Volume 31, Number 7, November 30, 2023

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 331-396

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—NEGLIGENCE—DAMAGES—MEDICAL EXPENSES. A circuit court judge for the Thirteenth Judicial Circuit held that Section 768.0427, which addresses admissible evidence of past and future medical expenses and requires certain disclosures when damages are incurred under letters of protection, is applicable to cases pending at the time the statute was enacted.** *GRISAR v. BRATE. Circuit Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed August 23, 2023. Full Text at Circuit Courts-Original Section, page 350a.*

- **REAL PROPERTY—PLANNED UNIT DEVELOPMENT—GOLF COURSE—REDEVELOPMENT. Plat restrictions pertaining to golf course tracts in a planned unit development and the reservations in those restrictions did not limit the use of the property to a golf course or recreational area. Because reservation of the golf course tracts created rights in favor of the dedicator to use the property freely, replacement of the golf course with residential units was not prohibited.** *SUNRISE OF PALM BEACH CONDOMINIUM ASSOCIATION, INC. 2 v. GRILLO GOLF MANAGEMENT, LLC. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed August 8, 2023. Full Text at Circuit Courts-Original Section, page 368.*

- **ESTATES—PERSONAL REPRESENTATIVE—NON-RESIDENTS. Stepchildren of a decedent, whose spouse had predeceased the decedent, can qualify to serve as non-residential representatives under section 733.304(3).** *IN RE: ESTATE OF MARGOLIS. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed August 25, 2023. Full Text at Circuit Courts-Original Section, page 375a.*

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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.

TORTS (continued)

VENUE

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TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

FLORIDA STATUTES

RULES OF CIVIL PROCEDURE

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

TABLE OF CASES TREATED (continued)

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DISPOSITION ON APPELLATE REVIEW

Disposition of cases previously reported in FLW Supplement on review by appellate courts. This is not a comprehensive listing.

Dirty Duck 16004 LLC v. Town of Redington Beach. Circuit Court, Sixth Judicial Circuit, Pinellas County, Case No. 21-003526-CI-19. Circuit Court Order at 30 Fla. L. Weekly Supp. 735b (April 28, 2023). Affirmed and Remanded at 48 Fla. L. Weekly D2139a

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Volume 31, Number 7
November 30, 2023
Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to urine test—Implied consent warning—No error in upholding license suspension for refusal to submit to urine test despite fact that licensee was not informed that he would be subject to increased penalty for refusal if he has previously refused to submit to test where licensee was warned of consequences of refusal and does not claim that omitted language affected his decision to refuse test

MICHAEL BLACKBURN, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2022-AP-7. Division AP-A. August 1, 2022. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen, for Petitioner. Mark Mason, Former Assistant General Counsel, DHSMV, for Respondent.

[Second-tier certiorari denied July 31, 2023 (Case No. 5D23-0262.]

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

Petitioner refused to submit to a urine test after a DUI investigation. Petitioner does not challenge the validity of the investigation, but argues the suspension is invalid because he was not properly informed of the consequences he would face if he refused to consent to a urine test. Specifically, Petitioner argues he was not informed that he would be subject to an increased penalty for refusal if he had previously refused to submit to a test pursuant to section 327.35215, Florida Statutes.[1] Because Petitioner was warned of the consequences of his refusal—and in no way claims the omitted language affected his decision—the Department did not depart from the essential requirements of the law by upholding the suspension. *See Dep't of Highway Safety and Motor Vehicles v. Nader,* 4 So. 3d 705, 709 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D657e]. Accordingly, the Amended Petition is **DENIED** and the "Motion for Oral Argument" is **DENIED as MOOT**. (GUY, BEVERLY, and HEALEY, JJ., concur.)

[1]Section 327.35215 details the penalties and procedures involving the refusal to consent to a test after being arrested for boating under the influence.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Request incident to lawful arrest—Finding that arrest preceded request for breath test was supported by competent substantial evidence where, although offense-incident report stated that licensee was placed under arrest after he refused to submit to breath test, the only two documents bearing specific time references showed that licensee was arrested at 1:01 a.m. and refused to submit to breath test at 1:20 a.m.

BASSAM ABDALLAH, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 14th Judicial Circuit (Appellate) in and for Bay County. Case No. 23-CA-48. August 21, 2023. Counsel: Charles Burden, Jr., Former Assistant General Counsel, DHSMV, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(WILLIAM S. HENRY, J.) THIS MATTER came before the Court for hearing on August 17, 2023, upon the Petitioner's Petition for Writ of Certiorari. Respondent filed a Response, and Petitioner thereafter filed a Reply. Upon review of the Petition, Response and Reply and after hearing argument, the Court finds as follows:

The Petition challenges the Hearing Officer's Findings of Fact, Conclusions of Law and Decision entered on December 22, 2022, (hereinafter "Decision") which upheld the suspension of Petitioner's driver's license for his refusal to submit to a breath-alcohol test after being requested to do so by law enforcement. The sole basis of Petitioner's challenge is that the Decision is not supported by competent, substantial evidence and did not comport with the essential requirements of law in that there was unclear or disputed evidence before the Hearing Officer as to whether Petitioner was arrested prior to the request for and refusal of the breath test, in accordance with *Department of Highway Safety and Motor Vehicles v. Hernandez*, 74 So.3d 1070 (Fla. 2011) [36 Fla. L. Weekly S648c] (holding that a driver's license cannot be suspended for refusal to submit to a breath test if the refusal was not incident to a lawful arrest) and *Department of Highway Safety and Motor Vehicles v. Pelham*, 979 So.2d 304 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D765a] (requiring a lawful arrest to precede the administration of a breath test).

In the instant case, the Hearing Officer found that the request for the breath test was incident to the arrest of Petitioner, in that he was arrested for leaving the scene of an accident and driving under the influence, with the citations issued at 1:01 am and 1:05 am respectively, and Petitioner refused the breath test at 1:20 am.

Petitioner takes issue with this finding, premised upon the statement of the arresting officer in the Offense-Incident Report (DDL-3) which read as follows:

> I proceeded to ask Mr. Abdallah if he would provide a breath sample to determine its alcohol content. Mr. Abdallah refused to provide a breath sample, and was advised of the adverse consequences if he chose not to provide a breath sample. Again Mr. Abdallah was asked to provide a breath sample, to which he denied. At this point in time, I placed Mr. Abdallah under arrest for driving under the influence and leaving the scene of a crash with property damage, issuing him a Florida DUI Uniform Traffic Citation AG3B7HE, and a Florida Uniform Traffic Citation AG5NUFE.[1]

Based on this narrative and compared to the times of the traffic citations (DDL-1 and DDL-7), Petitioner argues that there was a discrepancy which the Hearing Officer could not resolve by essentially "flipping a coin" since the hearing was held solely based on the documents submitted without live testimony of the arresting officer to clear up the conflict. *See*, *Trimble v. Department of Highway Safety and Motor Vehicles*, 821 So.2d 1084 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a], and *Department of Highway Safety and Motor Vehicles v. Colling*, 178 So.3d 2 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b].[2]

Quoting two Florida Supreme Court cases, the *Trimble* Court discussed what constituted competent, substantial evidence when reviewing a petition for certiorari arising in the context of a license suspension case, stating "that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached," and "that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient." *Trimble*, 821 So.2d at 1087 (quoting *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957) and *Florida Rate Conference v. Florida Railroad & Public Utilities Commission*, 108 So.2d 601, 607 (Fla. 1959)). In

apply these standards and other case law, the *Trimble* Court concluded that the "critical determination of when and whether the motorist was given the consent warning . . . was supported only by evidence that gives equal support to inconsistent inferences" and was therefore inadequate to support the suspension. 821 So.2d at 1087.[3] However, the inconsistent timeline in *Trimble* is markedly different than the issue in the instant case.

In the instant case, Petitioner argues that there is a discrepancy or inconsistency in the chronology between the Offense-Incident Report (DDL-3) when compared to the citations (DDL-1 and DDL-7) and the Affidavit of Refusal to Submit to Breath Test (DDL-4). However, the only documents bearing any specific time references are the citations and Affidavit of Refusal, which show Petitioner being arrested for leaving the scene of the accident at 1:01 am, being arrested for DUI at 1:05 am, and being warned and refusing the breath test at 1:20 am.

Admittedly, there is a discrepancy between the DUI citation (showing it being issued at 1:05 am) and the Affidavit of Refusal (showing Petitioner being arrested for DUI at 1:20 am), but this inconsistency is immaterial for purposes of the Petition. The documents with specific times demonstrate an arrest for leaving the scene at 1:01 am prior to the request for the breath test at 1:20 am, thus satisfying the requirements of *Hernandez* and *Pelham*. Whether Petitioner was arrested for DUI at 1:05 or 1:20 does not matter. Accordingly, there is sufficiently relevant, material and reliable evidence to support the Hearing Officer's Decision to uphold the suspension.

The instant case also is distinguishable from the facts in *Colling*, where the documents to support the suspension showed that Colling's breath-alcohol test results were .028 and either .0154 or .154. 178 So.3d at 3. This discrepancy was material since a .0154 result could mean that Colling was not in violation of the statute. As stated above, there is no similar discrepancy in the timeline in the instant case based on the documents that contain actual times.

In fact, the concluding discussion in *Colling* actually supports the Hearing Officer's determination in the instant case. In discussing conflicting documentation, the Court stated as follows:

> When the documents conflict on a material issue, however, the hearing officer cannot simply throw a dart to decide which one is correct. ***This does not necessarily mean that live testimony is always needed to resolve such conflicts***. For example, had the record here contained the machine-generated printout of the results, ***the hearing officer might appropriately have chosen to prefer it over a report, because it is an inherently reliable expression of the result***.

Id. at 5 (emphasis added).[4] In other words, had the machine printout been presented, the hearing officer could have relied upon that and rejected the breath results contained in Affidavit of Probable Cause, Breath Test Result Affidavit and/or the Notice of Suspension.

Similarly, in the instant case, *Colling* supports the Hearing Officer's rejection of the general chronology mentioned in the Offense-Incident Report (which contained no specific times) and the conclusion that there was "no confusion or conflict in the documents when considered in their totality." Accordingly, this Court finds that there was competent, substantial evidence to support the Hearing Officer's Decision upholding suspension of Petitioner's driver's license.

Therefore, it is

ORDERED AND ADJUDGED that:

1. Petitioner's Petition for Writ of Certiorari is hereby **DENIED**.

2. Petitioner's request for attorney's fees pursuant to §57.105, Florida Statutes, and Rule 9.400, Florida Rules of Appellate Procedure, is hereby **DENIED**.

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[1]For reference, Citation AG3B7HW was the citation for DUI and Citation AG5NUFE was the citation for leaving the scene of an accident with property damage.

[2]Petitioner's counsel made this argument before the hearing officer, and the hearing officer denied the motion, finding that upon review of "the packet of documentation provided by law enforcement in this matter in its totality," there was "no confusion or conflict in the documents when considered in their totality."

[3]The unexplained, inconsistent facts in *Trimble* involved when the request for breath test and warning were given. The officer's affidavit stated that the request for breath test was at 12:45 am on 9/27/20, with a warning regarding refusal and Trimble's refusal at that same time. An unsworn document showed the warning was given at 12:50 am, but the printout from the Breathalyzer machine showed refusal at 12:47 am. Accordingly, there was a conflict between whether the warning was given before (at 12:45) or after (at 12:50) Trimble refused the test at 12:47.

[4]This statement by the 5th DCA is clearly a rejection of the Circuit Court's conclusion in *Hall v. Department of Highway Safety and Motor Vehicles*, 4 Fla. L. Weekly Supp.208a (Fla. 19th Jud. Cir. July 9, 1996), which held that where there are inconsistent documents, a suspension cannot be sustained absent sworn testimony explaining the discrepancy.

* * *

Appeals—Dismissal—Failure to file proper initial brief and appendix

HERBERT SHICK, Plaintiff, v. CITY OF HOLLYWOOD, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23012085. Division AP. September 11, 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 29, 2023, and Order to Show Cause dated July 26, 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 29, 2023, and July 26, 2023, Orders and file a proper 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.

* * *

JUAN FRANCISCO CAMACHO OCANTO, Plaintiff, v. MARIO CHAVEZ, et al., Defendants. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23011872. Division AP. August 15, 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 29, 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 29, 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.

* * *

Volume 31, Number 7
November 30, 2023
Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Torts—Colleges and universities—Community college law enforcement academy—Negligent hiring—Failure to warn—Failure to prevent forbidden, inappropriate, or unsafe training tactic—Action against community college that operated law enforcement training academy brought by trainee who was attacked and injured during "bull-in-the-ring" drill—College is entitled to summary judgment on count of negligent hiring of defensive tactics instructor who supervised drill where plaintiff concedes that there is no evidence that college knew that instructor was unfit when he was hired—Summary judgment is also appropriate on claim of failure to warn of instructor's violent tendencies where there is no evidence that college had knowledge of violent tendencies—Because there is evidence from which jury could reasonably infer negligence regarding conduct of the "bull-in-the-ring" drill, summary judgment is not appropriate on negligence count

WILLIAM TSOMPANIDIS, Plaintiff, v. BOARD OF TRUSTEES FOR TALLAHASSEE COMMUNITY COLLEGE, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-276. September 11, 2023. David Frank, Judge. Counsel: Paul Anderson, Anderson & Hart, P.A., Tallahassee, for Plaintiff. Craig Knox and Riley Landy, Tallahassee, for Defendant.

AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on September 7, 2023 on defendant's Motion for Summary Judgment, and the Court having reviewed the papers filed in support and opposition and the court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

The Allegations of the Operative Amended Complaint

The allegations of the operative complaint are in pertinent part as follows:

Defendant operates the Pat Thomas Law Enforcement Academy (Florida Public Safety Institute) located in Havana, Florida.

On October 31, 2019, Plaintiff was enrolled in a certification program at the Institute. On that date, plaintiff was "attacked" while participating in a drill initiated and supervised by instructor Demario Bryant acting in the course and scope of his employment with defendant. Plaintiff later learned the drill is known as the "bull-in-the-ring drill."

At the direction of Bryant, and under the supervision of multiple Institute instructors, plaintiff was repeatedly hit about the head, shoulders and arms until he collapsed. Neither Bryant nor any other instructors attempted to stop the attack or to intervene to protect plaintiff s health or safety. Plaintiff was transported by EMS to Capital Regional Medical Center in Tallahassee.

At the time and place of the attack, defendant, through the Institute, owed a duty of care to plaintiff to assure its instructors exercised reasonable care and did not engage in conduct likely to cause injury to trainees.

Defendant's breaches of its duty of care include:

employing and retaining instructor Bryant to teach defensive tactics at Pat Thomas;

failing to warn Plaintiff of Bryant's violent tendencies and behavior which were known to TCC;

failing to warn Plaintiff that Bryant had previously caused or instructed training participants to cause physical injury to persons participating in defense tactics training at Pat Thomas;

permitting or not stopping Bryant employing the "bull in the ring" tactic when TCC knew or should have known the tactic was banned, forbidden, or deemed an inappropriate and unsafe training tactic;

failing to exercise reasonable care in the hiring, retention and supervision of law enforcement instructors such as Bryant;

permitting instructors to employ dangerous and/or banned instruction methods that could result in injury to officers participating in training at Pat Thomas.

Plaintiff's Response at 2.

Defendant's Grounds for Summary Judgment

Defendant seeks summary judgment in its favor because:

Defendant is entitled to summary judgment on plaintiff's claim for negligent hiring/retention because there were no issues with Bryant's employment indicating unfitness for the job as defensive tactics instructor.

Defendant is entitled to summary judgment on plaintiff's failure to warn claims because there were no violent tendencies or prior injuries about which plaintiff should have been warned.

Defendant is entitled to summary judgment because the "bull-in-the-ring" evasive exercise was not banned, forbidden, or unreasonably unsafe.

Defendant's Motion at 8-10.

Florida's New Summary Judgment Standard

Because the plaintiff has the burden of proof at trial for claims, to defeat a motion challenging a claim, the plaintiff must come forward with record evidence on the essential elements of the claim. See generally *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] and *Whitlow v. Tallahassee Mem'l Healthcare, Inc.*, 48 Fla. L. Weekly D1647c (Fla. 1st DCA Aug. 16, 2023). The same would be true for a defense on which the defendant has the burden of proof at trial. Another option would be for the party with the burden of proof at trial to come forward with evidence and assert that there is no contrary record evidence and, thus, summary judgment should be granted in its favor on that claim or defense.

"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). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fla.R.Civ.P. 1.510(c)(1).

"Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amends. to Fla. R. of Civ. P. 1.510*, 309 So.3d 192, 194 (Fla. 2020) [46 Fla. L. Weekly S6a] (citation omitted). "An issue of fact is material if it could have any bearing on the outcome of the case under the applicable law." *Id.* (citation omitted).

"At summary judgment, courts must view the evidence and draw inferences in the light most favorable to the nonmoving party." *Esteban-Garcia v. Wal-Mart Stores E. LP*, No. 21-23831-CIV, 2022 WL 16635816, at *2 (S.D. Fla. Nov. 2, 2022) (citation omitted). "To overcome summary judgment, an inference must be reasonable." *Id.* at 3 (citation and internal quotations omitted). "An inference is reasonable if it is one that a reasonable and fair-minded [person] in the exercise of impartial judgment might draw from the evidence." *Id.* (citation and internal quotations omitted). "While a reasonable inference may rest in part on conjecture, a jury cannot be allowed to

engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility." *Id*. (citation and internal quotations omitted). "An inference created from speculation and conjecture is not reasonable." *Id*. at 2 (citation and internal quotations omitted).

Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75-76 (Fla. 2021) [46 Fla. L. Weekly S95a], citing *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) [20 Fla. L. Weekly Fed. S225a].

However, testimony from parties always has an element of bias for their respective positions. It is human nature. The fact that a summary judgment affidavit is "self-serving" alone is not a ground to reject the testimony. Florida courts have addressed the veracity of "self-serving" summary judgment evidence. "A non-conclusory affidavit which complies with [Federal Rule of Civil Procedure 56] can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *Raissi v. Valente*, 247 So.3d 629, 632 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1124a], citing *United States v. Stein*, 881 F.3d 853, 858-59 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C877a].

Assuming the evidence is not such that it must be outright discarded, "If there is a conflict between the parties' allegations and evidence, the nonmoving party's evidence is presumed to be true and all reasonable inferences must be drawn in the nonmoving party's favor. *James B. Wilson v. Pinellas County*, No. 8:20-CV-135-TPB-SPF, 2021 WL 5163229, at *1 (M.D. Fla. Nov. 5, 2021). "A jury question is presented when the evidence is susceptible to inference that would allow recovery even though there are opposing inferences that are equally reasonable." *State Farm Mut. Auto. Ins. Co. v. Hanania*, 261 So.3d 684, 688 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2723a], quoting *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So.2d 1264, 1279 (Fla. 2003) [28 Fla. L. Weekly S538a].

Lessons From a Standard With Precedent—Florida's Standard for Directed Verdict

Although there still is a somewhat limited body of appellate decisions applying the new summary judgment standard, there are plenty applying Florida's long-established standard for directed verdict, which now is the same as the standard for summary judgment. *In re Amends. to Fla. Rule of Civ. Proc.* at 75; *Dumigan v. Holmes Reg'l Med. Ctr., Inc.*, 332 So.3d 579, 587 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D270a] (". . .[T]hose applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard.") "To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned." *Whitlow v. Tallahassee Mem'l Healthcare, Inc.*, 48 Fla. L. Weekly D1647c (Fla. 1st DCA Aug. 16, 2023) (citation and internal quotations omitted). As such, we can look to and be informed by precedent regarding directed verdicts.

The law in Florida on directed verdicts similarly places an "onerous burden" on the movant. Our First District has concisely outlined the standard for directed verdicts:

> The trial court must consider motions for directed verdict with extreme caution, because the granting thereof amounts to a holding that the non-moving party's case is devoid of probative evidence. A motion for directed verdict should not be granted unless the trial court, after viewing the evidence in the light most favorable to the non-moving party, determines that no reasonable jury could render a verdict for the non-moving party. The trial court must consider the evidence in its entirety in determining whether a reasonable jury could render a verdict for the non-moving party. But the trial court is forbidden from weighing the evidence or assessing the witnesses' credibility itself, and must deny a directed verdict if the evidence is conflicting or if different conclusions and inferences can be drawn from it.

Fannin v. Hunter, 331 So.3d 793, 795-96 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2100a], reh'g denied (Nov. 24, 2021), review denied, SC21-1753, 2022 WL 2951883 (Fla. July 26, 2022) (citations and internal quotations omitted).

The extreme caution when ruling on directed verdicts is further intensified when the cause of action is negligence:

> In negligence cases, motions for directed verdict should be treated with special caution because it is the function of the jury to weigh and evaluate the evidence. The power to direct a verdict should be cautiously exercised[.]") (citations omitted).

Hernandez v. Mishali, 319 So.3d 753, 759 FN 4 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1016b] (citation and internal quotations omitted).

This would be especially important where a party, as the defendant here, is relying on expert testimony because, "[a] jury is free to weigh the opinion testimony of expert witnesses, and either accept, reject or give that testimony such weight as it deserves considering the witnesses' qualifications, the reasons given by the witness for the opinion expressed, and all the other evidence in the case, including lay testimony." *Id*. (citation and internal quotations omitted).[1]

"Florida law cautions against a motion for directed verdict in negligence cases since the evidence to support the elements of negligence are frequently subject to more than one interpretation." *United Servs. Auto. Ass'n v. Rey*, 313 So.3d 698, 701 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1855d], quoting *Regency Lake Apartments Assocs., Ltd. v. French*, 590 So.2d 970, 972 (Fla. 1st DCA 1991) (other citations omitted).

Record Evidence for Each Ground Asserted for Summary Judgment

Defendant is entitled to summary judgment on plaintiff's claim for negligent hiring/retention because there were no issues with Bryant's employment indicating unfitness for the job as defensive tactics instructor.

Here defendant focuses on the allegation that it knew that Bryant was unfit for the job of defensive tactics instructor when he was hired.[2] The Court agrees that there was an absence of supporting evidence. However, it is unnecessary to address any further because the plaintiff concedes this point. As such, summary judgment would be appropriate as to the negligent hiring claim.

Defendant is entitled to summary judgment on plaintiff's failure to warn claims because there were no violent tendencies or prior injuries about which plaintiff should have been warned.

This second ground for summary judgment overlaps with the first ground in that there is an absence of record evidence regarding "knowledge of violent tendencies" which presumably would be the basis of the warning. As with the first ground, plaintiff has conceded that point, at least as it relates to negligent hiring. Moreover, the Court finds that "failure to warn" does not constitute a separate claim or defense in a lawsuit that does not sound in premises liability or defective product. As such, to the extent that "failure to warn" is intended to be plead as a separate, stand-alone claim, summary judgment would be appropriate.

The Court notes that evidence of a failure to warn regarding matters, other than Bryant's pre-employment "tendencies," may be relevant and admissible as to the other claims.

Defendant is entitled to summary judgment because the "bull-in-the-ring" evasive exercise was not banned, forbidden, or unreasonably unsafe.

This third ground requires an examination of specific record evidence. The claim is essentially a standard negligence claim; a failure to use reasonable care in the conduct of the subject exercise.[3]

We begin with context. A determination whether the facts of a case constitute a failure to use reasonable care is a matter for the jury, not the judge, *see* discussion above. In deciding whether the rare exception applies where it is a matter for the court, a court, "must view the evidence and draw inferences in the light most favorable to the nonmoving party."

As outlined in plaintiff's response and as discussed at the hearing, there is record evidence from which a jury could reasonably infer negligence regarding the conduct of the subject exercise. The evidence includes but is not limited to: a failure to use protective equipment, a slow or non-existent real time response to plaintiff's physical predicament and injury, a failure to use reasonable protocols that would make the exercise safe, and the appropriateness or approval of the exercise itself. *See* testimony of plaintiff and witnesses Tsompanidis, Colston, and Blalock in plaintiff's response and the transcript of the hearing.

Accordingly, it is ORDERED and ADJUDGED that

1. Defendant's motion is GRANTED as to plaintiff's negligent hiring claim.

2. Defendant's motion is GRANTED regarding "failure to warn" to the extent it is intended to be a stand-alone claim.

3. In all other respects, defendant's motion is DENIED.

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[1]There is recognition of this legal principle in post-amendment cases. "A party seeking summary judgment in a negligence action has a more onerous burden than that borne in other types of cases." *Pratus v. Marzucco's Constr. & Coatings, Inc.*, 310 So.3d 146, 149 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D186a] (citations omitted).

[2]Although defendant's motion reads "hiring/retention," the argument presented at the hearing associated this element or fact with negligent hiring.

[3]Defendant challenges the sufficiency of record evidence supporting the alleged breach of duties. The present motion does not challenge the other elements of negligence—existence of the duties or damages or causation.

* * *

Civil procedure—Response to complaint—Timeliness—Denial of motion for extension of time within which to file response—Failure of defendant to set motion for hearing

JAMES WEEKS, Plaintiff, v. WASTE PRO OF FLORIDA, INC., Defendant. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 39-2023-CA-000004-CAAM. September 12, 2023. David Frank, Judge. Counsel: William A. Kempner, III, Tallahassee, for Plaintiff. William G. K. Smoak, Chance C. Arias, and John E. Stiffler, Jr., Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT AND REQUIRING IMMEDIATE ACTION

This cause came before the Court on active case management, and the Court having reviewed defendant's motion for extension and the court file, and being otherwise fully advised in the premises, it is ORDERED that

A party may not ignore the time requirements imposed by the rules of civil procedure, file a motion, then allowing it to languish. *Brooks v. Brooks,* 340 So.3d 543, 546 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1222a]. Some courts have suggested the civil practice of law would benefit from a rule which provides that motions not pursued to resolution by the movant within a fixed period of time should be deemed denied. *Id.* (citation and internal quotation omitted). Litigants have an affirmative obligation to move their cases to resolution and not sit back and rely on the trial court to set their hearings for them. *Id.* (citation and internal quotation omitted). "Trial judges should not be expected to unilaterally review the hundreds of files assigned to them in search of motions which have been filed but have not been set for hearing or otherwise brought to the court's attention." *Id*. (citation and internal quotation omitted). "Litigants have an affirmative obligation to move their cases to resolution." *Erickson v. Breedlove,* 937 So.2d 805, 807 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2380a].

Here, the motion is untimely and, at this point, without merit. This Court will not condone the practice of buying time by filing a motion and then letting it sit. The Court notes that plaintiff also has neglected his responsibility by not pursuing a default or otherwise taking action.

Accordingly, the motion is DENIED. Defendant will respond to the complaint within ten (10) days from the date of this order. If a motion to dismiss is filed, a courtesy copy will be emailed to the Judicial Assistant along with a request for an expedited hearing. Plaintiff will file a notice for trial and email a courtesy copy to the Judicial Assistant along with a request a trial date no later than twenty days after the reply, or if there is no reply, twenty days after the answer.

* * *

Insurance—Property—Roof and interior damage caused by storm—Attorney's fees—Confession of judgment—Insurer's payment of claim following appraisal was not a confession of judgment entitling insureds to attorney's fees where insurer timely sought appraisal of entire claim and insureds filed suit for no clear reason rather than proceeding with appraisal—Claim or defense not supported by material facts or applicable law—Award of attorney's fees to insurer pursuant to section 57.105(1)(b) is mandatory where counsel for insureds knew or should have known that insurer's partial acceptance of coverage for loss required appraisal and that lawsuit was premature at time it was filed

ROBERT OWENS, MICHELLE OWENS, Plaintiffs, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CA-005589-O. Division 39 . May 26, 2023. Vincent Falcone III, Judge. Counsel: Kevin George, Kuhn Raslavich, P.A., Tampa, for Plaintiffs. Lynn S. Alfano and Christopher J. Goodrum, Alfano Kingsford, P.A., Maitland, for Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR ENTITLEMENT TO COSTS AND ATTORNEYS' FEES AND GRANTING DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO F.S. §57.105

THIS CAUSE, having come before the Court for hearing on May 1, 2023 on Plaintiffs' Motion for Entitlement to Costs and Attorneys' Fees ("Plaintiffs' Motion") and Defendant's Motion for Sanctions Pursuant to F.S. §57.105 ("Defendant's Motion") and the Court having reviewed the Motions, having heard argument, and being duly advised in the premises, hereby

ORDERS AND ADJUDGES AS FOLLOWS:

PLAINTIFFS' MOTION

1. Defendant timely demanded appraisal before the filing of this first-party property insurance lawsuit. Plaintiff asserted roof and interior damage caused by a storm, and it would be typical under applicable law for the entire claim to be appraised. *See, e.g.*, *People's Tr. Ins. Co. v. Tracey*, 251 So. 3d 931, 933 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1684a] (affirming decision to compel appraisal where carrier admitted coverage for interior damage caused by tornado, but declined to repair roof on basis that leak was caused by wear and tear or another non-covered cause); *First Protective Ins. Co. v. Colucciello*, 276 So. 3d 456, 458 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1810a] (finding appraisal required where coverage was not "wholly denied" in that insurer admitted coverage for mold and interior damage caused by hurricane, but not exterior damage); *State Farm Fla. Ins. Co. v. Sheppard*, 268 So. 3d 1006, 1007 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1115a] (finding appraisal required where insurer "agreed to pay for . . . water damage," but "refused to cover

costs of repairing the leaky pipes that caused the damage"). The record does not reflect that Defendant ever disputed this principle or sought to submit only a portion of the claim to appraisal either before or after the lawsuit was filed.

2. Plaintiffs did not proceed with appraisal and instead filed this lawsuit. Defendant again timely demanded appraisal. Plaintiffs raised a procedural issue (the initial lack of an affidavit), but did not assert any viable substantive objection to appraisal. At the July 26, 2021 hearing, Plaintiffs did not dispute that appraisal was appropriate and simply asked for confirmation that both the roof and interior would be appraised—which Defendant readily provided.

3. It is clear from the record that Defendant timely sought appraisal and never took the position that only part of the claim would be appraised.[1] The lawsuit was filed in violation of the appraisal provision, and the only obvious result produced from the filing of the lawsuit was a multi-year delay in resolution of the claim and the incurrence of litigation expenses that would have been avoided if there had been compliance with the appraisal provision. Nothing in the record reflects that any conduct by Defendant forced Plaintiffs to resort to litigation. Instead, the lawsuit was filed for no clear reason and caused the parties to needlessly incur litigation expenses while Defendant attempted to comply with the appraisal process in accordance with the policy.

4. For the foregoing reason, Plaintiffs have not shown that Defendant's payment following appraisal was a confession of judgment, and there is no basis for Plaintiffs to recover their attorneys' fees and costs. As a result, Plaintiffs' Motion is hereby **DENIED**.

DEFENDANT'S MOTION

5. The Court now turns to Defendant's Motion, which seeks sanctions under Section 57.105, *Florida Statutes*. Defendant's Motion asserts that the lawsuit was premature and never should have been filed. Defendant served Plaintiffs with the Motion on August 4, 2020, and Plaintiffs failed to withdraw the lawsuit during the statutory safe harbor period.

6. The current version of Section 57.105 does not require a finding that the entire action was frivolous and provides for the Court to assess whether a particular claim was supported at the time it was brought and whether the claim should have been dropped later once it became clear the claim was baseless. *See Albritton v. Ferrera*, 913 So. 2d 5, 8 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2099a]. If a claim was not reasonably supported in fact and law at either time, sanctions are mandatory. *Id.* at 8-9; *see also de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 685 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D991c]

7. Defendant's August 28, 2019 letter accepted coverage and found a covered loss for the interior, but maintained that there was no storm damage to the roof and that tile damage was consistent with age-related deterioration. Under binding appellate authority, Defendant's partial acceptance of coverage required appraisal, even if Defendant disputed that there was storm damage to the roof. *See Tracey*, 251 So. 3d at 933; *Colucciello*, 276 So. 3d at 458; *Sheppard*, 268 So. 3d at 1007. In the face of this authority, the litigation was plainly premature, and appraisal of the entire claim was required—a point that Defendant has never contested.

8. Despite the foregoing, counsel for Plaintiffs filed this action and then opposed appraisal altogether. Plaintiffs now suggest that there was simply uncertainty as to how much of the claim would be submitted to appraisal, but that was not the position taken at the outset. Plaintiffs, through the attorney handling the file at the time, suggested without any reasonable basis in fact or law that pre-suit mediation and Defendant's reinspection of the property were inconsistent with appraisal and resulted in waiver. (*See* Pl. Opp. to Def. Mot. to Compel Appraisal and Abate Litigation dated Feb. 16, 2021). At the February 22, 2021 hearing itself, counsel for Plaintiffs advanced only a procedural objection that the motion was not supported by an affidavit. In response to the Court's inquiry as to whether she disputed that the claim would be subject to appraisal if the correspondence attached to the motion was in fact sent, counsel responded : "No, Your Honor, not necessarily," subject to potential nuances in the policy language. (Feb. 22, 2021 Hearing Tr. at p. 18 (filed on July 19, 2021)). Counsel for Plaintiffs reiterated that she did not believe she was contesting appraisal on the merits and that a further hearing may not be necessary if the exhibits were authenticated. (*Id.* at p. 20). In its oral pronouncement and subsequent written order, the Court rejected the waiver argument (which was not pursued at the hearing) and directed Defendant to file a supporting affidavit to address the procedural objection. (*Id.* at p. 21; *see also* Order on Defendant's Motion to Compel Appraisal and Abate Litigation dated Mar. 5, 2021). The Court further directed the parties to confer as to whether there was agreement to appraisal within a specified period and, if there was not agreement, to schedule a further hearing. (*Id.*).

9. After the March 5, 2021 Order, Plaintiffs again objected to appraisal, albeit on different grounds. Now, Plaintiffs argued that Defendant disputed coverage and that coverage defenses had to be resolved before appraisal could proceed. (*See* Pl. Objections to Def. Motion to Compel Appraisal and Abate Litigation dated Mar. 22, 2021). Defendant responded that this was a new argument not contemplated by the prior hearing or the specified post-hearing procedures. Nevertheless, Defendant pointed out in its response that it actually anticipated and addressed the issue at the earlier hearing and specifically referenced the principle that appraisal is appropriate when there is not a complete denial of coverage, citing *Tracey* and similar decisions. (*See* Def. Resp. to Pl. Objections to Def. Motion to Compel Appraisal and Abate Litigation dated July 19, 2021). The hearing proceeded on July 26, 2021, and when it came time for Plaintiffs to respond, their counsel[2] asserted that he simply wanted assurance that the entire claim was subject to appraisal and did not oppose appraisal with that assurance. (*See* July 26, 2021 Hearing Tr. at pp. 15-17). Counsel for Defendant responded that the policy and law contemplated that the whole claim would go to appraisal. (*Id.* at pp. 17-18). As a result, the Court abated the litigation and compelled appraisal over a year and a half after Defendant's pre-suit demand for appraisal.

10. Defendant served the present Motion on August 4, 2020 shortly before filing its motion to compel appraisal and abate the litigation. Rather than withdraw the lawsuit within the safe harbor period, the prior attorney for Plaintiffs raised baseless arguments—first, that any right to appraisal had been waived; second, that appraisal was inappropriate based on the refusal to make payment for the roof—both of which sought to prevent appraisal outright. At the July 26, 2021 hearing, the current attorney for Plaintiffs appropriately conceded that appraisal of the entire claim is appropriate, but the concession came long after expiration of the safe harbor period. The suggestion that there was uncertainty over whether the whole claim would be appraised is not supported by the law or the record. Defendant never disputed that the entire claim should be appraised and even cited case law supporting that point during the February 22, 2021 hearing.

11. Counsel for Plaintiffs knew or should have known that this lawsuit was premature at the time it was filed and that appraisal was required. The filing of this lawsuit and Plaintiffs' opposition to appraisal were not supported by application of existing law to the material facts at the time of filing. Because the later concession that appraisal was appropriate does not remedy the issue, an award of attorney's fees pursuant to Section 57.105(1)(b) is mandatory.

12. Finally, the Court must note that this is exactly the situation for which Section 57.105 is intended. In first-party cases, there is a strong

incentive to rush to the courthouse to argue that a right to fees under Section 627.428 has been triggered. When that occurs prematurely and in violation of a mandatory appraisal process, the result is very often what occurred here—namely, unreasonable delay in resolving the claim, unnecessary litigation expenses, and waste of judicial resources. Plaintiffs had a plain opportunity to correct the improper filing of this lawsuit in the safe harbor period, and they declined to do so. As a result, sanctions are required.

13. For the foregoing reasons, Defendant's Motion is **GRANTED**. The Court finds that Defendant is entitled to the attorneys' fees incurred in connection with its defense of this lawsuit, including its efforts to compel appraisal. Because attorneys' fees are being awarded under Section 57.105(1)(b), they are assessed against counsel only and not against Plaintiffs. *See* Fla. Stat. § 57.105(3)(c). Counsel for the parties are directed to confer in good faith regarding the appropriate amount of the fee award and who should pay it. If counsel cannot reach agreement, they shall appear at short matters for a scheduling conference at which the Court will address the amount of time necessary for an evidentiary hearing and appropriate pre-hearing procedures.

14. Defendant's Motion does not seek fees against Mr. George, the attorney for Plaintiffs who argued at the July 26, 2021 and May 1, 2023 hearings. For the sake of clarity, Mr. George commendably conceded that appraisal was appropriate when he assumed the file, and sanctions are not being imposed or considered against Mr. George personally. The Court does not decide at this time who should be responsible for the fee award as between the firm and the other individual attorneys referenced in Defendant's Motion. The parties are directed to confer on the issue, and if there is a dispute, the Court will resolve the issue at the evidentiary hearing.

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[1]Counsel for Defendant made this position clear on the record at the July 26, 2021 hearing. The parties' submission of "competing" proposed orders does not demonstrate an actual dispute over this issue.

[2]By the time of the July 22, 2021 hearing, the attorney initially representing Plaintiffs had left the firm, and a different attorney within the same firm represented (and still represents) Plaintiffs.

* * *

Criminal law—Exchange of sexual messages and photos with minor—Evidence—Statements of defendant—Custody—Detectives' questioning of defendant at his house amounted to a custodial interrogation requiring *Miranda* warnings where detectives were wearing black vests on which "Sheriff" was printed in large yellow letters, detectives used coercion and deceit as well as intimidation during interrogation, defendant was confronted with entire case against him, and defendant was never told that he was free to leave—Reading of warnings in middle of interrogation after defendant had made admissions does not cure violation—All statements made by defendant to detectives at his home are inadmissible—Defendant's phone and any information it revealed are admissible where phone would have been discovered irrespective of any statements of defendant—Video gaming console and information derived from it are not admissible where detectives were not aware that console was used to send photos to victim before defendant revealed it during his interrogation

STATE OF FLORIDA, Plaintiff, v. SIMON PETER ANDERSON, Defendant. Circuit Court, 10th Judicial Circuit in and for Polk County. Case No. 20CF-4762. January 12, 2023. Melissa Gravitt, Judge. Counsel: Jessica L. Fisher, Assistant State Attorney, State Attorney's Office, Bartow, for Plaintiff. Ashley D. Parker, Lindsey, Ferry & Parker, P.A., Maitland, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND DERIVATIVE EVIDENCE

THIS MATTER came before the Court after a hearing October 19, 2022 on Defendant's MOTION TO SUPPRESS STATEMENTS AND DERIVATIVE EVIDENCE AND REQUEST HEARING, filed December 20, 2021. After review of the Motion, the court file, applicable law, and hearing arguments from counsel, the Court finds as follows:

Defendant seeks the suppression of evidence that he claims was acquired by means that violated his constitutional rights.

Procedural Background

Defendant is accused of exchanging inappropriate sexual messages and photos with a ten-year-old female victim between April 18 and April 20 of 2020. The victim provided law enforcement with her phone. Law enforcement performed a forensic download of victim's phone. On June 16, 2020, detectives from Polk County Sheriff's Office's SVU questioned the Defendant at his home and confiscated his flip-phone and Nintendo 3DS. The questioning was recorded by the detectives. Defendant moved to suppress any and all statements made to detectives during that questioning and any derivative evidence as "fruit of the poison tree."

A hearing was held on October 19, 2022 wherein the State presented two witnesses, Detective Watson and Detective Hensley, the State and Defense each presented their arguments.

Factual Findings

At approximately 9:45 am on the morning of June 16, 2020, Detective Watson and Detective Hensley arrived on the front porch of Defendant's home wearing the typical black "SHERIFF" vests over their plain clothes; after knocking, the Defendant answered the door. After Detective Watson asked Defendant to put his dogs up because of their barking, Defendant complied and returned to the detectives, Detective Watson asked, "Are you Simon?" To which, Defendant replied, "Yes sir." Then Detective Watson asked, "Do you have any idea why I'm here?" At no time during the entire interaction do either of the detectives introduce themselves. However, according to Detective Watson's testimony during the hearing, both detectives are wearing black vests with "SHERIFF" printed across the front in yellow letters, making it obvious who they are.

Without giving any *Miranda* warnings, Detective Watson began questioning the Defendant about a person called "Kylie" (the victim) and Defendant's relationship with her. Several times during the questioning Detective Watson stated how important it was for the Defendant to be truthful or honest. He started off by telling Defendant, "Honesty goes a long way with me." He referred to that statement throughout the questioning.

Several times during the questioning, Detective Watson told the Defendant that he already knew what the truth was. Approximately 35 minutes into the questioning, Detective Watson read Defendant the *Miranda* warnings. After asking "Do you understand your rights as I described them to you?" Defendant replied, "Yes sir." Then the detective then told the Defendant, "So, just because I read those, that doesn't mean you're going to jail." In the moments that follow, Detective Watson says "I'm not going to ever lie to you, I have no reason to lie to you." Throughout the entire questioning, both before and after the reading of the *Miranda* warnings, Detective Watson's demeanor is like that of a friend trying to be helpful and supportive, with occasional moments of firmness. After *Miranda* warnings, Detective Watson seeks to confirm the admissions Defendant made before the *Miranda* warnings.

During the questioning the Defendant stated that though he used his flip-phone to text messages to the victim, the flip-phone was not equipped to transmit pictures. Defendant told detectives that he used his Nintendo 3DS to exchange pictures with the victim.

At the end of questioning, Detective Watson asked, "Do you mind if I walk in with you so you can get your Nintendo in your room?" Defendant at first told detectives that his room is a mess but after encouragement from Detective Watson, the Defendant agreed. Once

in the room, Detective asked Defendant to hand the Nintendo to him and to hand the flip-phone to him. Immediately thereafter, Detective Watson told the Defendant he was under arrest and handcuffed the Defendant.

Defense claims the statements and admissions were not voluntary and that the *Miranda* warnings in the middle did not cure the violation. The Defense argues that the statements, the phone, and the Nintendo are all fruits of the poisonous tree and thus, inadmissible. The State's position is that when Detective Watson read Defendant the *Miranda* Warnings approximately 35 minutes into the questioning, and then went back through all the admissions Defendant made before the warning, that rectified the constitutional issue, and all the statements after the *Miranda* warnings arc admissible as is the flip-phone and the Nintendo.

Conclusions of Law

"[An] individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation." *Miranda v. Arizona,* 384 U.S. 436, 471, 86 S. Ct. 1602, 1626, 16 L. Ed. 2d 694 (1966).

"Failure to provide the *Miranda* warnings prior to custodial interrogation generally requires exclusion from trial of any post-custody statements given." *State v. Vazquez,* 295 So. 3d 373, 378 (Fla. 2d 2020) [45 Fla. L. Weekly D1133a]. In determining whether an interrogation was custodial, and thus required *Miranda* warnings, the Court looks to the *Ramirez* factors. *Id*. The four factors are: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning. *Ramirez v. State,* 739 So. 2d 568, 574 (Fla. 1999) [24 Fla. L. Weekly S353a].

Manner in Which Police Summon the Suspect for Questioning.

Two Detectives arrived wearing black vests over their plain clothes that said "SHERIFF" in large yellow letters across the front is intimidating. The first question Detective Watson asked after identifying Defendant was "Do you have any idea why I'm here?" This is like a law enforcement officer at a traffic stop when he or she asks the driver "Do you know why I pulled you over." Detective Watson never introduces himself, nor Detective Hensley during the entire engagement. The Defendant advised the detectives that his mother was at the hospital having surgery, his sister was with his mother, and he was home alone caring for his dogs. The Defendant told the detectives that his father committed suicide and that he himself had suicidal thoughts in the past. The Defendant expressed several times to the detectives during the interrogation that he was scared and worried about his mother's condition. A reasonable person in the Defendant's position would see this as Law Enforcement exerting authority and not feel free to leave during this interrogation.

The Purpose, Place, and Manner of the Interrogation

Detective Watson told Defendant, and restated at the hearing, that he already had all of the text messages exchanged between Defendant and the victim; specifically, the detective had a printout of the forensic download from the victim's phone. Detective Watson stopped the Defendant, during answers that the detective knew were not true, and referred again to the fact that he already knew the story from the victim and the forensic download. At times, Detective Watson read directly from the printed out forensic download transcript. Detective Watson reminded the Defendant "honesty goes a long way with me" several times during the questioning. After reading Defendant the *Miranda* warnings, the detective told the Defendant "that doesn't mean "you're going to jail." Detective Watson alternately acted very sympathetic toward the Defendant and then authoritative—calling him out for lying, reminding Defendant he, the detective, already knows the truth, and directing and controlling Defendant's location and behavior during the questioning. (e.g. telling the Defendant to put up his dogs and come back).

"The manifest purpose of question-first is to get a confession the suspect would not make if he understood his rights at the outset. When the warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. And it would be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." *Missouri v. Seibert,* 542 U.S. 600, 601, 124 S. Ct. 2601, 2603, 159 L. Ed. 2d 643 (2004) [17 Fla. L. Weekly Fed. S476a] (quoting *Moran v. Burbine,* 475 U.S. 412, 424, 106 S.Ct. 1135, 89 L.Ed.2d 410) ("question-first" refers to a police interrogation where the reading of the *Miranda* warnings is deliberately delayed) (internal quotations and citations omitted).

The purpose of the interrogation appears to have been to elicit admissions and get the Defendant to hand over evidence without the law enforcement agency having to go to the trouble of getting a warrant. The manner of this interrogation was coercion and deceit by pretending to be a friend, as well as intimidation by the use of proof of guilt already in hand. Detective Watson told the Defendant that if the Defendant was going to continue to lie to him, people would look at the Defendant in a negative way and the Defendant needed to show people that he could be honest. At one point during the interrogation, Detective Watson told the Defendant "you're being honest, that really does go a long ways". Detective Watson waited more than thirty-five minutes before reading the Defendant his Miranda rights, and then immediately told him "So, just because I read those, that doesn't mean you're going to jail." However, it was mere moments later that the detective placed the Defendant under arrest.

The Extent to Which the Suspect Is Confronted with Evidence of His Guilt

Detective Watson started the interrogation with a question about "Kylie", the victim. The detective told Defendant he knew the entire story, he read from the forensic download, he told Defendant what the victim already told him. Defendant was confronted with the entire case against him. The detectives had enough evidence to provide probable cause for a search warrant of the Defendant's electronic devices as well as for an arrest warrant.

Whether the Suspect Is Informed that He Is Free to Leave the Place of Questioning

Defendant is never told he is free to leave at any point during the interaction between Defendant and detectives. At the onset of the interview, Detective Watson tells the Defendant to put his dogs away and come back, which the Defendant does. Later, when Detective Watson asks the Defendant to come in and the Defendant is hesitant, Detective Watson reassures him that it is ok. A reasonable person in these circumstances would not feel free to leave.

Based on the *Ramirez* factors, this was a custodial interrogation and *Miranda* warnings were required. As explained by the United States Supreme Court in *Seibert,* reading *Miranda* in the middle does not cure the violation. All the statements made by Defendant to the Detectives at Defendant's home on June 16, 2020 are inadmissible.

The flip-phone would have been discovered regardless of any statements by the Defendant because the Sheriff's Office already had the victim's phone containing the texts, as evidenced by the printout of the forensic download. This was sufficient, in itself, to provide probable cause for a warrant. Therefore, the flip-phone and any information it revealed are admissible.

It appears from the audio recording of the interrogation that the Detectives were not aware of the Nintendo's involvement in the crimes before the Defendant revealed it during the interrogation, therefore the Nintendo and any information derived from it is inadmissible.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's motion is **GRANTED in part and DENIED in part**.

1. All statements to Detective Watson, both before and after *Miranda* warnings are inadmissible.

2. Evidence revealed by examining the flip phone is admissible.

3. The Nintendo 3DS and any information derived from it is inadmissible.

* * *

Criminal law—Search and seizure—Pat down—Officer did not have articulable reasonable suspicion that defendant who was passenger in vehicle stopped for seatbelt violation was armed and dangerous so as to authorize forceful removal of passenger from vehicle and pat down—Assuming that officer had articulable reasonable suspicion justifying pat down, officer was not entitled to conduct full body search with his hands inside defendant's sweat pants—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. LAZARO PRIETO, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-13667. August 28, 2023. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Lazaro Prieto was the passenger in a car that was stopped for a traffic infraction. He was taken from the car, searched, and found to be in possession of a firearm and crack cocaine. He moves to suppress those evidentiary artifacts and the attendant police observations. A hearing on his motion was had on July 27. Transcript references are to that hearing.

I. Facts

Angel Hernandez of the City of Miami Police Department is not a patrol officer. He is a detective, Tr. 34, assigned to what is termed the "Tactical Robbery Unit." Tr. 42.[1] Nonetheless, when he saw the Maserati in which Mr. Prieto was traveling, he was sufficiently intrigued to conduct a traffic stop, Tr. 35, ostensibly because it appeared that the driver of the car wasn't wearing his seat belt.

Q: Okay. Now you conducted a traffic stop in this case, correct?
A: Yes.
Q: For a seatbelt violation?
A: Yes.
Q: There's no other basis for the traffic stop when you initiated it, right?
A: Correct.
Q: No other traffic violations other than the seatbelt?
A: Correct.
Q: No other suspicion of any crimes before you initiated the traffic stop?
A: Correct.

Tr. 35-36. From and after the time that the car was stopped, Det. Hernandez concerned himself with the driver, not the passenger. Tr. 55 *et. seq*. He therefore has little more to tell us about Mr. Prieto.

Although it was Det. Hernandez, the lead officer, who effected the traffic stop, Hernandez's colleague Det. Jordany Bahamonde was on the scene as well. Like Det. Hernandez, Det. Bahamonde's "area of focus was the driver" of the car, not the passenger. Tr. 21-22, 25. "The passenger was detained by another officer," a Detective Labrador. Tr. 23. All that Bahamonde can tell us about the passenger, Mr. Prierto, is that he was detained for "officer safety." Tr. 23-24.

It was Det. Labrador who dealt with Mr. Prieto as his colleagues were dealing with the driver. Det. Labrador testified at length, Tr. 72 *et. seq*. During the course of his testimony, the video footage created by his "body-worn camera" was received in evidence and played. Tr. 79 *et. seq*. All agreed that the video footage fairly and accurately reflected the detective's interaction with Mr. Prieto.

This created a bit of a quandary for me at the hearing. According to Det. Labrador's testimony, he was:

Q: . . . concerned for your [*i.e.*, his own] safety, correct?
A: Yes.
Q: [For reasons] specific to Mr. Prieto, right?
A: Yes.

Tr. 83. This was despite the fact that:

Q: . . . Mr. Prieto never tried to flee, correct?
A: Did he attempt to flee? No.
Q: He never tried to run from the car as you were approaching, correct?
A: He stayed inside the cab of the vehicle.
Q: Okay. He never lunged at you?
A: Lunged at me? No.
Q: He never acted aggressively?
A: No.

Tr. 88-89. Herein my quandary: According to Det. Labrador, he removed Mr. Prieto from the car and "patted him down" for "officer safety." The video from the detective's camera tells a very different tale. Det. Labrador appears to be a weightlifter, and is certainly a strapping and imposing figure. By comparison Mr. Prieto is very slightly built. Labrador himself opened the passenger-side door, Tr. 89, laid hands on Prieto, and pulled him out with the ease with which he might handle a rag doll. He then flung him to the pavement like a football player spiking the ball in the end zone. Mr. Prieto was wearing lose-fitting sweat pants. Det. Labrador pawed Mr. Prieto, his hands actually inside Prieto's pants, touching his body in or near its most intimate areas, until a handgun fell out.

I do not wish to be misunderstood. I am not suggesting that Det. Labrador bore false witness. Testimonial evidence may be accurate or inaccurate; and if inaccurate, willfully or inadvertently so. At a hearing on a motion to suppress I sit as the trier of fact. I am concerned above all things with the accuracy or inaccuracy of evidence, testimonial or otherwise. There are a hundred reasons why a detective's testimony might be inaccurate. Not all of those reasons render such testimony false, and few render it willfully false. But where testimonial evidence departs from demonstrative evidence (in the form of videos as to the accuracy of which both parties stipulate), wiser judges than I have instructed me to give greater consideration to the demonstrative evidence.

Scott v. Harris, 550 U.S. 372 (2007) [20 Fla. L. Weekly Fed. S225a] (Scalia, J.) also involved a Fourth Amendment issue, albeit in a civil, rather than a criminal, context. For present purposes, that difference in context is entirely beside the point. The Court focused on the:

> existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent . . . .

Scott, 550 U.S. at 378. That being the case, the court below "should have viewed the facts in the light depicted by the videotape." *Id.*

Similarly, *Williams v. Brooks*, 809 F. 3d 936 (7th Cir. 2016), involved a Fourth Amendment issue in a civil context. The court cited *Scott* in holding that, "When the evidence includes a videotape of the relevant events, the Court should not adopt the nonmoving party's version of the events when that version is blatantly contradicted by the videotape." *Williams*, 809 F. 3d at 942. On the contrary: the Court of Appeals chose to "rely primarily on the video from the dashboard camera of Officer Brooks's vehicle." *Id. See also Cantrell v. McClure,* 805 Fed.Appx. 817, 819, n. 2 (11th Cir. 2020).

What I saw on the videotape was clear beyond peradventure: The officers detained the car in which Prieto was a passenger. Det. Labrador yanked Mr. Prieto out of that car, flung him to the ground, and searched Prieto's body by forcing his hands onto and even inside Prieto's pants. That search revealed a firearm, for the possession of which Mr. Prieto is prosecuted herein and as to which he seeks suppression.[2]

II. Analysis

A. The stop

The opinion of the United States Supreme Court in *Whren v. United States*, 517 U.S. 806 (1996), worked a revolution in the law governing police stops of cars. After *Whren*, an officer's actual reason for stopping a car is beside the point. "Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. Where probable cause or articulable reasonable suspicion exists to justify a stop, it is irrelevant for Fourth Amendment purposes that the officer conducted the stop for reasons entirely unrelated to the crime or infraction for which probable cause or reasonable suspicion existed. *Id*., *passim*, esp. at 819. A "driver's commission of [a] traffic infraction . . . provide[s] . . . detectives with probable cause for [a] lawful stop and detention of [the] vehicle, regardless of their [*i.e.*, the detectives'] actual motives." *State v. Hernandez*, 718 So. 2d 833, 836 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1837b].

It is all but impossible, after *Whren*, for a competent police officer *not* to be able to effect a lawful traffic stop whenever and wherever he pleases. He need only observe one of the dozens, more likely hundreds, of traffic infractions defined by Florida law. If he can testify that the driver whose car he wishes to detain failed to come to a complete stop at a stop sign; or failed to engage his signal indicator when he changed lanes, or 100 feet before he approached an intersection at which he was turning; or (as in the present case) appeared not to have his seatbelt fastened; then the law fully empowers him to waylay an otherwise-unoffending traveler. And having done so, he can then pursue whatever it was that piqued his interest in the car or driver in the first place, by observing what is in plain view and wheedling consent to observe what isn't.

The case at bar illustrates the point. The three detectives involved are, as noted *supra* at n. 1, not patrol officers. They are assigned to the "Tactical Robbery Unit," a "special unit." They are not in the business of handing out tickets for trivial traffic infractions such as seatbelt violations. They saw a Maserati SUV with out-of-state plates being driven by two young men. For whatever reason, that combination of factors caused them to want to scrutinize the car and its occupants.[3] That the driver was not wearing a seatbelt—and the video confirms Det. Hernandez's testimony on this point, *see, e.g.*, Tr. 31—was not of the slightest interest or concern to the detectives. It was simply the means to make lawful what would otherwise have been unlawful: the compelled detention of the car, and the ensuing opportunity to examine it and its occupants.

The officers could have admitted as much at the hearing. From a Fourth Amendment standpoint it would have made no difference. Under the doctrine of *Whren*, the stop was constitutionally permissible.

B. The search

From a standpoint of the jurisprudence of search and seizure, this case poses a common problem: The police are entitled, arguably obliged, to stop a car seen to be committing traffic infractions. Such a stop is a seizure of the person of the driver, but justified by the infractions for which the driver is responsible. Such a stop, however, is also a seizure of the person of any passenger, and certainly cannot be justified by any conduct in which the passenger has engaged. The passenger, after all, is not the author of the traffic infractions that prompt the stop. What, then, may the police demand of him? And how are those demands to be squared with the Fourth Amendment?

All courts agree that when police conduct a traffic stop, every person in the stopped car is seized for Fourth Amendment purposes. *See, e.g., Brendlin v. California*, 551 U.S. 249, 255 (2007) [20 Fla. L. Weekly Fed. S365a] ("during a traffic stop an officer seizes everyone in the vehicle, not just the driver"). Typically the passenger has nothing to do with the reason for the stop. That does not render the stop unreasonable as to him. It is impossible to stop the car without seizing everyone in it. If the stop is justified, it is not unreasonable to expect every occupant of the car to endure the seizure. A contrary rule—a rule that would forbid traffic stops absent probable cause as to every occupant of the car, young or old, waking or sleeping—would be a good deal more unreasonable.

The courts have gone further. "[D]uring a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk." *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997). *See also D.N. v. State*, 805 So. 2d 63, 65 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D185a] ("in order to protect officer safety, a law enforcement officer conducting a traffic stop may order any passenger . . . to exit the vehicle during the traffic stop"). Impliedly, an officer may (and typically will) order the passenger to stand here or stand there, and to keep his hands where the officer can see them. Undoubtedly this is an incremental invasion of Fourth Amendment interests, but it is reasonable because it is unavoidable. Danger, or the suspicion of danger, would be considerably enhanced if police were powerless to prevent a passenger, standing by the side of the road while a driver's documents are examined, from wandering about, reaching into his pockets, or the like. *See, e.g., Lopez v. State*, 225 So. 3d 330, 331 (Fla. 3d DCA 2017) [48 Fla. L. Weekly D1328c].

But that is as far as courts have gone. "To justify a patdown of the . . . passenger during a traffic stop, . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009) [21 Fla. L. Weekly Fed. S620a].[4] That language derives from the Court's holding in *Terry v. Ohio,* 392 U.S. 1 (1968), in which the Court drew a clear and firm line between the reasonable suspicion of ongoing crime that would be sufficient to justify a brief detention, and the reasonable suspicion of armed danger that would be necessary to justify a frisk. The standard for the latter is appropriately much higher, because the invasion of protected Fourth Amendment interests is very much greater.

> [I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Terry, 392 U.S. at 16-17 (footnotes omitted). Thus the issues that must be resolved to adjudicate the motion at bar are: (1) Did Det. Labrador have articulable reasonable suspicion to believe that Mr. Prieto was armed and dangerous at the time Labrador conducted the search that revealed the gun as to which suppression is sought? and (2) If so, did the detective confine himself to the "frisk" or "pat down" contemplated by *Terry* and progeny?

1. articulable reasonable suspicion

The locution "armed and dangerous" is worded in the conjunctive. For a police officer to conduct a *Terry* frisk, he must have reasonable suspicion that the person to be frisked is not only armed but also dangerous. *See also* Fla. Stat. § 901.151(5).

The law of Florida is relentlessly gun-friendly. It encourages ownership and possession of firearms of all kinds. A City of Miami detective might believe, and very reasonably believe, that some, many, perhaps nearly all the people he encounters on a given night in a given neighborhood are armed.[5] But that reasonable belief, standing alone, would be insufficient to justify the frisk of even one person. It is only when there is reasonable suspicion of armed *danger* that a frisk can go forward. In a jurisdiction in which firearm ownership and possession is so often perfectly legal and so common even when illegal, mere ownership or possession of a firearm may not give rise to articulable reasonable suspicion even to stop, much less to search.

Officer safety is so profound a concern to the criminal justice system that there exists the danger of misconstruing it. The present case provides a useful illustration. The pretext pursuant to which the detectives stopped the car in which Mr. Prieto was traveling was the failure of the driver to fasten his seatbelt. All those involved in the case understand perfectly well that the detectives had not the least concern about the unfastened seatbelt: it was merely the key that opened the door to police interdiction of the car and its occupants. No one seriously suggests that the driver's failure to fasten his seatbelt encroached on the safety of police officers or anyone else.

Leveraging the unbuckled seatbelt into a basis for detention, the officers stopped the car. There was some testimony that the driver made efforts to avoid stopping, Tr. 46-47, but there can be no suggestion that the driver's unwillingness to stop rendered Mr. Prieto, a mere passenger, a danger to the detectives.

But that is exactly how the detectives treated Mr. Prieto: as a danger of the most imminent and violent sort. Within scant seconds of the stop of the car in which he was riding he was ripped out of that car, hurled to the ground, and subjected to a search of the most invasive and degrading nature.

Of course there existed the possibility that officer safety could have been compromised if the detectives had done otherwise. In today's Miami that possibility exists every time a police officer interacts with a driver, a passenger, a pedestrian, a bystander, anyone. It is a possibility every police officer acknowledges and accepts when he picks up his badge and gun and begins his duty shift. What distinguishes a society committed to the rights of liberty and the usages of democracy from all other societies is the recognition that that possibility is the beginning and not the end of analysis. Juxtaposed to it is the vivifying force of the Fourth Amendment, which teaches that the right of the people to be secure in their persons shall not be violated. When Detective Labrador ran toward the car in which Lazaro Prieto was sitting, he knew no more about Mr. Prieto than that he was a passenger in a car in which the driver had failed to fasten his seatbelt and to pull over. Consistent with the Fourth Amendment, he had no authority whatever to lay hands on Lazaro Prieto, no authority whatever to toss him to the ground, no authority whatever to put his hands on and even inside Mr. Prieto's clothing. If such conduct can be justified by the magic words, "officer safety," then the Fourth Amendment is as chimerical as Macbeth's dagger, that "false creation/proceeding from the heat-oppressed brain."

It is a grim truth that we are sometimes put in the position of choosing between the safety of officers in their persons and the safety of citizens in their rights. But we made our choice more than two centuries ago, and we have had no occasion to regret the choice we made. Fourth Amendment rights:

> belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population,, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons, and possessions are subject at any hour to unheralded search and seizure by the police.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting). Detective Labrador's authority to act upon his officer-safety concerns ends where Lazaro Prieto's Fourth Amendment rights begin.

At the time when the car in which he was riding was stopped, no suspicion of any kind attached to Mr. Prieto. He was a mere passenger in a vehicle the driver of which had committed a minor traffic infraction. As noted *supra*, the police would have been permitted under prevailing law to order Prieto out of the car, to order him to stand still by the side of the car, to order him to keep his hands visible as he stood there.

That is not what happened here. Det. Labrador did not order Mr. Prieto out of the car; as the video makes abundantly clear, he opened the car door and jerked Prieto out of it. Det. Labrador did not order Mr. Prieto to stand still on the sidewalk; as the video makes abundantly clear, he hurled Prieto to the ground. Det. Labrador did not order Mr. Prieto to keep his hands visible at all times; as the video makes abundantly clear, he conducted an appallingly intrusive search of Prieto's body, actually forcing his own hands into Prieto's sweat pants. In his opinion in *Terry*, Chief Justice Warren made clear that even "a careful exploration of the outer surfaces of a person's clothing" if "performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised" is, for Fourth Amendment purposes, "a serious intrusion upon the sanctity of the person, [and a] great indignity." What was visited on Mr. Prieto was not "a careful exploration of the outer surfaces of [his] clothing" but the thrusting of the detective's hands onto and actually inside Prieto's pants. And this was not performed while Mr. Prieto "st[ood] helpless . . . facing a wall with his hands raised." It was done after Prieto was thrown onto the sidewalk with Det. Labrador crouched on top of him.

In his testimony, Det. Labrador tried to make a case for his belief that Mr. Prieto might have been armed. In the fractions of seconds that it took the detective to race from his car to the passenger side of the Maserati, he claims to have seen Prieto "crouching forward towards the actual vicinity of the floorboard of the vehicle, the front-passenger vehicle right on the—on the vicinity in front of him, he was slouching forward." Tr. 85. He claims, too, that in those same fractions of seconds he was ordering Mr. Prieto to put his hands up, and that Prieto was not complying. Tr. 83, 85.

Even if all this were true, it makes no case for the notion that Mr. Prieto was armed and dangerous at the time he was manhandled by Det. Labrador. A car is pulled over on a crowded Miami street. Three large and powerful officers wearing black muscle shirts, their sidearms drawn, converge on the car. Did the passenger, in the tumult of the moment and the cacophony of Miami gridlock, hear one of the

officers order him to put his hands up? Did he consciously reach for something, or merely squirm with surprise and panic? Assuming that he was "slouch[ed] forward" in his seat, was that an act of willful resistance or the cringing posture of a startled, frightened man? So far as Mr. Prieto was aware—so far as he had any reason to be aware—he had done nothing wrong, and certainly nothing so profoundly illegal or dangerous as to justify the show of force visited upon him by the police. Based on my viewing of the videotape, my consideration of the testimony of the detectives, and all the attendant circumstances, I cannot find that the detectives were possessed of articulable reasonable suspicion that Mr. Prieto was armed and dangerous at the time that they searched his person. "[A] police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Sibron v. New York*, 392 U.S. 40, 64 (1968). Here, such grounds were absent.

2. the "frisk"

Assuming the contrary—assuming that the detectives were possessed of articulable reasonable suspicion that Prieto was armed and dangerous, so as to justify the pat-down search contemplated by *Terry*—the question then becomes whether they confined themselves to the limits of such a search. In the case of "a formal arrest, the police have an automatic right, without any further evidentiary showing, to conduct a full-blown search of the person arrested and the physical area into which he might reach in order to grab a weapon or destroy evidentiary items." *State v. Ramos*, 378 So. 2d 1294, 1297 (Fla. 3d DCA 1979). "On the other hand, if the seizure is a temporary detention for investigation, there is never any right to conduct such a full-blown search of the person detained . . . . The police may only conduct a carefully limited, self-protective search of the outer clothing of such person to discover the presence of weapons." *Ramos,* 378 So. 2d at 1298.

The facts of *Harvey v. State*, 703 So. 2d 1113 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2576g] are in some respects similar to those of the case at bar. A police officer pulled over a car for speeding ten miles over the posted limit. *Harvey*, 703 So. 2d at 1113. "As the officer approached the car, he saw Harvey put one hand down as if placing something under the driver's side seat. The officer ordered [Harvey] to get out of his auto and as Harvey was complying with the officer's direction, [Harvey] stuck one hand down the back of his trousers." *Id.* Based on these observations, the "officer pulled back the waistband of Harvey's trousers and looked down between his underwear and buttocks to see what, if anything, [Harvey] had put down the seat of his pants." *Id*. This search resulted in the discovery of the contraband for which Harvey was prosecuted, and as to which he sought suppression. Because the officer "was required to conduct [the] reasonable, carefully-limited search required by *Terry*," and because here "the search . . . clearly exceeded the bounds" of such a search, *id*. at 1115, the appellate court reversed the conviction and remanded with directions to discharge Harvey.

In the case at bar, it is far from clear that Det. Labrador ever saw Mr. Prieto place anything under, or retrieve anything from beneath, the car seat; at most he saw Mr. Prieto "slouching forward" in the car seat. But the officer in *Harvey*, possessed of that articulable reasonable suspicion that Det. Labrador lacked, went too far: he "pulled down the waistband" of Mr. Harvey's pants and "looked" into his pants and buttocks. This intrusion was trivial in comparison to that visited by Labrador upon Prieto. And yet the search in *Harvey* exceeded the permissible scope of that limited pat-down of outer clothing authorized by *Terry* and Fla. Stat. § 901.151.

I again acknowledge that police-citizen confrontations on the streets of Miami are fraught with challenges to officer safety. But "officer safety" is not an incantation which causes the Fourth Amendment magically to "melt/Thaw, and resolve itself into a dew," Wm. Shakespeare, *Hamlet*, Act I sc. 2. Lazaro Prieto may be a bad man, but on July 27, 2022, he was nothing more than a passenger in a car the driver of which had neglected to fasten his seatbelt. That neglect entitled the police to stop the car and issue a ticket. It entitled the police to order Mr. Prieto to stand still by the side of the road while that ticket was issued. It did not entitle the police to search his person. And it certainly did not entitle the police to conduct the full-custody, highly-invasive search of his person that he was made to endure.

III. Conclusion

Defendant's *Motion to Suppress* is respectfully granted.

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[1]The "Tactical Robbery Unit" is "a special unit," Tr. 42, presumably one concerned with robbery and related dangerous crimes. Defense counsel and the witness described the "Tactical Robbery Unit" as "proactive." Tr. 43. If this neologism is a word at all, I suppose it must mean that the members of the unit act prospectively, preemptively, seeking to interdict crime before it occurs. I doubt very much that it is the business of the members of such a unit to give out parking tickets or tickets for traffic infractions. According to the "Missions, Goals, and Objectives" page of the Tactical Investigations Unit Standard Operating Procedures, the "unit's primary function is to deter robberies as well as seek out and apprehend violent felony subjects." Its goal is to "deter violent crimes." "Members of this elite unit respond to calls of armed robberies, carjackings, and shootings." *See* Tactical Investigations Unit Standard Operating Procedures, Miami Police Department, https://www.miami-police.org/SOPs/MPD%20SOPs%20-%20BookMarks/3%20CID/ISS/2%20Tactical%20Investigations/Tactical%20Investigations%20Unit.pdf.

Not a word about issuing tickets for seatbelt violations.

[2]At some point crack cocaine was also found on or near Mr. Prieto. That must have happened later. The search for and discovery of the gun, however, is clearly depicted in the video. Prieto, of course, seeks the suppression of both the gun and the drugs.

[3]There is no evidence in the record that the detectives' decision to stop the car in which Prieto was traveling was an act of invidious racial discrimination. Had that been the case, the stop would have transgressed the core equal-protection principles of the 14th Amendment; and there is at least an argument to be made that a stop that is in derogation of such principles is, without more, unreasonable for Fourth Amendment purposes. *See gen'ly Glock v. Moore*, 776 So. 2d 243, 252 (Fla. 2001) [26 Fla. L. Weekly S9a].

[4]Nor does the issuance of a traffic ticket entitle the issuing police officer to search the car. There is a "search-incident-to-a-valid-arrest" exception to the Fourth Amendment warrant requirement, but there is no "search-incident-to-a-valid-ticket" exception. *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, the ticket was for speeding; and "[n]o further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Knowles*, 525 U.S. at 118.

There was some unclear and inconclusive testimony at the hearing about whether marijuana was found inside the car. *See, e.g.,* Tr. 62-63; 90. The driver was arrested for aggravated battery on a law enforcement officer and driving with a suspended license, and was ticketed for the seatbelt violation. Tr. 51. There is no indication that he, or Mr. Prieto, was charged with any marijuana-related offense. So far as I can tell, the present motion to suppress extends only to the gun, the police observations attendant to the discovery of the gun, and some later-discovered crack cocaine. The gun was seized from Mr. Prieto prior to his formal arrest and was therefore not the product of a search incident to arrest. As to the cocaine, I assume it is Mr. Prieto's position that although it was found during a search subsequent to his arrest, the arrest itself was unlawful, thus tainting the search.

[5]In its opinion in *L.C. v. State*, 23 So. 3d 1215 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2306b], the court of appeal excerpted testimony from the hearing on a pretrial motion to suppress. Asked if at the time he encountered the defendant, the Miami-Dade Police officer believed that the defendant had a weapon, the officer testified, "I believe anybody has a weapon." *L.C.*, 23 So. 3d at 1220.

* * *

Criminal law—Sentencing—Correction—During resentencing for 2008 offense of armed robbery of drugstore, court was not barred from considering 2009 charges of attempted premeditated murder, tampering with witness, and conspiracy to commit first degree murder for attack on drugstore clerk that occurred six weeks after robbery where defendant had been convicted on 2009 charges by time of resentencing

THE STATE OF FLORIDA, Plaintiff, v. JULES DUCAS, Defendant, Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F08-18639, Section 60. August 16, 2023. Miguel M. de la O, Judge. Counsel: Suzanne Von Paulus, for

Plaintiff. Maria Llauredo, for Defendant.

ORDER DENYING MOTION TO CORRECT ILLEGAL SENTENCE PURSUANT TO RULE 3.800(b)

THIS CAUSE came before the Court on Defendant, Jules Ducas' ("Ducas"), Motion to Correct Sentence pursuant to Florida Rule of Criminal Procedure 3.800(b) ("Motion"). The Motion was served on July 17, 2023. The Motion is **DENIED**.

I. BACKGROUND.

On March 2, 2008, Ducas entered a CVS Pharmacy and robbed the store's employee, Alain Salas, and two others at gunpoint. He was charged with three counts of Armed Robbery on June 12, 2008 in case number F08-18639 ("2008 Case"). Six weeks later, Mr. Salas was gunned down in broad daylight shortly after getting off a Miami-Dade bus on his way home from work. Although shot multiple times in the chest and abdomen, he survived. A subsequent investigation revealed that Ducas conspired with a former girlfriend and a friend to murder Mr. Salas. On March 29, 2009, Ducas was charged with Attempted Premeditated Murder, Tampering with a Witness, and Conspiracy to Commit First Degree Murder ("2009 Case").

Ducas was subsequently convicted on March 17, 2010 of three counts of Armed Robbery and one count of Burglary in the 2008 Case. And on December 19, 2016, Ducas was convicted of all charges in the 2009 Case. Ducas' conviction in the 2009 Case was later affirmed on appeal. However, his conviction in the 2008 Case was reversed as to the Burglary count. *See Ducas v. State*, 84 So. 3d 1212 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D823a]. For unknown reasons, Ducas was not resentenced in the 2008 Case following the issuance of the mandate. He moved for resentencing on August 30, 2020, and was resentenced on July 22, 2022.

II. THE MOTION.

Ducas complains that during the July 22, 2022 resentencing on the 2008 Case, this Court improperly considered his conviction in the 2009 Case. The crux of Ducas' complaint is that both the crime and his arrest in the 2009 Case occurred *after* his arrest in the 2008 Case and should, therefore, not have been considered by this Court when it resentenced Ducas in the 2008 Case. Motion at 5. It is undisputed that at the time Ducas committed the 2008 armed robberies, he had not yet committed his 2009 crimes. It is equally undisputed that at the time of his resentencing for the 2008 Case, he had already been convicted in the 2009 Case. The question for this Court to answer is whether *Norvil v. State*, 191 So. 3d 406 (Fla. 2016) [41 Fla. L. Weekly S190a], bars it from considering the 2009 convictions. It does not.

III. ANALYSIS OF THE LAW.

Norvil established a clear rule: At sentencing, Florida trial courts may not consider subsequent arrests *without conviction*. *Id*. at 410 ("In conclusion, we adopt the following bright line rule for sentencing purposes: a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense."). Ducas maintains that *Norvil* controls the outcome of the Motion, even though at the time of resentencing he had been convicted in the 2009 Case. The Court disagrees.

A. JUDGES HAVE BROAD DISCRETION DURING RESENTENCING.

"From the beginning of the Republic," judges have possessed broad sentencing discretion. *Concepcion v. U.S.*, 142 S. Ct. 2389, 2398 (2022) [29 Fla. L. Weekly Fed. S536a]. "Federal courts historically have exercised this broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. *" Id*. This discretion applies equally in resentencing proceedings.

> The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings. . . . Accordingly, federal courts resentencing individuals whose sentences were vacated on appeal regularly consider evidence of rehabilitation developed after the initial sentencing. *See, e.g., United States v. Rodriguez*, 2020 WL 2521551, *5 (SDNY, May 18, 2020) (considering the movant's "exemplary conduct during a lengthy period of incarceration"); *United States v. Raifsnider*, 2020 WL 1503527, *3 (D Kan., Mar. 30, 2020) (considering that the movant "has completed his GED, taken hundreds of hours of programming offered by the Bureau of Prisons, and is taking college classes"). Similarly, district courts in resentencing proceedings frequently consider evidence of violence and rule breaking in prison. *See, e.g., United States v. Riley*, 785 Fed. Appx. 282, 285 (C.A.6 2019) (considering a " 'series of disciplinary violations while in the Bureau of Prisons' "); *United States v. Diaz*, 486 Fed. Appx. 979, 980 (C.A.3 2012) (considering "infractions while in prison, e.g., possession of marijuana").

Id. at 2399-400.

Of course, courts do not possess unbridled discretion. A trial court's discretion at sentencing is limited by statutory authority and the Constitution. *See id*. at 2398 ("Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.").

The issue, therefore, is whether this Court exceeded Florida statutory authority or violated the Constitution by considering Ducas' conviction in the 2009 Case when it resentenced in 2022 Ducas for the 2008 Case.

B. AT A RESENTENCING, THE CRIMINAL PUNISHMENT CODE AUTHORIZES THE CONSIDERATION OF SUBSEQUENT ARRESTS FOR WHICH A DEFENDANT HAS BEEN CONVICTED.

Ducas relies exclusively on *Norvil* to argue that the Criminal Punishment Code does not authorize the consideration of subsequent arrests even if they result in convictions. Motion at 4-5. Ducas sets forth no additional argument based on either constitutional or statutory authority. In *Norvil*, however, the defendant had been arrested—*but not convicted*—subsequent to the crime for which he was being sentenced. *Norvil*, at 407. Consequently, *Norvil* does not address the fact pattern before the Court and does not control the result here.

In *Barnes v. State*, 227 So. 3d 216 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1998a], the appellate court distinguished *Norvil* precisely because the defendant had been convicted of a subsequent crime. Barnes was convicted of Second-Degree Murder and Armed Robbery, crimes committed while he was a juvenile. At sentencing,

> the State filed copies of judgments and sentences in three other cases for crimes that Barnes committed after he committed the crimes in this case. The State conceded that the subsequent convictions could not be scored on the Criminal Punishment Code scoresheet, but argued that the court could consider them in determining whether a life sentence was appropriate.

Id. at 217. The trial court imposed a life sentence based at least in part on Barnes' subsequent convictions. The Fifth DCA disagreed that *Norvil* barred the trial court from considering the subsequent convictions.

> Barnes's reliance on *Norvil* is misplaced. Barnes is a juvenile offender and subject to the new statutes enacted for sentencing juveniles convicted as adults. These statutes allow the trial court to consider the juvenile offender's "youth and its attendant characteristics," including the juvenile's immaturity, lack of judgment, and possibility of rehabilitation in determining whether to impose a life sentence.

Id. at 218.

The result is no different here even though Ducas was not a juvenile at the time of the 2008 Case. The Criminal Punishment Code provides that rehabilitation for convicted adults, while not the paramount goal of sentencing in Florida, nevertheless remains a goal. *See* § 921.002(1)(b), Fla. Stat. (2023) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."). Therefore, *Barnes*—rather than *Norvil*—controls the result in the instant case.

The fact that following his arrest for Armed Robbery in 2008, Ducas made arrangements from jail to have a victim murdered, and was convicted of this subsequent crime, was a critical and relevant factor for the Court to consider in 2022 as it weighed the probability of Ducas' rehabilitation. Trial courts are not required to a blind eye to such serious post-arrest conduct by Florida law, the Florida Constitution, or the United States Constitution.

C. THE CONSTITUTION DOES NOT BAR CONSIDERATION OF THE SUBSEQUENT CONVICTION DURING DUCAS' RESENTENCING.

The Florida Supreme Court recently addressed the constitutional limitations on what a trial court can consider at sentencing. The Court explained that due process requires that a defendant's conduct may be considered for sentencing purposes only if the conduct is proven by a preponderance of the evidence. *See State v. Garcia*, 346 So. 3d 581, 586 n.5 (Fla. 2022) [47 Fla. L. Weekly S197a] ("The U.S. Supreme Court long ago decided that a defendant's conduct, proven by a preponderance of the evidence, may be considered by a sentencing court."). "This reliance on facts supported by a preponderance of the evidence speaks to why consideration of an arrest, standing alone, raises due process concerns: an arrest—again, standing alone—is supported only by a determination of probable cause." *Id*.

In resentencing Ducas, this Court did not rely on an arrest based on probable cause, nor even on acts supported by a preponderance of the evidence, but rather upon a conviction rendered by a jury employing the beyond a reasonable doubt standard. Such a result is not prohibited by the Constitution. Indeed, "the federal courts of every circuit allow a sentencing judge to consider a defendant's conduct—even if it has been the subject of an acquitted charge—as long as the conduct itself is established by a preponderance of the evidence." *Id*. If the Constitution tolerates a sentencing judge considering conduct which is established by a preponderance of the evidence, *but for which the defendant was acquitted*, it certainly allows this Court to consider during resentencing Ducas' attempt to murder the victim in the case.

One more point which should be obvious. If there was a constitutional infirmity in considering subsequent convictions, the Florida Supreme Court would have said so in *Garcia* and the Fifth DCA would have said so in *Barnes*.

There being neither a statutory nor constitutional prohibition to this Court considering Ducas' subsequent conviction in the 2009 Case during resentencing for the 2008 Case, the Motion is **DENIED**.

* * *

Municipal corporations—Employees—City manager—Dismissal—City council had cause to dismiss city manager for extensive history of mismanagement, poor relations, dishonesty and disrespect to council members—Whistle-blower retaliation—Manager's statement at city council meeting expressing disappointment that council was not following rules of order and procedure by addressing anonymous complaint against manager did not constitute protected whistleblowing complaint—Interview of manager by city's insurance counsel for purposes of obtaining information to respond to EEOC charge against manager does not constitute protected whistleblowing activity—Further, extensive record of manager's misconduct demonstrates that dismissal was not pretext for retaliatory discrimination—Council member's public reading of anonymous allegations against manager did not violate Whistle-blower Act protections—Allegations were not information under Act where there was no active investigation at the time the allegations were read—Even if allegations were confidential, Act allows for release of confidential information to persons in position to prevent danger or commission of crime—Further, because Act imposes only criminal penalties for improper disclosure of confidential information, manager lacks standing to raise allegation in civil complaint

CHARLES W. STEPHENSON, Plaintiff, v. THE CITY OF TEMPLE TERRACE, a Florida municipal corporation, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CA-4878. August 25, 2023. Paul L. Huey, Judge. Counsel: Craig Berman, Berman Law Firm, P.A., St. Petersburg, for Plaintiff. Robert Michael Eschenfelder, Trask Daigneault, LLP, Clearwater, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Temple Terrace's Motion for Summary Judgment was heard on August 14, 2023. The Court, having heard arguments of counsel, considered the pleadings, Defendant's motion and Plaintiff's response, and being otherwise advised in the premises, the Court **FINDS, ADJUDGES and DECREES:**[1]

Factual Background

Temple Terrace has a Council-Manager form of government with Council serving as the legislative branch and a City Manager as "administrative director" of the City's administrative branch. Section § 2.14 of the City Charter provides that the City Council "appoints and removes" the City Manager.

On July 5, 2016, City Council appointed Stephenson as City Manager. The written employment agreement at issue in this case was effective on February 27, 2021, with a term of 3 years, expiring on February 29, 2024.

The main issue in the case is whether Stephenson was fired for cause or without cause. If "without cause" he is entitled to 20 weeks of severance pay. If "with", nothing. There is a secondary whistleblower claim.

At its meeting of February 1, 2022, the Council unanimously voted to terminate Stephenson for cause. On February 4, 2022, the Mayor of Temple Terrace sent a letter to Stephenson informing him that he was terminated effective 7:38 p.m. February 1, 2022, based on a unanimous vote of the Council. The letter set forth as grounds of termination: 1. Failure to perform the duties of the City Manager's position in a satisfactory manner; 2. Willful disregard of City policies and procedures; and 3. Insubordination or deliberate refusal to follow the instructions of City Council. The letter noted that, among other things, Stephenson had recently failed to prevent the improper conduct of his subordinate, Mr. Anisi, who was arrested for conduct undertaken on the job; that Stephenson had failed to cooperate with the subsequent investigation into the alleged wrongdoings of Mr. Anisi, as he had promised; that he had mishandled the Finance Director's discipline in such a way that the City received an EEOC charge, and the City Council had to convene a special meeting to bring issues regarding the Finance Director to a conclusion; and that he had allowed an unlicensed contractor to perform work for the City. Finally, the letter indicated that in addition to these specific matters, several of the Council members' trust in his management and leadership abilities had been significantly eroded, particularly in selecting contractors, handling employees, and being forthright with Council.

Analysis of the Claims

Fla. R. Civ. P. 1.510(a) provides:

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.

In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a]. "A movant is entitled to summary judgment if no reasonable finder of fact could return a verdict for the nonmoving party." *G & G In-Between Bridge Club Corporation v. Palm Plaza Associates, Ltd.*, 356 So.3d 292, 296 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D275a]. "A party moving for summary judgment bears 'the burden of proving the absence of a genuine issue of material fact.' " *Norman v. DCI Biologicals Dunedin, LLC*, 301 So. 3d 425, 428 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1021a]. "Under the federal summary judgment standard now applicable in Florida's state courts, where, as here, the nonmoving party bears the burden of proof on a dispositive issue at trial, the moving party need only demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Rich v. Narog*, __ So.3d __, 2022 WL 436060, *4 (Fla. 3rd DCA September 21st 2022) [47 Fla. L. Weekly D1933a]. An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Mize v. Jefferson City Bd. Of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996). A fact is material if it may affect the outcome of the suit under the governing law. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

> Under the new standard, once the moving party satisfies this initial burden, the burden then shifts to the nonmoving party to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Specifically, it is incumbent upon the nonmoving party to come forward with evidentiary material demonstrating that a genuine issue of fact exists as to an element necessary for the non-movant to prevail at trial. A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Importantly, though, if the evidence presented by the nonmovant is merely colorable, or is not significantly probative, summary judgment may be granted.

Rich, 2022 WL 436060 at *5. Internal citations, brackets and quotations omitted.

The Court notes that although it gave careful consideration to Stephenson's response to the City's motion, Stephenson failed to cite to the record in that response, even once. It is well-settled under the federal judiciary's interpretation of the summary judgment standard that a principal purpose of the summary judgment rule is "to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). But courts do not have "an obligation to parse a summary judgment record to search out facts or evidence not brought to the court's attention." *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 463 F.3d 1201, 1209 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C1035a]. As the court in *Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C154a] explained, judges "are not like pigs, hunting for truffles buried in briefs. . .". Thus, while the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor", *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), where the motion is supported by an extensive citation to the record, the non-movant becomes obligated to demonstrate the existence of a material issue of fact. See, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("[T]he party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts"). As the Court will now explain, Stephenson has failed to demonstrate that there is a material issue of fact as to either count in his Complaint preventing summary judgment.

COUNT I—BREACH OF CONTRACT:

In Count I (breach of contract), Stephenson alleges that his discharge was "without cause" and that the City failed to pay him for the 20 weeks of severance pay his contract provides for if he were terminated without cause. Under § 3 of his February 27th 2021 employment contract, Stephenson had a term of employment of 36 months ending February 29th 2024, unless "the termination of City Manager by an affirmative vote of the majority of the City Council in accordance with Section 4 of this Agreement." In turn, § 4 provided:

> The City may terminate the City Manager for "cause." Termination by the City of the City Manager for "cause" **shall include, but not be limited to**, termination based on any of the following grounds (emphasis added):
>
> (a) Failure to perform the duties of the City Manager's position in a satisfactory manner;
>
> (b Fraud, misappropriation, embezzlement or acts of similar dishonesty;
>
> (c) Conviction of a felony involving moral turpitude;
>
> (d) Illegal use of drugs or excessive use of alcohol in the workplace;
>
> (e) Intentional and willful misconduct that may subject the City to criminal or civil liability;
>
> (f) Breach of the City Manager's duty of loyalty, including the diversion or usurpation of corporate opportunities properly belonging to the City;
>
> (g) Willful disregard of City policies and procedures;
>
> (h) Breach of any of the material terms of this Agreement; and
>
> (i) Insubordination or deliberate refusal to follow the instructions of the City Council.
>
> In the event the City Manager is terminated for "cause," the City shall provide notice to the City Manager stating the reason for termination and the allegations leading to termination. The City shall have no obligation to pay any severance pay unless and until the City Manager is found not guilty of any charges by a court of competent jurisdiction.
>
> In the event that the City Manager is terminated without cause by the City, the City shall pay the City Manager a lump sum cash payment equal to twenty (20) weeks aggregate salary, the maximum compensation permitted pursuant to Section 215.425(4)(a), Florida Statutes.

Because the City Council (1) voted to terminate Stephenson for cause; (2) the contract does not give Stephenson any due process appeal right to question the Council's judgment as to what it determines "cause" to be; (3) the City subsequently provided him with the written notice; and (4) that the termination was supported by a variety of validated, substantive, reasonable facts, Stephenson cannot, as a matter of law, establish a breach of his contract. *See, e.g., White v. Ft. Myers Beach Fire Control Dist.*, 302 So.3d 1064, 1071 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2094a]:

> If a contract's terms are clear and unambiguous, the language itself is the best evidence of the parties' intent and its plain meaning controls, warranting summary judgment.

Id., quoting *Pearson v. Caterpillar Fin. Servs. Corp.*, 60 So.2d, 1171

(Fla. 4th DCA 2011) [36 Fla. L. Weekly D1073a]. See also, *Muniz v. GCA Services Group, Inc*., 2006 WL 2130735 (M.D. Fla., July 28th 2006) (granting summary judgment on plaintiff's suit against his employer for breach of contract for failure to pay monies allegedly due as a bonus).

In Count I, Stephenson argues that a jury must decide whether Council's reasons for his termination were of sufficient cause. But the law and unrebutted facts set forth in the City's motion more than adequately establish the Council had ample performance and conduct reasons to relieve Stephenson of his duties for cause. Those include not just the pavement contractor matter and the mishandling of the Finance Director's discipline issues, but also Stephenson's (a) questionable honesty as to the gas tax issue; (b) his signing a notice of commencement under oath listing himself as a contractor when he was not the contractor nor licensed to be one; (c) his unilaterally disbanding the Mayor's Youth Council without the Mayor's permission; (d) his poor oversight of the permitting process; (e) his failure to perform written evaluations of his department directors as required; (f) his unprofessional treatment of the City Attorney, certain members of Council and citizens; and (g) several years of significantly poor performance evaluations from Council members, among the other instances detailed in the City's motion.

Because the phrase "for cause" is a contractual term, rules of contract interpretation apply. Therefore, the court must apply the plain meaning of the phrase. *Crapo v. Univ. Cove Partners, Ltd*., 298 So. 3d 697, 700 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1538e]. As the court in *Walton v. Lake-Sumter State College*, __ So.3d __ [360 So. 3d 1186], 2023 WL 2938525 (Fla. 5th DCA April 14th 2023) [48 Fla. L. Weekly D780g] pointed out:

> According to the foremost legal dictionary, "for cause" is defined as "[f]or a legal reason or ground. The phrase expresses a common standard governing the removal of a civil servant or an employee under contract." *For Cause, Black's Law Dictionary* 673 (8th ed. 2004).

Walton, *2. See also, *In re Piazza*, 719 F.3d 1253, 1261 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C384a], wherein the Eleventh Circuit Court of Appeals quotes Black's Law Dictionary, but adds that the understanding of "cause" "is not limited to legal dictionaries. Non-legal sources from 1978 to the present have consistently defined 'cause' as '[g]ood or sufficient reason,' as '[g]ood, proper, or adequate ground of action,' or as 'reasonable grounds for doing . . . something.' " 719 F.3d at 1261 (dictionary citations omitted).

Even if the Council had not set out detailed reasons tied to cause categories in the contract in its discussion of the termination motion, and in the subsequent notice letter, in the public sector setting, where "cause" is not a defined term, the courts will give broad leeway to a governing board to terminate for cause. For instance, in *Spurlin v. School Board of Sarasota County*, 520 So. 2d 294, 296 (Fla. 2d DCA 1988), the deputy school superintendent argued that "good cause" for termination was limited to the "seven-deadly sins" set out in a statute applicable to educator conduct.

The Second District rejected this narrow view, concluding the "good cause" standard that applied to the deputy school superintendent went beyond the seven offenses. The court stated that as "amorphous and unbounded as the words 'good cause' may seem when not specifically elaborated upon by the legislature, we are unwilling to ascribe to the expression a limitation which forecloses a school board from exercising its ability to decline a recommendation for a *lawful, rational, non-arbitrary, non-statutory reason*." *Id*. at 296 (emphasis added). That *Spurlin* involved construction of "cause" under a statute versus under a written contract like the one at issue here is a distinction without a difference.

In sum, the record is undisputed that Stephenson was terminated for grounds expressly enumerated, and indeed more. As the court in *Spurlin v. School Board of Sarasota County*, 520 So.2d 294, 296 (Fla. 2d DCA 1988) explained, "good cause" will not limit a recommendation that is made for lawful, rational, non-arbitrary reason. The case of *Video Electronics, Inc. v. Tedder*, 470 So. 2d 4 (Fla. 4th DCA 1985) is also consistent with this ruling. Giving Stephenson every benefit of the doubt, even if he has a dispute with one or two grounds for the termination (even though he cited no record evidence to that effect), in the totality of the circumstances, the City's proof is overwhelming.

COUNT II—WHISTLEBLOWER RETALIATION:

Florida Statutes §112.3187 provides, in relevant part:

Adverse action against employee for disclosing information of specified nature prohibited; employee remedy and relief

(1) Short title.—Sections 112.3187-112.31895 may be cited as the "Whistle-blower's Act."

(2) Legislative intent.—It is the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee.

(3) Definitions.—As used in this act, unless otherwise specified, the following words or terms shall have the meanings indicated:

(a) "Agency" means any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university.

(b) "Employee" means a person who performs services for, and under the control and direction of, or contracts with, an agency or independent contractor for wages or other remuneration.

(c) "Adverse personnel action" means the discharge, suspension, transfer, or demotion of any employee or the withholding of bonuses, the reduction in salary or benefits, or any other adverse action taken against an employee within the terms and conditions of employment by an agency or independent contractor.

(d) "Independent contractor" means a person, other than an agency, engaged in any business and who enters into a contract, including a provider agreement, with an agency.

(e) "Gross mismanagement" means a continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions, or fraudulent or criminal conduct which may have a substantial adverse economic impact.

(4) Actions prohibited.—

(a) An agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section.

(b) An agency or independent contractor shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's disclosure of information under this section.

(c) The provisions of this subsection shall not be applicable when an employee or person discloses information known by the employee or person to be false.

(5) Nature of information disclosed.—The information disclosed under this section must include:

(a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.

(b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

(6) To whom information disclosed.—The information disclosed under this section must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act, including, but not limited to, the Office of the Chief Inspector General, an agency inspector general or the employee designated as agency inspector general under s. 112.3189(1) or inspectors general under s. 20.055, the Florida Commission on Human Relations, and the whistle-blower's hotline created under s. 112.3189. However, for disclosures concerning a local governmental entity, including any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the information must be disclosed to a chief executive officer as defined in s. 447.203(9) or other appropriate local official.

(7) Employees and persons protected.—This section protects employees and persons who disclose information on their own initiative in a written and signed complaint; who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity; who refuse to participate in any adverse action prohibited by this section; or who initiate a complaint through the whistle-blower's hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs; or employees who file any written complaint to their supervisory officials or employees who submit a complaint to the Chief Inspector General in the Executive Office of the Governor, to the employee designated as agency inspector general under s. 112.3189(1), or to the Florida Commission on Human Relations. The provisions of this section may not be used by a person while he or she is under the care, custody, or control of the state correctional system or, after release from the care, custody, or control of the state correctional system, with respect to circumstances that occurred during any period of incarceration. No remedy or other protection under ss. 112.3187-112.31895 applies to any person who has committed or intentionally participated in committing the violation or suspected violation for which protection under ss. 112.3187-112.31895 is being sought.

(8) Remedies.—

(a) Any employee of or applicant for employment with any state agency. . .[not applicable].

(b) Within 60 days after the action prohibited by this section, any local public employee protected by this section may file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure for handling such complaints or has contracted with the Division of Administrative Hearings under s. 120.65 to conduct hearings under this section. The administrative procedure created by ordinance must provide for the complaint to be heard by a panel of impartial persons appointed by the appropriate local governmental authority. Upon hearing the complaint, the panel must make findings of fact and conclusions of law for a final decision by the local governmental authority. Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction. If the local governmental authority has not established an administrative procedure by ordinance or contract, a local public employee may, within 180 days after the action prohibited by this section, bring a civil action in a court of competent jurisdiction. For the purpose of this paragraph, the term "local governmental authority" includes any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing.

(c) Any other person protected by this section may, after exhausting all available contractual or administrative remedies, bring a civil action in any court of competent jurisdiction within 180 days after the action prohibited by this section.

(9) Relief.—In any action brought under this section, the relief must include the following:

(a) Reinstatement of the employee to the same position held before the adverse action was commenced, or to an equivalent position or reasonable front pay as alternative relief.

(b) Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate.

(c) Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the adverse action.

(d) Payment of reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith.

(e) Issuance of an injunction, if appropriate, by a court of competent jurisdiction.

(f) Temporary reinstatement. . . . . This paragraph does not apply to an employee of a municipality.

(10) Defenses.—It shall be an affirmative defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than, and would have been taken absent, the employee's or person's exercise of rights protected by this section.

Under Florida's Whistle-blower's Act, a public employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory or retaliatory reason. *O'Neill v. St. Johns River Water Management District*, 341 F.Supp.3d 1292 (M.D. Fla. 2018). To state a cause of action under the Whistle-blower's Act, three elements must be established:

(1) prior to termination the employee made a disclosure protected by the statute;

(2) the employee was discharged; and

(3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.

Walker v. Florida Dept. of Veterans' Affairs, 925 So.2d 1149 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1153c].

In Count II, Stephenson alleges that the statement he read at the August 17th 2021 Council meeting was protected activity because he was "disclosing malfeasance" in that he objected to Abel's conveying of the allegations on August 3rd in public violated § 112.3188. As noted *supra*, the statement Stephenson read from then handed to the Clerk expressed his "disappointment" that the Council "chose to violate the City Rules of Order and Procedure by addressing an anonymous complaint. . ." Stephenson then pledged his "full cooperation with any investigation this Council may decide on", and he noted that "when the facts of this matter are brought to light, I expect to be fully exonerated. . ."[2]

First, even if the statement read by Stephenson on August 17th and handed to the Council's Clerk was signed by him (Stephenson did not attach a copy to his Complaint, and his response to the City's motion does not point the Court to where in the record the signed document could be found), the only thing he indicated was "disappointment" that the Council was, in his view, not following the City Rules of Order and Procedure by addressing an anonymous complaint against the City Manager. This one line can in no way be seen to be an allegation of a "violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or

welfare.

Next, Stephenson's statement was not a writing provided to Council members. Stephenson did not hand out copies of his statement to the Council members. Rather, he only handed one copy to the Council Clerk and the record contains no evidence that it was handed out to Council members. Thus, the only communication to the Council members was the verbal statement. However, a verbal statement is not enough.

As noted in *Crouch v. Public Service Com'n*, 913 So.2d 111 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2481b], review denied 933 So.2d 520, a state employee's verbal complaints to his supervisory officials did not constitute whistle-blower complaints, even though supervisors relayed the complaints to employee designated as agency inspector general. See also, *Batz v. City of Sebring*, 794 Fed.Appx. 889, 2019 WL 6769671 (11th Cir. 2019), wherein the court found that a former city fire chief's email to city administrator seeking clarification in writing as to the actions to be taken with respect to a historic building that was not in compliance with state fire code was not a "written and signed complaint," as relevant to a claim for retaliatory discharge under the Florida Whistle-blower's Act. The court found that the email in question made no explicit reference to misconduct on administrator's part and, therefore, failed to document what fire chief disclosed in any meaningful sense, and that the administrator's response confirmed that the primary purpose of the email exchange was to clarify what steps fire chief was to take in condemning the building, and that no amount of context could convert the email into disclosure of official malfeasance or misfeasance.

But that issue aside, Stephenson's statement simply cannot be characterized as the disclosure of an "act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor." See, *Pickford v. Taylor County School District*, 298 So.3d 707 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1556a] (to state a claim under the Whistle-blower's Act based on termination, employee must establish he made a protected disclosure before his termination. Former substitute teacher's letter sent to elementary school principal disputing his pay rate was not statutorily protected disclosure under Whistle-blower's Act, and thus could not form basis for teacher's claim against school district under Act; letter failed to identify any violation of law, rule, or policy that would present a substantial and specific danger to the public's health, safety, or welfare, nor did it identify any act of misfeasance, malfeasance, or other gross conduct that would have triggered the Act's protections).

The recent federal case of *McAlpin v. Town of Sneads, Florida*, 61 F.4th 916 (11th Cir. 2023) [29 Fla. L. Weekly Fed. C2272a], which applied Florida's law, has similarities to this case. McAlpin was a long-serving chief of police. However, after a City Council election which brought on new members, McAlpin's relationship with Council began to deteriorate. Council eventually voted to terminate the Chief and he sued for violation of the Whistleblower's Act. McAlpin claimed he engaged in seven "protected activities":

> (1) he told Grice about Pettis's and Johnson's criminal history and provided her supporting documents; (2) he passed along Wright's statement reporting Griffin's alleged theft to the FDLE; (3) he voiced concerns about the midnight dispatch position at Town Council meetings and on Facebook; (4) he told Pettis that removal of a disciplinary memo violated the Public Records Act; (5) he delivered a "whistleblower" letter to the Town Council; (6) he emailed Bell about her alleged improper accounting for his leave time; and (7) he verbally complained to Town Attorney Green that the Town Council "illegally" placed Bell over him as his supervisor.

McAlpin, at 926.

The trial court found, however, that none of these activities were protected under the FWA because most were oral (and not in a signed written complaint) and the ones that were in writing were not made to an appropriate local official and/or did not report the type of information described in Florida Statute § 112.3187(5). The appeals court agreed:

> based on the unambiguous language and structure of the statute, McAlpin's disclosures constitute "statutorily protected activity" only if they satisfy either of the two enumerated requirements of subsection (5). Reviewing the disclosures McAlpin identifies, we hold that they do not satisfy subsection (5). Based on the record evidence, the disclosures that McAlpin identifies did not implicate either "[a]ny violation or suspected violation of any federal, state, or local law, rule, or regulation . . . which creates and presents a substantial and specific danger to the public's health, safety or welfare," *id*. § 112.3187(5)(a) (emphasis added), or "[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty," *id*. § 112.3187(5)(b).

McAlpin, 930.

The various statements made by McAlpin were far more numerous and detailed than the one expression of "disappointment" Stephenson uttered at Abel's alleged failure to comply with a City Council rule. Inasmuch as the *McAlpin* court found McAlpin's statements to not be protected by the statute, Stephenson's comment to the Council that he was disappointed that Abel discussed the allegations at the earlier Council meeting is simply not protected under the statute as a Whistleblower complaint.

Next, while Stephenson may strongly contend that he was, in fact, not as involved in the pavement project scandal (either as a player or as negligent manager who was not paying enough attention) as Council felt he was, what matters is what Council members were believing at the time. As the court in *Allocco v. City of Coral Gables*, 221 F.Supp.2d 1317 (S.D. Fla. 2002) confirmed, termination based on a good faith belief of an employee's misconduct is legitimate, for purpose of demonstrating non-pretextual reason for terminating employee in action under Florida's whistleblower statute, even if it is later determined that no misconduct occurred.

And, while Stephenson's Complaint also seems to try to shoehorn in his status as a protected whistleblower because of his participation in responding to Boswell's EEOC charge *against him* (an attempt Stephenson appears to have abandoned in his response and during argument on the City's motion) the statute's participation clause states protection is afforded employees "who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity." In this case, no government entity requested Stephenson participate in responding to Boswell's EEOC charge *against him*. Rather, after the charge was filed, the City's insurance defense counsel interviewed Stephenson so as to obtain information to draft a response to the EEOC charge. There is no record evidence the EEOC or any other entity sought to interview Stephenson. Indeed, even if they did, Stephenson does not allege in his *Complaint* that what he had to say fell within the disclosures outlined in Florida Statutes 112.3187(5).

In addition to Stephenson's inability to set out his own FWA case, the statute also provides the City an affirmative defense to the effect that, even if Stephenson had engaged in protected activity, the City must prevail if it establishes (a) that Stephenson's termination was predicated on grounds other than the alleged protected conduct, and (b) the City Council would have taken the same action even in the absence of such conduct. The City's *Answer and Affirmative Defenses* raises this affirmative defense. The Court finds that the City has met its burden of proof as to this affirmative defense as well. The extensive

record of mismanagement, poor relations, dishonesty, and disrespect to elected Council Members, coupled with the deposition testimony of a majority of Council Members, establishes that the City would have terminated Stephenson for cause whether he had made his August 17th statement or not.

See, for instance, *Batz v. City of Sebring*, 794 Fed.Appx. 889, 2019 WL 6769671 (11th Cir. 2019), wherein the court found that a former city fire chief failed to show that the proffered reasons for his termination, namely, his demeanor, attitude, treatment of others, and leadership of the fire department, were pretextual, as required to proceed with his claim for retaliatory discharge under the Florida Whistleblower's Act, alleging he was terminated based on his oral complaints about city officials undermining his efforts to enforce the state fire code. The court found that while the mayor's testimony and written statement recommending the fire chief's discharge, the city's response to interrogatories, and a councilman's affidavit all made reference to the chief's complaints, the documents did not contradict the city's proffered non-retaliatory reasons for the fire chief's discharge.

Also, in *Elver v. Hendry County Sheriff's Office*, 791 Fed.Appx. 56, 2019 WL 5448539 (11th Cir. 2019), the court found that the county sheriff's proffered legitimate, non-retaliatory reasons for deputy sheriff's dismissal, namely, insubordination, disparagement of superiors, and lowering agency morale by playing to deputy sheriff's subordinates a recording of meeting discussing transferring deputy sheriff while disparaging other officers, were not pretexts for retaliatory termination in violation of Florida Whistleblower Act regarding deputy sheriff's testimony about alleged misconduct of another deputy sheriff. The court found that the deputy sheriff never told anyone at the sheriff's office that he was involved in the matter concerning the alleged misconduct, and the decision to initiate an investigation, the investigation and its findings, the decision to recommend disciplinary action, and the decision to terminate the deputy's employment were all based solely on conduct surrounding the recording.

The inquiry into an allegation that an employer's proffered non-retaliatory reasons are a mere pretext for retaliation, with respect to a public employee's retaliation claim under Florida's Whistle-blower's Act, centers on the employer's beliefs, not the employee's beliefs and not on reality as it exists outside of the decision maker's head. *O'Neill v. St. Johns River Water Management District*, 341 F.Supp.3d 1292 (M.D. Fla. 2018). Thus, in *O'Neill*, the court found that the employee failed to demonstrate that employer's proffered reason for terminating him from his information technology position in the water management district, which was that he unilaterally revoked others' permissions to access to software used by the finance department, causing the IT department to go into emergency mode to investigate and restore use of the system to all users and network administrators, was a pretext for whistleblower retaliation for his complaining about mismanagement. Therefore, the employee's retaliation claim was precluded under the Whistle-blower's Act since the employee put forth no evidence that the employer was dissatisfied with him for retaliatory reasons and the employee merely disagreed with the employer's reasons for terminating him. That appear to be Stephenson's position in this case as well.

Finally, even if Stephenson's interview by the City's defense counsel to assist counsel with drafting a response to Boswell's EEOC charge could be characterized as protected participation under the statute, Stephenson's depositions of Council Members did not establish that any Council Member had knowledge of the extent of the Manager's participation in developing the response to Boswell's EEOC charge. Indeed, there is no testimony any Council Member even knew Stephenson participated in responding to the EEOC charge. As was pointed out in *Dipietro v. City of Hialeah*, 424 F.Supp.3d 1286 (S.D. Fla. 2020), to establish a causal connection between a statutorily protected expression and a materially adverse action, as required to state claim for retaliatory discharge under the Florida Whistleblower Act, a plaintiff must show that decision-makers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated.

Turning to the portion of Stephenson's Complaint wherein he alleges Councilwoman Abel improperly disclosed the anonymous allegations in violation of Florida Statutes § 112.3188, that statute provides, in relevant part:

Confidentiality of information given to the Chief Inspector General, internal auditors, inspectors general, local chief executive officers, or other appropriate local officials

(1) The name or identity of any individual who discloses in good faith to the Chief Inspector General or an agency inspector general, a local chief executive officer, or other appropriate local official information that alleges that an employee or agent of an agency or independent contractor:

(a) Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or

(b) Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty may not be disclosed to anyone other than a member of the Chief Inspector General's, agency inspector general's, internal auditor's, local chief executive officer's, or other appropriate local official's staff without the written consent of the individual, unless the Chief Inspector General, internal auditor, agency inspector general, local chief executive officer, or other appropriate local official determines that: the disclosure of the individual's identity is necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime; or the disclosure is unavoidable and absolutely necessary during the course of the audit, evaluation, or investigation.

(2) (a) Except as specifically authorized by s. 112.3189, all information received by the Chief Inspector General or an agency inspector general or information produced or derived from fact-finding or other investigations conducted by the Florida Commission on Human Relations or the Department of Law Enforcement is confidential and exempt from s. 119.07(1) if the information is being received or derived from allegations as set forth in paragraph (1)(a) or paragraph (1)(b), and an investigation is active.

(b) All information received by a local chief executive officer or appropriate local official or information produced or derived from fact-finding or investigations conducted pursuant to the administrative procedure established by ordinance by a local government as authorized by s. 112.3187(8)(b) is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the information is being received or derived from allegations as set forth in paragraph (1)(a) or paragraph (1)(b) and an investigation is active.

(c) Information deemed confidential under this section may be disclosed by the Chief Inspector General, agency inspector general, local chief executive officer, or other appropriate local official receiving the information if the recipient determines that the disclosure of the information is absolutely necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime. Information disclosed under this subsection may be disclosed only to persons who are in a position to prevent the danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime based on the disclosed information.

1. An investigation is active under this section if:

a. It is an ongoing investigation or inquiry or collection of information and evidence and is continuing with a reasonable, good faith anticipation of resolution in the foreseeable future; or

b. All or a portion of the matters under investigation or inquiry are active criminal intelligence information or active criminal investigative information as defined in s. 119.011.

2. Notwithstanding sub-subparagraph 1.a., an investigation ceases to be active when:

a. The written report required under s. 112.3189(9) has been sent by the Chief Inspector General to the recipients named in s. 112.3189(9);

b. It is determined that an investigation is not necessary under s. 112.3189(5); or

c. A final decision has been rendered by the local government or by the Division of Administrative Hearings pursuant to s. 112.3187(8)(b).

3. Notwithstanding paragraphs (a), (b), and this paragraph, information or records received or produced under this section which are otherwise confidential under law or exempt from disclosure under chapter 119 retain their confidentiality or exemption.

4. Any person who willfully and knowingly discloses information or records made confidential under this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Stephenson's Complaint alleges that Abel's reading of the anonymous allegations at the Council meeting was a violation of subsection (2)(b). However, as the text of that subsection confirms, it only addresses information received when "an investigation is active" and which alleges that a public official:

Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or

Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty

Unless the individual making the allegations consents to the information's release.

In this case, there are several reasons why this statute provides Stephenson no relief. First, there was, when the allegations were read by Councilwoman Abel to her Council colleagues, no active investigation.[3] Next, the individual who provided the allegations to Abel not only consented to the release of the allegations, but expressly intended that they be released, which was the entire reason the allegations were given to Abel to begin with.

Further, while it is now known that Mr. Collins, a former City Police Officer, was the author of the allegations, at the time the allegations were coming from an anonymous source. Thus, they were not even covered by Florida Statutes § 112.3188. As pointed out in *Shaw v. Town of Lake Clarke Shores*, 174 So.3d 444 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1827a], rehearing denied, review denied 2016 WL 1734980, an anonymous letter creates issues of proof as to who the whistleblower is at the time the disclosure is made, which is contrary to the purpose of the written and signed complaint requirement to state a retaliation claim under the Florida Public Sector Whistleblower's Act.

Next, even if the allegations Abel received and conveyed were to constitute confidential information under the statute, she had the right to convey it to her Council colleagues if, in her determination, the disclosure was "absolutely necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime." At the relevant time, all Councilwoman Abel knew was that very serious corruption allegations had been given to her, and that for all she knew, similar corrupt deals were still ongoing. She would also be within her rights to determine that a recreation facility constructed by an unlicensed contractor may not be safe for public use.

Further, the statute provides that when confidential information is released, it should be disclosed to "persons who are in a position to prevent the danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime based on the disclosed information." In this case, Stephenson only reported to, and thus could be controlled by, Council. And, under Florida's Sunshine Law, a member of a City Council could not discuss City business with her colleagues outside of a noticed, public meeting. Therefore, Abel's disclosure of the allegations clearly fit within the statute's terms.

Finally, the City argued, and the Court agrees, that Florida Statutes § 112.2188 does not grant standing to Stephenson to raise an allegation of its violation. Rather, subsection (c)(4) of the statute imposes only *criminal* penalties for a public official who "willfully and knowingly" improperly discloses information made confidential by the statute. Thus, the only person who could address any alleged violation of this statute by Councilwoman Abel would be the State Attorney. Stephenson's discussion of this topic in his civil *Complaint* is, therefore, irrelevant and he can seek no relief based on his allegations.

Conclusion

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED** that Defendant City of Temple Terrace's *Motion for Summary Judgment* is hereby **GRANTED**.

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[1]The Court is providing a review of the facts which are most central to the issues in the case. However, the Court further adopts by reference the more extensive factual review set forth in the City's Motion for Summary Judgment inasmuch as that factual review is specifically tied to citations in the record before the Court.

[2]Stephenson stated at the August 17, 2021, City Council meeting: Thank you, Mr. Mayor. If. . .I may, I would like to just kind of make a statement regarding our last meeting. While. . .I was disappointed that this body chose to violate the City rules of Order and Procedure by addressing an anonymous complaint against the City Manager at our last meeting, I am, nonetheless, pledged—pledging my full cooperation with any investigation this Council may decide on. And when the facts of this matter are brought to light, I expect to be fully exonerated of the alleged wrongdoing referenced by the still unnamed complainant. I am looking forward to putting this matter behind us, but until then, I will continue to attend to the business of the City for the good of our citizens, businesses, and the City staff who serve them. Thank you sir.

[3]See **AGO 99-07** opining that records made and received by an inspector general conducting an active investigation of a whistle-blower disclosure are confidential and remain confidential until resolution of the investigation; but that the initial report received by the inspector general was a public record *because it was received before the start of the investigation* but the name and identity of the whistle-blower are confidential.

* * *

Torts—Negligence—Motor vehicle accident—Damages—Past and future medical expenses—Evidence—Retroactive application of statute—Section 768.0427, which addresses admissible evidence of past and future medical expenses and requires certain disclosures when damages are incurred under letters of protection, is applicable to case pending at time statute was enacted

ROBERT GRISAR, Plaintiff, v. TREVOR BRATE and KATHLEEN BRATE, Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CA-12920. Division E. August 23, 2023. Anne-Leigh Gaylord Moe, Judge. Counsel: Sumeet Kaul, Morgan & Morgan, Tampa, for Plaintiff. Julian Wood, Wood & Wood, P.A., St. Petersburg, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION IN LIMINE

THIS CAUSE comes before the Court on a Motion in Limine (the "**Motion**") filed by Defendants Trevor Brate and Kathleen Brate. The Motion was heard on August 10, 2023. Sumeet Kaul, Esq. of Morgan & Morgan represented Plaintiff Robert Grisar. Julian Wood, Esq. of Wood & Wood, P.A. represented Defendants.

I. The Act & the Statute

The Florida Legislature recently addressed past medical expenses and letters of protection as part of a tort reform bill called HB 837. HB

837 was enacted as Chapter 2023-15, Florida Laws (the "**Act**"). Among other things, the Act included the language that is now Section 768.0427, Florida Statutes[1] (the "**Statute**"). The Statute took effect on March 24, 2023 when Governor DeSantis signed HB 837. Section 6 of HB 837 provides that, in pertinent part, the Statute will read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) A copy of the letter of protection.

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

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

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

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

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

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

II. The Motion

In the Motion, Defendants ask this Court to apply the Statute to this case. Specifically, Defendants request:

(a) With respect to medical expenses incurred in the past and already paid, that evidence presented to the jury by Plaintiff be limited to only the amount actually paid by any payer;

(b) With respect to medical expenses incurred in the past that remain unpaid, that Defendants be allowed to offer any evidence specifically permitted by section 768.0427(2)(b), including evidence of the amount of any third-party loan services were paid in return for the right to receive payment under any letters of protection; and

(c) With respect to future medical expenses to be incurred and paid in the future, that Defendants be permitted to offer any evidence specifically permitted by section 768.0427(2)(c).

III. Analysis

A. Adoption & Incorporation of Prior Rulings

Two prior orders entered on the same legal issue are attached, adopted, and incorporated. The order in *Torres-Aponte*[2] (the "**Torres-Aponte Order**") attached, adopted, and incorporated the order in *Sapp v. Brooks*[3] (the "**Sapp Order**") and **Exhibit A** contains both orders. In addition to reasons laid out below, the Motion is granted for the same reasons articulated in the Torres-Aponte Order and the Sapp Order.

The Sapp Order began the analysis with an effort to discern, structurally, how Florida's judicial branch approaches the temporal reach of new statutes. It concluded that, in Florida, there are certain default settings and the analysis of temporal reach in the state court system differs from how federal courts approach the topic. The Sapp Order speculated (but did not rest its conclusion on the idea) that the reasons for Florida's decisional framework relate to our separation of powers, which is more pronounced than the United States Constitution's separation of powers.

The Torres-Aponte Order engaged in a textual analysis of Section 30 of the Act. It concluded that, consistent with the decisional framework and default settings discussed in the Sapp Order, Section 30 was the Legislature's acknowledgement of our branch's temporal reach framework.

Others soon will be asked to lay down a more definitive ruling on these issues. With that in mind, two more points are made. First, Florida history helps explain why this issue is complicated. Second, data supports the need for a final resolution as soon as possible. On the latter point, there is an obvious advantage to seeing this issue play out with boots on the ground. Whoever gets the baton next may find it helpful to know that (a) the temporal reach of this Statute is a matter of potentially massive financial significance to the parties either way and (b) the ultimate resolution of this question will potentially impact more than 50% of this Circuit's civil docket. Neither (a) nor (b) compels any particular conclusion other than that an answer was needed yesterday.

B. A Little Florida History

It may be necessary to wrestle with how it is that all of the following statements could be true: (1) Florida has in Article III, section 2 of its Constitution a more rigid separation of powers[4] than exists in the United States Constitution; (2) among the exclusive powers given to the judicial branch in the Florida Constitution is rule-making authority[5] under Article V, section 2(a); but (3) if the Legislature passes a statute that has procedural aspects, trial courts are to presume it is constitutional and should apply the new law to pending cases even before it is taken up[6]; (4) when a new statute eventually makes its way to the Supreme Court the Court may find that the statute was procedural and an encroachment on its rule-making authority[7] and/or it may resolve any constitutional problems by adopting the statute as a rule of procedure "to the extent it is procedural,"[8] and (5) the judicial branch does not look to the Legislature for temporal reach direction on statutes that it has found to be procedural.[9]

Florida history isn't just for fourth graders. For that lawyer who has kept Florida's Rules of Court at his or her right hand since passing the bar, it is almost inconceivable that there was a time when those rules did not exist in that form. But for the first 135 years of its statehood, Florida did not have the Florida Evidence Code and for the first 100 years or so we did not have the Florida Rules of Civil Procedure. *See* A Brief History, Florida Department of State, https://dos.myflorida.com/florida-facts/florida-history/a-brief-history/ (last visited Aug. 16, 2023); *In Re Florida Evidence Code,* 372 So. 2d 1369 (Fla. 1979) (temporarily adopting the Florida Evidence Code two days before the effective date of the act unanimously adopted by the Legislature in the 1976 session); *Petition of Florida State Bar Ass'n for Adoption of Rules for Practice and Procedure,* 155 Fla. 710 (Fla. 1945) (forming a committee appointed by the Chief Justice to make recommendations to the Court "for early consideration and adoption").

Florida's constitutional design reflects that we as its people are the source of our government's power and we retain our right to define and control the terms and conditions under which we consent to be governed. The power structure in Floridians' relationship with the government often comes into play when the Florida Supreme Court takes up matters that pertain to procedure in trial courts. In 1940, the fact that the people had not (yet) given the judicial branch the power to lay down uniform rules of procedure was the reason the Florida Supreme Court denied the Florida Bar's petition to establish the Florida Rules of Civil Procedure. *Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure,* 199 So. 57 (Fla. 1940). In that decision, the Court acknowledged the wisdom of and broad support for a set of rules but restrained itself from adopting them because "it takes more than public urgence to clothe the court with power where none existed before." *Id.* at 60; *see also id.* ("Few subjects in the law have been bruited and discussed more than the inherent power of the courts to make rules. . . Some of the State Constitutions are silent on the subject; some of them confer the rule-making power exclusively on the courts; some of them vest it in the Legislature while others divide it between the courts and the Legislature.").

It's helpful to stop here and consider what the Supreme Court was saying about our Constitution and who calls the shots in our government. Word pictures can bring life to important but dry or abstract concepts. What easily captures the mind right now? A lot of people seem to like a show called Yellowstone. The main character, played by Kevin Costner, is named John Dutton. He owns a ranch. He has a horse[10] because a horse is useful for transportation and cattle-herding. The good news is that John's horse is fully capable of doing those things. The bad news is that, unless it's contained, the particular horse in our word picture will wander off, divert its energy to things other than its intended purpose, and could damage things that matter to John. How and where John constructs the fence takes into account what jobs he needs the horse to perform, and also where he doesn't want it to go. John is well aware that horses can escape fences, so he hires a ranch hand (Rip) to keep an eye on the situation and go get the horse if it jumps over.

The people of Florida are John Dutton. John's horse is Florida's government. The Florida Constitution is the fence the people put up to contain their government. The judicial branch gets to be Rip for a minute.

Turning back to the Supreme Court's decision in 1940, Rip saw that the fence was constructed in a manner that struck him as inconsistent with the job John gave him to do. But Rip understood his place; he's a ranch hand, not the owner. His job was to tell John the problem and let John decide if he wanted to move the fence.

That Court spoke of the "processes of democracy" as being "often slow and tedious resulting from safeguards and restraints that have been imposed on it." *Id.* But "when the reason is revealed" those processes "were all imposed for a righteous purpose." *Id.* While "[c]hanging conditions may outmode these restraints, . . . they should be cast aside and new ones imposed by orderly procedure because "[u]surpation is the arch foe of the democratic process." *Id*.

John saw the problem and exercised his authority to move the fence. More precisely, the people amended the Florida Constitution and gave the Supreme Court rule-making powers it lacked previously, *see* art. V, sec. 2(a), Fla. Const. Once it had the authority to do it, the Supreme Court adopted Florida's Rules of Civil Procedure.

Then, in the 1970s, a movement stirred in favor of creating a state code of evidence. *See* Charles W. Ehrhardt, A Look at Florida's Proposed Code of Evidence, 2 Fla. St. U. L. Rev. 681, 681 n.4 (1974). Some may argue that John, the horse, the fence, and Rip got lost in the excitement.

The Evidence Code was created by the Florida Law Revision Council, "a statutory body which was charged with recommending to the Florida Legislature comprehensive legislation in areas of Florida law needing reform and codification." *See* Charles W. Ehrhardt, History and Construction of the Evidence Code, 1 Fla. Prac., Evidence § 102.1 (Jul. 2023). The membership of the Council was made up of gubernatorial appointees and members of the Florida Bar who were also members of both houses of the Legislature. *Id.* The Council appointed someone to research the status of Florida's evidence law and recommend a codification. *Id.* Over three years, the drafting committee with a "wide-ranging membership composed of most segments of the bench and bar" met monthly to discuss and make changes to the proposed codification. *Id.* The Council eventually recommended that the Legislature codify the law of evidence in

Chapter 90 of the Florida Statutes and, in 1979, "[a]fter sometimes intense legislative debate, political maneuvering, and amendment," this occurred. *Id.* According to Ehrhardt:

> The Evidence Code is patterned after the Federal Rules of Evidence. Many of its provisions are identical to the Federal Rules. Because the Evidence Code was drafted before the Federal Rules were adopted, Congressional action was uncertain during the drafting of Chapter 90. Some sections differ slightly from the Federal Rules; these differences were usually made in order to clarify the provision and were not intended to change the substance of the Federal Rule. Others differ significantly; these provisions generally involve a substantive difference. They generally retain the pre-Code Florida law rather than adopt the more permissive Federal rule.
>
> After the Evidence Code was originally enacted and later when its provisions were amended by the legislature, the Florida Supreme Court regularly adopted the statute or the amendment as a rule of court, to the extent it is procedural, without indicating whether the provision is procedural. This process has furthered a fundamental purpose of [ ] codifying the rules of evidence—to avoid having the evidence rules scattered in a piece-meal fashion in various statutes and rules of procedure and to have a codification based on the Federal Rules of Evidence in a single comprehensive set of rules. The Court's actions also eliminated having to delve into that frequently murky area of distinguishing between substance and procedure.

Id.

In approving and adopting the Florida Evidence Code, the Florida Supreme Court did not go into great detail about how it reconciled a methodology by which two branches of government[11] that are seemingly prohibited from job-sharing under Article III, section 2 in fact shared the job of adopting rules governing admission of evidence in the courtroom. *See* art. III, § 2, Fla. Const. ("The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches expressly provided herein."); art. V, sec. 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . .").

On the one hand, the job-sharing scheme might appear incongruent with Article III, section 2. On the other, the Court evidently concluded it was a matter of necessity. The basis for this was that the whole of the Evidence Code might have some aspects that are procedural and some that are substantive. No one of Florida's three branches of government has the constitutional authority to implement both types of rules. As part of an effort "[t]o avoid multiple appeals and confusion in the operation of the courts," the Supreme Court decided not to decide which rules were substantive and which were procedural. *In Re Florida Evidence Code,* 372 So. 2d 1369, 1369 (Fla. 1979) ("[i]t is generally recognized that the present rules of evidence are derived from multiple sources, specifically, case opinions of this Court, the rules of this Court, and statutes enacted by the legislature," "[r]ules of evidence may in some instances be substantive law and, therefore the sole responsibility of the legislature," "[i]n other instances, evidentiary rules may be procedural and the responsibility of this Court" and "[t]o avoid multiple appeals and confusion in the operation of the courts caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional because they had not been adopted by this Court under its rule-making authority, the Court hereby adopts temporarily the provisions of the evidence code as enacted . . . .to the extent they are procedural."). Instead, it adopted all of them "to the extent that they are procedural." *Id*.

After the Florida Evidence Code was adopted but before it took effect, the Florida Bar raised a concern over the Code's effective date. *In Re Florida Evidence Code,* 376 So. 2d 1161, 1161 (Fla. 1979). Specifically, the Bar advocated for a change in the applicability date for civil cases. *Id.* at 1162. The Bar and the Florida Academy of Trial Lawyers recommended that the Code be made to apply to all "civil proceedings *pending or brought* after July 1, 1979" rather than the temporal reach direction given by the Legislature, which was that the rules would apply to all "civil actions *accruing* after July 1, 1979." *Id.* (emphasis added). The Court "recognize[d] the merit of the Bar's position" because "[f]or example, in a products liability action against both the retailer and the manufacturer, this provision could hold the Code applicable to the retailer of the product but not to the manufacturer" which "can cause unnecessary legal disputes and resulting costs and delay to litigants." *Id.* However, the Court concluded that it had "no authority to change the applicability provision *without first finding the entire Code to be procedural*." *Id.* (emphasis added).

By this point, again, it is not perfectly clear how things are working out for John, the fence, the horse, and Rip. We do know that Florida emerged with an Evidence Code. More germane to this case, the Court in this 1979 decision expressed more directly than perhaps anywhere else the point made in the Sapp Order: if a matter is found to be procedural, the judicial branch is not bound by temporal reach direction from the Legislature. In 1979, the Florida Supreme Court deferred to the Legislature's temporal reach direction on the Florida Evidence Code for reasons that do not exist here. The Court decided not to decide what was procedural and what was substantive in Florida's Evidence Code. Without sifting through what was or was not procedural, the Court felt it necessary to defer to the Legislature's direction.

Here, the branch has been asked to decide whether a specific part of the Statute is substantive or something else. The Statute is not part of the Florida Evidence Code. The portion sought to be applied is procedural or procedural/remedial, as the Supreme Court has defined those terms. Precedent demonstrates that trial courts may presume that new procedural statutes are constitutional before the Supreme Court takes them up. *School Bd. of Broward County v. Price,* 362 So. 2d 1337, 1339 (Fla. 1978) (citing *Carter v. Sparkman,* 335 So. 2d 802, 806 (Fla. 1976)). The Florida Supreme Court has established a default setting on the temporal reach of procedural statutes. The text of Section 30 contains no clear and unequivocal statement of intent that the judicial branch should depart from its default setting. Whether this is because the Legislature understands that the judicial branch will not look for direction on procedural aspects of a new law or some other reason seems immaterial. Florida's constitutional structure, precedent, and history lend themselves to the conclusion that the Statute should apply to pending cases if it makes sense to do so, given the posture of the case.

C. The Importance of the Matter at Hand

Every time this issue marches through the courthouse doors, a growing pile of orders leads the way. Those orders are not binding on anyone and they serve only one purpose—they show that trial courts even within a given circuit are deciding this question of law differently. Assuming that the same problem arises at the district court level, it seems likely that the question presented will end up with the Florida Supreme Court at some point. The glaringly obvious problem for the parties is that no matter how diligently and efficiently everyone in the branch works, the wheels of justice are infamously slow. Way too much time will pass between this ruling and the ultimate resolution.

Whether the temporal reach of the Act constitutes a matter of great public importance is for others to decide. But data shows that it is certainly not of minor significance to the parties in this case. Given the number of cases pending in the Thirteenth Circuit that may be impacted by this question, it seems to be of great public importance in the administration of justice.

1. The Importance to the Parties in a Personal Injury Case.

Ninety-four percent. That's how much higher Mr. Grisar's past medical expenses are, when you compare them to the amount that the Statute allows the defense to offer as evidence of the reasonable cost for the same treatment. Under his various agreements to pay providers who did not bill insurance, subject to the outcome of this litigation (the "**Letters of Protection**"), Mr. Grisar's past medical expenses are $320,473.99. For the same treatment, Medicare would have paid $17,261.35. But under the Statute, the number that matters more is 120% of the Medicare reimbursement rate: $20,713.62. The defense seems poised to argue that, net-net, the decision to seek treatment under letters of protection resulted in past medical expenses that are 94%[12] higher than they needed to be.

Mr. Grisar is hardly alone in his decision to execute letters of protection. The use of letters of protection in personal injury cases is widespread. At times, it is obvious why the letter of protection was needed: the injured person had no other way to pay for the treatment. Other times, it is harder to understand for what good reason that arrangement was chosen. Either way, the numbers in this case show what can happen if a letter of protection is involved.

Ninety-four percent may be an outlier. The Statute's magnitude of impact may be different in Tampa than in Sopchoppy. The injuries and the physicians or practices involved may cause the Statute to have less of an impact in one case versus another. It seems fair to assume, though, that if all of us across the State asked the lawyers for the case-specific data it would clearly show that whether to apply the Statute is a question of great importance in every case involving letters of protection or similar medical liens.

2. Importance to the Administration of Justice in the Circuit Courts

It is not enough to examine the impact that application of the Statute may have on Mr. Grisar and Mr. and Mrs. Brate. Theirs is but one auto negligence case. According to the Clerk of Court, in the Thirteenth Circuit auto negligence cases make up forty-two percent (42%) of the entire Circuit Civil docket. *See* **Exhibit B**. Auto negligence is only one category of personal injury cases in which past medical damages will be at issue. Add negligent security, premises liability, and medical negligence to the types of cases that this part of the Statute may impact. Then the number rises to *more than half the entire Circuit Civil docket*, before any other part of the Act is considered.

Another factor is that auto negligence seems to be the category of cases most frequently tried. When they go to trial, auto negligence cases typically require one day for jury selection and five days for the trial. Since the Legislature passed the Act, a version of this Motion has been filed in an escalating number of these cases. If we get too far down the road it will be an enormous burden to retry the wrongly-decided ones.

What's the point of that information? The matter raised in this Motion is ubiquitous, and with some judges applying the Statute and other judges ruling that it does not apply, whichever ones of us are wrong are getting it wrong at a brisk pace with a devastating financial impact being suffered by whichever side is beset with the wrong analysis.

IV. Conclusion

The practice of law is noble and a worthy calling. Most good lawyers would probably agree that although they were paid for the effort, there is an element of selflessness required in putting someone else's problems onto your own shoulders for a living. And until the finish line is crossed, neither lawyer nor client can fully move on. There is a saying that a good lawyer knows the law, and a great lawyer knows the judge. In an ideal world t-shirts that bear that saying would only be used to polish cars. If judges are committed to following the law, then their private opinions and preferences ought to be immaterial. There is a complication, though, even when everyone is trying to follow the law and set aside their private opinions: we must be able to identify what the law is. Confusion in the law results in the situation we're in today. We lack the ability to produce uniformity even when we endeavor to follow the law, because the law is not clear. This judge has analyzed the law one way, but if the Clerk had randomly assigned the case to another judge down the hall who is also working diligently to follow the law, the result would have been different. It is reasonable for everyone to find this problematic.

I have looked at this issue and have concluded that the Statute applies. Since I believe the law says the Statute should apply, I cannot do anything but apply the Statute. If an appellate court decides otherwise—or if a party comes in and convinces me on another case that my prior analysis was incorrect—then I will proceed in whatever direction the law requires, with alacrity.

Like others who have decided this issue differently after their own careful analysis, my conclusion about what the law compels cannot in good faith be set aside in a compromise to help everyone have predictability. That is true even though I appreciate the problems that this lack of predictability has caused.

But I am not completely constrained. What I can do is this: I can join in respectful requests for a speedy resolution of the issue on appeal. And I can preemptively ask those who will consider this on appeal to forgive me if in doing so I have been too presumptuous. My hope is that none of them will see it that way.

The population of Florida has changed quite a bit since 1945. But some things that were found to be true of Floridians back then still seem true today. For example, when it determined to begin the process of creating what became the Florida Rules of Civil Procedure, the Florida Supreme Court said this of the litigants who come to the court system:

> Litigants are practical; they know what they want, and they have little patience with what is known as the sporting theory of justice. If they have an urge to satisfy the gambling instinct, they try poker or go to the races. If they want to be entertained, they try the movies; if they want to be instructed, they take the lyceum or the seminar, but when they want justice, they look to the courts and nothing lowers their respect for them so much as having justice delayed or lost in the shuffle while court and lawyers bandy words and befuddle the issues over the interpretation of an antiquated inept rule. All the lawyers this side of Kingdom come cannot explain to him why he came through the wrangle liquidated when he expected to get through justified.

Petition of Florida State Bar Ass'n, 155 Fla. 710, 717 (Fla. 1945).

Impatience is not unjustified here. But thinking back to the ranch, keep in mind that it's a busy place. There is more to Rip's job than just watching the fence. If John calls and Rip cannot answer immediately, John may need to consider the scope of what he has given Rip to do. These days, Rip isn't afforded many naps on the porch.

Accordingly, it is now

ORDERED and **ADJUDGED** that:

1. The Motion is **GRANTED.**

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

[2]*Torres-Aponte v. Hudnall,* Case No.: 20-CA-7146 (Fla. 13th Cir.) [31 Fla. L. Weekly Supp. 255b].

[3]*Sapp v. Brooks,* Case No:. 17-CA-5664 (Fla. 13th Cir.) [31 Fla. L. Weekly Supp. 123b].

[4]Article III, § 2, Fla. Const. ("The powers of the state government shall be divided into legislative, executive, and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein*.") (emphasis added); *but see DeLisle v. Crane Co.,* 258 So. 3d 1219, 1223 (Fla. 2018) [43 Fla. L. Weekly S459a] ("The Florida Legislature and the Florida Supreme Court have worked in tandem for nearly forty years to enact and maintain codified rules of evidence.").

[5]Article V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.").

[6]*McLean v. State,* 854 So. 2d 796 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2075a]; *Mortimer v. State,* 100 So. 3d 99 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2073b]; *Mallory v. State,* 866 So. 2d 127 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D382a].

[7]*DeLisle v. Crane Co.,* 258 So. 3d 1219 (Fla. 2018) [43 Fla. L. Weekly S459a].

[8]*See, e.g., In Re Amendments to Florida Evidence Code,* 278 So. 3d 551, 554 (Fla. 2019) [44 Fla. L. Weekly S170a] (adopting procedural statutes "in accordance with this Court's exclusive rule-making authority and longstanding practice of adopting provisions of the Florida Evidence Code as they are enacted or amended by the Legislature").

[9]*In Re Florida Evidence Code,* 376 So. 2d 1161, 1162 (Fla. 1979) ("Unfortunately, we have no authority to change the applicability provision without first finding the entire Code to be procedural.").

[10]An avid watcher of the show would point out that John has *many* horses. Work with me here.

[11]Or three, depending how the gubernatorial appointees on the Council are considered.

[12]$320,473.99-$20,713.62=$299,760.37 and $299,760.37/$320,473.99=0.935 (94%)

* * *

Insurance—Personal injury protection—Standing—Issue of standing pertains to court's subject-matter jurisdiction and cannot be waived by insurer's failure to file answer—Insured lacks standing to bring action against PIP insurer where insured assigned benefits to two medical providers but only alleges that she received post-suit reassignment of benefits from one provider

MELODY BORDEAUX, Plaintiff, v. AMICA MUTUAL INSURANCE COMPANY, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CA-007374, Division E. July 10, 2023. Anne-Leigh Gaylord Moe, Judge. Counsel: E. Lynn Gibbons, Jorgensen Gibbons, P.A., Saint Petersburg, for Plaintiff. Justin L. Seekamp, Cole, Scott & Kissane, P.A., Orlando, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

THIS CAUSE, came before the Court at the May 25, 2023 hearing on the Defendant's Motion for Summary Judgment and Memorandum of Law filed on our about January 31, 2023 After having reviewed Defendant's motion and summary judgment evidence, having heard argument of counsel and after having reviewed the applicable legal authority and otherwise being fully advised in the premises, it appears that good and sufficient grounds have been shown for GRANTING Defendant's Motion for Final Summary Judgment for the reasons set forth below. The Court being fully advised in the premises, it is Ordered and Adjudged as follows:

l. Plaintiff brought this Personal Injury Protection ("PIP") action against Defendant on September 13, 2021 for purportedly underpaid PIP benefits for following a motor vehicle accident that occurred on September 21, 2017. Within the four-corners of Plaintiff's Complaint the Plaintiff generally avers that Defendant failed to pay PIP benefits to Plaintiff and was otherwise not-specific as to any specific claims of underpayment to Plaintiff.

2. On October 06, 2022, Defendant filed Defendant's Motion to Dismiss for Lack of Standing and Failure to State a Proper Cause of Action Upon Which Relief Can be Granted detailing Plaintiff's lack of standing to pursue PIP benefits against Defendant due to Plaintiff's pre-suit "assignments of benefits" to Plaintiff's medical providers, Chambers Medical Group and Tampa Bay Imaging, that assigned all rights and benefits under the policy of insurance from Defendant providing PIP benefits for the September 21, 2017 date of loss.

3. On January 31, 2023, Defendant filed the subject Motion for Summary Judgment and Memorandum of Law in Support regarding Defendant's position that Plaintiff lacked "standing" to pursue the claim for PIP benefits for Chambers Medical Group and Tampa Bay Imaging pursuant to applicable Florida Statutes, binding case law, and the Affidavit of Barkley Finsterbush.

4. On May 11, 2023, Plaintiff filed Plaintiff's Response to Defendant's Motion for Summary Judgment wherein Plaintiff argued, in sum, that (1) post initiation of this litigation that Tampa Bay Imaging had "re-assigned" rights and benefits back to Plaintiff or otherwise had shown intent to "re-assign" rights and benefits back to Plaintiff and that (2) Defendant had "waived" the standing issue and "all defenses" due to Defendant not initially filing an Answer to Plaintiff's Complaint. Plaintiff otherwise filed no additional summary judgment evidence to rebut the summary judgment evidence submitted by Defendant.

5. It is uncontroverted by Plaintiff that this case involves a claim for Florida No-Fault, ("PIP"), benefits arising from a motor vehicle accident on September 21, 2017, involving Plaintiff.

6. Defendant contends that Plaintiff's pre-suit assignments of benefits to medical providers Chambers Medical Group and Tampa Bay Imaging render Plaintiff's claims for PIP benefits improper because Plaintiff is not the proper Plaintiff to claim PIP benefits due to the respective assignments of benefits. While the Plaintiff contends that the one (1) post-suit "reassignment" of benefits from Tampa Bay Imaging or their intent to provide Plaintiff with the rights and benefits Plaintiff had assigned to Plaintiff prior to this suit and Defendant's failure to file an Answer to Plaintiff's Complaint "waived" Defendant's argument regarding Plaintiff's lack of standing e.

7. In reading binding Second DCA opinion, *84 Lumber Company v. Cooper*, 656 So.2d 1297, 1298 (Fla. 2d DCA 1994) as well as other relevant case law *See Kumar Corporation v. Nopal Lines, Ltd.*, 462 So.2d 1178, 1183 (Fla. 3d DCA 1985) and *Stel-Den of America, Inc. v. Roof Structures, Inc.*, 438 So.2d 882, 884 (Fla. 4th DCA 1983), this Court agrees with Defendant that as the issue of "standing" pertains to subject matter jurisdiction of this Court to consider the claims of Plaintiff that standing, or lack thereof, cannot be waived.

8. Additionally, an assignment of PIP benefits concerns the claimant's standing to bring the action. For a medical provider to bring an action for PIP benefits, the insured must assign her or her right to such benefits under the policy to the medical provider. *Progressive Exp. Ins. Co., v. McGrath Comm. Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. A provider cannot cure standing post suit. *Id.*, at 1285. *McGrath*, which remains binding upon this Court, specifically held the following:

> Unlike a statutory requirement of the construction lien law, an assignment of PIP benefits concerns the claimant's standing to bring the action. "Standing is . . . that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." *Gen. Dev. Corp. v. Kirk*, 251 So. 2d 284, 286 (Fla. 2d DCA 1971). At any one time, only the insured or the medical provider "owns" the cause of action against the insurer for PIP benefits. *Oglesby v. State Farm Mut. Auto. Ins. Co.*, 781 So. 2d 469, 470 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D702a]. For a medical provider to bring an action for PIP benefits, the insured must assign his or her right to such benefits under the policy to the medical provider.
>
> Thus the assignment of PIP benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place. If the insured has assigned benefits to the medical provider, the insured has no standing to bring an action against the insurer.

McGrath, at 1285.

In this instance, the Court is not compelled by Plaintiff's arguments of the alleged post-suit "reassignment" of PIP benefits from Tampa Bay Imaging to Plaintiff. Additionally, Plaintiff has not addressed the evidence before it that Plaintiff had ALSO executed an assignment of benefits to Chambers Medical Group. As such, this Court agrees, again, with Defendant that the post-suit "reassignment" of benefits from Tampa Bay Imaging to Plaintiff, without addressing the lack of any position regarding the assignment of benefits between Plaintiff and Chambers Medical Group, does not change Plaintiff's lack of standing to pursue these claims for PIP benefits against Defendant.

25. The Plaintiff does not have standing to pursue the claim for PIP benefits against Defendant. .

Therefore, it is hereby ORDERED:

a. Defendant, AMICA MUTUAL INSURANCE COMPANY's, Motion for Final Summary Judgment is GRANTED.

Plaintiff, MELODY BORDEAUX, shall take nothing by this action, and Defendant shall go hence without day. This Court reserves jurisdiction to determine the amount of attorneys fees and costs owed by Plaintiff to Defendant.

* * *

Torts—Defamation—Conspiracy to defame—Intentional infliction of emotional distress—Action by plaintiff, a county commissioner who is also a general contractor, and plaintiff's construction company against immigration activists who assisted in creation of Netflix documentary depicting alleged wage theft by the plaintiffs—Presuit notice—Defendant activists were not news media defendants entitled to presuit notice of defamation action—Defendants are entitled to summary judgment on defamation count where plaintiffs are public figures, documentary episode regarding use of immigrant labor to rebuild after natural disasters and companies' failure to pay for that labor is matter of public concern, and there is no competent substantial evidence to sustain plaintiffs' heightened burden to show that any false allegations made in documentary regarding plaintiffs' involvement in wage theft by their subcontractors were made with actual knowledge of their falsity or with reckless disregard for truth—Because action for defamation is necessary predicate to cause of action for conspiracy to defame, defendants are also entitled to summary judgment on conspiracy count—Defendants are entitled to summary judgment on count alleging that they intentionally inflicted emotional distress on plaintiffs by organizing group of people to approach residence of plaintiff commissioner at night, knocking on door several times, and leaving note—Alleged conduct is not sufficiently outrageous to support claim

TOMMY HAMM, JR., individually, and WINTERFELL CONSTRUCTION, INC., a Florida corporation, Plaintiffs, v. RESILIENCE FORCE, an unincorporated association; NATIONAL GUESTWORKER ALLIANCE, an unincorporated association; SAKET SONI, individually; CYNTHIA S. HERNANDEZ, individually; ALVARO GUZMÁN BASTIDA, individually; CHRISTINA CLUSIAU, individually; SHAUL SCHWARZ, individually; REEL PEAK FILMS, an unincorporated association; and NETFLIX, INC., a Delaware corporation, Defendants. Circuit Court, 14th Judicial Circuit in and for Bay County. Case No. 21-293 CA. September 1, 2023. James J. Goodman, Judge. Counsel: Kenneth G. Turkel, Shane B. Vogt, and Lesli Harm, Turkel Cuva Barrios, P.A., Tampa; and Michael A. Wynn, Burg Wynn P.A., Marianna, for Plaintiffs. Thomas R. Julin and Timothy J. McGinn, Gunster, Yoakley & Stewart, P.A., Miami, for Resilience Force, Saket Soni and Cynthia J. Hernandez, Defendants. Rachel E. Fugate, Deanna K. Shullman, and Minch Minchin, Shullman Fugate, PLLC, Tampa, for Christina Clusiau, Shaul Schwarz, Alvaro Guzman Bastida, Reel Peak Films, and Netflix, Inc., Defendants. Edward L. Birk, Marks Gray, P.A., Jacksonville; and Rachel F.S. Strom and Abigail B. Everdell, Davis Wright Tremaine, LLP, New York, New York, for Non-Party NEO Philanthropy, Inc.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on November 3, 2022,[1] on the "Motion of Saket Soni, Cynthia S. Hernandez, and Resilience Force for Final Summary Judgment and Memorandum of Law in Support Thereof" (the "Motion"), filed June 30, 2021. Plaintiffs filed their Counter Statements of Facts in Opposition to Defendant's Motion for Summary Judgment and Opposition to Resilience Force's Motion for Final Summary Judgment on October 14, 2022 (the "Response in Opposition"). On October 31, 2022, Defendants filed the "Resilience Force Defendants' Response to Plaintiffs' Counter Statement of Facts in Opposition to Defendants' Motion for Summary Judgment" and "Reply of Saket Soni, Cynthia S. Hernandez, and Resilience Force to Plaintiffs' Opposition to Their Motion for Final Summary Judgment" ("the Reply"). Having considered the underlying Motion, the Plaintiffs' Response in Opposition, Defendants' Reply, the summary judgment evidence, arguments of counsel, court file and records, and being otherwise fully advised, this Court finds as follows:

FINDING OF FACTS AND PROCEDURAL HISTORY

1. The initial Complaint and Demand for Jury Trial in this matter was filed on March 4, 2021. Plaintiffs asserted five Counts against the multiple Defendants. Relevant in the instant matter are Count I—Defamation, Count III—Conspiracy, and Count V—Intentional Infliction of Emotional Distress, against the three Defendants—Soni, Hernandez, and Resilience Force.[2]

2. The underlying Motion was filed on July 30, 2021, less than five (5) months after the filing of the initial Complaint and after limited discovery. The Motion was supported, however, by the Affidavits of Kerry Ann O'Brien, Saket Soni, and Cynthia Hernandez. Further, the Resilience Force Corporation has also moved to dismiss the case against it and quash service, arguing that at the time service was obtained, the allegations in the initial Complaint were based on events that had occurred prior to the entity's formal incorporation.

3. Conversely, Plaintiffs filed their Response in Opposition on October 14, 2022. The Response was filed more than a year of discovery, which discovery included various depositions reviewed by the Court.

4. On October 31, 2022, Defendants filed a Reply to the Plaintiffs' Opposition to Their Motion for Final Summary Judgment.

Overview of the Parties

5. Plaintiff, TOMMY HAMM ("Hamm"), is an elected member of the Bay County Board of County Commissioners ("BOCC"). He was first elected in 2016 and was reelected in 2020. (Hamm Decl. ¶¶ 3-4.)

6. Along with serving on the BOCC, Hamm is the owner and president of Winterfell Construction, Inc. ("Winterfell") and a Florida Certified General Contractor and Roofing Contractor. (Hamm Decl. ¶ 5.) Plaintiffs claim that Winterfell only has a few employees and generally contracts with subcontractors to perform various construction-related projects. (Hamm Decl. ¶ 6.)[3]

7. Saket Soni ("Soni") received his bachelor's degree from the University of Chicago. (Soni Decl. ¶ 4). Following obtaining his degree, Soni worked in New Orleans and formed the New Orleans Workers' Center for Racial Justice ("NOWCRJ"). (Soni Decl. ¶ 19.) After that, Soni formed the National Guestworker Alliance ("NGA"), an unincorporated association to assist immigrants who entered the United States on "guestworker" visas. (Soni Decl. ¶ 28.) Following the aftermath of Hurricane Katrina, Soni formed Resilience Force as an unincorporated sub-project of NGA. (Soni Decl. ¶¶41-46.)

8. From 2018 through early 2020, Resilience Force was an unincorporated immigration activism fiscally sponsored project of NEO (through NGA), attempting to represent a group of disaster aid workers called the "resilience workforce." (Soni Dep. 103:7-105:20.) On or about March 5, 2020, an entity called "Resilience Force" was formally incorporated in Washington D.C. (Soni Dep. 121:3-21.) Soni

has received national recognition for his work in labor relations and worker's rights. (Soni Decl. ¶¶ 29-39.)

9. To help with the Resilience Force project, Soni enlisted Cynthia Hernandez ("Hernandez") and Kerry O'Brien ("O'Brien"). (Soni Decl. ¶¶ 46-47.)

10. Hernandez holds a Master's degree from Florida International University ("FIU"), along with various professional certificates. (Hernandez Decl. ¶ 4.) She began her career as an instructor at FIU in 2006 and has published reports and performed extensive research on the subject of wage theft. (Hernandez Decl. ¶¶ 6-24.) From November 21, 2018, through February 28, 2019, Hernandez was a consultant for Resilience Force and was tasked to write a report on "racial equity in the recovery to Hurricane Irma." (Hernandez Dep. 69:12-70.) In March 2019, Hernandez worked for Resilience Force as an employee of NEO Philanthropy, Inc. ("NEO") in the position of Resilience Force's and NGA's "Florida Director." (Hernandez Dep. 75:12-25, 76:19-77:3.)

11. O'Brien is a licensed attorney who has worked on various Resilience Force and NEO-related projects for many years. (O'Brien Dep. 20:24-30:1, 33:10-23.) O'Brien also had relevant experience prior to assisting Resilience Force as she served in the U.S. Department of Labor, where she worked on a task force that put together the Wage & Hour Administrator's Interpretation of when a general contractor could be found liable for nonpayment of workers who had been hired by subcontractors. (O'Brien Decl. ¶¶ 10, 12, 22-25.)

12. Christina Clusiau ("Clusiau") and Shaul Schwarz ("Schwarz"), both of whom are documentary filmmakers, founded Reel Peak Films ("RPF"), a production company.[4] (Clusiau Dep. 27:6-29:11). Clusiau and Schwarz directed and produced "Immigration Nation" in conjunction with and pursuant to a contractual relationship with Netflix. (Clusiau Dep. 40:5-41:17, 56:25-67:18; Schwarz Dep. 11:7-12:5, 16:15-18:16.)

13. Alvaro Bastida ("Bastida") worked as a researcher and field producer on the six-part documentary series "Immigration Nation," including the portion of Episode 4 ("The New Normal"), which is the primary concern of the underlying litigation. (Clusiau Dep. 47:11-49:22).

14. Netflix is one of the leading internet entertainment streaming services, offering a wide variety of TV shows, movies, documentaries, etc. The six-series documentary *Immigration Nation* premiered on Netflix on August 3, 2020.

The Events

15. In 2017, RPF and/or INLLC Schwarz and Clusiau executed a multimedia agreement with the United States Immigration and Customs Enforcement ("ICE") to do a documentary that would profile ICE agents. (Clusiau Dep. 55:14-24.)

16. On or about June 13, 2018, RPF and Netflix entered into an agreement related to the production of the documentary series *Immigration Nation*. (Schwarz Dep. 123:6-128:10.) Among other things, this agreement memorialized the Netflix Defendants' ownership and authorship of *Immigration Nation*. (Schwarz Dep. 123:6-128:10.)

17. On October 10, 2018, Hurricane Michael made landfall as a category-five hurricane in Bay County, Florida. (Hamm Decl. ¶ 7.) The devastation caused by the storm cannot be understated, as Michael was the first category-five hurricane to strike the contiguous United States since Hurricane Andrew in 1992. It quite literally destroyed much of Bay County.

18. Shortly after Michael hit, Bastida reached out to Soni to seek his involvement in the *Immigration Nation* project. (Soni Decl. ¶ 62.) Bastida alerted Soni that one focus of the project was to highlight the importance of immigrant labor organizations "because of the high degree of exploitation that exists in industries where immigrants make up the majority of the labor force." (Dep. Ex. 5.)

19. On or around October 22, 2018, Soni and the Resilience Force team first arrived in Bay County and spent about five days observing the destruction caused by Michael. (Soni Decl. ¶¶ 53-54.) After the visit, the discussions between Soni and Bastida continued and Soni alerted Bastida that Resilience Force would be engaged in helping immigrant workers in Bay County for the foreseeable future. (Soni Decl. ¶ 63.) Soni also offered to put Bastida and the Immigration Nation team in touch with workers in Bay County for the purposes of their documentary. (Soni Decl. ¶¶ 63- 64.) At this point, however, neither Soni nor Resilience Force was being paid by Netflix or RPF for any assistance in the documentary. (Soni Decl. ¶¶ 65-67.)

20. Summary judgment record evidence indicates that during one of the phone calls between Bastida and Soni, Soni stated:

> I think the best way for this to work is for you to give some uh—almost as if this was fiction um or if you were making—this is nonfiction obviously but if you were making a fictional film and you were writing a character, what types of characters would you really want that would help you know, and if you could come up with a couple of those then I can sit with my team and think about—think about ways to get you. Is that what you're looking for basically? Am I on the right track?

21. Subsequently, during Soni's initial trips to Bay County between December 2018 and February 2019, he became concerned with various workers' living conditions. (Soni Decl. ¶¶ 68.) He and Hernandez were also alerted that some workers had not been paid in a timely and accurate manner. Thus, they began sending information to O'Brien so that Resilience Force could potentially help workers to make claims for their unpaid wages. (Soni Decl. ¶ 74.) During this period in early 2019, Soni, Hernandez and O'Brien also determined that they should convince the Board of County Commissioners ("BOCC") to adopt a "wage theft ordinance" to properly address their concerns regarding the workers. (Soni Decl. ¶¶ 69-74; O'Brien Decl.¶ 26.)

22. On or around February 2019, Resilience Force and RPF started to collaborate regarding various potential storylines for an episode of Immigration Nation involving Bay County and the potential exploitation of immigrant labor. During this period, RPF and Resilience Force agreed to begin formal work in Bay County during the first week of March 2019. (Dep. Exs. 6, 7, 114.) It was also contemplated that Resilience Force would, to a certain degree, assist in facilitating RPF's needs. (*Id*.)

23. To assist with footage pertaining to the filming, Hernandez reached out to the Bay County Commissioners to schedule meetings with them during the week in March when the Reel Peak Defendants planned to be in Panama City. It was the intention of Resilience Force and the Reel Peak Defendants that many of these meetings would be filmed as part of the production. (Dep. Ex. 330; Hernandez Dep. 87:19-89:23.)

24. Before the meetings with the Commissioners, the Resilience Force Defendants prepared a four-page document that contained various information regarding the five Bay County Commissioners. The information included, for example, a photograph of each commissioner, a map showing the district each one of them represented, and a brief biographical description taken from the Bay County website. The description of Hamm consisted of two paragraphs concerning his education, business, and public service. (Dep. Ex. 395.) The document identified all five Bay County Commissioners as "republican, men and white." Another 16-page document circulated among various Defendants identified all federal elected officials, federal executive branch officials, state elected officials, and county and local officials who had the authority to deal with Hurricane Michael recovery issues in Bay County, Florida. (Dep. Ex. 439.)

25. On March 4, 2019, three members of the BOCC, including Hamm, along with County Manager Robert Majka, met individually with Soni and Hernandez to discuss the Resilience Force workers' concerns. (Soni Decl. ¶78; Soni Dep. 136:2-137:8; Ex. 331.) At the meeting, Soni and Hernandez attempted to explain to the BOCC representatives the primary objectives of their organization. (*Id.*) To some extent, the meetings were coordinated with RPF so they could be preserved for use in the documentary. (Hernandez Dep. 87:19-89:23; Soni Dep. Ex. 330.)

26. Also, in the beginning of March 2019 and around the same time as the aforementioned interviews, the RPF Defendants followed and filmed the Resilience Force Defendants in Panama City as they attempted to assist with various workers. (Soni Dep. 136:2-137:8; Dep. Ex. 112.)

27. During their multiple trips to Bay County, Soni and Hernandez claim they encountered several different groups of workers who alleged they were victims of wage theft.

28. On March 5, 2019, Soni, Hernandez, and others confronted a contractor identified as "Joe" who was ultimately depicted in Episode 4. Plaintiffs assert that this particular meeting further supports their underlying claims because the raw footage of the interaction between Joe and the Resilience Force representatives was edited to exclude parts showing Defendants "extorting" Joe to make various statements. Further, Plaintiffs argue that Episode 4 also failed to include Joe's explanation that he had already paid his subcontractors, but the subcontractors had failed to pay the workers.

29. Shortly after confronting "Joe," Soni, Hernandez, Pinzino, Castellanos and a group of workers also confronted another contractor, who was an African American man, named "Kenneth," and accused him of stealing wages. Plaintiffs claim that a substantial portion of the raw footage depicting these particular events was excluded from the series because, again, it demonstrated that the Resilience Force was falsely blaming contractors for the non-payment of wages and did not fit the "narrative" of the underlying storyline.[5]

30. Importantly, according to Soni and Hernandez, some of the undocumented workers they were interviewing asserted that Hamm and Winterfell were also involved in failing to properly compensate the workers for their labor in the aftermath of the Hurricane. (Soni Decl. ¶ 89; Hernandez Decl. ¶¶ 50-63.)

31. After allegedly being informed of Hamm and Winterfell's deficiencies, Hernandez attempted to contact Hamm by email, telephone, and text to inform him of the claims of the workers. (Soni Decl. ¶¶ 91-94; Hernandez Decl. ¶¶ 68-69.) Hernandez claims that Hamm was unresponsive to the multiple requests for further information. (Hernandez Decl. ¶¶ 71 & 73.)

32. In support of their claims, Plaintiffs provided internal emails between Defendants suggesting that as of April 15, 2019, the Resilience Force was aware that the Winterfell's subcontractors such as C&C General Contractors Development, LLC, and Justino "Tino" Sanchez of T&K Contractors, were responsible for the non-payment of the wages and that Tino Sanchez was the one who "stole [the workers'] money." In addition, Plaintiffs argue that some additional raw footage was deceptively edited to exclude Mr. Freddy Fuentes[6] identifying Mr. White of C&C General Contractors as the specific person responsible for the non-payment of the wages and not Winterfell.

33. On May 13, 2019, Hernandez sent Hamm the following text message:

> I have been trying to reach you for several weeks. We have several dozen workers who worked under your company and did not receive payment. It is imperative that we meet with you next week as these workers are preparing liens for all five of the properties.

(Pl.'s Ex. J, filed October 14, 2022; Hernandez Decl. ¶ 70; Soni Decl. ¶ 96.)

34. On April 24, 2019, Hernandez emailed Hamm with a request for a meeting, but Hamm did not respond. It is undisputed that said email did not mention any claims for unpaid wages.

35. On April 25, 2019, the Resilience Force representatives and Bastida spoke on the phone and planned the May 20th program/work week in Bay County. Resilience Force also created a project plan, where, among other things, one of the success outcomes to be achieved was to catch on film "Tommy Hamm situation—next steps TBD."

36. On April 29, 2019, Hernandez tried to meet with Hamm regarding a possible "clean-up/services project" in the district.

37. Hernandez wrote to Hamm again on May 14, 2019, via email "that there are nearly 30 workers who worked on multiple projects with your company, Winterfell, that did not receive payment for their work." (Pl.'s Ex. K, filed October 14, 2022; Hernandez Decl. ¶ 72.)

38. On May 20, 2019, Soni, Hernandez and Daniel Castellanos ("Castellanos")[7] were in Bay County meeting with workers who were allegedly experiencing problems getting paid. RPF attended some of the meetings wherein various workers implicated that Hamm and Winterfell were part of the problem. (Hernandez Decl. ¶ 74; Soni Decl. ¶¶ 89-90; Soni Dep. Exs. 206-209.) Ultimately, a decision was made by Soni and Hernandez, along with various workers, to go to Hamm's home, which was also Winterfell's business address, and to express the workers' concerns and demand payment for any unpaid wages. (*Id.*)

39. On the evening of May 20, 2019, approximately ten workers went with Soni, Hernandez and Castellanos, along with the RPF, to Hamm's home between 8:30-8:45 PM. (Hernandez Decl. ¶¶ 75-83; Soni Decl. ¶¶ 100-107.) There is no dispute that Winterfell's business address listed on its website and with the Florida Division of Corporations was also Hamm's home address. (Hernandez Decl. ¶ 76.) It is also undisputed that the address is in a residential neighborhood and the structure appeared to be a family home. Upon arriving, Soni, Hernandez, Castellanos, and three of the workers walked from the street to Hamm's front door and knocked several times, waited a few minutes, and then knocked again. (*Id.*) The remaining workers waited by the sidewalk. Ultimately, the group left after placing a letter at the door that attempted to explain the reasons for their visit. (*Id.*)

40. At the time of the visit to Hamm's residence, the home was still severely damaged by Hurricane Michael and Hamm's family was living in an RV in the backyard. (Hamm Decl. ¶ 25.) Hamm's wife was alone inside the home when the group approached as it was getting dark. (Hamm Decl. ¶¶ 27-29.) Ultimately, Hamm's wife called the police, who arrived after the group of strangers had already left. (*Id.*)

41. The next day, May 21, 2019, in response to Hernandez and the Resilience Workers' inquiries, Hamm forwarded to Hernandez a letter prepared by Winterfell's attorney at the time, Mitch Dever. The letter asserted that any unpaid laborers likely worked for a subcontractor of Winterfell and were not employees of Winterfell. (Pl.'s Ex. L.) The letter further informed Hernandez that laborers and subcontractors would not have lien rights but still offered to contact the subcontractor for the alleged unpaid wages upon providing "all documentation as to who these individuals were working for and their information, i.e. name address, telephone number, and the amount of the wages owed." (*Id.*)

42. On the same day, Soni and Hernandez, along with several workers wearing the name "Resilience Force" on their shirts, appeared at a BOCC meeting. (Soni Decl. ¶ 111; Hernandez Decl. ¶¶ 87-88.) The meeting was filmed by RPF. Soni and Hernandez spoke at the meeting, and Hernandez translated comments for a worker identified as Sanchez ("Sanchez"), who talked about injuring

his leg while working on a roof. (Soni Dep. 191:1-194:18.) Sanchez was self-admittedly not employed by Winterfell and was not involved in any Winterfell projects. (*Id.*) In response to the concerns expressed at the meeting, BOCC members mentioned contacting OSHA to ensure that the work sites were safe and in compliance with applicable federal law. (Soni, Decl. ¶¶ 113&114).[8] After the meeting, Soni and Hernandez attempted to speak with Hamm, but were turned away by a Bay County Sheriff's employee. (Soni Decl. ¶¶ 115-119.)

43. On May 22, 2019, Soni and Hernandez met with Joel Salazar ("Salazar"), Joel Salazar's mother, Ana Salazar, and Hector Emilio Rivamar ("Rivamar"). Most of the interviews with them were recorded by RPF. (Soni Decl. ¶ 123.) During the meeting, Salazar indicated that he met Justino "Tino" Sanchez ("Sanchez) of T&K Constructors in Houston, Texas, in November 2018. (Soni Decl. ¶¶ 124-148.) Eventually, Salazar indicated that he was given a vest and hardhat by Sanchez with the Winterfell logo on and that many projects he worked on had Winterfell signs on the property. (*Id.*) Salazar also claimed that Sanchez instructed Salazar to provide time records in triplicate so T&K Constructors (Sanchez's company), Winterfell, and Porter International Construction would have copies. (*Id.*) Salazar, Salazar's mother, and Rivamar also claimed they had not been appropriately compensated for their work. (Hernandez Decl. ¶¶ 53-60.) Finally, Salazar and Rivamar asserted that Hamm and Winterfell had employed them directly—not through a subcontractor—for a period of approximately three weeks. (Soni Decl. ¶¶ 144-146; Hernandez Decl. ¶ 57.) The workers further claimed that even when they normally worked for a subcontractor, they took directions from Hamm, Stephany Pryor, and others who they believed were Winterfell's employees. They also indicated they were instructed to wear Winterfell Construction gear and received materials directly from Winterfell. (Hernandez Decl. ¶ 60.) [9]

44. After speaking with Salazar, Salazar's mother, and Rivamar, Soni and Hernandez claimed to have believed that the assertions "fit a pattern [they] had seen repeatedly whereby a local, state-licensed construction contractor recruits immigrant laborers through an unlicensed out-of-state company to do emergency reconstruction after a hurricane; the out-of-state company fails to pay wages to the employees; the out-of-state company claims the local contractor is responsible for payment of the employee; and the local contractor claims the out-of-state company is responsible for payment of the employees." (Soni Decl. ¶¶ 138-149; see also Defs.' Mot. p. 16.) This sentiment was apparently echoed by O'Brien, who determined, based on the information provided to her by Hernandez and Soni, that Winterfell "should be treated as joint employers with the subcontractors and therefore would be responsible for the nonpayment." (Hernandez Decl. ¶¶ 96-98.)

45. On May 28, 2019, Hernandez emailed Winterfell's attorney Dever, identifying five projects where workers had allegedly not been paid without identifying the workers at issue.[10] The next day Dever sent another email and asked that the workers involved be specifically identified. (Pl.'s Ex. N; Hernandez Decl. ¶¶ 103-105). Ultimately, Winterfell's counsel and Hernandez reached a stalemate as Hernandez was not willing to provide the information requested by Dever.

46. On June 4, 2019, Hernandez requested another meeting with Hamm, but Hamm did not agree to meet with her.

47. During the next month, Defendants visited multiple houses of Winterfell's customers and filmed some of the interactions with them.

48. It is undisputed that Defendants also contemplated filming additional confrontations with Hamm. Specifically, they discussed possibly attending another Bay County BOCC meeting, picketing at Hamm's church or outside of his wife's yoga studio. It appears these matters were considered for additional film footage to support their narrative.

49. On July 2, 2019, Soni received a cease-and-desist letter from Hamm indicating that he would be pursuing action against Soni and Resilience and that Soni was not to trespass on Hamm's property. (Soni Decl. ¶¶ 160-161; Pl.'s Ex. O.) The Letter included in all capital letters that Hamm was also "SEEKING ACTIONS THROUGH THE BAY COUNTY SHERIFF'S DEPARTMENT AND THE DISTRICT ATTORNEY'S OFFICE. . . TO PROSECUTE YOU AND ANY OTHER PRESENT TO THE FULLEST EXTENT OF THE LAW." (Pls.' Ex. O.) The letter further contained language that if Soni or his associates ever came to his home or worksites again, "THE POLICE WILL BE CONTACTED AND THOSE PRESENT WILL BE ARRESTED AND PROSECUTED." (*Id.*)

50. After Soni inquired with O'Brien about her opinion regarding the letter, she wrote to Soni and Hernandez on July 8, 2019:

> Mr. Hamm's construction company and his subcontractors have engaged in a pattern of nonpayment of wages, safety violations, and other abusive conditions almost since the start of the recovery process in the fall of 2018, which continued through at least February and perhaps even into the present. The blatant wage theft is all the more egregious given that Hamm is an elected official serving on the Bay County Board of Commissioners. Resilience Force attempted to obtain a meeting with Mr. Hamm about its concerns, but he did not respond to emails and did not return phone calls.

(Hernandez Decl. 60 & Ex. C.)

51. O'Brien also contacted different law firms inquiring about representing Soni and Hernandez if Hamm followed through on his threat to have them arrested. (O'Brien Decl. ¶¶ 51-52.)

52. On July 17, 2019, Bastida sent an email emphasizing that the Reel Peak Defendants needed additional footage of "legal action" and "direct action" on the Tommy Hamm story.

53. On September 17, 2019, Soni, Hernandez, and various workers appeared again at a BOCC meeting and provided testimony in support of the need for an ordinance to protect workers from wage theft. It is undisputed that Salazar's mother, Ana Salazar, read a statement claiming that she and her children worked for Winterfell Construction picking up debris and that she suffered an accident but was not provided with any medical assistance. At the meeting, she further stated that she never received payment for her work. (Soni Decl. ¶¶ 169-171.) At the end of the comments, the BOCC asked Soni to leave the proposed ordinance with staff for potential future consideration. (Soni Decl. ¶ 173.) Based on the undisputed summary judgment record, the ordinance was never passed.

54. On October 5, 2019, the *New York Times* published an article, *Hurricane Chasers: An Immigration Work Force on the Trail of Extreme Weather*. It described Resilience Force working in Bay County following Hurricane Michael. It also included a description of various portions of testimony presented to the BOCC by workers and Resilience Force representatives. (Soni Decl. ¶¶ 189-191.) Around the time the New York Times published its article, Resilience Force was working with their public relations firm, Elle Communications, to generate coverage for the matter by "pitching" the story to various other media outlets. (Exs. 162, 163, 256-58, 263, 265, 272; Soni Dep. 323:11-325:11.) Indeed, there is record evidence indicating that Resilience Force was trying to whet the appetite of various media outlets for the documentary.

55. Defendants do not dispute that they were attempting to draw media attention to the story but claimed that this was done in good faith and mainly "because it concerned a group of immigrant workers who were owed substantial amount for unpaid wages for their work performed on five homes in Bay County that were being repaired by Hamm and Winterfell Construction." (Defs.' Reply ¶ 68; Dep. Ex. 283.) Plaintiffs obviously dispute such assertions.

56. It is also undisputed that throughout October and November 2019, the Reel Peak Defendants worked on editing *Immigration Nation*. On November 18, 2019, Bastida emailed the Resilience Force Defendants because the Reel Peak Defendants were "fact-checking" the chunks of the series that featured Resilience Force and specifically inquired about the status of any legal action against Hamm and whether a lawsuit against him and his entity had been filed. (Dep. Ex. 237.) The record is void as to whether they were ever able to substantiate their concerns regarding any lawsuit which was filed against him and his legal entity based on the alleged unpayment of migrant workers.

57. On March 5, 2020, Resilience Force ceased to be an unincorporated association and instead became a District of Columbia not-for-profit corporation, qualifying for tax-exempt status on January 25, 2021. (Soni Decl. ¶ 203-24.)

58. Ultimately, footage depicting the work done by Resilience Force in Bay County was included as a critical part of Episode 4 of the documentary. The episode was 64 minutes long and displayed certain events in Charlotte, North Carolina, and in Bay County, Florida. After reviewing the documentary, Soni and Hernandez concluded that Netflix and RPF accurately depicted the "gist" of what they had discussed with filmmakers about Hamm and Winterfell. (Soni Decl. ¶ 245; Hernandez Decl. ¶ 128.)

59. *Immigration Nation* became available to the public on August 3, 2020. The episode is described as documenting activists fighting back against ICE and "In Florida, a local politician exploit[ing] immigrant fears." It seems fairly obvious that the "local politician" being referred to was Hamm.

60. On January 8, 2021, Soni assisted Joel Salazar, Ana Salazar, and Emilio Rivamar in filing a claim with the United States Department of Labor regarding the alleged "wage theft." (Soni Decl. ¶¶ 247-250.)

61. On March 4, 2021, Hamm and Winterfell filed the underlying lawsuit claiming that they were defamed by the publicizing of the allegations of wage theft (Count I); that all defendants had conspired to defame them (Count III); and that Defendants intentionally inflicted emotional distress to Hamm by attempting to contact him at his home on May 20, 2019 (Count V).

62. On June 30, 2021, Soni, Hernandez and Resilience Force filed the underlying Motion. In essence, the Motion argues that Defendants are entitled to summary judgment on Count I because Plaintiffs were a public official and a public figure and could not prove "actual malice" by convincing clarity. Defendants further asserted that the Court should enter summary judgment in their favor because Plaintiffs could not prove substantial falsity, nor "express malice" and that Defendants' statements were protected by a common law qualifying privilege. They also argued that Plaintiffs were required to give them pre-suit notice pursuant to section 770.01, Florida Statutes, but failed to do so. Finally, the Motion argued that summary judgment should be entered in Defendants' favor on Counts III because they did not conspire to defame Hamm and Winterfell and on Count V because the attempt to contact Hamm at his home did not constitute intentional infliction of emotional distress.[11]

63. In response to the Motion, Plaintiffs argued that the actual malice rule should not be applied to them because Defendants failed to meet their evidentiary burden to establish that they were public figures and that even if found to be public figures, there were more than sufficient evidence of actual malice and genuinely disputed material facts to preclude summary judgment.

64. In opposition to the underlying Motion, Plaintiffs also provided the Declaration of Hamm, where he claimed that neither he nor Winterfell had ever employed, directly or otherwise, Joel Salazar, Ana Salazar, Emilio Rivamar, Saul Zavalos, or Freddy Fuentes, that he did not know said individuals and only met some of them for the first time at the BOCC meeting in September 2019. (Hamm Decl. ¶ 21.)

65. Hamm also asserted that Winterfell subcontracted with Porter International Construction ("Porter"), owned by Lavern ("Vernon") Smith and that Porter employed Stephanie Pryor and Randy Clark. (Hamm Decl. ¶¶ 11-13.) According to Hamm, on February 27, 2019, Winterfell terminated its subcontract with Porter for causes such as lack of proper licensing and insurance, not performing construction work properly, and not paying sub-contractors. (Hamm Decl. ¶ 15.) Hamm further asserted that he demanded from Porter payment for all amounts previously advanced by Winterfell for projects where Porter failed to perform its obligations but that until now, Porter had not repaid any of the $479,388.80 that Winterfell demanded. (Hamm Decl. ¶ 16.) Subsequently, as Hamm claimed, Winterfell filed a lawsuit against Porter in March 2020.[12] (Hamm Decl. ¶ 17.) Hamm also declared that while Winterfell had purchased some vests with its logo on them and had made such available to anyone who worked on its projects, no one was required to wear such. (Hamm Decl. ¶ 23.)

66. Plaintiffs also pointed to evidence of workers, homeowners, and other individuals explaining on and off camera that Winterfell's subcontractors and not Winterfell itself were responsible for the workers' stolen wages. (O'Brien Dep. 38:20-39:11, 46:19-47:21, 50:2-19; Soni Dep. 162:5-163:9; Pls.' Counterstatement of Facts ¶¶ 47-48, 104; 106, 118, 121-122, 124-125, 127.)

67. Furthermore, according to Plaintiffs, on or around July 29, 2019, Hernandez obtained copies of Joel Salazar's records, such as texts, payroll, and bank records, confirming that Salazar, his mother, and Rivamar worked for Porter and under Tino Sanchez's supervision until February 2019, and not for Winterfell. (Dep. Ex. 406.)

68. Plaintiffs also argued that the three workers were paid to make public appearances for Resilience Force and had become so important for the project that they were referred to as "workers leaders," "leaders of Resilience Force," and "national speakers for the organization."[13] (Pls' Counterstatement of Facts ¶¶ 133-134; Dep. Ex. 289.) The undisputed evidence presented by Plaintiffs also indicated that Ana Salazar was offered media training by Defendants prior to her public appearances. (Dep. Exs. 173 & 276.)

69. In furthering their assertion that Defendants had actual knowledge that Hamm and Winterfell were not responsible for the unpaid wages of the undocumented immigrants, Plaintiff also relied on a January 16, 2020, Research prepared by a Resilience Force intern, who sent an update on the "bad guy search" for Tino Sanchez and other subcontractors and who circulated copies of "bad checks" written by Sanchez to Joel Salazar and other members of the Resilience Force. (Dep. Exs. 180 & 376; O'Brien Dep. 120:11-123:3.)

70. In addition, Plaintiffs explicitly argued that by early April 2019, Defendants had already zeroed in on Hamm as their "target" for the "wage theft" storyline and that they referred to Hamm as a "Trump Surrogate" and tailored their message accordingly. (Pls.' Counter Statement of Facts ¶¶ 47, 57 & 153; Pl.'s Ex. I.; Hernandez Dep. 110:15-114:17; Pinzino Dep. 146:9-147:2.) Moreover, Plaintiffs alleged that Defendants were developing plans for "rehearsing" and "role-playing" with "workers" and previewing and coordinating their efforts to ensure they would get the scenes they needed. (Pls.' Counterstatement of Facts ¶ 58.) Lastly, Plaintiffs asserted that there was evidence showing Defendants scripted and staged many of the scenes and specifically their appearances at the BOCC meetings and at Hamm's home and targeted Hamm directly because he was a "republican, white man" and "Trump Surrogate" and had predetermined to use him and Winterfell as the "villains" in Episode 4 of the documentary. (Pls.' Counter Statement of Facts ¶¶ 135-139; Pls.' Am. Compl. ¶ 206.)

71. In their Reply, Defendants admitted that they prepared and

organized the workers for approaching Hamm, who they considered a powerful public figure. (Soni Dep. 177:11-179:2.) However, they contested any allegations that this was done in attempt to construct any false allegations about Plaintiffs. (Defs.' Reply ¶¶ 66-67, 69, 76-77.) Instead, according to Defendants, the conversations with workers over a period of months about unpaid wages gradually led them to believe that Hamm and Winterfell were somehow involved. (Hernandez Decl. ¶¶ 119-25.) Specifically, Soni claimed that based on the information provided to him and to Hernandez, it was their opinion that Hamm and Winterfell were responsible for the workers' missing wages. (Soni Decl. ¶¶ 243-244.)

72. Finally, among other things, Defendants took issue with the evidentiary value of Hamm's July 2, 2019, Letter to Soni and his Declaration filed in opposition to their Motion. Precisely, Defendants argued that to the extent such documents concerned the particular events in front of Hamm's home on the night of May 20, 2019, the documents had to be disregarded by the Court for the purposes of summary judgment because Hamm lacked personal knowledge since he was in his RV with his children behind the home and had not made any prior declarations that he had seen anyone arriving at his home or even that he was aware that anyone went there and knocked on the door. (Defs.' Reply ¶ 118.) Accordingly, Defendants argued that there was no competent evidence in the record that Hamm endured any type of confrontation at his home. (*Id*.)

SUMMARY JUDGMENT STANDARD

73. Effective May 1, 2021, Florida became aligned with "the supermajority of states" by generally adopting the federal summary judgment standard articulated by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (the "*Celotex* trilogy"). *See, In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.").

74. Before May 1, 2021, Florida's prior Rule 1.510 entitled a movant to summary judgment "if the pleadings and summary judgment evidence on file show[ed] there [was] no genuine issue as to any material fact and that the moving party [was] entitled to judgment as a matter of law." Conversely, Federal Rule 56 provided that "[t]he court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." While, at first blush, these summary judgment standards seem similar, the different interpretations given to them by Florida courts and Federal courts amounted to a growing chasm.

75. Until the new summary judgment standard was adopted, Florida movants had to jump the almost insurmountable hurdle of essentially "proving a negative, i.e., the non-existence of a genuine issue of material fact." *Hall v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). Consistent with this lofty standard, the prior standard also dictated that "[i]f the record reflects . . . the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises *even the slightest doubt that an issue might exist, summary judgment is improper*." *See, e.g., St. Pierre v. United Pacific Life Ins., Co.*, 644 So. 2d 1030, 1031 (Fla. 2d DCA 1994) (emphasis added).

76. Finally, under the old standard, a moving party was burdened with not only establishing their own case but also disproving the other party's defenses. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a] ("Florida courts have required the moving party conclusively 'to disprove the nonmovant's theory of the case in order to eliminate any issue of fact.") (citations omitted). These extremely stringent thresholds ultimately "unduly hindered the use of summary judgment in our state" for over half a century. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a].

77. Realizing that the historical summary judgment standard did not "best comport with the text and purpose of Rule 1.510," the Florida Supreme Court determined that adopting the federal standard was "in the best interest of [the State of Florida]." *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 194. The purpose of the summary judgment procedure has traditionally been recognized as serving to avoid the cost and delay of unnecessary trials and to dispose of lifeless cases. *See, i.e., Petruska v. Smartparks-Silver Springs, Inc.*, 914 So. 2d 502, 503 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a] ("The great benefit derived from summary judgment is that it puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury."); *Nat'l Airlines, Inc. v. Fla. Equip. Co. of Miami*, 71 So. 2d 741, 744 (Fla. 1954) ("The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact."). In considering such overarching purpose, the Florida Supreme Court found that the adoption of the federal standard better "secures the just, speedy, and inexpensive determination of every action" without inappropriately trespassing upon fundamental and traditional processes for determining the rights of litigants. *In re Amendments to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 194.

78. Under Florida's revised summary judgment standard, trial courts are to apply what generally mirrors a directed verdict standard. *See, e.g., Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) ("[T]he non-moving party must either point to evidence in the record or present additional evidence 'sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.' ") (citations omitted). More specifically, a movant in Florida no longer has any duty to negate the opposing party's defenses or denials. Instead, the burden of a moving party is much more aligned to their burden at trial. "[T]he burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. "[I]f the nonmoving party must prove 'X' to prevail at trial, the moving party at summary judgment can either produce evidence that 'X' is not so or point out that the nonmoving party lacks the evidence to prove 'X.' " *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018). Once a moving party satisfies said burden, the burden then shifts to the nonmoving party, who must establish the existence of a triable issue via qualified, competent evidence.

79. It is critical to comprehend what constitutes a "genuine issue of material fact" when applying the Celotex trilogy and its progeny. "An issue of fact is 'material' if it is a legal element of the claim under applicable substantive law which might affect outcome of the case." *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997) (citations omitted). An issue of fact "is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* (citations omitted). Trial courts are tasked with viewing all evidence and factual inferences drawn therefrom in the light most favorable to the nonmoving party and to ultimately determine whether that evidence could reasonably sustain a jury verdict. *Id.*

80. In reviewing an application for summary judgment, trial courts are only to consider the record as identified in subdivision (c). Said materials include portions of the record in the case that represent either sworn testimony[14] or admissions.[15] Trial courts may not consider other materials, nor can they consider testimony at the summary judgment hearing. *See., e.g., Nichols v. Preiser*, 849 So. 2d 478, 481 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1671a]; *First North American Nat'l*

Bank v. Hummel, 825 So. 2d 502, 504 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2010a] ("[D]ocuments [that] were not authenticated or supported by an affidavit or other evidentiary proof" should not have been considered on summary judgment motion).

81. Rule 1.510 does not require that a party seeking summary judgment wait for the conclusion of all discovery to pursue the remedy. Instead, subsection (d) affords a responding party the ability to argue that it needs additional time "to obtain affidavits or declarations or to take discovery" to present facts essential to justify its opposition. Nonmovants seeking additional time should not make such applications, however, when they have been dilatory in seeking or taking advantage of discovery opportunities. *See., e.g., Martins v. PNC Bank, NA*, 170 So. 3d 932, 936-37 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1813a] ("[I]f the non-moving party does not act diligently in completing discovery or uses discovery methods to thwart and/or delay the hearing on the motion for summary judgment, the trial court is within its discretion to grant judgment even though there is discovery still pending).

82. The revised Rule 1.510 places the onus on litigants to provide clear and concise arguments establishing their entitlement to relief. First, the parties' supporting factual positions must be filed well before the hearing, not at the last minute. Second, each party must specifically identify particular parts of the record, establishing that a fact cannot be or is genuinely disputed. "A party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. "The nature of this responsibility varies, however, depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or the nonmovant would bear the burden of proof at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Where the movant bears the burden of proof at trial, "that party must show affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Id.* (citations omitted). For issues on which the movant does not bear the burden of proof, "the moving party simply may show there is an absence of evidence to support the nonmoving party's case." *Id.* (citations omitted). Parties not fulfilling their pleading burdens under Rule 1.510 should expect to fail.

83. Finally, and somewhat unique to summary judgment motions involving defamation actions, while the Court is due to "draw all reasonable inferences in favor of [ ] the nonmoving party [. . .] summary judgments are to be more liberally granted in defamation actions against public-figure plaintiffs." *Don King Productions, Inc. v. Walt Disney Co.*, 40 So.3d 40, 44 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1447a] (citation omitted). Specifically, "on a motion for summary judgment in a public-figure defamation case, the burden is on the plaintiff 'to present record evidence sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant.' " *Id.* (citation omitted).

THE LAW

Defamation

84. The law of defamation embraces the idea that individuals should be free to enjoy their reputations unaffected by false and defamatory attacks. Defamation is generally defined as "the unprivileged publication of false statements which naturally and proximately result in an injury to another." *Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973). In Florida, defamation encompasses both libel and slander. *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983).

85. Accordingly, while the Florida Constitution provides that every person may speak, write, and publish sentiments on all subjects, when such right is abused, the ones responsible can be held accountable for the damages caused. *See* Art. I, §4, Fla. Const.

86. Defamation under Florida law has the following five elements: "(1) publication; (2) falsity; (3) [the] actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official or public figure (actual malice), or at least negligently on a matter concerning a private person; (4) actual damages; and (5) [the] statement must be defamatory." *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) [33 Fla. L. Weekly S849a]. Stated otherwise, the plaintiff must show that the defendant published a false statement about the plaintiff to a third party and the falsity of the statement caused injury to the plaintiff. *See NITV, L.L.C. v. Baker,* 61 So. 3d 1249, 1252 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1112a].

87. Due to our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," for at least over fifty years, we have required public officials to meet a much higher threshold than an ordinary plaintiff to succeed in a defamation action. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Specifically, when a plaintiff is a public official, he is required to prove by clear and convincing evidence that the false statements were made with actual malice. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342 (1974).

88. Thus, a critical determination that a trial court must make initially in reviewing an action for defamation is whether the plaintiff is a public official or a public figure for purposes of the claim. This determination is considered an issue of law and is for the Court to resolve. *See Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D701c] (*quoting Saro Corp. v. Waterman Broad. Corp.*, 595 So. 2d 87, 89 (Fla. 2d DCA 1992)).

89. Florida courts employ a two-step process to make this critical assessment: "First the court must determine whether there is a 'public controversy'." *Mile Marker, Inc.*, 811 So. 2d at 845. A public controversy concerns an issue that "had foreseeable and substantial ramifications for nonparticipants." *See generally Sullivan,* 376 U.S. 254 at 270-73 (internal quotation mark omitted). Second, "the court must . . . determine whether the plaintiff played a sufficiently central role in the instant controversy to be considered a public figure for purposes of that controversy." *Mile Marker, Inc.,* 811 So. 2d at 846.

90. When the plaintiff is a public official, he or she must prove, through clear and convincing evidence, that the defamatory falsehood relating to their conduct was made with "actual malice," meaning, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279-80[16]; *see also Smith v. Cuban Am. National Foundation*, 731 So. 2d 702, 706 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b] (citation omitted). In other words, actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

91. The standard of "actual malice" is obviously "more than mere negligence." *Don King. Prods., Inc.,* 40 So. 3d at 43. Instead, and as specifically set forth in *Sullivan*, actual malice contemplates reckless conduct. This type of conduct has also been defined by the United States Supreme Court:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

92. In *Rosenblatt*, the Supreme Court explained the rationale of the *New York Times* constitutional privilege as follows:

> The motivating force for the decision in *New York Times* was twofold. We expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S., at 270, 84 S.Ct., at 721. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

383 U.S. at 85 (footnote omitted).

93. The court added that *New York Times* standards apply "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees," 383 U.S. at 86, and that it is the position itself that must invite public scrutiny, "entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 U.S. at 87 n.13.

94. The *New York Times* rule also applies to public figures. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967). The Supreme Court has advanced two principal reasons for expanding the *New York Times* rule to public figures. First, because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy," such individuals are less vulnerable to injury from defamatory statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Second, public figures often "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and thus have invited "attention and comment." *Id.* at 345.

95. Furthermore, true statements, i.e., statements that are not capable of being proved false and statements of pure opinion, are protected from defamation by the *First Amendment. Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 717 (11th Cir. 1985). As mentioned above, whether a statement is one of fact or opinion and whether a statement of fact is susceptible to defamatory interpretations are generally questions of law for the courts. *Fortson v. Colangelo*, 434 F.Supp.2d 1369, 1378 (S.D. Fla. 2006) [20 Fla. L. Weekly Fed. D94a].

96. Accordingly, a false statement of fact is critical if there is to be recovery in a defamation action. *Zorc v. Jordan*, 765 So. 2d 768, 771 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1620a]. It is also constitutionally mandated that in defamation cases involving public figures, the burden of proving falsity falls on the plaintiff. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775-76 (1986).[17]

97. It should be also recognized that while a false statement of fact has been described as the "sine qua non for recovery in a defamation action," *Byrd,* So. 2d at 595, Florida also recognizes the "substantial truth doctrine" in this type of case. *Smith*, 731 So. 2d at 706. "Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true. *Id*. Indeed, as long as a statement is substantially correct, "[i]t is not necessary that it be exact in every immaterial detail or that it conforms to the precision demanded in technical or scientific reporting." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502-03 (Fla. 3d DCA 1993) (citation omitted). Thus, it is important that trial courts "construe statements in their totality, with attention given to any cautionary terms used by the publisher in qualifying the statement." *Turner v. Wells*, 879 F.3d 1254, 1263 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C539a] (applying Florida law).

98. Florida has also recognized a difference between statements presented as facts and statements presented as opinions or rhetorical hyperboles. *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1235 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D836a]. In such situations, where a controversy exists as to whether a statement qualifies as an opinion or rhetorical hyperbole, "[t]he key distinction is whether the incorrectly reported material would 'have had a different effect on the mind of the viewer' by affecting 'the gist of the story.' " *Id*. (citation omitted). A statement is pure opinion, as a matter of law, "if the speaker states the facts on which he bases his opinion." *Lipsig v. Ramlawi*, 760 So. 2d 170, 184 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D811a]; *see also*, *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981).

99. Indeed, Florida law is clear that a plaintiff cannot "recover for defamation based on statements which are pure opinion." *Fidelity Warranty Services, Inc. v. Firstate Ins. Holdings, Inc.*, 74 So. 3d 506, 515 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2196a] (citing *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D678b]. However, "a 'mixed opinion,' which is based on undisclosed facts . . . that damages [one's] business reputation, is actionable. The facts upon which the opinion is based must be stated and disclosed or known to the audience to whom the publication is made not to be actionable." *Scott v. Busch*, 907 So. 2d 662, 668 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1827a]. "One looks to the totality of the statement, the context in which it was published, and the words used to determine whether the statement is pure or mixed opinion." *LRX, Inc. v. Horizon Assoc. Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So. 2d 881, 885 (Fla. 4th DCA 2003) [30 Fla. L. Weekly D1341b] (citing *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D2181a]). "The distinction between fact and non-actionable opinion is a question of law to be determined by the court and not an issue for the jury." *Fla. Med. Ctr., Inc. v. N.Y. Post Co.*, 568 So. 2d 454, 457 (Fla. 4th DCA 1990).

100. Finally, "there is no strict requirement that an allegedly defamed person be named in a publication for the statement to be actionable." *Beres v. Daily Journal Corp.*, 2022 WL 805733 (S.D. Fla. 2022) (citation omitted). Therefore, Florida courts recognize as a stated cause of action "defamation by implication," in which "the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts." *Jews for Jesus, Inc. v. Rapp,* 997 So. 2d 1098, 1108 (Fla. 2008) [33 Fla. L. Weekly S849a] (internal quotation marks omitted). In such instances, the defendant "may be held responsible for the defamatory implication unless it qualifies as an opinion, even though the particular facts are correct." *Id*. The relevant inquiry is whether "the average person upon reading [the] statements could reasonably have concluded that the plaintiff . . . was implicated." *Miami Herald Publishing Co. v. Ane*, 423 So. 3d 376, 39 (Fla. 3d DCA 1982).

101. Defamation by implication is critical to recognize because "while the defamation law shields publishers from liability for minor factual inaccuracies, it also works in reverse, to impose liability upon the defendant who has the details right but the 'gist' wrong." *Id*. at 1107-08. Importantly, however, even if statements qualify as

defamation by implication, "a defendant is still protected from suit if his statements qualify as opinion." *Turner*, 879 F.3d at 1269 (citation omitted). Thus, if a trial court determines that any of the alleged defamatory statements are in fact pure opinion, then the question of whether the defendant created a defamatory implication by omitting facts is irrelevant.

102. Finally, editorial discretion must be recognized by courts. Indeed, post-*New York Times* defamation cases have often determined that publishers have no obligation to be fair and balanced in reporting a story.[18] *See*, *i.e.*, *Perk v. Reader's Digest Association*, 931 F.2d 408, 412 (6th Cir. 1991) ("[Publishers] have no legal obligation to present a balanced view of what led up to the publicized event]."); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985) (concluding that Newsweek was not liable for omission of additional facts where the omission did not make what was published untrue); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261 (1974) (White, J., concurring) ("[It is an] elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor)."). Ultimately, "[t]he law of defamation is concerned with whether a publisher reports a story *truthfully*, not generously." *Turner v. Wells*, 198 F. Supp. 3d 1355, 1371 (S.D. Fla. 2016).

Conspiracy to Defame

103. "The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy, and which results in damage to the plaintiff." *Liappas v. Augoustis,* 47 So. 2d 582, 582 (Fla. 1950). Thus, a conspiracy has been defined as a combination of two or more people by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th DCA 1985). Indeed, conspiracy is not a separate or independent tort but is a vehicle for imputing the tortuous actions of one co-conspirator to another to establish joint and several liability. *Ford v. Rowland*, 562 So. 2d 731 (Fla. 5th DCA), *rev. denied*, 574 So. 2d 141 (Fla. 1990).

104. Accordingly, if the civil action for damages is maintained against defendants who are alleged to have conspired to harm someone's reputation by defamation statements, the law of defamation applies *Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D509a]. Subsequently, when there is no defamation, there can be no conspiracy claim based on it. *Id.*

Intentional Infliction of Emotional Distress

105. For intentional infliction of emotional distress under Florida law, the plaintiff must prove: (1) deliberate or reckless infliction of mental suffering; (2) by outrageous conduct; (3) which conduct must have caused the suffering; and (4) the suffering must have been severe. *Metropolitan Life Ins. Co. v. McCarson,* 467 So. 2d 277, 278 (Fla.1985) (adopting definition laid out in Restatement (Second) of Torts § 46); *Dominguez v. Equitable Life Assur. Soc. of the United States,* 438 So. 2d 58, 59 (Fla. 3d DCA 1983).

106. Some Florida courts have also held that "before any proper and viable cause of action for intentional infliction of mental distress arises . . . , there must first of all be an independent tort." *Lavis Plumbing Serv. Inc. v. Johnson*, 515 So. 2d 296, 297 (Fla. 3d DCA 1987) (citations omitted).

107. The standard in Florida for evaluating whether the alleged facts are sufficiently outrageous to support a claim for intentional infliction of emotional distress is extremely high. *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278 (Fla. 1985). Indeed, it is not enough that the defendant has acted with an intent which is tortious or criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or "a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Gallogly v. Rodriguez*, 970 So. 2d 470, 471-72 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2925a] (citing to Restatement (Second) of Torts § 46 cmt.d (1965)). Instead, liability would be found "only where the conduct has been so outrageous in character, and so extreme in degree," crossing "all possible bounds of decency," and pertaining as "atrocious, and utterly intolerable in a civilized community." *Id.*

108. Whether the conduct at issue is outrageous enough to support a claim of intentional infliction of emotional distress is a question of law, not a question of fact. *See Scheller v. American Medical International Inc.,* 502 So.2d 1268, 1271 (Fla. 4th DCA 1987). In this regard, the courts are required to evaluate the conduct as objectively as is possible to determine whether it is atrocious and utterly intolerable in a civilized community. *See Baker v. Fla. Nat,'l Bank*, 559 So. 2d 284 (Fla. 4th DCA 1990).

ANALYSIS

109. The Court cannot recall having internally debated a summary judgment order to the extent of this matter. Ultimately, while the Court comprehends the harm that the documentary likely caused Hamm and his business, Winterfell, the extremely high evidentiary threshold established in *Sullivan*, and the progeny of cases that have flowed therefrom, require the Motion to be granted.

110. Make no mistake, the summary judgment record indicates that Hamm and his company, Winterfell, likely became an unfortunate showroom display for certain individuals and corporations that are participating in a national debate about how to handle migrant workers who assist in post-storm cleanups. Indeed, a ripe theory can be asserted that Plaintiffs were simply in the wrong place, at the wrong time, and ultimately got caught in the crossfire of an issue that requires comprehensive state and federal solutions.

111. There is ample evidence from which a reasonable finder of fact could determine that Hamm and Winterfell did *nothing* wrong in relation to how they treated undocumented migrant workers in the aftermath of Hurricane Michael. Further, there is record evidence by which a reasonable juror could determine that Plaintiffs were, to some extent, targeted by individuals who believed that the "ends justified the means" in promoting their cause and allowed somewhat sloppy journalism and questionable judgment to set the narrative for a potentially profitable documentary. Unfortunately for Plaintiffs, such findings, even if they are true, do not satisfy the exceptionally lofty threshold of *Sullivan*.

112. While various members of the current United States Supreme Court[19] have indicated that *Sullivan* went too far as it relates to the minimum requirements for a "public figure" to succeed on a defamation claim, *Sullivan* remains a binding precedent on this Court. More specifically, although various decisions have qualified the burden established in *Sullivan* as it relates to public figures as being "*almost impossible*" for a public official to meet, such burden remains the law of the land. *See*, *i.e.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring) (". . .instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages. . .").

113. The Court fully comprehends the importance of promoting free speech in a democratic society, especially as it relates to allowing criticism of those in public office. However, it is also axiomatic that there are two sides to every sword. The Court is therefore also aware that the "malice standard," as set forth in *Sullivan,* can, to some extent, limit a public official's ability to protect his or her reputation. Some even argue that *Sullivan*'s lofty requirement of malice almost encourages the proliferation of falsehood, which can destroy a person's reputation. Indeed, under *Sullivan's* heightened standard,

"[v]ery few can hope to prevail under the immunity granted defamation defendants . . . ." *Mastandrea v. Snow*, 333 So. 3d 326, 329 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D339a] (Thomas, B.L., concurring).

Count I—Defamation

114. The Court's initial analysis begins with rejecting the Resilience Force Defendants' argument that Plaintiffs were required to provide them with a pre-suit notice pursuant to section 770.01, Florida Statutes. On this specific issue, Florida Courts have concluded that this section of the statute applies "only to the news media, i.e., the press." *Mazur v. Ospina Baraya*, 275 So. 3d 812, 818 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1795b]. Because the Resilience Force Defendants are not engaged in the business of disseminating news, they were not entitled to a pre-suit notice under the applicable statute.[20]

115. The Court's next task is to determine whether the alleged defamation arose out of a matter of public or private concern and whether Plaintiffs should be considered public figures or simply private actors. *Friedgood v. Peters Pub. Co.,* 521 So. 2d 236 (Fla. 4th DCA 1988). The importance of this determination cannot be understated as it relates to the Court's analysis under *Sullivan*.

116. Plaintiffs allege that Defendants made several false statements or implications in episode 4 of Immigration Nation. As articulated by Plaintiffs, the most damaging of them suggested that Hamm and Winterfell were engaging in a "pattern" of "wage theft," using "shell companies" to hire and "steal wages" from undocumented immigrant workers and creating a "construction empire" by using immigrant labor. Plaintiffs' underlying allegation is also that Defendants had manipulated some of the individuals' statements and raw footage of the actual events to create the false impression that Plaintiffs were the ones accountable for the undocumented workers' stolen wages when they knew or purposely disregarded the truth that the responsible parties were indeed the Winterfell's subcontractors.

117. The use of immigrant labor to rebuild towns after natural disasters and companies' failure to pay for such labor is a matter of public concern because it "ha[s] foreseeable and substantial ramifications for nonparticipants." *See generally Sullivan,* 376 U.S. 254 at 270-73. Further, the issue regarding the treatment of immigrants was at the time of Hurricane Michael and still is, a matter of contested debate throughout the United States. Finally, it is difficult to imagine how the aftermath of Hurricane Michael, one of the most powerful and destructive hurricanes to make landfall in United States' history, would *not* be considered a matter of public concern under the *Sullivan* analysis.

118. Further, Hamm was a sitting Bay County Commissioner at the time the hurricane made landfall and served in such capacity for the entirety of the period at issue. As set forth in Hamm's Declaration, "[a]s a county commissioner, [he] was responsible for helping Bay County residents prepare for Hurricane Michael and recover and rebuild after the storm." (Hamm Decl. ¶ 8.) Quite simply, Hamm was a high-ranking public official at all relevant times. Hamm also "was responsible for Winterfell's day-to-day operations and performing [his] general contractor's responsibilities on construction projects for local residents whose homes were damaged in the storm." (Hamm Decl. ¶ 8.) Additionally, the record indicates that Plaintiffs, at the very least, benefited from the labor of undocumented migrant workers through the actions of their subcontractors. It can thus be concluded that Plaintiffs injected themselves in the public controversy. Accordingly, for the purposes of the Court's analysis, Plaintiffs are considered public figures for purposes of further analysis.

119. Because this case involves public figures and the episode at-issue highlighted a matter of public concern, it is Plaintiffs' burden to prove not only that the statements were defamatory and false, but also, that Defendants acted with "actual malice." Further, Plaintiffs must establish such malice by clear and convincing evidence. *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So. 2d 1012 (Fla. 4th DCA 1988); *Smith v. Cuban Am. Nat. Foundation*, 731 So. 2d 702, 707 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b].

120. As discussed above, Plaintiffs argue that the Resilience Force Defendants knew that Episode 4 of *Immigration Nation* was false or that they acted with reckless disregard for the truth of the statements they made throughout the series.

121. In essence, the false statements of fact, according to Plaintiffs, is, to a large extent, the clear implication that Hamm and Winterfell exploited undocumented immigrant workers who were trying to help rebuild Panama City after Hurricane Michael by stealing their wages and threatening them with deportation to cover up their crimes. (Pls.' Am. Compl. ¶ 2.)

122. As detailed in the findings of fact above, Plaintiffs also claimed that Defendants "staged, scripted, rehearsed, directed, and deceptively edited the scenes depicted in . . . [the] 'documentary' to create what is essentially a propaganda film intended to sway public opinion on immigration policies heading into the 2020 election and simultaneously generate revenue and recognition for Defendants at Plaintiffs' expense." (Pls.' Am. Compl. ¶ 5.) In support of its proposition that the statements at issue were false or that Defendants acted with reckless disregard regarding their falsity, Plaintiff relied heavily on Defendants' internal communications and certain interviews with workers and other individuals.

123. While it is obvious that Defendants slanted and edited the video footage to fit the documentary's narrative, it also appears that at least some of the interviewed individuals indicated that Winterfell's subcontractors were responsible for the unpaid wages. Plaintiffs further took issue that the interactions with some other contractors were cut short or completely excluded, while Hamm and Winterfell were almost exclusively targeted and remained the focus of the episode. This, according to Plaintiffs, illustrates the blatant disregard that Defendants had for the truth of what was occurring.

124. Ultimately, the choice to include some interviews and footage while editing other footage is somewhat irrelevant to the underlying analysis because such decisions are generally considered at heart editorial. *See Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241 (1974); *Newton v. National Broad. Co.,* 930 F.2d 662, 685-86 (9th Cir. 1990). As noted by Alfred Hitchcock regarding producing films that people want to see, "[t]he more successful the villain, the more successful the picture."[21] While the record supports an argument that Defendants wanted Hamm and Winterfell to be the primary villains, such a decision does not ripen a claim for defamation.

125. Moreover, "[u]nder the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *Id*. at 706. "The question of falsity, the [Supreme] Court held, 'overlooks minor inaccuracies and concentrates upon substantial truth.' " *Id*. at 707 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). Likewise, in determining whether a statement is "substantially true," the statement in question must be read in the full context of its publication. *Id*. at 705-06.

126. While the parties dispute some of the exact details surrounding the relevant events in this case, for the purposes of the underlying analysis, it is important to note that there appears to be no dispute that there have been undocumented migrant workers, some of whom performed labor on Winterfell Construction projects in the aftermath of Hurricane Michael, who communicated with Defendants about their troubles. The record also confirms that some workers claimed, rightly or wrongly, that they were not compensated for their post-hurricane work. Further, whether accurate or not, some workers indicated that Winterfell was at least partly responsible for such

nonpayment. Accordingly, there was information presented to Defendants by which they could have believed that Plaintiffs improperly benefited from immigrant labor on their construction sites without adequately insuring the compensation of such workers. More specifically, there was information presented to Defendants by migrant workers and other third parties, by which they could have believed that Defendants were legally or morally obligated to assist the migrant workers in obtaining appropriate compensation for their work.

127. Ultimately, this Court's task is to evaluate the episode, not by "extremes, but as the common mind would naturally understand it." *McCormick v. Miami Herald Publishing Co.,* 139 So. 2d 197, 200 (Fla. 2d DCA 1962). In other words, the statements should be considered in their natural sense without a forced or strained construction. *Byrd*, 433 So. 2d at 595. Clearly, a false statement about another is a required element of defamation. *Cape Publ'n, Inc. v. Reakes*, 840 So. 2d 277, 279-80 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D353a]. However, "falsity only exists if the publication is substantially and materially false, not just if it is technically false." *Smith v. Cuban Am. Nat'l Found.*, 731 So. 2d 702, 707 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b].

128. In the instant matter, it may be ultimately true, as Plaintiffs state, that they were not involved in any manner in the alleged mistreatment of the workers. Indeed, Defendants explicitly acknowledged that it was Winterfell's position that the subcontractors were the entities solely responsible for the "stolen wages." However, under *Sullivan* and its progeny, Defendants were not required to emphasize this specific point to the extent that Plaintiffs currently demand. *See Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 412 (6th Cir. 1991).[22] Indeed, very little of what is shown as "news" on television is "fair and balanced"— despite what the creators say.

129. The record also confirms that in making its ultimate inferences, the Resilience Defendants discussed the legal complications of the non-payments at issue with O'Brien, who advised them that in certain circumstances, the general contractors could be found joint employers and held liable for the non-payments.[23] Record evidence also indicates that Defendants, to some extent, contemplated the fact that there were multiple workers who complained that they were not paid for their labor and also attempted to collect information regarding who employed the complaining workers. This record evidence further undermines a conclusion that they acted with malice as is required under *Sullivan*.

130. Accordingly, the conclusion that Plaintiffs were not responsible for the unpaid wages is "not something that could be easily proved or disproved by the testimony of one individual," and instead was more likely a determination that was due to be made by an administrative agency or court. *Perk,* 931 F.2d at 412.[24] On this specific topic, courts have previously held that the "[d]ifference of opinion as to the truth of a matter . . . does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity or with a 'high degree of awareness of . . . probable falsity.' " *Connaughton,* 491 U.S. at 681 (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964)).

131. Finally, even if the allegations against Plaintiffs were indeed false, as this Court accepts for its analysis, there is no clear and convincing evidence that Defendants made such with actual knowledge of such falsity or with reckless disregard for the truth. No matter how gross the untruth, the *Sullivan* rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered in reckless disregard of the truth." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). In this case, there is no competent evidence to sustain such a heightened burden.

132. As outlined above, this Court has thoroughly reviewed the summary judgment record and has considered it in the light most favorable to Plaintiffs. Because the uncontroverted evidence is legally insufficient for Plaintiffs to meet their heightened requisite burden of proof under *Sullivan*, Defendants are entitled to summary judgment in their favor on Count I. This conclusion makes it unnecessary for the Court to discuss any further the remaining legal arguments related to Count I that were raised in the parties' filings.

Count III—Conspiracy

133. Because a cause of action for defamation is a necessary predicate to a cause of action for conspiracy to defame, Count III of the Complaint against the Resilience Force Defendants also cannot survive the summary judgment stage. *See Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) (citing *Liappas v. Augoustis*, 47 So. 2d 582 (Fla. 1950); *see also Hoon v. Pate Constr. Co.*, 607 So. 2d 423, 430 (Fla. 4th DCA 1992); *Palm Beach Health Care v. Prof'l Med. Educ.*, 13 So. 3d 1090, 1096 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1379a] ("Since the counts regarding the goals of the conspiracy—defamation and tortious interference—fail, so too the conspiracy count must fail.").

134. Accordingly, the Resilience Force Defendants are entitled to summary judgment in their favor on Count III.

Count V- Intentional Infliction of Emotional Distress (IIED)

135. Defendants also seek summary judgment on Plaintiff's IIED claim. As explained above, whether conduct is outrageous enough to support a claim of intentional infliction of emotional distress is generally a question of law, not a question of fact. *Gandy v. Trans World Computer Tech. Group*, 787 So. 2d 116, 119 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1053b].

136. The primary focus of Plaintiff's complaint regarding this count evolves from Defendants' visit to Hamm's home on the evening of May 20, 2019. Indeed, among other things, Hamm asserts that Defendants organized a large group of people to approach his "home under the cover of darkness while being encouraged to 'go like an army.' " He further claims this was done with the intent "to terrorize Hamm and his family so they could be filmed without their knowledge." (Pls.' Compl.) Hamm also alleged that Defendants' conduct was outrageous, that it caused him severe emotional distress, shame, embarrassment, and humiliation, and was committed "with the intent to harm [him], or in blatant disregard of the substantial likelihood of causing him harm." (Pls.' Am. Compl. ¶¶ 422-424.)

137. The Court does not doubt that the May 20, 2019, visit to Hamm's residence was embarrassing and distressful. Indeed, this Court pointed out the apparent hypocrisy with Defendants' arguing that the migrant workers felt "*threatened*" when the Bay County BOCC indicated that OSHA may need to review their complaints while simultaneously failing to acknowledge the legitimate feelings that may exist by an individual when between 10-15 strangers show up at his house at night in protest in a storm devastated community. Indeed, the tranquility of Hamm's home and his family members were impaired by the described events. Moreover, the Court recognizes that the evidence in the record supports Hamm's assertion that the May 20 trip to his house was "stag[ed]" for the purpose of "acting out . . . confrontation" that needed to be filmed for the documentary. (*Id.*)

138. However, the law in Florida is settled that under these specific facts, it cannot be concluded that Defendants acted in a manner "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Metropolitan*, 467 So. 2d at 279. As argued, filming a visit to someone's home in the evening, knocking on the door several times, and leaving a note, even in the aftermath of a hurricane, could not be considered "utterly intolerable in a civilized community." In other words, Plaintiff's state of "vexation" cannot be the foundation for a finding that Defendants' behavior was "within the

range marked out in *Metropolitan*." *Kent v. Harrison,* 467 So. 2d 1114, 1114 (Fla. 2d DCA 1985) (a "several months continued campaign of telephonic harassment in the aftermath of a verbal conflict" in a parking lot did not make out a cause of action for intentional infliction of emotional distress); *Cape Pubs., Inc. v. Bridges,* 423 So. 2d 426, 427 (Fla. 5th DCA 1982) (holding that, since the plaintiff was an actor in an event of public interest, her claim of intentional infliction of mental distress was not actionable, despite a photo of her clad only in a towel after the police rescued her from her murderous husband; the court noted that the exposure in the photo was similar to "what can be seen on the beaches"); *Ponton v. Scarfone,* 468 So. 2d 1009, 1010 (Fla. 2d DCA 1985) (holding that "Scarfone's utterances, designed to induce [plaintiff] to join with him in a sexual liaison," did not constitute intentional infliction of mental distress).

139. Therefore, because Defendants' actions fail to meet the test of outrageousness required by the applicable law, Defendants are entitled to summary judgment on this count as a matter of law.

CONCLUSION

140. The law of defamation creates a natural tension between our society's commitment to freedom of speech on the one hand and the importance we place on an individual's reputation on the other. Post-*Sullivan*, as it relates to public figures, the balance currently weighs in favor of full and free public discourse, even to the extent that such speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Sullivan*, 376 U.S. at 270. Here, Plaintiffs simply cannot fulfill *Sullivan's* heightened and rigorous standard, as, even reviewing the evidence in a light most favorable to their cause, they cannot establish by clear and convincing evidence that the alleged defamatory statements were made with knowledge that the statements were false or with reckless disregard of whether they were false.

141. While there is sufficient record evidence from which a reasonable juror could determine that Defendants portrayed Plaintiffs unfairly and even acted with ill will toward them, "[i]ll will is different than actual malice under the defamation test." *Don King Productions, Inc.*, 40 So. 3d at 44 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1447a]. Indeed, this Court believes that Defendants consciously chose to present Plaintiffs in a negative light to support the documentary's (and the political cause's) overarching purpose. For example, record evidence establishes that Defendants failed to include relevant footage and information which would portray Plaintiffs more fairly to a viewer of the documentary. Again, unfortunately for Plaintiffs, "[a]n intention to portray a public figure in a negative light, even when motivated by ill will or evil intent, is not sufficient to show actual malice unless the publisher intended to inflict harm through knowing or reckless falsehood." *Id*. at 45.

142. Further, while Plaintiff may be correct that Defendants, to a certain extent, may have negligently ignored reasons to doubt the undocumented workers' allegations regarding who was responsible for payment of their wages, the evidence, even viewed in light most favorable to Plaintiffs, is not sufficient to prove by clear and convincing evidence that Defendants acted with actual malice in publishing the statements about Plaintiffs. *Id*. at 45-46. Finally, while reasonable journalism standards may have required Defendants to further investigate the claims being made by the migrant workers about the circumstances involving their nonpayment, "[t]he law is well established that the failure to investigate, without more, does not constitute actual malice." *Id*. at 46.

143. Under the standard set forth in *Sullivan*, Plaintiffs did not meet their burden of presenting sufficient record evidence to establish a genuine issue of material fact exists which would allow a jury to find actual malice by clear and convincing evidence.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is **GRANTED**, and summary judgment is entered in favor of the Defendants Saket Soni, Cynthia S. Hernandez, and Resilience Force on Counts I, III & V.

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[1]The entry of this Order was delayed because of a stay due to a bankruptcy case filed by Plaintiff Hamm after the November 3, 2022, hearing. On March 24, 2023, the United States Bankruptcy Court Northern District of Florida issued an Order Granting Debtor's Motion for Relief from Stay to Allow them to Continue Prosecution of Pending Litigation.

[2]Plaintiffs have filed an Amended Motion for Leave to Amend Complaint to include other Defendants and additional facts. However, the relevant counts against Defendants in the proposed Amended Complaint remain identical. The Court will enter a separate Order with respect to the aforementioned Amended Motion.

[3]It should be noted that Defendants took issue with this assertion and instead argued that based on Hamm's claims that Winterfell terminated its contractual relationship with certain subcontractors for failure to have licensing or insurance since said contracts were void from their start, any workers who performed labor on the Winterfell's projects should be considered directly employed by Winterfell. (*See* Defs.' Reply ¶ 3.) For the purposes of this Order, however, this issue does not impact the holding contained herein.

[4]Reel Peak is a fictitious name used by Shaul Schwarz Photography, Inc.

[5]At the hearing, counsel for Plaintiffs further suggested that because Kenneth was an African American contractor, he did not fit the profile of the antagonist that Defendants needed for the narrative of the story. Plaintiffs' Amended Complaint also took issue that Defendants did not "create any Campaign Action plans for any other contractors or subcontractors." (Pls.' Am. Compl. ¶ 114.)

[6]Plaintiffs presented an April 23, 2019, email to Bastida, where the Resilience Force Defendants updated Bastida of the development of the events and confirmed that Freddy Fuentas was a subcontractor under Saul Zavalos.

[7]Castellanos worked as an employee of NEO in 2019-20 and an organizer for Resilience Force and was a co-founder of NGA. (Castellanos Dep. 9:11-17; 19:7-20:24.)

[8]The position expressed by the Resilience Force Defendants is that they took such comments as a potential threat to the undocumented workers, who feared detention and deportation during encounters with federal agencies such as OSHA.

[9]The Court notes that Plaintiffs took issue with some of these statements and argued they should be excluded as inadmissible hearsay. However, the Court notes that the Deposition of Joel Salazar taken by Plaintiffs on October 6, 2022, confirms that Salazar believed he worked for Winterfell and in essence restates the events described by Soni and Hernandez throughout their Declarations. (Joel Salazar Dep. 18:15-20:11.)

[10]The record indicates that there were some discussions between the Resilience Force representatives regarding whether said letter inquired about the identity of the workers or the identity of the subcontractors who allegedly failed to pay the undocumented workers' wages. It was subsequently agreed that the letter was asking for more information about the subcontractors' identity.

[11]On October 24, 2022, Plaintiffs filed their Amended Motion for Leave to Amend Complaint, seeking to add additional parties and more facts in support of falsity and actual malice. At the time of the hearing, counsel for Defendants consented that, for the purposes of the underlying motion and to any extent necessary and if appropriate, the Court should consider Plaintiffs' First Amended Complaint and its additional factual allegations included therein.

[12]Defendants took specific issue with the fact that Plaintiffs had failed to take any legal actions against Porter until after the New York Times story was published and the Netflix and RPF's production was already completed. The evidence provided by Defendants illustrated that the owner of Porter, Lavern Smith, had subsequently filed for bankruptcy in Texas in 2021, asserting the company had a value of $2,250 and a fish tank. (Soni Decl. ¶ 194 & Exs. E, F & G.)

[13]Defendants admitted that they provided "monetary stipends" to workers who had to take time off to assist the Resilience Force project. (Soni Dep. 74:18-75:4.)

[14]This may be in the form of sworn deposition testimony, sworn answers to interrogatories and affidavits submitted in support or in opposition to the motion.

[15]Admissions may come either through the pleadings in the file or through admissions that are effectuated under Rule 1.370 regarding requests for admissions.

[16]"The New York Times line of decisions . . . represents 'unquestionably the greatest victory won by the defendants in the modern history of the law of torts. . . . It has literally revolutionized the law of defamation in Florida and every other jurisdiction in the country.' " *Miami Herald Publishing Co., v. Ane*, 423 So. 2d 376, 382-83 (Fla. 3d DCA 1983) (internal citations omitted).

[17]Historically, publishers were strictly liable for publication of defamatory statements unless they could prove that the statements were either true or privileged. *From v. Tallahassee Democrat, Inc.*, 400 So. 52, 54 (Fla. 1st DCA 1981) (citation omitted). Therefore, at common law, the truth was considered simply a defense. *Id*. However, in 1964, the United States Supreme Court in *New York Times v. Sullivan* concluded that truth standing alone was insufficient to protect freedom of expression and held that guarantees afforded by the First Amendment prohibit a public official from recovering damages for a defamatory falsehood unless he proves that the

statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Id*.

[18]Unfortunately, it is almost impossible to find a modern news reporting outlet that would qualify as fair and balanced at the national level. It has become common place for citizens to understand that much of what they watch on the news—especially the "national" news—is slanted based on the political views of the presenter.

[19]Justices Thomas and Gorsuch, for example, have indicated that *Sullivan* was wrongly decided and was not grounded in the history or text of the First Amendment. *See, i.e., Berisha v. Lawson*, 141 S. Ct. 2424, 2425-30 (2021) [29 Fla. L. Weekly Fed. S9a] (Thomas, J., and Gorsuch, J., dissenting); Former members of the High Court have also expressed similar reservations over the prior 50 years.

[20]The Court is *not* making determination on this specific issue as it relates to any of the remaining Defendants.

[21]*See*, Hitchcock/Truffaut (1966) by Francois Truffaut.

[22]Additionally, it should be recognized that the Resilience Defendants were not the ultimate decision-makers as to what footage would be included or excluded from the episode, even if it is undisputed that they agreed that the final version of the episode was an accurate depiction of the events at issue.

[23]The Court is not providing any opinion regarding the legal analysis provided by O'Brien in guiding Defendants. Indeed, an argument can be made that O'Brien could not have conducted a thorough analysis of Plaintiffs' responsibility for payment of these workers with the minimal information at her fingertips when the opinion was provided.

[24]O'Brien declared that under the specific facts presented to her, it was her position that Hamm and Winterfell could be regarded as joint employers of the workers who did not receive their promised or statutorily required pay for the work that they had performed through Winterfell. (*See* O'Brien Decl. ¶ 27.) Indeed, various jurisdictions use the joint employer test to determine if an employer should be liable for a subcontractor's wage violations. Some jurisdictions have also passed specific legislation imposing liability on the general contractor. The applicable federal law on this matter is outlined in the Fair Labor Standards Act (FLSA). In addition, the Eleventh Circuit has established an eight-factor test guided by five principles to determine whether there is a joint-employer relationship. *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1175 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1277a] (the eight factors are the nature and degree of control of the workers; the power to determine the pay rates or the methods of payment; the right, directly or indirectly to hire, fire, or modify the employment conditions; payroll and payment of wages; the ownership of the facility where the work occurred; whether the job performed was integral to the asserted joint employer's business, and; evaluation of the relevant investments in equipment and facilities used by the workers).

* * *

Real property—Planned unit development—Plat restrictions—Development of golf course—Action by condominium association and individual unit owners seeking declaratory and injunctive relief to prevent golf course in planned unit development from being redeveloped for residential use—Standing—Where plat restrictions and reservations "reserved" golf course tracts, reservation created rights in favor of dedicator to use property freely and did not confer enforcement rights on plaintiffs—No merit to argument that redevelopment of golf course would violate common plan of development where there were no plats, deeds or chains of title, or other recorded instruments containing restrictions against replacing golf course with dwelling units, and neither master plan nor master declaration contain any such restrictions—Summary judgment is entered in favor of defendants

SUNRISE OF PALM BEACH CONDOMINIUM ASSOCIATION, INC. 2, Plaintiff, v. GRILLO GOLF MANAGEMENT, LLC, MATTAMY HOMES CORPORATION, and MATTAMY PALM BEACH, LLC, Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502021CA013862XXXXMB AI. August 8, 2023. G. Joseph Curley, Judge. Counsel: John M. Jorgensen, Scott, Harris, Bryan, Barra & Jorgensen, P.A., Palm Beach Gardens, for Plaintiff. William J. Berger, Weiss, Handler & Cornwell, P.A., Boca Raton, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE was before the Court on July 5, 2023, on the Motion for Summary Judgment filed by Defendants, Grillo Golf Management, LLC ("Grillo") and Mattamy Palm Beach, LLC ("Mattamy") (the "Motion") (DE # 111). Having considered the Motion, Plaintiffs' Response (DE # 137), and Defendants' Reply (DE # 140), the summary judgment material submitted by the parties, the oral argument of counsel, and being otherwise duly advised, the Court makes the following findings of fact and conclusions of law.

Plaintiffs' Claims

The original Complaint was filed December 23, 2021. (DE # 3). The current Complaint is the Third Amended Complaint ("TAC") deemed filed November 11, 2022. (DE # 90). The parties have had adequate time to conduct discovery.

This dispute concerns Lucerne Lakes Planned Unit Development (PUD) in Palm Beach County. Plaintiffs, a condominium association in Lucerne Lakes, and three individuals who own single family homes there, have sued the seller (Grillo) and buyer (Mattamy) of the golf course in Lucerne Lakes for declaratory and injunctive relief to prevent the golf course from being redeveloped for residential use.

In Count I for a declaratory judgment, Plaintiffs allege:

a. The redevelopment of the golf course would be "in violation [of] plat restrictions and reservations that preserve the [golf course] in perpetuity for the purposes of recreation, in accordance with a common plan of development." (TAC ¶ 1);

b. "The plat restrictions and reservations in the three [golf course] plats create enforceable private rights for Plaintiffs and other homeowners in the Lucerne Lakes [PUD] that the [golf course] be reserved and used in perpetuity for recreational purposes." (TAC ¶ 3);

c. "The plat restrictions and reservations in the three [golf course] plats are consistent with and implement a common plan of development as reflected in the Master Plan for the PUD, last revised in 2000, and in the Lucerne Lakes Master Declaration of Covenants and Restrictions ('Master Declaration') wherein the Recreational Tracts and Golf Course Tracts provide recreational and open green space for the PUD." (TAC ¶ 4);

d. "Absent such a declaration, Defendants will proceed to redevelop the [golf course] . . . which would directly violate plaintiffs [sic] private rights arising from the plat restrictions and reservations." (TAC ¶ 29.); and

e. In the WHEREFORE clause, Plaintiffs ask the Court to enter a judgment declaring "that the plat restrictions and reservations are binding and enforceable and restrict use of the [golf course] to recreation in perpetuity. . . ."

In Count II for injunctive relief, Plaintiffs allege:

a. They will suffer irreparable harm if the tracts are redeveloped as residential because the residential development "would violate the plat restrictions and reservations that reserve for the benefit of Plaintiffs and other residents of the PUD that the residential Tracts and Golf Course Tracts be reserved in perpetuity for recreational purposes, reduce green space; and permanently destroy the character of the Community" (TAC ¶ 34); and the redevelopment "would reduce the value of the Plaintiffs' properties" (TAC ¶ 35);

b. They "reasonably and justifiably relied, and continue to rely, on the application and enforceability of the plat restrictions and reservations to limit the use and purpose of the Recreation Tracts and Golf Course Tracts that surround their residences and the Community." (TAC ¶ 36);

c. The residential redevelopment "would violate a clear right of implied private rights created by the plat restrictions and reservations . . . ." (TAC ¶ 37);

d. They have no adequate remedy at law. (TAC ¶ 38); and

e. In the WHEREFORE clause, they request an injunction to enjoin the redevelopment of the golf course tracts and "that the [golf course tracts] be used in perpetuity for the purposes recreation. . . ."

"The issues before the Court are whether the reservations in the golf course plats restrict the use of the golf course to a golf course or recreational area, and whether Plaintiffs have standing to enforce the reservations." (Resp. 2.) "The issue before [the] Court is whether reservations in the golf course plats limit Grillo's and Mattamy's use of the of the property to a golf course." (Resp. 18, ¶ 13.)

Undisputed Facts

Lucerne Lakes is a residential planned unit development established by the Palm Beach County Commission in 1970. (Ex. 1 at 110, 112.)[1] It covers 273 acres. Of these, 79 acres comprise the golf course. (Ex. 1 at 112.) All of Lucerne Lakes, including the golf course, has always been zoned residential. (Ex. 1 at 110.)

Lucerne Lakes was initially approved to have 3,395 dwelling units. (Ex. 1 at 110.) It currently is approved to have 3,282 dwelling units. (Ex. 1 at 112.) The allowable density is 12 units per acre. (Ex. 1 at 112). The number of existing dwelling units is 1,940. (Ex. 1 at 112.)

Lucerne Lakes is divided into twenty subdivisions, all zoned residential. Seventeen subdivisions are used for residential use, including condominiums and single-family homes, and three subdivisions are used as the golf course, an allowable use under the residential zoning. (Ex. 1 at 134; Ex. 3 at 7.) The twenty plats for the twenty subdivisions were recorded in the Palm Beach County public records in phases on different dates. (Ex. 3 at 7.)

The golf course

The golf course existed before a portion of it was first platted by the developer in 1973. (Ex. 1 at 110; Resp. at 12, ¶ 4.) Florida Gardens Land and Development Company ("Florida Gardens"),[2] platted the golf course in phases, the first in 1973, the second in 1977, and the third in 2000. (TAC ¶ 2.) The golf course is privately owned and managed. It is open to the public. Membership in the golf course is not required for Lucerne Lakes residents. (Ex. 1 at 110.) The golf course has no membership. Lucerne Lakes residents have no special privileges related to the use of the golf course and pay nothing for its support. (Ex. 4 at 3, 4.)

The alleged "plat restrictions and reservations"

Plaintiffs seek to enforce alleged "plat reservations and restrictions" found in the "Dedication" sections of the three golf course plats. (Ex. 5g; Ex. 5a; Ex. 5f.) The grantor of the plats (the owner of the property) was the same for all three plats. The Dedications in the golf course plats are quoted below in the order they were recorded. The alleged "plat restrictions and reservations" are highlighted in bold and certain words are underlined for emphasis, with the remainder in normal font.

Golf course plat 1, recorded May 22, 1973 (Ex. 5g):

HAVE CAUSED THE SAME TO BE SURVEYED AND PLATTED AS SHOWN HEREON, AND FURTHER ACKNOWLEDGES THAT IT HAS RESERVED TRACT "A", THE GOLF COURSE TRACT AND THE RELATED DRAINAGE EASEMENTS FOR THE PURPOSES IDENTIFIED ON THIS PLAT. THE TRACT FOR PRIVATE ROAD PURPOSES AS SHOWN IS HEREBY DEDICATED TO THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION AND ITS PERPETUAL MAINTENANCE OBLIGATION OF SAID ASSOCIATION TO BE FORMED BY THE DEDICATOR OR THEIR SUCCESSORS OR ASSIGNS.

Golf course plat 2 recorded April 28, 1977 (Ex. 5a):

1. AND DO HEREBY FURTHER ACKNOWLEDGE THAT IT HAS RESERVED TRACT "A", (LUCERNE LAKES BOULEVARD), AS SHOWN HEREON, FOR PRIVATE ROAD PURPOSES, SAID TRACTS "A" AND THE DRAINAGE EASEMENTS AS SHOWN HEREON, ARE HEREBY DEDICATED TO THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION AND IS THE PERPETUAL MAINTENANCE OBLIGATION OF SAID ASSOCIATION TO BE FORMED BY THE DEDICATION (sic), OR THEIR SUCCESSOR OR ASSIGNS.

2. **RECREATION TRACTS AS SHOWN HEREON ARE HEREBY RESERVED IN PERPETUITY FOR THE PURPOSES OF RECREATION. SAID RECREATION TRACTS ARE THE PERPETUAL MAINTENANCE OBLIGATION OF OWNERS, THEIR ASSIGNS, OR TRANSFEREES**.

Golf course plat 3 recorded April 17, 2000 (Ex. 5f):

1. . . . AN EASEMENT OVER THE WATER MANAGEMENT TRACTS (W.M.T.) AND/OR ANY DRAINAGE EASEMENTS DEPICTED HEREIN ARE GRANTED TO LUCERNE LAKES HOMEOWNERS' ASSOCIATION, INC. . . . AND/OR ANY OTHER ASSOCIATION, ENTITY OR INDIVIDUAL WHICH HAS THE DUTY TO MAINTAIN ANY LANDS ADJOINING THE W.M.T. . . .

2. **GOLF COURSE TRACTS (G.C.) TRACTS GC-1 THROUGH GC-E, AS SHOWN HEREON, ARE HEREBY RESERVED FOR THE FLORIDA GARDENS LAND DEVELOPMENT COMPANY, A FLORIDA CORPORATION, ITS SUCCESSORS AND ASSIGNS FOR GOLF COURSE PURPOSES AND ARE THE PERPETUAL MAINTENANCE OBLIGATION OF SAID CORPORATION, ITS SUCCESSORS AND ASSIGNS WITHOUT RECOURSE TO PALM BEACH COUNTY.**

On April 28, 1974, an entity named Lucerne Lakes Associates, Ltd. recorded the plat for the subdivision where the individual Plaintiffs live. (Ex. 5b.)

On September 17, 1981, Florida Gardens recorded the plat for the subdivision where the condominium units operated by Plaintiff Sunrise are located. (Ex. 5d.)

On September 3, 1982, Florida Gardens recorded the plat for the subdivision where two former individual Plaintiffs live. (Ex. 5d.)

The Master Declaration and the Master Homeowners Association

In 1978, the developers of Lucerne Lakes, including Florida Gardens, recorded the Lucerne Lakes Master Declaration of Covenants and Restrictions (the "Master Declaration"). (Ex. 6 at 1.) In 1978, the Lucerne Lakes Master Homeowners Association was formed. Its members are eight residential community associations and the golf course owner. (Ex. 6, Ex. B.)

The sole purpose of the Lucerne Lakes Master Declaration and the Master Association is to maintain the common areas of the Master Association, namely, Lucerne Lakes Boulevard and the drainage easements which run through Lucerne Lakes. (Ex. 6 at 1.) To carry out this purpose, the Master Association assesses its members (the Sub-Associations and the golf course owner) for operating and maintenance expenses. (Ex. 6 at 4-5.)

The County Commission's approval

In 2020, Defendants submitted an application to Palm Beach County for a development order amendment to modify the use of the golf course to residential and replace the golf course with 450 dwelling units.[3] (Ex. 5i; Ex. 1 at 107; Ex. 3a.) The Lucerne Lakes Master Homeowners Association supported the application and entered into a written agreement with Mattamy to that effect. (Ex. 8a.) Plaintiffs' attorneys submitted written objections to the application. (Ex. 1 at 121.) On October 28, 2021, at a quasi-judicial hearing, the County Commission, over Plaintiffs' objections, adopted a resolution approving Defendants' application (the "Resolution"). (Ex. 5 ¶ 27.) The Resolution incorporates a Staff Report and authorizes Mattamy to submit for approval a modified Master Plan for Lucerne Lakes showing residential use of the golf course. (Ex. 5j.)

The alleged "plat restrictions and reservations" are not in Plaintiffs' chains of title

Critical facts are that (1) none of the Plaintiffs or the unit owners of Sunrise or Sunrise itself own property in the three golf course plats (Ex. 5; Ex. 9 ¶¶ 1-10); (2) none of the Plaintiffs have in their respective chains of title any deed or other document that makes reference to

any of the three golf course plats or the alleged "plat restrictions and reservations" (Ex. 5; Ex. 10; Ex. 11 ¶¶ 1-3); (3) none of the Plaintiffs acquired title to their respective properties by way of a conveyance that refers to any of the golf course plats (Ex. 5; Ex. 10; Ex. 12 ¶ 1); (4) none of the Plaintiffs are the successors or assigns of property within any of the golf course plats (Ex. 5); (5) none of the Plaintiffs have been assigned the right to enforce the alleged "plat restrictions and reservations" (Ex. 5); and (6) none of the Plaintiffs have ever paid to support the golf course nor are they obliged to do so.

From 1972 to 2021, the Palm Beach County Commission approved multiple modifications to the Lucerne Lakes Master Plan. (Ex. 1 at 110.)

Summary Judgment Standard

Summary judgment is appropriate where 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). "[S]ummary judgment should be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *In re Amendments to Fla. R. of Civ. P. 1.510,* 309 So.3d 192 (2020) [46 Fla. L. Weekly S6a] (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548 (1986)).

Analysis

Defendants assert that Lucerne Lakes is atypical of the communities in cases holding that property owners can enforce use restrictions found in adjoining property. Defendants assert that in those cases, courts found the plaintiffs were the intended beneficiaries of the restrictions at issue for reasons which do not apply here: *e.g.,* where the restriction was in the plat, where the plaintiff owned property, or the restriction was in the chain of title of the plaintiff's property, or the plaintiff acquired its property by a conveyance with reference to the restriction, or there were deeds from a common grantor containing the restriction.

In *Cudjoe Gardens Property Owners Association, Inc. v. Payne,* 770 So.2d 190 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2305b], the Supreme Court expressly distinguished the standing of a plaintiff who owns property, from one who does not own property, in the subdivision with a plat containing the restriction sought to be enforced. "The Paynes' reliance on *Palm Point* [*Property Owners' Association of Charlotte County, Inc. v. Pisarski,* 626 So.2d 195, 197 (Fla. 1993)] is misplaced because in the present case, unlike the Association in the *Palm Point* case, the Cudjoe Gardens Association owned a platted lot within the subdivision." *Id.*

In *Hurt v. Lenchuk,* 223 So.2d 350, 351 (Fla. 4th DCA 1969), the court held the plaintiffs could enforce a restriction on the use of property as a park located in their same subdivision. The plaintiffs "thereby acquired by implied covenant a private easement in all of the park as appurtenant to the premises granted and conveyed to them." *Id.*

In *McCorquodale v. Keyton,* 63 So.2d 906, 908 (Fla. 1953), the successful property owners owned property in the subdivision with a plat containing the restriction they sought to enforce. The court held the property owners in the platted subdivision could enforce a dedication in their plat dedicating a parcel as a park "for the use of the property owners of said plat. . . ." *Id.* at 910.

In *Bonifay v. Dickson,* 459 So. 2d 1089 (Fla. 1st DCA 1984), the plaintiff acquired title with reference to a plat containing the restriction. In *Osius v. Barton,* 147 So. 862, (Fla. 1933), a real estate developer inserted in its common grantor deeds a restrictive covenant aimed at permitting only residential construction.

Property outside a subdivision is not subject to restrictions found within the subdivision absent a reference to the restrictions in the property's deed of conveyance. *Roeder v. Orange Tree Estate Homes, Section One,* 580 So.2d 823, 826 (Fla. 5th DCA 1991). "The complaint in this case is based on the theory that the landowners' property was part of the subdivision in which Lot 40 is located and was subject to the subdivision restrictions. In fact, as the trial court found by partial summary judgment, the landowners' 'additional parcel' is not in the subdivision and not subject to the recorded subdivision restrictions." *Id.*

Unlike the facts in the above cited cases, Plaintiffs have presented no evidence to establish their deeds contain or refer to the alleged "plat restrictions and reservations."

Principles of construction

A plat is a map of a subdivision. " 'Plat or replat' means a map or delineated representation of the subdivision of lands, being a complete exact representation of the subdivision and other information in compliance with the requirement of all applicable sections of this part and of any local ordinances." Fla. Stat. § 177.031(14).

Platting is the subdivision of property as recorded in the official records. "The recording [in the official records] of any plats made in compliance with the provisions of this part shall serve to establish the identity of all lands shown on and being part of such plats, and lands that may thenceforth be conveyed by reference to such plat." Fla. Stat. § 177.021.

Every plat contains a "Dedication" section executed by the owner. "Every plat of a subdivision filed for record must contain a dedication by the owner or owners of record. The dedication must be executed by all persons, corporations, or entities whose signature would be required to convey record fee simple title to the lands being dedicated in the same manner in which deeds are required to be executed. . . ." Fla. Stat. § 177.081(2). "The primary name of the subdivision shall be shown in the dedication and shall coincide exactly with the subdivision name." Fla. Stat. § 177.051(1).

The principles for construction of a plat are the same as for other written documents. "A plat is a written instrument and like all other documents must be construed as a whole in order that the intention of the parties may be ascertained and every part of the instrument given effect." *Ware Const. Co., Inc. v. Thomas,* 357 So.2d 452, 453 (Fla. 2d DCA 1978). Rejection of any part of the plat as superfluous should be avoided. *Id.*

Where a restriction is ambiguous, it must be construed against the party seeking to enforce it. *Boyce v. Simpson,* 746 So.2d 507 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2658a]. In *Boyce,* neighboring property owners sought an injunction to prohibit the defendants' using their dwelling as an adult congregate living facility based on an ambiguous use restriction in the homeowners' association's declaration. The circuit court denied the request for an injunction. The Fourth District held that the restriction did not prohibit the homeowners' proposed use of their dwelling, stating, "Restrictive covenants pertaining to the free use of real property are to be strictly construed in favor of the [property owner against whom enforcement is sought]."

Citing *Boyce,* the Third District in *Beach Towing Services, Inc. v. Sunset Land Associates, LLC,* 276 So.3d 857, 863-864 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2195a], refused to enforce an ambiguous restriction:

> Where a restrictive covenant is ambiguous, it must be construed against the party seeking to enforce it. *Boyce v. Simpson,* 746 So. 2d 507 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2658a]. Moreover, restrictive covenants must be strictly construed in favor of the free and unrestricted use of real property. See *19650 NE 18th Avenue, LLC v. Presidential Estates Homeowners Assoc., Inc.*, 103 So. 3d 191, 195 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2280a]. Here, Defendants are the parties seeking to enforce the Covenant. Therefore, it must be

construed against them. *Boyce,* 746 So. 2d at 508. In addition, because the Covenant restricts the use of real property, it must be construed in favor of the free and unrestricted use of the Property. *19650 NE 18th Avenue, LLC,* 103 So. 3d at 195. Accordingly, the Covenant must be construed to prohibit only the use of the Property for a company where vehicles are mechanically repaired, rebuilt or constructed for compensation. *See, McInerney v. Klovstad,* 935 So.2d 529, 532 ((Fla. 5th DCA 2006) [31 Fla. L. Weekly D1462c] (concluding that disputed phrase "any conflict" in restrictive covenant was ambiguous because it was undefined and thus fairly susceptible to more than one interpretation, and holding that "based on our conclusion that [the covenant] is ambiguous, the rules of construction require that it be construed against the [neighbors] who seek to enforce the restriction"). The Covenant cannot be read to prohibit a parking garage on the Property. Any other construction would run counter to the well settled rules that a restrictive covenant must be strictly construed against the party seeking to enforce it, and in favor of the free and unrestricted use of the Property. *See, Presidential Estates,* 103 So. 3d at 195.

"The expressed intent of the parties is the controlling factor. Intent unexpressed will be unavailing, and substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant." *Moore v. Stevens,* 90 Fla. 879, 106 So. 901, 903 (1925), quoted in *Beach Towing, supra,* at 860. "Restrictive covenants will be enforced provided that they are unambiguous, reasonable, and make the parties' intent clear." *19650 NE 18th Ave., LLC v. Presidential Estates Homeowners Ass'n, Inc.,* 103 So.3d 191, 194 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2280a].

Opposing the above holdings, Plaintiffs cite *North Lauderdale Corporation v. Lyons,* 156 So.2d 690, 692 (Fla. 2d DCA 1963): "if the plat is ambiguous, the construction must be against the dedicator and in favor of the public. *E.g., Florida East Coast Ry. Co. v. Worley,* 49 Fla. 297, 38 So. 618 (1905)." *North Lauderdale* and *Worley,* however, are inapplicable to this holding since they involved actions to enforce rights of the public.[4] In the instant case, Plaintiffs alleged private rights to restrict the use Defendants' property, not rights on behalf of the public.[5] Plaintiffs ask the Court to construe the reservations in their favor, not the public's.

In construing a written document, the first task "is to determine whether [the terms in question] are unambiguous or ambiguous on [their] face." *Beach Towing, supra* at 861, citing *Team Land Development, Inc. v. Anzac Contractors, Inc.,* 811 So.2d 698, 699-700 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D288a] (the initial determination of whether a contractual term is ambiguous is a question of law for the court).

Restriction versus Reservations

The operative word in the alleged "plat restrictions and reservations" is "RESERVED." *See,* Undisputed Facts, *supra* at 6-7.

Plaintiffs contend that by using the word "RESERVED" in the three golf course plat dedications, Florida Gardens intended to grant the residents of Lucerne Lakes the right to restrict in perpetuity the golf course owner's use of the property to golf and recreation use and to maintain that use in perpetuity. They argued that because the reservations do not state whom they were intended to benefit, they are ambiguous, and a genuine factual dispute is created by extrinsic evidence showing the grantor intended to benefit the residents. Plaintiffs cite no case holding a plat reservation is ambiguous merely because the dedicator has not named itself as the beneficiary of the reservation.

The Fourth District has defined a reservation, in contrast to a restriction, as for the benefit of the grantor of the reservation. "Restriction involves a limitation on the use of property. 7 G. Thompson, Real Property s. 3160 (1962). **Reservations are created for the benefit of a grantor** out of the thing granted, causing something to exist that had no existence before the grant. *City of Jacksonville v. Shaffer,* 107 Fla. 367, 144 So. 888 (1932)." *Regency Highland Assoc. v. Sherwood,* 388 So. 2d 271, 272 (Fla. 4th DCA 1980) (emphasis in original). The grantor typically "reserves" some right or burden to itself that did not previously exist.

Plaintiffs' state in their Response, "Defendants cite *City of Jacksonville v. Shaffer*, [*supra*], for its definition of the term reservation. As stated in *City of Jacksonville*, 'reservations are created for the benefit of a grantor out of the thing granted, causing something to exist that had no existence before the grant.' " (Resp. 12.) Despite this concession, Plaintiffs then seek to offer a different definition: "[h]owever, as noted in *Broward County v. Lerer,* 203 So.2d 672 (Fla 4th DCA 1967), a reservation of land in a plat does not necessarily preclude a dedicatory intention." (Resp. at 12.)

In *Lerer,* the Fourth District did not offer a contrary definition of reservation to the one in its later decision in *Regency Highland* or the Florida Supreme Court's decision in *City of Jacksonville.* Instead, the *Lerer* court identified other words in the plat that created an ambiguity in the grantor's **use** of the word reservation which created a factual dispute whether the grantor meant reservation each time it used the word or whether it was using the word interchangeably with the word dedication. As a result of these other words, "[i]t is clear in this instance the dedicator used the words reservation and dedication interchangeably." *Lerer,* 203 So.2d at 674. That is not the case here. Plaintiffs do not point to any words in the golf course plats, and there are none, which suggest Florida Gardens intended to use reservation interchangeably with dedication or any other word. Indeed, the words appear to be precise when reserving or dedicating matters.

A central feature of Plaintiffs' arguments in their Response and at oral argument is the question, why would the grantor of the golf course plats have reserved them for golf course use if not to benefit the residents. (Resp. 16-17.) The suggestion is that the grantor could conceivably not have had any reason or purpose for the reservations except to benefit the residents.

City of Jacksonville, the Florida Supreme Court case cited in *Regency Highland,* however, demonstrates that plat reservations can be used to protect the dedicator rights from a change of circumstances that could affect its use of the platted property. In that case, the property owners platted property located at the time outside the City of Jacksonville. The reservation in the plat dedication was to operate utilities on the property. Thereafter, the City annexed the property and instituted condemnation proceedings. The issue was whether the plat reservation entitled the owners to compensation for the loss of value of operating the utilities. The Florida Supreme Court held they were so entitled, stating "[a] 'reservation' is the creation in behalf of the grantors [of the plat] a new right issuing out of the thing granted, something which did not exist as an independent right before the grant." 107 Fla. at 371.

City of Jacksonville illustrates the purpose served by the owner including in a plat dedication a reservation for a particular use that was allowable at the time of the platting, but which may otherwise not be a right under future circumstances. The operation of utilities was an existing allowable use of the property before it was platted. By reserving that right in the plat, the property owners rights vested. Platting the property with the reservation protected them from a change of circumstances.

Here, while the use of the golf course was and is a permitted use under the Lucerne Lakes PUD residential zoning designation, by including the reservations in the golf course plats, Florida Gardens protected its right to use the properties for a golf course even if the County eliminated those uses as allowable uses under the residential zoning designation. At the same time, the reservations allowed Florida Gardens, its successors and assigns, *i.e.,* Defendants, to seek and

obtain permission from the County to change the use to residential, consistent with the County Commission's original vision of Lucerne Lakes as a high residential community.

In the context of arguing that reservation is interchangeable with dedication, Plaintiffs' quote from the section titled "Dedication and Reservation" from Article II of the Palm Beach Uniform Land Development Code ("ULDC"): "Although the term "dedication" is meant to imply a public use while the term 'reservation' is meant to imply a private use, the terms may inadvertently be used interchangeably." (Resp. 12, ¶ 2.) Here, there is no evidence that Florida Gardens inadvertently used reservation interchangeably with dedication.

Plaintiffs also refer to the ULDC provision that, "All areas reserved for use by residents of the subdivision shall be reserved by the owner of the land at the time the plat is recorded." (Resp. 9, ¶ 10.) They cite this provision without comment or regard for the date of its passage. Because the provision applies to subdivisions which are reserved for use by residents, it is not probative whether the reservations here were reserved for use by the residents.

Plaintiffs concede the definition of reservation as being in favor of the grantor. They contend, however, the Court must consider the plats "as a whole." "Generally, 'reservation' does have a technical definition, however, in this case, they argue that the Court must look beyond the technical definition of reservation and consider the language of the golf course plats as a whole." (Resp. 12, ¶ 3.)

The full dedications are quoted below. The words relied on by Plaintiffs are highlighted. The words they omitted are not highlighted. The dedications appear in the order in which the three plats were recorded by the dedicator beginning in 1973.

Golf course plat 1 recorded May 22, 1973 (Ex. 5g):

HAVE CAUSED THE SAME TO BE SURVEYED AND PLATTED AS SHOWN HEREON, AND FURTHER ACKNOWLEDGES THAT IT HAS RESERVED TRACT "A", THE GOLF COURSE TRACT AND THE RELATED DRAINAGE EASEMENTS FOR THE PURPOSES IDENTIFIED ON THIS PLAT. THE TRACT FOR PRIVATE ROAD PURPOSES AS SHOWN IS HEREBY DEDICATED TO THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION AND ITS PERPETUAL MAINTENANCE OBLIGATION OF SAID ASSOCIATION TO BE FORMED BY THE DEDICATOR OR THEIR SUCCESSORS OR ASSIGNS.

The dedicator used the word "RESERVED." Under the *Regency Highland,* this term is a reservation, not a restriction. It creates a right in favor of the dedicator to operate a golf course in the location shown on the plat. This right is reserved in favor of the dedicator even though the reservation does not expressly state it is for the dedicator's benefit. There are no words in the dedication expressing an intent that the reservation benefits the residents.

In contrast, the unhighlighted words are express dedications to "THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION" of a portion of the subdivision "FOR PRIVATE ROAD PURPOSES." Put simply, when the dedicator intended to benefit the residents, it expressly stated that intent. The highlighted words do not express an intent to benefit "THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION" or any residents. Had the dedicator intended that the golf course reservation was intended to benefit "THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION" or the residents, it could have easily expressly stated that intent.—It did not.

Golf course plat 2 recorded April 28, 1977 (Ex. 5a):

1. AND DO HEREBY FURTHER ACKNOWLEDGE THAT IT HAS RESERVED TRACT "A", (LUCERNE LAKES BOULEVARD), AS SHOWN HEREON, FOR PRIVATE ROAD PURPOSES, SAID TRACTS "A" AND THE DRAINAGE EASEMENTS AS SHOWN HEREON, ARE HEREBY DEDICATED TO THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION AND IS THE PERPETUAL MAINTENANCE OBLIGATION OF SAID ASSOCIATION TO BE FORMED BY THE DEDICATION (sic), OR THEIR SUCCESSOR OR ASSIGNS.

2. **RECREATION TRACTS AS SHOWN HEREON ARE HEREBY RESERVED IN PERPETUITY FOR THE PURPOSES OF RECREATION. SAID RECREATION TRACTS ARE THE PERPETUAL MAINTENANCE OBLIGATION OF OWNERS, THEIR ASSIGNS, OR TRANSFEREES.**

As with the first plat, the dedicator used the word "RESERVED." Under *Regency Highland,* this term is a reservation, not a restriction. It creates a right in favor of the dedicator to operate a golf course in the location shown on the plat. This right is reserved in favor of the dedicator even though the reservation does not expressly state it is for the dedicator's benefit. There are no words in the dedication expressing an intent that the reservation benefits the residents in Lucerne Lakes.

The unhighlighted words are express dedications to "THE LUCERNE LAKES MASTER CONDOMINIUM ASSOCIATION" of "SAID TRACTS 'A' AND THE DRAINAGE EASEMENTS AS SHOWN HEREON." Here again, when the plat dedicators intended to benefit a party other than themselves, they expressly stated that intent

The unambiguous meaning of the highlighted words in this plat dedication relied on by Plaintiffs is that the dedicator reserved for itself the right to use the "RECREATION TRACT" for recreation. Under the above case law, this language is a reservation in favor of the dedicator, not a restriction on its use of the property. It creates a right in favor of the dedicator to use the "Recreation Tracts" for recreation purposes. This right is reserved in favor of the dedicator even though the reservation does not expressly state it is for the dedicator's benefit. There are no words expressing an intent that the reservation benefits the residents.

Golf course plat 3 recorded April 17, 2000 (Ex. 5f) (emphasis added):

1. . . . AN EASEMENT OVER THE WATER MANAGEMENT TRACTS (W.M.T.) AND/OR ANY DRAINAGE EASEMENTS DEPICTED HEREIN ARE GRANTED TO LUCERNE LAKES HOMEOWNERS' ASSOCIATION, INC. . . . AND/OR ANY OTHER ASSOCIATION, ENTITY OR INDIVIDUAL WHICH HAS THE DUTY TO MAINTAIN ANY LANDS ADJOINING THE W.M.T. . . .

2. GOLF COURSE TRACTS (G.C.) **TRACTS GC-1 THROUGH GC-E, AS SHOWN HEREON, ARE HEREBY RESERVED FOR THE FLORIDA GARDENS LAND DEVELOPMENT COMPANY, A FLORIDA CORPORATION, ITS SUCCESSORS AND ASSIGNS FOR GOLF COURSE PURPOSES AND ARE THE PERPETUAL MAINTENANCE OBLIGATION OF SAID CORPORATION, ITS SUCCESSORS AND ASSIGNS WITHOUT RECOURSE TO PALM BEACH COUNTY**.

The plain meaning of the highlighted words above is that the dedicator has reserved the "GOLF COURSE TRACTS (G.C.)," specifically, "TRACTS GC-1 THROUGH GC-E, AS SHOWN HEREON," for itself for the purpose of a golf course. The dedicator has used the word "RESERVED." This language is a reservation, not a restriction. It creates a right in favor of the grantor to operate a golf course in the location shown on the plat. Here, in fact, the dedication expressly states whom the reservation is intended to benefit, namely, the dedicator, its successors, and assigns. Plaintiffs contended that, "there is nothing in the facts of this case that would indicate that the grantors of the three golf course plats were reserving the recreational

and golf course use of the plats for themselves" (Resp. 12-13) and "[t]he reservations in the golf course plats do not state they are for the benefit of the grantors." (Resp. 13). The opposite appears true, to wit, there are no words expressing Florida Gardens' intent that the "reservation" benefits the residents.

The unhighlighted words are express grants to "LUCERNE LAKES HOMEOWNERS' ASSOCIATION, INC. . . . AND/OR ANY OTHER ASSOCIATION, ENTITY OR INDIVIDUAL WHICH HAS THE DUTY TO MAINTAIN ANY LANDS ADJOINING THE W.M.T." of "AN EASEMENT OVER THE WATER MANAGEMENT TRACTS (W.M.T.) AND/OR ANY DRAINAGE EASEMENTS DEPICTED HEREIN." Again, when the plat dedicator intended to benefit the residents, it expressly stated that intent. Had the dedicator intended to benefit "THE LUCERNE LAKES HOMEOWNERS ASSOCIATION, INC." or the residents, it could have expressly stated that intent. Again, it did not.

It is the Court's determination that there is no genuine dispute that they confer no private enforcement rights on Plaintiffs or the other residents in Lucerne Lakes.

Even had the Court concluded that the alleged "plat restrictions and reservations" were ambiguous (which they are not), Plaintiffs would fare no better. If the alleged "plat restrictions and reservations" were ambiguous, they are the "restrictions" and must be construed against Plaintiffs as the parties seeking to enforce them and in favor of Defendants' free, unrestricted use of their property. *Boyce, supra; Beach Towing, supra.*

Lucerne Lakes is not a "common plan of development"

The second theory on which Plaintiffs base their lawsuit is that the redevelopment of the golf course would "violate the common plan of development as reflected in the PUD Master Plan and the Master Declaration." (TAC ¶ 26.)

The elements of a common plan of development, also called a general plan or scheme for development, are stated in *Roeder,* 580 So.2d at 825:

> Under certain circumstances **when restrictive covenants are imposed as part of a general plan or scheme for the development of a subdivision such covenants can be enforced against a purchaser of a lot in that subdivision even when the restrictions have been omitted from the deed to such purchaser.**

Roeder cites *Hagan v. Sabal Palms, Inc.,* 186 So.2d 302, 307 (Fla. 2d DCA 1966), cert. denied, 192 So.2d 489 (Fla.1966), where the court similarly stated,

> **A 'general building scheme' may be defined as one under which a tract of land is divided into building lots, to be sold to purchasers by deeds containing uniform restrictions**. . . . **Ordinarily the right to enforce restrictions imposed pursuant to a general scheme must be universal or reciprocal, that is, the same restrictions must apply substantially to all lots of like character of similarly situated. A minor or isolated exception or exceptions, however, will not impair or insulate the efficacy of the general scheme**. 26 C.J.S. Deeds s 167 (2)b, p. 1147 *et seq. See, Edgewater Beach Hotel Corporation v. Bishop,* 1935, 120 Fla. 623, 163 So. 214; *Osius v. Barton,* 1933, 109 Fla. 556, 147 So. 862, 88 A.L.R. 394.

The "common plan of development" designation applies in limited situations ("[a] minor or isolated exception or exceptions") to enforce a restriction not found in a purchaser's deed or chain of title but is found in the deeds to other properties or in their chains of title in accordance with a common plan of development. Where the restrictions have been imposed in accordance with a common plan of development but have been omitted from certain deeds or chains of title, other property owners in the subdivision can still enforce the restrictions against a purchaser whose deed or chain of title omits the restrictive covenant.

The court in *Hagan* gave an example of the type of restriction which is a necessary element of a "common plan of development":

> Here **the words used in the deeds from the common grantor, viz.: 'No building shall be used for any purpose other than as a dwelling, '**were clear, concise and to the point, and could not have failed to have expressed the intention of the parties that is, the original grantor and his immediate grantees, to establish a general scheme of exclusive residential buildings.

186 So.2d at 307.

Hagan cites the leading case of *Osius v. Barton,* 109 Fla. 556, 147 So. 862 (Fla. 1933):

> In *Osius v. Barton,* 1933, 109 Fla. 556, 147 So. 862, 88 A.L.R. 394, a real estate developer, **in pursuance of a general plan of developing** and subdividing certain described real estate for exclusive residential purposes, **inserted in its common grantor deeds a restrictive covenant aimed at permitting only residential construction**, and thereafter certain grantees, who had acquired property in the restricted area by mesne conveyances, sought to operate a beauty parlor thereon. Plaintiffs Barton and others, as owners of property in the development from the common grantor, brought suit to restrain the violation by the Osiuses. Both the lower Court and the Supreme Court upheld the enforceability of the restrictive covenant and enjoined the violation. In the course of the opinion the Supreme Court stated as follows (text 147 So. 865):
>
> > 'The general theory behind the right to enforce **restrictive covenants** is that the **covenants must have been made with or for the benefit of the one seeking to enforce them.** The violation of a restrictive covenant creating a negative easement may be restrained at the suit of one for whose benefit **the restriction** was established, irrespective of whether there is privity of estate or of contract between the parties, or whether an action at law is maintainable. The action of a court of equity in such cases is not limited by rules of legal liability and does not depend upon legal privity of estate, or require that the parties invoking the aid of the court should come in under **the covenant**, if they are otherwise interested. The rule is well established that **where a covenant in a deed** provides against certain uses of the property conveyed which may be noxious or offensive to the neighborhood, inhabitants, those suffering from a breach of **such covenant**, though not parties to the deed, may be afforded relief in equity upon a showing that **the covenant** was for their benefit as owners of neighboring properties.

186 So.2d at 308.

As common sense would suggest, a common plan of development requires that **the restrictive covenants a plaintiff seeks to enforce must be found somewhere**, although not everywhere, in the community:

> A uniform plan of development is not a sine qua non for sustaining the validity of building restrictions per se. But the presence or absence of such a uniform plan may be the main factor in many cases by which the beneficial interest of **a complainant asking for the judicial enforcement of such restrictive covenants** is to be determined when it is not otherwise apparent. Proof of a general plan or scheme for the improvement of the property, as a prerequisite to the right of grantees from a common grantor **to enforce, inter sese, covenants** entered into by each with, or through, the grantor, is only required to show that **the covenant sought to be enforced** has entered into the consideration for the grant of the title, and therefore such as should be exacted from each purchaser for the benefit of all purchasers."

Id. at 309.

These principles are discussed in *Fiore v. Hilliker,* 993 So. 2d 1050, 1053 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D702b]. The court

found the common or general plan of development doctrine did not apply on facts similar to those here, including that there was a common developer:

> Here, **although the parties' properties were originally owned by a common owner**, Mr. Spivey, **their subsequent sales were not subject to a general scheme or plan of development subjecting them to mutual restrictions**. *Cf. Hagan v. Sabal Palms, Inc.,* 186 So.2d 302, 307 (Fla. 2d DCA 1966) (holding that "[w]here the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, **imposing restrictions on its use pursuant to a general plan of development or improvement**, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created"). **"A 'general building scheme' may be defined as one under which a tract of land is divided into building lots, to be sold to purchasers by deeds containing uniform restrictions."** *Id.* **The record in this case shows that there was no general building scheme involving mutual covenants.**

Also, property outside a subdivision is not subject to restrictions found within the subdivision absent **a reference to the restrictions in the deed of conveyance of the property outside the subdivision**. *Roeder,* 580 So.2d at 826. "The complaint in this case is based on the theory that the landowners' property was part of the subdivision in which Lot 40 is located and was subject to the subdivision restrictions. **In fact, as the trial court found by partial summary judgment, the landowners' additional parcel' is not in the subdivision and not subject to the recorded subdivision restrictions."** *Id.*

Thus, a common plan of development has two elements: (1) a system of recorded restrictions which a plaintiff is attempting to enforce which are (2) imposed in accordance with a general plan of development of a community.

Plaintiffs misconstrue the concept of a general or common plan of development. They argue the appearance of a community creates a system of restrictions and thus a common plan of development, whereas the doctrine is just the opposite: there must be a system of restrictions first, either in a deed, the chain of title, the plat or some other recorded instrument containing a restriction, and a community developed based on that system of restrictions. Without a system of recorded restrictions which the plaintiff is attempting to enforce, the doctrine can not apply. The restrictions do not arise out of thin air from the community's appearance or layout alone. The doctrine requires that the developer record restrictions which the plaintiff is attempting to enforce in accordance with a particular scheme and not just build a community that has a uniform appearance, or which looks a certain way.

Lucerne Lakes was platted over time with 20 separate subdivisions, all zoned residential as envisioned when Lucerne Lakes was established as a planned unit development in 1972, the plats of which make no reference to each other. The residences are all in 17 subdivisions and the golf course is in the other three. "It is undisputed that Plaintiffs do not own property on any of the golf course plats. . . ." (Resp. 15, ¶10). Their deeds do not refer to the golf course plats. "In the present case, the restrictions are not in Plaintiffs' chain of title, and they are not deed restrictions." (*Id.* at 19.)

Plaintiffs cannot prove their allegation that Lucerne Lakes is a "common plan of development." They cannot prove the first element of a common plan of development—a system of restrictions—since they cannot prove there are any restrictions in any plats, deeds, or chains of title or other recorded instruments in Lucerne Lakes containing restrictions against replacing the golf course with dwelling units.

Plaintiffs refer to the current Master Plan and the Master Declaration where they allege, "the common plan of development, as reflected in the PUD Master Plan and Master Declaration." (TAC ¶26.)

A Master Plan "means a planning document that integrates plans, orders, agreements designs, and studies to guide development as defined in this section and may include, as appropriate, authorized land uses. . . ." Fla. Stat. § 163.3164. A Master Plan may be a system of restrictions, but only so long as the Master Plan is in effect. Plaintiffs' do not contend their rights arise out of the 2000 Master Plan since they maintain they have private rights not dependent on governmental approvals and they concede the Palm Beach County Commission in 2021 approved a change in the 2000 Master Plan to allow Defendants to build residences on the golf course depicted in the 2000 Master Plan. Plaintiffs merely use the 2000 Master Plan to show the appearance of Lucerne Lakes. But, as stated, the appearance of a community does not create a system of restrictions necessary for a common plan of development. Nor does the appearance make the golf course an "integral part of the community."

The Master Declaration does not contain any restrictions against replacing the golf course with dwelling units. It provides for the creation of a Master Association whose members are the residential Sub-Associations and the golf course owner, and a method of assessing those members for the cost to maintain Lucerne Lakes Boulevard and the drainage system and operate the Master Association. Most important, the Declaration does not contain a restriction on the use of the golf course property.

Also, the Master Declaration contains a provision for amendment. (Master Declaration, Art. XIV, at 11.) In the future, the Master Association may amend the method of assessments once residential communities replace the golf course, but nothing in the Master Declaration prevents the residential use of the golf course property.

Plaintiffs also rely on an unrecorded Declaration of Restrictive Covenants accompanying a letter dated April 23, 1973, from a law firm purportedly representing Florida Gardens to the Palm Beach County Engineer. The unrecorded Declaration is allegedly signed by Karl Blecher on behalf of Florida Gardens.[6] It states, "Open space (golf course) Land designated as open-space recreation area shall at all times remain as open-space and contain no buildings or dwelling units thereon." The document does not contain a legal description of the property. It is undisputed the Declaration was not recorded. It is also undisputed the first golf course plat was recorded soon after the date of the letter and that plat makes no reference to the unrecorded Declaration. Plaintiffs offer no other evidence about the unrecorded Declaration.

Even assuming the letter and unrecorded Declaration could be found in the files of the Palm Beach County Engineer, it has no probative value that would benefit Plaintiffs. The document was not recorded. Rather, Florida Gardens later recorded a plat containing no restrictive covenant and reserving the golf course for itself. The unrecorded Declaration also provided, "the described land shall be used only in conformity with the declarant's master plan dated, revised, April 8, 1972, as approved accepted and filed pursuant to said resolution. In the event said master plan is hereafter duly modified or otherwise altered, pursuant to law, these restrictions shall automatically be deemed likewise modified or altered to the same effect." This means that if a new Master Plan is approved eliminating the golf course, then any restrictive covenant arising from the unrecorded Declaration pertaining to the golf course was eliminated. It is undisputed that the Palm Beach County Commission approved a new Master Plan that eliminated the golf course.

There is an absence of proof that the golf course was or is an integral part of Lucerne Lakes. The only common restriction in

Lucerne Lakes is the residential zoning designation applying to all of its subdivisions, including the golf course. Defendants' plan to develop the golf course for residential use, resulting in a total number of dwelling units is well below the allowable number established in 1972, and is in line with the original vision of Lucerne Lakes as a planned unit development.

Based on the above, there is no genuine dispute of fact and Defendants are entitled to summary judgment as a matter of law. Accordingly, it is

ORDERED AND ADJUDGED the Motion is **GRANTED**.

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[1]Reference to the exhibits filed by Defendants in support of the Motion is by "Ex. [exhibit number], [page number or internal exhibit number or letter]." Court filings are referred to as "D.E. [docket entry number]." All emphasis is supplied unless otherwise stated.

[2]Two of the golf course plats, the ones recorded in 1973 and 2000 (*see,* p. 6-7 below) identify the grantor or dedicator of the plats (the property owner) as Florida Gardens. The golf course plat recorded in 1977 states the property owners/developer are three trustees. The trust settlor or beneficiary are not identified. However, as pointed out by Plaintiffs (Resp. 19), Karl Blecher is one of the trustees. He signed the 1973 and 2000 plats on behalf of Florida Gardens. For purposes of this Motion, Defendants have conceded Plaintiffs' contention that the golf course plats were effectively signed by a common grantor or dedicator, Florida Gardens.

[3]The application, filed with the Palm Beach County Planning, Zoning and Building Division, is referred to as a "Zoning Application." Defendants did not seek to change the underlying residential zoning of the golf course. They sought a Development Order modification to modify the use of the golf course. (Ex. 5 ¶ 23.)

[4]"The dispute arose by virtue of an ambiguous provision in that portion of the plat dedicating certain rights of way to the public. . ." *North Lauderdale,* 156 So.2d at 691. "If the document is ambiguous in respect to the extent of the dedication, the construction must be against the dedicator and in favor of the public." *Worley,* 38 So. at 618.

[5]"The plat restrictions and reservations in the three [golf course] plats create enforceable private rights for Plaintiffs and other homeowners in the Lucerne Lakes [PUD] that the [golf course] be reserved and used in perpetuity for recreational purposes." (TAC ¶ 3.) The residential redevelopment "would violate a clear right of implied private rights created by the plat restrictions and reservations . . . ." (TAC ¶ 37.)

[6]The document was not authenticated and could not be properly received as evidence. The Court however finds that it is immaterial and would not alter the result even if admitted as evidence.

* * *

Estates—Personal representatives—Non-residents—Stepchildren of decedent, whose spouse predeceased the decedent, can qualify to serve as non-resident personal representatives under section 733.304(3)

IN RE: ESTATE OF GAIL MARGOLIS, Deceased. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Probate Division. Case No. 50-2023-CP-004043-XXXX-SB. Division IZ. August, 25, 2023. Samantha Schosberg Feuer, Judge. Counsel: Andrew K. Fein, Minerley Fein, P.A., Boca Raton.

ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVES

(self-proved)

The Petition for Administration filed in this Estate came before the Court for hearing on August 22, 2023, at 9:00 A.M., and the Court, having heard the argument of counsel for the Petitioners, having reviewed the Memorandum of Law filed in support of the Petition, and being otherwise fully advised in the premises, ORDERS and ADJUDGES as follows:

Two of the Petitioners, Robert Snyder and William Snyder, are each a stepchild of the decedent, and both are non-residents of Florida. Petitioners' father, Edward Snyder, pre-deceased his spouse, the decedent, Gail Margolis. As a result, the Court considered the question of whether the stepchildren of a decedent, whose spouse pre-deceased the decedent, can qualify to serve as a non-resident personal representative under Florida Statutes Section 733.304(3).

The Court holds that the stepchildren under this circumstance are eligible to serve under Florida Statutes Section 733.304(3). First, if the decedent's spouse had survived the decedent, the non-resident stepchildren would clearly be eligible to serve, and the Court sees no logic in disqualifying some, but not all, non-resident stepchildren. Second, in *Hill v. Davis,* 70 So. 3d 572 (Fla. 2011) [36 Fla. L. Weekly S487a], the Supreme Court allowed the son of a probate decedent's pre-deceased spouse, *i.e.*, a stepson, to serve as personal representative. While *Hill v. Davis* was technically decided on other procedural grounds, it nevertheless stands for the proposition that non-resident stepchildren through a pre-deceased spouse can qualify. Third, at the hearing on this Petition, the Court was made aware of other instances where similarly situated stepchildren were allowed to serve in other cases in this Circuit. Fourth and finally, allowing the Petitioners here to serve carries out the decedent's intent as expressed in her will, which is one of this Court's primary responsibilities.

ACCORDINGLY, the instrument presented to this Court as the last will of GAIL MARGOLIS, deceased, having been executed in conformity with law, and made self-proved by Order Admitting Will & Appointing Personal Representatives Estate of Gail Margolis the acknowledgment of the decedent and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will in the form required by law, and no objection having been made to its probate, and the Court finding that the decedent died on July 15, 2023, and that GABRIELLA S. SNYDER, ROBERT SNYDER, and WILLIAM SNYDER are entitled and qualified to be co-personal representatives, it is

ADJUDGED that the will dated June 22, 2023, and attested by David Schlossberg and Ronald Haiman, as subscribing and attesting witnesses, is admitted to probate according to law as the last will of the decedent, and it is further,

ADJUDGED that GABRIELLA S. SNYDER, ROBERT SNYDER, and WILLIAM SNYDER are appointed co-personal representatives of the estate of the decedent, and that upon taking the prescribed oaths, filing designations and acceptances of resident agent, and entering into bond in the sum of $0 Letters of Administration shall be issued.

* * *

Landlord-tenant—Commercial lease—Eviction—Notice—Sufficiency—Month-to-month lease—Where evidence demonstrates that rent under unwritten commercial lease was payable monthly, 15-day notice was legally sufficient to terminate lease—Possession—Although landlord, a shareholder in tenant-veterinary practice properly terminated tenancy, equities lie with veterinary practice on issue of writ of possession—Landlord was aware of time that would be required to relocate practice, had thwarted financial stability of practice by removing cash cushion that could be used to relocate, and had quietly taken action to establish new separate practice—Further, practice had no history of delinquent rent or other defalcations as tenant—Practice is ordered to vacate premises within 8 months

BRANDON COX, Plaintiff, v. GENTLE CARE ANIMAL HOSPITAL, INC., Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 23-30650 COCE (53). August 22, 2023. Robert W. Lee, Acting Circuit Judge. Counsel: Karen Amlong, Fort Lauderdale, for Plaintiff. Jack Seiler, Fort Lauderdale, for Defendant.

FINAL JUDGMENT ON CLAIM FOR EVICTION

This cause came before the Court from August 3 -10, 2023 for bench trial. The Court's having received evidence and heard argument, having made findings of credibility consistent with this ruling, and having reviewed the relevant legal authorities finds as follows:

This case involves a commercial eviction[1] that does not concern non-payment of rent[2] or violation of any terms of a lease. Rather, this case involves a termination of a tenancy by statutory notice at the end of the tenancy's term. In the great majority of eviction cases, including commercial rentals, this is a fairly straightforward matter. This case is the rare exception, involving a trial of almost 4 days with, at the time of trial, numerous filings and motions constituting 112 docket entries

(and counting). The Defendant first challenges the sufficiency of the Plaintiff's statutory Notice of Termination of Tenancy.

THE NOTICE OF TERMINATION OF TENANCY

The Court notes that the Defendant has raised no argument that the notice of termination of tenancy was not sent or received. PL Ex. 1. Further, the parties agree that there is no written lease, and as a result, Florida law governing unwritten leases controls. As relates to the notice of termination, the Defendant argues only that the notice was insufficient because it was provided based on a month-to-month tenancy, while the Defendant argues that the parties had an annual tenancy requiring a longer period of notice. Fla. Stat. §83.01 (governing notice requirements for unwritten leases). At the crux of this case is whether the lease is month-to-month, in which case the notice was sufficient, or whether it is an annual lease, in which case the notice was not sufficient. *See id.* §§83.03(1) & (3) (three month notice required to terminate an unwritten annual lease vs. 15-days notice required to terminate unwritten month-to-month lease). Whether an unwritten lease is month-to-month vs. annual is determined by when the rent is "payable." *Id.* . §83.01. Importantly, the statute does not focus on when the rent is actually "paid." As a result, the focus on when rent is "payable" is when the rent is actually due, not when it is actually paid.

In this case, the greater weight of credible evidence demonstrates that at the time the notice of termination was sent in this case, the rent was "payable" monthly. The Court bases this conclusion on several evidentiary findings. First, the evidence showed that the amount of rent due was for many years determined based on a monthly amount, not an annual amount.[3] Second, at the time the parties agreed that the rent would be increased, it was again based on a monthly amount ($9,000.00), rather than an annual amount. Third, in at least the past three years, at no point did any party request or demand that the rent be paid annually. Fourth, the actual payment of rent was sporadic for years, but for at least the past three years was never paid on a lump sum annual basis. Fifth, the testimony of the Plaintiff, and text messages from Dr. Cords, confirm the understanding that the rent was payable monthly. PL Ex. 7, 8. And sixth, the actual rent checks that were written demonstrate a monthly amount consistent with a month-to-month tenancy. PL Ex. 5; 9; DF Ex. 3.

Generally speaking, this would end the discussion. The Defendant, however, has raised equitable arguments as to why an immediate eviction should not result. Under Florida law, equitable considerations may come into play, even if the landlord is otherwise entitled to an eviction.[4] *See BR LEO LLC v. Sky Beach Hallandale LLC*, 30 Fla. L. Weekly Supp. 253a (Broward Cty. Ct. 2022), and cases cited therein. *See also* Nicholas C. Glover, Fla. Commercial Landlord Tenant Law ch. 3, §H (Supp. 1993) ("[a] tenant may use equitable defenses in landlord and tenant litigation"). To understand the applicability of these considerations, the Court lays out a narrative timeline of events from the creation of the Hospital up through the issues resulting in the notice of termination being sent.

THE CREATION AND EARLY OPERATION OF THE BUSINESS

The Plaintiff, a veterinary physician, took title to the subject property in 1990. PL Ex. 6. That same year, she incorporated Gentle Care Animal Hospital, Inc. for purposes of operating a veterinary hospital at the location. She was sole shareholder for several years. In 1993, Dr. Alan Cords joined the practice as another veterinary physician. In 1996, the Plaintiff merged Gentle Care with the animal clinic business and veterinary practice of Dr. Cords, then known as Downtown Animal Hospital, Inc. The surviving entity became the practice that is the Defendant in this action. The Plaintiff and Dr. Cords entered into a shareholders agreement in which Dr. Cords was ultimately given 50% of the shares of the corporation, so that the Plaintiff and Dr. Cords then each held a 50/50 share. DF Ex. 2, 6. Several years later, in 2012, another veterinary physician was asked to join the group, Dr. Kerry Rafuse. DF Ex. 23. No new shareholder agreement was created. However, all parties agree that at that time the shares of the business were structured so that each physician held one-third of the shares. As a result, unanimity was no longer required to make corporate decisions, with two physicians being able to make the majority decisions in the firm.[5]

Beginning with the addition of Dr. Rafuse to the practice, the annual salary of each physician was set at $141,000.00. This figure remained the same for more than a decade. However, at the end of each year, a distribution of profits was made so that each shareholder received an equal one-third of what the team calculated to be the profits of the firm. For the most part, this was accomplished by taking the operating account balance at the end of the year and subtracting the balance in the account at the time of the prior distribution, subject to a few adjustments for such items as insurance, costs borne by an individual physician, and unpaid rent. No calculations were made for each physician's individual receivables, based on the idea that each physician was contributing an equal share to the success of the firm.

A significant issue in this case is the cash cushion that existed in the operating account—that is, the amount originating in the account at some point in the past operation of the business and which was carried forward year to year. Without dispute, at least a portion of this balance existed prior to either Dr. Cords or Dr. Rafuse joining the practice. However, as the years went by, the "cushion" amount increased substantially, with no physician being able to clearly explain how or why this had occurred. Nevertheless, by the time Dr. Rafuse joined the practice in 2012, the cushion—referred to by the Plaintiff as the "historical balance"—had increased to $331,322.00, where it has remained since then. PL Ex. 10; DF Ex. 7.

DR. CORDS AND DR. RAFUSE DESIRE TO CUT BACK PRACTICE

The operation of the business by the team of three physicians went along smoothly for many years. However, beginning sometime in 2020, Dr. Rafuse raised her desire to start cutting back in her practice. In the past few years, after substantially building its practice, the officers and shareholders had been discussing the valuation and potential sale of the practice as a going concern. Confusion developed as to how to calculate the value of the business for purposes of the parties' interests in the corporation. Dr. Rafuse researched the issue of valuation of the practice, and she reached out to an outside company for that purpose. Instead of merely providing a valuation, the outside company made an offer to purchase the controlling shares in the company, in exchange for control of the corporation. All three physicians rejected the idea of "corporate medicine," and that offer died.

Shortly thereafter, Dr. Cords also raised the issue of his desire to cut back. During these discussions, while the Plaintiff (as a shareholder) expressed some empathy for the other physicians' desire to begin to wind down their practices, the Plaintiff desired, in her words, "to keep on working." Dr. Cords and Dr. Rafuse suggested that their salaries remain the same—fairly low in the Court's view—while the Plaintiff be given a raise to make up for the other physicians reducing their hours. PL Ex. 8. The Plaintiff rejected the suggestion. She also viewed the suggestion to cut back hours as a difference in "work ethic," rather than a desire to face the inevitability of retirement. PL Ex. 3. Otherwise, she resisted discussing the issue in a concrete manner, which ultimately resulted in the chain of events giving rise to this lawsuit.

THE SHAREHOLDERS REACH AN IMPASSE

At no point was a written lease entered into between the Plaintiff and the Defendant. However, for many years, all went well. At the time Dr. Rafuse joined the practice, the rent was calculated at a monthly rate of $4,500.00. For at least a decade, the rent stayed the same. In November 2022, the Plaintiff raised the issue of an increase in rent, and in January 2023, the Plaintiff advised that the monthly rental amount would be raised to $9,000.00, much closer to the current market rate. No one objected to the increase.

In 2022, Dr. Rafuse reached out again to another "valuation" entity. The company presented the Defendant an offer to list the business for sale, including the sale of the real estate belonging to the Plaintiff. The Plaintiff understandably declined to consider this proposal, as she was the sole owner of the real property.

The Plaintiff ultimately concluded that the business relationship could not be salvaged, and she recommended dissolution of the corporation as the only solution. PL Ex. 3. She did not, however, have the power to do this unilaterally. Her ace in the sleeve was her ownership of the land upon which the business operated. The other two shareholders, however, declined to agree to dissolution, and wanted the business to continue to operate, but with their working with a reduction in hours. PL Ex. 4.

The Notice of Termination of Tenancy was served on the Defendant by hand delivery on or about March 16, 2023, for the business to vacate the premises by the end of the month. During this time, the Plaintiff continued to work at the business with the other two physicians, a clearly uncomfortable situation. About a week prior to the delivery of the Notice of Termination, the Plaintiff, however, created a new corporation (DF Ex. 4) to the exclusion of Dr. Cords and Dr. Rafuse, apparently understanding that she did not own a controlling interest in the Defendant. She did not advise the other shareholders she was doing so. The Plaintiff also registered "Gentle Care Animal Hospital" as a fictitious name so that she could continue to use the business name. DF Ex. 5. The Court concludes that the Plaintiff intended to continue to operate a business without interruption on the site to the exclusion of Dr. Cords and Dr. Rafuse. In response, Dr. Cords and Dr. Rafuse acted quickly.[6] They, as controlling shareholders of the corporation, fired the Plaintiff as an employee of the corporation and physically locked her out of the premises. So, although the Plaintiff was still a minority shareholder in the corporation, as well as the business's landlord, she was now effectively thwarted from operating her own practice.

EQUITABLE CONSIDERATIONS:
THE REMOVAL OF
THE BUSINESS FINANCIAL CUSHION

The Defendant's primary equitable argument is that the Plaintiff removed $330,000.00 from the Defendant's business operating account shortly before she notified the Defendant that she was terminating the tenancy. A focus on this argument reveals some of the complex issues in this case—the Plaintiff, in her capacity as shareholder and President of the Defendant/Hospital, removed the funds before she, in her capacity as landlord, sent the letter terminating the tenancy. Further, in the Notice of Termination of Tenancy, the Plaintiff conflated her two roles by advising the Defendant, in her business capacity, that she had transferred the $330,000.00 out of the Defendant's operating account, which of course had nothing to do with her position as landlord.[7] While the facts are not crystal clear at this point as to how these funds came about in their entirety, the undisputed credible evidence demonstrated that these funds were almost the entire operating "cushion" for the business. The Plaintiff testified earlier that even leaving half this amount as a cushion would have been cutting it "close" for financial operations.[8] Coupled with the fact that the Defendant/Hospital had just a few months earlier made its end of the year distribution to the shareholders, the Court cannot avoid the conclusion that the Plaintiff's actions, albeit not in her role as landlord, nevertheless left the business with almost no operating cushion. This action seriously jeopardized the viability of the business, in which she still has a significant financial and operational interest.

Further, the undisputed credible evidence established that even if the funds were distributed to the shareholders pursuant to the unwritten agreement under which the business had been operating for years, a majority of the $330,000.00 would not belong to the Plaintiff in her role as shareholder. Rather, while the precise amount remains to be determined, a majority of this distribution would belong to the other two shareholders, who were given no say in whether these funds should be removed from the operating account. The Court agrees with the Defendant that these actions, taken as a whole, amounted to a breach of the Plaintiff's fiduciary duty to the business, both as President and shareholder. *See* Joseph T. Walsh, *Fiduciary Foundation of Corporate Law*, 27 J. Corporate Law 333, 333 (2001) (corporate officers owe a fiduciary duty to shareholders). Here, the Plaintiff put her own personal interest above that of the business. *See id.* (corporate officer cannot make personal decisions about corporate property, "even if that dealing [does] not harm the interests of the beneficiary"); Robert Flannigan, *Fiduciary Duties of Shareholders and Directors*, J. Business Law 277, 277 (2004) (the focus of fiduciary accountability is to "discipline self-interested conduct"). The fact that the Plaintiff placed these funds in her attorney's trust account out of fear that the other shareholders would somehow misappropriate the funds is, in the Court's view, of no import. While the Plaintiff makes much of the fact that these funds were "safe" in the trust account, the fact remains that the business had no access to these funds for the purpose for which they were established. The question remains, however, to what extent this breach affects the termination of the tenancy and any resulting remedy.

EQUITABLE CONSIDERATIONS:
THE "SURREPTITIOUS" VALUATIONS

The Plaintiff makes much of the efforts of Dr. Cords and Dr. Rafuse to surreptitiously seek valuations for the property. The Court finds, however, nothing untoward about this. Frankly, the Court finds it wise to seek valuations for shareholders who see the end of the tunnel—a time when the business would stop operating as it had for years because it was time for the current physicians to step back from their practice. The Court views as of no import the fact that the Plaintiff may not have known what was to be done with the business records that Dr. Cords and Dr. Rafuse requested. Certainly, as officers and shareholders in the corporation, they had the right to review these records regardless of the purpose.

EQUITABLE CONSIDERATIONS:
BUSINESS RECORDS, PHARMACEUTICALS,
EQUIPMENT AND GOODWILL

On the other hand, the Defendant makes much of the Plaintiff's stated position that she planned to keep the business records, pharmaceuticals, equipment, and corporate goodwill. As for the pharmaceuticals and equipment, the Court finds the equitable issue to be minimal. However, the Court is troubled by the Plaintiff's retaining the business records and effectively denying the Defendant access to its own records. While both parties argued as to who owns and has custody of these records, the Court cannot help but make the inescapable conclusion that these records really "belong" to the clients of the business who have for years in many cases brought their pets to the Hospital. Although the parties acknowledge that the business records had been held for years offsite at the Plaintiff's home, and no one

objected to this arrangement, there was previously no issue of access to the premises. On the other hand, the Plaintiff has in effect now cutoff access to these records, to the detriment of the clients of the business.

As to corporate goodwill, the Plaintiff is incorrect when she asserts in the Notice of Termination that she personally owns the "establishment goodwill." PL Ex. 1, p. 2. While she may have an interest in it as a shareholder, she certainly does not own a personal interest in it to the exclusion of the other shareholders. *See* Black's Law Dictionary 703 (7th ed. 1999) (goodwill is a "business's reputation, patronage, and other intangible assets that are considered when appraising the business"). *See also Swann v. Mitchell*, 435 So.2d 797, 800-01 (Fla. 1983) (distinguishing business goodwill from that of "elements of goodwill attributable to the personality, skill, or business acumen" of an individual).

EQUITABLE CONSIDERATIONS:
THE CONTINUED OPERATION OF THE BUSINESS

After receiving the Plaintiff's letter proposing dissolution of the corporation (PL Ex. 3), Dr. Rafuse and Dr. Cords made it clear that they would "continue on as we have been until you decide our fate as a corporation." They also made suggestions as to restructuring the work schedule, bringing in an associate veterinarian, and giving the Plaintiff a raise. PL Ex. 4. The Plaintiff responded by creating a new corporation (DF Ex. 4), registering "Gentle Care Animal Hospital" as a fictitious name owned by the new corporation, and sending a Notice of Termination of Tenancy giving the business—not solely Dr. Cords and Dr. Rafuse—15 days to vacate the premises.

To give immediate effect of an eviction would certainly produce a harsh result for the hundreds of patients[9] that are currently served by this practice. The Plaintiff elicited testimony that it will take the Defendant up to nine months to build out its new location. In the interim, if the business were dispossessed, it is likely that many of these clients will have to take their pets to other practices, thus crushing the award-winning business while at the same time hurting the public. It would also jeopardize the positions of the employees who have served the company for years.

On balance, the Court finds that while the Plaintiff properly terminated the tenancy, the equities lie with the Defendant on the issue of a writ of possession. The Plaintiff had long participated in an informal operation of the business, with nothing in writing. The Plaintiff is certainly well aware of the time required to relocate a business in which she is also a shareholder. The Plaintiff has thwarted the financial stability of the business by removing its cash cushion from the operating account, funds it could have used to relocate the business. The Plaintiff quietly took actions to establish her new business, while leading the other two shareholders to believe that there was a way to dissolve the corporation. Further, the Defendant had no history of delinquent payments or any other defalcations as tenant. The record in this case clearly demonstrates the Defendant's significant investment into the promotion and development of a veterinary practice at the premises for more than two decades.

Considering the facts of this case, as well as the case law that has developed on this issue, the Court finds that under the total circumstances presented, while the tenancy was clearly terminated in this case, it would be inequitable to provide only a 15-day notice of vacate the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant shall vacate the premises no later than eight (8) months from the date of this judgment, or within one (1) week of no longer operating a business out of the premises, whichever comes first, failing which the Plaintiff may apply for an immediate writ of possession to be executed on the property forthwith. This ruling is subject to the Defendant's continuing to timely pay the rent into the Court Registry, unless otherwise ordered by the Court; to properly maintain the premises and all required licenses to operate the premises as a business, including those licenses and permits pertaining to the operation of a veterinary hospital; and to comply with all duties of a commercial tenant under the Florida Landlord-Tenant Act.

FURTHER, the Court retains jurisdiction to enter such orders as may be necessary or proper to enforce this Court's decision, including resolving any issues involving disposition of the funds in the Court Registry and involving attorney's fees and costs.

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[1]This case also includes a counterclaim for damages, which is proceeding separately under a streamlined trial order.

[2]Although this action does not relate to non-payment of rent, the Defendant has throughout this proceeding properly tendered its rent into the Court Registry as required by Fla. Stat. §83.232(1): "In an action by the landlord which includes a claim for possession of real property, the tenant shall pay into the court registry [. . .] any rent accruing during the pendency of the action, when due."

[3]*See, e.g.*, DF Ex. 12, describing rent as "$4500/month/3 partners" and then "$54,000/yr." See also DF Ex. 14 ("$4500/mo"). Further, the Distribution Reconciliations for 2017 and 2018 reflect an amount of $36,000.00 rent due to the Plaintiff at the end of the year, clearly suggesting that rent for four months ($18,000.00) had already been paid, which it would not have been had it been due "annually." DF Ex. 15, 16.

[4]The Defendant has also raised the issue of fraudulent omission, concealment and representation by the Plaintiff. The Court finds, however, insufficient credible evidence to sustain these defenses, and as a result, discusses them no further in this decision.

[5]Notably, neither party challenges whether the corporation was operating properly as required by the Florida Business Corporation Act, Fla. Stat. ch. 607. As a result, the Court does not consider compliance issues, although as the Court noted during the trial, the parties operated the corporation in a fairly unorthodox manner.

[6]In its Reply to Defendant's Memorandum of Law Regarding Equitable Defenses submitted August 15, 2023, the Plaintiff appears to downplay the effect of the Notice of Termination of Tenancy: "it should be noted that there was no inevitability in the bringing of this eviction action. While the [Notice of Termination] did serve as a notice of lease termination of a commercial month-to-month lease, this was a mere three lines in that letter. Ninety-five (95) percent of the letter sought a peaceful resolution of the issues between the parties. It was an invitation for a discussion and resolution, it was not, by itself, a cause of the instant eviction action." The Plaintiff's Reply thereafter expresses surprise at the Defendant's reaction to this letter. In the Court's view, the Plaintiff's position is untenable, as the Notice of Termination clearly stated that the tenancy "is hereby terminated as of April 1, 2023," and that the business be "prepare[d] to vacate the premises on or prior to April 1." Additionally, the Plaintiff refers to the Defendant as the "now-evicted tenant." PL Ex. 1, pp. 1-2. This doesn't sound to the Court like an "invitation for a discussion and resolution."

[7]This melding of the roles of landlord and shareholder continues in Plaintiff's Reply to Defendant's Memorandum of Law Regarding Equitable Defenses in which the Plaintiff argues that the property was "physically seized" from her as a landlord when she and her daughter were fired from the business and the locks of the business changed, actions that deal with her as an employee and shareholder, and not a landlord. In its Reply, the Plaintiff further refers to the "Prohibited Practices" section of the Florida Landlord-Tenant Act, which applies to residential tenancies, not non-residential tenancies, a fact the Plaintiff concedes. Even if it did apply, however, the focus of the "Prohibited Practices" statute is action by the landlord, not the tenant. Fla. Stat. §83.67.

[8]Dr. Cords had earlier suggested cutting the financial cushion in half to about "150k," PL Ex. 7, which the Plaintiff testified was too little. And yet, the Plaintiff removed all of this from the business account, and as a result, from the business's access.

[9]During her testimony, the Plaintiff acknowledged this existing high volume of clients.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Investigatory stop—Arrest—Where officer responding to dispatch regarding reckless driver who caused property damage drove to address of registered owner of vehicle and observed defendant sitting in driver's seat of running damaged vehicle, investigatory stop was lawful based on officer's observation of defendant in actual physical control of vehicle and fact that officer was investigating accident—State was not required to prove that vehicle was capable of immediate self-powered mobility as element of proving actual physical control of vehicle—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. AARON RUIZ WEIHE, Defendant. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 45-2022-CT-000482-CTAY. Criminal Traffic Division. January 30, 2023. Jenny S. Higginbotham, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter came to be heard on January 5, 2023, on the Defendant's MOTION TO SUPPRESS, filed pursuant to Rule 3.190(h) and (i), Florida Rules of Criminal Procedure, seeking an Order prohibiting the State from introducing any evidence obtained via unlawful warrantless arrest of the Defendant; to wit: any and all evidence seized by the police including roadside exercises, observations and open container, and refusal to submit to breath test after detention. The Court having reviewed Defendant's written motion, conducted an evidentiary hearing, and considered argument of counsel, and being advised, the Court denies the motion to suppress.

The Defendant argues the evidence was seized without a warrant in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution, and in violation of Defendant's right to privacy in Article I, Section 23 of the Florida Constitution.

The Defendant argues the arresting officer did not observe the Defendant driving the vehicle or in actual, physical control of the vehicle and did not have any reasonable suspicion to order the Defendant out of the vehicle.

An officer can arrest a person for misdemeanor DUI in three circumstances: (1) "the officer witnesses each element of a prima facie case," (2) the "officer is investigating an 'accident' [and] develop[s] probable cause to charge DUI," or (3) "one officer calls upon another for assistance [and] the combined observations of the two or more officers [are] united to establish the probable cause to the arrest." *Steiner v. State,* 690 So.2d 706, 708 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D850a] (citing §§ 316.645, 901.15(1), Fla. Stat. (1993), and *State v. Eldridge*, 565 So.2d 787 (Fla, 2d DCA 1990)). The third circumstance is also called the fellow officer rule. *See Horsley v. State*, 734 So.2d 525, 526 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1289c].

At the hearing, Deputy Gordon testified that he received information via dispatch that identified the Defendant's vehicle as a reckless driver that had caused damage to property in Fernandina. Deputy Gordon testified that he looked up the vehicle's registration and drove to the address where the vehicle is registered. Once he arrived, Deputy Gordon testified the Defendant was sitting in the car, behind the wheel, while the vehicle was running. Deputy Gordon also testified that he observed damage to the vehicle consistent with the information provided by dispatch and information related to investigation of the accident.

Defendant argues the State of Florida cannot present a prima facia case the Defendant was in control of the vehicle.

However, the State of Florida presented evidence from Deputy Gordon that the Defendant was sitting behind of the wheel of the vehicle while the vehicle was running. Although the fact of inoperativeness of the vehicle is one factor to be considered when deciding whether a person was in actual physical control of vehicle in a driving under the influence case, the State is not required to prove, as part of element of actual physical control, that the vehicle is capable of immediate self-powered mobility. Furthermore, Deputy Gordon testified that while investigating the accident, Deputy Gordon determined the Defendant to be impaired based on the totality of circumstances.

The Court finds the State of Florida presented evidence that the Defendant was in physical control of the vehicle and because Deputy Gordon testified, he was investigating the accident that took place in Fernandina, the stop and investigation of the Defendant was proper and did not violate the law.

It is, therefore,

ORDERED and ADJUDGED:

Defendant's Motion to Suppress the evidence is **DENIED**. The Court finds the State of Florida presented evidence the arresting officer was investigating an accident and could present a prima facie case the Defendant was in control of the vehicle under Section 316.645.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Limitation of reimbursement to schedule of maximum charges—Insurer properly based reimbursement on Medicare Part B participating physicians fee schedule, rather than on higher "limiting charge"

NEXT MEDICAL FLORIDA, LLC., a/a/o Marvin Jackson, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 11377 CODL. Division 71. August 29, 2023. Angela A. Dempsey, Judge. Counsel: Michelle Rene Reeves, Simoes Reeves P.A., Deland, for Plaintiff. Kaleb El-Khatib, USAA, Tampa, for Defendant.

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

BEFORE THE COURT is Defendant's Renewed Motion for Final Summary Judgment. The parties appeared for a hearing on August 15, 2023. Upon consideration, Defendant's Renewed Motion for Final Summary Judgment is granted.

I. INTRODUCTION

This is a Personal Injury Protection ("PIP") action brought by Next Medical Florida, LLC ("Next Medical") as the assignee of benefits from USAA's insured, Marvin Jackson. After Next Medical filed the complaint, USAA asserted, as an affirmative defense, proper payment of all medical bills at issue in this suit. On May 8, 2023, in pursuit of that defense, USAA filed its Renewed Motion for Final Summary Judgment, arguing that it had properly paid all benefits due under the subject policy and the Florida PIP statute, section 627.736, Florida Statute (2013). In support, USAA filed Virginia Gloria's declaration, which authenticated and certified USAA's business records, including the Explanations of Reimbursement for the medical bills at issue and the PIP log.[1] Additionally, USAA filed a request for judicial notice, asking the Court to take compulsory judicial notice of both Medicare and Workers' Compensation fee schedule amounts pertaining to the CPT codes at issue in this suit.[2]

On July 26, 2023, Next Medical filed a Response in Opposition, narrowing the issue before the Court to an alleged underpayment of CPT 97012. In their Response, Next Medical takes the position that CPT 97012 should have been paid at the higher 2007 Medicare Part B limiting charge rate, rather than the lower 2020 Medicare Part B

participating physicians rate. Additionally, Next Medical contends that in calculating the 2007 Medicare Part B limiting charge rate for CPT 97012, the "budget neutrality adjustment" should be removed from the published 2007 Medicare physicians fee schedule formula.

On July 31, 2023, USAA filed a Supplemental Memorandum of Law, in which USAA argues that CPT 97012 was properly reimbursed under the schedule of maximum charges, as (1) USAA was not required to reimburse under the 2007 Medicare Part B limiting charge rate, and (2) even if USAA was required to reimburse under the 2007 Medicare Part B limiting charge rate, it would be incorrect to remove the "budget neutrality adjustment" from the published 2007 Medicare physicians fee schedule formula. It is worth noting that removing the "budget neutrality adjustment" from the published 2007 Medicare physicians fee schedule formula is the only way the 2007 Medicare Part B limiting charge rate would be higher than the 2020 Medicare Part B participating physicians fee schedule rate for CPT 97012.

II. MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate "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). At the onset of the hearing, on August 15, 2023, both parties stipulated that the relevant USAA policy provided sufficient notice of its intent to limit reimbursement in accordance with the schedule of maximum charges, pursuant to section 627.736(5)(a)5., Florida Statutes (2013). Furthermore, both parties agreed that there were no genuine disputes as to any material fact pertaining to this suit. The only issues before the Court were purely legal in nature, namely: (1) was USAA required to use the 2007 Medicare Part B limiting charge rate when calculating reimbursement for CPT 97012, and (2) was USAA required to remove the "budget neutrality adjustment" from the 2007 Medicare physicians fee schedule formula when determining the 2007 Medicare Part B limiting charge rate. For reasons more fully set forth below, the Court need only address the first issue, and by virtue of this Court's ruling on the first issue, finds the second issue to be moot.

The amount billed by Next Medical for CPT 97012 exceeded the allowable amount for this service under the PIP statute's schedule of maximum charges found in section 627.736(5)(a)1. As conceded by Next Medical at the hearing, on August 15, 2023, USAA's notice in its policy permitted USAA to limit reimbursement for CPT 97012 to an amount equal to 80% of 200% of the allowable amount for the service under the PIP statutes schedule of maximum charges. USAA exercised its right to limit reimbursement accordingly, and as evidenced by USAA's declaration and the certified Explanations of Reimbursement attached thereto, USAA paid Plaintiff for the subject medical service pursuant to the 2020 Medicare Part B non-facility participating physicians fee schedule.

In their Response, Next Medical alleges that USAA improperly reimbursed Next Medical for CPT 97012 as USAA did not issue payment pursuant to the 2007 Medicare Part B limiting charge rate. In support of their position, Next Medial relies on *Priority Med. Centers, LLC v. Allstate Ins. Co.,* 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], wherein the Third District held that, "[u]nder the current version of the PIP statute, and giving effect to the 2012 legislative amendment, the highest reimbursement allowable fee schedule of Medicare Part B is the non-facility limiting charge for 2007[.]" *Id.* at 727. Specifically, the Third District reasoned that when the Florida Legislature removed the reference to the "participating physicians fee schedule" in the language of section 627.736(5)(a)2. and replaced it with "applicable schedule," the legislative intent was to incorporate the Medicare Part B limiting charge into section 627.736(5)(a)2., which creates a base "floor" amount that an insurer cannot reimburse less than when determining payment pursuant to the schedule of maximum charges. *Id.* 726-27.

While the Fourth District was initially aligned with the Third District on the issue of whether the 2007 Medicare Part B limiting charge rate was included in the "applicable schedule," language of section 627.736(5)(a)2., it has more recently receded from this position and certified conflict with the Third District in *Progressive Select Ins. Co. v. In House Diagnostic Services,* 359 So. 3d 817 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D860g], a unanimous, *en banc* decision, wherein the Fourth District concluded that the "applicable schedule" language of section 627.736(5)(a)2. "necessarily refers only to the fee schedules applicable to a given medical service as set forth in section [627.736(5)(a)1.f(I)-(III)]." *Id.* at 821. In reliance on *In House,* USAA argues, and this Court agrees, that "[t]he Third District in *Priority Medical* focused on the changes to [section 627.736(5)(a)2.] in isolation and on the Legislature's omission of "participating physician fee schedule" in that subparagraph, instead of evaluating the changes to the overall statutory scheme affected by the 2012 amendments to both [sections 627.736(5)(a)1. and 627.736(5)(a)2.]." *Id.*

This Court is further persuaded by the thorough analysis of the Sixth District in *Progressive Express Ins. Co. v. SimonMed Imaging,* 48 Fla. L. Weekly D990a (Fla. 6th DCA May 12, 2023). In certifying conflict with *Priority Medical,* The Sixth District held that, "[b]ased on the plain language of the statute," when read as a whole, the relevant benchmark for the floor" amount under section 627.736(5)(a)2. is the Medicare Part B participating fee schedule, not the higher Medicare Part B limiting charge. *Id.* "In ascertaining the meaning of the 'applicable schedule,' we view the term in light of the statute's overall structure and the physical and logical relation of its many parts. . . [a]nd viewing the term in this manner, the only reasonable conclusion one can draw from the text in context is that the term 'applicable schedule' in [section 627.736(5)(a)2.] refers back to the three delineated fee schedules in [section 627.736(5)(a)1.]. In Fact, the text of [section 627.736(5)(a)2.] spells it out, plainly noting it exists 'for the purposes of [section 627.736(5)(a)1.]" *Id.* It is logical that "[b]ecause the Florida Legislature added the two new fee schedules in 2012, the Legislature. . .broadened the language of [section 627.736(5)(a)2.]

Furthermore, USAA argues, and this Court agrees, that "there is nothing discernable from the statute's text, structure, or operation that would suggest the term ['applicable schedule'] requires the reader to look beyond the three delineated fee schedules in [section 627.736(5)(a)1.] or that the limiting charge is somehow silently incorporated into the statutory text." *Id.* In fact, as noted in *SimonMed,* "rather than a 'fee schedule,' the limiting charge is more accurately characterized as the 'amount which a provider may directly bill an insured.' " *Id.* (citing *In House Diagnostic Services,* 359 So. 3d 817 at 821).

Under the undisputed facts established in USAA's declaration and the attached business records, and in light of the judicial notice taken by this Court of the 2020 Medicare Part B fee schedule amounts for CPT 97012 and the 2007 Medicare Part B fee schedule amounts for CPT 97012, this Court finds that the "applicable schedule" referenced in section 627.736(5)(a)2. is not inclusive of the higher 2007 Medicare limiting charge and that USAA correctly reimbursed Next Medical at the 2020 Medicare Part B non-facility participating physicians fee schedule amount for CPT 97012. Furthermore, this Court finds that in ruling in USAA's favor on the limiting charge issue, the second issue before the court, specifically, whether USAA was required to remove the "budget neutrality adjustment" from the 2007 Medicare physicians fee schedule formula when determining the 2007 Medicare Part B limiting charge rate, is rendered moot.

Accordingly,

1. Defendant's Renewed Motion for Final Summary Judgment is

GRANTED.

2. The Court enters FINAL JUDGMENT in favor of Defendant, United Services Automobile Association, and against Plaintiff, Next Medical Florida, LLC a/a/o Marvin Jackson, Plaintiff shall take nothing and Defendant shall go hence without day.

3. The Court reserves jurisdiction to award costs and fees under proper application.

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[1]USAA's declaration also authenticated and certified an incomplete copy of the subject policy. On August 10, 2023, USAA filed a Notice of Filing Certified Copy of Policy, with a certified copy of the complete policy attached. At the hearing, on August 15, 2023, both parties stipulated that the subject policy language was not at issue, as the subject policy provided sufficient notice of its intent to limit reimbursement in accordance with the schedule of maximum charges, pursuant to Fla. Stat. § 627.736(5)(a)5. (2013).

[2]During the hearing on August 15, 2023, at Defendant's request, and without objection, judicial notice was taken of the documents attached to Defendant's Request for Compulsory Judicial Notice and the various material cited therein.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Parties are ordered to comply with policy's appraisal provision where the only dispute is cost of repair or replacement, not coverage—Motion to dismiss granted

LC AUTOGLASS SERVICES, INC., a/a/o Jose Osorio, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-SC-033017-O. August 23, 2023. Brian S. Sandor, Judge. Counsel: Michael B. Brehne, Law Office of Michael B. Brehne, P.A., Altamonte Springs, for Plaintiff. Ryan H. Wisneski, de Beaubien, Simmons, Knight, Mantzaris, & Neal, LLP, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS MATTER came before the Court at 3:00 p.m., on August 22, 2023, on Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (the "Defendant" or "State Farm"), Motion to Dismiss, or in the alternative, Motion to Stay and Compel Appraisal, and Defendant's Motion for Protective Order and Motion to Stay All Discovery, and the Court having reviewed the record, heard the arguments of counsel, and being otherwise fully advised in the premises, it is hereupon:

ORDERED and **ADJUDGED** as follows:

1. The Defendant's Motion to Dismiss is **GRANTED**.

2. The Court finds that the State Farm Policy, including the appraisal provisions found in the 6910A Amendatory Endorsement, are incorporated by reference into the Complaint. The subject State Farm policy states in the 6910A Amendatory Endorsement, in relevant part, "[i]f there is a disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal will be used as the first step toward resolution." The State Farm Policy also contains a "no action clause," which states that "[l]egal action may not be brought against [State Farm] until there has been full compliance with all the provisions of this Policy." The Policy is clear and unambiguous and requires a party filing a lawsuit against State Farm to comply with the appraisal provision prior to filing a lawsuit. The Plaintiff has not alleged that an appraisal has occurred in this case and the Plaintiff has not alleged that it complied with the no action clause. Based on the allegations in the Complaint, the only issue in dispute is the cost of repair or replacement and not coverage. Therefore, an appraisable issue exists in this action, and Plaintiff was required to comply with the appraisal provision prior to filing this lawsuit, which it failed to do, and failed to allege.

3. The Court relies on the opinion from the Fifth District Court of Appeal *NCI, LLC, v. Progressive Select Ins. Co.*, 350 So. 3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2366c] ("*NCI*"). In *NCI,* the Fifth District Court of Appeal affirmed the trial court's dismissal without prejudice of the plaintiff's complaint due to the plaintiff's failure to comply with the policy's appraisal provision prior to filing suit. *Id.* at 804-805. The *NCI* Court also found that the appraisal provision contained adequate procedures, the insurer did not waive its rights to appraisal by asserting a standing argument, appraisal did not violate public policy concerns or fundamental rights such as access to courts, and appraisal is not prevented by the prohibitive cost doctrine. *Id.* at 807-810. The Fifth District confirmed that when the allegations of the complaint show that the dispute is over the amount of the loss, an appraisal issue exists. *Id.*

4. In reaching its ruling, the Court also relies on the opinion from the Second District Court of Appeal in *Progressive Amer. Ins. Co. v. Glassmetics, LLC,* 343 So. 3d 613 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b] ("*Glassmetics*"). In *Glassmetics,* the Second District Court of Appeal held that the appraisal provision in Progressive's policy was not ambiguous, nor against public policy, provided sufficient procedures and methodologies, did not conflict with a retained rights clause, and did not violate assignee's rights of access to courts. *Id.* at 621-626.

5. Further, it is well settled law in Florida that the purpose of an appraisal provision in an insurance policy is specifically to avoid litigation by providing the parties with a mechanism for resolving the dispute. *See NCI,* 350 So. 3d at 807 ("[t]he goal of appraisal provisions is to settle disputes without litigation."); *Glassmetics,* 343 So. 3d at 619 ("[r]esolving disputes without litigation is the goal of the appraisal process. . . [t]he appraisal process does not entail legal work arising from insurance company's denial of coverage or breach of contract; it is simply work done within the terms of the contract to resolve the claim") (internal citations omitted). As such, the Court concludes that staying the case and ordering the parties to complete appraisal is not the appropriate remedy. *See United Cmty. Ins. Co. v. Lewis,* 642 So. 2d 59 (Fla. 3d DCA 1994) (reversing denial of motion to dismiss declaratory judgment action for failure to comply with condition precedent of appraisal); *See also Cunmit v. State Farm Mutual Auto. Ins. Co.,* Case No. 2022-SC-004743 (Orange County Court Nov. 17, 2022) (granting State Farm's Motion to Dismiss for failure to comply with appraisal provision based on *NCI, LLC v. Progressive*); *Accusafe Auto Glass, a/a/o Shannon Anderson, v. Progressive American Insurance Company,* 30 Fla. L. Weekly Supp. 623b (Volusia County Ct. December 13, 2022) (finding dismissal was the proper remedy since appraisal was not completed prior to the onset of litigation, based on the Fifth DCA in *NCI, LLC* and the Second DCA in *Progressive Am. Ins. Co. v. Hillsborough Ins. Recovery Ctr., LLC,* 349 So. 3d 965 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]); *Shazam Auto Glass, LLC, a/a/o Victor Zavitsky v. Progressive American Ins. Co.,* 30 Fla. L. Weekly Supp. 444a (Hillsborough County Ct. Aug. 29, 2022) (dismissing plaintiff's complaint because plaintiff failed to comply with policy's appraisal provision, which was a mandatory condition precedent); *SG Calibration Network, LLC, a/a/o Matthew Whitehurst v. State Farm Mut. Auto. Ins. Co.,* Case No. 2022-CC-047089 (Hillsborough County Court Dec. 20, 2022) (dismissing plaintiff's complaint because plaintiff failed to comply with policy's appraisal provision, which was a mandatory condition precedent).

6. Lastly, the Court finds that Plaintiff's Complaint fails to state a claim for declaratory relief and should be dismissed because there is no bona fide, practical need for a declaratory judgment on any issues raised therein.

7. Since dismissal is appropriate, the Court does not address Defendant's Motion for Protective Order and Motion to Stay All Discovery and it is **MOOT.**

8. Based upon the foregoing, the Court grants State Farm's Motion

to Dismiss and this case is **DISMISSED** in its entirety, without prejudice.

9. The clerk is directed to administratively close this case.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Evidence—Hearsay—Examination under oath—Transcript of insured's EUO, which was taken as part of requirements of insurance policy and not in connection with judicial proceeding, is not admissible as summary judgment evidence in medical provider/assignee's action against insurer—Transcript is statement of non-party, not admission of party—Further, section 92.33 prohibits use of EUO as summary judgment evidence unless movant can show that it was provided to the insured at the time the statement was taken—Affidavits of claims adjuster and underwriter that are based entirely on hearsay statements in EUO transcript are also inadmissible

MANUEL V. FEIJOO, M.D., a/a/o Andisleydis Sordo Perez, et al., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-005348-SP-25. Section CG04. September 15, 2023. Jacqueline Woodward, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Karen E. Trefzger, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter having come before the court on August 14, 2023, on Defendant United Auto's Motion for Summary Judgment based on its affirmative defense alleging 'material misrepresentation' and the court having heard the arguments of counsel, having reviewed Defendant's motion and Plaintiff's response, and being otherwise fully advised therein, it is hereby:

ORDERED & ADJUDGED as follows:

BACKGROUND

On February 6, 2016, the named insured—Gendry Perez—purchased an insurance policy from Defendant, United Automobile Insurance Company (UAIC). The policy listed Mr. Gendry Perez and Andisleydis Sordo Perez as named insureds. During the policy term, Andisleydis Sordo Perez was injured in an accident and sought medical care from Plaintiff, who accepted an assignment of PIP benefits from the insured and submitted its bills to Defendant for payment. Defendant refused to remit payment because it alleged that the insured made a material misrepresentation on the insurance policy application by allegedly failing to disclose that the vehicle would be used for business purposes. As a result, Defendant declared the subject policy void to be *ab initio*. This action followed.

On September 12, 2022, Defendant filed its Motion for Summary Judgment claiming it owes nothing to Plaintiff because of the alleged material misrepresentation. See, F.S. 627.409. In support of its motion for summary judgment, Defendant relied on the affidavit of its own claims adjuster, Jean Labossiere ("Labossiere"), as well as the affidavit of its underwriter, Jorge De La O ("De La O").

During the discovery phase of this case, both affiants testified in deposition that they did not have any personal knowledge of the facts giving rise to the alleged material misrepresentation and that all of the information contained in their affidavits was derived from the Examination Under Oath (EUO) transcript taken of Mr. Gendry Perez, on March 3, 2016, which was apparently transcribed on March 5, 2016 (which is when the EUO became a written statement).

Hence, Defendant's summary judgment evidence consisted of the EUO transcript and the two affidavits (Labossiere and DeLaO), which were based entirely on the statements contained in the EUO. Plaintiff objected to the use of and reference to the EUO transcript as summary judgment evidence and argued that the EUO cannot be used as summary judgment evidence because it was not a deposition; Plaintiff had no opportunity to cross examine the declarant; it was not obtained in the course of a judicial proceeding; it was never signed nor acknowledged by the declarant; it is a pre-suit investigatory tool used by the Defendant insurer in anticipation of litigation; there is no opportunity for witness review (see, Rule 1.310(e); the EUO was never seen by the declarant; and F.S. 92.33 prohibits the use of the EUO for any purpose in any civil action unless it can be shown that it was provided to the declarant at the time it was taken and the defense has no evidence indicating that the EUO was ever provided to the declarant.

Defendant concedes that the EUO transcript is hearsay (i.e., an out of court statement offered to prove the truth of the matter asserted), but claims that the EUO falls under the hearsay exception as set forth in F.S. 90.803(18). During the hearing on Defendant's motion for summary judgment, the Court then conducted an in-depth analysis of the 90.803(18) factors, including subsections (a) through (e), and determined that none of those factors apply to the facts of the instant case and therefore Rule 90.803(18) is unavailing for the defense as a means of using the EUO transcript as summary judgment evidence.

Fla. R. Civ. P. 1.510 states that the moving party "must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ('summary judgment evidence') on which the movant relies." Accordingly, the burden is on the Defendant to identify and supply the necessary evidence to demonstrate 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." *Id*. An Examination under Oath is not listed in the rule and is not akin to a deposition. The EUO transcript proffered by Defendant is a statement of a non-party.

The Court finds the case law cited by Defendant, to wit: *Stinnett v. Longi, Inc.*, 460 So. 2d 528 (Fla. 2d DCA 1984) and *Avampato v. Markus*, 245 So. 2d 676 (Fla. 4th DCA 1971), to be inapposite as these cases did not involve the use of affidavits or sworn statements at summary judgment. An EUO is taken as part of the requirements of an insurance policy. In the instant case, it was taken prior to this lawsuit being filed and it was not taken in connection with a judicial proceeding. Further, there was no opportunity for cross examination or objection. See *Goldman v. State Farm*, 660 So. 2d 300 (Fla 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and depositions are not the same and they serve vastly different purposes). Moreover, there are procedural safeguards in a deposition (including witness review under Fla. R. Civ. P. 1.310(e)), which do not exist in an examination under oath. Similarly, Examinations Under Oath are not like affidavits; EUO's are typically not signed while an affidavit is always signed. Equally important is the fact that F.S. 92.33 prohibits the use of EUO's as summary judgment evidence unless the movant can show it was provided to the declarant at the time the statement was taken, but Defendant was unable to do so. This statutory provision F.S. 92.33 was discussed in *Fendrick v. Faeges* 117 So. 2d 858 (Fla. 3rd DCA 1960), where the court held that the statement made by the declarant prior to suit was properly excluded from evidence where it was not shown that the statement was given to the declarant as required by § *92.33, Fla. Stat.,* "Clearly, this statute makes inadmissible any statement by an injured person . . . until it is shown that a copy of the statement made was furnished to the person making the same. The *Fendrick* court went on to say that ". . .the trial judge was eminently correct in excluding it from evidence."

For the reasons expressed herein, the Court finds that the EUO transcript is not admissible for consideration as summary judgment evidence.

The affidavits of Labossiere and DeLaO are also not admissible because they are not based on personal knowledge and using those

affidavits in support of a motion for summary judgment is akin to treating those affiants as a conduit for inadmissible hearsay. The rule's (1.510, which is now identical to Fed. Rule 56) personal knowledge requirement is clear. To be sufficient, an affidavit must be based on personal knowledge. See, *Duke v. Northstar Mortgage, LLC,* 893 F. 3d 1238 (S.D. Fla. 2012). An affidavit based on anything less than personal knowledge is insufficient. See, *Duke*, supra, citing to *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C316a] (citing *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 851 (11th Cir. 2000) ("upon information and belief" is insufficient); *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 154 (5th Cir. 1965) ("upon knowledge, information and belief" is insufficient); *Robbins v. Gould*, 278 F.2d 116, 118 (5th Cir. 1960) ("knowledge and belief" is insufficient)). Additionally, the affidavit or declaration must state the basis for such personal knowledge. *See Bruce Constr. Corp. v. United States*, 242 F.2d 873, 877 (5th Cir. 1957).

Rule 56(e)—and by extension—Rule 1.510 provides that an affidavit in support of summary judgment "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein." *Fed.R.Civ.P. 56(e).* As such, an affidavit must be stricken when it is a conclusory argument, rather than a statement of fact, or when the affidavit is not based personal knowledge. *Story v. Sunshine Foliage,* 120 F. Supp. 2d 1027 (M.D.Fla. 2000).

Hence, to the extent that the affidavits of Labossiere and DeLaO rely on the hearsay statements contained in the EUO transcript, they cannot be considered by the court.

For the reasons set forth above, Defendant's motion for summary judgment is hereby DENIED.

* * *

Insurance—Personal injury protection—Limitation of actions—Medical provider's suit for PIP benefits is barred by statute of limitations where suit was filed almost one year after expiration of five-year limitations period

PRECISION DIAGNOSTIC OF LAKE WORTH, LLC, a/a/o Yulishka Danastor, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-006910-SP-21. Section HI01. August 23, 2023. Milena Abreu, Judge. Counsel: Nikolas M. Salles, Patino Law Firm, for Plaintiff. Gladys Perez Villanueva and Tracy Berkman, Law Offices of Leslie M. Goodman as Employees of Kemper, for Defendant.

FINAL ORDER OF DISMISSAL

This matter came before the Court upon the Defendant, Infinity Indemnity Insurance Company ("Infinity's"), Motion to Dismiss, or Alternatively Motion for Entry of Final Judgment. Plaintiff, Precision Diagnostic of Lake Worth, LLC a/a/o Yulishka Danastor ("Plaintiff"), was represented by Nikolas M. Salles, Esq. of The Patino Law Firm, and Defendant, Infinity Indemnity Insurance Company, was represented by Gladys Perez Villanueva, Esq.; and Julia Sturgill, Esq. and Tracy Berkman, Esq. of Law Offices of Leslie M. Goodman & Associates. The Court, having heard argument of counsel on the 2nd day of August, 2023, reviewed the court file, written submissions of the parties, legal authorities, and being otherwise duly advised in the matter, GRANTS Infinity's motion and makes the following findings of fact and conclusions of law:

Material Facts

On February 28, 2016, the claimant was involved in an automobile accident. (Comp. ¶ 4) Plaintiff provided medical services to the claimant on March 29, 2016. (Comp. ¶ 46) Plaintiff timely submitted its bill to Infinity as required by Florida Statute 627.736(5)(c). (Comp. ¶ 12) The bill was received on April 8, 2016. (Comp. ¶¶ 12, 13, 14—demand & response). Infinity denied the claim and made no payments. (Comp. ¶¶ 12, 13, 14—demand & response). On May 18, 2021, Plaintiff served a demand letter for PIP benefits; Infinity responded to Plaintiff's demand letter on July 6, 2021, again denying the claim. (Comp. ¶¶ 12, 13, 14—demand & response). Plaintiff filed the instant action for recovery of Personal Injury Protection benefits under Florida's No-Fault Statute, 627.736, Florida Statutes, on June 15, 2022.

Infinity filed a Motion to Dismiss or Alternatively Motion for Entry of Final Judgment based upon the statute of limitations, along with a Memorandum of Law. This Court set the Motion to Dismiss for hearing, which is the subject of this order.

Conclusions of Law

A. Procedural Considerations for Motion to Dismiss

In considering a motion to dismiss a complaint, this Court is confined to the allegations contained within the four corners of the complaint and supporting exhibits, and all documents impliedly incorporated via reference; all allegations in the complaint must be accepted as true. *See One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]; *Veal v. Voyager Prop. & Cas. Ins. Co*., 51 So. 3d 1246 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a] *Hitt v. North Broward Hospital Dist*., 387 So. 2d 482 (Fla. 4th DCA 1980). Where, as here, the complaint refers to documents that under the law form the basis for the Plaintiff to be able to bring suit, and impliedly incorporates those documents by reference, a trial court is entitled to review those documents in ruling on a motion to dismiss. *Id.* If the existence of an affirmative defense is apparent on the face of the complaint, such a defense can be considered on a motion to dismiss. *Fla. R. Civ. P.* 1.110(d). Although as a general rule, the statute of limitations should be raised as an affirmative defense in an answer, when the facts constituting the defense appear affirmatively on the face of the complaint, the statute of limitations may also be raised via a motion to dismiss. *See Williams v. Potamkin Motor Cars, Inc.*, 835 So. 2d 310 (Fla. 3d DCA 2002) [28 Fla. L. Weekly D16a]; *General Motors Acceptance Corp. v. Thornberry*, 629 So. 2d 292 (Fla. 3d DCA 1993); *Toledo Park Homes v. Grant*, 447 So. 2d 343, 344 (Fla. 4th DCA 1984). This is especially true where the cause of action is under Florida's PIP statute, as the statutory provisions delineate the precise timing for submission and processing of PIP claims.

B. Statute of Limitations for PIP Claims

The prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) [26 Fla. L. Weekly S465a]. This includes the defendant's right to be free from claims from one who has willfully slept on its legal rights. *Id.* "As a rule, statutes of limitation impose a strict time limit for filing legal actions." *Id.* at 1074.

The parties agree that the statute of limitations for a PIP breach of contract action, such as the one *sub judice*, is governed by section 95.11(2)(b), and provides for a five year statute of limitations. Infinity maintains that the statute of limitations ran, at best, on July 26, 2021, making the instant suit barred, as Plaintiff's complaint was filed on June 15, 2022, almost a year after the expiration of the statute of limitations. This Court agrees with Infinity's analysis, as it is in accord with the statutory framework in Florida's No-Fault Law and Florida Supreme Court precedent.

The path from claim to suit in PIP is well delineated in the PIP statute and in robust caselaw spanning decades. For our purposes, the analysis begins when the Plaintiff seeks payment for providing medical services to a claimant. The Plaintiff is required under the No-Fault Statute to furnish the insurer with a statement of charges and the insurer is not required to pay charges for treatment or services rendered more than 35 days before the postmark date. *See*

§627.736(5)(c), Florida Statutes (2015). This provision was enacted by the Florida Legislature in 1998. Prior to its enactment, the only limitation on submissions of claims was the five year statute of limitations. *See Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005) [30 Fla. L. Weekly S197b]. Consequently, "medical providers could potentially allow charges to mount, and submit charges for services rendered over a long period of time and distant from the time of the original accident." *Id.* Therefore, as a matter of law, Plaintiff is required to comply with the statutory requirements, including time limitation, for presenting a claim or be barred from recovery. However, the cause of action has not accrued at this point, because the insurer may or may not pay and is not in breach of the contract. That being said, Plaintiff avers in paragraph 12 of its complaint that "the medical bills were submitted timely, as required by Fla. Stat. 627.736(5)(c). The Court takes this averment to be true.

The question then becomes, when does the cause of action accrue for purposes of the statute of limitations in a PIP suit. The Florida Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Lee*, 678 So. 2d 818 (Fla. 1996) [21 Fla. L. Weekly S335a], clearly established the applicable statute of limitations in an action based on an insurer's failure to pay PIP benefits. The limitations period begins to run on the date of the insurer's alleged breach of the contract—that is, the date when PIP benefits under the policy become overdue. *Id.* Section 627.736(4)(b), Florida Statutes, provides that "[p]ersonal injury protection insurance benefits. . .are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same."

Once the claims becomes "overdue," the PIP Statute guides the progression of the claim. Subsection (10), states:

(10)DEMAND LETTER.—

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

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

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

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

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

(c)Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the insurer if requested by the claimant in the notice, when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this subsection. Each licensed insurer, whether domestic, foreign, or alien, shall file with the office the name and address of the designated person to whom notices must be sent which the office shall make available on its Internet website. The name and address on file with the office pursuant to s. *624.422* is deemed the authorized representative to accept notice pursuant to this subsection if no other designation has been made.

(d)If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer. If the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, no action may be brought against the insurer if, within 30 days after its receipt of the notice, the insurer mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment in accordance with the notice and to pay a penalty of 10 percent, subject to a maximum penalty of $250, when it pays for such future treatment in accordance with the requirements of this section. To the extent the insurer determines not to pay any amount demanded, the penalty is not payable in any subsequent action. For purposes of this subsection, payment or the insurer's agreement shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment, or the insurer's written statement of agreement, is placed in the United States mail in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery. The insurer is not obligated to pay any attorney fees if the insurer pays the claim or mails its agreement to pay for future treatment within the time prescribed by this subsection.

(e)**The applicable statute of limitation for an action under this section shall be tolled for 30 business days by the mailing of the notice required by this subsection.**

In 2001, the Legislature amended the PIP statute to require the insured to provide a pre-suit notice of intent to initiate litigation. Section 627.736(10) requires a demand letter as a condition precedent to the filing of a PIP suit to recover benefits. *See Rivera v. State Farm Mut. Auto. Ins. Co.*, 317 So. 3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]. "[T]he purpose of the demand letter is not just notice of intent to sue. The demand letter also notifies the insurer as to the exact amount for which it will be sued if it does not pay the claim." *Id.* at 204. The intent of this section is 'to reduce the burden on the courts by encouraging the quick resolution of PIP claims. . .' *Id. (citing Venus Health Center v. State Farm*, 21 Fla. L. Weekly Supp 496a (Fla. 11th Cir. Ct. Mar. 13, 2014)). Plaintiff, in paragraph 13 of the Complaint states that it submitted a demand letter, pursuant to section 627.736(10). The Court takes this averment as true and considers that Plaintiff's demand letter is incorporated by reference.

It is clear from the plain language of the demand letter section of Florida's No-Fault statute and caselaw interpreting same that: a) Plaintiff must provide a pre-suit demand; b) an insurer cannot be sued if it pays upon demand and will avoid potential exposure to attorney's fees; c) an insurer has a right not to pay any amount demanded; and d) that a demand letter tolls the statute of limitation. The payment or non-payment upon demand does not constitute a second breach of the insurance contract, it simply places the bill in dispute and gives the Plaintiff the statutory right to initiate the lawsuit under Florida's PIP Statute for the *disputed amounts* and gives the insurer the right to defend. *See Century-Nat'l Ins. Co. v. Regions All Care Health Ctr., Inc.*, 336 So. 3d 445 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D896a] (*citing United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a]).

Importantly, the Legislature included the sole tolling provision for a PIP suit—the thirty business day tolling by the demand letter—following subsection (d), an elaborate statutory scheme intended to curtail PIP litigation and afford the insurer an opportunity to avoid a lawsuit and exposure to attorney's fees. If the statute of limitation is tolled by the mailing of a demand letter, it necessarily follows that the

applicable statute of limitations had already begun to run; otherwise, the Legislature would not have included the tolling provision of 627.736(10)(e). This analysis, as detailed by Infinity, comports with the PIP statutory scheme and *Lee*.

At the hearing, Infinity argued four different alternative scenarios based upon the Plaintiff's Complaint, its Notice of Intent, and Florida's PIP Statute to support its position. *See* Notice of Filing Demonstrative Aid; D.E. 21. At the heart of Infinity's argument is the following unavoidable conclusion: whether this Court considers documents in Infinity's Notice of Intent and whether or not Plaintiff's demand letter (which was arguably untimely and therefore a nullity) served to toll the Statute of Limitations, the instant suit is barred by the Statute of Limitations. This Court agrees with Infinity.

This case presents a classic example of an untimely suit, outside the applicable limitation period. The formula to determine the statute of limitation in a PIP suit, as supported by authorities above, is as follows:

1. What was the date the bill became "overdue?" Under section 627.736(4)(b), Florida Statutes, benefits are "overdue" if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.

2. Was the statute of limitations tolled for 30 business days by a pre-suit demand letter? 627.736(10)(e), Fla. Stat.[1]

3. Add the five-year limitation period under section 95.11, Florida Statutes.

Scenario 1—Court considers the documents in the Notice of Intent and the demand letter.

Under this analysis, Plaintiff's suit is for date of service March 29, 2016. The bill was received on April 8, 2016. The bill, therefore, became overdue 31 days after, on May 9, 2016. Plaintiff submitted a demand letter, which tolls[2] the statute of limitation in PIP cases for 30 business days, which would mark overdue date at June 20, 2016. *Id.* Five years added to the date the bill became overdue, therefore, would mark the limitation period as June 19, 2021. Plaintiff filed the instant suit on June 15, 2022, almost a year outside of the limitation period.

Scenario 2—Court does NOT consider documents in the Notice of Intent, but considers the demand letter.

Under this analysis, Plaintiff's suit is for date of service March 29, 2016, as provided in Paragraph 46 of the Complaint. Plaintiff timely submitted the bill as required by section 627.736(5)(c), and as provided in Paragraph 12 of the Complaint. Section 627.736(5)(c), requires that the bill be furnished to insurer and may not include charges for treatment or services rendered more than 35 days before the postmark date. Thus, even if the Court did not know when the bill was received and afforded Plaintiff the maximum statutory timeframe (35 days), the bills are deemed received on May 4, 2016. The bill, therefore, became overdue 31 days after, on June 6, 2016. *See* §627.736(4)(b), Fla. Stat. Plaintiff submitted a demand letter, which tolls[3] the statute of limitation in PIP cases for 30 business days, which would toll the overdue date until July 18, 2016. Five years added to the date the bill became overdue, therefore, would mark the limitation period as July 18, 2021. Plaintiff filed the instant suit on June 15, 2022, almost a year outside of the limitation period.

Scenario 3—Court considers the documents in the Notice of Intent, but not untimely demand letter.

Under this analysis, Plaintiff's suit is for date of service March 29, 2016. The bill was received on April 8, 2016. The bill, therefore, became overdue 31 days after, on May 9, 2016. Five years added to the date the bill became overdue, therefore, would mark the limitation period as May 9, 2021. Plaintiff submitted its demand letter on May 18, 2021, after the Statute of Limitations ran. Accordingly, the demand letter was a legal nullity and did not serve to toll the Statute of Limitations. Plaintiff filed the instant suit on June 15, 2022, over a year after the limitation period expired.

Scenario 4—Court does NOT consider documents in the Notice of Intent and tolls SOL from date of receipt of the demand letter.

This scenario presents the most favorable timeframe for the Plaintiff. Plaintiff's suit is for date of service March 29, 2016, as provided in Paragraph 46 of the Complaint. Plaintiff timely submitted the bill as required by section 627.736(5)(c), and as provided in Paragraph 12 of the Complaint. Section 627.736(5)(c), requires that the bill be furnished to insurer and may not include charges for treatment or services rendered more than 35 days before the postmark date. Thus, even if the Court did not know when the bill was received and afforded Plaintiff the maximum statutory timeframe (35 days), the bills are deemed received on May 4, 2016. The bill, therefore, became overdue 31 days after, on June 6, 2016. *See* §627.736(4)(b), Fla. Stat. Five years added to the date the bill became overdue, therefore, would mark the limitation period as June 6, 2021. The demand was received on May 18, 2021, meaning that there were 19 days left before the Statute of Limitations ran. The demand letter tolled the statute of limitations for 30 business days, which would toll the overdue date until July 7, 2021. The Plaintiff then had the remaining 19 days left within which to file a suit, marking the limitations period to expire on July 26, 2021. Plaintiff filed the instant suit on June 15, 2022, almost a year outside of the limitation period.

Plaintiff failed to present any argument to contravene the statutory analytical framework for expiration of the Statute of Limitations as set forth above. Even if this Court agreed with Plaintiff that it could not consider documents outside the four corners of the Complaint, under a purely statutory analysis, the Statute of Limitations defense is apparent on the face of the Complaint, as illustrated above. The PIP statute clearly establishes the timeline that confers the right to sue on Plaintiff. First, Plaintiff is required to furnish bills to the insurer within 35 days of service. Plaintiff then is placed on notice when an insurer fails to pay a claim or purportedly underpays and, consequently, when that bill becomes "overdue." Further, Plaintiff is then under a legal obligation to provide a pre-suit demand letter. The insurer has a right to not pay the bill. Plaintiff is also on notice of the expiration of the thirty days after it provided the pre-suit demand, which would toll the statute of limitations. Upon the expiration of the thirty business days, Plaintiff has complied with the condition precedent and may file suit against the insurer to recover benefits purportedly due. The insurer, of course, would be subject to the statutory penalties as set forth in 627.736(10). The clear statutory framework for the progression of PIP claims from accrual of the cause of action for purposes of the statute of limitations by virtue of "overdue" claims, the tolling of same to provide the insurer to cure at demand, and subsequent right to sue if the insurer fails to pay upon demand, leaves no room for plaintiffs to argue that they are not on notice of the insurer's position in relation to a claim or that the cause of action did not accrue until the insurer responded to the demand. Taken to its logical extension, such a position would abrogate section 95.11(2)(b) and section 627.736(10), Florida Statutes. Plaintiff, as all other plaintiffs who fail to act within the limitations period, did nothing to assert its claim during the five year period.

IT IS HEREBY ORDERED AND ADJUDGED that Infinity's Motion to Dismiss or Alternatively Motion for Entry of Final Judgment is hereby GRANTED.

The instant cause is hereby DISMISSED, as it is barred by the Statute of Limitations.

This Court reserves jurisdiction to determine attorney's fees and costs.

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[1]For its entire argument, Infinity is not waiving its position that the demand letter

herein, served after the expiration of the statute of limitations is a nullity.

[2]*Id.*

[3]*Id.*

* * *

Insurance—Automobile—Windshield repair— Appraisal— Declaratory judgment—Motion to dismiss complaint seeking declaratory relief regarding appraisal process is denied—Policy provision is ambiguous where it is devoid of framework for selection of impartial umpire if appraisers disagree as to amount of loss—Breach of contract claim is stayed pending resolution of declaratory judgment counts

ADAS WINDSHIELD CALIBRATIONS, LLC Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-039536-SP-26. Section SD06. September 7, 2023. Laura Maria Gonzalez-Marques, Judge. Counsel: Martin I. Berger, Berger|Hicks, Miami, for Plaintiff.

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

THIS CAUSE came before the Court for a hearing on Defendant's Amended Motion to Dismiss Or, In the Alternative, Motion to Compel Appraisal and Motion to Stay Litigation and Discovery Pending Completion of Appraisal (DE 14). The Court having reviewed the Motion, heard the argument of counsel, and being otherwise advised, it is hereby

ORDERED and ADJUDGED

Defendant has moved to dismiss this litigation or, alternatively, stay the case and compel the parties to arbitration, as provided by the insurance policy at issue. Plaintiff argues compelling appraisal is improper as Plaintiff seeks declaratory relief regarding the appraisal provision. Rather, Plaintiff posits the appropriate relief is to stay the breach of contract claims and allow Plaintiff to proceed on the declaratory judgment claims.[1] For the reasons described below, Defendant's Motion is **DENIED**.

I. LEGAL STANDARD

"When ruling on a motion to dismiss, the Court 'must limit itself to the four corners of the complaint, including any attached or incorporated exhibits, assuming the allegations in the complaint to be true and construing all reasonable inferences therefrom in favor of the non-moving party.' " *Skupin v. Hemisphere Media Grp., Inc.*, 314 So. 3d 353, 355 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a] (citing *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014)) [39 Fla. L. Weekly D648a]. Further, "the trial court must treat as true all of the complaint's well-pleaded allegations, including those that incorporate attachments." *Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1732a]; *Skupin*, 314 So. 3d at 355-356 ("[A]ll allegations must be taken as true, and 'any reasonable inferences drawn from the complaint must be construed in favor of the non-moving party.' "). The exhibits attached to the Complaint control and "where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994).

Even if the policy is not expressly attached to a complaint, "when the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *Air Quality Assessors of Fla. v. Southern-Owners Ins. Co.*, No. 1D21-1217, 2022 WL 14738493, *1 [354 So. 3d 569] (Fla. 1st DCA, October 26, 2022) [47 Fla. L. Weekly D2171a] (citing *One Call Prop. Servs. Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a].

Finally, when examining an appraisal clause, the three elements to consider are: "1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether a party has waived the right to arbitrate." *NCI, LLC v. Progressive Select Ins. Co.*, 350 So. 3d 801 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2235f] (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a].

Relevant to the analysis are recent appellate opinions: *NCI, LLC v. Progressive Select Ins. Co.*, 350 So. 3d 801, *Progressive Am. Ins. Co v. Glassmetics, LLC*, 343 So. 3d 613 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b], and *Progressive American Ins. Co. v. Hillsborough Ins. Recovery Center, LLC*, 349 So. 3d (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2265a]. All involved the review of appraisal clauses in insurance contacts, similar to the issues in this case. In *NCI*, the plaintiff appealed the dismissal of its complaint, wherein it had challenged the appraisal provision. In affirming the dismissal, the appellate court found the appraisal provision was valid, that an appraisable issue existed, and that the right to appraisal had not been waived. *Id.*, at 804-805.

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

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

Id. at 805 (emphasis removed). "The policy also contain[ed] a clause entitled, "Legal Action Against Us," which state[d] that "[w]e may not be sued unless there is full compliance with all the terms of this policy." *Id.*

In finding the policy provision valid, the Court found "the appraisal provision is unambiguous," (*Id.* at 807); that the provision contained adequate procedures (*Id.* at 807-808); that appraisal provisions did not violate public policy (*Id.* at 808) nor violated the plaintiff's rights (*Id.* at 808-809); and finally, that the prohibitive cost doctrine was inapplicable to the appraisal process (*Id.* at 809). The Court next found that as "the parties' only dispute is the amount of loss," an appraisable issue existed. *Id.* Finally, the Court found Progressive's challenging the plaintiff's standing at the same time it demanded appraisal did not waive its right to appraisal. *NCI*, 350 So. 3d at 810.

II. THE APPRAISAL CLAUSE

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

> A. If "we" and "you" do not agree on the amount of loss, either may demand an appraisal of loss. In this event, each party will select a competent appraiser. The two appraisers will select an umpire. The appraiser will state separately the actual cash value and amount of loss. If they agree, they will submit their differences to the umpire. A decision upon by and any two will be binding. Each party will:

1. Pay its chosen appraiser; and
2. Bear the expenses of the appraisal and umpire equally.

B. "We" do not waive any of "out" rights under this policy by agreeing to an appraisal.

(DE 14, at ¶ 11). It also states, in a section titled "LEGAL ACTION AGAINST 'US' ": "No legal action may not be brought against 'us' until there has been full compliance with all the terms of this policy nor until thirty days after the required notice of the accident and reasonable proof of claim has been filed with 'us'." *Id*. ¶ 12.

III. ANALYSIS

Defendant argues that the *NCI* and *Glassmetics* cases apply here and compel the dismissal of this action until appraisal is completed. Plaintiff argues that Defendant's policy is deficient and that the recent appellate cases are distinguishable. Among other arguments, Plaintiff points to the fact that, unlike *NCI* and *Glassmetics*, Defendant's policy provides no procedure to resolve a dispute as to the selection of the umpire. Defendant points to the *Glassmetics* Court's rejection of a challenge by the plaintiff to the lack of sufficient procedures in the Progressive policy.

The Court finds *Glassmetics* and *NCI* distinguishable. In those cases, the policy language at issue established a basic framework for how appraisal would be conducted.[2] The Progressive policy provided the following steps: both sides would select their own appraisers; if the appraisers could not determine an amount of loss, they would select an umpire; if they could not agree on an umpire, they could petition the court to select one; the appraisers and the umpire would then determine the amount of loss. The Court found this framework was sufficient as it provided for, among other things, "how an impartial and competent umpire. . .is selected if the appraisers disagree as to the amount of loss." *Glassmetics*, 343 So. 3d at 623; see also *NCI*, 350 So. 3d at 808.

Unlike *Glassmetics* and *NCI*, however, the policy here does not provide a framework for the selection of the umpire. Defendant's policy only states that "the two appraisers will select an umpire." (DE 14 at ¶11). While the *Glassmetics* policy expressly stated that "[i]f the two appraisers are unable to agree upon an umpire within 15 days, [either party] may requests that a judge. . .select an umpire," (343 So. 3d at 617), the policy here stops short.

Insurance contracts are construed according to their plain meaning. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a]. A court "cannot rewrite an insurance contact. . .beyond what is clearly set forth in the contractual language." *Fla. Residential Prop. & Cas. Joint Underwriting Ass'n v. Kron*, 721 So. 2d 825, 826 (Fla. 3d DCA 1998) [24 Fla. L. Weekly D12a]. In other words, where a contract is clear and unambiguous, the Court cannot add provisions to it that do not exist.

The Defendant's policy is not like the policies at issue in the recent appellate cases. In the appellate cases, the framework of how to select the umpire was set out clearly and plainly. Here, Defendant's policy is devoid of procedures for selecting an umpire where the appraisers disagree. There is no metric for breaking a stalemate and no provision that invites this Court, or anyone else, to make the selection. As such, the Court cannot agree that Defendant's policy provides adequate procedures like those found in *NCI*, *Glassmetics*, and *Hillsborough*.

The Motion is **DENIED**, and Plaintiff's breach of contract claim is **STAYED** pending resolution of the remaining declaratory judgment counts. *Progressive Am. Ins. Co. v. Dr. Car Glass, LLC*, 327 So. 3d 447, 448 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2030c]; *People's Trust Ins. Co. v. Marzouka*, 320 So. 3d 945, 948 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a].

[1]Plaintiff, rightfully, concedes that Count IV and VI of their Complaint, dealing with the prohibitive cost doctrine and public policy arguments, have been ruled upon by the appellate courts and has withdrawn those counts. (DE21 at n1). Accordingly, this Court's Order addresses only the remaining declaratory claims, Counts I-III & V, and the breach of contract claims, Count VII.

[2]The policy language in *NCI* and *Glassmetics* was identical.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to compel appraisal is denied where defenses raised in insurer's answer make it clear that amount of loss is not sole issue in case—Further, demand for appraisal that was not raised in insurer's first responsive pleading within thirty days of complaint was untimely

DR CAR GLASS, LLC, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-027832-SP-26. Section SD05. September 11, 2023. Michaelle Gonzalez-Paulson, Judge. Counsel: Martin I. Berger, Berger|Hicks, Miami, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO COMPEL APPRAISAL

THIS CAUSE having come before this Court on July 25, 2023 upon Defendant's Motion to Compel Appraisal, and the Court having been otherwise advised in the premises, it is hereby:

CONSIDERED, ORDERED, and ADJUDGED:

What sets this Motion apart from the myriad of other Motions to Compel Appraisal, however, is that this Motion was not accompanied by a Motion to Dismiss Plaintiff's Complaint. In fact, Defendant filed an Answer and Affirmative Defenses to Plaintiff's Complaint, in which it alleges five defenses to this action, all inconsistent with a claim for appraisal, and in which Defendant does not even allege appraisal. As Defendant has made it clear through its defenses that this action is not one where the sole issue is the amount of the loss, this action does not qualify for appraisal and Defendant's Motion must be denied. As stated by the Third District in the case of *Gray Mart, Inc. v. Fireman's Fund Ins. Co*., "the right to an appraisal may be waived if a party maintains a position inconsistent with the appraisal remedy." 703 So. 2d 1170 (Fla. 3rd DCA, 1998) [23 Fla. L. Weekly D1c].

Florida law is clear that appraisal is appropriate when the sole issue in the case is the amount of the loss. *Gonzalez v. State Farm Fire and Casualty Company*, 805 So. 2d 814 (Fla 3rd DCA 2000) [26 Fla. L. Weekly D390a]. However, when a Defendant raises other issues, such as coverage or other related defenses, those are to be determined by a Court and the claim is not one for appraisal. In fact, the Court in *Johnson v. Nationwide Mut. Ins. Co*. . 828 So. 2d 2021 (Fla. 2002) [27 Fla. L. Weekly S779a] quotes, "where there is a demand for an appraisal under the policy, the only "defenses" which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate." If Defendant asserts defenses other than those listed above, the matter must be decided by a court and is not the subject of appraisal.

A simple review of Defendant's Answer and Affirmative Defenses shows that Defendant has inserted multiple defenses into this action that take this case out of the realm of one that is eligible for an appraisal determination. Again, appraisal is to be used only when the sole issue in the case is the amount of the loss. In its defenses, however, Defendant alleges the following: 1) Plaintiff has failed to state a cause of action; 2) Progressive has paid in full, which of course lends itself the necessity to conduct discovery on what payment methodology Defendant used to calculate its 'full payment"; 3) Estoppel; 4) Waiver; and 5) Accord and Satisfaction. All of these defenses are complete bars to the case.

And clearly, Defendant does not get to allege defenses that are complete bars to recovery and then still force appraisal, just to see what happens. This is the underlying reason behind appraisals only being allowed in cases where the sole issue is the amount of the loss.

Courts cited above do not want Defendants getting multiple shots at defeating a claim through multiple venues. If the sole issue is amount, then Progressive can argue that appraisal may apply. But, if there are multiple defenses raised by Defendant, all of which can act as a bar to the claim, appraisal is not appropriate.

The demand for appraisal is also untimely. Plaintiff agrees that a claim for appraisal can be made after litigation has commenced. But, as the Fourth District Court has stated, the demand for appraisal is only timely when "the insurance company raised its right to an appraisal in its first pleading within thirty days of the complaint." *Florida Insurance Guaranty Association v. Castilla*, 18 So. 3d 703 (Fla 4th DCA, 2009) [34 Fla. L. Weekly D2000a]. In the case at bar, Defendant did not raise appraisal in its first responsive pleading and did not raise appraisal within thirty days of the Complaint. The demand for appraisal is untimely. See *People's Trust Insurance Company v. Vidal*, 305 So. 3d 710 (3d DCA 2020) [45 Fla. L. Weekly D1149a].

For the foregoing reason, Defendant's Motion to Compel Appraisal is DENIED.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Order dismissing case is set aside where parties have undertaken appraisal but reached impasse over selection of umpire—Because policy does not provide procedure for selection of umpire in event of disagreement, appraisal process is considered complete despite impasse

DR CAR GLASS, LLC, Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-027395-SP-26. Section SD06. August 18, 2023. Motion for Rehearing Denied September 14, 2023. Laura Maria Gonzalez-Marques, Judge. Counsel: Martin I. Berger, Berger|Hicks, Miami, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE 12/19/2022 ORDER OF DISMISSAL AS PARTIES HAVE COMPLETED THE APPRAISAL PROCESS WITHOUT A RESOLUTION AND MOTION TO SET ASIDE STAY OF DISCOVERY AND COMPEL DEFENDANT TO RESPOND TO ALL OUTSTANDING DISCOVERY

This Matter, having come up for hearing on the 15th day of August, 2023, on Plaintiff's Motion to Set Aside 12/19/2022 Order of Dismissal as Parties Have Completed the Appraisal Process Without a Resolution and Motion to Set Aside Stay of Discovery and Compel Defendant to Respond to All Outstanding Discovery, and the Court, having heard argument on same and being otherwise advised on the premises, it is hereby

ORDERED AND ADJUDGED:

Plaintiff's Motion is granted. As the parties have undertaken appraisal, this Court's Order of Dismissal dated December 19, 2022, is set aside.

Defendant's policy provides no avenue for this Court to select an umpire where the parties disagree on the umpire selection. "Courts are powerless to rewrite a contract to make it more reasonable or advantageous to one of the parties . . . or to substitute their judgment for that of the parties to the contract in order to relieve one of the parties from the apparent hardships of an improvident bargain." *World Finance Group, LLC. v. Progressive Select Ins. Co.*, 300 So. 3d 1220, 1222 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D120d]. Accordingly, although the appraisal is at an impasse, the Court finds that the parties have completed the process.

The Order Staying discovery is also set aside. Defendant shall have Thirty (30) days to file its discovery responses to all outstanding discovery.

* * *

Landlord-tenant—Complaint—Amendment—Motion to amend complaint to substitute business entity for persons named as landlord and plaintiff in suit is denied—There is no connection between named persons and business entity, and none of criteria for substitution of parties under rule 1.260 have been met

EMILIO CASTRO, et al., Plaintiffs, v. AIMEE CESPEDES, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-034998-CC-05, Section CC02. September 6, 2023. Miesha S. Darrough, Judge. Counsel: Alberto Cardet, Miami, for Plaintiffs. Jeffrey M. Hearne, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER DENYING PLAINTIFF'S VERIFIED MOTION TO CORRECT PLAINTIFF'S NAME AND AMEND CASE STYLE

THIS CAUSE came before the Court for hearing on Plaintiff's Verified Motion to Correct Plaintiff's name and amend case style, and the Court finds, having considered the pleadings and argument of the parties, it is hereby:

ORDERED AND ADJUDGED:

The Motion filed in this case seeks to change the plaintiff from Emilio Castro and Kathy Castro ("the Castros") to 1621 Apartments LLC ("the LLC"). The LLC argues it was a scrivener's error to identify the Castros as the landlord and plaintiff and the LLC should be allowed to become the plaintiff by amending the pleadings under Rule 1.190, Florida Rules of Civil Procedure.

Courts have authorized substitution through amendment under Rule 1.190 when there is a misnomer between corporate parties with an identity of interest. *See Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D640a]; *St. John's Hosp. & Health Ctr. v. Toomey*, 610 So. 2d 62 (Fla. 3d DCA 1992); *Schwartz ex rel. Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.*, 725 So. 2d 451, 453 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D403a]. Here, there is no connection between the Castros and the LLC—they are complete strangers to each other. This is not a misnomer, but rather the LLC is seeking to substitute a totally separate party. *See Lindsey v. H.H. Raulerson Jr. Mem Hosp.*, 505 So.2d 577, 578 (Fla. 4th DCA 1987) ("[T]his was not a mere misdescription of a party or a 'misnomer.'. . .rather a totally separate party was added.").

Rule 1.260 governs the substitution of parties. Rule 1.260 authorizes substitution of parties in four instances: (1) the death of the party; (2) the incompetency of a party; (3) a transfer of interest; and (4) a public officer's death or separation from office. None of those circumstances apply in this case, therefore the LLC's motion is DENIED.

* * *

Criminal law—Driving under influence—Search and seizure—Curtilage—Driveway in which officers encountered and detained defendant who was passed out in driver's seat of running vehicle was not within curtilage of house where driveway was openly visible to street and passers-by, area was not enclosed, and no steps had been taken to protect it from view—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. AUSTIN SCOTT SACHKAR, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, South County Criminal Division. Case No. 2022 CT 12382 SC. August 4, 2023. Maryann Olson Uzabel, Judge.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE came before the Court upon Defendant's Motion to Suppress filed on April 10, 2023. At the hearing on said motion on July 26, 2023, the Court considered the Motion to Suppress, the Memorandum of Law in Support of Denying Defendant's Motion to Suppress, the testimony of witnesses, and argument of counsel for the State and the Defense and was otherwise advised in the premises. After further review of the evidence presented, the Court finds as

follows:

1. On December 2, 2022, Deputy Houston Dikeman of the Sarasota Sheriff's Office was dispatched to a hit and run accident. He ran the tag from a witness to the crash and drove to the registered owner's house.

2. Upon arrival, he testified that the vehicle with the matching license plate number was parked half on the driveway and half in the grass. The deputy found the Defendant unconscious in the driver's seat of his car with the engine running. The vehicle was in plain view of the street. He testified that the driveway was not enclosed and there was no furniture present on the outside of the property.

3. Deputy Dikeman called Deputy Ryan Miller to assist him and waited approximately 5-10 minutes for him to arrive on scene. Deputy Dikeman testified that he reached through the passenger door, turned off the car and took the keys for safety reasons. He stated that it took 5-7 minutes for Deputy Miller to wake up the Defendant. He observed Deputy Miller yelling loudly and shaking the Defendant to wake him.

4. Deputy Ryan Miller of the Sarasota Sheriff's Office testified that the Defendant was in the driver's seat, "passed out and drooling." He took a photo on his cell phone of the Defendant as evidence. The deputy testified that he yelled and applied a sternum rub on the Defendant because he was unresponsive. He called for EMS because he could not wake the Defendant. The Defendant had droopy eyelids and was lethargic and confused upon waking.

5. Deputy Al-Abdullah arrived at the residence with the witness to the crash who identified the Defendant as the driver who was involved in the hit and run accident.

6. After a subsequent investigation, the Defendant was arrested for DUI with property damage and leaving the scene of a crash.

Legal Issues

Defendant's Motion to Suppress challenges the lawfulness of the stop arguing that there was "no lawful basis for the warrantless detention of the Defendant in his dwelling (curtilage)." In support of its motion, the Defendant cites to *Guerrie v. State,* 691 So.2d 1132 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D903a]. The Defendant requests suppression of "all evidence obtained as a result of the illegal detention and arrest of the Defendant, including all observations of the Defendant, all statements made by the Defendant and the breath test refusal." The defense argues that if the vehicle was located within the curtilage of the house, the warrantless search is unlawful.

The State argues that the original entry was a consensual encounter and that any reasonable person, such as a neighbor or citizen, could do the same thing and walk up a driveway at night to check on a person in a running, parked car. An officer may address questions to anyone on the street, and unless the officer attempts to prevent the citizen from exercising his/her right to walk away, such questioning will usually constitute a consensual encounter rather than a stop. *Mays v. State,* 887 So.2d 402 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2239c], *citing State v. Mitchell,* 638 So.2d 1015, 1016 (Fla. 2d DCA 1994).

An officer may temporarily detain an individual if the officer has a reasonable, articulable suspicion that the individual has committed, is committing, or is about to commit a crime.[1] Officers may conduct a brief, temporary stop to investigate a person's identity and the circumstances surrounding the detained person's behavior if the officer has reasonable, articulable suspicion based on the totality of the circumstances that "criminal activity is afoot." *Frazier v. State,* 789 So.2d 486 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1666a]. The Court must look to the totality of the circumstances to determine reasonable suspicion, including the time of day, appearance and behavior of the suspect, appearance, and manner of operation of any vehicle involved, and anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge.

One of the main issues in this case is whether the driveway is considered part of the curtilage and privacy of the house. The defense argued that law enforcement officers may not lawfully enter private premises to effect an arrest for a misdemeanor without a warrant, notwithstanding that the crime is committed in the officer's presence.[2] The Fourth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." A person's home has heightened scrutiny to be free from unreasonable governmental intrusion.[3] The area "immediately surrounding and associated with the home" is part of the home and curtilage of the property.[4] A driveway at a house has been found to be within the curtilage of the home.[5] Moreover, a warrantless entry and subsequent seizure in the privacy of a person's backyard violates the Fourth Amendment.[6]

The United States Supreme Court established four factors to determine whether an area surrounding the house is within protected curtilage under the Fourth Amendment. *United States v. Dunn,* 480 U.S. 294, 107 S.Ct.1134 (1984). The *Dunn* factors are:

1) The proximity of the area to the home,
2) Whether the area is within an enclosure surrounding the home,
3) The nature and uses to which the area is put, and
4) The steps taken by the resident to protect the area from observation by passersby.

In this case, the Court finds that this driveway is not within the curtilage of the house. It is openly visible to the street and passersby. The area is not enclosed, and no steps have been taken to protect the area from view. Based on the circumstances and information provided, the law enforcement officers had reasonable suspicion to investigate the situation as a welfare check as well as a potential criminal matter and the temporary detention of the Defendant was appropriate.

Therefore, it is

ORDERED AND ADJUDGED that the Motion to Suppress is DENIED.

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[1]*Terry v. Ohio,* 392 U.S. 1(1968); *Fla. Stat.* §901.151(2).
[2]*Guerrie v. State,* 691 So.2d 1132 Fla. 4th DCA 1997) [22 Fla. L. Weekly D903a].
[3]*Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679 (1961).
[4]*Oliver v. United States,* 466 U.S. 170, 176, 104 S.Ct. 1735 (1984).
[5]*State v. Musselwhite.* 402 So.2d 1235 (Fla. 2d DCA 1981), *Joyner v. State,* 303 So.2d 60 (Fla. 1st DCA 1974).
[6]*State v. Morsman,* 394 So.2d 408 (Fla. 1981), *Glass v. State,* 736 So.2d 788 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1615d], *Maggard v. State,* 736 So.2d 763 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1559a].

* * *

Insurance—Automobile—Windshield repair—Insurer's payment in amount of its own internally generated repair estimate does not comply with policy provision requiring it to pay "bid or repair estimate"

EXPRESS AUTO GLASS, LLC, a/a/o Stephen Caronna, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, General Civil Division. Case No. 19-CC-27024. Division H. December 27, 2021. James S. Moody, III, Judge. Counsel: Marc Nussbaum, Reeder & Nussbaum, P.A., St. Petersburg; and Anthony T. Prieto, Morgan & Morgan, P.A., Tampa (Co-Counsel), for Plaintiff. Alexander Peckham, Banker Lopez Gassler, P.A., St. Petersburg, for Defendant.

ORDER ON COMPETING MOTIONS FOR SUMMARY DISPOSITION

THIS CAUSE came before the Court on November 29, 2021, on competing motions for summary disposition filed by both parties. The Court, having considered the motions, the arguments of counsel, and the admissible evidence, and being advised in the premises,

ORDERS AND ADJUDGES as follows:

A. Introduction

1. Plaintiff has brought the above-styled cause of action seeking overdue/unpaid benefits for windshield replacement services

rendered to the insured under the Physical Damages portion of the relevant policy of insurance.

2. In this matter, Stephen Caronna, the ("Insured") requested the Plaintiff replace a damaged windshield on a motor vehicle that had windshield replacement insurance issued by the Defendant. The Insured assigned his insurance benefits to the Plaintiff. The Plaintiff remediated the loss and submitted its bill to the Defendant in the amount of $861.18. The Defendant did not pay the Plaintiff's billed amount, and instead paid Plaintiff $309.19.

3. The action is centered around the language set forth in the relevant insurance policy, which states in pertinent part:

Insuring Agreement

1. Comprehensive Coverage

a. ***We*** will pay for *loss, except loss caused by collision,* to a *covered vehicle.*

.....

c. The deductible does not apply to damage to the windshield of any *covered vehicle.*

.....

Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage

1. *We* have the right to choose to settle with *you* or the owner of the *covered vehicle* in one of the following ways:

a. Pay the cost to repair the *covered vehicle* minus any applicable deductible.

(1) *We* have the right to choose one of the following to determine the cost to repair the *covered vehicle*:

(a) The cost agreed to by both the owner of the *covered vehicle* and us;

(b) A bid or repair estimate approved by *us*; or

(c) A repair estimate that is written based upon or adjusted to:

(i) the prevailing competitive price;

(ii) the lower of paintless dent repair pricing established by an agreement *we* have with a third party or the paintless dent repair price that is competitive in the market; or

(iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the *covered vehicle is* to be repaired as determined by a survey made by *us.* If asked, *we* will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the *covered vehicle* to its pre-loss condition.

You agree with *us* that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

(2) The *cost* to repair the *covered vehicle* does not include any reduction in the value of the *covered vehicle after* it has been repaired, as compared to its value before it was repaired.

(3) If the repair or replacement of a part results in the betterment of that part, then *you* or the owner of the *covered vehicle* must pay for the amount of the betterment.

(4) If you and we agree, then windshield glass will be repaired instead of replaced;

b. Pay the actual cash value of the covered vehicle minus any deductible.

.....

4. Plaintiff contends it has complied with all relevant terms of the policy and that Defendant breached the insurance policy by failing to pay its billed amount.

5. Defendant contends that its payment complied with the limitation of liability set forth in the above-quoted section 1.a.(1)(b) of the Limit and Loss Settlement portion of the insurance policy.

6. For the reasons set forth herein, this Court concludes that the material facts are undisputed, and that as a matter of law, the Plaintiff is entitled to summary disposition because of Defendant's failure to pay the loss in a manner that complies with section 1.a.(1)(b) of the Limits and Loss Settlement provision.

B. Analysis

7. The Court has reviewed all pleadings, motions responses, depositions, notice of filings, affidavits and supporting documents.

8. It is undisputed that when the Plaintiff's invoice was submitted, Defendant confirmed the loss with the insured, afforded coverage, and made a payment which Defendant contends complies with the "bid or repair estimate approved by us" provision of section 1.a.(1)(b) of the Limit and Loss Settlement provision of the insurance policy.

9. Defendant contends it received two bids from separate facilities, from its third-party administrator, LYNX. However, it is undisputed that Defendant did not pay either of those two bids. Instead, Defendant internally generated and then approved its own repair estimate amount, without any explanation or evidence of how that amount was determined.

10. This Court finds that the admissible undisputed evidence conclusively establishes that Plaintiff has complied with all relevant portions of the insurance policy.

11. This Court finds that Defendant's payment of its own internally generated estimate does not comply with the standard set forth in section 1.a.(1)(b) of the Limits and Loss Settlement portion of the insurance policy, as that provision requires that Defendant must receive an external "bid or repair estimate" from someone other than the Defendant, in order to then "approve" and pay the amount of that "bid or repair estimate." Otherwise, section 1.a.(1)(b) would be superfluous if Defendant could simply pay any arbitrary amount that it desires to pay.

12. To permit Defendant to issue payment in the manner they did would be to render the provision illusory allowing Defendant to essentially estimate any amount they want, approve it and pay it.

13. Defendant has not presented any admissible evidence of any bid or repair estimate provided to and approved by the Defendant, or of how its $309.19 payment amount was determined.

14. Defendant bears the burden of proving compliance with its limitation of liability provisions as an affirmative defense. *St. Paul Mercury Ins. Co. v. Coucher,* 837 So.2d 483, 487 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D131b]; *State Farm Mut. Auto. Ins. Co. v. Curran,* 135 So.3d 1071, 1079 (Fla. 2014) [39 Fla. L. Weekly S122a]. Because the undisputed evidence demonstrates that Defendant did not comply with its limitation of liability provision (section 1.a.(1)(b) of the Limits and Loss Settlement portion of the insurance policy), Defendant breached its insurance policy by failing to pay Plaintiff's billed amount.

15. Consequently, the remaining applicable section of the insurance policy for this Court's consideration states that Defendant "will pay for loss." The only admissible record evidence on the amount of damages in this case was an affidavit filed by the Plaintiff incorporating the invoice for the replacement of the windshield. Defendant did not file any admissible (non-hearsay) evidence to contradict the amount of damages set forth by Plaintiff's invoice for the windshield replacement. In an effort to dispute the amount of damages claimed by the Plaintiff, Defendant relies on a LYNX generated document, which references bid amounts from two windshield companies. However, this Court granted Plaintiff's objection to the admissibility of this information on the grounds of hearsay and as such it cannot be

considered by this Court in this matter.

C. Conclusion

16. Based on the foregoing, the Defendant's motion for summary disposition is **DENIED**, and Plaintiff's motion for summary disposition is hereby **GRANTED**.

17. The Plaintiff's damages are set in the amount of $551.99, which is the difference between the amount charged by Plaintiff and the amount paid by Defendant.

18. This is a non-final order, and the Court hereby reserves jurisdiction to determine interest, enter a final judgment, and determine post-judgment claims for attorneys' fees and costs.

* * *

Civil procedure—Discovery—Depositions—Protective order—Sanctions—Attorney's fees—Motion for sanctions granted where defendant failed to appear for duly noticed deposition of corporate representative—Although defendant filed a motion for protective order, defendant failed to schedule a hearing on the motion before failing to appear—Plaintiff's counsel is entitled to attorney's fees for time related to deposition, filing of motion for sanctions, and attending hearing on motion for sanctions—Defendant has waived all objections, other than privilege, by failing to respond to discovery requests or request an extension of time within which to respond

AJ THERAPY CENTER, INC., a/a/o Sergio Cordova Bernal, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-074375. October 8, 2023. Matthew A. Smith, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AND GRANTING PLAINTIFF'S MOTION TO COMPEL DISCOVERY

THIS CAUSE having come before the Court on September 28, 2023 Plaintiff's Motion for Sanctions, Plaintiff's Motion to Compel Discovery and Plaintiff's Motion to Set Trial. Upon consideration of the filings and the arguments of the parties,

1. The Court finds that Plaintiff's counsel submitted multiple requests to Defendant's counsel in an attempt to mutually coordinate the deposition of Defendant's claims Corporate Representative . Plaintiff's counsel received no cooperation from Defendant's counsel, to wit, on June 8, 2023, Plaintiff filed a Notice of Taking Deposition Duces Tecum for July 17, 2023 at 1:00 PM.

2. Defendant waited until July 13, 2023 to file a Motion for Protective Order. However, Defendant made no attempts to contact the Court to set a hearing on its Motion for Protective Order.

3. Defendant and Defendant's counsel failed to appear at the deposition on July 17, 2023, to wit, a Certificate of Non-Appearance was taken.

4. The Court finds that Plaintiff has submitted numerous Court Orders which stand for the proposition that prior to a party refusing to appear for a duly noticed deposition, said party must both file and schedule for hearing a Motion for Protective Order prior to failing to appear for said deposition. Defendant and Defendant's counsel failed to appear for a duly noticed deposition on July 17, 2023 and did not schedule for hearing its Motion for Protective Order prior to failing to appear for said deposition. As such, Plaintiff's Motion for Sanctions is **HEREBY GRANTED**

5. Plaintiff's counsel is entitled to reasonable attorneys' fees for all time spent related to the deposition, the filing of Plaintiff's Motion for Sanctions and attending a hearing on same.

6. The deposition of Defendant's Corporate Representative must be scheduled within 15 days of the date of this Order and the deposition must occur within 30 days of the date of this Order.

7. The parties are given twenty 20 days to attempt to reach a resolution on the total amount of attorney's fees to be awarded as sanctions. Should the parties not be able to reach an agreement, the matter shall be set for an evidentiary fee hearing, including fee experts, before the Court.

8. Plaintiff's Motion to Compel Discovery argues that Defendant failed to timely respond to Plaintiff's discovery requests and that all objections, other than privilege, have been waived. The Court finds that Defendant failed to file any responses to said discovery requests nor did Defendant request an extension. As such, Defendant has waived all objections, other than privilege. *American Funding Ltd. v. Hill,* (Fla. 1st DCA 1981). As such, Plaintiff's Motion to Compel Discovery is **HEREBY GRANTED**

9. Defendant shall file verified answers to Plaintiff's Interrogatories within15 days of the date of this Order. Defendant shall file appropriate responses to Plaintiff's Request to Produce and Plaintiff's Request for Admissions which comply with this Order within 15 days of the date of this Order.

* * *

Insurance—Personal injury protection—Complaint alleging that medical provider is equitable assignee of policy adequately states cause of action—Motion to dismiss is denied

ADVANCED WELLNESS & REHABILITATION CENTER, CORP., a/a/o Solymar Benitez, Plaintiff, v. IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-014709. Division J. September 20, 2023. Cory L. Chandler, Judge. Counsel: Tim Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Marsha Moses and Teodora Siderova, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before this Court on Defendant's, IMPERIAL FIRE & CASUALTY INSURANCE COMPANY ("Defendant"), Motion to Dismiss and Motion to Stay Discovery ("Motion") on September 13, 2023 at 3:30 PM. The Court reviewed all filings, heard arguments from the parties, and is otherwise fully advised in the premises. As such, it is hereby:

ORDERED AND ADJUDGED:

1. Defendant's Motion is hereby **DENIED** for the following reasons.

2. In deciding whether a complaint has adequately stated a cause of action, the Court is confined to the four corners of the Complaint , must draw all reasonable inferences to the non-moving party, and accept as true and accurate all well pleaded allegations.

3. Plaintiff has pled in Paragraph five (5) of the Complaint that Plaintiff is the equitable assignee of the subject policy of insurance.

4. In light of those allegations and accepting those as true, Plaintiff has adequately pled a cause of action.

5. Defendant has thirty (30) days from the date of this Order to file a responsive pleading.

* * *

Small claims—Sealing of documents—Applicable rule

E.L. ABUSAID, pro se and/or D.L.A. (only by Intervention-Post Trial), Plaintiff, v. COMFORTABLE CARE DENTAL HEALTH PROFESSIONALS, P.A., d/b/a WIMAUMA DENTAL CARE, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 23-CC-077300. Division H. September 21, 2023. James S. Glardina, Judge. Counsel: E.L. Abusaid, Pro se, Plaintiff. Krithut Vasudevan, for Defendant.

ORDER TO SEAL DOCUMENT [#54] SOCIAL MEDIA POST Fla. Sm.C1. R. 7.040(b) & Fla. R. Gen. Prac. Jud. Admin. 2.425(d)

This action was heard on September 19, 2023 on Defendant's [#55] Motion to Strike the Plaintiff's [#54] Notice of Filing Social

Media Complaint Against Defendant for Public View (the "Notice").

Upon agreement of all the Parties, Rule. 7.040 (b) of the small claim rules in sync with the Florida Rule of General Practice and Judicial Administration 2.425(d) hereby instructs the Clerk to seal the Notice [08/24/2023] to be sealed from public view. See:

(d) Motions Not Restricted. This rule does not restrict a party's right to move for protective order, ***to file documents under seal,.*** ....." *Rule 2.425* - Fla. R. Gen. prac. Jud. Admin. 2.425

IT IS ADJUDGED that that the Clerk seal the [#54] Notice from public view.

* * *

Insurance—Answer and affirmative defenses—Amendment—Motion to amend answer and affirmative defenses to assert new defense that would inject new issues into case is denied—Evidence in support of defense is not strong, and granting motion would prejudice insured as well as administration of justice

NAGELA MOUSSIGNAC, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22013656. Division 53. August 27, 2023. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO AMEND ANSWER AND AFFIRMATIVE DEFENSES UPON A FINDING OF PREJUDICE

This cause came before the Court on August 23, 2023 for hearing of the Defendant's Motion for Leave to Amend Answer and Affirmative Defenses. The Court's having reviewed the Motion and entire Court file, having heard argument, and having considered the relevant legal authorities, finds as follows:

This case was filed on March 14, 2022 and is now in a jury trial posture, with the pretrial conference set for September 1, 2023. This case is scheduled for the Court's October jury trial docket.

The Court entered its Uniform Order Setting Pretrial Deadlines on August 1, 2022. Discovery cutoff occurred on March 29, 2023. The joint pretrial stipulation was filed on April 10, 2023. No motion has been made to extend either deadline. Mediation took place on April 27, 2023 but was unsuccessful. A Case Management Conference to address readiness for trial and pretrial compliance took place on April 21, 2023, at which time the Court referred the parties to mandatory non-binding arbitration. The pretrial conference was originally set for August 25, 2023, but was reset by the Court to September 1, 2023. The Defendant filed the instant Motion on April 19, 2023, but did not diligently move its Motion forward to hearing. At the time of the instant hearing, the arbitration process had been completed.

The Court notes that the proposed new defense was of a nature that, in the Court's view, the Defendant should have clearly been aware had it acted diligently in preparing its case. The Defendant argues that it actually did not find out about this defense until it took the Plaintiff's deposition on February 10, 2023. That it "found out" about this possible defense late in the game was through no fault of the Plaintiff. Indeed, Defendant clearly should knew about the possibility of this defense before discovery cutoff and before the parties had filed their joint pretrial stipulation. Further, the Defendant waited more than two months after the deposition to file its Motion—waiting until after discovery cutoff had occurred. And then, Defendant waited to set a hearing date more than four months after it filed its Motion, with the Court having plenty of much earlier available hearing time. The Defendant ignored the pretrial deadlines and is trying to reap the reward of its own recalcitrance.

The Court notes that this case is approaching the end of the time standard for resolution of this type of case. Further, the Defendant's underpinning evidence to support the new defense—the Plaintiff's deposition testimony—is frankly not strong. More importantly, the Court concludes that granting this late request would unfairly prejudice the Plaintiff, as well as the administration of justice. This new defense is not merely a restated emanation of what the parties had already prepared for. Rather, the proposed new defense would inject new issues into the case and advance a new theory for the first time. Discovery would have to be reopened, as the proposed added new defense was not something that the Plaintiff was anticipating, as they were not previously raised at any point in this case. At some reasonable point, a plaintiff is entitled to prepare its case and accept the rules at face value—a defense not raised is waived. Rule 1.140(h)(1) . Additionally, mediation and arbitration would have to be reopened, the joint pretrial stipulation would have to be amended, as to witnesses, exhibits, and jury instructions. The pretrial conference and jury trial would have to be postponed further. Such amendment under these circumstances would be both prejudicial to the Plaintiff and the administration of justice in this case. *See State Farm Mutual Auto. Ins. Co. v. Baum Chiropractic Clinic PA*, 323 So.3d 756, 757 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1548a]; *Alliance Spine & Joint III, LLC v. GEICO Gen. Ins. Co.*, 321 So.3d 242, 245 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1149a]. As a result, it is respectfully

ORDERED that the Defendant's Motion is DENIED upon a finding of prejudice.

* * *

Insurance—Personal injury protection—Venue—Forum non conveniens—Broward County is inconvenient and improper forum where accident occurred in Martin County, parties and witnesses reside in either Martin or St. Lucie County, and treatment took place in St. Lucie County—Motion to transfer venue is granted

COX CHIROPRACTIC CARE, LLC, a/a/o Kristina Blount, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23044017. Division 53. September 19, 2023. Robert W. Lee, Judge.

ORDER TRANSFERRING CASE TO ST. LUCIE COUNTY

THIS CAUSE came before the Court on September 19, 2023 for hearing of the Defendant's Motion to Transfer Case for Forum Non Conveniens, and the Court's having reviewed the Motion and entire court file, heard argument, and reviewed the relevant legal authorities, finds as follows:

This case is one of ***literally thousands*** of insurance cases that have been flooding Broward County courts during the past several years that having nothing whatsoever to do with Broward County, other than the fact that Plaintiff's counsel simply does not want to file its cases—for whatever reason—in their home county. (Even Plaintiff's counsel is not located in Broward County, but rather Palm Beach County.) Indeed, Broward County Court is on track to having almost 200,000 civil cases being filed in the County Court in 2021, shattering the record of civil cases filed each month, and more than triple the amount of the last pre-Covid year, 2019. This case is yet but one exemplar of the forum shopping occurring for these type of cases.

Background:

1. By Plaintiff's own admission at the hearing, everything in this case happened more than 80 miles away in either Martin or St. Lucie County.

The insurance policy at issue in this case insures a driver residing in St. Lucie County; the auto accident occurred in Martin County; the owners and occupants of the other vehicle involved in the accident reside in either St. Lucie or Martin Counties; and the medical treatment took place in St. Lucie County.

2. No evidence was presented or argument made that the owners of the subject property, any witness to the automobile accident, or any person involved in the medical treatment reside or work in Broward County.

3. The Plaintiff filed this complaint in Broward County, Florida. The Plaintiff did not allege any connections between the facts of this case and the chosen venue.

4. The Plaintiff has demanded a jury trial, which is in keeping with the great majority of cases coming before the Court in which an insurance company is a defendant.

CONCLUSIONS OF LAW

The C ourt finds that the undisputed record in this case establishes that Broward is forum *non conveniens*. The Fourth District Court of Appeal has recently aligned itself with the decision of the Third District Court of Appeal in *Caceres v. Merco Grp. of Palm Beaches*, 282 So.3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2802a]. *See Expert Inspections LLC v. State Farm Florida Ins. Co*., Case No. 4D21-520 [317 So. 3d 160] (Fla. 4th DCA May 19, 2021) [46 Fla. L. Weekly D1152d]. In *Caceres*, the appellate court relied on decisions which upheld a trial court's decision to transfer a case to another Florida county when the other location was the "location of the majority of witnesses and the site of the alleged contact, noting that 'in the interest of justice' Polk County should not hear a case where the only connection was the location of the lawyer's office," citing *E.I. DuPont de Nemours & Co. v. Fuzzell*, 681 So.2d 1195, 1197 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a].

When venue is otherwise proper, the Florida Legislature has for more than 50 years set forth a simply-stated procedure for transferring the case from county to another: "For the convenience of the parties or witnesses or in the interests of justice, any court of record may transfer any civil action to another court of record in which it might have been brought." Fla. Stat. §47.122. This Court recognizes that these are in the disjunctive—it is possible that parties will not be inconvenienced, but witnesses will be. It is further possible that both parties and witnesses will not be inconvenienced, but in the interests of justice, the trial court determines that the case should nevertheless be transferred to another county. In the instant case, however, all three components militate against the case remaining in Broward. All the fact witnesses in this case are more than 80 miles north of this county. And, the interests of justice strongly compel a decision that the workload of the Broward County Court should not be exponentially increased because attorneys simply want to practice here, and further that Broward jurors be called upon to make decisions in cases that have nothing to do with the county in which they live. Moreover, the Court notes that the laws in play in the instant case are such that the jurors of the county in which the treatment took place are uniquely in a better position to determine whether the provider's medical charges are reasonable. (The Court recognizes that in a recent decision of the Fourth DCA, the third factor of "the interests of justice" is almost of no significance when neither party agrees to the transfer. However, in the instant case, the Defendant is requesting the transfer.)

The Court agrees that the Plaintiff has chosen an inconvenient and i mproper forum because all the parties, accident, treatment and witnesses reside or took place in either Martin or St. Lucie County. The substantial contacts in this case all fall in St. Lucie County where the treatment at issue took place.

Moreover, considering the interests of justice, a Broward County jury should not be burdened with determining a case that has no connection with Broward County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co*., 673 So.2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a] (finding the trial court was correct in transferring a case from Dade County to Hillsborough County as a "Dade County jury, which is both a scarce and precious resource, should not be burdened with determining a case that has not connection with Dade County"). *See also Hall v. R.J. Reynolds Tobacco Co*., 118 So.3d 847 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] (affirming transfer of case from Dade County to Seminole County based upon the fact that Dade County had no relevant connection to the case); *Pep Boys v. Montilla*, 62 So.3d 1162, 1166 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1171a] (stating that the interest of justice weighs in favor of Sarasota County . . . "Broward County's connections to the case are that the plaintiff's attorney is from there and the tire had been sold and installed there. Broward County is a larger, more populous county, has crowded dockets, and the community has virtually no connection to the case"). *See Hall v. R.J. Reynolds Tobacco Company*, 118 So.3d 847, 848 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] and cases cited therein; *Stamen v. Arrillaga*, 169 So.3d 1209, 1210 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1638a] ("a trial court may *sua sponte* raise the question" of inconvenient forum "in the interest of justice"), quoting *McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc*., 39 So.3d 504, 511 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1491c]. See also *Clear Vision Windshield Repair LLC v. GEICO,* 24 Fla. L. Weekly Supp. 194a (Lee Cty. Ct. 2016).

Simply put, this case is not a Broward County case, but rather a case that belongs in St. Lucie County. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Transfer Case is GRANTED. The Clerk shall transfer this case to St. Lucie County. Because the Plaintiff has continued to create this problem despite frequent court admonitions, the Court exercises its discretion to require the Plaintiff to bear the costs of transfer. Fla. Stat. §47.191. Failure to pay the transfer fee within 30 days shall result in the case being dismissed without further notice or hearing.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim for attorney's fees is stricken where policy effective date and date of loss occurred after repeal of section 627.428

ASSOCIATESMD, a/a/o Alicia Stansbury, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23055856. Division 53. September 6, 2023. Robert W. Lee, Judge. Counsel: Aaron Drazin, Drazin Law PLLC, Sunrise; and Geoffrey Adam Levy, The Levy Firm PLLC, Fort Lauderdale, for Plaintiff. Kate Vazzana, Law Office of George L. Cimballa, III, Plantation, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION TO STRIKE

THIS CAUSE having come upon Defendants' Motion to Dismiss and Motion to Strike and the Court having reviewed the pleadings, heard the argument of counsel for the parties, and otherwise being fully advised in the premises it is ORDERED AND ADJUDGED as follows:

1. Defendants Motion to Strike Plaintiff's Claim for Attorneys Fees is GRANTED. The Court finds that HB837 repealed Florida Statute §627.428 on March 24, 2023. The policy at issue was in effect beginning on March 26, 2023. The date of loss at issue is April 22, 2023. As such, Plaintiff's claim for attorneys' fees stated in paragraphs one (1), forty-one (41), forty-two (42), forty-three (43) and the "wherefore" clause of its complaint is hereby stricken.

2. Defendant's Motion to Dismiss Plaintiff's single count-complaint for Declaratory relief is DENIED. Defendant shall file an answer to the complaint within ten (10) days from the date of this order.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Membership, organizations, and avocational activities—Lobbying, activist, and advocacy groups—A judge may serve as an unpaid member of board of directors of National Coalition of 100 Black Women, Inc., an advocacy group for black women and girls

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-07. Date of Issue: August 24, 2023.

ISSUE

May a judge serve as an unpaid member of the board of directors of the National Coalition of 100 Black Women, Inc.?

ANSWER: Yes

FACTS

National Coalition of 100 Black Women, Inc. is a nationwide organization whose stated mission is to advocate on behalf of black women and girls to promote leadership development and gender equity in the areas of health, education and economic empowerment. The group advertises itself as an "advocate of black women and girls."

The inquiring judge asks whether a judge may be elected or appointed and serve as an unpaid member of the board of directors of the group. The judge indicates that the service would not be in an executive position such as presidency or vice-presidency of the organization and states that the judge would not be involved in any fundraising or political advocacy.

DISCUSSION

Judges must be circumspect in their association with any groups which might cause those appearing before them to have a reasonable fear of being treated with less than complete impartiality. As stated in Florida Code of Judicial Conduct, Canon 2A, "A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Several provisions of the Code of Judicial Conduct are implicated in the judge's question. The first is the propriety of belonging to and taking a leadership role in an organization whose stated goal is to advocate for a) a certain sex, and b) a certain ethnic group. Canon 2C of the Code provides general guidance concerning membership in in organizations whose membership might be associated with a certain race, sex, or other identifying characteristics. Canon 2C states that:

> A judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation of this provision.

The commentary to Canon 2C reminds us that the analysis of such issues requires inquiry not only into statements made, but also into the actions of the organization. Diversity of membership must be considered, but is not the only factor. As stated in said commentary:

> . . . Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.

Here, although the committee is informed that membership is open to all persons sharing the goals of the organization, the very nature of the organization is such that reasonable persons would expect that its membership would consist primarily, if not exclusively, of black women. So long as the organization does not practice invidious discrimination on the basis of race, sex, religion, or national origin, the lack of a diverse membership does not indicate invidious discrimination and should not alone prevent a judge from considering membership. From the information available to the committee, there is no evidence of any other indicia of invidious discrimination which would prevent a judge from joining the group or serving as a director.

The next factor which must be considered is the prohibition against judges engaging in political activities as expressed in Canon 7D of the Code of Judicial Conduct. The inquiring judge has indicated in response to questions posed by the committee that, although the organization does sometimes advocate for certain legislation which it believes relate to its mission and goals, it considers itself non-partisan and does not endorse or otherwise support individual political candidates or parties. The judge indicated specifically that the judge will abstain from any fundraising or political activity on behalf of the organization.

The committee has previously considered several questions concerning membership in organizations that become involved in political issues. In Fla. JEAC Op. 09-13 [16 Fla. L. Weekly Supp. 1003a], membership in the National Rifle Association was approved based upon the conclusion that the NRA, though clearly involved in political advocacy, is neither a "political party" nor a "political organization" as defined in the Code of Judicial Conduct (citing Fla. JEAC Op. 00-22). Using the same reasoning, it was determined in Fla. JEAC Op. 20-22 [28 Fla. L. Weekly Supp. 745a] that a judge could become a dues-paying member of the National Association for the Advancement of Colored People (NAACP). Similarly, Fla. JEAC Opinion 20-04 [28 Fla. L. Weekly Supp. 91a] held that it was appropriate for a judge to attend, as an honoree, a meeting of the National Congress of Black Women, so long as the purpose of the event was not fundraising.

Limits clearly do exist on participation in advocacy groups. As stated previously, a judge must carefully consider actual nature and extent of the activities of any group the judge wishes to join, not merely its stated goals. In several instances, this committee has deemed participation in advocacy groups to violate the proscriptions contained in the Code. Fla. JEAC Op. 82-18 found membership in Mothers Against Drunk Drivers to be inappropriate. In Fla. JEAC Op. 91-14, membership in the Adam Walsh Child Resources Center was found to violate the canons, as did membership in the Dade County Political Women's Caucus in Fla. JEAC Op. 93-50 [1 Fla. L. Weekly Supp. 549b], membership in a county domestic violence council in Fla. JEAC Op. 01-14 [8 Fla. L. Weekly Supp. 663b] (although such service has been approved under other circumstances), and service on the civil rights committee or executive committee of the Anti-Defamation League in Fla. JEAC Op. 94-13.

Based upon the information provided by the inquiring judge, the committee finds no evidence service as a director of the National Coalition of 100 Black Women as proposed would violate the Code of Judicial Conduct and believes that the proposed activity is permissible.

As was done in Fla. JEAC Op. 20-22 [28 Fla. L. Weekly Supp. 745a], we repeat the reminder provided in Fla. JEAC Op. 09-13 [16 Fla. L. Weekly Supp. 1003a] concerning the vigilance which must be continually exercised by any judge who chooses to become a member of an advocacy group:

> Canon 2A states, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 5A provides, in pertinent part, "A judge shall conduct all of the judge's extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality; (3) demean the judicial office; (4) interfere with the proper performance of judicial duties; (5) lead to

frequent disqualification of the judge; or (6) appear to a reasonable person to be coercive." Canon 3E(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

This Committee has consistently cautioned judges against lending the prestige of the judicial office to further the interests of advocacy groups, and it has specifically opined that judges cannot be personally involved with any lobbying activities for such organizations. However, the Committee has historically taken the position that mere membership in an organization which is well-known for its positions on political or controversial issues or promotes a particular legislative agenda is not prohibited by the Code of Judicial Conduct.

After quoting from Fla. JEAC Op. 09-13 [16 Fla. L. Weekly Supp. 1003a], Fla. JEAC Op. 20-22 [28 Fla. L. Weekly Supp. 745a] then continues with the additional admonition which is worthy of repetition:

The judge is reminded of the commentary to Canon 5C(3)(a) which provides, in pertinent part, "The changing nature of some organizations and their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated in order to determine if it is proper for the judge to continue the affiliation." This comment has equal relevance to any consideration of Canon 2A's command that a judge act in a manner that promotes public confidence in the impartiality of the judiciary, Canon 2B's directive that a judge not lend the prestige of judicial office to advance the private interests of another, Canon 2B's proscription that a judge not convey the impression that others are in a special position to influence the judge, or Canon 5A's cautions that a judge be circumspect in the judge's extra-judicial activities. Thus, the inquiring judge must continually monitor membership in this, or any, organization to ensure that the organization's activities and the public perception of the organization have not changed to the extent that continued membership implicates any of the various provisions of the Code of Judicial Conduct.

With those cautions in mind, the committee finds that the inquiring judge's proposed service on the board of directors of National Coalition of 100 Black Women, Inc., is not prohibited by the Code of Judicial Conduct

REFERENCES

Fla. Code of Judicial Conduct, Canons 2A, 2B, 2C, 3E(1), 5A, 5C(3)(a), 7D and Commentaries to Canon 2A and 2C
Fla. JEAC Ops. 82-18, 91-14, 93-50, 94-13, 00-22, 01-14, 09-13, 20-04, and 20-22

* * *

Judges—Judicial Ethics Advisory Committee—Practice of law—A judge may participate in oral argument before the Florida Supreme Court concerning a proposed rule change

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-08. Date of Issue: September 1, 2023.

ISSUE

May a judge participate in oral argument before the Florida Supreme Court concerning a proposed rule change?

ANSWER: Yes

FACTS

The inquiring judge is a member of a Florida Bar committee tasked with considering potential amendments to the various procedural rules that are applicable in judicial proceedings. After a rules committee considers a proposal, it informs the Florida Bar's Board of Governors whether it recommends the rule change. The proposed change is then filed with the Florida Supreme Court. The Florida Supreme Court assigns the proposed amendment a case number and the case proceeds as ordered by the court.

In this case, one of the proposed amendments is scheduled for oral argument at the Florida Supreme Court. The inquiring judge was asked to participate in the oral argument on behalf of the rules committee.

DISCUSSION

In Fla. JEAC Op. 2019-04 [26 Fla. L. Weekly Supp. 1007a], an inquiring judge asked whether the judge could comment on a proposed amendment to a rule. In that opinion we responded that the inquiring judge was permitted to comment on the proposed rule change. We provided three reasons. First, Fla. R. Gen. Prac. & Jud. Admin. 2.140(b)(6) allows any person to file a comment. Second, Fla. R. Gen. Prac. & Jud. Admin. 2.140(a)(4) allows judges to sit on the various rules committees. Third, Canon 4B of the Florida Rules of Judicial Conduct encourages judges to participate in the activities concerning the law.

We do not view the act of presenting oral argument in a rules proceeding to be any different than filing a public comment. So, based on our opinion in Fla. JEAC Op. 2019-04 [26 Fla. L. Weekly Supp. 1007a], we conclude the inquiring judge may participate in the scheduled oral argument.

Additionally, the committee would note that the Florida Supreme Court has permitted judges to participate in oral argument in rules cases on prior occasions. *See generally In re Report & Recommendations of Workgroup on Improved Resolution of Civil Cases*, SC22-122, 2023 WL 166455 (Fla. Jan. 12, 2023) (appellate judge presenting oral argument on various proposals); *In re Amendments To Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob. Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure*, 346 So. 3d 1105 (Fla. 2022) [47 Fla. L. Weekly S187a] (circuit judge presenting oral argument); *In re Amendments to Florida Rules of Appellate Procedure—2017 Regular-Cycle Report*, 256 So. 3d 1218 (Fla. 2018) [43 Fla. L. Weekly S508c] (appellate judge arguing on behalf of a committee proposal relating to the number of circuit judges required to sit in appeals from the county court).

In sum, the judicial canons, this committee's past opinions, and prior practice before the Florida Supreme Court lead us to conclude there is no prohibition against a judge offering oral arguments and comments to the Florida Supreme Court in connection with a proposed rule amendment.

REFERENCES

In re Report & Recommendations of Workgroup on Improved Resolution of Civil Cases, SC22-122, 2023 WL 166455 (Fla. Jan. 12, 2023)
In re Amendments To Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob. Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure, 346 So. 3d 1105 (Fla. 2022)
In re Amendments to Florida Rules of Appellate Procedure—2017 Regular-Cycle Report, 256 So. 3d 1218 (Fla. 2018)
Fla. Code of Judicial Conduct, Canon 4B
Fla. R. Gen. Prac. & Jud. Admin. 2.140
Fla. JEAC Op. 2019-04

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