Volume 31, Number 6, October 31, 2023

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 283-330

**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—LIMITATION OF ACTIONS—STATUTE OF REPOSE—DESIGN, PLANNING, OR CONSTRUCTION OF IMPROVEMENT TO REAL PROPERTY. A homeowner's association brought an action asserting claims for building code violations, negligence, vicarious liability, and breach of implied warranties against a developer who constructed townhomes in the development and sold them to individual purchasers. The developer raised the ten-year statute of repose in section 95.11(3)(c) as an affirmative defense. The circuit court granted the plaintiff's motion for partial summary judgment on this defense. Concluding that the statute of repose applied to the townhouse community as a whole, not to individual units, the court held that the plaintiff's suit was not time-barred where it was filed within ten years of the issuance of the last certificate of occupancy for the community.** *BEACON PARK PHASE II HOMEOWNERS ASSOCIATION, INC. v. D.R. HORTON, INC. Circuit Court, Ninth Judicial Circuit in and for Orange County. Filed August 17, 2023. Full Text at Circuit Courts-Original Section, page 287b.*

- **TORTS—TRIP AND FALL—SIDEWALKS. The circuit court entered summary judgment in favor of the city in an action brought by a plaintiff who was injured when she tripped and fell on an uneven section of sidewalk where two concrete panels met. The court concluded that a change in elevation of 9/16 of an inch between sidewalk slabs was not, as a matter of law, a dangerous condition.** *DESIMONE v. CITY OF SARASOTA. Circuit Court, Twelfth Judicial Circuit in and for Sarasota County. Filed June 27, 2023. Full Text at Circuit Courts-Original Section, page 298a.*

- **INSURANCE—PROPERTY—INSURED'S ACTION AGAINST INSURER—CONDITIONS PRECEDENT. A notice of intent to initiate litigation that included a proper claim number was sufficient to satisfy the pre-suit notice requirements of section 627.70152, Florida Statutes (2021).** *HENRY v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed July 21, 2023. Full Text at Circuit Courts-Original Section, page 304a.*

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# FLW SUPPLEMENT

**CASES REPORTED.**

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

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

**Subject Matter Index and Tables**

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

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

**Bold** denotes decision by circuit court in its appellate capacity.



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**CIVIL PROCEDURE (continued)**



**CONSUMER LAW**



**CONTRACTS**



**COUNTIES**



**CRIMINAL LAW**

**TABLE OF CASES REPORTED (continued)**



* * *

**TABLE OF STATUTES CONSTRUED**

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



**TABLE OF STATUTES CONSTRUED (continued)**



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**TABLE OF CASES TREATED**

*Case Treated / In Opinion At*

**TABLE OF CASES TREATED (continued)**



**TABLE OF CASES TREATED (continued)**



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**REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS**



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# CIRCUIT COURTS—APPELLATE

**Counties—Code enforcement—Fire code—Appeals—Jurisdiction—County board of rules and appeals departed from essential requirements of law and deprived motel owner of procedural due process by denying appeal of fire prevention code violations for lack of jurisdiction where motel owner filed appeal using board's printed form, purpose of appeal fell within form's pre-printed selections, and board denied appeal without written findings or explanation**

PLANTATION HOSPITALITY GROUP, LLC, Petitioner, v. BROWARD COUNTY BOARD OF RULES AND APPEAL, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-018528 (AP). Administrative Case No. CE-22-00756. July 20, 2023. Petition for Writ of Certiorari from Petitioner, Plantation Hospitality Group, LLC. Counsel: Richard G. Coker, Jr., Coker & Feiner, Ft. Lauderdale, for Petitioner. Charles M. Kramer, Benson, Mucci & Weiss, P.L., Coral Springs, for Respondent. Kerry L. Ezrol, Goren, Cherof, Doody & Ezrol, P.A., Ft. Lauderdale, for Amici.

## FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(**PER CURIAM**.) This cause comes before the Court for consideration on Petitioner, Plantation Hospitality Group, LLC's Petition for Writ of Certiorari. Having carefully considered the Petition for Writ of Certiorari, the Response, the Reply, the Exhibits and appendixes, the record, and the applicable law, and being otherwise duly advised, this Court dispenses with oral argument, the Petition for Writ of Certiorari is hereby **GRANTED** and the Broward County Board of Rules and Appeal's denial of Petitioner's administrative appeal based on a lack of jurisdiction is hereby **QUASHED**.

Petitioner is the owner of a motel in the City of Plantation in Broward County (The Plantation Inn). Respondent is an entity established by Special Act Chapter 71-575 of the Laws of Florida and incorporated in Article IX, § 9.02 of the Broward County Charter. Respondent is the administrative, quasi-judicial body designated with jurisdiction to hear appeals on alleged violations of the Florida Fire Prevention Code (FFPC) in Broward County.

On November 17, 2022, Respondent, voted unanimously to approve an *ore tenus* motion to deny Petitioner's appeal of a March 23, 2022, Notice of Violation of FFPC NFPA Fire Code § 18.2.3.5.4 issued by the City of Plantation Fire Marshall. No written order was rendered by Respondent relating to the November 17, 2022, hearing. This Court relies upon the transcript provided.

Subsequent to receiving the March 23, 2022, Notice of Violation, Petitioner filed a "Broward County Board of Rules and Appeals, Appeal Application" on August 24, 2022. The Appeal Application is the official form of the Respondent that is required to invoke the Board's appellate jurisdiction over decisions made by municipal Fire Code Officials (Fire Marshals) in Broward County. The Appeal Application form leaves a space open for the appellant to fill in the municipality (Plantation) and a box for appellant to check relating to the specific Code that is at issue (Florida Fire Prevention Code). The Appeal Application form filed by Petitioner includes: "We, the undersigned, appeal the decision of the Building Fire Code Official of Plantation as it pertains to . . . (check one) . . . (X) Florida Fire Prevention Code."

Respondent does not contend that Petitioner's appeal of the Fire Code violation was untimely. Further, Respondent does not contend that it was divested of jurisdiction to hear the appeal based on any other law or procedural flaw in Petitioner's filing of the administrative appeal.

Petitioner therefore established Respondent's jurisdiction to hear the issues on appeal by and through Respondent's own formal procedure to invoke said jurisdiction.

Pursuant to the hearing Transcript in the record, Petitioner, by and through counsel, provided two legal issues as the basis for its challenge to the Notice of Violation, in that it "was two-fold . . . the Plantation Inn has been an existing building since 1968 at least, and under the code, you cannot retroactively apply this section of the code without a finding that such application would prevent an imminent danger and no such finding has been made . . ., and secondly, it [the fire protection services apparatus] still has access through the Medical One fire access gate, so it has access beyond 150 feet for a turnaround." However, this Court need not consider the merits of these issues at this point as a consequence of Respondent's departure from the essential requirements of law and the deprivation of due process of law resulting from Respondent's decision that it lacked jurisdiction to rule on the substantive issues of Petitioner's appeal.

On November 17, 2022, after hearing testimony and reviewing other evidence, Mr. Pellecer, a member of Respondent, Broward County Board of Rules and Appeals, made an *ore tenus* motion to deny Petitioner's appeal. The motion was seconded and the board voted unanimously to approve the motion. Prior to the vote, Mr. Pellecer stated: "Just in closing my motion . . . [w]e don't have any jurisdiction over this, so that's why my motion was made. This Board should not be ruling on this. This is something for a judge to rule on, not us."

Petitioner framed two specific and relevant issues on appeal. The uncontroverted facts agreed to by the parties were that the motel structure predated the adoption of the current Fire Code. The first issue, as to whether the Fire Marshal had made a finding, as required by the Fire Code, either on or before the issuance of the Notice of Violation, that the "existing situation constitutes an imminent danger" was relevant to the retroactive application of the Fire Code to Petitioner's property and it was a factual issue to be determined at the hearing. If the Fire Marshal had not made such a finding, then the current provision of the Fire Code under which Petitioner was being cited would not apply. If the cited provision of the Fire Code did not apply, then the Respondent had the obligation to grant Petitioner's appeal and quash the Notice of Violation. Accordingly, this issue was within the jurisdiction of Respondent and Respondent had to make a finding in regard to this issue.

The second issue that Petitioner framed on appeal to Respondent involved an interpretation of the cited Fire Code provision, as a matter of law, and a factual finding as to whether the Code applied and whether Petitioner was in compliance with Respondent's interpretation of the Fire Code. If in fact the alleyway was in excess of 150 feet in length but the access to a turnaround for fire protection apparatus through a fire gate maintained by a third party in compliance with the Fire Safety Code met the requirements of the Code, then the Respondent had the obligation to grant Petitioner's appeal and quash the Notice of Violation. The Respondent had both the authority and duty to address the issues on appeal and to go on the record as to the meaning of the Code provision with a determination as to whether Petitioner was or was not in compliance within the meaning of the Code.

In either case, the Respondent had a duty as the administrative appellate body with jurisdiction to address the substantive issues on appeal to make a determination as to the meaning of the operative Code provisions with an additional determination as to whether Petitioner was or was not in compliance within the meaning of those Code provisions. This was the entire purpose of the appellate evidentiary hearing.

An appellate court may raise jurisdiction *sua sponte* even where neither party raises the issue. *See Guernsey v. Haley,* 107 So.2d 184, 186 (Fla. 2nd DCA 1958)("This court recognizes and approves the general rule that an appellate court should confine the parties to the points raised and determined in the court below and briefed in this court on assignment of errors before the court, but there is a well-recognized exception to the general rule that appellate courts may raise a question for the first time on appeal where the question is jurisdictional.")

In addressing Respondent's denial on the basis of jurisdiction, this Court finds that Petitioner properly filed an appeal using Respondent's own form. That the purpose of the appeal fell within the form's pre-printed selections (ie. Violation of the Florida Fire Prevention Code). That Respondent denied Petitioner's appeal on the basis of a lack of jurisdiction without written findings or explanation. That based on the hearing Transcript in the court record, no legal basis was orally provided by movant while making the motion. That no explanation or reasoning was provided to support the decision to deny the appeal on jurisdictional grounds. And that in doing so, Respondent prevented Petitioner from having its appeal heard on the merits and thereby violated Petitioner's procedural due process rights. The record and Respondent's Response provide no justification for the decision.

Respondent's denial of jurisdiction over the issues framed in Petitioner's appeal departed from the essential requirements of law, denied Petitioner of its due process right to appeal the Notice of Violation, and left Petitioner without administrative remedy.

Accordingly, based upon the above,

It is hereby **ORDERED** that Petitioner's Petition for Writ of Certiorari is **GRANTED,** and the Broward County Board of Rules and Appeal's denial of Petitioner's administrative appeal based on a lack of jurisdiction is hereby **QUASHED**. (J. BOWMAN, J. LEVENSON, and Y. GAMM, JJ., Concur.)

* * *

**Municipal corporations—Development orders— Appeals— Certiorari—Standing—Residents living within 500 feet of property had standing to challenge approval of site plan that was based on illegally granted height variance—After height variance was quashed in prior certiorari proceedings, site plan was no longer in compliance with applicable zoning regulations, and town did not follow essential requirements of law in approving plan**

RICHARD CRUSCO, et al., Petitioners, v. TOWN OF HILLSBORO BEACH, et al., Respondents. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-003094. Admin. Hearing Re: February 1, 2022, Development Order regarding 1174-1185 Hillsboro Mile. July 20, 2023. Petition for Writ of Certiorari from Petitioners, Richard Crusco, Charles Doherty and Frank J. Kolb Jr. Counsel: Ralf Brooks, Cape Coral, for Petitioners. Martin J. Alexander, Miami; Jeffery Scott Bass, Shubin & Bass, Miami; and Donald J. Doody, Hillsboro Beach, for Respondents.

## FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) This cause, comes before the Court for consideration on Petitioners', Richard Crusco, Charles Doherty and Frank J. Kolb Jr's "Petition for Writ of Certiorari," filed on March 1 , 2022. Having carefully considered the Petition on its own merits separate from our April 21, 2023, Order in a related case, the Appendixes, and the applicable law, being otherwise duly advised, the Petition for Writ of Certiorari is hereby **GRANTED** and the Final Order is hereby **QUASHED** for the reasons discussed below.

*Factual and Procedural History*

Hillsboro Mile Property Owner, LLC ("the Applicant") is the owner of real property located at 1174-1185 Hillsboro Mile ("the Property") in the Town of Hillsboro Beach ("Hillsboro"). The Applicant, Hillsboro and Eric Fordin are co-defendants in this case and shall be collectively referred to herein as "Respondents." The Applicant is the developer of the Residences at Hillsboro Mile Project that was the subject of the proceedings below. Charles Doherty, Richard Crusco and Frank J. Kolb Jr. (referred to herein collectively as "Petitioners") are all residents of Hillsboro Beach who reside within 500 feet of the Property.

The Property is zoned as RM-16, as a Multiple-Family Dwelling Residential District, by the Town of Hillsboro Beach. Hillsboro's Land Development Code ("Code"), section 12-142, limits the height of structures erected within the RM-16 district to prohibit their construction or alteration to a height exceeding 35 feet, or three stories above dune elevation.

On December 17, 2021, the Applicant submitted a revised site plan to Hillsboro. The December 17, 2021, revised site plan proposed a 130-foot tall building with 102 units. On January 11, 2022, a variance request was approved by the Board at a public meeting to allow for the construction of the 130-foot tower pursuant the December 17, 2021, revised site plan. On February 1, 2022, the Board approved the site plan at issue herein at a subsequent public meeting.

Petitioners timely filed two separate petitions for writ of certiorari on March 1, 2022. One petition challenged the Board's grant of the height variance and the other, at issue herein, challenges the Board's approval of the site plan. On April 21, 2023, this Court granted Petitioner's petition for writ of certiorari quashing the Board's grant of the height variance, finding: 1) Petitioners had standing to challenge the Board's zoning action granting the height variance, 2) Petitioners procedural due process rights were not violated during the January 11, 2022, hearing regarding the height variance and 3) the essential requirements of law were not followed in the granting of the height variance because the Board made no finding that no reasonable use could be made of the property without the variance.

*Standard of Review*

On a petition for writ of certiorari seeking review of the decision of an administrative agency, the reviewing court is limited to a three-part standard. *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The court must review the record to determine whether: (1) procedural due process is accorded; (2) essential requirements of the law have been observed; and (3) administrative findings and judgment are supported by competent, substantial evidence. *Id.* If the Court determines that any one of the three requirements was not met, the Court can only quash the order below but not enter an order to the contrary. *See Nat'l Adver. Co. v. Broward Cnty.,* 491 So. 2d 1262 (Fla. 4th DCA 1986) ("A court's certiorari review power does not extend to directing that any particular action be taken but is limited to denying the writ of certiorari or quashing the order reviewed.").

*Standing of the Parties*

Respondents maintain Petitioners lack standing to challenge the variance in question. For a court of law operating as one of the three branches of government under the doctrine of the separation of powers, standing is a threshold issue which must be resolved before reaching the merits of a case. *Solares v. City of Miami,* 166 So. 3d 887, 888 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]. Before a court can consider whether an action is illegal, the court must be presented with a justiciable case or controversy between parties who have standing. *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So.2d 374, 376 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D719a] ("The issue of standing is a threshold inquiry which must be made at the outset of the case before addressing [the merits].").

Herein, the Petitioners are all residents who live within 500 feet of

the Property. Charles Doherty and Richard Crusco both reside at 1194 Hillsboro Mile. Frank J. Kolb Jr. resides at 1173 Hillsboro mile, on the parcel directly south of the property that was granted the variance at issue. Thus, Petitioners will be adversely affected by the variance to a greater extent than the community in general. *See Renard v. Dade County,* 261 So. 2d 832 (Fla. 1972). The right of an adjacent or nearby home-owner directly affected by zoning action to sue is generally recognized. *Id.*; *see Elwyn v. City of Miami,* 113 So. 2d 849, 853 (Fla. 3d DCA 1959). Thus, as neighboring and proximate property owners, Petitioners have a cognizable right to sue and thus have standing.

*Approval of the Site Plan*

In their Petition, Petitioner's argue that the Board should not have approved the site plan because its approval was premised on an illegally granted height variance. Hillsboro's code outlines site plan approval standards which require compliance with "all applicable town zoning ordinances and regulations." Hillsboro Beach, Fla., CODE OF THE TOWN OF HILLSBORO BEACH ch. 12 , § 12-48(F). The record establishes the Property is located in an area zoned as RM-16, as a Multiple-Family Dwelling Residential District by the Code. The heights of buildings in areas zoned as RM-16 districts are limited to 35 feet, or three stories above dune elevation. *Id. at* § 12-142(A). In order to bring their site plan into compliance with all applicable town zoning regulations, it was necessary for Applicant to seek a height variance from the Board.

Petitioners argue that Hillsboro failed to follow the essential requirements of law when it relied on an illegally granted height variance when it granted the final site plan approval for the Property. This Court granted Petitioner's petition for writ of certiorari quashing Hillsboro's grant of the height variance on April 21, 2023. Thus, Applicant's site plan is not in compliance with all applicable zoning regulations, specifically, the height restriction on buildings constructed in a RM-16 district. Therefore, Petitioners have demonstrated Hillsboro did not follow the essential requirements of law when granting the subject site plan.

Accordingly, it is hereby **ORDERED** that the Petition for Writ of Certiorari is **GRANTED**. (BOWMAN, LEVENSON, and GAMM, JJ., concur.)

* * *

**Appeals—Dismissal—Failure to file initial brief**

BPL, LLC, Plaintiff, v. CITY OF FORT LAUDERDALE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23012653. Division AP. July 26, 2023.

**FINAL ORDER OF DISMISSAL**

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated June 13, 2023. Appellant was directed by this Court to file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. As of the date of this Order Appellant has failed to comply with this Court's June 13, 2023, Order and file an Initial Brief and Appendix.

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

* * *

CITY OF DEERFIELD BEACH, Plaintiff, v. MATTHEW ADAMS, et al., Defendants. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23012523. Division AW. August 8, 2023.

**ORDER ADOPTING JOINT STIPULATION FOR DISMISSAL**

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the Joint Stipulation of Dismissal, dated July 25, 2023. Upon review of the stipulation and Court file, this Court finds as follows:

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

* * *

TODD E. MCGUIRE, et al., Plaintiff, v. CITY OF TAMARAC, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22015747. Division AP. July 19, 2023.

**ORDER OF DISMISSAL**

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the Notice of Settlement and Stipulation of Voluntary Dismissal, dated June 8, 2023. Upon review of the stipulation and Court file, this Court finds as follows:

The Notice of Settlement and Stipulation of Voluntary Dismissal is hereby **ACCEPTED** by this Court. The Broward County Clerk of Courts is **DIRECTED** to close this case as "disposed" of by way of stipulation for voluntary dismissal.

* * *

**Licensing—Driver's license—Hardship license—Suspension—Early reinstatement—Denial—Appeals—Certiorari—Absence of transcript of administrative hearing that resulted in denial of application for early reinstatement of hardship license—Petition for certiorari review denied—Further, request for immediate reinstatement of hardship license was rendered moot when licensee's full driving privileges were restored upon expiration of 6-month revocation period**

CHARLES JOHN KICKI, JR., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 21-06-AP. July 25, 2023. Counsel: Michael Lynch, Former Assistant General Counsel, DHSMV, for Respondent.

**ORDER DENYING WRIT OF CERTIORARI**

(JESSICA RECKSIEDLER, J.) Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' Final Order Denying Early Reinstatement issued on November 4, 2021. This Court has jurisdiction pursuant to section 322.31, Florida Statutes (2023), and Florida Rule of Appellate Procedure 9.030(c)(3).

**BACKGROUND**

On September 2, 2021, Petitioner was arrested for driving under the influence (DUI). After his arrest, he provided breath samples yielding breach alcohol results of .08 or higher, which resulted in the suspension of his driving privilege for six months pursuant to section 322.2615(1), Florida Statutes. On September 6, 2021, Petitioner completed a Request for Eligibility Review, requesting a review of his record for the purpose of determining his eligibility for immediate reinstatement of his driving privilege on a restricted basis, for "Business Purposes Only." On September 9, 2021, a review waiver hearing was conducted pursuant to section 322.271(7) at which Petitioner received reinstatement of his driving privilege on a restricted basis. Petitioner was informed at the hearing that his restricted driver license would no longer be valid upon a conviction of the DUI.

On October 14, 2021, Petitioner was convicted of the DUI that caused the initial suspension of his driving privilege. His driving privilege was revoked for six months due to the conviction. On October 16, while his license was revoked, Petitioner was driving his vehicle when he was stopped by a Seminole County Sheriff's Office deputy. Petitioner stated to the deputy that he knew his license was

suspended.

On November 4, 2021, an administrative hearing was conducted to determine whether Petitioner should be granted a hardship license. The hearing officer considered Petitioner's driving record, testimony during the hearing, and qualification, fitness, and need to drive. The hearing officer denied Petitioner's application for early reinstatement of his hardship license based on his continued operation of a motor vehicle on October 16, 2021, after the revocation began.

Petitioner filed his Petition for Writ of Certiorari on December 2, 2021. He also filed a Motion for a Stay Pending Appeal. On December 30, 2021, the Department filed a Motion to Abate and for Order Directing Petitioner to File Hearing Transcript. On February 16, 2022, the Court denied Petitioner's motion to stay, and granted the Department's motion to abate. The case was abated for sixty days, and Petitioner was ordered to make appropriate arrangements to ensure that a transcript of the November 4, 2021 administrative hearing was transmitted in accordance with Florida Rule of Appellate Procedure 9.200 within sixty days of the order. Petitioner was cautioned that his failure to comply would result in the Court ruling on the issues based solely on the record provided. After the abatement ended, the Court directed the Department to file a response, and the response was filed on August 29, 2022. To date, Petitioner has failed to submit the administrative hearing transcript to the Court.

**STANDARD OF REVIEW**

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (internal citation omitted).

**ANALYSIS**

Petitioner contends that the Final Order Denying Early Reinstatement should be quashed because the Department deviated from the essential requirements of law. He claims that the day after he was convicted of the DUI, he followed the judge's instructions and went to the Department's Bureau of Administrative Reviews (BAR) office with his restricted driver license and the Pinellas County court's Notice of Adjudication and Sentencing on DUI Charge. The office representative, Marion Martinez, indicated that Petitioner already had a restricted driver license and took no action. Petitioner left the office believing that his restricted license was his hardship license. When he was subsequently pulled over, he admitted to the deputy that he knew his license was suspended, but explained that he followed procedures to obtain a hardship license. He claims that Ms. Martinez was negligent in failing to provide him with the appropriate hardship license form and the opportunity to pay the reinstatement fee when he went to the BAR office on October 15, 2021. He states that he has been without his driving privileges since October 16, 2021, when the deputy seized his driver license, and that he was wrongfully denied a hardship license that would have been valid through the period of suspension, until April 12, 2022. He requests that the Court quash the Final Order and immediately reinstate his driving privilege on a hardship basis.

In response, the Department asserts that the relief sought by Petitioner has been rendered moot because his full driving privileges were restored on April 12, 2022, when the six-month revocation related to his DUI conviction expired and his license became valid. The Department states that even if Petitioner was successful and his petition was granted, there is no suspension/revocation to set aside. The Department also asserts that Petitioner did not file a written transcript of the administrative hearing as required and, without the transcript, the Court does not have a sufficient record for review of the hearing officer's findings.

The Court agrees with the Department. Due to Petitioner's failure to provide a written transcript of the administrative hearing, the Court does not have an adequate record to review for the purpose of evaluating the hearing officer's decision. Without a copy of the transcript, the Court cannot determine whether the hearing officer's findings departed from the essential requirements of law or whether those findings are supported by competent, substantial evidence. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979) (noting that in appellate proceedings the decision of a trial court has the presumption of correctness and, without a record of the trial proceedings, the appellate court cannot properly resolve the factual issues so as to conclude that the trial court's judgment is not supported by the evidence); *Encarnacion v. Encarnacion,* 877 So. 2d 960, 963 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1742a] (holding that without a transcript, the appellate court is unable to provide a remedy "because it has nothing to review and the presumption is there was competent evidence to support the trial court's rulings"). Thus, the hearing officer's decision has the presumption of correctness, and the record is insufficient to quash that decision.

Furthermore, Petitioner's request to quash the Final Order and immediately reinstate his driving privilege on a hardship basis was rendered moot when his full driving privileges were restored upon expiration of the six-month revocation period on April 12, 2022. "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992). "A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." *Id.* Petitioner does not challenge his license suspension/revocation in this case; rather, he seeks early reinstatement of his driving privilege on a hardship basis. Thus, this is not a case where "collateral legal consequences that affect the rights of a party flow from the issue to be determined." *Id.* Moreover, the Court would not be able to reinstate Petitioner's driving privilege as such action would exceed the scope of certiorari review. *See Dep't of Highway Safety & Motor Vehicles v. Bailey,* 870 So. 2d 47, 49 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2384a] (holding the circuit court exceeded the scope of certiorari review when it ordered the Department to reinstate the respondent's license).

Based upon the foregoing, Petitioner has failed to establish that he is entitled to the requested relief. Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. (STACY and SPRYSENSKI, JJ., concur.)

* * *

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# CIRCUIT COURTS—ORIGINAL

**Liens—Construction—Discharge and cancellation of liens—Failure of lienor to respond to summons by filing action to enforce liens or to show cause within 20 days after service of summons why lien should not be vacated and canceled of record—Motion to extend time to respond to complaint does not satisfy statutory requirement that lienor file action to enforce liens or show good cause why deadline should not be enforced**

VAN SELOW DESIGN BUILD, LLC, Plaintiff, v. AAASCO, INC., a/k/a AAASCO, INC., d/b/a AAA SERVICE COMPANY, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 23-007551-CI. August 8, 2023. Amy M. Williams, Judge. Counsel: Jason S. Lambert, Hill Ward Henderson, Tampa, for Plaintiff. Daniel L. Saxe, Saady & Saxe, P.A., St. Petersburg, for Defendant.

## ORDER GRANTING MOTION FOR DISCHARGE OF CONSTRUCTION LIENS

THIS CAUSE came before the Court on Van Selow Design Build, LLC's ("VSDB") Motion for Discharge of Construction Liens (the "Motion"), and the Court, having reviewed the Motion and the authorities cited therein, having reviewed the Court docket and Court file, and being otherwise advised in the premises, the Court finds as follows:

1. On July 5, 2023 VSDB filed its Complaint pursuant to §713.21(4), *Florida Statutes* [Doc #2], seeking to discharge two construction liens recorded in the Public Records of Pinellas County, Florida by Defendant.

2. Specifically, the liens VSDB sought to discharge were as follows:

a. Official Records Book 22388, Page 1317 of the Public Records of Pinellas County, recorded against 640 Gulf Boulevard, Belleair Shores, FL 33786 (the "Gulf Boulevard Lien").

b. Official Records Book 22388, Page 1336 of the Public Records of Pinellas County, Florida, recorded against 16308 Redington Drive, Redington Beach, FL 33708 (the "Redington Drive Lien").

3. Defendant was served with a summons and complaint pursuant to § 713.21, *Florida Statutes*, on July 7, 2023, and a return of service reflecting this was filed with the Court on July 13, 2023 [Doc # 4].

4. Accordingly, Defendant had until July 27, 2023 to commence an action to enforce its lien or show cause why such enforcement action should not be commenced by that deadline. *See* § 713.21(4), *Florida Statutes*.

5. On July 27, 2023, Defendant, through counsel, filed a motion for extension of time to respond to the Complaint filed by VSDB in this action. Defendant filed nothing else in this litigation.

6. Defendant's Motion for Extension of time is not an action to enforce either the Gulf Boulevard Lien or the Redington Drive Lien.

7. Defendant's Motion for Extension of time is also not a showing of good cause why either the Gulf Boulevard Lien or the Redington Drive Lien should not have been timely enforced as required by § 713.21(4), *Florida Statutes. See e.g. Mgmt. & Consulting, Inc. v. Tech Elec., Inc.*, 305 So. 3d 316 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D753c] (holding that a motion for extension of time is not good cause to extend the deadline to enforce a lien imposed by § 713.21, *Florida Statutes*); *Dracon Const., Inc. v. Facility Const. Mgmt., Inc.*, 828 So. 2d 1069 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2311a] (same); *Sturge v. LCS Dev. Corp.*, 643 So. 2d 53 (Fla. 3d DCA 1994) (same).

8. Accordingly, VSDB is entitled to discharge and cancellation of the Gulf Boulevard Lien and the Redington Drive Lien. *See* § 713.21(4), Fla. Stat.; *Unnerstall v. Designerick, Inc.*, 17 So. 3d 900, 902 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1913a]

**Therefore, it is hereby ORDERED and ADJUDGED as follows:**

9. VSDB's Motion is hereby GRANTED.

10. Defendant's Gulf Boulevard Lien, recorded in Official Records Book 22388, Page 1317 of the Public Records of Pinellas County, recorded against 640 Gulf Boulevard, Belleair Shores, FL 33786 is hereby DISCHARGED and CANCELLED.

11. Defendant's Redington Drive Lien, recorded in Official Records Book 22388, Page 1336 of the Public Records of Pinellas County, Florida, recorded against 16308 Redington Drive, Redington Beach, FL 33708 is hereby DISCHARGED and CANCELLED.

12. The Court hereby reserves jurisdiction to enforce this Order, and to entertain any subsequent motions for attorneys' fees and/or costs.

* * *

**Torts—Limitation of actions—Statute of repose—Design, planning or construction of improvement to real property—Action by homeowners association against developer who constructed townhomes in development and sold them to individual purchasers and against subcontractor—Ten-year statute of repose in section 95.11(3)(c) does not bar action for violations of building code, negligence/vicarious liability, and breach of implied warranties where suit was filed within ten years of issuance of last certificate of occupancy—Statute of repose is applied to townhouse community as whole, not to units individually**

BEACON PARK PHASE II HOMEOWNERS ASSOCIATION, INC., a Florida Not-For-Profit Corporation, Plaintiff, v. D.R. HORTON, INC., et al., Defendants. D.R. HORTON, INC., Crossclaim Plaintiff, v. A.B. DESIGN GROUP, LLC, f/k/a A.B. DESIGN GROUP, INC., et al., Crossclaim Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CA-007042-O. Division 43. August 17, 2023. John E. Jordan, Judge. Counsel: Jeffrey A. Widelitz, Ball Janik LLP, Orlando, for Plaintiff. Joshua D. Grosshans, The Grosshans Group, PLLC, Winter Garden, for D.R. Horton, Inc., Defendant. Bryan M. Krasinski, Kubicki Draper, Tampa, for Matthew Miller, Inc., Defendant.

## ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT D.R. HORTON, INC.'S SECOND AFFIRMATIVE DEFENSE RELATING TO STATUTE OF REPOSE AND DENYING DEFENDANTS D.R. HORTON, INC. AND MATTHEW MILLER, INC.'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AS TO THE STATUTE OF REPOSE

THIS CAUSE came before the Court for hearing on June 28, 2023, on "Plaintiff's Motion for Partial Summary Judgment as to D.R. Horton, Inc.'s Second Affirmative Defense," filed August 3, 2022; as well as Defendant "D.R. Horton, Inc.'s Motion for Partial Summary Judgment as to the Statute of Repose," filed August 15, 2023; and "Third-Party Defendant, Matthew Miller, Inc.'s Motion for Summary Judgment," filed April 11, 2022 (collectively the "Motions"). The Court, having reviewed the file, the Motions, the Responses in Opposition to the Motions, the Replies, having heard arguments of counsel and being otherwise fully advised in the premises, hereby finds as follows:

### Standard

Effective May 1, 2021, Florida adopted the federal summary judgment standard. *In re Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d 72, 73 (Fla. 2021) [46 Fla. L. Weekly S95a]; *see also* Fla. R. Civ. P. 1.510 ("[T]his rule shall be construed and applied in accordance with the federal summary judgment standard."). Accordingly, "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. P. 1.510(a); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) ("[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.*

The defendant has the burden of proving an affirmative defense. *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695 (Fla. 2015) [40 Fla. L. Weekly S188a] (*citing Hough v. Menses,* 95 So. 2d 410, 412 (Fla. 1957)). On summary judgment proceedings, the defendant bears the initial burden of showing that an affirmative defense is applicable. *G & G In-Between Bridge Club Corp. v. Palm Plaza Associates, Ltd.,* 356 So. 3d 292, 299 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D275a](*quoting Off. of Thrift Supervision v. Paul,* 985 F. Supp. 1465, 1470 (S.D. Fla. 1997)).

**Relevant Procedural Background**

On July 9, 2020, Plaintiff Beacon Park Phase II Homeowner's Association, Inc. (the "Association") sued Defendant D.R. Horton, Inc. ("DRH") and two subcontractors for violations of the Florida Building Code, negligence/vicarious liability, and breach of implied warranties. *See* Complaint. DRH raised the affirmative defense that the Association's claims are barred, in whole or in part, by Florida's statute of repose under Fla. Stat. § 95.11(3)(c) (hereinafter the "Statute"). *See* DRH Answer and Affirmative Defenses.

On January 20, 2021, the Association amended the Complaint and added Builders FirstSource—Florida, LLC ("BFS") as a Defendant, among others. *See* Amended Complaint. On September 30, 2021, BFS filed its Third-Party Complaint naming subcontractors, including but not limited to, Matthew Miller, Inc. ("Miller"). *See* BFS Third-Party Complaint. Miller raised the statute of repose as an affirmative defense. *See* Miller's Answer and Affirmative Defenses.

On April 11, 2022, Miller filed its Motion for Summary Judgment Against BFS regarding the statute of repose ("Miller's Motion"). On August 3, 2022, the Association filed its Motion, seeking summary judgment that the statute of repose does not bar the Association's claims ("Association's Motion"). Then on August 15, 2022, DRH filed its own competing Motion for Summary Judgment on the statute of repose ("DRH's Motion").

These three Motions address arguments based on the same legal grounds and reasoning. *See* Motions. Therefore, the Court addresses all three Motions in this Order.

**Findings of Fact, Analysis and Ruling**

This case arises from the planning, development, design, and construction of Beacon Park Phase II Townhomes, located in Orange County, Florida (the "Community"). *See* Third Amended Complaint. DRH served as the developer and general contractor for the Community, which consists of 14 buildings containing a total of 104 individual townhome units. *See* Affidavit of Louis Avelli attached to DRH Motion, ¶¶4, 5 ("Avelli Affidavit").

DRH entered into contracts with entities it hired to perform various work on the Community. *See* Association's Motion, Composite Exhibit F. Collis Roofing, Inc. ("Collis") was the licensed roofer employed by DRH to install the roofs on all 14 buildings. *See Id.*; *see also* Association's Motion, Composite Exhibit I. Final payment under the Collis contract was due on October 14, 2011. *Id.* The last Certificate of Occupancy for the Community was issued on September 29, 2011. *See* Association's Motion, Composite Exhibit C. The Association filed the instant action on July 9, 2020. *See* Complaint.

Fla. Stat. §95.11 provides, in relevant part:

> In any event, the action must be commenced within 10 years after [1] the date of actual possession by the owner, [2] the date of the issuance of a certificate of occupancy, [3] the date of abandonment of construction if not completed, or [4] the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. However, counterclaims, cross-claims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred.

Fla. Stat. §95.11(3)(c) (hereinafter the "Statute"). The parties agree that statutory trigger [3] (date of abandonment of construction) is not applicable here. However, the parties are in disagreement as to the remaining statutory triggers [1] (date of actual possession by the owner); [2] (date of the issuance of a certificate of occupancy); and [4] (date of completion of the contract . . .). *See* Motions.

As to statutory trigger [1], the Association asserts that "date of actual possession by the owner" should be interpreted as the date the last unit was deeded by DRH to a non-developer owner. *See* Association's Motion. This interpretation was recently rejected in *Westpark Preserve Homeowners Association, Inc. v. Pulte Home Corporation,* 2023 WL 3325821 (Fla. 2d DCA May 10, 2023) [48 Fla. L. Weekly D952a]. In *Westpark Preserve,* the Court explained that in circumstances like the one here, the developer is the owner within the meaning of the Statute when construction is completed and the county issues the certificate of occupancy. *Id.* at *3. The Court finds that pursuant to *Westpark Preserve,* the date of actual possession by the owner in this case coincides with the date of the certificate of occupancy. *See Id.*

The parties also disagree on whether to apply the Statute's triggers to the Community as a whole, or alternatively, to the individual units. While the Association contends the Community should be considered as a whole, both DRH and Miller assert that each unit should be considered separately. *See* Association's Motion; DRH's Motion; Miller's Motion. There are no legal authorities before the Court adopting DRH and Miller's approach, and the Court finds that DRH failed to meet its burden. *See Hess*, 175 So. 3d at 695 (Fla. 2015) (*citing Hough,* 95 So. 2d at 412; *G & G In-Between Bridge Club Corp.,* 356 So. 3d at 299 (*quoting Off. of Thrift Supervision,* 985 F. Supp. at 1470).

Applying the Statute's triggers to the Community as a whole, the Court finds that the Statute does not bar the claims against DRH and Miller because final payment under the Collis contract was due on October 14, 2011; the last Certificate of Occupancy for the Community was issued on September 29, 2011; and the instant action was commenced less than ten years later, on July 9, 2020. *See Allan & Conrad, Inc. v. Univ. of Cent. Fla.,* 961 So. 2d 1083, 1087 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1794a] (*citing Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condo. Ass'n, Inc.,* 581 So. 2d 1301, 1303 (Fla. 1991); *Angrand v. Fox,* 552 So. 2d 1113, 1116 (Fla. 3d DCA 1989)) (Florida law disfavors limitations defenses and when there is any doubt as to legislative intent, the preference is to allow the longer period of time).

Finally, the Court finds no merit in Miller's argument that BFS did not commence its third-party action within the Statute's one-year period for third-party claims. BFS was joined as a Defendant on January 20, 2021, and tiled its third-party claim against Miller less than one year later on September 30, 2021. *See* Amended Complaint; BFS Third-Party Complaint; *see also* Fla. Stat. §95.11(3)(c) ("third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up

to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred.").

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

1. Plaintiff's Motion for Partial Summary Judgment as to D.R. Horton, Inc.'s Second Affirmative Defense is hereby **GRANTED**.

2. D.R. Horton, Inc.'s Motion for Partial Summary Judgment as to the Statute of Repose is hereby **DENIED**.

3. Third-Party Defendant, Matthew Miller, Inc's Motion for Summary Judgment is hereby **DENIED**.

* * *

**Estates—Claim against estate for paralegal services allegedly supplied to decedent over 20 years earlier is stricken with prejudice—Claim is unsupported by any evidence and is barred by applicable statutes of limitations and laches—Claim for return of genetic material that decedent allegedly induced claimant to provide to fertility clinic is stricken with prejudice—Material is not in possession of estate, and claim is barred by statutes of limitations and laches—Motion to compel examination of personal representative's birth certificate, sought to prove that personal representative is not blood relative of decedent, is denied where movant is not party to suit or interested party**

IN RE: ESTATE OF MICHELE MARIE GILLEN, Deceased. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2021-3122-CP-02. December 7, 2021. Milton Hirsch, Judge. Counsel: Sherryll Martens Dunaj, Simon Schindler & Sandberg LLP, Miami, for personal representative of estate. Alexander Moskowitz, Claimant, Pro se.

[Affirmed (Fla. 3DCA, Case No. 3D21-2405, May 4, 2022).]

**ORDER ON CERTAIN PENDING PLEADINGS**

Michele Gillen departed this world on June 11 of this year. *Petition for Administration,* DE 3, ¶3. On July 14 letters of administration were issued, DE 18, and Ms. Gillen's half-brother John Laurence was appointed personal representative. DE 19.

On September 28 (and for some reason again on October 9), one Alexander Moskovits, acting *pro se,* filed what purported to be a "Statement of Claim." DE 52. Actually, he asserted two claims. First, he alleged that Ms. Gillen owed him a $10,000 debt for paralegal services rendered some two decades ago. Second, he alleged that Ms. Gillen induced him to provide a specimen of his genetic material to the New York Fertility Institute in New York City—and he'd like it back.

The personal representative promptly objected, DE 53. As to the claim for payment on a contract, the personal representative noted that Mr. Moskovits appended to his claim no contract, no other documentation, no support of any kind for the existence of the alleged debt. In addition, the personal representative pointed out that this ancient claim is statutorily barred as untimely, whether conceived of as an action for wages, *see* Fla. Stat. § 95.11(4)(c) (two years) or an action upon an oral contract, *see* Fla. Stat. § 95.11(3)(k) (four years); and in any event is barred by the Statute of Frauds, *see* Fla. Stat. § 725.01 (one year). As to the application for the return of genetic material, the personal representative takes the position that it, too, is untimely, both as a matter of statute law and on principles of laches. And of course the genetic material referred to is not in the possession of the estate or the personal representative.

Mr. Moskovits, still acting *pro se,* responded by filing a motion to compel the production of the personal representative's birth certificate. DE 61. In his motion, Mr. Moskovits expresses at length and with obvious depth of feeling his suspicions that the personal representative is not the decedent's biological half-brother, and that he should therefore cease to act as personal representative. Mr. Moskovits speculates that examination by the court of the personal representative's birth certificate will confirm these suspicions. The personal representative, in his *Response to and Motion to Strike Motion to Compel* of December 2 (no docket entry number as of the time of this writing), points out that Mr. Moskovits is not a party to nor an interested person in this matter, and as such is without standing to move to compel anything. On December 3 Mr. Moskovits, continuing to act without counsel, filed a reply (no docket entry number as of the time of this writing), in which he reprises his arguments.

I. As to Mr. Moskovits's claim for payment for services rendered

It would be a simple matter to strike this claim without prejudice as insufficiently pleaded. Mr. Moskovits offers a naked allegation, unsupported by dates, times, or terms; unsupported by written undertakings or affidavits; unsupported, in short, by anything; that once upon a time, long long ago, the decedent promised to pay him money. It is a principle too well-settled to invite citation to authority that such a naked allegation pleads nothing, and entitles the pleader to nothing. At best, Mr. Moskovits can hope for no more than an opportunity to re-plead his claim, and to re-plead it (perhaps with the assistance of counsel?) sufficiently.

Here, however, it would be pointless to strike without prejudice. Even if Mr. Moskovits could plead a facially sufficient claim, he is barred from doing so by not one but more than one statute of limitations, and by the doctrine of laches.

Regarding the applicable statutes of limitations, they are cited in the personal representative's pleadings and referenced hereinabove. In addition to statutes of limitations, however, the civil-law doctrine of laches is applicable to proceedings in chancery. *See, e.g., McCray v. State,* 699 So. 2d 1366, 1368 (Fla. 1997) [22 Fla. L. Weekly S627a] (citing *Anderson v. Singletary,* 688 So. 2d 462, 463 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D601a]); *Xiques v. Dugger,* 571 So. 2d 3 (Fla. 2d DCA 1990); *Smith v. Wainwright,* 425 So. 2d 618 (Fla. 2d DCA 1982); *Remp v. State,* 248 So. 2d 677 (Fla. 1st DCA 1970). *Vigilantibus non dormientibus aequitas subvenit* was the maxim at equity: Equity assists those who are vigilant, and not those who sleep on their rights. "[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced." *Homberg v. Armbrecht,* 327 U.S. 392, 396 (1964) (quoting *Galliher v. Cadwell,* 145 U.S. 368, 373 (1892)). The doctrine of laches bars relief when, from the face of a claim, it is obvious that the adverse party has been manifestly prejudiced and no reason for an extraordinary delay has been provided. *McCray,* 699 So. 2d at 1368. *See also Wright v. State,* 711 So. 2d 66, 68 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D851d]; *Hurtado v. Singletary,* 708 So. 2d 974, 975 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D766a]. Prejudice is apparent where, as here, a two-decades-old claim against a decedent, incapable of replying to or refuting that claim, is asserted against the decedent's estate. And Mr. Moskovits offers no reason for such extraordinary delay. It is scarcely imaginable that a satisfactory reason could be offered.

Mr. Moskovits's claim for payment for services allegedly rendered is stricken with prejudice.

II. As to Mr. Moskovits's claim for the return of his genetic material

Mr. Moskovits alleges that the decedent induced him, for reasons that need not concern us, to provide his genetic material to a fertility clinic in the State of New York. He'd like it back.

The short answer is: the estate doesn't have it. We know that because Mr. Moskovits tells us so.

This is a probate proceeding. It is concerned with the contents of the decedent's probate estate, with any *bona fide* claims against those contents, and with the lawful and proper distribution of those contents. The genetic material that Mr. Moskovits covets is not in the custody or possession of the estate, or of the personal representative. It is, as he himself informs us, in the custody and possession of a fertility clinic in another jurisdiction. He is welcome to seek to obtain it from that

clinic. That is no concern of this estate, or of this court.

Even if the demised genetic material were in the custody and possession of the estate, the statute of limitations arguments and laches arguments appearing in the preceding section of this order would be fully applicable here. Mr. Moskovits's claim for his genetic material is stricken with prejudice.

III. As to Mr. Moskovits's motion to compel examination of the personal representative's birth certificate

As noted above, Mr. Moskovits is not a party to this lawsuit. More importantly, he is not an interested person, and is thus bereft of standing.

Section 731.201(23), Florida Statutes, defines, "interested person as, "[A]ny person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. . . . The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings." This very protean definition is rendered no less protean by oft-quoted language appearing in the leading case of *Hayes v. Guardianship of Thompson,* 952 So. 2d 498, 508 (Fla. 2006) [31 Fla. L. Weekly S763a] (internal quotation marks omitted): "[B]ecause the question of who is an interested person may vary as the circumstances . . . change, we cannot provide strict guidelines for the lower courts to follow." *See also Cruz v. Community Bank & Trust of Florida,* 277 So. 3d 1095, 1097 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2037a] ("Standing to bring or participate in a particular legal proceeding often depends on the nature of the interest asserted").

In *Hayes,* the ward, before the institution of the guardianship, lived with relatives, including her nephew and sister. It developed, however, that she "was a victim of multiple abuses at the hands of her nephew and sister," who kept her in "deplorable" living conditions and misappropriated her assets. *Hayes,* 952 So. 2d at 501. During the course of the ensuing guardianship, the guardian's counsel filed several petitions for attorney fees. The nephew and sister sought to object to these fees on a variety of grounds, but were determined by the trial court to lack standing—a determination that the appellate court affirmed.

Although the Supreme Court took issue with some of the district court's reasoning, it agreed that the nephew and sister had no standing to challenge the attorney fee submissions of the guardian's counsel. Apart from the fact that the nephew and sister "never made a request for notice under Rule 5.060 . . . [the] guardianship proceedings . . . were necessitated by their own mistreatment of the ward and misappropriation of her funds [which] does not entitle them to participate in proceedings involving requests for attorney's fees." *Id.* at 508-09. And perhaps the most important lesson of *Hayes* is that appearing in the conclusion of the opinion: "There must be a balance between ensuring that petitions for attorney's fees are carefully scrutinized and ensuring that these petitions are not subject to endless challenges by those whose only interest is to maximize their potential inheritance." *Id.* at 509.

*Hernandez v. Hernandez,* 230 So. 3d 119 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1969b], is the leading Third District application of *Hayes.* Elena Hernandez, the ward in that case, had three adult children: Antonio, Eusebio, and Elena. Upon a determination of the mother's total incapacity, Eusebio was appointed plenary guardian. *Hernandez,* 230 So. 3d at 120. There then followed a very atrabilious course of litigation between Eusebio as guardian and Antonio, who sought to object to attorney fees and costs incurred by Eusebio. The probate court found that Antonio was not an interested person and was therefore without standing to make his objections. *Id.* at 122. This finding the appellate court affirmed, citing *Hayes.* "Here, as in *Hayes,* Antonio's involvement in the guardianship proceedings was necessitated by his alleged mistreatment of the ward and misappropriation of her funds and, thus, does not entitle him to participate in the attorney's fees proceedings." *Id.* at 123. More recently, in *Duff-Esformes v. Mukamal,* __ So. 3d __ (Fla. 3d DCA Nov. 24, 2021) [46 Fla. L. Weekly D2508a], the Third District offered a reminder of the inextricable relationship between interested-person status and standing.

Mr. Moskovits's averment of interested-person status is even more tepid than those at issue in *Hayes* or *Hernandez.* He makes an utterly unsupported claim of indebtedness from the decedent, which claim is in any event time-barred. He hints that the decedent was, once upon a time, somehow complicit in causing him to provide genetic material to an entity that is not involved in any way in this probate case. He is no more than an officious intermeddler in this proceeding; and when the personal representative points that out, Mr. Movkovits demands evidence that the personal representative is a blood relative of the decedent—evidence that Mr. Moskovits has absolutely no right or standing to demand.

The motion to compel is denied.

IV. Conclusion

Mr. Moskovits's claims are stricken with prejudice. His motion to compel is likewise denied. Respectfully, Mr. Moskovits is also cautioned that his right to file pleadings and papers in the case at bar is not absolute. As noted by Chief Justice Warren Burger, "the judicial system [is not] a laboratory where small boys can play." *Clark v. Florida,* 475 U.S. 1134, 1136 (1986). Abusing the justice system by filing frivolous motions is sanctionable. Mr. Moskovits is discouraged from further filings herein.

* * *

**Insurance—Property—Conditions precedent to suit—Compliance with post-loss obligations—Conditions precedent to suit against insurer were not satisfied where insured failed to comply with post-loss duties to provide prompt notice of loss, records requested by insurer, and compliant sworn statement in proof of loss—Insurer is presumed to have been prejudiced by material breaches of post-loss obligations, and insured failed to present sufficient record evidence to rebut presumption—Final judgment entered in favor of insurer**

MILEYDIS CUENCA, Plaintiff, v. SAFEPOINT INSURANCE COMPANY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-008027-CA-01. Section CA05. June 6, 2023. Vivianne Del Rio, Judge. Counsel: Carlos Santi, for Plaintiff. Donald Lavigne, Salehi, Boyer, Lavigne, Lombana, P.A., for Defendant.

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

**THIS CAUSE**, having come on to be heard on the Defendant's Motion for Final Summary Judgment, the Court having heard argument of counsel and otherwise having been fully advised on the matter, it is hereby **ORDERED and ADJUDGED** that the Defendant's Motion for Final Summary Judgment is **GRANTED** for the following reasons:

1. **Factual Background:**

The material facts in this matter are undisputed. The Plaintiff alleges that her property, located at [Editor's note: Address redacted], Miami, FL 33165, was damaged by Hurricane Irma occurring on September 10, 2017. Initially, on or about September 12, 2017, the Plaintiff reported a claim for damage to the *exterior* of the property as a result of Hurricane Irma. The Plaintiff did not report any interior damages when the claim was reported on September 12, 2017. On December 5, 2017, the Defendant issued a coverage determination letter to the Plaintiff which advised that although partial coverage was

afforded for the claim, payment could not be issued because the total amount of covered damages was less than the applicable deductible. Moreover, the letter stated that "[t]his payment does not necessarily constitute a full and final settlement of your claim for damages. You may submit supplemental claim(s) for any additional damage discovered during the covered reconstruction and repair of the above-mentioned property."

On January 21, 2020, 863 days after the reported loss, Gustavo Santos with Santos Public Adjusters, on behalf of the Plaintiff, requested that the Defendant reopen the claim. Accordingly, on the same day, the Defendant reopened the claim and issued a correspondence to the Plaintiff and the Public Adjuster requesting an executed proof of loss and estimate. On March 2, 2020, the Plaintiff's Public Adjuster submitted an estimate, for the first time ever, in the amount of $176,591.55 and a Sworn Proof of Loss in the amount of $170,173.55. Moreover, this marked the first time that the Plaintiff indicated that there was any damage to the interior of the property. In response, the Defendant made several attempts to gather additional information from the Plaintiff and the Public Adjuster regarding the extent of interior damages, why these damages were not mentioned during the initial reporting of the claim, potential intervening damages, and repairs performed. However, neither the Plaintiff nor their Public Adjuster provided a response despite the Defendant's repeated attempts to secure the information necessary to complete its adjustment of the Plaintiff's Supplemental Claim. Instead of providing the requested information, on April 8, 2020, the instant lawsuit was filed.

It was learned later, through discovery and the sworn testimony provided by the Plaintiff, that the property suffered additional damage for a severe weather event in December of 2019 and that several repairs were made between the Defendant's initial inspection and the Plaintiff's reporting of the supplemental claim on January 21, 2020. Again, despite several requests, as well as the obligation under the policy, the Plaintiff never provided the requested documents related to the performed repairs. In fact, Plaintiff did not even respond to the Defendant's request for documentation and information. In addition, the Plaintiff failed to provide a compliant sworn statement in proof of loss prior to filing suit, and therefore materially breached several post loss duties and conditions precedent to filing suit. Based on those material breaches, Defendant is entitled to a presumption of prejudice in its favor as a matter of law, and Plaintiff has failed to put forth competent record evidence rebutting that presumption of prejudice.

After reviewing the Defendant's motion and defense counsel's presentation of said motion, as well as the evidence submitted, this Court grants Final Judgment in favor of the Defendant for the reasons detailed below.

2. **Relevant Policy Provisions:**

The Policy upon which the Plaintiff's action has been predicated includes the following terms in relevant part:

> **SECTION I—CONDITIONS**
>
> . . .
>
> **B. Duties After Loss.** In case of a loss to covered property, we have no duty to provide coverage under this Policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed by you, an "insured" seeking coverage, or a representative of either:
>
> **(1)** Give prompt notice to use or your insurance agent;
>
> . . .
>
> **(4)** Protect the property from further damage. If repairs to the property are required ,you must:
>
> a. Make reasonable and necessary repairs to protect the property; and
>
> b. Keep an accurate record of repair expenses;
>
> . . .
>
> **(5)** Cooperate with us in the investigation of a claim;
>
> . . .
>
> **(7)** As often as we reasonably require:
>
> . . .
>
> b. Provide us with records and documents we request and permit us to make copies;
>
> . . .
>
> **(8)** Send to us, within 60 days after our request, our signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> . . .
>
> b. The interests of all "insureds" and all others in the property involved and all liens on the property.
>
> . . .
>
> **6. Suit Against Us.**
>
> No action can be brough against us; unless there has been full compliance with all of the terms under Section I of this policy and the action is started within two years after the date of loss.

3. **Relevant Deposition Testimony:**

This Court reviewed the Plaintiff's deposition in this matter and found it important to its decision on the Defendant's Motion. During her deposition, the Plaintiff testified that after Hurricane Irma, she did not observe any interior damage to her property. *See Plaintiff's Deposition,* P. 48-49. Notably, the Plaintiff made repairs to the property immediately following the storm, including repairs to the roof but did not have any documentation to support the specific repairs completed. *Id. P.* 57-59. Then, in December of 2019, nearly two years after Hurricane Irma, Plaintiff experienced a significant water event at her property when she returned home and found her living room flooded with water as a result of a rain event. *Id.* at P. 84-86. As a result, the Plaintiff contacted a roofer to perform repairs, and he completed additional repairs to the Plaintiff's roof for which Plaintiff has no records. *Id.* At P. 92-93. It was not until after this rain event, and after the additional undocumented repairs to the property, that the supplemental claim was reported by the Plaintiff's Public Adjuster. As such, Defendant was unable to inspect the property until after the subsequent significant rain event, after the undocumented repairs were made, and after more than 863 days had elapsed since the reported date of loss.

4. **Request for Information Correspondences:**

Prior to the hearing on the Defendant's Motion, this Court reviewed the evidence submitted regarding the Defendant's multiple requests for information directed towards the Plaintiff and her Public Adjuster. Following receipt of the Public Adjuster's estimate in the amount of $176,591.55 and a Sworn Proof of Loss in the amount of $170,173.55, the Defendant issued an email correspondence to the Plaintiff on March 2, 2020, stating, in relevant part:

> ". . . I'm confused as to why there was no damage after the storm and now more than 2 years later there is a substantial amount of interior damage being reported and claimed, and now the tile floor is even damaged by Irma?? What measures were taken by the insured to protect the property from damage, after the reported loss and initial coverage decision made? If repairs were made when were the repairs made after our initial inspection? Please provide invoices, receipts of any repairs made to protect the property."

On March 4, 2020, Defendant issued a correspondence to the Plaintiff advising that the submitted Sworn Proof of Loss was non-compliant as it failed to identify: (1) the occupancy of the property with sufficient specificity including the identity of the individuals residing at the subject property, and (2) the specific parties, by name, which have an interest in the property. Citing these reasons, the Defendant rejected the Plaintiff's Sworn Proof of Loss. Thereafter, the Plaintiff failed to submit a fully compliant sworn proof of loss despite

the Defendant's request for same. In addition, Defendant followed up on its request for documents and records pertaining to the estimate submitted by the Plaintiff's Public Adjuster and documentation related to completed repairs on March 10, 2020, March 24, 2020, April 2, 2020, and April 6, 2020. *See Affidavit of Defendant's Corporate Representative* ¶ 13. In addition, Defendant placed several phone calls to the Plaintiff's Public Adjuster on March 5, 2020, April 2, 2020, April 16, 2020, and April 20, 2020. *Id. ¶ 15*. The Defendant never received a response, let alone the requested information. As a result of the Plaintiff's failure to comply with her post-loss duty to provide requested records and a compliant Sworn Statement in Proof of Loss, the Defendant is presumed to have been prejudiced and the Plaintiff has failed to present sufficient record evidence to rebut that presumption.

5. **Florida Jurisprudence:**

This Court is bound by Florida Jurisprudence, including out of the Third District Court of Appeal. This Jurisprudence clearly dictates that Final Judgment be entered in favor of the Defendant in this matter.

First and foremost, Florida law is well-established that "an insured's post-loss obligations set forth in a homeowner's insurance policy are conditions precedent to suit." *American Integrity Ins. Co., v. Estrada*, 276 So. 3d 905, 913 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a], citing to *Hunt v. State Farm Fla. Ins. Co.*, 145 So. 3d 210, 212 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1762b], *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 197 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a], *AMICA Mut. Ins. Co. v. Drummond*, 970 So. 2d 456, 460 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2907a], and *Starling v. Allstate Floridian Ins. Co.*, 956 So. 2d 511, 513 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1100a]. To establish that an insured failed to satisfy their post-loss obligations resulting in forfeiture of coverage, "the insurer must plead and prove that the insured has materially breached a post-loss policy provision." *Bankers Insurance Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985).

Specifically, an insured's failure to provide prompt notice of the loss prior to filing suit constitutes a material breach of the policy. *Hunt*, 145 So. 3d at 210 (upholding summary judgment in favor of the insurer); *see also Bankers*, 475 So. 2d at 1218 (Fla. 1985) (stating that providing prompt notice of a loss is a condition precedent to suit); *see also Kroener v. FIGA*, 63 So. 3d 914 (Fla. 4DCA 2011) [36 Fla. L. Weekly D1334a] (holding that as a matter of law, notice to the insurer of a claim of loss more than two (2) years and two (20 months after the date of loss was not prompt notice, and the untimely reporting of the loss violated the insurance policy and was sufficient to bar the claim); *see also Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1217 (Fla. 1985) (explaining that an insurance policy's notice requirement is imposed to enable the "insurer to conduct a timely and adequate investigation of all circumstances surrounding an accident"); *see also State Farm Mut. Auto Ins. Co. v. Ranson*, 121 So. 2d 175, 180 (Fla. 2d DCA 1960) (stating that timely notice of a loss enables the insurer to "evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it"). Untimely notice constitutes a breach of the notice requirement because the insurer is deprived of its contractual right to timely investigate a claimed loss. *Banker*, 475 So. 2d at 1218. An Insured's failure to give timely notice under such a provision is a "legal basis for the denial of recovery under the policy." *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782, 785 (Fla. 3d DCA 1981). The purpose of a notice provision in an insurance policy is to allow an insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it. *Laquer*, 167 So. 3d at 473-4 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1186a] citing to *LoBello v. State Farm Florida Ins. Co.*, 152 So.3d 595, 598 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c]. An Insured is required to provide notice of a loss where an occurrence occurs that should lead a reasonable and prudent to believe that a claim for damages arises. *Id.*

***Additionally, this Court is finds that it is bound by recent cases with similar fact patterns to the instant case:***

In the first case, *Perez v. Citizens Property Ins. Corp.*, 343 So. 3d 140 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1451a], the Florida Third District Court of Appeal found that the insured had failed to overcome the insurer's presumed prejudice and upheld summary judgment where the insured did not report her claim for over two years after Hurricane Irma and yet made repairs without maintaining records for those repairs. *Id. At 141-2.* Additionally, since it was first notified of the insured's claim several years after the loss occurred, its inspection only occurred after repairs had already been conducted. *Id.* The Third District specifically noted as follows relating to the engineer report submitted by the insured in relevant part:

> Mr. Renne's report and conclusions, coupled with Ms. Perez's statement that some of the wate damage began in the days following the Hurricane, may be sufficient to show tht some damage may have been caused by Hurricane Irma. However, as in Hope, the fact that Mr. Renne's opinion is based on an investigation conducted nearly three years after the claimed date of loss renders it impossible for Citizens to determine which, if any, of the current damage to the roof came as a result of the Hurricane, and which, if any, of the current damage was caused by some other event . . .
>
> Mr. Perez's expert did not have access to any information as to the state of the roof immediately following the Hurricane. . .Instead, Mr. Renne formed his opinion based solely on his investigation conducted nearly three years after the incident, after repairs had already been conducted on the roof. This lapse in time, as well as the intervening repairs, rendered Mr. Renne's opinion wholly conclusory as to whether the current damage was caused by the Hurricane or some other event from the intervening three years.
>
> *Id. At 142-3.*

In addition, in *Hope v. Citizens Prop. Ins. Corp.*, 114 So. 3d 457 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1230a], the Third District Court of Appeal ruled in favor of the insurer, where the insured failed to give prompt notice of hurricane roof damages and had made repairs prior to reporting the loss to the insurer. The Court found that the insurer's investigation was prejudiced because the insurer was unable to properly evaluate the damage and attribute any damage to a covered loss. *See id.* The Court reasoned that the insured's affidavit, a roofer's repair estimate, and the public adjuster's damage estimate were insufficient as a matter of law to overcome the prejudice to the insurer, because where the passage of time has rendered the insurer unable to determine exactly what current damage is directly attributable to a covered loss, evidence fails to rebut the presumption of prejudice. *See id.* at 460.

Finally, in *Navarro v. Citizens Prop. Ins. Corp.*, 353 So. 3d 1276 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D152b], the Third District Court of Appeal once again upheld summary judgment where the insured noticed damage days, weeks and months following the storm but waited over two years and seven months to report the claim after repairs had been completed and no documentation was retained for those repairs. *Id.* at 1277-80. The Third District noted that the purpose of the notice provision is to afford the insurer an adequate opportunity to investigate, to prevent fraud and imposition upon it, and to form an intelligent estimate of its rights as soon as practicable." *Id.*

Moreover, an insured's failure to provide an insurer with records and documents requested—a post-loss obligation—constitutes a breach precluding recovery from the insurer as a matter of law. *See Shivdasani v. Universal Prop. & Cas. Ins. Co.*, 306 So. 3d 1156-1161 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2044a]. *See also Estrada*,

276 So. 3d at 916 ("Holding that when an Insurer has alleged, as an affirmative defense to coverage, and thereafter has subsequently established, that an insured has failed to substantially comply with a contractually mandated post-loss obligation, prejudice to the insurer from the insured's material breach is presumed, and the burden then shifts to the insured to show that any breach of post-loss obligations did not prejudice the insurer.")

Lastly, an insured's failure to provide an insurer with a compliant sworn proof of loss—another post-loss obligation—constitutes a breach precluding recovery from the insurer as a matter of law. *See Shivdasani*, 306 So. 3d at 1156-61 (holding that the insureds' failure to provide a sworn proof of loss at any point in time prior to the trial court's entry of summary judgment materially breached the condition precedent for commencement of a breach of contract action); *see also Rodrigo v. State Farm Fla. Ins. Co.*, 144 So. 3d 690-692 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1760a] (holding that the insured was not entitled to payment under the policy because the insured failed to submit a sworn proof of loss, which was a condition precedent pursuant to the terms of the policy); *see also Gonzalez v. People's Trust Insurance Company*, 307 So. 3d 956 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2391a] (the purpose of a proof of loss provision is to inform the insurer of facts surrounding the loss and to afford the insurer an adequate opportunity to investigate, prevent fraud, and form an intelligent estimate of its rights and liabilities before it is obliged to pay).

Consequently, once it has been established that an insured materially breached a post-loss obligation, "prejudice to the insurer from the insured's material breach is presumed, and the burden then shifts to the insured to show that any breach of post-loss obligations did not prejudice the insurer." *Estrada*, 276 So. 3d at 905; *see also Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 303 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] ("[a]n insurer need not show prejudice when the insured breaches a condition precedent to suit").

6. **Conclusion:**

The Court finds that final judgment must be entered in favor of the Defendant in this matter.

Clearly, the Policy requires the Plaintiff to give the Defendant prompt notice of the loss. Despite this requirement, the Plaintiff did not report the supplemental claim for interior damage (for the first time) until more than two years (approximately 863 days) after the alleged date of loss, which was untimely as a matter of law. In that intervening time, the Plaintiff experienced a significant weather event that caused damage to the interior of her home and as a result she retained unknown individuals who performed several repairs between initially reporting the claim on September 12, 2017 and January 21, 2020, all of which were undocumented. By the time the supplemental claim was reported and the Plaintiff first put the Defendant on notice of newly claimed extensive interior damages (none of which were claimed initially), it was impossible for the Defendant to determine the actual cause of the loss or the full extent of the damage that existed immediately after the loss versus what may have been caused by other storms that had made landfall or some other intervening event.

Clearly, the Policy requires the Plaintiff to keep an accurate record of repair expenses and to provide the Defendant with documents and records requested. Despite these contractual duties, the Plaintiff has admitted under oath that she did not keep records of the repairs completed at the property following the storm but before reporting the supplemental claim. Moreover, despite several requests, Plaintiff never even responded to the Defendant's request for accurate repair records. Plaintiff has failed to comply with the Defendant's numerous pre-suit requests for records and documents pertaining to the estimate submitted on behalf of Plaintiff. Plaintiff's failure to comply with her post-loss duty to provide accurate repair records gives rise to a presumption of prejudice in favor of the Defendant and Plaintiff has failed to put forth sufficient record evidence to overcome that presumption.

The Policy also requires the Plaintiff to provide a compliant Sworn Proof of Loss within sixty (60) days of the Defendant's request for same. The Sworn Proof of Loss submitted on March 2, 2020, was incomplete and therefore rejected by Defendant based on non-conformance. In a written correspondence on March 4, 2020, the Defendant advised the Plaintiff that the Sworn Proof of Loss was non-compliant and rejected as such and specifically identified for the Plaintiff how the Sworn proof of Loss was non-compliant. Nonetheless, the Plaintiff failed to provide the Defendant with a compliant Sworn Proof of Loss prior to filing suit.

The Plaintiff's failure to comply with the Policy's post-loss obligations was a material breach of the Policy which gives rise to a legal presumption of prejudice in favor of the Defendant, which has not and cannot be overcome by the Plaintiff. The Defendant is presumptively prejudiced due to the Plaintiff's untimely reporting of the supplemental claim, the Plaintiff's failure to provide the requested documents to the Defendant, and the Plaintiff's failure to submit a complaint Sworn Proof of Loss to the Defendant. As there is no genuine dispute as to any material fact and the Plaintiff materially breached the Policy, the Plaintiff is barred from recovery under same. The Plaintiff failed to rely on competent evidence to overcome the presumption of prejudice. Instead, the Plaintiff relied on a conclusory and unsupported affidavit and report prepared by an Engineer that did not inspect the property until November 21, 2021, which was more than four (4) years after the loss. Moreover, the Plaintiff's expert did not review any photographs of the subject property prior to significant weather event in December of 2019 and the completed repairs as testified to by the Plaintiff. As such, and as concluded by this Court, there is no way that the Court cannot grant Summary Judgment [in favor of Defendant] in this case.

Based on the foregoing, the Court hereby GRANTS Defendant's Motion for Summary Judgment and hereby enters Final Judgment in its favor. The Plaintiff shall take nothing by this action and Defendant, Safepoint Insurance Company, shall go hence without day. The Court reserves jurisdiction to consider and rule upon any timely-filed motions for attorney's fees and costs. The Court also reserves jurisdiction to enforce this Order.

* * *

**Insurance—Property—Premature suit—Insurer is relieved of obligations under policy where insured materially breached policy by prematurely filing suit less than 90 days after supplemental claim was opened**

MILEYDIS CUENCA, Plaintiff, v. SAFEPOINT INSURANCE COMPANY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-008027-CA-01. Section CA05. June 6, 2023. Vivianne Del Rio, Judge. Counsel: Carlos Santi, for Plaintiff. Donald Lavigne, Salehi, Boyer, Lavigne, Lombana, P.A., for Defendant.

**ORDER GRANTING FINAL JUDGMENT ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING NO BREACH OF CONTRACT AS A MATTER OF LAW**

**THIS CAUSE**, having come on to be heard on the Defendant's Motion for Summary Judgment Regarding No Breach of Contract as a Matter of Law, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby **ORDERED and ADJUDGED** that the Defendant's Motion is **GRANTED** for the following reasons:

**Factual Background:**

The material facts in this matter are undisputed. The Plaintiff alleges that her property, located at [Editor's note: Address redacted], Miami, FL 33165, was damaged by Hurricane Irma occurring on September 10, 2017. Initially, on or about September 12, 2017, the Plaintiff reported a claim for damage to the *exterior* of the property as a result of Hurricane Irma. The Plaintiff did not report any interior damages when the claim was reported on September 12, 2017. On December 5, 2017, the Defendant issued a coverage determination letter to the Plaintiff which advised that although partial coverage was afforded for the claim, payment could not be issued because the total amount of covered damages was less than the applicable deductible. Moreover, the letter stated that "[t]his payment does not necessarily constitute a full and final settlement of your claim for damages. You may submit supplemental claim(s) for any additional damage discovered during the covered reconstruction and repair of the above-mentioned property."

On January 21, 2020, 863 days after the reported loss, Gustavo Santos with Santos Public Adjusters, on behalf of the Plaintiff, requested that the Defendant reopen the claim. Accordingly, on the same day, the Defendant reopened the claim and issued a correspondence to the Plaintiff and the Public Adjuster requesting an executed proof of loss and estimate. On March 2, 2020, the Plaintiff's Public Adjuster submitted an estimate, for the first time ever, in the amount of $176,591.55 and a Sworn Proof of Loss in the amount of $170,173.55. Moreover, this marked the first time that the Plaintiff indicated that there was any damage to the interior of the property. In response, the Defendant made several attempts to gather additional information from the Plaintiff and the Public Adjuster regarding the extent of interior damages, why these damages were not mentioned during the initial reporting of the claim, potential intervening damages, and repairs performed. However, neither the Plaintiff nor their Public Adjuster provided a response despite the Defendant's repeated attempts to secure the information necessary to complete its adjustment of the Plaintiff's Supplemental Claim. Instead of providing the requested information, on April 8, 2020, the instant lawsuit was filed.

It was learned later, through discovery and the sworn testimony provided by the Plaintiff, that the property suffered additional damage for a severe weather event in December of 2019 and that several repairs were made between the Defendant's initial inspection and the Plaintiff's reporting of the supplemental claim on January 21, 2020. Again, despite several requests, as well as the obligation under the policy, the Plaintiff never provided the requested documents related to the performed repairs. In fact, Plaintiff did not even respond to the Defendant's request for documentation and information. In addition, the Plaintiff failed to provide a compliant sworn statement in proof of loss prior to filing suit, and therefore materially breached several post loss duties and conditions precedent to filing suit. Based on those material breaches, Defendant is entitled to a presumption of prejudice in its favor as a matter of law, and Plaintiff has failed to put forth competent record evidence rebutting that presumption of prejudice.

After reviewing the Defendant's motion and defense counsel's presentation of said motion, as well as the evidence submitted, this Court grants Final Judgment in favor of the Defendant for the reasons detailed below.

1. **Relevant Policy Provisions and Florida Statutes:**

The Policy upon which the Defendant relies in support of its arguments includes the following terms in relevant part:

> **SECTION I—CONDITIONS**
>
> . . .
>
> **I. Loss Payment**
>
> . . .
>
> **3.** Within 90 days after we receive notice of an initial claim, "reopened claim", or "supplemental claim" from you, we will pay or deny such claim or a portion of the claim unless the failure to pay such claim or a portion of the claim unless the failure to pay such claim or portion of the claim is caused by factors beyond our control which reasonably prevent such payment.
>
> . . .
>
> **6. Suit Against Us.**
>
> No action can be brought against us; unless there has been full compliance with all of terms under Section I of this policy and the action is started within two years after the date of loss.
>
> . . .

**Florida Statutes Section 627.70131**

This Court is bound by the Florida Statutes enacted by the State Legislature. Florida Statutes Section 627.70131(7)(a) states in relevant part:

> Within 90 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. The insurer shall provide a reasonable explanation in writing to the policyholder of the basis in the insurance policy, in relation to the facts or applicable law, for payment, denial, or partial denial of a claim. If the insurer's claim payment is less than specified in any insurer's detailed estimate of the amount of the loss, the insurer must provide a reasonable explanation in writing of the difference to the policyholder.
>
> *See Fla. Stat. Section 627.70131(7)(a).*

2. **Relevant Coverage Correspondences and Timeline:**

Prior to the hearing on Defendant's Motion, this Court reviewed the evidence submitted regarding the timeline of events leading up the filing of this lawsuit. This Court notes that it is undisputed that the subject claim was reopened by the Defendant on January 21, 2020, in response to the Public Adjuster's request for same. Following receipt of the Public Adjuster's estimate in the amount of $176,591.55 and a Sworn Proof of Loss in the amount of $170,173.55, the Defendant issued an email correspondence to the Plaintiff on March 2, 2020, stating, in relevant part:

> ". . . I'm confused as to why there was no damage after the storm and now more than 2 years later there is a substantial amount of interior damage being reported and claimed, and now the tile floor is even damaged by Irma?? What measures were taken by the insured to protect the property from damage, after the reported loss and initial coverage decision made? If repairs were made when were the repairs made after our initial inspection? Please provide invoices, receipts of any repairs made to protect the property."

Thereafter, the Defendant followed up on its request for documents and records pertaining to the estimate submitted by the Plaintiff's PA and documentation related to completed repairs on March 10, 2020, March 24, 2020, April 2, 2020, and April 6, 2020. *See Affidavit of Defendant's Corporate Representative* ¶ 13. In addition, Defendant placed several phone calls to the Plaintiff's Public Adjuster on March 5, 2020, April 2, 2020, April 16, 2020, and April 20, 2020. *Id. ¶ 15.* The Defendant never received a response, let alone the requested information. Given that the Plaintiff undisputedly gave notice of its Supplemental Claim on January 21, 2020, the Defendant had until April 20, 2020, to complete its investigation and render a coverage determination. Instead of providing the requested information and allowing the Defendant its ninety (90) days to adjust the supplemental claim pursuant to subject Policy and Florida Law, Plaintiff elected to prematurely file suit on April 8, 2020. At the time the Plaintiff filed suit, Plaintiff had failed to comply with the Policy; specifically, the condition precedent to filing suit. At the time the lawsuit was filed, the

Defendant could not have been in breach of contract as it was undisputedly still adjusting the Plaintiff's supplemental claim with the proscribed statutory period. It is undisputed that the Plaintiff filed this lawsuit on April 8, 2020, which was only 78 days after the claim was reopened on January 21, 2020.

3. **Conclusion:**

The Court finds that final judgment must be entered in favor of the Defendant in this matter.

Clearly, under the Policy and Florida Statutes Section 627.70131(7)(a), the Defendant is allowed 90 days to adjust the reopened or supplemental claim. Despite this requirement, Plaintiff prematurely filed suit on April 8, 2020, while Defendant was actively adjusting the Plaintiff's Supplemental Claim. The Defendant re-opened the Plaintiff's claim on January 21, 2020, and had not completed its investigation as the Defendant was waiting to receive documents from the Plaintiff which were necessary to effectively investigate and adjust the claimed loss. Notwithstanding the Defendant's rightfully ongoing investigation, the Plaintiff prematurely filed suit 78 days after the supplemental claim was opened which amounts to a material breach of the subject policy of insurance and thereby relieves the Defendant of its obligations under the Policy, as consistently held by Florida Courts. Moreover, the Plaintiff failed to comply with the "Suits Against Us" provision of the policy as the Plaintiff had failed to allow the Defendant to adjust the claim within the time frame proscribed by the Policy and Fla. Stat. 627.70131(7)(a). As such, the Plaintiff's Complaint was filed prematurely and at the time the lawsuit was filed the Defendant could not have been in breach of contact as a matter of law.

Based on the foregoing, the Court hereby GRANTS Defendant's Motion for Summary Judgment and hereby enters Final Judgment in its favor. The Plaintiff shall take nothing by this action and Defendant, Safepoint Insurance Company, shall go hence without day. The Court reserves jurisdiction to consider and rule upon any timely-filed motions for attorney's fees and costs. The Court also reserves jurisdiction to enforce this Order.

* * *

**Criminal law—Post conviction relief—Newly discovered evidence—Motion for post conviction relief based on "newly discovered" witness is denied where motion reveals that no efforts were made to locate witnesses prior to defendant's entry of plea, and no reasonable defendant would have rejected generous plea offer and gone to trial based on testimony of witness who is five-time convicted felon and had no first-hand knowledge of who committed murder when state had both an eyewitness to the murder and physical evidence of defendant's guilt—Because defendant has abused judicial system by filing nine successive and meritless post conviction motions, defendant is ordered to show cause why he should not be barred from filing further pro se pleadings**

STATE OF FLORIDA, Plaintiff, v. MARHLAU BELIZIARE, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F07-17556. August 16, 2023. Milton Hirsch, Judge.

## ORDER ON SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

Marhlau Beliziare, convicted of murder more than a decade and a half ago on his plea of no contest, has filed the latest in a long series of meritless motions for post-conviction relief. This will be his last such pleading.

I. Facts

On an April night in 2007, Mr. Beliziare walked up to Terrance Moses from behind and shot him to death. Given that the prosecution had eye-witness testimony, Mr. Beliziare was fortunate indeed to be afforded a plea to second-degree murder and a sentence of straight probation.[1]

Mr. Beliziare's ensuing career as a post-conviction litigant is minutely detailed in a very scholarly *Order Denying Motion For Post-Conviction Relief* authored by my predecessor Judge Ramiro Areces on July 31, 2020. Judge Areces notes that Mr. Beliziare had filed eight post-conviction motions as of that date, all of which were denied. The motion at bar—which, as noted *supra,* will be Mr. Beliziare's last—is therefore number nine.

The present motion candidly acknowledges that it "is successive[,] in that there have been numerous other post-conviction pleadings." *Successive Motion for Post-Conviction Relief* p. 4. As a general rule, even one successive motion is barred.[2] An exception, however, is made for newly-discovered evidence, as provided by Fla. R. Crim. P. 3.850(c)(7). Seeking to fall within that exception, and as required by that rule, Mr. Beliziare's motion appends an affidavit from a witness purportedly newly discovered.

That witness, who signed but did not draft the affidavit appended to the present motion,[3] is Victor Pino. The affidavit identifies Mr. Pino as "an inmate in the custody of the Florida Department of Corrections." *Affidavit of Victor Pino* p. 1. The affidavit does not identify Mr. Pino's crimes of conviction, or what sentence he undergoes. The affidavit's author, Mr. Beliziare's attorney, has good reasons for not sharing that information. According to the Florida Department of Corrections website, Mr. Pino was sentenced in 2016 to 40 years for murder, 15 years for a firearm-related offense, and five years for obstruction of a criminal investigation. He has at least seven prior convictions and sentences for drug crimes going back at least as far as 2007. *See* the attached print-out from the Florida Department of Corrrections.

Mr. Pino does not claim to have seen the murder to which Mr. Beliziare pleaded no contest. What he does claim is that on the night of the homicide, he was in the same building in which the crime was committed, and at one point saw Mr. Moses (the victim) and William Wright (the eyewitness) together. *Affidavit of Victor Pino* p. 1. He claims to have heard the two men arguing, although he concedes that he was on a different floor of the apartment building than the two men. *Id.* He claims to have heard gunshots—he does not tell us how many—and afterward saw Mr. Wright running away. *Id.* It was not until later that he learned that Mr. Moses had been killed. *Id.*

"Police came to the building but [Mr. Pino] did not speak to them," *id.*—hardly surprising, given his criminal activities. He alleges that "many people in the building" knew that it was Mr. Wright who killed Mr Moses, *id.,* but does not identify even one of these "many people."

In summary: Mr. Beliziare seeks to justify the filing of a grossly untimely, grossly successive post-conviction motion by offering an affidavit signed by a ten-times-convicted murderer and drug dealer whose present sentences insulate him from any real fear of the consequences of perjury.[4] And this exemplary affiant does not even assert that he saw the murder committed. He did not see Mr. Wright's (or anyone else's) "murderous falchion smoking in [Mr. Moses's] blood," Wm. Shakespeare, *Richard III* Act I, sc. 2. He asserts only that he saw Mr. Wright—who, along with Messrs Moses and Beliziare he describes as "young men involved in drug sales," *id.*—running from the scene of a shooting. (Query: If it is evidence of Drug Dealer Wright's guilt that he ran from the sound of gunfire, is it evidence of Drug Dealer/Murderer Pino's guilt that he ran from police inquiry about the source of that gunfire?)

Who the shooter was—whether Mr. Beliziare was the shooter—is something as to which Mr. Pino expressly denies being an eyewitness. His testimony is almost wholly irrelevant and could not possibly alter the outcome of this case.

II. Analysis of the merits[5]

To plead a claim of newly-discovered evidence, a defendant convicted on his plea of guilty or no contest must allege that the demised evidence was unknown to him at the time that he took his plea; that it could not have been discovered by the exercise of due diligence; and that, had he been possessed of the evidence at the time of the plea, a reasonable defendant situated as he was would not have entered into a plea but would have insisted on going to trial. *Long v. State,* 183 So. 3d 342, 346 (Fla. 2016) [41 Fla. L. Weekly S15a]; *Williams v. State,* 255 So. 3d 464, 467 n. 1 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2110a]. As to the first of those three elements, I assume *arguendo* that the evidence at issue here—the testimony of Pino—was unknown to Mr. Beliziare at the time Beliziare entered his no-contest plea.

A. Could Pino's testimony have been obtained by the exercise of due diligence?

The motion at bar does not detail any efforts—any at all—made by Mr. Beliziare, or by his former attorneys, or by an investigator on his behalf, to locate witnesses. This is all the more curious because we have the word of none other than Mr. Pino himself for the proposition that "many people in the building" knew that Mr. Wright and not Mr. Beliziare was the murderer. Were efforts—diligent efforts—made on Mr. Beliziare's behalf to gain information from Mr. Pino and these "many people?" No such efforts are detailed in the pending motion. True, Pino was avoiding the police and might well have avoided an investigator acting on behalf of Beliziare. The Pinos of this world are less than eager to participate in the criminal justice process unless they feel entirely confident that no harm can come to them from doing so. But what the law requires is diligent efforts, not necessarily successful ones. If Mr. Beliziare and those acting on his behalf had ferreted out the Pinos and others who might have had knowledge of the particulars of this crime, and if those persons refused to talk, at least it could be said that diligent efforts had been made. If Mr. Beliziare and those acting on his behalf had so much as attempted to ferret out the Pinos and others who might have had knowledge of the particulars of this crime, perhaps it could be said that diligent efforts had been made. But so far as the present motion reveals, no efforts, absolutely none, diligent or otherwise, were made. The present motion is subject to dismissal with prejudice on that basis alone.

As much as a century and a quarter ago, a leading treatise explained:

> The reasons for requiring the exercise of diligence by the accused in this connection are obvious. If the existence and the character of the evidence were known to him while his trial was pending, and if he could have procured it in season by the exercise of diligence, it was his duty to do so at the earliest opportunity. A person indicted for a crime and on trial cannot be allowed to speculate upon the outcome of his trial and to hold back evidence which he may easily procure, with the hope and expectation that, should the proof against him be more convincing than he anticipates, he can put the state to the additional expense of another trial, at which the evidence that he has [withheld] can be introduced.

H. C. Underhill, *A Treatise on the Law of Criminal Evidence* (1898) § 517 at p. 580-81. *See also People v. Schmidt,* 216 N.Y. 324, 328-29 (N.Y. 1915) (Cardozo, J.).[6]

In his affidavit, Pino avers that he was unaware at or about the time Beliziare took his plea that Beliziare was charged with this crime. Even assuming that to be true, the question is not whether Pino sought out Beliziare but whether Beliziare sought out Pino, or someone situated as Pino claims to have been. If Beliziare believed that he was innocent, or that his case was otherwise defensible, he had a duty founded as much in self-preservation as in the efficient operation of the justice system to make efforts, diligent efforts, to seek out helpful witnesses and evidence. Yet the present motion recites no such efforts—none at all. The obvious inference is that Beliziare and his lawyers made no such efforts because Beliziare knew that such efforts would be fruitless, knew that he himself had committed the murder with which he was rightly charged, knew that one favorable plea deal was worth more than a hundred chimerical witnesses.

The requirement of due diligence at or about the time of plea, or certainly within the statutory two-year period thereafter, is an absolute prerequisite to the untimely assertion of a claim of newly-discovered evidence. Mr. Beliziare's claim is grossly untimely, and was preceded by no diligence, due or otherwise. In such circumstances, the law is clear. This motion must be denied with prejudice.

B. Would a reasonable defendant possessed of Pino's testimony have rejected a plea and gone to trial?

Although the foregoing is dispositive of the present motion, for completeness of the analysis I consider the third and final prong of the test: Had he been possessed, at the time he took the plea, of Pino's affidavit, would a reasonable defendant have rejected the plea and gone to trial? The answer is a categorical "no."

Had this case gone to trial in 2007 or 2008, and had the defense chosen to call Mr. Pino as a witness, Pino would have been amenable to impeachment as to only the mere five felony convictions he had then, as compared to the ten he has now. *See* attachment. Assuming he answered correctly when asked on cross-examination about the number of his felony convictions, the jury would never have learned that he was a drug trafficker who would later graduate to murder but had yet to do so. *See* Fla. Stat. § 90.610. Still, five felony convictions is hardly the description of an attractive witness.

What the jury would have learned from Mr. Pino (assuming—and this is a very considerable assumption—that although he is a willing drug dealer and murderer, he would never willingly bear false witness) is that he did not see who committed the crime in this case, that he never heard anyone admit to having committed the crime in this case, and that he has no firsthand knowledge of who committed the crime in this case. What the jury would have learned from Mr. Pino is that after shots rang out in a high-crime area in the dark of night, at least one (perhaps more than one; perhaps many more than one) person ran away. What the jury would have learned from Mr. Pino is that when the police came around to investigate that shooting, Pino made sure to avoid them. This is hardly the description of a useful witness.

In summary: the question posed by the motion at bar is whether a reasonable defendant, confronted with both eyewitness and physical evidence of his guilt as to a charge of first-degree murder, would reject a chance to plead no contest to second-degree murder and receive a sentence of four years' probation and not a day of incarceration in exchange for a chance to call Victor Pino as a defense witness as trial. That question may provoke a laugh, but it does not invite a response. The Florida Supreme Court has explained:

> [I]n determining whether a reasonable probability exist that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including factors such as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial.

*Long,* 183 So. 3d at 346 (quoting *Grosvenor v. State,* 874 So. 2d 1176, 1181-82 (Fla. 2004) [29 Fla. L. Weekly S125a]).

Pino's testimony offered no "particular defense [that] was likely to succeed at trial." Indeed Pino's testimony offered no particular defense at all. Yes, he claimed that from one part of an apartment

building he thought he heard Moses and Wright quarreling in another part of the apartment building. Yes, he claimed to have seen Wright (and, likely, everyone in the area) run away from the sound of gunfire. None of this is in the slightest degree inconsistent with the State's thesis that Beliziare shot and killed Moses, and that Wright was an eyewitness to the shooting. No competent criminal defense lawyer would encourage his client to risk his life on such a "defense," especially when offered through the mouth of the likes of Pino.

The motion at bar makes no suggestion that the change-of-plea colloquy that Beliziare underwent was deficient in any way, or failed to inform him of his rights and the consequences of the waiver of those rights. Having reviewed the record, I am aware of no such deficiency.

The third prong of the *Long/Grosvenor* analysis is the most telling of all: "the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." The sentence imposed under the plea was one of straight probation. If Mr. Beliziare had been able to conform his conduct to law for just a few years, he would never have spent a day in custody and would have been quits with this case and its consequences. If Mr. Beliziare had gone to trial and been convicted he would have been sentenced to mandatory life in prison. Again, no competent criminal defense lawyer would encourage his client to pass up such a generous plea offer and take his chances on such a severe sentence.

The present motion is subject to denial with prejudice because no reasonable defendant would have rejected the plea that Beliziare got in favor of the prospect of the penalty that Beliziare faced.

III. There is no need for an evidentiary hearing on this matter

I recognize that as a general rule, a claim of newly-discovered evidence invites an evidentiary hearing. *Floyd v. State,* 202 So. 3d 137, 140 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2356b]. But a post-conviction court may pretermit such a hearing when, as here, "the affidavit is . . . obviously immaterial to the verdict and sentence." *Davis v. State,* 26 So. 3d 519, 526 (Fla. 2009) [34 Fla. L. Weekly S605a]. *See also McLin v. State,* 827 So. 2d 948 (Fla. 2002) [27 Fla. L. Weekly S743a]; *Andrews v. State,* 919 So. 2d 552 (Fla. 4th DCA 2005) [31 Fla. L. Weekly D95b]. Here, the affiant is a thoroughgoing scoundrel bereft of credibility, *and* the affidavit is "obviously immaterial to the verdict."

Even if Pino and his affidavit were to be believed, entirely believed, his testimony would not exculpate Beliziare at all. Pino does not claim to know of his own knowledge who committed the demised murder. He does not claim to have seen the murder or the murderer. He does not claim to know where Beliziare was at the time of the murder. He does not claim that someone other than Beliziare admitted committing the murder. At most he can testify that sometime prior to the shooting, the victim may have been heard (but was not seen) to be arguing with someone other than Beliziare, and that sometime subsequent to the shooting that same person (and perhaps others) was seen to run away. (His testimony as to neighborhood tittle-tattle—that "many people" in the neighborhood, not one of whom can be identified, knew that Beliziare didn't do the shooting—is of course entirely inadmissible.)

"A post-conviction court is not required to hold hearings on absurd claims or accept as true allegations that defy logic and which are inherently incredible." *Capalbo v. State,* 73 So. 3d 838, 840 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2389a]. *See also Boone v. State,* 311 So. 3d 955 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1869d] (summary rejection, *i.e.,* rejection without evidentiary hearing, of "inherently incredible" claim); *Williams v. State,* 290 So. 3d 1046 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D349b] (same). In *Stilley v. State,* 222 So. 3d 601, 602 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1549a] the court of appeal held that the post-conviction court was not obliged to hold a hearing because Stilley's "claims that he would not have taken such a favorable plea offer and would have gone to trial, given the evidence against him, are patently incredible". Beliziare's claim that, facing a charge of first-degree murder, he would have rejected a no-contest plea to second-degree murder and a sentence of four years' probation because of his confidence that the testimony of a Victor Pino would result in the jurors carrying him out of the courtroom in triumph is likewise "patently incredible."

The author of the motion at bar takes the position that, absent an evidentiary hearing, I must treat the allegations in Pino's affidavit as gospel truth. But it isn't as simple as that. Pino is a thoroughgoing scofflaw. As the case law discussed in the preceding paragraphs makes clear, to the extent that his averments are "inherently incredible," "patently incredible," I am not obliged to pretend they are true.

More to the point, however: *even if I were to treat the entirety of Pino's affidavit as true,* it would benefit Mr. Beliziare not at all. Pino does *not* say he saw the murder committed, or that he saw who committed it. Pino does *not* say that someone other than Beliziare confessed to committing the murder. Pino does *not* say that he is an eyewitness to anything. At best, he offers some inconsequential circumstances: He claims to have heard an argument between the eyewitness and the victim sometime before the murder. He does not say how long before the murder the argument took place, nor what the argument was about, nor who else heard the argument.

He also claims to have seen the eyewitness running away sometime after the shooting. Certainly this is the most inconsequential circumstance of all. In a high-crime area in the dark of night, a shot or shots—he does not say how many—were fired . Surely anyone who valued his life ran away. Surely anyone who wished to avoid an unwelcome encounter with the police ran away. Apparently the thesis of Mr. Beliziare's motion is that, "The wicked flee when no man pursueth, but the righteous are as bold as a lion." Proverbs 28:1. With the greatest respect for Holy Writ, if that statement is true in present-day Miami then the righteous must spend a lot more time at the police station than do the wicked. It has long been

> a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."

*Alberty v. United States,* 162 U.S. 499, 511 (1896). If Wright, and others, ran away from the sound of deadly gunfire, good for him, and them. He, and they, would have been foolish to do otherwise. His, and their, doing so proves absolutely nothing, except his, and their, rational self-interest.

The reason for the general rule that a hearing must be ordered in these circumstances is to afford the post-conviction court an opportunity to make a critical analysis of the value and credibility of the allegedly newly-discovered evidence. This bears directly upon the court's determination whether a reasonable defendant, situated as the defendant was at time of plea, would have rejected the plea and gone to trial if the newly-discovered evidence had been available to him then. But the reason for the general rule is wholly inapplicable here. I am perfectly willing to assume, solely for the sake of the argument, that the statements appearing in Mr. Pino's affidavit are true. (Again, this is an assumption made for the sake of the argument—nothing more.) Even if true, those statements do not exculpate Mr. Beliziare, or undermine confidence in his guilt. Taking the averments appearing in Pino's affidavit in the context of all the evidence in the case, no reasonable jury would be expected to acquit in reliance on the former and in disregard of the later. And no reasonable defendant would think otherwise. That being the case, there is no reason to conduct an

evidentiary hearing, and nothing to be accomplished by conducting one.

Finally, Pino's allegation that "many people" knew that Beliziare is innocent is entirely irrelevant because entirely inadmissible. It does, however, serve to underscore Mr. Beliziare's failure of due diligence. "Many people" could have exculpated him, yet according to the present motion he made no efforts to find even one, and certainly no efforts to find Mr. Pino.

IV. Sanctions

Contrary to what appears to be Mr. Beliziare's impression, the "post-conviction process does not exist simply to give [defendants] something to do in order to pass the time as they serve their sentences." *Carroll v. State,* 192 So. 3d 525, 526 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1066a]. There comes a point when "enough is enough." *Carroll,* 192 So. 3d at 526.

There is more at issue here than the minor annoyance and inconvenience involved in disposing of Beliziare's frivolous pleadings. "It must prejudice the occasional meritorious [post-conviction] application to be buried in a flood of worthless ones. [The post-conviction judge] who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen,* 344 U.S. 443, 537 (1953) (Jackson, J., concurring). In the same vein, the Florida Supreme Court has observed that one justification for sanctioning an abusive post-conviction litigant, "lies in the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings." *Pettway v. McNeil,* 987 So. 2d 20, 22 (Fla. 2008) [33 Fla. L. Weekly S355a]. This court's resources are finite, and every minute spent on entertaining meritless post-conviction motions is time that cannot be spent on potentially meritorious cases. Mr. Beliziare has abused the judicial system by filing the motion at bar.

I recognize that the motion at bar is filed, not by Mr. Beliziare himself, but by a member of the Florida Bar. That, however, is a condition of aggravation, not of mitigation. An inmate in the Florida penal system, untutored in the law and desperate for hope however false, like the protagonist of Oscar Wilde's *Ballad of Reading Gaol,* may well be among, "Those witless men who dare/To try to rear the changeling Hope/In the cave of black Despair." He may well persuade himself that an affidavit, probative of next to nothing and authored by an execrable thug, is the certain path to freedom and a new life. And thus persuaded he may feel himself justified in filing a motion that is entirely untimely, entirely successive, and entirely meritless—and barred for all those reasons.

But a lawyer knows better.

Marhlau Beliziare is hereby directed to show cause within 30 days of the entry of this order why he should not be barred from filing further pleadings or papers pertaining or relating to, or arising out of, the present case.

V. Conclusion

Marhlau Beliziare's present successive post-conviction motion is hereby denied. This is a final order. The movant has 30 days in which to appeal. Fla. R. Crim. P. 3.850(k). In the event of an appeal, the Clerk of Court is to transmit the present motion; the prior order entered by Judge Areces and referenced *supra* at 1; and the present order; with the appellate record.

No motion for rehearing will be entertained. *See* Fla. R. Crim. P. 3.850(j).

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[1]2Beliziare promptly violated his probation and is presently in prison.

A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was made on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was not good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion. Fla. R. Crim. P. 3.850(h)(2).

[3]The affidavit itself acknowledges that it was drafted by the lawyer currently representing Mr. Beliziare.

[4]This point bears emphasis. At the time Mr. Beliziare's crimes were committed, Pino scrupulously avoided being interviewed by the police—understandably enough for a drug dealer. That he is now willing to aid and participate in the criminal justice process is probably not due to any epiphany that he has experienced. It is probably because his present sentences will keep him behind bars for most, if not all, of the rest of his life. So why not help an old friend with some handy perjury? Even if he were to be convicted of that perjury, of what consequence is a five-year sentence to someone who will likely never live to serve the sentences he already undergoes?

[5]Despite the categorical language of Rule 3.850(c) and (n) providing that a motion not signed and sworn to by the defendant is subject to dismissal, the author of the motion at bar admits that the motion is unsworn, but represents that it will be sworn to on some unidentified date in the future. The motion breezily asserts that, "This is permissible." With all due respect, the motion is facially insufficient and subject to dismissal without prejudice, at least until it is properly signed and sworn to—something that has not happened as of this writing.

The foregoing notwithstanding, I reach the merits—such as they are—of the motion because the filing of this motion constitutes such an egregious abuse of the court's process that it would be wrong to protract its adjudication. After 15 years and eight frivolous post-conviction motions, Mr. Beliziare and his counsel seek a new lease on litigation life based on an affidavit signed by a scurrilous villain, which affidavit does not even offer firsthand evidence of Beliziare's innocence. This must stop.

[6]*Schmidt* involved a post-sentencing motion for a new trial, rather than a collateral attack on a judgment and sentence. The principle at issue, however, is the same.

* * *

**Torts—Municipal corporations—Premises liability—Trip and fall on city sidewalk—Change between sidewalk slabs did not constitute hidden danger or concealed peril where condition of sidewalk would have been obvious to individual upon ordinary use of own senses—Change in sidewalk elevation of 9/16 of an inch is not dangerous condition as matter of law**

JEAN DESIMONE, Plaintiff, v. CITY OF SARASOTA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2022 CA 3397 NC. June 27, 2023. Stephen M. Walker, Judge. Counsel: Mitchel Chusid and Jordan Chusid, Chusid, Katz & Sposato, LLP, Coral Springs, for Plaintiff. Joseph C. Mladinich, Fournier, Connolly, Shamsey, Mladinich & Polzak, P.A., Sarasota, for Defendant.

**ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT, AND, PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

THIS CAUSE came before the Court on May 3, 3023, upon Defendant CITY OF SARASOTA'S Motion for Final Summary Judgment and Plaintiff JEAN DESIMONE'S Motion for Partial Summary Judgment, and the Court having reviewed said motions, responses, and corresponding exhibits, affidavits and evidence, and having heard argument of counsel, having familiarized itself with applicable law, and after being otherwise duly advised in the premises, finds as follows:

On January 10, 2022, the Plaintiff in this case, JEAN DESIMONE (hereinafter "Plaintiff"), was walking from her home to the local library when she tripped and fell on an uneven section of sidewalk where two concrete panels met. The sidewalk at issue was owned and maintained by the Defendant, CITY OF SARASOTA (hereinafter "Defendant"). Shortly thereafter, Defendant took photographs and measurements of the incident location, which depicted a maximum deviation between sidewalks panels of nine-sixteenth (9/16") of an inch; however, the sidewalk at issue was otherwise well-maintained. Defendant filed a Motion for Final Summary Judgment and Plaintiff filed a Motion for Partial Summary Judgment. Given that the issues in the two motions overlap significantly, the following analysis is determinative as to both motions.

A landowner owes two duties to a business invitee: (1) to use reasonable care in maintaining the premises in a reasonably safe

condition; and (2) to give the invitee warning of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care. *St. Joseph's Hosp. v. Cowart*, 891 So.2d 1039, 1040 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D2058a]. The law is well settled and the Supreme Court of Florida has held that "that a difference in floor levels does not of itself constitute failure to use due care for the safety of a person invited to the premises and there is no duty to issue warning of such condition when it is obvious and not inherently dangerous." *Schoen v. Gilbert*, 436 So. 2d 75, 76 (Fla. 1983) (quoting *Hoag v. Moeller*, 82 So. 2d 138, 139 (Fla. 1955). In a premises-liability decision upholding summary judgment for the landowner, the Florida Supreme Court recognized more than a half-century ago that although a "business invitee is entitled to expect that the proprietor will take *reasonable* care to discover the actual condition of the premises and either make them safe or warn [the invitee] of dangerous conditions*, it is equally well settled that the proprietor has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses*." *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129, 1130-31 (Fla. Dist. Ct. App. 2017) [42 Fla. L. Weekly D752a] (quoting *Earley v. Morrison Cafeteria Co. of Orlando*, 61 So.2d 477, 478 (Fla. 1952) (*emphasis added*). There are two types of obvious conditions that will not constitute a breach of a duty to maintain premises in a reasonably safe condition, to wit: 1) where the condition is so "open and obvious and not inherently dangerous"; or 2) where the condition may be dangerous, but is "so open and obvious that an invitee may be reasonably expected to discover them to protect himself." *Id.* at 1133.

With the adoption of the new summary judgment standard in Florida, the application of federal cases applying Florida law has become very relevant. Defendant cited to two cases which control the analysis by this Court. *See Durrah v. Bowling Green Inn of Pensacola, LLC,* No. 3:20CV5234-TKW-EMT, 2021 WL 4120802 (N.D. Fla. Mar. 29, 2021); *Kelley v. Sun Communities, Inc.*, No. 8:19-CV-1409-T-02AAS, 2021 WL 37595 (M.D. Fla. Jan. 5, 2021). In *Durrah*, the Court granted summary judgment, holding, "because the uneven sidewalk in this case—and its ½ inch height difference between slabs—is not a dangerous condition as a matter of Florida law, Defendant did not breach either its duty to maintain the sidewalk free of dangerous conditions or its duty to warn Plaintiff of a hidden dangerous condition on its property." *Durrah v. Bowling Green Inn of Pensacola, LLC.* at *5. In *Kelley*, the plaintiff tripped on an uneven joint between two concrete slabs of "only a few inches". *Kelley v. Sun Communities, Inc.* at *3. The defendant in *Kelley* argued that it was entitled to summary judgment because it did not breach either is duty to warn or its duty to maintain the property in a reasonably safe condition. *Id.* at *2. The *Kelley* Court found that an uneven sidewalk, "while not a construction feature like the difference in floor height within a building or the step-down from a street curb, uneven sidewalks are just as commonplace—any stretch of sidewalk is bound to have flaws and uneven spots caused by tree roots or myriad other reasons." *Id.* at *3. The *Kelley* Court also pointed out other Florida District Courts of Appeal finding certain conditions not inherently dangerous. *Id.* at *3*; See Circle K Convenience Stores, Inc. v. Ferguson*, 556 So. 2d 1207, 1208 (Fla. 5th DCA 1990)(holding that an uneven juncture between the cement and asphalt in a gas station parking lot was "so common and innocuous" that it was not a dangerous condition); *Gorin v. City of St. Augustine,* 595 So. 2d 1062, 1063 (Fla. 5th DCA 1992)(holding that the step-down from a sidewalk curb to a parking lot or street is not inherently dangerous)*)*; *see also Aventura Mall Venture v. Olson,* 561 So. 2d 319, 321 (Fla. 3d DCA 1990)*; K.G. ex rel. Grajeda v. Winter Springs Cmty. Evangelical Congregational Church*, 509 So. 2d 384, 385 (Fla. 5th DCA 1987)(holding that, "protruding, uneven bricks" placed around the base of a tree in an area where children often played was not a dangerous condition that required a landowner to take corrective or precautionary measures*).* While the *Kelley* Court granted summary judgement where the change in elevation was only a "few inches", the undisputed facts in the instant case are even more favorable to the Defendant as the deviation between sidewalk panels was only nine-sixteenth (9/16") of an inch.

In the case before the Court, the condition of the sidewalk does not constitute a hidden danger or concealed peril. Further, the Florida Supreme Court has held that a landowner has the right to assume that an invitee will perceive that which would be obvious to him or her upon the ordinary use of one's own senses. The summary judgment evidence establishes that the condition of the sidewalk in this case would be obvious to an individual upon the ordinary use of his or her own senses. Furthermore, the nine-sixteenth (9/16") of an inch change in elevation between sidewalk panels is not a dangerous condition as a matter of Florida law. The law imposes on a landowner the duty to mitigate unreasonable hazards on the property; however, it does not require the landowner to foreclose all risk that an invitee will injure himself or herself during an inattentive moment.

Accordingly, based on the foregoing findings, it is hereby ORDERED and ADJUDGED as follows:

A. Defendant's Motion for Final Summary Judgment is hereby GRANTED; and

B. Plaintiff's Motion for Partial Summary Judgment is hereby DENIED.

* * *

**Municipal corporations—Community redevelopment agency—Contracts—Competitive bidding—Disqualification—Challenge to city procurement official's disqualification of winning response to request for proposal on ground that proposer violated "no lobbying" provisions of RFPs and city code—Disqualification for soliciting members of community not associated with plaintiff to contact public officials in support of plaintiff's proposal was arbitrary and capricious where neither city code nor RFP defined vague terms "contact," "lobbying," or "seeking to influence" or clearly precluded proposers from seeking unpaid, unaffiliated public support—Official's after-the-fact interpretation of lobbying provisions also raises questions of whether city code is void for vagueness and violates First Amendment right to petition—No merit to argument that case was rendered moot by subsequent cancellation of RFP—Cancellation based on disqualification of both proposers was rendered invalid by court's determination that plaintiff's disqualification was not done in good faith—If cancellation was not due to disqualifications, but was instead based on RFP provision allowing cancellation "with or without cause, for any reason or for no reason," cancellation was not a good faith, honest exercise of CRA's discretion**

VITA LOUNGE, LLC, a Florida limited liability company, Plaintiff, v. COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF WEST PALM BEACH, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502022CA007080XXXXMB. Division AF. March 23, 2023. Carolyn Bell, Judge. Counsel: Anthony M. Stella, City of West Palm Beach, City Attorney's Office, West Palm Beach, for Plaintiff. F. Malcom Cunningham Jr., The Cunningham Law Firm, P.A., West Palm Beach, for Defendant.

## FINAL JUDGMENT ON COUNT I

**THIS CAUSE** came before the Court for non-jury trial on January 26 and 27, 2023. The Plaintiff, Vita Lounge, LLC, ("Vita"), filed a two-count Complaint[1] against the Community Redevelopment Agency of the City of West Palm Beach ("CRA"). In the matter tried before the Court, Vita sought an Action for Declaratory Relief for Improper Disqualification after being awarded Request For Proposal

("RFP") No. 21-22-206 JG Operation of the Sunset Lounge—A Historical Restaurant/Supper Club & Entertainment Venue, WPB File No. 21-27570 (the "Sunset RFP"). Specifically, Vita sought to have the Court determine whether the CRA improperly disqualified it as the winning proposer for the operation of the Sunset Lounge. The CRA, represented by the City of West Palm Beach, maintains Vita's disqualification must be sustained. For the reasons detailed below, the Court finds in favor of the Plaintiff.

The Court's factual and legal findings and rulings are as follows:

I. Factual Findings[2]

In early February 2022, the CRA issued the Sunset RFP, which was a request for proposals to undertake the operation and management of the Sunset Lounge, a historically significant building in Northwest West Palm Beach. The Sunset RFP's main stated objective was "the revival of the Sunset Lounge as a state-of-the-art performance and art-focused venue and African American cultural tourism destination that pays homage to its rich jazz history and the black history of the area, which further encourages the economic development of the historic Northwest neighborhood." The Sunset RFP required the operator of the Sunset Lounge to "provide direct community benefits through the offering of music lessons, art exhibitions and performing arts classes, along with training for jobs in the hospitality industry" and "programming for Heart & Soul Park in connection with activities at the Sunset Lounge." Thus, the Sunset RFP required the operator to not only "program, manage and operate the 150-seat bar and restaurant/supper club and state-of-the art entertainment venue, along with the rooftop bar and patio," but also "program the entertainment venue with such events and recognized artists to establish the Sunset Lounge as a cultural tourism destination."

Two entities submitted proposals seeking to have the CRA award them the Sunset RFP. One of them was Vita. Vita was a local West Palm Beach business whose Vice-President was long-time community member Darrin Cummings. Mr. Cummings was also the General Manager of the Sunset Community Group which he organized and led as a vehicle to assist Vita in securing an operating agreement for the Sunset Lounge. The Sunset Community Group was a full-service hospitality and event management team. Tracy Thomas was another West Palm Beach community member who served as a consultant for community outreach and programming, as well as digital marketing, for the Sunset Community Group. The other proposing entity, called Mad Room, did not have significant ties to Palm Beach County.

An important part of the CRA's evaluation process of the Sunset RFP proposals involved input from the public. Proposers were to be assessed by a panel of West Palm Beach citizens who would assist in determining points to be awarded based on technical criteria. Proposers were also required to put on a public entertainment event at the Sunset Lounge at which attendees would critique the presentations made by the proposers.

The governing Board of the CRA consisted of the elected Mayor of the City of West Palm Beach and elected West Palm Beach City Commissioners. On June 7, 2022, at a duly noticed and properly convened public meeting of these officials, the Board voted 4 to 2 to award the Sunset RFP to Vita. This award was not a final contract but, rather, entitled Vita to engage in negotiations with the CRA to finalize an agreement to operate and manage the Sunset Lounge.

Approximately one month after Vita's selection, Vita was informed it was disqualified from the Sunset Lounge project and that no further negotiations with the Vita team would be commenced. No one from the City or the CRA personally contacted Mr. Cummings or anyone associated with Vita. Instead, the information was conveyed through a July 12, 2022 Disqualification Letter from Paul A. Bassar, as Procurement Official for the City of West Palm Beach ("Disqualification Letter"). Mr. Bassar was an unelected government employee who, though not an attorney, reported to the West Palm Beach City Attorney. In the Disqualification Letter, Mr. Bassar made it clear that it was his decision to disqualify Vita, stating, "I find Vita Lounge, LLC, has violated Sec. 66-8 of the City of West Palm Beach Code of Ordinances and the no-lobbying provisions of the RFP."

The Disqualification Letter included the language of Section 66-8 of the City Procurement Code, which reads:

**Section 66-8—Prohibited Lobbying**

No person, firm corporation, or others representing such person, firm or corporation shall contact or lobby the mayor, the city commissioner, city staff or evaluation committee member in person, by telephone, in writing, by email, or any other means of communication, regarding the procurement of goods, services or construction from the time the intent to procure such goods services or construction is advertised to the time of completed procurement. The only permissible contact regarding a procurement solicitation shall be with the procurement official or with the evaluation committee at a duly noticed public meeting. Lobbying and lobbyist shall have the same meaning as provided in subsection 2-581(a) of the city's ethics code.

The Disqualification Letter also included the anti-lobbying provisions of the Sunset RFP, as follows:

**NO LOBBYING**

CONTACT BY A PROPOSER (OR ANYONE REPRESENTING A PROPOSER) WITH THE MAYOR, ANY CITY COMMISSIONER, OFFICER, AGENCY OF THE WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, CITY OR CRA EMPLOYEE (OTHER THAN AN EMPLOYEE OF THE WEST PALM BEACH PROCUREMENT DIVISION OR OFFICE OF ECONOMIC OPPORTUNITY), REGARDING THIS RFP, IS GROUNDS FOR DISQUALIFICATION. Contact with the Procurement Division shall be for clarification purposes only. Contact with the Office of Equal Opportunity shall be for equal opportunity purposes only.

**Lobbying Prohibited**. As to any matter relating to this RFP, contact by a Proposer, or anyone representing a Proposer, with the Mayor, any City Commissioner, officer, CRA employee, CRA contractor or consultant, City employee, or any City representative or contractor, or any other person working on behalf of the CRA or City on any matter related to or involved with the RFP, other than employee of the West Palm Beach Procurement Division or Office of Small and Minority Business Programs is grounds for disqualification. For purposes of clarification, a team's representatives shall include, but not be limited to, the Proposer, the Proposer's employees, partners, attorneys, officers, directors, contractors, lobbyists or any actual or potential contractor or subcontractor of the Proposer or the Proposer's team. All oral or written inquiries are to be directed to the Procurement Division staff. Any violation of this condition may result in rejection and/or disqualification of the Proposer. The No Lobbying condition is in effect from the date of publication of the RFP and shall remain in effect until the CRA executes a contract, or otherwise takes action which ends the solicitation process for the services under this RFP.

In the Disqualification Letter, Mr. Bassar went on to give examples of what he found were violations of the lobbying provisions. These included Facebook posts by Mr. Cummings and Mr. Lorenzo "Lolly" Hutchinson, whom Mr. Bassar described as Mr. Cummings' "partner," encouraging members of the community to show support for Vita by showing up at the CRA Board selection meeting and by emailing the City Commissioners. Mr. Bassar also relied upon what he described as an "email chain" which he inferred was sent to at least forty people directly from Ms. Thomas seeking to have them send emails supporting Vita to City Commissioners prior to the CRA Board selection meeting. Mr. Bassar also stated Vita had violated the Sunset RFP's prohibition on News Releases/Publicity when Mr. Cummings

gave an interview to news stations about the Sunset Lounge without first requesting City approval.

During the Plaintiff's case-in-chief, the Court heard credible testimony that certain of the allegations relied upon by Mr. Bassar were incorrect. Significantly, while Mr. Cummings had replied to a Facebook post by his friend, Mr. Hutchinson, and encouraged the community to contact the CRA Board with their support for Vita, both Mr. Hutchinson and Mr. Cummings testified that Mr. Hutchinson was not Mr. Cumming's "partner," business or otherwise, and was not associated with Vita. In addition, Ms. Thomas testified that she had only sent the email asking for support to a few of her friends, and that they, not she, must have forwarded it to others.

As part of the Plaintiff's rebuttal case, Mr. Bassar was called as a witness and confirmed that he was the sole decision maker in disqualifying Vita. He also stated that although he had included the News Releases/Publicity violation in his Disqualification Letter, this was not actually a basis for his decision. Mr. Bassar further testified that he could not identify any particular e-mail sent to the CRA that was in direct response to a request by Mr. Cummings or Ms. Thomas.

At no time prior to sending the Disqualification Letter did Mr. Bassar contact Mr. Cummings or anyone associated with Vita or in the community for any information about the allegations relied upon in disqualifying Vita. At no time after the disqualification was Vita offered a hearing or appeal before Mr. Bassar, the City, or the CRA Board, or any opportunity to respond to the assertions in the Disqualification Letter or the reasons given for the CRA's action.

Neither Mr. Bassar nor anyone associated with the CRA has alleged that anyone affiliated with Vita, or anyone representing or paid by Vita, had direct contact with the Mayor, a City Commissioner, city staff, anyone associated with the CRA other than procurement employees, or anyone associated with any evaluation committee about the Sunset RFP.

On August 3, 2022, for unrelated reasons, Mr. Bassar sent a letter to Mad Room informing them that they, too, had been disqualified from the Sunset RFP. On August 4, 2022, Mr. Bassar issued a letter declaring that the Sunset RFP had been cancelled (the "Cancellation Letter"). The Cancellation Letter gave no explanation for the action other than stating, "Any termination of selection, withdrawal or cancellation of such solicitation either before or after selection of a proposer shall be made without any liability or obligation on the part of the City or its employees." At trial, however, Mr. Bassar testified that he determined that the cancellation was in the best interest of the CRA and the City as all proposers regarding the Sunset RFP had been disqualified and, by cancelling the Sunset RFP, the CRA could start anew regarding ideas or proposals for a possible new solicitation for the Sunset Lounge.

II. Legal Findings

The issue before the Court is whether the disqualification of Vita from the Sunset RFP by Mr. Bassar, the City's Procurement Official, was proper and otherwise lawful. The Court finds it was not.

The City urges the Court to find that, as long as Mr. Bassar was acting in good faith, the Court must defer to his decision. The City asserts that in order to invalidate Mr. Bassar's decision, the Court must find evidence of illegality, fraud, oppression or misconduct.

There is no question that "a public body has wide discretion in soliciting and accepting bids" for public improvement projects which, when based on an honest exercise of this discretion, "will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." *Liberty County vs. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982). As the Florida Supreme Court specifically noted in a decision on which *Liberty* relies, however, the concept of good faith in this context includes more than just evidence of illegality, fraud, oppression or misconduct. "[T]he discretion vested in a public agency in respect to letting public contracts may not be exercised arbitrarily or capriciously, but . . . must be bottomed upon facts reasonably tending to support its conclusions." *Culpepper v. Moore*, 40 So. 2d 366, 370 (Fla. 1949). This "arbitrary and capricious" language has been widely cited by the Florida Supreme Court and other courts opining on the appropriate standard in these types of cases, both before and after *Liberty*. *See, e.g., Dep't of Transp. v. Groves-Watkins Constructors,* 530 So. 2d 912, 914 (Fla. 1988) ("The hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly"); *Town of Riviera Beach v. State*, 53 So. 2d 828, 831 (Fla. 1951) ("No principle of law is better established than that courts will not sit in review of proceedings of municipal officers and departments involving legislative discretion, in the absence of bad faith, fraud, arbitrary action or abuse of power"); *Mayes Printing Co. v. Flowers*¸ 154 So. 2d 859, 864 (Fla. 1st DCA 1963) ("Public officers have a discretion in the awarding of contracts, yet that discretion may not be exercised arbitrarily and capriciously"); *City of Sweetwater v. Solo Const. Corp*., 823 So. 2d 798, 802 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1879a] ("While a public authority has wide discretion in award of contracts for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously"); *Accela, Inc. v. Sarasota County*, 993 So. 2d 1035, 1038 (2d DCA 2008) [33 Fla. L. Weekly D601a] ("We conclude that the trial court was required to determine whether the County acted arbitrarily or capriciously in entering into the agreements with CSDC"); *Emerald Corr. Mgmt. v. Bay County Bd. Of County Comm'rs*, 955 So. 2d 647, 651, 652-53 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1174b] (summarizing cases standing for the proposition that the arbitrary and capricious standard applies to local governments' handling of bids and competitive proposals, including RFP's and holding "While we recognize the wider discretion afforded counties and cities in exercising discretion in accepting or rejecting responses to RFPs, the decisions still must be subject to review to determine whether the governing body acted arbitrarily or capriciously").

Thus, in determining whether Mr. Bassar, on behalf of the City, acted in good faith in disqualifying Vita from the Sunset RFP, the Court must consider whether he acted arbitrarily and capriciously in making his decision. Although no cases directly define the term "arbitrary and capricious" in the context of bid proposals, a wealth of jurisprudence supports a finding that government entities act arbitrarily and capriciously when they use terms in the competitive bid processes that are unclear, ambiguous, or altered mid-stream.

In *Sweetwater*, for example, the Third District Court of Appeal affirmed a trial court's finding that a city violated competitive bid statutes when, without notice during the bidding process, the city changed its criteria for awarding a contract from the "lowest responsible bidder" to the "most responsible bidder." *City of Sweetwater*, 823 So. 2d at 802. Notably, the appellate court recognized the decision in *Decarion v. Monroe County*, 853 F. Supp. 1415 (S. D. Fla. 1994), wherein the United States District Court for the Southern District of Florida defined "arbitrary and capricious" for substantive due process purposes to include "acts taken with improper motive, without reason or for a reason which is merely pretextual." *Id*. Based on that definition, the *Sweetwater* court found the city's action—i.e., altering the terms upon which it predicated its decision amidst the ongoing bidding process—was done "without reason, or for a reason that is merely pretextual in that [they are] devoid of any legal basis." *Id*. "Accordingly, the city's decision to award the contract to [the most responsible bidder instead of the lowest bidder] *was arbitrary and capricious and based upon criteria that were neither include in the bid documents nor clearly defined in any manner whatsoever*." *Id*.

(emphasis added)

Similarly instructive is the First District Court of Appeal's decision in *Emerald Corr. Mgmt. v. Bay County Bd. Of County Comm'rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1174b], in which a prospective contractor alleged that a public body abused its discretion by not complying with language in its RFP in evaluating proposals, and/or that the evaluators misinterpreted the RFP, proposal, statute or facts. The appellate court held the trial court erroneously relied on the broad discretion retained by the county in the RFP process. *Id*. Significantly, the reviewing court found, "[w]hether the Board acted arbitrarily is generally controlled by a determination of whether the Board complied with its own proposal criteria as outlined in the RFP." *Id*.; *see State, Dep't of Lottery v. Gtech Corp*., 816 So. 2d 648, 652 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1733c] (finding State improperly accepted a proposal that materially altered or omitted material provisions of the RFP): *see also Accela, Inc. v. Sarasota County*, 993 So. 2d 1035, 1043 (2d DCA 2008) [33 Fla. L. Weekly D601a] (quoting *Robert G. Lassiter & Co. v. Taylor*, 128 So. 14, 17 (1930) ("[t]he city could not circumvent the charter provision by first entering into a legal contract for pavement in accordance with plans and specifications [set forth in the notice to bidders,] and later, by agreement, change the contract to a different type of pavement or make a new contract.")

Also persuasive is the Second District Court of Appeal's decision in *Town of Longboat Key v. Islandside Property Owners Coalition, LLC*, 95 So. 3d 1037 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2058a], which affirmed a trial court's lack of deference to a government entity's interpretation of a local ordinance. In *Longboat Key*, the appellate court denied a petition for writ of certiorari challenging a circuit court's order quashing a town ordinance. *Id*. at 1043. In that case, the town argued the circuit court "departed from the essential requirements of the law" by not deferring to the town's interpretation of its "ambiguous" zoning Code. *Id*. at 1042. The town relied upon its "longstanding interpretation of its Code;" the trial court limited its analysis to the wording of the town's Code. *Id*. The Second District Court of Appeal insightfully held:

> The Town's longstanding interpretation of its Code cannot tie the circuit court's hands. To allow such a result would countenance a shifting sands approach to Code construction that would deny meaningful judicial review of local quasi-judicial decisions. The meaning of a Code would remain in flux. Such an approach does not promote consistency in the application of law. *As the wording of its laws binds a legislature, the Town is bound by the wording of its Code. This mounts a bulwark against the Town's unfettered exercise of power.*

*Id*. (internal citations omitted) (emphasis added).

Here, the bidding proposal criteria included "no lobbying" provisions based upon specific wording in both the Sunset RFP and in the City's Code. Neither of these sources, however, state that proposers seeking to have an RFP awarded to them are prohibited from soliciting members of the community to contact their elected officials.

Indeed, in its "No Lobbying" provisions, the RFP specifies that neither ***a proposer nor anyone representing a proposer*** may ***contact*** anyone associated with a decision maker. The RFP defines the "Proposer's team" as including "the Proposer, the Proposer's employees, partners, attorneys, officers, directors, contractors, lobbyists or any actual or potential contractor or subcontractor of the Proposer or the Proposer's team." Members of the community are not included as part of the Proposer's team. The term "contact" is not defined. Most significantly, nowhere in the RFP does it state that anyone on the proposer's team is prohibited from reaching out to unaffiliated members of the community and asking them to advocate to their elected officials.

Similarly, Section 66-8 of the Procurement Code reads, in pertinent part "**No person, firm, corporation, or others representing such** person, firm or corporation ***shall contact or lobby*** . . ." the decision makers in any procurement matter (emphasis added).[3] Subsection 2-581(a) of the City's Code define "lobbying" and "lobbyist" as follows:

> Lobbying shall mean **seeking to influence** the decision of any city commissioner, any advisory board member, any employee or any other decision maker with respect to the passage, defeat or modification of any item which may foreseeably be presented for consideration to such entities as applicable.
>
> **Lobbyist shall mean any person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying on behalf of a principal.** "Lobbyist" shall not include any employee as defined in this article when acting in the course of his or her employment, any elected local official when the official is lobbying on behalf of the governmental agency which the official serves, or any member of the official's staff when such staff member is lobbying on an occasional basis on behalf of the governmental agency by which the staff member is employed.

(emphasis added)

The Code does not further elaborate on what "seeking to influence" entails or to whom the prohibition applies. Given that this part of the Code defines both lobbying and lobbyist together, a natural reading of the anti-lobbying provision limits the restrictions on "lobbying" to only the proposer or a lobbyist hired by the proposer—not an unaffiliated member of the community.

Despite the lack of clarity in the City's Code, as framed in the Disqualification Letter, Mr. Bassar interpreted the phrase "seeking to influence" to include members of Vita's team encouraging members of the West Palm Beach community who were not lobbyists or otherwise associated with, represented by, or paid by Vita to appeal to their elected officials on Vita's behalf. This is not a circumstance where, on their face, either the City's Code or the Sunset RFP provided clear and unambiguous guidance of what indirect contacts were prohibited. No place in either the City's Code or in the Sunset RFP is there anything other than broad, vague language of what "contact," "lobbying" or "seeking to influence" entailed or to whom the provisions applied. Nowhere in these provisions are these terms clearly defined to preclude a proposer from seeking unpaid, unaffiliated public support for a proposal which, notably, required public evaluation and input. Nor is that the common understanding of those words. There was no evidence presented to the Court that the City had previously interpreted these rules in this way or had publicized this interpretation.

Instead, Vita first received actual notice that its particular activities were prohibited only when it received Mr. Bassar's after-the-fact interpretation of the rules contained in the Disqualification Letter. There may be serious due process issues with rules whose language is not sufficiently explicit to inform those subject to their provisions what conduct is prohibited when measured by common understanding and practice. *See, e.g., Whitaker v. Dep't of Ins. And Treasurer*, 680 So. 2d 528, 532 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1353b] (in context of unfair licensing statute, finding statute that is too vague to provide notice of prohibited acts is void for vagueness under due process clause). Moreover, if, *arguendo*, the phrase "seeking to influence" prohibited those associated with Vita from encouraging community members with no financial or other formal ties to Vita from contacting their elected officials, this potentially implicates the First Amendment right to petition and thereby could render Mr. Bassar's decision illegal. *See generally Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) [15 Fla. L. Weekly Fed. S187a]; *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 202 (Fla.1985).

The possibility of such profound due process and First Amendment constitutional consequences with Mr. Bassar's after-the-fact interpretation of the lobbying provisions crystalizes another glaring issue in this case: by failing to give notice to Vita and the other proposers that he interpreted the rules in this way, there was no opportunity for the rules to be properly vetted. As the Fourth District Court of Appeals held in a similar context, "Government cannot function in such after-the-fact fashion; property owners are entitled to rely upon the clear and unequivocal language of municipal ordinances." *Ocean's Edge Dev. Corp. v. Town of Juno Beach*, 430 So. 2d 472, 474-75 (Fla. 4th DCA 1983) relying upon *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 554 (Fla.1973). In this case, Vita was entitled to the same type of clarity from the CRA, a public entity, prior to its participation in the Sunset RFP process, when Vita's principals could adjust their behavior and potentially challenge the rules. Instead, they received no notice that their actions were prohibited before or during their participation in the Sunset RFP, nor were they afforded an opportunity for any appeal or hearing after Mr. Bassar's disqualification decision.

Vita encourages this Court to opine on the constitutionality and reasonableness of Mr. Bassar's interpretation of the City's lobbying provision and those in the Sunset RFP. At this juncture, however, the Court finds it is not necessary to do so in determining that the Plaintiff has met its burden in showing that the CRA, through Mr. Bassar, acted arbitrarily and capriciously in disqualifying Vita from the Sunset RFP.

The Court makes this finding based on the totality of Mr. Bassar's actions on behalf of the City and the CRA. After Vita had been selected by elected officials sitting on the Board of the CRA, Mr. Bassar, an unelected government employee, independently determined that Vita should be disqualified. He based his decision at least in part on incorrect facts. His Disqualification Letter purported to disqualify Vita for, among other reasons, violating the publicity provision of the Sunset RFP. He later testified that this was not actually a ground that he relied upon. The disqualification was based on an interpretation of rules that may have been unconstitutional and therefore illegal. Most significantly, the criteria used to disqualify Vita was not clear or unambiguous, was not disclosed in the Sunset RFP or the City's Code, and was not otherwise publicized or communicated prior to or during the process to those who had to follow these rules. Nor did those who had to comply with the rules have the opportunity to appeal the disqualification to Mr. Bassar, the City, or the elected members of the CRA Board. Mr. Bassar's disqualification of Vita was arbitrary and capricious as it relied upon his after-the-fact interpretation of the rules under which the Sunset RFP proceeded, of which the participants in the process did not have adequate notice or an opportunity to be heard. The Court finds that the decision to disqualify Vita was not made in good faith, and therefore declares the CRA's disqualification to be invalid.

III. Mootness/Standing/Jurisdiction

At the close of the evidence at trial, the City argued *ore tenus* that Vita lacked standing to bring this declaratory action and that the matter was moot as Mr. Bassar had cancelled the Sunset RFP as of the August 4, 2022 Cancellation Letter. The City maintained that, regardless of the status of Vita's disqualification, all issues were moot because it was within the CRA's sole discretion to cancel or withdraw the Sunset RFP for any reason. They pointed to language from the Sunset RFP, including:

> "The CRA/City reserves the right to reject any and all proposals received, either in whole or in part, with or without cause, for any reason, or for no reason, without any resultant liability to the CRA/City."

The City similarly contended the Court lacked jurisdiction to enter a declaratory judgment because—as the cancellation of the Sunset RFP rendered the matter moot—there was no bona fide dispute to a present justiciable question before the Court.

The CRA's argument is unexpected. On July 25, 2022, Vita filed a two count Complaint against the CRA which included a count for injunctive relief. The next day, on July 26, 2022, Vita filed an Emergency Motion for Temporary Restraining Order to Preclude Enforcement of Unlawful Disqualification, which was the basis for the Emergency Order. Despite this pending legal action, the CRA, through Mr. Bassar, issued its Cancellation Letter on August 4, 2022. At no time did the elected CRA Board take any action.

On August 29, 2022, after a hearing, the Court's predecessor Judge issued an Order On Vita's Emergency Motion For Temporary Restraining Order to Preclude Enforcement of Unlawful Disqualification. In this Order, the Court found the Plaintiff had withdrawn its Emergency Motion, and the CRA "acknowledged it could not advertise a bid until trial concludes on the Plaintiff's claim for Declaratory Relief." The Court then ordered, "The Community Redevelopment Agency of the City of West Palm Beach shall not advertise or publish a bid for the operation of the Sunset Lounge before the Court enters its decision on Count 1 of the Plaintiff's Complaint after the expedited trial in this matter." (DE #38). There is no indication that at that time the City took the position that the proceedings were moot.

Regardless, the Court rejects the City's argument. Based on the timing of the Cancellation Letter and Mr. Bassar's testimony, the Court finds it is clear that Mr. Bassar predicated the cancellation of the Sunset RFP on the disqualification of both of the proposers for the project. The Court has carefully weighed the evidence and determined that Mr. Bassar's disqualification of Vita was not done in good faith. As such, the basis for the cancellation of the Sunset RFP—i.e., the disqualification of both proposers—is not valid, and Mr. Bassar's cancellation cannot be considered to have been a good faith, honest exercise of his discretion.

If the City is maintaining the cancellation of the Sunset RFP is not based upon the disqualification of the proposers but because the Sunset RFP allowed them to do so "with or without cause, for any reason, or for no reason," the Court also finds the cancellation is arbitrary and capricious, and not a good faith, honest exercise of the CRA's discretion. To reiterate, a public authority's "wide discretion" in the bidding process "must be exercised based upon clearly defined criteria." *City of Sweetwater*, 823 So. 2d at 802. Such an "unfettered exercise of power" is the antithesis of clearly defined criteria. *Town of Longboat Key,* 95 So. 3d at 1042. As well said in *Grace & Naeem Uddin, Inc. v. North Broward Hos. Dist.*, 2013 WL 3313443, *4 (U.S. District Court, S.D. Florida, Judge James Cohn, July 1, 2013), "While a body is free to create standards or procedures to judge bidders' capability and reliability, 'it cannot be allowed to write out the competitive requirement . . . by affording itself overly broad discretion to capriciously and arbitrarily award contracts without established criteria.' "*; see Emerald Corr. Mgmt. v. Bay County*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1174b] ("A public body is not entitled to omit or alter material provision required by an RFP because in doing so the public body fails to 'inspire public confidence in the fairness of the RFP process' ") (internal citations omitted). The fact that the City belatedly made this argument in these proceedings further supports this Court's conclusion that the decision, if indeed made on this basis, was arbitrary and capricious.

Regardless, the CRA should not be allowed to use its own violation to the disadvantage of the opposing party. *See Coventry First LLC v. State, Office of Ins. Regulation*, 30 So. 3d 552, 560-61 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1276a] (holding a party should not be

allowed to violate a rule and then use its own violation to the disadvantage of the opposing party by asserting that opposing party's claim is moot); *see also Robinson Elec. Co. Inc. v. Dade County*, 417 So. 2d 1032, 1035 fn.1 (Fla. 3d DCA 1982) (rejecting County's contention an appeal on a bid was moot when County awarded contract to another firm while appeal on bidding process was pending.)

On the record before the Court, the Court finds that the CRA's cancellation of the Sunset RFP was arbitrary and capricious. Since Vita is not disqualified, the Court finds the City is legally required to continue the Sunset RFP and negotiate in good faith with Vita. Any attempt by the City to do otherwise is contrary to law, inconsistent with this Court's order and would unfairly circumvent the competitive bidding process. *City of Sweetwater*, 823 So. 2d at 803.

Even if an argument could be made that the cancellation of the Sunset RFP could stand, the Court has the inherent power to do those things necessary to enforce its orders and to "return the parties to the status quo prior to the institution of proceedings." *JSZ Financial Co., Inc., v. Whipple*, 939 So. 2d 1189, 1191 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2657a]; *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Insurance Co.*, 639 So. 2d 606, 608-609 (Fla. 1994). Under the totality of the circumstances in this case, given its ruling that Vita's disqualification was not warranted, the Court would exercise its inherent authority and require the City to negotiate with Vita pursuant to the Sunset RFP.

For all of these reasons, the Court finds the issue before the Court is not moot, the Court has jurisdiction over the matter, and Vita has standing to pursue the declaratory judgment currently before the Court.

IV. Motion for Involuntary Dismissal

The City made a Motion for Involuntary Dismissal at the close of the Plaintiff's case, and again at the close of all of the evidence. The City notes that, having previously reserved ruling on this issue, the Court must make a ruling prior to entering judgment in this case. Under Fla. R. Civ. P. 1.420(b), involuntary dismissal of a complaint is appropriate if the facts and law presented do not establish a right to affirmative relief. *Valdes v. Ass'n. I.N.E.D., H.M.O., Inc.*, 667 So. 2d 856, 856 fn.1 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D241e]. However, a court should not grant a motion for involuntary dismissal where the plaintiff has presented a prima facie case and different conclusions or inferences can be drawn from the evidence. *See, e.g., Day v. Amini*, 550 So. 2d 169, 171 (Fla. 2d DCA 1989); *Luciani v. Nealon*, 181 So. 3d 1200, 1202-03 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2697b].

While the evidence presented after the Plaintiff rested its case provided additional evidence supporting this Court's ruling, none of it was dispositive. The Disqualification Letter, presented as part of the Plaintiff's case-in-chief, made clear the decision to disqualify Vita was made by Mr. Bassar. At no time prior to the Disqualification Letter was Mr. Bassar's after-the-fact interpretation of the lobbying provisions of the City's Code or Sunset RFP made known to Vita or anyone else involved in the Sunset RFP process. The testimony of the Plaintiff's witnesses was that neither Mr. Bassar nor anyone associated with the CRA contacted anyone associated with Vita to determine the accuracy of the allegations on which he based his decision. The testimony was also clear that neither Mr. Bassar nor anyone associated with the CRA offered a hearing or any appeal of Mr. Bassar's disqualification ruling.

This evidence, without more, was sufficient for the Court to find the CRA, through Mr. Bassar, did not act in good faith in disqualifying Vita. Furthermore, to the extent the City predicates its argument for involuntary dismissal on Vita's lack of standing, or mootness, or the Court's lack of jurisdiction, for the reasons articulated above, the Court finds otherwise.

For all of these reasons, the Court denies the City's Motions for Involuntary Dismissal.

Based on the foregoing, it is hereby

**ORDERED AND ADJUDGED** as follows:

- The disqualification of Vita from the Sunset RFP was not made by the CRA in good faith as the CRA's decision was arbitrary and capricious;
- The disqualification of Vita from the Sunset RFP is invalidated;
- The cancellation of the Sunset RFP by the CRA was not made in good faith as it was based upon the arbitrary and capricious disqualification of Vita;
- The cancellation of the Sunset RFP is invalidated;
- Vita is not disqualified as the winning proposer under the Sunset RFP;
- Pursuant to the terms of the Sunset RFP, the City and the CRA must negotiate in good faith with Vita for a contract for the operation of the Sunset Lounge.
- Within the next thirty (30) days, the parties are to schedule a hearing to determine the status of Count II of Vita's Complaint.

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[1]Vita initially filed a two count Complaint against the CRA. Count I, for declaratory relief, was tried before this Court. Count II sought injunctive relief. It appears that there may have been some confusion as to whether the Court disposed of Count II as part of its August 29, 2022 Order On Vita's Emergency Motion For Temporary Restraining Order to Preclude Enforcement of Unlawful Disqualification, discussed within. As there is nothing in the record formally indicating that Count II has been withdrawn or that a final order has been entered on that basis, however, this Court is only issuing Judgment as to Count I at this time.

[2]The Court has carefully considered the credibility of each witness, all the while being cognizant of the interests of the parties in the outcome of the case. In summarizing any evidence or the substance of any witness's testimony, the Court has not included every detail, nor attempted to state non-essential facts; because the Court has not done so, however, does not mean it has failed to consider all of the evidence. Further, in its findings, the Court has not considered any inadmissible evidence, nor any evidence irrelevant to any of the matters at issue, and is only considering evidence for the purposes for which it was admitted. *See J.G. v. State*, 213 So. 3d 936, 937 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D623b] (A judge may hear information that a jury would not be permitted to hear because a "judge as finder of fact is presumed to have disregarded any inadmissible evidence or improper argument.")

[3]Although the rule reads "no person" shall contact or lobby, Mr. Bassar's reasons for disqualification did not include members of the community on their own contacting the decision makers. Particularly given the public's express role in evaluating the proposers and the right of citizens to petition their elected officials, such an interpretation would be absurd. "No literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or to a purpose not designated by the lawmakers." *City of Boca Raton v. Gidman,* 440 So. 2d 1277, 1281 (Fla. 1983).

* * *

**Insurance—Property—Insured's action against insurer—Conditions precedent—Notice of intent to initiate litigation—Motion to dismiss insureds' suit against insurer based on failure to provide notice of intent to initiate litigation is denied—Pre-suit notification defense was not presented in timely filed motion or responsive pleading—Even if defense was not waived, pre-suit notice that had proper claim number was sufficient**

ROBERT HENRY and CLAUDJA HENRY, Plaintiffs, v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Circuit Civil Division AF. Case No. 50-2022-CA-002233-XXXX-MB. July 21, 2023. Carolyn Bell, Judge. Counsel: Maria F. Diaz, Diaz Legal Consulting, Sunrise, for Plaintiff. Rafael Harris, Fort Lauderdale, for Defendant.

**ORDER DENYING MOTION TO DISMISS**

**THIS CAUSE** came before the Court upon the Defendant's Motion to Dismiss. The Court held a hearing on the Motion on July 19, 2023. Based upon review of the argument of counsel, a complete review of the court file, and the Court being otherwise fully advised in the premise, the Court hereby finds and rules as follows:

Defendant seeks to have the Complaint at issue dismissed based upon Section 627.70152, (Fla. Stat. 2021), which requires presuit

notice of intent to litigate as a condition precedent to filing suit. Defendant claims that Plaintiff did not comply with the statute. Defendant brings this Motion now based upon the recent decision in *Cole v. Universal,* No. 4D22-1054, 2023 WL 3214643, at *4 (Fla. Dist. Ct. App. May 3, 2023) [48 Fla. L. Weekly D916a], which holds that Section 627.70152 is retroactive.

Retroactive or not, this Court finds that Defendant's Motion was brought well out of the time allowed for Motions to Dismiss pursuant to Fla. R. Civ. P. 1.140 (b). The Court specifically finds that pre-suit notification is simply a condition precedent properly raised as an affirmative defense. As such, the Court finds this defense was waived pursuant to Fla. R. Civ. P. 1.140 (h)(1) as it was not presented by motion or in a responsive pleading.

Further, even if the defense had not been waived, in this case the Court finds that presuit notice was given by Plaintiffs. The strictures of Section 627.70152 do not require the specificity that Defendant seeks. Plaintiffs' notice had the proper claim number on it and was sufficient both as a practical matter and pursuant to the statute.

For these reasons, the Court finds that Defendant's Motion to Dismiss must fail.

It is, therefore, hereby

**ORDERED AND ADJUDGED** that the Motion to Dismiss is **DENIED**.

* * *

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# COUNTY COURTS

**Consumer law—Debt collection—Discovery—Privilege log is required to support claims of work product privilege**

BETTY SAMS, Plaintiff, v. SUNTRUST BANK, N.A., Defendant. County Court, 5th Judicial Circuit in and for Hernando County, Small Claims Civil Division. Case No. 2020-SC-578. February 23, 2023. Barbara-Jo Bell, Judge. Counsel: Richard K. Peck, Peck Law Firm, P.A., Spring Hill, for Plaintiff. David S. Hendrix, GrayRobinson, P.A., Tampa, for Defendant.

**ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANT, SUNTRUST BANK, N.A., RESPONSES AND TO OVERRULE OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION AND FIRST SET OF INTERROGATORIES**

THIS CAUSE, having come before the Court on October 25, 2022 upon Plaintiff's Motion to Compel Defendant, SUNTRUST BANK, N.A., Responses and to Overrule Objections to Plaintiff's First Request for Production and First Set of Interrogatories, and the Court having considered the Motion, and being otherwise being fully advised in the premises, does hereby:

**ORDER AND ADJUDGE that**:

1. With regard to Request for Production Nos. 1 and 3, Defendant's objection is overruled and Defendant shall file a privilege log and produce documents responsive to both Requests for Production for the Court to perform an *in camera* review. *Fann v. Wells Fargo Auto Fin., Inc.* 18 Fla. L. Weekly Supp. 97c (Fla. Hillsborough County Ct. 2009). Defendant shall have the burden of establishing that the documents withheld are confidential at an evidentiary hearing following the Court's *in camera* review of the materials produced. *Id.*; *see also Avatar Prop. & Cas. Ins. Co. v. Simmons,* 298 So. 3d 1252, 1254 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1429a] ("[I]t is equally established that the party asserting privilege has the burden to prove such a privilege should apply"). This ruling is consistent with precedent from this jurisdiction reaching the same conclusion under identical facts. *Patella v. Fed. Nat'l Mortg. Ass'n* 23 Fla. L. Weekly Supp. 57a (Fla. Hernando County Ct. 2009).

2. Defendant's contention at oral argument that *Simmons* is inapplicable to the immediate discovery dispute because it concerned the work product privilege is misplaced. Florida Rule of Civil Procedure 1.280(b)(6) makes no distinction based on the type of privilege invoked by a party, but rather, treats all of the privileges the same. Regardless of the privilege invoked by a party, the objecting party has the burden of proving that the materials withheld are, in fact, privileged. *Id.*; *see also Fann v. Wells Fargo Auto Fin., Inc.* 18 Fla. L. Weekly Supp. 97c (Fla. Hillsborough County Ct. 2009) (requiring objecting party to file privilege log for judicial determination of privilege applicability); *accord Patella v. Fed. Nat'l Mortg. Ass'n* 23 Fla. L. Weekly Supp. 57a (Fla. Hernando County Ct. 2009) (requiring objecting party to produce documents for *in camera* inspection and making judicial determination of privilege applicability at evidentiary hearing); *Avatar Prop. & Cas. Ins. Co. v. Simmons,* 298 So. 3d 1252, 1254 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1429a].

3. With regard to Interrogatory Nos. 12 and 13, Defendant's objections are overruled, and Plaintiff's Motion is granted. Defendant's objection to Interrogatory No. 12 is based on the general prohibition against admitting evidence of subsequent remedial measures to prove culpable conduct, but admissibility at trial is not the standard for discoverability. Fla. R. Civ. P. 1280(b)(1). Rather, "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.*" *Id.* (emphasis added). Because Plaintiff is required to prove that Defendant had actual knowledge that Plaintiff was represented by counsel and because Defendant has asserted an affirmative defense denying the same, Defendant's conduct in response to the receipt of the letter at issue in this case is reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 13 is relevant for the same reason.

4. Defendant shall have thirty (30) days from the date of this Order to comply with this Order.

* * *

**Consumer law—Debt collection—Discovery—Privilege log is required to support claims of work product privilege**

MELISSA JOINER, Plaintiff, v. TRUIST BANK, f/k/a SUNTRUST BANK, N.A., Defendant. County Court, 5th Judicial Circuit in and for Hernando County, Small Claims Civil Division. Case No. 2020-SC-1400. February 23, 2023. Barbara-Jo Bell, Judge. Counsel: Richard K. Peck, Peck Law Firm, P.A., Spring Hill, for Plaintiff. David S. Hendrix, GrayRobinson, P.A., Tampa, for Defendant.

**ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANT, SUNTRUST BANK, N.A., RESPONSES AND TO OVERRULE OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION AND FIRST SET OF INTERROGATORIES**

THIS CAUSE, having come before the Court on October 25, 2022 upon Plaintiff's Motion to Compel Defendant, SUNTRUST BANK, N.A., Responses and to Overrule Objections to Plaintiff's First Request for Production and First Set of Interrogatories, and the Court having considered the Motion, and being otherwise being fully advised in the premises, does hereby:

**ORDER AND ADJUDGE that**:

1. With regard to *Request for Production Nos. 1 and 3*, Defendant's objection is overruled and Defendant shall file a privilege log and produce documents responsive to both Requests for Production for the Court to perform an *in camera* review. *Fann v. Wells Fargo Auto Fin., Inc.* 18 Fla. L. Weekly Supp. 97c (Fla. Hillsborough County Ct. 2009). Defendant shall have the burden of establishing that the documents withheld are confidential at an evidentiary hearing following the Court's *in camera* review of the materials produced. *Id.*; *see also Avatar Prop. & Cas. Ins. Co. v. Simmons,* 298 So. 3d 1252, 1254 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1429a] ("[I]t is equally established that the party asserting privilege has the burden to prove such a privilege should apply"). This ruling is consistent with precedent from this jurisdiction reaching the same conclusion under identical facts. *Patella v. Fed. Nat'l Mortg. Ass'n* 23 Fla. L. Weekly Supp. 57a (Fla. Hernando County Ct. 2009).

2. Defendant's contention at oral argument that *Simmons* is inapplicable to the immediate discovery dispute because it concerned the work product privilege is misplaced. Florida Rule of Civil Procedure 1.280(b)(6) makes no distinction based on the type of privilege invoked by a party, but rather, treats all of the privileges the same. Regardless of the privilege invoked by a party, the objecting party has the burden of proving that the materials withheld are, in fact, privileged. *Id.*; *see also Fann v. Wells Fargo Auto Fin., Inc.* 18 Fla. L. Weekly Supp. 97c (Fla. Hillsborough County Ct. 2009) (requiring objecting party to file privilege log for judicial determination of privilege applicability); *accord Patella v. Fed. Nat'l Mortg. Ass'n* 23 Fla. L. Weekly Supp. 57a (Fla. Hernando County Ct. 2009) (requiring objecting party to produce documents for *in camera* inspection and making judicial determination of privilege applicability at evidentiary hearing); *Avatar Prop. & Cas. Ins. Co. v. Simmons,* 298 So. 3d 1252,

1254 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1429a].

3. Defendant shall have thirty (30) days from the date of this Order to comply with this Order.

* * *

**Insurance—Personal injury protection—Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Insurer that paid claim in full in response to presuit demand letter is entitled to award of attorney's fees**

STEVEN J. MELILLI, D.C., P.A., (Patient: Miriam Krugliak), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. 19-004543-SC. July 2, 2023. Susan P. Bedinghaus, Judge. Counsel: Michael Skirvin, GED Lawyers, LLP, Boca Raton, for Plaintiff. John R. Hittel, Mimi L. Smith & Associates, Employees of the Law Department of State Farm Mutual Automobile Insurance Company, Orlando, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO TAX ATTORNEYS' FEES AND COSTS**

THIS CAUSE, has come before the Court for hearing on June 19, 2023, on Defendant's Motion to Tax Attorneys' Fees and Costs, and the Court having heard argument of counsel, reviewed Defendant's Motion, and having examined the pleadings and being otherwise fully advised in the premises, it is:

ORDERED AND ADJUDGED that:

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

2. Plaintiff filed suit alleging damages for service dates from February 15, 2019 through March 4, 2019. Prior to filing suit, Plaintiff demanded $427.25 for this service date range. In response to Plaintiff's demand letter, Defendant issued payment in the amount of $427.25, plus applicable interest, penalty, and postage.

3. On June 29, 2021, Defendant served a proposed Motion to Tax Attorneys' Fees and Costs pursuant to section 57.105, Florida Statutes along with a section 57.105 safe-harbor letter, indicating that the amount demanded had been paid and Plaintiff lacks damages to sustain the suit. On March 15, 2022, Defendant filed the Motion to Tax Attorneys' Fees and Costs with the Court. On March 29, 2022, Plaintiff voluntarily dismissed this suit without prejudice.

4. This Court finds that Plaintiff and Plaintiff's Counsel knew or should have known that the claim presented was not supported by the material facts necessary to establish the claim, as the amount demanded by Plaintiff was paid in full by Defendant in response to Plaintiff's demand letter, and as such, Defendant is entitled to attorneys' fees under section 57.105, Florida Statutes.

5. This Court finds that Defendant is entitled to costs under Florida Rule of Civil Procedure 1.420(d).

6. Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY is entitled to attorneys' fees and costs from Plaintiff, STEVEN J. MELILLI, D.C., P.A. and Plaintiff's counsel, GED Lawyers, LLP, to be paid in equal amounts. The Court reserves jurisdiction to determine the amount of the award of attorneys' fees and costs to Defendant.

* * *

**Insurance—Venue—Forum non conveniens—Because evidence of inconvenience is uncontradicted, motion to transfer venue is granted**

DONALD G. BROWN, D.C., P.A., a/a/o Stanley Wilson, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, a foreign corporation, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023 10929 CODL. August 14, 2023. Angela A. Dempsey, Judge. Counsel: Jonathan De Armas, De Armas Law, Altamonte Springs, for Plaintiff. Roy Kielich, Andrews Biernacki Davis, Tampa, for Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE AND MOTION FOR PROTECTIVE ORDER**

**THIS MATTER** having come before the Court on Defendant's Motion to Transfer Venue and Motion for Protective Order pursuant to Florida Rule of Civil Procedure 1.061 and this Honorable Court having considered arguments, reviewed the record, the docket and the respective Motion and supporting documents and caselaw filings, and being otherwise fully advised in the premises, it is hereby,

**ORDERED AND ADJUDGED** that Defendant's Motion to Transfer Venue Based on Forum Non- Conveniens pursuant to Florida Rule of Civil Procedure 1.061 is **GRANTED**:

1. The Court further finds that the caselaw cited by the Plaintiff in *At Home Auto Glass a/a/o Andrew Bryant v. Mendota Insurance Company* (Fla. 5th DCA 2022-Case No. 5D21-2052) [47 Fla. L. Weekly D1706a] is distinguishable from the facts in the *sub judice* suit, where here the Motion to Transfer was sworn, but in *At Home Auto Glass* the motion to transfer venue was unsworn.

2. The Fifth DCA has made clear ". .it is incumbent upon *parties* to submit affidavits and other evidence that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice." *Eggers v. Eggers*, 776 So.2d 1096 (5th DCA 2001) [26 Fla. L. Weekly D438a] (*citing Ground Improvement Techniques, Inc. v. Merchants Bonding Co.*, 707 So.2d 1138 (5th DCA 1998) [23 Fla. L. Weekly D464a] (emphasis added).

3. Plaintiff produced no evidence to contradict the evidence put forth by Defendant. While Plaintiff's choice is presumptively correct, the evidence of inconvenience put forth by Defendant is uncontradicted and shows sufficient evidence that the convenience of the parties, witnesses and ultimately the interest of justice is best served by transferring the case to Hillsborough County.

4. Any fee by the Clerk of Court required to transfer the case to Hillsborough County, FL shall be incurred by the Defendant, and shall be paid fee within forty-five (45) days of the date of this order.

5. Defendant's Motion for Protective Order **GRANTED**. Upon payment of the transfer fee, Defendant shall thirty (30) days to respond to any of Plaintiff's outstanding discovery requests.

* * *

**Insurance—Personal injury protection—Coverage—Emergency services—Exhaustion of policy limits in payments to other non-emergency providers was improper and unjust where insurer had received substantially complete claim from emergency services provider—Insurer had obligation to reserve $5,000 in benefits to satisfy emergency services provider's bill once it was put on notice of bill's existence**

EMERGENCY PHYSICIANS OF CENTRAL FLORIDA, LLP, a/a/o Craig Lilly, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-SC-5062-O. January 27, 2023. Andrew L. Cameron, Judge. Counsel: Steven Dell, Bradford Cederberg, Orlando, for Plaintiff. Maria Pace, Dutton Law Group, P.A., for Defendant.

**ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

**THIS MATTER** having come before this Court on the Plaintiff's Motion for Final Summary Judgment and the Defendant's Motion for Summary Judgment Regarding Proper Exhaustion of Benefits, both filed pursuant to Florida Rule of Civil Procedure 1.510, and this Court having heard arguments of counsel, considering the material facts presented, the case law in support of each side's argument, and being otherwise fully advised in the premises, it is hereby established that:

**UNDISPUTED MATERIAL FACTS**

The subject action involves a claim for PIP benefits filed by the Plaintiff, Emergency Physicians of Central Florida, LLP as assignee of Craig Lilly, against the Defendant, Metropolitan Casualty Insurance Company, for alleged unpaid PIP benefits. The facts behind the claim are not in dispute.

Craig Lilly was involved in an automobile accident on May 6, 2016, in which he sustained injuries and sought medical treatment. He was initially treated for his injuries by South Seminole Hospital, Medical Center Radiology Group and the Plaintiff, Emergency Physicians of Central Florida. At the time of the accident, Craig Lilly was insured under a contract of automobile insurance issued by the Defendant that provided up to $10,000.00 in PIP coverage.

The Defendant's first notice of the accident was on May 6, 2016. Pursuant to Florida Statute Section 627.736(4)(c), the Defendant was required to reserve $5,000.00 in PIP benefits for payment to certain emergency services providers, like the Plaintiff, for 30 days from the date they were placed on notice of the accident. The 30-day reserve period ended on June 5, 2016.

The South Seminole Hospital and Medical Center Radiology bills, which were received by the Defendant on May 24, 2016, were accompanied by a diagnosis of low back pain and cervicalgia. The Defendant applied the statutory fee schedule to these bills and issued payment of PIP benefits to those two providers on May 27, 2016.

On May 31, 2016, the Defendant received a Centers for Medicare and Medicaid Services ("CMS") 1500 form from the Plaintiff, seeking payment for emergency services dated May 6, 2016. The CMS 1500 form failed to include ICD diagnosis codes in Box 21. There is no indication in this record that any medical records from the Plaintiff accompanied the CMS 1500 form. On June 2, 2016, the Defendant issued an Explanation of Benefits, denying the Plaintiff's bill for failure to include the ICD diagnosis codes in Box 21.

The Plaintiff's bill was received within thirty (30) days of the date the Defendant received notice of the accident potentially covered by PIP benefits. The Plaintiff's services were considered reasonable, related, and medically necessary and the charge was a reasonable amount. The Defendant failed to pay the Plaintiff's bill only because it found the bill lacked ICD diagnosis codes.

The Plaintiff received notification from the Defendant of the denied medical bill on June 16, 2016. The Plaintiff mailed a revised CMS1500, which included the ICD diagnosis codes, to the Defendant on June 29, 2016. Upon receipt of the Plaintiff's resubmission, the Defendant denied payment based on an alleged exhaustion of PIP benefits.

## PROCEDURE

The Plaintiff has filed both a Motion for Final Summary Judgment and a Response to the Defendant's Motion for Summary Judgment Regarding Proper Exhaustion of Benefits, pursuant to Florida Rule of Civil Procedure 1.510. The Defendant has failed to serve any response to the the Plaintiff's Motion for Summary Judgment. According to Florida Rule of Civil Procedure 1.510 and interpreting appellate opinions, this Court may consider the facts of the Plaintiff's motion as undisputed. See generally, *Siegler v. Empire Dawn, LLC*, 338 So. 3d 391 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D839b] and *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1239a].

On June 28, 2022, the parties argued their competing Motions for Summary Judgment and this Court continued the hearing to September 7, 2022, so that each side would have ample time to provide their case law and complete argument.

## ARGUMENT

The Defendant argues in support of its motion that the Plaintiff's bill was not compensable as initially submitted. The Plaintiff's correctly resubmitted bill was not received until after all benefits had been exhausted. Once an insurer has paid policy limits to an insured (or his assignees) and benefits are exhausted, there is no further obligation to pay the Plaintiff's bill.

The Plaintiff argues that its submitted bill for medical services was substantially complete when initially submitted. As such, Florida Statute §627.736(4)(c)(2016) requires that insurance carriers must reserve $5,000 in PIP benefits for payment to emergency medical providers like the Plaintiff and argues that exhaustion of benefits defense is not reasonable since the Defendant failed to pay the substantially completed medical bill from the statutorily required reserve.

## ANALYSIS

Florida Statute §627.736(4)(c) (2016) states:

> **Upon receiving notice of an accident** that is potentially covered by personal injury protection benefits, **the insurer must reserve $5,000 of personal injury protection benefits for payment** to physicians licensed under chapter 458 or chapter 459 or dentists licensed under chapter 466 who provide emergency services and care, as defined in s. *395.002,* or who provide hospital inpatient care. The amount required to be held in reserve may be used only to pay claims from such physicians or dentists until 30 days after the date the insurer receives notice of the accident. After the 30-day period, any amount of the reserve for which the insurer has not received notice of such claims may be used by the insurer to pay other claims. The time periods specified in paragraph (b) for payment of personal injury protection benefits are tolled for the period of time that an insurer is required to hold payment of a claim that is not from such physician or dentist to the extent that the personal injury protection benefits not held in reserve are insufficient to pay the claim. This paragraph does not require an insurer to establish a claim reserve for insurance accounting purposes. **Emphasis Added**.

This Court is required to apply the plain meaning of the language used in this statute to the undisputed material facts in this matter. *Saleeby v. Rocky Elson Const., Inc.,* 3 So. 3d 1078 (Fla. 2009) [34 Fla. L. Weekly S106a].

The Plaintiff initially submitted a medical bill that seemingly qualified for the protections set forth by Florida's legislature in the $5,000 reserve subsection. At the time the Defendant received the Plaintiff's bill, the Defendant was in possession of notification of the accident, as well as medical bills for the same date of service with diagnosis codes from other emergency providers.

It is the Defendant's argument that inclusion of diagnosis codes with submitted bills are mandatory under the PIP statute so the insurer can determine whether subsequent bills will be covered. The Defendant's actions in this claim show that PIP payments were made under the subject policy to providers not protected by the statute's protections covering emergency providers, before any bills were received from the emergency services and care providers in the hospital emergency room.

The Plaintiff's bill was not improperly submitted. According to the plain language of the PIP statute, medical submissions "shall be submitted to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office and adopted by the commission for purposes of this paragraph." *Fla. Stat. §627.736(5)(d)* (2016). The term "properly completed" is defined under the No Fault Act as "providing truthful, substantially complete, and substantially accurate responses as to all material elements to each applicable request for information or statement by a means that may lawfully be provided and that complies with this section, or as agreed by the parties." *Fla. Stat. §627.732(13)* (2016).

Multiple appellate courts have acknowledged that an insurer is put on notice of a covered claim by the submission of a substantially complete claim form. See generally, *Geico Gen. Ins. Co. v. Tarpon Total Health Care*, 86 So. 3d 585 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D1027a]; *United Automobile Insurance Co. v. Professional Medical Group, Inc.*, 26 So. 3d 21 (Fla. 3d DCA 2009) [34 Fla. L.

Weekly D2500a]; *USAA Casualty Ins. Co. v. Pembroke Pines MRI, Inc.*, 31 So. 3d 234 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D613b]; and *Fla. Med. & Injury Ctr., Inc. v. Progressive Express Ins. Co.*, 29 So. 3d 329 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D215b].

Given the legal authority regarding substantially complete claims, this Court places little weight on the competing affidavit allegations surrounding whether or not a CMS1500 requires ICD codes. While the initial bill was not perfect, it was certainly substantially complete and sufficient for the Defendant to issue payment to the Plaintiff or at least reserve the amount of the bill in benefits under the $5,000 statutory requirement.

Accordingly, the Defendant had no legal authority to release the funds sought by the Plaintiff to pay other, non-protected medical providers. This Court finds that exhaustion of benefits was improper and unjust given the substantially complete medical bill initially submitted by the Plaintiff. Additionally, the Defendant had an obligation under the PIP statute to reserve funds to satisfy this medical bill once being put on notice of its existence. See generally, *United Services Automobile Association v. Emergency Physicians of Central Florida, LLP, as assignee of Barbara Maughan*, 23 Fla. L. Weekly Supp. 302b (Ninth Jud. Cir. Appellate 2014) and *Auto-Owners Insurance Company (Appellant) v. Florida Emergency Physicians Kang & Associates, M.D., P.A., as assignee of Nicole Lockeywerner (Appellee)*, 23 Fla. L. Weekly Supp. 513a (Ninth Jud. Cir. Appellate 2016).

Furthermore, exhaustion of benefits is not a defense when bad faith claims handling has been alleged. The Plaintiff's Reply to the Defendant's Answer and Affirmative Defenses presented argument from the plain language of Fla. Stat. §627.736(4)(c) that the defense of exhaustion of benefits was improper. The Defendant failed to consider the totality of the circumstances when it received the Plaintiff's bill and failed to properly adjust the claim in the best interest of its insured. The Defendant's decision to deny the Plaintiff's initial bill for missing ICD codes was in opposition to the PIP statute's purpose for swift and virtually automatic payment of benefits. See generally, *Ivey v. Allstate Insurance Company*, 774 So.2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a].

**FINDINGS**

The Defendant's first notice of the amount of a covered loss regarding the Plaintiff's bill was upon receipt of the Plaintiff's originally submitted bill on May 31, 2016. This Court finds that the provider substantially complied with the requirements of Florida Statute section 627.736(5)(d), notwithstanding its failure to include the ICD diagnosis codes on the initial bill submitted. As a result, the carrier was obligated to reserve the amount of the covered loss upon receipt of the Plaintiff's initial bill on May 31, 2016.

The undisputed facts establish that the Plaintiff received the Explanation of Benefits from the Defendant denying payment based upon the absence of diagnosis codes on June 16, 2016, and submitted a revised bill including diagnosis codes by U.S. mail thirteen (13) days later on June 29, 2016. The Plaintiff's subsequent submission of an amended bill should have been considered timely under the plain language of *Fla. Stat. §627.736(4)(b)3*. Upon rejection of a claim based upon alleged error in the form of its submission, the claimant may submit a revised claim within 15 days, which shall be considered a timely submission of written notice of a claim. *Fla. Stat. §627.736(4)(b)3* (2016). Accordingly, the resubmission should also have been treated by the Defendant as statutorily compliant and paid from the $5,000 reserve amount under *Fla. Stat. §627.736(4)(c)* (2016).

It is clear from the record that the Defendant's denial of the Plaintiff's initial bill, in addition to its failure to reserve funds for payment of a re-submitted bill, constitutes bad faith claims handling based on the Florida PIP Statute and the policy of insurance.

Personal Injury Protection benefits were not properly exhausted. The Plaintiff is entitled to payment of its lawfully submitted bill.

**IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The Plaintiff's Motion for Final Summary Judgment is hereby **GRANTED.**

2. The Defendant's Motion for Summary Judgment Regarding Proper Exhaustion of Benefits is hereby **DENIED.**

3. Final Judgment is hereby granted in favor of the Plaintiff, Emergency Physicians of Central Florida, LLP, as assignee of Craig Lilly.

4. The Plaintiff shall recover from the Defendant, Metropolitan Casualty Insurance Company, $608.80 in unpaid Personal Injury Protection benefits and statutory interest to be calculated pursuant to Fla. Stat. §627.736(4)(d)(2016), for which sum let execution issue forthwith.

5. The Court finds the Plaintiff, as the prevailing party on a first party insurance dispute, is hereby entitled to reasonable attorneys' fees and costs expended in the litigation of this matter.

6. The Court reserves and retains jurisdiction to determine the amount of attorneys' fees and costs due to the Plaintiff pursuant to Fla. Stat. §§627.736, 627.428, 57.041.

* * *

**Insurance—Personal injury protection—Coverage—School bus passenger—Reimbursement—Sovereign immunity—Insurer's action seeking reimbursement from school board for PIP benefits insurer paid to its insured, who was injured while passenger on school bus owned by school board, is not barred by sovereign immunity**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. SCHOOL BOARD OF ORANGE COUNTY, d/b/a ORANGE COUNTY SCHOOL BOARD, a/k/a ORANGE COUNTY PUBLIC SCHOOLS, Defendant. County Court, 9th Judicial Circuit in and for Orange County, Civil Division. Case No. 2021-CC-016105-O. Division 71. July 24, 2023. Evellen H. Jewett, Judge. Counsel: David Kampf, Kampf, Inman & Associates, P.A., Tampa, for Plaintiff. Elizabeth Plummer, for Defendant.

**ORDER GRANTING STATE FARM'S MOTION FOR SUMMARY JUDGMENT**

**THIS CAUSE**, having come to be heard before the Court on June 26, 2023, on Plaintiff's Motion for Final Summary Judgment Based on the Commercial Right of Reimbursement and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon

**ORDERED AND ADJUDGED** that:

1. State Farm filed the instant suit seeking reimbursement from the School Board of Orange County for personal injury protection (a/k/a no-fault benefits) paid by State Farm on behalf of the State Farm insured while the insured occupied public school transportation. The vehicle was a public school bus.

2. Reimbursement is sought pursuant to Fla. Stat. §627.7405, which provides:

> Insurers' right of reimbursement.—Notwithstanding any other provisions of ss. 627.730-627.7405, an insurer providing personal injury protection benefits on a private passenger motor vehicle shall have, to the extent of any personal injury protection benefits paid to any person as a benefit arising out of such private passenger motor vehicle insurance, a right of reimbursement against the owner or the insurer of the owner of a commercial motor vehicle, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle while not an occupant of any self-propelled vehicle.

3. The undisputed facts here establish that the vehicle was not being used for personal or private purposes at the time of the accident.

The vehicle was used primarily, if not exclusively for the School Board's business, professional and/or occupational purposes.

4. The School Board asserts several defenses including there is no express waiver of sovereign immunity so as to preclude suit.

5. State Farm asserts the statutory definition of commercial motor vehicle under F.S. §627.732(3) applies. That the legislature clearly excluded certain types of government vehicles from being motor vehicles but otherwise all other vehicles are motor vehicles and, thus, commercial motor vehicles when not a private passenger motor vehicle.

6. State Farm also relies on *Lee Cty. Sch. Bd. v. State Farm Mut. Auto. Ins.* Co., 276 So. 3d 352 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1352b], as being the only appellate decision on the current legal issues and, thus, is controlling as to the current suit as the relevant facts are identical.

7. This Court agrees with the arguments raised by State Farm regardless of whether *Lee Cty. Sch. Bd.* is controlling as to the current facts and law. Thus, summary judgment in favor of State Farm is appropriate. This Court finds that sovereign immunity does not bar the claim for reimbursement per F.S. 627.7405.

8. Further, this Court finds *Lee Cty. Sch. Bd.* is controlling as to the current facts and law.

9. Based on the above, this Court finds that Plaintiff is entitled to a commercial right of reimbursement as to the undisputed amount at issue, $3,148.41.

10. The Court reserves jurisdiction to address entitlement and reasonableness of costs due Plaintiff.

* * *

**Insurance—Automobile—Windshield repair—Attorney's fees—Confession of judgment—Windshield repair shop's motion for partial summary judgment/confession of judgment based on insurer's post-suit payment of invoiced amount is denied where there remains genuine issue of material fact as to whether shop submitted invoice to insurer prior to filing suit**

AT HOME AUTO GLASS, LLC, a/a/o David Battle, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-007673-O. August 10, 2023. Eric H. Dubois, Judge. Counsel: Imran Malik and John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

## ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT/ CONFESSION OF JUDGMENT

This matter came before the Court on August 7, 2023, at 1:30 p.m. on Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment and the Court, having reviewed the motion and responses, considered the argument of counsel, and being otherwise fully advised of the premises, hereby sets forth the following undisputed facts and conclusions of law:

### UNDISPUTED FACTS

1. State Farm issued an automobile insurance policy to its insured.

2. The windshield of the insured's vehicle was damaged and Plaintiff, At Home Auto Glass LLC, repaired the damage.

3. On March 2, 2020, Plaintiff filed a lawsuit against State Farm under the insured's policy with State Farm and attached an invoice to the Complaint for the repair work totaling $2,842.29.

4. After State Farm was served with the Complaint with Plaintiff's $2,842.29 invoice, State Farm determined the coverage amount of the damaged vehicle's windshield was $363.59 and issued a payment to Plaintiff, which included interest, in the amount of $391.87.

### CONCLUSIONS OF LAW

#### Summary Judgment Standard

5. Pursuant to the Florida Supreme Court's opinion in *In re: Amendments to Florida Rule of Civil Procedure 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a], Florida's summary judgment standard is to be construed and applied in accordance with the federal summary judgment standard

6. Per newly amended rule 1.510(a), the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

7. As the Florida Supreme Court held, the "correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 317 So. 3d at 75 (quotation omitted). The new standard asks whether there is competent substantial record evidence that could support a verdict for the non-moving party. *See Lindon v. Dalton Hotel Corp.,* 49 So. 3d 299, 303 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D2423a]. "Competent, substantial evidence" is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957).

#### Summary Judgment Evidence

8. In support of Plaintiff's Motion for Partial Summary Judgment/ Confession of Judgment, Plaintiff's corporate representative executed an affidavit stating that on May 19, 2019, Plaintiff sent an email to State Farm attaching its $2,842.29 windshield repair invoice.

9. In opposition to Plaintiff's motion, State Farm's corporate representative executed a declaration stating State Farm's first notice of the invoice was upon receipt of the lawsuit and that it has been unable to locate Plaintiff's email or any other communication of Plaintiff's invoice before receiving documents as part of this litigation.

10. Based on the competing sworn statements, a genuine issue of material fact remains in dispute as to whether Plaintiff submitted its invoice to State Farm pre-suit. Accordingly, the Court denies Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment.

#### Attorneys' Fees Under Fla. Stat. §627.428

11. In order to recover attorneys' fees under Florida Statute § 627.428, "[a]n insured moving for attorney's fees must prove 'the suit was filed for a legitimate purpose, and whether the filing acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." *People's Tr. Ins. Co. v. Polanco,* 354 So. 3d 557, 2023 WL 151310, at * 2, 48 Fla. L. Weekly D120b (Fla. 4th DCA Jan. 11, 2023) (citing *State Farm Fla. Ins. Co. v. Lime Bay Condo., Inc.,* 187 So. 3d 932, 935 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D730a]). "[T]here must have been 'some dispute as to the amount owed by the insurer' *before* the insured filed suit.' " *Id.* (emphasis added) (citing *Lewis v. Universal Prop. & Cas. Ins. Co.,* 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1104a]).

12. "Florida's cases have uniformly held that a section 627.428 attorney's fee award may be appropriate where, following some dispute as to the amount owed by the insurer, the insured files suit and, *thereafter,* . . . the insured recovers substantial additional sums." *Lewis v. Universal Prop. & Cas. Ins. Co.,* 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009). "Underlying these decisions is the notion that the insureds were entitled to fees as the insureds 'did not 'race to the courthouse,' the suit was not filed simply for the purpose of the attorney's fee award, but rather to resolve a legitimate dispute, and the filing of the suit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance con-

tract." *Id.* (internal citations omitted). *Id.* at 829; *see also Clifton v. United Casualty Insurance Co. of America,* 31 So. 3d 826, 829 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D364e] ("the existence of a bona fide dispute and not the mere *possibility* of a dispute is a crucial condition precedent" to treating a post-suit payment as a confession of judgment.)

13. In *Polanco,* the insured "never informed People's Trust that he disputed its estimate or coverage determination" and never "completed [a] sworn proof of loss[.]" *Polanco,* 2023 WL 151310, at *1. Instead, "[t]he first indication of disagreement was when the insured filed the complaint." *Id.* at *2. Because "[t]he insured in this case made no effort to resolve the dispute without court intervention," the court held that "he cannot recover attorney's fees" as "the insured's lawsuit was not a necessary catalyst to his recovery." *Id.* at *2-*3. *See also Nationwide Prop. & Cas. Ins. v. Bobinski,* 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D368a] (reversing trial court that awarded fees against insurer for resolving dispute in arbitration before filing suit); *People's Tr. Ins. Co. v. Farinato,* 315 So. 3d 724, 728 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D787a] (reversing trial court that awarded fees because "the confession-of-judgment doctrine should not be applied 'where the insureds were not forced to sue to receive benefits' " where insurer demanded appraisal before suit).

14. The Court rejects Plaintiff's argument that State Farm "confessed" judgment in voluntarily making a payment to Plaintiff after this litigation began. To argue that State Farm "confessed" error, Plaintiff relied on authorities in entirely different circumstances, where an insurer fully paid a claim that had been *undisputedly* filed and denied before litigation began. In *Ivey v. Allstate Insur. Co.,* 774 So. 2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a], cited by Plaintiff, the insured "timely applied to Allstate for personal injury protection (PIP) benefits" and a "health insurance claim form . . . was timely and properly forwarded to Allstate." *Id.* at 681. There exists a question of fact as to whether that occurred here.

15. Similarly, in *Clifton,* 31 So. 3d 826, cited by Plaintiff, the insured "promptly filed a claim with United Casualty for the damage." *Id.* at 827. Plaintiff's other cited cases follow the same pattern.[1]

16. Based on the record before the Court, State Farm did not confess judgment by partially paying Plaintiff's invoice after suit to resolve wasteful litigation because there is a question of fact as to whether State Farm ever even knew of the claim and had an obligation to make a payment under the policy.

17. Based on the record presented, Plaintiff did not meet its burden under the summary judgment rule. Moreover, a genuine dispute of fact exists about whether a bona fide dispute between Plaintiff and State Farm existed before Plaintiff filed the lawsuit.

**WHEREFORE**, it is **ORDERED** and **ADJUDGED**:

Plaintiff's Motion for Partial Summary Judgment/Confession of Judgment is DENIED.

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[1]*Johnson v. Omega Insurance Co.,* 200 So. 3d 1207, 1208 (Fla. 2016) [41 Fla. L. Weekly S415a], "arose from a claim for insurance benefits Kathy Johnson, the insured, submitted to Omega." In *Pepper's Steel & Alloys, Inc. v. United States,* 850 So. 2d 462, 464 (Fla. 2003) [28 Fla. L. Weekly S455a], "[a]fter the United States sued to recover remediation costs arising from an allegedly polluted site, [Pepper's Steel] demanded coverage from United States Fidelity and Guaranty Company (USF & G), which had issued an insurance policy covering the site." This is not a case like *Wollard v. Lloyd's & Companies of Lloyd's,* 439 So. 2d 217, 218 (Fla. 1983), where the insurer agreed to settle a case and "in effect, declined to defend its position in the pending suit." And in *Barreto v. United Services Automobile Ass'n,* 82 So. 3d 159, 161 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D571a], the insured "had to resort to the judicial process to obtain the benefits owed to them under the policy" after the insurer refused to pay part of their submitted claim. Likewise, the insured sued in *De Leon v. Great American Assurance Co.,* 78 So. 3d 585, 591 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2250a], because "there was no other way to be paid" after the insurer denied his claim. Finally, unlike in this case, in *Goff v. State Farm Florida Ins. Co.,* 999 So. 2d 684, 686 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2833a], the insured "filed a claim after their house sustained hurricane damage[.]"

* * *

**Insurance—Automobile—Windshield repair— Standing—Assignment—Assignee repair shop lacked standing to sue where undisputed testimony and evidence showed that insured did not intend to assign insured's right to sue insurer**

AT HOME AUTO GLASS, LLC, a/a/o Kyle Morrell, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-008555-O. August 2, 2023. Eric H. DuBois, Judge. Counsel: Imran Malik and John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

[Original Opinion at 31 Fla. L. Weekly Supp. 146a]

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

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

**BACKGROUND**

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

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

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

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

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

**UNDISPUTED FACTS**

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

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

8. Plaintiff submitted a claim to State Farm under Mr. Morrell's Policy and sent State Farm an invoice for $1,302.26.

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

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

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

> I hereby assign At Home Auto Glass LLC all right [sic] which I have against my insurer for collection of monies due for such repairs and/or replacement. This assignment includes, but is not limited to, the right to receive direct payment of the claim from the insurance company, the right to make demand for payment (including the right to make a demand under relevant consumer protection statute or regulation), the

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

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

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

I hereby assign any and all insurance rights, benefits, proceeds and causes of action under any applicable insurance policies that I have to At Home Auto Glass LLC. This assignment is given in consideration for the glass replacement services provided by At Home Auto Glass LLC and for not requiring full payment at the time services are provided. I further agree that I shall remain personally liable for the unpaid portion of all charges on this invoice for which no insurance coverage is available.

14. The signature line on the Invoice contains a partially illegible signature.

15. Mr. Morrell testified in a deposition, and executed a Declaration wherein he attested, the signature appearing on Plaintiff's Invoice was not his. He also testified and attested he did not sign Plaintiff's Invoice or Work Order.

16. Mr. Morrell further testified, and attested, he never intended to give Plaintiff the right to sue State Farm under his Policy and he never authorized Plaintiff to file a lawsuit against State Farm under the Policy.

## CONCLUSIONS OF LAW

### Summary Judgment Standard

17. Pursuant to the Florida Supreme Court's opinion in *In re: Amendments to Florida Rule of Civil Procedure 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a], Florida's summary judgment standard is to be construed and applied in accordance with the federal summary judgment standard.

18. Per newly amended rule 1.510(a), the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

19. As the Florida Supreme Court held, the "correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 317 So. 3d at 75 (quotation omitted). No longer is it plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *Id.* at 76 (quotation omitted).

### Standing

20. Under Florida law, "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *See, LaFrance v. US Bank Nat. Ass'n,* 141 So. 3d 754, 756 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1419a] ("A plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed and cannot be established retroactively by acquiring standing to file a lawsuit after the fact"); *Progressive Exp. Ins., Co. v. McGrath Comm. Chiropractic,* 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b] (recognizing that the assignment of insurance benefits "is not merely a condition precedent to maintain an action . . . it is the basis for the claimant's standing to invoke the processes of the court in the first place."); *See also VIP Auto Glass, Inc. v. GEICO General Insurance,* 2018 WL 3649638 (M.D. Fla. Jan. 3, 2018) (dismissing case against VIP Auto Glass, a windshield repair company, with prejudice after it failed to show cause why an adverse judgment on the merits due to lack of standing should not be entered against it for its use of a forged assignment of benefits where the insured unequivocally testified that he did not sign the purported assignment of benefits).

21. "Ultimately, 'the intent of the parties determines the existence of an assignment.' " *QBE Specialty Insurance Company v. United Reconstruction Group, Inc.,* 325 So.3d 57, 60 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1692a] (quoting *Citizens Prop. Ins. Corp. v. Ifergane,* 114 So. 3d 190, 195 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a]). "In other words, a third party's ability to bring suit against an insurance company is predicated on it having received a valid assignment of benefits from the insured." *Id.*

### Mr. Morell's Testimony and Plaintiff's Purported Assignment of Benefits

22. In this case, Mr. Morrell testified under oath that he did not intend to provide an assignment of any rights or benefits to sue State Farm under his Policy. Specifically, Mr. Morrell's Deposition and Declaration both confirm that he did not provide a written assignment of benefits to Plaintiff as the signature on Plaintiff's Work Order and Invoice are not his.

23. Mr. Morrell also testified under oath that it was never his intention to assign Plaintiff the right to sue State Farm under his insurance Policy and that he never authorized Plaintiff to file a lawsuit against State Farm under his Policy.

24. Because the insured had no intention of assigning any rights or benefits to Plaintiff, Plaintiff cannot avoid summary judgment by attempting to claim an equitable assignment exists in this case. *See QBE Specialty Ins. Co.,* 325 So.3d at 60-61 (holding "the intent of the parties determines the existence of an assignment" and noting that making repairs to property "does not give rise to an equitable assignment absent evidence the insured intended to assign her rights.")

25. The undisputed evidence and testimony from the insured himself unequivocally show Mr. Morrell did *not* intend to assign any rights to bring suit against State Farm to Plaintiff. As such, Plaintiff is not an assignee of Mr. Morrell as a matter of law.

26. Because there is no genuine issue of material fact that Plaintiff lacks standing under Plaintiff's invoice attached to the complaint and in equity, State Farm is entitled to summary judgment in its favor as a matter of law.

**WHEREFORE**, it is **ORDERED** and **ADJUDGED** that:

1. State Farm's Motion for Summary Judgment is GRANTED.

2. Full and final judgment is hereby ENTERED in favor of State Farm.

3. Plaintiff shall take nothing in this action and Plaintiff shall go henceforth without day.

4. The court reserves jurisdiction to award fees and costs in favor of State Farm.

* * *

**Criminal law—Reckless or careless operation of vessel—Violation of navigational rules causing serious bodily injury—Failing to maintain proper lookout—Defendant entitled to judgment of acquittal on charges stemming from collision between boat and swimmer resulting in serious bodily injury where state failed to present direct evidence identifying operator of boat at time of accident or establishing that operator failed to maintain proper lookout**

STATE OF FLORIDA, Plaintiff, v. IRWIN ELLIOT TAUBER, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. M-20-010275. Citation No. V641222. Section M-3. Division CENTG. July 7, 2023. Raul Cuervo, Judge. Counsel: Andres Roberto Perez, Assistant State Attorney, Miami, for Plaintiff. Neal L. Sandberg, Simon Schindler & Sandberg LLP, Miami, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

**THIS CAUSE** came before the Court upon a non-jury trial held on April 21, 2023, and Defendant IRWIN ELLIOT TAUBER's Motion for Judgment of Acquittal pursuant to Fla. R. Crim. P. 3.380 made at the close of the State's case. The Court has reviewed the memoranda filed by the Defendant and the State along with the submitted case authorities, heard the parties' arguments, presided over the trial, reviewed the court file, and is otherwise duly advised in the premises.

The Defendant was charged with violating Florida Statute § 327.33(3)(a), as the operator of a vessel upon the water of the state by failing to maintain a proper lookout as required by Navigational Rule 5. After the State rested its case, the Defendant moved for judgment of acquittal, and in support thereof challenges the sufficiency of the evidence as to the offense alleged as to the Defendant. "If, at the close of the evidence for the state . . . the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the . . . defendant shall, enter a judgment of acquittal." Fla. R. Crim. P. 3.380(a). "A motion for judgment of acquittal is designed to challenge the legal sufficiency of the evidence," and it should not be granted "unless, when viewed in a light most favorable to the state, the evidence does not establish the prima facie case of guilt." *State v. Williams,* 742 So. 2d 509, 511 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D2366a]. "It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." *Id.* "[T]he prosecution, in order to present a prima facie case, is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the prosecution fails to meet this burden . . . a judgment of acquittal should be granted." *Baugh v. State,* 961 So. 2d 198, 203-04 (Fla. 2007) [32 Fla. L. Weekly S197a], *citing Williams v. State,* 560 So.2d 1304, 1306 (Fla. 1st DCA 1990).

To support a conviction, The State was required to present evidence to prove: (1) the Defendant operated a vessel upon the waters of the state; (2) the Defendant violated Navigational Rule 5, maintaining a proper look-out (33 C.F.R. § 83.05); (3) the violation resulted in an accident; and (4) the accident caused serious bodily injury. The testimony established a collision between the vessel and a swimmer resulting in a serious bodily injury to the swimmer, but little else. The State failed to present evidence of the other elements sufficient for the fact finder to establish guilt beyond a reasonable doubt. Defendant was not cited for any violation other than that based upon Rule 5. The Defendant was not charged with reckless operation of a vessel. The parties stipulated that the vessel was travelling at a proper speed.

At trial, the State was required to establish its prima facie case. The State failed to present direct evidence identifying the operator of the subject vessel, establishing the operator failed to maintain "a proper lookout by sight or hearing" or of the standard for a "proper lookout". Officer Gomez' testimony at trial that Arboca Holdings, LLC was the owner of record of the vessel and that Defendant was a member of that limited liability company was insufficient to establish Defendant was in control of the vessel at the time of the accident. Indeed, there was no evidence presented as to who was on the bridge and charged with the duty to act as a lookout.

Nor has the State presented any authority to support the contention that Defendant, as a member or manager, can be held *criminally* responsible for a failure that may have occurred on the subject vessel. *See Franzone v. State,* 58 So. 3d 329, 334 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D631b] ("In denying Mrs. Franzone's motion for judgment of acquittal, the trial court failed to recognize that the State did not charge that Mrs. Franzone was individually responsible for the criminal acts of the LLC.").[1]

The State appears to take the position that by merely presenting evidence that an accident occurred and that a vessel struck a swimmer it has met its burden to establish that the operator of the vessel failed to maintain a proper lookout. That is not so. See, *Baltrunas v. State,* CRC 08-00075 (Fla. 6th Circuit App. Court, Pinellas County Florida (August 31, 2009) [16 Fla. L. Weekly Supp. 1110d] ("The fact that there was a boating accident does not establish a failure to maintain a proper lookout or create a conflict in the evidence."). In the instant case, the State did not present evidence that the Defendant was the operator of the vessel and in that capacity failed to provide a proper lookout.

Further, the State did not present evidence that there was not a proper lookout on the vessel. The State argues that because it presented evidence that the injured party was visible to others nearby, she must have been visible to the operator of the boat. Even viewed in a light most favorable to the state that is insufficient to prove that the operator did not have a proper lookout. The Court finds that the State failed to prove its prima facie case beyond a reasonable doubt because it failed to prove beyond a reasonable doubt a necessary element of the offense charged.[2]

Based on the above, the court concludes that Defendant is entitled to a judgment of acquittal on the cited offense, Florida Statute § 327.33(3)(a). It is therefore,

**ORDERED** AND **ADJUDGED** that the Defendant's Motion for Judgment of Acquittal is **GRANTED**.

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[1]The State's reliance upon *de la Osa v. State,* 158 So. 3d 712 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D467a] is misplaced. *De la Osa* was a prosecution for conspiracy, conspiracy to commit racketeering and organized scheme to defraud and did not involve a limited liability company. The State has not charged any of those offenses in the instant case. Nor does *Stirrup v. Reiss,* 410 So. 2d 537 (Fla. 4th DCA 1982), also cited by the State, justify the imposition of criminal liability on Defendant. In *Stirrup,* a civil case, the plaintiff and one of two defendants appealed from a summary judgment entered in favor of the defendant-alleged boat owner after an accident. They claimed the alleged boat owner was present at the time of the accident and therefore liable for negligent operation of the boat. On appeal, the Fourth District held disputed issues of fact as to ownership of the boat precluded summary judgment, but that the allegations of independent negligence against the purported owner were without merit: "As to the furnishing of beer to the boat occupants (if Moss did so), such conduct would not independently impose liability on Moss for negligent operation of the vessel. As to his negligently failing to maintain a proper lookout, there is no evidence in the record that Moss was specially charged to act as a lookout, nor is there any evidence from which it might reasonably be inferred that the collision would not have occurred had Moss acted as lookout." *Id.* at 539 (citation omitted). In addition to being factually distinguishable in numerous respects, that case did not impose criminal liability as the State seeks to do in the instant case.

[2]As the trier of fact in this bench trial, the Court would acquit the Defendant based on the evidence presented because the Court has reasonable doubt.

* * *

**Criminal law—Reckless or careless operation of vessel—Violation of navigational rules causing serious bodily injury—Search and seizure—Information seized from defendant's GPS device during boating accident investigation without warrant and before defendant was given *Miranda* warnings is inadmissible**

STATE OF FLORIDA, Plaintiff, v. IRWIN ELLIOT TAUBER, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. M-20-010275. State Case No. 13-2020-MM-010275-0001XX. Citation No. V641222. April 3, 2023. Raul Cuervo, Judge. Counsel: Gabriela Millan, Assistant State Attorney, Miami, for Plaintiff. Neal L. Sandberg, Simon Schindler & Sandberg LLP, Miami, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court on February 24, 2023, on the Defendant's Motion in Limine and Motion to Suppress data and images obtained from the Defendant's Garmin GPS device, seized by Florida Fish and Wildlife officer Ruben Gomez during the course of his investigation of a boating accident in which a swimmer was struck by a vessel. The Court reviewed the memoranda filed by the Defendant and the State along with the submitted case authorities and conducted an evidentiary hearing.

The defendant, Irwin Elliot Tauber ("Defendant") is charged with a misdemeanor under §327.33(3)(a) Fla Stat.[1] Defendant is charged with violation of Navigational Rule 5, which requires that every vessel shall at all times maintain a proper lookout by sight and hearing, appropriate to the prevailing circumstances and conditions.

The Court finds and holds that any data or information from the Garmin GPS on Defendant's vessel, obtained by the State during its accident investigation and warrantless seizure of the Garmin GPS, and its data and fruits therefrom shall be suppressed. The State admitted that no warrant was issued to obtain any material from the Garmin GPS. The State also stated on the record that it did not intend to use any information obtained from the Garmin device, except for screen shots from the Garmin GPS relating to the location of the Defendant's vessel. Officer Gomez, who performed the accident investigation, testified that he obtained the screenshots during the accident investigation without a warrant and did not inform Defendant that he was conducting a criminal investigation. In fact, the charging document of the alleged crime was not filed until several days after the accident investigation.

The Court finds that the data, images, or fruits therefrom obtained from the Garmin GPS, including any testimony relating to that data was obtained without a warrant in violation of Defendant's Fourth Amendment rights and expectations of privacy. The Court finds as follows:

A motion to suppress evidence generally involves a mixed question of fact and law, *State v. Worsham,* 227 So. 3d 602, 603 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D711c]. "A warrantless search constitutes a prima facie showing which shifts to the State the burden of showing the search's legality." *Id.*; *State v. K.C.,* 207 So. 3d 951, 953 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2716a]; *Miles v. State,* 953 So. 2d 778, 779 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1081a]; *see also Kilburn v. State,* 54 So. 3d 625, 627 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D394b].

It is undisputed that the information from Defendant's Garmin GPS device was seized without issuance of a search warrant. The State so stipulated, and the testimony of Officer Ruben Gomez confirmed that the data and/or images from Defendant's Garmin GPS device were seized during the course of an accident investigation without a warrant and before Defendant was given Miranda warnings.

The State provided no evidence to justify the warrantless search and seizure. Officer Gomez testified he received data and information from the Defendant's Garmin during his investigation of the incident before any Miranda warnings were given to Defendant. Defendant argued all information he provided was before he was administered Miranda warnings and as a result the disclosures were incident to the accident investigation and therefore privileged.

Defendant objected to any testimony about or use of data from the Garmin GPS, citing the accident investigation privilege, Florida Statute §327.301(4) which provides as follows:

> Except as specified in this subsection, each accident report made by a person involved in an accident and any statement made by such person to a law enforcement officer for the purpose of completing an accident report required by this section is without prejudice to the individual reporting. Such report or statement may not be used as evidence in any trial, civil or criminal.

Defendant argued that upon the statutory basis alone information taken from the Garmin GPS must be suppressed. The State conceded in its November 16, 2022, response to Defendant's Motion to Suppress as follows: "State stipulates that any testimony protected by the accident report privilege will not be introduced at trial."

Notwithstanding the admission that the evidence was obtained without warrant, and during the accident investigation, the State argued that seizing and obtaining information from the Garmin, including taking photos of its screen, during an investigation, is not subject to any privilege. The State further argued that the Garmin's location data was admissible, but inconsistently conceded that any other information obtained from the Garmin GPS, for example speed, was taken in violation of the Fourth Amendment.

The case law cited by the State, including *United States v. Knotts,* 460 U.S. 276 (1983) and *United States v. Butts,* 729 F.2d 1514 (5th Cir. 1984), is inapplicable here. In those cases, the government "bugged" the mode of defendant's transportation (a car in *Knotts* and an airplane in *Butts*) to remotely follow their travels. While these cases may demonstrate that there is no privacy right to the *visual* observation or *surveillance* by third parties of the *movements* of a mode of transportation on the road or in the air, the rationale does not apply to this case.

The State's argument fails because here the GPS data seized without a warrant was historical data as opposed to contemporaneous information disseminated to the public. Here the question is whether the State may seize without a warrant information from the Garmin GPS device and then use the data it retrieved. This is not a case of the State *observing, monitoring, or surveilling* the movements of the vessel from afar (or even with a "bugging" device as in *Knotts* and *Butts*) at the time of the activity, but rather the State attempting to reconstruct what it did not observe, monitor or surveil using data to which it had no authority to take without warrant.

The State further argues that a warrantless search of the vessel and its seizure of the Gamin device is allowed based upon a federal statute, 14 U.S.C. §522(a). Here, too, the State's logic fails. As well-explained in *United States v. Cardona-Sandoval,* 6 F. 3d 15 (1st Cir. 1993), while the expectation of privacy by those on board a vessel is subject to the Coast Guard's authority to conduct document and safety inspections and its *limited power* to search more intrusively *upon reasonable suspicion*, the Fourth Amendment still prohibits unreasonable searches and warrantless seizures. The statute is not authority to operate outside the confines of the Fourth Amendment. See also *United States v. Franki-Irizarry,* 2009 U.S. Dist. LEXIS 125722, 2009 WL 5874319(explaining that the statute allowing Coast Guard boarding for document and safety inspections on the high seas does not negate the expectation of privacy).

Defendant argued that any information obtained during the accident investigation is privileged and that the Garmin GPS was Defendant's personal property in which he had an expectation of privacy. The government's warrantless search of his Garmin GPS and

its data violated his right to privacy.

*State v. Worsham,* 227 So. 3d 602, is instructive. In that case the police downloaded data from an event data recorder or "black box" in defendant's vehicle. The defendant was the driver of a vehicle involved in a high-speed accident that killed his passenger. Several days after the vehicle was impounded, law enforcement downloaded the information from the black box, without a warrant. The State defended the warrantless search on the basis that the defendant had no privacy interest in the downloaded information. *Id.*

The *Worsham* Court rejected the argument from the State based on *People v. Diaz,* 213 Cal. App. 4th 743, 153 Cal. Rptr. 3d 90 (2013), which held that a defendant lacked a privacy interest in his vehicle's speed and braking data obtained from a diagnostic module after a fatal accident. *Id.* at 607-08. Instead, the Fourth District found the reasoning in *United States v. Jones,* 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) [23 Fla. L. Weekly Fed. S102a] more applicable. In *Jones,* the United States Supreme Court found that acquiring data through electronic means, even without an accompanying trespass could still be an invasion of privacy. *Jones,* 565 U.S. at 412.[2]

It was undisputed at the evidentiary hearing that the Garmin GPS device contained not only speed and direction information, but other historical data such as where the vessel had been previously and other private information. In a very similar case involving a Garmin device in a car, *Wertz v. State*, 41 N.E.3d 276 (Ind. Ct. App. 2015), the state argued that it sought only to use evidence of speed and location of the vehicle. The court found that the Garmin device in the vehicle contained much more information than speed and location.[3] The appellate court reversed denial of the defendant's motion to suppress data obtained without a warrant or consent from the defendant's personal Garmin GPS because the seizure violated the defendant's Fourth Amendment rights. In *Wertz*, while the hospitalized defendant under the influence of pain medication said he would consent to the police accessing his GPS, even with that "consent," the police had to get a pin number for the Garmin device. Reversing the denial of the motion to suppress, the Court approached the warrantless search "with the basic understanding that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,' " *Wertz,* 41 N.E. 3d at 279 *citing Katz v. United States,* 389 U.S. 347 (1967), as quoted in *Arizona v. Gant,* 556 U.S. 332 (2009) [21 Fla. L. Weekly Fed. S781a].

The same reasoning applies here. The Garmin device was accessed without a warrant; its data accessed illegally by unlawful search and seizure and cannot be used as evidence in this proceeding.

In *United States v. Jones,* 565 U.S. 400 (2012) [23 Fla. L. Weekly Fed. S102a], law enforcement without a valid warrant used data from a GPS device attached to a vehicle driven by the defendant to obtain a drug trafficking conviction. The United States Supreme Court held that the admission of evidence obtained from the warrantless use of the data from the GPS device which monitored the Defendant's movements violated the Fourth Amendment, as well as his expectation of privacy. Justice Sotomayor, in her concurring opinion, warned of the privacy and Fourth Amendment concerns applicable to seizures of GPS monitoring devices:

> GPS monitoring generates a precise, comprehensive record of a person's public movements that reflect a wealth of detail about familial, political, professional, religious, and sexual associations See, *e.g., People v. Weaver,* 12 N. Y. 3d 433, 441-442, 909 N.E.2d 1195, 1199, 882 N.Y.S.2d 357 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure . . . .
>
> 565 U.S. at 415-17.

The right of privacy and freedom from warrantless searches of property and effects is embodied in the Florida Constitution. art. I, § 12, as follows:

> The right of the people to be secure in their persons, houses, papers and *effects* against unreasonable searches and seizures, *and against unreasonable interception of private communications by any means*, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be search, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. The right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution*

Accordingly, the screen shots and other information obtained during the accident investigation without Miranda warnings cannot be used at trial. In addition, any information obtained from the Defendant's Garmin Device without a warrant is inadmissible. The Defendant's Motion to Suppress is GRANTED and the State shall not use in evidence by testimony or documentation any information derived from the Garmin GPS device or the fruits therefrom.

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[1]"A person who violates the navigational rules and the violation results in a boating accident-causing serious bodily injury. . .but the violation does not constitute reckless operation of a vessel, commits a misdemeanor of the second degree."

[2]The *Warsham* Court further explained "a car's black box is analogous to other electronic storage devices for which courts have recognized a reasonable expectation of privacy. Modern technology facilitates the storage of large quantities of information on small portable devices. *The emerging trend is to require a warrant to search these devices."* 227 So. 3d at 604.

[3]The *Wertz* Court stated, "we are not persuaded by the State's argument that the search was permissible because law enforcement only sought information about where Wertz was located on a particular evening." *Id.* at 285. Contrasting real-time monitoring, which the Supreme Court in *Knotts* found was permissible under the Fourth Amendment, because the information sought is limited, with examination of a defendant's historical location data, which gives "information concerning every day." *Id.* at 286.

* * *

**Insurance—Homeowners—Standing—Assignment of benefits—Validity—Assignments of benefits that do not contain written, itemized, per-unit cost estimate of services to be performed by assignee do not comply with statutory requirements—In absence of language in assignments incorporating estimates attached to amended complaint, court cannot find that estimates were contained in the assignments—Further, none of estimates is deemed signed, and estimates at issue are more akin to generic price lists than to written, itemized, per unit cost of work to be performed required by statute—Amended complaint is dismissed with prejudice**

DOLPHIN WATER REST PEDRO ESTEVEZ, Plaintiff, v. BANKERS INSURANCE GROUP, et al., Defendants. County Court, 11th Circuit in and for Miami-Dade County. Case No. 2022-014329-CC-05. Section CC06. August 17, 2023. Luis Perez-Medina, Judge.

**ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE**

**THIS CAUSE** came before the Court on August 7, 2023, on First Community Insurance Company ("FCIC") Motion To Dismiss With Prejudice ("Motion")(File #169404182), FCIC's Notice of Supplemental Authority (File #169695196), and FCIC's Second Notice of Supplemental Authority (File # 175377527), the Court having reviewed FCIC's Motion and Authority, the pleadings, heard arguments from the Parties, and the Court otherwise advised in the premises, it is hereby:

**ORDERED AND ADJUDGED** as follows:

Defendant's Motion is **GRANTED WITH PREJUDICE**. This Court finds that Fla. Stat. § 627.7152(2)(a)4, requires that the Plaintiff's Assignment of Benefits ("AOB") must "contain" a written itemized per unit cost estimate of services to be performed by the assignee. It is a question of law for this Court to interpret the meaning of the language in Fla. Stat. § 627.7152(2)(a)4. The word "contain" means to comprise, include and/or enclose. The AOB is void of any incorporating language that would allow this Court to find that the estimates were indeed incorporated into the AOB. In the absence of this necessary incorporating language required to be in the AOB, this Court is compelled to conclude that none of the estimates attached to the fourth Amended Complaint were contained in the AOB. Accordingly, based on this ground, alone, the entire Amended Complaint is dismissed with prejudice.

Below this Order will set forth Findings of Facts and Conclusions of Law.

**A.**

FIRST COMPLAINT. The Plaintiff served FCIC with its original Complaint on August 1, 2022 (File # 153790428). Attached to this first Complaint was a three-page AOB, marked as Exhibit A. The third page contained a line which read: "Insured's Signature: _____." This signature line was left blank. The third page of the AOB also contained a line which read: "Note; the last page of this document will show Insured's signature." The fourth page did include two digital signature blocks: (1) Pedro & Mayda Estevez, and (2) Jaime Baez. This digital signature page contained the date of March 30, 2020. The Complaint identified the reported date of loss as September 10, 2017. *See* Complaint, ¶7 ("On or about September 10, 2017, . . . the property was damaged as a result of Hurricane Irma . . .").

This first Complaint also contained an Exhibit B attaching four Invoices. These four Invoices were as follows: (1) Invoice Nos. 2682, dated 12.16.19, Tarp Installation ($4,020.00), Quantity 1,500.00, Price $2.38, (2) Invoice Nos. 2721, dated 01.06.20, Remove Tarp ($2,050.00), Quantity 1, Price $1,600.00, (3) Invoice Nos. 2912, dated 04.14.20, Wrap Roof ($11,650.00), Quantity 3,200, Price $350.00, and (4) Invoice Nos. 3080, dated 07.17.20, Remove Wrap ($2,950.00), Quantity 1, Price $2,500.00.

SECOND COMPLAINT. On September 20, 2022, the Plaintiff served an Amended Complaint (File # 157731260). Attached to this Amended Complaint was a second AOB. The fourth page of this AOB had only one digital signature block for Pedro Estevez. This AOB had a date of December 16, 2019. This Amended Complaint contained the first AOB described above. The same four Invoices were attached.

THIRD COMPLAINT. On September 28, 2022, the Plaintiff served a second Amended Complaint (File # 158258793). This third filed complaint attached the same two AOBs outlined above and the same four Invoices.

ORDER. On March 10, 2023, this Court granted FCIC's Motion to Dismiss the Amended Complaint filed on September 28, 2022. *See* Order granting motion to dismiss (File # 168497946). This Court granted the Plaintiff leave to amend to "attach a line-item estimate that comports with the statute." *See* Order, Pg. 2.

FOURTH COMPLAINT. On March 9, 2023, the Plaintiff filed its fourth Amended Complaint (File #168372942). This fourth Amended Complaint attached the same two AOBs outlined above and the same four Invoices. The Plaintiff did attach four new "estimates." These four "estimates" were as follows: (1) Estimate Nos. 1427, dated 12.13.19, Tarp Installation ($4,200.00), Quantity 1,500.00, Price $2.50, (2) Estimate Nos. 1446, dated 01.03.20, Remove Tarp ($2,050.00), Quantity 1.00, Price $1,600, (3) Estimate Nos. 1845, dated 03.24.20, Wrap Roof ($9,075.00), Quantity 2,300.00, Price $3.75, and (4) Estimate Nos. 2106, dated 06.22.20, Remove Wrap ($2,700.00), Quantity 1.00, $2,250.00.

This last estimate (No. 2106) was not signed. The first three estimates (Nos. 1427, 1446, and 1845) contained a line which read: "To accept this estimate, Please sign below: _____." The signature line was left blank on each of the four estimates. Each of these four estimates lack any reliable indicators that would allow this Court to conclude that these newly disclosed estimates were indeed incorporated into the AOBs. None of the estimates included a header or footer that read: "Exhibit," "Addendum," or "Estimate incorporated into the Assignment" or some facsimile thereof. None of the estimates included page numbers that would correspond with the AOB, such as, Pg. 5 of 5, which might match with the AOB pagination which might read Pg. 1 of 5, Pg. 2 of 5, Pg. 3 of 5, Pg. 4 of 5, and Pg. 5 of 5. Indeed, the AOBs and estimates both failed to contain any page numbers at all.

These first three estimates (Nos. 1427, 1446, and 1845) were furnished with a second page containing a digital signature of Pedro Estevez. This Court finds that none of the four estimates included any "incorporating" language that would indicate that the separate signature page would indeed be part of the estimate and be deemed incorporated into the estimate. The signature page for each estimate also fails to include any reliable indicators that would allow this Court to conclude that these separate signature pages were incorporated into the estimate.

**B.**

The interpretation of a statue is a question of law for this Court. *See GTC, Inc. v. Edgar,* 967 So. 2d 781, 786 (Fla. 2007) [32 Fla. L. Weekly S546a] ("statutory interpretation is a question of law . . . the plain meaning of the statute is always the starting point in statutory interpretation."). The key provision at issue, in this case, is Fla. Stat. § 627.7152.

"Section 627.7152 establishes mandatory requirements which an AOB must include to be enforceable." *See Air Quality Experts Corp. v. Fam. Sec. Ins. Co.,* 351 So. 3d 32, 37 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c]. "One of those requirements at issue here is that it must "**contain** a written, itemized, per unit cost estimate of services to be performed by the assignee." (Bold added for emphasis) *Id.* Fla. Stat. § 627.7152(2)(d) reads: "an assignment agreement that does not comply with this subsection is invalid and unenforceable."

Fla. Stat. § 627.7152, reads as follows:

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

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4. **Contain** a written, itemized, per unit cost estimate of the services to be performed by the assignee." (Bold added for emphasis).

"We must look at the AOB itself to determine whether it complies with the statute." *Id.* at 37. *See K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL,* 48 So. 3d 889, 894 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2317a] ("It is well settled that the court must consider an exhibit attached to the complaint together with the complaint's allegations, and that the exhibit controls when its language is inconsistent with the complaint's allegations." *See also Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97, 98 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b].

The Third District has already addressed the issue of whether an estimate must actually be contained in an AOB. *See Total Care Restoration, LLC v. Citizens Prop. Ins. Corp.,* 357 So. 3d 1260 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D540a].

In *Total Care,* the Third District writes:

Total Care Restoration, LLC . . . appeals the trial court's order dismissing its breach of contract complaint with prejudice. The trial court dismissed the complaint based on Total Care's failure to comply with section 627.7152(2)(a)4., Florida Statutes (2021), which provide that an assignment of benefits agreement must **contain** a written,

itemized, per unit cost estimate of the services *to be performed by the assignee*. [Italicize added in original]. The assignment of benefits agreement in the instant case contained a generic list of *available services*, together with their unit cost, which the trial court concluded was insufficient to satisfy the statute's requirement, rendering the assignment agreement statutorily invalid and unenforceable. We agree with the trial court's conclusion and, for the reasons that follow, affirm the trial court's order." *Id.* at 1261-1262. (Bold added for emphasis).

In *Total Care,* there was no dispute, between the Parties, that the AOB did in-fact contain a list of services and prices. The plaintiff in *Total Care* claimed that their list of services and prices complied with the statute. The insurance carrier in *Total Care* argued that it was a generic menu services and did not comply with the statute. The Third District explained:

"By contrast, the document provided by Total Care is nothing more than a generic menu of available services offered by Total Care, listing the cost of each available service." *Id.* at 1263.

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"... [W]e conclude it falls far short. *Id.* at 1264. "It is not tailored to the insured or to the services to be performed on this particular property." *Id.*

*In this case, the threshold predicate issue for this Court is*:

**"Whether the AOB itself "contains" an estimate?"**

If the AOB does not contain an estimate, then there is no need to examine the estimate to determine if the estimate meets the criteria that it be tailored to the service to be performed by the assignee for this particular property.

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *See Martinez-Rivero v. State*, 317 So. 3d 1172, 1174 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D292a]. Fla. Stat. § 627.7152(2)(a) requires that any assignment must: ... 4. **Contain** a written, itemized, per unit cost estimate of the services to be performed by the assignee." (Bold added for emphasis).

The word "contain" is defined to mean:

"to hold together," "hold in," "to have or be capable of having within," and/or "contain implies the actual presence of a specified substance or quantity within something."

*See Merriam-Websters Collegiate Dictionary, Eleventh Edition, Pg. 269; see also definition contained in the on-line version of Merriam-Websters Dictionary* ("to hold, comprise, include, enclose, bound").

The Third District has addressed the issue of when a document can be considered to be incorporated into another document. *See Hurwitz v. C. G. J. Corp.* 168 So.2d 84 (Fla. 3d DCA 1964). In *Hurwitz,* the Third District explained:

"[T]here are two different rules for determining whether a document has been incorporated by reference. A document *must* be considered incorporated by reference where the incorporating document specifically provides that it is subject to the incorporated document ... The other ... rule is that a document *may* be considered if it is sufficiently described or referred to in the incorporating agreement."

(Italicize in original) *Id.* at 87. This is known as the "**incorporation by reference doctrine**." *See Citizens Prop. Ins. Corp. v. European Woodcraft & Mica Design Inc.,* 49 So. 3d 774 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2168a] *citing favorably to Hurwitz. See also Spicer v. Tenet Fla. Physician Servs., LLC.,* 149 So. 3d 163 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2208a] citing favorably to *Hurwitz. See also Jenkins v. Eckerd Corp.,* 913 So. 3d 43, 51 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2291a] *citing favorably to Hurwitz* ("Incorporation by reference, however, requires more than simply making a reference to another document in a contract. As we explain in *Management Computer Controls Inc. v. Charles Perry Constr. Inc.,* 743 So. 2d 627 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D2458c] "A document may be incorporated by reference in a contract if the contract specifically describes the document and expresses the parties' intent to be bound by its terms. The contract must contain more than a mere reference to the collateral document ...").

Here, in this case, the AOB is void of any language that could be construed to incorporate by reference a specific estimate. Indeed, the two AOBs attached to the Amended Complaint (Filed on March 9, 2023, File # 168372942) does include this language: "*Note; the last page of this document will show Insured's signature*." This Court finds that this language shows that the Plaintiff knows well how to add incorporating language.

The AOB is void of any similar language (i.e. the signature incorporating language) incorporating any estimates. This Court finds that the Plaintiff failed to include in its AOB any incorporating language that would allow this Court to find that the estimate was indeed incorporated into the AOB. In the absence of this necessary incorporating language required to be in the AOB, this Court is compelled to conclude that none of the estimates attached to the fourth Amended Complaint were contained in the AOB. **Accordingly, based on this ground, alone, this Court grants the Motion to dismiss with prejudice.**

This Court further finds that under the "incorporation by reference" standard set forth in *Hurwitz v. C. G. J. Corp.* 168 So.2d 84 (Fla. 3d DCA 1964), a mere reference to an attached estimate, without more, will be legally insufficient to incorporate that other document into the AOB. *See also Management Computer Controls Inc. v. Charles Perry Constr. Inc.,* 743 So. 2d 627 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D2458c] *citing favorably to Hurwitz.*

**C.**

In addition to the omission of the necessary incorporating language required to be in the AOB, the estimates also failed to include any corresponding indicators that would allow this Court to conclude that these estimates were contained in the AOB. *See Gonzalez v. Citizens Prop. Ins. Co.*, 273 So. 3d 1031, 1037 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D686a] ("**A judge is not required to check his or her common sense in the robing room**.").

The Plaintiff produced four new estimates in its fourth Amended Complaint. As indicated earlier herein, the last estimate (No. 2106) was not signed at all. In addition to this Court's predicate finding that none of the estimates can be deemed contained in either of the two AOBs, this Court further finds that the absence of any signature on this estimate (No. 2106) means that the Plaintiff cannot recover any money for this invoice No. 2106. *See Kidwell Grp. v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97, 97-98 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b] ("Appellant ... **appeals the trial court's dismissal with prejudice** ... While Appellant included the invoice as an attachment to the complaint along with the assignment of benefits, such invoice was unexecuted ... As such, the trial court properly concluded the assignment did not contain a written, itemized, per-unit cost estimate of services to be performed by Appellant as required by sections 627.7152(a)(1) and 627.7152(2)(a)4. Accordingly, the trial court's **dismissal ... was proper**."). *See also Air Quality Experts Corp. v. Fam. Sec. Ins. Co.,* 351 So. 3d 32, 38 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c] ("**We also decline the assignee's request to further amend its complaint**. Not only did it not request that relief in the trial court, but **we also conclude that any amendment would be futile**."). The furnishing of an estimate actually signed by the Insured will not bring the estimate into compliance with the statute. The signed and dated estimate must also still be "contained" in the AOB.

Each of the four estimates (Nos. 2106, 1427, 1446, and 1845) do contain a line which reads: "To accept this estimate, Please sign below: _____." The signature line was left blank on each of the four

estimates. None of the estimate have a signature on the estimate page itself.

None of the estimates included a header or footer that read: "Exhibit," "Addendum," or "Estimate incorporated into the Assignment" or some facsimile thereof. None of the estimates included page numbers that would correspond with the AOB, such as, Pg. 5 of 5, which might match with the AOB pagination which might read Pg. 1 of 5, Pg. 2 of 5, Pg. 3 of 5, Pg. 4 of 5, and Pg. 5 of 5. Indeed, the AOBs and estimates both failed to contain any page numbers at all. This Court finds that the absence of corresponding indicators further supports the legal conclusion that these estimates were not incorporated into the AOBs.

Finally, three of the estimates (Nos. 1427, 1446, and 1845) were furnished with a second page containing a digital signature of Pedro Estevez. This Court further finds that none of these estimates includes any "incorporating" language that would indicate that the separate signature page would be part of the estimate and be deemed incorporated into the estimate. As detailed earlier herein, the Plaintiff knows well how to include such "signature incorporating language." *See* the third page of the AOB, which reads: "*Note; the last page of this document will show Insured's signature*." The estimates do not contain this similar statement.

The signature page, for each estimate, also fails to include any corresponding indicators that would allow this Court to conclude that these separate signature pages were incorporated into the estimate. Based on the foregoing findings, this Court concludes that the digital signature pages cannot be deemed to be incorporated into the estimates furnished by the Plaintiff. As such, the Amended Complaint is dismissed with prejudice as it relates to estimate Nos. 2106, 1427, 1446, and 1845, for not having signatures and not being incorporated into the AOBs.

**D.**

This Court further finds that the estimates are more akin to a generic price list as opposed to a "written, itemized, per unit cost estimate to be performed by the assignee." None of these estimates are tailored to the services to be performed on this particular Property. *See also Air Quality Experts Corp v. Fam. Sec. Ins. Co.,* 351 So. 3d 32 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c] ("There is nothing in the attachments which tied the price list to the insured's home so that it could be considered an estimate. . . the price list was simply a menu of services, . . . a price list of work or services that could be performed."); *see also Total Care Restoration LLC v. Citizens Prop. Ins. Corp.,* 357 So. 3d 1260 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D540a] ("By contrast, the document provided . . . is nothing more than a generic menu of available services offered . . . it is not tailored to the insured or to the services to be performed on this particular property."). First, the four estimates fail include a consistent square footage of the roof or Property, and/or the number of hours or days it would take to perform the tasks. The Third District wrote in *Total Care, supra*:

> The estimate "**fails to set forth: the specific services being performed** by Total Care, . . . and [fails to set forth] the estimated cost for each of the services being performed . . . based on the number of **"units" (e.g. number of hours/days needed for each service and/or number of square feet** involved for each specific service being performed on the insured's property. (Bold added for emphasis). *Id.* at 1265.

Below is a list of the relevant information contained in the original Invoice and the newly submitted estimates in the fourth Amended Complaint:

[1] Invoice Nos. 2682, dated 12.16.19, Tarp Installation ($4,020.00), Quantity *1,500.00* // Price $2.38
[1] Estimate Nos. 1427, dated 12.13.19, Tarp Installation ($4,200.00), Quantity *1,500.00* // Price 2.50
[2] Invoice Nos. 2721, dated 01.06.20, Remove Tarp ($2,050.00), Quantity *1.00* // Price $1,600.00
[2] Estimate Nos. 1446, dated 01.03.20, Remove Tarp ($2,050.00), Quantity *1.00* // Price $1,600.00
[3] Invoice Nos. 2912, dated 04.14.20, Wrap Roof ($11,650.00), Quantity *3,200.00* // Price $3.50
[3] Estimate Nos. 1845, dated 03.24.20, Wrap Roof ($9,075.00), Quantity *2,300.00* // Price $3.75
[4] Invoice Nos. 3080, dated 07.17.20, Remove Wrap ($2,950.00). Quantity *1.00* // Price $2,500.00
[4] Estimate Nos. 2106, dated 06.22.20, Remove Wrap ($2,700.00). Quantity *1.00* // $2,250.00

Based on the inconsistencies of the square footage of this roof or Property, this Court finds that none of these estimates are tailored to the services to be performed on this particular roof or Property. If the estimates are not tailored to this particular Property, this Court is compelled to conclude that the estimate are more akin to a generic price.

This Court finds that the intent behind the statute is to require the assignee to furnish the Insured with a "proposal" describing the specific work to be performed for this particular Property and the prices to be charged. With this information, the Insured is able to make an informed decision on whether the Insured wants the assignee to perform the work. This proposal or estimate must then be "contained" in the AOB that is signed by the Insured.

In this case, in addition to having different numbers representing the square footage of the roof or Property set forth above, the third estimate (No. 1845) was for $9,075.00. The proposed work was "roof wrap." When the "roof wrap" work was completed, the Insured was Invoiced (No. 2912) for $11,650.00. This Court finds that it is type of price increase that the statute is designed to prevent.

This same price increase occurred with the fourth estimate (No. 2106). Recall, this is the unsigned estimate. With that said, the "roof wrap removal" estimate (No. 2106) is for $2,700.00. When the work was completed, the Insured was Invoiced for $2,950.00 (No. 3080).

This Court finds that Plaintiff cannot collect any money associated with these two estimates (Nos. 1845 and 2106) and/or the corresponding invoices to these estimates. This Court finds that these numerous invoices and estimates are more akin to a generic price list than an actual proposal that is tailored to this particular Property. Accordingly, the Amended Complaint is dismissed with prejudice as it relates to estimate Nos. 1845 and 2106.

**E.**

**CONCLUSIONS OF LAW**

This Court finds that Fla. Stat. § 627.7152(2)(a)4, requires that the Plaintiff's AOB must "contain" a written itemized per unit cost estimate of services to be performed by the assignee. It is a question of law for this Court to interpret the meaning of the language in Fla. Stat. § 627.7152(2)(a)4. The word "contain" means to comprise, include and/or enclose. The AOB is void of any incorporating language that would allow this Court to find that the estimates were indeed incorporated into the AOB. In the absence of this necessary incorporating language required to be in the AOB, this Court is compelled to conclude that none of the estimates attached to the fourth Amended Complaint were contained in the AOB. Accordingly, based on this ground, alone, the entire Amended Complaint is dismissed with prejudice.

Plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed. The plaintiff must prove that it had standing when the complaint was filed. The Plaintiff cannot cure this lack of standing through discovery. *See Total Care Restoration, LLC v. Citizens Prop.*

*Ins. Corp.,* 357 So. 3d 1260 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D540a] (affirmed: dismissal with prejudice); *Kidwell Grp. v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97, 97-98 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1295b] (affirmed: dismissal with prejudice); *Air Quality Experts Corp. v. Fam. Sec. Ins. Co.,* 351 So. 3d 32, 38 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c] (affirmed: dismissal with prejudice). "[P]laintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." *See McLean v. JP Morgan Chase Bank N.A.,* 79 So. 3d 170, 172 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D334b]. "[T]he plaintiff must prove that it had standing . . . when the complaint was filed." *Id.* The Plaintiff cannot cure this lack of standing through discovery.

This Court further grants this Motion to Dismiss with prejudice on the grounds that none of the four estimates were deemed signed. Specifically estimate No. 2106 has no signature. The remaining three estimates (Nos. 1427, 1446, and 1845) do not contain any incorporating language to include the digital signatures furnished on separate pages for each of these estimates. This Court concludes that the digital signature pages cannot be deemed to be incorporated into the estimates furnished by the Plaintiff. As such, the Amended Complaint is dismissed with prejudice as it relates to estimate Nos. 2106, 1427, 1446, and 1845.

Finally, this Court further grants this Motion to Dismiss with prejudice on the grounds that that none of these four estimates were tailored to the services to be performed on this particular Property. If the estimates are not tailored to services to be performed on this particular Property, then the estimates a more akin to a generic price list. This conclusion is supported by the inconsistencies of the square footage of the roof and/or Property. This conclusion is also supported by the fact that two of the estimates were for a lower amount, than the amount ultimately invoiced to the Insured. The third estimate (No. 1845) was for $9,075.00. The proposed work was "roof wrap." When the "roof wrap" work was completed, the Insured was Invoiced (No. 2912) for $11,650.00. This same price increase occurred with the fourth unsigned estimate (No. 2106). The "roof wrap removal" estimate (No. 2106) is for $2,700.00. When the work was completed, the Insured was Invoiced for $2,950.00 (No. 3080). This Court finds that it is type of price increase that the statute is designed to prevent. This Court finds that Plaintiff cannot collect any money associated with these two estimates (Nos. 1845 and 2106) and their corresponding invoices. Accordingly, the Amended Complaint is dismissed with prejudice as it relates to estimate Nos. 1845 and 2106.

* * *

**Criminal law—Threatening death or bodily harm to officer—Evidence—Defendant's statements and actions threatening officers during processing at correctional center following his unlawful arrest for disorderly conduct are not fruit of poisonous tree as they are not legally derivative, but are independent acts of misconduct—Motion to suppress statements of defendant and officers' observations of his conduct is denied**

STATE OF FLORIDA, v. ALEXANDER MARTINEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. B23-10284. Section Jail Division. August 1, 2023. Cristina Rivera Correa, Judge. Counsel: Dolores Sinistaj, Assistant State Attorney, Miami, for State. Ciaran Foley, Assistant Public Defender, Miami, for Defendant.

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

THIS MATTER having come before the Court on Defendant, Alexander Martinez's ("Defendant") Motion to Suppress pursuant to the Fourth and Fourteenth Amendments to the United States Constitution; and Article I §9 and Article I §12 of the Florida Constitution, filed on July 7, 2023 ("Motion to Suppress"), the Court having considered the State's Response to Defense Motion to Suppress, filed on July 27, 2023 ("Response"), conducted a hearing on July 28, 2023[1], and the Court otherwise being fully advised in the premises, the Court finds and orders as follows:

PROCEDURAL HISTORY AND FACTUAL ALLEGATIONS

On May 25, 2023, at around 11:36am, Defendant was arrested and charged with Disorderly Conduct, in violation of Fla. Stat. § 509.143, under case number B23-10239. This Court ultimately found on July 7, 2023, that there was no probable cause to arrest Defendant for Disorderly Conduct under case number B23-10239. While Defendant was being processed at the Turner Knight Correctional Center under case number B23-10239,

> Def[endant] became extremely irate and disorderly[,] directed his anger towards [Officer Robbins] and began to make numerous threats towards [Officer Robbins] and [his] family, [such as] "Wait till I get out and see you on the street, I'm going to fuck you up and your family up if I see you. [. . .] Def[endant] also made threats against Sgt. M. Castillo, [such as] "When I see Matt Castillo, I'm going to kick his ass and when I see Matt's dad, Robert at Bella's Bakery[,] I'm going to fuck him up."[2]

Accordingly, Defendant was also arrested and charged on May 25, 2023, at around 11:36am with Threatening Death or Bodily Harm to a Law Enforcement Officer and/or Family, in violation of Fla. Stat. §836.12(2), under case number B23-10284.

On July 7, 2023, in the instant case, B23-10284, Defendant filed his Motion to Suppress 1) Defendant's statements and 2) the officers' observations following his arrest under case number B23-10239.

LEGAL ANALYSIS AND CONCLUSIONS

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV.* The text of the federal constitution does not provide for suppression of evidence unlawfully obtained; however, the United States Supreme Court has established an exclusionary rule, the idea being that exclusion of unlawfully obtained evidence would deter police misconduct. *See Herring v. United States,* 555 U.S. 135, 139, 129 S. Ct. 695 (U.S. 2009) [21 Fla. L. Weekly Fed. S582a]. To be sure: that is the exclusionary rule's limited objective, and "not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality." *Tims v. State,* 204 So. 3d 536, 539 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2257b].

Defendant cites *Wong Sun v. United States,* 371 U.S. 471 (U.S. 1963) in support of his Motion to Suppress, arguing that Defendant's statements and the observations officers made of Defendant while being processed under a charge for which there is no probable cause are "fruit of the poisonous tree," and that exclusion of Defendant's violent encounter with police following an unlawful arrest furthers policy interests by penalizing unconstitutional government behavior. Defendant asserts that the statements and behavior he seeks to exclude occurred in close proximity to Defendant's unlawful arrest and would not have occurred at all, but for Defendant's arrest.

This court is unconvinced by Defendant's position. Notwithstanding the proximity in time from, or the prompting by, the unlawful arrest, Defendant's statements and the officers' observations following Defendant's booking under case number B23-10239 are not fruit of the poisonous tree, as they are not legally derivative, but rather, an independent act of misconduct for which the exclusionary rule does not provide recourse.

The U.S. Supreme Court's decision in *Wong Sun* does not command exclusion of Defendant's statements and conduct following his unlawful arrest under these circumstances because this case is not

the typical suppression case contemplated by the *Wong Sun* court.

> The evidence at issue here does not relate to some earlier crime discovered while officers allegedly violated the Fourth Amendment; it relates to crimes [the defendant] *committed* against officers while they allegedly violated the Fourth Amendment.

*Tims* at 539.

Even though the altercations between Defendant and the officers may never have occurred "but for" Defendant's arrest under case number B23-10239, the evidence concerning Defendant's threats to the officers and their family is not legally derivative for purposes of the exclusionary rule. *State v. Freeney,* 613 So. 2d 523, 539. *See Wong Sun,* 371 U.S. 471 (1963). Defendant's proactive conduct in threatening the officers and their family creates the basis of a separate crime that Defendant is alleged to have subsequently committed against the officers. *State v. Clavette,* 969 So. 2d 463 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2719b] (Evidence of defendant's violent actions against officers who unlawfully entered his home not subject to suppression, as independent acts of misconduct). "[E]xtending the fruits doctrine to immunize a defendant from arrest for new crimes gives a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct." *United States v. Bailey,* 691 F. 2d 1009, 1017 (11th Cir. 1982).

Suppressing Defendant's statements and the officers' observations following Defendant's arrest under case number B23-10239 does not advance the purpose of the exclusionary rule. To hold otherwise would encourage defendants to resort to threats and other acts of violence in response to an unlawful arrest. *Tims* at 540. It is well established that a person is not entitled to display threatening behavior to contest an illegal arrest. *Meeks v. State,* 369 So. 2d 109 (Fla. 1st DCA 1979); *Jones v. State,* 570 So.2d 433 (Fla. 5th DCA 1990); *Wallace; Dominique v. State,* 590 So. 2d 1059 (Fla. 4th DCA 1991). *See* § 776.051(1), Fla. Stat. (1991). "Under the law, the defendant was expected to tolerate this type of illegal [detention] and to seek redress for any violation of his rights in a subsequent legal proceeding." *Freeney* at 525.

Accordingly, Defendant's Motion to Suppress is hereby DENIED.

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[1]Defense counsel waived Defendant's in-person presence for the hearing; Defendant was present virtually via Zoom. The parties stipulated to relying on the factual allegations and requested that the court make a determination as to the law.

[2]Arrest Affidavit in case number B23-10284.

* * *

**Insurance—Personal injury protection—Medical provider's action against insurer—Venue—Venue is proper in Hillsborough or Brevard County where insurer has agent or representative in Hillsborough County and cause of action accrued in Brevard County—Motion to transfer venue from Miami-Dade County, in which insurer does not have agent or representative, is granted**

DR. J COMERFORD, P.A., dba SPORTS CHIROPRACTIC, HEALTH & REHAB., a/a/o Raphael O. Smith, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-003572-SP-23. Section ND06. July 12, 2023. Ayana Harris, Judge. Counsel: Manuel Mendoza, Shuster Saban & Estevez, Miami, for Plaintiff. August Mangeney, Staff Counsel, First Acceptance Insurance Company, Tampa, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE TRANSFER VENUE**

THIS CAUSE, having come before the Court on Defendant's Motion to Dismiss, or in the Alternative Transfer Venue, and this Court having reviewed the Motion, having heard argument of counsel and being otherwise duly advised in the premises, the Court finds as follows:

1. The Plaintiff filed the instant action in Miami-Dade County for breach of contract arising out of alleged unpaid PIP benefits.

2. The Defendant, First Acceptance Insurance Company, filed its Motion to Dismiss or in the Alternative Transfer Venue challenging Plaintiff's selection of Miami-Dade County as a proper venue for this action.

3. Defendant filed its Affidavit in support of its Amended Motion establishing that Defendant, First Acceptance Insurance Company, is a foreign corporation that does not have an agent or representative in Miami-Dade County, and that does have a representative in Hillsborough County.

4. Further, the evidence before the Court shows that the Plaintiff, Dr. J Comerford, P.A. dba Sports Chiropractic, Health & Rehab., is located in Brevard County, the treatment at issue was rendered in Brevard County, Plaintiff's billing address is in Brevard County, and the alleged payment due to Plaintiff was to be remitted in Brevard County. Additionally, the assignor lives in Brevard County and the loss that is the basis for this action occurred in Brevard County.

5. The Plaintiff did not file a response in opposition to Defendant's Motion and Affidavit.

6. The Court notes that Fla. Stat. § 47.051 provides that "Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located." *See Burnup & Sims Telcom, Inc. v. McCrone*, 590 So. 2d 1121 (Fla. 3d DCA 1991).

7. When a party establishes that venue is improper in the county in which the suit was filed by way of an affidavit, the burden shifts to the opposing party to rebut the affidavit with sworn evidence. *See Gino Vitiello, M.D., P.A. v. Genovese Joblove & Battista, P.A.*, 123 So.3d 1185 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2206b].

8. The Court finds that Defendant does not have an agent or representative in Miami-Dade County and therefore venue is improper in Miami-Dade County.

9. The Court further finds that the Defendant has agents or representatives in Hillsborough County, and that the cause of action accrued in Brevard County.

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

**IT IS HEREBY ORDERED AND ADJUDGED**:

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

2. Defendant's Motion to Transfer Venue is **GRANTED.** At the request of the Plaintiff, this case shall be transferred to Hillsborough County.

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

* * *

ITALO IBARRO, Plaintiff, v. POLLACK AND ROSEN, P.A., et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-031406-CC-25. Section CG03. July 27, 2023. Patricia Marino Pedraza, Judge. Counsel: Shawn Wayne, Law Office of Robert Wayne; and Bryan Dangler, The Power Law Firm, for Plaintiff. Ramiro Kruss, Pollack & Rosen, P.A., for Defendant.

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

THIS MATTER coming before the Court with a special set hearing on July 26, 2023, on Defendant Pollack & Rosen P.A.'s Motion to Dismiss, and the Court being duly advised in the premises, hearing argument from the parties, reviewing the case law presented, as well as Plaintiff's filed response to the motion, it is hereby:

**ORDERED AND ADJUDGED:**

1. The Motion to Dismiss is **DENIED**.

2. On a motion to dismiss, the Court is confined to the four corners of the complaint and must accept all well-pled allegations as true.

3. The Court finds that Plaintiff has stated and established a cause of action under the Fair Debt Collection Practices Act (FDCPA) venue provision 15 U.S.C.S. 1692i.

4. The operative complaint seeks statutory damages and alleges actual damages under the FDCPA.

5. Defendant shall file an answer within 10 days of entry of this Order.

* * *

**Consumer law—Debt collection—Florida Consumer Collection Practices Act—Proposals for settlement are not permitted in claims predicated on violations of FCCPA—Motion to strike is granted**

TREVOR TAMBORELLO, Plaintiff, v. RADIOLOGY ASSOCIATES OF CLEARWATER, Florida Limited Liability Company, and RECEIVABLE MANAGEMENT GROUP, INC., foreign profit corporation, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 23-SC-001800. Division V. July 26, 2023. Matthew Alex Smith, Judge. Counsel: Thomas M. Bonan, Seraph Legal, P.A., Tampa, for Plaintiff. Nicole D. Walsh, Hill Ward Henderson, Tampa, for Defendants.

**ORDER STRIKING PROPOSAL OF SETTLEMENT SUBMITTED BY DEFENDANT RADIOLOGY ASSOCIATES OF CLEARWATER**

This matter comes before the Court on Plaintiff's Motion to Strike Defendant Radiology Associates of Clearwater's Proposal For Settlement. The Court, having reviewed and considered the Plaintiff's Motion, Defendant's Response, Plaintiff's Reply, and having a hearing upon the issues, holds as follows:

The Plaintiff has brought a claim against Defendant Radiology Associates of Clearwater under the Florida Consumer Collection Practices Act. On May 26, 2023, Defendant Radiology Associates of Clearwater served a proposal for settlement pursuant to Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. Numerous jurisdictions, including the Thirteenth Judicial Circuit of Florida, have held such offers are invalid under the FDCPA and FCCPA. *Hall v. Deutsche Bank Nat'l Tr. Co. & Ocwen Loan Servicing LLC*, No. 13-CC-13185 (Fla. Hillsborough County Ct. Aug. 25, 2015) [23 Fla. L. Weekly Supp. 476a]; *Southers v. National Action Financial Services, Inc*., 15 Fla. L. Weekly Supp. 932a (13th Jud. Cir. Cty. Ct. 2008); *Pass v. St. Joseph's Hospital. Inc., et al*., 15 Fla. L. Weekly Supp. 1013b (13th Jud. Cir. Cty. Ct., Hills., Co. Fla. 2008); *Hall v. W.S. Hadcock Corporation*, 19 Fla. L. Weekly Supp. 290b (13th Jud. Cir. Dec 15, 2011); *Peeples v. Ugly Duckling Corp*., 15 Fla. L. Weekly Supp. 900b (13th Jud. Cir. Ct. Hills., Co. Fla. 2003); all citing to *Clayton v. Bryan*, 753 So. 2d 632 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D505a]; *Townsend v. Asset Acceptance Corp.*, No. 03-1921CI-88A (Fla. 6th Cir. App. Ct. Aug. 6, 2004) [12 Fla. L. Weekly Supp. 189a]; *Harrington v. Roundpoint Mortg. Servicing Corp*., Case No: 2:15-cv-322-FtM-28MRM (M.D. Fla. Aug. 9, 2018).

Courts have also acknowledged the purpose of the FCCPA is to provide additional protection to Florida consumers beyond what is provided by the FDCPA. *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1192 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C647a]. Indeed, Section 559.77(5), Florida Statutes states, "In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act."

Florida Law clearly holds that when two statutes conflict, the more specific of the two statutes should be followed. *State v. J.M.*, 824 So.2d 105, 112 (Fla. 2002) [27 Fla. L. Weekly S621a] (citing *State ex rel. Johnson v. Vizzini*, 227 So.2d 205, 207 (Fla. 1969) (applying the "long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute.") Section 559.77, Florida Statutes, contains fee and cost shifting language that is more specific than the language found in Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. Therefore, Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 are inapplicable to claims brought under the FCCPA.

Therefore, it is hereby **ORDERED AND ADJUDGED**:

The Motion to Strike the Proposal for Settlement is hereby **GRANTED**.

* * *

**Insurance—Automobile—Windshield repair— Standing—Assignment—Assignment is admissible in evidence where windshield repair shop met burden to authenticate assignment of benefits through circumstantial evidence and through certification from custodian of records, and insurer did not produce any evidence to dispute authenticity of assignment—No merit to insurer's contention that assignment is unenforceable because it lacks agreed-upon price for repairs—Insurer's reliance on Motor Vehicle Repair Act and unclean hands defense are unavailing—Insurer is not a customer under MVRA, and unclean hands doctrine is not recognized defense to breach of contract claim—Repair shop is entitled to summary disposition**

SHAZAM AUTO GLASS, LLC, a/a/o Cindy Andrews, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 19-CC-059051. Division O. August 1, 2023. Joseph M. Tompkins, Judge. Counsel: Anthony Prieto, Morgan & Morgan, Tampa; and David M. Caldevilla, de la Parte, Gilbert, McNamara & Caldevilla, P.A., Tampa, for Plaintiff. Lindsey R. Trowell, Ariane J. Smith, and Chloe A. Orta, Smith, Rivkin Radler, LLP, Jacksonville, for Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND ENTERING FINAL JUDGMENT**

THIS MATTER is before the Court on Plaintiff's *Motion for Summary Disposition* (the "Motion") (Doc. 84), which was filed on April 19, 2022. Defendant filed its *Response in Opposition to Plaintiff's Motion for Summary Disposition* (Doc. 99) on October 19, 2022. The Court held a hearing on the Motion, at which both parties appeared through counsel and presented their arguments.

Following that hearing, the Court entered an order directing Plaintiff to support its factual allegation that the insured, Cindy Andrews,[1] executed an assignment of benefits in favor of the Plaintiff. (Doc. 109). Plaintiff then timely filed its supplemental brief and affidavit from its corporate representative. (Docs. 112, 115). Defendant then filed its Response in Opposition. (Doc. 116). The Court held another hearing on June 21, 2023, at which both parties appeared.

Accordingly, after considering the Motion, the Response, the supplemental briefs and affidavit, the oral arguments, the pleadings, the Court file, applicable law, and being otherwise advised in the premises, the Court concludes that Plaintiff is entitled to summary disposition on its breach of contract claim.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Defendant Geico General Insurance Company ("Geico") issued an automobile insurance policy to Kevin and Cindy Andrews (the insureds). The policy went into effect on December 26, 2018, and expired on June 26, 2019.

2. The policy contained comprehensive coverage benefits for windshield loss to the insureds' motor vehicle.

3. While the policy was in effect, the windshield of the insureds' vehicle suffered a covered loss on June 11, 2019. (*See* Doc. 84, Ex. 1). Geico's corporate representative, Susanna Eberling, conceded as much in her deposition. (Doc. 85, p. 22, lines 7-11).

4. The insureds selected Plaintiff Shazam Auto Glass, LLC ("Shazam") to repair the windshield. (Doc. 84, Ex. 1). In fact, Ms. Andrews called Geico to report the loss. (Doc. 85, p. 13, lines 2-5). She advised Geico that she was going to choose Shazam to perform the replacement of the windshield. (*Id.*, p. 15).

5. Geico was timely notified of the loss and acknowledged receipt of the notice, invoking its right to inspect the damage in a letter dated July 11, 2019. (Doc. 84, Ex. 1.). In that letter, Geico stated: "If the repair or replacement is approved, you will receive a work order. If the repair or replacement is denied, we will notify you." (*Id.*); (*see also* Doc. 85, p. 14, lines 23-25).

6. Shortly thereafter, Geico performed its inspection of Ms. Andrews' vehicle. (Doc. 85, p. 18-20). Geico then sent a work order dated July 16, 2019, pre-approving or authorizing Shazam to repair the insured vehicle's windshield. (Doc. 84, Ex. 2); (*see also* Doc. 85, pp. 15-18, 20).[2] Shazam repaired the windshield and submitted an invoice to Geico. (Doc. 84, Exs. 3-5; Doc. 85, p. 20; Doc. 112, Ex. 1).

7. Geico acknowledged receipt of the invoice from Shazam for the work performed. (Doc. 84, Exs. 3-5; Doc. 85, p. 20; Doc. 112, Ex. 1).

8. Notably, the invoice contained an assignment of benefits provision entitled "Authorization to Pay."[3] (Doc. 84; Doc. 112). Below that provision was a "signature line" on which "C Andrews" was signed. (Doc. 84, Ex. 4; Doc. 112, Ex. 1). On that same page was a copy of Ms. Andrews' driver's license. (*Id.*). The invoice further reflected that the cost to the customer was $0.00. It also described the insured's vehicle, as well as identified the insurer, the parts, and the services to be provided. (*Id.*).

9. As to the signature on the document, Mr. Martineau stated that Shazam obtained the signature from Ms. Andrews, as well as had the installer take a photograph of Ms. Andrews' driver's license in the normal course of business. (Supp. Affidavit, Doc. 112, ¶¶ 12-13).[4] Mr. Martineau also testified that it was their normal business practice to have their independently contracted installers to obtain signatures from their customers. (Doc. 100, Ex. A, pp. 27-30).

10. Mr. Martineau further testified as follows: (1) he had personal knowledge of the processing of the claim as it related to windshield loss sustained by Ms. Andrews; (2) the exhibits attached to its summary judgment motion were maintained at Shazam's office; (3) the documents were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters; (4) the documents are kept in the normal course of the regularly conducted activity of Shazam; and (5) the documents were made as a regular practice in the course of the regularly conducted activity of Shazam. (*See* Docs. 112, 84).

11. Ultimately, the total amount billed to Geico was $1,120.25. After receiving the invoice, Geico did not pay Shazam, refusing to pay for the work performed. (Doc. 84).

12. As a result, Shazam, as assignee of Ms. Andrews, sued Geico for breach of contract. (Doc. 2).

## LEGAL STANDARD

Florida Small Claims Rule 7.135 requires a trial court "to enter a summary disposition at a pretrial conference or subsequent hearing if it determines that there is no triable issue." *Save A Lot Car Rental, Inc. v. Tri J. Co. Towing & Recovery*, 325 So. 3d 285, 286 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1846a]. The "rule is similar, although not identical, to Florida Rule of Civil Procedure 1.510, which provides that a trial court must enter a summary disposition when there is no genuine dispute as to any material fact and a party is entitled to a judgment as a matter of law." *Id.* (citing Fla. R. Civ. P. 1.510(c)). Unlike its counterpart though, Rule 7.135 does not require the trial court to "state its reasons on the record for granting or denying summary disposition in a small claims action." *Mech v. Brazilian Waxing by Sisters, Inc.*, 349 So. 3d 453, 455 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2221a].

In practice, the focus for determining whether a genuine dispute exists is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Like the standard for directed verdict, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-252. "When the moving party has carried its burden under [the summary judgment rule], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

## DISCUSSION

The main issue in this case concerns Shazam's standing and the proper authentication of the purported assignment of benefits. Geico contends that a triable issue of fact exists regarding whether Shazam obtained a valid assignment of benefits from Ms. Andrews. Specifically, Geico claims that because Shazam did not have personal knowledge as to whether the signature affixed to the purported assignment of benefits belonged to Ms. Andrews, a genuine issue of material fact exists as to Shazam's standing to bring suit. But Shazam maintains that it has sufficiently authenticated the assignment of benefits through both circumstantial evidence and its supplemental affidavit. Shazam further highlights that Geico has yet to produce any evidence showing that the assignment of benefits is anything other than what it purports to be. For the reasons expressed below, the Court agrees with Shazam.

**I. Shazam properly authenticated the assignment of benefits.**

Section 90.901, Florida Statutes, requires the authentication of evidence prior to admissibility. It provides: "Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fla. Stat. § 90.901.

"Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic." *Casamassina v. U.S. Life Ins. Co. in City of New York*, 958 So. 2d 1093, 1099 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1522a] (quoting *ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc.,* 617 So.2d 750 (Fla. 4th DCA 1993)). "Authentication by circumstantial evidence is permissible." *Id.*; *Sunbelt Health Care & Subacute Center-Apopka v. Galva*, 7 So. 3d 556 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D464a] ("The use of circumstantial evidence to authenticate is permissible."). Indeed, "evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances." *Casamassina*, 958 So. 2d at 1099; *Galva*, 7 So. 3d at 559 ("Authentication occurs in a situation where the offered item considered in light of the circumstances, logically indicates the personal connection sought to be proved."). Thus, as long as the proponent proves that the matter in question is what it purports to be through either direct or circumstantial evidence, the dictates of section 90.901 are met. *Cf. United Auto. Ins. Co. v. Estate of Levine ex rel. Howard*, 87 So. 3d 782, 787 n.4 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D679b] ("[T]hreshold authentication of a bilateral contract such as the assignment can be accomplished by either party to the document."); *Casamassina*, 958 So. 2d at 1099 (holding that the summary judgment movant met its prima facie burden of authenticity through circumstantial evidence); *Galva*, 7 So. 3d at 560 (holding that the trial court erred in excluding a handwritten letter under the "reply letter" doctrine simply because the proponent did not present any testimony as to the author of that handwriting; the

circumstantial evidence indicated who sent the reply letter).

This Court finds that Shazam met its burden of authentication under section 90.901 for at least five reasons. First and foremost, Mr. Martineau provided unrebutted sworn testimony that (1) he had personal knowledge of the processing of the claim regarding Ms. Andrews, (2) Shazam obtained the insured's signature on the assignment of benefits, and (3) Shazam performed the repair. Second, Mr. Martineau testified that he was familiar with Shazam's regular business practices, including its practices to obtain a customer's signature on the written contract, as well as take photos of a customer's driver's license prior to working on any vehicle. Third, Shazam presented evidence that its business practices were followed, as Shazam produced both the signed contract and a picture of Ms. Andrews' driver's license placed on that record. Fourth, Ms. Andrews told Geico that she planned to use Shazam to repair her windshield. And fifth, Geico's own actions, as the insurer of Ms. Andrews' vehicle, indicate that the assignment of benefits is what it purports to be. Specifically, Geico advised Shazam of its intention to inspect Ms. Andrews' loss, authorized Shazam to repair the loss in a work order *after* it completed that inspection, and offered to pay Shazam an amount based on the same exact payment parameters identified in the limit of liability provision of Ms. Andrews' automobile policy. Taken all together, Shazam met its prima facie burden to show that the assignment of benefits is what it purports to be—that is, a signed, written contract between Ms. Andrews and Shazam that provides for the assignment of Ms. Andrews' insurance benefits to Shazam in exchange for the repair of the windshield.

And even if the aforementioned circumstantial evidence is insufficient to establish authenticity of this written contract under section 90.901, Shazam met its burden to authenticate the assignment of benefits under section 90.902. "Extrinsic evidence of authenticity as a condition precedent to admissibility is *not required* for . . . (11) an original or a duplicate of evidence that would be admissible under s. 90.803(6) and is accompanied by a certification or declaration from the custodian of the records or another qualified person[.]" Fla. Stat. § 90.902(11) (emphasis added). This certification or declaration must meet the essential requirements of the business records exception under section 90.803(6). Specifically, the custodian or other qualified person must certify or declare that the document:

> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity,
>
> provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed

§ 90.902(11); *see also Jackson v. Household Finance Corporation III*, 298 So. 3d 531, 536 (Fla. 2020) [45 Fla. L. Weekly S205a]. When these requirements are met through the recitation of the elements, "the burden shifts to the opposing party to prove that the records are untrustworthy or that they should not be admitted for some other reason." *Id.* (internal citations omitted) (finding that an objection to a record custodian's testimony based on a lack of personal knowledge was correctly overruled because the proper predicate was laid by the custodian to admit the original note, mortgage, and other payment records; specifically, custodian testified "to his familiarity with the business practices of his company and to each foundational requirement" in order to satisfy the business records exception).

Here, the unrebutted affidavits of Shazam's owner, as well as the surrounding circumstances, clearly satisfy these statutory requirements. Consequently, the burden shifted to Geico to prove that Shazam's records lacked trustworthiness. But Geico failed to produce any evidence to dispute the authenticity of the records in this case.

Instead, Geico argued that because Mr. Martineau has "absolutely no personal knowledge of how or of the actual [sic] circumstances that occurred in which the Insured had purportedly executed the assignment of benefits," the assignment of benefit is still unauthenticated. But this argument misses the mark. Mr. Martineau was only required to satisfy the aforementioned foundational requirements to establish the assignment of benefit's authenticity.[5] *See* Fla. Stat. §§ 90.902(11); 90.803(6); *Jackson*, 298 So. 3d at 537. That was done. To rule otherwise would be to create an additional foundational requirement that is just not found in the language of the statute. *See id.* at 538 ("Again, we . . . hold that a qualified witness who has testified as to each element of the business records exception for the admission of a business record has laid the proper predicate for admission of the document such that the document should be admitted unless the opponent establishes it to be untrustworthy.").[6]

Accordingly, because Shazam met its prima facie burden to establish the authenticity of the assignment of benefits, the assignment of benefits is admissible because it is not hearsay. *See All Borough Grp. Med. Supply, Inc. v. GEICO Ins. Co.*, 43 Misc. 3d 27, 28, 984 N.Y.S.2d 537, 538 (App. Term 2013) ("An assignment of benefits is not hearsay; like a contract, it has independent legal significance and need only be authenticated to be admissible."); *see also Green Tree Servicing, LLC v. Atchison*, 230 So. 3d 635, 636 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D2587a]; *Deutsche Bank Nat'l Trust Co. v. Alaqua Prop.*, 190 So. 3d 662, 664-65 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b]; *A.J. v. State*, 677 So. 2d 935, 937 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1677e]. And even if it is hearsay, it is still admissible under the business records exception.

**II. Shazam is entitled to summary disposition.**

The only remaining issues concern the following: (1) whether Shazam's assignment of benefits is unenforceable due to the lack of an agreed-upon price; (2) whether Shazam violated the Florida Motor Vehicle Repair Act; and (3) whether Shazam should be prevented from collecting its benefits under the "unclean hands" defense. The Court answers all of the questions in the negative.

At the outset, the Court rejects Geico's contention that an assignment of benefits is unenforceable if it lacks an agreed-upon price. Geico did not cite to a single case that directly supports this proposition. Nor can it. It is well established that contracts assigning benefits in exchange for a service are enforceable.[7] Both cases that Geico relies upon are clearly distinguishable. Additionally, FMVRA does not provide any protection to Geico because it does not fall within the definition of "customer" under the Act. *See* Fla. Stat. § 559.903(1). Finally, Geico's reliance upon the "unclean hands" doctrine is misplaced. This doctrine is not a legally recognized defense to a breach of contract claim. It is an equitable defense. *See, e.g., Regions Bank v. Old Jupiter, LLC*, Case No. 10-80188-CIV, 2010 WL 5148467, at *5-6 (S.D. Fla. Dec. 13, 2010), aff'd 449 F. App'x 818 (11th Cir. 2011) (holding that when plaintiff seeks only damages, the unclean hands doctrine does not apply). Therefore, having disposed of all remaining issues, the Court finds that Shazam is entitled to summary disposition on its breach of contract claim.

Based on the foregoing, the Court **ORDERS AND ADJUDGES** as follows:

1. Shazam's Motion for Summary Disposition is **GRANTED**.

2. Final Judgment is hereby entered in favor of Plaintiff, Shazam Auto Glass, LLC, as assignee of Cindy Andrews, against Defendant, Geico General Insurance Company.

3. Shazam shall recover damages from Geico in the amount of

$595.06, plus pre-judgment interest in the amount of $187.30, plus post-judgment interest on the combined amount, at the interest rate established by Section 55.03(1), Florida Statutes, for which sum, let execution issue.[8]

4. This Court reserves jurisdiction to determine any claims for attorneys' fees and costs.

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[1]Due to a scrivener's error, the insured or assignor is incorrectly referred to throughout the record as "Cindy Andrew." The style and caption of the case is hereby amended to reflect the correct spelling of her name.

[2]The affidavit of Geico's corporate representative, Katie Land, also states that the "work order" referenced in the letter is "an authorization to the glass repair/replacement facility to perform the work and communicates the pricing parameters that Geico would pay for a valid claim." (*See* Doc. 101, Ex. A, at ¶ 6). The work order was received by Shazam from Geico's third-party administrator, Safelite Solutions, with a referral number of 463844. It contained the same payment parameters listed in the work order as those contained in the policy's "Limit of Liability" section of Geico's insurance policy endorsement.

[3]This provision stated, in pertinent part, as follows:

> I hereby authorize the glass repairs and assign to Shazam Auto Glass, LLC . . . any and all benefits & duties from/to the insurer providing coverage for the repaired vehicle. This assignment is given in consideration for the glass repairs performed by the assignee. This acts as an assignment of rights and benefits to the extent of the services provided by the Assignee. If the insurer refuses to make full upon demand by me or Assignee, I hereby assign and transfer to Assignee any and all causes of action and all proceeds therefrom, and further authorize Assignee to prosecute said causes of action in my name or Assignee's name. I further authorize Assignee to settle or resolve claims and/or cause of actions as it sees fit.

[4]Unlike in the original affidavit, Mr. Martineau stated in his supplemental affidavit that Shazam had "obtained the signature of the insured on the assignment/work order and invoiced Geico." (*Compare* Supp. Affidavit, Doc. 112, ¶ 12, *with* Original Affidavit, Doc 84., pp. 10-12). Mr. Martineau further added: "In the normal course of business, the insured also provided her driver's license to prove her identity. The driver's license was placed on the signed assignment/work order at the time the job was completed as shown in the document." (Doc. 112, ¶ 13).

[5]Geico attempts to use Rule 1.510(c)(4), Florida Rules of Civil Procedure, to argue that Mr. Martineau's lack of personal knowledge as to the signature on the assignment of benefits is fatal to its summary disposition motion. But this rule was not invoked in this case. Nor, for that matter, does Mr. Martineau's affidavit fail to meet this uninvoked standard. His supplemental affidavit specifically states that he has personal knowledge regarding the process of the claim as it relates to Ms. Andrews' loss.

[6]At best, in an attempt to create doubt as to the trustworthiness of the documents *in this case,* Geico relies upon statements from Mr. Martineau in other cases. But such efforts are futile in light of the undisputed facts and the absence of any evidence indicating that Ms. Andrews did not sign the contract and/or that her signature was somehow forged or fraudulent. Geico simply failed to show that Shazam lacks standing to bring this suit.

[7]*See, e.g.*, *Nicon Constr., Inc. v. Homeowners Choice Prop. & Cas. Ins. Co.*, 249 So. 3d 681 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1076a] (recognizing that an assignment of benefits in exchange for the performance of a service is a valid contract); *Salyer v. Tower Hill Sel. Ins. Co.*, 2023 WL 3766710, at *2-3 (Fla.5th DCA 2023) [48 Fla. L. Weekly D1118a] ("An assignment is like any other contract. Thus, a court interprets it in accordance with contract law.").

[8]After the hearing, the parties conferred and presented a copy of a proposed final judgment identifying (1) the appropriate damages amount and (2) the agreed-upon prejudgment interest amount. These amounts are reflected herein.

* * *

**Insurance—Personal injury protection—Bad faith—Complaint—Amendment—Motion for leave to file amended complaint alleging bad faith claim handling based on insurer's confession of judgment and failure to cure civil remedy notice within 60 days is denied—Allowing amendment to raise new cause of action when case has been pending for 19 months and all court deadlines have passed would prejudice insurer—Further, medical provider has abused privilege to amend where provider's failure to specify curative action and its refusal to confer with insurer deprived insurer of meaningful opportunity to cure CRN, and provider is now attempting to use insurer's inaction as basis for amending complaint—Amendment would be futile where CRN does not satisfy specificity requirements of statute**

GULF COAST INJURY CENTER, LLC, a/a/o Craig Jorden, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2021-CC-115756. Division I. August 7, 2023. Miriam Valkenburg, Judge. Counsel: C. Spencer Petty and Joseph Shafer, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Cari R. Shapiro, Shutts & Bowen LLP, Miami, for Defendant.

## ORDER GRANTING ALLSTATE'S MOTION FOR ENTRY OF FINAL JUDGMENT (BASED ON CONFESSION OF JUDGMENT) AND FINAL JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT AND/OR AMEND THE COMPLAINT

THIS CAUSE, having come before this Honorable Court on July 10, 2023 on Allstate's Motion for Entry of Final Judgment and on Plaintiff's Motion for Leave to Supplement and/or Amend the Complaint, and the Court having heard argument of counsel, and being otherwise fully advised on the premises, this Court makes the following findings of fact and conclusions of law:

### *Material Facts*

On December 1, 2021, Plaintiff filed a breach of contract lawsuit (the "Complaint") against Allstate under Section 627.736, Florida Statutes, for alleged damages up to $99.00 in connection with a motor vehicle accident. The Complaint sought personal injury protection ("PIP") benefits, extended medical payment benefits, penalty, postage, interest, costs, and attorney's fees. On December 7, 2021 the Court issued its General Differentiated Case Management Order Establishing Deadlines, setting a projected trial period in May of 2023.

The law firm of Shutts & Bowen LLP entered a notice of appearance as counsel for Allstate on January 4, 2022, and attempted to contact opposing counsel through email the same day to confer in good faith regarding the case issues and alleged damages, in an effort to avoid any unnecessary further litigation. Plaintiff did not respond to the January 4, 2022 communication. *See* Allstate's June 28, 2023 Notice of Filing Regarding Plaintiff's Delay (Docket Entry 38) ("Allstate's Notice of Filing"). On January 12, 2022, Plaintiff filed a Civil Remedy Notice ("CRN") with the Florida Department of Financial Services. The CRN contained non-specific allegations that Allstate committed bad faith in the handling of the underlying claim at issue in this lawsuit, and then cited to statutory provision of Florida's bad faith statute, without specifying any curative action that Allstate could take to "cure" the CRN. Allstate timely filed its response to the CRN on March 11, 2022.

The Defendant, Allstate continued its efforts to confer with Plaintiff regarding the merits of the lawsuit and whether settlement was warranted. Allstate sent seven emails and made multiple phone calls to opposing counsel between January and April of 2022, and Plaintiff failed to respond substantively to any of those attempted communications.[1] *See* Allstate's Notice of Filing. Thus, Allstate ultimately filed its Notice of Filing Confession of Judgment on May 11, 2022. Allstate confessed judgment for the amount of $1,549.64 (inclusive of benefits and applicable interest) and stipulated to Plaintiff's entitlement to reasonable attorney's fees and costs.[2]

On June 3, 2022, Plaintiff filed its Motion for Leave to Supplement and/or Amend the Complaint for statutory bad faith pursuant to Section 624.155, Florida Statutes (the "Motion for Leave"). The Motion for Leave attached a proposed amended complaint (the "Proposed Amended Complaint"). The Motion for Leave is 12 paragraphs long and generally alleges that the amendment should be granted because of the liberal standard governing amendment of pleadings, providing no additional factual or argumentative support for the requested relief. The Proposed Amended Complaint alleges Allstate engaged in bad faith claim handling "because Defendant confessed judgment and failed to cure Plaintiff's Civil Remedy Notice within 60 days." Plaintiff made no attempts to set the Motion for Leave for hearing until nine months later, when Allstate began

attempts to set its February 21, 2023 Motion for Entry of Final Judgment for hearing.

***I. Amendment of Pleadings***

Pursuant to Rule 1.190 of the Florida Rules of Civil Procedure, leave to amend is freely granted. However, it is "recognized that the trial court possesses the discretion to deny such motions where appropriate." *Noble v. Martin Memorial Hospital Association, Inc.*, 710 So. 2d 567, 568 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]. "As a general rule, refusal to allow amendment of pleadings constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." *Craig v. East Pasco Medical Center, Inc.*, 650 So. 2d 179, 180 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D395b] (citations omitted). Amendments to pleadings are permitted because "the law favors trial of cases on their merits." *Ohio Casualty Ins. Co. v. MRK Construction*, 602 So. 2d 976, 978 (Fla. 2nd DCA 1992).

It is well-established Florida law that there comes a point in litigation where each party is entitled to some finality, and the rule of liberality gradually diminishes as the case progresses to trial. *Levine v. United Cos. Life Ins. Co.*, 659 So. 2d 265, 266-67 (Fla. 1995) [20 Fla. L. Weekly S444c]. Inexplicable delay by the party moving to amend should also be considered when determining whether to grant leave. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2nd Cir. 1990) (a trial court may "deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant. . . The burden is on the party who wishes to amend to provide a satisfactory explanation for the delay").[3] It is not an abuse of discretion to deny an untimely amendment to pleadings. *See Bronstein v. Allstate Insurance Company*, 315 So. 3d 44 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D725b] (*citing Vella v. Salaues,* 290 So. 3d 946, 949 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2553a] [affirming denial of motion for leave to amend complaint where "following two years of contentious litigation, on the proverbial 'eve' of the summary judgment hearing, immediately preceding the scheduled trial date, [plaintiff] sought to inject an entirely novel theory of prosecution into his lawsuit. Under these circumstances, the prejudice to the [defendants] is evident."].)

While Plaintiff's Motion for Leave cites to the general proposition that amendment should be liberally granted, the Motion for Leave fails to allege any supporting facts addressing the three established factors for the court's consideration whether to grant leave: prejudice, abuse, and futility.

***A. Prejudice to Allstate***

Allowing Plaintiff to amend the Complaint at this stage of litigation, to raise a new cause of action, arising out of different conduct, and under a different statute, would undoubtedly prejudice Allstate. This lawsuit has been pending for 19 months, and every deadline contained in the December 7, 2021 General Differentiated Case Management Order Establishing Deadlines has elapsed, including the projected trial term. Plaintiff's delay in seeking leaving to amend to allege a new cause of action, for which no explanation was ever provided, has placed the parties in a position that would require the case to start over, almost two years into litigation, after all of the court deadlines have expired. Here, the Plaintiff is not precluded from filing a bad faith action in a separate and distinct cause of action. *See Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D624b].

During the July 10, 2023 hearing, Plaintiff relied upon *Alliance Spine & Joint, III, LLC a/a/o Audrey Belmonte v. Geico General Insurance Company*, 321 So. 3d 242 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1149a] in support of its proposition that the court maintains jurisdiction to consider the Motion for Leave, despite the confession of judgment. Although *Alliance Spine* held the court maintained jurisdiction to hear the motion to amend, the court alternatively denied the motion to amend based on prejudice. "Citing the timing of the motion to amend, the court found that the proposed amendment would prejudice [the insurer]." *Alliance Spine*, 321 So. 3d at 244-45. Analogous to the present case, plaintiff's timing of the motion to amend prejudices Allstate in that all of the court deadlines have passed, and plaintiff waited nine months after the Motion for Leave was filed to set it for hearing, without explanation. Plaintiff's failure to meet its burden by explaining the delay is fatal to its

***B. Abuse of the Privilege to Amend***

Plaintiff's actions in this case demonstrate the precise abuse that is intended to be prevented. Plaintiff effectively placed Allstate in an untenable position by way of the chronology of its actions—filing the CRN during the course of litigation (instead of prior to litigation)—and left Allstate with two equally unfavorable options.

Allstate's first option was that it could have attempted to "cure" the CRN, which it was practically unable to do based on the vague allegations of the CRN which did not put Allstate on notice of how it could cure the alleged violations, and due to Plaintiff's refusal to meet and confer regarding the curative action Allstate could take to resolve the case. Even if Allstate was put on sufficient notice of how it could "cure" the CRN, that cure would have constituted a confession of judgment in the present litigation. The second, and only other, option available to Allstate was to respond to the CRN and not "cure," since Plaintiff provided no curative action either formally or informally. Following the expiration of the CRN, Allstate's only avenues to resolve the claim were to settle the litigation (which requires good faith conferral from both parties), or confess judgment. Plaintiff did not dispute that Allstate's counsel contacted Plaintiff's counsel prior to service of the CRN, nor did it dispute that Plaintiff failed to respond prior to serving the CRN. Thereafter, Allstate confessed judgment. Plaintiff is now attempting to utilize Allstate's selection of the second option as means to bring a bad faith action. In other words, Plaintiff did not provide Allstate a meaningful opportunity "cure" the CRN, and is now attempting to utilize that non-action as the basis for Plaintiff's Motion for Leave.

***C. Futility***

In determining whether to grant Plaintiff's Motion for Leave, the court must analyze the sufficiency of Plaintiff's Proposed Amended Complaint to determine if the complaint is properly framed, or whether it would be subject to dismissal if it were to be the operative complaint. Here, the Proposed Amended Complaint would be subject to dismissal because it is legally insufficient.

Section 624.155, Florida Statutes, requires the CRN to "state with specificity," in part, the "facts and circumstances giving rise to the violation," the specific policy language relevant to the violation, and the specific statutory language that has allegedly been violated. The statute must be strictly construed. *Talat Enterprises, Inc. v. Aetna Casualty and Surety Company*, 753 So. 2d 1278 (Fla. 2000) [25 Fla. L. Weekly S172a]. A CRN that simply lists every statutory provision available to bring the alleged violation does not satisfy the specificity requirements of the statute. *See Julien v. United Property & Casualty Insurance Company*, 311 So. 3d 875 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D486d].

Plaintiff's CRN does not satisfy the requirements of Section 624.155 and fails to strictly comply with the statute. *See* Plaintiff's January 12, 2022 Notice of Filing Civil Remedy Notice and Attachment (Docket Entries 16-17). The CRN consists primarily of quoted statutory language. The one paragraph of the CRN alleged to be

specific to this claim contains issues that are irrelevant to this lawsuit, i.e. application of the deductible, and misapplication of limiting charge. The allegations in the CRN as to Allstate's violations are vague in that no specific dates of service, codes, amounts, or requested cure are detailed. There is no specific policy language referenced and plaintiff's assertion that the listed policy language "[t]racks language of PIP statute" is inaccurate. Plaintiff's CRN merely recites pages of statutory language, and in fact pastes the entire text of Section 624.155. Due to the legally insufficient CRN, upon which the Motion for Leave is based, allowing the amendment would be futile.

Finally, the rationale behind consideration of the prejudice, abuse, and futility factors is to ensure adjudication on the merits, but the merits upon which this lawsuit was filed have been resolved by the confession of judgment and stipulation to reasonable attorney fees. Therefore, granting leave to amend would have no impact on whether the lawsuit is adjudicated on the merits. Moreover, the denial of plaintiff's Motion for Leave does not preclude it from bringing a separate bad faith action.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Leave to Supplement and/or Amend the Complaint is **DENIED**.

2. Defendant's Motion for Entry of Final Judgment is **GRANTED**.

3. Final Judgment is entered for Plaintiff for $1,502.13 in benefits, which Defendant has paid.

4. Since Defendant has acknowledged Plaintiff's entitlement to reasonable attorneys' fees and costs, the Court reserves jurisdiction to determine same.

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[1]Plaintiff attorney C. Spencer Petty provided one response to the seven emails, on March 29, 2022, which did not address Allstate's attempts to confer, but rather merely sought "depositions."

[2]Between the amount of benefits issued on confession, and the amount of benefits Allstate reimbursed to Plaintiff in response to the pre-suit demand letter, Plaintiff has been reimbursed 100% of the benefits demanded pre-suit ($1,682.63). The pre-suit demand letter, or "intent to initiate litigation" is incorporated by reference into Plaintiff's Complaint. *See* Complaint at ¶ 16. Plaintiff has not alleged the confession was incomplete or underpaid.

[3]Decisions of the Federal courts construing federal rules of civil procedure identical to Florida's rules of procedure have been held to be on point as to the proper construction of the Florida Rules. *U.S. v. State*, 179 So.2d 890 (1965); *Carson v. City of Fort Lauderdale*, 173 So.2d 743 (Fla. 2d DCA 1965).

* * *

**Insurance—Personal injury protection—Discovery—Stay—Discovery is stayed pending disposition of legal issue of whether medical provider's action is barred by insurer's payment of claim within 30 days of receipt of demand letter**

LIFE MEDICAL CENTER OF LECANTO, INC., d/b/a KINNARD CHIROPRACTIC, a/a/o Hillary Schmidt, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims. Case No. 19-CC-013195. Division M. August 3, 2023. Lisa A. Allen, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Lisa M. Lewis, Cole, Scott, & Kissane P.A., Tampa, for Defendant.

**ORDER ON DEFENDANT'S EMERGENCY MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY**

THIS CAUSE having come before the Court on Defendant's Emergency Motion For Protective Order To Stay Discovery 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. Plaintiff brought this breach of contract suit against Defendant alleging breach of contract for personal injury protection benefits. Defendant has denied the material allegations and has asserted that it cured the demand letter. Pursuant to Florida Statute 627.736(10), "no action may be brought against the insurer" if the claim is paid within 30 days after receipt of a demand letter. As this matter pertains to only a legal issue, it should be resolved prior to any depositions being conducted.

In general, parties may obtain discovery regarding any non-privileged matter so long as it is relevant. *Fla. R. Civ. P.* 1.280(b)(1). However, discovery may be unnecessary when the basic facts are not at issue and the whole dispute involves a legal question. *See Hurley v. Werly,* 203 So.2d 530 (Fla. 2nd DCA 1967) (holding that a party should not be involuntarily deposed when a "dispute involves an essentially legal question and where the basic facts are not in issue"). As such, a deposition of Defendant's representative will do nothing to further Plaintiff's position on that issue. Lastly, *Fla. R. Civ. P.* 1.280(e) governs the sequence and timing of discovery, and by its very own terms, contains two factors that apply to this discovery issue: 1) convenience of the parties, and 2) interests of justice. Here, it makes no logical sense to inconvenience either party with potentially unnecessary depositions. Furthermore, the interests of justice lead this Court to hold that any and all depositions should be postponed until the legal issue presented in this case has been resolved. Plaintiff's unilaterally set deposition of Jennifer McKenzie on August 21, 2023 is hereby cancelled.

* * *

**Insurance—Personal injury protection—Medical provider's action against insurer—Venue—Venue is proper in Hillsborough or Leon County where insurer has agent or representative in Hillsborough County and medical provider is located in Leon County—Motion to transfer venue from Broward County is granted**

SPINE INJURY PROFESSIONALS, LLC, a/a/o Michael Kimble, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23010715. Division 62. August 9, 2023. Terri-Ann Miller, Judge.

**ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE TRANSFER VENUE**

THIS CAUSE, having come before the Court on Defendant's Motion to Dismiss, or in the Alternative Transfer Venue, and this Court having reviewed the Motion, having heard argument of counsel and being otherwise duly advised in the premises, the Court finds as follows:

1. The Plaintiff filed the instant action in Broward County for breach of contract arising out of alleged unpaid PIP benefits.

2. The Defendant, First Acceptance Insurance Company, filed its Amended Motion to Dismiss or in the Alternative Transfer Venue challenging Plaintiff's selection of Broward County as a proper venue for this action.

3. Defendant filed its Affidavit in support of its Motion establishing that Defendant, First Acceptance Insurance Company, is a foreign corporation that does not have an agent or representative in Broward County, and that does have a representative in Hillsborough County.

4. Further, the evidence before the Court shows that the Plaintiff, Spine Injury Professionals, LLC DBA Tallahassee Accident & Rehab, is located in Leon County, the treatment at issue was rendered in Leon County, Plaintiff's billing address is in Georgia, and the alleged payment due to Plaintiff was to be remitted in Georgia. Additionally, the assignor lives in Leon County and the loss that is the basis for this action occurred in Leon County.

5. The Plaintiff did not file a response in opposition to Defendant's Motion and Affidavit.

6. The Court notes that Fla. Stat. § 47.051 provides that "Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the

property in litigation is located." *See Burnup & Sims Telcom, Inc. v. McCrone*, 590 So. 2d 1121 (Fla. 3d DCA 1991).

7. When a party establishes that venue is improper in the county in which the suit was filed by way of an affidavit, the burden shifts to the opposing party to rebut the affidavit with sworn evidence. *See Gino Vitiello, M.D., P.A. v. Genovese Joblove & Battista, P.A.*, 123 So.3d 1185 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2206b].

8. The Court finds that Defendant does not have an agent or representative in Broward County and therefore venue is improper in Broward County.

9. The Court further finds that the Defendant has agents or representatives in Hillsborough County, and that the Plaintiff is located in Leon County.

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

**IT IS HEREBY ORDERED AND ADJUDGED**:

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

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

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

* * *

**Insurance—Motion for rehearing of order denying motion for summary judgment is denied—Insurer did not set motion for hearing, did not seek clarification when it received notice of hearing on motion set by court which insurer believed to be scheduled in error, and did not attend hearing set by court**

CORA HEALTH SERVICES, INC., Plaintiff, v. LM GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22007883. Division 53. August 10, 2023. Robert W. Lee, Judge.

**ORDER DENYING DEFENDANT'S MOTION FOR REHEARING AND/OR RECONSIDERATION**

This cause came before the Court sua sponte upon case management review. The Court notes that on August 1, 2023 the Defendant filed its Motion for Rehearing and/or Reconsideration of the Court's Order Denying the Defendant's Motion for Summary Judgment , apparently without any effort to comply with Administrative Order 2022-5-GEN dealing with such motions. For the following reasons, the Defendant's Motion is DENIED.

On May 3, 2023, the Defendant filed its Motion for Summary Judgment. It did not move its Motion forward to hearing.

Pursuant to Rule 1.510(b), a hearing on the Motion for Summary Judgment could have been set as early as June 12, 2023.

The Honorable Terri-Ann Miller, who was previously assigned this case, noticed that the parties had not set the Motion for hearing. As a result, on July 5, 2023, by electronic notice, she set the Motion for Summary Judgment for hearing for July 20, 2023 at 3:15 p.m.

The Defendant does not dispute that it received the electric notice. The notice clearly states the date and time of the hearing, what motion is being heard, the zoom link for the hearing, and the fact that the Judge was the "scheduler." Notwithstanding this notice, the Defendant curiously asserts that it ignored the notice because the "Defendant was only made aware of this hearing via an email from the Court and therefore thought it was scheduled in error. No formal Notice of Hearing was filed by either party or the Court in furtherance of this hearing."

Failure to move motions to hearing thwarts the timely resolution of cases. Further, the parties demanded a jury trial, and pursuant to Administrative Order 2021-23-CO, cases assigned to the Satellite Courthouses must be transferred to the Central Courthouse for jury trial upon resolution of all outstanding motions. As a result, Judge Miller acted properly and diligently in setting and noticing the Defendant's Motion for hearing when the parties failed to do so.

No one appeared at the hearing. As a result, Judge Miller denied the Motion for Summary Judgment. That being the only outstanding Motion, she then transferred the case to the Central Courthouse, where it was assigned for jury trial to the undersigned Judge, who now must address the Defendant's unavailing Motion for Rehearing.

The Defendant should not be heard to complain when it failed to move its Motion for Summary Judgment to hearing, failed to appear at a hearing at which it had notice, and failed to seek clarification from the Court when it received an electronic notice for hearing that it believed was erroneous. Further, the Court notes that the Defendant's failure to comply with the Administrative Order concerning motions for rehearing further suggests a lackadaisical attitude toward the handling of this case.

* * *

**Insurance—Medical provider's action against insurer—Service of process—Extension of time—Fact that medical provider has 1,000 cases pending at same time does not establish good cause for failure to timely effect service of process—Motion to extend time to effect service is denied—Case will stand dismissed unless proof of service is filed within 20 days**

RADIOLOGY IMAGING ASSOCIATES, LLC, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23033422. Division 53. August 12, 2023. Robert W. Lee, Judge.

**ORDER DENYING PLAINTIFF'S MOTION TO EXTEND TIME TO SERVE**

The Court's having already had a hearing on the precise issue raised in this Motion by this party, and the Court's having found that the grounds set forth for extension of time to serve are unavailing as they do not set forth good cause under Rule 1.070(j) for failure to timely serve, the Plaintiff's Motion is DENIED. At the hearing, the Plaintiff stated that it had about 1,000 of these cases pending on the same issue. The Court finds that seeking an extension to serve—which in essence would operate as a stay on these cases, thus thwarting required case management procedures—is quite different than on occasional case where settlement discussions are in play. As a result, the PLAINTIFF SHALL TAKE NOTICE that pursuant to Rule 1.070(j), this case shall stand DISMISSED without further hearing or notice unless the Plaintiff shall, within the next twenty (20) days, FILE with the Clerk proof that the Defendant has been served in this case. The Court notes that a return of service affidavit has not been docketed in this case evidencing service of process on the Defendant.

* * *

**Insurance—Personal injury protection—Reimbursement by insurer of commercial vehicle—Workers' compensation lien on insured's recovery from third-party tortfeasor—PIP insurer is entitled to commercial right of reimbursement of $5,000 it paid to reimburse insured for his out-of-pocket payment of workers' compensation lien satisfaction amount and for medical bill it paid**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. INDIAN RIVER COUNTY BOARD OF COUNTY COMMISSIONERS, Defendant. County Court, 19th Judicial Circuit in and for Indian River County. Case No. 2022 SC 000567. June 24, 2022. Robyn E. Stone, Judge. Counsel: David Kampf, Kampf, Inman & Associates, P.A., Tampa, for Plaintiff. Susan Jayne Prado, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

THIS CAUSE, having come before the Court on June 10, 2022, on Plaintiff's Motion for Summary Disposition and Defendant's Motion

for Summary Disposition, and the Court having reviewed the file, hearing argument of counsel and being otherwise fully advised in the Premises, it is hereby:

ORDERED AND ADJUDGED that:

1. The Plaintiff, State Farm Mutual Automobile Insurance Company (State Farm), filed the instant suit seeking reimbursement from the Defendant for personal injury protection (no-fault benefits) paid by the Plaintiff on behalf of their insured while the insured occupied a commercial motor vehicle owned by the Defendant.

2. The reimbursement is sought pursuant to Fla. Stat. §627.7405, which provides:

> Insurers' right of reimbursement.—Notwithstanding any other provisions of ss. 627.730-627.7405, an insurer providing personal injury protection benefits on a private passenger motor vehicle shall have, to the extent of any personal injury protection benefits paid to any person as a benefit arising out of such private passenger motor vehicle insurance, a right of reimbursement against the owner or the insurer of the owner of a commercial motor vehicle, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle while not an occupant of any self-propelled vehicle.

3. It is undisputed that on November 4, 2018, Joseph Kovaleski was injured in an automobile accident as an occupant of a vehicle owned by the Defendant. Mr. Kovaleski was working for the Defendant at the time of the accident.

4. The facts here clearly establish the County vehicle was not being used for personal or private purposes at the time of the accident. The vehicle was used primarily, if not exclusively, for the Defendant's business, professional and/or occupational purposes. Thus, this vehicle is a commercial motor vehicle per F.S. §627.732(3), which defines commercial motor vehicles for purposes of the No-fault Statute.

5. The Plaintiff, as the private insurer for the insured, issued payment of No-fault benefits on behalf of the insured. The first of two payments was issued to Gilford Sound Emergency Physicians totaling $661.60.

6. The insured did not submit any request for mileage, prescriptions, PIP expenses or medical bills. No other medical providers submitted bills to State Farm for payment. Instead, the bills were submitted to be paid through workers' compensation benefits.

7. As a result of medical bill(s) being submitted through workers' compensation, the employer maintained a lien against any recovery the insured obtained from a third-party claim against the other driver or via an uninsured motorist claim. The amount was well over $5,000. The facts here clearly establish that the attorney for the insured settled the employer's lien for the total amount of $5,000. Thus, the insured was required to pay $5,000 out of his own pocket from the third-party settlement to satisfy the lien.

8. The attorney for the insured contacted State Farm and provided proof of the Defendant's lien on any bodily injury recovery. State Farm was informed of the lien and that a reduced payment of $5,000 was necessary to satisfy the lien. State Farm was asked by the counsel for the insured to issue payment directly to Johns Eastern Company, the third-party adjusting company for the employer handling the workers' compensation claim of Joseph Kovaleski.

9. Therefore, the second payment was issued to Johns Eastern Company totaling $5,000. *The payment was not to pay any particular bill or service. The payment was not in an equal amount of any bill but was to satisfy the lien.* State Farm was not asked to pay any bills but was asked to pay the reduction to the insured's bodily injury recovery.

10. The Defendant asserts State Farm was precluded from paying the $5,000 out-of-pocket expense alleging that no bills were timely submitted to State Farm. The Defendant asserts State Farm was not obligated to pay the workers' compensation lien satisfaction amount or to reimburse the insured. The Defendant asserts that since no amount should have been paid, then the Plaintiff is not entitled to reimbursement. Yet, there was no submission of any evidence as to when bills were submitted or if paid bills were untimely. In fact, bills for hospital and emergency services are not required to be submitted within any time frame when the bills are submitted through PIP.[1] The Defendant's position, even if accurate, would not prevail if the paid bills were for hospital and emergency charges.

11. The Defendant admits that reimbursement is required as to the payment issued to the emergency provider totaling $661.60. At the hearing, the Defendant agreed that a sovereign immunity claim does not apply in this case.

12. As to the reimbursement sought for the payment to reimburse the insured for his out-of-pocket expenses, the Plaintiff's claims are based on long-standing appellate case law that was presented prior to and during the hearing. The Defense asserts that the case law relied upon by the Plaintiff is no longer applicable based on the more recent case of *State Farm Mut. Auto. Ins. v. Pressley,* 28 So. 3d 105 (Fla. 1st DCA January 12, 2010) [35 Fla. L. Weekly D150b].

13. This Court disagrees with the Defendant's position that *Pressley* reverses or overturns the long line of cases addressing the interplay between worker's compensation law and PIP law. First, *Pressley* was issued prior to appellate law addressing the exact issue as in the current matter. See *Cannino v. Progressive Exp. Ins. Co.*, 58 So. 2d 275 (Fla. 2nd DCA Dec. 17, 2010) [35 Fla. L. Weekly D2866b]. *Cannino* is factually similar to the instant case and consequently requires the PIP insurer to satisfy the workers' compensation lien. *Cannino* did not require the constraints asserted by the Defendant. Statutory construction requires this Court to accept the fact that the *Cannino* Court was aware of *Pressley* when *Cannino* was issued nearly one year after *Pressley.*

14. The analysis begins with F.S. §627.736(4), which provides that PIP (and workers' compensation benefits) are primary coverages/benefits, unlike health insurance, which was the lien basis in *Pressley.* The insured or medical providers may submit bills to the PIP insurer and the bills must be paid but not if there is a duplication of benefits. In the current matter, the PIP insurer is not being asked to pay the same bills paid by the workers' compensation insurer, but is being asked to reimburse the insured the amount the insured paid the workers' compensation carrier to satisfy the lien. The legislative intent behind F.S. §627.736(4), is that the PIP benefits are primary and must be paid in full whether or not any other coverage exists. If workers' compensation benefits are available, PIP benefits are still primary. "This statutory provision is intended to give a credit, as a loss accrues, for workmen's compensation benefits, thereby preventing one from recovering for a loss which is not sustained because of workmen's compensation benefits, and is not intended to reduce the limits of liability under the statutory minimum required for personal injury protection benefits. See *Comeau v. Safeco Ins. Co. of Amer.,* 356 So. 2d 790 (Fla. 1978).

15. Furthermore, the Plaintiff also relies on *South Carolina Ins. Co. v. Arnold*, 467 So. 2d 324 (Fla. 2d DCA 1985), which involved the question of whether an injured party's claim for PIP benefits must be reduced to the extent of workers' compensation benefits received when the workers' compensation lien has been satisfied from the proceeds of a settlement with the third-party tortfeasor. The purpose of the statute is to preclude a duplication of recovery but there is no duplication when satisfying the lien. *Arnold* provides,

"Had appellee not been covered by workers' compensation, there would be no question of his right to PIP benefits. The purpose of subsection (4) in requiring workers' compensation payments to be offset against PIP benefits is to preclude a duplication of recovery. Here, however, there is no duplication of recovery because the workers' compensation benefits have been repaid from appellee's third party settlement. We need not be concerned with the anomaly that under subsection (3) the appellee had no right to recover from the third party any damages for which PIP benefits were payable, to wit: medical and disability benefits, while Greyhound could obtain full reimbursement for the payment of medical and disability benefits out of appellee's recovery under section 440.39, Florida Statutes (1979). The fact remains that since Greyhound's subrogation lien has been satisfied from appellee's funds, appellee is in the same posture that he would have been if the workers' compensation payments had never been made. Appellee should not be penalized simply because he was hurt on the job. *Id.* at 325-326.

16. Turning attention back to *Cannino,* the issue in that case concerned the interplay between a workers' compensation lien on the insured's recovery from a third-party tortfeasor and the insured's right to recover no-fault insurance benefits. *Cannino*'s facts are most similar to the instant case as aforementioned. "Progressive maintained that payment was not due because it was entitled to a credit for the workers' compensation benefits and Cannino never eliminated the credit by paying out-of-pocket to satisfy the workers' compensation lien. Progressive argued that a contrary holding would give Cannino an impermissible windfall." *Id.* at 276. The Court further stated, "We reject Progressive's assertion that Cannino was required to directly satisfy the workers' compensation lien by paying out-of-pocket in order to claim his PIP benefits. This would improperly place form over substance Cannino effectively did pay from his pocket by giving consideration, i.e., giving up his right to seek future workers' compensation benefits in exchange for a negotiated cash payment and the waiver of the lien, when settling with the workers' compensation carrier." *Id.* at 277.

17. Therefore, the Court finds that the Plaintiff was obligated to pay to the insured the amount paid to satisfy the workers' compensation lien (as in *Cannino*).

18. The instant case can be distinguished from *Pressley* for several reasons. First, *Pressley* addresses health insurance liens (for which there is no statutory protection) versus workers' compensation liens and cites to two prior DCA cases, including *Arnold*, which addressed workers' compensation liens. *Pressley* further addresses the statutory changes in determining that bills need to be timely submitted to the PIP provider in order for PIP to pay the bills that created the health insurance lien.

19. In addressing those prior workers' compensation lien cases, *Pressley* expressly provides, "The cases also involved the application of a workers' compensation lien, and under section 627.736(4), benefits received under workers' compensation are specifically credited against PIP benefits. Workers' compensation benefits are also a primary compensation for work-related motor vehicle accidents. See §440(1)(a), Fla. Stat. Accordingly, *Arnold* and *Mazorra* are distinguishable." *Pressley* at 112.

20. *Pressley* distinguished *Arnold* and *Mazorra* in part because they addressed workers' compensation liens. This Court interprets this language to mean that *Pressley* does not alter or change the interplay between workers' compensation liens and PIP claims, namely that the obligation to pay the lien satisfaction amount remains.

21. Further, in the current matter, like in *Arnold, Mazorra* and *Cannino,* State Farm was not asked to pay the bills that created a lien, like in *Pressley.* Plaintiff was asked to pay a *lien satisfaction amount* per the PIP statute and controlling law. The PIP insurer in *Pressley* was asked to pay the bills creating the non-statutory health insurance lien. *Here, the request did not relate to a specific bill or bills.* Also, here and per *Arnold* and *Mazorra,* the request to State Farm was not to pay the lien like in *Pressley,* but the request was to pay the satisfaction amount.

22. The elements to prove the Plaintiff is entitled to a commercial right of reimbursement have been met. Further, the Defendant does not contest the commercial right of reimbursement or the Plaintiff's entitlement to at least $661.60 plus pre-judgment interest.

23. Based on the above, this Court finds that the Plaintiff is entitled to a commercial right of reimbursement as to all amounts sought, to include the $5,000 to satisfy the aforementioned lien, plus pre-judgment interest.

24. The Plaintiff's motion for summary disposition is hereby granted. The Defendant's motion for summary disposition is hereby denied.

25. Therefore, the Plaintiff is entitled to a Final Judgment in the amount of $5661.60 plus pre-judgment interest. The Plaintiff is directed to submit a proposed Final Judgment to the Court within ten (10) days of this Order.

26. The Court reserves jurisdiction to address entitlement and reasonableness of attorneys' fees and costs.

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[1]See F.S. §627.736(4), "With respect to any treatment or service, other than medical services billed by a hospital or other provider for emergency services as defined in s. 395.002 or inpatient services rendered at a hospital-owned facility, the statement of charges must be furnished to the insurer by the provider and may not include, and the insurer is not required to pay, charges for treatment or services rendered more than 35 days before the postmark date or electronic transmission date of the statement."

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