. In the past, the Chief Justice has exercised this authority to extend the speedy trial period because of courthouse closings due to hurricanes. *See Sullivan v. State,* 913 So. 2d 762 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2571c]; *State v. Hernandez,* 617 So. 2d 1103 (Fla. 3d DCA 1993). The Defendant argues that the Florida Constitution does not grant the Chief Justice authority to establish court rules on his own. However, in issuing the administrative orders extending the speedy trial time period, the Chief Justice was acting under the authority granted to him by the rules established by the Supreme Court of Florida as a whole. Furthermore, as the State points out, the Chief Justice has not established any court rules on his own, he has merely implemented some temporary changes to the speedy trial rule in order to mitigate the effects from the public health emergency and its aftermath.

g. The Defendant also claims that Admin. Order No. AOSC21-17 Amendment 3 violates the separation of powers clause. The Defendant argues that section 252.36, Florida Statutes, grants the governor of the state the power to manage emergency situations and does not grant the Chief Justice any such powers. The Defendant points out that the governor issued an executive order on September 25, 2020 lifting all restrictions that he had previously imposed due to COVID-19. Yet, the Chief Justice continues the extension of the recapture period well beyond the date of the governor's executive order.

h. The Court finds that that Admin. Order No. AOSC21-17 Amendment 3 does not violate the separation of powers clause. The administrative order pertains to the operation of the court system and does not contradict the executive orders that have been issued by the governor. The Chief Justice issued these administrative orders under the authority granted to him by rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v), rules that were established by the Supreme Court of Florida under the authority granted to them by Article V, Section 2 of the Florida Constitution. Rules 3.191(i)(5) and 2.205(a)(2)(B)(iv) and (v) are constitutional as is Admin. Order No. AOSC21-17 Amendment 3 issued under the authority of those rules. Therefore, the Defendant's trial has been scheduled within the recapture period and the Defendant is not entitled to a final discharge.

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

The Defendant's Amended Motion for Final Discharge/Motion to Declare Fla. R. Crim. P. 3.191(i)(5) Unconstitutional is **DENIED**.

* * *

**Criminal law—Driving under influence—Speedy trial—Amended information—Motion to dismiss amended information filed after speedy trial period ended is denied where amendment from charge of DUI to charge of DUI with one prior increases penalty but does not charge defendant with new or different offense**

STATE OF FLORIDA, Plaintiff, v. JAMIE CHRISTINE VOGEL, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-CT-56803-XXXX-XX. April 24, 2023. Judy Atkin, Judge. Counsel: Ben Fox and Christel Lawrence, Assistant State Attorneys, State Attorney's Office, Viera, for Plaintiff. R. Scott Robinson, Viera, for Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE AMENDED INFORMATION**

**THIS CAUSE** came to be heard before the Court on April 19, 2023, upon the Defendant's Motion to Dismiss the Amended Information, filed on April 11, 2023. The State filed a Response to the Defendant's motion on April 18, 2023. The Court has heard and considered the arguments of counsel and has carefully reviewed the motion along with the State's response. Based upon this review, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

a. The Defendant was arrested on December 18, 2022. On February 16, 2023, the State filed an Information charging the Defendant with Driving Under the Influence. On April 5, 2023, after the 90 day speedy trial period expired, the State filed an Amended Information charging the Defendant with Driving Under the Influence with One Prior. The Defendant has not waived her speedy trial rights.

b. The Defendant claims that the Court must dismiss the Amended Information under *State v. D.A.,* 939 So. 2d 149 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2422b], which states that a court must dismiss any new charge raised in an amended information filed after the expiration of the speedy trial period if the defendant has not waived his or her right to a speedy trial. The State argues that this case is distinguishable from *D.A.* because the Amended Information does not charge the Defendant with a new or different crime. They argue that the offense charged in each Information has the same elements and that the prior offense only comes into play during sentencing. The State distinguishes this situation from a felony DUI where a person's prior convictions increase the degree of the offense to a felony. Here, the elements and the degree of the offenses are the same, however, the penalties increase. The State cites to *State v. Haddix,* 668 So. 2d 1064 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D550a] in support of their argument. In *Haddix,* the court held that in the case of a misdemeanor DUI, a prior offense does not need to be included in the Information for the trial court to impose the enhanced penalties. The court pointed out that a DUI with a prior conviction does not change the elements or the degree of the offense. *Id.* at 1067.

c. The Court agrees with the State that the Amended Information does not charge the Defendant with a new or different offense. The elements and the degree of the offense remain the same. Therefore, the State could legally file the Amended Information after the speedy trial period expired.

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

The Defendant's Motion to Dismiss the Amended Information is **DENIED**.

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# MISCELLANEOUS REPORTS

**Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Homeowners' associations—A judge need not resign from the board of an out-of-state property owners' association**

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-04. Date of Issue: May 3, 2023.

## ISSUE

Whether the inquiring judge who serves on the board of directors of an out-of-state property owners' association must resign from the board of the association.

ANSWER: No.

## FACTS

The inquiring judge is a member of the board of directors of an out-of-state property owners' association.

## DISCUSSION

In Fla. JEAC Op. 2004-10 [11 Fla. L. Weekly Supp. 377a], the Committee advised that the inquiring judge in that opinion should resign from the board of a homeowner's association in the community in which the judge resided and where a homeowner had filed suit against the homeowner's association in the circuit in which the inquiring judge presided over cases.

Canon 5C(3)(a)), Fla. Code Jud. Conduct, states:

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, sororal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

As service on the board of directors of an out-of-state property owners' association does not implicate any of the factors set forth in Canon 5C(3)(a), the inquiring judge need not resign from the board of directors of an out-of-state property owners' association.

## REFERENCES

Fla. Code of Judicial Conduct, Canon 5C(3)(a)
Fla. JEAC Op. 2004-10 [11 Fla. L. Weekly Supp. 377a].

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