Volume 31, Number 5, September 29, 2023

SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 235-282

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **TORTS—DAMAGES—MEDICAL EXPENSES—EVIDENCE. The circuit courts continue to address the retroactive application of Section 768.0427, Florida Statutes (2023), which addresses the admissibility of evidence to prove medical expenses in personal injury or wrongful death actions, disclosure of letters of protection, and recovery of past and future medical expenses damages, and which applies to "causes of action filed after the effective date of this act."** *JACKSON v. PROGRESSIVE SELECT INSURANCE COMPANY (Circuit Court, Second Judicial Circuit in and for Gadsden County). Filed July 28, 2023. Full Text at Circuit Courts-Original Section, page 249a. TORRES-APONTE v. HUDNALL (Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County). Filed May 19, 2023. Full Text at Circuit Courts-Original Section, page 255b. WILLIAMS v. WOLF (Circuit Court, Fourth Judicial Circuit in and for Duval County). Filed June 15, 2023. Full Text at Circuit Courts-Original Section, page 251a.*

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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.

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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.

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TABLE OF CASES TREATED (continued)

* * *

REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

* * *

Volume 31, Number 5
September 29, 2023
Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Municipal corporations—Development orders—On rehearing, circuit court again finds that village's denial of application for 480-unit development on property zoned for maximum of 400 units is not supported by competent substantial evidence and departed from essential requirements of law where village previously agreed to transfer development rights for 85 units permitted on other environmentally sensitive land owned by developer on condition that developer donate environmentally sensitive land to village, and developer fulfilled condition of transferring land to village—No merit to argument that denial was justified by developer's failure to have donated land rezoned and comprehensive plan amended where village had not imposed those conditions on transfer—Moreover, law did not require rezoning—No merit to argument that village was not obligated to accept land transfer—Claim that village had to choose to accept donated land was not supported by record—Village was equitably estopped from denying transfer after developer relied on village's approval of transfer and met conditions imposed by village

17777 OLD CUTLER ROAD, LLC, Petitioner, v. VILLAGE OF PALMETTO BAY, FLORIDA, a Florida Municipal corporation, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-00012-AP-01. Original Opinion filed March 10, 2023. Amended Opinion filed July 5, 2023. On Petition for Writ of Certiorari from the Village of Palmetto Bay approval of Resolution No. 2022-05. Counsel: Eileen Ball Mehta, Kenneth J. Duvall, and Liana M. Kozlowski, Bilzin Sumberg Baena Price & Axelrod LLP; and Jerry B. Proctor, Jerry B. Proctor, P.A., for Petitioner. Laura K. Wendell and John J. Quick, Weiss Serota Helfman Cole & Bierman, P.L., for Respondent.

OPINION

[Original Opinion at 31 Fla. L. Weekly Supp. 1a]

(Before TRAWICK, SANTOVENIA, and DE LA O, JJ.)

ON MOTION FOR REHEARING

(DE LA O, Judge.) We grant Respondent's Motion for Rehearing in part, withdraw our previous opinion, and issue the following in its place.

Petitioner, 17777 Old Cutler Road, LLC, petitions this Court to quash Village Resolution No. 2022-05, adopted by the Respondent, Village of Palmetto Bay ("Village"), on January 24, 2022. (App. 00001-00004) .[1]

For well over a decade, Petitioner has made efforts to build a 480-unit development on property zoned for a maximum of 400 units. In 2016, the Village determined that Petitioner owned other land on which it could develop 85 units. This other land was environmentally sensitive land the Village wished to preserve and use as a park and a fire station. As a result, Petitioner obtained approval from the Village to transfer the 85 development units from this environmentally sensitive land on the condition it donate the land to the Village. Believing it had satisfied the conditions for transferring those 85 development units, Petitioner combined them with its existing right to develop 400 units on its property and sought approval for its 480 unit development. At a final public hearing, however, the Village denied the 85 development units existed because Petitioner had not fulfilled a condition which the Village had not imposed and the law does not require—the rezoning of the environmentally sensitive land Petitioner was donating to the Village.

On certiorari review, the Village argues there was competent substantial evidence to justify denial of Petitioner's application for development because Petitioner did not rezone the donated land. The Village also raises a new argument: that it was not obligated to accept the donated land. Neither argument is supported by competent substantial evidence. Moreover, the Village did not observe the essential requirements of law. Petitioner relied on the Village's 2016 approval and met the conditions imposed by the Village for the transfer of the development credits. Therefore, the Village is equitable estopped from denying the transfer of the 85 units, the Petition is granted, and the Village's denial is quashed.

Background

Petitioner owns two abutting parcels of land in the Village, comprising approximately 80 acres (collectively, the "Property").[2] There are two folio's—the Development Site and the Donation Sites.[3] In 1985, the Development Site was rezoned to an Office Park District to accommodate office buildings for Burger King, and the Donation Sites were zoned GU-Interim District.

In 2005, the Donation Sites were designated as "Parks and Recreation" or "Environmentally Protected Parks" in the comprehensive plan. In June 2008, the Village created the Village Mixed-Use Zoning District (VMU), which zoned approximately 44 acres of the Development Site as VMU. The Donation Sites were zoned Interim in 2009, a category that coincides with the County's GU Interim District.[4]

In 2015, the Village adopted a Transfer of Development Rights ("TDR") ordinance to preserve environmentally sensitive lands and to increase park land. On January 11, 2016, the Petitioner requested a "determination of development right"[5] from the Department of Planning and Zoning regarding the west 22 acres of the Donation Sites, pursuant to the provisions of the Interim Zoning District and the TDR ordinance. In his letter response, former Director Darby Delsalle determined that the west 22 acres "enjoy[ ] a potential zoning development right of 85 residential units. (App. 00733-35) ("Trending Determination Letter").

In March and May 2016, the Village conducted quasi-judicial public hearings which resulted in the Village adopting: (1) the VMU Comprehensive Plan Amendment (Resolution 2016-13); (2) the VMU Zoning Amendment (Resolution 2016-14), and (3) the TDR Amendment (Resolution 2016-28) (collectively, the "2016 Approvals").[6] The 2016 Approvals permitted up to 400 multi-family units on the Property. Resolution No. 2016-28 specifically transferred the development rights of 85 residential units from the Donation Sites to the Development Site. (App. 00689-00698) if certain conditions were met.

On October 5, 2017, relying on the 2016 Approvals, the Petitioner submitted an application to construct a 480-unit multi-family development on the Development Site ("Site Application"). Several public hearings were held regarding the Site Application. For the first public hearing on October 18, 2021, the Village staff prepared a thorough 74-page report ("Staff Report") recommending approval of the Site Plan for 480 units and acceptance of the deed pursuant to the 2016 Approvals. (App. 00005-00078). The Staff Report also recommended acceptance by the Village of the declaration of restrictions, covenants and reservations pursuant to Ordinance No. 2016-14, and Resolution No. 2016-28. (App. 00006).

The second public hearing on November 15, 2021 consisted of Petitioner's presentation to the Village, along with testimony from the public for and against Petitioner's Site Application.

At the third public hearing, on January 24, 2022, the Village approved Resolution No. 2022-05 which denied Petitioner's Site Application. The Village denied the Site Application *solely* based on the January 26, 2016 Trending Determination Letter from Darby Delsalle, former Director of the Department of Planning and Zoning. (App. 00733). The Conclusions of Law section determined that the Donation Sites had to first be rezoned, and the comprehensive plan

amended, to allow for 85 development units before those units could be available for transfer to the Development Site.

Standard of Review

A three-part standard governs this Court's review: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative decision is supported by competent substantial evidence. *Village of Palmetto Bay v. Palmer Trinity Priv. Sch., Inc.,* 128 So. 3d 19 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c].

A decision granting or denying a site plan is governed by local regulations that must be uniformly administered. An applicant must first demonstrate grounds for approval according to the legislated zoning criteria. *See Irvine v. Duval Cty. Planning Comm'n,* 495 So. 2d 167 (Fla. 1986). An application satisfies these criteria once consistency with a zoning authority's land use plan and zoning criteria have been demonstrated. *See Jesus Fellowship, Inc., v. Miami-Dade Cnty.,* 752 So. 2d 708, 709 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1179b]. Once an applicant meets that burden, the burden shifts to the opposition to demonstrate that the application does not meet the criteria and is in fact adverse to the public interest. "The application must be granted unless the opposition carries its burden, which is to demonstrate [by competent, substantial evidence] that the applicant's request [does] not meet the standards and are in fact adverse to the public interest." *Id.*

> We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. We are of the view that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (cleaned up).

Petitioner Met Its Burden Under Irvine

Petitioner satisfied its burden of proof as required by *Irvine v. Duval Cnty. Planning Comm'n,* 495 So. 2d 167 (Fla. 1986). The Village's professional staff recommended approval of the Site Application to construct a multi-family residential development consisting of 480 multi-family development units. (App. 00005-00078). The staff's favorable recommendation constitutes competent substantial evidence for approving the Site Application. In *Palmer Trinity,* the Third District Court of Appeal held that a similar review by Village staff constituted competent substantial evidence that the request served the public interest. *Id.* at 26-27 (and cases cited therein). "Based on this record, the burden shifted to the opponents of the request to introduce competent substantial evidence demonstrating that the application did not meet the standards and was, in fact, adverse to the public interest." *Id.* at 27 (cleaned up).

The Village Failed to Meet Its Burden

Under *Irvine,* the burden shifted to the Village to demonstrate, by competent substantial evidence, that the Site Application did not meet the relevant standards and was adverse to the public interest. In response to the Petition, the Village presented two arguments to justify its denial of the Site Application.

> In seeking to develop 480 multifamily units, the success or failure of the application depended upon the completed transfer of development rights to 80 extra units to the Development Site. This did not occur for two reasons. First, the contingency for the transfer was not met, namely, that the Village accept title to lands, subject to a declaration of restrictions, covenants and reservation, on which terms the Village and the Developer failed to agree. Second, the transfer of the 80 extra units was incomplete because no rezoning or amendment to the PR land use designation on the 22-acre "sending site" has as yet occurred.

Response at 60.

We initially note that the Village's first argument was *not* included as a basis for denial in Village Resolution No. 2022-05. (App. 00003). The sole reason set forth in the resolution was the Village's conclusion that the Petitioner failed to rezone the Donation Sites and amend the Comprehensive Plan and, therefore, the 85 units were unavailable for transfer to the Development Site.

> Based on the letter dated January 26, 2016 issued by Mr. Darby DelSalle, the-then Village Planning 85 Zoning Director, which constitutes substantial competent evidence, the Village Council DENIES the application based on the above facts and the requirement that rezoning and a comprehensive plan amendments must be approved for the 85 units to first exist and then be available for transfer to the Receiver Site.

Id.

Nevertheless, we will also address the Village's argument that the Petitioner did not meet the condition in Resolution No. 2016-28 because the Village did not accept title to the Donation Sites.

Petitioner was Not Required to Rezone the Donation Sites or Amend the Comprehensive Plan

The Village's conclusion that the Petitioner did not have 85 units to transfer to the Development Site, and therefore its Site Application had to be denied, is unsupported by any evidence, much less competent substantial evidence, and is contradicted by the evidence in the record. The only support for the Village's conclusion comes from a skewed interpretation of the Trending Determination Letter. Because the interpretation ascribed to the Trending Determination Letter is so obviously wrong, unsupported by either law or reason, we can only conclude that it was crafted to support a predetermined conclusion.

During the November 15, 2021 public hearing, a Village Commissioner asked the Village Attorney if the Village was "required" to give the Petitioner the 85 units to transfer from the Donations Sites to the Development Site.

> COUNCIL MEMBER MATSON: Okay. Mr. Attorney, are the 85 TDRs required to be given, or is that optional for the Council?
>
> MR. DELLAGLORIA: Well, that actually brings up a very interesting question. And as I read the resolution, which—actually be able to find, as I read Resolution 2016-28, the Village has agreed to this transaction under that resolution. . . . But the deal has been made through that resolution. Okay.
>
> The problem is, and I might as well get to it now to address it. The problem is that I don't believe the transaction was ever correctly completed. And I say that based on the very letter that the applicants have relied on, which is the Director's letter of January 26th, 2016.
>
> Now, the last line of the letter says, applying the assumptions—it appears that the building right potential for the 22 net acres would be 85 units.
>
> But the director had a lot of language in front of that last sentence. At the last sentence of the third paragraph of that letter, after the director went through some analysis as to what should, you know, this be. He states, "For private development to occur on the property, be it residential or commercial, the land use designation shall change accordingly."
>
> In the next paragraph, the Director writes, "Typically a determination would be applied to the property, and then be followed by a rezoning request consistent with the identified uses." You see, this is what they did wrong. Back in 2015 or '16 when the Council passed this resolution, they should have immediately come forward and done three things.
>
> They should have asked for the covenant, the 1985 covenant to go away, just be rescinded or whatever. Then they should have applied for both a rezoning and a re-comp plan, but they didn't do that. The Director's letter says, they had to do both.

> And now the conundrum we are in is that even though we have a transaction that was approved by the Council to do a resolution, they still have to finish the steps necessary to make that happen.
>
> They can't get there from here. And they can't get there from here based on the very letter that they've been relying on all this time.

(App. 00496-00498).

To state the obvious, the Village Attorney's understanding of the Trending Determination Letter is not competent substantial evidence. The Trending Determination Letter would be competent substantial evidence if it in fact required rezoning of the Donation Sites as the Village asserts. It does not.

The Village Attorney's analysis, and the Village's argument on certiorari, rests wholly on the word "typically." In the Trending Determination Letter, Director Darby Delsalle explained that "Typically, a [trend of development] determination would be applied to the property and then be followed by a rezoning request consistent with the identified uses and intensity." (App. 00734).

Based on a fair reading of the plain meaning of the Trending Determination Letter, and a review of the applicable ordinances and resolutions, it is difficult to avoid the conclusion that the Village is deliberately misreading the Trending Determination Letter and misapplying the relevant law.

First, the Trending Determination Letter does not refer to transferring development rights. In fact, the word "transfer" does not appear anywhere in Director Delsalle's letter. This is unsurprising because the Trending Determination Letter only establishes the potential number of units which could be developed on a site.

Second, the Trending Determination Letter makes the unremarkable observation that "For private development to occur on the property, be it residential or commercial, the land use designation shall change accordingly." This was written in the context of explaining that because the land was zoned PR (Parks and Recreation), its land use designation would have to be changed if residential or commercial development was actually going to occur on the land. The entire point of transferring development rights, however, is to *prevent* such development on the land which is transferring those rights. *See* Resolution 1016-28 ("once development rights are transferred, they are not available for private development on the sender site") (App. 00689). As Village Attorney Dexter Lehtinen noted during the March 7, 2016 public hearing: "The 22 acres is currently found to have 85 residential development rights on it. They can build 85 units on that 22 acres. Those 85 units are not increased, but transferred." (App. 00819).

Third, the Trending Determination Letter notes that "typically" (*i.e.,* usually) a trending determination is followed by a rezoning request. But "typically" does not mean "always," "must," or "shall." Indeed, by saying "typically," one acknowledges that sometimes things are done differently.[7] Which is precisely the case here where, rather than trying to develop the land subject to the Trending Determination Letter, the owner is transferring to another property the rights to the units which could potentially be developed.

Fourth, the very point of the Trending Determination Letter was to determine the "potential" units which could be built on the Donation Sites so that an equal number could be transferred to the Development Site without the need to rezone. As far back as 2014, the Village Manager noted:

> The property in question is presently zoned Interim (I), with a land use designation of Parks and Recreation. The I zoning category created by the Village was designed to mirror Miami-Dade County's Government Use (GU) designation which essentially provided for a trending of development. In other words, if a property is surrounded by one (1) acre single family homes, then you could apply those regulations to that property ***in lieu of rezoning.***

(App. 01758) (emphasis added).

Fifth, the Staff Report recognized that Resolution 2016-28 transferred the development rights from the Donation Sites to the Development Site (subject to five conditions):

> On May 2, 2016, the Mayor and Village Council of the Village of Palmetto Bay adopted Resolution 2016-28, pursuant to Section 30-30.15 of the Village code, entitled the transfer of development rights (TOR), transferring 85 residential development units from the donor site at 17901 Old Cutler Road, consisting of 21.22 acres of wooded upland along Old Cutler Road, presently referred to as the West Donation Site: to the receiver site that is the VMU-zoned land abutting it to the east, and presently referred to as the Development Site.

(App. 00042).

Sixth, the Village's TDR ordinance does not require that a sender site be rezoned before the development rights can be transferred to a receiving site. (App. 00652-00653). The Petitioner complied with all the requirements of the TDR ordinance, as evidenced by the Village's approval of the transfer of development rights in Resolution 2016-28.

Seventh, and most significantly, Resolution 2016-28 expressly granted the transfer of the development rights as requested by the Petitioner subject to five conditions.

> The Village Council grants the transfer of developments request with the following conditions:
>
> 1. The applicant shall provide sealed surveys that accurately depict the sender site, receiver, and land dedication site, prior to the transfer of the 85 residential units. Said surveys will be deemed acceptable for purposes of transferable rights and land dedication upon staff determination that they are generally reflective of the Attachments A, B, and C of the Resolution.
>
> 2. As part of the land dedication process, and prior to transfer of the 85 residential units, the lands involved shall comply with Chapter 28, Subdivisions, of the Miami-Dade County Code of Ordinances, and/or record any other legal instrument deemed necessary to ensure clear title.
>
> 3. The approved Resolution shall be recorded to the titles of all lands involved.
>
> 4. Prior to transfer of the 85 residential units The Village shall receive clear title to the dedicated lands as generally described in Attachment C of the Resolution and as further depicted in the survey submitted and accepted pursuant to condition of 2 of this recommendation.
>
> 5. All previous conditions, approvals, covenants and resolutions shall remain in effect unless otherwise altered by the granting of this request and any conditions assigned therein.
>
> This is a final order.

(App. 00691). Resolution 2016-28, by its terms, rejects the Village's newfound rezoning requirement because such a condition was not listed when it approved the transfer of the 85 units to the Development Site. *See Miami-Dade Cnty. Expressway Auth. v. Elec. Transaction Consultants Corp.,* 300 So. 3d 291, 294 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D44a] ("The deficiency in this interpretation is plainly encapsulated within the maxim, *expressio unius est exclusio alterius.* If one subject is specifically named in a contract, or if several subjects of a large class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded.") (cleaned up).

Finally, although judicial and collateral estoppel may not be technically applicable here, Petitioner correctly notes that in a different certiorari proceeding the Village acknowledged that the development rights were rightfully transferred to the Petitioner.

> Instead, the Village staff followed the provisions in the existing TDR Ordinance, 2015-17, and made a trend determination of what

> development rights may exist for the Sender Site, and the Council then transferred the potentially available development rights to the Receiver Site. This procedure ensured that the Sender Site will be donated to the Village and remain free of residential development in perpetuity, one of the primary purposes articulated in Ordinance 2015-17 for the granting of the TDR, and ultimately what Petitioner wants most fervently. A Council determination that the Sender Site had "vested rights" was neither necessary nor was it ever made. . . . It is irrelevant whether there is competent substantial evidence in the record whether the Sender Site had "vested rights." **The site had potential development rights, which is all that is required for a transfer of such rights under the TDR Ordinance.**

(App. 01212) (emphasis added).

In summary, the assertion that the Petitioner was required to rezone the Donation Sites and amend the Comprehensive Plan before the development rights for 85 units could be transferred to the Development Site is unsupported by any evidence in the record. Nothing in the Interim Zoning District ordinance, the TDR ordinance, the 2016 Approvals, or in any other legislation of the Village, Miami-Dade County, or the State of Florida, requires rezoning before development rights can be transferred. We know this to be so because nowhere in the Village's 62-page Response does it cite to any authority for this proposition other than the Village Attorney's comments during the 2021-2022 hearings. We also know this is so because the Village Attorney relied exclusively on his interpretation of the Trending Determination Letter. There is not a scintilla of other authority relied on by the Village, the Village Attorney, or the Response.

In light of the plain meaning of the Trending Determination Letter, Resolution 2016-28, and the other applicable resolutions and ordinances, we have no difficulty concluding that the Village did not have competent substantial evidence to support its denial of the Site Application.

The Village was Required to Accept the Donation Sites

Resolution 2016-28 transferred the development rights from the Donations Sites to the Property if five conditions were met. The Village now claims that condition 4 was not satisfied. "[T]he contingency for the transfer was not met, namely, that the Village accept title to lands, subject to a declaration of restrictions, covenants and reservation, on which terms the Village and the Developer failed to agree." Response at 60; *see also id.* at 55-56 ("the transfer of those rights . . . depended on the contingency that the Village Council choose to accept ownership of the West Donation Site"). This position is not supported by competent substantial evidence.

First, condition 4 did not require the Village to *accept* title. Rather, condition 4 required that "[p]rior to transfer of the 85 residential units The Village shall *receive* clear title to the dedicated lands." (App. 00691) (emphasis added). Resolution 2016-28 required the Village to accept the Donation Sites if clear title were provided by the Petitioner. The suggestion that the Village had to "choose to accept" the Donations Sites is a position unsupported by the plain language of the resolution.

The record evidence establishes that the Petitioner was, and is, prepared to provide clear title to the Donation Sites. Refusing to accept such title, and as a result claiming Petitioner has not complied with the conditions required by Resolution 2016-28, does not satisfy the Village's obligation to support its denial with competent substantial evidence.

Second, Resolution 2016-28 contained no requirement that the Donations Sites be subject to acceptable restrictions, covenants, and reservations. It is true the parties attempted to negotiate restrictions on the future use of the Donation Sites that would be acceptable, but this was not a condition of Resolution 2016-28. Regardless, the Petitioner proposed the very restrictions which the Village is obligated to impose on the Donation Sites upon obtaining ownership pursuant to Resolution 2018-68. (App. 00699).

> The Village Council hereby states its intention to preserve in its natural state the land currently zoned Interim ("I"), located east of and contiguous to Old Cutler Road, and north of and contiguous to SW 184th Street (that is, located at the northeast corner of Old Cutler Road and SW 184th Street), when the Village becomes the owner of such land, by taking the following steps at such time:
>
> (A) Adopting and recording a covenant running with the land, which requires the land be preserved in its natural state and prohibits any development, except for the development of: (1) bicycle or pedestrian trails which do not disturb the fundamental natural condition of the contiguous land; and (2) a Miami-Dade Fire and Rescue facility at the southeast corner of the land, no larger than necessary and appropriate to accommodate a fire/rescue station in the health and safety interests of area residents.

(App. 00699-00700). Resolution 2016-28 also recognized that the purpose of the Village receiving the Donations Sites was to make "available [ ] a passive park and conservation area with only ancillary structures, . . . [and] a much needed fire rescue facility," and that the donation was "consistent with and in furtherance of the recognized purpose of the TDR program including the creation [of] additional open[ ] space, preservation of environmentally sensitive lands, and public facilities." (App. 00689). The Petitioner's proposed restrictive covenants where aligned with these goals. (App. 00090-00093).

In short, the Village's denial did not pretend to rely on the argument it raises now on certiorari review. Consequently, it cannot *post-hoc* assert it to justify its denial. Especially when the given reason is unsupported by the Village's 2016 Approvals and the proposed restrictive covenants comply with Resolution 2016-68.

Even if we ignore the fact that disagreement over the restrictive covenants was not a stated basis for the denial of the Site Application, the Village's invocation on certiorari review of a disagreement over the language of the proposed restrictive covenants is not competent substantial evidence given the nature of the restrictions proposed by the Petitioner. As such, the Village departed from the essential requirements of the law.

"Every citizen has the right to expect that he will be dealt with fairly by his government." *Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So. 2d 10, 18 (Fla. 1976).

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.

Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

Equitable Estoppel

Equitable estoppel is available on certiorari review.[8]

> The rules of fair play require us to conclude that under the facts of this case, the County is equitably estopped from enforcing section 33-50 of the Code against the Castros. Thus, we hold that the circuit court erred in failing to apply the doctrine of equitable estoppel to the circumstances of this case and thereby departed from the essential requirements of the law.

Castro v. Miami-Dade Cnty. Code Enf't, 967 So. 2d 230, 234 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1728a]. *See The Florida Companies v. Orange Cnty., Fla.,* 411 So. 2d 1008, 1012 (Fla. 5th DCA 1982) ("appellant's petition for certiorari demonstrated that the county

should be estopped from denying appellants the right to develop their property in accordance with the plat preliminarily approved, since substantial expenditures had been made in reliance on the county's approval of the plat. The circuit court should have granted the writ of certiorari on this ground."); *Equity Res., Inc. v. Cnty. of Leon,* 643 So. 2d 1112, 1119-20 (Fla. 1st DCA 1994) ("The fact that the county continuously issued permits for the unrestricted construction of the project over a period of 18 years with knowledge of expenditures for improvements to be made for the benefit of the undeveloped as well as developed land is legally sufficient to establish that it would be grossly unfair to allow the county to deny Pelham and Equity Resources a vested right at the eleventh hour of their development of Phase II. The doctrine of equitable estoppel is based fundamentally on rules of fair play. The trial court applied incorrect legal principles in ruling on the merits of the estoppel claim and thereby departed from the essential requirements of law.") (cleaned up).

The Petitioner relied upon Resolution 2016-28's approval of the transfer of development credits. The Village Manager and the Village Attorney confirmed that the Applicant could build 400 units on the Development Site as a matter of right and that the Donation Sites had 85 development rights eligible for transfer. (App. 00815, 00819). The 2016 Approvals transferred the 85 development units from the Donation Sites to the Development Site subject to conditions which did not include rezoning. (App. 00678-00697). The Village and the Petitioner successfully defended Resolution 2016-28 in the appellate division of the Circuit Court. (App. 01126-01347). The Applicant spent more than $720,000 in preparing the Application and engaging the professional consultants and attorneys necessary to pursue it. (App. 00442).

The Village's additional condition that the Donation Sites had to be rezoned before their 85 development rights could exist is, therefore, inequitable. This Court has previously held that unreasonable conditions imposed by the Village amount to a departure from the essential requirements of law:

> . . . the court can consider whether the conditions are whimsical or capricious. Conditions on a use, just like exceptions to a rule, can swallow or drown the use which was intended to be approved in the first place. Owners are entitled to fair play; their properties, which may represent their life fortunes, should not be subjected to whimsical or capricious conditions.

Palmer Trinity Priv. Sch., Inc. v. Village of Palmetto Bay, 18 Fla. L. Weekly Supp. 342a (Fla. 11th Jud. Cir. Ct., Feb. 11, 2011) (quoting *Caps-On-The Water, Inc., v. St. Johns County,* 841 So. 2d 507, 508-09 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D537a].

Conclusion

The Village denied the Site Application because the Petitioner had not rezoned the Donations Sites. The denial was based on a faulty interpretation of the Trending Determination Letter, an interpretation not supported by a plain reading, the 2016 Approvals, or any statute or ordinance. In other words, an interpretation unsupported by competent substantial evidence. On certiorari, the Village raised another reason for the denial: its voluntary decision not to accept the warranty deed from the Petitioner for the Donation Sites. The Village was required to accept the Donation Sites. Choosing not to so that it could claim the Petitioner had not transferred the 85 units to the Development Site was inequitable and departed from the essential requirements of the law.

As the Petitioner correctly asserts:

> Foisting a park designation on private property, prohibiting private, beneficial use, repudiating previously granted development rights and denying entirely a site plan that staff recommended as compliant with all published criteria is viscerally, intellectually and legally wrong.

Reply at 2.

We grant the Petition for Writ of Certiorari. Village Resolution No. 2022-05 is **QUASHED**.[9] (TRAWICK and SANTOVENIA, JJ., concur.)

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[1]"App." stands for Petitioner's Appendix to Petition for Writ of Certiorari.

[2]The Property is bounded by SW 184 Street to the south, the Village's Ludovici Park, which is near SW 176 Street, to the north, Old Cutler Road to the west, and the shoreline of Biscayne National Park to the cast. The Property forms a virtual island, separated from the surrounding single-family neighborhoods by vegetation, roads, and intervening governmental properties.

[3]The Property's zoning classifications and comprehensive plan designations do not coincide exactly with the tax folio boundaries. The Development Site refers generally to the area in the center of the Property. The Donation Sites refers generally to the area of the Property located northwest, west and south of the Development Site.

[4]By Resolutions Nos. 2009-11, 2017-53, and 2018-68, the Village has repeatedly reaffirmed its support for acquiring the western 22 acres of the Donation Sites.

[5]A " 'determination of development' right means an official zoning letter issued by the Village which verifies the maximum residential and/or commercial development potential of a particular property." (App. 00030).

[6]By Ordinance No. 2016-13, the Comprehensive Plan was amended to reflect a total of up to 400 permitted multifamily residential uses. The Ordinance provided that "for purposes of consistency throughout the Village's Comprehensive Plan a note is added to reflect the VMU land use designation's eligibility to participate in the Transfer of Development Rights program as provided for at Policy 1.1.14." (App. 00678).

Ordinance No. 2016-14 amended the text of the Village Mixed Use zoning district (Sec. 30-50.19), and provided a notation in Section 30-50.19(e)(1)e, that the Village Mixed Use zoning district is eligible to participate in Section 30-30.15 TDR.

The Findings of Fact section of Resolution No. 2016-28 stated that "[t]he Rules that govern transfer of development rights are at Section 30-30.15 of the Land Development Regulations." (App. 00690). The Conclusions of Law section specified that "the transfer of development rights application was reviewed pursuant to Section 30-30.15(f) of the Village of Palmetto Bay's Code of Ordinances and was found to be conditionally consistent." *Id.*

[7]Indeed, Director Delsalle explained exactly why the zoning designations on the Donations Sites were not typical.

> The property in question is presently zoned Interim (I) with a land use designation of Parks and Recreation (PR). The I zoning category was applied to the property when the Village adopted its own land development regulations in 2009. It was previously zoned Government Use (GU) under Miami-Dade County's zoning provisions. The PR designation was applied in 2005 when the Village adopted its Comprehensive Plan and corresponding Future Land Use Map (FLUM). Chapter 163 of the Florida Statutes requires zoning to be consistent with land use. Although the I zoning category is consistent with a PR designation, it may be considered awkward in the context of the private ownership of land.

(App. 00733).

[8]Petitioner asserted equitable estoppel in the quasi-judicial hearing before the Village Council.

> Because we've been at this for a while, we've spent a lot of money in this process. We've relied on the zoning, the resolutions, the ordinances that are out there, and the law. . . . [W]e have judicial doctrines that provide protection to people, like my clients, who rely on those decisions even though the elected officials change. And those doctrines include equitable estoppel and res judicata. . . . [W]e are relying on those doctrines. . . .

(App. 00441, 00446).

[9]Were it allowed, this Court would quash the Village's denial of the Site Application and remand with directions to the Village to grant it. However, pursuant to *Miami-Dade Cnty. v. Snapp Indus., Inc.,* 319 So. 3d 739 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1029a], this Court is empowered only to quash the Village's denial. *But see Debes v. City of Key West,* 690 So. 2d 700, 703 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a] ("circuit court decision so fundamentally and seriously departs from the controlling law that a miscarriage of justice has resulted and that review on certiorari is therefore both justified and required. Upon that review, the decision is quashed and the cause remanded with directions to require the City Commission to grant the application in question.") (cleaned up).

* * *

Municipal corporations—Historic preservation—Certificates of appropriateness—Certiorari challenges to decision of city historic preservation board approving COA for renovation and development of hotel property in historic district and to special magistrate's order affirming board's decision are denied—Standing—Petitioners who own abutting property and appeared before board have standing under city code and case law—Argument that board's approval of COA violated city ordinance because city is fee simple owner of adjacent right-of-way but failed to sign COA application lacks merit—Although city holds right-of-way dedication, it is not fee simple owner of right-of-way—No merit to argument that board approved building with greater floor area ratio than permitted—FAR was in compliance with code once additional right-of-way owned by developer was considered—No merit to argument that board erred by approving COA without making determination that proposed addition to hotel did not impede appearance and visibility of architecturally significant portions of existing structure—City code does not require explicit finding regarding visibility, and board adopted staff report that found that proposed site plan does not impede pedestrian sight lines and view corridors—Special magistrate's decision affirming COA approval is supported by competent substantial evidence in form of staff report recommendations

SETAI RESORT & RESIDENCES CONDOMINIUM ASSOCIATION, INC., a Florida Not for Profit Corporation, et al., Petitioners, v. BHI MIAMI LIMITED CORP., et al., A Delaware Limited Partnership, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case Nos. 2022-36-AP-01, 2021-36-AP-01, Consolidated. July 10, 2023. On Petition for Writ of Certiorari from City of Miami Beach Historic Preservation Board Order in File No. 20-0442 rendered June 24, 2021 (Case No. 2021-36-AP-01) and Petition for Writ of Certiorari from City of Miami Beach Historic Preservation Special Magistrate Order in Case No. SM 2021-002 rendered May 25, 2022 (Case No. 2022-36-AP-01). Counsel: Kent Harrison Robbins, Law Offices of Kent Harrison Robbins, P.A., for Setai Resort & Residences Condominium Association, Inc., Petitioner. Bradley S. Gould, Gray Robinson, P.A., for Setai Hotel Acquisition, LLC, Petitioner. Jeffrey S. Bass, Deana D. Falce, Whitney A. Kouvaris, and Dylan M. Helfand, Shubin & Bass, P.A.; and Rafael A. Paz and Nicholas E. Kallergis, City of Miami Beach Attorney's Office, for City of Miami Beach, Respondent. Carter McDowell, Eileen Ball Mehta, Melissa Pallett-Vasquez and Kenneth Duvall, and Kayla Marina Hernandez, Bilzin Sumberg Baena & Axelrod LLP; and Michael W. Larkin, Bercow Radell Fernandez Larkin & Tapanes, for BHI Miami Limited Corp., Respondent.

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

OPINION

(SANTOVENIA, J.) Petitioners, Setai Resort & Residences Condominium Association, Inc. and Setai Hotel Acquisition, LLC filed two Petitions for Writ of Certiorari. The first petition filed in 2021-36-AP-01 ("Petition I") seeks certiorari review of an order rendered on June 24, 2021 representing a quasi-judicial decision of the City of Miami Beach Historic Preservation Board ("Historic Preservation Board" or "HPB") approving a Certificate of Appropriateness ("COA").

The second petition filed in 2022-36-AP-01 ("Petition II") seeks to quash a local Historic Preservation Board Special Magistrate Order ("Special Magistrate Order") rendered on May 25, 2022 affirming the COA. Both Petitions for Writ of Certiorari arise from the same HPB approval of a Certificate of Appropriateness for the same applicant, Respondent BHI Miami Limited Corp. for the same project[1]. On November 2, 2022, the Court consolidated both Petitions.

Factual Background

Petitioner Setai Resort & Residences Condominium Association, Inc. ("Association" or "Setai") is the owner of the Setai Condominium property located at 2001 Collins Avenue, Miami Beach. The Seagull Hotel ("Seagull") is located at 100 21st Street in Miami Beach ("Subject Property"). Petitioner Setai Hotel Acquisition LLC, ("SHA") is a member of the Association and owns multiple condominium units in the Dempsey-Vanderbilt Hotel which is part of the Subject Property. The Seagull, Setai Condominium Towers and Dempsey-Vanderbilt Hotel are adjacent to each other on the same block. Collectively, the Association and SHA are referred to as the "Petitioners."

Respondent, City of Miami Beach's ("City") Historic Preservation Board reviews, *inter alia*, Certificates of Appropriateness in the City's designated historic districts. Respondent BHI Miami Limited Corp. ("BHI" or "Applicant") is the owner/developer of the Subject Property. Collectively, the City and BHI are referred to as the "Respondents."

BHI filed a Land Use Board Hearing Application requesting a COA for the Subject Property ("Application") with the HPB and the HPB held a hearing to consider the Application. The project for the Subject Property envisions the partial demolition, renovation and restoration of the hotel building; the total demolition of an accessory cabana structure; the construction of ground level and rooftop additions; modifications to the south and east façades; one or more waivers; and a variance to relocate signage to a non-street facing façade. The proposed redevelopment of the Subject Property envisions that the Seagull is to be renamed the Bvlgari Hotel.

At the HPB Hearing, the Board discussed the Application, and BHI presented the Application through its legal counsel, historic preservation expert, designers and architects, and local architect of record. The Association appeared through counsel at the HPB Hearing and objected to the COA based on: (i) the southern addition's impact on views **from** the Setai to the ocean; (ii) the City's failure to sign the Application as alleged fee simple owner of an adjacent right-of-way; and (iii) that the square footage of the property legally described in the Application did not include a legal description of the area of the right-of-way to be vacated. The HPB approved the Application for the COA, and rendered its order.

Standing

Respondents argue that Petitioners were obligated to demonstrate at the Special Magistrate hearing the factual basis for their special injury conferring standing. *Renard v. Dade Cnty.*, 261 So. 2d 832, 837 (Fla. 1972) (holding that to maintain a judicial challenge to a zoning action, a party must demonstrate that the action will cause him or her to suffer a "special injury", i.e., an adverse impact upon a protected and legally sufficient interest.)

Petitioners argue as their "special injury" that their view of the ocean will be obstructed. Respondents contend that the line-of-sight and view corridor analyses relate to the public's potential injury and do not confer standing on Petitioners premised on a special injury. Respondents argue that assuming *arguendo* that a public view corridor was to be impeded, the resultant injury would be an injury to the public—the exact opposite of a special injury to the Petitioners sufficient to confer special injury standing upon it. *Id.* at 835.

Section 118-9(c)(3)(B)(iii), Rehearing and appeal procedures of the City of Miami Beach Code ("Code") states:

> (3) Eligible appeals of the design review board or historic preservation board shall be filed in accordance with the process as outlined in subsections A through D below:
>
> . . .
>
> B. Eligible parties to file an application for an appeal are limited to the following:
>
> . . .
>
> (iii) An affected person, which for purposes of this section shall mean either a person owning property within 375 feet of the applicant's project reviewed by the board, or a person that appeared before the board (directly or represented by counsel) and whose appearance is confirmed in the record of the board's public hearing(s) for such project;

We find that Petitioners are authorized by §118-9(c)(3)(B)(iii) of the Code to file an appeal of the decision of the HPB to the Special

Magistrate as an "affected person" who owns property within 375 feet of the Applicants' Property and who "appeared at the board" through counsel and representatives at the hearing before the HPB. Thus, Petitioners have standing due to their special injury.

Similarly, applicable case law requires that in evaluating standing, ". . .a court must consider 'the proximity of [the party's] property to the property to be zoned or rezoned, the character of the neighborhood, . . . and the type of change proposed.' " *Renard, supra.,* 261 So. 2d at 837. Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc., v. Miami-Dade County*, 355 So. 3d 534 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D224a]; see *Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986) (holding owner of single-family home directly across from rezoned property had standing to challenge proposed rezoning); see also *Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. 3d DCA 1959) ("Plaintiffs as abutting home owners [sic] were entitled to maintain the suit challenging the propriety, authority for and validity of the ordinance granting the variance."). Such proximity generally establishes that the homeowners have an interest greater than "the general interest in community good share[d] in common with all citizens." *Save Calusa*, *supra.*, 355 So. 3d at 540 (citing *Renard*, 261 So. 2d at 837). We find that the Petitioners also have standing due to their status as an abutting property owner.

Standard of Review

This Court reviews a local government's quasi-judicial orders under a three-part review that asks whether the local government: (a) afforded procedural due process[2]; (b) applied the correct law, and (c) supported its decision with competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

Failure to exhaust administrative remedies

The City Code requires that appeals of quasi-judicial orders rendered by the HPB be heard by a Special Magistrate. Section 118-9(c)(2)(A)(i) of the Code provides in pertinent part:

> Any applicant requesting an appeal of an approved application from the historic preservation board (for a certificate of appropriateness only) shall be made to the historic preservation special magistrate, except that a land use board order granting or denying a request for rehearing shall not be reviewed by the Historic preservation special master.

On July 13, 2021, Petitioners invoked this administrative remedy by filing a notice of appeal of the HPB Order to the Special Magistrate. Petitioners shortly thereafter filed Petition I with this court. While Petition I and the Special Magistrate appeal were pending, on November 3, 2021, Petitioners filed a Complaint for Writ of Prohibition ("Prohibition Complaint") with the Circuit Court seeking to avoid the Special Magistrate administrative remedy that Petitioners themselves had commenced.[3] (Supp.A.490-599, A.491-600.) [Dkt. 35 (Pet. I) & 4 (Pet. II).]

In the Prohibition Complaint, Petitioners challenged the jurisdiction of the Special Magistrate to hear administrative appeals of HPB orders based on the Florida Rules of Appellate Procedure. Following a special set final hearing on the Prohibition Complaint, the Circuit Court denied the writ and entered final judgment against Petitioners ("Prohibition Final Judgment") on June 10, 2022, in a written opinion that reiterated its previous denial of Setai's writ, stating that:

> The Setai argues that the Florida Rules of Appellate Procedure somehow bar the Special Magistrate's ability to hear an administrative appeal. However, neither the Special Magistrate nor the City is part of the judiciary. Consequently, neither is governed by the Florida Rules of Appellate Procedure as it relates to the conduct of their internal, administrative decision-making." *See Canney v. Bd. of Pub. Instruction of Alachua Cnty*., 278 So. 2d 260, 262 (Fla. 1973) ("The administrative body is not part of the judiciary and this Court cannot promulgate rules of practice and procedure for administrative bodies.").

Further, the Circuit Court reasoned that "[t]he plain text of the City Code confirms that this subject matter is within the jurisdictional authority of the Miami Beach City Commission delegated by ordinance to the Special Magistrate." The Prohibition Final Judgment denied Plaintiffs' Writ and thereby allowed the hearing before the Special Magistrate to go forward.[4] Accordingly, the Prohibition Final Judgment entered by the Circuit Court affirms the subject matter jurisdiction of the Special Magistrate to hear appeals arising from the HPB's approval of a COA. We agree with and adopt the reasoning in the Prohibition Final Judgment.

The Court finds Respondents' exhaustion argument compelling—that Petition I was not ripe, and it was filed prematurely because Petitioners failed to exhaust administrative remedies before the Special Magistrate proceeding occurred. Rather than filing one petition for first-tier certiorari review at the conclusion of the Special Magistrate proceedings, Petitioners instead elected to file Petition I *prior* to exhausting their administrative remedy. Petitioners then elected to file Petition II *after* the conclusion of the Special Magistrate appeal.

Florida law holds that piecemeal appeals are disfavored. *See Cicco v. Luckett Tobaccos, Inc.,* 934 So. 2d 560, 561 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1689b] (Shepherd, J.) ("We have long adhered to the rule that piecemeal appeals will not be permitted where claims are interrelated and involve the same transaction and the same parties remain in the suit.") (citing *Morgan v. Am. Bankers Life Assurance Co.*, 605 So. 2d 104, 105 (Fla. 3d DCA 1992)); *see also S.L.T. Warehouse Co. v. Webb,* 304 So. 2d 97, 99 (Fla. 1974) (same). Even considering Petition I on the merits, Petition I would be denied for the same reasons set forth below because Petition I asserts the same substantive arguments as Petition II.

Essential Requirements of Law

In *Haines*, *supra.*, 658 So. 2d at 530, the Supreme Court held that "applied the correct law" is synonymous with "observ[ed] 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.* at 527. (citation omitted).

City of Miami Beach Resolution 2021-31723 approved the vacation of the south half of 21st Street in favor of the abutting property owner, BMI. As a condition of the vacation, BMI granted a perpetual, non-revocable easement in favor of the City, for the City's continued use of the right-of-way, so that roadway access would not be affected.

Petitioners argue that the HPB failed to follow the essential requirements of the law by approving BHI's Application for a COA, and that the HPB Order violated the City Ordinance and HPB By-Laws because the City, as the alleged fee simple owner of the right-of-way, failed to sign the Application. Petitioners further contend that the Special Magistrate failed to follow the essential requirements of the law by affirming the HPB Order because the Special Magistrate wrongly concluded that BHI owns the right-of-way.

BHI's counsel explained why the City did not sign the Application:

> The reason the city didn't sign our application is because there was a requirement in our application that we couldn't come before you until the city commission had taken action on both the ordinance and roadway application. We own it. And, therefore, they are not required to sign the application.

BHI's position regarding its ownership of the right-of-way was also confirmed by the City Manager's recommendation in support of the resolution to vacate the right-of-way. On May 26, 2021, City of Miami Beach Manager Alina T. Hudak sent the Commission an extensive memorandum with attachments explaining the vacation of the portion of the southern half of 21st Street, of an approximately 6,736 square feet total area. Ms. Hudak explained:

> The City is currently **not** the underlying fee simple owner of the Street ROW, and does not hold legal title to the ROW. Instead, the City holds a right of way dedication, which confers on the public an exclusive right of use, so long as the dedicated right of way is used for the purpose of the dedication (namely, for pedestrian and vehicular access). . .The vacation of a right-of-way is a legislative act within the exercise of the City Commission's discretion, if the City Commission determines the vacation is in the public interest. . .**By operation of law, once the City vacates the ROW, the underlying fee interest in the ROW vests with the current abutting property owners**. . .

Pet. App. 213. (citations omitted) (emphasis in original). Thus, there was a finding that the City was not the underlying fee simple owner of the 21st Street right-of-way.

The Special Magistrate agreed with the City Manager and stated in his Order: ". . . the City recognized that the Applicant owns the right-of-way and further recognized that the property was part of the Certificate of Appropriateness making a condition of payment dependent on the approval of such Certificate and after all appeals have been taken." (Resp. App. 87). The Special Magistrate Order also explained that ". . . it is well established under Florida Law that a property owner's dedication of right-of-way does not transfer the title of the property to the City. The City is simply the trustee or steward of the public right-of-way for the use and benefit of its citizens. *Sun Oil Co. v. Gerstein*, 206 So. 2d 439, 441 (Fla. 3d DCA 1968)." (Resp. App. 87).

We find Respondents' argument that dedications differ from conveyances to be compelling. The Third District Court of Appeal recently agreed. "[A] dedication of land to a municipality is not the same as a fee simple conveyance of real property because, generally, a dedication is simply an easement for public use, entrusted to the municipality with the fee simple title remaining with the grantor." *1000 Brickell, Ltd. v. City of Miami*, 339 So. 3d 1091, 1094 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1224a]; *see also City of Coral Gables v. Old Cutler Bay Homeowners Corp.*, 529 So. 2d 1188, 1189-90 (Fla. 3d DCA 1988) ("Acceptance of a common law dedication does not pass the fee in land. The interest acquired by the municipality is generally held to be in the nature of an easement."); *Robbins v. White*, 42 So. 841, 843 (Fla. 1907) (same). Because the City was not the fee simple owner of the adjacent right-of-way, the City was not required to join in the Application. While Petitioners argue that the City should sign the Application, the Special Magistrate was correct to reject this argument.[5]

Respondents are correct that the Special Magistrate observed the essential requirements of the law, and the City was not required to sign the Application since it was not the fee simple owner of the right-of-way.

Legal Description

Petitioners next argue that the legal description provided in the Application does not include the City's right-of-way proposed to be vacated. Furthermore, Petitioners argue that because BHI and the City had not entered into the vacation agreement and the City had not conveyed the right-of-way to BHI, the City was still the owner of the right-of-way at the time of the HPB Hearing. As a result, Petitioners maintain that the HBP order affirmed by the Special Magistrate was in violation of §118-564(a)(3) of the Miami Beach Code since the total square footage of land actually owned by BHI, the Applicant exceeded the maximum allowed FAR (floor area ratio) of 2.0. Petitioners contend that because the land owned by Applicant totaled 58,361 square feet (sq. ft.). with a FAR of 2.0, the maximum floor area permitted was 116,722 sq. ft. (that is, 58,361 sq. ft. times 2.0 FAR). However, Petitioners contend that the HBP Order approved a building with a total floor area of 128,660 sq. ft., or 11,938 sq. ft. greater FAR than what was permitted.

As noted above, a dedication of land to a municipality is not the same as a fee simple conveyance of real property *See 1000 Brickell, Ltd., supra.*, 339 So. 3d at 1094. Here, the Applicant was the owner of the right of way. The record shows that this created an additional total floor area of 13,472 sq. ft. and was in compliance with the applicable Code provision. Thus, there was no prejudice to the Petitioners from the City not having included the vacated right-of-way in the legal description.

Views

Petitioners next argue that the HPB failed to follow the essential requirements of law because it approved the COA without a "determination" that the proposed addition did "not impede the appearance and visibility of architecturally significant portions of the existing structure," the Dempsey-Vanderbilt, as mandated by Code §142-246(d)(2).

Petitioners' arguments regarding the issue of view have inverted during the course of these proceedings. Before the HPB, the Association argued that the proposed addition to the south façade would block views **from** the Setai to the ocean. (*See, e.g.*, Tr.44:9-15 ("These were the views from the—**from that building** where they had ocean views. . .Those ocean views are going to be gone. . .[T]hat's the structure that's actually going to be blocking the views.") (emphasis added).) On appeal, however, Petitioners assert a contrary position. Petitioners argue before this court that the proposed south addition would block views **from** the ocean to the Setai. (*See, e.g.*, Petition II Reply at 5 ("[The] 9-story south addition would block the view of the Dempsey-Vanderbilt façade from the beach and ocean."). [Dkt. 70 (Pet. I) & 50 (Pet. II).]

The City's Professional Staff prepared a detailed report and recommendation ("Staff Report"). The Staff Report notes that §142-246(d)(2) of the Code provides the HPB with discretion to modify the line-of-sight requirements for rooftop additions based on the following criteria:

> (i) The addition enhances the architectural contextual balance of the surrounding area;
>
> (ii) The addition is appropriate to the scale and character of the existing building;
>
> (iii) the addition maintains the architectural character of the existing building in an appropriate manner; and
>
> (iv) the addition minimizes the impact of existing mechanical equipment or other rooftop elements.

(Pet. App. 21).

The court initially notes that the Staff Report states that the Bvlgari is proposed to be 106.5 feet high. (Pet. App. 13). By comparison, the Setai is 393 feet high.

Respondents contend that the Special Magistrate correctly rejected Petitioners' private view corridor argument. Respondents are correct in that the Special Magistrate's opinion is consistent with the way in which the City has historically construed the view regulations it administers—that the City Code regulates public views, not private ones. Respondents note that the decision is in harmony with and relies upon long-established principles of Florida law addressing private views.

The Staff Report states that "the proposed site plan does not

impede pedestrian sight lines and view corridors." (Pet. App. 17). It also states that "[t]he proposed additions have been oriented and massed in a manner which maintain view corridors important to the historic district." (Pet. App. 18).

Deborah Tackett, Historic Preservation & Architecture Officer at the Planning Department, City of Miami Beach testified that the Staff Report did address view corridors, and contemplated those corridors within the COA criteria.

While Petitioners argue for an explicit finding, the plain text of Code §142-246(d) does not require the HPB to make an additional explicit finding. The HPB determined—based on its adoption of the City's Staff Report—that "the proposed site plan does not impede pedestrian sight lines and view corridors." Thus, we find that the Special Magistrate followed the essential requirements of law.

Competent substantial evidence

The last issue for our review is whether the Special Magistrate's decision is supported by competent substantial evidence. "Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The test is whether any competent substantial evidence exists to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm's.,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

The Staff Report concluded that the Application satisfied the COA standards and recommended approval. In pertinent part, Staff summarized its recommendation for approval as follows:

> The proposed project including the ground level and rooftop additions has been designed in a manner which is highly compatible with the environment and adjacent structures.
>
> * * *
>
> The proposed site plan does not impede pedestrian sight lines and view corridors.
>
> * * *
>
> The proposed additions have been oriented and massed in a manner which maintain view corridors important to the historic district.

(A.17-18). [Dkt. 2 (Pet. I & II)]

The Special Magistrate correctly recognized that the Staff Report recommendations in favor of the Application for a COA constitute competent substantial evidence sufficient to support the affirmance of a quasi-judicial approval. *See Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.,* 128 So. 3d 19, 27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c] (a staff report is competent substantial evidence where the staff made a complete review of all applicable review criteria); *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*., 857 So. 2d 202, 204-05 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1686a] (staff recommendations can constitute substantial competent evidence). Competent substantial evidence may also be comprised of aerial photographs and maps. *See generally Metro. Dade Cty. v. Blumenthal*, 675 So. 2d 598, 600 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c].

We find that the Special Magistrate's decision to affirm the HPB's COA based on the City's Staff Report constitutes competent substantial evidence to support that decision, along with the testimony of HPB representative Ms. Tackett, architect Arthur Marcus, the architectural firm Citterio Viel & Partners, the chairperson of the Miami Beach Chamber of Commerce and the College Park Neighborhood Association. Moreover, Kimley-Horn and Associates performed a traffic assessment for the Subject Property and submitted a report which included trip generation calculations along with a valet service and operations analysis.

Accordingly, for the foregoing reasons, the Petitions for Writ of Certiorari are **DENIED.** (TRAWICK and WALSH, JJ., concur.)

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[1]The parties in both cases are identical.

[2]Petitioners do not allege a deprivation of due process, but argue only that the Special Magistrate's findings departed from the essential requirements of the law and are not supported by competent substantial evidence.

[3]*See Setai Resort & Residences Condo Ass'n, Inc., et al. v. BHI Miami Ltd. Corp., et al.*, No. 2021-24426 CA 07 (Fla. 11th Cir. Ct. Nov. 3, 2021).

[4]Petitioners' Writ of Certiorari to the Third District Court of Appeal challenging the Order Granting [Defendants'] Joint Motion to Lift Automatic Stay ("Order") was denied on April 27, 2022. See Order [Denying Setai's Petition for Writ of Certiorari], *Setai Resort & Residences Condo. Ass'n, Inc., et al. v. City of Miami Beach, et al.*, Case No. 3D22-381 (Fla. 3d DCA Apr. 27, 2022). The Order had determined that the Circuit Court in the prohibition proceeding would "hear final argument and decide whether a Writ of Prohibition should be granted. Unless or until that happens, the Special Magistrate may proceed to hear the Setai's administrative appeal". That Order was followed by the Final Judgment Denying Verified Complaint for Writ of Prohibition dated June 10, 2022.

[5]The Special Magistrate stated at the hearing that the Respondents do not need a vacation agreement in order to file their COA.

* * *

Municipal corporations—Code enforcement—Unsafe structures—Appeals—Preservation of issue

CASSA BRICKELL CONDOMINIUM ASSOCIATION, INC., Appellant, v. CITY OF MIAMI UNSAFE STRUCTURES PANEL, a/k/a CITY OF MIAMI, UNSAFE STRUCTURES SECTION, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-44-AP 01. L.T. Case Nos. 1604084 and 1604085. July 17, 2023. On appeal from a Final Order of the City of Miami Unsafe Structures Panel. Counsel: Kyle A. Alonso and Darrin Gursky, Gursky Ragan, P.A., for Appellant. Eric J. Eves, Senior Appellate Counsel for Victoria Mendez, City Attorney, for Appellee.

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

(PER CURIAM.) AFFIRMED. *See Tillman v. State,* 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by [an appellate] court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation."); *Castor v. State,* 365 So.2d 701, 703 (Fla. 1978) (Contemporaneous objection provides notice to the trial judge and allows that judge to correct any errors in an early stage of the proceedings); *Clear Channel Communications, Inc. v. City of North Bay Village,* 911 So.2d 188 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b] (requirement to make contemporaneous objections applies to administrative proceedings); *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.,* 103 So. 3d 866, 869 (Fla. 4th DCA 2012) [38 Fla. L. Weekly D10a] ("To properly preserve an issue for appellate review, a litigant must make a timely, specific, contemporaneous objection."); and *Cutting Edge Real Estate Solutions LLC., v. City of Miami, Building Department,* 2019-131-AP-01 (Fla. 11th Cir. App. 2020) [28 Fla. L. Weekly Supp. 463c] (Case Resume and Calculation Sheet were sufficient to establish that "the 'cost of completion, alteration, repair/ or replacement' of the Appellant's structure exceeded 50 percent of its value.").

* * *

Municipal corporations—Code enforcement—Unsafe structures—Appeals—Preservation of issues—Contemporaneous objection in lower tribunal required

ADRIAN JAVIER PAREDES, Appellant v. UNSAFE STRUCTURES BOARD, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-68-AP 01. L.T. Case No. BB2022001763. July 17, 2023. On appeal from a Final Order of the City of Miami Unsafe Structures Panel. Counsel: Regina M. Campbell, The Campbell Law Group, P.A., for Appellant. John A. Greco, Chief Deputy City Attorney for Victoria Mendez, City Attorney, for Appellee.

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

(PER CURIAM.) AFFIRMED. *See Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by [an

appellate] court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation."); *Castor v. State,* 365 So.2d 701, 703 (Fla. 1978) (Contemporaneous objection provides notice to the trial judge and allows that judge to correct any errors in an early stage of the proceedings); *Clear Channel Communications, Inc. v. City of North Bay Village,* 911 So.2d 188 (Fla 3d DCA 2005) [30 Fla. L. Weekly D2170b] (requirement to make contemporaneous objections applies to administrative proceedings); *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.,* 103 So. 3d 866, 869 (Fla. 4th DCA 2012) [38 Fla. L. Weekly D10a] ("To properly preserve an issue for appellate review, a litigant must make a timely, specific, contemporaneous objection."); and *Cutting Edge Real Estate Solutions LLC., v. City of Miami, Building Department,* 2019-131-AP-01 (Fla. 11th Cir. App. 2020) [28 Fla. L. Weekly Supp. 463c] (Case Resume and Calculation Sheet were sufficient to establish that "the 'cost of completion, alteration, repair/ or replacement' of the Appellant's structure exceeded 50 percent of its value.").

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop and detention—Officer had reasonable suspicion to stop and detain licensee where licensee's driving caused officer to brake to avoid collision, licensee was slow in stopping after officer activated emergency lights, and officer observed that licensee was lethargic and had bloodshot eyes—Lawfulness of arrest—DUI investigator had probable cause for arrest after he observed licensee's lethargy, bloodshot eyes and odor of alcohol, licensee admitted that he had been tasting cocktails in his bartending job, and licensee performed poorly on field sobriety exercises—Implied consent warning—Although it is undisputed that licensee was read older version of implied consent warning that does not include warning about enhanced penalties for prior suspension or fine for boating under influence, omission is inconsequential and is not ground to invalidate suspension where licensee does not claim that he ever had suspension or fine for BUI

NICOLAS CASTILLA, 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-9352. Division H. June 6, 2023. Counsel: Susan Z. Cohen, Jacksonville, for Petitioner. Michael Lynch, Former Assistant General Counsel, DHSMV, Orlando, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HELENE L. DANIEL, J.) **THIS MATTER** is before the Court on Nicolas Castilla's Second Amended Petition for Writ of Certiorari. (Doc. 12). Petitioner contends that the order upholding the administrative suspension of his driving privilege should be quashed because he was not read the current version of implied consent, which now includes enhanced penalties for prior suspensions or fines related to a driver's operation of a *vessel* under the influence. The Court has reviewed the second amended petition (Doc. 12), response (Doc. 16), reply (Doc. 17), appendices, and applicable law. Because Petitioner does not assert that a prior suspension was related to the operation of a vessel under Chapter 327, the omission of the additional reference in the current version of the implied consent he was given was inconsequential and is not ground to invalidate the suspension. Moreover, where Petitioner committed a traffic infraction that caused law enforcement to slam on his brakes, the stop was justified. Thereafter, evidence of alcohol consumption and impairment provided probable cause to support the arrest and breath test request. Accordingly, the petition is denied.

Background

In a formal review of a license suspension, a hearing officer is required to determine:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.

2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. Implicit within this scope of review is consideration of the lawfulness of the arrest. *See generally Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a].

Petitioner's driver's license was administratively suspended for a violation of section 316.193, Florida Statutes, for driving under the influence (DUI). A formal review hearing was held July 20, 2022 and completed September 21, 2022 before Department hearing officer Bethany Connelly. The suspension was upheld by order issued October 7, 2022, which found the following facts by a preponderance of the evidence:

i. In the early morning hours of March 21, 2022, Sgt. P. F. Watkins of the Jacksonville Beach Police Department observed a vehicle driven by Petitioner fail to make a right turn into the proper lane, causing Sgt. Watkins to take evasive action to avoid a collision.

ii. Sgt. Watkins initiated a traffic stop. Petitioner was slow to respond, traveling over five blocks before stopping. Sgt. Watkins observed that Petitioner's eyes were bloodshot, so he detained Petitioner to await a DUI investigator.

iii. When Officer Keen arrived, Sgt. Watkins reported Petitioner's improper turn that resulted in his having "to slam on the brakes" and that Petitioner's eyes were bloodshot as the bases for seeking a DUI investigation. He also noted a previous license suspension.[1]

iv. Petitioner twice tried to drive away from the scene while law enforcement held his license.

v. On making contact with Petitioner, Officer Keen detected an odor of alcohol and noted that Petitioner's eyes were bloodshot and watery, and his movements were slow.

vi. Although Petitioner was lethargic on exiting his vehicle, he did not appear to stumble on video, nor was he unsteady. The video, which did not show Petitioner's eyes or his movements before he exited his vehicle, was consistent with law enforcement narratives.

vii. Petitioner performed field sobriety exercises and displayed additional signs of impairment. Petitioner advised law enforcement that one of his legs was shorter than the other, but he indicated it would not affect his ability to perform the exercises.

viii. Petitioner completed field sobriety tests which provided additional evidence of impairment. Thereafter he was arrested for DUI. He refused a lawful request to submit to a breath test.

Although not mentioned in the Order, the record shows that in response to Officer Keen's question as to why he could smell alcohol emanating from Petitioner, Petitioner told Officer Keen that he is a bartender and that he had tasted drinks to make sure they "taste right" the night of the traffic stop. This is only relevant, however, if there was a reasonable suspicion on Sgt. Watkins's part that Petitioner was driving under the influence.

Petitioner now presents two bases for quashal of the order upholding the suspension of his driving privileges. First, he contends that he was not given the correct version of implied consent. Second, he claims the record lacks competent, substantial evidence that the officer had reasonable suspicion for the traffic stop.

Standard of Review

Circuit courts review of an administrative agency decision in certiorari is to determine (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. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). 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. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989).

Analysis

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.

The Court will address first Petitioner's argument that the record lacks evidence that there was a reasonable suspicion to detain and probable cause to arrest him for DUI. The Court disagrees that the record lacks the necessary quantum of evidence to uphold the suspension. Regarding reasonable suspicion to effectuate a traffic stop, Sgt. Watkins observed Petitioner make a right turn on red and immediately cross three lanes of traffic, cutting off Sgt. Watkins's vehicle and causing Sgt. Watkins to hit the brakes to avoid a collision. Whether or not Sgt. Watkins issued a citation, Petitioner's driving pattern was a citable infraction. §316.151(1)(a), Fla. Stat. This pattern and near collision with Sgt. Watkins justified the initial stop. *State, Dept. of Highway Safety and Motor Vehicles v. Deshong*, 603 So. 2d 1349,1352 (Fla. 2d DCA 1992) (to effect a valid stop for DUI, the officer need only have a "founded suspicion" of criminal activity . . .driving need not rise to level of infraction to justify stop for DUI). Thereafter, Petitioner was slow to respond to emergency lights directing him to stop, driving five blocks before stopping. When he finally did stop, he did so in a traffic lane, rather than pulling off the roadway. Petitioner told Sgt. Watkins that he did not see him or any traffic. Sgt. Watkins noted at least two physical signs of possible impairment: lethargy and bloodshot eyes. Although Sgt. Watkins does not mention noticing an odor of alcohol, the odor of alcohol is not required in a reasonable suspicion analysis. *Dept. of Highway Safety & Motor Vehicles v. Rose,* 105 So. 3d 22, 25 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a]. That Petitioner's driving required Sgt. Watkins to brake to avoid a collision, the late hour, Petitioner's slow response in stopping, lethargy, and bloodshot eyes together provided Sgt. Watkins for reasonable cause to believe Petitioner was driving under the influence. §316.1932(1)(a)1.a., Fla. Stat. If during the lawful stop an officer obtains further evidence to give the officer reasonable suspicion that a crime has been committed, is being committed, or will be committed, the officer may further detain the person for purposes of determining whether there is probable cause to arrest such person. *State v. Taylor*, 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]. Therefore, the stop and detention were lawful.

To investigate his suspicion that Petitioner was driving under the influence, Sgt. Watkins requested a DUI investigator. Officer Keen responded, and Sgt. Watkins left the scene. Despite that Officer Keen, parked behind Petitioner, Petitioner attempted to drive away. Officer Keen was able to stop Petitioner from leaving and made contact with him in the driver seat of his vehicle. Officer Keen detected the odor of alcohol. He confirmed Sgt. Watkins's observation that Petitioner's eyes were bloodshot, and his movements were slow. Although Petitioner initially denied consuming alcohol, he later admitted that, as a bartender, he routinely tasted cocktails during work to ensure they are made correctly.

Petitioner agreed to submit to field sobriety tests after disclosing a physical issue, which he said would not affect his ability to perform the tests. Despite Petitioner's argument to the contrary, these provided further indicators of impairment. As a result, Officer Keen placed Petitioner under arrest. The late hour, bloodshot eyes, lethargy, and near collision with law enforcement observed by Sgt. Watkins, along with the added factors of the odor of alcohol, and Petitioner's admission of alcohol consumption, even without the results of field sobriety exercises, provide probable cause to support Petitioner's arrest and the request that he submit to a breath test. *Rose,* 105 So.3d at 23-4, citing *State v. Kliphouse*, 771 So.2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (components central to developing probable cause include bloodshot eyes, poor coordination, dangerous operation of a vehicle, odor of alcohol, and admissions).

The Court now turns to Petitioner's argument that he was read an older version of implied consent, and law enforcement's failure to read the current version requires that his suspension be invalidated. There is no dispute that Petitioner was read an older version of implied consent. The version of Implied Consent in place at the time of Petitioner's arrest include enhanced penalties for a prior suspension or fine related to a driver's operation of a vessel while under the influence. §316.1932, Fla. Stat. Because Petitioner does not claim he had ever had a suspension or fine related to his operation of a vessel, this portion of the new law was not relevant to informing him of the penalties to which he would be subjected if he refused a breath test. He was, however, told that his license would be suspended, and the length of the suspension, if he refused to submit to a test. That is all that is required. *Grzelka v. State*, 881 So. 2d 633, 634-35 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a] (refusal to submit to breath test was admissible where defendant was advised of at least one adverse consequence that would result from refusal, and nothing in the statute requires exclusion when the statutory warning is not complete). In fact, nothing in the statute mandates that the statute be read to drivers verbatim. §316.1932, Fla. Stat.[2]

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.

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[1]Petitioner's license was not, in fact, suspended at the time of the stop.

[2]*Cf. Benito Berrios v. Dep't. of Highway Safety & Motor Vehicles,* 29 Fla. L. Weekly Supp. 276a (Fla. 13th Jud. Cir. 2021) (failure to warn of penalties related to CDL did not immunize Petitioner from suspension of his regular driving privilege for refusing to submit to a breath test where Petitioner was not driving a commercial vehicle at the time of traffic stop resulting in license suspension).

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing—Failure of witness to appear—Arresting officer's nonappearance at formal review hearing does not require invalidation of license suspension where officer was excused from appearing due to scheduling conflict—Request that licensee submit to breath test was supported by competent, substantial evidence where licensee was stopped for speeding and weaving in crowded area late at night, officer noted odor of alcohol, and licensee performed poorly on field sobriety exercises

JUAN RAMIREZ, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 23-CA-13097. Division G. June 30, 2023. Counsel: Lily M. McCarty, Todd Foster Law Group, Tampa, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHRISTOPHER C. NASH, J.) This matter is before the Court on Petition for Writ of Certiorari filed June 12, 2023. The petition is timely, and this court has jurisdiction. Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P.; and §322.31, Fla. Stat. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine his blood alcohol level. Petitioner contends that the Department was required to lift the suspension under section 322.2615(11), Florida Statutes, because the arresting officer did not appear for the hearing. Petitioner also contends that the record lacks the competent, substantial evidence that there was a reasonable suspicion for the stop and, later, probable cause to request a breath test. Because the arresting officer's nonappearance was excused in advance because of a scheduling conflict, he did not "fail" to appear, and the law does not mandate invalidating the suspension. *Objio v. DHSMV,* 179 So. 3d 494, 496-97 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2608a] (section 322.2615(11) mandates invalidating suspension only where no continuance is ordered); *Simmons v. DHSMV,* 23 Fla. L. Weekly Supp. 692a (Fla. 13th Jud. Cir. [Appellate] 2015) (in the absence of justification for officer's nonappearance, suspension must be invalidated); Rule 15A6.105, Fla. Admin. Code. In addition, where Petitioner was stopped after being observed speeding and weaving in a crowded area late at night, law enforcement noted the odor of alcohol and, thereafter, Petitioner performed poorly on field sobriety exercises, competent, substantial evidence justified the request that Petitioner submit to a breath test. Therefore, Petitioner's license suspension was properly upheld.

It is therefore ORDERED that the petition is DENIED without need for a response in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

* * *

Municipal corporations—Code enforcement—Appeals—Standing—Subsequent property owner does not have standing to appeal special magistrate's order denying motion to quash where previous owner filed motion in her own name based on due process violation and did not appeal denial—Magistrate's supplemental order/code enforcement lien is affirmed—Motion for rehearing of opinion finding that subsequent owner of property does not have standing to appeal special magistrate's denial of previous owner's motion to quash alleging denial of due process and affirming supplemental order/code enforcement lien—Motion for rehearing does not state with particularity any points of law or fact that appellate court has overlooked or misapprehended and raises points of law and fact not previously raised—Where subsequent owner did not own property and was not party to code enforcement action at time that previous owner's due process claim would have arisen, previous owner's due process claim was personal to her and may not be asserted vicariously or assigned, and previous owner waived all objections she might have raised by selling property without attempting to assert due process violation prior to sale, subsequent owner did not have standing to appeal order denying motion to quash that was based on previous owner's personal due process claim—No merit to argument that unexplained change in styling of case or scrivener's error in style made by magistrate *sua sponte* substituted subsequent owner for previous owner before lower tribunal—As to magistrate's supplemental order/lien, due process was accorded to subsequent owner, essential requirements of law were observed, and judgment was supported by competent substantial evidence

VIP RE 2503, LLC, Appellant, v. TOWN OF PEMBROKE PARK, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-006712 (AP). Administrative Case No. 6155. April 21, 2023. [Order denying Amended Motion for Rehearing, June 21, 2023.] Appeal from the Town of Pembroke Park Special Magistrate Harry Hipler. Counsel: Martyn W.D. Verster, Miami, for Appellant. Brian J. Sherman, Goren, Cherof, Doody & Ezrol, P.A., Ft. Lauderdale, for Appellee.

OPINION

(**PER CURIAM**.) Having carefully considered the briefs, appendixes, the record, and the applicable law, this Court dispenses with oral argument and hereby **AFFIRMS** the Town of Pembroke Park Special Magistrate's April 20, 2022, Supplemental Order/Code Enforcement Lien.

Appellant, VIP RE 2503, LLC does not have standing to appeal the Town of Pembroke Park Special Magistrate's April 20, 2022, Order Denying Motion to Quash. Appellant's appeal of said Order Denying Motion to Quash is hereby **DISMISSED**. *Epstein v. Bank of America,* 162 So. 3d 159 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D293a] (*en banc*); *State v. Muller,* 693 So. 2d 976 (Fla. 1997) [22 Fla. L. Weekly S264a]; *City of Sebring v. Wolf,* 105 Fla. 516 (Fla. Div. B 1932); *Ahlers v. Wilson,* 867 So.2d 524 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D494a].

The Town of Pembroke Park Special Magistrate's April 20, 2022, Supplemental Order/Code Enforcement Lien in Case No. **6155** is hereby **AFFIRMED**. (BOWMAN, KOLLRA, and WEEKES, JJ., concur.)

ORDER DENYING AMENDED MOTION FOR REHEARING

(JOHN BOWMAN, J.) Having carefully considered Appellant's Amended Motion for Rehearing, Appellee's Response, Appellant's Reply to Appellee's Response, the briefs, appendixes, the record, and the applicable law, Appellant's Motion for Rehearing is **DENIED**.

Florida Rule of Appellate Procedure 9.330 provides in pertinent part:

> Rule 9.330. Rehearing; Clarification; Certification; Written Opinion
>
> **(a) Time for Filing; Contents; Response.**
>
> (1) *Time for Filing.* A motion for rehearing, clarification, certification, or issuance of a written opinion may be filed within 15 days of an order or decision of the court or within such other time set by the court.
>
> (2) *Contents.*
>
> (A) Motion for Rehearing. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding.

APPELLANT'S MOTION:

Appellant argues in its Amended Motion for Rehearing that this Court erred in finding that Appellant did not have standing to appeal the Special Magistrate's Order Denying Motion to Quash. Appellant

states that it has standing because it "was a party in the proceedings in the lower tribunal when Jeanette Verster ("hereinafter "Verster")(the original Respondent in the case) filed her Motion to Quash;" "it was *sua sponte* substituted to act in the place and stead of Verster;" and Verster was "relegated to let [Appellant] represent her interests, continue on her behalf and with her consent, to appeal the orders referenced above" when the Special Magistrate, without explanation, changed the caption (style of the case) on the Order Denying Motion to Quash (and dropped Verster's name thereon and replaced it with Appellant's name in the caption instead). Appellant further states that the unexplained change to the caption of the case "is effectively the same as the entry of an order by a Court" of an order of substitution.

In addition, Appellant argues that this Court's finding that Appellant did not have standing to appeal the Special Magistrate's Order Denying Motion to Quash (the motion filed by Verster) denies this Court of jurisdiction to Affirm the Special Magistrate's separate Supplemental Order/Code Enforcement Lien.

ANALYSIS:

In the First Amended Brief of Appellant, Appellant presented its argument regarding its standing to appeal the Special Magistrate's Order Denying Motion to Quash and stated: "This is an appeal by Appellant VIP RE 2503 . . . [and] [a]s of January 1st, 2022, Appellant VIP RE 2503 LLC became the new owner of the property, previously owned by initial respondent JEANETTE VERSTER, who owned the property individually and not as an LLC or corporation. As hereinafter used, Appellant VIP RE 2503 and JEANETTE VERSTER may be collectively referred to as 'Appellant' or 'VIP RE' . . ." *See* Appellant's Initial Brief at P. 4. Verster filed the Motion to Quash in her individual capacity and she did not appeal the Order Denying Motion to Quash.

This Court considered Appellant's standing in light of Appellant's above representation that it, as the subsequent property owner, had standing for the purpose of the appeal of the Special Magistrate's Order Denying Motion to Quash and Supplemental Order/Code Enforcement Lien. Appellant did not raise the issue that it was claiming standing to appeal the Order Denying Motion to Quash based on a theory that it was *sua sponte* substituted for Verster in the lower tribunal via a caption change on the order, and it did not include any mention or argument thereon in its First Amended Brief or its Reply Brief.

In its First Amended Brief, Appellant proposed that it presumptively had standing based on Appellant's purchase of the real property from the original owner. Thus, Appellant's now attempting to frame the issue as standing gained as the result of a formal substitution resulting from an unexplained change to the styling of the case or scrivener's error by the Special Magistrate on his Order Denying Motion to Quash is raised for the first time in Appellant's Amended Motion for Rehearing. In addition, no Motion for Substitution was filed in the lower tribunal. No Order of Substitution was entered in the lower tribunal. And, no substitution would transfer any right to Appellant to appeal the denial of the prior property owner's Motion to Quash that was specifically related to a due process claim that was owned by the prior property owner in her personal and individual capacity on September 28, 2021, and October 20-21, 2021, respectively. Appellant does not provide this Court with a single case that would support its position that it may, under any circumstances, vicariously assert a due process challenge that it did not own, and specifically, Appellant fails to present any case law that would support the argument that an unexplained change in the styling of the case or a scrivener's error by the presiding magistrate on an order acts as a formal order of substitution that places a party in the position to vicariously raise the due process rights of a third party individual.

Further, Appellant did not raise or include any mention or argument in its First Amended Brief or its Reply Brief that a finding by this Court that Appellant lacked standing to appeal the Special Magistrate's Order Denying Motion to Quash would deprive this Court of jurisdiction to Affirm the Special Magistrate's Supplemental Order/Code Enforcement Lien.

In regard to Appellant's argument that this Court lacked jurisdiction to Affirm the Special Magistrate's Supplemental Order/Code Enforcement Lien, in Appellant's Amended Initial Brief it stated that "[t]his Court has jurisdiction pursuant to Fla. Stat. 162.11," and in its Amended Motion for Rehearing, Appellant states that it "is aggrieved by all orders and findings of the lower tribunal," which would specifically include the Special Magistrate's Supplemental Order/Code Enforcement Lien that this Court's Opinion Affirmed. Appellant therefore invoked this Court's jurisdiction regarding the Special Magistrate's Supplemental Order/Code Enforcement Lien by filing its appeal and its now contrary argument is without merit.

Fla. R. App. P. 9.330 provides that Appellant's Amended Motion for Rehearing must "state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding." Appellant's Amended Motion for Rehearing does not state with particularity any points of law or fact that the Court may have overlooked or misapprehended and Appellant is now raising new points of law and fact that were not previously raised in the Appellant's First Amended Brief or its Reply Brief.

THE BASIS OF THIS COURT'S OPINION THAT FOUND APPELLANT DID NOT HAVE STANDING TO CHALLENGE THE SPECIAL MAGISTRATE'S ORDER DENYING MOTION TO QUASH

This Court considered Appellant's standing in light of the following facts, case law and analysis:

The original property owner and Respondent in the lower tribunal, Jeanette Verster, filed her Motion to Quash in her own individual capacity thereby raising her due process claim approximately two and a half months after she had sold the property to Appellant. The Special Magistrate allowed Verster to fully argue her motion through counsel and to present both documentary and oral evidence at the hearing on April 22, 2022. In her Motion to Quash, Verster alleged that she personally had been deprived of her due process rights to proper service of the Code Enforcement Notice of Violation and Notice of Hearing dated September 28, 2021. On September 28, 2021, and on the date of the hearing and entry of the Final Order, October 20 and 21, 2021, respectively, Jeanette Verster owned the property in her individual capacity and she was the sole respondent in the case. Appellant did not own the property on September 28, 2021 or October 20-21, 2021, and Appellant was not a party to the proceeding that was before the lower tribunal on October 20, 2021. Appellant did not acquire ownership of the property until January 1, 2022. Therefore any alleged due process violation occurring on September 28, 2021 and/or October 20-21, 2021, would be a claim that was personal to Jeanette Verster in her individual capacity. Verster did not appeal the Special Magistrate's April 22, 2022, Order Denying Motion to Quash.

In *Epstein v. Bank of America,* 162 So. 3d 159, 162 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D293a] (*en banc*), the Fourth District Court of Appeal held that "Constitutional rights are personal and may not be asserted vicariously" (*citing Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed. 830 (1973), and **"[t]his holds true specifically for due process challenges"** (emphasis added)(*citing State v. Muller,* 693 So. 2d 976, 978 (Fla. 1997) [22 Fla. L. Weekly S264a] (in which the Florida Supreme Court held that a defendant lacked standing to challenge the alleged violation of due process

rights of a non-defendant). Further, in *City of Sebring v. Wolf,* 105 Fla. 516,518-21 (Fla. Div. B 1932), a city acquired real property with outstanding tax certificates and thereafter sought to raise a constitutional right of the prior owner to challenge the validity or application of a Florida statute. The Florida Supreme Court held that "even though a statute [may] be unconstitutional, those only who have the right to raise the question of unconstitutionality may invoke aid of the courts to have it judicially set aside . . . [and] **there accrued to the [prior] property owner, and to him alone, the right to raise the question that the statute's effect was to unconstitutionally deprive him as a property owner, of his property without due process of law** . . . ." (emphasis added). "[In addition], [t]he right to challenge the constitutionality of a statute on grounds which are personal to the owner of property is a right which may be waived by the owner, . . . and even [where] not waived, such a right of action in equity is not assignable . . . [a]nd so as may be discerned . . . the owner did waive all objections he might have raised . . . by selling the land to complainant without attempting to assert such objection prior to the sale. [T]he [prior] owner of the property . . . must be deemed to have waived any [constitutional] objection because he conveyed the property without questioning the constitutionality of the act."). *Id. (Cf Ahlers v. Wilson,* 867 So.2d 524, 526 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D494a] (wherein the First District Court of Appeal found that "in Florida, the right to appeal is available only to those who were parties to the action in the lower tribunal."

In the present case, in regard to Appellant's standing, this Court considered that Appellant was not a party to the action at the time that Verster's due process claim would have arisen, it did not own the real property at the time that Verster's due process claim would have arisen, Verster's due process claim was personal to her, due process rights are personal and may not be asserted vicariously, a right to due process is not assignable, and Verster waived all objections she might have raised by selling the land to Appellant without first attempting to assert a violation of due process prior to the sale.

Accordingly, as previously stated in this Court's Opinion, Appellant did not have standing to appeal the Order Denying Motion to Quash that was filed by Verster based upon a personally owned claim that her (Verster's) individual due process rights were violated on September 28, 2021, and/or October 20-21, 2021.

THE SUPPLEMENTAL ORDER/CODE ENFORCEMENT LIEN

In regard to the Special Magistrate's April 20, 2022, Supplemental Order/Code Enforcement Lien, Appellant owned the subject property on the date of that hearing and as such it had a direct interest in and was substantially affected by the Supplemental Order/Code Enforcement Lien.

Appellant admitted on the record that it did not contest notice for the April 20, 2022, hearing. Appellant was also afforded a full evidentiary hearing on April 22, 2022.

Further, in its First Amended Brief, Appellant did not challenge the competency or the substantiality of the evidence presented at the April 20, 2022, hearing in which the Special Magistrate "found that the Respondent(s) had not complied with the Final Order issued on October 21, 2021."

In addition, in its First Amended Brief, Appellant did not challenge or allege that the Special Magistrate, while conducting the April 20, 2022, hearing, regarding the Supplemental Order/Code Enforcement Lien, failed to observe the essential requirements of law in making his findings that Appellant had not complied with the lower tribunal's Final Order or in assessing the amount of the lien.

In our Opinion, in regard to the Special Magistrate's Supplemental Order/Code Enforcement Lien, this Court found that procedural due process was accorded, the essential requirements of law were observed, and the administrative findings and judgment were supported by competent substantial evidence. *See Town of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982).

It is hereby **ORDERED** and **ADJUDGED** that Appellant's Amended Motion for Rehearing is **DENIED**.

* * *

Volume 31, Number 5
September 29, 2023
Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Torts—Negligence—Damages—Past and future medical expenses—Evidence—Retroactive application of statute—Section 768.0427(2), which addresses admissible evidence of past and future medical expenses and provides that it applies to "causes of action filed after the effective date of this act," is not applicable to case filed on effective date of act

LEE N. JACKSON, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY and SANDRA D. WILFORD, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2022-CA-0019. July 28, 2023. David Frank, Judge. Counsel: Hubert R. Brown, Tallahassee, for Plaintiff. Christopher Barkas, Douglas P. Jones, and S. Kyle Weaver, Tallahassee, for Defendants.

ORDER DENYING DEFENDANTS' MOTION IN LIMINE ON THE APPLICATION OF HB 837

This cause came before the Court on Defendants', Progressive Select Insurance Company and Sandra Wilford, July 13, 2023 Motion in Limine Regarding Florida Statute 768.0427(2), and the Court having reviewed the motion and response and the court file, and being otherwise fully advised in the premises, finds

Defendants argue that recently enacted Florida tort reform legislation, Section 768.0427(2), Florida Statutes, also referred to as "HB 837," should be applied retroactively to the current case, and if it is, the Court should:

1) As to past medical expenses already paid, allow Plaintiff to offer only evidence of the amount actually paid by any source, pursuant to Fla. Stat. § 768.0427(2)(a);

2) As to past medical expenses not yet paid (if any), allow defendant to offer any evidence specifically permitted by Fla. Stat. § 768.0427(2)(b); and,

3) As to future medical expenses, allow defendant to offer any evidence permitted by Fla. Stat. § 768.0427(2)(c).

Defendants' motion at 5-6.

Plaintiff has responded in opposition and argues the statute must be applied prospectively and, therefore, is not applicable to the present case.

Initially, it was the intention of this Court to draft a detailed and very long exposition addressing all of the various matters raised along this statute's short path. Instead, let us start, and essentially finish, with three quotes:

No question is so difficult to answer as that to which the answer is obvious.
-George Bernard Shaw

We can and should instead decide this case on grounds clearly supported by existing law, thus adhering to principles of judicial restraint and avoiding novel public policy decisions. See PDK Labs., Inc. v. United States Drug Enf't Admin.,* 362 F.3d 786, 799 (D.C. Cir. 2004) *(Roberts, J., concurring) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.").
-Love v. Young, 320 So.3d 259, 263 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1496b]

It is totally within the domain of the legislature to pass laws and exercise its discretion to make laws prospective or retroactive as it sees fit. We are obliged to follow the law as formulated by the legislature unless it infringes on vested rights as protected by the United States or Florida Constitution.
-Brown & Brown, Inc. v. Gelsomino, 262 So.3d 755, 761 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2642a]

Section 30 of HB 837 provides that it applies to "causes of action filed after the effective date of this act." Section 31 provides that HB 837 "shall take effect upon becoming law," which occurred on March 24, 2023. This action was filed by March 24, 2023.

The parties have discussed several important rules of statutory construction, constitutional imperatives, and methods of analysis to support their positions. Are not these three facts all that we really need?

No appellate court has issued an opinion on the issue. It appears that a majority of trial courts disagree with defendants' argument and have ruled that the law must be applied prospectively. Plaintiff's Response at Exhibit A. In plain words, the majority view is that the statute applies to cases filed after March 24, 2023.

As my learned colleague, Judge Kimberly Byrd noted in *Miskiel v. Dukes*, No. 2018-CA-2401 (Fla. 6th Cir. Ct. June 2, 2023), we can stop work after reading the statute because it is "unnecessary . . . to continue the constitutional analysis" because such an analysis "is only necessary to protect constitutional rights when the legislature attempts to apply a substantive change in the law retroactively." *Id.* This Court agrees.

Accordingly, it is ORDERED and ADJUDGED that defendants' motion is DENIED.

* * *

Elections—Municipal recall petitions—Settlement—Enforcement—Failure to sign general release required by settlement agreement resolving various appeals of a successful challenge to a recall election—Incapacity—Claim that defendant was mentally incapacitated at time of mediation and that, accordingly, settlement agreement, or at least the agreement's general release requirement, should be invalidated with respect to defendant was unsupported by evidence—Motion to enforce settlement agreement granted—Attorney's fees incurred in enforcing settlement assessed against defendant and his counsel

IN RE: CITY OF QUINCY, FLORIDA RECALL CASES. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case Nos. 2022 CA 401, 2022 CA 443, 2022 CA 029, and 2022 CA 1498, Consolidated. July 31, 2023. David Frank, Judge. Counsel: Jack L. McLean, Jr., Tallahassee; Larry K. White, Tallahassee; and Louis Thaler, Coral Gables, for Plaintiff. Robert E. Larkin, III and Benjamin M. Lagos, Tallahassee, for Defendant.

ORDER GRANTING MOTION TO ENFORCE SETTLEMENT

This cause came before the Court on the joint motion to enforce settlement filed by the City of Quincy, Commissioner Ronte Harris, and Keith Dowdell (to be referred to as "defendants"), to compel Emanuel Sapp and his attorneys, (to be referred to as "plaintiffs") to execute and deliver a general release of claims, and the Court having reviewed the papers submitted in support and opposition to the motion, heard and considered evidence, heard argument of counsel, and being otherwise fully advised in the premises, finds

The long, tortuous, and expensive process that brings us here began when Mr. Jack McLean and Mr. Emanuel Sapp filed a complaint for declaratory and injunctive relief accusing the City of Quincy and individual commissioners of violating Florida's Sunshine law when it voted to discharge Mr. McLean from his position as city manager. That specific line of cases resulted in a final judgment in favor of defendants that was upheld on appeal. A second line of cases involving plaintiffs attempt to force a recall vote of certain commissioners also resulted in a final judgment in favor of defendants but was ultimately resolved via global settlement conference during the

pendency of various appeals. It is compliance with that settlement that is the issue today.

On January 11, 2023, the Court issued an order referring the parties to mediation to resolve remaining issues. The remaining issues were various pending appeals filed by plaintiffs and various motions for attorney's fees filed by defendants.

On February 20, 2023, the parties gathered at the office of Accurate Court Reporters in Tallahassee to conduct the mediation.

On February 21, 2023, mediator and former Florida Bar president Kelly Overstreet Johnson filed the following notice:

> A Mediation Conference was held in the above-captioned matter by Kelly Overstreet Johnson, Certified Circuit Civil Mediator, Certification No. 21645R, on February 20, 2023. The parties and their counsel attended the mediation, which resulted in a signed Mediation Settlement Agreement.

Paragraph 4 of the settlement states as follows:

> The Opposing Parties and Defendants will execute a General Release of all claims, including the aforementioned terms, which shall include a release of all claims, known and/or unknown, up to and including the date of execution of the General Release agreement. As to Taylor, the aforementioned General Release shall exclude any and all claims, known or unknown, related to claims for defamation, tortious interference with a contract, and/or prospective business relationship.

On June 23, 2023, defendants filed the present joint motion to enforce the settlement and requested the following:

> WHERFORE, Movants respectfully request this Honorable Court grant this Joint Motion to Enforce Settlement Agreement, direct Mr. Sapp and his counsel to execute Movants' proposed General Release Agreement, require Mr. Sapp and his counsel pay the reasonable expenses incurred by Movants as a result of Mr. Sapp and his counsel's refusal to comply with the terms of the Mediation Settlement Agreement, and award any further relief this Court deems just and proper.

On June 27, 2023, defendants filed a notice of hearing on the motion to enforce settlement. The hearing was set for July 14, 2023. Defendants never moved for a continuance nor did they indicate there was anything for which they needed more time.

On July 14, 2023, as noticed, the Court conducted an evidentiary hearing at which defendants were given ample time to present the testimony of their one and only witness, Emanuel Sapp, and to argue their opposition to the motion.

At the start of the hearing, Mr. McLean objected on behalf of plaintiffs to defendants' opening, stating that the hearing was "an evidentiary hearing" and, therefore, it was improper to come to the hearing with nothing more than legal argument. Point being that plaintiffs were operating under the assumption that the hearing would be an evidentiary hearing. This is troubling because in a later brief, plaintiffs argued that the Court should deny the motion because they were not properly advised that the hearing would be evidentiary.[1]

Based on the evidence presented and uncontested facts discussed at the hearing, the Court specifically finds:

1. Mr. Sapp attended a Court ordered mediation, in person, with his attorneys who were also physically present, with him, in the same room.

2. Mr. Sapp and his attorneys signed and duly executed the settlement agreement that included the general release requirement stated above.

3. During the weeks following mediation, Mr. Sapp's attorney attempted to negotiate a "carve out" for Mr. Sapp that would allow him to get around the general release. The attempt was ultimately unsuccessful.

4. Months after mediation, when it was clear that a carve out would not be given to Mr. Sapp, Mr. Sapp's attorneys argued that he was mentally incapacitated at the time of mediation and, therefore, the settlement, or at least the condition of a general release, should be invalidated.

5. Contrary to their argument, the evidence indicated references to Mr. Sapp's ongoing medical appointments and medical condition around the time of mediation were unrelated to the conduct of mediation.

6. At mediation, Mr. Sapp did not feel well due to his blood sugar being low. He felt exhausted and was clearly irritated with the length and, what he described as, pettiness of the proceeding. However, he clearly was uncomfortable with his attorney's use of the word "dementia."

7. Plaintiffs offered no expert testimony to support their incapacitation argument. There was no evidence that Mr. Sapp was experiencing any legal incapacity such that he was required to have, or that anyone suggested he should have, a guardian or representative with powers of attorney making decisions for him. Mr. Sapp conceded on cross examination that understood what was happening, he just did not like it. He never actually testified that he did not understand what a general release is or how it operates.

8. Mr. Sapp has not yet provided a signed general release and, as such, has failed to perform a term or condition under the binding settlement entered into by the parties.

9. Mr. Sapp and his attorneys acted in bad faith as to the general release requirement.

10. Defendants incurred the expense of attorney's fees litigating enforcement of the settlement.

Applicable Law

At the hearing, the Court instructed the parties to file memoranda addressing the authority for defendants' request for attorney's fees, whether fees would be assessed against the parties, the lawyers, or both, and how such allocations would be determined.

Defendants filed their brief and cited to Florida Rule of Civil Procedure 1.730(d) as their authority for the assessment of attorney's fees. The subsection reads:

> In the event of any breach or failure to perform under the agreement, the court upon motion may impose sanctions, including costs, attorneys' fees, or other appropriate remedies including entry of judgment on the agreement.

The Court agrees that this rule is the proper authority for the assessment of attorney's fees given the posture of this case.

Plaintiffs filed their brief but did not address Rule 1.730(d). Instead, plaintiffs discussed Florida Statute 57.105 and the Court's inherent authority to sanction, neither of which are applicable.

As one might imagine, the standard for a court's inherent authority to enter a default or dismiss a case because of an attorney's or party's bad conduct is much more serious and handled with much more care than compelling a party to simply comply with a term or condition of a mediated settlement.

"Rule 1.730[d] appears to allow for sanctions after relatively mild transgressions—a breach or failure to perform under a mediation agreement. . . . Fees could be justified under rule 1.730[d] for conduct that does not come close to triggering entitlement under the inequitable conduct doctrine." *Cox v. Great Am. Ins. Co.*, 88 So.3d 1048, 1050 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1271c]. Under Rule 1.730(d), a trial court is required to make specific factual findings detailing the breach or failure to perform under the mediation agreement and identified those attorney's fees and costs incurred as a result of such conduct. *Id.* at 1049. *See also, Pompano Masonry Corp. v. Anastasi*, 125 So.3d 210, 213 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D295a] (failure to execute the release as required under the settlement was a "failure to perform" the terms of the settlement under

Rule 1.730(d)).

To prevail on an incapacitation argument, plaintiffs would have had to present live testimony, lay or expert, from a relative or from a medical professional. *John Knox Vill. of Tampa Bay, Inc. v. Perry*, 94 So.3d 715, 717 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1976a]. Being "confused on some occasions but not on others" would not be sufficient. *Id*. "Mere physical feebleness or mental weakness will not authorize a court to set aside a contract or other executed document on the ground of mental capacity unless the evidence demonstrates that such mental or physical weakness amounted to an inability to comprehend the effect and nature of the transaction. *Murrey v. Barnett Nat'l Bank of Jacksonville*, 74 So.2d 647 (Fla. 1954); *Davis v. Wigfall*, 70 So.2d 908 (Fla. 1954)." *Nassau Life Ins. Co. v. Hynes*, 604 F. Supp. 3d 1322, 1327 (N.D. Fla. 2022).

Accordingly, it is ORDERED and ADJUDGED that

Defendants' motion to enforce settlement is GRANTED. Within ten (10) days from the date of this order Mr. Sapp will execute a General Release of defendants of all claims, known and/or unknown, up to and including the date of execution of the General Release agreement.

IT IS FURTHER ORDERED that, should Mr. Sapp fail to comply with this order, defendants will file an affidavit confirming the same and request a hearing to show cause why sanctions should not be imposed, including holding Mr. Sapp in indirect civil contempt and assessing addition attorney's fees and/or a daily purge amount or incarceration, to run until five months and thirty days or compliance, whichever is sooner.

IT IS FURTHER ORDERED that defendants' request for attorney's fees for the expense incurred enforcing the settlement to be assessed against Mr. Sapp and his three attorneys is GRANTED, in an amount to be determined at a subsequent hearing. The parties will use their best efforts to agree on the amount.

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[1]Similarly, plaintiffs suggested at the hearing that they would like more time to get some of Mr. Sapp's medical records, even though they would not proffer what exactly they contended that the records would show. Instead, Mr. Sapp repeatedly responded that "they would speak for themselves." Most importantly and controlling here, plaintiffs never requested a continuance or otherwise addressed the matter prior to the hearing.

* * *

Torts—Negligence—Section 768.0427, which provides standards for admissibility of evidence of cost of past and future medical treatment or services and specifies damages that may be recovered for medical care, does not apply to case filed before effective date of act creating statute—Plain language of law states that legislature intended for act to be applied prospectively to causes of action filed after its effective date

EXYLENA WILLIAMS, Plaintiff, v. ELI WOLF, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CA-008017. Division CV-E. June 15, 2023. Bruce R. Anderson, Jr., Judge. Counsel: Bryan Scott Gowdy, Jacksonville; and Daniel A. Iracki, Jacksonville, for Plaintiff. Dale T. Gobel, Gobel Flakes, LLC, Orlando, for Defendant.

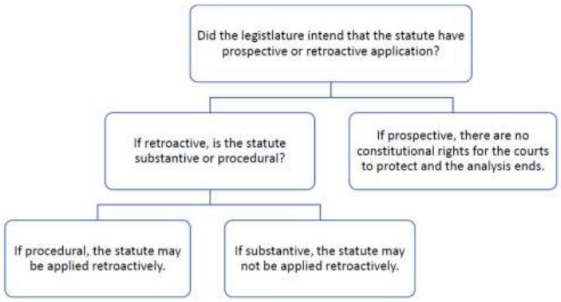
ORDER ON DEFENDANT'S MOTION IN LIMINE REGARDING EVIDENCE OF PLAINTIFF'S PAST AND FUTURE MEDICAL TREATMENT OR SERVICES

This cause came before this Court, after hearing on June 13, 2023, on Defendant's motion in limine regarding evidence of Plaintiff's past and future medical treatment or services, filed May 31, 2023 (Doc. 236). For the following reasons, Defendant's motion is **DENIED**.

ANALYSIS

Defendant seeks to apply section 768.0427, Florida Statutes (2023). This new statute was created by chapter 2023-15, Laws of Florida—commonly known as HB 837. The law plainly states that it "shall apply to causes of actions filed after the effective date of this act." Ch. 2023-15, § 30, Laws of Fla. Because the act became effective on March 24, 2023—well after this case was filed—it does not apply to this case.

Many courts have reached the same conclusion.[1] For example, Judge Kimberly Byrd denied a defendant's attempt to apply HB 837 because "the legislature intended that the provision of the statute at issue be applied prospectively." *Miskiel v. Dukes*, No. 2018-CA-2401 (Fla. 6th Cir. Ct. June 2, 2023). Judge Byrd explained it was therefore "unnecessary . . . to continue the constitutional analysis" because such an analysis "is only necessary to protect constitutional rights when the legislature attempts to apply a substantive change in the law retroactively." *Id.* Judge Byrd illustrated her analysis with a diagram:



The parties agree about the application of the first step of Judge Byrd's diagram. Indeed, at the hearing, Defendant conceded that the plain language of HB 837 indicates the legislature's intent for HB 837 to apply prospectively. Nevertheless, Defendant argues that this Court should ignore the legislature's intent. In support, Defendant relies on an order entered in *Sapp v. Brooks*, No. 17-CA-5664 (Fla. 13th Cir. Ct. May 19, 2023) [31 Fla. L. Weekly Supp. 123b].

This Court declines to follow the *Sapp* order because it contradicts the plain language of HB 837, it misconstrues the caselaw on retroactivity, it renders section 768.0427 unconstitutional, and it unconstitutionally exercises the Florida Supreme Court's rulemaking authority.

I. The *Sapp* order contradicts the plain language of HB 837.

"The 'plain meaning of the statute is always the starting point in statutory interpretation.' " *Alachua County v. Watson*, 333 So. 3d 162, 169 (Fla. 2022) [47 Fla. L. Weekly S15a] (citation omitted). Here, the language is clear: HB 837 "shall apply to causes of actions filed after the effective date of this act." Ch. 2023-15, § 30, Laws of Fla.[2] Because the act became effective on March 24, 2023—well after this case was filed—it does not apply to this case. Yet, the *Sapp* order contradicted the statute's plain language and ruled that section 768.0427 applies to cases filed before the effective date of HB 837. *Sapp* at 38-39. The court thus erred. *See State Farm Mut. Auto. Ins. v. Shands Jacksonville Med. Ctr., Inc.*, 210 So. 3d 1224, 1228 (Fla. 2017) [42 Fla. L. Weekly S176a] ("Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law." (citation omitted)).

Following the plain language of the law is particularly important when determining the temporal applicability of a law. This is because the Florida Supreme Court has "insist[ed] that a declaration of retroactive application be made expressly in the legislation under review." *Fleeman v. Case*, 342 So. 2d 815, 817 (Fla. 1976). "By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any

overriding constitutional provision." *Id.* at 817-18.

Consistent with the Florida Supreme Court's instruction, courts have followed the plain language of a law when the law states that it should be applied prospectively. *See Theodorou v. Burling*, 438 So. 2d 400, 402 (Fla. 4th DCA 1983) ("The statute on its face is not to apply to any 'action' filed before July 1, 1980."); *Brown & Brown, Inc. v. Gelsomino*, 262 So. 3d 755, 758 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2642a] (indicating that the language in a 2006 law showed an intent to apply the law prospectively). Federal courts likewise follow the legislature's direction to apply a law prospectively. *E.g.*, *Bradley v. School Bd.*, 416 U.S. 696, 715 n.21 (1974); *Fenner v. Bruce Manor, Inc.*, 409 F. Supp. 1332, 1348 (D. Md. 1976). And legal commentators have recognized that HB 837 does not apply retroactively.[3]

II. The *Sapp* order misconstrues the caselaw on retroactivity.

The *Sapp* order cites a series of Florida decisions on retroactivity. *Sapp* at 17-29. In none of those decisions did the court contradict the legislature's direction to apply a law prospectively. Rather, the cited decisions ignored a legislative directive only when (i) the legislature provided that a law would apply retroactively, and (ii) retroactive application would be unconstitutional. *See State Farm Mut. Auto. Ins. v. Laforet*, 658 So. 2d 55, 61-62 (Fla. 1995) [20 Fla. L. Weekly S173a] (declining to apply a law retroactively because doing so would violate constitutional principles); *Menendez v. Progressive Express Ins*, 35 So. 3d 873, 877-80 (Fla. 2010) [35 Fla. L. Weekly S222b] (same). None of the other cited decisions ignored a legislative directive on temporal applicability.[4]

For example, the *Sapp* order includes a lengthy discussion of *Love v. State*, 286 So. 3d 177 (Fla. 2019) [44 Fla. L. Weekly S293a]. *Sapp* at 25-29. Unlike here, however, in *Love* the legislature did not intend that the law at issue be applied only prospectively. *See* 286 So. 3d at 188. To the contrary, the court concluded that the law "was intended" to apply to pending cases. *Id. Love* therefore provides no basis to contradict the plain language of HB 837. Rather, *Love* demonstrates that the legislature's intent governs unless doing so would be unconstitutional.

There is nothing unconstitutional about applying HB 837 prospectively. After all, that is how most laws presumptively operate. *Old Port*, 986 So. 2d at 1284 ("In the absence of clear legislative intent to the contrary, a law is presumed to operate prospectively."); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 41, 261 (2012) ("A statute presumptively has no retroactive application."). Although there are constitutional restrictions on the temporal applicability of a law, those restrictions apply to attempts to apply a law to rights, obligations, conduct, and cases that existed *before* the law's enactment. *See, e.g.,* Art. I, § 9, Fla. Const. (prohibiting the deprivation of property without due process of law); Art. I, § 10, Fla. Const. (prohibiting ex post facto laws and laws impairing the obligation of contracts).

To be sure, the Florida Supreme Court has said "[t]he general rule is that . . . a procedural or remedial statute is to operate retrospectively." *Laforet*, 658 So. 2d 55. But that "general rule" is merely a presumption of legislative intent. *See Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994) (explaining that, "whenever possible, [remedial] legislation should be applied to pending cases *in order to fully effectuate the legislation's intended purpose*" (emphasis added)); *see also Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 500 (Fla. 1999) [24 Fla. L. Weekly S267a] ("It must be kept in mind that the presumption against retroactivity is only a default rule of statutory construction. The essential purpose of statutory construction is to determine legislative intent."). By definition, a presumption can be overcome by contrary evidence. *Mercury Cab Owners' Ass'n v. Jones*, 79 So. 2d 782, 784 (Fla. 1955).

Here, even if HB 837 were entirely procedural or remedial (which it is not), the legislature has clearly stated its intent that the law "shall apply to causes of actions filed after the effective date of this act." Ch. 2023-15, § 30, Laws of Fla. Accordingly, the presumption for retroactive application of procedural or remedial statutes is overcome by the plain language of HB 837.

Not only does the plain language demonstrate the legislature's intent to apply HB 837 prospectively, but the structure of HB 837 also demonstrates this intent. *See Devon*, 67 So. 3d at 197 (explaining that a court may consider the "structure" of a law to determine its intended temporal applicability). For instance, section 768.0427(2) addresses admissible evidence of medical treatment or service expenses, while section 768.0427(3) imposes certain disclosures as "a condition precedent to asserting any claim for medical expenses for treatment rendered under a letter of protection." Obviously, a new condition *precedent* cannot be applied to a claim that has already been asserted.

Similarly, section 768.0427(4) governs the "damages that may be recovered by a claimant in a personal injury or wrongful death action for the reasonable and necessary cost or value of medical care rendered." It defines the recoverable damages as being limited to "the evidence of medical treatment and services expenses admitted pursuant to subsection (2)." § 768.0427(4), Fla. Stat. Accordingly, the substantive measure of damages is defined by the evidentiary rules created by this same statute. This indicates that the legislature intended for the provisions of HB 837 to apply together in harmony—not that procedural aspects would apply in pending cases and substantive aspects only in future cases.

Finally, the legislative history of HB 837 demonstrates the legislature's intent to apply HB 837 prospectively. *See Devon*, 67 So. 3d at 197 (explaining that a court may consider the "legislative history" of a law to determine its intended temporal applicability). Specifically, an earlier draft of HB 837 provided that "[t]he procedural changes within this act are remedial in nature and shall apply to all pending and prospective claims." Committee Substitute 2 for HB 837, § 17 (Mar. 9, 2023). Notably, however, the house later voted to amend that language and adopt the current language providing that the law applies to cases filed *after* the effective date. *See* Rep. Gregory Amendment 263047 (Mar. 16, 2023). The house's rejection of the earlier language further demonstrates its intent that HB 837 should apply prospectively. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 459-60 (2012) [23 Fla. L. Weekly Fed. S272a] (relying on a committee markup as confirmation of plain meaning).

III. The *Sapp* order's analysis renders section 768.0427 unconstitutional.

The Florida Supreme Court has "the exclusive authority to adopt rules of judicial practice and procedure for actions filed in this State." *Se. Floating Docks, Inc. v. Auto-Owners Ins.*, 82 So. 3d 73, 78 (Fla. 2012) [37 Fla. L. Weekly S63a]. When a law enacted by the legislature conflicts with a rule of procedure adopted by the Florida Supreme Court, the law is unconstitutional. *Massey*, 979 So. 2d at 937 ("[W]here this Court has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict."). The same is true for laws that conflict with caselaw on a matter of procedure. *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1229 (Fla. 2018) [43 Fla. L. Weekly S459a].

The *Sapp* order concluded that section 768.0427 must be applied retroactively because it is "procedural." *See Sapp* at 32-39. But if that were true, then section 768.0427 would be unconstitutional to the extent it conflicts with decisions of the Florida Supreme Court. Section 768.0427 conflicts with multiple such decisions. *Compare*

Worley v. Cent. Fla. Young Men's Christian Ass'n, 228 So. 3d 18, 20 (Fla. 2017) [42 Fla. L. Weekly S443b] (holding that "the attorney-client privilege protects a party from being required to disclose that his or her attorney referred the party to a physician for treatment"), *with* § 768.0427(3)(e), Fla. Stat. (requiring a plaintiff to disclose such a referral and by providing that evidence of the referral is admissible at trial). *Compare Joerg v. State Farm Mut. Auto. Ins.*, 176 So. 3d 1247, 1249 (Fla. 2015) [40 Fla. L. Weekly S553a] ("As an evidentiary rule, payments from collateral source benefits are not admissible because such evidence may confuse the jury with respect to both liability and damages."); *and Dial v. Calusa Palms Master Ass'n*, 337 So. 3d 1229, 1231 (Fla. 2022) [47 Fla. L. Weekly S115b] (noting that *Joerg* "preclude[es] the admission of evidence of a plaintiff's eligibility for future Medicare benefits"); *with* § 768.0427(2)(c)(2), Fla. Stat. (allowing the admission of a plaintiff's eligibility for future Medicare benefits).

In short, if this Court were to accept the *Sapp* order's conclusion that section 768.0427 is procedural, then section 768.0427 would be unconstitutional because it conflicts with the Florida Supreme Court's rulemaking authority. *See DeLisle*, 258 So. 3d at 1229. Courts should avoid statutory constructions that render a law unconstitutional. *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004) [29 Fla. L. Weekly S95a].

IV. The *Sapp* order unconstitutionally exercises the Florida Supreme Court's rulemaking authority.

"Only the Florida Supreme Court has the power to adopt rules of practice and procedure for Florida's courts." *State v. Ferguson*, 556 So. 2d 462, 464 (Fla. 2d DCA 1990), *disapproved on other grounds*, *State v. Hernandez*, 645 So. 2d 432, 435 (Fla. 1994). By deciding for itself the applicable date of section 768.0427, the *Sapp* order unconstitutionally exercises the Florida Supreme Court's rulemaking authority.

Not only does the *Sapp* order unconstitutionally exercise the Florida Supreme Court's rulemaking authority, but it also does so contrary to the Florida Supreme Court's historical practice. When the Florida Supreme Court adopts a law to the extent the law is procedural, the court does so effective of the date chosen by the legislature or a later date (such as the date of the court's opinion).[5] This Court is not aware of any decision in which the Florida Supreme Court adopted a law to the extent it is procedural yet chose to make it effective *earlier* than the date chosen by the legislature.

Finally, the reason why the Florida Supreme Court adopts laws to the extent the laws are procedural is "[t]o avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional because they had not been adopted by [the court] under its rule-making authority." *In re Fla. Evidence Code*, 372 So. 2d at 1369. The *Sapp* order, by contrast, creates more confusion and will result in more litigation because the court concluded that procedural elements of HB 837 apply to cases filed before the act's effective date whereas substantive elements do not. *See Sapp* at 39. This conclusion necessarily leads to further litigation about which aspects of HB 837 are procedural and which aspects are substantive.

On the other hand, applying the plain text of HB 837 results in no such confusion or litigation. Instead, the answer is simple: HB 837 "shall apply to causes of actions filed after the effective date of this act." Ch. 2023-15, § 30, Laws of Fla.

CONCLUSION

For the foregoing reasons, Defendant's motion in limine regarding evidence of Plaintiff's past and future medical treatment or services, filed May 31, 2023 (Doc. 236), is **DENIED**.

[1]*See, e.g.*, *Crooms v. Allied Van Lines, Inc.*, No. 2018-CA-4242 (Fla. 4th Cir. Ct. Apr. 25, 2023); *Ketcham v. Evergreen Land Servs., Inc.*, No. 2021-CA-005738 (Fla. 12th Cir. Ct. May 3, 2023); *Franklin v. Walker*, No. 2021-CA-1300 (Fla. 8th Cir. Ct. May 10, 2023); *Cole v. Pin Chasers, Inc.*, No. 19-CA-11229 (Fla. 13th Cir. Ct. June 2, 2023); *Patrignani v. Abernethy*, No. 20-CA-004397 (Fla. 13th Cir. Ct. June 12, 2023).

[2]Two specific provisions of HB 837 have *even later* dates of application, but those provisions are not at issue. *See* Ch. 2023-15, § 28, Laws of Fla. (concerning amendments to the statute of limitations in section 95.11, Florida Statutes); *id.* § 29 (concerning rights under insurance contracts).

[3]*E.g.*, Joanne I. Nachio et al., *Florida Passes Tort Reform: What You Need to Know*, Marshall Dennehey (Mar. 27, 2023) ("The changes apply to causes of action accruing after the effective date—March 24, 2023."); Johnathan Brown, *Florida's Comprehensive Tort Reform—Governor DeSantis Signs H.B. 837 Into Law, Signaling a New Era For Civil Litigation in Florida*, Burr Forman (Apr. 6, 2023) ("This legislation applies to actions filed after the passage of H.B. 837, except as to the new negligence statute of limitation, which apply to negligence claims accruing after March 24, 2023, the effective date of the Act."); Taylor Cavaliere et al., *Florida Governor Signs Sweeping Tort Reform Bill Into Law*, Jones Day (Mar. 2023) ("The amendment to the statute of limitations provision will apply prospectively to causes of action accruing after the date the bill becomes effective. The remaining provisions will apply to claims filed after the bill's effective date (March 24, 2023)."); Evan P. Dahdah & Kristy Pantaleon, *Four Updates You Need to Know as Florida's Sweeping Tort Reform Takes Effect*, Phelps Dunbar (Mar. 31, 2023) ("The bill's strictures do not apply retroactively, so any case filed before March 24 will not be governed by the bill."); Devin M. Topper & Steven I. Klein, *Florida Tort Reform Now Law: Effective Upon Governor's Signature*, Rumberger Kirk (Mar. 24, 2023) ("The provisions of the bill shortening the statute of limitations for negligence claims will apply to causes of action which accrue after the effective date. All of the other provisions of the bill will apply to lawsuits filed after the effective date."); *Florida Tort Reform: Major Changes, What to Know, and Why*, Wicker Smith (Mar. 28, 2023) ("HB 837/SB 238 became effective law on the date of signature, March 24, 2023, and will apply to any lawsuit filed thereafter.").

[4]*See Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) (declining to apply a law retroactively because there was "no clear evidence of legislative intent to rebut the presumption against such retroactive application"); *Smiley v. State*, 966 So. 2d 330, 336 (Fla. 2007) [32 Fla. L. Weekly S303b] (declining to address legislative intent because it would be unconstitutional to apply the law retroactively in any event); *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One*, 986 So. 2d 1279, 1284 (Fla. 2008) [33 Fla. L. Weekly S478a] (declining to apply a law retroactively because "the plain language of [the statute] d[id] not evince an intent that the statute apply retroactively"); *Massey v. David*, 979 So. 2d 931, 943 (Fla. 2008) [33 Fla. L. Weekly S264a] (holding that a law unconstitutionally encroached on the court's rulemaking authority); *Fla. Ins. Guaranty Ass'n v. Devon Neighborhood Ass'n*, 67 So. 3d 187, 197 (Fla. 2011) [36 Fla. L. Weekly S311a] (declining to apply a law retroactively because there was "no clear evidence of legislative intent for retroactivity"); *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 949 (Fla. 2011) [36 Fla. L. Weekly S69a] (declining to apply a law retroactively because of "the lack of evidence of legislative intent to apply the statute retroactively"); *Love v. State*, 286 So. 3d 177, 188 (Fla. 2019) [44 Fla. L. Weekly S293a] (applying a procedural law to pending cases because it "was intended" to apply in that manner).

[5]*E.g.*, *In re Clarification of Fla. Rules of Prac. & Proc.*, 281 So. 2d 204, 205 (Fla. 1973) ("These amendments and changes shall take effect on the effective date of the statutes to which they are related."); *In re Fla. Evidence Code*, 372 So. 2d 1369, 1269 (Fla. 1979) (adopting the evidence code effective of the date chosen by the legislature); *The Fla. Bar*, 404 So. 2d 743, 743 (Fla. 1981) (adopting amendments to the evidence code effective of the date chosen by the legislature); *In re Amend. of Fla. Evidence Code*, 497 So. 2d 239, 240 (Fla. 1986) (adopting amendments to the evidence code and noting that its decision "does not alter the established effective date" set by the legislature); *Timmons v. Combs*, 608 So. 2d 1, 3 (Fla. 1992) (adopting **"**effective as of the date of this opinion**"** the procedural portion of an earlier enacted statute); *In re Fla. Evidence Code*, 638 So. 2d 920, 920 (Fla. 1993) (adopting amendments to the evidence code "effective the dates the bills became law"); *In re Fla. Evidence Code*, 675 So. 2d 584, 584 (Fla. 1996) [21 Fla. L. Weekly S241b] (same); *In re Amends. to the Fla. Evidence Code*, 782 So. 2d 339, 342 (Fla. 2000) [25 Fla. L. Weekly S909a] (same); *In re Amends to the Fla. Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002) [27 Fla. L. Weekly S679a] (same); *Amends to the Fla. Evidence Code*, 891 So. 2d 1037, 1038 (Fla. 2004) [29 Fla. L. Weekly S787a] (same); *In re Amends. to the Fla. Evidence Code-Section 90.104*, 914 So. 2d 940, 941 (Fla. 2005) [30 Fla. L. Weekly S701b] (same); *In re Amends. to the Fla. Evidence Code*, 960 So. 2d 762, 763 (Fla. 2007) [32 Fla. L. Weekly S500a] (same); *In re Amends. to the Fla. Evidence Code*, 53 So. 3d 1019, 1020 (Fla. 2011) [36 Fla. L. Weekly S29a] (same); *In re Amends. to Fla. Evidence Code*, 278 So.3d 551, 554 (Fla. 2019) [44 Fla. L. Weekly S170a] (adopting amendments to the evidence code effective of the date of the court's opinion); *In re Amends. to Fla. Evidence Code*, 347 So. 3d 312, 313 (Fla. 2022) [47 Fla. L. Weekly S238a] (adopting an amendment to the evidence code effective "the date the amendment became law").

* * *

Civil procedure—Discovery—Depositions—Absence of opposing counsel—Petitioner's counsel improperly began and concluded deposition before deposition was scheduled to commence and at a time when respondent's counsel was not yet present—Deposition stricken—Sanctions are imposed

IN RE: ROBINSON, ELIZABETH M., Decedent. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-003685-CP-02. Section PMH03. June 9, 2023. Bertila Soto, Judge. Counsel: Michael Farrar, Doral, for Petitioner. Jacqueline C. Ledón, Ledón Law, P.A., Miami, for Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR A PROTECTIVE ORDER AND/OR TO EXCLUDE IMPROPER DEPOSITION TESTIMONY, TO COMPEL RE-TAKING OF DEPOSITION AND FOR SANCTIONS

THIS MATTER, having come before the Court for hearing on June 7, 2023, on Respondent's Motion for a Protective Order and/or To Exclude Improper Deposition Testimony, to Compel Re-Taking of Deposition & for Sanctions, the Court having considered argument of counsel and reviewed the file, and being otherwise fully advised in the premises, IT IS HEREBY

ORDERED AND ADJUDGED:

1. The Motion is GRANTED.

2. Petitioner's counsel began and concluded the May 11, 2023, deposition of witness Elizabeth G. Robinson before it was scheduled to commence. As such, Respondent's counsel was not present nor given an opportunity to object or cross-examine the witness.

3. Accordingly, the deposition is hereby STRICKEN and inadmissible for any purpose. Fla. Prob. R. 5.025(d)(2). Fla. R. Civ. P. 1.330(a) ("Any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition"). See also *Broward Indus. Plating v. Welby*, 394 So. 2d 1117, 1120 (Fla. 1st DCA 1981) (holding that where notice is improper and counsel cannot appear at the deposition, rule 1.310(b) prohibits admission of the testimony); *Tampa Bay Performing Arts Ctr. v. Campbell*, 789 So. 2d 511, 512 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1720b] (same).

4. Petitioner's counsel is ordered to pay $475 for one hour of Respondent's counsel's attorney's fees, for the time expended traveling to and from the deposition, made payable to Ledón Law Trust Account within 10 days of the date of this order. Fla. R. Civ. P. 1.380(a)(4); *Moakley v. Smallwood*, 826 So. 2d 221, 224 (Fla. 2002) [27 Fla. L. Weekly S357b].

5. Petitioner's counsel is ordered to coordinate all future depositions, hearings, and other proceedings in this matter, including the date, time, and place, with Respondent's counsel.

* * *

Criminal law—DUI manslaughter—Vehicle homicide—Sentencing—Guidelines—Downward departure—Isolated offense committed in unsophisticated manner and for which defendant has shown remorse—Motion for downward departure sentence is granted

STATE OF FLORIDA, Plaintiff, v. JACK GARCIA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F21-18927. June 28, 2023. Daryl E. Trawick, Judge. Counsel: Michael A. Catalano, Michael A. Catalano, P.A., Miami, for Defendant.

ORDER GRANTING MOTION FOR DOWNWARD DEPARTURE SENTENCE

THIS CAUSE having come to be heard upon the Defendant's Motion for Downward Departure and the Court being fully advised in the premises rules as follows:

The Motion is hereby Granted as stated herein and as stated on the record on 6/22/23 as follows:

The Defendant, **JACK GARCIA**, through undersigned counsel and pursuant to §921.0026, Fla. Stat., moved for a downward departure sentence and as grounds stated that:

1. The Defendant plead guilty to both counts of the information on 6/22/23. One count is DUI manslaughter, F.S. 316.193(3), a 2nd degree felony and the other count is Vehicle Homicide, F.S. 782.071(1)(A), also a second-degree felony. The Defendant's sentencing guidelines recommend a state prison sentence. DUI Manslaughter has a 4-year minimum mandatory sentence. F.S. 316.193(3). The court has the discretion to sentence the Defendant from 4 years prison to 30 years prison in addition to mandatory probation and other required conditions. All parties agreed to waive a PSI report.

2. A court may depart from the recommended guidelines sentence where there are circumstances or factors which reasonably justify the departure.

3. Section 921.0026(2)(j) provides that a mitigating circumstance under which a departure from the sentencing guidelines is reasonably justified include situations where the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse. The Defendant is now 31 years old and has no prior criminal convictions. He received his first Florida DL in 2010. He has personally never been convicted of a traffic violation. The Defendant has suffered depression and anxiety as a result of how bad he has felt because he caused the death of the victim. He is a college graduate. He has a family and friends who support him. Some came to the sentencing. He has seen many doctors and testified about his remorse and mental health issues at sentencing. He also supplied exhibits to verify what he said under oath.

Moreover, these grounds have been found to be proper by the appellate court under similar circumstances. *State v. VanBebber,* 805 So. 2d 918 (Fla. 2nd DCA 2001) [26 Fla. L. Weekly D2558b] (Affirmed by the Florida Supreme Court in: *State v. VanBebber,* 848 So. 2d 1046 (Fla. 2003) [28 Fla. L. Weekly S390a] (Trial court properly granted defendant a downward departure sentence following his DUI convictions, some resulting in death or serious injury of the victims, where crime was an isolated incident, committed in an unsophisticated manner, for which defendant had shown remorse). Such evidence clearly supports a downward departure as contemplated by this section of the statute.

4. Finally, the list of statutory departure reasons is not exclusive and, therefore, a trial court may impose a downward departure for reasons ***not*** delineated in the statute, so long as the reason given is supported by competent, substantial evidence and not other vise prohibited. See e.g., *State v. Stephenson,* 973 So.2d 1259 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D513a]. The Defendant, 29 years of age at the time of offense, now stands before the Court at the age of 31 with an otherwise excellent driving history and no prior convictions. Accordingly, a downward departure sentence is warranted herein.

5. The court finds the testimony and exhibits credible and believes a downward departure is warranted in this matter. The court carefully listened to the mother of the victim, the Defendant and the attorneys and made a final decision. The court is also obligated to issue an order even though the State said they were not appealing this decision.

6. As stated on the record, the court granted the downward departure and sentenced the Defendant to 10 years in state prison with a 4-year minimum mandatory sentence on Count 1, and 10 years of probation on Count 2, with all special conditions announced by the Court at the sentencing hearing on 6/22/23. Each count is to run consecutively.

* * *

Counties—Licensing—Discovery—Depositions—Recording—Rule 1.310 allows either party to create audiovisual record of deposition irrespective of whether party appears pro se or through counsel

SPIROS C. PAIZES, Plaintiff, v. SARASOTA COUNTY FLORIDA, SARASOTA COUNTY GENERAL CONTRACTORS LICENSING AND EXAMINING BOARD, SARASOTA COUNTY MECHANICAL CONTRACTORS LICENSING AND EXAMINING BOARD, Defendants. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2022 CA 000265 NC. Division C Circuit. June 23, 2023. On Motion for Clarification July 12, 2023. Hunter W. Carroll, Judge. Counsel: Spiros C. Paizes, Pro se, Bradenton, Plaintiff. Aleksandr Boksner, Deputy Sarasota County Attorney, Sarasota, for Defendants.

ORDER CONCERNING PLAINTIFF'S MOTION FOR JUDICIAL INTERVENTION

BEFORE THE COURT is Plaintiff's Motion for Judicial Intervention and Protective Order [DIN 63], Defendant's response in opposition [DIN 69], and Plaintiff's response [DIN 73]. The Court, having reviewed the Motions, hereby ORDERS the following:

Plaintiff is permitted to create an audiovisual record of depositions under Fla. R. Civ. P. 1.310, provided he complies in full with the instruction provided in subdivision (b)(4).

While both parties address 1.310's interchangement of terms "officer" and "operator" in DINs 63, 69, and 73, these discrepancies are of no moment. A plain reading of 1.310 allows for either ***"party"*** to create an audiovisual record of a deposition—without regard to whether such party is *pro se* or represented by counsel.

ORDER ON PLAINTIFF'S MOTION FOR CLARIFICATION AND FOR PROTECTIVE ORDER

BEFORE THE COURT is Plaintiff's Motion for Clarification and for Protective Order [DIN 81].

The Court grants the motion. Mr. Paizes is permitted personally to videotape the deposition provided that he complies with the rule 1.310. Defense counsel may not preclude the Plaintiff from doing that. The County's relief is to file a motion.

As for the County's request for an evidentiary hearing on the conduct of Ms. Paizes and the language used in filings, the County may file an appropriate motion and the Court will allow Mr. Paizes to respond and the Court will then address that motion in due course.

* * *

Torts—Negligence—Motor vehicle accident—Damages—Past and future medical expenses—Evidence—Retroactive application of statute—Section 768.0427, which addresses admissible evidence of past and future medical expenses and requires certain disclosures when damages are incurred under letters of protection, is applicable to case pending at time statute was enacted—No merit to argument that statute is substantive in nature because it establishes condition precedent to assertion of claim for damages incurred under letters of protection where statute requires disclosures before asserting claim, not filing lawsuit—Pretrial posture of case allows for application of statute even if continuance is required for preparation of disclosures by plaintiff

INGRID TORRES-APONTE, Plaintiff, v. JOHN HUDNALL and SABRINA'S TRUCKING, LLC, Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CA-7146. Division E. May 19, 2023. Anne-Leigh Gaylord Moe, Judge. Counsel: Joshua Wright, Morgan & Morgan, Tampa, for Plaintiff. Lindsay Topping Brigman and Sonny Romano, Wicker, Smith, O'Hara, McCoy & Ford, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANTS' MOTION IN LIMINE REGARDING SECTION 768.0427, FLORIDA STATUTES

THIS CAUSE comes before the Court on a Motion in Limine Regarding Section 768.0427, Florida Statutes (the "**Motion**"), filed by Defendants John Hudnall and Sabrina's Trucking, LLC. The Motion was heard on June 30, 2023. Joshua Wright, Esq. of Morgan & Morgan represented Plaintiff Ingrid Torres-Aponte. Lindsay Brigman, Esq. of Wicker Smith O'Hara McCoy & Ford, P.A. represented Defendants.

I. Introduction

A. The Facts

At the time of Ingrid Torres-Aponte's unfortunate collision with John Hudnall on February 14, 2019, she had medical insurance. But Ms. Torres-Aponte decided not to use her medical insurance, even though her providers would have accepted it. Instead, in a move that at least doubled her medical expenses, Ms. Torres-Aponte agreed that her surgeon, Dr. Highsmith, and Dunedin Surgery Center (the surgery center at which her surgery was performed) would be compensated under letters of protection (the "**Letters of Protection**").[1]

Florida has standard jury instructions for civil cases, and in a personal injury case the jury is instructed that, if the plaintiff establishes negligence and causation, then the jury should award "the *reasonable* value or expense of medical care and treatment *necessarily* or *reasonably* obtained by the plaintiff in the past." Fla. Std. Jury Instr. 501.2(b) (emphasis added). Mr. Hudnall and Sabrina's Trucking would like to offer evidence that may tend to show that the amounts incurred under the Letters of Protection were not reasonable and, instead, a different number represents the reasonable value or expense of Ms. Torres-Aponte's medical care and treatment necessarily or reasonably obtained in the past.

One of the first arguments Ms. Torres-Aponte makes is that sometimes letters of protection are a matter of necessity for a plaintiff in a personal injury case. Some doctors will not accept patients in litigation, so options for those patients can be limited. Other doctors will only treat patients under a letter of protection.

Yet neither of those things are true about Dr. Highsmith. Dr. Highsmith accepts patients in litigation. He also accepts all forms of insurance as an out-of-network provider. In his deposition, he even testified that he would have facilitated the submission of Ms. Torres-Aponte's charges to her medical insurance. He further acknowledged that when a patient is in litigation, there are negotiations that take place about the charges.[2]

At the upcoming trial, Ms. Torres-Aponte intends to demand that the jury enter a verdict in her favor and against Mr. Hudnall and Sabrina's Trucking for, among other things, her past medical expenses incurred under the Letters of Protection. And Mr. Hudnall and Sabrina's Trucking believe it was unreasonable for Ms. Torres-Aponte to forgo her insurance and at least[3] double her medical expenses—and their exposure in this lawsuit[4]—by choosing to receive care under the Letters of Protection. They want the jury to hear *not only* what the charges for the same procedures would have been, if Ms. Torres-Aponte had used her insurance, *but also* the even lower amount that the medical insurance would have been entitled to pay. If Defendants have their way, when the jury considers the reasonable value of past medical expenses, the jury will have heard (1) the amount incurred under the Letters of Protection, (2) the amount that would have been charged to medical insurance, if Ms. Torres-Aponte had chosen to use medical insurance, and (3) the amount that the medical insurance would have paid.

B. The Act

The Florida Legislature recently addressed past medical expenses and letters of protection as part of a tort reform bill called HB 837. HB 837 was enacted as Chapter 2023-15, Florida Laws (the "**Act**"). Among other things, the Act included the language that is now Section 768.0427, Florida Statutes[5] (the "**Statute**"). The Statute took effect on March 24, 2023 when Governor DeSantis signed HB 837. Section 6

of HB 837 provides that, in pertinent part, the Statute will read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

(3) LETTERS OF PROTECTION; REQUIRED DISCLOSURES.—In a personal injury or wrongful death action, as a condition precedent to asserting any claim for medical expenses for treatment rendered under a letter of protection, the claimant must disclose:

(a) A copy of the letter of protection.

(c) If the health care provider sells the accounts receivable for the claimant's medical expenses to a factoring company or other third party:

1. The name of the factoring company or other third party who purchased such accounts.

2. The dollar amount for which the factoring company or other third party purchased such accounts, including any discount provided below the invoice amount.

(d) Whether the claimant, at the time medical treatment was rendered, had health care coverage and, if so, the identity of such coverage.

(e) Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral is made by the claimant's attorney, disclosure of the referral is permitted, and evidence of such referral is admissible notwithstanding s. 90.502. Moreover, in such situation, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of the bias of a testifying medical provider.

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

C. The Question Presented

The Motion seeks a ruling that the Statute applies to this case. As of the date of this Order, trial courts across the state have considered various parts of the Statute and reached differing conclusions. This court previously ruled that a portion of the Statute—section 786.0427(2)—is procedural and appropriately applied to a pending case when it makes sense to do so given its posture. *See* Amended Order Granting Defendants' Motion in Limine (docket # 264), *Sharon Sapp v. James Brooks,* Case No. 17-CA-5664 (Fla. 13th Cir. Ct. May 19, 2023) [31Fla. L. Weekly Supp. 123b] (the "**Sapp Order**"). The Sapp Order is attached because its analysis of Florida's precedent on temporal reach of a new procedural statute is adopted and incorporated herein by reference. The Sapp Order addressed the big picture of temporal reach: as a matter of process, beyond the effective date, the judicial branch does not look to the legislative branch for direction on the temporal reach of a new procedural law. Rather, the judicial branch has consistently been clear that trial courts should apply a new procedural law to pending cases when it makes sense to do so, given the posture of the case.

The issues in *Sapp* were analyzed in the amount of time that the Court had available to consider them when that motion was filed. This Motion presents an opportunity to continue the analysis. For that reason and in that sense, this order is intended to be a continuation of the Sapp Order. And, in brief, its conclusion is that, consistent with the "big picture" discussed in *Sapp,* the Legislature did not attempt to direct the judicial branch on the temporal reach of the procedural aspects of the Statute.

Now, there are a few distinctions between this case and *Sapp.* First, the Motion seeks to apply more of the Statute than was before the Court in *Sapp.* The only portion of the Statute that was before the Court in *Sapp* was section 768.0427(2). The Motion in this case seeks to apply section 768.0427(2)[6] and *also* section 768.0427(3)(a-e). Second, the arguments are not identical. This case raises some interesting new points.

Having made those distinctions, what remains the same is Florida's precedent on temporal reach. The judicial branch has shown the Legislature an answer key on how it interprets the temporal reach of statutes. The Legislature legislates against that background.

The answer key is this:

There is a core assumption that the Legislature makes law for the future. A substantive law made for the future will apply to cases filed after the effective date. There are constitutional reasons why this is so, and why the judicial branch must exercise caution any time the Legislature expresses a clear intent that the normal rule for substantive statutes should not apply. It is only when the Legislature articulates a clear intent that a substantive provision should apply retroactively that the judicial branch will even consider applying a substantive statute retroactively. And it will decline to do so if retroactive application offends the Constitution.

The future is more immediately upon us when the new law is procedural or remedial in nature. When a new law of that type takes effect, the Florida Supreme Court has directed trial courts to apply it to pending cases if it makes sense to do so given the posture of the case.[7]

D. The Relief Requested & The Arguments

The Motion asks the Court to:

(1) For medical expenses already paid, allow Plaintiff to offer only evidence of the amount actually paid, pursuant to section 768.0427(2)(a);

(2) For unpaid medical expenses, allow Defendant to offer evidence permitted by section 768.0427(2)(b)(1)-(2), including evidence of the amount the Plaintiff's health care coverage is obligated or would pay the health care provider to satisfy the past unpaid medical charges under the insurance contract or regulation;

(3) Allow Defendants to offer evidence permitted by section 768.0427(2)(c) for future medical expenses;

(4) As to medical expenses incurred under letters of protection, as that term is defined in 768.0427(1), require Plaintiff to meet all of the terms of sections 768.0427(3)(a) through (e) for evidence of such expenses to be admissible;

(5) Require Plaintiff to disclose who referred her for medical treatment that was provided under a letter of protection and allow this information to be admitted at trial; and

(6) Require Plaintiff to disclose information regarding the financial relationship between her medical providers including the information contained in section 768.0427(3)(e).

Ms. Torres-Aponte argues that these parts of the Statute are substantive and the Legislature provided clear direction in Sections 30 and 31 that the Statute should *only* apply to cases filed after the effective date. She also argues that this Court would arrogate to itself the Florida Supreme Court's rule-making authority if it applies a new procedural statute to pending cases prior to the Florida Supreme Court expressing its approval of the enactment.

Defendants argue that Florida's courts do not take direction from the Legislature on temporal reach of a procedural statute, beyond the effective date. Even if the judicial branch did take instructions on temporal reach of procedural statutes, Defendants argue that the Legislature did not provide temporal reach instructions that could be considered a clear expression of intent that the judicial branch depart from its practice of applying new procedural statutes to pending cases.

II. Analysis

A. The Supreme Court Plainly Permits Trial Courts to Apply New Procedural Rules Prior to Its Consideration of Them.

Some dogs don't hunt. The idea that it is an arrogation of the Supreme Court's rule-making power for a trial court to apply a new procedural statute to a pending case before the Supreme Court takes it up is one of them. It would have been odd for the Florida Supreme Court to have so consistently directed trial courts to apply new procedural statutes to pending cases if in fact the Supreme Court meant that procedural statutes should only be applied to pending cases *after* the Supreme Court considers them, which could happen years later.

In defense of Ms. Torres-Aponte, she seemingly conceded the issue after being invited to brief *McLean v. State,* 854 So. 2d 796 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2449a]; *Mortimer v. State,* 100 So. 3d 99 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2073b]; and *Mallory v. State,* 866 So. 2d 127 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D382a]. In her supplemental brief, she acknowledged that this controlling precedent stands for the proposition that trial courts may apply a new procedural statute to pending cases even before the Florida Supreme Court takes it up. *McLean,* 853 So. 2d at 803, n. 7.

McLean concerned a statute that the trial court found to be (a) procedural in nature and (b) passed to overrule certain Florida Supreme Court precedent on the admissibility of *Williams* rule evidence in cases involving child molestation. 853 So. 2d at 798. The new statute made such evidence admissible. *Id.* The trial court ruled that the new statute could properly be applied to the pending case even though the charged offense was committed in October 2000, before the statute took effect. *Id.* The trial occurred in November of 2001, after the statute took effect, but before the Supreme Court adopted the rule in 2002. *Id.* at 802. Noting that "[a]pparently, the Supreme Court intends to allow trial courts to utilize a rule of evidence during the period between its legislative enactment and its adoption by the Supreme Court if the trial court determines that the new rule of evidence is procedural and does not violate the prohibition against ex post facto application," the Second District found no error in the trial court's application of the new procedural statute prior to the Supreme Court's adoption of it. *Id.* at 803, n.7. Rather, it recognized that trial courts may apply such statutes to pending cases with the risk that the Supreme Court may later disapprove the change. *Id.*

Mortimer concerned a trial court's admission of evidence under a common law hearsay exception that was not a part of the evidence code at the time of trial. 100 So. 3d 99. After the trial, the Legislature amended the evidence code to include that hearsay exception. *Id.* at 103. Although the Fourth District considered it error for the trial court to have applied the exception at trial because it did not yet exist in the evidence code at that time, the error did not merit reversal because the same evidence would then be admissible at a second trial. *Id.* at 101.

Mortimer addressed the "separate procedural/substantive issue [that] arises as a result of article V, section 2(a) of the Florida Constitution, which provides that the 'Supreme Court shall adopt rules for the practice and procedure in all courts.' " *Id.* at 103. It explained that "[i]n order to comply with its constitutional responsibility and recognizing that the evidence code contains both substantive and procedural provisions, the Florida Supreme Court regularly issues opinions adopting or refusing to adopt the procedural rules enacted as amendments to the Florida Evidence Code." *Id.* However, even if the Supreme Court has not yet adopted a change to the evidence code deemed procedural, "the Supreme Court's unwritten policy is 'to allow trial courts to utilize a rule of evidence during the period between its legislative enactment and its adoption by the supreme court if the trial court determines that the new rule of evidence is procedural and does not violate the prohibition against *ex post facto* application.' " *Id.* at 104. Further, "statutes are presumed constitutional and given effect until they are declared unconstitutional." *Id.*

Mallory concerned a recently amended provision in the evidence code. 866 So. 2d at 127. Mallory was convicted of a crime and argued that the trial court erred in denying a motion to suppress evidence before trial. *Id.* His counsel conceded that he failed to renew the motion during trial, which constituted a waiver under existing case law. *Id.* But after the trial, a statutory amendment to Section 90.104(1)(b) eliminated the need to renew the objection at trial. *Id.*

Rather than determine the constitutionality of Section 90.104(1)(b), the Fourth District recommended that the Supreme Court adopt it as a rule. *Id.* Further, the court presumed that the statute was constitutional and gave it effect:

> Because statutes are presumed constitutional and given effect until they are declared unconstitutional, *Ison v. Zimmerman,* 372 So. 2d 431 (Fla. 1979), we apply the statute and reach the merits of the ruling on the motion to suppress.

Id. at 128.

Considered together, *Mallory, Mortimer,* and *McLean* explain how it is—aside from the Florida Supreme Court's own explicit, repeated direction to trial courts that new procedural statutes should (with emphasis on *should*, because that word matters, too, as discussed *infra*) be applied to pending cases—that trial courts can apply new procedural laws to pending cases.

Florida's adoption of the *Daubert*[8] standard for expert testimony further illustrates this point. In 2013, the Legislature amended section 90.702 to incorporate *Daubert* in the Florida Rules of Evidence. *DeLisle v. Crane Co.,* 258 So. 3d 1219, 1227 (Fla. 2018) [43 Fla. L. Weekly S459a]. Trial courts applied *Daubert* when considering expert testimony challenges. Then, in 2018, the Supreme Court held that the Legislature had exceeded its authority in adopting the statute and that the statute was unconstitutional because it conflicted with a Supreme Court rule. *Id.* at 1228-30. Thereafter, the Supreme Court decided to adopt the *Daubert* standard in amended section 90.702. *In re Amendments to Florida Evidence Code,* 278 So. 3d 551 (Fla. 2019) [44 Fla. L. Weekly S170a]. In a concurring opinion, Justice Lawson explained that the Supreme Court "routinely adopts evidence rules 'to the extent that they are procedural'—without deciding whether they are procedural." *Id.* at 556. The concurrence explained that the Court takes a "practical approach" because "[s]o long as the Legislature has adopted the provision, which was done here, no separation of powers concerns can flow from our decision to simply adopt the provision to the extent that it is procedural, and thereby avoid the uncertainty and attendant costs that we would impose on parties by continued litigation of the issue." *Id.* at 556-67.

If this argument is even being maintained anymore in this case, it is being put to bed first because it is important. A trial court may apply a procedural statute to pending cases before the Supreme Court considers it, and in that interim period the trial court may presume that it is constitutional.

B. Fidelity to the Text: Where is the Only?

Assume for the sake of argument that the Sapp Order got it completely wrong.[9] Assume the judicial branch looks to the legislative branch to provide temporal reach direction on procedural statutes, above and beyond the effective date. Procedural aspects of the Statute should *still* be applied to pending cases. Why? Because by stating that the Act applies to future causes of action, the Legislature did not clearly express an intent that the judicial branch depart from its default setting of applying new procedural statutes to pending case, if the posture of the case permits it.

When the judicial branch has *ever* departed from its default settings on temporal reach[10] it has only done so where the Legislature has explicitly directed that departure. But Section 30 contains no clear direction to the judicial branch to depart from its default settings on temporal reach. Section 30 seems to be a legislative effort to (1) acknowledge that the judicial branch would look for a clear expression of intent that substantive portions of the Act should be applied retroactively, and (2) make clear that it had no such intent.

Ms. Torres-Aponte wants Section 30 to say something else. She argues that Section 30 means that the Act *only* applies to causes of action filed after March 24, 2023. Or, she argues, Section 30 means that the Act *should not* apply to pending cases. The problem is that Section 30 says neither of those things. And to read into Section 30 a prohibition against applying procedural aspects of the Statute to pending cases necessarily requires writing into the text that which is not there. "[A]bsent provision[s] cannot be supplied by the courts" and "[w]hat the legislature 'would have wanted' it did not provide, and that is an end of the matter." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012) (discussing the omitted-case canon).

And Section 30 is not an appropriate candidate for the negative implication cannon. *See generally, id.* at 107 (discussing the negative-implication canon). "Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." *Id.* Where "[c]ontext establishes the conditions for applying the canon," it is necessary to limit it to those situations where "the *unis* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so." *Id.* Section 30 is not unlike this example:

> The sign outside a restaurant 'no dogs allowed' cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are the animals that customers are most likely to bring in; nothing is implied about other animals.

Id. The context is this: the Legislature did its work on the Act against the background of precedent. The precedent tells the Legislature (and trial courts) that the procedural aspects of the Act should be applied to pending cases if it makes sense given the posture of the case. And while the precedent in this area is challenging—and one of those challenges is that there do not seem to be any cases in which the Supreme Court has found a statute to be procedural but should not be applied to pending cases because of the Legislature's temporal reach direction[11]—there is one consistent drumbeat: if a statute is procedural or remedial, it *should be applied to pending cases* and trial courts "*should*" apply new procedural statutes to pending case "*whenever possible*."

According to Black's Law Dictionary, "should" is "[t]he past tense of shall; ordinarily implying duty or obligation." *Should, Black's Law Dictionary* 1237 (5th ed. 1979). As the past tense of the word "shall," "should" carries with it the same conception of being mandatory where it appears in legal contexts. *See Reading Law,* p. 112 ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive.") (emphasis in original).

The Supreme Court has not left it to trial judges to apply new procedural statutes to pending cases only if we are especially gung-ho about the subject matter. We have been consistently directed that it should be done. *Smiley v. State,* 966 So. 2d 330, 334 (Fla. 2007) [32 Fla. L. Weekly S303b] ("[i]n the analysis of a change in statutory law, a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law" and because statutes relating to modes of procedure "do not come within the legal conception of a retrospective law" they "*should be* applied to pending cases in order to fully effectuate the legislation's intended purpose.") (emphasis added); *Alamo Rent-A-Car v. Mancusi,* 632 So. 2d 1352, 1358 (Fla. 1994) ("[p]rocedural or remedial statutes . . . *are to be* applied retrospectively and *are to be* applied to pending cases."); *Adjei v. First Community Ins. Co.,* 352 So. 3d 900, 904 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D2116a] ("Ordinarily, procedural statutes apply retroactively."); *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 424 (Fla. 1994) (an intent that the new law be applied to pending cases should be presumed when the new law is remedial); *Young v.*

Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985) (unlike substantive statutes, "statutes which relate only to the procedure or remedy are generally held applicable to all pending cases."); *Bunin v. Matrixx Initiatives,* 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1308a] ("It is well-settled that '[p]rocedural or remedial statutes . . . *are to be* applied retrospectively and are to be applied to pending cases.' ").

It does not seem to be a debatable point whether trial courts should apply a new procedural or remedial statute to pending cases. A new procedural or remedial statute should be applied to pending cases if the posture of the case allows for it, because that is what the Supreme Court has told us to do.

C. Legislative History is Unhelpful.

Ms. Torres-Aponte believes that legislative history should be consulted to understand the Legislature's intent. Like a poodle at a python hunt, legislative history is woefully ill-suited for the task at hand. Since its heyday, legislative history has been repudiated as having no value in discernment of the intent of the Legislature. It is "illegitimate" as a tool to determine legislative intent because "[i]f one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history." *Conroy v. Aniskoff,* 507 U.S. 511, 519 (1993).

This is not to say that legislative history tells us nothing. It may provide insight into the intent of someone who participated in generating it. But that answers a question we are not asking here. We are not inquiring into what individual members of the Legislature, lobbyists, staffers, pages, summer interns, or whoever else gets involved in creating those materials intended. We are interested in the intent of the entire body of the elected representatives of the people of the State of Florida: the Legislature. And the reliable, accepted method by which we discern that intent is to look at the words of the bill that was passed by that body.

Can we say, with a straight face, that the drafters of HB 837 were just totally unaware that the word "only"[12] is how we communicate exclusivity in the English language? Or that they were unfamiliar with the literary device whereby if a thing is meant for one purpose but should not be used for another, the words "should not" are added in? Of course not.

Let's look at it again: "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." If a person with a reasonable command of the English language intended to restrict the application of this Act to *only* cases filed after the effective date of the Act, was this the way to phrase it? It seems very obvious that it was not. If exclusivity was intended, the text would convey it by adding something that is not there. There are plenty of ways it could have been done:

"This act shall *only* apply to causes of action filed after the effective date of the act."

"This act shall apply to causes of action filed after the effective date of the act, *and not to pending cases*."

"This act shall apply to causes of action filed after the effective date of the act, *but not to pending cases*."

"This act shall *not apply to pending causes of action and* shall *only* apply to causes of action filed after the effective date of the act."

We could be at this for quite some time before we ran out of ways the Legislature could have clearly expressed an intent that the Act should be applied only to future causes of action. The fact that there are so many ways it could have been done underscores the point. When we speak the English language, we have between 500,000 to one million words at our disposal. *See* How Many Words Are There in English?, Merriam-Webster, *https://www.merriam-webster.com/help/faq-how-many-english-words* (last visited July 11, 2023). Within that rich vocabulary, there are many words that either standing alone (examples: "only," "exclusively," "solely") or in combination with one another (examples: "but not," "and not," "however, not") convey the idea of exclusivity. The absence of *any* of those words used here is conspicuous. The Legislature did not intend to express exclusivity.

The effect of the word "only" is even more well-established when it is used in legal texts. *See Only, Black's Law Dictionary* 982 (defining "only" as "solely; merely; for no other purpose; at no other time; in no otherwise; along; of or by itself; without anything more; exclusive; nothing else or more."). One would have to venture into the realm of the absurd—did some rascal *steal* all the o, n, l, and y keys off keyboards in Tallahassee that week?—to conclude anything other than that the drafters of HB 837 chose not to use the word "only" because they did not intend to say "only." When we read statutes, judges cannot add, delete, or change the words the Legislature gives us. *See Reading Law,* pp. 93-96 (elaborating on the principle that "what a text does not provide is unprovided.").

So, to the extent that Ms. Torres-Aponte argues that the Legislature provided clear direction that procedural aspects of the Statute should not be applied to pending cases, that argument is counter-factual. Section 30 is susceptible to the construction that it was the Legislature's effort to make clear that the substantive portions of the Act should not be applied retroactively. After all, the Legislature legislates on the background of judicial branch precedent, which alerts the Legislature that courts will (1) look for direction on retroactivity when the matter is substantive but (2) if the matter is procedural, it will be applied when the court decides it makes sense to do so.

It is the argument that Section 30 says that (1) the Act should "only" be applied to causes of action filed after the effective date or (2) the Act "should not" be applied to pending cases that ignores the text, not the other way around. "Only," "should not," and their synonyms are absent. They cannot be read in—through the power of suggestion or otherwise—without adding something to the text that is not there. As a matter of statutory interpretation, it is just as wrong to add words to the text as it is to change, delete, or ignore the words that *are* there. "Where the wording of the Law is clear and amenable to a logical and reasonable interpretation a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law." *State Farm Mut. Auto. Ins. v. Jacksonville Med. Ctr., Inc.,* 210 So. 3d 1224, 1228 (Fla. 2017) [42 Fla. L. Weekly S176a].

How did we get the idea that the Legislature said that the Act would only apply to future cases? From the argument of counsel, which is not a source from which we can derive legislative intent. An example of this is found in Ms. Torres-Aponte's response to the Motion. She argues that "the Legislature specifically states in HB 837 that this overall act would ***only*** apply to causes of action filed after the effective date of the act, and that the act would not even take effect until it became a law." *See* Plaintiff's Response in Opposition, doc. # 186, p. 3 (emphasis added). But, as shown *supra*, that statement is not true. The Legislature did not "specifically state" the word only. The Legislature did not say it all.[13]

D. Section 768.0427(3) Is Procedural or Procedural/Remedial.

1. Requires Disclosures Prior to Asserting a Claim, not Filing a Lawsuit.

Ms. Torres-Aponte argues that Section 768.0427(3) is substantive in nature because it establishes a "condition precedent" to assertion of a claim for medical damages incurred under the Letters of Protection. It is her position that "[o]bviously a new condition precedent cannot be applied to a claim that has already been asserted" and therefore a condition precedent must be substantive. But, as always, the language of the Statute matters. Here is what it says:

(3) LETTERS OF PROTECTION; REQUIRED DISCLOSURES.—In a personal injury or wrongful death action, as a condition precedent to asserting any claim for medical expenses for treatment rendered under a letter of protection, the claimant must disclose:

(a) A copy of the letter of protection.

(c) If the health care provider sells the accounts receivable for the claimant's medical expenses to a factoring company or other third party:

1. The name of the factoring company or other third party who purchased such accounts.

2. The dollar amount for which the factoring company or other third party purchased such accounts, including any discount provided below the invoice amount.

(d) Whether the claimant, at the time medical treatment was rendered, had health care coverage and, if so, the identity of such coverage.

(c) Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral is made by the claimant's attorney, disclosure of the referral is permitted, and evidence of such referral is admissible notwithstanding s. 90.502. Moreover, in such situation, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of the bias of a testifying medical provider.

The question is what "asserting" means. And the Legislature's choice of the word "asserting" is material, because "asserting" is not the same thing as "filing." Does the requirement that a plaintiff make these disclosures as a condition precedent to asserting a claim mean that the disclosure must occur presuit? No one has explained why it would. In fact, the nature of the matter to be disclosed (treatment under a letter of protection) in these cases will frequently arise only after suit has been filed, which may itself explain why this section does not call for "presuit disclosure" of the Letters of Protection. It requires the disclosure as a condition precedent to asserting the claim.

Consider how the term "condition precedent" is used elsewhere in the Florida Statutes. *Reading Law,* p. 167 (discussing the whole-text canon and the need to consider "the entire text, in view of its structure and of the physical and logical relation of its many parts."). When it establishes conditions precedent the Legislature explains *before what* the condition precedent must occur. And it has never struggled to articulate itself when the condition precedent must occur before filing suit. In other words, if the Legislature intends to establish a condition precedent before filing suit, it says so. Conditions precedent to filing suit are frequently tied to some area where workup has some particular utility before litigation begins. For example, in first-party property insurance cases there is now an extensive presuit procedure that seems intended to promote early and expeditious resolution of claims that can implicate disproportionate attorney fee awards if more fully litigated. To that end, in section 627.70152(3)(a), Florida Statutes, the Legislature has required that "[a]s a condition precedent *to filing a suit* under a property insurance policy, a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department." § 627.70152(3)(a), Fla. Stat. (emphasis added).[14] In that statute, the Legislature has left no question: the suit cannot be filed before the pre-suit notice is provided. *Id.* That is not to say that this is the only scenario where the Legislature has required a condition precedent before a suit can be filed; it certainly is not. For example, in section 75.03, Florida Statutes, the Legislature required that, in the context of bond validation proceedings, "[a]s a condition precedent *to filing of a complaint* for the validation of bonds or certificates of debt, an election be held to authorize the issuance of such bonds." § 75.03, Fla. Stat.

Conditions precedent do not always tie to the filing of a complaint; conditions precedent appear throughout the Florida Statutes, at times as an apparent barrier to an injustice. For example, before efforts to make personal service can be eschewed in favor of constructive service section 49.031, Florida Statutes requires that a sworn statement of diligent search and inquiry be filed "[a]s a condition precedent to service by publication." For what seems like obvious reasons, the Legislature did not require that the diligent search and inquiry occur prior to filing the suit. In fact, a common use of constructive service is in those situations where a complaint was filed, the summons was generated, the process server attempted service at a known address, but the defendant allegedly "conceals himself or herself so that process cannot be personally served." § 49.041(3)(c).

Having dispensed with the idea that a condition precedent is equivalent to something that must occur before suit can be filed, the next step in analyzing what "asserting" a claim means. This mandates some basic consideration of the life cycle of civil cases. Grossly, that life cycle can be broken into these phases: presuit, pleading, discovery, trial, and post-judgment/appeal.

In the ordinary course of a general civil case, the process begins with the claim being asserted through a demand letter, notice of intent, or similar dispute-resolution process prior to filing suit. Once presuit negotiations end the claim is asserted in a complaint filed with the court. Asserting the claim continues during discovery. The plaintiff ultimately asserts the claim to the fact-finder. In fact, the first stage in a life cycle of a case where arguably the claim is not being "asserted" is post-judgment, where the plaintiff is no longer asserting the claim; rather, the plaintiff is pursuing a judgment or seeking an appellate remedy.

So if plaintiff is asserting a claim from presuit through trial, when must these disclosures occur under the Statute? It is counter to what we know and understand about litigation to conclude that if disclosures are a condition precedent to asserting a claim then the disclosures must occur before the demand letter or the filing of the complaint. In personal injury cases, many times the injured person continues to treat—sometimes in an escalating fashion, seeing more and new medical care providers as the trial approaches. If the Statute required disclosure of letters of protection as a condition precedent to filing suit, that would achieve the result that a personal injury plaintiff would be unable to enter into letters of protection once the complaint was filed. Is the plaintiff who is continuing to treat the problem the Legislature was trying to address with this Statute? No. What the Legislature was concerned with is the evidence juries are given to consider on the question of reasonableness of medical damages. The disclosures in section (3) facilitate procurement of evidence that other parts of the Statute make admissible at trial.

So the Statute establishes a requirement that a plaintiff who at trial intends to assert a claim for medical expenses must disclose certain information that the jury may consider in evaluating the credibility of and weight to be assigned to the evidence of medical expenses. Precedent disfavors trial by ambush so the disclosures must be provided to the defense before the claim for those damages is asserted at trial. So, ultimately, section 768.0427(3) requires that the information be disclosed at some time before the claim is asserted to the jury.

2. Impacts the Form, Manner, or Means to Prove Damages.

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

A matter is considered procedural if it relates to "the form, manner, or means by which substantive law is implemented." *Id.* (citing *In re Fla. Rules of Criminal Procedure,* 272 So. 2d 65, 65 (Fla. 1972)); *see*

also Kenz v. Miami-Dade Cnty., 116 So. 3d 461, 466 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D922c] (change in section 768.0755, which required plaintiff to produce evidence of defendant's actual or constructive knowledge, was procedural and not substantive); *Litvin v. St. Lucie Cnty. Sheriff's Dep't,* 599 So. 2d 1353, 1355 (Fla. 1st DCA 1992) (statutory amendment that imposed an "actual knowledge" threshold in a workers' compensation claim was procedural); *Stuart L. Stein, P.A. v. Miller Indus., Inc.,* 564 So. 2d 539, 540 (Fla. 4th DCA 1990) ("increasing the burden of proof to a 'clear and convincing' standard did not amount to a substantive change in the statutory scheme" and may be applied retroactively); *Larocca v. State,* 289 So. 3d 492, 493 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D99a] ("We apply *Daubert* to the facts of this case because the amendment implementing *Daubert* is procedural and so the change applies retroactively.").

"Stated differently, procedural law 'includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Id.* at 1225 (citing *Allen,* 756 So. 2d at 60); *see also id.* (citing *Haven Federal Savings & Loan Ass'n v. Kirian,* 579 So. 2d 730, 732 (Fla. 1991)) ("It is the method of conducting litigation involving rights and corresponding defenses."); *Bionetics Corp. v. Kenniasty,* 69 So. 3d 943, 948 (Fla. 2011) [36 Fla. L. Weekly S69a] (quoting *Massey v. David,* 979 So. 2d 931, 936-37 (Fla. 2008) [33 Fla. L. Weekly S229a]) (" 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses.") (internal quotations omitted). A new procedural statute is "generally held applicable to all pending cases," *Young v. Altenhaus,* 472 So. 2d 1152, 1154 (Fla. 1985), in part because "no one has a vested interest in any given mode of procedure." *State v. Kelly,* 588 So. 2d 595, 597 (Fla. 1st DCA 1991).

The requirement that Ms. Torres-Aponte disclose the information required by the Statute prior to asserting her claim for medical expenses to the jury at trial is plainly not substantive. It does not change the elements of her claim. It does not block her ability to seek compensation for "the reasonable value or expense of medical care and treatment necessarily or reasonably obtained . . . in the past." *See* Fla. Std. Jury Instr. 501.2(b). It does not interfere with vested rights.

If this section is anything but purely procedural, it is a hybrid of procedural and remedial. It is remedial to the extent that it allows discovery that may not have been available prior to the effective date of the Statute. And it permits admission of evidence that may have been inadmissible or had questionable admissibility prior to the effective date of the Statute. Otherwise, it is procedural, because it provides a method by which evidence regarding medical expenses incurred under letters of protection may be admitted for the jury's consideration. And, as noted in *Love,* where a provision like this one is procedural, application to this pending case "is not in and itself a retrospective application of the statute." *Love v. State,* 286 So. 3d 177, 187 (Fla. 2019) [44 Fla. L. Weekly S293a] (citing *Landgraf,* 511 U.S. at 269-70) ("*Landgraf* generally explained the concept of a retrospective statute: 'A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.' ").

3. Posture of the Case Allows for Application.

In this case, when Ms. Torres-Aponte presents her case to the jury she will assert a claim for medical expenses incurred under the Letters of Protection. The jury has not been selected or sworn. The trial has not yet begun. No reason has been presented why the disclosures cannot be made now, before the trial. Mr. Hudnall and Sabrina's Trucking have not suggested that it would be unfair to them to allow the disclosure to be made at this late stage. Ms. Torres-Aponte's counsel, Morgan & Morgan, has indicated that some continuance may be necessary for the firm to gather information on the number of referrals, frequency, and financial benefit obtained. Even knowing that a continuance may be required so that Ms. Torres-Aponte can be given a reasonable amount of time to prepare the disclosures, the defense made this Motion. The posture of the case allows for application of the procedural aspects of the Statute.

III. Conclusion

The Legislature spoke for the people of our State when it enacted the Act and the Statute. Simply looking at the text of that enactment, it appears that the people grew concerned that procedural rules in Florida's courts were (1) at worst, facilitating an injustice and (2) at best, allowing an incomplete or inaccurate evidentiary presentation in personal injury cases. To that evident end, the Legislature has directed that a more fulsome presentation of evidence be allowed in these cases, so that the jury can perform its constitutional role in finding the facts as they relate to reasonable medical expenses.

If there was ever a dead horse worth beating, it is this one: judges have a duty to follow the law, regardless of their personal views on what the law says or the way they feel about the outcomes that flow from applying the law as its written. In fact, if a judge always feels great about the outcome in her cases then she cannot possibly have followed the law in all of them. And if that is true, she has wronged those who submitted to the court's jurisdiction expecting a just and lawful resolution of their disputes. It is worse than that, though. It is one thing if a judge reads and tries to follow the law but gets it wrong. Unfortunately, despite our best efforts, any one of us at this level could be wrong about anything—especially about an issue that is this nuanced and undeveloped. But a judge who reads what the law says and, after carefully considering what it means, refuses to follow it is by definition lawless. A lawless judge is a danger to the entire jurisdiction she pledged to serve.

This order and the Sapp Order are detailed. It was hard to find time to write them, and it will be hard for anyone to find time to read them, either. But the analysis was called for by the importance of the matter at hand. And that matter is zero-sum. Whoever ends up unhappy on an issue like this ought to get as well-reasoned an explanation as the decision-maker can possibly provide, considering the time available.

In the television show The Office, Michael decided his GPS was directing him to drive into a lake, and so he did.[15] Ignoring Dwight's objections ("It can't mean that! There's a lake there!"), Michael concluded that the GPS's direction to "make a right turn" meant that he should immediately turn right into the lake rather than—as Dwight, logic, and the road signs in front of him suggested—going another twenty feet and then turning right to go over the bridge.

No matter what Michael's GPS told him, there was an obvious reason why he should not take an immediate right. There was a lake right there. To support his manifestly wrong choice Michael had to add something to the directions—like the word "immediately"—to what the GPS told him. But why would you *add* something to a direction that will only compel you to go somewhere you clearly should not?

Unlike television shows, car accidents and lawsuits involve real people dealing with very serious problems. This case is no laughing matter. But the mental picture is not without value. When there is an obvious reason why an answer cannot be the correct one, it is perplexing to choose that answer anyway. Certainly, the choice cannot be grounded in a commitment to follow directions if you must add something to the directions to get there.

Accordingly, it is now

ORDERED and **ADJUDGED** that:

1. The Motion is **GRANTED.**

---

[1]Why would a plaintiff in a personal injury case want to be treated under a letter of protection, when she has insurance? This was discussed, without a clear reason being provided, at the hearing.

THE COURT: Mr. Wright, why is it that, as a practical matter, someone would not use their health insurance if they have medical care—a need for medical care?

COUNSEL: I think one of the Number 1 reasons is that I think people underestimate how many doctors out there will not treat people in litigation. They will outright not only treat them, they'll outright tell them they will not treat them. And so, they're forced to go through different avenues to find doctors that will treat under some other arrangement; in this case, a letter of protection, or some other way.

. . .

COURT: And so, in this case, she goes to Dr. Highsmith, who does—does bill through insurance. Why would someone use a Letter of Protection in that instance?

COUNSEL: Well, I don't think she—I don't think they did bill through insurance. Whether he did or not, I can't speak to why they did not. I don't think they bill through insurance, at all.

COURT: Just so I can understand it. Like what—if you have—if you're going to a surgeon and that surgeon will accept your insurance as an out-of-network provider, why would you choose to do a letter of protection—

COUNSEL: Why would, who—

COURT:—as the Plaintiff?

. . .

COUNSEL: That's a personal decision. I can't speak for the mindset[.]

(Hearing Tr. 77:22-82:21.)

[2]This was proffered by the defense without explanation. Dr. Highsmith has not sold the Letter of Protection in this case, but perhaps this is a reference to his willingness to resolve his charges after litigation for some amount less than the full amount presented to the jury.

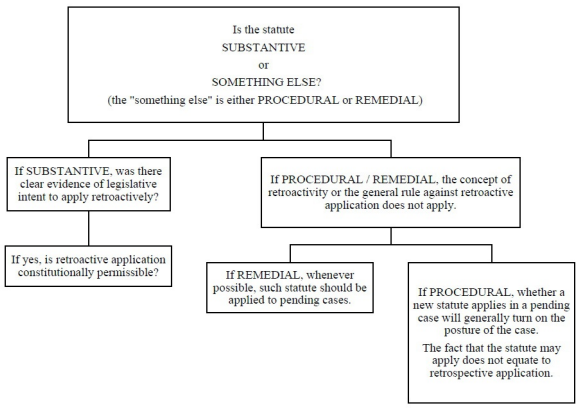
[3]Defendants argue that if the amounts that Dr. Highsmith would have been paid as an out-of-network provider under Ms. Torres-Aponte's medical insurance were known (at the time of the hearing they were not), then her expenses under the Letters of Protection would likely be *more* than double what was reasonable and necessary.

[4]Arguably, the decision more than doubled Defendants' exposure even if you do not consider the point made in the note *supra* that the amounts medical insurance would have paid may be even lower than the amounts Dr. Highsmith would have billed to insurance. For example, if the jury applies a multiple to "hard costs" like medical expenses to calculate an award for pain and suffering, then doubling the hard costs could have an exponential effect. Even if the jury does not apply a multiple, the jury might consider the magnitude of the hard costs when judging the reasonableness of a pain and suffering number that a plaintiff requests be awarded.

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

[6]The analysis of that section is the same in this case as it was in *Sapp.* There is no need to re-tread that ground here because the Sapp Order is adopted and incorporated.

[7]Depicted in a flowchart:



[8]*Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993).

[9]To be clear, this assumption is invited for the purposes of making a point; no part of the Sapp Order's analysis is being retracted.

[10]Those default settings are (1) to apply substantive statutes to future cases and (2) to apply procedural and remedial statutes to pending cases.

[11]With all of the temporal reach cases on the books in Florida, why is it that no one has brought a case to this court in which the Supreme Court (1) found a statute to be procedural but (2) decided that it should not be applied to pending cases because of the Legislature's temporal reach direction? Could it be that this is because the legislative branch understands that the judicial branch will apply new procedural statutes to pending cases if it makes sense to do so, and therefore does not direct the temporal reach of those statutes beyond the provision of an effective date?

[12]Or its synonyms. After all, words like solely, purely, alone, exclusively, just, and simply would have gotten the same idea across. None were used in Section 30.

[13]After the language of Section 30 was read, the following exchange occurred with Ms. Torres-Aponte's counsel:

COURT: It doesn't say that it should only apply. So . . . the wording does not exclude the possibility of applying this to a pending case, does it?

COUNSEL: I would disagree. Because that's what the preceding section says, except as otherwise expressly provided in this act. Implying that unless it says otherwise, this act only—this act applies to causes of action filed after the effective date.

COURT: But did you catch what you just did there?

COUNSEL: I—yeah. I did—

COURT: You just added the word only.

(Tr. 124: 22-125:15).

Later, her counsel also argued "How can something that says, shall apply to one thing, apply to something that it's saying—that it's *only*—like how can it apply to something that it's saying it *only* applies to the other—it applies to A, therefore, logic tells us that it can't apply to B. Because it *only* applies to what the legislature has already said it applies to." (Tr. 131:6-14) (emphasis added).

[14]The Fourth District very recently held that this provision—which created a condition precedent to filing suit—was procedural and should be applied to policies in effect at the time of enactment. *Cole v. Universal Property & Cas. Ins. Co.,* 2023 WL 3214643, at *4 (4th DCA May 3, 2023) [48 Fla. L. Weekly D916a]. In November 2020, plaintiff sustained property damage and submitted a claim to his homeowners insurance company under his existing policy. *Id.* at *1. On July 1, 2021, the Legislature enacted section 627.70152, which required a presuit notice of intent as a condition precedent to filing suit. *Id.* In August 2021, plaintiff filed suit. *Id.* The trial court dismissed the complaint without prejudice for plaintiff's failure to comply with the presuit requirements, which predated the filing of the complaint but did not exist at the time plaintiff contracted for the policy, sustained the damage, or asserted his claim presuit. *Id.* In *Cole,* there was no argument that the Legislature did not intend for substantive portions of the bill to be applied retroactively. *Id*.

[15] GPS: Make a right turn.
[Michael Scott starts to turn right]
Dwight Schrute: Wait, wait, no, no, no, it means "bear right." Up there.
Michael Scott: No, it said right. It said take a right.
Dwight Schrute: No, no. Look, it means go up to the right—bear right—over the bridge, and hook up with 307.
GPS: Make a right turn.
Michael Scott: Maybe it's a shortcut, Dwight. It said go to the right.
[he turns right]
Dwight Schrute: It can't mean that, there's a lake there!
GPS: Proceed straight.
Michael Scott: I think it knows where it is going.
Dwight Schrute: This is the lake! THIS IS THE LAKE!
Michael Scott: The machine knows! Stop yelling at me! Stop yelling!
Dwight Schrute: NO! IT'S UP THERE! THERE'S NO ROAD HERE!

Dunder Mifflin Infinity, Michael Drives Into a Lake, The Office, Season 4 (2007), available at https://www.youtube.com/watch?v=DOW_kPzY_JY (last visited July 3, 2023).

* * *

Volume 31, Number 5
September 29, 2023
Cite as 31 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Personal injury protection—Discovery—Third-party examinations under oath—Denial—Recordings of third parties' EUOs are not relevant or reasonably calculated to lead to admissible evidence where medical provider's PIP claim was denied because assignee failed to appear at examination under oath

CENTRAL FLORIDA HEALTH AND REHAB CLINIC, LLC, a Florida Corporation, a/a/o Sams Jules, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-SC-063927-O. July 21, 2023. Andrew L. Cameron, Judge. Counsel: Erik Abrams, Jason B. Giller, P.A., Miami, for Plaintiff. Tiffany V. Colbert, Andrews Biernacki Davis, Orlando, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO OVERRULE DEFENDANT'S OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION, DENYING PLAINTIFF'S MOTION TO OVERRULE DEFENDANT'S OBJECTIONS TO PLAINTIFF'S REQUEST FOR PRODUCTION RE: STATEMENTS TAKEN AND GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER (NON-PARTY STATEMENTS)

THESE CAUSES having come before the Court for consideration on Friday, July 7, 2023 at 10:00am, upon Plaintiff's Motion To Overrule Defendant's Objections To Plaintiff's First Request For Production, Plaintiff's Motion To Overrule Defendant's Objections To Plaintiff's Request For Production Re: Statements Taken, And Defendant's Motion For Protective Order (Non-Party Statements), and the Court having reviewed the record evidence, pleadings, and motions, and having considered argument of Counsel and legal authority submitted, and being otherwise fully advised in this matter, hereby, FINDS as follows:

1. This is a breach of contract cause of action seeking PIP benefits from the Defendant insurer under the policy of insurance issued by the Defendant stemming from an automobile accident occurring on or about October 11, 2019.

2. Plaintiff, in its motions to overrule Defendant's Objections to Plaintiff's First Request for Production and supplemental Request for Production re: Statements Taken, sought to obtain the Examination Under Oath, ("EUO"), audio recordings of third parties, namely Samson Jules and Bernadene Gay, obtained by Defendant in relation to the October 11, 2019 loss.

3. Defendant, in its Motion, sought a Protective Order for those EUO recordings of Samson Jules and Bernadene Gay, neither of whom are the claimant/assignee in this cause of action.

4. Defendant's denial of coverage is premised on Sams Jules' lack of compliance with Fla. Stat. § 627.736(6)(g), a condition precedent, when he did not appear for an EUO.

5. Pursuant to Fla. R. Civ. P. 1280(c) and for good cause shown, a court may enter an order to protect any party or person "from annoyance, embarrassment, oppression, or undue burden or expense." Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence. *Allstate Ins. Co. v. Langston,* 655 So. 2d 91, 94 (Fla. 1995) [20 Fla. L. Weekly S217a].

6. Because Defendant's denial of coverage is premised on the failure of Sams Jules' compliance with Fla. Stat. § 627.736(6)(g), a condition precedent, and not some other coverage-related issue, the EUO recordings of Samson Jules and Bernadene Gay, taken in relation to the October 11, 2019 loss, are not relevant nor reasonably related to the discovery of admissible evidence.

It is therefore ORDERED and ADJUDGED as follows:

(1) Plaintiff's Motion To Overrule Defendant's Objections To Plaintiff's First Request For Production is **DENIED**;

(2) Plaintiff's Motion To Overrule Defendant's Objections To Plaintiff's Request For Production Re: Statements Taken is **DENIED**;

(3) Defendant's Motion For Protective Order (Non-Party Statements) is **GRANTED**.

* * *

Civil procedure—Discovery—Requests for admissions—Defendant's requests to deem all items in request for admissions admitted and for summary disposition are granted given plaintiff's failure to respond to request for admissions in timely manner or secure extension of time within which to respond and failure to move for relief from technical admissions

DNF ASSOCIATES, LLC, Plaintiff, v. CHRISTOPHER DYER, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 48-2022-SC-038516-A001OX. June 21, 2023. Eric DuBois, Judge. Counsel: Steven Meyer, Consuegra & Duffy P.L.L.C., Tampa, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

THIS ACTION came before the Court on Defendant's Motion to Compel Discovery and for the Award of Attorney Fees and Costs and Defendant's Motion for Summary Disposition and supplements thereto at which counsel for both parties appeared and presented argument and Defendant filed Defendant's Memorandum of Law in Support of Defendant's Motion for Summary Disposition and Response to Case Law Presented by Plaintiff and the Court being fully informed in the premises, it is HEREBY ORDERED AND ADJUDGED:

1. The Court finds that the items in Defendant's First Request for Admissions were admitted on day 31 when Defendant did not respond thereto within 30 days. The Court also finds that Defendant did not need to file a motion requesting that the items therein be deemed admitted. Moreover, the Court finds that Defendant did not move for relief from technical admissions.

2. The Court acknowledges that Plaintiff filed a motion for extension of time to respond to Defendant's discovery. However, the Court notes that Plaintiff never set a hearing on its motion for extension and the motion for extension was never granted. The Court also finds that the motion for extension does not state the amount of additional time Plaintiff was seeking to respond and counsel for Defendant attempted to come to an agreement with Plaintiff as to a new discovery deadline and provided to Plaintiff an additional 30 days which this Court finds to be reasonable.

3. The Court also acknowledges that Plaintiff responded to Defendant's discovery. However, the discovery is dated October 1, 2022, and Plaintiff responses are dated May 2, 2023, and so it took Plaintiff about 7 months to respond, and Plaintiff was not granted an extension of time. The Court further notes that at the hearing on May 15, 2023, Plaintiff brought to the attention of the Court the decision rendered in *American Franchise Group v. Gastone,* 319 So.3d147 (Fla. 3rd DCA 2021) [46 Fla. L. Weekly D779a]. Following the hearing, Defendant filed Defendant's Memorandum of Law in Support of Defendant's Motion for Summary Disposition and Response to Case Law Presented by Plaintiff in which Defendant noted to the Court that *Gastone* is distinguishable from the case at bar. The Court notes that Plaintiff did not file anything in response to Defendant's Memorandum to point out how or why the arguments set forth therein are incorrect. The Court has reviewed Defendant's Memorandum and agrees with the arguments set forth therein and

finds *Gastone* to be distinguishable for the reasons set forth therein.

4. Based on these findings, Defendant's request to deem all the items in Defendant's First Request for Admissions as admitted is hereby GRANTED.

5. Based on the ruling that the items in Defendant's First Request for Admissions are admitted, Defendant's Motion for Summary Disposition and supplements thereto are hereby GRANTED.

6. Summary Disposition is hereby entered in favor of the Defendant and Plaintiff shall take and recover nothing in this lawsuit.

7. The Court retains jurisdiction for the purpose of determining entitlement to prevailing party attorney fees.

* * *

Insurance—Automobile—Windshield repair— Appraisal—Competency of appraiser—Plaintiff complied with process for contesting competency of insurer's selected appraiser—Insurer's motion to dismiss denied—Timeline for completing appraisal abated pending resolution of claim that appraiser is not competent

PRISTINE AUTO GLASS, LLC, a/a/o Kelsey Edwards, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-007756-SP-25. Section CG02. July 19, 2023. Gloria Gonzalez-Meyer, Judge. Counsel: Emilio R. Stillo, Emilio Stillo, P.A., for Plaintiff. Jose Musa, Goldstein Law Group, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL APPRAISAL AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY LITIGATION AND DISCOVERY PENDING COMPLETION OF APPRAISAL

THIS CAUSE having come on to be heard on July 6, 2023, on Defendant's Motion to Compel Appraisal and Motion to Dismiss or, in the Alternative, Stay Litigation and Discovery Pending Completion of Appraisal, filed on March 30, 2023, filing # 170041946, the Court having reviewed the file and the case law, received argument of counsel, and having otherwise been duly advised in the Premises, the Court finds as follows:

Findings of Fact

1. This a breach of contract action for a failure to pay the proper amount pursuant to the policy of insurance.

2. The complaint alleges the following:

a. The insured sustained damage on the windshield which required a replacement.

b. The vehicle was insured by Defendant, State Farm Mutual Automobile Insurance Company ("State Farm") on the date of loss.

c. Pursuant to an assignment of benefits, Plaintiff provided a windshield replacement on the insured's vehicle and billed the Defendant, State Farm.

d. Defendant, State Farm made a reduced payment to the Plaintiff.

e. At the time of payment, Defendant, State Farm, sent a letter to the Plaintiff invoking the appraisal provision in the policy of insurance and appointing Auto Glass Inspection Services ("AGIS") as its appraiser.

f. Plaintiff responded to the correspondence demanding an explanation for the reduced payment, objecting to AGIS to serve as an appraiser on the basis of competency (or lack thereof) and seeking removal of AGIS.

g. Defendant refused or failed to withdraw AGIS.

h. Plaintiff is seeking an order finding AGIS as not "competent" to serve as an appraiser and striking the same.

3. At the hearing, Plaintiff argued that AGIS is unqualified to serve as an appraiser as the policy of insurance requires each party to select a "competent" appraiser. Defendant refused to remove AGIS and appoint a different appraiser.

4. It is undisputed that the appraisal provision in the policy of insurance requires each party to select a "competent" appraiser.

Conclusions of Law

The process to which an insured may contest a competent appraiser was addressed in *Travelers of Florida v. Stormont,* 43 So.3d 941 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2059a], as follows:

> If the insured believed that the insurer's appraiser was not competent (where, as here, the appraisal clause required appointment of a competent appraiser), the issue must be raised promptly upon learning of the grounds for disqualification. The correct procedure would be first to make a written demand that the insurer replace the appraiser. If the insurer declines to do so, then the insured must promptly file a complaint in circuit court seeking removal of the appraiser. *Id. at 945*

In this case, Plaintiff complied with the process provided in *Stormont.*

Based on the foregoing, it is ORDERED AND ADJUDGED:

A. The Defendant's Motion to Dismiss is DENIED.

B. The Defendant's Motion to Compel Appraisal is GRANTED. The timeline to complete the appraisal is abated pending resolution of Plaintiff's claim that AGIS is not "competent" as required in the policy of insurance.

C. The Defendant's Motion to Stay litigation is GRANTED in part and DENIED in part. Since Plaintiff disputes the competency of AGIS the Motion to Stay litigation is DENIED as it relates to AGIS, and a stay is granted as to other discovery.

* * *

Condominiums—Injunctions—Restriction on access to premises—Condominium association's deactivation of key fob used by month-to-month tenant to access resident gate in effort to coerce tenant to renew lease and end prohibited month-to-month tenancy was unlawful under section 718.303(3)(a)—Association's act of locking tenant out of visitor gate necessitates further court intervention—Association ordered to reinstate tenant's resident gate access—Association enjoined from further restricting or removing tenant's gate access

LATKISHA MOSLEY, Plaintiff, v. MAJORCA ISLES II CONDOMINIUM ASSOCIATION, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-012111-CC-05. Section CC04. June 20, 2023. Diana Gonzalez-Whyte, Judge. Counsel: James R. Glover, Legal Services of Greater Miami, Inc., Miami, for Plaintiff. Craig Shankman, Boyd Richards Parker Colonnelli, Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S VERIFIED EMERGENCY MOTION FOR INJUNCTIVE RELIEF (DOCKET INDEX NUMBER: 3)

THIS CAUSE came before the Court for hearing on May 24, 2023 and May 30, 2023, on Plaintiff's Verified Emergency Motion for Injunctive Relief to Restore and Maintain Access to the Property, and having heard argument from counsel for the parties, taking evidence including the documents and memoranda of law filed with the Court, reviewing the file and pleadings, and having found that Plaintiff has a substantial likelihood of success on the merits, and being otherwise duly advised in the premises, the Court finds as follows:

FINDINGS OF FACT

Plaintiff is an arms-length tenant living in a condominium unit ("Unit") within the Majorca Isles II Condominium, and is subject to the rules and regulations of the Declaration of Condominium and Chapter 718, Florida Statutes. Plaintiff has lived in the Unit for approximately 7 years. Plaintiff's most recent lease expired on November 30, 2022. Subsequently, Plaintiff has lived in the Unit pursuant to a month-to-month tenancy. Plaintiff is currently battling cancer, and has an active domestic violence protective order against

a third party.

Defendant is a Condominium Association responsible for operating the Majorca Isles II Condominium, and is governed by the recorded Declaration of Condominium and Chapter 718, Florida Statutes. The Condominium property, including the Unit, can only be accessed by a security gate at the front entrance of the Condominium. The gate is owned, operated, and maintained by Defendant association. There are two methods of entering the Condominium at the gate. Registered Condominium residents can pay for a key fob or similar entry tag, and can enter the Condominium automatically through the Resident Gate. Otherwise, guests and other unregistered invitees are required to enter through the visitor gate. To enter the visitor gate, a person must insert their driver's license into an automatic machine, and if unsuccessful, they are required to register with security through an automated call-box.

Defendant association has a policy prohibiting month-to-month tenancies. In order to coerce Plaintiff's compliance with Defendant's lease renewal requirement and month-to-month prohibition, Defendant automatically disables the Resident gate key fob access for all tenants immediately upon lease expiration. In the instant case, Defendant disabled Plaintiff's resident gate access automatically on December 1, 2022.

After her resident fob was disabled, Plaintiff used the visitor gate to access her Unit. Plaintiff alleges that, as a result of maintenance issues, she was regularly refused access to her Unit using the visitor gate, or otherwise delayed entry. The Court took extensive testimony on a specific incident on May 19, 2023, at approximately 6:30 PM, where Defendant's security team refused to grant Plaintiff access to her Unit through the visitor gate. Plaintiff ultimately called the police, and the police required Defendant's security team to grant Plaintiff access.

Plaintiff has filed a four-count complaint against Defendant seeking injunctive and declaratory relief to reinstate her resident gate entry access. At hearing on May 24 and May 30, the Court heard testimony from Plaintiff Latkisha Mosley, Association President Rayon Howard, and Association Property Manager Fred Molina. The Court also heard testimony relating to the amount of the bond, if any, required to be posted under Rule 1.610(b), Florida Rules of Civil Procedure.

Plaintiff argues that gate access, including use of the resident gate, is a "common element needed to access the unit" as defined and regulated in F.S. 718.303(3)(a). By removing Plaintiff's resident gate access, Defendant has unlawfully suspended use of a common element needed to access the Unit. Plaintiff argues that the plain language of the statute does not permit Defendant's visitor gate access scheme.

In response, Defendant argues that Plaintiff is no longer a registered resident in the Condominium by virtue of the lease expiration. Defendant is permitted to control security and regulate access to the Condominium, including removing registered gate access. Defendant disputes that it had ever locked Plaintiff out of the Condominium through the visitor gate, either intentionally or unintentionally.

LEGAL STANDARD

Chapter 718.303(3)(a), Florida Statutes (2022) states as follows:

> (a)An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest, or invitee, to use the common elements, common facilities, or any other association property for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. This paragraph does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.

To obtain a temporary injunction, the petitioner must satisfy a four-part test under Florida law: (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest. *Quirch Foods LLC v. Broce*, 314 So. 3d 327, 338 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2336a] (citing *Scott v. Trotti*, 283 So. 3d 340 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1691c]).

CONCLUSIONS OF LAW

The Court finds that Plaintiff has standing to sue the Association under Section 718.303, Florida Statutes, and the Declaration of Condominium. The Court further finds that Defendant's restriction of Plaintiff's resident gate access is unlawful under Section 718.303(3)(a). To the extent necessary, the Court also finds that, on at least one occasion, Defendant has intentionally or unintentionally locked Plaintiff out of the Condominium and her Unit through the visitor gate, necessitating further intervention by this Court.

Consequently, the Court turns to the four-part test to issue a temporary injunction, and holds that Plaintiff has satisfied its burden as to all four parts of the test. 1. The Court finds that Plaintiff has a substantial likelihood of success on the merits. 2. The Court finds that Plaintiff lacks an adequate remedy at law. 3. The Court finds that Plaintiff has a likelihood of irreparable harm absent the entry of an injunction [FN1-Editor's note: no corresponding footnote in court document], 4. Finally, the Court finds that injunctive relief will serve the public interest, as self-help and lockouts are strongly disfavored under Florida Law. [FN2-Editor's note: no corresponding footnote in court document]

For the foregoing reasons, this Court finds that a temporary injunction requiring Defendant to reinstate Plaintiff's resident gate access is necessary and appropriate under Florida Statutes 718.303(3)(a).

SETTING OF BOND

Florida Rule of Civil Procedure 1.610(b) states:

> (b) Bond. No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined. Unless otherwise specified by the court, the bond shall be posted within 5 days of entry of the order setting the bond. When any injunction is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person.

The Court heard testimony relating to the amount of the Bond, if any, required under 1.610(b). The Court finds that Plaintiff's cancer condition and the Domestic Violence protective order requires Plaintiff to have immediate and unrestricted access to the Unit. Consequently, the Court finds that the injunction reinstating Plaintiff's gate access is needed solely to prevent Plaintiff from suffering physical injury and abuse. Therefore, Plaintiff shall not be required to post a temporary injunction bond.

For the foregoing reasons, it is ORDERED AND ADJUDGED:

1. Immediately upon entry of this order, Defendant MAJORCA ISLES II CONDOMINIUM ASSOCIATION, INC. shall reactivate and reinstate Plaintiff LATKISHA MOSLEY's resident gate access and her key fob or other similar car tag needed to access and use the resident gate.

2. Defendant is enjoined from further restricting or removing Plaintiff's access to the resident gate.

* * *

Insurance—Personal injury protection—Res judicata—Medical provider's second suit for additional dates of service not included in first suit is barred by doctrine of res judicata and section 627.736(15) where provider's first suit for PIP benefits was settled and voluntarily dismissed with prejudice

BACK TO MIND CHIROPRACTIC, a/a/o Mary Zabala, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-006067-SP-26. Section SD03. July 12, 2023. Lissette De la Rosa, Judge. Counsel: Stephanie Vera, Steinger, Greene & Feiner, for Plaintiff. Tracy Berkman, Law Offices of Leslie M. Goodman as Employees of Kemper, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO THE DOCTRINE OF RES JUDICATA AND FLORIDA STATUTE § 627.736(15)

THIS CAUSE, having come before the Court at hearing on July 10, 2023, and the Court having heard the argument of each party, and being otherwise advised in the premises, it is hereupon:

ORDERED AND ADJUDGED:

1. Defendant's Motion is GRANTED.

2. On February 24, 2023, Plaintiff filed the instant action seeking Personal Injury Protection ("PIP") benefits relating to an automobile accident occurring August 26, 2019 and assigned claim number 20003571587 under a policy of insurance issued by Defendant (the "Claim").

3. Plaintiff previously filed suit relating to the same Claim on or about June 16, 2021, through prior counsel Todd Landau, P.A. in Broward County, Florida assigned case number COSO-21-006557[1].

4. Pursuant to the representation of Defendant's counsel and the Notice of Voluntary Dismissal attached as Exhibit "B" to Defendant's Motion to Dismiss, the first-filed suit was settled and a voluntary dismissal with prejudice filed on June 28, 2022.

5. The complaint in the first-filed lawsuit sought PIP benefits for dates of service September 5, 2019 through October 17, 2019.

6. The complaint in the instant litigation does not list any dates of service; however, counsel for Plaintiff advised at hearing that Plaintiff pursues this lawsuit on dates of service which were, for an unidentified reason, not included in the original lawsuit on this Claim.

7. "The foundation of res judicata is that a final judgment in a court of competent jurisdiction is absolute and settles all issues actually litigated in a proceeding as well as those issues that ***could have*** been litigated." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1259 (Fla. 2006) [32 Fla. L. Weekly S1a] (emphasis added).

8. Florida has a long history prohibiting the splitting of causes of action, which flows from the doctrine of res judicata:

> We recognize the rule against the splitting of causes of action and that as a general rule the law mandatorily requires that all damages sustained or accruing to one as a result of a single wrongful act must be claimed and recovered in one action or not at all. As is stated in 1 Am. Jur. 481, "the rule is founded upon the plainest and most substantial justice—namely, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits."

Gaynon v. Statum, 151 Fla. 793, 10 So. 2d 432, 433 (Fla. 1942); *Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc.*, 570 So. 2d 892, 901 (Fla. 1990) ("The rule against splitting causes of action makes it incumbent upon plaintiffs to raise all available claims involving the same circumstances in one action."); *see also Larson & Larson, P.A. v. TSE Indus.*, 22 So. 3d 36 (Fla. 2009) [34 Fla. L. Weekly S591a]; *Tyson v. Viacom,* 890 So. 2d 1205, 1210-1211 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D185c].

9. The Court in *Mid-Fla. Growers* held, and this Court agrees, that the rule against splitting of causes of action is founded on policy concerns including that multiple lawsuits arising out of a single incident are costly to litigants and an inefficient use of judicial resources, and that multiple lawsuits cause substantial delay in the final resolution of disputes.

10. Furthermore, the PIP statute, Fla. Stat. § 627.736(15), expressly prohibits multiple lawsuits relating to a single claim with only a narrow exception for good cause:

> (15) ALL CLAIMS BROUGHT IN A SINGLE ACTION.— In any civil action to recover personal injury protection benefits brought by a claimant pursuant to this section against an insurer, all claims related to the same health care provider for the same injured person ***shall be brought in one action, unless good cause is shown*** why such claims should be brought separately. If the court determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant.

(emphasis added).

11. In other words, the statute requires a showing good of cause as to why all dates of service could not have been brought in one suit, and thus Plaintiff's argument that good cause is shown by the mere existence of additional dates is unconvincing.

12. Based on the above, Defendant's Motion to Dismiss Pursuant to the Doctrine of Res Judicata and Florida Statute § 627.736(15) is hereby **GRANTED.**

13. The instant lawsuit is hereby dismissed with prejudice.

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[1]The Court recognizes, and the parties do not dispute, that Plaintiff Back to Mind Chiropractic is the d/b/a of Gady Abramson DC PA.

* * *

Insurance—Automobile—Windshield repair—Appraisal process suspended pending court's resolution of counts seeking declaratory relief regarding appraisal clause's lack of effective procedures for resolving dispute as to umpires and insurer's alleged failure to appoint competent appraiser—Breach of contract action is abated pending resolution of declaratory counts and completion of appraisal if ordered

DR. CAR GLASS, LLC, Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-032477-SP-26. Section SD05. July 14, 2023. Michaelle Gonzalez-Paulson, Judge. Counsel: Martin I. Berger, Berger|Hicks, Miami, for Plaintiff.

ORDER ON DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND COMPEL APPRAISAL, OR, IN THE ALTERNATIVE, DEFENDANT'S MOTION TO COMPEL APPRAISAL AND ABATEMENT OF THIS SUIT

THIS CAUSE having come before this Honorable Court on "Defendant's Motion to Dismiss the Complaint and Compel Appraisal, or, In the Alternative, Defendant's Motion to Compel Appraisal and Abatement of this suit," having heard arguments of counsel on July 7, 2023, reviewed relevant legal authority, and this Court being otherwise fully advised, this Court finds as follows:

CONSIDERED, ORDERED AND ADJUDGED:

The Third District Court of Appeal holds that when a party properly pleads declaratory counts, and those declaratory counts relate to the very appraisal process at issue in the case, it is incumbent on the Court to resolve the declaratory counts before proceeding with appraisal. As the Third District Court stated, when "there are challenges targeting the enforceability of the appraisal and other policy provisions themselves, the trial court could not have granted the motion to compel appraisal as to the breach of contract claim without improperly and prematurely adjudicating these issues with regard to the declaratory judgment claims. Cf. *Express Damage Restoration, LLC v. First Community. Ins. Co*., 45 Fla. L. Weekly D2750b,

D2750b (Fla. 3d DCA Dec. 9, 2020) ('[T]o the extent that the trial court decided the very question of construction that was the subject of the declaratory action, the assignee is correct that the court procedurally erred in failing to deny the motion [to dismiss and compel appraisal].')" *People's Trust Ins. Co. v. Marzouka*, 320 So. 3d 945 (Fla. 3rd DCA 2021) [46 Fla. L. Weekly D1155a] See also, *Progressive American Ins. Co. v. Dr. Car Glass*, 327 So. 3d 447 (Fla. 3d DCA, 2021) [46 Fla. L. Weekly D2030c].

This language in Dr Car Glass cited above being quoted from *Marzouka* is not mere window dressing, but is the holding of the case that binds this Court. This Court must follow binding precedent and must only address whether Plaintiff's declaratory actions state a cause of action that must be decided by this Court prior to the commencement of the appraisal.

The court finds that Plaintiff has properly stated a cause of action for declaratory relief in on Counts II and IV.

Again, this Court is not denying Defendant the right to appraisal, it is only suspending that appraisal process from commencing until the Court rules on Plaintiff's Declaratory Counts, II, and IV. Plaintiff has withdrawn Count V of its Amended Complaint.

As to Plaintiff's Count VI, (misnumbered as VII) Breach of Contract, this Count is abated pending resolution of the remaining Declaratory Counts and the appraisal if so ordered.

As to Plaintiff's Declaratory Count II, concerning the lack of effective appraisal policy procedures, **Defendant's Motion to Dismiss is DENIED**. Unlike the appraisal provisions considered in the recent decisions handed down by the Second and Fifth District Courts of Appeal in *Progressive Am. Ins. Co. v. Glassmetics*, 343 So. 3d 613, (Fla. 2nd DCA, 2022) [47 Fla. L. Weekly D1106b], and *NCI v. Progressive Select Ins. Co.*, 350 So. 3d 801, (Fla. 5th DCA, 2022) [47 Fla. L. Weekly D2235f], the appraisal clause fails to list any procedures concerning what happens when the parties disagree as to umpires. And it is not within the power of this Court to add to or rewrite a deficient appraisal provision. *Home Dev. Co. v. Bursani*, 178 So. 2d 113 (Fla. 1965), see also, *World Finance Group, LLC v. Progressive Select Ins. Co.*, 300 So. 3d 1220 (Fla. 3rd DCA, 2020) [45 Fla. L. Weekly D120d].

As to Plaintiff's Declaratory Count IV, concerning failure to appoint a competent appraiser, **Defendant's Motion to Dismiss is DENIED**. As set forth by the Third DCA in *Heritage Property and Casualty Insurance Co. v. Romanach*, 224 So. 3d 262 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1563a], the proper method to challenge the competency of an appraiser is through a declaratory action.

Counts I, and III, are **Dismissed**. *See Glassmetics*, 343 So. 3d at 622 ("[T]he appraisal process is an informal one. . . . Appraisers generally are chosen for and expected to act on their own skill and knowledge relating to the matters being appraised.") (quoting *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc.,* 117 So. 3d 1226, 1229-30 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1507c]).

Even if the appraisers' evaluation depended on the resolution of the policy language, their determination of the value of the claim does not constitute a coverage question, which would otherwise be outside their purview. *J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co.*, 634 So. 2d 1089, 1090 (Fla. 4th DCA 1994). When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, appraisers decide the amount to be paid—not the courts. *Johnson v. Nationwide Mut. Ins. Co.,* 828 So. 2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a]; *Fla. Ins. Guar. Ass'n, Inc. v. Lustre,* 163 So. 3d 624, 628 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D968a]; *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.,* 162 So. 3d 140, 143 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D78a]; *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n,* 125 So. 3d 846, 854 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D820a]; *J.J.F. of Palm Beach*, 634 So. 2d at 1091;

Also see *Vazquez v. Citizens Prop. Ins. Corp.,* 304 So. 3d 1280, 1286 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a] (holding a declaratory judgment action is moot when it raises a settled question of law)

Defendant shall file its Answer and Affirmative Defenses regarding counts II, and IV within twenty (20) days of this order and respond to discovery relating to the declaratory counts within forty-five (45) days of this order.

* * *

Insurance—Personal injury protection—Declaratory judgments—Motion to dismiss count seeking declaration that insurer failed to comply with terms and conditions of policy is denied—Declaratory judgments are proper means to determine insurer's obligations, and medical provider has sufficiently pled elements of count—There is no requirement that provider specifically plead exact CPT code at issue and exact amount at issue

PRESTIGE HEALTHCARE GROUP, a/a/o Ingrid Colome, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-012238-SP-25. Section CG03. November 3, 2022. Patricia Marino Pedraza, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Anthony Lewin, Mimi L. Smith & Associates, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT AND MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE, having come before the Court for hearing on September 28, 2022, on Defendant's Motion to Dismiss Count II of Plaintiff's Complaint and Motion for More Definite Statement, after hearing argument of counsel for each party, and the Court having reviewed said Motion and being otherwise duly advised in the premises, finds as follows:

The subject action is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to comply with the terms and conditions of the policy, as well as Fla. Stat. 627.736. In response to Plaintiff's Complaint, the Defendant filed its Motion to Dismiss Count II of Plaintiff's Complaint and Motion for More Definite Statement. Defendant alleges that Count II must be dismissed as it does not set forth the appropriate grounds for a declaratory judgment and that the appropriate remedy is a breach of contract via Count I of the Complaint. This Court rejects Defendant's position as Courts have long held that declaratory judgments are proper in respect to determine the insurer's obligations. *Higgins v. State Farm Fire and Casualty Company*, 894 So.2d 5 (Fla. 2005) [29 Fla. L. Weekly S533a]. Moreover, the Plaintiff has sufficiently plead the elements to bring forth its count for declaratory relief. Furthermore, the Plaintiff has the right to choose its legal strategy and the right to pursue its chosen legal path. The mere existence of another remedy at law does not preclude a judgment for declaratory relief. *Maciejewski v. Holland*, 441 So.2d 703 (1983).

As to its Motion for More Definite Statement, the Defendant argues that the Plaintiff failed to indicate the exact CPT Codes at issue and the amounts alleged owed. The Court disagrees with the Defendant's notion as a Complaint would be legally sufficient if the pleading "... [contains] (1) a short and plain statement of the grounds upon which the court's jurisdiction depends,. . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems appropriate." Rule 1.110 (b) Fla. R. Civ. P. Unlike special damages, which are required by Rule 1.120(g) to be plead with specificity, there is no requirement for the Plaintiff to indicate the

exact amount at issue. In reviewing the Plaintiff's Complaint, this Court finds it to be legally sufficient pursuant to Rule 1.110(b). Moreover, the Defendant has the available avenue of discovery in order to clear up any confusion as to the amount claimed to be at issue.

Accordingly, it is therefore ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Count II of Plaintiff's Complaint and Motion for More Definite Statement is hereby DENIED.

2. Defendant shall respond to Count II of Plaintiff's Complaint within thirty (30) days.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Insurer is not allowed to conduct depositions related to fraud defense that was not raised in pleadings

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Mauricio Perez, Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-000254-CC-24. Section MB01. June 26, 2023. Stephanie Silver, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Alicia Hampton, Carabotta Steakley, PLLC, North Miami, for Defendant.

ORDER PURSUANT TO STATUS CONFERENCE HEARING

THIS MATTER, having come before the Court for a status hearing on May 15, 2023, pursuant to the Court's Orders dated May 3, 2023, the Court having reviewed the respective docket, heard argument from counsel of each party, and having been sufficiently advised in the premises, finds as follows:

The subject action, filed on January 14, 2021, is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to fully comply with the terms and conditions of the policy, as well as Fla. Stat. 627.736. During the pendency of this action, as reflected per the docket, the Plaintiff served the Defendant with several discovery requests. The discovery consisted as follows: Initial Interrogatories, (filed with Complaint), Initial Request for Production (filed with Complaint), Request for Production regarding Denial of Bills at Issue (filed on February 24, 2021), Request for Production regarding Claimant's Prior Injuries (filed on March 3, 2021), Interrogatories regarding Claimant's Prior Injuries (filed on September 21, 2022), Request for Production regarding Demand Letter (filed on April 5, 2021).

Based on the Defendant's failure to respond to the subject discovery, and the failure to timely seek an extension of time to respond to the subject discovery, the Plaintiff filed several Motions to Compel Defendant's Responses to Discovery and for Attorney's Fees and Costs pursuant to Rule 1.380(a)(4). In compliance with Administrative Order No. 06-09, after providing the Defendant with written notice of the overdue discovery responses, the Plaintiff submitted Ex Parte Orders to the Court for review and execution. As reflected per the docket, the Plaintiff obtained **nineteen (19)** Ex Parte Orders in which this Court ordered the Defendant to respond to Plaintiff's discovery within a designated time. Moreover, the Court granted sanctions based on the Defendant's repeated failure to comply with the Court's numerous Orders. As the Defendant failed to fully comply with the Court's Orders, this Court requested the parties attend an in person status conference hearing.

At the subject hearing, the parties were questioned as to issues pending to which Plaintiff's counsel indicated that the deposition of the Defendant's Litigation Adjuster was scheduled to take place on June 15, 2023.[1] On the other hand, the Defendant indicated that it had three (3) depositions pending as follows: Mauricio Perez (set for July 10, 2023); Yassell Abreu (driver of vehicle in which claimant was in) (set for July 12, 2023); and Yasser Hernandez (passenger in vehicle in which claimant was in) (set for July 14, 2023). Defendant indicated that said depositions were necessary as they believed there was fraud based on the Examination Under Oath of the claimant, conducted on October 15, 2020. Plaintiff objected to the depositions Defendant has scheduled pursuant to *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988), in which the Supreme Court barred the injection of new claims or theories into an action, when said issues were not raised by the pleadings. Upon review of the Defendant's Answer and Affirmative Defenses, dated March 30, 2021, Defendant has failed to raise any defenses relative to any issue of fraud. The only defenses raised by Defendant relate to an allegation of an invalid demand letter and services not being compensable based on services being rendered by a licensed massage therapist. This Court hereby strikes the Defendant's pending depositions as these depositions are not relevant to the issues as framed by the pleadings. This Court cannot allow the Defendant to further delay this action by seeking depositions which are not relevant, this is especially true considering that the deadline for discovery was set for September 15, 2022. The Defendant's unilateral lack of diligence has unduly delayed the progression of this action. This Court will however allow the Defendant to take the deposition of the Plaintiff's Corporate Representative. Said deposition shall be mutually coordinated among the parties within five (5) days and take place within forty-five (45) days. Additionally, the Court will set this action for trial on its November 2023 Trial Calendar. The Plaintiff shall file its Motion for Summary Judgment/s by July 1, 2023 and said motion's shall be heard by October 1, 2023.

Moreover, as of the date of the hearing, Defendant has failed to provide verified responses to Plaintiff's Initial Interrogatories and Interrogatories regarding Claimant's Prior Injuries. Defendant's counsel has represented that verified responses have been secured and will be filed. Considering same, this Court orders Defendant to provide verified responses by end of day.

Finally, the Court will conduct an evidentiary hearing to assess the amount for monetary sanctions in relation to Plaintiff's several Motions to Compel Discovery Responses from the Defendant, including preparation for and attendance at the status conference hearing and parking costs. The parties shall mutually coordinate an evidentiary hearing to take place within sixty (60) days.

[1]The deposition was previously coordinate to take place on August, 18, 2021 pursuant to the Court's Order dated May 10, 2021. Plaintiff's counsel represented that said deposition was cancelled by the Plaintiff based on Defendant's failure to respond to discovery.

* * *

Landlord-tenant—Public housing—Eviction—Jury trial—Waiver—Tenant did not knowingly, voluntarily, and intelligently waive right to jury trial where waiver, which appeared in paragraph 49 of 56-paragraph lease, was not conspicuous, landlord and affordable housing tenant are not at same level of sophistication and experience, lease was signed in take-it-or-leave-it situation with no opportunity for prior review by tenant, relative bargaining power of landlord and tenant is imbalanced, and tenant was not represented by counsel—Motion to strike jury trial demand is denied

TUSCAN PLACE LIMITED PARTNERSHIP, Plaintiff, v. KIMBERLY KING, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-001600-CC-05. Section CC08. March 28, 2023. Diana Gonzalez-Whyte, Judge. [Motion for Reconsideration Denied. June 12, 2023. Maria D. Ortiz, Judge.] Counsel: Kaye-Ann Baxter, Pembroke Pines, for Plaintiff. Jeffrey M. Hearne, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE JURY DEMAND

THIS CAUSE came before the Court on March 20, 2023, on

Plaintiff's Motion to Strike Defendant's Demand for Jury Trial. The Court heard argument of counsel and considered the motion (DE 13), Defendant's response to the motion (DE 20), and Defendant's sworn declaration attached to the response (DE 20, Ex. B).

Plaintiff filed this eviction against Defendant, Kimberly King, based on an alleged, non-monetary lease violation (DE 2). Along with her Answer, Defendant timely demanded a jury trial. (DE 12). Plaintiff then filed a Motion to Strike her jury demand on the grounds that the lease includes a Waiver of Trial by Jury. (DE 13). Defendant filed a response to the Motion to Strike and included a declaration signed by Defendant. (DE 20). Plaintiff did not file a declaration to support its Motion to Strike the Jury Demand.

Both the Florida Constitution, Article I, Section 22, and the United States Constitution, Amendment VII, provide for the right to a jury trial. While that right can be waived, a waiver of the right to jury trial is only enforceable if it is entered into knowingly, voluntarily, and intelligently. *See Amquip Crane Rental, LLC v. Vercon Const. Management, Inc.*, 60 So. 3d 536 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D932a] (favorably citing the five-factor *Leslie* test); *Leslie v. Carnival Corp.*, 22 So. 3d 567, 580-81 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2448a] (dissent)). In determining whether a party knowingly, voluntarily, and intelligently waived their constitutional right to a jury trial, courts consider several factors. *Id*. These factors include:

(1) The conspicuousness of the provision in the contract.

(2) The level of sophistication and experience of the parties entering into the contract;

(3) The opportunity to negotiate terms of the contract;

(4) The relative bargaining power of each party; and

(5) Whether the waiving party was represented by counsel.

Id. at 581.

Florida courts emphasize the importance of the right to a jury trial by establishing a presumption in favor of the party seeking the jury trial. *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65, 71 (Fla. 1975) ("questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions."); *see also Hansard Const. Corp. v. Rite Aid of Fla., Inc*., 783 So. 2d 307, 308 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D871a] ("questions regarding the right to a jury trial should be resolved in favor of a jury trial . . ."). This analysis requires a fact-intensive determination.

A careful analysis of the five-factor test applied to the jury waiver in this lease, as well as the facts identified in Defendant's declaration, reveals that Defendant did not knowingly, intelligently, and voluntarily waive her fundamental right to a jury trial.

Although it is a close call, the first factor ("conspicuousness") is resolved in favor of Defendant as the party seeking jury trial. *Hollywood*, 321 So. 2d at 71; *Hansard Const.*, 783 So. 2d at 308. The jury waiver is the 49th paragraph out of 56 paragraphs in the lease. It is located on page 15 of the 16-page lease. While the waiver is in all capital letters and Defendant initialed at the bottom of the page, Plaintiff should have done more to make the paragraph and waiver conspicuous. Plaintiff could have: (1) Created a separate addendum to highlight the waiver; (2) Required Defendant to initial next to paragraph 49 waiving her right; (3) Brought attention to the waiver by pointing it out or highlighting it when Defendant signed the lease. *See* Declaration, DE 20, Exhibit B, Page 2, ¶7.

The second factor ("sophistication and experience") is resolved in Defendant's favor. Defendant and Plaintiff are not at the same level of sophistication or experience. Defendant lives in affordable housing and works as a deli clerk at Publix, while Plaintiff operates a large residential building. *See* Declaration ¶3.

The third factor ("opportunity to negotiate") is resolved in Defendant's favor. When Defendant signed her lease in November 2022, Plaintiff did not provide Ms. King with a copy of the lease to read and review before signing. *See* Declaration, ¶ 4-6. It was a "take it or leave it" situation where Ms. King had no choice to sign the lease as written if she wanted to keep her affordable apartment. *Id*. During the hearing, Plaintiff's counsel conceded that Plaintiff has hundreds of apartments and Plaintiff could not negotiate lease terms with each tenant.

Similarly, the fourth factor ("the relative bargaining positions of the parties") is resolved in Defendant's favor. The relative bargaining power between a landlord providing affordable housing and a tenant needing affordable rental housing is imbalanced. Plaintiff could have refused to rent the apartment to Ms. King if she complained about the lease terms or refused to sign the lease provided. *See* Declaration ¶4. Ms. King has been living in her apartment for eight years and works at the Publix five minutes away, often taking overtime shifts to make ends meet. *Id.* ¶¶ 2, 3. Ms. King cannot afford rent in the private market, *Id.* ¶ 2, so she is not in a position to bargain over her lease terms.

Finally, the fifth factor ("represented by counsel") is resolved in Defendant's favor. Ms. King was not represented by counsel when she signed the lease. *See* Declaration ¶8. At the hearing, Defendant proffered that that as a large landlord operating hundreds of units that has legal counsel review and draft its leases and contracts, and Plaintiff did not dispute this fact.

Based on these five factors, Defendant did not knowingly, intelligently, and voluntarily waive her constitutional right to a jury trial. As a tenant facing eviction, Defendant is entitled to a jury trial. *See Baldwin Sod Farms, Inc. v. Corrigan*, 746 So. 2d 1198, 1205 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2771a]. If this case goes to trial, the matter will be heard by a jury of Defendant's peers.

Accordingly, for the reasons stated, it is—

ORDERED AND ADJUDGED:

A. Plaintiff's Motion to Strike Jury Demand is DENIED.

B. The case will be heard by jury when it is set for trial.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL

THIS CAUSE came before the Court and after holding a hearing on May 24, 2023, and after hearing argument of counsel, it is—

ORDERED AND ADJUDGED:

For the reasons stated on record, the Motion is DENIED.

* * *

Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Failure of insurer to respond to discovery requests, seek motion for extension of time prior to expiration of time allowed, or comply with 16 orders requiring it to respond to discovery—Attorney's fees awarded to medical provider—No merit to insurer's claim that provider failed to comply with administrative order requiring 7-day notice of overdue discovery before submitting ex parte orders to compel to court

GONZALEZ REHAB PROFESSIONALS, LLC., a/a/o Luis Tamayo, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-002431-SP-24. Section MB01. June 29, 2023. Stephanie Silver, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff.

ORDER PURSUANT TO STATUS CONFERENCE HEARING

THIS MATTER, having come before the Court for a status hearing on June 26, 2023, pursuant to the Court's Orders dated May 22, 2023,

the Court having reviewed the respective docket, heard argument from counsel of each party, and having been sufficiently advised in the premises, finds as follows:

The subject action, filed on July 5, 2022, is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to fully comply with the terms and conditions of the policy, as well as Fla. Stat. 627.736. During the pendency of this action, as reflected per the docket, the Plaintiff served the Defendant with several discovery requests. The discovery consisted as follows: Initial Interrogatories, (filed with Complaint), Initial Request for Production (filed with Complaint), Request for Production regarding Relatedness and Medical Necessity (filed on August 22, 2022), Interrogatories regarding Claimant's Prior Injuries (filed on September 13, 2022), Request for Production regarding Payments (filed on October 11, 2022), and Interrogatories regarding (filed on December 7, 2022).

Based on the Defendant's failure to respond to the subject discovery, and the failure to timely seek an extension of time to respond to the subject discovery, the Plaintiff filed several Motions to Compel Defendant's Responses to Discovery and for Attorney's Fees and Costs pursuant to Rule 1.380(a)(4). As reflected per the docket, the Plaintiff obtained **sixteen (16)** Ex Parte Orders in which this Court ordered the Defendant to respond to Plaintiff's discovery within a designated time. As the Defendant failed to fully comply with the Court's Orders, this Court requested the parties attend an in-person status conference hearing.

At the subject hearing, Plaintiff's counsel acknowledged that Defendant's violation of numerous Court Orders may certainly allow for the severe sanction of entering a default and/or striking of pleadings, however, Plaintiff opted to seek for sanctions in the form of attorney's fees and costs as the former are the most severe of all sanctions and should be employed only in extreme circumstances. *Mercer v. Raine,* 443 So.2d 944.

In response, Defendant argued that Plaintiff obtained Orders in contravention to Administrative Order No. 06-09 by failing to afford the Defendant "the requisite seven (7) day period or provide any good faith letter." This Court finds that the record evidence clearly establishes that Defendant's representation is without merit. Plaintiff complied with Administrative Order No. 06-09, by providing the Defendant written notice of the overdue discovery responses in conjunction with the filing of its numerous Motions to Compel. Upon expiration of the seven (7) day period, after confirming no discovery responses were filed by Defendant, Plaintiff submitted Ex Parte Orders to the Court for consideration.[1]

The Defendant further argued that, on August 29, 2022, it filed a Motion for Enlargement of Time to Respond to Initial and Supplemental Discovery and that the Plaintiff improperly submitted an Unopposed Order regarding same.[2] Plaintiff in contrast argued that the Court was informed, by way of correspondence, at the time of submission of the Order that Plaintiff had no opposition to a (20) day extension for Defendant to respond to then existing discovery. Moreover, as pointed out by Plaintiff, Defendant's motion was untimely as Rule 1.090 indicates that a party may seek an enlargement "when an act is required or allowed to be done at or within a specified time" . . . if the request "is made before the expiration of the period originally prescribed or as extended by a previous order." Rule 1.090(b)(1)(a). The Notice of Service of Process indicates that Defendant was served with the Complaint and Discovery on July 12, 2022, thus Defendant's response to Plaintiff's Initial Discovery was due on August 22, 2022. Nevertheless, the record shows that the Defendant never moved to vacate said Order. Instead, the Defendant waited to file discovery responses until the 9:30 p.m, the night before the subject hearing, at which point, numerous Orders were violated by the Defendant, pertaining to the discovery served at the time of Defendant's motion, as well as additional discovery.

The Defendant further argues that the discovery propounded by Defendant was unnecessary as it stipulated to relatedness and medical necessity, however, as Plaintiff argued, Defendant failed to issue payment on at least one service billed under CPT Code S8948 (Lower Level Laser Therapy), thus it propounded discovery to ascertain if Defendant's position was that said service was not related or medical necessary. Even if Defendant found said discovery to be irrelevant, it nevertheless has an obligation to comply with the rules promulgated by the Florida Supreme Court as well as the Orders of this Court. The Court may well have agreed that the Defendant was correct—however, this discovery was subject to numerous orders. The Defendant never moved for relief from these Orders.

Therefore, it is ORDERED and ADJUDGED that Plaintiff's request for sanctions in the form of attorney's fees and costs is hereby GRANTED. The Court will conduct an evidentiary hearing to assess the amount for monetary sanctions against Defendant. The parties shall mutually coordinate an evidentiary hearing to take place within forty-five (45) days.

This Court also considered Defendant's Motion to Overrule Objections to Defendant's Interrogatories filed on November 28, 2022. Plaintiff advised the Court that amended responses were filed in which Plaintiff withdrew objections to items 1 and 2. As to item three, the Court reviewed the response, and hereby orders that Plaintiff identify the CPT Code it maintains was not paid. The Court also directs the Plaintiff to provide verified responses within twenty (20) days.

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[1]Plaintiff provided the Court with copies of emails sent to Defendant enclosing correspondence advising of overdue discovery responses.

[2]The Supplemental Discovery at the time of Defendant's motion consisted of Request for Production regarding Relatedness and Medical Necessity.

* * *

Insurance—Discovery—Depositions—Instruction by insurer's counsel that its corporate representative not answer deposition questions was improper in absence of one of the exceptions expressly stated in Rule 1.310(c)

PHYSICIANS GROUP, L.L.C., a/a/o Maya Williams, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, a foreign profit corporation, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2021 SC 006943 NC. July 27, 2023. Erika Quartermaine, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff.

ORDER ON PLAINTIFF'S EMERGENCY MOTION TO OVERRULE DEPOSITION OBJECTIONS AND FOR SANCTIONS

THIS CAUSE having come before the Court for hearing on July 13, 2023, upon Plaintiff's Motion to Overrule Deposition Objection and for Sanctions, and the Court, having reviewed the motion, the Court file, the case law presented, and having heard argument of counsel and being otherwise fully advised in the premises, it is hereby, **ORDERED AND ADJUDGED:**

1. On May 19, 2023, Plaintiff's counsel attempted to depose Defendant's corporate representative as to underwriting—Rose Chrustic. During the deposition, counsel for the Defendant raised relevance and harassing objections, and instructed the witness not to answer the foundation or background questions posed in the deposition. Due to defense counsel's objections and instruction to the witness to not answer deposition questions, the deposition was terminated in accordance with Fla. R. Civ. P. 1.310(d) by Plaintiff's counsel. Defendant never raised an objection as to privilege.

2. Rule 1.280(b)(1) of the Florida Rules of Civil Procedure states, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably

calculated to lead to the discovery of admissible evidence."

3. In *Jones v. Seaboard Coast Line Railroad Company*, 297 So. 2d 861 (Fla. 2d DCA 1974), interpreted rules 1.310(c), 1.330(c), and 1.280(b) to mean that the "oral deposition of any deponent shall proceed to completion, subject to recorded objections subsequently to be resolved by the court, and all reasonably relevant questions, leading or otherwise, must be answered unless privileged, whether or not such answers themselves, or other evidence toward which they may lead, would be admissible at trial."

4. In *Smith v. Gardy*, 569 So. 2d 504, 507 (Fla. 4th DCA 1990), the Fourth District Court of Appeals addressed improper objections and instructions not to answer at a deposition. The court went on to state that Dr. Freeman should have answered the (non-privileged questions), and "the arrogance of the defense attorney in instructing the witness not to answer is without legal justification. Nowhere in the Florida Rules of Civil Procedure is there a provision that states that an attorney may instruct a witness not to answer a question."

5. The Court finds that Defendant's instruction to its witness to not answer the deposition questions at issue was improper. See Fla. R. Civ. P. 1.310(c)("a party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d)").

6. Plaintiff's motion is **GRANTED** in full.

7. The Parties shall reschedule Ms. Rose Chrustic's deposition within the next 15-days, and the deposition must occur within the 60-days of this order.

8. Defendant is prohibited from instructing the witness to not answer a question in the rescheduled deposition, unless one of the exceptions expressly stated in Rule 1.310(c), *supra*, apply.

9. The court further awards Plaintiff attorney's fees and costs pursuant to Fla. R. Civ. P. 1.380 but reserves as to amount. If the parties are unable to agree on the amount, Plaintiff may set a fee hearing.

* * *

Attorney's fees—Prevailing party—Dismissal for lack of prosecution—Defendant is entitled to prevailing party attorney's fees for case dismissed due to lack of prosecution

TD BANK USA, N.A., Plaintiff, v. SYLVIA WINGATE, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 41-2020-SC-001718-SCAXMA. June 22, 2023. Jacqueline Steele, Judge. Counsel: Drew Linen, RAS LaVrar, LLC, Plantation, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

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

THIS ACTION came before the Court on May 26, 2023 on a hearing on Defendant's Motion for the Court to Determine Entitlement to an Award of Attorney Fees and Costs and Then to Tax Same Against Plaintiff at which counsel for both parties appeared and presented argument and the Court having considered those arguments and being otherwise informed in the premises, it is HEREBY ORDERED AND ADJUDGED:

1. At the hearing, counsel for Plaintiff argued that since this lawsuit was dismissed for lack of prosecution there is no prevailing party for purposes of entitlement to prevailing party attorney fees. In support, Plaintiff presented to the Court the matter of *Moritz v. Hoyt Enterprises, Inc.,* 604 So.2d 807 (Fla.1992). As *Moritz* had not been presented to the Court or Defendant's attorney in advance of the hearing, the Court provided to counsel for Defendant 10 days in which to respond to *Moritz* and for both parties to present to the Court case law and authority for or against the proposition that a dismissal for lack of prosecution results in a prevailing party.

2. After the hearing, on June 5, 2023, Defendant filed Defendant's Memorandum of Law in Support of Defendant's Motion for Entitlement to Prevailing Party Attorney Fees. In this Memorandum, Defendant noted that *Moritz* is distinguishable from the case at bar. Defendant also cited multiple cases with regard to a dismissal resulting in a party the prevailing party for purposes of prevailing party attorney fees, including cases that found that a party was entitled to prevailing party attorney fees when the lawsuit was dismissed for lack of prosecution. The Court notes that while Plaintiff was provided 10 days to submit case law and authority for its position, Plaintiff did not do so.

3. The Court finds that *Moritz* does not support Plaintiff's argument that a dismissal for lack of prosecution does not result in a prevailing party and is distinguishable for the reasons set forth in Defendant's Memorandum of Law.

4. Based on the case law and authority cited in Defendant's Memorandum of Law, the Court also finds that Defendant is the prevailing party by virtue of the Order on Defendant's Motion to Dismiss for Lack of Prosecution and Supplements Thereto

5. The Court further finds that Defendant placed Plaintiff on notice of her intent to seek prevailing party attorney fees when counsel for Defendant filed his Notice of Appearance as Counsel for Defendant and that the underlying cardholder agreement contains a provision providing for the recovery of attorney fees.

6. Based on the findings set forth herein, Defendant's Motion for the Court to Determine Entitlement to an Award of Attorney Fees and Costs and Then to Tax Same Against Plaintiff is hereby GRANTED.

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

* * *

Insurance—Automobile—Appraisal—Where appraisal is mandatory condition precedent under terms of policy, case is ripe for appraisal, and it is undisputed that plaintiff did not comply with appraisal obligation, case is dismissed without prejudice

SHAZAM AUTO GLASS LLC, a/a/o Camilo Rodriguez, Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-059323, Division M. June 21, 2023. Lisa A. Allen, Judge. Counsel: Christopher K. Leifer, FL Legal Group, Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott, & Kissane P.A., Tampa, for Defendant.

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

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED.

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, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a] ("It is well settled that, as a general rule, parties are free to 'contract out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."). Indeed, "[w]hen the insurer admits that there is a covered loss, any dispute on the amount of loss suffered is appropriate for appraisal." *Cannon Ranch,* 162 So. 3d at 145 (internal quotations omitted). Further, 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." *People's Trust Ins. Co. v. Marzouka,* 320 So. 3d 945, 947 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a] (internal alteration omitted); *Preferred Mut. Ins. Co. v. Martinez*, 643 So. 2d 1101, 1103 (Fla. 3d DCA 1994) (reversing denial of motion to compel appraisal).

This action is ripe for appraisal. *See, Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC,* 47 Fla. L. Weekly D2265a (Fla. 2d DCA November 4, 2022), citing *Am. Capital Assurance Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n,* 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2463a], review granted, SC20-1766, 2021 Fla. LEXIS 189, 2021 WL 416684 (Fla. Feb. 8,2021) ("A demand [for appraisal] is ripe where post loss conditions are met, 'the insurer has a reasonable opportunity to investigate and adjust the claim,' and there is a disagreement regarding the value of the property or the amount of loss."). The subject Star Casualty policy states in relevant part, "[i]f **we** and **you** do not agree on the amount of **loss**, either may demand an appraisal of the **loss**." The Star Casualty Policy also includes a "suits against us" clause which states that, "**[w]e** may not be sued unless there is full compliance with all terms of this policy." The Policy is clear and unambiguous and requires a party filing a lawsuit against Star Casualty to comply with the appraisal provision prior to filing the lawsuit, when demanded.

The Court finds that appraisal is a mandatory condition precedent under the terms of the Policy. There is no doubt as to whether the parties entered into the agreement and there is no doubt that a disagreement exists, and that Star Casualty invoked appraisal. As such, Plaintiff, the post-loss assignee, is contractually obligated to participate in appraisal. *See Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC,* No. 2D21-58, 2022 WL 16703249, at *3 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]; *NCI, LLC v. Progressive Select Ins. Co.,* No. 5D21-1282, 2022 WL 16702296 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f]. Appraisal is the first and best step towards resolution.

When it is undisputed that a party did not comply with a controlling appraisal obligation, "[d]ismissal without prejudice [is] a proper remedy." *NCI v. Progressive Select Ins. Co*., 47 Fla. L. Weekly D2235f (Fla. 5th DCA November 4, 2022). The Court is not inclined to stay this matter, as requested by Plaintiff, as that would refute what the contract was intended to do. This matter is dismissed without prejudice. The clerk is directed to close the case.

* * *

Insurance—Personal injury protection—Coverage—Res judicata—Default judgment—Identity of parties—Plaintiff provider acting as assignee of vehicle passenger is entitled to summary judgment based on prior declaratory judgment in favor of the named insured, which involved same policy—Court rejects argument that declaratory judgment could not be considered an adjudication on the merits for the purposes of res judicata because it was default judgment—There is identity of the parties where, although the claimant assigning their benefits is different, the provider acting as assignee is the same—Alternatively there is privity

FLORIDA WELLNESS CENTER, INC., a/a/o Yoan Aquino, Plaintiff, v. INTEGON PREFERRED INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-029351. Division L. August 18, 2023. Richard H. Martin, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Matthew D. Chamoff, McFarlane Dolan, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY FINAL JUDGMENT

Plaintiff, Florida Wellness Center Inc., as assignee of Yoan Aquino ("Florida Wellness"), moved for summary judgment (Doc. 115) on its single count complaint seeking a declaratory judgment of PIP insurance coverage against Defendant, Integon Preferred Insurance Company ("Integon"). Plaintiff's motion was heard on August 2, 2023. Because the record demonstrates that there is no genuine issue of material fact that Plaintiff is entitled to summary judgment based on a prior declaratory judgment of coverage in favor of the named insured involving the same policy of insurance, the Court grants Plaintiff's motion.

I. Background

Unless otherwise noted, the following facts appear from the Court's review of the record to be undisputed. Integon issued an auto insurance policy to Yoel Aquino Alonso, with effective dates of September 7, 2017 to September 7, 2018. Shortly after the policy was issued, Yoel Aquino Alonso was involved in a car accident on October 1, 2017 in which he was the driver. In the car with him was his adult cousin, Yoan Aquino. Apparently, both Yoel Aquino Alonso and Yoan Aquino were injured. Both sought treatment with Florida Wellness and assigned their right to collect PIP benefits to Florida Wellness. During an examination under oath, Yoel Aquino Alonso testified that his daughter, Lillian, was also in the car with him, that she lived in his household and that she was of driving age. (Doc. 105, at 112.) Integon issued a notice of rescission on November 12, 2017, claiming Yoel Aquino Alonso had made material misrepresentations in his policy application by failing to disclose all driving-age household members. (Doc. 108, p. 68.) Florida Wellness had submitted a claim for PIP benefits as assignee of Yoan Aquino, which Integon denied based on its rescission of the policy.

In this case, filed on March 25, 2021, Florida Wellness sought a declaratory judgment determining that Integon had improperly rescinded the policy. While this case was pending, in a separate case, Case Number 20-CC-55534, Florida Wellness Center, Inc., as assignee of Yoel Aquino, obtained an amended final judgment of default against Integon on February 7, 2022. (Doc. 116.) The amended default judgment provides that Florida Wellness is:

> entitled to a declaration of PIP coverage subsequent to Defendant's denial of coverage for alleged material misrepresentation in the application for insurance by the named insured pursuant to claim no. 3008264 for the accident dated October 21 [sic], 2017. Pursuant to F.S. Section 627.428, Plaintiff is entitled to attorney's fees and costs, with the final amount to be determined at a later date. Plaintiff shall recover for which let execution issue.

(Doc. 116.)

Plaintiff filed a motion for summary judgment in this case based on *res judicata* as to the amended default judgment. Defendant's response made no legal argument and simply listed items a number of items it intended to rely upon, some of which were in the record. (Doc. 118.) Others (items 3, 4, 5) were not or were merely "catch all" items (items 12-17). I ordered supplemental briefing on the application of *res judicata*.

II. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. Proc. 1.510(a). In applying the summary judgment standard, courts are to construe and apply the rule "in accordance with the federal summary judgment standard." *Id.* Where the nonmoving party bears the burden of proof on a dispositive issue at trial, the moving party need only demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986). In adopting the new standard, the Supreme Court of Florida noted, "In Florida, it will no longer be plausible to maintain that 'the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry

and precludes summary judgment, so long as the 'slightest doubt' is raised." *In re Amendments to Fla. Rule of Civil Procedure 1.510*, 317 So. 3d 72, 76 (Fla. 2021) [46 Fla. L. Weekly S95a] (quoting Bruce Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.)).

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

"The moving party bears the initial burden of identifying those portions of the record demonstrating the lack of a genuinely disputed issue of material fact." *Waters Mark Dev.*, 350 So. 3d at 398. "If the movant does so, then the burden shifts to the non-moving party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law." *Id.* "To satisfy its burden, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (*quoting Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) (internal quotations omitted)). The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322, 106 S. Ct. 2458. "To do so, the non-moving party must go beyond the pleadings and 'identify affirmative evidence' that creates a genuine dispute of material fact." *Id.* (quoting *Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)). If the nonmovant's evidence "is merely colorable, or not sufficiently probative, summary judgment may be granted." *In re Amendments to Fla. Rule of Civil Procedure 1.510*, 309 So. 3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a]. The trial court must determine whether the nonmovant's evidence presents sufficient disagreement to require submission to a finder of fact "or whether it is so one sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52, 106 S. Ct. 2505. "That is to say, the nonmovant's evidence must be of sufficient weight and quality that 'reasonable jurors could find by a preponderance of the evidence that [the nonmovant] is entitled to a verdict." *Rich v. Narog*, __ So. 3d ___, 47 Fla. L. Weekly D1933a, 2022 WL 4360601 at *5 (Fla. 3d DCA Sept. 21, 2022).

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

III. Applicable Law and Analysis

The doctrine of *res judicata* provides that a judgment on the merits bars a later suit on the same cause of action between the same parties or others in privity with those parties. *Medicability, LLC v. Blue Hill Buffalo Consulting, LLC*, 352 So. 3d 467, 469 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2528a]. *Res judicata* bars a subsequent lawsuit when the following identities exist: (1) identity of the thing being sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality or capacity of the persons for or against whom that claim is made. *Id.* A declaratory judgment between the insurer and the insured concerning questions of insurance coverage under the policy has the force and effect of a final judgment and is *res judicata* as to the matters at issue between the parties and those in privity with them. *Clearcare, LLC v. Granada Ins. Co.*, Case No. 4D22-1924 (Fla. 4th DCA Aug. 2, 2023) [48 Fla. L. Weekly D1511a] (slip op). A non-party may be in privity with a party to the prior action if, among other things "a substantive legal relationship existed between the person to be bound and a party to the judgment." *Thews v. Wal-Mart Stores East, LP*, 210 So. 3d 723, 725 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D376a].

Integon argues that the default judgment is not considered an adjudication on the merits for purposes of res judicata. Integon cites for this proposition *Allbright v. Hanft*, 333 So. 2d 112 (Fla. 2d DCA 1976), and *State Street Bank & Tr. Co. v. Badra*, 765 So. 2d 251, 254 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1880a]. *Allbright* is distinguishable because the judgment at issue there was a Georgia judgment that determined there was no jurisdiction over a defendant. A judgment that a court lacks jurisdiction is plainly not an adjudication on the merits. *State Street* involved a subsequent foreclosure action based on a separate notice of acceleration where the trial court had found a prior notice of acceleration was defective and the lender failed to comply with a condition precedent. By contrast, a default judgment is adjudication on the merits that can have a preclusive effect upon subsequent litigation. *Hay v. Salisbury*, 109 So. 617, 92 Fla. 446 (Fla. 1926); *AGB Oil Co. v. Crystal Exploration and Production Co.*, 406 So.2d 1165 (Fla. 3d DCA 1981).

Here, the elements of *res judicata* exist. In both cases, Florida Wellness sought a declaratory judgment against Integon of coverage under Integon's policy issued to Yoan Aquino Alonso for the October 2017 accident and a finding that Integon's rescission of the policy for misrepresentation was improper. Florida Wellness and Integon were parties in both cases. The same counsel represented Florida Wellness in both cases. Integon argues that there is a lack of identity of the parties because, "Although the provider is the same, the claimant assigning their benefits is not." (Doc. 123, at 3.) Florida Wellness, acting as the assignee of the rights of Yoel Aquino Alonso in one case and Yoan Aquino in the other, was seeking PIP benefits under the same Integon policy. The only distinction is that in the Yoel Aquino Alonso case, Florida Wellness was suing as assignee of the *named insured* whereas in this case, Florida Wellness is suing on behalf of a *vehicle passenger insured under the same policy*. Thus, the claim in this case for declaratory judgment by the passenger that the rescission of the insured's policy due to misrepresentation by the insured was improper is derivative of, and dependent upon, establishing the same claim by the named insured. The capacity of Florida Wellness in both cases is the same—it sought a declaration of coverage on behalf of an insured under the same policy. I find that there is identity of the parties or, in the alternative, there is privity.

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED. The Court finds the default judgment in Case 20-CC-55534 is binding on the parties in this case. Based on the default judgment in Case 20-CC-55534, Plaintiff, Florida Wellness Center, Inc., as assignee of Yoan Aquino, is entitled to a declaration of PIP coverage subsequent to Defendant Integon Preferred Insurance Company's denial of coverage for alleged material misrepresentation in the application for insurance by the Yoel Aquino pursuant to claim no. 3008264 for the accident dated October 1, 2017.

* * *

Civil procedure—Interpleader—All interpleader defendants forfeited any claim of entitlement to disputed funds deposited into court registry by interpleader plaintiff by failing to answer complaint in interpleader or appear at final hearing—Unclaimed funds will remain in registry for statutory period to claim funds—Interpleader plaintiff is entitled to payment of attorney's fees and costs from deposited funds

JURIS TITLE CHARTERED, Plaintiff, v. EDWARD SCRIVANI, individually, JOSEPH PACE, individually, and ALAN ROSENTHAL, individually, Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-22-065150. June 22, 2023. Robert W. Lee, Judge.

FINAL JUDGMENT IN INTERPLEADER AND AWARD ON ATTORNEY'S FEES AND COSTS, WITH DIRECTIONS TO CLERK

THIS CAUSE came before the Court June 2, 2023 for final hearing of the Plaintiff's Complaint for Interpleader, which was filed on October 23, 2022. The Court having reviewed the Complaint, having considered the relevant legal authorities, having heard argument, and having been sufficiently advised in the premises, the Court finds as follows[1]:

1. On March 13, 2023, the Court entered its order directing that the Plaintiff would be dismissed from this action after depositing the entire disputed funds into the court registry, and upon service of process upon the Defendants in this cause.

2. All Defendants in this cause have been served.

3. The funds were deposited into the Court Registry on April 14, 2023.

4. None of the Defendants appeared at the final hearing, although being duly noticed.

5. The Court has reviewed the record carefully and found that upon process of service, all of the Defendants in this cause have failed to answer the Plaintiff's Complaint in Interpleader and further failed to appear the final hearing. Under relevant case law, a named interpleader defendant who fails to answer the interpleader complaint and assert a claim to the res forfeits any claim of entitlement that might have been asserted. *See Modern Woodmen of Am. v. Stuckey,* 2022 WL 2806465, *3 (N.D. Fla. 2022). *See also Life Ins. Co. of N. Am. v. Spitzer,* 2022 WL 2339576, *2 (M.D. Fla 2022); *Metro. Life Ins. Co. v. Prewitt,* 2019 WL 917430, *2 (S.D. Fla 2019). However, this case is different in that *all* of the Defendants have failed to make a claim for the funds, leaving an open question to the disposition of the interpleaded funds. As far as the Court has been able to determine, this being an unprecedented matter in Florida, the Court notes from a persuasive out-of-state authority with analogous facts that the unclaimed funds should remain in the court registry for the statutory period to claim funds. *See Miller v. Jackson Cnty.,* 2023 WL 2414904, 2-3 (Tex. App. 2023). The Clerk of Courts is hereby directed to close the case, however, subject to reopening upon any Defendant filing a claim for the remaining funds during the statutory period, at which time the Court may consider further proceedings. The Defendants have all been provided due process and notice of the existence of the funds, and Florida law has a clear process for disposition of unclaimed funds.

6. The Clerk is hereby directed to transmit to Plaintiff's Attorney the total sum of $1,956.65 from the funds in the Court Registry, based on the following findings. The Plaintiff filed for the Court's consideration its Verified Statement of Costs and Attorney's Fees Award to the Plaintiff's interpleaded sum. In its Order of March 13, 2023, the Court had reserved jurisdiction to award fees and costs from the interpleaded funds. *Drummond Title Company v. Weinroth,* 77 So.2d 606, 609-10 (Fla. 1955); 32 Fla. Jur. 2d *Interpleader* §1, 11(2003). Upon hearing, the Court concludes that Plaintiff's Motion for Award on Attorneys' Fees and Costs should be GRANTED in the total amount of $1,400.00, with costs totaling $556.65, the total amount of fees and costs sought by Plaintiff's Attorney, broken down as:

Filing Fee:	$310.50
Issuance of Summons:	$31.05
Service of Process:	$215.00

[1]The Court thanks Nova Southeastern University judicial intern Nancy Jaramillo-Vazquez for her research assistance on the legal issues raised in this order.

* * *

Insurance—Personal injury protection—Affirmative defenses—Accord and satisfaction—Where facts indicate that insurer did not believe that amount paid was compromise of what medical provider was due, there was no dispute prior to issuance of payment, and, accordingly, defense of accord and satisfaction was not established—Explanation of benefits advising provider that it should let insurer know amount of any deficiency in payments so that insurer could resolve issue without resorting to litigation evidences the absence of any dispute prior to payment

ALLIANCE SPINE AND JOINT II, a/a/o Simon Wilkinson, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22043840. Division 83. June 9, 2023. Ellen Feld, Judge. Counsel: Mariel Tollinchi, Tollinchi Law, P.A., Pembroke Pines, for Plaintiff. Rashad Haqq El-Amin, UAIC, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: ACCORD AND SATISFACTION

THIS CAUSE came to be heard on January 19, 2023, on Defendant's Motion for Summary Judgment re: Accord and Satisfaction and Request for 57.105 Sanctions. Upon hearing arguments of counsel present and otherwise being fully advised of the premises thereof, it is hereby **ORDERED AND ADJUDGED** that for the reasons cited below, Defendant's Motion for Summary Judgment re: Accord and Satisfaction is hereby **DENIED**.

The Court finds that there is no material issue of disputed fact in this matter regarding the accord and satisfaction defense. Based upon the summary judgment evidence before the court demonstrates that as a matter of law the elements of the defense of accord and satisfaction are not present and cannot support a defense of accord and satisfaction under either the common law or under Section 673.3111, Fla. Stat.

An affirmative defense of accord and satisfaction requires (1) proof of a preexisting dispute as to the nature and extent of an obligation between the parties, (2) their mutual intent to effect settlement of that dispute by a superseding agreement, and (3) the obligor's subsequent tender and the obligee's acceptance of performance of the new agreement in full satisfaction and discharge of the prior disputed obligation. *St. Mary's Hospital v. Schocoff*, 725 So.2d 454 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D405a]. An accord and satisfaction results when (1) the parties mutually intend to affect a settlement of an existing dispute by entering into a superseding agreement, and (2) there is actual performance in accordance with the new agreement. *Martinez v. South Bayshore Tower, LLLP*, 979 So.2d 1023 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D655a]. The elements are not present under the facts of this case.

There must be unequivocal evidence that a dispute existed prior to the issuance of the payment by the Defendant. *San Hueza v. National Foundation Life Insurance Company*, 545 So.2d 321 (Fla. 3d DCA 1989) [14 Fla. L. Weekly 1142] (the defense of accord and satisfaction was not established where the insurer issued checks for payment of medical services in amounts for which there had been no showing of the existence of a real dispute).

The Affidavit of Defendant's Litigation Adjuster, Zunilda de la Cruz, attempts to demonstrate a preexisting dispute by asserting that Defendant's February 16, 2022, Demand Response and associated Explanation of Benefits had reduced the amounts billed and therefore evidenced a dispute as to the reasonableness of the charges submitted. However, neither the Demand Response nor the Explanation of Benefits communicated the existence of a dispute or that Defendant had determined Plaintiff's charges to be unreasonable. To the contrary, Defendant's Explanation of Review advised ". . .if you believe that the combined sum totals of all our drafts fail to satisfy the total amount/s due, please let us know the exact amount of any deficiency so that we can resolve it without resorting to unnecessary

litigation" demonstrating that Defendant has communicated no dispute to create an accord and satisfaction, and clearly evidencing the absence of any dispute.

The record evidence shows that there was no contract between the parties subsequent to the Defendant's receipt of the Plaintiff's bill and the issuance of the check to discuss any dispute over the payment of the Plaintiff's bill. The Defendant has argued that the payment itself at an amount less than the charge is the dispute. However, the Court finds that an "insurer. . .cannot create a dispute by making payment in an amount it contends will fully satisfy its obligation." *Pino v. Union Bankers Insurance Company*, 627 So.2d 535 (Fla. 3rd DCA 1993). The correspondence sent with the check did not indicate the existence of a dispute and that the payment was offered in full and final accord and satisfaction of the dispute. Quite contrary, the correspondence states that if there was a dispute, the Plaintiff's medical provider should contact the Defendant.

The Court finds that the indisputable evidence presented demonstrates that Defendant communicated no dispute prior to sending the check(s) for the 12/16/2021 date of service. Further, the Court finds that prior to the issuance of the check(s) for the 12/16/2021 date of service, there is no summary judgment evidence as to any conversations or correspondence by the Defendant advising the Plaintiff that the payments were intended as a compromise or settlement of the Plaintiff's claim.

Here, the facts indicate, and the Court finds, that the Defendant did not believe that the amount paid was a compromise of what Defendant owed or to what Plaintiff was otherwise entitled. The Court finds that there is no genuine issue of material fact as to the absence of a mutual intent to affect a settlement of a preexisting dispute.

Based upon the foregoing findings of facts together with the arguments set forth in the motion and at hearing IT IS ADJUDGED that the Defendant's Motion for Summary Judgment is DENIED.

* * *

Insurance—Personal injury protection—Demand letter—Sufficiency—Medical provider satisfied statutory condition precedent of section 627.736(10) by attaching itemized statement to demand letter—PIP statute does not require that demand letter state exact amount owed by insurer

ALLIANCE SPINE AND JOINT II, a/a/o Simon Wilkinson, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22043840. Division 83. June 9, 2023. Ellen Feld, Judge. Counsel: Mariel Tollinchi, Tollinchi Law, P.A., Pembroke Pines, for Plaintiff. Rashad Haqq El-Amin, UAIC, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: DEFECTIVE DEMAND LETTER

THIS CAUSE came to be heard on January 19, 2023, on Defendant's Motion for Summary Judgment re: Defective Demand Letter or in the Alternative Motion to Abate. Upon hearing arguments of counsel present and otherwise being fully advised of the premises thereof, it is hereby **ORDERED AND ADJUDGED** that for the reasons cited below, Defendant's Motion for Summary Judgment is hereby **DENIED**.

The Court finds that Plaintiff's Demand Letter substantially complies with Florida Statute 627.736 and qualifies as a valid Demand letter.

> "a plaintiff need only substantially comply with conditions precedent." *Id*. at 61 (citing *Fed. Nat'l Mortg. Ass'n v. Hawthorne,* 197 So.3d 1237, 1240 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1800a]). "Substantial compliance or performance is 'performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee' the benefit of the bargain." *Lopez v. JPMorgan Chase Bank,* 187 So.3d 343, 345 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D595b] (quoting *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.*, 247 So.2d 72, 75 (Fla. 4th DCA 1971)). "Moreover, a breach of a condition precedent does not preclude the enforcement of an otherwise valid contract, absent some prejudice. . . . Even if we concluded that the required notice was mailed to an incorrect address, the Bank correctly points out that the defective notice did not prejudice the Borrowers, as they did not attempt to cure the default.

Citigroup Mortg. Loan Tr. Inc. v. Scialabba, 238 So. 3d 317, 319-20 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D523a].

> Additionally, section 627.736(5)(b)1.d., Florida Statutes (2004), states that an insurer is not required to pay a claim or charges "[w]ith respect to a bill or statement that does not substantially meet the applicable requirements of paragraph (d)." Accordingly, based upon the statute's plain language, a bill or statement need only be "substantially complete" and "substantially accurate" as to relevant information and material provisions in order to provide notice to an insurer.

United Auto. Ins. Co. v. Prof'l Med. Grp., Inc., 26 So. 3d 21, 24 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2500a].

Defendant contends that the Demand Letter fails to reduce the amount claimed to be due and owing in accordance with the applicable fee schedules. The Court finds that the documents submitted to the insurance carrier satisfies the Plaintiff's obligation to include an "itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The Court adopts the reasoning set forth by Judge Guzman in *Saavedra v. State Farm,* 26 Fla. L. Weekly Supp. 663a (Dade Cty. Ct. 2018) where he held:

> this Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount owed. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible.1 The Court is not free to edit statutes of add requirements that the legislature did not include. *Meyer v. Caruso,* 731 So.2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c].

Based upon the foregoing findings of facts together with the arguments set forth at hearing IT IS ADJUDGED that the Defendant's Motion for Summary Judgment Re: Defective Demand Letter is DENIED.

* * *

Insurance—Property—Attorney's fees—Amount—Hourly rates requested are reduced to rates in keeping with rates customarily awarded in county where case was filed rather than county where plaintiff's attorneys are based—Number of attorney hours sought is reduced by excessive or unnecessary work, duplicative efforts by multiple attorneys and clerical tasks—Although amount in dispute was small, plaintiff's attorneys were not overly-litigious in view of zealous defense

SUPREME MOLD TESTING, LLC, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21019911. Division 53. June 30, 2023. Robert W. Lee, Judge.

FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

THIS CAUSE came before the Court on June 23, 2023 for hearing of the Plaintiff's Motion for Attorneys' Fees and Costs, and the Court's having reviewed the Motion and entire Court file; received evidence; heard argument; and been sufficiently advised in the premises, the Court finds as follows:

Background. On December 8, 2022, this Court entered its Final Order of Dismissal upon the parties' settlement of the case based on a confession of judgment, retaining jurisdiction to enforce the settlement including any issue of attorney's fees and costs. The same day, the Plaintiff filed its Motion for Attorney's Fees and Costs. By Order of February 15, 2023, the Court ordered the Plaintiff to file a breakdown of the fees and costs it was seeking. Two law firms representing Plaintiff are seeking fees in this case: Robert J. Lee, P.A., who filed its breakdown on March 3, 2023; and Guerrero Legal PLLC, who filed its breakdown on March 16, 2023. Thereafter, on March 23, 2023, this Court entered its Order Preliminary to Hearing on Motion for Attorney's Fees and Costs, directing that the Defendant serve and file any specific written objections to Plaintiff's time entries. The Defendant served its response on April 20, 2023.

The Plaintiff is seeking 248.8 hours for trial level work, with Cristopher R. Guerrero, Esq. billing 75.4 hours at an hourly rate of $450.00; Robert J. Lee, Esq. billing 90.8 hours at an hourly rate of $575.00; Michael V. Tichenor, Esq., billing 45 hours at an hourly rate of $550.00, and 10 hours at an hourly rate of $600.00; Patricia G. Preciado, Esq. billing 2.7 hours at an hourly rate of $550.00; and various legal assistants and clerks billing 25 hours at an hourly rate of $200.00, for a total of $123,375.00. In his Notice of Filing, the Defendant's expert advised the Court that the Defendant did not object to 104.1 hours of time claimed by Plaintiff's counsel, for a total fee of $43,240.00. However, the Defendant objected to 144.7 hours of time billed, as well as the hourly rates requested. The Plaintiff's expert agreed with 29.5 hours objected to by the Defendant, leaving 115.2 hours in dispute, as well as the hourly rates. At the hearing, the Defendant advised the Court that it agrees that costs should be taxed in the amount of $3,239.95, with a dispute only as to the peer review report prepared by Mr. Brizuela who charged $1,500.00. (The Court agrees with the Defendant that the cost of the peer review report should not be taxed, as it does not fall under the Uniform Guidelines as a cost that should or may be taxed. Rather, the peer review cost specifically "should not be taxed" because the expert was consulted but did not testify, either by deposition or at trial.)

The Court set the matter for hearing for June 23, 2023. At the hearing both sides appeared with their capable expert witnesses, Russel Lazega, Esq. for the Plaintiff and Daniel Kaufman, Esq. for the Defendant. The Court has also considered the detailed written submissions of both parties, the argument of the attorneys, and the controlling case law. In addition, the Court is quite familiar with and conducted its own thorough review of all matters of record in this case. This Court has presided over thousands of insurance cases, and is quite familiar with the issues involving the pleadings, discovery, strategy, motion practice and resolution related to insurance cases litigated in South Florida.

Conclusions of Law. The Court has determined that the number of hours reasonably expended by Plaintiff's counsel in this case is a total of 196.65 hours: 56.9 hours for Mr. Guerrero; 78.8 for Mr. Lee; 43.9 for Mr. Tichenor; 2.2 for Ms. Preciado; and 14.85 for Plaintiff's legal assistants/clerks.

Rather than awarding the higher hourly rates sought by Plaintiff's counsel, the Court has determined based upon the criteria set forth in Disciplinary Rule 4-1.5(b) of the Florida Bar Rules of Professional Responsibility that a reasonable hourly rate for the hours expended by Plaintiff's counsel is $375.00 for Cristopher Guerrero; $475.00 for Robert J. Lee; $500.00 for Michael Tichenor; $475.00 for Patricia Preciado; and $150.00 for Legal Assistants/Clerks. The Court has considered all testimony presented on this issue, including the parties and their experts.

The Court is not aware of any attorney being awarded in Broward County the high hourly rates that Plaintiff's counsel seeks. Indeed, there is no evidence that any ***client*** actually pays these high hourly rates in property insurance cases, as the rates sought are strictly in the context of the insurance company paying when the plaintiff is a prevailing party. The fee award sought is in the nature of a contingency agreement—the plaintiff agrees to no fee if the plaintiff does not prevail. The insurance company has no choice here—if it loses the case, it must pay the reasonable fee as determined by the Court. The insurance company has no ability to "reject" the attorney if the hourly rate is too high. This Court is simply not willing to give Plaintiff's counsel these extraordinarily high hourly rates just because it says that's what it charges. To whom? Who willingly pays these rates? No one.

The Court is aware that Plaintiff's counsel are based in Miami-Dade County. This case was, however, filed in Broward County. The Court finds the awarded rates more in keeping with the rates customarily awarded in Broward County.

In making its ruling, the Court specifically considered the following factors in determining the reasonable hourly fee and the reasonable number of hours spent litigating this case:

A. The time and labor required, the novelty and difficulty of the question involved and the skill requisite to perform the legal service properly.

B. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

C. The fee customarily charged in the locality for similar legal services.

D. The amount involved and the results obtained.

E. The time limitations imposed by the client or by the circumstances.

F. The nature and length of the professional relationship with the client.

G. The experience, reputation, and ability of the lawyer or lawyers performing the services.

H. Whether the fee is fixed or contingent.

Additionally, based on controlling case law dealing with the issue of awarding of attorney's fees, the Court notes several guidelines to assist in determining whether a fee is reasonable:

• The Court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the case at issue. *Trumbull Ins. Co. v. Wolentarski*, 2 So.3d 1050, 1056-57 (Fla. 3d DCA 2009) [34 Fla. L.

Weekly D274a]; *Baratta v. Valley Oak Homeowners' Ass'n*, 928 So.2d 495, 499 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c]. In the instant case, the defense expert claims that Plaintiff's counsel was "over-thorough" in research and preparation. In reviewing the extensive times entries in this case, the Court agrees. Based on the Court's own experience in these cases, similar counsel representing similar plaintiffs certainly could have achieved the same result without the level of over-preparation which was the practice in this case. And while the Plaintiff may want an attorney who goes above and beyond what's usual in preparation, the Plaintiff should not expect that level of preparation to be placed on the shoulders of the non-prevailing party. As a result, in addition to the reductions conceded by Plaintiff's expert, the Court has made the appropriate reduction in number of hours expended in this case as follows for excessive and/or unnecessary work: for Mr. Lee 4.4 hours; for Mr. Tichenor 2.5 hours; for Mr. Guerrero 4.0 hours; for Ms. Preciado 0.4 hours; and for Legal Assistants/Clerks 0.75 hours.

• As a general rule, duplicative time charged by multiple attorneys working on the case is usually not compensable. *Baratta*, 928 So.2d at 499. An exception is for work that "reflects the distinct contribution of reach lawyer to the case." *Spanakos v. Hawk Systems, Inc.*, 48 Fla. L. Weekly D808a, D812-14 (Fla. 4th DCA April 19, 2023). Similar to the discussion in the paragraph above, the Court finds many time entries where Mr. Guerrero works on the exact same matters as Mr. Lee. Indeed, the Defendant points out that Mr. Guerrero billed for 57 hours of work that was also billed by Mr. Lee. This duplication of work was in essence done to provide some level of comfort to the attorneys that they are sufficiently prepared, but it is certainly beyond what is ordinarily billed by practitioners in the community. In addition to the reduction for duplicative work already conceded by Plaintiff's expert, and scrutinizing the entries for both attorneys on these dates, the Court finds that 6.7 additional hours do not reflect a "distinct" contribution of both lawyers. As a result, the Court has made the appropriate further reduction in number of hours expended in this case as follows for duplicative work: for Mr. Guerrero 3.4 hours; for Mr. Lee 2.9 hours; and for Mr. Tichenor 0.4 hours.

• The Court notes that some of the time sought was truly no more than clerical in nature, which could have simply be handled by a secretary or assistant. As a result, the Court has made the appropriate reduction in number of hours expended in this case as follows for clerical work: for Mr. Guerrero 0.2 hours; for Mr. Lee 0.2 hours; and for the Legal Assistants/Clerks 3.1 hours.

• The Court should also consider the amount of fees sought in relation to the amount in dispute. *See Progressive Express Ins. Co. v. Schultz*, 948 So.2d 1027, 1032-33 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D548b]. In determining whether the fee sought in this case is reasonable, the Court has therefore considered that this is a County Court case seeking less than $2,500.00 in damages.

• The Court should consider the nature of the defense, particularly whether the non-moving party went "to the mat" in the case. *See Progressive*, 948 So.2d at 1032. If the non-moving party took positions and actions to be litigious, it cannot now be heard to complain that it "invited the moving party to dance." *See Roco Tobacco Co. v. Div. of Alcoholic Beverages*, 934 So.2d 479, 482 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1826b]. Up until the confession of judgment was entered in this case, there was extensive litigation. The docket reflects 122 docket entries prior to settlement. Although this case involved a seemingly small amount of damages in relation to the fee sought, the Court notes that both parties engaged in zealous actions in litigating this case. The Defendant appears to agree as much by conceding that a fee of $43,240.00 would be reasonable for a case in which the Plaintiff recovered less than $2,500.00. However, on the whole, the Court finds that the Defendant's work in this case was measured in response to the Plaintiff's work, and as a result, the Court cannot conclude that the Defendant's actions in this case were "over-litigious."

• The Court should further consider whether it has received adequate documentation to support the number of hours claimed. As stated by the Florida Supreme Court, "inadequate documentation may result in a reduction in the number of hours claimed." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985). This is true because "Florida courts have emphasized the importance of keeping accurate and current time records of work done and time spent on a case, particularly when someone other than the client may pay the fee." *Id*. The Court finds Plaintiff's time records, as well as the documents brought to the hearing, were clearly adequate and sufficiently detailed to support the Court's fee award.

The ultimate goal of all the guidelines set forth above is to determine whether a fee is "reasonable." The Court therefore finds that 56.9 hours for Cristopher Guerrero, Esq. at an hourly rate of $375.00 is reasonable; 78.8 hours for Robert J. Lee, Esq. at an hourly rate of $475.00 is reasonable; 43.9 hours for Michael Tichenor, Esq. at an hourly rate of $500.00; 2.2 hours for Patricia Preciado, Esq. at an hourly rate of $475.00; and 14.85 hours for Legal Assistants/ Clerks at an hourly rate of $150.00 is reasonable.

In sum, the Court finds that the time awarded in this case was reasonable based on the conduct of the Defendant in denying the claim for damages; the zealous manner in which this particular case was defended; the amount of time the attorney needed to bring this case to a conclusion; the amount recovered; and the specific factors discussed in *Rowe*, *Bell*, and Rule of Professional Responsibility 4.1-5. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff shall recover the sum of **$83,990.00** (the reasonable attorney fee for the law firm that represented the Plaintiff, SUPREME MOLD TESTING, LLC) from the Defendant, CITIZENS PROPERTY INSURANCE CORPORATION, plus interest thereon at 6.58% per annum from December 8, 2022 to the date of this Judgment (*Clay v. Prudential*, 617 So.2d 443 (Fla. 4th DCA, 1993)), in the amount of **$3,073.66**, with costs taxed at **$3,039.95**, **for a total of $90,103. 61**, that shall bear interest at the rate of 6.58% per annum until paid, for which sums let execution issue. It is also

ORDERED AND ADJUDGED that Plaintiff's attorney fee expert, Russel Lazega, Esq., shall recover the sum of **$8,250.00**, which shall bear interest at the rate of 6.58% per annum until paid, for which sum let execution issue.

* * *

Insurance—Personal injury protection—Demand letter—Sufficiency—Presuit demand letter did not comply with statute where letter failed to accurately reflect previous amounts paid by insurer, and amount demanded differed from amount sought in complaint

SUNSHINE REGIONAL MEDICAL REHAB CENTER, INC., Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22045093. Division 73. June 28, 2023. Steven P. DeLuca, Judge. Counsel: Fesner Petion, for Plaintiff. Tracy Berkman, Law Offices of Leslie M. Goodman as Employees of Kemper, Doral, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION(S) FOR SUMMARY JUDGMENT AS TO DEMAND LETTER COMPLIANCE

THIS CAUSE having come before the Court at the special set hearing occurring June 21, 2023 on Plaintiff and Defendant's respective summary judgment motions, and the Court having reviewed the Motions, court file and relevant legal authorities, having heard argument of counsel and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED as follows:

1. At hearing before the Court on June 21, 2023 were Plaintiff's Motion for Partial Summary Judgment filed August 23, 2022 and Defendant's Motion for Final Summary Judgment filed May 10, 2023, both regarding the sufficiency of Plaintiff's pre-suit demand letter under Fla. Stat. § 627.736(10).

2. Plaintiff's summary judgment motions filed on June 19, 2023 (Plaintiff's Cross Motion for Final Summary Judgment and Plaintiff's Amended Cross Motion for Final Summary Judgment) are hereby stricken as untimely.

3. Pursuant to Fla. Stat. 627.736(10), a pre-suit demand letter is a condition precedent to filing a Personal Injury Protection ("PIP") lawsuit.

4. The issue before the court involves the level of sufficiency needed to comply with the requirements of Fla. Stat. § 627.736(10).

5. The Defendant alleged that Plaintiff's pre-suit demand letter failed to comply with the requirements based on the failure to accurately reflect previous amounts paid by the Defendant, and because the amount sought in the Complaint was not reflective of the amount demanded in the pre-suit demand letter.

6. Conversely, Plaintiff asserted that the pre-suit demand letter complied with the requirements of Fla. Stat. § 627.736(10) because it attached a ledger thereto, satisfying the intended purpose of giving Defendant notice that Plaintiff intended to file suit.

7. Based on the argument of counsel and case law, the Court finds Plaintiff's argument unpersuasive based on the opinion in *Chris Thompson, P.A. a/a/o Elmude Cadau v. Geico Indem. Co.*, 347 So. 3d 1 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1588b] ("Thompson Case").

8. The *Thompson Case* and the instant litigation share several commonalities. In both circumstances, the insurer issued significant payment to the plaintiff provider prior to receipt of the demand letter. In both instances, the insurer declined additional payment and suit was filed by the plaintiff provider, and in both instances. The complaint sought an amount different than that demanded in the pre-suit demand letter. The Fourth District Court of Appeal ("4th DCA") upheld summary judgment in the insurer's favor based on a failure to comply with the specific requirements of Fla. Stat. § 627.735(10).

9. In making this holding, the 4th DCA found that subsection (10) "requires precision in a pre-suit demand letter" and, quoting *MRI Assocs. of Am., LLC v. State Farm Fire & Cas. Co.*, 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b], held that the statute mandates identification of the specific amount at issue, and that such a requirement of precision was to discourage gamesmanship. Moreover, the 4th DCA held that the demand letter statutory requirements are "significant, substantive preconditions to bringing a cause of action for PIP benefits." *Chris Thompson*, 347 So. 3d at 2 (*quoting MRI Assocs. of Am., LLC v. State Farm Fire & Cas. Co.*, 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]) (*citing Rivera v. State Farm Mut. Auto. Ins. Co.*, 317 So. 3d 197, 205 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]).

10. The 4th DCA found that because the demand letter was not precise in the amount claimed to be due (based in part on the discrepancy between the amounts demanded in the pre-suit demand letter and the amount sought in the complaint), it was "hardly precise." *Chris Thompson*, 347 So. 3d at 3. "A demand letter that complies with the statute permits the insurer to accurately evaluate its decision to pay the claim or litigate." *Id*. at 2 (internal citations omitted).

11. With respect to Plaintiff's argument that the intended purpose of the pre-suit demand letter was to give Defendant notice that Plaintiff intended to file suit, the 4th DCA has addressed this proposition directly and stated: "the 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." *Id*. (*quoting Rivera*, 317 So. 3d at 204)); *see also MRI Assocs. of Am., LLC v. State Farm Fire & Cas. Co.*, 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b] (holding that the statute requires the same precision in the pre-suit demand requirements as in subsection 627.736(5)(d)).

12. In short, the 4th DCA has held that "[t]he statutory requirements surrounding a demand letter are significant, substantive preconditions to bringing a cause of action for PIP benefits." *MRI Assocs. of Am., LLC v. State Farm Fire & Cas. Co.*, 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b].

13. Based on the rulings of the 4th DCA, the Court finds that the Plaintiff failed to meet the requirements of Fla. Stat. 627.736(10) and must therefore deny Plaintiff's motion and enter final summary judgment in favor of Defendant.

14. Defendant's Motion for Final Summary Judgment is **GRANTED.**

15. Plaintiff's Motion for Partial Summary Judgment as to Defendant's Second Affirmative Defense of Defective Demand and Memorandum of Law in Support Thereof is **DENIED.**

* * *

Insurance—Arbitration—Confirmation of award—Judgment must be entered in accordance with arbitrator's decision where parties did not request trial de novo within 20 days of service of arbitrator's decision

AUBREY BURGHER, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21047888. Division 53. June 28, 2023. Robert W. Lee, Judge.

FINAL JUDGMENT ON ARBITRATOR'S DECISION IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court for consideration on the Defendant's Motion for Entry of Judgment, the Notice of Filing Arbitration Award filed by the Arbitrator, Joyce A. Julian, and the Court's having reviewed the docket, the entire Court file, the relevant legal authorities, and having been otherwise fully advised in the premises, the Court finds as follows:

This case was submitted to mandatory non-binding arbitration. The arbitrator served her decision on June 5, 2023. Under Rule 1.820(h), Fla. R. Civ. P., a motion for trial de novo must be "made" within 20 days of the "service" of the arbitrator's decision. Under Florida law, "a party has the right to move for a trial within twenty days after service of the arbitrator's decision. If no motion for trial is timely served, then the trial 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).

The Plaintiff failed to timely reject the Arbitrator's decision and request a trial de novo or otherwise failed to dispose of the case of record within the de novo deadline. The Plaintiff's request for trial de novo was required to be filed *no later than* June 26, 2023. The Court has confirmed with the Clerk that the docketing for this case is current, and neither party filed a timely request. Moreover, Defendant promptly moved for judgment on the arbitrator's decision, and the docket does not reflect that the Defendant engaged in any "gotcha" tactics.

Accordingly, the Court has this day unsealed the Arbitrator's decision and as a result, the Court hereby enters judgment in accordance with the Arbitrator's decision that finds in favor of the Defen-

dant. The Arbitration Decision reflects that the arbitrator appropriately considered the parties' arguments, as well as their submitted evidence. Rule 1.820(c). It is hereby

ORDERED AND ADJUDGED THAT:

The Plaintiff shall take nothing in this action and the Defendant shall go hence without day. The Court reserves jurisdiction on any issue of attorney's fees and costs.

The pretrial conference set for Friday, June 30, 2023 is hereby CANCELED.

* * *

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September 29, 2023
Cite as 31 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Family member affiliations—Judge may preside over cases involving law enforcement agency for which judge's spouse works as long as the judge does not preside over cases in which judge's spouse is involved—Judge may approve search warrants or arrest warrants originating from spouse's law enforcement agency as long as judge's spouse did not author the affidavit for the warrant and was not involved in the investigation from which the warrant was created—Judge may preside over first appearance hearings involving spouse's law enforcement agency if judge's spouse had no involvement in the case—A judge whose spouse is a law enforcement officer is not required to automatically disclose that relationship

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-05. Date of Issue: June 20, 2023.

ISSUES

1. May the judge preside over cases that involve the police agency for which the judge's spouse works?

ANSWER: Yes, as long as the judge does not preside over any case where the judge's spouse is involved.

2. May the judge approve search warrants or arrest warrants originating from the agency for which the judge's spouse works?

ANSWER: Yes, as long as the judge's spouse did not author the affidavit for the warrant and was not involved in the investigation from which the warrant was created.

3. May the judge conduct first appearance hearings for defendants arrested by the agency for whom the judge's spouse works?

ANSWER: Yes, as long as the judge's spouse had no part in the arrest of the persons brought before the judge at first appearance.

4. Is the judge required to disclose the judge's relationship with the judge's spouse whenever cases from the sheriff's office are brought before the judge?

ANSWER: No.

FACTS

The inquiring judge was recently appointed to the bench. The judge will not preside over criminal cases, but instead will preside in family court. The judge is married to a deputy sheriff. The deputy serves in a supervisory role within the sheriff's office. The judge seeks to determine what impact, if any, the judge's relationship will have on the judge's ability to preside over cases involving the sheriff's office or any deputy sheriff. Specifically, the judge questions whether, when serving as a duty judge or covering for a colleague, the judge must recuse from cases involving the sheriff's office or must disclose the judge's relationship when presiding over cases arising from the sheriff's office. The following Canons and Commentary to the Canons of Judicial Conduct offer guidance:

- Canon 2B states, "a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."
- Canon 3E(1) states, "a judge shall disqualify himself or herself where his or her impartiality might reasonably be questioned.
- Canon 3E(1)(d)(iii) advises a judge shall disqualify himself or herself where the judge or the "judge's spouse . . . is known by the judge to have more than a *de minimis* interest that could be substantially affected by the proceeding; or is to the judge's knowledge likely to be a witness in the proceeding."
- Commentary to Canon 3E(1) requires a judge to disclose on the record any information the judge believes the parties or their attorneys might consider relevant to disqualification, even if the judge believes there is no real basis for disqualification.

The issues and concerns presented here are not of the first impression. We have previously noted that inquiries such as this must be considered on a case-by-case basis. Fla. JEAC Op. 2003-08 [10 Fla. L. Weekly Supp. 1064a]. *See also* Fla. JEAC Op. 2002-15 [9 Fla. L. Weekly Supp. 647b], (whether a judge may preside over cases that have some intersection with the employment of the judge's spouse depends upon the relationship of the employing entity to the judge and the spouse's degree of participation).

In Fla. JEAC Op. 93-18, a traffic magistrate was married to a sheriff's deputy. The magistrate inquired as to whether that relationship required the magistrate to refrain from hearing matters originating from the sheriff's office. A unanimous JEAC concluded that the magistrate's relationship with a member of the sheriff's office did not require disqualification from all sheriff's office cases. One member of the Committee noted it is "obvious" that the magistrate cannot hear cases where the magistrate's spouse was involved in the investigation. In Fla. JEAC 96-15, the nine members of the Committee unanimously agreed a judge whose son was deputy sheriff and a lawyer would not be disqualified from hearing cases brought by the sheriff's office that did not involve the judge's son. In Fla. JEAC Op. 2007-11 [14 Fla. L. Weekly Supp. 897b], the Committee received an inquiry from two judges whose relatives worked at the local sheriff's office. The spouse of one judge and the son of the other judge were both deputy sheriffs. We concluded the employment of the judges' family members with the sheriff's office was not, in and of itself, grounds for disqualification. We also concluded that disclosure was not necessary, unless the judge believed that his or her impartiality might reasonably be questioned, which would happen if that judge's relative was directly or indirectly involved in a case before that particular judge.

In Fla. JEAC Op. 2018-13 [26 Fla. L. Weekly Supp. 251a], the inquiring judge was married to an assistant public defender who served as a supervisor in the diversion courts over which the judge was to preside We concluded the judge should not preside over cases in that division. We clarified that the judge could preside over a non-diversion court related criminal docket, first appearance hearings, plea hearings or cover for colleagues when the inquiring judge's spouse is not the attorney of record and did not have supervisory authority.

Considering the facts presented here, we believe the inquiring judge may preside over cases that involve the sheriff's office as long as the judge's spouse is not directly involved as an arresting or supervising deputy. We also believe it is proper for the judge to sign search warrants from the sheriff's office as long as the judge's spouse is not the author of the affidavit or warrant and has no discernable direct involvement in the case. It is also appropriate for the inquiring judge to conduct first appearance hearings of defendants arrested by the sheriff's office as long as the judge's spouse did not participate in the arrest. Finally, we do not believe that it is necessary for the inquiring judge to disclose the judge's relationship whenever a case from the sheriff's office happens to be brought before the judge. This is partly because the judge is assigned to the family law division, but it is also because it is "obvious" that the judge may not preside over any case in which the judge's spouse is involved. If the inquiring judge believes that his or her impartiality might reasonably be questioned, he or she should disclose the relationship.

REFERENCES

Canon 2B; Canon 3E(1); Canon 3E(1) and Canon 3E(d)(iii) Commentary to Canon 3E(1)
Fla. JEAC Ops. 93-18; 96-15; 2002-15; 2003-08; 2007-11; and 2018-13

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Bar associations and organizations—Judge may speak to association of state prosecutors regarding how to address issues that arise when dealing with a specific type of litigant so long as judge complies with Canon 2A

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-06. Date of Issue: July 18, 2023.

ISSUE

Whether a judge may speak to an association of state prosecutors regarding how to address issues that arise when dealing with a specific type of litigant.

ANSWER: Yes, so long as the judge complies with Canon 2A.

FACTS

The inquiring judge has been invited to speak to an out-of-jurisdiction association of state prosecutors. The topic concerns a very specific class of litigants and how judges can deal with the issues that arise when they encounter these litigants in court. The inquiring judge has lectured on this topic to judges across the country, but is concerned with whether the Florida Code of Judicial Conduct prohibits addressing a group consisting solely of prosecutors.

DISCUSSION

Judges are explicitly "encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice." Fla. Code Jud. Conduct, Canon 4B. As a result, this Committee has advised judges that they may teach lawyers and nonlawyers about a range of topics in a variety of settings. These have included:

- Writing columns on legal issues and the judicial system. *See* Fla. JEAC Op. 1999-14 (judge may write a short monthly column in the local newspaper on the judicial system in his county); Fla. JEAC Op. 1995-37 [3 Fla. L. Weekly Supp. 559b] (judge may write a biweekly column concerning the issue of attorney's fees in the Daily Business Review).
- Speaking to community groups about legal issues. *See* Fla. JEAC Op. 2006-30 [14 Fla. L. Weekly Supp. 193b] (judge may speak to various community groups, including parent/teacher organizations, regarding the dangers of online predators); Fla. JEAC Op. 1982-06 (judge may lecture to a group of non-attorneys who are interested in landlord-tenant law).
- Teaching law courses. *See* Fla. JEAC Op. 1997-26 (judge may teach a church law course at an accredited religious university); Fla. JEAC Op. 1977-14 (judge may teach a graduate seminar in juvenile justice and family law); Fla. JEAC Op. 1976-21 (judge may teach criminal justice at a community college).
- Participating in panel discussions about legal issues that arise in the criminal justice system. *See* Fla. JEAC Op. 2023-03 [31 Fla. L. Weekly Supp. 48a] (judge may serve as keynote speaker for a non-partisan victims' rights event presented by the district's state attorney's office, police departments, county sheriff's office and victims' shelter); Fla. JEAC Op. 2006-17 [13 Fla. L. Weekly Supp. 1118a] (judge may participate in a panel discussion sponsored by Mothers Against Drunk Driving on the problem of underage drinking); Fla. JEAC Op. 2020-03 [28 Fla. L. Weekly Supp. 906a] (judge may participate in a panel discussion regarding the issue of human trafficking).
- Training participants in the judicial system. *See* Fla. JEAC Op. 2015-04 [41 Fla. L. Weekly S143a] (judge can teach at a training session for judges, magistrates, and court staff on how to deal with domestic violence issues); Fla. JEAC Op. 2022-03 [30 Fla. L. Weekly Supp. 134a] (judge who presides over criminal cases may make a presentation about the criminal justice system, including about courtroom procedures and etiquette, to doctors and investigators at the local Medical Examiner's office); Fla. JEAC Op. 1987-3 (judge may lecture at a legal seminar sponsored by the Academy of Florida Trial Lawyers).
- Training law enforcement officers. *See* Fla. JEAC Op. 2020-20 [28 Fla. L. Weekly Supp. 561a] (judge may educate federal law enforcement officers on False Claims Act issues); Fla. JEAC Op. 2005-11 [12 Fla. L. Weekly Supp. 1197b] (judge may teach at the police academy).

These opinions all point in the same direction. So long as the judge complies with Canon 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), the Code does not prohibit a judge from teaching a homogenous group about the law. We acknowledge, however, that Fla. JEAC Op. 2008-21 [15 Fla. L. Weekly Supp. 1238b] creates some doubt because the Committee, opining on the propriety of a judge teaching an educational/trial skills course at a Dependency Court Improvement Summit sponsored by the Department of Children and Families, stated that

> the judge should ensure that the course is intended to provide an educational benefit for all attendees. The course should not be designed or taught in a manner that would appear to constitute a training session for DCF attorneys. To tailor the course solely for the benefit of DCF attorneys would tend to cast reasonable doubt on the judge's capacity to act impartially as a judge.

Id. We recede from this opinion to the extent that it implies that a judge cannot teach a seminar for a homogenous audience. Such a conclusion would contradict other opinions we have cited in this opinion.

Of course, as we have repeatedly stressed, "the inquiring judge [must] be careful not to comment on pending cases, not to answer hypothetical questions in a way that appears to commit to a particular position, and not to make any other remarks that could lead to disqualification or be construed as an indication as to how the judge would rule in a particular case." Fla. JEAC Op. 2006-30 [14 Fla. L. Weekly Supp. 193b]. In addition, in Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b] we provided a list of "factors for a judge to consider when deciding whether to engage in an extrajudicial or quasi-judicial activity with or without compensation." We explained that "[i]f the answer to any one of the following eight questions is yes, then it is recommended the judge decline to engage in the activity." The eight factors are:

1. Whether the activity will detract from full time duties;
2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;
3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;
4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;
5. Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;
6. Whether the activity will create any other conflict of interest for the judge;
7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and
8. Whether the activity will lack dignity or demean judicial office in any way.

So long as the inquiring judge complies with these guidelines, we see no reason why the inquiring judge cannot speak to a prosecutor's association.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A; 4B
Fla. JEAC Ops. 1976-21; 1977-14; 1982-06; 1987-3; 1995-37; 1997-26; 1999-14; 2005-11; 2006-17; 2006-30; 2008-21; 2015-04; 2019-2; 2020-03; 2020-20; 2022-03; 2023-03

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