Volume 31, Number 4, August 31, 2023

FLW SUPPLEMENT

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Pages 177-233

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.

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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

Bold denotes decision by circuit court in its appellate capacity.

ZONING (continued)

* * *

TABLE OF CASES REPORTED

* * *

TABLE OF STATUTES CONSTRUED

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

FLORIDA STATUTES

RULES OF CIVIL PROCEDURE

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

TABLE OF CASES TREATED (continued)

* * *

Volume 31, Number 4
August 31, 2023
Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—Withhold of adjudication for DUI charge constitutes conviction for purposes of revocation of driving privilege for fourth DUI conviction—Hearing officer's rejection of licensee's claims that one predicate DUI conviction was actually conviction for attempted DUI and another was dismissed was supported by competent substantial evidence of driving record

JAMES MAPLES, III, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2023 AP 2. May 16, 2023. Counsel: Lee Meadows, for Petitioner. Charles Burden Jr., Former Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANGELA C. DEMPSEY, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari filed on March 10, 2023. Petitioner seeks certiorari review of Respondent's final order sustaining Petitioner's permanent driver license revocation under §322.28, Fla. Stat., as a result of having four or more DUI Convictions. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), and Section 322.31, Florida Statutes. This Court reviewed the Petition and Appendix, the Department's Response to Petition for Writ of Certiorari, and Petitioner's Reply. Based on the foregoing, this Court finds as follows:

Factual Background:

1. After being convicted of driving under the influence of alcohol (DUI) four times, Petitioner's driving privilege was permanently revoked by the Department pursuant to Section 322.28, Fla. Stat. The revocation went into effect on November 24, 2004. Petitioner received two additional DUI convictions on November 11, 2004, and December 14, 2012.

2. Petitioner requested and received a show cause hearing on January 11, 2023, before the Department pursuant to Section 322.271, Fla. Stat., and Fla. Admin. Code R. 15A-1.0195.

3. At the hearing held on January 11, 2023, the Hearing Officer relied on a certified copy of the Petitioner's driving record. Petitioner submitted various documents contesting three of the convictions reflected on the driving record and testified regarding the circumstances around one of the contested convictions.

4. The Hearing Officer issued a final order on February 8, 2023, upholding the revocation. Petitioner timely filed a petition for writ of certiorari as provided in Section 322.31, Fla. Stat.

Standard of Review:

5. A circuit court's review of an administrative agency decision is limited to the following: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were 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). Further, it is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination. *Cohen v. School Board of Dade County, Florida,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984); *Campbell v. Vetter,* 392 So. 2d 6 (Fla. 4th DCA 1980), *pet. for review denied,* 399 So. 2d 1140 (Fla. 1981).

Analysis:

6. Petitioner contests three convictions reflected on his driver record, arguing the record is inaccurate and that these cases were either resolved without a conviction or dismissed. To the extent Petitioner alleges the driving history is inaccurate, it is the duty of the driver at hearing to show cause why his or her license should not be revoked. Fla. Admin. Code R. 15A-1.0195. The purpose of the hearing is not to simply challenge the truthfulness of the driving record, or to skirt around the lapsing of a jurisdictional deadline. Instead, the purpose of the show cause hearing is to present evidence showing why the record is inaccurate. *Midgett v. Dep't of Highway Safety & Motor Vehicles,* 16 Fla. L. Weekly Supp. 795b (Fla. 4th Cir. Ct. Apr. 20, 2009).

7. Bare legal challenges to the sufficiency of the Department's records (specifically, records received by the Department from clerks of court and the licensing authorities in other states), fails to satisfy the evidentiary burden of proving the record is inaccurate. *McKinnon v. Dep't of Highway Safety & Motor Vehicles,* 28 Fla. L. Weekly Supp. 201a (Fla. 13th Cir. Ct. Apr. 1, 2020). In his petition, Petitioner does not argue that the DUI offenses listed on the Department's driver record did not belong to him, but instead, he argues that he received a withhold of adjudication for one DUI offense and therefore not a conviction. Petitioner also asserts another DUI should have been an attempted DUI rather than a DUI conviction, and that the third DUI was dismissed.

8. The hearing officer had competent, substantial evidence to reject Petitioner's claims. Regarding Citation 0537XAB, the hearing officer rejected Petitioner's claim of receiving a conviction for attempted DUI. The hearing officer weighed the Department's driving record and found the incomplete two pages of the judgment and sentence provided by Petitioner were not persuasive.

9. On Citation 91447BT, Petitioner argues he received a withhold of adjudication instead of a conviction. Section 322.25(5), Florida Statutes requires the Department to consider any disposition of a DUI case as a conviction so long as the driver enters a plea and receives a fine or sentence by the court.

10. Finally, on Citation 159896W, Petitioner argues the Department's records are inaccurate and the case was dismissed. In support of this argument, Petitioner provided a public records response from the Department showing it did not have certain records beyond what was showing in the driver's record. Additionally, Petitioner testified at the hearing regarding the circumstances around the original case and why he believed the DUI charge was dismissed. The Petitioner has provided no authority showing the Department is responsible for maintaining detailed records of the original convictions. In fact, the Department's retention schedule shows such documents are destroyed immediately after they are entered into the Department's electronic record. Though Petitioner testified his case was dismissed, the hearing officer, as the finder of fact, is free to weigh his testimony against the conflicting evidence and can choose to disbelieve any testimony. *Dep't of Highway Safety v. Luttrell,* 983 So. 2d 1215 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a].

11. Accordingly, this Court concludes that the Department's decision to uphold the permanent revocation of Petitioner's driver license is supported by competent substantial evidence, that the Petitioner was accorded procedural due process, and that there was no departure from the essential requirements of the law.

It is hereby **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Municipal corporations—Permitting—Demolition—Denial—City design review board erred in denying permit for demolition of rooftop pylon constructed to display onsite advertisement for bank that was former occupant of property because current owner failed to submit plan for pylon's replacement—Although pylon was legal when built and could continue as legal nonconforming use after city code was revised to prohibit rooftop pole signs so long as bank owned property, upon sale of property nonconforming pylon was required to be removed—City applied incorrect law by characterizing demolition application as request for exterior alteration of building, rather than as request to remove illegal pole sign

BEACH LEGAL PROPERTIES, INC., Petitioner, v. CITY OF MIAMI BEACH, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-18 AP 01. May 25, 2023. On a Petition for Writ of Certiorari from a March 17, 2021, City of Miami Beach Commission Resolution No. 2021-31654 affirming a decision of the City Design Review Board. Counsel: Joni Armstrong Coffey and Wesley J. Hevia, Akerman LLP, for Petitioner. Rafael A. Paz, Aleksandr Boksner, Nicholas E. Kallergis, and Farosha Andasheva, City Attorney's Office, for Respondent.

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

OPINION

(PER CURIAM) Petitioner, Beach Legal Properties, Inc. ("Petitioner") filed a Petition for Writ of Certiorari to quash Resolution No. 2021-31654, which was adopted by the City of Miami Beach ("City") Commission ("Commission") on March 17, 2021.

Background

The one-story property is located at 301-317 71st Street, Miami Beach ("Property"), constructed in approximately 1952. An 81-ton, 55-foot-high comet tripod pole weighing 162,000 pounds (the "Pylon") sits on the roof of the Property. The Pylon was originally constructed in 1966, 14 years after the building was constructed, to display onsite advertising of former Property occupant Financial Federal Savings.

Petitioner owns the Pylon and the Property. On October 1, 2018, Petitioner applied to demolish the Pylon. Petitioner was subsequently informed by the City's Design Review Board ("DRB")[1] that DRB approval would be required before demolition. The DRB admitted that it did not have any "legal jurisdiction to deny removal of the [Pylon.]" (App. 164)[2] However, the DRB took the position that it could effectively deny removal unless Petitioner proposed some undefined replacement for the Pylon which would then be reviewed pursuant to 19 Design Review Criteria.

On July 7, 2020, the DRB held a public hearing on Petitioner's demolition application. The DRB analyzed the demolition application pursuant to the 19 Design Review Criteria, notwithstanding that the application was for demolition of the Pylon only, did not include a proposed replacement for the Pylon, and did not include the proposed demolition of any building feature. The DRB found that criteria 1-7, 10 and 15 were not satisfied, and remaining criteria 8, 9, 11, 13, 14 and 16-19 were inapplicable. The DRB recommended denial of the demolition permit "without prejudice" upon the condition that Petitioner re-file the application later "when a replacement option for the [Pylon] has been identified." Ultimately, the DRB issued a final decision ("DRB Order") that denied the demolition permit until a satisfactory replacement proposal for the Pylon was submitted.

On March 17, 2021, the Commission held a hearing on Petitioner's appeal of the DRB Order. Petitioner's counsel and the City Attorney's Office appeared and addressed the Commission. The Commission affirmed the DRB Order denying demolition of the Pylon, absent submission of a plan for the Pylon's replacement.

Petitioner timely filed this Petition on April 26, 2021.

Standard of Review

In first-tier certiorari review, the circuit court must determine "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Miami-Dade Cty. v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a] (quoting *Broward County v. G.B.V. Internat'l, Ltd.,* 787 So. 2d 838 (Fla. 2001) [26 Fla. L. Weekly S389a] (quoting *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982)).

Petitioner argues that procedural due process was not accorded pursuant to the Code of the City of Miami Beach's ("City Code") quasi-judicial procedures,[3] the Resolution violates the essential requirements of the City Code, and the Resolution is unsupported by the record evidence.

Analysis

Essential Requirements of Law

In *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a], the Supreme Court held that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, to warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Id.* (citation omitted).

Section 118-252(a)(1) of the City Code sets out the City's procedure for reviewing demolition permits: "All building permits for new construction, public interior areas, interior areas that face a street or sidewalk, demolitions and wrecking, alterations, or additions to existing buildings, . . . shall be subject to review under the design review procedures . . ."

In addition, three sections of the City Code are specifically applicable to pole signs:

Article IX. Nonconformances, Section 138(5)(j) states that "**pole signs and roof signs** are not permitted, except for pole signs which are associated with filling stations as provided in section 138-56. Legal nonconforming roof and pole signs may be repaired only as provided in section 138-55." (emphasis added).

Section 138(55)(a)(3) states that "existing nonconforming roof signs and pole signs shall be removed if ownership or use of the advertised building or business changes, except as otherwise provided herein."

Section 118-390(a) provides:

> Nothing contained in this article shall be deemed or construed to prohibit the continuation of a legally established nonconforming use, structure, or occupancy, as those terms are defined in section 114.-1. **The intent of this section is to encourage nonconformities to ultimately be brought into compliance with current regulations. This section shall govern in the event of conflicts with other regulations of this Code** pertaining to legally established nonconforming uses, structures, and occupancies.

(emphasis added.)

Although the Pylon was lawful when built, the City Code was amended to prohibit pole signs. *See* Section 138(5)(j) ("pole signs and roof signs are not permitted, except for pole signs which are associated with filling stations. . .").

While it is undisputed that the Pylon was built years after the building on whose roof it stands to hold signage for the bank and has served no other purpose, the City argues that "the Pylon has not held a sign in more than four decades[4] and, in the absence of any signage, is treated as an architectural feature rather than a "sign," and not subject to mandatory removal under Chapter 138 of the City Code." Response Brief at p.9. The City argues that: (a) removal of advertising signage from the Pylon pole structure transformed it into a different

and undescribed type of structure that was not a sign, or (b) that with the passage of time, the Pylon had "evolved" from a pole sign into an architectural feature of the building so that demolition could be conditioned on a replacement.[5] The City's argument that somehow over time the pole sign transforms into another structure is meritless. Petitioner correctly argues that the City cannot arbitrarily change a pole sign into something else.

After the demolition permit application was reviewed solely before the DRB and on a review limited to the Design Review Criteria in section 118-251 of the City Code, the City argues that the City Commission was not required to evaluate the DRB's decision under the City Code's pole sign rules because the Pylon is not a pole sign. Curiously, the City contends that "whether a sign is a sign is an administrative determination for the Planning Department to make, not the DRB." Response Brief at 10. However, the City points to no request for such a determination ever having been submitted to, or a determination having been made by, the Planning Department, notwithstanding that the propriety of the City's failure to apply the pole sign provisions of the City Code rests entirely on the assumption that the Pylon is not a pole sign.[6] We are not persuaded by the City's argument that the Pylon is not a pole sign. *See* generally *Villamorey, S.A. v. BDT Invs., Inc.,* 245 So. 3d 909, 911 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D822b] ("This well-known abductive reasoning test [the "Duck Test"] posits: 'If it looks like a duck, and quacks like a duck, then it is a duck."); *Githler v. Grande,* 289 So. 3d 533, 539 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D3031a] ("[I]f it looks like a duck and quacks like a duck, we don't have to ask if it's a pig")(interpreting whether a stock was included within the statutory definition of a security).

The City also argues that "there is no explicit prohibition on maintaining a legally established nonconforming structure." Response Brief at p. 23. A legal nonconforming structure is one that was lawfully established under the zoning regulations, but no longer complies because the zoning regulations were amended after its establishment. *See* Section 118-390, City Code. Section 118-390(a) provides that "[n]othing contained in this article shall be deemed or construed to prohibit the **continuation** of a **legally established nonconforming use**, structure, or occupancy, as those terms are defined in section 114.-1. . ." (emphasis added). Thus, even after pole signs were prohibited by the City Code, the Pylon could have continued as a legal nonconforming use to advertise Financial Federal Savings' business if the bank had continued to own the Property.[7] However, upon the bank's sale of the Property, the Pylon would have been required to be removed in any event. *See* Section 138(55)(a)(3) ("existing nonconforming roof signs and pole signs **shall** be removed if ownership or use of the advertised building or business changes. . . .") (emphasis added). Yet the City fails to explain how the Pylon would have continued as a legal nonconforming use after the bank's sale of the Property even if a legal nonconforming use had ever been established.

Were the Pylon shaped like a flagpole, the City would not be arguing that demolition is contingent on provision of a replacement structure, nor would the demolition permit have been reviewed based on design criteria applied to a replacement structure. However, the shape or design of the Pylon does not change the applicable analysis, law or conclusion. The requirement in Section 138(55)(a)(3) that "existing nonconforming roof signs and pole signs shall be removed if ownership or use of the advertised building or business changes. . ." focuses solely on **ownership or use** of the business, and not on the design of the pole or sign. Notably, this provision does not specifically exempt from its application illegal pole signs that have existed long enough to become "iconic," that are popular or favored by community residents, or that were designed in an architecturally significant style.[8] Nor can we add any such provision to the City Code[9] in contravention of the clear meaning of the pole sign provisions. *See Carroll v. City of Miami Beach,* 198 So. 2d 643, 645 (Fla. 3d DCA 1967)("[t]he City is bound by the express terms of its own ordinance. . .If the City desires a different meaning for its ordinance in the future, it may amend, modify or change the same by legislative process."). Moreover, the City's contention would render meaningless the requirement for removal of the Pylon in section 138-55(a)(3) of the Code. *See Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.,* 3 So. 3d 1220, 1233 (Fla. 2009) [34 Fla. L. Weekly S251a] ("Basic to our examination of statutes, . . . is the 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.").

The City's counsel expressly acknowledged that "the DRB does not have any legal jurisdiction to deny the removal of the [Pylon] structure."[10] Yet the City's review process of the demolition permit application—which characterized the application as one for exterior alterations to the building—allowed the City to avoid this admitted fact. In doing so, the City applied the incorrect law.

Section 118-251 of the City Code, Design review criteria, "encompasses the examination of architectural drawings for consistency with the criteria stated below, with regard to the aesthetics, appearances, safety, and function of any new or existing structure and physical attributes of the project in relation to the site, adjacent structures and surrounding community. . ." It makes sense that that provision vests the DRB with the authority to examine architectural drawings based on design review criteria if a new structure is being proposed or demolition would significantly alter the design of a building. However, removal of the Pylon attached to the roof of the building as proposed involved solely the demolition of a pole sign on the building roof, and did not include alteration to the exterior design or architecture of the Property. Here, there can be no legal replacement for the Pylon as the current regulations in the City Code prohibit pole signs, period. *See* Article IX. Nonconformances, Section 138(5)(j) ("pole signs and roof signs are not permitted, except for pole signs which are associated with filling stations . . ."). Moreover, the stated intent of section 118-390(a) of the City Code is to encourage nonconformities ultimately to be brought into compliance with current regulations, not to replace and thereby continue nonconformities.

The City failed to apply the pole sign provisions of the City Code to the application for demolition of the Pylon. This was error. *See Alvey v. City of North Miami Beach,* 206 So. 3d 67 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1028a] (failure to consider and apply essential provisions of the city code departs from the essential requirements of law).

Competent substantial evidence

Having concluded that the City failed to follow the essential requirements of law in applying an incorrect analysis, "flawed" and "erroneous" staff recommendations are "invalid" and "d[o] not constitute competent evidence." *See First Baptist Church v. Miami-Dade Cty.,* 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1547a]. Accordingly, the Resolution is also not supported by competent substantial evidence.

For the foregoing reasons, the Petition for Writ of Certiorari is **GRANTED**. The Resolution is quashed and the decision of the DRB is reversed. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

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[1]The DRB is a City board appointed by the City Commission.

[2]"App." stands for Petitioner's Appendix.

[3]Having concluded that the City failed to follow the essential requirements of law and that the Resolution is not supported by competent substantial evidence, we do not

reach the argument that Petitioner was allegedly denied procedural due process.

[4]Oddly, this contention amounts to the conclusion that a four-decades-old illegality somehow becomes legal and an architectural feature of the building although it was not designed as part of the building when the building was constructed.

[5]Adding to its illegality, the Resolution purports to place a condition on a denial, when the Code allows conditions only on approvals. *See* City Code Section 118-264, Design review approval conditions and safeguards:

> In granting design review approval, the design review board may prescribe appropriate conditions and safeguards either as part of a written order or on approved plans. Violation of such conditions and safeguards, when made a part of the terms under which the design review approval is granted, shall be deemed a violation of these land development regulations.

[6]This is a particularly glaring omission in light of the fact that City Code Sec. 118-253(a). - Application for design review, provides that:

> The applicant shall obtain a design review application from **the planning department, which shall be responsible for the overall coordination and administration of the design review process.** When the application is complete, **the planning department** shall place the application on the agenda and **prepare a recommendation to the design review board**. . .

(emphasis added).

[7]Petitioner correctly notes in its brief that "[h]ad the Pylon continuously retained its advertising for a continuing onsite business (Financial Federal Savings), this case would have been different—the Pylon could have claimed continuing legal nonconforming status. But that was not the case". Initial Brief at p. 18.

[8]The Pylon is in the Miami Modern or "MiMo" style. Neither the Pylon, nor the building on whose roof it sits, has been historically designated, nor is the district in which the Property is located a historic district.

[9]Whether amendments to the City Code are appropriate or necessary in order to preserve and retain architecturally significant structures that have not been designated historic is for the City Commission to address.

[10]The City, while acknowledging in its Response Brief that "the DRB does not have any legal jurisdiction to deny the removal of the structure" takes the position that "the DRB does have jurisdiction to review, and require, some form of iconic replacement for the Pylon that satisfies the Design Review Criteria". Response Brief at p. 6.

* * *

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—Withholding of adjudication on lesser charge of attempted felony DUI constitutes conviction for purpose of applying statute requiring permanent license revocation for fourth DUI conviction—Department of Highway Safety and Motor Vehicles was authorized to permanently revoke license for fourth conviction notwithstanding fact that criminal court only sentenced licensee to 10-year license revocation

ELEANOR LORI KAY OWEN, 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 31552 CICI. Division 31. May 31, 2023. Counsel: Jason A. Cameron, for Petitioner. Michael Lynch, Former Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(DENNIS CRAIG, J.) THIS CAUSE came before this Court on a Petition for a Writ of Certiorari (Dckt. No. 1) filed by Eleanor Lori Kay Owen (hereinafter "Petitioner"). The court, having reviewed the Petition and attached Exhibits, the Response (Dckt. No. 6) filed by the Florida Department of Highway Safety and Motor Vehicles (hereinafter "the Department"), and being fully advised in the premises, finds as follows:

Statement of the Facts

Petitioner was charged by Information on May 6, 2022 with the offense of felony DUI (based upon her having three prior DUIs), along with a misdemeanor charge for driving with a canceled, suspended or revoked license. (Dckt. No. 3 at 5). On August 8, 2022, Petitioner, on a negotiated plea agreement with the state attorney's office, pled Nolo Contendere to a lesser included offense of "Attempted" Felony Driving Under the Influence, pursuant to Florida Statute 316.193(2)(b)3, and Florida Statute 777.04(1) titled "attempts, solicitation, and conspiracy." (Dckt. No. 3 at 7). The criminal court withheld adjudication of guilt as to the lesser "attempted" DUI charge. Petitioner's sentence included, among other penalties, a monetary fine and a 10-year driver license revocation. *Id.* On September 16, 2022, more than 30 days after the criminal court imposed sentence, the clerk of court electronically notified the Department, (Dckt. No. 7 at 3-5), which then placed Petitioner's disposition for the violation of section 316.193, Florida Statutes, on her driving record. (Dckt. 7 at 116). The Department subsequently determined its records showed Petitioner had incurred four convictions for violations of section 316.193, Florida Statutes, and, by Order of Revocation and Final Order of License Revocation, Suspension, or Cancellation (hereinafter "Order") dated September 26, 2022, ordered Petitioner's driver license permanently revoked, pursuant to Florida Statutes 322.28 and 322.24, effective *nunc pro tunc* to August 8, 2022. (Dckt. No.2 at 3-4). Petitioner timely filed the instant petition on October 25, 2022, and the Department filed a Response on March 22, 2023. The Court heard oral arguments on May 18, 2023.

Jurisdiction

This Court has jurisdiction to consider the Petition pursuant to section 322.31, Florida Statutes (2022) and Florida Rule of Appellate Procedure 9.030(c)(3).

Standard of Review

In reviewing an administrative agency decision by certiorari, this Court's role is strictly limited to consideration of: (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 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)).

Procedural due process is not at issue in the instant Petition. The second factor, "whether the essential requirements of law were observed," requires an analysis of whether the administrative agency applied the correct law. *Heggs,* 658 So. 2d at 530; *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a]. The third factor focuses on whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached," and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

Ruling

Petitioner argues the Department departed from the essential requirements of the law when it permanently revoked Petitioner's driver license, and contends the Department's order is not supported by competent substantial evidence. Specifically, Petitioner asserts the withholding of adjudication of guilt on the "attempted" felony DUI does not equate to a DUI conviction for purposes of a permanent driver license revocation. Petitioner further argues the Department exceeded its legislative authority to permanently revoke Petitioner's driver license since the criminal court specifically addressed revocation in its sentence. (Dckt. No. 3 at 18).

The issue before this Court is whether the aforementioned withhold of adjudication of guilt constitutes a "conviction" for violation of section 316.193, Florida Statutes, for purposes of a permanent DUI revocation pursuant to section 322.28(2)(d), Florida Statutes. Petitioner asserts that because adjudication of guilt was withheld, and was done so on a lesser charge of "attempted" DUI, she was not "convicted" of DUI a fourth time, and thus, section 322.28(2)(d), upon which the Department relied, does not apply. Petitioner also argues that because the above statute does not apply, the trial court was allowed discretion in sentencing her to a 10-year driver license revocation instead of permanent revocation, and the

Department lacked authority to usurp the trial court's sentence. This Court disagrees.

Section 322.28(2)(d), Florida Statutes (2022), provides in pertinent part, "[t]he court *shall* permanently revoke the driver license or driving privilege of a person who has been convicted four times for violation of s. 316.193." (emphasis added). The statute further provides that if a court does not do so within 30 days of judgment and sentence, then "the department *shall* permanently revoke the driver license or driving privilege pursuant to this paragraph." *Id.* (emphasis added). Permanent revocation applies so long as at least one of the convictions occurred after July 1, 1982. *Id.* All of Petitioner's convictions for violation of section 316.193 occurred after that date. (Dckt. No. 7 at 115-116).

Florida law also mandates that "no court may suspend, defer, or *withhold adjudication of guilt* or imposition of sentence for any violation of s. 316.193 . . . " § 316.656(1), Fla. Stat. (2022) (emphasis added). *See State v. Whitaker,* 590 So.2d 1029 (Florida 1st DCA 1991) (holding the trial court was not authorized to withhold adjudication of guilt for violations of section 316.193); *State v. Griffith,* 540 So.2d 916 (Fla. 2nd DCA 1989)(holding the adjudication provision of 316.656(1) is mandatory and precludes trial court from withholding adjudication of guilt for any violation of 316.193). Further, section 322.25(5), Florida Statutes (2022) provides:

> For the purpose of this chapter, the entrance of a plea of nolo contendere by the defendant to a charge of driving while intoxicated, driving under the influence, driving with an unlawful blood-alcohol level, *or any other alcohol-related or drug-related traffic offense similar to the offenses specified in s. 316.193,* accepted by the court and under which plea the court has entered a fine or sentence, whether in this state or any other state or country, *shall be equivalent to a conviction.*
> (Emphasis added.)

Petitioner argues she pled only to Florida Statute 777.04(1) and not to a violation of section 316.193, asserting the inclusion of the latter offense on the Plea form (Dckt. No. 3 at 7) and the Judgment and Sentence (Dckt. No. 3 at 9), was what amounted to a clerical requirement. This argument is not persuasive. The record clearly reflects Petitioner pled to a violation of section 316.193(2)(b)3. As the violation is alcohol-related and the offense is similar to those specified in that section, the Court finds that Petitioner was convicted of DUI, and this, her fourth conviction, subjected her to the statutory requirement of permanent revocation.

As to the Department's authority in this regard, Florida courts have clearly distinguished between a criminal sentence and administrative actions flowing from a criminal defendant's actions. Whereas the criminal sentence punishes the defendant, the administrative mandate that follows is a remedy for the public protection. *See Dep't of Highway Safety & Motor Vehicles v. Gordon,* 860 So.2d 469, 471 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2498b] ("Any bargain a defendant may strike in a plea agreement in a criminal case has no bearing on administrative consequences that flow from the defendant's actions.") (citing *State v. McFarland,* 884 So.2d 957 (Fla. lst DCA 2003) [28 Fla. L. Weekly D2298a] (citations omitted); *Dep't of Highway Safety & Motor Vehicles v. Grapski,* 696 So.2d 950, 951 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1739a] ("When made mandatory by statute, revocation of a license is an administrative function, as opposed to the imposition of a criminal sentence involving at least some exercise of judicial discretion."). Thus, the Department was authorized to permanently revoke Petitioner's license in the absence of the criminal court doing so within 30 days of imposing sentence.

This Court concludes competent substantial evidence exists to support the Department's action of permanently revoking Petitioner's driver license. Further, the Department did not depart from the essential requirements of the law in issuing said revocation.

Accordingly, it is hereby

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

* * *

Municipal corporations—Employees—Discipline—Demoted finance manager for city police department was not deprived of due process in multiple evidentiary hearings before civil service board—No merit to argument that board departed from essential requirements of law by upholding demotion for inability to perform job functions —Employee's claim that she was tasked with performing functions not in her job requirements was not substantiated by record—However, decision must be quashed where some findings in deputy chief's memorandum demoting finance manager were supported by competent substantial evidence and some are not, and there is no indication that civil service board would have sustained demotion absent the unsupported findings

XIAO-WEN MICHELLE CHOI, Petitioner, v. CITY OF MIAMI, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-2-AP-01. May 24, 2023. On Appeal from a Final Order of City of Miami City Manager following City Service Board's Finding of Just Cause. Counsel: Charles C. Mays, for Petitioner. Victoria Méndez, City Attorney, Kerri L. McNulty, Senior Counsel, and Marguerite Snyder, Assistant City Attorney, for Respondent.

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

OPINION

(PER CURIAM) Petitioner, Xiao-Wen Michelle Choi, petitions for a writ of certiorari to quash the final decision by the City Manager sustaining her demotion from her position as the Finance Manager of the City of Miami Police Department. The City Manager implemented the demotion based upon the Civil Service Board's finding of just cause following quasi-judicial proceedings.

We have jurisdiction to review this final decision. *See* Art. V, Sec. 5, Fla. Const.; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).

Background

Petitioner was the Police Budget and Finance Manager for the City of Miami Police Department. When Ronald Papier was first promoted to Deputy Chief of Police on October 6, 2020, he began supervising Ms. Choi.

Approximately 13 months later, he issued a memorandum demoting her to her prior position at the Parks Department. He demoted her for two reasons: (1) her inability to perform her essential job function and (2) her lack of leadership. Specifically, in his memorandum detailing the reasons for the demotion, Deputy Chief Papier cited the following factual bases:

> **Inability to Perform Essential Job Functions**
>
> 1. Ms. Choi failed to respond to requests from the Finance Department detailing potential reimbursements from FEMA for a fence and substation damaged during Hurricane Irma.
>
> 2. Related to the FEMA reimbursement, Ms. Choi told payroll clerk Janeisy Aracena to ignore a directive to enter PATEO information to facilitate FEMA reimbursements. Failure to enter this information resulted in delay and additional work to reconcile entered records.
>
> 3. In July 2017, Ms. Choi reported a budget surplus of $900,000 when in fact the police department was facing a shortfall. Deputy Chief approved purchase orders based on the erroneous belief that there was a surplus.
>
> 4. Ms. Choi approved an unnecessary payment for a $7,000 refrigerator in a cafeteria space, when in fact the vendor contract required the vendor to pay for the purchase.
>
> 5. In June 2017, Ms. Choi misallocated $233,000 of a federal grant for the purchase and implementation of a Body Worn Camera program, leaving elements of the implementation of the program unfunded.

6. The Office of Management and Budget identified and documented deficiencies in Ms. Choi's work output.

Lack of Leadership

Deputy Chief Papier identified the following lapses in Ms. Choi's leadership performance:

1. Ms. Choi is unwilling to supervise sworn officers who carry firearms. Her role requires her to supervise employees who are sworn officers who carry guns. Ms. Choi is afraid of people with guns.

2. Several of Ms. Choi's employees have chosen to transfer to different assignments, quit or roll back (choose demotion), citing Ms. Choi's toxic work environment as the primary reason for their decision.

(DE 74 at Tab 4, App. 20)

Pursuant to the City of Miami's ordinances, Choi demanded review of her demotion before the Civil Service Board. Following multiple quasi-judicial evidentiary hearings that spanned more than a year, the Civil Service Board upheld the demotion, and the City Manager implemented the demotion with a final order. The following evidence was presented to the Civil Service Board on Deputy Chief Papier's findings in his memorandum justifying demoting Choi.

A. Inability to Perform Essential Job Functions

1. Choi failed to respond to requests from the Finance Department detailing potential reimbursements from FEMA for a fence and substation damaged during Hurricane Irma.

Choi was the Budget and Finance Director. The Police Department sustained physical damage following Hurricane Irma for which it was seeking reimbursement from FEMA. Major Armando Aguilar was assigned at the time as the Major for personnel resource management. Prior to a meeting to scope the extent of the recovery for submission of a claim to FEMA, an October 23, 2017 meeting took place to "clear up any questions or concerns we had regarding what was reimbursable, what was not, what documentation was needed and to just really begin that process to get the reimbursement that the city was due." The meeting was important—every section commander was present. Major Aguilar testified that getting "every single dollar that we could get in reimbursable funds [was] important."

He recounted that it was difficult to get information from Choi on the extent of damage to a fence and radio antenna. Deputy Chief Papier specifically requested this information from her. On October 23, she told Major Aguilar that she had already provided that information to the finance department. The next day, it was discovered she had not relayed that information. On October 25, 2017, Major Aguilar asked her at a meeting to comment on amounts for the fence and antenna. In response, she looked confused and appeared to know nothing about it. Similarly, she could not respond to a request for information about damage to a substation.

Choi testified and argued that it was not her job to know whether the Police Department sustained damage and what such damages cost. Other personnel who operate facilities should have been more appropriately tasked to determine this information. Major Aguilar testified that while facilities manager Angel Blanco would have had better knowledge of the actual costs, "[t]he issue is not in-the-weeds knowledge of how much money each item costs. It was just a lack of awareness of the issues as a whole to where two department directors, the finance department director and the police chief had to get involved." Contrary to Choi's arguments, it was reasonable for Deputy Chief Papier and the Civil Service Board to conclude that with two department directors asking Choi for this information, and with an important meeting with FEMA coming up, she should have obtained the information.

Major Aguilar testified that Choi would not be the person who estimated the damage or obtained a quote for damages. Rather, "we're looking more at yes, no questions. We got to fix a fence or don't we" and "we need to ensure we get our money."

There was competent substantial evidence presented to support this finding.

2. Related to the FEMA reimbursement, Choi told payroll clerk Janeisy Aracena to ignore a directive to enter PATEO information to facilitate FEMA reimbursements. Failure to enter this information resulted in delay and additional work to reconcile entered records.

There was no evidence presented at the hearings to substantiate this allegation.

3. In July 2017, Ms. Choi reported a budget surplus of $900,000 when in fact the police department was facing a shortfall. Deputy Chief approved purchase orders based on the erroneous belief that there was a surplus.

Deputy Chief Papier testified that in July 2017, Choi reported a budget surplus of $900,000 when in fact the police department was facing a shortfall. Deputy Chief Papier approved purchase orders based on the erroneous belief that there was a surplus. Deputy Chief Papier testified that he relied upon Choi's projection of a surplus to sign purchase orders amounting to the projected amount of the budget. However, according to Deputy Chief Papier, there was no surplus, and all of his purchase orders were canceled because there was insufficient money in the budget to pay for the items. Deputy Chief Papier chalked this error up to a mistake on Choi's part.

In fact, all relevant witnesses testified there was a projected surplus, that this was not a mistake, and that existing spending was based upon the projected surplus. Deputy Chief Papier's excess purchase orders surpassed available funds, which was not Budget Director Choi's fault.

There was insufficient competent substantial evidence to support this finding.

4. Choi approved an unnecessary payment for a $7,000 refrigerator in a cafeteria space, when in fact the vendor contract required the vendor to pay for the purchase.

Deputy Chief Papier testified that Choi signed a purchase order for a $7,000 refrigerator for the cafeteria. He challenged this purchase on the ground that the contract required the vendor to make this purchase, not the Department. Choi insisted that it was the Police Department's responsibility. Deputy Chief Papier checked the contract and confirmed the vendor's responsibility for the purchase. Deputy Chief Papier testified this episode proved Choi's unfamiliarity with reading contracts.

While the Department never paid the cost of the refrigerator and never paid a restocking fee, there was competent substantial evidence that Choi made the alleged error.

5. In June 2017, Choi misallocated $233,000 of a federal grant for the purchase and implementation of a Body Worn Camera program, leaving elements of the implementation of the program unfunded.

Much of the evidence presented at the multiple evidentiary hearings pertained to the allegation that Choi was responsible for an excess purchase order to buy additional ethernet equipment to support a federal grant for body worn cameras for its officers. Only $25,000 was allocated under the grant for the supportive ethernet portion. Choi approved a purchase order for $233,000, which required a reconciliation process to account for the excess $208,000 to avoid problems with this federal grant.

Unbeknownst to Choi, after the body worn camera grant was approved, the program was increased from 4 to 12 locations, thus requiring increased camera equipment and the need for additional ethernet. Choi was not privy to any of the details of the grant, as she

was never included in any of the department meetings about the grant. Her direct subordinate, Blanca Joseph, signed off on the purchase order. Joseph testified that Choi asked her to sign off on the grant, which she had never had to do before.

There was a great deal of conflicting testimony on this point—including whether Joseph as Grant Manager had direct responsibility to ensure whether the request for funds was in line with the grant and whether Joseph had access to Oracle, the computerized budget system (Joseph claims she had no access, while Michelle Choi claims that she did).

Despite the conflict in the evidence, it was uncontroverted that Choi was kept out of the loop. She was not told that the project was being expanded to 12 locations requiring concomitant increases in ethernet purchases. She was not included in the meetings. She relied upon her subordinate. We conclude that there was insufficient competent substantial evidence to sustain this finding by the Board.

6. The Office of Management and Budget identified and documented deficiencies in Choi's work output.

There was ample evidence presented at the hearings of deficiencies identified by the Office of Management and Budget. Chris Rose, the Budget Director for the City of Miami, testified at length in support of this finding. As to whether Choi's budget responsibilities were carried out timely, Rose testified that there were times when Choi was late. Her tardiness frustrated the budget coordinator. As a result of her tardiness, the budget coordinator had to do Choi's work. Lateness also caused delays in the budget process, requiring the reconciliation of information after key meetings. Rose testified:

> If there are things that are undone corning into that meeting, then yeah. It does present—I can't think of a better word than drama but the things that are unknown coming into the meeting that really ought to be known. So a lot of times we'd have to schedule another meeting and come back and rehash through some of the things we really would have liked to have gotten done in the first meeting.

As for Choi's budget reasoning, sometimes it was adequate, other times not. Regarding budget efficiency, Rose testified "[a]gain, there were times when Choi did exactly what was necessary and there were other times when it came up short."

By comparison, Rose testified that Choi's successor has exceeded all expectations. The budget process went much smoother after she left the position. Under Choi, there were more complaints than in prior years.

B. Lack of Leadership

1. Choi is unwilling to supervise sworn officers who carry firearms.

Her role requires her to supervise employees who are sworn officers who carry guns. Ms. Choi is afraid of people with guns.

The record was replete with competent substantial evidence that Choi was uncomfortable supervising sworn officers. Under the structure of the Police Department, while Choi was a civilian employee, she was in the position of a commander, and thus was required to supervise sworn officers. Deputy Chief Papier testified that Choi was uncomfortable supervising subordinates who carried guns. He also testified that Choi expressed her fear of guns.

Major Aguilar likewise testified that Choi was intimidated by subordinates with weapons. He testified that on several occasions, Choi requested that another Major be required to supervise her unit.

This record supports a conclusion that it was not feasible or practical for someone with Choi's trepidation toward firearms to work in her assigned role within the police department, since the environment abounds with armed personnel.

2. Several of Choi's employees have chosen to transfer to different assignments, quit or roll back (choose demotion), citing Ms. Choi's toxic work environment as the primary reason for their decision.

Choi's lawyer complained throughout the proceedings that all of the evidence presented at the hearing in support of this finding was hearsay and therefore incompetent evidence. Several witnesses testified that Choi's staff members chose to roll back or voluntarily seek demotion to another unit rather than continue to work in Choi's unit.

Deputy Chief Papier testified that employees complained that Choi created a hostile work environment. Executive Officer Natalie Martinez testified that employees told her there was a hostile work environment. Complaining employees included Sonia Hurtado, Bianca Joseph, Joy Sonlet and others.

Some of the complaints by employees were that Choi would require them to perform functions that were not in their job description and that they would have to stop what they were doing to perform such functions. The Department also introduced written exit interviews of employees who left the Department during Choi's tenure. These records were purportedly introduced as business records, but contained the statements of the exiting employees.

Bianca Joseph, Choi's subordinate, testified about her treatment by Choi. She worked as the grants coordinator under the leadership of Choi. Joseph testified that Choi created a hostile work environment. She stated that it was so unpleasant to work in Choi's department that she chose to roll back to a demotion rather than continue to work under Choi. Joseph testified that she received no training for her job. Choi regularly asked her to perform administrative tasks which were not in her job description. She asked Joseph to supervise and discipline other employees, something that Joseph was not required to do.

Joseph asserted that Choi lacked people skills and empathy. When asked about the environment, for employees, Joseph testified that she felt like she was walking on eggshells, and that she was micromanaged. Choi's leadership style caused Joseph to request to roll back her position rather than continue to work under Choi.

Joseph is now a Commander for the Police Department.

Analysis

A circuit court panel reviewing a petition for writ of certiorari is tasked with determining: (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. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982); *Haines City Community Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

The Petitioner challenges whether the decision of the Civil Service Board was supported by competent substantial evidence. The Petitioner further contends that the Department held her accountable for duties which are neither found in the applicable Department Order nor in the Standard Operating Procedures applicable to the function at issue. We treat this issue as a claim that there was a departure from the essential requirements of law. Finally, the Petitioner argues that she was deprived of due process at her hearing.

Due Process

We reject the argument that Choi was deprived of due process. She received ample due process in the multiple evidentiary hearings held over the course of a year. Her lawyer was given unfettered opportunities to challenge and cross-examine witnesses. The record is replete with the evidence offered by her counsel.

> 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. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross examine witnesses, and be informed of all the facts upon which the commission acts.

Jennings v. Dade Cnty., 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Applying this standard, Choi received due process in her quasi-judicial process.

Departure from the Essential Requirements of Law

Choi claims that she was tasked with performing functions not in her job requirements. We treat this as an argument that the City departed from the essential requirements of law, although this issue is not clearly set forth in the Petition.

Major Aguilar testified that although Choi is not the employee who would have known the details of the cost of hurricane-related damages, she was asked to, and promised to get this key information to her supervisor. She claimed ignorance at a meeting, causing delay and frustration to Deputy Chief Papier and Major Aguilar. Choi testified that she was not required to sign off on grants, as this was the purview of Joseph, the grants manager or coordinator. On the other hand, Deputy Chief Papier testified that providing this information was within Choi's responsibilities.

There is nothing in the record before us to substantiate Choi's claim that her duties were riot found in the applicable Department Order nor in the Standard Operating Procedure. This precludes us from finding that the essential requirements of law were not met.

Competent Substantial Evidence

The crux of Petitioner's arguments is that certain allegations were unsupported by any non-hearsay evidence and therefore, these findings were unsupported by competent substantial evidence.

While hearsay is admissible in administrative hearings, it may not provide the sole foundation for an administrative finding. *See MacPherson v. Sch. Bd. of Monroe County,* 505 So. 2d 682, 684 (Fla. 3d DCA 1987). Thus, hearsay evidence may be considered to corroborate non-hearsay evidence:

> Although hearsay evidence is admissible in an administrative hearing to corroborate or explain other evidence, it may not be used to support a finding not otherwise supported by competent substantial evidence. *Spicer v. Metropolitan Dade County,* 458 So.2d 792 (Fla. 3d DCA 1984); *Pasco County School Bd. v. Florida Pub. Employees Relations Comm'n,* 353 So.2d 108 (Fla. 1st DCA 1977); § 120.58(1)(a), Fla.Stat. (1985).

Id. at 684. But "[i]f, on the other hand, hearsay evidence is corroborated by otherwise competent, substantial evidence, it may support an agency determination." *Spicer,* 458 So. 2d at 794. (citation omitted)

Bianca Joseph testified that Choi caused a hostile work environment, that she ordered her to perform administrative tasks not within her job description, and that the work environment caused her to seek demotion rather than continue in her position. This was direct evidence and not hearsay. Hearsay evidence presented by Deputy Chief Papier, Major Aguilera, and Natalie Martinez about similar complaints by other employees, and employees' decisions voluntarily to seek demotion rather than continue under Choi's leadership buttressed the direct evidence presented by Bianca Joseph.

This Court: recognizes that Bianca Joseph's testimony conflicted with Choi's testimony and that there was likely acrimony between them. Choi offered contrary evidence as to the reasons why employees sought demotion. But it is not our job to re-weigh evidence. *See Haines City Community Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. We therefore find that there was competent, substantial evidence supporting Choi's demotion based upon the finding that she lacked leadership ability.

Remedy

We find that there was competent substantial evidence to support Deputy Chief Papier's findings of Choi's inability to perform her essential job functions: (1) by failing to report damages to a fence and a substation to support a FEMA claim, (4) by approving an unnecessary expenditure for a refrigerator, and (6) as reflected by the Office of Management and Budget, identifying and documenting deficiencies in Choi's work output. There was also competent substantial evidence to support Deputy Chief Papier's findings that she lacked leadership ability: (1) by being unwilling to supervise employees with guns and (2) by causing employees to transfer to different assignments, quit or roll back (choose demotion), citing Choi's toxic work environment as the primary reason for their decision.

However, there was insufficient competent substantial evidence to support the findings of Choi's inability to perform her job functions in (2) telling payroll clerk Janeisy Aracena to ignore a directive to enter PATEO information to facilitate FEMA reimbursements, (3) inaccurately reporting a budget surplus, and (5) misallocating $233,000 of a federal grant for the purchase and implementation of a Body Worn Camera program.

As some of the findings in Deputy Chief's memorandum demoting Choi were supported and some were not supported, and as there is no indication wbether the Civil Service Board would have sustained Choi's demotion absent the findings which were unsupported by competent substantial evidence, we must quash the decision below.

Beyond quashing the decision below, we have no power to direct the scope of proceedings on remand. The Florida Supreme Court explained in *Broward County v. G.B.V. Intern., Ltd.,* 787 So. 2d 838, 844 (Fla. 2001) [26 Fla. L. Weekly S389a], that a circuit court in granting certiorari may do no more than quash the lower tribunal's ruling: "The role of the reviewing court in such a proceeding is to halt the miscarriage of justice," nothing more:

> On certiorari the appellate court only determines whether or not the tribunal or administrative authority whose order or judgment is to be reviewed has in the rendition of such order or judgment departed from the essential requirements of the law and upon that determination either to quash the writ of certiorari or to quash the order reviewed.
>
> When the order is quashed, as it was in this case, 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 and the parties stand upon the pleadings and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of their rights under the law in the same manner and to the same extent which they might have proceeded had the order reviewed not 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 order or judgment.

(quoting *Tamiami Trail Tours v. Railroad Commission,* 128 Fla. 25, 174 So. 451, 454 (1937)). *See also Miami-Dade County v. Snapp Industries, Inc.,* 319 So. 3d. 739 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1029a].

The Petition is granted and the decision below is quashed. (TRAWICK, WALSH, and SANTOVENIA, JJ. concur.)

* * *

Counties—Zoning—Rezoning—Due process—No merit to argument that opponents to rezoning were denied due process by lack of formal notice—Although opponents did not live within radius of property owners that county code required be notified, they nonetheless appeared and fully participated in hearing—Opponents' claim that county code procedures for rezoning hearing unfairly limited their ability to address county commissioners raises issue of substantive due process that cannot be addressed on certiorari review—Challenge to consistency of development order with comprehensive plan are not appropriately brought in petition for writ of certiorari

SAM CALCO and JAY MUFFLY, Petitioners, v. HILLSBOROUGH COUNTY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough

County, General Civil Division. Case No. 22-CA-7322. Division H. May 17, 2023. Counsel: Luke Charles Lirot, Law Offices of Luke Lirot, Clearwater, for Petitioner. Mary J. Dorman, Office of the County Attorney, Tampa, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HELENE L. DANIEL, J.) **THIS CAUSE** is before the court seeking to quash the County's quasi-judicial approval of a proposed rezoning of certain real property from agricultural single-family conventional to planned development (PD). The requested rezoning would allow the development of a convenience store and gas station on U.S. Highway 41 in Lutz. (Doc. 3). Petitioners raise two issues in support of their petition. First, they contend that they have been denied procedural due process on two bases: a) because they were not notified of the hearing, and b) because opponents' ability to present testimony against the project was unfairly limited under the County's land development code. Second, they challenge the finding that the project is consistent with the County's comprehensive plan. The Court has reviewed the petition (Doc. 3), the response (Doc. 28), reply (Doc. 35), related appendices and applicable law, and heard arguments of counsel in oral argument held March 1, 2023. Because Petitioners received adequate procedural due process, and because certiorari is unavailable to review either the challenge to the fairness or constitutionality of the land use code or the development order's alleged inconsistency with the comprehensive plan, the petition is denied.

The Property that is the subject of the contested rezoning is a nearly three-acre parcel in Lutz at 18601 North US Highway 41. It is near the intersection of North U.S. Highway 41 and Sunset Lane. The Highway 41 / Sunset Lane intersection has substantial existing commercial development. The Property is on the north side of the highway within an area currently comprised of suburban scale neighborhood commercial, residential, and agricultural uses. An aerial photograph of the site and surrounding properties shows that to the west is property zoned Planned Development (PD) and used for a self-storage facility, and to the south is property also zoned PD with a Walgreens Pharmacy. South of the Walgreens is property zoned Commercial Neighborhood (CN). The property to the north is either vacant or used for single-family homes, and the property to the east is vacant. The owner sought to rezone the property to allow for the development of a 7-11 convenience store and gas station.

Proceedings to rezone property in Hillsborough County are comprised of two parts. §§10.03.03, 10.03.04, Hillsborough County Code. The first proceeding is before a zoning hearing master (ZHM). §10.03.03. During the ZHM proceeding the case is made for, or against a proposed project. Similar to, but much less formal than, a trial, parties may be represented by counsel, testify, call and cross-examine witnesses, and submit documentary evidence. *Id.* The code sets forth the parameters for the proceeding, including the notice required, and the time allotted for parties and participants. §§10.03.02D-G.; 10.03.03 B, Hillsborough County Code, respectively. Participation in this level of the proceeding is often, but not always, a prerequisite to a party or participant's ability to address the BOCC in the next phase of the proceeding. §10.03.04 E.

The second prong of the proceeding is before the Board of County Commissioners (BOCC). §10.03.04, Hillsborough County Code. Typically, the BOCC considers only matters in the record. §10.03.04 D.1. It may take additional evidence if circumstances warrant. §10.03.04 D.2. Or it may remand the matter back to the ZHM to consider additional evidence. §10.03.04 E.3. As with the proceeding before the ZHM, the code sets forth the order of proceedings, including the time allotted to each speaker. §10.03.04 E.2.(a-g). Parties of record, whether they are proponents or opponents of the project, receive 10 minutes total. §10.03.04 E.2.(d-e).

Petitioner Muffly lives about a half mile from the Property by roads. Petitioner Calco lives nearly two miles from the Property by roads. Based on their distance from the subject property, neither Petitioner was entitled to receive formal notice of the hearings on the rezoning application. § 10.03.02(E)(1), Hillsborough County Code (requiring notice to property owners within 500 feet of the subject property). Because the BOCC remanded the matter back to the ZHM to obtain more evidence, four hearings were held on the rezoning. Although neither petitioner received formal notice of the application to rezone the Property, general notice was posted on the Property. Both petitioners appeared for and fully participated in all four hearings. They were represented by counsel, offered testimony, presented witnesses, including an expert witness, and submitted documents into the record. Ultimately, the BOCC approved the requested rezoning unanimously.

In reviewing quasi-judicial decisions of administrative boards, the circuit court must determine whether Petitioners were afforded due process, whether competent, substantial evidence supports the decision, and whether the decision comports with the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624 (Fla. 1982). In so doing, the court is not permitted to reweigh evidence. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1275 (Fla. 2001) [26 Fla. L. Weekly S329a]. Moreover, the court is to examine the record for evidence to support the underlying decision; evidence that may refute the decision is outside the scope of the court's review. *Id.* "When the facts are such as to give the [City] Commission a choice between alternatives, it is upon the [City] Commission to make that choice—not the circuit court." *Metro Dade County v. Blumenthal*, 675 So. 2d 598, 606 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c].

In support of quashal of the rezoning approval, Petitioners argue that Hillsborough County's rezoning process denies them procedural due process on two bases: because they received no notice of the proceeding, and because their ability to participate in the proceeding before the BOCC is strictly time limited. In addition, Petitioners assert that the requested rezoning should be quashed because it is inconsistent with the comprehensive plan.

DUE PROCESS

In a certiorari proceeding, the circuit court is to determine whether a petitioner received *procedural* due process. Procedural due process requires the provision of fair notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Authority,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. "[T]he notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.' " *Id. Citing Mathews v. Eldridge,* 424 U.S. 319, 222 (1976). Specifics involved in procedural due process are not evaluated by fixed rules of law, but, rather, by the requirements of a particular proceeding. *Keys,* 795 So. 2d at 948 (internal citations omitted). Due process is flexible. *Id.*

Not everyone is entitled to receive notice under the code. Petitioners, who live no closer than a half mile from the Property, were not within the radius of property owners the applicant was required to notify. As noted earlier, only owners of property within a 500-foot radius are entitled to receive notice by mail. §10.03.02 D., Hillsborough County Code. Because Petitioners were not entitled to receive direct notice under the code, however, they could not have been denied due process because they were not formally notified. Despite not receiving formal notice, both petitioners appeared and fully participated in the underlying proceedings.

Petitioners also argue that the code unfairly limits participation before the BOCC by restricting presentations to evidence already of record. Under the code, the BOCC may not receive new evidence. §10.03.04, Hillsborough County Code. Petitioners say that this practice deprives them of due process by restricting their opportunity to address their elected officials on matters that concern them, specifically, zoning changes that affect their community. Indeed, at least one board member was sympathetic to Petitioners' position, indicating that county staff was studying the issue.[1]

Petitioners suggest that the procedures depart from the essential requirements of law, but not because the BOCC failed to apply the code or even that the code was applied incorrectly, either regarding notice or the allotted time to present evidence. Rather, Petitioners assert that application of the codified notice and time constraints in the code unfairly limit their ability to address their elected officials on matters important to them. In short, they maintain the procedures are unfair. Although the court understands Petitioners' position, their argument is more a *substantive* than *procedural* due process issue. Circuit courts may review substantive due process issues, but they may not do so in certiorari. *Nostimo, Inc. v. City of Clearwater,* 594 So. 2d 779, 782 (Fla. 2d DCA 1992) (Certiorari review may only properly consider the *procedural* due process afforded; *substantive* due process must be determined in a declaratory action.) (emphasis added) (internal citations omitted). Thus, where there was no violation of the code alleged, neither the challenge to the adequacy of notice nor allotted time is properly before the court.

INCONSISTENCY WITH THE COMPREHENSIVE PLAN

Petitioners also argue that the development order is inconsistent with the County's comprehensive plan. As with substantive due process claims, claims that a development order is *inconsistent* with the comprehensive plan are not reviewable in certiorari. State law requires challenges to a finding that a proposed development is consistent with the comprehensive plan to be brought as a *de novo* action for declaratory, injunctive, or other relief. *See* §163.3215(1), (3), Fla. Stat. (stating that a *de novo* action is the *exclusive* method to challenge a finding of comp plan consistency) *See also Stranahan House, Inc. v. City of Ft. Lauderdale,* 967 So. 2d 1121, 1126 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2702a] ("issues of plan inconsistency are not appropriately brought in a petition for certiorari"); *accord Bush v. City of Mexico Beach,* 71 So. 3d 147, 150 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1930b].

The Court declines to discuss any remaining issues. It is therefore **ORDERED** that the petition for writ of certiorari is **DENIED**.

[1]If new evidence is discovered and meets the criteria for the BOCC to accept new evidence, the matter is usually remanded to the ZHM for further proceedings unless remand is waived by the applicant. §10.03.04D.(8,9), Hillsborough County Code.

* * *

Traffic infractions—Violation of right of way resulting in death—Charging document—Although defendant did not sign and accept citation for traffic infraction resulting in death as required by section 318.14(2), citation was valid charging instrument where it was emailed to defendant at his request, defendant indicated his receipt of email and appeared at hearing, and citation conveyed all information necessary to answer charge—Trial court erred in dismissing citation

STATE OF FLORIDA, Appellant, v. MOUYID BIN ISLAM, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appeal. Case No. 21-CA-5036. Division K. L.T. Case No. 20-TR-41200. Citation No. AANW47E. May 15, 2023. On review of a decision of the County Court for Hillsborough County, Florida. Margaret Taylor, County Court Judge. Counsel: Marc Soren Makholm, Hillsborough County Court, 13th Judicial, Tampa; and Jill R. Hamel, Hillsborough County Sheriff's Office, Tampa, for Appellant. Michael Alexander Misa, Michael A. Misa, P.A., St. Petersburg, for Appellee.

APPELLATE OPINION

(CAROLINE TESCHE ARKIN, J.) This case is before the court on the State's appeal seeking review of the dismissal of a civil traffic citation against Appellee Mouyid bin Islam (defendant below). The civil traffic citation was dismissed on the ground that it was not signed as required by section 316.14(2), Florida Statutes (2019). This Court has appellate jurisdiction. Art. V., S. 5(b), Fla. Const.; §318.16, Fla. Stat.; *State v. bin Islam*, 352 So. 3d 956, 957 (Fla. 2d DCA 2022) [48 Fla. L. Weekly D42a] ("if the circuit court has jurisdiction over a defendant's appeal [under §318.16], then it follows that the circuit court has jurisdiction over a state's appeal in these matters. Any other construction would lead to counterintuitive results.") The Court has reviewed the record, the parties' briefs, and applicable law. Because refusal to sign and accept a citation requiring a court appearance is a criminal offense, and the record indicates that the contested citation was provided to and received by Appellee in a manner he requested, conveyed all the necessary information for him to answer the charge, and provided the court's location, the citation was a valid charging instrument. Accordingly, the dismissal is reversed, and the cause remanded for further proceedings.

In late 2019,[1] Appellee Mouyid Bin Islam was involved in an accident that resulted in someone's death. Law enforcement deferred issuing a citation until the cause of death of the victim, who died sometime after the crash, was confirmed. Law enforcement attempted to serve the citation in person, but Mr. Islam resisted, citing COVID concerns. Law enforcement offered to present the citation by email if he acknowledged receipt by return email immediately. Although Mr. Islam did not initially respond to the email containing the citation as he had promised law enforcement he would, after being advised that the alternative was an in-person meeting, he acknowledged receipt by return email. The May 27, 2020 citation indicated that Mr. Islam violated section 316.125(1), Florida Statutes, for failing to yield right-of-way, and that the collision resulted in a fatality. It further advised that a hearing would be set within 30 days. On May 29, 2020, the clerk of court sent a notice of hearing. After receiving the notice of hearing, Mr. Islam retained counsel, who filed a notice of appearance and written plea of not guilty on June 18, 2020. On August 31, 2020, Cpl. Graves filed a witness list and copy of the citation with the clerk. Later, defense counsel filed a motion to dismiss the citation, alleging that Mr. Islam was cited for a violation requiring a mandatory hearing, adding that law enforcement had failed to obtain the defendant's signature on the citation as required by section 318.14(2).

The State responded that the citation was not subject to dismissal because 1) law enforcement presented the citation to Mr. Islam via email at Mr. Islam's request, and Mr. Islam noted acceptance and receipt of the citation in his reply email, and 2) that the law enforcement officer's electronic certification that he served Mr. Islam with the citation was prima facie evidence that it was served. The State also argued that because the State of Florida was in a state of emergency due to the pandemic at the time the citation was served, substantial compliance with the statute was sufficient, especially considering the electronic accommodation was made at Mr. Islam's request. Moreover, he did not argue, and the court did not find, that he was prejudiced under the circumstances.

The court granted the motion to dismiss, finding that "[t]here is no indication in any of the Administrative Orders that specifically alters the statutory signature requirement. The county court observed that "there is also a distinct lack of case law regarding substantial compliance with this requirement, as compared to the language in the statute which is written as strict compliance." This timely appeal followed. The state raises the same arguments in the appeal as in the matter below. This Court acting in its appellate capacity reviews the trial court's interpretation of statute under the de novo standard of review.

State v. Sampaio, 291 So. 3d 120, 123 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D390a] (where motion to dismiss turns on a question of law, the standard of review is de novo).

Most traffic infractions are handled under section 318.14, Florida Statutes. Although many infractions, including violation of right of way, typically do not mandate a hearing, a hearing is mandatory when a traffic infraction results in a person's death. §318.19, Fla. Stat. In that instance, section 318.14(2) requires a person so cited to *sign and accept* the citation indicating a promise to appear. It is undisputed that, although Mr. Islam did not physically sign the citation; it was emailed to him, he indicated his receipt of the email, and he appeared for a hearing.

As the county court aptly noted, there is a dearth of case law on this issue. To determine the issue before this Court, it is necessary to discern the purpose of the statute. Given that a court appearance is mandatory, the purpose is to secure cited drivers' appearance when otherwise minor infractions result in serious consequences; it is not to provide drivers a technicality or escape hatch through which to avoid responsibility. That purported goal is reinforced by section 318.14(3), which provides that the refusal to sign a citation is a second-degree misdemeanor.[2] Compliance with the statute further assures the court that, if cited drivers don't appear, they were at least made aware of the need to appear. Here, where Mr. Islam objected to receipt of the citation in person, acquiesced to electronic exchange of the citation, indicated receipt of the email to which it was attached, and, thereafter, appeared in court, the purpose of the statute—to notify the cited driver that his appearance at a hearing is required—is satisfied.

Although not cited by either party, this Court finds that *Deel v. State,* 750 So.2d 112 (Fla. 5th DCA 1999) [25 Fla. L. Weekly D54a], is applicable here. In *Deel,* a driver cited with a *criminal* traffic charge argued that the citation was invalid because it was not signed. *Id.* The court held that the citations for Driving under the Influence and refusing to sign a citation were valid charging instruments, despite that the notice to appear was incomplete and Deel refused to sign the initial citation, where the citations sufficiently described the offenses, indicated the blood alcohol levels, noted the requirement of a court appearance, and listed the precise address of the county court. *Id.* At 113-14. The court concluded that the traffic citations conveyed all the information necessary to answer the charges and constituted a valid charging instrument.

Here, the citation, which Mr. Islam received in a manner he chose, described the offense as violation of right-of-way in violation of section 316.125, Florida Statutes, indicated that serious bodily injury and fatality had occurred, included the date and approximate time of the offense, informed Mr. Islam that a court appearance was mandatory, and provided the address of the court. It added that a hearing would be scheduled within 30 days. Two days later, a notice of hearing notifying him of the date and time of the hearing were sent to Mr. Islam, and he appeared. As in *Deel,* which applied this rationale in a criminal context, as opposed to a civil one, the citation here conveyed all the information necessary to answer the charge and is a valid charging instrument. The submission to Mr. Islam's email at his request does not provide a basis to avoid responsibility, where the form of notice was his choice, and refusal to sign would be a criminal offense.

In light of the foregoing, it is unnecessary to discuss the remaining issue.

It is therefore ORDERED that the decision of the county court is REVERSED, and the cause is REMANDED for proceedings consistent with this opinion on the date imprinted with the Judge's signature.

[1]Speedy trial is not at issue in this appeal; speedy trial was suspended by Administrative Order of the Florida Supreme Court during the COVID pandemic.

[2]The court is not persuaded by Mr. Islam's argument that his acknowledgment of receipt was not an electronic signature or an acknowledgment that he had received the citation. If the Court accepted that argument, he would then potentially be subjected to a criminal penalty, as opposed to a civil one.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Lawfulness of arrest—Actual physical control of vehicle—Officer had probable cause to believe that licensee was in actual physical control of motor vehicle while under influence where officer found licensee asleep in driver's seat of illegally parked operable truck, keys were in truck, and licensee admitted to drinking alcohol and exhibited multiple indicia of impairment

GERMAN SCHWEIZER, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-10820. Division H. May 4, 2023. Counsel: Rick Silverman, Rick Silverman, P.A., Tampa, for Petitioner. Christie S. Utt, General Counsel, and Kathy A. Jimenez-Morales, Chief Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETIONER'S PETITION FOR WRIT OF CERTIORARI

(HELENE L. DANIEL, J.) **THIS MATTER** is before the Court on German Schweizer's Petition for Writ of Certiorari. (Doc. 4). Petitioner contends that the order upholding the administrative suspension of his driving privilege should be quashed because the record lacks competent, substantial evidence that he was in actual physical control of his motor vehicle, and therefore, could not have violated section 316.193, Florida Statutes. The Court has reviewed the petition, response (Doc. 9), reply (Doc. 12), appendices, and applicable law. Because Petitioner was behind the wheel at the time of the stop, the keys were in the vehicle and accessible to Petitioner, and Petitioner offered to move the vehicle off the roadway, Petitioner was in actual, physical control of the vehicle. Accordingly, the petition is denied.

Background

Petitioner's driver's license was administratively suspended for a violation of section 316.193, Florida Statutes, for driving or being in actual physical control of a motor vehicle while having a breath-alcohol level of 0.08 or higher. A formal review hearing was held before Department Hearing Officer James Garbett. The suspension was upheld by order issued November 30, 2022, which found the following facts by a preponderance of the evidence:

i. On October 16, 2022, Sgt. Kenney observed a pickup truck with an attached trailer parked diagonally, against the flow of traffic, and in such a way that other vehicles would be prevented from driving on the roadway. Two occupants who appeared to be asleep were in the front seats.

ii. Sgt. Kenney knocked on the window and Petitioner, who was in the driver's seat, opened the door. After he exited the truck, Petitioner indicated that he would move the truck to clear the roadway. Sgt. Kenney observed that Petitioner's eyes were bloodshot and glassy, his breath smelled like alcohol, his speech was slurred, and he had difficulty maintaining his balance. Petitioner admitted consuming alcohol earlier in the night.

iii. Sgt. Kenney requested assistance from the DUI unit, and Deputy DiBiase responded to the call. Deputy DiBiase also observed that Petitioner's breath smelled like alcohol, his eyes were bloodshot and glassy, he was unsteady on his feet, and he admitted to drinking earlier in the evening. Deputy DiBiase observed that Petitioner showed additional signs of impairment while performing field sobriety exercises. Deputy DiBiase also observed that Sgt. Kenney had identified that the keys to the truck were in the vehicle and that the truck was operable. Thus, Deputy DiBiase arrested Petitioner for DUI. After a 20-minute observation period, Petitioner provided two breath

samples with results of 0.094 and 0.096 BrAC.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. Courts are not entitled to reweigh the evidence but may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Id*.

Analysis

It is undisputed that Petitioner had not been driving at the time he encountered law enforcement. That does not, however, preclude a finding that a driver had actual, physical control of a motor vehicle. Here, Petitioner argues that because the record "was devoid of any specific allegations as to Petitioner's possession of the keys to the vehicle, or that Petitioner had access to the keys to the vehicle," the hearing officer's conclusion that he was in actual, physical control of the vehicle was not supported by competent, substantial evidence. Under Florida law:

> In a formal review hearing under subsection (6) . . . , the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of review shall be limited to the following issues:
>
> (a) If the license was suspended for driving with an unlawful blood-alcohol or breath-alcohol level of 0.08 or higher:
>
> (1) Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving *or in actual physical control of a motor vehicle* in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> (2) Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.319.

§ 322.2615(7)(a)(1)-(2), Fla. Stat.

In its seminal case on the issue of being in "actual physical control" of a motor vehicle, while under the influence, the Second District explained that the Florida legislature's intent in defining the crime of driving under the influence to include not only *driving* but also exercising *actual physical control* of a vehicle while under the influence was "to enable the drunken driver to be apprehended before he strikes." *Griffin v. State*, 457 So. 2d 1070, 1072 (Fla. 2d DCA 1984) (quoting *Hughes v. State*, 535 P.2d 1023, 1024 (Okla. Crim. App. 1975)). Thus, "the real purpose of the statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers." *Id.* (quoting *State v. Juncewski*, 308 N.W. 2d 316, 320 (Minn. 1981)).

Significantly, the *Griffin* court held that "an intoxicated person seated behind the steering wheel" is in actual physical control of the vehicle because a legitimate inference can be drawn that "he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away." *Id.* (quoting *Hughes*, 535 P.2d at 1024) (emphasis added). Thus, while *Griffin* offers two additional reasons explaining its denial of the defendant's writ, only one is necessary. *Baltrus v. State*, 571 So. 2d 75, 76 (Fla. 4th DCA 1990) ("the [*Griffin*] opinion implies that *each reason alone* would be sufficient to affirm the defendant's conviction.") (emphasis added). *See also Fieselman v. State*, 537 So. 2d 603, 606 (Fla. 3d DCA 1988) ("*Griffin* does not stand alone in emphasizing that evidence that the defendant was found sitting behind the wheel of the vehicle is a circumstance heavily supporting a finding that the defendant was exercising control over the vehicle."). Indeed, the *Fieselman* court noted that "[o]ther courts reaching the same result as *Griffin* have similarly pointed to the defendant's upright position behind the wheel as an important part of the calculus in determining the question of the defendant's actual physical control over the vehicle." *Id.*

Here, the record contains competent, substantial evidence supporting his conclusion that the arresting officer had probable cause to believe that Petitioner was under the influence and in actual physical control of a motor vehicle: he was found asleep in the driver's seat of an illegally parked pickup truck with an attached trailer blocking the roadway; the keys to the truck were inside of the vehicle, the truck was operable, Petitioner offered to move the truck to clear the roadway, he admitted drinking, and he exhibited multiple signs of being under the influence. After being lawfully arrested, Petitioner provided two breath samples with results of 0.094/0.096 BrAC. It is therefore

ORDERED AND ADJUDGED that Petitioner's petition for writ of certiorari is **DENIED** in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of request for breath test—Competent substantial evidence supported conclusion that officers who went to licensee's house to arrest him for leaving scene of accident that had occurred an hour earlier had probable cause to believe licensee was driving under influence at time of accident—Officers observed significant signs of impairment, and licensee told officers that he had been sleeping when they arrived at home and did not indicate that he had consumed alcohol between time of accident and time of officers' arrival at his home

CHASE ENGELBRECHT, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 22-CA-008310. Division J. May 8, 2023. Counsel: Keeley Rae Karatinos, Karatinos Law, PLLC, Dade City, for Petitioner. Michael John Carl Lynch, Seminole County Sheriff's Office, Sanford, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(REX BARBAS, J.) Petitioner Chase Engelbrecht seeks review of the final order of a hearing officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles entered September 2, 2022. The order affirmed the suspension of Petitioner's driving privileges because of his alleged refusal to submit to a breathalyzer test after being arrested on suspicion of driving under the influence. Law enforcement detained Petitioner at his home after a nightclub's security video showed him hitting a parked car and leaving the scene. Petitioner contends that, where law enforcement did not arrest him in the act of driving, and there was a lapse between the incident and law enforcement's contact with him, there is no evidence that he was driving under the influence, such that the decision is not supported by competent, substantial evidence. The Court has reviewed the petition, response, appendices, and applicable law. Petitioner did not file a reply. Being fully advised in the matter, the Court finds that where the hearing officer based her decision on the conclusion that the record contained both evidence of impairment, and an absence of evidence that Petitioner had consumed alcohol *after* the incident, law enforcement could reasonably conclude that Petitioner was under the influence at the time of the incident. Accordingly, the Court must deny the amended petition.

JURISDICTION AND STANDARD OF REVIEW

A decision by the Department to uphold or invalidate a suspension may be reviewed by a petition for writ of certiorari to the circuit court in the county in which formal or informal review was conducted. §§ 322.31; 322.2615(13), Fla. Stat. This Court, therefore, has

jurisdiction to review the Department's decision in this case. Review is not de novo. §322.2615(13), Fla. Stat. Rather, the Court must determine whether Petitioner received procedural due process, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The Court may not reweigh the evidence contained in the record. *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

As depicted on the Crescent Club's security video, on July 15, 2022, at approximately 11:39 p.m., Petitioner backed his truck out of a parking spot where the right rear hubcap and tire of his truck hit the front left bumper of another parked vehicle, damaging both his truck and the other vehicle. Petitioner stopped briefly without getting out of his truck, then drove home. Neither the video nor any other evidence established whether Petitioner had been drinking or was otherwise impaired at the time of the incident. Based on a tip from a witness who knew Petitioner, and after viewing the security video, the Sarasota County Sheriff's Office visited Petitioner's home, albeit nearly an hour after the collision. After initially claiming she was the driver, Petitioner's female companion, and Petitioner himself, admitted that Petitioner was driving. Petitioner offered that he didn't know he'd hit anything, adding that he had been sleeping at the time deputies arrived. Noting various signs of impairment, including bloodshot eyes, inability to focus, slurred speech, swaying, and lack of coordination, Deputy Brenkle arrested Petitioner for leaving the scene of an accident at 1:04 a.m. on July 16, 2022, and read Petitioner Miranda warnings. After his arrest, Petitioner was asked to submit to field sobriety tests and a breath test, both of which he refused, resulting in the administrative suspension of his driving privilege.

Petitioner timely requested a formal review of the suspension. A formal review was held August 24, 2022. There were no live witnesses; only documentary evidence was submitted into the record. Petitioner made several motions to invalidate the suspension, including one to dismiss the suspension because a lack of competent, substantial evidence supported that Petitioner was impaired at the time of the collision. The hearing officer denied all of Petitioner's motions, affirming the suspension. This timely petition followed.

When reviewing a suspension that is the result of a driver's refusal to submit to testing, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, whether Petitioner refused to submit to any such test after being requested to do so by law enforcement, and whether Petitioner was told that if he refused to submit to such test his privilege to drive a vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. §322.2615(7)(b), Fla. Stat. In addition, a hearing officer is required to determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. § 322.2615(7), Fla. Stat. "Preponderance of evidence is defined as evidence 'which as a whole shows that the fact sought to be proved is more probable than not.' " *Dufour v. State*, 69 So. 3d 235, 252 (Fla. 2011) [36 Fla. L. Weekly S476a] (*quoting State v. Edwards*, 536 So. 2d 288, 292 n. 3 (Fla. 1st DCA 1988)).

Here, Petitioner contends that the hearing officer lacked sufficient evidence to affirm the suspension where there is no evidence as to Petitioner's impairment at the time of the incident and his arrest occurred more than an hour later. It is accurate to say that Petitioner was not stopped in the act of driving. However, the record reflects that law enforcement saw significant signs of impairment including lack of coordination, slurred speech, a strong odor of alcohol, swaying, and bloodshot eyes after arriving at Petitioner's home. Petitioner admitted that he had been driving, adding that he didn't know he'd hit anyone, and that he'd been sleeping when law enforcement arrived. Significantly, Petitioner did not indicate that he'd consumed alcohol between the time of the accident and the arrival of law enforcement, only that he'd been sleeping. Petitioner refused law enforcement's request to perform field sobriety exercises or submit to a breath test.

Respondent asserts that probable cause to arrest exists where the facts and circumstances within the officer's knowledge are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." *Stone v. State*, 856 So. 2d 1109, 1111 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2415a]. Petitioner contends that the hearing officer lacked competent, substantial evidence to uphold the suspension, and shifted the burden to Petitioner to prove that he consumed alcohol *after* the accident. Petitioner relies on *Eckert v. DHSMV,* 20 Fla. L. Weekly Supp. 1134a (Fla. 13th Jud. Cir. App., Aug. 13, 2013) in support of his argument. This reliance is misplaced. Although *Eckert,* like this case, involves an arrest after a hit-and-run accident, the court's decision hinged on the fact that no evidence supported that Eckert was driving at the time of the traffic stop.

The circuit court in *Eckert* does not appear to have been presented with or considered the comparable *Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a], which Respondent cites in support of its contention that the evidence was adequate to uphold the suspension. In *Favino,* Mr. Favino was the driver of a vehicle involved in a motor vehicle crash. *Id.* at 307. After the crash, Favino drove to his home. *Id.* Over twenty minutes later, law enforcement arrived at Favino's home to speak with him. *Id.* When law enforcement arrived, Favino was drinking grapefruit juice, his eyes were bloodshot, his speech was slurred, his balance was unsteady, and he had an odor of alcohol coming from his person. *Id.* Favino was arrested for DUI and subsequently refused to submit to a breath, urine, or blood test, resulting in the suspension of his driver license. *Id.* A hearing officer sustained the suspension after administrative review. *Id.* Favino petitioned the circuit court for a writ of certiorari, arguing there was no evidence at the hearing that he was drinking prior to or at the time of his motor vehicle crash. *Id.* at 308. Although the circuit court granted the petition, the First District Court of Appeal quashed the circuit court order. *Id.* at 309. Specifically, the district court of appeal held the facts and circumstances of the case were "clearly" sufficient "for a reasonable person to conclude that Favino operated his vehicle while under the influence of alcohol, given the unchallenged observations of the officer shortly after the accident occurred and given the circumstances surrounding the accident." *Id.* Further, the district court of appeal stated "[t]he hearing officer found by a preponderance of the evidence that such probable cause existed, and there was competent, substantial evidence to support that finding." *Id.* Finally, the court held the circuit court impermissibly rejected the hearing officer's findings when there was competent, substantial evidence in the record to support the findings, reweighed the evidence, and substituted its judgment for that of the hearing officer. *Id.*

Except for the length of time between the accident and arrest, this case is virtually identical to *Favino*. In this case, as in *Favino*, sufficient competent substantial evidence supports the conclusion that Petitioner operated his motor vehicle while under the influence of alcohol, given that Petitioner admitted driving, displayed indicators of alcohol consumption and impairment, and gave no indication that he had consumed alcohol between the time of the incident and his detention by law enforcement, instead advising them that he had been sleeping. *See, e.g.*, *Favino*, 667 So. 2d at 309. Because the lack of competent, substantial evidence is the only ground upon which the amended petition seeks relief, and this Court finds that competent,

substantial evidence supports the hearing officer's decision to uphold the suspension, the amended petition is DENIED.

* * *

Municipal corporations—Code enforcement—Fine—Appeals—Certiorari—Various forms of relief sought by petitioners, including declaration that town code is preempted by state law, is beyond scope of certiorari review—Petition dismissed

ATLAS INVESTMENTS, LLC, Plaintiff, v. TOWN OF SOUTHWEST RANCHES, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23001411. Division AW. May 25, 2023.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** came before the Court, in its appellate capacity, upon this Respondent's Motion to Dismiss Petition for Writ of Certiorari with Prejudice dated May 16, 2023. This Court, after review of the Motion to Dismiss, Petitioner's Response in Opposition dated May 17, 2023, the Petition's for Writ of Certiorari and Prohibition dated January 2, 2023, Respondent's Response to Order to Show Cause dated April 6, 2023, and Petitioner's Reply dated May 5, 2023, the case file and applicable law, and being otherwise duly advised finds as follows:

As Petitioner and Respondent are both in agreeance that the challenged January 3, 2023, Order Imposing Municipal Code Enforcement and Municipal Fine, should be reviewed via direct appeal rather than by petition for writ of certiorari, Respondent's Motion to Dismiss is **GRANTED**.

Review of the case file reveals that the parties have requested all manner of relief in this certiorari proceeding including an advisory opinion, declarations on jurisdictional issues, a declaration that the Town of Southwest Ranches Code section 2-158(b) is preempted by Florida Statutes section 162.11, an Order requiring the parties to proceed with a direct appeal, and requests for other relief deemed just and proper. On a Petition for Writ of Certiorari, the Court is limited in the extent of its review to only deny or quash the Order being challenged, the other forms of relief requested by the parties are either inappropriate or beyond the power of this Court. *See, e.g., Snyder v. Douglas,* 647 So.2d 275, 279 (Fla. 2d DCA 1994) ("[O]n certiorari an appellate court can only deny the writ or quash the order under review. It has no authority to take any action resulting in the entry of a judgment or orders on the merits or to direct that any particular judgment or order be entered."); *ABG Real Estate Dev. Co. v. St. Johns County,* 608 So.2d 59, 64 (Fla. 5th DCA 1992) ("A court's certiorari review power does not extend to directing that any particular action be taken, but is limited to quashing the order reviewed."); *Nat'l Adver. Co. v. Broward County,* 491 So.2d 1262, 1263 (Fla. 4th DCA 1986) ("A court's certiorari review power does not extend to directing that any particular action be taken, but is limited to denying the writ of certiorari or quashing the order reviewed."); *Gulf Oil Realty Co. v. Windhover Ass'n, Inc.,* 403 So.2d 476, 478 (Fla. 5th DCA 1981) ("[A]fter review by certiorari, and appellate court can only quash the lower court order; it has no authority to direct the lower court to enter contrary orders.").

Further, the parties have failed to provide any legal authority to support that this Court has the ability to grant their request relief, including ruling that a municipal code ordinance is preempted. To the extent this Court's power does extend further, it declines to rule on these issues or provided the requested relief.

Additionally, Respondent has requested that the Court retain jurisdiction in this case to entertain future motions on attorney's fees, should they be filed. Petitioner opposes this request, arguing the substantive and procedural basis for denial of such a motion. This Court is not in the habit of ruling on motions prior to their filing.

Based upon the forgoing, and for reasons of judicial economy, it is hereby:

ORDERED that Respondent'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 this Court retains jurisdiction to consider motions for attorney's fees should they be filed and this proceeding properly re-opened.

* * *

Municipal corporations—Due process—Denial of trial continuance

NEWTON MOFFATT, Appellant, v. CITY OF MIRAMAR, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 20-10AC10A. L.T. Case No. 19-19-033415TI40A. May 18, 2023. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Michael Davis, Judge. Counsel: Gawane Grant, for Appellant. No appearance for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial Brief of Appellant, the record on appeal, and applicable law, we find Appellant was denied procedural due process. Given the short notice involved, the lack of emergency, and the totality of these circumstances, the motion to continue should have been granted to allow Appellant and his counsel to appear and participate in the trial which was set for January 28, 2020. We therefore REVERSE AND REMAND with Instructions for a new trial. (BOWMAN, KOLLRA, and WEEKES, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Homeowners—Insured's action against insurer—Conditions precedent—Ten-day notice—Retroactive application of statute—Statute requiring that homeowners file ten-day notice of intent to initiate litigation under property insurance policy substantively affects rights of insureds and cannot be applied to policy issued prior to effective date of statute—Motion to dismiss is denied

ALTHEA EDWARDS & LEROY EDWARDS, Plaintiffs, v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2021-CA-000946. March 29, 2022. Steven B. Whittington, Judge. Counsel: Juan C. Arias and Mohad Abbass, Arias & Abbass Your Attorneys, Coral Gables, for Plaintiffs. Matthew Messina, Walker, Revels, Greninger, PLLC, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before this Court on March 15, 2022, on the *Defendant's Motion to Dismiss Plaintiff's Complaint* (the "Motion"), filed on December 16, 2021, and *Plaintiffs' Response to Defendant's Motion to Dismiss* (the "Response"), filed on January 31, 2022, and the Court, after reviewing the Motion, Response, applicable authority, the court file, after hearing arguments of counsel and being otherwise advised on the premises, and after further consideration thereof, the Court,

FINDS that:

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

2. This action involves a first-party property insurance claim between Plaintiffs and Defendant.

3. The issue for the Court to resolve pursuant to the Motion and the Response arises from a notice of intent to initiate litigation as a condition precedent to filing a suit pursuant to Section 627.70152, Fla. Stat., enacted on July 1, 2021 (the "new statute").

4. Plaintiffs' Complaint was filed on November 23, 2011.

5. The subject property insurance policy became in effect on August 12, 2020 (the "insurance policy").

6. The subject loss occurred on April 11, 2021, and the same was reported to Defendant on September 15, 2021.

7. Defendant's position is that the new statute applies to all property insurance suits brought after July 1, 2021, and that it is a procedural change that should apply retroactively to property insurance policies that were issued prior to July 1, 2021.

8. Plaintiffs' position is that the new statute fundamentally, substantively, and directly alters the rights and obligations of the parties under the subject policy and, therefore, is a substantive change that cannot be applied retroactively to property insurance policies that were issued prior to July 1, 2021.

9. From a careful reading of the statute, it is not clear whether the intent was for it to apply prospectively or retroactively. Notwithstanding this lack of clarity, the Court finds that the new statute substantively affects the rights the parties had when the policy was issued. Therefore, Section 627.70152 cannot be applied retroactively to property insurance policies that were issued prior to July 1, 2021, pursuant to *Menendez v. Progressive Express Ins. Co.,* 35 So.3d 873 (Fla. 2010) [35 Fla. L. Weekly S81a].

10. In Menendez, the Supreme Court said that a "statutory right to attorneys' fees is not a procedural right, but rather a substantive right." *Id.* at 878-879. Likewise, Section 627.70152, alters the entitlement and award of the amount of reasonable attorney fees and costs that the claimant may recover. Accordingly, "statutes that limit the ability to seek attorneys' fees are substantive in nature." *Id.* at 879.

11. Based on *Menendez,* in determining the retroactive application of the law, the Court must consider whether the policy was issued before the new law came into effect, ; there is no dispute the policy at issue here was issued before July 2021. The date the policy became effective is the day that controls for retroactivity, and it is certainly not the date of the filing of the lawsuit.

Accordingly, it is ORDERED and ADJUDGED:

A. Defendant's Motion to Dismiss Plaintiffs' Complaint is hereby DENIED.

B. Defendant shall file an Answer within ten (10) days of this Order.

C. This Court retains jurisdiction over the subject matter and the parties.

* * *

Criminal law—Possession of firearm by convicted felon—Constitutionality of statute—Motion to declare state felon in possession of firearm statute unconstitutional under Second Amendment is denied

STATE OF FLORIDA, Plaintiff, v. ANTONIO VALDEZ MONTANO, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-10127. May 24, 2023. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION TO DECLARE FLORIDA'S "FELON IN POSSESSION" STATUTE UNCONSTITUTIONAL

I. Introduction

In the year 2023, library shelves groan under the weight of statute books defining Florida's hundreds and hundreds of felony crimes. But it was not always so. At common law there were but nine felonies.[1] The penalty for conviction was frequently death. Thus in the year 1791, when the Second Amendment was enacted, there was a relatively small, likely very small, population of convicted felons—persons who had committed one of the few felony crimes, but were still living.

The weapon of choice for the Minute Men—those "once . . . embattled farmers"[2]—was the musket. It was a muzzle-loading long gun with an unrifled barrel.[3] One skilled in its use might get off as many as two rounds a minute, although without much accuracy. The weapon of choice for America's present-day mass murderer is the AR-15, which, even without a "bump stock," can fire about 60 rounds per minute. *See* Jonathan Franklin, *How AR-15-Style Rifles Write the Tragic History of America's Mass Shootings*, NPR (May 10, 2023, 5:01 AM), https://www.npr.org/2023/05/10/1175065043/mass-shootings-america-ar-15-rifle; Scott Pelley, *What Makes the AR-15 Style Rifle the Weapon of Choice for Mass Shooters?*, CBS News (May 29, 2022, 7:01 PM), https://www.cbsnews.com/news/ar-15-mass-shootings-60-minutes-2022-05-29/ ("the AR-15 is the weapon of choice of the worst mass murderers"); Jay Anderson, *The AR-15 is for Mass Killing—Ban It*, AZMirror (Jun. 4, 2022, 10:28 AM) https://www.azmirror.com/2022/06/04/the-ar-15-is-for-mass-killing-ban-it/ ("Modified with a bump stock, [an AR-15] can fire 400 rounds per minute or more.").

It is the thesis of the motion at bar that the Second Amendment, enacted when convicted felons were few by today's standards and firearms not particularly dangerous by today's standards, renders absolutely unconstitutional Florida's present-day prohibition on the possession by Florida's many convicted felons of today's frighteningly deadly firearms. The people of the State of Florida and their duly-elected legislative representatives, in enacting and maintaining on the statute-books for decades a prohibition against the possession of firearms by those convicted of crimes—often of violent, dangerous

crimes—have, according to the pending motion, acted in flagrant disregard for constitutional limitations.

I respectfully disagree.

II. Analysis

For nearly a century and a half from the time of the enactment of the Second Amendment the federal government felt no particular obligation to regulate the traffic in firearms. But in the 1920's Prohibition gave rise to bootlegging, and bootlegging gave rise to (among many other shoot-outs) Al Capone's boys machine-gunning Bugsy Moran's boys in a Clark Street garage in Chicago on Valentine's Day. *See Saint Valentine's Day Massacre*, Wikipedia, https://en.wikipedia.org/wiki/Saint_Valentine%27s_Day_Massacre (last visited May 19, 2023). The crash of 1929 gave rise to the Great Depression, and the Great Depression gave rise to Tommy-gun-toting bank robbers such as John Dillinger, *see John Dillinger*, FBI.gov, https://www.fbi.gov/history/famous-cases/john-dillinger (last visited May 19, 2023), Pretty-Boy Floyd, *see Pretty Boy Floyd*, Encyclopedia Britannica, https://www.britannica.com/biography/Pretty-Boy-Floyd (last visited May 19, 2023), and Ma Barker, *see Ma Barker*, Wikipedia, https://en.wikipedia.org/wiki/Ma_Barker (last visited May 19, 2023). In response to unprecedented acts of criminality perpetrated with weapons of unprecedented destructive force, the National Firearms Act was enacted on June 26, 1934.

Jack Miller and a codefendant were charged with violating the act by interstate transportation of a sawed-off shotgun. *United States v. Miller*, 307 U.S. 174, 175 (1939). "A duly interposed demurrer alleged [that the] National Firearms Act . . . offends the inhibition of the Second Amendment to the Constitution." *Miller*, 307 U.S. at 176. Justice McReynolds, writing for an all-but-unanimous Court (Justice Douglas did not participate), undertook what today would be described as an "originalist" approach, an examination of "original intent." He carefully considered the text of the Constitution and Bill of Rights, a number of state legislative enactments made contemporarily with those documents, and commentators upon whom the founders would surely have relied such as Blackstone and Adam Smith (the author of *The Wealth of Nations*). Based on that originalist survey, Justice McReynolds had no difficulty concluding for the Court that, "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id*. at 178. The intent of the framers was clear:

> With obvious purpose to assure the continuation and render possible the effectiveness of such forces [*i.e.*, citizen militias as they existed at the time of the founding] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.
>
> . . .
>
> The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the militia—civilians primarily, soldiers on occasion.

Id. at 178-79.

The sense of the foregoing seems plain enough; and it was the law of the land from not later than 1939 until 2008. Then everything—everything—changed.

If we were to pose the question: Is there any rule of constitutional interpretation that has been universally endorsed from the dawn of our jurisprudence to the present day—endorsed without regard to party affiliation or jurisprudential school of thought—the answer would be: yes, there is one. It is the rule that the Constitution is to be interpreted as a whole, that no passage in the Constitution is to be dismissed as mere rhetorical flourish or prosodic device. That changed completely in 2008 with the promulgation of *District of Columbia v. Heller*, 554 U.S. 570 (2008) [21 Fla. L. Weekly Fed. S497a].

Heller proceeded from the premise that the Second Amendment consists of a merely "prefatory clause," an inoperative bit of rhetorical filigree ("A well regulated militia being necessary to the security of a free state"); and an "operative clause," which is all that need be construed to interpret the amendment properly ("the right of the people to keep and bear arms shall not be infringed"). *Heller*, 554 U.S. at 577.

If that was true—if the first dozen words of the Second Amendment are the only genuinely inert language appearing anywhere in the Constitution—then of course *Miller* and every post-*Miller* case, *i.e.*, the entire then-existing Second Amendment jurisprudence, was wrongly decided. The *Heller* court proceeded to tear that jurisprudence up root and branch.

If that was true—if the first dozen words of the Second Amendment are the only genuinely inert language appearing anywhere in the Constitution—then of course the Second Amendment must be profoundly reinterpreted, relying solely on its "operative clause," to create an all-purpose individual right to keep and bear arms. *Id*. Although "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," *id*. at 625, neither the Second Amendment nor *Heller* tells us exactly what weapons are "typically possessed by law-abiding citizens for lawful purposes" or how to recognize such typical possession. *Heller* is not restricted to the right to keep and bear muskets. Does it extend to the right to keep and bear AR-15's? *See id*. at 582 ("the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding").

What *Heller* does tell us is that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id*. at 626. If that language from *Heller* has survived the intervening jurisprudential voyage, it provides the rule of decision here.

Two years later, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) [22 Fla. L. Weekly Fed. S619a] dealt more with the issue of 14th Amendment incorporation than with Second Amendment interpretation. It concluded that the Second Amendment right created in *Heller* is, by operation of the 14th Amendment, fully applicable to the states. *McDonald*, 561 U.S. at 750.

Apropos the case at bar, the *McDonald* court rehearsed with emphasis these words from *Heller*: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons' . . . . We repeat those assurances here." *Id.* at 786. Thus as late as a dozen years ago, it was clearly the law that states could, without infringing on Second Amendment rights incorporated via the 14th Amendment, prohibit the possession of firearms by convicted felons.

New York State Rifle & Pistol Assoc. v. Bruen, ___ U.S. ___, 142 S. Ct. 2111 (2022) [29 Fla. L. Weekly Fed. S440a], is the Supreme Court's latest pronouncement on this subject, and the one upon which the defendant relies entirely. For present purposes the facts of *Bruen* are of little consequence. What is of consequence is the Court's treatment of the Second Amendment.

It would perhaps be more accurate to refer to the Court's treatments, plural, of the Second Amendment issue. Justice Alito's crucial concurring opinion, as well as opinions of other justices, seem to point in one direction. Justice Thomas's opinion for the majority may, or may not, point in a different direction.

A. The opinions other than the majority opinion

The majority opinion in *Bruen* is lengthy and far-ranging. In his concurrence, Justice Alito, the author of *McDonald*, seeks to make clear that *Bruen* is intended as a step forward in the same direction taken by *Heller* and *McDonald*—not a divagation from that path.

> [T]oday's decision . . . holds that a State may not enforce a law . . . that effectively prevents its law-abiding residents from carrying a gun . . . .
>
> That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. . . . Nor have we disturbed anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns.

Bruen, 142 S. Ct at 2157 (Alito, J., concurring). *See also id.* at 2159 ("I reiterate: All that we decide in this case is that the Second Amendment protects the right of *law-abiding people* to carry a gun") (emphasis added).

Justice Kavanaugh, concurring for himself and the Chief Justice, makes the same point. He quotes the passage from *Heller* that, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626). The three dissenters had the same understanding of the majority opinion. *See Id.* at 2189 (Breyer, J., dissenting for himself and Justices Sotomayor and Kagan) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on that aspect of *Heller's* holding"). Thus six justices expressly stated their view that *Bruen* preserves, rather than undermines, the teaching in *Heller* and *McDonald* that states can, without transgressing the Second Amendment, bar convicted felons from possessing firearms.

If this is the extent of *Bruen*, the motion at bar is easily disposed of. The Florida statute under attack prohibits the possession of firearms by those who, as a matter of tautology, are not "law abiding people" but are felons.[4] According to Justice Alito, Justice Kavanaugh, and the Chief Justice in concurrence; and Justices Breyer, Sotomayor, and Kagan in dissent; *Heller* and *McDonald* make clear beyond peradventure that states remain at liberty to take firearms out of the hands of such persons.

B. Justice Thomas's majority opinion

But Justice Alito, Justice Kavanaugh, and the Chief Justice did not write the Court's opinion in *Bruen*. Justice Thomas did.

There is reason to believe that, with respect to the issue of a state's authority to bar the possession of firearms by convicted felons, the Court's opinion intends generally what the concurring and dissenting justices stated explicitly. The majority opinion is capacious and lengthy; but nowhere in it does Justice Thomas suggest any disagreement with or rebuttal of that specific point made in the concurrences or the dissent.

But we need not rely solely on a negative inference. Time and again, the majority opinion refers to the right of "law-abiding" persons to keep and bear arms. *See id.* at 2125 (describing the petitioners as "law-abiding adult citizens"); *id*. at 2133 (referring to "a law-abiding citizen's right"); *id*. at 2134 (again describing petitioners as "ordinary, law-abiding, adult citizens"); *id*. at 2150 ("law-abiding citizens"); *id*. at 2156 ("law-abiding, responsible citizens"). One such use of the phrase might or might not be indicative of much; the repetition of that phrase five times or more (I may have missed one or two) must be indicative of something.

If it could be said with something approaching certainty that *Bruen* is intended as nothing more than a baby step forward in the direction set by *Heller* and *McDonald*, and that the unequivocal teaching of the latter cases that states may lawfully prohibit convicted felons from possessing firearms is preserved in *Bruen*, this matter would be at an end. But there are passages in *Bruen* that make the issue less than entirely clear. There are passages that suggest that, just as *Heller* erased *Miller* and its jurisprudence from the blackboard and wrote an entirely new Second Amendment jurisprudence, so *Bruen* erases *Heller* and *McDonald* from the blackboard and writes yet a newer Second Amendment jurisprudence.

As *Bruen* acknowledges, in the wake of *Heller* and *McDonald* a very substantial body of decisional law from federal appellate courts has developed employing what the Court referred to as a "two-step framework" or "two-part approach." *Id.* at 2125-26. The Court appears to describe the two prongs as a "history" prong and a "means-end" prong. *Id*. This two-step approach is very roughly analogous to the approach taken by the Court itself in construing the "obligation of contracts" provision of Art I, § 10, cl. 1. That constitutional provision seems to speak in categorical terms: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." It has been the law since at least 1934, however, that circumstances may temper the absolute command of that clause. *See Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934). It is now settled Supreme Court decisional law that, "not all laws affecting pre-existing contracts violate" this constitutional provision. *Sveen v. Melin*, ___ U.S. ___, 138 S. Ct. 1815, 1821 (2018) [27 Fla. L. Weekly Fed. S317a]. "To determine when such a law crosses the constitutional line, th[e] Court has long applied a two-step test. The threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship.' " *Id.* at 1821-22 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). If such a substantial impairment is present, "the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.' " *Id.* at 1822 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

This two-step test, combining textual analysis with means-ends analysis, is, as noted, roughly comparable to the jurisprudence created by the federal appellate courts in the wake of the revolutionary decision in *Heller*. But the majority opinion in *Bruen* rejects it in no uncertain terms. Means-end analysis has no place in the post-*Bruen* world.

> Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Bruen, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961) (internal quotation marks omitted)). *See also id.* at 2127 ("government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"); *id*. at 2129-30 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"). As used in *Bruen*, the locution "the Nation's historical tradition of firearm regulation" is read by the authors of the motion at bar to center on practices generally in effect at or about the time of the adoption of the Second Amendment, *viz*., in 1791. *Id.* at 2130.

The task for the lowly trial judge is to understand just how literally this is to be applied. In the view of the defense, the answer is simple: laws prohibiting possession of firearms by convicted felons did not generally exist in 1791. Therefore they cannot, consistent with the

Second Amendment, be enacted and enforced now. Is the matter really that simple?

As noted *supra*, the language of *Heller* that bears most directly on the motion at bar is as follows:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.

Heller, 554 U.S. at 626. In a footnote to the foregoing, the Court adds that, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

Whatever is meant by the *Heller* Court's use of the word, "longstanding," it is clearly not a synonym for, "since 1791." State laws prohibiting possession of firearms by convicted felons became commonplace in the 1920's and 30's—unsurprisingly so, as a consequence of the sorts of crimes associated with Prohibition and the Great Depression. *See*, *e.g.*, 1923 N.H. Laws 138, ch. 118 § 3; 1923 N.D. Laws 380, ch. 266 § 5; 1923 Cal. Laws 696, ch. 339 § 2; 1925 Nev. Laws 54, ch. 47 § 2. The 1934 National Firearms Act discussed in *Miller, supra*, was the first federal statute to include some restrictions on possession of firearms by convicted felons. (Federal law prohibiting convicted felons from purchasing guns from licensed firearms dealers dates only to 1968, *see* Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (1968)). No doubt a widespread pattern in state and federal regulation that goes back a hundred years or nearly so can fairly be described as one of "longstanding." Generally-accepted exceptions to the Second Amendment's limitation on the regulation of firearms need be "longstanding" in that sense; they need not be coeval with the Second Amendment.

The law could scarcely be otherwise. In 1878, Massachusetts became the first state to employ a system of probation as part of its criminal justice process. *See Probation*, Wikipedia, https://en.wikipedia.org/wiki/Probation (last visited May 19, 2023) (citing https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history). As late as 1920, only 21 other states had adopted probationary systems, *id.*, and the federal government did not enact the National Probation Act until March 5, 1925. If there was no probation in 1791, then certainly probationers (who didn't exist) were not barred by statute from possessing firearms. Does it follow that in 2023 Florida, with its hundreds of thousands of probationers, many of them convicted of crimes involving the use of firearms, may not prohibit and criminalize the possession of a firearm by a probationer? If so, should a judge who, at sentencing, is considering imposing X years of incarceration followed by Y years of probation, instead sentence the defendant to X+Y years of incarceration as the only means to keep dangerous weapons out of the hands of a dangerous criminal?

And what about prisoners? If the present motion's strict literalist reading of *Bruen* is correct, then unless there was widespread state and local legislation prohibiting persons in jail or prison from possessing firearms in 1791 or thereabouts, there can be no such legislation now. Of course prisons, as we know them today, were non-existent in those early times. But jails existed. I concede that my research on this most obscure point is incomplete, but as far as I have been able to determine there were not statutes in widespread effect *circa* 1791 expressly providing that persons held in local jails were prohibited from possessing firearms. Does it therefore follow that the Second Amendment protects the rights of the inmates of the Miami-Dade Department of Corrections, 4,000 strong,[5] to keep and bear arms?[6]

Until I am told otherwise by my betters on the court of appeal, I decline to believe that this is what was intended by *Bruen*. "When all is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Ins. Comm.*, 450 S.W. 2d 235, 236-37 (Ky. 1970). If I am mistaken, at least I am not alone. *See United States v. Meyer*, 22-10012-CR, 2023 WL 3318492, at *3 (S.D. Fla. May 9, 2023) (Altman, J.) (collecting cases) ("*every federal judge* who has considered this question since *Bruen* has upheld the continued validity of" the federal felon-in-possession statute) (emphasis in original).

III. Conclusion

Defendant's motion to declare Florida's felon-in-possession statute, Fla. Stat. § 790.23(1), unconstitutional is respectfully denied.

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[1]Murder, robbery, manslaughter, rape, sodomy, larceny, arson, mayhem, and burglary. *Jerome v. United States*, 318 U.S. 101, 108 n. 6 (1943).

[2]By the rude bridge that arched the flood,
Their flag to April's breeze unfurled,
Here once the embattled farmers stood
And fired the shot heard round the world.

The foe long since in silence slept;
Alike the conqueror silent sleeps;
And Time the ruined bridge has swept
Down the dark stream which seaward creeps.
On this green bank, by this soft stream,

We set today a votive stone;
That memory may their deed redeem,
When, like our sires, our sons are gone.
Spirit, that made those heroes dare

To die, and leave their children free,
Bid Time and Nature gently spare
The shaft we raise to them and thee.

—*Concord Hymn*, by Ralph Waldo Emerson. The poem was written for the dedication of a monument to the "Minute Men" on July 4, 1837.

[3]*United States v. Miller,* 307 U.S. 174, 180 (1939) quotes from a Massachusetts statute in effect during the Revolutionary period which describes the musket in use at the time as "not less than three feet nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould" which was to be accompanied by "one pound of powder, twenty bullets, and two fathoms of match."

[4]Section 790.23(1), Fla. Stat., captioned, "Felons and delinquents; possession of firearms, ammunition, or electric weapons or devices unlawful," provides that, "It is unlawful for any person to own or to have in his or her care, custody, possession, or control[,] any firearm, ammunition, or electric weapon or device . . . if that person has been . . . [c]onvicted of a felony . . . ." Exceptions are made for persons whose civil rights have been restored, or whose criminal history has been expunged. Fla. Stat. § 790.23(2)(a), (b).

[5]"The Miami-Dade Corrections and Rehabilitation Department operates the eighth-largest jail system in the country. There are between 4,000 to 4,200 persons incarcerated daily in our detention facilities." https://www.miamidade.gov/global/corrections/home.page https://www.miamidade.gov/global/corrections/corrections-reports.page.

[6]Yes, the county jail would no doubt fit comfortably within the "sensitive places such as schools and government buildings" exception carved out in *Heller*. But *Heller* does not state that such an exception was well-recognized at the time of the adoption of the Second Amendment, or at the time of the adoption of the 14th Amendment; nor that it need have been, to qualify as an exception of "longstanding."

* * *

Insurance—Homeowners—Coverage—Summary judgment—Opposing affidavit—Unauthenticated and unsworn documents and untimely affidavit submitted by homeowners were insufficient to avoid summary judgment—Even if it were timely filed, affidavit was vague, conclusory, and speculative and therefore insufficient to defeat summary judgment

JEAN and RONETTE DOMINIQUE, Plaintiffs, v. FLORIDA PENINSULA INSURANCE COMPANY, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21006039 (18). May 16, 2023. Fabienne E. Fahnestock, Judge. Counsel: Jeffrey T. Donner, for Plaintiff. Oscar Lombana, Salehi, Boyer, Lavigne, Lombana, P.A., Coral Gables, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING FINAL JUDGMENT FOR DEFENDANT

THIS CAUSE came before the Court on Defendant's Motion for Summary Judgment filed on November 17, 2021. The Court reviewed the pleadings in support of and in opposition to the motion, considered argument of counsel, and hereby ORDERS and ADJUDGES that:

I. RELEVANT BACKGROUND AND UNDISPUTED FACTS

1. This is a first-party insurance breach of contract claim brought by Jean and Ronette Dominique ("Plaintiffs").

2. Plaintiffs claim their property at [Editor's note: Address redacted], Miramar, Florida 33027 (the "Property") sustained wind damage from Tropical Storm Eta on November 8, 2020.

3. Florida Peninsula Insurance Company ("Defendant") issued a policy of homeowners' insurance to the Plaintiffs covering the period July 24, 2020 through July 24, 2021.

4. The Policy insured for "sudden and accidental direct loss to property described in Coverages A and B only if that loss is a physical loss to covered property."

5. On December 16, 2020, Plaintiffs provided notice to Defendant of the alleged loss.

6. Defendant subsequently inspected the Property and on January 4, 2021, issued a coverage determination letter to Plaintiffs denying coverage under the terms of the Policy.

7. Plaintiffs filed the instant lawsuit on March 23, 2021.

8. Defendant filed its Motion for Summary Judgment on November 17, 2021, and the Affidavit of Corporate Representative in Support of its Motion was filed on February 15, 2022.

9. On September 9, 2022, Plaintiffs filed their Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Response").

10. In its Response, Plaintiffs attach several hundred documents, including photographs, alleged water mitigation documents, the policy, and estimates, none of which are correctly cited in the Response itself.

11. More importantly, the documents attached to Plaintiffs' Response are unsworn and unauthenticated.

12. On February 13, 2023, Plaintiffs filed the Affidavit of Expert Aryeh Fraser in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and Motion to Reschedule Hearing on Defendant's Motion if Necessary. Plaintiffs concede that the Affidavit was untimely, and not in compliance with Fla. R. Civ. P. 1.510 which requires Plaintiff to serve any evidence supporting its factual position at least (20) days prior to the hearing on the motion.

II. LEGAL STANDARD

Effective May 1, 2021, Florida Rule of Civil Procedure 1.510, Summary Judgment, was amended to conform to Rule 56 of the Federal Rules of Civil Procedure. Under Florida's previous standard, "a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Soncoast Cmty. Church of Boca Raton, Inc. v. Travis Boating Ctr. of Fla., Inc.*, 981 So.2d 654, 655 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1361a] (citing *Craven v. TRG-Boynton Beach, Ltd.*, 925 So.2d 476, 479-80 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1100a]. Now that Florida has adopted the federal summary judgment standard, Rule 56 (a) mandates that "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. The court should state on the record the reasons for granting or denying the motion." Fed.R.Civ.P. 56(a).

Under the federal standard, a party seeking summary judgment always bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the record which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Furthermore, "there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id*. The burden on the moving party may be discharged by showing the Court that there is an absence of evidence to support the non-moving party's case. *Id*. at 325. Alternatively, a non-moving party who bears the burden of proof at trial, must go beyond the pleadings and by his/her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Id*. at 324.

III. ANALYSIS

To avoid the entry of summary judgment, a nonmoving party must come forward with something more than just 'competent evidence to create an issue of fact' or evidence that is merely 'colorable or not significant probative'. The evidence must "do more than simply show that there is some metaphysical doubt as to the material facts." *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The test is whether "the evidence is such that a reasonably jury could return a verdict for the nonmoving party." *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986).

For factual issues to be considered genuine, they must have a real basis in the record supported by competent evidence. A party cannot simply attach unsworn or unauthenticated documents to a motion for summary judgment and satisfy the procedural requirements of Florida Rule of Civil Procedure 1.510(e). *See Freiday v. OneWest Bank*, 162 So.3d 86, 87 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2072a]. Here, Plaintiffs rely on unauthenticated and unsworn documentation attached to its Response to attempt to defeat summary judgment. The documents attached to the Response fail to satisfy the procedural requirements of Florida Rule of Civil Procedure 1.510(e), and do not constitute competent evidence.

Plaintiffs also rely on the Affidavit of Aryeh Fraser as support that a genuine issue of material fact exists, which precludes entry of summary judgment in Defendant's favor. As conceded by Plaintiffs, the Affidavit was untimely and in violation of Fla. R. Civ. P. 1.510. Notwithstanding, even if the Court considers the Affidavit, the Court finds that the Affidavit is vague, conclusory, and speculative, and therefore insufficient to defeat summary judgment. *See*, *e.g., Motors Ins. Corp. v. Woodcock*, 394 So. 2d 485, 488 n. 4 (Fla. 3d DCA 1981) (noting that the "affidavit . . . included hearsay . . . which cannot be considered on a motion for summary judgment." *Ham v. Heintzelman's Ford, Inc*., 256 So. 2d 264, 268 (Fla. 4th DCA 1971) (holding "an affidavit predicted upon inadmissible hearsay does not comply with the summary judgment rule and cannot be utilized either in support of or in opposition to summary judgment")

In his Affidavit, Mr. Fraser opines that "wind-driven rain during Tropical Strom Eta penetrated an upstairs window of the insured property, causing damages to the interior of the property". Mr. Fraser relies on "researched weather data recorded in the general vicinity of the project site. . ." and goes on to state that "Tropical Storm Eta featured wind gusts of over (50) miles per hour in the area of the insured property at issue in this litigation. Mr. Fraser does not identify the sources of information he relies on for this "weather data," nor

does he explain the reliability of the weather data on which he relies. The Affidavit also fails to explain how Mr. Fraser, a Public Adjuster, has the requisite skill and expertise to interpret meteorological data. Finally, among other things, Mr. Fraser offers no independent data, studies or treatises to support his conclusions that the Property sustained damage by the alleged loss. There is nothing in the Affidavit to support his conclusions regarding winds speeds at the Property.

Mr. Fraser also opines that "sideways flying" wind-driven rain entered through what is considered a "peril-created opening," thus creating coverage, under the insurance policy that is at issue in this litigation." This is a legal conclusion and outside the expert's purview. He also offers opinions as to the Limited Warranty provided by window manufacturers to support his conclusion that "sideways-moving rain during an extreme wind event is considered to have entered insured properties. . ."

Mr. Fraser essentially opines that based on generally used window manufacturer warranties, and uncorroborated wind data, he can causally relate damages to the alleged wind event. These conclusions are conclusory, not supported by record evidence, supported by inadmissible hearsay, and speculative. It is well established that an expert opinion must be based on a reliable methodology and cannot be based on pure opinion.

IV. CONCLUSION

Based upon the foregoing, the Court grants FLORIDA PENINSULA INSURANCE COMPANY's Motion for Summary Judgment and hereby enters Final Judgment in its favor. The Plaintiffs, shall take nothing by this action and Defendant, FLORIDA PENINSULA INSURANCE COMPANY shall go hence without day. The Court reserves jurisdiction to consider and rule upon any timely-filed motions for attorney's fees and costs. The Court also reserves jurisdiction to enforce this order.

* * *

Estates—Trusts—Power of attorney—Undue influence—Where there was confidential relationship between grantor of trust and stepson during her hospitalization following a stroke, stepson actively procured new estate plan, and stepson is 100% beneficiary under new plan, plaintiffs have established presumption of undue influence and burden shifts to stepson to prove that new estate plan was not procured by undue influence—Evidence overwhelmingly shows that stepson exerted undue influence over grantor, which caused the subversion of her mind during execution of new estate plan—Absent hospital records or witness testimony for dates that grantor executed new estate documents, evidence is insufficient to prove that grantor lacked testamentary capacity at that time—Stepson was unjustly enriched by receipt of 100% of assets under new estate plan procured through undue influence when he was only entitled to 50% of assets under prior estate plan—No merit to stepson's counterclaim alleging that because he was 100% beneficiary under original joint trust of father and stepmother and father's share of that trust became irrevocable upon his death, stepmother was not entitled to dispose of or terminate father's share as she did in executing second trust in her name alone—Where original joint trust provided that father and stepmother would each have share of trust composed of their individually owned assets, and stepmother individually owned 100% of assets that made up original joint trust, she was free to retitle assets as second trust—Moreover, stepson's claims are barred by statute of limitations—Estate plan and power of attorney executed under undue influence of stepson are invalidated and damages are calculated

IN RE: TRUST OF FISHMAN, GRACE M. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. PRC180005071. Division 62J. February 22, 2023. Kenneth Gillespie, Judge. Counsel: Daniel A. Seigel, Law Offices of Daniel A. Seigel, P.A., Boca Raton; and Justin C. Carlin, The Carlin Law Firm, PLLC (Co-Counsel), Fort Lauderdale, for Plaintiffs. Bradley Trushin, and Daniel F. Bachman, Chepenik Trushin, LLP, North Miami, for Defendant. Jonathan M . Drucker, Florida Trust & Estate Counsel, PLLC, Coral Gables, for Intervenors North Shore Animal League America, and Dedication and Everlasting Love to Animals - D.E.L.TA. Rescue.

AMENDED AND CORRECTED FINAL JUDGMENT (AS TO DAMAGES ONLY)

THIS CAUSE, having come before the Court for a non-jury trial held on August 23-27, 2021; October 26-28, 2021; November 16-17, 2021; December 14, 2021; and December 20, 2021. The Court makes the following findings of fact and conclusions of law on the evidence presented.

PROCEDURAL BACKGROUND

This is an action to invalidate a Power of Attorney executed by the Decedent, Grace M. Fishman ("Grace") on September 13, 2011 (the "2011 POA"), and a First Amendment to the Grace M. Fishman Living Trust Agreement executed on September 19, 2011 (the "2011 Trust Amendment") (collectively the "2011 Estate Plan"), and for related relief. In their Fifth Amended Complaint (deemed filed on May 7, 2020), Eileen Fitton ("Eileen") and Ronald Sinagra ("Ron") (collectively "Plaintiffs") assert claims to: invalidate the 2011 POA due to undue influence (Count 1) and lack of testamentary capacity (Count 2); for unjust enrichment from the use of the 2011 POA (Count 3); to invalidate the 2011 Trust Amendment due to undue influence (Count 4) and lack of testamentary capacity (Count 5), and for unjust enrichment based on assets received by Barry Fishman ("Defendant or Barry") from the 2011 Trust Amendment (Count 6). Barry filed an Answer and Affirmative Defenses to the Fifth Amended Complaint on October 1, 2020, to which the Plaintiffs filed a Reply on October 28, 2020. On November 15, 2011, North Shore Animal League America and Dedication and Everlasting Love to Animals—"D.E.L.T.A. RESCUE" (collectively "Intervenors") filed their Motion to Intervene by Charitable Beneficiaries and an Agreed Order granting the motion was entered on November 20, 2019.

On August 29, 2019, Barry filed an Amended Counterclaim for Equitable Recoupment (Count 1), Unjust Enrichment (Count 2), Constructive Trust (Count 3), Declaratory Judgment (Count 4), and Resulting Trust (Count 5) relating to the allegedly improper removal of assets comprising the property of a joint trust created by Grace and Marvin Fishman ("Marvin") on March 29, 2002. On September 9, 2019, Plaintiffs filed an Answer and Affirmative Defenses to the Amended Counterclaim, to which Barry filed a Reply on September 30, 2019.

On May 6, 2019, Plaintiffs filed a Motion for Order Freezing Assets Pursuant to Sections 736.8165 and 736.0201, Florida Statutes. On May 23, 2019, the Court granted the Motion, freezing $1,447,525.51 of trust property in a brokerage account held by Prospera Financial Services, Inc., managed by C.E. Gaye & Sons Securities, Ltd. Notably, Plaintiffs and Intervenors allege that Barry, unduly influenced his stepmother, Grace, into executing the 2011 Estate Plan. Alternatively, Plaintiffs allege that Grace lacked capacity to execute the 2011 Estate Plan on the dates in question. As such, Plaintiffs and Intervenors ask this Court to **(1)** invalidate Grace's 2011 Estate Plan and (2) give effect to Grace's 2009 Estate Plan consisting of The Grace M. Fishman Revocable Living Trust Agreement (the "2009 Trust"); a Last Will and Testament (Pour-Over Will) of Grace M. Fishman; a Healthcare Proxy; and a Power of Attorney (collectively, the "2009 Estate Plan") by assessing damages and attorney's fees against Barry.

FINDINGS OF FACT

"Earth provides enough to satisfy every man's needs, but not every man's greed."- Mahatma Gandhi. Clearly, the evidence adduced at trial created a portrait that greed was the motivation behind the actions Barry took to change Grace's 2009 Estate Plan. The portrait highlights

evidence of two contrasting Estate Plans with two contrasting purposes and motivations. The first, Grace's 2009 Estate Plan, portrays her loyalty to, and love for the three most important people and things in her life: (1) her love for her husband, Marvin, which was shown by her honoring him by devising fifty percent (50%) of her Estate to his son Barry; (2) her love for her friends, Eileen and Ron, which was evidenced by her devise of twenty percent (20%) of her estate to each respectively; and (3) her love for animals which was shown through her bequest of ten percent (10%) of her estate to two animal charities, North Shore Animal League America and Dedication and Everlasting Love to Animals—"D.E.L.T.A. RESCUE". The second, conversely, portrays a pattern of greed on the part of Barry that is corroborated by the testimony regarding Barry's reputation, relationship with his father and stepmother Grace, his actions taken during Grace's illness, and his orchestration of the 2011 Estate Plan wherein he became the sole beneficiary.

I. Grace and Marvin's Estate Planning History

On July 9, 1966, Marvin and Grace were married in the State of New York. Marvin and Grace did not have any children from their marriage together, but Marvin had a son from his prior marriage, Barry. In 2002, Grace and Marvin hired Estate Conservation Group in New York to prepare estate planning documents. On March 29, 2002, Marvin and Grace created "The Marvin Fishman and Grace M. Fishman Revocable Living Trust Agreement" (the "2002 Joint Trust"). Under the 2002 Joint Trust, Barry and his immediate family members were 100% beneficiaries. Barry was a 30% beneficiary; Barry's wife, Amelita Gabayan Fishman, was a 30% beneficiary; and Barry's daughter, Lindsay Caitlin Fishman, was a 40% beneficiary. Marvin and Grace were named Co-Trustees of the 2002 Joint Trust and following the death of either Marvin or Grace, the surviving spouse would be named as First Successor Trustee. Marvin and Grace then named Eileen and her daughter, Jennifer Fitton ("Jennifer"), as successor trustees upon the death of both Marvin and Grace. Eileen was Grace's housekeeper and longtime friend.

The property of the 2002 Joint Trust consisted of several financial accounts that were originally titled in Grace's name, including a brokerage account at C.E. Gaye & Sons Securities, Ltd., as well as a parcel of real estate located at 41 7th Street, Valley Stream, New York 11581 (the "New York Property"), that was originally titled in Grace's name. In addition to the 2002 Joint Trust, Grace executed a Nomination of Adult Guardian in which she named Marvin as her initial guardian and Eileen and Jennifer as successor guardians. Grace also executed a Power of Attorney for Healthcare Decisions in which she named Marvin as her initial agent and Eileen and Jennifer as successor agents. Barry was not named as a fiduciary under any of the 2002 documents. A pattern emerged from these early documents, which revealed a glimpse into the testamentary mindset of Marvin and Grace.

On July 13, 2006, Marvin and Grace—again through the Estate Conservation Group—created the "First Amendment to Revocable Living Trust Agreement" (the "2006 First Amendment"). The 2006 First Amendment made Barry the 100% beneficiary of the 2002 Joint Trust. Like the 2002 Joint Trust, the 2006 First Amendment named Marvin and Grace as initial trustees, the survivor of them as First Successor Trustee, and Eileen and Jennifer as successor trustees. Barry was not named as a fiduciary in any capacity. Marvin passed away in March of 2007.

II. Grace's Estate Planning History

On October 18, 2007, Grace began the process of allocating her assets by executing a life insurance contract with Liberty Mutual Life Insurance of Boston ("Liberty Mutual") naming Ron, her longtime friend and chiropractor, as the 100% beneficiary of the policy, and the 2002 Joint Trust was listed as the 100% contingent beneficiary. In 2009, Grace turned her attention to updating her estate plan and went back to Estate Conservation Group for drafting. On September 24, 2009, Grace executed her 2009 Estate Plan. In the 2009 Trust, Grace made Barry a 50% beneficiary, Eileen a 20% beneficiary, Ron a 20% beneficiary, North Shore Animal League of America ("North Shore") a 5% beneficiary, and Dedication and Everlasting Love to Animals Rescue ("D.E.L.T.A. Rescue") a 5% beneficiary. In creating the 2009 Trust, Grace memorialized what (and who) meant the most to her. At trial, it was established that Grace was an "avid animal lover" and someone who would do anything to help animals. She consistently donated to both North Shore and D.E.L.T.A. Rescue (collectively "Animal Charities") for more than two decades. Grace also honored Marvin by making Barry a 50% beneficiary. Lastly, Grace included Eileen and Ron, as beneficiaries.

Under the 2009 Estate Plan, Grace named Eileen as initial trustee of the 2009 Trust, personal representative of her Estate, and agent under the Power of Attorney. Jennifer was named as the immediate successor in each of those roles, followed by Ron. Grace named Ron as her health care proxy and Eileen and Jennifer as successor healthcare proxies, respectively. Notably, with respect to both the 2002 Joint Trust and the 2006 First Amendment, Barry was not named as a fiduciary under the 2009 Estate Plan. After the 2009 Estate Plan was executed, all the assets and accounts previously titled in the name of the 2002 Joint Trust were either transferred to, or retitled in the name of, the 2009 Trust.

III. Grace's Stroke and the Execution of the 2011 Estate Planning Documents

On August 11, 2011, Eileen entered Grace's home and found her "slumped over" and rushed her to the Franklin Hospital Medical Center ("Franklin") for emergency treatment. Grace suffered a large acute right middle cerebral artery stroke. She would remain at Franklin until August 25, 2011, when she was transferred to Mercy Medical Center ("Mercy"). During Grace's admission to Franklin, Eileen took possession of Grace's jewelry—consisting of a diamond tennis bracelet, gold shrimp style earrings, a watch, a diamond ring, and blue green topaz ring.

On the same day of Grace's stroke, Eileen contacted Barry to inform him of the stroke. Barry flew to New York and stayed in Grace's house during his time there. He testified that he discovered Grace's 2009 Estate Plan in her home and confronted Grace about them, specifically asking her why she made him a 50% beneficiary, instead of a 100% beneficiary. Barry further testified that, on September 7, 2011, he privately visited Grace at Mercy and that Grace told him that he should immediately give the keys to her home and checkbook to Eileen. In response, Barry claims to have told Grace that Eileen had barged into her house (while Barry was staying there); that she did not want to keep Grace alive with a feeding tube; and thought she was "in charge" and had changed the mail. He further testified that Grace said that she "screwed up" and asked Barry to find her an estate planning attorney.

On September 7, 2011, Barry contacted his cousin, Gail Adler, to find an estate planning attorney for Grace. Grace did not play any part in securing the attorney. Following a discussion with Barry, Ms. Adler's husband referred Barry to Nathaniel Feller, Esq. ("Attorney Feller"), a New York attorney whom Grace had never used and did not know. Interestingly, Barry did not contact Estate Conservation Group—the firm that Grace had previously used for her estate planning in 2002, 2006, and 2009. On September 11, 2011, Barry contacted Attorney Feller in reference to changing Grace's estate plan. On September 12, 2011, Attorney Feller traveled to Mercy to meet with Grace to whom Barry introduced to Grace.

On September 13, 2011, Grace executed a Power of Attorney (the

"2011 POA"), appointing Barry as Grace's agent. The 2011 POA purports to make Barry's wife (Amelita Fishman) successor agent. In addition to the 2011 POA, Grace executed a new Healthcare Proxy document making Ron her primary healthcare surrogate. Notably, Attorney Feller was the only witness to the execution of the 2011 POA. On September 19, 2011, Grace executed the 2011 Trust Amendment which made Barry the 100% beneficiary of the 2009 Trust and completely disinherited Eileen, Ron, North Shore, and D.E.L.T.A. Rescue. In sum, the 2011 Trust Amendment made the following changes to Grace's 2009 Estate Plan:

a)Made Barry 100% beneficiary;
b)Made Barry successor trustee;
c)Removed Eileen as beneficiary (20% to 0%);
d)Removed Eileen as successor trustee;
e)Removed Ron as beneficiary (20% to 0%);
f)Removed Ron as second successor trustee;
g)Removed Jennifer Fitton as successor trustee;
h)Made Barry's wife sole successor trustee;
i)Removed D.E.L.T.A. Rescue as beneficiary (5% to 0%); and
j)Removed North Shore Animal League as beneficiary (5% to 0%).

IV. Grace's Continued Decline and Barry's Actions

On September 19, 2011 (the day on which Grace signed the 2011 Trust Amendment), Grace was transferred from Mercy to Cold Springs Center for Nursing and Rehabilitation ("Cold Springs"). On her admission to Cold Springs, she was documented as having "an impaired ability to understand others secondary to cognition" and "an impaired ability to make herself understood secondary to slurred speech." Based upon her condition, Cold Springs set a target goal for Grace that she would be able to communicate "basic needs and preferences with necessary cues and guidance from staff for 90 days" and "respond appropriately to simple communications for 90 days." Another target goal was for Grace to remain alert and oriented x3 for 90 days and continue to participate in "decision-making" for 90 days. At the time of her admission to Cold Springs, Grace was oriented to herself but disoriented as to place and time. Ron—who was not prohibited by Barry from visiting Grace—testified that he visited Grace at Franklin, Mercy, and Cold Springs and that she was not conversational at each facility. Gail Adler also testified that she visited Grace during her stay at Cold Springs, and that during that time she was "not at all clear as to what was going on."

On October 13, 2011, Grace was subsequently moved to North Shore University Hospital after suffering a seizure. Upon her admission to that facility, Grace was diagnosed with dementia. On October 14, 2011, Barry utilized the 2011 POA to make himself a 100% beneficiary of Grace's life insurance policy with Liberty Mutual. On November 2, 2011, Barry also sought to change the annuity beneficiary designation. Barry paid Attorney Feller's legal fees associated with the preparation and execution of the 2011 Estate Plan documents, and sent a "thank you" note to Attorney Feller for the services provided. On January 7, 2012, Grace was re-admitted to Mercy.

On June 29, 2012 (approximately eleven months after her stroke and ten months after the execution of the 2011 Estate Plan), Grace was formally declared incapacitated by Bagdid Bagdassarian, M.D., one of Grace's treating physicians. Attorney Feller e-mailed Barry the following message on July 1, 2012:

> "Barry, please see attached. As you can see on the bottom of page 2, upon Grace's incapacity, you may serve as sole trustee. Furthermore, and perhaps, more importantly, the top of page 3 explicitly states that the signature of only one trustee is necessary! I hope that is helpful."

On September 17, 2012, Barry accepted his appointment as trustee. On October 1, 2012, he requested that Grace be removed from North Shore's mailing list, effectively ending the donations that she made for more than two decades prior to the cancellation.

On October 3, 2012, Barry utilized the 2011 POA to make himself the 100% beneficiary of the IRA brokerage account held by Prospera Financial Services, Inc., managed by C.E. Gaye & Sons Securities, Ltd. (account no. #8559). On January 23, 2012, Grace was moved to her last place of treatment, Townhouse Center for Rehabilitation and Nursing. On April 15, 2014, Barry utilized the 2011 POA to establish a new IRA Account (#8996) for Grace and transferred the assets in Grace's Prospera Financial Services IRA Account (#8559) to this account. Barry remained the beneficiary of the #8996 account.

On March 25, 2015, Grace passed away. Following Grace's death, Barry became the 100% beneficiary of the 2009 Trust assets by virtue of the 2011 Trust Amendment. On August 4, 2015, Barry received $73,624.11 in life insurance proceeds as sole beneficiary of Grace's life insurance policy with Liberty Mutual and received sole ownership of Grace's IRA Account #8996.

CONCLUSIONS OF LAW

I. Choice of Law

The Court notes at the outset that the events allegedly giving rise to Plaintiffs' and Intervenors' claims took place in New York in 2011. Pursuant to a pre-trial stipulation between the parties, the Court will apply New York substantive law in deciding this matter. On October 25, 2021, this Court entered its Order on Defendant/Counter-Plaintiffs Trial Memorandum of Law Regarding Florida Law Governing the Procedural Issues of **(1)** Burden of Proof and (2) Standard of Proof. In its October 25, 2021 Order, the Court indicated that Florida law applies to procedural issues pursuant to the Fourth District Court of Appeal's holding in *Siegel v. Novak*, 920 So.2d 89, 93 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D206a]. Additionally, the October 25, 2021 Order determined that Florida is the forum state and; as such, Florida law will determine whether a particular issue is substantive or procedural for choice of law purposes. *Id.* This Court also cited to *Shaps v. Provident Life & Acc. Ins. Co.*, which held that Florida law deems the issues of burden of proof and standard of proof to be procedural issues. *See Shaps v. Provident Life & Acc. Ins. Co.*, 826 So.2d 250, 254-55 (Fla. 2002) [27 Fla. L. Weekly S710a]; *Stuart L. Stein, P.A. v. Miller Industries, Inc.*, 563 So.2d 539, 540 (Fla. 4th DCA 1990). Accordingly, Florida law controls the burden of proof and standard of proof in this case.

II. Undue Influence Claims (Plaintiffs' Counts 1 and 4)

In Counts 1 and 4 of their Complaint, Plaintiffs allege that Barry exercised undue influence over Grace and this resulted in her changing her Estate Plan. The Court recognizes that a large body of Florida law regarding undue influence cases primarily reference will contests. However, it is well established Florida law and public policy that case law addressing undue influence regarding wills also applies to trusts and other inter vivos gifts. *See Cripe v. Atl. First Nat. Bank of Daytona Beach*, 422 So. 2d 820 (Fla. 1982).

In determining the burden of proof in undue influence cases, the Court looks to section 733.107, Fla. Stat, which states in pertinent part,

> (1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

733.107, Fla. Stat.

In *Levin v. Levin*, the Florida Supreme Court held that the individual contesting a will based on undue influence has the burden of proving the undue influence alleged. *Levin v. Levin*, 60 So. 3d 1116

(Fla. 4th DCA 2011) [36 Fla. L. Weekly D1765c]. *See also Hannibal v. Navarro*, 317 So. 3d 1179, 1181 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D286a]. However, a presumption shifting the burden of proof arises when a substantial beneficiary under a contested will (1) occupies a confidential relationship with the testator, (2) is a substantial beneficiary, and (3) actively procures the will. *Carpenter v. Carpenter*, 253 So. 2d 697, 701 (Fla. 1971); § 733.107, Fla. Stat. (2021). If the individual contesting the will successfully shifts the burden to the proponent, the proponent then must prove by a preponderance of the evidence that the disputed will was not procured by undue influence. *Hannibal*, 317 So. 3d at 1181-82. Because New York substantive law governs this case, it will dictate whether the procedural burdens set by Florida law have been met, such as whether the elements of a "confidential relationship" and "active procurement" have been established, both of which are necessary to shift the burden of proof under Florida procedural law.

New York substantive law determines the existence of a confidential relationship by deciphering whether the circumstantial evidence presented demonstrates inequity or a controlling influence. *Matter of Nurse*, 160 AD 3d 745, 748 [2d Dept. 2018]. In *Gordon v. Bialystoker Ctr. and Bikur Cholim, Inc.*, 45 NY2d 692, 698 [1978], the New York Court held that "a confidential relationship is one that is of such a character as to render it certain that [the parties] do not deal on terms of equality". In *Matter of Bonczyk*, 119 AD3d 1124, 1125-26 [3d Dept. 2014], the New York Court expounded on the meaning of inequity by stating, "inequality may occur from either one party's 'superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence' or from the other's 'weakness, dependence, or trust justifiably reposed' on the stronger party." Additionally, if the facts so demonstrate, the beneficiary of the transaction has the additional burden of proving the transaction was "fair, open, voluntary, and well understood, and therefore free from undue influence" *Matter of In re Boatwright*, 114 AD3d 856, 858 [2d Dept. 2014].

In applying these factors, New York Courts have held that a confidential relationship exists where "relevant circumstances, included decedent's established lack of interest in, or ability to manage, her own finances, and concomitant dependence upon others to do so, a finding that the trust she reposed in petitioner was such that they dealt on an unequal footing, and hence petitioner had a fiduciary duty to act in decedent's best interest". *Matter of Estate of Antoinette*, 238 AD2d 762, 764 [3d Dept. 1997]. Moreover, the Court in *Matter of Estate of Antoinette* found that "although close family ties may negate the presumption of undue influence that would otherwise arise from a confidential or fiduciary relationship, the jury, not unreasonably, could have decided that the relationship between petitioner and decedent was such that it could fairly be said that petitioner acted not out of family duty, but rather cupidity." *Id*.

Additionally, New York Courts have held a confidential relationship did not exist where evidence was presented that established decedent's sound mind and their active participation in the estate planning process. *Matter of Estate of Burrows*, 203 AD3d 1699 [4th Dept. 2022], lv to appeal denied, 207 AD3d 1092 [4th Dept. 2022]. Additionally, a confidential relationship was found not to exist where a decedent was not under the exclusive care and control of the proponent of the will and had fairly regular contact with friends as his illness progressed. *Id*.

In applying the New York case law with respect to the factors relating to a confidential relationship to the instant case, the evidence adduced at trial overwhelmingly showed that Grace lacked the ability to manage her affairs while hospitalized. Having suffered a stroke, **Grace was not on equal footing with Barry and heavily relied on him during the period of her hospitalization.** Without question, the evidence showed that Grace did not actively participate in the changing of her 2009 Estate Plan as she had no hand in retaining the attorney. There is also no sufficient evidence to support that the execution of the 2011 Estate Plan was fair, open and voluntary. In fact, the evidence showed that when Grace was well, she did not have a relationship with Barry and did not rely on him to manage her finances. Lastly, the evidence showed that Barry kept Eileen, Grace's closest friend, from seeing her at a number of the hospitals and facilities where she was being treated. Consequently, based on the above, this Court finds the existence of a confidential relationship between Barry and Grace.

In turning to "active procurement", the evidence at trial showed that Barry found and retained Attorney Feller. Notably, the evidence showed that Barry assisted Attorney Feller by "filling in" details during the preparation of the 2011 Estate Plan. Accordingly, the Court determines that Barry was critical to the active procurement of the 2011 Estate Plan. As such, the Court finds that Plaintiffs have established a presumption of undue influence given that Barry (1) had a confidential relationship with Grace, (2) actively procured the 2011 Estate Plan, and (3) is a substantial beneficiary under the terms of the Grace's revised 2011 Estate Plan. Therefore, applying Florida procedural law, the burden of proof shifts to Barry to prove that the 2011 Estate plan was not procured by undue influence.

In applying New York substantive law, the Court in *In re Will of Sanger* held that in order to prove undue influence, the objectants must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator in the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed. *In re Will of Sanger,* 45 Misc. 3d 246, 253 [Sur Ct 2014].

Plaintiffs and Intervenors argue that when Barry found Grace's 2009 Estate Planning Documents and discovered the change in his bequest from a 100% beneficiary to a 50% beneficiary, Barry, motivated out of self-interest, went to the hospital to confront Grace about it. Additionally, Plaintiffs and Intervenors argue Barry exerted undue influence by coercing Grace to execute a new estate plan (the 2011 Estate Plan) while she was in a weakened state. To that end, Plaintiffs and Intervenors argue that Barry capitalized on Grace's hospitalization and used this time to subvert Grace's mind about Eileen in order to coerce Grace into make changes to her 2009 Estate Plan. As he testified and argued through counsel, Barry maintains that Grace's decision to make a change to her 2009 Estate Plan was motivated by information Barry provided to Grace about Eileen. In response, Barry alleges that it was this information that resulted in Grace's desire to return to the dispositions within her 2002 and 2006 Estate Plans. Barry testified that he told Grace about how Eileen (1) was vocally opposed to a feeding tube when Grace was first admitted to the hospital before even speaking to Grace's doctors about her prognosis; (2) had been refusing to return Grace's jewelry and other personal belongings; and (3) had declared herself to be completely in charge of Grace's affairs. Further, Barry testified that when he informed Grace about the foregoing, she said "I screwed up," and she asked Barry to get her an estate planning attorney. Barry argues that he was acting as a dutiful son by warning Grace about Eileen.

The Court finds Barry's testimony, as referenced above, not credible and borders on an "orchestration of fiction" as to those facts presented by Barry. Particularly, the Court finds that Barry's statements regarding the circumstances surrounding Eileen's possession of Grace's jewelry and Eileen's initial involvement in Grace's care, to the extent of their existence, was a misrepresentation aimed at manipulating Grace into altering her estate plan. Prior to Barry's conversations with Grace, taking Barry's testimony as true, there is no evidence that shows that Grace had any reason to change her estate

plan. The Court finds that Barry's explanation fails to address why Ron and the two charities were also removed from the 2011 Estate Plan. The evidence adduced at trial showed that Grace's relationship with Ron never changed and that Grace was very attached to her dog Freckles and maintained a 20-plus-year history of consistent donations to the animal charities. Lastly, the 2011 Estate Plan documents prepared by Attorney Feller were inconsistent with the other aspects of the prior estate plan Grace drafted with Estate Conservation Group. Specifically, in the 2011 Estate Plan, Barry was appointed as Grace's power of attorney and trustee of her Trust, roles he was not given in the 2002, 2006, and 2009 Estate Planning Documents prepared by Estate Conservation Group.

The nature of Grace's relationship to Barry is also relevant as a grantor's relationship with the beneficiary is relevant to whether undue influence was exercised. *Matter of Burke*, 82 A.D. 260, 269 [2d Dept. 1981]. Here, testimony adduced at trial revealed that Grace and Marvin's relationship with Barry was not close and that they called him a "free loader". This is supportive of the fact that Barry was not selected as a fiduciary in the original estate plans of Grace and Marvin. Notably, after Barry was named Power of Attorney under the 2011 Estate Plan, he took control of Grace's jewelry, sold it, and gave his daughter the proceeds. Additionally, Barry permanently prohibited Eileen from visiting Grace and he used the Power of Attorney to execute a Prospera Financial Services IRA beneficiary change request form for Grace's IRA and changed the beneficiary designation to himself. The Court finds that none of these actions was in the interest of Grace, but rather motivated by Barry's own self interest.

Plaintiffs and Intervenors argue that Barry took advantage of Grace's weakened state and used this opportunity to exercise undue influence over her. At trial, Barry, through counsel, maintained that Grace had the testamentary capacity to execute the 2011 Estate Plan. In *Children's Aid Society v. Loveridge,* 70 NY 387 [1877], the Court held that the physical and mental condition of the decedent is a factor in determining whether undue influence occurred. While the Court addresses Grace's testamentary capacity *infra*, the Court notes here that, at the time of the execution of the 2011 Estate Plan, Grace was receiving medical treatment for a stroke. Even Attorney Feller testified that during his initial encounter with Grace, "she appeared physically weak."

Lastly, Plaintiffs and Intervenors argue that the most glaring example of the exercise of undue influence over Grace was Barry's act of retaining Attorney Feller, the drafting attorney of the 2011 Estate Plan. In *Matter of Elmore*, 42 AD2d 240 [3d Dept. 1973], the New York Court found that a factor indicating undue influence was whether the attorney who drafted the document was the decedent's attorney. Here, Barry testified that he retained Attorney Feller at the request of Grace which this Court finds not credible. He also testified that he sought to find an attorney for Grace because "[h]e didn't think she had the capacity to pick up the phone and dial it". At trial, the evidence revealed that Attorney Feller worked solely on behalf of Barry, and Grace did not have a prior relationship with Attorney Feller and did not hire him. Further, the evidence revealed that during the alleged attorney client relationship with Attorney Feller, Attorney Feller never called Grace and Grace never called Attorney Feller. In fact, the evidence showed that Grace consistently used Estate Conservation Group for her estate-planning needs prior to her stroke.

Significantly, the evidence showed that Barry was present when both the 2011 POA and the 2011 Trust Amendment were executed, as he was in the room both prior to and after their execution and was likely in a hallway during the actual execution. Following the execution of these documents, the evidence showed that Barry took possession of the 2011 POA and the 2011 Trust Amendment for safekeeping. From an "instructions" standpoint, the evidence showed that Barry gave Attorney Feller extensive instructions on the preparation of the 2011 Estate Plan, who subsequently drafted the documents. And finally, the most telling aspect of the relationship between Barry and Attorney Feller is that the evidence revealed that Attorney Feller continued working on Barry's behalf after the declaration of Grace's incapacity and eventual death. Barry also paid Attorney Feller for his legal services.

Consequently, the Court finds that Barry failed to provide sufficient evidence to meet his burden of proof by a preponderance of the evidence that he did not unduly influence Grace with regards to her 2011 Estate Plan. Instead, the evidence overwhelmingly showed that Barry exerted undue influence over Grace and that this undue influence caused the subversion of Grace's mind during the time of the execution of the 2011 Estate Plan. The Court finds, as supported by the evidence, that—but for undue influence—Grace would not have executed the 2011 Estate Plan.

III. Lack of Testamentary Capacity (Plaintiffs' Counts 2 and 5)

As discussed *supra*, Florida law governs the procedural issues in the instant case and New York law governs the substantive issues. Florida procedural law places the burden on Plaintiffs and Intervenors to prove, by a preponderance of the evidence, that Grace lacked testamentary capacity on September 13, 2011 and September 19, 2011, the dates that the 2011 Estate Plan documents were executed. *See Hendershaw v. Estate of Hendershaw,* 763 So. 2d 482, 483 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1633a] (holding "[t]he burden of invalidating a will because of lack of testamentary capacity is a heavy one and must be sustained by a preponderance of the evidence.") *See also* Fla. Stat. §736.0207(1) ("[i]n an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of establishing the grounds for invalidity."); and Fla. Stat. §733.0601 ("[t]he capacity required to create, amend, revoke, or add property to a revocable trust. is the same as that required to make a will.").

Under New York substantive law, in order for a testator to have testamentary capacity, they must understand:

> (1) the nature and consequences of executing a will;
>
> (2) the nature and extent of the property she was disposing of; and
>
> (3) who would be considered natural objects of her bounty and her relations with them.

Estate of Kumstar, 66 NY2d 691, 692 [1985].

The question of testamentary capacity is a question, which is determined by the testator's mental status at the time the testamentary document is executed. *Matter of Hedges*, 100 AD2d 586, 588 [2d Dept. 1984]. Lack of testamentary capacity can be proven by two different types of evidence: medical records and the testimony of credible witnesses that knew the testator well enough to testify that he/she lacked capacity at the time the Will was executed. Here, the documents at issue in this case were executed during Grace's hospitalization at Mercy Medical Center.

At trial, Plaintiffs and Intervenors alleged that Grace lacked capacity to execute the 2011 Estate Plan. In support of this claim, they presented medical records from Franklin Hospital Medical Center, between the dates of August 11-25, 2011, and records from Cold Springs Center for Nursing and Rehabilitation, between the dates of September 19-October 13, 2011. Notably, the records from Mercy Medical Center, where Grace was treated, between the dates of August 25, 2011 to September 19, 2011 are missing due to being destroyed by the facility.

Additionally, Plaintiffs and Intervenors relied on the testimony of their Medical Expert, Dr. Marc Feinberg, a Board Certified Neurologist, and the Medical Report he submitted after reviewing Grace's medical records. To this end, Dr. Feinberg reviewed the medical

records from Franklin Hospital Medical Center and Cold Springs Center for Nursing and Rehabilitation. Based on these records, he opined that Grace suffered a large right middle cerebral artery stroke on August 11, 2011. He also opined that upon her admittance to Cold Springs, the initial comprehensive review found her to have an impaired ability to understand others secondary to cognition and impaired ability to make herself understood. He indicated that multiple assessments confirmed cognitive deficits.

In response, Barry argued that because the 2011 Power of Attorney was executed on September 13, 2011 and the 2011 Trust Amendment was executed on September 19, 2011, this is the only legally relevant time period that the Court should consider. Consequently, Barry argued that Dr. Feinberg could not opine as to Grace's testamentary capacity at the time the 2011 Estate Plan was executed, because the question of testamentary capacity is determined by the testator's mental status at the time of the execution and the Mercy medical records from August 25, 2011 to September 19, 2011 were not available for Dr. Feinberg to review.

Additionally, Barry argues that Dr. Feinberg's testimony exemplifies why New York law deems the testimony of a medical expert who solely reviewed medical records and never physically observed or examined the testator as "the weakest and most unreliable kind of evidence" and the testimony of an expert who reviewed incomplete medical records is entitled to "no weight." *Matter of Will of Slade*, 106 AD2d 914, 915 [4th Dept. 1984]. To counter Dr. Feinberg's opinion, Barry offered Dr. Dmitry Byk, a forensic psychiatrist, who accused Dr. Feinberg of "cherry picking" records to form the basis of his opinion. Lastly, Barry highlights New York law that holds "[w]here expert opinion testimony differs from witness fact testimony, 'the facts must prevail.' " *Id; See also In re Stern's Estate*, 137 Misc. 668, 671 [Sur Ct 1930], *affd sub nom. In re Stern's Will,* 235 AD 60 [1st Dept. 1932], *affd,* 261 NY 617 [1933] ("Where the opinion of a medical witness is contradicted by the facts, the facts must prevail.").

Here, Plaintiffs and Intervenors provided the testimony of Gail Walsh and Bill Fitton. Gail Walsh testified that, when she visited Grace at Cold Springs, it was obvious to her that Grace was "not at all clear what was going on" and that Grace lacked insight into her condition. Bill Fitton testified that, on September 25, 2011, Grace did not recognize him. These interactions both occurred at Cold Springs Medical Center following the execution of the 2011 Estate Plan.

Barry, in response, provided the testimony of Grace's long-time broker, Christopher Gaye; Eileen; and Gail Adler, Grace's niece. Mr. Gaye testified that, upon receiving the 2011 Trust Amendment, he personally called Grace in late September of 2011 and confirmed that she wanted her accounts to be retitled to reflect the 2011 Amended Trust. Eileen testified that on or around the first week of September 2011, she visited Grace at Mercy Hospital and told Grace that Barry had locked her out of the house and Grace responded by saying: "I'll get you keys by tonight." Barry testified that he visited Grace that same day or the next (September 7, 2011), and during that visit Grace requested that Barry give Eileen a set of keys as well as Grace's checkbook. Eileen acknowledged that she crossed paths with Barry as he was walking to Grace's room in Mercy, which corroborates Barry's testimony. As a result, Barry argued that his testimony as well as the testimony of Eileen support the fact that while Grace was at Mercy, she was able to recognize those around her, communicate intelligibly, recall conversations, and complete specific tasks. Eileen further testified that, on September 13, 2011 (the date the 2011 Power of Attorney was executed), she again visited Grace. Eileen testified that during this visit, Grace told her about the 2011 Power of Attorney she had executed in favor of Barry and explained to Eileen that Barry would be taking care of her moving forward (Eileen was Grace's attorney-in-fact under a prior power of attorney). Barry argues that Eileen's testimony confirms that: (1) Grace was aware she had executed a power of attorney in favor of Barry; (2) Grace understood the significance of the document; and (3) that the 2011 Power of Attorney reflected Grace's wishes.

Gail Adler testified that she visited Grace sometime in September while Grace was at Mercy Hospital in 2011, which is where Grace executed the 2011 Estate Plan. Ms. Adler testified that Grace recognized her right away, was glad to see her, and had a conversation with her about how Ms. Adler and her family were doing. Ms. Adler further testified that she put Grace on the phone with Ms. Adler's mother, and the two were able to have a conversation with one another. Ms. Adler testified that during her approximately one-hour visit, she observed that Grace was alert, aware of her surroundings, expressed herself coherently, and did not seem confused. Thus, Barry argues that Ms. Adler's testimony further supports the fact that Grace was able to recognize her family members, comprehend what was said to her, and communicate coherently during her stay at Mercy Hospital.

Based on New York law, capacity is determined at time of execution. This Court does not have access to the medical records that can provide insight as to whether Grace was capacitated at the time of her executing the documents. However, the Court does have witness testimony from persons who had interactions with Grace during the time when the 2011 Estate Plan was executed. Both, Eileen and Gail Adler, saw Grace during her hospitalization at Mercy Hospital (around the time the 2011 Estate Plan was signed). They both testified about interactions that appeared to show Grace was capacitated during their visits. In contrast, Plaintiffs offer no witnesses who provided testimony that Grace lacked capacity during the time the challenged documents were signed. Notably, the Court does not have access to the medical records that can provide insight as to whether Grace was capacitated at the time of her executing the documents.

Consequently, the Court finds Plaintiffs and Intervenors have not provided sufficient evidence to prove that Grace lacked capacity based on the unavailability of the Mercy Hospital medical records and the witness testimony. The Court notes that the Cold Springs medical records from the day the 2011 Trust Document was signed is highly persuasive as an indication of Grace's possible lack of testamentary capacity but, standing alone, is not sufficient to rise to the very high threshold New York law requires to support a finding of lack of testamentary capacity. Therefore, without the Mercy Hospital records, the Plaintiffs and Intervenors have failed to meet their burden of proving that Grace did not understand the nature and consequences of executing a will, the nature and extent of the property she was disposing of, and who would be considered natural objects of her bounty and her relations with them at the time she executed the 2011 Estate Plan.

IV. Unjust Enrichment (Plaintiffs' Counts 3 and 6)

Plaintiffs and Intervenors argue that the Barry was unjustly enriched by receiving one hundred percent (100%) of Grace's IRA and one hundred percent (100%) of the assets in the 2009 Trust. New York law provides that to recover under the theory of unjust enrichment, a litigant must show that: (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011].

This Court has found that the 2011 Estate Plan was the product of undue influence. This Court now finds that Barry was enriched at the expense of the Plaintiffs and Intervenors as they were unable to receive the assets devised to them under the 2009 Estate Plan as a result of Barry's use of the invalid 2011 Estate Plan (procured through undue influence as indicated herein) to obtain 100% of Grace's IRA and Trust assets. Accordingly, the Court finds that it would be against

equity and good conscience to permit Barry to retain 100% of the IRA and Trust assets as he was only entitled to 50% of the IRA and Trust assets under Grace's 2009 Trust and Estate Plan.

V. Barry's Affirmative Defenses

On October 1, 2020, Barry filed his Answer and Affirmative Defenses to Plaintiffs Fifth Amended Complaint. This Court finds as follows with regards to Barry's Affirmative Defenses:

1) Defendant's fourth, fifth, sixth, seventh, eighth, tenth, seventeenth, eighteenth, nineteenth, twenty first, twenty-third, and twenty-fourth affirmative defenses are not legally cognizable affirmative defenses. Accordingly, none of them operate to avoid or negate liability as to any of Plaintiffs' claims.
2) Defendant's sixth, tenth, and eleventh affirmative defenses are irrelevant and lack merit.
3) Defendant's first, second, third, twenty-fifth, twenty-sixth, and twenty-seventh affirmative defenses are barred by both the doctrine of laches and New York's six-year statute of limitations applying any claim or defense that is equitable in nature. *See* CPLR § 213(1).
4) Defendant's fourteenth affirmative defense is without merit.
5) Defendant' s ninth affirmative defense fails to meet the elements of fraud and undue influence under New York law. *See Matter of Bianco*, 195 AD2d 457 [2d Dept. 1993].
6) Defendant' s thirteenth, fifteenth, sixteenth affirmative defenses are barred by both the doctrine of laches and New York's six-year statute of limitations applying any claim or defense that is equitable in nature. *See* CPLR § 213(1).
7) Defendant's fourteenth affirmative defense is without merit.
8) Defendant's twelfth, thirteenth, fourteenth, twenty-third, and twenty-fourth affirmative defenses are addressed in the Counterclaim Section of this Order.
9) Defendant's twentieth affirmative defense is without merit. The Fourth District Court of Appeal has held that "[s]ubject matter jurisdiction in a probate case is not determined by the decedent's domicile; rather, it is based on the power of the court over the class of cases to which the controversy belongs. *Pastor v. Pastor*, 929 So. 2d 576 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1098a]. This Court has subject matter jurisdiction over this action pursuant to Article V, Section 5, of the Florida Constitution; Section 26.012(b) of the Florida Statutes, provides circuit courts with jurisdiction over all actions at law not cognizable by the county courts, in all cases in equity, and of proceedings "relating to the settlement of estates of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency and other jurisdiction usually pertaining the courts of probate"; Section 34.01 of the Florida Statutes which confers circuit courts with jurisdiction when the amount in controversy exceeds $30,000.00; and Section 736.0203, Florida Statutes, which provides that "[t]he circuit court has original jurisdiction in this state of all proceedings arising under [the Florida Trust Code]." Additionally, the fact that the Power of Attorney is governed by New York Law does not preclude the Court from invalidating it and awarding damages for its misuse by Defendant in Florida. *See*§ 47.011, Fla. Stat (2018).
10) Defendant's twenty-second affirmative defense lacks merit as Ron qualifies as an interested person pursuant to §709.2116(d), Fla. Stat.

VI. Counterclaim and Affirmative Defenses Related to the 2002 Joint Trust

Plaintiffs and Intervenors seek 50% of the total assets of Grace Fishman at the time of her death, most of which were transferred into the 2009 version of the Grace M. Fishman Revocable Living Trust, dated September 24, 2009 ("2009 Trust"), which was later amended through the 2011 Trust Amendment. In his Amended Counterclaim for Equitable Recoupment, Unjust Enrichment, Constructive Trust, Declaratory Judgement and Resulting Trust, Barry alleges that Grace impermissibly transferred assets from Marvin's half of an earlier trust, 2002 Joint Trust, of which Marvin and Grace were both settlors and beneficiaries during their lifetime. On April 4, 2002, Eileen accepted an appointment as Joint Successor Trustee of the 2002 Joint Trust. On April 9, 2002, Eileen's daughter, Jennifer, accepted her appointment as Joint Successor Trustee of the 2002 Joint Trust.

On or about July 13, 2006, Marvin and Grace amended the 2002 Joint Trust by executing the "First Amendment to Revocable Living Trust Agreement" ("2006 Trust Amendment"). The 2006 Trust Amendment made Barry 100% beneficiary of the 2002 Joint Trust, whereas previously Barry, his wife, and daughter had been the combined 100% beneficiaries. Under the 2002 Joint Trust, upon the death of either Marvin or Grace, their respective share of the Trust became irrevocable per Sections 1.10 ("Irrevocability") and 3.03 ("Division into Shares"). This irrevocability aspect of the 2002 Joint Trust was not altered by the 2006 Joint Trust Amendment.

Marvin passed away in March 2007. Barry argues that upon Marvin's passing, his share of the 2006 Joint Trust became irrevocable, and Grace became the sole trustee. After Marvin's death, Barry also argues that, as the sole surviving Trustee, Grace was obligated to separate out Marvin's Irrevocable Share, from which she was entitled to income. To that end, Barry argues that Grace could only invade the principal for health, maintenance, or support.

Additionally, Barry argues that upon Grace's death, Marvin's Irrevocable Share was to be distributed to him (as a 100% beneficiary), and after Marvin's death, Grace was not permitted to terminate or dispose of Marvin's Irrevocable Share, pursuant to the above trust provisions. Lastly, Barry argues that this error was rectified by the 2011 Trust Amendment that made him a 100% beneficiary of the 2009 Trust. Barry argues that if the 2011 Trust Amendment is revoked, an inequitable result would follow if he does not receive 100% of Marvin's Irrevocable Trust share. When the 2009 Trust was created, 100% of the assets in the 2006 Trust were transferred into the 2009 Trust, which Barry argues included Marvin's share that had become irrevocable in 2007 upon his passing.

The primary dispute between the parties is exactly what constitutes Marvin's Irrevocable Share. Pursuant to the 2002 Joint Trust, at § 1.06:

> During our lifetime, the trust estate shall be held and administered as follows:
>
> 1) All property and other assets transferred to this trust shall be allocated to and held in separate shares, the first such share being designated the "MARVIN FISHMAN Trust Share" and the second share being designated the "GRACE M. FISHMAN Trust Share."
>
> 2) Each Grantor's separate trust share shall be composed of the assets as follows: The Grantor's one-half interest in jointly held property transferred to the trust, and The Grantor's individually owned property which is transferred to the trust.

Plaintiffs and Intervenors argue that the 2002 Joint Trust provided that all assets that were previously titled in Grace's name funded and comprised the "Grace M. Fishman Trust Share" and the Grace M. Fishman Trust Share was revocable by Grace after Marvin's death. Further, Plaintiffs and Intervenors argue that the evidence presented at trial demonstrated that none of the assets that comprised the 2002 Joint Trust were previously titled in Marvin's name, but were all individually owned by Grace. To support their contention, Plaintiffs and Intervenors point to the testimony of Steven Arresto, the Corporate Representative of Estate Conservation Group, who testified that he personally met with Grace and Marvin in 2002 to discuss the funding of the 2002 Joint Trust. To this end, Mr. Arresto authenticated all the documentation that he produced at his deposition as corporate records of Estate Conservation Group. Notably, Mr. Arresto testified

that corporate records produced by Estate Conservation Group conclusively showed that all financial assets that subsequently comprised the 2002 Joint Trust were previously titled in Grace's name. Likewise, the Bargain and Sale Deed—which transferred the New York Property into the 2002 Joint Trust—demonstrates that the residence was originally titled in Grace's name, and that she was listed as the grantor of the transfer and the trustee of the 2002 Joint Trust as a grantee. Plaintiffs and Intervenors contend that Barry did not cite to any evidence establishing that any assets (which subsequently comprised the 2002 Joint Trust) were previously titled in Marvin's individual name.

New York law states that "the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself." *See Whitehouse v. Gahn*, 84 AD3d 949 [2d Dept. 2011]. Based on the evidence presented at trial, the Court finds that Grace individually owned one hundred percent (100%) of the assets that made up the 2002 Joint Trust and; therefore, following Marvin's death, these assets became a part of the "Grace M. Fishman Share" created in 2002 Joint Trust. As such, based on the express language of the 2002 Joint Trust, Grace was free to retitle the assets in the Grace M. Fishman Share in any manner she wished pursuant to Section 1.08 of the 2002 Joint Trust. Based on these findings, the Court further finds that, Eileen and Jennifer, in their capacities as Successor Trustees, committed no breach of their fiduciary duties regarding Barry and the 2002 Joint Trust.

Turning to the affirmative defenses referencing the 2002 Joint Trust, Plaintiffs and Intervenors argue that Barry's twelfth, thirteenth, fourteenth, twenty-third, and twenty-fourth affirmative defenses relating to the 2002 Joint Trust are barred by the statute of limitations. *See* Section 111.G, infra (discussing the statute of limitations under New York law). New York has a strict six-year statute of limitations for any claim to property of an express trust following the trustee's termination of the trust or the termination of the trustee's service as trustee. *See*, e.g., *Tydings v. Greenfield, Stein & Senior, LLP*, 11 NY3d 195 [2008]. Similarly, a six-year statute of limitation applies to any claim that is equitable in nature. *See* CPLR § 213(1); *Loengard v Santa Fe Indus., Inc*., 70 NY2d 262 [1987].

Grace renounced the 2002 Joint Trust in 2010 when she transferred the assets to the 2009 Trust. Additionally, she ceased being trustee of the 2009 Trust in 2012 when Barry executed documentation confirming that Grace lacked capacity to serve as trustee. Applying either accrual date (2010 or 2012), Barry's claims are barred by the statute of limitations (e.g., *Tydings v. Greenfield, Stein & Senior, LLP*, 11 NY3d 195 [2008]. Notably, these claims were asserted by Barry for the first time in these proceedings on June 28, 2019, and do not arise out of the factual underpinnings contained in any of the parties' prior pleadings. *See HSBC Bank USA, NA. v. Karzen*, 157 So. 3d 1089, 1091 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D530a] (for statute of limitation purposes, an amended pleading asserting an additional claim relates back to an original pleading when the claim "[arises] out of the same conduct, transaction, or occurrence set forth" in the original pleading) (citation omitted).

CONCLUSION

If only the old adage that "less is more" were heeded in this case, this controversy could have been averted. Notwithstanding, when considered as a whole, the "hues" of evidence demonstrate a vibrant color of undue influence. Clearly, Barry wanted more than what Grace's 2009 Estate Plan allotted to him. He was not content with receiving only fifty percent (50%) of Grace's Estate. This discontentment led Barry to take steps to orchestrate a "plan" so that he could inherit Grace's entire Estate. Based upon the evidence above, and the Court having found that the testimony offered by Barry to be not credible, the Court finds that Barry exercised undue influence over Grace. Pursuant to Florida procedural law, the burden of proof shifts to Barry to prove that the 2011 Estate Plan was not the result of undue influence. See *Hannibal v. Navarro*, 317 So.3d 1179 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D286a]. Under New York substantive law, Barry failed to prove, by a preponderance of evidence, that the 2011 Estate Plan was not the product of undue influence.

Clearly, the evidence showed that Barry had a confidential relationship with Grace, and took advantage of this confidential relationship by exerting undue influence over Grace by surreptitiously convincing Grace to execute a new estate plan (the 2011 Estate Plan) while she was in a weakened and frail state. Further, it was Barry who actively procured Attorney Feller, retained him as his attorney, and assisted Attorney Feller by "filling in" the details during the preparation of Grace's 2011 Estate Plan. To this end, Barry wrote himself into Grace's Estate Plan as the **sole beneficiary**. Notably, the evidence adduced at trial shows a completely different portrait of Grace's intent relating to her "overall" Estate Plan prior to Barry's visit to the hospital after Grace's stoke, and his procurement of Attorney Feller who re-wrote Grace's Estate Plan in her weakened condition. Based on New York law, the evidence clearly shows that Barry exercised undue influence over Grace and that the 2011 Estate Plan was the result of his undue influence. *See In re Will of Sanger*, 45 Misc. 3d 246,253 [Sur Ct 2014].

The Court finds that Plaintiffs and Intervenors failed to prove, by a preponderance of the evidence, that Grace lacked testamentary capacity. The Court acknowledges that under New York and Florida law, it is very difficult to make a finding that a Decedent lacks testamentary capacity without a determination that the Decedent is incapacitated. Further, Plaintiffs and Intervenors did not offer sufficient witness testimony or corroborating medical records to support a finding of lack of testamentary capacity. The main deficiency in the Plaintiffs' and Intervenors' evidence was the lack of medical records from Mercy Hospital from the specific days when the 2011 Estate Plan was executed. Consequently, based on the lack of evidence, this Court cannot make a finding that Grace lacked testamentary capacity when she executed the 2011 Estate Plan.

However, despite this Court's findings regarding lack of testamentary capacity, the facts adduced at trial, overwhelmingly support a finding of undue influence and; as such, the Court invalidates the 2011 Estate Plan consisting of the Power of Attorney executed on September 13, 2011 and the First Amendment to the Grace M. Fishman Living Trust Agreement executed on September 19, 2011.

DAMAGES & ATTORNEYS' FEES

At trial, the parties presented their respective experts, who testified to the value of the Decedent's estate assets. Here, Steven B. Tubbs, Plaintiffs' expert witness, opined that one prudent approach for calculating Plaintiffs' damages is to take into account the current value of Decedent's assets, as of September 30, 2011, adding back in the withdrawals by Barry Fishman taken after the Decedent's death, and then computing and adding the interest factor—based on Florida Judgment Interest Rates for the amounts withdrawn. Utilizing this approach, the Plaintiffs' calculation yields a total of $7,606,228.70 as of September 30, 2011. As such, Plaintiffs argue that fifty percent (50%) of this amount ($3,803,114.35) is due to Barry; forty percent (40%) is due to Eileen and Ron *(i.e.*, totaling $3,042,491.47); and ten percent (10%) is due to the two (2) intervening charities, North Shore Animal League and D.E.L.T.A. Rescue (totaling $760,622.88).

Further, the Plaintiffs' expert also presented an alternative calculation described as "Option Two". Here, the Plaintiffs' expert suggests using the fair market value of the Estate assets at the time of Grace's death and adding an interest factor-based on Florida Judgment Interest Rates for the amounts withdrawn. Notably, Plaintiffs' expert opines that this option would unfairly allow Barry to capture all

the appreciation of the assets since Decedent's date of death. Lastly, Plaintiffs' argue that Ron is owed the total amount of the Liberty Mutual Life Insurance policy, including interest, totaling $98,612.58.

On the other hand, Defendant argues that the issues surrounding Marvin's Irrevocable Share shall be addressed through adjustments to Plaintiffs' and Intervenors' damages claim. Here, Andrew Kaplan, Defendant's forensic accounting expert, opines that Plaintiffs' and Intervenors' distribution should be $1,531,084.54. Mr. Kaplan concludes that this amount is based on the available financial documentation relating to the assets transferred into the 2009 Trust which is premised on the belief that 50% of the assets transferred out of the 2002 Joint Trust and into the 2009 Trust constituted Marvin's Irrevocable Share of which Barry was a 100% beneficiary.

The Court has carefully considered the battle between the experts and finds that their respective expert testimony has both failed to capture the calculation of damages in its simplest form: "The value of Decedent's estate on the date of death." Title 26, of the Code of Federal Regulations, imposes a tax on "the transfer of the taxable estate of every decedent who is a citizen or resident of the United States," *(sec. 2001(a))* and it defines the taxable estate as "the value of the gross estate" less applicable deductions *(sec. 2051)*. The value of the gross estate of a Decedent is "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated," to the extent provided in sections 2033 through 2045. *Sec. 20.2031-1(a)*, *Estate Tax Regs.* Section 2033 includes in the gross estate the value of "all property to the extent of the interest therein of the decedent at the time of his death." *26 U.S.C. 2033.* Further, the regulations tell us to value a decedent's property at its fair market value. *Sec. 20.2031-1(b), Estate Tax Regs.*

Notably, the Court finds that the Decedent's aggregate estate on the date of her death (March 25, 2015), was $4,517,639.37, which included the fair market value of the following assets:

BB&T Bank Account (Cash)	$162,597.45
Elite Gold/Investor Account	$104,943.50
Total Cash:	**$267,540.95**
C.E. Gaye & Sons Securities, Ltd	$3,657,093.37
Barry Fishman C.E. Withdrawals	$1,902,650.39
IRA Brokerage Account C.E. Gaye & Sons Securities, Ltd	$593,005.05
Barry Fishman C.E. IRA Withdrawals	$123,171.15
New York Real Property	Valued not yet determined until sold
Total Estate Assets (after removal of Barry Fishman Withdrawals):	**$4,517,639.37**

Consequently, the Court finds as follows:

a. Barry is entitled to fifty percent (50%) of $4,517,639.37 equaling the amount of **$2,258,819.69.** However, Barry has already received $2,025,821.54 through his withdrawals from the C.E. Gaye & Sons Securities, Ltd. accounts, so Barry is entitled to a distribution of only **$232,998.15 (subject to further reductions as indicated *infra*).**

b. Eileen Fitton is entitled to twenty percent (20%) of $4,517,639.37 equaling the amount of **$903,527.87**.

c. Ron Sinagra is entitled to twenty percent (20%) of $4,517,639.37 equaling the amount of **$903,527.87**.

d. Ron Sinagra is further entitled to additionally compensation in the amount of **$73,624.11**, as beneficiary of the Liberty Mutual Life Insurance Policy at issue in Counts 1 and 3 (**said amount is to be deducted from Barry's distribution as a result of the finding of undue influence regarding the POA**).

e. North Shore Animal League is entitled to five percent (5%) of $4,517,639.37 equaling the amount of **$225,881.97**.

f. D.E.L.T.A. Rescue is entitled to five percent (5%) of $4,517,639.37 equaling the amount of **$225,881.97**.

Specifically, as it relates to the current calculation of Decedent's gross estate and the interest factor based on Florida Judgment rates, the parties shall confer and propose any amendments to this Final Judgment and claims of entitlement to interest.

As to attorney fees, the Court finds that the Plaintiffs' are entitled to attorney fees pursuant to Fla. Stat. § 736.1005. Fla. Stat. §736.1005(1) provides that "any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust". The Court also finds that Plaintiffs are entitled to recover their attorney's fees from Barry's part of the Trust assets pursuant to Fla. Stat. § 736.1005(2). Further, the Court finds that Plaintiffs' are entitled to attorney fees pursuant to Fla. Stat. § 709.2116(3). Fla. Stat. § 709.2116(3), provides that, "[i]n any proceeding commenced by filing a petition under this section, including, but not limited to, the unreasonable refusal of a third person to allow an agent to act pursuant to the power of attorney, and in challenges to the proper exercise of authority by the agent, the court shall award reasonable attorney fees and costs as in chancery actions." Here, Counts 1 and 2 of Plaintiffs' Fifth Amended Complaint sought the invalidation of the 2011 POA and all actions exercised by Barry under the purported authority as agent under the 2011 POA. Similarly, the parties shall meet and confer on attorney fees; and if no agreement is reached as to same, set the matter before the Court for determination of the amount of attorney fees.

The Court further finds that pursuant to Fla. R. Civ. P. 1.380 and Florida's Inequitable Conduct Doctrine, Barry is not entitled to attorney's fees and costs in connection with re-deposing Plaintiffs Medical Expert during the trial. This Court finds that there is no significant evidence to classify Plaintiffs' conduct as egregious. Coincidently, if the Court were to classify Plaintiffs' conduct as such, it would be compelled to review Defendant's conduct with equal scrutiny and thereby could easily find both sides wanting. Consequently, the Court declines to make such a finding for Plaintiffs or Defendant.

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

A. The Power of Attorney executed by Grace M. Fishman on September 13, 2011 and the First Amendment to the Grace M. Fishman Revocable Living Trust Agreement dated September 19, 2011 are hereby declared invalid, void, and of no legal effect.

B. All transactions predicated on the 2011 Estate Plan documents are hereby declared invalid, void, and of no legal effect.

C. Eileen Fitton shall have and recover from the Estate's assets, the sum of $903,527.87, for which let execution issue.

D. Ronald Sinagra shall have and recover from the Estate's assets, the sum of $903,527.87, for which let execution issue. Ronald Sinagra is further entitled to recover from Barry Fishman's distribution an additional $73,624.11 (as beneficiary of the Liberty Mutual Life Insurance Policy).

E. Under each of Fla. Stat. §§ 736.1005 and 709.2116(3), Plaintiffs are awarded attorneys' fees and taxable costs to be paid out of Defendant's share of the Estate/trust property. The Court expressly reserves jurisdiction to determine the amount of such attorneys' fees,

costs, and litigation expenses at a subsequent hearing.

F. North Shore Animal League shall have and recover from the Estate's assets, the sum of $225,881.97, for which let execution issue.

G. D.E.L.T.A. Rescue shall have and recover from the Estate's assets, the sum of $225,881.97, for which let execution issue.

H. The brokerage account held by Prospera Financial Services, Inc., managed by C.E. Gaye & Sons Securities, Ltd. (account no. *5285), is hereby retitled in the name of Eileen Fitton as trustee of the 2009 Trust. The freeze of the account imposed by the Court's May 23, 2019, Order, is hereby lifted based upon the Court's declaration that Eileen Fitton is trustee of the 2009 Trust, which entitles her to access of the account and prohibits Barry Fishman from accessing the account.

I. The IRA brokerage account held by Prospera Financial Services, Inc., managed by C.E. Gaye & Sons Securities, Ltd. (account no. *8083), is hereby retitled in the name of Eileen Fitton as trustee of the 2009 Trust.

J. Eileen Fitton is trustee of the 2009 Trust and, as trustee, is authorized to pay the amounts referenced in Paragraphs "C", "D", "F", and "G" (from the brokerage account no. *5285) to herself (with payment directed to "Law Offices of Daniel A. Seigel, P.A. IOLTA Account"), Ronald Sinagra (with payment directed to "Law Offices of Daniel A. Seigel, P.A. IOLTA Account"), North Shore Animal League (with payment directed to "Trescott & Drucker, P.L. IOLTA Account"), and D.E.L.T.A. Rescue (with payment directed to "Trescott & Drucker, P.L. IOLTA Account"), and to hold the remaining amounts pending a determination of the amount of attorneys' fees and taxable costs to which Plaintiffs are entitled to be paid out of Defendant's share of the Estate/trust property.

K. Eileen Fitton, as trustee, is authorized to sell the New York Property and to hold the proceeds in the Trust's brokerage account no. *5285 pending further order of the Court. Once the New York Property is sold, there shall be a pro rata distribution pursuant to the terms of the 2009 Trust.

L. Barry Fishman is entitled to a distribution of only $159,374.04 (after a deducting the amount of $73,624.11, which is to be distributed to Ronald Sinagra as beneficiary of the Liberty Mutual Life Insurance Policy). However, Barry Fishman shall receive no distribution until the resolution of Plaintiffs' attorney fees and a determination of entitlement to interest.

M. Plaintiffs, Eileen Fitton, Ronald Sinagra, Northshore Animal League and DELTA Rescue shall go hence without day.

N. The Court reserves jurisdiction to modify and enforce this Final Judgment.

* * *

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COUNTY COURTS

Insurance—Homeowners—Standing—Assignment of benefits—Validity—Assignment of benefits that contains charges for warranty and travel time does not comply with statutory requirements and is invalid and unenforceable

INNOVATED INVESTMENTS, INC. d/b/a Tarp Techs, a/a/o Salah Hajjaji, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2022-SC-008147. April 4, 2023. James A. Ruth, Judge. Counsel: Dustin Allen Hite, Hollywood, for Plaintiff. Gina Glasgow, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS

THIS CAUSE having come on before the Court to be heard upon Defendant's Amended Motion to Dismiss, at which counsel for Plaintiff failed to appear, and the Court being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that:

1. Plaintiff's purported Assignment of Benefits includes itemized charges for "Travel Time" and "Warranty".

2. Charges for a warranty and travel time are administrative in nature, and do not protect, repair, or restore the damaged property or mitigate against further damage.

3. Fla. Stat. 627.7152 states:

(2)(a) "An assignment agreement must:

(5) Contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee.

(6) 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)(b) "An assignment agreement may not contain:

4. An administrative fee."

(2)(d): "An assignment agreement that does not comply with this subsection is invalid and unenforceable."

4. Plaintiff's purported Assignment of Benefits is invalid and unenforceable per Fla. Stat. §627.7152, and Plaintiff does not have standing to pursue this action.

5. Defendant's Motion to Dismiss is hereby GRANTED with Prejudice.

* * *

Garnishment—Jurisdiction—Location of accounts subject to garnishment is not determined solely by agreement between account holder and garnishee to the exclusion of other persuasive evidence—Considering totality of circumstances, debtor's accounts were located in Florida, notwithstanding governing document's statement that the accounts were "located" in Virginia, where accounts were opened at one of garnishee's Florida branches by debtor, a Florida corporation with its principal place of business in Florida, and were accessed and utilized by the debtor in Florida—Further, there was no indication that debtor ever registered or did business in Virginia or utilized accounts in Virginia—Plaintiff is entitled to final judgment in garnishment

THE OHIO CASUALTY INSURANCE COMPANY and OHIO SECURITY INSURANCE COMPANY, a New Hampshire corporation authorized to do business in the State of Florida, Plaintiff, v. DARRELL BLACKMAN CONCRETE, INC., Defendant, v. NAVY FEDERAL CREDIT UNION, Garnishee. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2021-CC-011145. May 30, 2023. Kimberly A. Sadler, Judge. Counsel: Ryan E. Sprechman, Sprechman and Fisher, P.A., Miami, for Plaintiff. Jennifer Shoaf Richardson, for Garnishee.

FINAL JUDGMENT IN GARNISHMENT AFTER TRIAL

THIS CAUSE came on for consideration after Plaintiff and Garnishee, in lieu of the non-jury trial on Plaintiff's Reply to Garnishee's Answer to the Writ of Garnishment served on Garnishee on December 15, 2022 (the "Writ"), submitted a Joint Stipulation of Facts and Documentary Evidence, filed on April 28, 2023 (the "Joint Stipulation"), and separate Trial Briefs, filed by Plaintiff on April 28, 2023 and by Garnishee on May 1, 2023, and based on the agreed evidence included in the Joint Stipulation and the legal argument in each party's Trial Brief, the Court finds as follows:

Location of the Accounts

The undisputed facts as stipulated by the parties are that at the time of opening the subject accounts, the Important Disclosures for the accounts were silent as to the location of the accounts. Instead, the governing documents stated that the "accounts are maintained and governed in accordance with federal law and the laws of the Commonwealth of Virginia". Then, prior to service of the Writ, the governing documents were revised to explicitly state that the accounts are "located" in Virginia. The Garnishee's position is that the Court should look no further than the Important Disclosures to determine the location of the accounts for the purpose of garnishment.

The Court disagrees with Garnishee's position. There is no case presented to this Court which would support the idea that the "location" of an account should be determined solely by an agreement between the account holder and garnishee, to the exclusion of other persuasive factors. Instead, the Court must look at the totality of the circumstances to determine the location of the accounts. For example, one Court applying Florida law held that "helpful indicia for identifying an account's location include deposit slips, documents related to an account's opening, and other similar information." *Power Rental Op Co, LLC v. Virgin Islands Water & Power Auth.*, 3:20-CV-1015-TJC-JRK, 2021 WL 9881137, at *8 (M.D. Fla. July 6, 2021).

It is undisputed, as stipulated by the parties, that the accounts were opened at a branch in Florida, accessed in Florida, and utilized in Florida. It is also undisputed, as stipulated by the parties, that the Defendant is registered in Florida as a Florida corporation with a principal place of business in Florida. There is no indication that the Defendant corporation ever registered in Virginia, ever did business in Virginia, ever accessed the accounts in Virginia, ever utilized the accounts in Virginia, or in fact has any connection to Virginia.

Given those facts, the Court finds that the Defendant's accounts are located in Florida. Other than the Important Disclosures, there is nothing tying the Defendant's accounts to Virginia. Instead, every material fact—including the opening of the accounts, the location of the Defendant, and the Defendant's interactions with the account—support a finding that the accounts are located in Florida.

Additionally, Florida law does not support the idea that a judgment debtor and garnishee can determine the "location" of bank accounts at will. Were Garnishee's position adopted, then any unscrupulous judgment debtor and garnishee can easily avoid garnishment by continually changing the "location" of the accounts whenever it is convenient. Also, if Garnishee's position were adopted, then a judgment debtor and garnishee would be able to engage in venue shopping to create a fiction where an account is deemed to be located in a jurisdiction with favorable laws without regard to whether the judgment debtor has any connection to that jurisdiction. These results cannot be allowed.

Because the Court finds the Defendant's accounts to be located in Florida, the other issues raised in Plaintiff's Brief and Garnishee's Brief are moot. Each of those issues is only relevant if the accounts were located outside of Florida—which they are not. Therefore,

Plaintiff is entitled to Final Judgment in Garnishment.

Though the Court need not address the remaining issues, it will do so for completeness.

Garnishee is Indebted to Defendant

Plaintiff takes the position that the "location" of the accounts is not relevant to the Court's analysis because a garnishment attaches to a garnishee's intangible indebtedness, as opposed to a physical account. Garnishee takes the position that the Court should view the Defendant's accounts as tangible items, and therefore the "location" of the accounts is relevant.

The Court agrees with Plaintiff's position. Pursuant to Fla. Stat. § 77.01 (2022), a garnishment action is not necessarily based on the location of any property in the possession of a third party. Rather, a garnishment subjects "any debt due to defendant by a third person," or "any tangible or intangible personal property of defendant in the possession or control of a third person." Fla. Stat. § 77.01 (2022). "Garnishment is available to subject any debt due to a judgment debtor by a third person to the claims of the judgment creditor." *Coleman Music & Games* Co. v. *McDaniel,* 411 So. 2d 193, 193 (Fla. 5th DCA 1981). Additionally, Fla. Stat. § 77.04 (2022), Fla. Stat. § 77.06 (2022), and Fla. Stat. § 77.083 (2022) support the idea that garnishment is based on a garnishee's indebtedness.

It is undisputed that at the time of service of the Writ, Garnishee was indebted to Defendant in the amount of $1,752.45. It is also undisputed that this Court has personal jurisdiction over the Garnishee. The "location" of the accounts is irrelevant to determining whether the Garnishee is indebted to the Defendant. Therefore, the Garnishee is subject to garnishment of its indebtedness to Defendant, and Plaintiff is entitled to Final Judgment in Garnishment.

The Court Has Jurisdiction Over the Accounts

Even if the Court were to view the Defendant's accounts as tangible items, the Court does have jurisdiction to enforce the Writ. Again, it is undisputed that this Court has personal jurisdiction over Garnishee. "It has long been established in this and other jurisdictions that a court which has obtained in personam jurisdiction over a defendant may order that defendant to act on property that is outside of the court's jurisdiction, provided that the court does not directly affect the title to the property while it remains in the foreign jurisdiction." *Gen. Elec. Capital Corp. v. Advance Petroleum, Inc.,* 660 So. 2d 1139, 1142 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2096a]. "[A]lthough a court may not directly act upon real or personal property which lies beyond its borders, it may indirectly act on such property by its assertion of in personam jurisdiction over the defendant." *Id.* at 1143. "This Court has recognized that it is permissible for a trial court to direct a defendant over whom it has personal jurisdiction to act on property located outside its jurisdiction, if the title to the property is not directly affected while the property remains in the foreign jurisdiction." *Schanck v. Gayhart,* 245 So. 3d 970, 973 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D965a] (relying on *Ciungu v. Bulea,* 162 So. 3d 290, 294 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D689c]).

Additionally, very recently the Florida Supreme Court held, "[I]t is well-established that a court's personal jurisdiction over a defendant gives the court the "power to require a defendant 'to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.' " " *Shim v. Buechel,* 339 So. 3d 315, 317-18 (Fla. 2022) [47 Fla. L. Weekly S133a] (quoting *Fall v. Eastin,* 215 U.S. 1, 8 (1909)). This is also supported in the context of garnishment by *Stansell v. Revolutionary Armed Forces of Columbia,* 19-20896-CIV, 2019 WL 5290922, (S.D. Fla. Sept. 26, 2019) ("*Stansell II*") and *Stansell v. Revolutionary Armed Forces of Columbia,* 19-20896-CIV, 2020 WL 5547916 (S.D. Fla. Apr. 30, 2020), rev'd and remanded sub nom. *Stansell v. Revolutionary Armed Forces of Colombia,* 45 F.4th 1340 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1621a] ("*Stansell III*").

As this Court may compel Garnishee to act, this Court may direct Garnishee's indebtedness to Defendant to be due to Plaintiff pursuant to Fla. Stat. Chapter 77 (2022). Therefore, Plaintiff is entitled to Final Judgment in Garnishment.

Applicability of the CFPB Consent Order

Garnishee takes the position that the Garnishee must comply with the Consent Order entered by the Consumer Financial Protection Bureau (CFPB) in *Bank of Am., N.A.,* 2022 WL 2974669 (2022) (the "Consent Order"), and as a result cannot participate in the garnishment of the Defendant's accounts. Plaintiff takes the position that the Consent Order does not apply for various reasons. The Court agrees with Plaintiff's position.

First, the CFPB is a federal agency with authority to "implement and . . . enforce Federal consumer financial law". *See* 12 U.S.C. § 5511(a). For the purpose of establishing authority for the CFPB, "The term 'consumer' means an individual or an agent, trustee, or representative acting on behalf of an individual." 12 U.S.C. § 5481(4). Additionally, as it specifically relates to the CFPB's authority over financial institutions such as Garnishee, it is repeatedly constrained to the financial institution's relationship with consumers.

The Defendant is not an individual, trustee, or representative acting on behalf of an individual. Therefore, the Defendant clearly is not a consumer. Instead, the Defendant is a corporation. Garnishee's Brief does not at all address how or why this Court should apply the Consent Order to these non-consumer accounts. Accordingly, any directive or Consent Order from the CFPB has no application to corporate accounts, such as those at issue.

Second, the Consent Order is not controlling because none of Plaintiff, Defendant, or Garnishee were parties to the Consent Order. The Consent Order was exclusively between the CFPB and Bank of America. In fact, the Garnishee even admits in its Brief that "Navy Federal does not suggest that it [the Consent Order] is controlling". Therefore, not only are Plaintiff, Defendant, and Garnishee not bound by the Consent Order, but certainly this Court is not bound by the Consent Order.

Finally, a thorough reading of the Consent Order does not prevent Garnishee from responding to and processing garnishment notices against out-of-state bank accounts or withholding funds pursuant to a Florida Writ of Garnishment. Instead, for example in paragraph 61(f), the Consent Order required Bank of America to "[c]ease freezing or holding funds in an Out-of-State Deposit Account on receipt of an Out-of-State Garnishment Notice from any Restriction State, unless required to do so under state law." The Consent Order does not dictate what state law is; instead, it directed Bank of America merely to do as required under state law. Because Florida law does require Garnishee to respond to and process garnishment notices and withhold funds pursuant to a Florida Writ of Garnishment, the Consent Order does not prevent Garnishee from compliance with this garnishment.

For the above reasons, it is

ORDERED AND ADJUDGED that:

1. The Court finds in favor of the Plaintiff.

2. Plaintiff, THE OHIO CASUALTY INSURANCE COMPANY AND OHIO SECURITY INSURANCE COMPANY, a New Hampshire corporation authorized to do business in the State of Florida, shall have, receive, and recover from Garnishee, NAVY FEDERAL CREDIT UNION, the sum of $1,752.45 for which amount let execution issue forthwith. Upon payment by Garnishee of

the above sum, Garnishee shall release any additional funds being held pursuant to the Writ of Garnishment back to the account holder(s).

3. Payment shall be made payable and sent to SPRECHMAN & FISHER, P.A. TRUST ACCOUNT; SPRECHMAN & FISHER, P.A., 2775 Sunny Isles Blvd., Suite 100, Miami, Florida 33160-4007, file #: 150571.

* * *

Criminal law—Immunity—Stand Your Ground law—Defendant's use of force to prevent mother of his children from entering his residence and driving away with children while she was impaired—Motion to dismiss alleging defendant reasonably believed use of force was necessary to defend himself from mother's imminent use of force, to prevent imminent commission of forcible felony, and to prevent imminent death or great bodily harm to children was sufficient to raise prima facie claim for self-defense immunity, and state failed to prove by clear and convincing evidence that defendant was not entitled to immunity—Motion to dismiss granted

STATE OF FLORIDA, v. AUSTIN SMITH, Defendant. County Court, 5th Judicial Circuit in and for Hernando County. Case No. 2022-MM-1983. December 13, 2022. Kurt E. Hitzemann, Judge. Counsel: Tik Kwok and Kasey Cadavieco, Assistant State Attorneys, Hernando County State Attorney's Office, Brooksville, for State. Keeley R. Karatinos, Karatinos Law, PLLC, Dade City, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON IMMUNITY PURSUANT TO FLORIDA STATUE § 776.032, § 776.012 AND § 776.013

THIS CAUSE, having come to be heard on December 8, 2022 on Defendant's Motion to Dismiss Based on Immunity Pursuant to Florida Statute § 776.032, § 776.012 and § 776.013 (hereinafter "Stand Your Ground Motion"), and the State's Motion to Strike Defendant's Motion to Dismiss (hereinafter "Motion to Strike"). Assistant State Attorneys Tik Sang Kwok, Esq. and Kasey Cadavieco, Esq., represented the State of Florida. Ms. Keeley R. Karatinos, Esq., represented the Defendant, Austin Smith. The State presented the testimony of Ms. Katie Marie Sheck and Deputy Johnathan Weeks of the Hernando County Sheriff's Office. Having reviewed the motions, having received documentary and testimonial evidence, having heard the arguments of the State and Defendant's Counsel, and being otherwise fully informed in the premises, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE DENIAL OF STATE'S MOTION TO STRIKE

1. The State argued in its Motion to Strike and at the hearing that the Defendant's Stand Your Ground Motion insufficiently alleged that Defendant was defending against an imminent use of force. The facial sufficiency of a motion to dismiss is a legal conclusion. *Fla. Bar v. Greene,* 926 So. 2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S212a]; *Derossett v. State,* 311 So. 3d 800, 890 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2713a].

2. Defendant's Motion to Dismiss alleged that Ms. Sheck and Mr. Smith shared two children in common, and that Mr. Smith had lawful custody of the two children. That Mr. Smith contacted Ms. Sheck to inform her that he would be staying overnight at a Hernando County residence and that she was welcome to pick the children up at that location. Ms. Sheck agreed to pick the children up at 9:00 P.M. on August 7, 2022, after she got off work at Glory Days in Wesley Chapel where she serves alcohol. Ms. Sheck did not arrive at the Hernando residence at the agreed time, that she did not return calls or texts for hours, and that she arrived at 2:15 A.M. on August 8, 2022. When Ms. Sheck arrived, Mr. Smith observed Ms. Sheck to smell of alcohol, exhibiting unsteady balance, bloodshot, watery eyes, and slurred speech. Ms. Sheck demanded to take the children, wherein an argument began after Mr. Smith refused to allow her to take the children and drive back to Pasco County with them in the car in an apparently inebriated state. Mr. Smith revoked his permission to take the children and enter the home, instructing her to leave. Ms. Sheck did not have the consent of Mr. Smith or any resident of the Hernando residence to enter the home. Ms. Sheck pushed Mr. Smith in the face as she tried to get around him to enter the residence to take the children, at which point a physical altercation ensued. Mr. Smith argued he was justified in his use of force because he reasonably believed that using such force was necessary to defend himself from Ms. Sheck's imminent use of force, to prevent the imminent commission of a forcible felony, to wit: Burglary; and to prevent the imminent death or great bodily harm of his children, in that he prevented Ms. Sheck from driving impaired with the children in the car.

3. Under §§ 776.032(4), Ms. Smith's sole burden is to raise a prima facie claim of self-defense immunity. A prima facie claim of immunity is "an assertion, at first glance, is sufficient to establish a fact or right but is yet to be *disproved* or rebutted by someone." *Derossett v. State,* 311 So. 3d 880, 890 (Fla. 5th 2019) [44 Fla. L. Weekly D2713a] (quoting *Jefferson v. State,* 264 So. 3d 1019, 1027 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D135a]. "Further, the language in this statute requiring that the self-defense immunity claim be 'raised' by the defendant merely requires the defendant '[t]o bring up for discussion or consideration; to introduce or put forward.' " *Id.* (quoting *Jefferson,* 264 So. 2d at 1027)(quoting *Raise,* Black's Law Dictionary (10th ed. 2014)).

4. This Court determined at the hearing that Defendant's Stand Your Ground Motion was facially sufficient, denied the State's Motion to Strike, finding that the burden had shifted to the State to prove by clear and convincing evidence that Mr. Smith was not entitled to immunity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING DEFENDANT'S STAND YOUR GROUND MOTION

5. This Court finds that the State did not prove by clear and convincing evidence that Mr. Smith was not entitled to immunity. Ms. Sheck's testimony was inconsistent with the evidence submitted at hearing, by her own admission during cross-examination, and the testimony of Deputy Weeks. The State's presentation was inconsistent and failed to establish by clear and convincing evidence that Mr. Smith was not entitled to immunity.

ORDERED AND ADJUDGED

a. that the Motion to Dismiss is GRANTED with prejudice.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Traffic infraction—Defendant was lawfully stopped for speeding and lawfully detained until issuance of speeding citation—Continued detention after issuance of citation for purpose of conducting DUI investigation was not lawful—Although testimony that defendant had odor of alcohol was unimpeached, officers' claims regarding other indicia of impairment were undermined by video from body cameras and by statements indicating that arresting officer's primary interest was adding another DUI arrest to his record rather than conducting objective investigation—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. ENRIQUE SANTOS, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case Nos. 2022 CT 3728 and 2022 CT 3729. February 14, 2023. Hal C. Epperson, Jr., Judge. Counsel: Shydarrius Zhkei Jackson, Office of the State Attorney, Kissimmee, for Plaintiff. Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

This matter came before the court for hearing on February 3, 2023 on defendant's Motion to Suppress. In his motion, the defendant asserts that all evidence obtained should be suppressed. First, defendant asserts that law enforcement lacked probable cause for an infraction to conduct a traffic stop. Secondly, the defendant asserts that law enforcement lacked reasonable suspicion for driving under the influence to justify an investigatory detention. Third, the defendant asserts that law enforcement lacked probable cause to place him under arrest for driving under the influence. At hearing, the state conceded that the defendant enjoyed standing to challenge the stop, the detention, and the arrest. The state thereby assumed the burden of establishing the reasonableness of law enforcement's actions with respect to each level of detention as well as for the ultimate arrest. The state called two witnesses to testify at hearing, City of Kissimmee Police Corporal Nieves and City of Kissimmee Police Officer Quiles-Davila. Additionally, the body worn camera evidence from each officer was admitted.

EVIDENCE AT HEARING

Corporal Nieves conducted a traffic stop of the defendant for speeding. While standing outside of the defendant's car and speaking to the defendant, Corporal Nieves smelled an odor of alcoholic beverages. Corporal Nieves also testified that the defendant was slow in retrieving documentation and that the defendant's eyes were watery. Corporal Nieves returned to his patrol car to write a speeding ticket and checked the DAVID system and discovered that the defendant had a prior DUI arrest(s) and a prior refusal. Corporal Nieves called Officer Quiles-Davila to the scene for a DUI investigation. When Officer Quiles-Davila arrived on scene, Corporal Nieves advised of the observations made of the defendant. Corporal Nieves also elected to advise Officer Quiles-Davila of the fact that the defendant had a prior DUI and prior refusal. In response to hearing of the defendant's prior DUI and refusal, Officer Quiles-Davila responded "beautiful, I love it". The body worn camera evidence captures the tone in which this exclamation is made by Officer Quiles-Davila. The tone of satisfaction heard in Officer Quiles-Davila's voice is consistent with the content of the expression itself. Officer Quiles-Davila explicitly and emotively deemed it a beautiful circumstance that he was commencing his DUI investigation on someone with a prior record for DUI.

Officer Quiles-Davila approached the defendant-motorist who was still sitting in the driver's seat and spoke with him for approximately three minutes. The defendant was questioned as to where he was coming from and where he was heading. The defendant indicated that he was coming from his home in Hunter's Creek and travelling to his girlfriend's house for the night which was about a mile away from the location of the traffic stop. The defendant indicated that, prior to leaving his home, he had been working. Specifically, he testified that he had been doing documentation in conjunction with his work as a physical therapist. He also stated that he had left about an hour earlier. After this mere three-minute conversation with the defendant, Officer Quiles-Davila returned to Corporal Nieves' patrol car and announced that the defendant was definitely "Signal One". Officer Quiles-Davila briefed the corporal on the conversation. This conversation is captured on the body worn camera evidence. Officer Quiles-Davila construed the defendant's roadside statements as confusing and self-contradictory and therefore evidence of impairment. Corporal Nieves advised Officer Quiles-Davila that the defendant would most likely refuse a breath test due to a prior refusal. Officer Quiles-Davila responded "That's fine if he wants to refuse then I'll just charge him for the second refusal, that will give him two misdemeanors, the DUI and then the refusal".

Corporal Nieves then re-approached the defendant-motorist and had him exit the vehicle to issue him the speeding citation. This is the first instance in which the defendant exited the vehicle. Once the citation was issued and explained, Corporal Nieves informed the defendant that Officer Quiles-Davila was going to continue speaking with him and then he would be "good to go". Officer Quiles-Davila then requested the defendant to perform field sobriety exercises by stating the following: "to make sure that your okay to drive so we can let you go to your girlfriend's house, I'm asking if your willing to do some field sobriety exercises so I can let you go, okay?" The defendant declined to do the field sobriety exercises, citing an ankle replacement. Officer Quiles-Davila made the request again but the defendant refused. The defendant was then placed under arrest. Officer Quiles-Davila read the defendant Implied Consent and requested a breath test but the defendant refused.

Following the arrest, Officer Quiles-Davila asks whether a fellow officer has any tow sheets, announcing with a chuckle that he has run out of tow sheets because he does so many DUI arrests. When informed by another officer that the defendant might have more than one DUI prior, Officer Quiles-Nieves once again exclaims "oh beautiful". When informed that a prior might have involved property damage, Officer Quiles-Nieves responds with a high pitched "whoo"—if he was convicted, it bumps to felony". He further opines "that would be a good one, plus, I'm going to charge him with a refusal. . ." A few minutes later he states "they're going to suspend this forever", referring to the defendant's driver's license. Officer Quiles-Davila continues to make a series of statements concerning his fondness for making DUI arrests, all of which are not referenced in this order but are captured on body worn camera admitted in evidence. Worthy of note, however, are the following exchanges:

Officer Quiles-Davila expresses appreciation to Corporal Nieves for calling him to the scene of the DUI, as reflected in the following dialogue:

Quiles-Davila: You are awesome.

Corporal Nieves: I appreciate you coming out.

Quiles-Davila: I love these DUIs, I love these so..

Corporal Nieves: I know you do—that's why I'd rather give it to someone who loves them than someone who doesn't.

Quiles-Davila: I love these.

After this dialogue, Officer Quiles-Davila rehearses the facts of another DUI which he was actively working and declared it to be "the best case ever".

A few moments later, another officer arrives on scene and the following dialogue takes place between this officer and Officer Quiles-Davila:

Officer: every night (a reference to DUI arrest)

Quiles-Davila: this is his fourth.

Officer: every shift that I'm working with you, you always have a DUI.

Quiles-Davila: yeah.

Officer: you told me you want to beat Ford (an apparent reference to longtime KPD DUI Officer Glenn Ford)

Quiles-Davila: Yeah, I know.

Officer: Your going to have to work hard for that.

Quiles-Davila: I'm trying; I am trying.

Officer: Your missing probably just like 400, that's it. (laughter)

Quiles-Davila: Yeah, pretty much (laughter)

ANALYSIS OF ISSUES—TRAFFIC STOP

Corporal Nieves had probable cause that the defendant committed a traffic infraction and conducted a lawful traffic stop for speeding. The defendant conceded this at hearing. Therefore, the defendant was lawfully detained on scene until he was issued the traffic citation for speeding. The testimony and body worn camera evidence demon-

strates that Corporal Nieves acted diligently in going through the standard procedures for issuing the citation and there was no unreasonable delay.

INVESTIGATORY DETENTION FOR DUI

Once the uniform traffic citation was issued to the defendant, he was free to leave and no longer subject to detention by law enforcement unless there was reasonable suspicion to believe that he had committed a crime. The state argues that, based upon the observations of Corporal Nieves and Officer Quiles-Davila, there was reasonable suspicion to believe the defendant was driving under the influence at the time the defendant was issued the citation. To determine this question, one must consider the totality of the interactions each officer had with the defendant from the time of the traffic stop until the citation was issued. Corporal Nieves spent one minute and ten seconds speaking with the defendant following the traffic stop before returning to his vehicle to write the traffic citation. While Corporal Nieves testified at hearing that he observed numerous indicia of impairment during this conversation, the body worn camera of Corporal Nieves depicts the defendant in a much more favorable light. The defendant's speech is very clear and not slurred. The defendant is responsive to the questions asked of him and retrieves the items requested of him with promptitude, though he had to attempt to obtain the most recent copy of his registration via phone. Certainly, common sense would dictate that recordings are not capable of depicting sights, sounds, and smells to the same qualitative degree those observations can be made and discerned in person. For example, body worn camera evidence does not detect and reproduce an odor of alcohol. Corporal Nieves testimony concerning an odor of alcoholic beverages was unimpeached. Notwithstanding this, however, this court saw no other indicators of impairment while watching the defendant conversing with Corporal Nieves.

Officer Quiles-Davila arrived on scene and before making contact with the defendant was informed by Corporal Nieves that the defendant had a prior DUI and refusal. As indicated above, Officer Quiles-Davila responded by stating "beautiful, love it". Officer Quiles-Davila then approached the defendant who was still sitting in the driver's seat and engaged him in conversation for three minutes. The subject matter of the conversation concerned the defendant's point of origin and intended destination. Following this conversation, Officer Quiles-Davila returned to Corporal Nieves patrol vehicle and opined to Corporal Nieves that defendant was definitely "signal one". In support of this conclusion, Officer Quiles-Davila described the defendant's statements as confusing, inconsistent and self-contradictory. Officer Quiles-Davila's interaction with the defendant is captured on his body worn camera and was admitted into evidence. This court could clearly hear the dialogue between the defendant and Officer Quiles-Davila. The defendant's speech was clear. His speech did not in any way sound slurred. He was promptly responsive to the officer's questions. More importantly, this court did not construe the substance of the defendant's statements to be confusing, inconsistent, or self-contradictory.

As set out above, more conversation takes place between Corporal Nieves and Officer Quiles-Davila before Corporal Nieves returns to the defendant to issue him the speeding ticket. During this conversation, Corporal Nieves predicts the defendant will probably refuse the breath test due to a prior refusal which draws the response from Officer Quiles-Davila that he will then arrest him for both DUI and the Refusal. This statement by Officer Quiles-Davila takes place prior to what is often viewed as the formal commencement of the DUI investigation—the request to perform field sobriety exercises. According to his own words, Officer Quiles-Davila had already determined he had sufficient cause to arrest the defendant for DUI. Corporal Nieves then returns to the defendant's vehicle, has the defendant exit, and then explains and issues the traffic citation for speeding. When the defendant exited the vehicle and walked to the back of his vehicle, he exhibited no signs of impairment. While Corporal Nieves spoke to him concerning the citation, the defendant stood with a steady gait with no indication of instability. The citation was issued and the question before the court is whether, at this juncture in the proceedings, there was reasonable suspicion to detain the defendant for a DUI investigation.

There is an undeniable disparity between what is depicted on the body worn camera evidence and some of the testimony adduced at hearing. It is certainly possible that some of this disparity can be attributed to the variance in quality between sensory perceptions made in real time on scene and those inherent limitations associated with recordings. A person on scene at a traffic stop can smell the odors of the impurities of an alcoholic beverage. A judge watching a recording of the same traffic stop cannot. Where there is discrepancy between the testimony concerning an event and video evidence of the same event, a fact finder must make an accounting for such disparity. Does the disparity lie in the shortcomings of the recording or does the disparity undermine the veracity of the testifying witness?

Implicit in the burden of proof is a burden of credibility. In other words, it is not enough that an officer's testimony clangs out the conventional bells of impairment—odor of alcohol, glassy eyes, slurred speech. The notes must also ring true. Generally, the roadside banter on scene between police officers is wholly irrelevant to the court's consideration as to whether their testimony establishes reasonable suspicion or probable cause. It is well settled that the subjective intent or sentiment of an arresting officer is not relevant. Rather, the question is simply whether the facts objectively establish the respective standard for either investigatory detention or arrest. In this case, however, the many words of Officer Quiles-Davila matter. Officer Quiles-Davila's consistent and repeated commentary on scene is indicative of an officer whose primary interest was that of making a DUI arrest rather than conducting an objective DUI investigation.

The duty of a police officer is often epitomized by the slogan "protect and serve". DUI is a serious offense which poses real danger to the motoring public. There is nothing wrong with an officer experiencing satisfaction by doing his job removing impaired motorists from the highway. However, Officer Quiles-Davila's expressed gusto for piling up numbers of DUI arrests to beat Officer Ford's numbers strikes one not as a commitment to public safety but rather selfish ambition. When an officer's stated objective is to set a record for arrests, it calls into question the objectivity of his work product. Left unchecked, it can become a recipe for the arrest of innocent citizens.

This court does not find the collective testimony to be credible, particularly with respect to the testimony of Officer Quiles-Davila. His testimony is undermined by his own body worn camera and his credibility is undermined by his wagging tongue. The evidence did sufficiently establish that the defendant was speeding. Additionally, the proposition that the defendant emitted an odor of alcoholic beverages was not impeached. However, a speeding infraction coupled with an odor of alcohol falls short of establishing reasonable suspicion for continued detention once the citation was issued. All evidence obtained subsequent to the issuance of the traffic citation for speeding is inadmissible. Given the finding that law enforcement lacked a reasonable suspicion to detain the defendant for a DUI investigation, it is unnecessary for the court to address the question of whether there was probable cause for arrest.

WHEREFORE, the Defendant's Motion to Suppress is **GRANTED**, and all evidence obtained subsequent to the issuance of the speeding ticket to the defendant is inadmissible.

* * *

Garnishment—Location of accounts—Writ of garnishment attaches to Florida judgment debtor/depositor's interest in Virginia credit union account—Physical location of account is irrelevant to garnishment, notwithstanding account documents providing that "members' funds and checking, savings, and all other accounts are located in the Commonwealth of Virginia"—Funds are available upon demand of Florida resident debtor at locations in Florida and are subject to garnishment in Florida

SURF CONSULTANTS, INC., as successor in interest to Summit Financial Corp., Plaintiff, v. AMII GRIFFIN, Defendant, and NAVY FEDERAL CREDIT UNITION, Garnishee. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-CC-15403-O. June 7, 2023. Tina L. Caraballo, Judge. Counsel: Ryan E. Sprechman, Sprechman & Fisher, P.A., Miami, for Plaintiff. W. Patrick Ayers, for Garnishee.

[Appeal filed. (Fla. 6DCA, Case No. 6D23-2983]

FINAL JUDGMENT AGAINST GARNISHEE

THIS CAUSE came on for consideration after Plaintiff and Garnishee, in lieu of the non-jury trial on Plaintiff's Reply to Garnishee's Answer to the Writ of Garnishment served on Garnishee on 11/04/2022, submitted a Joint Stipulation of Facts and Documentary Evidence for Consideration in Lieu of Trial, filed on 04/20/2023. The parties filed separate Trial Briefs, Plaintiff on 04/25/2023 and Garnishee on 05/05/2023.

In this garnishment action, there is no dispute the Court has jurisdiction over the Garnishee, Navy Federal Credit Union. The Garnishee disputes this Court's jurisdiction over monies deposited in the Defendant, judgment debtor's, savings and checking accounts with the institution. The Garnishee's answer admits it was indebted to Defendant in the sum of $5,556.90 when the writ was served.

The relevant facts are a Florida resident opened accounts in a Florida branch of Navy Federal Credit Union. When the account was opened, the agreement between the Defendant and Navy Federal Credit Union provided "Navy Federal accounts are maintained and governed in accordance with federal law and the laws of the Commonwealth of Virginia . . . ." In September 2022, Navy Federal changed its account disclosure with its depositors to provide "Navy Federal members' funds and checking, savings, and all other accounts are located in the Commonwealth of Virginia . . . ."

Garnishment is a statutory method to collect a money judgment. Section 77.01, Florida Statutes, provides for garnishment:

> Every person or entity who has sued to recover a debt or has recovered judgment in any court against any person or entity has a right to a writ of garnishment, in the manner hereinafter provided, to subject any debt due to defendant by a third person or any debt not evidenced by a negotiable instrument that will become due absolutely through the passage of time only to the defendant by a third person, and any tangible or intangible personal property of defendant in the possession or control of a third person. The officers, agents, and employees of any companies or corporations are third persons in regard to the companies or corporations, and as such are subject to garnishment after judgment against the companies or corporations.

The garnishment statutes further provide:

> The writ shall require the garnishee to serve an answer on the plaintiff within 20 days after service of the writ ***stating whether the garnishee is indebted to the defendant at the time of the answer***, or was indebted at the time of service of the writ, plus up to 1 business day for the garnishee to act expeditiously on the writ, or at any time between such times; in what sum and what tangible or intangible personal property of defendant the garnishee has in his or her possession or control at the time of his or her answer, or had at the time of the service of the writ, or at any time between such times; ***and whether the garnishee knows of any other person indebted to defendant, or who may have any of the property of defendant in his or her possession or control.*** The writ shall state the amount named in plaintiff's motion. If the garnishee is a business entity, an authorized employee or agent of the entity may execute, file, and serve the answer on behalf of the entity.

§ 77.04, Fla. Stat. (emphasis supplied).

"Possession or control" is not defined. Our court's have defined possession as "the fact of having or holding property in one's power; the exercise of dominion over the property." *Arnold, Matheny and Eagan, PA v. First Am. Holdings, Inc.,* 982 So. 2d 628, 633 (citation omitted). "Control is defined as 'to exercise power or influence over.' " *Id.* (citation omitted). An example of funds over which a garnishee does not have possession or control include utility escrow accounts when all conditions of the escrow have not been completed. *See Fla. Pub. Serv. Comm'n v. Pruitt, Humphress, Powers & Munroe Advert. Agency,* 587 So. 2d 561, 563 (Fla. 1st DCA 1991).

When funds are deposited with the credit union, ownership transfers to the credit union. The depositor is a creditor of the institution with the institution agreeing to refund the same amount, or any part thereof, on demand. While neither party argued otherwise, this is consistent with Virginia law.

In *PS Bus. Parks, L.P. v. Deutsch & Gliden, Inc.,* 287 Va. 410, 417 (Va. 2014), the Virginia Supreme Court explained the relationship between depositor and bank: "The relationship between a general depositor and the bank in which its deposit is made is simply that of creditor and debtor. The monies deposited become the property of the bank and the bank becomes a debtor to that depositor." (citation omitted). The Court further explained that "garnishment proceedings are 'substantially . . . action[s] at law by the judgment debtor in the name of the judgment creditor against the garnishee, . . . the judgment creditor stands upon no higher ground than the judgment debtor and can acquire no greater right than such debtor . . . possesses.' " *Id.* (citation omitted).

In Florida, garnishment proceedings are quasi in rem. *Suntrust Bank v. Arrow Energy, Inc.,* 199 So. 3d 1026, 1028 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1559a]. The "court must have both the jurisdictional authority to adjudicate the class of cases to which the case belongs and jurisdictional authority over the property which is the subject matter of the controversy." *Id.* (citation omitted). "The court acquires jurisdiction over the garnishee to the extent of the property garnished, as the ***extent of the garnishee's liability is the amount that it owes to the judgment debtor***." *Id.* (emphasis supplied) (citation omitted).

The writ of garnishment is therefore attaching to the depositor's interest (right to refund of the amounts deposited) in the account, subject to the credit union's right of setoff as to the minimum balance asserted in its answer. The physical location of the account is irrelevant to the garnishment. The credit union does not make its depositors travel to the Commonwealth of Virginia to access the funds on deposit. The funds are available upon demand of the Florida resident debtor at locations in Florida and are subject to garnishment in Florida.

The Court rejects garnishee's contention that it is constrained by a consent order between the Consumer Financial Protection Bureau and Bank of America. Accordingly, it is

ORDERED AND ADJUDGED that:

1. Plaintiff, SURF CONSULTANTS, INC. as successor in interest to Summit Financial Corp., shall have, receive, and recover from Garnishee, NAVY FEDERAL CREDIT UNION, the sum of $5,556.90 for which amount let execution issue forthwith. Upon payment by Garnishee of the above sum, Garnishee shall release any additional funds being held pursuant to the Writ of Garnishment back to the account holder(s).

2. Payment shall be made payable and sent to SPRECHMAN & FISHER, P.A. TRUST ACCOUNT; SPRECHMAN & FISHER,

P.A., 2775 Sunny Isles Blvd., Suite 100, Miami, Florida 33160-4007, file #: S21448.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Agency inspection that was required before Intoxilyzer could be returned to evidentiary use following annual inspection was not conducted in substantial compliance with administrative rules where the instrument was re-tested after two failed tests and no notation was made of the reasons for repeating the test—Motion to suppress breath test results is granted—Subsequent monthly agency inspections prior to defendant's breath test did not cure lack of substantial compliance

STATE OF FLORIDA, Plaintiff, v. JACQUELIN NICOLE MITCHELL, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2022CT-001024LD. Division L1. April 28, 2023. Mary Catherine Green, Judge. Counsel: William Friel, Assistant State Attorney, State Attorney's Office, for Plaintiff. Leslie M. Sammis, Sammis Law Firm, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPRESS OR EXCLUDE BREATH TEST RESULTS FOR LACK OF SUBSTANTIAL COMPLIANCE

In the above-referenced cause, Defendant was arrested for Driving Under the Influence (DUI). Subsequent to the arrest, Defendant submitted to breath alcohol testing with an Intoxilyzer 8000 breath test instrument, the results of which the State intends to introduce into evidence at trial, pursuant to Florida Statute 316.1932 (also known as the Implied Consent Law). Defendant's Motion to Suppress challenges the admissibility of the breath test results based upon an alleged failure to comply with the Implied Consent Law (316.1932, *Fla. Stat.*) and Rule 11D-8, Florida Administrative Code. As a result, the Defendant argues her breath results are scientifically unreliable and inadmissible.

Upon sufficient showing by the defense that the state failed to substantially comply with Florida Statute 316.1932 and Rule 11D-8, the burden of proof shifted to the state to show substantial compliance, or that any noncompliance was insubstantial.

During the evidentiary hearing held March 31, 2023, the State presented testimony from Officer Camilo Almedia, the Agency Inspector for the Intoxilyzer 8000 instrument at the Lakeland Police Department, and Taylor Gutschow, a Department Inspector of the Intoxilyzer 8000 instrument for the Florida Department of Law Enforcement. The Court also received exhibits into evidence.

Section 316.1932(2), Fla. Stat. states "[t]he Alcohol Testing Program within the Department of Law Enforcement is responsible for the regulation of the operation, inspection, and registration of breath test instruments utilized under the driving. . .under the influence provisions. . . ." § 316.1932(1)(a)2 Fla. Stat. Further, "[a]n analysis of a person's breath, in order to be considered valid under this section, must have been performed substantially according to methods approved by the Department of Law Enforcement." 316.1932(1)(b)2, Fla. Stat. Those approved methods are codified in Chapter 11D-8 of the Florida Administrative Code (FAC).

Rule 11D-8 and its several subsections provide the following authority pertinent to the testimony, exhibits, and argument before the Court:

a. An "Approved Breath Alcohol Test" requires a minimum of two breath samples analyzed using "an approved breath test instrument". 11D-8.002, FAC.

b. An "Evidentiary Breath Test Instrument" is an instrument approved by the Department under 11D-8.002, FAC.

c. An instrument registration, when issued by the Department, certifies that the instrument meets the requirements of FAC and is authorized to be placed into evidentiary use. 11D-8.002, FAC.

d. Registered breath test instruments shall be inspected by the Department at least once each calendar year, and further must be conducted subsequent to any repair of the instrument. 11D-8.004, FAC.

e. Agency inspections conducted by the Agency Inspector shall occur at least once each calendar month in accordance with Agency Inspection Procedures as codified in 11D-8.006 FAC.

Central to the argument in this case is whether pertinent agency inspections of the Intoxilyzer 8000 at the Lakeland Police Department were performed in substantial compliance with Rule 11D-8, FAC. More specifically, Defendant argues that the Intoxilyzer 8000, Serial number 80-005810, had issues and irregularities with several monthly agency inspections, that the inspections themselves were not performed in substantial compliance with Rule 11D-8, FAC, and that the instrument should have been removed from service prior to being used to administer the breath test to Defendant. As a result of Defendant's breath test being conducted on an instrument that should not have been in service, Defendant urges the Court to grant her Motion to Suppress or Exclude her Breath Test Results as unreliable. State argues that, regardless of whether there were other issues and irregularities, the monthly agency inspections of the Intoxilyzer 8000, Serial number 80-005810, for the month immediately preceding and the month of Defendant's breath test were performed in substantial compliance with 11D-8, FAC and that the instrument was in substantial compliance. Therefore, State urges the Court to find that the state has successfully rebutted any defense allegations that the state failed to substantially comply with Florida Statute 316.1932 and 11D-8 and that the Motion to Suppress or Exclude Breath Test Results should be denied.

After considering the testimony and exhibits introduced into evidence at hearing, the Court makes the following findings:

1. Defendant's breath test was conducted on February 12, 2022 utilizing Intoxilyzer 8000, serial number 80-005810 (hereafter "the instrument"). The readings from the instrument indicated breath alcohol contents of 0.112 and 0.109 g/210L.

2. The instrument was registered and approved for evidentiary use on June 16, 2013.

3. On June 29, 2021, the Department conducted an annual inspection of the instrument and certified that it was in compliance with 11D-8, FAC, and it was returned to evidentiary use with Lakeland Police Department. The Department Inspection Processing Sheet noted that an agency inspection of the instrument must be conducted prior to evidentiary use.

4. On July 9, 2021, an agency inspection of the instrument was conducted at the Lakeland Police Department by Officer Almedia, the Agency Inspector. The instrument failed the first inspection by producing "ambient fail", "control outside tolerance", and "non-compliance" error codes. No reason was noted on the Agency Inspection Report for repeating the test. However, without explanation, Officer Almedia conducted a second test on the instrument. The instrument also failed the second test showing "control outside tolerance," "control outside tolerance", and "non-compliance error codes". Officer Almedia then conducted a third test on the instrument, noting on the Agency Inspection Report "Air tight seal checked and confirmed, reconnected, met standard". Officer Almedia certified on the Agency Inspection Report that the instrument complied with 11D-8, FAC and that he performed the inspection in accordance with the provisions of Chapter 11D-8, FAC.

5. 11D-8.006 directs, "If any test is out of compliance, the instrument will prompt the agency inspector to repeat . . .the test. Each test may only be repeated once. If a test must be repeated, the reason must be recorded . . . .on the Agency Inspection Form". . *See* 11D-8.006, FAC. The July 9, 2021 Agency Inspection was the first inspection following the instrument being returned from the Depart-

ment, was required before the instrument was placed into evidentiary use, and was not in compliance with Rule 11D-8, FAC.

6. There were no issues noted for the required monthly inspection in August, 2021.

7. In September, 2021, the instrument failed the agency inspection during the first test. The test was repeated, the reason was noted on the Agency Inspection Report, and there were no issues with the second test. The instrument was certified as in compliance with 11D-8, FAC.

8.There were no issues noted for the required monthly inspection in October, November, and December, 2021.

9. On January 25, 2022, the instrument failed the agency inspection during the first test showing "RFI Detect" and "05:Interferent Detect" error codes. The Agency Inspection Report notes the inspector "accidentally" used the wrong sim and the instrument was too close to the printer which caused RFI. The sim card was replaced, the instrument was moved away from the printer, the test was repeated, and the reasons handwritten on the Agency Inspection Report. There were no issues with the second test. The instrument was certified as in compliance with 11D-8, FAC.

10. There were no issues noted for the required monthly inspection in February, 2022 and March, 2022.

11. In April 2022, the instrument did not pass its annual inspection, the Department required it to remain out of evidentiary use and recommended the Lakeland Police Department send it for repairs.

Based upon these findings, the Court concludes the July 9, 2021 agency inspection, which was required before the instrument could be returned to evidentiary use, was not conducted in substantial compliance with 11D-8, FAC, and therefore could not provide sufficient reliability that the instrument met the requirements of FAC to be placed into evidentiary use. Breath results are admissible into evidence only upon compliance with the statutory provisions and administrative rules of the Implied Consent law. *See State v. Donaldson*, 579 So. 2d 728 (Fla. 1991). Subsequent monthly agency inspections do not cure the lack of substantial compliance. It is therefore,

ORDERED AND ADJUDGED:

1. The Motion to Suppress or Exclude Breath Test Results for Lack of Substantial Compliance is GRANTED.

2. Defendant's breath test results are excluded as evidence in this cause.

* * *

Landlord-tenant—Eviction—Non-attorney cannot represent corporate tenant in eviction action

GATOR 13800 NW 7TH AVE. LLC, Plaintiff, v. C&M SWEET BAKERY, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-030890-CC-23. Section ND01. May 22, 2023. Myriam Lehr, Judge. Counsel: Mark A. Goldstein, Miami, for Plaintiff.

ORDER STRIKING DEFENDANT'S PRO SE ANSWER

This cause came before the Court on Plaintiff's Motion to Strike Defendant's Answer, and the Court having reviewed the Motion and being fully advised in the premises, it is Ordered as follows:

1. The Defendant, through a non-lawyer, filed an Answer to the eviction Complaint.

2. A corporation, unlike an individual, may not appear in court in 'proper person' and represent itself. Neither may a pleading be signed by a corporate officer who is not a licensed attorney at law. Thus, any pleading purporting to be signed by such a corporate officer is a nullity and has no effect. *Daytona Migi Corp. v. Daytona Automotive Fiberglass, Inc.*, 417 So.2d 272 (Fla. 5th DCA 1982); *Nicholson Supply Co., Inc. v. First Federal Savings & Loan Assoc. of Hardee County,* 184 So.2d 438, 442 (Fla. 2nd DCA 1966).

3. Defendant's Answer is hereby stricken.

4. Defendant shall retain counsel to represent it in this case and such counsel shall file an answer to the complaint within 5 days of this Order. If counsel fails to appear within that time, the Court will enter a Default and Default Judgment for possession against the Defendant.

* * *

Insurance—Personal injury protection—Medical provider's action against insurer—Venue—Insurer's motion to transfer venue from Miami-Dade County to Hillsborough County granted—Venue is proper in either Orange or Hillsborough County where insurer, a foreign corporation, has agents or representatives in Hillsborough County but not in Miami-Dade County, and cause of action accrued in Orange County

PREZIOSI WEST/EAST ORLANDO CHIROPRACTIC CLINIC, LLC, a/a/o Jayne Bemba Kaye, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-005732-SP-24. Section MB01. June 15, 2023. Stephanie Silver, Judge.

ORDER ON DEFENDANT'S 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 arising out of alleged unpaid PIP benefits.

2. The Defendant, First Acceptance Insurance Company, filed its 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 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 a representative in Hillsborough County.

4. Further, the evidence before the Court shows that the Plaintiff, Preziosi West/East Chiropractic Clinic, LLC. is located in Orange County, the treatment at issue was rendered in Orange County, Plaintiff's billing address is in Orange County, and the alleged payment due to Plaintiff was to be remitted in Orange County. Additionally, the assignor lives in Orange 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 and therefore venue is improper 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 Orange County.

10. Therefore, the Court finds that venue is proper in either Hillsborough County or Orange County.

IT IS HEREBY ORDERED AND ADJUDGED:

1. Defendant's Motion to Dismiss is **DENIED**.

2. Defendant's Motion to Transfer Venue is **GRANTED.** This case shall be transferred to Hillsborough County.

Plaintiff shall pay the transfer fee within forty-five (45) days from the date of this Order

* * *

Insurance—Automobile—Windshield repair—Appraisal provision of policy is valid, appraisable issue as to amount of loss exists, and insurer did not waive right to appraisal by raising issue of plaintiff's lack of standing—Pending declaratory action does not bar ruling on motion to dismiss—Case is dismissed so parties may complete appraisal

ADAS WINDSHIELD CALIBRATIONS, LLC, a/a/o Walter Herndon, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-03378-SP-26. Section SD03. May 17, 2023. Lisette De la Rosa, Judge. Counsel: Jonathan D. Wulwick, Wulwick Law Firm, LLC, North Miami Beach, for Plaintiff. Jose Musa and Kelsey P. Hayden, Goldstein Law Group, Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court for a hearing on Defendant's Motion to Dismiss Or, In the Alternative, Motion to Compel Appraisal and Motion to Stay Litigation and Discovery Pending Completion of Appraisal. The Court having reviewed the Motion, heard the argument of counsel, and being otherwise advised, it is hereby ORDERED and ADJUDGED:

Defendant has moved to dismiss this litigation or, alternatively, stay the case and compel the parties to appraisal, as provided by the insurance policy at issue. Plaintiff argues compelling appraisal is improper as Plaintiff seeks declaratory relief regarding the appraisal provision. Rather, Plaintiff posits the appropriate relief is to allow Plaintiff to proceed on the declaratory judgment claims. For the reasons described below, Defendant's Motion is **GRANTED**.

I. LEGAL STANDARD

"When ruling on a motion to dismiss, the Court 'must limit itself to the four corners of the complaint, including any attached or incorporated exhibits, assuming the allegations in the complaint to be true and construing all reasonable inferences therefrom in favor of the non-moving party.' " *Skupin v. Hemisphere Media Grp., Inc.*, 314 So. 3d 353, 355 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a] (citing *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014)[39 Fla. L. Weekly D648a]).

Further, "the trial court must treat as true all of the complaint's well-pleaded allegations, including those that incorporate attachments." *Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1732a]; *Skupin*, 314 So. 3d at 355-56 ("[A]ll allegations must be taken as true, and 'any reasonable inferences drawn from the complaint must be construed in favor of the non-moving party.' "). The exhibits attached to the Complaint control and "where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994).

Even if the policy is not expressly attached to a complaint, "when the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *Air Quality Assessors of Fla. v. Southern-Owners Ins. Co.*, No. 1D21-1217, 2022 WL 1473-8493, *1 (Fla. 1st DCA, October 26, 2022) [47 Fla. L. Weekly D2171a] (citing *One Call Prop. Servs. Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a].

Finally, when examining an appraisal clause, the three elements to consider are: "1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether a party has waived the right to arbitrate." *NCI, LLC v. Progressive Select Ins. Co.*, 2022 WL 16702296, Case No. 5D21-1282 (Fla. 5th DCA) (November 4, 2022) [47 Fla. L. Weekly D2235f] (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) [22 Fla. L. Weekly D2208b].

In *Progressive*, the plaintiff appealed the dismissal of its complaint, wherein it had challenged the appraisal provision. In affirming the dismissal, the appellate court found the appraisal provision was valid, that an appraisable issue existed, and that the right to appraisal had not been waived. *Id.*, at *1.

In *Progressive*, the relevant policy provision was as follows:

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

Id. (emphasis removed). "The policy also contain[ed] a clause entitled, "Legal Action Against Us," which state[d] that "[w]e may not be sued unless there is full compliance with all the terms of this policy." *Progressive*, 2022 WL 16702296 at *1.

In finding the policy provision valid, the Court found "the appraisal provision is unambiguous," (*Id.* at *3); that the provision contained adequate procedures (*Id.* at *3-4); that appraisal provisions did not violate public policy (*Id.* at *4) nor violated the plaintiff's rights (*Id.*); and finally, that the prohibitive cost doctrine was inapplicable to the appraisal process (*Id.* at *5). The Court next found that as "the parties' only dispute is the amount of loss," an appraisable issue existed. *Id.* at 5. Finally, the Court found Progressive's challenging the plaintiff's standing at the same time it demanded appraisal did not waive its right to appraisal. *Progressive*, 2022 WL 16702296 at *5-6.

II. THE APPRAISAL CLAUSE

The appraisal clause in the insurance policy at issue here is as follows:

1. PHYSICAL DAMAGE COVERAGES

If there is disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal *will be used as the first step toward resolution*.

Appraisal will follow the rules and procedures as listed below:

(a)The owner and ***we*** will each select a competent appraiser

(b)The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or ***we*** may petition a court that has jurisdiction to select the third appraiser.

c) Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.

d) The appraisers shall only determine the cost of repair, replacement, and recalibration of glass. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class- representative basis.

e) A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they

arrived at their appraisal, will be binding on the owner of the ***covered vehicle*** and ***us***.

(f) ***We*** and ***you*** do not waive any rights by submitting to an appraisal. (See *Policy, Amendatory Endorsement 6910A*)

In a section titled Legal Action Against Us, the policy also states:

"Legal action may not be brought against us until there has been full compliance with all the provisions of this policy."

III. APPLICATION OF PROGRESSIVE

The Court finds that *Progressive* is directly on point and applies to the appraisal clause at issue here. The appraisal clause here is similar in all essential aspects and contains the same elements as assessed by the *Progressive* court. Accordingly, the Court finds that under the guidance of the *Progressive* decision, this appraisal clause here is deemed valid.

The next element is whether an appraisable issue exists. Again, the answer is in the affirmative, the Complaint involves a dispute regarding issues surrounding the amount of loss. *Progressive*, 2022 WL 16702296 at *5. And, as Defendant raised the appraisal issue in its Motion to Dismiss, the Court finds there has been no waiver of its rights under the appraisal clause. *Id.* at *5 ("Progressive did not waive its right to appraisal by raising NCI's lack of standing in its motion to dismiss contemporaneously with its demand for appraisal.").

Finally, that a ruling cannot be rendered on a Motion to Dismiss while there is pending a Declaratory Action is in contradiction to the holding of *United Community Insurance Company v. Lewis*, 642 So. 2d 59 (3d DCA 1994).

As the appraisal clause is valid, and appraisable issue exists, and there has been no waiver by Defendant of the right to invoke the appraisal clause, the Motion to Dismiss is **GRANTED**. The case is dismissed so the Parties may complete appraisal.

* * *

Landlord-tenant—Commercial lease—Eviction—Default for possession—Failure to deposit rent into court registry

GATOR 4848 NW 7th AVE, LLC, Plaintiff, v. CHEZKATU RESTAURANT, LLC, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-035010-CC-23. Section ND05. June 9, 2023. Chiaka Ihekwaba, Judge. Counsel: Mark W. Goldstein, Miami, for Plaintiff. Kai Jacobs, for Defendant.

DEFAULT FINAL JUDGMENT OF POSSESSION

This cause came before the Court on Plaintiff, Gator 4848 NW 7th Ave, LLC's, Motion for Final Judgment of Eviction and the Court having reviewed the Motion and being otherwise fully advised in the premises, it is Ordered as follows:

1. Plaintiff filed this eviction lawsuit to remove a tenant from a commercial premises for the non-payment of rent.

2. On June 2, 2023, the Court entered an Order requiring the Defendant tenant to deposit into the court registry, within 72 hours, the sum of $9,812.36, alleged in the Amended Complaint.[1]

3. The Court's June 2, 2023, Order further provided that "The failure of the Defendant to pay the rent into the court registry pursuant to this Order shall be deemed an absolute waiver of the Defendant's defenses. In such case, the Plaintiff shall be entitled to an immediate default for possession without further notice or hearing thereon. See *Park Adult Residential Facility, Inc. v. Dan Designs, Inc.,* 36 So.3d 811 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1192a]; *Kosoy Kendall Assocs. LLC v. Los Latinos Rest., Inc.,* 10 So. 3d 1168 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1075a].

4. No money has been deposited by the Defendant into the court registry.

5. It is ADJUDGED that Plaintiff GATOR 4848 NW 7TH AVE, LLC, recover from Defendant CHEZKATU RESTAURANT, LLC, possession of the real property described as follows:

4850-52 NW 7th Ave, Miami, FL 33127.

For WHICH LET WRIT OF POSSESSION ISSUE FORTHWITH.

[1]The sum due is shown in the three-day notice which is attached as "Exhibit B" to the Amended Complaint.

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Demand letter that stated total amount billed and did not account for prior payment by insurer did not satisfy statutory condition precedent

BONETT MEDICAL CENTER CORP., a/a/o Marlen Fraga, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-019630-SP-05. Section CC08. March 22, 2023. Maria D. Ortiz, Judge. Counsel: George Milev, The Evolution Law Group; Milev Law, LLC, Miami, for Plaintiff. Manuel Negron, Shutts & Bowen, LLP, Miami, for Defendant.

[Hearing on Motion for Rehearing scheduled for 11/20/2023.]

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 Demands (Filing# 152540864, 6/30/22) and Plaintiff's Response to Defendant's Motion for Summary Judgment—Invalid Presuit Demand (Filing# 165903182, 2/1/23) and Plaintiff's Motion for Summary Judgment on the Issue of Conditions Precedent—Denial in Answer (Filing# 166977549, 2/16/23); and the Court, having reviewed the Motions, having heard argument of Counsel on February 21, 2023, and being sufficiently advised in the premises, finds as follows:

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. (2017), ("Section (10)") furthers this purpose by obligating would-be Plaintiffs to submit a letter before they can file suit, advising the insurer of any claims that remain overdue, thereby providing insurers one last chance to pay any overdue benefits and 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] ("*Ebba Register*"). The legislature described the obligation imposed on potential PIP Plaintiffs stating their overdue claims in the Demand Letter with the following words: "specificity," "itemized," "specifying," "each" and "exact." *See* Section (10)(b)(3).

FACTS

The Plaintiff rendered medical services to the Plaintiff from June 13, 2017 through November 14, 2017 in the total amount of $9,656.92. *See* Exhibits B and C to Affidavit of Adjuster. Allstate initially reimbursed Plaintiff in the total amount of $4,587.52. See *id.* Allstate initially denied reimbursement for treatments after September 20, 2017 due to the results of an independent medical examination ("IME"). Allstate sent its final Explanation of Benefits denying payment to the Plaintiff on December 4, 2017.

Thereafter, on April 6, 2019, Plaintiff submitted a presuit demand letter for all dates of service, claiming an incorrect total billed amount of $10,388.92, a total paid amount of $4,587.52 and an amount due of $3,723.62. *See* Exhibit D to Affidavit of Adjuster. Plaintiff calculated the amount due by taking 80% of the total allegedly billed for all services and subtracting the total amount paid. *Id.* Allstate responded to Plaintiff on May 7, 2019, overturning its prior denials based on the IME and tendering additional payment in the amount of $3,403.37.

This additional payment was $320.25 less than the total amount demanded based on the incorrect total amount billed. *See* Exhibit E to Affidavit of Adjuster. In response to the first demand, Allstate also produced its policy, Explanations of Benefits and Payout Ledger and noted that the bills were paid in accordance with the fee schedule payment methodology. *Id.*

Plaintiff then submitted a second demand claiming entitlement to an additional $3,318.02 for the same dates of service. It corrected the billed amount from the prior demand to $9,656.92. *See* Exhibit D to Affidavit of Adjuster. The demand stated that it calculated the $3,318.02 amount due in the same manner as the prior demand—by taking 80% of the total billed and subtracting the total paid. *Id.* Using this formula yields an alleged amount paid of $4,587.52, the same amount paid stated in the first demand. However, the second demand did not account for the additional $3,403.37 paid in response to the first demand. The actual amount paid at this time was $7,990.89, not $4,587.52. Allstate responded to the second demand, denying any further payment and again producing its policy, Explanations of Benefits and Payout Ledger and noting that the bills were previously paid in accordance with the fee schedule payment methodology. *See* Exhibit E to Affidavit of Adjuster.

Plaintiff claimed entitlement in both demands to 80% of what it billed. The correct total billed amount, as noted in the second demand was $9,656.92. 80% of this amount is $7,725.54. Allstate paid a total of $7,990.89—more than was demanded by the formulas provided by the Plaintiff. Had Plaintiff utilized the correct paid amount in the second demand, it would have seen that it was overpaid pursuant to its own method of calculating damages. Notwithstanding, Plaintiff initiated litigation, filing a Complaint that vaguely claimed $500.00 to $2,500.00 in damages. In its Amended Complaint, Plaintiff claimed an amount due of $3,138.02 due to "improper IME cutoff denials and improper 'Billed Amount' reductions." In its Answers to Interrogatories, Plaintiff abandoned its claim for any IME denials, finally admitting these were paid, and maintained its claim for purported underpayments/reductions pursuant the "Billed Amount" issue. Pursuant to the Billed Amount theory, payment at 80% of the billed amount is incorrect and Plaintiff demands a higher payment. However, 80% of the billed amount is precisely what was demanded in both pre-suit demands and Allstate paid more than that calculation prior to the initiation of this litigation.

ANALYSIS

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). *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a] ("*Rivera*"). The *Rivera* Court 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).

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 D1899b] ("*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 amounts in the demand did not match the amounts in suit. When it drafted its demands, Plaintiff had at its disposal the same information it used to state calculate its claim in suit. 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. The operative second demand failed to account for payments received by the Plaintiff. This alone can render a demand deficient. See *Rivera* at 204; *Venus Health; Government Employees Ins. Co. v. Open MRI of Miami-Dade, Ltd.,* 18 Fla. L. Weekly Supp. 337a (Fla. 11th Cir. (App.) February 16, 2011); *State Farm Mut. Auto. Ins. Co. v. Douglas Diagnostic Center, Inc. (Jainek Perez),* 25 Fla. L. Weekly Supp. 942b (Fla. 17th Cir. App. December 18, 2017); *Medical Therapies, Inc. d/b/a Orlando Pain Clinic (Sonja M. Ricks) v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 1033a (Fla. 9th Cir. August 10, 2012), *aff'd* 22 Fla. L. Weekly Supp. 34a (Fla. 9th Cir. App. July 1, 2014) *Chambers Medical Group, Inc. (Marie St. Hilaire) v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. App. December 1, 2006). The payments a Plaintiff **receives** is knowledge that is in the exclusive possession of the Plaintiff. Plaintiff is required to disclose this information and the failure to do so is not stating "the exact amount due as fully as the provider's information allows." *Rivera* at 204 *(quoting Venus Health).* These deficiencies deprived Allstate of notice with "specificity" of the "exact" amount claimed to be due as mandated by Section 10. *See* Section (10)(b)(3).

Lastly, Plaintiff's claim in suit is specifically barred by Section (10)(d), which provides that "[i]f. . . the overdue claim specified in the notice is paid by the insurer,. . . no action may be brought against the insurer." Plaintiff's sole claim in litigation is that the codes paid at 80% of the billed amount were incorrectly paid. Yet, this is exactly what Plaintiff demanded in its demand: 80% of the billed amount. Because Allstate paid 80% of the billed amount with reference to the codes Plaintiff claims at issue in this case, Plaintiff's claim for additional payment on these codes is barred under the plain language of Section (10)(d) by its request for 80% of the billed amount in its pre-suit demand. Allstate paid what was demanded on these codes. Plaintiff cannot now sue for more. Certainly, Allstate cannot be said to have been provided pre-suit notice of this claim when the Plaintiff is completely abandoning the position it took in the demand.

CONCLUSION

The *Rivera* Court ruled that a demand letter is "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 demands included noncompensable charges, failed to account for application of the fee schedules and failed to deduct payments previously received. Such deficiencies almost ensure that, in litigation, the amount claimed owed would be different—so different that it was the opposite of the formula Plaintiff used to calculate damages in the demand in this case.

The Court is bound by *Rivera* and *Chris Thompson* to find that the Plaintiff failed to strictly comply with Section 10. The pre-suit 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 pre-suit demand is invalid for failure to comply with Section (10). Under the circumstances presented, dismissal is the appropriate remedy for failure to comply with the condition precedent. *Medical Therapies. LLC. v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 34a (Fla. 9th Cir. App. 2014). "The Third District Court stated in [*Progressive Express Ins. Co. v.*] *Menendez* [979 So.2d 324 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D818d] ("*Menendez*")] that when a plaintiff fails to comply with the statutory condition precedent of F.S. 627.736 the proper remedy is dismissal." *Eduardo J Garrido, DC, PA (Jose Ortega) v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 693c (Fla. Miami-Dade Co. March 13, 2014) (*citing United v. Dynamic Medical Services. a/a/o Doralis Mesa*, Case No.: 09-239 AP (Fla. 11th Cir. App. 2012) [19 Fla. L. Weekly Supp. 777a]). "[A]s defects in a required pre-suit demand may not be cured merely by the passage of time, a lawsuit filed subsequent to a defective demand is not merely premature, and as such, 'dismissal, and not abatement, is the proper remedy.' " *Foundation Chiropractic Clinic. Inc. v. State Farm Mutual Automobile Insurance Company,* 20 Fla. L. Weekly Supp. 694(c) (Palm Beach Co. May 3, 2013) (*citing Menendez,* 979 So. 2d at 333).

THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that:

1. Allstate's Motion for Summary Judgment regarding Pre-suit Demands is GRANTED and Plaintiff's Response to Defendant's Motion for Summary Judgment—Invalid Pre-suit Demand and Plaintiff's Motion for Summary Judgment on the Issue of Conditions Precedent—Denial in Answer are DENIED.

2. Judgment is hereby entered in favor of Defendant, Allstate Property and Casualty Insurance Company.

3. Plaintiff shall take nothing from this action and Defendant shall go hence without day.

4. The Court reserves jurisdiction to consider any applicable claims for reasonable attorneys' fees and costs, if any.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where PIP policy provided that charge submitted for amount less than amount allowed by schedule of maximum charges shall be paid in amount of charge submitted, insurer was required to pay 100% of charge that was less than 200% of Medicare fee schedule, not 80% of that charge

RT PROFESSIONAL, INC., a/a/o Karla Manrara, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-021905-SP-26. Section SD04. February 2, 2023. Lawrence D. King, Judge. Counsel: Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Jamelia Hudson, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having come before the Court on January 19, 2023, on Plaintiff's Motion for Summary Judgment and the Court being fully advised therein and having reviewed all matters of record, it is hereby ORDERED & ADJUDGED as follows:

BACKGROUND

This is an action seeking to recover unpaid PIP benefits. Defendant issued a policy of insurance to the insured claimant, Karla Manrara, which provided PIP benefits for the subject auto accident that occurred on November 10, 2016. As a result of that accident, Manrara was injured and received medical care from the Plaintiff. The subsequent medical bills were then submitted to Defendant for payment.

Defendant's EOB was attached to Plaintiff's Motion for Summary Judgment and it details the medical services provided via CPT codes, by the Plaintiff as well as the amount billed and paid for each of the CPT codes.

In determining how much it would pay for each CPT code submitted, Defendant resorted to the Medicare Part B schedule of maximum charges found in the PIP statute, F.S. § 627.736(5)(a), and which is incorporated into its policy, which provides that Defendant would pay 80% of 200% of the Medicare Part B allowance.

Defendant's policy also contains an additional provision which pertains to medical charges that fall below the Medicare Part B allowance and that policy provision mandates that CPT codes which are billed below the Medicare Part B allowance are to be paid at 100%—not at 80%.

In order to determine Defendant's obligation, the Court is required to analyze and interpret the insurance policy issued by Defendant Geico, as well as Geico's Florida Policy Endorsement FLPIP (01-13) (hereinafter the Policy and Policy Endorsement[1])."

The policy of insurance issued by Defendant Geico specifically states that it will pay the full amount of the charges submitted when those charges are less than the Medicare Fee Schedule. Specifically, Geico's policy states, in relevant part: "[a] charge submitted by the provider, for an amount less than the amount allowed above shall be paid in the amount of the charge submitted." Notwithstanding, its policy language, Geico reduced the Plaintiff's charges at issue to 80% of the billed amount instead of paying them at 100%.

Plaintiff argues the plain language of the Policy Endorsement means exactly what it says—that Geico will pay the full amount of the charges, which clearly means without reduction. Geico argues that the Policy Endorsement allows it to pay 80% of the submitted charges, which is less than 200% of the allowable amount under the Medicare Part B fee schedules.

Geico's Endorsement states, in relevant part, as follows:

PAYMENTS WE WILL MAKE

The Company will pay in accordance with the Florida Motor Vehicle No Fault Law (as enacted, amended, or newly enacted), and where applicable in accordance with all fee schedules contained in the Florida Motor Vehicle No Fault Law, to or for the benefit of the injured person:

A. Eight percent (80%) of ***medical benefits*** which are ***medically necessary,*** pursuant to the following schedule of maximum charges contained in the Florida Statutes § 627.736(5) (a)l., ( )2. and (a)3.:

5. For all other medical services, supplies, and care, 200 percent of the allowable amount under, :

(1.) The participating physicians fee schedule of Medicare Part B . . .

However, if such services, supplies, or care is not reimbursable under Medicare Part B (as provided in section.

(A) 6. above), we will limit reimbursement to eighty percent (80%) of the maximum reimbursable allowance under workers compensation, as determined under Florida Statutes §440.13 and rules adopted there under 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 us.

***

A charge submitted by a provider, for an amount less than the amount allowed, shall be paid in the amount of the charge submitted.

See page 3 of 11 of the Florida Policy Amendment, form FLPIP (07-15) attached hereto as Exhibit "C") [exhibit omitted] (emphasis added).

In the instant case, four different CPT codes were billed by Plaintiff at amounts below the Medicare Part B schedule of maximum charges. Those services include electrical stimulation (unattended), billed under CPT Code 97014; office outpatient visit—25 minutes, billed under CPT code 99214; therapeutic exercise, billed under CPT code 97110; and neuromuscular re-education billed under CPT Code 97112.

The charges for the CPT Codes billed by Plaintiff which are at issue in this action are set forth in the chart below, along with the amounts paid by Geico, the fee schedule allowance, the number of times these codes were billed, by Plaintiff and the amount due for each improperly paid CPT code.

CPTCode	Units	Amt Billed	Geico Paid	Difference	Total
97014	28	$24.00	$19.20	$4.80	$134.40
99214	1	$172.10	$137.68	$34.42	$34.42
97110	14	$134.12	$107.30	$26.82	$375.48
97112	15	$140.08	$114.06	$ 26.02	$ 390.30

The total due for these underpaid codes comes to $934.60.

Rather than paying these CPT codes at 100% of the billed amount as required by the subject policy (and by the PIP statute), Defendant Geico paid those codes at 80%.

ANALYSIS

Where the language in an insurance contract is clear and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written. *Washington Nat'l Corp v Ruderman*, 117 So.3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S616b], citing *State Farm Mut. Auto Ins. Co. v. Menendez*, 70 So.3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]. However, "any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer." *Ruderman*, at 949-950.

A provision is ambiguous if it is "susceptible to two reasonable interpretations, one which provides coverage and the other which excludes coverage. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d. 1082, 1086 (Fla. 2005) [30 Fla. L. Weekly S203a]. Any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer." *Id.* The ambiguity must be genuine and the lack of a definition for an operative term does not, by itself, create an ambiguity." *Botee v. S. Fid. Ins. Co.*, 162 So. 3d 183, 186 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D368a]. "When a term in an insurance policy is undefined, it should be given its plain and ordinary meaning, and courts may look to legal and nonlegal dictionary definitions to determine such a meaning." *Id.* See also, *Geico v. Macedo*, 228 So.3d 1111, 1113 (Fla. 2017) [42 Fla. L. Weekly S731a].

In *Ruderman*, supra, the Florida Supreme Court held that "where the provisions of an insurance policy are at issue, any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer. *Ruderman*, at 949-50.

It has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which must be construed liberally in favor of the insured and strictly against the insurer. *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So.3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a], *quoting Berkshire Life Ins. Co. v. Adelberg*, 698 So.2d 828, 830 (Fla. 1998) [22 Fla. L. Weekly S513a].

i. Geico's Policy Language is Clear and Unambiguous

The policy states: *"A charge submitted by the provider for an amount less than the amount allowed above, shall be paid in the amount of the charge submitted."* The plain meaning of this language is easily and obviously discerned from the language itself. For the services at issue, Geico agreed to pay the billed amounts which were less than "the amount allowed above." Geico's own policy indicates that the "allowable amount above" equals "200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B. . . " In this case, the amounts billed were less than "200 percent of the allowable amount under the participating physician fee schedules" and as such, Geico was required to pay the full amount billed.

ii. Geico's Policy Interpretation is Inconsistent with the Plain Meaning of the Policy Language.

Geico argues that if the charges are less than 200% of the allowable Medicare fee schedule, both the PIP statute and the Policy Endorsement allow it to reduce the amount to be paid to 80% of the amount billed. This is inconsistent with Geico's policy. With respect to the co-insurance reduction, Geico states it will reduce the amount paid to 80% under two circumstances: 1) under Section (A)6 of its policy, Geico states "The Company will pay. . . Eighty percent (80%) of medical benefits. . . for all other medical services, supplies, and care 200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B. . . 2) "If such services supplies, or care is not reimbursable under Medicare Part B. . . we will limit reimbursement to eighty percent (80%) of the maximum reimbursable allowance under workers' compensation. . .

However, with respect to charges billed for an amount less than 200% of Medicare or the maximum reimbursable amount under

workers' compensation fee schedule, Geico clearly states it will "pay the amount of the charge submitted". If Geico intended to pay 80% of the amount submitted, it could have said so just as it did in the other two scenarios as stated in the policy language. To interpret the policy otherwise would require the Court to rewrite Geico's policy.

It is well settled that Florida courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary of the intention of the parties." *Intervest Const. of Jax., Inc. v. Gen. Fid. Ins. Co.,* 133 So.3d 494,497 (Fla. 2014) [39 Fla. L. Weekly S75a], *quoting State Farm Mut. Auto. Ins. Co., v. Pridgen,* 498 So.2d 1245, 1248 (Fla. 1986).

In *A&M Gerber Chiropractic, LLC v. Geico,* 291 F. Supp. 3d 1318 (S.D. Fla. 2017) [27 Fla. L. Weekly Fed. D133a; vacated 27 Fla. L. Weekly Fed. C2031a (lack of standing)], the U.S. District Court for the Southern District of Florida answered the narrow question raised in an action seeking declaratory judgment as to whether Geico's policy requires it to pay 100% of charges that are below 200% Medicare Part B coverage. The named plaintiff and the class members in *A&M Gerber* argued that the policy language at issue means that Geico is required to pay 100% of the amount billed for medical services if the bill total is below 200% of the fee schedule. *Id.* On the other hand, Geico argued that the policy requires a 20% coinsurance applied to all charges—regardless of whether the charges are less than 200% of the fee schedule—meaning that Geico only has to pay 80% of amounts charged in all circumstances. *Id.*

In answering the question, the district court agreed with the provider's interpretation of the policy language. The *A&M Gerber* court reasoned that Geico's incorporation into its policy of similar language that is found in the Florida Motor Vehicle No Fault Law "does not allow the Court to ignore the language of the policy and replace it with the language of the statute." In relying on the language in the statute, Geico failed to recognize that the statute provides that "the insurer may pay the amount of the charge submitted," Fla. Stat. § 627.736(5)(a)(5), if the amount is below 200% of the fee schedule. *Id*. The difference between the language in the statute and the language in the policy is dispositive of the issue. The language in the policy provides that "a charge submitted by a provider, for an amount less than the amount allowed above, *shall* be paid in the amount of the charge submitted." *Id*. The substitution of the word "shall" for the word "may" in the policy tipped the balance in favor of the providers, allowing "the Court [to] hold that, under the disputed provision, when a health care provider bills for covered services in an amount less than 200% of the fee schedule, Geico is required to pay the charge as billed without any reduction." *Id*.

More recently, the Fourth District Court of Appeal in *Geico v. Muransky Chiro. P.A*, 323 So. 3d 742 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a] agreed with the Southern District of Florida, and affirmed judgment in favor of a medical provider and found that Geico breached the insurance contract when it failed to pay the full amount of the charges submitted when those amounts were less than 200% of the allowable amount under the participating fee schedule of Medicare Part B.

Plaintiff's Motion for Summary Judgment in the instant case pertains to the exact same policy language and as such, the Court adopts the same interpretation as that found in *Ruderman,* supra. Under this interpretation, Plaintiff's claim for medical services at an amount lower than 200% of the fee schedule must be paid in full, with no reduction. Therefore, Plaintiff's Motion for Summary Judgment must be granted.

iii. **A Federal Class Action Decision is Binding on Subsequent Individual State Court Actions Brought by Class Members**

In *Philip Morris USA, Inc. v. Douglas,* 110 So.3d 419, 429 (Fla. 2013) [38 Fla. L. Weekly S160a], the Florida Supreme Court found that a decision in a federal class action has binding effect on subsequent individual state court actions filed by members of the class. The class action was brought by smokers and their survivors "against cigarette companies and industry organizations for damages allegedly caused by smoking-related injuries." *Id*. at 422; see *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39, 40 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D284a] (*Engle I*).

In that case, The Florida Supreme Court held that general causation is determined by the outcome of the class action suit, while 'individual causation' must be determined in subsequent lawsuits." *Id. (citing Engle v. Liggett Group, Inc.,* 945 So.2d 1246, 1255 (Fla. 2006) [32 Fla. L. Weekly S1a]).

Moreover, in *American Agronomics Corp. v. Smith,* 342 So.2d 554, 55 (Fla. 3d DCA 1977), the Florida Third District Court of Appeal was asked to decide whether a final judgment entered in a federal class action was binding on a subsequent state court action—in which the plaintiff was a member of the class which was filed before the entry of judgment in the class action. In *Smith*, the Smiths entered into contracts with the appellants for the sale, maintenance and marketing of orange groves in Lee County, Florida. After the action was brought, "two actions previously commenced in the United States District Court for the Northern District of Ohio by the purchasers of similar contracts were consolidated into a class action." *Id*. The certified class included the Smiths, and the United States District Court sent each member of the class a notice giving them a simple method to exclude themselves from the class. *Id.* "The Smiths took no action either to exclude themselves from the class nor to participate in the case." *Id*. "A settlement between the members of the class and the defendants in that action—the appellants here—was approved by the District Court's final judgment." *Id*. The final judgment in the class action provided that "all claims which were made or could have been made against the [s]ettling [d]efendants . . . are hereby dismissed . . . with prejudice . . . and each member of the class is forever barred from the prosecution against the [s]ettling [d]efendants in the class action[.]" *Id.*

The Smiths continued their Florida action and were awarded a judgment. *Id*. On appeal, the Third District "h[eld] that the [Smiths], having failed to exclude themselves from the class action, have thereby assented to the inclusion of their claim as one of those that was settled, and thereupon, have elected the benefits of that judgment." *Id*. at 556. The court reasoned that, to allow the judgment in the Smiths' Florida action to be enforced would be a "violation of that [class action] judgment [,]" *Id*., indicating that a judgment in a federal class action that is entered after the commencement of a state court suit litigating the same issue is binding on the state court action.

In the present case, the relationship between Plaintiff's state court action and the federal class action that resolved the dispute over Geico's policy language is similar to the relationship of the *Douglas* state court action and the federal class action that litigated the *Engle* defendants' common liability to class members. Like in *Douglas*, where a jury's findings of common liability were used to determine specific liability for each class member (*Douglas*, at 428), the common liability found in *A&M Gerber* should be used to determine breach of contract damages for individual class members. As was the case in *Douglas*, where the court distinguished between general causation and "specific" or "individual" causation. *Id.* This Court makes a similar distinction between Geico's general causation—the improper interpretation of its policy language—and specific or individual causation—the specific damages that this improper interpretation led to with respect to each class member. Like the Florida Supreme Court did in *Douglas*, this Court must allow the use

of the federal class action findings to establish general causation, and be used in subsequent individual damages actions, such as the present case.

Further, unlike in *Smith*, where the federal class action final judgment explicitly barred class members from bringing any actions against the settling defendants that could have been brought in the class action, *Smith*, at 556, Judge Bloom's opinion in *A&M Gerber* made it clear that class members would not be prevented from raising arguments in other proceedings in "relation to the ultimate compensability of the claims." So, while the federal class action was decided before the present case was resolved, the class action decision only decided the narrow issue of the interpretation of Geico's policy language, which necessarily would be used to determine the amount Geico owes to each class member because of its improper interpretation of the policy language.

Therefore, this Court is bound by the class action decision in *A&M Gerber,* which ruled in favor of Plaintiff's interpretation of the policy language. Because of the binding nature of the federal class action, Plaintiff's Motion for Summary Judgment must be granted.

iv—The Court Cannot Consider Unpled Defenses nor Unsworn Exhibits

On December 28, 2022, Defendant filed its response in opposition to Plaintiff's Motion for Summary Judgment. Defendant's 2-page response argues for the first time that summary judgment should not be granted for Plaintiff because—according to Defendant—Plaintiff's claim is barred by the doctrine of *res judicata*, which is an affirmative defense under Florida law (see, *Palmer v. McCallion*, 645 So. 2d 131 (Fla. 4th DCA 1994)). However, Defendant never pled any affirmative defenses pertaining to *res judicata*. An affirmative defense which has not been pled is deemed waived. See, *Congress Park Office Condos II, LLC., v. First Citizens Bank & Trust* 105 So. 3d 602 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D145a]. Hence, Defendant has waived that unpled defense.

Furthermore, an un-pled defense cannot be the basis for opposing Plaintiff's motion for summary judgment. Said differently, Defendant may not raise an unpled defense as a basis for resisting a motion for summary judgment. See, *Rauch, Weaver, et al., v. AJP Pine Island* 313 So. 3d 625 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D591a]. "An affirmative defense is waived unless it is pleaded." *Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D752a]. Thus, "[f]ailure to raise an affirmative defense prior to a plaintiff's motion for summary judgment constitutes a waiver of that defense." *Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46, 48 (Fla. 1988) (quoting *Wyman v. Robbins*, 513 So. 2d 230, 231 (Fla. 1st DCA 1987)). In other words, a defendant may not "raise an unpled affirmative defense as a basis for resisting a motion for summary judgment*." Capotosto v. Fifth Third Bank*, 230 So. 3d 891, 892 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2471a]. Further, Defendant never sought nor attempted to seek leave of court to amend its affirmative defenses.

Attached to Defendant's 2-page response to Plaintiff's Motion for Summary Judgment is a set of exhibits, none of which have been authenticated and therefore cannot be considered by this Court on summary judgment. See, *Bifulco v. State Farm*, 693 So. 2d 707 (Fla 4th DCA 1997) [22 Fla. L. Weekly D1325a]. See also, Rule 1.510, Fla. R. Civ. P. A trial court, in passing upon a motion for summary judgment, is bound by the procedural strictures inherent in *Fla.R.Civ.P. 1.510,* which mandates that copies of all papers or parts thereof used to support or oppose a motion for summary judgment shall be sworn to or certified. In the instant case, Defendant failed to do so and therefore those materials cannot be considered.

Conclusion

Plaintiff's Motion for Summary Judgment must be granted because the clear and unambiguous policy language requires Defendant Geico to pay the aforementioned medical bills and CPT codes at 100% and not at 80%. The exact same policy language has already been adjudicated in favor of the medical providers and against Geico and therefore Geico is required to satisfy its contractual obligation by paying those CPT codes at 100%. Geico cannot avail itself of an unpaid defense, which is deemed waived as a matter of law. And, Geico cannot rely on documents and/or exhibits in defense of Plaintiff's Motion for Summary Judgment because those materials were not certified or otherwise authenticated.

Therefore, Plaintiff's Motion for Summary Judgment is hereby granted and Plaintiff is entitled to a judgment in its favor for the difference between what Defendant Geico paid (i.e. 80%) and what Geico should have paid (i.e., 100%) of those CPT codes referenced above. Plaintiff is therefore entitled to a final judgment in its favor for the sum of $934.60. Plaintiff is also entitled to an award of attorney's fees pursuant to F.S. §627.428.

[1]By its terms, Geico's Policy Endorsement at issue replaces the entire Personal Injury Protection portion of the subject insurance policy.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Attorney's fees and costs are taxed against medical provider that filed suit after insurer timely paid full amount demanded in presuit demand letter

PHYSICIANS GROUP, LLC, a/a/o Rachel Brown, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case 21-CC-112541. Division H. May 31, 2023. James S. Giardina, Judge. Counsel: Joseph F. Shafer and C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Christopher S. Dutton, Dutton Law Group, P.A., Tampa, for Defendant.

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

THIS CAUSE having come before the Court for hearing on May 24, 2023, on Defendant's Motion to Tax Attorney's Fees and Costs, and the Court having heard argument of counsel and being otherwise fully advised in the premises, the Court finds Defendant's arguments to be well-taken and grants Defendant's Motion to Tax Attorney's Fees and Costs in its entirety.

By way of background, on November 15, 2021, Plaintiff, PHYSICIANS GROUP, LLC., a/a/o Rachel Brown, filed the above-styled lawsuit against Defendant, MGA INSURANCE COMPANY, INC., to recover Personal Injury Protection ("PIP") benefits based on an alleged breach of a policy of automobile insurance. Plaintiff is a healthcare provider that provided medical treatment, services, and/or supplies to its patient, Rachel Brown, for injuries allegedly sustained in a motor vehicle accident that occurred on October 14, 2018. At the time of the subject accident, Rachel Brown was covered under a policy of automobile insurance issued by Defendant to Rachel Brown, as a named insured, that provided PIP benefits coverage for the policy period from August 11, 2018 to February 11, 2019.

The subject policy limited PIP reimbursements to 80% of the amounts allowed by the policy's schedule of maximum charges, consistent with the schedule of maximum charges outlined in subsection 627.736(5)(a) of the Florida Statutes (2021) (referred to herein as "statutory fee schedule" or the "schedule of maximum charges"). Defendant received bills from Plaintiff for medical treatment, services, and/or supplies allegedly provided to Rachel Brown for injuries sustained in the subject accident.

Plaintiff, through its counsel, served a pre-suit Demand Letter dated October 11, 2021, which was received by the Defendant on October 15, 2021, alleging an amount owed of $91.88 (if insurer uses the Medicare fee schedule payment methodology) in Personal Injury

Protection Benefits, plus interest, penalties, and postage. Defendant timely responded to the Demand Letter on October 27, 2021, issuing payments in the amount of $97.55 in benefits, together with $20.07 in interest, $11.77 in penalties, and $8.36 in postage. Defendant's response to the Pre-Suit Demand Letter was sent on October 27, 2021, within the statutory 30-day period.[1]

Florida Statute Section 627.736(10)(d), states, in pertinent part, as follows:

> (d) 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.

The amounts paid by Defendant in response to Plaintiff's Demand Letter paid the overdue claim specified in the notice, therefore no action should have been brought against the Defendant.

Nevertheless, Plaintiff filed suit following receipt of the payments made in response to the Demand Letter. On March 23, 2022, Defendant served Plaintiff with a Motion for Sanctions pursuant to Florida Statute Section 57.105, based upon Defendant's payment in response to Plaintiff's Demand Letter. Plaintiff failed to dismiss the suit prior to the expiration of the 21-day safe harbor period, and the Motion was filed with the Court on April 22, 2022.

The purpose and underlying intent of the pre-suit demand letter provision is to prevent expensive litigation when an insurer pays the amount of an overdue claim. Florida Statute Section 627.736(10)(d) clearly provides that if payment is made, then "no action may be brought against that insurer."

Therefore, Plaintiff and its attorney should have known that a claim or defense "was not supported by the material facts necessary to establish the claim" or "would not be supported by the application of then-existing law to those material facts." Fla. Stat. § 57.105(1)(a)-(b).

Defendant's Motion to Tax Attorney's Fees and Costs was predicated upon Defendant's Motion for Sanctions pursuant to Florida Statute Section 57.105 regarding satisfaction of amount demanded within Plaintiff's Pre-Suit Demand Letter prior to suit. Plaintiff conceded at the hearing that Defendant is entitled to costs based upon Florida Rule of Civil Procedure 1.420(d).

Defendant's Motion to Tax Attorney's Fees and Costs is hereby **GRANTED**. The Court retains jurisdiction to award reasonable Attorney's Fees and Costs to the Defendant.

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[1]Defendant filed an affidavit providing factual support. Plaintiff failed to file any evidence.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to dismiss or abate for appraisal is denied where plaintiff has properly alleged that insurer breached policy by not properly paying invoice and failed to select competent or impartial appraiser

SAME DAY WINDSHIELD, LLC, a/a/o John Gomes, Plaintiff, v. MENDOTA INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-11779. Division I. April 3, 2023. Miriam Valkenburg, Judge. Counsel: Marc B. Nussbaum, Reeder & Nussbaum, P.A., St. Petersburg, for Plaintiff. Matthew C. Scarborough, Scarborough Attorneys at Law, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY MOTION TO ABATE OR STAY

THIS CAUSE came before the Court on Defendant's Motion to Dismiss or Alternatively Motion to Abate or Stay Plaintiff's Amended Complaint filed on February 14, 2023 and Defendant's Motion for Protective Order and Motion to Stay Discovery. Having considered the motion, argument of counsel, the record, and applicable law, the Court finds as follows:

1. The Plaintiff, SAME DAY WINDSHIELD, LLC, LLC is a windshield replacement facility that provided services to the insured's John Gomes' vehicle.

2. The Defendant, MENDOTA Insurance extended coverage and issued partial payment to the Plaintiff pursuant to the terms and conditions of the subject policy. Plaintiff filed an amended complaint under two counts. In count I of its amended complaint, Plaintiff contends that Defendant breached the policy of insurance by not properly paying the invoice pursuant to the terms of the contract and by failing to select a competent or impartial appraiser as required by the contract

3. In Count II of the amended complaint, the Plaintiff also asserts an action for Declaratory Judgment to determine various rights and obligations between the parties under the policy pursuant to Chapter 86, Florida Statutes.

4. Defendant now moves for dismissal of Plaintiff's action arguing that the Plaintiff failed to perform all conditions precedent before the filing of the lawsuit and is thereby bound by the appraisal provision contained within the Mendota policy language. Appraisal clauses in insurance policies are enforceable unless they violate statutory law or public policy. *See The Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.,* 162 So. 3d 140, 145 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *see also Green v. Life & Health of America,* 704 So. 2d 1386, 139091 (Fla. 1998) [23 Fla. L. Weekly S42a].

5. A motion to dismiss test the legal sufficiency of a complaint and is not intended to determine issues of ultimate fact. *See Holland v. Anheuser Busch, Inc.*, 643 So.2d 621, 623 (Fla. 2d DCA 1994). In ruling on a motion to dismiss, the trial court is confined to the allegations within the complaint and attachment(s). The Court must determine "whether, if the factual allegations of the complaint are established by proof or otherwise, the plaintiff will be legally or equitably entitled to the claimed relief against the defendant. *See Hankins v. Title and Trust Company of Florida*, 169 So. 2d 526 (Fla. App 1964).

6. The Defendant further argues that the Plaintiff's complaint for declaratory relief must allege facts showing there is a bona fide, actual present and practical need for a declaration.

7. A motion to dismiss a complaint for declaratory judgment is not a motion on the merits. *See Royal Selections, Inc. v. Fla. Dep't of Revenue,* 687 So. 2d 893, 894 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D298a]. "Rather, it is a motion only to determine whether the plaintiff is entitled to a declaration of its rights, not to whether it is entitled to a declaration in its favor." *Id*. (citing *Rosenhouse v. 1950 Spring Term Grand Jury,* 56 So. 2d 445, 448 (Fla. 1952)). "[A] motion to dismiss for failure to state a cause of action is not a substitute for a motion for summary judgment, and in ruling on such a motion, the trial court is confined to a consideration of the allegations found within the four corners of the complaint." *Consuegra v. Lloyd's Underwriters at London,* 801 So. 2d 111, 112 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2483b] (citing *Cyn-co, Inc. v. Lancto,* 677 So. 2d 78, 79 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1665b]).

8. In general, a complaint for declaratory judgment must allege the following: "(1) there is a bona fide dispute between the parties; (2) the plaintiff has a justiciable question as to the existence or nonexistence of some right, status, immunity, power or privilege, or as to some fact upon which existence of such a claim may depend; (3) the plaintiff is in doubt as to the claim; and (4) there is a bona fide, actual, present need for the declaration." *Ribaya v. Bd. Of Trs. Of City Pension Fund for Firefighters & Police Officers in City of Tampa,* 162 So. 2d 348, 352 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D820b].

9. Here, the Plaintiff challenges the enforceability of the appraisal

provision based upon the Defendant's course of conduct and noncompliance of its own policy requirements. "When ruling on a motion to dismiss for failure to state a cause of action, a trial court must limit its review to the allegations contained within the four corners of the complaint and 'accept the material allegations as true.'" *Touchton v. Woodside Credit, LLC,* 136 So. 3d 392, 395 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D768a] (quoting *Murphy v. Bay Colony Prop. Owners Ass'n,* 12 So. 3d 924, 926 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1467a].

10. Taking into account the four-corners of the amended complaint, Plaintiff properly alleged in Count I of its complaint that the Defendant breached the subject policy of insurance by not properly paying the invoice pursuant to the terms of the contract and that the Defendant failed to select a competent or impartial appraiser as required by the contract. While the courts have consistenly favored appraisal provisions holding these provisions are enforceable, the Plaintiff raises significant challenges that must be first addressed to determine the rights and obligations of each party. *See, Progressive v. Glassmetics,* 343 So. 613, (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b].

11. Based upon the foregoing Court finds that Plaintiff has properly stated a valid cause of action upon which relief can be granted in count I and II and dismissing Plaintiff's amended complaint would be inappropriate.

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

a. Defendant's Motion to Dismiss or Alternatively Abate or Stay Plaintiff's Amended Complaint is hereby **DENIED**.

b. Defendant's Motion for Protective Order and Motion to Stay Discovery is **DENIED.**

* * *

Insurance—Automobile—Windshield repair—Declaratory actions—Appraisal—Motion to compel appraisal is granted—There is no bona fide present need for declaration on issues raised by plaintiff, and appraisal is ripe—Insurer's right to appraisal was not waived by timeliness of demand or by any actions inconsistent with right to appraisal—Court declines to address challenge to competency and disinterestedness of appraiser in advance of appraisal

QUALITY COUNTS AUTO GLASS, a/a/o Alma Velez, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-77574. May 19, 2023. Joseph M. Tompkins, Judge. Counsel: Marc B. Nussbaum, Reeder & Nussbaum, P.A., St. Petersburg, for Plaintiff. Tierney R. Gilmore, Law Offices of Gabriel O. Fundora & Associates, Tampa, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION TO ABATE OR STAY AND COMPEL APPRAISAL

THIS MATTER came before the Court on May 8, 2023,[1] on Defendant Infinity Auto Insurance Company's *Amended Motion to Abate or Stay and Compel Appraisal* (the "Motion"). Having considered the Motion, the arguments of counsel, the pleadings, and applicable law, the Court finds that this action should be temporarily stayed to allow the parties to complete appraisal. The Court writes only to address a few of the arguments raised by Plaintiff.

1. In its Amended Statement of Claim, Plaintiff asserted two claims against Defendant for breach of contract and declaratory judgment. As to the breach of contract claim, Plaintiff alleged that Defendant breached its contract by refusing to pay in full for its repair of the insured's windshield. As to its claim for declaratory relief, Plaintiff attempts to challenge the enforceability of the appraisal provision contained in the automobile insurance policy at issue.

2. More specifically, Plaintiff argued at the hearing that the appraisal provision should not be enforced because it has a bona fide, actual, present, practical need for a declaration on the following issues: (1) whether there was notice of a dispute prior to the Defendant attempting to elect appraisal, (2) whether the Defendant made a timely demand for appraisal, (3) whether Defendant waived its right to appraisal by taking an inconsistent position to appraisal, (4) whether Defendant chose a competent and disinterested appraisal, and (5) whether Defendant properly paid the loss pursuant to the relevant portion of the policy's limit of liability. Thus, Plaintiff argues that the Court should not allow appraisal until it resolves the aforesaid issues.

3. But none of these issues require this Court to forego appraisal. This is because many of these issues do not present a bona fide, present need for a declaratory judgment. To be sure, as to the first issue, the Court finds that a "notice of a dispute" is not required before invoking appraisal. In fact, a party may invoke appraisal after a lawsuit is filed. *See NCI, LLC v. Progressive Select Ins. Co.*, 350 So. 3d 801, 810 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2366c]; *Gonzalez v. State Farm Fire and Cas. Co.*, 805 So. 2d 814, 818 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D390a]. As such, because it is undisputed that Defendant demanded appraisal after this lawsuit was filed, there is no bona fide, present need for a declaration on this matter.

4. As to the second and third issues, Plaintiff argues essentially that Defendant waived its right to appraisal by making an untimely demand for appraisal or by taking actions inconsistent with the right to appraisal. In this case, the demand for appraisal is neither untimely under the undisputed terms of the appraisal provision nor waived due to any actions taken by Defendant. Indeed, Defendant moved to enforce the appraisal clause 51 days after service of the complaint and 30 days after moving for an extension of time to respond to the complaint. Such actions are not inconsistent with enforcing the right to appraisal. *See Fla. Ins. Guar. Ass'n, Inc. v. Castilla*, 18 So. 3d 703, 705 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2000a]. Thus, the Court need not wait until these issues are resolved before requiring appraisal.

5. As to the fourth issue regarding the competency and disinterestedness of the chosen appraiser, the Court declines to address this question in advance of appraisal. *See Progressive Amer. Ins. Co. v. Glassmetics, LLC a/a/o Devan Hammond*, 343 So. 3d 613, 624 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b]; *Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342, 344 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1436a] (explaining that courts have discretion to control the order in which appraisal and coverage determinations proceed). And even if Defendant selected a biased appraiser, such a selection would not constitute a waiver of its right to appraisal. *See Glassmetics*, 343 So. 3d at 624. Accordingly, there is no present need to resolve this issue prior to appraisal.

6. As to the fifth issue regarding whether Defendant properly paid the loss in accordance with the policy limits, the Court finds that this issue is exactly why appraisal should be compelled at the outset of this suit. Indeed, at the heart of this dispute is whether Defendant appropriately valued and paid the loss in accordance with the terms of the policy. Defendant concedes that the policy affords coverage to the claimed loss. Nor is there any dispute that Defendant made a payment that was less than the amount billed by Plaintiff and that Plaintiff accepted that payment. (*See* Plaintiff's Supplemental Response, Doc. 23, p. 2) ("Plaintiff requested reimbursement for the cost to complete the windshield replacement pursuant to the subject policy. However, the Defendant paid an amount less than what was invoiced asserting that it had paid up to limits of liability and met its obligation under the policy."). As such, this action is clearly a dispute over the amount of loss, not coverage. Said disputes should be resolved in appraisal. As such, because appraisal is ripe[2] and may potentially resolve this case without further litigation, the Court finds that this case should be

stayed until appraisal is completed.

7. Finally, the Court notes that Plaintiff's reliance upon *People's Trust Ins. Co. v. Marzouka*, 320 So. 3d 945, 947 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a], and *Progressive Am. Ins. Co. v. Dr. Car Glass, LLC*, 327 So. 3d 447 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2030c], is misplaced for two reasons. First, both cases do not stand for the proposition that a trial court is precluded from compelling appraisal whenever there is a challenge to the enforceability of an appraisal clause. In fact, the Third District—and the Second District—have stated that the trial court maintains "the discretion" to compel appraisal prior to ruling on the merits of the declaratory action. *See Marzouka*, 320 So. 3d at 948; *see also Villagio at Estero Condo. Assoc., Inc. v. Am. Capital Ass. Co.*, 2021 WL 1432160, at *3 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D879a]. The Court is exercising that discretion based on the circumstances and undisputed facts presented by the parties.

8. Second, the operative pleading in *Marzouka* contained allegations that challenged whether an agreement to appraisal actually existed between the parties. There, the complaint alleged that the appraisal clause—located within a preferred contractor endorsement of a property insurance policy—was unconscionable due to a lack of meaningful choice regarding contractors, materials, repairs, information, and other alleged facts. *See Marzouka*, 320 So. 3d at 949. In fact, the Third District, in upholding the trial court's decision to forego appraisal in light of the unconscionability claim, emphasized that appraisal should be granted only where the trial court "*entertains no doubts that such an agreement was made*." *Id.* at 947 (emphasis in original).

9. Here, unlike in *Marzouka*, the Court entertains no doubt that such an agreement was made. This is because there are no allegations challenging whether any such agreement was made or whether coverage applies. Rather, it is undisputed that the insured, Alma Velez, sought an automobile insurance policy from Defendant and that Defendant issued her a policy with the undisputed appraisal provision contained therein. (Am. Compl., at ¶¶5-6). Thus, the Court finds that Plaintiff's reliance upon *Marzouka* and *Dr. Car Glass* is misplaced.

10. Accordingly, the Court concludes that entering a stay to compel appraisal is an appropriate remedy under these circumstances. Indeed, the purpose of an appraisal provision in an insurance policy is to avoid litigation by providing the parties with a mechanism for resolving the dispute. *See Glassmetics*, 343 So. 3d at 619 ("Resolving disputes without litigation is the goal of the appraisal process.").

Therefore, based upon the foregoing, the Court ORDERS and ADJUDGES as follows:

1. Defendant's Amended Motion to Abate or Stay and Compel Appraisal is **GRANTED**.

2. This case is **STAYED** until further order of this Court.

3. The Clerk of Court is directed to **ADMINISTRATIVELY CLOSE** this case. This case may be reopened or reactivated upon completion of appraisal and the filing of an appropriate motion by either party.

[1]At the hearing, counsel for Defendant stated that it was not seeking dismissal of the complaint based on the appraisal clause.

[2]*See Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr.*, 349 So. 3d 965, 971 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a] (holding that appraisal is ripe where (1) postloss conditions are met, (2) the insurer has a reasonable opportunity to investigate and adjust the claim, and (3) there is a disagreement regarding the value of the property or the amount of loss). Though not raised by either party, the Court notes that determining whether Defendant paid in accordance with the terms of the policy is not a true post-loss condition to obtaining coverage or benefits. *See, e.g., D&S Realty, Inc. v. Markel Ins. Co.*,789 N.W.2d 1, 16-17 (Neb. 2010); *Am. Coastal Ins. Co. v. Ironwood, Inc.*, 330 So. 3d 570, 572 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2315a]; COUCH ON INSURANCE § 186:1, 42 (West Apr. 2023). Stated differently, even if this Court were to grant Plaintiff's request and enter a declaratory judgment stating that Defendant did not comply with its post-loss obligation to properly value its payment in accordance with the policy, such a finding would not negate coverage for the loss. And if that does not negate coverage, then this dispute clearly concerns the amount of loss and should be resolved at appraisal. *See The Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 145 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a] ("When the insurer admits that there is a covered loss, any dispute on the amount of loss suffered is appropriate for appraisal.").

* * *

Insurance—Automobile—Windshield repair— Appraisal— Ripeness— Motion to dismiss and compel appraisal is denied—Insurer has not presented any competent substantial evidence demonstrating that appraisal is ripe—Unauthenticated letter and copy of check do not constitute competent substantial evidence

SAME DAY WINDSHIELDS, LLC., a/a/o Elaine Higa, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 22-CC-091935. Division J. May 16, 2023. J. Logan Murphy, Judge. Counsel: Marc B. Nussbaum, Reeder & Nussbaum, P.A., St. Petersburg, for Plaintiff. Sarah Small Roddenberry, Law Offices of Gabriel O. Fundora & Assoc., Tampa, for Defendant.

ORDER DENYING MOTION TO DISMISS AND COMPEL APPRAISAL

BEFORE THE COURT is Defendant's Motion to Dismiss the Complaint and Enforce Appraisal Clause. Both parties appeared for a hearing on May16, 2023.

Before compelling appraisal, a trial court must evaluate (1) whether a valid written agreement for appraisal exists; (2) whether an appraisable issue exists; and (3) whether a party has waived the right to appraisal *NCI, LLC v. Progressive Select Ins. Co.,* 350 So. 3d 801, 806 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2366c]. There is no dispute that a valid written agreement for appraisal exists, and Infinity did not waive its right to appraisal. The dispute, therefore, is whether an appraisable issue exists between the parties.

An appraisable issue exists once appraisal is ripe. *Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC,* 349 So. 3d 965, 971 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]. Appraisal is ripe when (1) post-loss conditions are met; (2) the insurer has a reasonable opportunity to investigate and adjust the claim; and (3) there is a disagreement regarding the value of the property or the amount of loss. *Id.* Ripeness *must* be supported by competent, substantial evidence. *Am. Cap. Assur. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n,* 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2463a], *rev. granted,* SC20-1766, 2021 WL 416684 (Fla. Feb. 8, 2021).

Here, Infinity has not presented any competent, substantial evidence that appraisal is ripe. It filed an unauthenticated letter and a copy of a check (Doc. 29), which counsel argues were sent. But the letter and check are not accompanied by any sworn, competent evidence. *See E.H.W. v. State,* 321 So. 3d 364, 370 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1316a] (holding unsworn statements from witnesses and attorney do not constitute competent, substantial evidence); *State v. Sawyer,* 350 So. 3d 427, 429 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2249a] (holding unsworn letter does not constitute competent substantial evidence); *Dyck-O'Neal, Inc. v. Herman,* 307 So. 3d 52, 61-62 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2514c] (holding unauthenticated forms and unsworn statements do not constitute competent substantial evidence); *Sonson v. Hearn*, 17 So. 3d 745, 747 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1469b] (holding certificate of non-appearance and letters from counsel do not constitute competent substantial evidence sufficient to support sanctions). Absent competent, substantial evidence, appraisal cannot be compelled.

Because the motion to dismiss does not address the particularized aspects of Count II for declaratory relief, I decline to address that

claim, as well. To the extent Infinity argues the motion to compel appraisal applies to that claim, I decline to compel appraisal because it is not ripe.

Accordingly,

1. Defendant's Motion to Dismiss the Complaint and Enforce Appraisal Clause is DENIED.

2. Defendant shall answer the complaint within 30 days.

3. Defendant shall respond to all outstanding discovery within 45 days of this order.

* * *

Insurance—Personal injury protection—Confession of judgment—Retraction—Insurer's original notice of confession of judgment to all claims asserted in complaint operated as equivalent of judgment on both breach of contract action and declaratory relief claim—Insurer's subsequent attempt to file amended notice purporting to retract the confession as to declaratory relief claim is rejected—Insurer cannot unilaterally alter confession of judgment without leave of court—Even if insurer had filed motion for leave to retract confession of judgment, it has not presented any viable justification to authorize retraction of original notice of confession on count for declaratory relief

TOTAL VITALITY MEDICAL GROUP, LLC, a/a/o Alejandro Romero, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-19938. Division N. June 9, 2023. Michael J. Hooi, Judge. Counsel: Anthony Prieto and Amy Sullivan, Morgan & Morgan, Tampa; and David M. Caldevilla, de la Parte, Gilbert, McNamara & Caldevilla, P.A., Tampa, for Plaintiff. David S. Dougherty, David M. Angley, and Megan E. Alexander, Law Offices of David S. Dougherty, Tampa, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court on May 18, 2023, concerning the "Defendant's Amended Notice of Confession of Judgment and Motion for Entry of Confessed Final Judgment," and the "Plaintiff's Motion for Attorneys' Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and Entry of Final Judgment."

A. Introduction

1. The portions of the "Plaintiff's Motion for Attorneys' Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and Entry of Final Judgment" and the "Defendant's Amended Notice of Confession of Judgment and Motion for Entry of Confessed Final Judgment," requesting entry of a final judgment are hereby **GRANTED**, to the extent set forth herein. The portion of the Defendant's motion suggesting that the Plaintiff's declaratory judgment claim is a "nullity" is **DENIED.** The portion of Plaintiff's motion concerning its claim for attorneys' fees and costs may be decided separately after a hearing on that portion of the motion.

2. On March 23, 2020, the Plaintiff filed its two-count complaint against the Defendant. Count I was a claim for declaratory relief, and Count II was a claim for breach of contract for unpaid or underpaid personal injury protection and/or medical payment benefits stemming from the patient's insurance policy.

3. On June 12, 2020, the Defendant filed its "Notice of Confession of Final Judgment and Motion for Entry of Final Judgment," which effectively conceded to all claims asserted in the complaint, including the Plaintiff's separate claims for declaratory relief and breach of contract, the amount of damages claimed by the Plaintiff, and the Plaintiff's entitlement to reasonable attorney's fees and costs. In addition, on June 12, 2020, the Defendant issued payment to the Plaintiff for a total sum of $7,935.98 in PIP benefits and $441.93 in applicable interest. With respect to the Plaintiff's Count I declaratory relief claim, ¶3 of the notice of confession specifically stated, "This post-suit payment also acts as a confession of judgment to the declaratory relief sought by the plaintiff in its separate count."

4. Shortly thereafter, in response to the Defendant's notice of confession concerning both counts of the complaint and the Defendant's payment of the claim, the Plaintiff filed its "Plaintiff's Motion for Attorneys' Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and Entry of Final Judgment."

5. Unfortunately, a dispute subsequently arose between the parties concerning the proper form and contents of the final judgment to be entered pursuant to the Defendant's notice of confession.

6. Over 2½ years later, on February 10, 2023, without seeking leave of the court or other appropriate motion, the Defendant filed its "Amended Notice of Confession of Final Judgment and Motion for Entry of Final Judgment," in which the Defendant purported to unilaterally retract its previous confession of judgment concerning the Plaintiff's declaratory relief claim in Count I, which the Defendant contends is now a "nullity." As explained below, this Court rejects the Defendant's attempt to retract its confession of judgment concerning Count I.

B. Analysis

7. In Florida, an insurance company's "payment of a settlement claim is the functional equivalent of a confession of judgment or a verdict in favor of the insured." *Pepper's Steel & Alloys, Inc. v. U.S.*, 850 So.2d 462, 465 (Fla. 2003) [28 Fla. L. Weekly S455a]. *See also, Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 684-685 (Fla. 2000) [25 Fla. L. Weekly S1103a] ("[W]here an insurer pays policy proceeds after suit has been filed but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or verdict in favor of the insured. . . ."); *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So.2d 217, 218 (Fla. 1983) ("When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured.").

8. A defendant's confession of judgment also operates as an abandonment of pleadings and defenses. *Allstate Fire & Cas. Ins. Co. v. Castro*, 351 So. 3d 127, 131 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D2314b] ("defendant abandoned his plea or other allegations by confession of judgment); *Amador v. Latin Am. Prop. & Cas. Ins. Co.*, 552 So.2d 1132, 1133 (Fla. 3d DCA 1989) ("When the insurance company has agreed to settle a disputed . . . case, it has, in effect, declined to defend its position in the pending suit."); *Bryant v. GeoVera Specialty Ins. Co.*, 271 So.3d 1013, 1020 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1232a] (by paying claim and confessing judgment, insurer abandoned its pre-suit position); *United Auto. Ins. Co. v. Zulma*, 661 So.2d 947, 948 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2373i] (insurer "abandoned its defense" by confession of judgment).

9. The confession of judgment doctrine applies to a declaratory judgment claim, and the confession of a related claim for damages does not automatically render the declaratory judgment claim a "nullity." *See, e.g., Lewis v. Universal Prop. & Cas. Ins. Co.*, 13 So.3d 1079 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1104a] (insurer's payment after insured filed suit for breach of contract and declaratory judgment was filed operated as a confession of judgment entitling the insured to attorney fees); *Tampa Chiropractic Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 141 So.3d 1256 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1441a] (auto insurer's payment of medical provider's bills for PIP benefits constituted a confession of judgment, so as to entitle provider to recover attorney fees as assignee of insureds' policy benefits, in declaratory judgment action concerning Section 627.736, Florida Statutes).

10. While the parties were unable to locate an appellate decision directly on point to this situation, the Court notes that the Defendant's original notice of confession and its concurrent payment of the claim operated as the "functional equivalent" of a judgment or verdict. *Pepper's Steel*, 850 So.2d at 465; *Ivey*, 774 So.2d at 684-685; *Wollard*, 439 So.2d at 218. If the Defendant had received an actual adverse judgment or verdict, the Defendant could not unilaterally alter such a judgment or verdict, but would have to file a timely and appropriate motion seeking relief from the court. *See*, Fla. R. Civ. P. 1.530 (establishing a 15-day deadline to amend or alter a judgment); Fla. R. Civ. P. 1.540(b)(1) (establishing a one-year deadline to seek relief from a "final judgment, decree, order, or proceeding" for mistake, inadvertence, surprise, or excusable neglect). Likewise, if the Defendant had inadvertently or erroneously admitted something in the Plaintiff's request for admissions, the Defendant would have to file an appropriate motion seeking relief from the Court. *See*, Fla. R. Civ. P. 1.370(b) (authorizing the court to permit withdrawal or amendment of an admission). Similarly, a plaintiff who erroneously files a notice of voluntary dismissal cannot unilaterally retract it, and must file an appropriate motion seeking relief from the court. *See, e.g., Miller v. Fortune Ins. Co*., 484 So. 2d 1221, 1224 (Fla. 1986) (a court has limited jurisdiction under Rule 1.540(b) to correct an erroneous voluntary notice of dismissal). In this case, the Defendant did not file such a motion, and even if the Defendant had filed a motion, the Defendant has not described any legally cognizable reason, excusable neglect, mistake, or other viable justification to authorize a retraction of its original notice of confession on Count I for declaratory relief, other than to simply be relieved of the obvious ramifications of that original notice of confession. *See, e.g., Beach Resort Hotel Corp. v. Wieder*, 79 So.2d 659, 663 (Fla. 1955) ("courts may not. . .substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain").

C. Conclusion

11. Based on the foregoing, final judgment is hereby entered in favor of the Plaintiff and against the Defendant, as follows:

(a) With respect to Count I, in accordance with ¶3 of the Defendant's original notice of confession, final judgment is hereby entered in favor of the Plaintiff against the Defendant, and the declaratory relief alleged in and requested by the complaint is hereby granted.

(b) With respect to Count II, final judgment is hereby entered in favor of the Plaintiff against the Defendant, and the Court hereby awards damages and interest to the Plaintiff in the total amount of $8,377.91, which award has been satisfied by the Defendant's payment which was made in conjunction with its original notice of confession.

12. This Court retains jurisdiction to determine the remaining portion of the "Plaintiff's Motion for Attorneys' Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and Entry of Final Judgment," including but not limited to the date of entitlement and the amount to be awarded.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Insurer is entitled to fee award where medical provider filed suit after insurer timely and fully paid presuit demand—No merit to argument that insurer is not entitled to fee award under section 57.105 because it obtained summary judgment on fact issue rather than legal issue—Statute allows sanctions for claims not supported by facts or law—Insurer is also entitled to fees and costs under offer of judgment statute

PHYSICIANS GROUP, LLC, a/a/o Kevin Moran, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-110175. Division J. May 30, 2023. J. Logan Murphy, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Christopher S. Dutton and Victoria Posada, Dutton Law Group, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO TAX ATTORNEY'S FEES AND COSTS

BEFORE THE COURT is Defendant's Motion to Tax Attorney's Fees and Costs. Plaintiff did not file a response or any evidence in opposition to the motion. Both parties appeared for a hearing on May 30, 2023.

If an overdue PIP claim is paid by the insurer within 30 days of receiving notice of the claim, "no action may be brought against the insurer." § 627.736(10)(d), Fla. Stat. (2021). Physicians Group demanded $276.42, and MGA timely paid $667.03, plus $93.55 in interest, penalties, and postage—far exceeding Physicians Group's demand. But Physicians Group still filed suit. Because § 627.736(10)(d) precludes the claim, I granted MGA summary judgment. MGA now moves for fees and costs under § 57.105 and § 768.79.

I. § 57.105

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

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

. . . .

(3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

§ 57.105, Fla. Stat.

"The statute is 'intended to address frivolous pleadings,' " but it should not "cast a chilling effect on use of the courts." *Soto v. Carrollwood Village Phase II Homeowners Ass'n, Inc.*, 326 So. 3d 1181, 1184 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1974a] (quoting *Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D462a]); *Stevenson v. Rutherford*, 400 So. 2d 28, 29 (Fla. 4th DCA 1983). To that effect, "section 57.105 should not be construed to discourage a party from pursuing a colorable claim . . . ." *Swan Landing Dev., LLC v. First Tenn. Bank Nat'l Ass'n*, 97 So. 3d 326, 328-29 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2225a]. And it must be applied with restraint "to ensure that it serves the purpose for which it was intended." *Bridgestone/Firestone, Inc. v. Herron*, 828 So. 2d 414, 419 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2173a].

Awarding § 57.105 sanctions is within the trial court's discretion. *Swan Landing*, 97 So. 3d at 328. But a finding of entitlement must be based on "substantial, competent evidence presented at the hearing . . .

or otherwise before the court and in the record." *Mason v. Highlands Cnty. Bd. of Cty. Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1061a].

Substantial competent evidence in the record shows that Physicians Group filed suit after MGA timely and fully paid the pre-suit demand—and much more. Physicians Group's attorney even candidly acknowledged that they filed suit knowing that MGA had paid an amount far exceeding the sum demanded. Physicians Group and its attorneys therefore knew—or at a minimum, should have known—that the claim was not supported by the material facts necessary or then-existing law.

Physicians Group made three arguments at the hearing. First, it mentioned an unarticulated argument about a potential "limiting charge" or "billed amount" issue. But it cannot now avoid sanctions by arguing it was entitled to some other amount that was never demanded, never pled, and never raised in opposition to summary judgment.

Second, Physicians Group argued that *Bain Complete Wellness, LLC v. Garrison Prop. & Cas. Ins. Co.*, 356 So. 3d 866 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2623a], precludes sanctions. I disagree. *Bain* was not the law when the case was filed and, more importantly, this case is not about the degree of particularity required in a demand letter under § 627.736(10)(b). No matter how detailed the demand letter, the fact remains that MGA fully paid the demand, and § 627.736(10)(d) barred Physicians Group from filing suit—but it did anyways.

Third, and finally, Physicians Group argued that because MGA obtained summary judgment on an issue of fact, rather than law, § 57.105 cannot form a basis for sanctions. The plain text of § 57.105 allows sanctions for a claim that was "not supported by the material facts" *or* "[w]ould not be supported by the application of then-existing law to those material facts." § 57.105(1). Both apply here.

The record and the evidence presented by MGA show that the PIP claim "[w]as not supported by the material facts necessary to establish" it, and it "[w]ould not be supported by the application of then existing law to those material facts" because MGA paid far in excess of the amount demanded.

II. § 768.79.

Beginning again with the plain language of the statute:

> [I]f a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award.

§ 768.79(1), Fla. Stat. (2021). Physicians Group presented no argument on this point, effectively conceding MGA's entitlement to fees and costs under § 768.79. Competent substantial evidence in the record supports findings that MGA filed an offer of judgment, which Physicians Group did not accept. MGA is therefore entitled to recover "reasonable costs and attorney's fees incurred by" MGA and a judgment in its favor.

III. § 57.041.

As the prevailing party, MGA is also entitled to recover its "legal costs and charges." § 57.041, Fla. Stat. (2022).

IV. CONCLUSION.

1. Defendant's Motion to Tax Attorney's Fees and Costs is GRANTED.

2. Defendant MGA Insurance Company, Inc. is ENTITLED to a reasonable attorney's fee, including prejudgment interest, to be paid in equal parts by the Plaintiff, Physicians Group, LLC, and the attorney for Plaintiff, Irvin & Petty, P.A.[1] § 57.105(1).

3. Defendant MGA Insurance Company, Inc. is ENTITLED to all of its reasonable costs and charges. §§ 768.79(1), 57.041.

4. The parties shall confer concerning the amount of the award within 14 days of this order. If the parties are unable to reach an agreement on the amount of fees and costs to be paid, MGA shall set the matter for an evidentiary hearing.

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[1]Because I find the claim was both not supported by the material facts, and not supported by the application of then-existing law to those facts, § 57.105(3)(c) does not apply, and the statute requires the fee to be paid by both Plaintiff and its attorney.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to dismiss is granted, and parties are ordered to comply with policy's appraisal provision—Appraisal is ripe, and there is no present practical need for pre-appraisal declarations on questions regarding competency of insurer's chosen appraiser and application of limits and loss settlement provision of policy

PRISTINE AUTO GLASS, LLC, a/a/o Michael Tomich, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-016127. Division L. May 23, 2023. Richard H. Martin, Judge. Counsel: Emilio Stillo, Stillo & Richardson, P.A., Tampa, for Plaintiff. Jose Musa and Kelsey P. Hayden, Goldstein Law Group, Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), moved to dismiss the statement of claim of plaintiff, Pristine Auto Glass, LLC a/a/o Michael Tomich ("Pristine"), or alternatively to compel appraisal (Doc. 14). A hearing was held on May 18, 2023. The Court grants the motion to dismiss without prejudice and orders the parties to complete the insurance policy's appraisal procedure.

I. Factual Background

Pristine brought this action against State Farm on February 24, 2023, as assignee of State Farm policyholder Michael Tomich for declaratory judgment relating to payment from State Farm for services Pristine performed in the replacement of Tomich's auto glass under a State Farm policy. According to the statement of claim, Tomich sustained damage to his windshield glass in April 2022 and was insured under a State Farm policy. (Doc. 4, ¶ 19, 21.) Tomich selected Pristine to replace the glass and assigned the right to collect benefits under his policy to Pristine. (*Id.* ¶ 22-24.) After completing the replacement, Pristine submitted an invoice to State Farm for payment.[1] State Farm issued a partial payment of Pristine's invoice in an amount which Pristine contends is too low and using a methodology which Pristine disputes. (*Id.* ¶ 28.) In response to Pristine's invoice, State Farm sent Pristine and Tomich a letter, dated April 29, 2022, explaining its adjustment of the claim and agreeing to pay $412.46 in benefits. (Doc. 14, Ex. A.) State Farm's letter also recognized the existence of a dispute between the parties over cost of the glass, invoked the policy's appraisal provision and named Auto Glass Inspection Services ("AGIS") as its appraiser. Although the appraisal letter is not attached to Pristine's statement of claim, it is referred to therein. (Doc. 4, ¶ 38-40.) Further, at the hearing, Plaintiff's counsel acknowledged corresponding with State Farm or its counsel about the appraisal process before this action was filed. Instead of proceeding with appraisal, though, Pristine filed suit.

Pristine asserts four counts in its statement of claim for declaratory judgment. In Count I—Pristine seeks a declaratory judgment that

AGIS is not a competent appraiser and seeks removal of AGIS as State Farm's appraiser. Count II seeks a declaratory judgment that State Farm misapplied the policy's "Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage" provision regarding "repairs" to the "replacement" of windshield glass, whether partial payment of an amount less than allowed under the policy constitutes a prior breach waiving State Farm's right to appraisal, whether the payments violate the policy provisions, and whether the terms "cost to repair" and "repair" are ambiguous. Count III seeks a declaratory judgment as to whether State Farm properly applied the "Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage" provision in arriving at the amount it proposed to pay Pristine and whether various terms in that provision are ambiguous.

Tomich's policy from State Farm contained a 6910A Amendatory Endorsement, which provided:

> If there is a disagreement as to the cost of repair, replacement or recalibration of glass, an appraisal will be used as the first step toward resolution. Appraisal will follow the rules and procedures as listed below:
>
> a. The owner and we will each select a competent appraiser.
>
> b. The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or we may petition a court that has jurisdiction to select the third appraiser.
>
> c. Each party will pay the cost of its own appraiser, attorneys and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.
>
> d. The appraisers shall only determine the cost of repair, replacement, and recalibration of glass. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class-representative basis.
>
> e. A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at the appraisal, will be binding on the owner of the covered vehicle and us.
>
> f. We and you do not waive any rights by submitting to an appraisal.

(Doc. 4, ¶ 46; Doc. 13, at 5.)

The policy further provides, "Legal action may not be brought against us until there has been full compliance with the provisions of this policy." (Doc. 16, at 63.)

Several things were also undisputed at the hearing. First, State Farm acknowledged coverage expressly and by tendering payment and invoking appraisal presuit and in its motion to dismiss. Second, Pristine failed to comply with the appraisal provision after State Farm's demand. Instead, Pristine filed this action for declaratory judgment before participating in the appraisal process or engaging through its own appraiser with AGIS.

II. Discussion

Insurance contracts are construed according to their plain meaning. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a]. Courts do not have the liberty to rewrite contracts, add meaning that is not present, relieve a party from an apparent hardship or improvident bargain, or use equity to remedy an un-fair situation. *Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr.*, 349 So. 3d 965, 971 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]. Where an insurance contract, like the one at issue here, contains an appraisal provision, and that appraisal provision is timely invoked, compliance with the appraisal procedure is a condition precedent to suit. *New Amsterdam Cas. Co. v. J.H. Blackshear, Inc.,* 156 So. 695, 116 Fla. 289, 291 (1934).

Before compelling appraisal, a trial court must evaluate (1) whether a valid written agreement for appraisal exists; (2) whether an appraisable issue exists; and (3) whether a party has waived the right to appraisal. *NCI, LLC v. Progressive Select Ins. Co.*, 350 So. 3d 801, 806 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2366c]. There is no dispute that a valid written agreement for appraisal exists here. An appraisable issue exists here because Pristine's complaint establishes (1) postloss conditions are met, (2) State Farm had a reasonable opportunity to investigate and adjust the claim, and (3) there is a disagreement regarding the amount of loss. *Hillsborough Ins.*, 349 So. 3d at 971. In the language of the policy, "there is a disagreement as to the cost of repair, replacement or recalibration of glass." State Farm has not waived its right to appraisal. Indeed, State Farm invoked appraisal presuit and at the earliest stages of this case.

"Once the trial court makes the preliminary ripeness determination, motions to compel appraisal 'should be granted whenever the parties have agreed to appraisal and the court entertains no doubts that such an agreement was made.' " *Hillsborough Ins.*, 349 So. 3d at 971 (*quoting People's Tr. Ins. Co. v. Marzouka*, 320 So. 3d 945, 947-48 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a]). Thus, compelling appraisal would be required unless Pristine could show some present, practical need for a declaratory judgment prior to its compliance with the contractual condition precedent.

Pristine's amended complaint fails to make such a showing. Florida's Declaratory Judgment Act provides broad remedial relief. § 86.101, Fla. Stat. (2021). County courts "have jurisdiction . . . to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." § 86.011, Fla. Stat. (2021). With that jurisdiction, courts may render declaratory judgments concerning the existence or nonexistence of "any immunity, power, privilege, or right," or of "any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege or right now exists or will arise in the future." §§ 86.011(1), 86.011(2). To that end, any person "who may be in doubt about his or her rights under" a contract "may have determined any question of construction or validity arising under such" contract. § 86.021, Fla. Stat. (2022).

"[W]hile the scope of a court's jurisdiction to issue a declaratory judgment is broad, 'it does have limits—one of which is that courts will not render advisory opinions or give legal advice.' " *MacNeil v. Crestview Hosp. Corp.*, 292 So. 3d 840, 843 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D571a] (quoting *Golfrock, LLC v. Lee Cnty.*, 247 So. 3d 37, 40 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D984a]). To ensure jurisdiction over a petition for declaratory relief, the plaintiff must show:

> (1)There is a bona fide, actual, present practical need for the declaration.
>
> (2) The declaration should deal with a present, ascertained, or ascertainable state of facts or present controversy as to a state of facts.
>
> (3) Some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts.
>
> (4) There is some person or persons who have, or reasonably may have, an actual, present, adverse, and antagonistic interest in the subject matter, either in fact or law.
>
> (5) The antagonistic or adverse interests are all before the court.
>
> (6) The relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952).

These requirements "ensure that the proceeding is 'judicial in nature' and falls 'within the constitutional powers of the courts.' " *MacNeil*, 292 So. 3d at 843 (quoting May, 59 So. 2d at 639). "Thus, absent a bona fide need for a declaration . . . , the [trial court] lacks jurisdiction to render declaratory relief." *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192-93 (Fla.

1995) [20 Fla. L. Weekly S333a] (citing *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991); *Ervin v. Taylor*, 66 So. 2d 816 (Fla. 1953)). "The courts' jurisdiction to declare rights, status, and other legal relations does not extend to 'what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.' " *Riverside Ave. Prop., LLC v. 1661 Riverside Condo. Ass'n, Inc.*, 323 So. 3d 997, 1002 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1740a] (quoting *Apthorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D490a]) (emphasis in original).

When viewed in its entirety, Pristine's complaint seeks a declaratory judgment about the mere possibility of legal injury based upon a hypothetical state of facts which have not yet fully matured. Pristine prematurely brought this action for declaratory judgment. The policy requires State Farm and the covered vehicle owner to appoint a "competent appraiser", and State Farm identified AGIS. The competence of the persons at AGIS who actually perform the appraisal of this claim can more accurately and appropriately be analyzed once the appraisal process is underway, or after completion. That is the relevant competency inquiry—not the competence of the entity as a whole. Attempting to so opine now would exceed the Court's declaratory judgment jurisdiction by rendering a speculative advisory opinion. Moreover, the policy gives Pristine the ability to mitigate any potential injury as to the qualifications of State Farm's appraiser by having the appraisers select an third "competent" appraiser.

An example of a more concrete, particularized circumstance in a closely analogous situation is the Third District's decision in *Heritage Prop. & Cas. Ins. Co. v. Romanach*, 224 So. 3d 262 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1563a]. There, an insurer brought a declaratory judgment action after an insured's appraiser and the umpire had agreed on the amount of loss and finalized an appraisal award. The insurer contended it was entitled to a new appraisal process because the umpire had improperly determined coverage issues and had allegedly colluded with the insurer's appraiser. The insurer further alleged familial relationships between the appraiser, umpire and property owner which called into question the impartiality of the process. *Id.* at 263-64. The Third District held the insurer validly stated a claim for declaratory judgment as to the impartiality of the umpire and the integrity of the appraisal process and reversed the dismissal of the insurer's declaratory judgment complaint. *Id.* at 265.

The juxtaposition between the concrete facts in *Heritage Prop. & Cas. Ins. Co.*, and this action could not be clearer. The court there was presented with concrete facts about a specific situation after both parties had made efforts to comply with the presuit appraisal process and an appraisal award had been made. The set of facts brought to the court about the qualifications and impartiality of the appraiser were much more concrete and particularized than those before this Court. Instead, Pristine seeks an abstract legal opinion about whether AGIS, or any of its personnel, can *ever* be a competent appraiser when Pristine has made no effort yet to actually engage with the entity or its agents with respect to this claim. Dismissal under these circumstances is appropriate. *See NCI, LLC,* 350 So. 3d at 810.

Pristine's claims in Counts II and III relating to the application of the Limits and Loss Settlement provision are likewise subject to appraisal. As the Second District explained in *Cincinnati Insurance Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a], while coverage is a judicial question, where, as here, an insurer admits there is a covered loss, "any dispute over the amount of the covered loss suffered is appropriate for appraisal." Indeed, attempting to resolve disagreements over the method of calculating and valuing a loss is the very purpose of the appraisal process. To the extent I have discretion to decide whether issues concerning the interpretation of the policy precede or follow appraisal, *see Sunshine State Ins. Co. v. Rawlins*, 34 So. 3d 753, 755 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D888a], in my view, appraisal and an award therefrom should come first.

III. Conclusion

Accordingly, Defendant's motion to dismiss is **GRANTED**. Plaintiff's amended complaint is **DISMISSED**, without prejudice. The parties are directed to comply with the policy's appraisal provisions.

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[1]Pristine's invoice for $1,162.76 is attached to State Farm's motion. (Doc. 14, at 14.) Thus, it appears the amount in dispute is approximately $750.30.

* * *

Insurance—Automobile—Windshield repair— Appraisal— Ripeness—Motion to dismiss or abate for appraisal is denied where insurer has not shown that it has otherwise complied with post-loss policy requirements prior to invoking appraisal—Further, where complaint alleges that appraisal provision is not enforceable because chosen appraiser is not impartial, appraisal is not proper until challenge to enforceability has been adjudicated

SAME DAY WINDSHIELDS, LLC, a/a/o Black Bird Trucking, Plaintiff, v. GRANADA INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-082227. May 15, 2023. James Giardina, Judge. Counsel: Marc B. Nussbaum, Reeder & Nussbaum, P.A., St. Petersberg, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR BREACH OF CONTRACT AND DECLARATORY RELIEF, OR ALTERNATIVELY MOTION TO STAY AND COMPEL APPRAISAL

THIS CAUSE came before the Court on Defendant's Motion To Dismiss Plaintiff's Amended Complaint For Breach Of Contract And Declaratory Relief, Or Alternatively Motion To Stay And Compel Appraisal on May 11, 2023. Having considered the motion, argument of counsel, the record, and applicable law, and being otherwise advised in premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. A motion to dismiss test the legal sufficiency of a complaint and is not intended to determine issues of ultimate fact. *Holland v. Anheuser Busch, Inc.,* 643 So.2d 621, 623 (Fla. 2d DCA 1994). In ruling on a motion to dismiss, the trial court is confined to the allegations within the complaint and attachment(s). The Court must determine "whether, if the factual allegations of the complaint are established by proof or otherwise, the plaintiff will be legally or equitably entitled to the claimed relief against the defendant. *Hankins v. Title and Trust Company of Florida,* 169 So. 2d 526 (Fla. App 1964).

2. The Court finds that the Complaint sets forth a cause of action for Breach of Contract and for Declaratory Relief.

3. Before a trial court can compel appraisal, it must make a preliminary determination as to whether the demand for appraisal is ripe. *Heritage Property & Casualty Ins. Co. v. David Williams and Holly Williams,* 338 So.3d 1119 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1194b]; *Citizens Prop. Ins. Corp. v. Admiralty House, Inc.,* 66 So. 3d 342,344 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1436a]. A finding that appraisal is ripe must be supported by competent substantial evidence. *Am. Cap. Assurance Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n, Inc.,* 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2463a] (citing *Fla. Ins. Guar. Ass'n v. Hunnewell,* 173 So. 3d 988, 991 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D661a]). No evidence has been presented that appraisal is

ripe, or that Defendant has otherwise complied with its policy of insurance prior to invoking appraisal. *Heritage,* 338 So.3d at 1121 (holding that there must be sufficient compliance with a policy's post-loss conditions so as to trigger the policy's appraisal provision); *People's Trust Insurance Company v. Ortega,* 306 So.3d 280, 284 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1523a] (holding that the right to appraisal "cannot be triggered until both parties have complied with their contractual obligations") (emphasis added). Invoking the clause does not make it automatically ripe. *Corzo v. Am. Superior Ins. Co.,* 847 So. 2d 584, 585 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1432c].

4. Defendant has not presented evidence or proof that it has adjusted or paid the subject windshield loss in accordance with its policy of insurance, specifically, the limitation of liability within the subject policy of insurance. Thus, Defendant's right to invoke appraisal has not been triggered, and cannot be triggered until Defendant complies with its post-loss policy requirements (or provides proof that compliance has occurred).

5. Plaintiff has also challenged the Defendant's appraisal election as being improper alleging that the chosen appraiser is not impartial. The intentional selection of a known impartial appraiser could render the appraisal election improper as it would defeat the entire purpose of the appraisal clause which mandates the designation of an impartial appraisal.

6. "Where declaratory counts challenging the enforceability of an appraisal clause exist, courts must enjoy no less power to decide whether to address such arguments in an adjudication of the merits of such counts, or in response to a motion to compel appraisal, before the appraisal can be enforced." *People's Trust Ins. Co. v. Marzouka,* 320 So.3d 945, 949 (Fla. 3rd DCA 2021) [46 Fla. L. Weekly D1155a] (As framed by the briefs, the main issue is whether the trial court erred in denying appraisal as premature on the basis that the insureds' complaint partly sought a declaration that the policy provisions requiring appraisal were unenforceable, which merits determination was deemed necessary before appraisal could be compelled. We answer this question in the negative.) (citing *Higgins v. State Farm Fire & Cas. Co.,* 894 So. 2d 5, 18 (Fla. 2004) [29 Fla. L. Weekly S630a]). *See also, Progressive Am. Ins. Co. v. Dr. Car Glass, LLC,* No.: 3D21-0558 (Fla. 3d DCA, September 15, 2021) [46 Fla. L. Weekly D2030c].

7. The Court finds that because the Amended Complaint challenges the enforceability and appropriateness of the appraisal and other policy provisions, that appraisal is not proper without adjudication of such claims. *See Id.*

8. Based on the foregoing, the Court finds that appraisal is not ripe. Accordingly, it is ORDERED AND ADJUDGED that Defendant's Motion to Dismiss or Alternatively Abate or Stay Plaintiff's Amended Complaint for Appraisal is hereby: **DENIED.**

* * *

Insurance—Personal injury protection—Coverage—Affirmative defenses—Accord and satisfaction— Defense of statutory accord and satisfaction fails where there is no evidence of dispute between parties prior to issuance of check for reduced PIP benefits

STAND-UP MRI OF FORT LAUDERDALE, a/a/o Chad Sanford, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21030092. Division 54. April 24, 2023. Florence Taylor Barner, Judge. Counsel: Dalton Thomas, The Injury Firm, Fort Lauderdale, for Plaintiff. House Counsel, United Automobile Insurance Company, for Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on April 11, 203 on Defendant's Motion for Final Summary Judgment Re: Accord and Satisfaction and Plaintiff's Cross Motion for Summary Judgment Regarding Accord and Satisfaction. The Court having reviewed the party's Motions with supporting evidence, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise sufficiently advised in the premises, hereby enters this Order GRANTING Plaintiff's Motion for Summary Judgment, DENYING Defendant's Motion for Summary Judgment, and makes the following factual findings and conclusions of law.

I. Findings of Fact

Chad Sanford was involved in an automobile accident on November 16, 2017 while insured under an automobile policy issued by Defendant, United Automobile Insurance Company ("United") that provided coverage for personal injury protection ("PIP") benefits. Mr. Sanford sought and received medical services from Plaintiff, Stand-Up MRI of Fort Lauderdale, on date of service February 6, 2018. Pursuant to the assignment benefits executed by Mr. Sanford in Plaintiff's favor, Plaintiff billed United directly for the services which included MRI scans identified as CPT codes 72141 and 72148.

In response to the Plaintiff's claim, United determined the amount to pay the Plaintiff for CPT code 72141 and 72148 for date of service February 6, 2018 was $1,773.04. United determined this amount based solely on their calculation of the schedule of maximum charges found in Florida Statute § 627.736(5)(a). On May 18, 2018, United issued a draft in the amount of $1,773.04 to the Plaintiff that included the language "FULL and FINAL Benefits for Bill IDs on attached STATEMENT" on the payee line. Prior to Defendant's issuance of the check, there was no communication or correspondence between the Plaintiff and United regarding the claim. On May 30, 2018, the Plaintiff deposited the draft.

II. Issue

The sole remaining issue is "[w]hether an accord and satisfaction by use of instrument occurred pursuant to Florida Statute § 673.3111."

III. Analysis

Florida Statute § 673.3111 provides:

> (1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.
>
> (2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

In the instant case, there is no dispute that the Plaintiff obtained payment of the instrument. Therefore, prior to getting to the conspicuousness of the statement, the express language of § 673.3111(1) still requires United to prove that they in good faith tendered the instrument in full satisfaction of a claim and that the claim was unliquidated or there was a bona fide dispute at the time of the tender.

a. Good Faith

Florida Statute § 673.1031(1)(d) defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Previous courts analyzing "good faith" have found that the issue of good faith or bad faith is usually a question for the finder of fact. *Fortune v. First Protective Ins. Co.,* 302 So. 3d 485, 490 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2092a]. See also *Cox v. CSX Intermodal, Inc.,* finding that establishing good or bad faith at the summary judgment stage is difficult. 732 So. 2d 1092 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D195a].

In analyzing the good faith requirement of Florida Statute § 673.3111, the court takes note that "Florida's Uniform Commercial Code (UCC) accord and satisfaction defense was adopted verbatim from the Uniform Laws Annotated of the UCC, section 1-201. In such situations, Florida courts often rely upon the Code and its comments for guidance." *United Auto. Ins. Co. v. Rivero Diagnostic Ctr., Inc.,* 327 So. 3d 376, 380 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1917a], *review denied,* SC21-1517, 2022 WL 165154 (Fla. Jan. 19, 2022).

Comment 4 of the Uniform Commercial Code comment that follows section 673.3111's accord and satisfaction provision states:

> Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).
>
> § 3-311. Accord and Satisfaction by Use of Instrument., Unif. Commercial Code § 3-311

The Plaintiff has presented evidence that 66% of the 10,940 drafts for pip benefits issued by the United in the six-month period encompassing May 18, 2018 contain full and final language. The Plaintiff has additionally presented evidence that United has created check boxes in computer programs to include boilerplate full and final language on explanations of benefits and drafts for benefits.

As the Plaintiff has presented some evidence of a lack of good faith, the Court finds that the good faith requirement of Florida Statute § 673.3111 is a question of fact to be determined by the jury.

b. Liquidated Damages

Damages are liquidated "when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." *Cellular Warehouse, Inc. v. GH Cellular, LLC,* 957 So.2d 662, 665 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a] (citing *Bowman v. Kingsland Dev., Inc.,* 432 So.2d 660, 662 (Fla. 5th DCA 1983)). In the instant case, the parties have stipulated to the amount of damages due under the policy of insurance as $164.00. The stipulated damages were calculated under the fee schedule by determining 200% of the 2007 non-facility limiting charge. As the amount due under the policy of insurance was calculated based upon the fee schedule formula, then, by definition, the claim is liquidated.

c. Bona Fide Dispute

The express language of Florida Statute § 673.3111 requires the amount of the claim to be subject to a bona fide dispute. The Court reads this provision as imposing a requirement that there be a dispute at the time of the tender of the instrument. In determining the existence of a bona fide dispute, the Court notes that generally "whether there is an accord and satisfaction ordinarily involves a pure question of intention, which is, as a rule, a question of fact." *U.S. Rubber Products v. Clark,* 200 So. 385, 389 (Fla. 1941).

The record evidence presented in the instant case establishes that, prior to the Defendant's issuance of draft, there was no communication between the parties nor were there any negotiations or defenses raised. United argues that the Plaintiff's submission of the bill in an amount greater than the amount payable under the policy presumptively creates a dispute. As Judge Robert Lee found in *Best Amer. Diag. Center, Inc. (a/a/o Lenia Pineiro),* "an insurer's receipt of medical bills does not constitute a "preexisting dispute." Citing *St. Mary's Hospital, Inc. v. Schocoff,* 725 So.2d 454 (Fla. 4th DCA 1999). 20 Fla. L. Weekly Supp. 447a (Broward Cty. Ct., January 4, 2013), *affirmed*, (Fla. 17th Jud. Cir., August 7, 2014). Instead, the record evidence establishes that United simply paid the amount they believed they were supposed to pay as established by the policy and the schedule of maximum charges in Florida Statute § 627.736(5). Courts have previously held that an offer to pay the amount thought to be the full amount under the original agreement cannot form the basis of accord and satisfaction. *Brody Irrevocable Grantor Tr. No. 2 v. Brody,* 322 So. 3d 150, 155 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1242a].

In the instant case, United's corporate representative testified that on May 18, 0218, United wasn't aware of there being any dispute as to the amount of $1,773.04. In response to a request for admission, United also denied that at the time the Defendant issued the check at issue, the amount of the claim was subject to a bona fide dispute. Therefore, although accord and satisfaction ordinarily involves a pure question of intention that should generally be submitted to a jury, the stipulations and record evidence presented require this Court to find that no bona fide dispute existed that could form the basis for an accord and satisfaction.

IV. Conclusion

"[T]he burden of proving each element of an affirmative defense rests on the party that asserts the defense." *Custer Medical Center v. United Auto. Inc. Co.,* 62 So. 3d 1086 1097 (Fla. 2010) [35 Fla. L. Weekly S640a]; see also *State Farm Mut. Auto. Ins. Co. v. Curran,* 135 So. 3d 1071, 1079 (Fla. 2014) [39 Fla. L. Weekly S122a]. It is this Court's holding that no bona fide dispute existed that could form the basis for an accord and satisfaction. As United failed to establish the elements of Florida Statute § 673.3111(1), the Court need not reach the evaluation of the conspicuousness of the statement under § 673.3111(2).

Accordingly, it is hereby ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment Re: Accord and Satisfaction is DENIED; and Plaintiff's Cross Motion for Summary Judgment Regarding Accord and Satisfaction is GRANTED.

Plaintiff shall submit a final judgment for execution by the Court.

* * *

Insurance—Default—Vacation—Summary denial—Motion not submitted under oath and unaccompanied by supporting affidavit

WELLINGTON CHIROPRACTIC CENTER OF PALM BEACH, INC., Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23006443. Division 53. June 19, 2023. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT

This cause came before the Court for consideration of the Defendant's Motion to Vacate Default, and the Court's having reviewed the Motion, finds as follows:

Before a motion to vacate a default can be considered on the merits, the moving party must submit the motion under oath or with supporting affidavit. *See Garcia v. State*, 306 So.3d 212, 215 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1402b]; *Dodrill v. Infe, Inc.*, 837 So.3d 1187, 1187 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D558d]; *Mieles v. Lugo*, 26 Fla. L. Weekly Supp. 865a (5th Cir. Ct. App. 2019); *Irkhin v. Simonelli*, 25 Fla. L. Weekly Supp. 996, 997 (12th Cir. Ct. App. 2017); *Woodard v. Mid-Atlantic Finance Co.*, 2015 WL 12659998, *1 (Fla. 4th Cir. Ct. App. 2015). *See also Waterson v. Seat & Crawford*, 10 Fla. 326, 330 (1863) (defendant submitted affidavit demonstrating meritorious defense and unavoidable neglect); *Orchard Grove Ass'n, Inc. v. Gregory*, 26 Fla. L. Weekly Supp. 114,

115 (17th Cir. Ct. 2018) (defendant submitted verified motion setting forth excusable neglect.)

Because the Defendant did not submit the motion under oath or with any any supporting affidavit, the Motion should be summarily denied. Further, even if the Court were to consider the substance of the Motion, the Court notes that the Motion does nothing more than insufficiently argue in a conclusory fashion that an unspecified error was excusable. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Vacate Default is DENIED without prejudice.

* * *

Civil procedure—Answer and affirmative defenses—Amendment—Insurance—Insurer's motion for leave to amend answer and affirmative defenses is denied—Amendment less than six weeks before trial date would cause substantial prejudice to plaintiff and court

TAR CAPITAL LLC, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21039917. Division 53. May 23, 2023. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S AMENDED MOTION FOR LEAVE TO AMEND ANSWER AND AFFIRMATIVE DEFENSES, UPON A FINDING OF PREJUDICE

THIS CAUSE having come before the Court for hearing of the Defendant's Amended Motion For Leave to Amend Answer and Affirmative Defenses, having reviewed the motion, heard argument, and being otherwise sufficiently advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

1. Defendant's Motion is DENIED.

2. The Court finds the granting of Defendant's motion less than six weeks before the trial date would cause substantial prejudice to the Plaintiff and the Court. The trial has been set, mediation and arbitration taken place, a pretrial conference held, exhibits marked, and jury instructions and verdict form reviewed and approved.

3. A brief recitation of the history of this case puts this matter in context. On December 6, 2021, the Court issued a Uniform Order Setting Pre-Trial Deadlines and Related Requirements.

4. The parties filed a joint pre-trial stipulation on August 15, 2022, and the issues being raised by Defendant were not raised at that time. Almost four months later, Defendant filed the Amended Motion for Leave to Amend Answer and Affirmative Defenses on December 8, 2022, but waited until to set it for hearing to take place May 18, 2023.

5. The parties participated in Court ordered mediation on October 27, 2022 and were subsequently ordered to participate in arbitration on December 1, 2022. The arbitration took place on January 25, 2023, and the arbiter's decision was filed under seal on January 31, 2023. The arbiter's decision could not have ruled on issues which were not previously raised in the pleadings. To grant the Defendant's Motion would require the Court to reopen both mediation and arbitration, as the Defendant's proposed amendment would change its theory of defense.

6. On April 14, 2023, the Court held a Pre-Trial Conference to mark exhibits and review the proposed jury instructions and verdict forms. Once again, Defendant failed to raise any of the new issues at the Pre-Trial Conference. At the Pretrial Conference, after hearing argument from counsel regarding the proposed jury instructions and verdict forms, the Court took the arguments under advisement, and on April 18, 2023, the Court issued a notice of transmittal of Jury Instructions and Verdict Form.

7. Allowing Defendant to amend the Answer and Affirmative Defenses at this late stage of litigation would re-open the pleadings and lead to further discovery on the new issues raised. Furthermore, the parties would have to amend their pre-trial stipulation including new jury instructions and verdict forms to reflect the newly raised issues, and the Court would then have to render another decision on the proposed jury instructions and verdict forms.

8. For the reasons detailed above, the Court finds Plaintiff would be substantially prejudiced by the granting of Defendant's motion. Specifically, Plaintiff would be substantially prejudiced by Defendant's failure to raise these issues at any time during discovery, during the conferral of the joint pre-trial stipulation, prior to mediation, or prior to arbitration.

9. Finally, although not dispositive, the Court notes the inconvenience to the administration of justice. This is the oldest case pending in the Court's division. It is also the only case on the trial calendar for June 2023, with it being too late to add any additional case(s) to the docket. Like the Plaintiff, the Court would have to deal with mediation, arbitration, and discovery issues. Another pretrial conference scheduled, new exhibits considered, and jury instructions and verdict form reviewed anew.

* * *

Arbitration—Confirmation of award—Judgment must be entered in accordance with arbitrator's decision where parties did not file request for trial de novo within 20 days from date arbitrator's decision was served on parties

SNW INVESTMENT LLC, Plaintiff, v. CONDOMINIUM A ASSOCIATION AT SHERWOOD SQUARE, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22055095. Division 53. June 1, 2023. Robert W. Lee, Judge.

FINAL JUDGMENT ON ARBITRATOR'S DECISION IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court for consideration of the notice of filing Arbitration Decision filed by the Arbitrator L. Robert Gould, and the Court's having reviewed the docket, the entire Court file, and the relevant legal authorities; and having been sufficiently advised in the premises, the Court finds as follows:

This case was submitted to mandatory arbitration, as permitted by the rules and controlling case law. The arbitration hearing was held on May 1, 2023. On May 8, 2023, the arbitrator served his decision on the parties. Under Rule 1.820(h), Fla. R. Civ. P., any party objecting to the decision had 20 days to *file* (not merely *serve*) a request for trial de novo. The deadline was therefore May 30, 2023 (May 28 being Sunday, and May 29 being a legal holiday.) The Court has confirmed with the Clerk of Courts that it is current with docketing and filing through that date. No party filed a request for trial de novo. As a result, the court "*must* enforce the decision of the arbitrator and has no discretion to do otherwise" (emphasis added). *Bacon Family Partners, L.P. v. Apollo Condominium Ass'n*, 852 So.2d 882, 888 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1795a]. *See also Johnson v. Levine*, 736 So.2d 1235, 1238 n.3 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1456a]; *Klein v. J.L. Howard, Inc.*, 600 So.2d 511, 512 (Fla. 4th DCA 1992). Accordingly, the Court has this day unsealed the Arbitrator's decision. A review of the thorough decision reveals that the arbitrator conducted "a hearing which provide[d] both parties the opportunity to present their respective positions." Rule 11.060(b)(2), Fla. R . Ct.-Appointed Arb. (2023). Accordingly, it is hereby

ADJUDGED THAT:

The Plaintiff, SNW INVESTMENTS LLC shall take nothing in this action, and the Defendant, CONDOMINIUM A ASSOCIATION AT SHERWOOD SQUARE INC., shall go hence without day. The Court retains jurisdiction to determine any issues involving attorney's fees and costs.

The case management conference set for June 2, 2023 is CANCELED.

* * *

Criminal law—Driving under influence—Search and seizure—Arrest—Probable cause—Actual physical control of vehicle—Statements of defendant—Accident report privilege—Officer who encountered defendant standing 10 feet away from vehicle at scene of single-vehicle accident did not have probable cause to believe that defendant was in actual physical control of vehicle where keys were not in defendant's possession—Defendant's statements to officer about driving were not admissible where officer told defendant three times that he was only doing accident investigation and never read *Miranda* warning to defendant—Motion to suppress is granted

STATE OF FLORIDA, v. CHRISTINA MCLAUGHLIN, Defendant. County Court, 20th Judicial Circuit in and for Collier County, Criminal Action. Case No. 22CT003764. June 6, 2023. Robert Crown, Judge. Counsel: Alexis Moffett, Assistant State Attorney, Naples, for State. Daniel J. Garza, Wilbur Smith, LLC, Fort Myers, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION TO SUPPRESS ARREST

THIS CAUSE came before the Court on May 30, 2023, as a result of the Defendant, Christina McLaughlin (hereinafter "McLaughlin"), through counsel, having filed a Motion to Suppress Arrest pursuant to Fla. R. Crim. P. 1190.

FACTUAL BACKGROUND

On November 25, 2022, Corporal Campbell of the Collier County Sheriff's Office was dispatched to a single vehicle crash. The only information Corporal Campbell was given was the location of the crash and that it was a single vehicle crash. Upon arrival, Corporal Campbell observed McLaughlin standing approximately 10 feet away from the vehicle involved in the crash. McLaughlin did not have the vehicle keys in her possession, they were still in the vehicle. McLaughlin was exhibiting signs of impairment, namely an odor of alcohol, unsteadiness while standing, and bloodshot watery eyes. There were some personal items of McLaughlin found in the vehicle but at no time was McLaughlin seen in the vehicle or driving the vehicle by Corporal Campbell. Corporal Campbell conducted a crash investigation and upon "switching hats" to a criminal investigation did not read McLaughlin *Miranda.* McLaughlin refused to perform field sobriety exercises and was subsequently arrested for DUI.

FINDINGS

The Second District Court of Appeals has outlined the three circumstances in which a misdemeanor arrest for driving under the influence can be made:

> An officer can arrest a person for misdemeanor DUI in three circumstances:
>
> 1. The officer witnesses each element of a prima facie case,
>
> 2. The officer is investigating an accident and develops probable cause to charge DUI, or
>
> 3. One officer calls upon another for assistance and the combined observations of the two or more officers are united to establish the probable cause to the arrest.

Sawyer v. State, 905 So. 2d 232, 234 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1466c]. The State and Defense agree that the Defendant's Motion to Suppress rests on the second prong, whether Corporal Campbell, while investigating the accident, had probable cause to charge DUI.

The first element the State must prove in a DUI case is that a defendant was driving or in actual physical control. In the instant case, it is undisputed that McLaughlin was approximately 10 feet away from the vehicle when Corporal Campbell arrived at the scene and McLaughlin was never seen driving or in the vehicle. The fact that McLaughlin's belongings were in the vehicle does not support actual physical control, she very well may have been a passenger. A critical component in support of actual physical control is if a defendant is in possession of the vehicle's keys. Here, the keys were still in the vehicle. That is not evidence in support of actual physical control.

The State argued that Mclaughlin's own statement about driving proves actual physical control. We have evidence from Corporal Campbell that he told McLaughlin three times that he was only doing an accident investigation and that he never read *Miranda.* The Court finds those comments made during the accident investigation are privileged, not admissible, and cannot be used against her. The State's reliance on *State v. Blocker,* 2023 WL 3082868 [360 So.3d 742 (Fla. 4DCA 2023); 48 Fla. L. Weekly D867a] is misplaced. *Blocker* is distinguished from this case in that in *Blocker* the officer conducting the criminal investigation was not ever conducting the accident investigation, so there was no need to switch hats. It is settled law in the State of Florida that when an officer is conducting an accident investigation and they are about to switch to a criminal investigation, they must tell the suspect they are switching to a criminal investigation and follow that up with *Miranda.*

CONCLUSION

The evidence presented was that of a vehicle crash, the location, McLaughlin was 10 feet away, she did not have the keys in her possession, although she did exhibit signs of impairment, do not rise to the level of probable cause that she was in actual physical control of the vehicle. Therefore, the Defense's Motion to Suppress the unlawful arrest, and all evidence obtained thereafter, is granted.

ORDERED AND ADJUDGED that the Motion to Suppress the unlawful arrest, and all evidence obtained thereafter, is GRANTED.

* * *