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FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 397-423

Reports of Decisions of:

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

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

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention—Hearing officer did not err in concluding that officer had reasonable suspicion to detain licensee for longer than necessary to write speeding citation while waiting for DUI investigator to arrive—Officer who stopped licensee for speeding testified and stated in arrest report that licensee had glassy eyes, droopy eyelids, slurred and mushy speech, and slow, sluggish movements, and video evidence did not substantially conflict with officer's account—Argument that DUI investigator did not have reasonable cause to detain licensee for DUI investigation because stopping officer's observations were not communicated to investigator was refuted by record—There was no requirement for officers to obtain arrest warrant, search warrant, or consent before entering hospital room in which licensee was being held—Room was located in emergency department of hospital and was not a private room that would be associated with heightened expectation of privacy—Totality of circumstances supports finding that there was probable cause to arrest licensee for DUI

RUSSELL RANDALL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OF DRIVER IMPROVEMENT, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2020-CA-010326-O. October 3, 2023. Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles, Bureau of Driver Improvement, Dawn Jarvis, Hearing Officer. Counsel: Stuart I. Hyman, Stuart I. Hyman, P.A., Orlando, for Petitioner. Christie S. Utt, General Counsel, and Kathy A. Jimenez-Morales, Chief Counsel, Tallahassee, for Respondent.

(Before ALVARO, EGAN and J. BEAMER, JJ.) Petitioner Russell Randall timely filed this petition seeking certiorari review of a State of Florida, Department of Highway Safety and Motor Vehicles ("the Department"), order affirming the suspension of his driver's license for refusal to submit to a breath alcohol test. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c) and sections 322.2615(13) and 322.31 of the Florida Statutes. We deny the petition.

Background

Randall requested a formal review hearing of his driver's license suspension pursuant to § 322.2615, Florida Statutes. Testimony and exhibits entered into evidence at the hearing support the facts adopted by the hearing officer in her written "Findings of Fact, Conclusions of Law and Decision." Specifically, while on routine patrol, Corporal Kristopher Kruse of the Clermont Police Department observed a vehicle traveling at a high rate of speed on State Road 50, clocking it by radar at 71 mph. Corporal Kruse observed the vehicle make multiple lane changes, some of which were in close proximity to other vehicles, with at least one without a blinker, and he observed that the vehicle was drifting from the left fog line to the right lane divider and made abrupt steering corrections multiple times while he was behind it. Corporal Kruse conducted a traffic stop.

Upon approaching the vehicle, Kruse observed Randall in the driver's seat. During his conversation with Randall, the corporal noticed Randall's glassy eyes, drooping eyelids, and slurred speech. When Corporal Kruse asked where Randall was coming from, he stated that Randall had to repeat the restaurant's name three times before the corporal understood him due to Randall's slurred speech. The corporal told Randall why he was stopped, and Randall argued that he was not doing 71 mph. Since Corporal Kruse had concerns that Randall may be impaired, he requested Officer Andrew Wilkins come to assist with a DUI investigation. Corporal Kruse could have fully investigated the incident, but if an arrest was ultimately necessary, the corporal could not leave the city to process the arrest since he was the supervisor on duty for the department that night.

Officer Wilkins responded to the scene, and after he made contact with Randall, he noticed that Randall's eyes were glassy and that he could detect the odor of alcohol from Randall's breath when he spoke. He requested Randall to step out of the vehicle and perform field sobriety tests, but Randall began to complain of injuries, stated he was retired NYPD, and made excuses as to why he could not complete the exercises. Randall complained of a panic attack after being prompted to exit the vehicle despite his breathing being fine and seemingly calm. He requested EMS, and when EMS arrived, he asked to be taken to the hospital. Randall was taken to South Lake Hospital, within the City of Clermont, for evaluation, but Randall ultimately refused medical assistance later at the hospital.

Officer Wilkins and Corporal Kruse responded to the hospital, and after Randall had been seen by medical personnel, Officer Wilkins again requested that Randall participate in the field sobriety exercises. When Randall refused to comply, he was arrested for DUI. Randall was observed for the 20-minute observation period, and Corporal Kruse then requested a sample of Randall's breath. Randall stated that he did not refuse but could not provide the sample for medical reasons. Randall complained of chest pain despite already refusing x-rays, breathing problems despite refusing bloodwork to test for possible reasons for the breathing complications, and pain in his back and right leg. He continuously made excuses for not taking the breath test but requested that Corporal Kruse bring it to him so he could blow in the tube. Randall then blew air around the tube but refused to place his lips on the mouthpiece. After being read implied consent, Randall continued to avoid the breath test—ultimately causing the instrument to time out. During the second attempt, Randall said he was not doing it, so a refusal was registered and the appropriate paperwork was completed.

While in the hospital, Randall frequently became agitated and yelled for hospital staff. Each time he would do so, it had been noted that a distinct odor of alcoholic beverage would be present in the hospital room. Also, in the hospital, Randall stated he was unable to walk to the bathroom without a walker, but after he was issued the DUI citation and transported to the Lake County Jail, he was able to walk into the intake area without any assistance, directly contradicting his claims of only being able to walk with assistance.

The hearing officer determined that based on the above, Randall was placed under lawful arrest for DUI. She also noted that she had reviewed the video evidence in its entirety, and it supported the evidence in this case. She found that all the elements necessary to sustain the suspension of Randall's license for refusal to submit to a breath, blood, or urine test under § 322.2615 of the Florida Statutes were supported by a preponderance of the evidence.[1] The suspension of Randall's license was affirmed. This action followed.

Standard of Review

On first-tier certiorari review of a hearing officer's decision to sustain the suspension of a driver's license, the circuit court's 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. *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Dep't Highway Safety & Motor Vehicles v. Cherry,* 91 So. 3d 849, 854 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1562a]. The circuit court, sitting in its appellate capacity, may not reweigh the evidence considered by the hearing officer at a license suspension hearing. *See Cherry,* 91 So. 3d at 854-5. *See also* §322.2615(13), Fla. Stat. (subsection allowing for review via

petition for writ of certiorari to the circuit court not to be construed to provide for a de novo review.)

Analysis

Randall submits several arguments contending that the hearing officer departed from the essential requirements of law and that her decision was not based on competent, substantial evidence. He bases some of these arguments on the dash cam and body cam videos he has provided as part of his appendix, citing *Wiggins v. Dep't Highway Safety & Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a].

First, Randall asserts that Corporal Kruse had no reasonable suspicion to detain him longer than necessary to issue a citation and that he was illegally detained to allow Officer Wilkins to arrive and do the DUI investigation, as seen in the real-time video related to this case. Randall came to the attention of Corporal Kruse due to his unlawful speed and driving pattern. When Corporal Kruse stopped and then approached the vehicle, his report states that he observed that Randall's eyes were glassy, he had droopy eyelids, his speech was slurred, and he spoke with a "mushed mouth," pushing words together. His hearing testimony added that Randall's eyes were bloodshot and that he moved with slow, sluggish movements.

The only video of Randall's initial encounter with Corporal Kruse came from the officer's vehicle dash cam. The footage of Randall's driving begins as Randall's vehicle is still in the distance and does not show a driving pattern substantially different from that described in the officer's report and testimony. On approach to the vehicle, the dash camera is not pointed toward the driver's side of Randall's vehicle to see the parties' interaction at that point—much less the condition of Randall's eyes or the speed of his movements. It is difficult to hear the conversation clearly.

We find that the video evidence does not substantially conflict with Corporal Kruse's arrest report and testimony related to the initial stop and detention such that the report and testimony could not be considered competent, substantial evidence for the hearing officer's decision. The arrest report and testimony of Corporal Kruse support the hearing officer's conclusion that there was reasonable suspicion to detain Randall for longer than necessary to write a traffic citation while waiting for Officer Wilkins to arrive at the scene and that the length of detention was not unreasonable.

Second, Randall also asserts that there was no reasonable cause for Officer Wilkins to detain him to conduct a DUI investigation, including the field sobriety exercises, since the record below is devoid of evidence of any communication between the officer and Corporal Kruse about Kruse's observations, citing *Montes-Valeton v. State,* 216 So. 3d 475 (Fla. 2017) [42 Fla. L. Weekly S210a], and since Officer Wilkins himself observed no slurred speech or bloodshot or red eyes on the part of Randall. However, Officer Wilkins testified at the hearing that he spoke to Corporal Kruse on his arrival, who informed him of why he did the stop and why he called the officer to the scene. In addition, Corporal Kruse can be heard on the dash cam video discussing the stop of Randall with Officer Wilkins both on the phone and once he arrives. While it is difficult to make out the entire conversation on the video, there is competent, substantial evidence presented in the case from which the hearing officer could determine there was an appropriate discussion between the officers, allowing the fellow officer rule to apply.

Further, Randall contends that the officers illegally entered his hospital room without a warrant or consent to require field sobriety tests and a breath test, citing *Jones v. State,* 648 So. 2d 669 (Fla. 1994). However, courts in Florida have made a distinction between the level of privacy to be afforded to a patient admitted to a hospital with a private room, like in *Jones,* and a patient in the emergency department of a hospital. *See State v. Butler*, 1 So. 3d 242, 247 (Fla. 1st DCA 2008) [34 Fla. L. Weekly D40b]; *Buchanan v. State,* 432 So. 2d 147, 148 (Fla. 1st DCA 1983).

At the hospital, Randall was in a room with an open door, not a curtained area. However, this room was still within the emergency department, not a private room, which would be associated with the heightened expectation of privacy discussed in *Jones.* Therefore, we find that there would be no requirement for an arrest warrant, search warrant, or Randall's consent for the officers to enter the room holding Randall in the hospital's emergency department to continue the DUI investigation of Randall, which had begun roadside. The hearing officer's rejection of Randall's argument on this point meets the essential requirements of law and is supported by competent, substantial evidence.

Finally, Randall contends that Officer Wilkins had no probable cause to arrest him for DUI and require a breath test. However, we find that when viewing the totality of the circumstances, there was competent, substantial evidence to support the hearing officer's decision that there was probable cause for Randall to be charged with DUI in this case, and that decision meets the essential requirements of law. Even if the officers' interaction with Randall in the hospital is not considered, the testimony and evidence presented of Randall's impairment included the time of the stop, Randall's difficulty maintaining his lane of travel, speeding, his failure to use a turn signal, the odor of alcohol emanating from him, his glassy eyes, his droopy eyelids, his occasionally slurred speech, his slow and sluggish movements, his combative demeanor after it was explained to him that he was being held for a DUI investigation, his refusal to submit to field sobriety exercises at the scene of the stop, and Randall's feigned medical episodes to frustrate the DUI investigation.[2] If the officers' interactions with Randall within the hospital room are considered, although Randall refused to perform the field sobriety exercises, the officers could certainly observe his demeanor, speech, and condition. Those observations were listed in their reports. When viewing all of the record evidence, there was substantial, competent evidence of these factors in the record for the hearing officer to find that the arrest was lawful, and the testimony and evidence were not substantially contradicted by the real-time video submitted in this case.

Based on the foregoing, the Court concludes that Randall was provided procedural due process and that the hearing officer's order did not depart from the essential requirements of law and was supported by competent, substantial evidence. It is therefore ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED. (EGAN and J. BEAMER, JJ., concur.)

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[1]At a formal review hearing of an administrative suspension of a driver's license for refusal to submit to a breath test, the Department carries the burden of proving by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension, and the scope of the review shall be limited to:

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

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

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

§ 322.2615(7)(b), Fla. Stat. Implicit within the scope of review is consideration of the lawfulness of the arrest. *See Florida Dept of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S654a].

[2]It was within the officers', and then the hearing officer's, purview to determine that Randall was faking or at least substantially exaggerating his condition to frustrate the DUI investigation.

* * *

Municipal corporations—Employees—Separation package—Appeals—Quasi-executive action—Certiorari challenge to city commission resolution clarifying that it had approved a mutually-agreed-upon inclusion of two and a half weeks of unused sick time as part of separation package for former executive director of community redevelopment agency, not the payment of all unused sick time as reflected in written agreement—Court lacks jurisdiction to review commission's quasi-executive action—Petition dismissed

CORNELIUS SHIVER, Petitioner, v. CITY OF MIAMI SOUTHEAST OVERTOWN/PARKWEST COMMUNITY REDEVELOPMENT AGENCY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-000009 AP 01. October 5, 2023. On Petition for Writ of Certiorari from a decision to quash Resolution No. CRA-R-22-0006 of the City of Miami Southeast Overtown/Parkwest Community Redevelopment Agency. Counsel: Charles A. Gibson, Gibson Law Offices, for Petitioner. Victoria Mendez, City Attorney, and Bryan E. Capdevila, Assistant City Attorney, City of Miami & Southeast Overtown/Parkwest Community Redevelopment Agency, for Respondent.

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

(R. ARECES, J.) On November 18, 2021, Petitioner, Cornelius Shiver ("Petitioner"), appeared before the Board of Commissioners of the City of Miami Southeast Overtown/Parkwest Community Redevelopment Agency (the "Board"). Petitioner had served as the Executive Director of the Community Redevelopment Agency ("CRA") for approximately four years and now the Board was being asked, by one of its own members, to approve a separation package that would afford Petitioner three months' pay, plus two and a half weeks of his unused sick time. Petitioner expressly stated these terms were "mutually agreed" upon. Sometime thereafter, the Board discovered that, rather than provide payment for two and a half weeks, the written agreement provided for *all* unused sick leave. As a result, on February 7, 2022, the Board passed Resolution No. CRA-R-22-0006 (the "Resolution"),[1] wherein it clarified that it had only previously approved the mutually agreed upon terms of three months' pay, plus two and a half weeks of unused sick leave. Petitioner now contends that this clarification deprived him of some contractual right to all of his unused sick leave. This Court does not reach the merits of the Petition, because this Court lacks jurisdiction over the Board's quasi-executive acts.

Florida courts have long held that a challenge to a board's quasi-executive actions must be brought as an original action in circuit court. *See, e.g., Lee County v. Harsh*, 44 So. 3d 239 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2199a] (certiorari relief is not available for executive decisions); *see also Bd. Of Cnty. Comm'rs of Hillsborough Cnty. v. Casa Dev. Ltd., II*, 332 So. 2d 651, 654 (Fla. 2d DCA 1976).

Notwithstanding Petitioner's statement that the terms of the separation agreement were "mutually agreed" upon, and that the terms approved by the Board were unambiguously "three months and two and a half weeks of sick time," Petitioner contends the Board's subsequent Resolution, which merely clarified that the Board had only approved those "mutually agreed" upon terms, amounted to a quasi-judicial proceeding over which this Court has jurisdiction. Appellant's argument is unpersuasive.

The Third District Court of Appeal (the "Third DCA") recently had occasion to address the nature of quasi-judicial actions. *See Miami-Dade County v. City of Miami*, 315 So. 3d 115 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D19a]. In *Miami-Dade County*, the Third DCA examined four characteristics of quasi-judicial decisions. *Id*. at 120. Specifically, the Third DCA noted,

> (1) quasi-judicial action results in the application of a general rule of policy. . . .;
>
> (2) a quasi-judicial decision has an impact on a limited number of persons or property owners and on identifiable parties and interests. . . .;[2]
>
> (3) a quasi-judicial decision is contingent on facts arrived at from distinct alternatives presented a hearing. . . .; and
>
> (4) a quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. . . .

Id. (citing *D.R. Horton, Inc. - Jacksonville v. Peyton*, 959 So. 2d 390, 398-99 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1496c]).[3] Additionally, the Florida Supreme Court has long held that "purely administrative determination[s] without hearing or adversary evidence," for which "statutory notice" is not required, are simply not quasi-judicial determinations. *See Teston v. City of Tampa*, 143 So. 2d 473, 476 (Fla. 1962).

In this case, Petitioner appeared before the Board on November 18, 2021. Petitioner had no matter on the agenda that day. Instead, Board Member King called up "an item to the agenda" as an add-on. Specifically, Board Member King, stated,

> And if I may add an item to the agenda. You have been given a separation package for the executive director, [Petitioner]. I'd like to thank him for his service. And for your review is his separation package, and I'd like for you to approve that.

Minutes of November 18, 2021 Meeting, Respondent's Appx. A at 2.[4]

What followed was not a quasi-judicial proceeding. There was no application of a general rule of policy. There was no decision contingent on the finding of any fact presented at the hearing. The Board did not act as fact-finder, nor did it determine the rules of law applicable to Petitioner's termination, or the rights affected by said rules of law. The Board's determination, such as it was, was purely executive—should it, in its unbridled discretion, approve a separation package to which Petitioner had no legal entitlement.[5] To that end, Petitioner and the Board engaged in the following exchange,

> Vice Chair Diaz de la Portilla: What's the amount?
>
> Board Member King: **The terms are three months and two and a half weeks of sick pay.**
>
> Vice Chair Diaz de la Portilla: So moved.
>
> Board Member Reyes: Second. And it has been mutually agreed, right?
>
> [Petitioner]: **Mutually agreed, yes.**
>
> . . .
>
> Board Member King: **He's going to be paid three months and two and half weeks of sick time.**
>
> . . .
>
> [Petitioner]: . . .**I am in agreement with it** because this is the right thing to do, the right time for the right Commissioner.
>
> Vice Chair Diaz de la Portilla: Because you believe that we have a new chairman of the CRA, that the Commissioner or the new chairman has the right to pick their own executive director and their own staff, correct?
>
> [Petitioner]: I'll go beyond that. I'm from the old school. . .**And so I truly believe**—and I articulated this to **the newly elected Commissioner—that she—like any of you—have a 100 percent right to work with any executive director that you feel comfortable with**.
>
> Board Member Carollo: How many years have you worked as the executive director?
>
> [Petitioner]: I think it's about four years.
>
> . . .
>
> Board Member Carollo: So about four years. **So what we're giving you is about a month for each of those four years if we included the unused sick leave.**

Id. at 2-6 (cleaned up) (emphasis added).

On February 7, 2022, Petitioner's separation package was, once again, before the Board. This time, the Board was informed that Petitioner's unused sick leave was not, in fact, the two and a half weeks that were mutually agreed to, but was, instead, "in the range of 550 or 560 hours." The Board then engaged in a lengthy dialogue

concerning the terms it had *already* approved. Specifically, the Board members stated, in part,

> Board Member Reyes: Let me—once again, what did we pass, two and a half weeks? If there is a discrepancy now—because when it was written—and I know—you know that I am—I love [Petitioner] and I'm a friend of his and all of that. But I don't think we should be arguing this here. In all fairness, what we passed was two and a half weeks. You should pay that, and if he has proof that it's something else, go to court.
>
> . . .
>
> [Petitioner]: . . .Now what happened—and **I will admit to you, Commissioner Carollo—that when the item was presented to the Board, there was a misrepresentation that the unused sick time was two and a half weeks, but that didn't come from me.**
>
> . . .
>
> Chair King: . . .And if you had given me the courtesy of speaking to me or the executive director, it would have clarified that there was a mistake, and we are not in any way trying to rescind the agreement. **We are only trying to clarify that what was presented was two and a half weeks of sick time pay.** That is the motion on the floor. All in favor?
>
> . . .
>
> Board Member Reyes: . . .the motion as I understood is that there was an agreement—
>
> Chair King: Yes, for two and a half—
>
> Board Member Reyes:—and we're going to stick to that agreement. And if there's any discrepancy, it should be taken to another court, another place.

Minutes of February 7, 2022 Meeting, Petitioner's Appx. Ex.E (cleaned up).

Nothing about either meeting would tend to indicate that they were quasi-judicial in nature. This is particularly true for the February 7, 2022 meeting, where the Board, rather than weigh alternatives contingent on the finding of some fact or apply any laws or general rules of policy, simply reaffirmed the terms it had previously approved. Far from being a quasi-judicial proceeding, it does not appear that the Resolution is even a *modification* of the written separation agreement. In fact, at least one Board member made it abundantly clear that the Board was merely reaffirming what it had previously approved and that if Petitioner wanted to enforce any additional rights, he could seek relief from the courts. *See id*. The Board's Resolution, reaffirming the exact previously approved and mutually agreed upon terms, does not convert the Board's initial approval, or even the clarification itself, into a quasi-judicial act.

Petitioner has not otherwise persuaded this Court that one or both of these proceedings were quasi-judicial in nature. First, Petitioner has not cited to any statute that requires notice and/or an evidentiary hearing before the Board may determine whether to approve, clarify or even breach, a separation agreement. *See Teston v. City of Tampa*, 143 So. 2d at 476. In fact, it does not appear that any such notice or evidentiary hearing is required by statute. *See* § 163.356(3)(d), Fla. Stat. (providing for notice and hearing prior to the removal of *commissioners*, but saying nothing of executive directors). If the legislature wanted to require that a quasi-judicial proceeding be conducted prior to an executive director's removal or the award of a separation package, it could have enacted appropriate legislation.

Second, it is of no consequence that the February 7, 2022 meeting was publicly held. *Most* board meetings are noticed and publicly held. Indeed, nearly fifty years ago, the Florida Supreme Court stated,

> Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. . .Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public. Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process.

Town of Palm Beach v. Gradison, 296 So. 2d 473, 475 (Fla. 1974). The mere fact that the Board took up the Resolution on February 7, 2023 at a public hearing does not, standing alone, convert a quasi-executive action into a quasi-judicial proceeding.

In summary, if Petitioner believes the written agreement entitles him to any additional unused sick leave, then he can file an action in the Circuit Civil Division. The Board will then have an opportunity to assert any affirmative defenses it wishes to raise. Petitioner should not, however, through the filing of a writ of certiorari, be permitted to effectively foreclose Respondent from asserting its affirmative defenses concerning the approval and/or formation of the written separation agreement.

For the aforementioned reasons, this Court lacks jurisdiction over the Board's quasi-executive actions. Accordingly, the Writ of Certiorari is DISMISSED.

(TRAWICK, J., CONCURS.) I agree that the Respondent's decision here is an executive rather than a quasi-judicial decision. We therefore lack jurisdiction to entertain this petition. However, if the Court did have jurisdiction, I agree with the dissent for the reasons stated therein. When the Respondent changed the terms of Petitioner's severance agreement, the Respondent failed to observe the essential requirements of law, and further, the Respondent's decision was unsupported by substantial competent evidence.

(SANTOVENIA, J., DISSENTS.) I respectfully dissent and disagree with the majority's opinion that this Court lacks jurisdiction to entertain the Petition. The Petition seeks a writ of certiorari directed to the CRA to quash Resolution No. CRA-R-22-0006 of the CRA, approved by the Board. The matter below is properly resolved by a writ of certiorari as it is a quasi-judicial, and not an executive matter. The Florida Supreme Court has listed four characteristics of a quasi-judicial decision:

> 1. Quasi-judicial action results in the application of a general rule of policy, whereas legislative action formulates policy;
>
> 2. A quasi-judicial decision has an impact on a limited number of persons or property owners and no identifiable parties and interests, while a legislative action is open-ended and affects a broad class of individuals or situations;
>
> 3. A quasi-judicial decision is contingent on facts arrived at from distinct alternatives presented at a hearing, while a legislative action requires no basis in fact finding at a hearing; and
>
> 4. A quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions, while a legislative act prescribes what the rule or requirement shall be with respect to future acts.

D.R. Horton, Inc. - Jacksonville v. Peyton, 959 So. 2d 390, 398-99 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1496c] (citing *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 459, 474 (Fla. 1993)).

Applying the first factor, the Board's decision did not adopt an ordinance or rule of general application. Instead, the Board reviewed the Agreement's provision that Petitioner should be compensated for his unused sick time at 100 percent, and altered the amount of sick time to two and one-half weeks. Applying the second factor, the

Board's vote on the Agreement had an impact on a limited number of persons—it impacted only the Petitioner. Applying the third factor, the decision of the Board was based on the vote at the Board hearing, and the Board briefly also heard from Petitioner. There were minutes of the February 7, 2022, Board meeting, and thus a record for the Court to review. Petitioner is correct that there was notice of the Board meeting, as he submitted an affidavit prior to the meeting. Applying the fourth factor, the vote on Petitioner's sick time did not prescribe a rule or requirement with respect to future acts.

I also note that Petitioner correctly argues in his Response to Respondent's Motion to Dismiss that under §163.340(1), Fla. Stat., the CRA is a public agency. Notably, the Agreement signed by Petitioner states that any modification to the Agreement will require a public hearing. That portion of the Agreement provides:

> Amendment. This Agreement may not be modified, alerted, or changed except upon express written consent of both Parties wherein specific reference is made to this Agreement. Any modification of the Agreement must be by written instrument signed by all Parties. **Any modification, alteration, or change will require a public hearing of the Board of Commissioners of the CRA.**

(Pet. App., Exh. C, Section 12) (emphasis added). That contractual provision requires not just a hearing of the Board of Commissioners of the CRA with a quorum present, but a *public* hearing. Moreover, a public hearing is no less public because the Petitioner's presentation was scheduled as part of the two-minute public comment period permitted by the Board.

"[W]hen notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive." *Miami-Dade Cty. v. City of Miami,* 315 So. 3d 115, 121 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D19a] (citing *DeGroot v. Sheffield,* 95 So. 2d 912, 915 (Fla. 1957)). *See also Anoll v. Pomerance*, 363 So. 2d 329, 331 (Fla. 1978) ("[A] judgment becomes judicial or quasi-judicial, as distinguished from executive, when notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing."). "While certiorari relief is available for quasi-judicial decisions, it is not available for executive decisions because, as a practical matter, when an executive makes a decision without conducting a hearing, there is nothing for the circuit court to review." *Lee Cnty. v. Harsh*, 44 So. 3d 239, 242 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2199a].

At the November 18, 2021 CRA meeting, Board member Christine King added to the agenda the discussion regarding the separation package for Mr. Shiver. Ms. King also opened the floor for public comment and asked if anyone would like to speak on the item. At the February 7, 2022 CRA meeting, the issue of Mr. Shiver's separation from the Board was on the agenda. Mr. Shiver spoke for two minutes, and Chairman King noted that after two minutes, his time was up. Thus, there was a second public hearing on the matter.

Curiously, the City argues that "the resolution that Petitioner seeks to challenge in this appellate proceeding was an executive decision by the CRA Board that it did not need to enter in the first place" and that Petitioner was not entitled to a hearing. Response Brief at p. 19. This argument wholly ignores that the Agreement requires a public hearing for "[a]ny modification, alteration, or change" to the Agreement.

Moreover, the City's position begs the question as to why there were two public hearings to address Mr. Shiver's contract and the City contractually bound itself in the Agreement to a public hearing of the Board of Commissioners of the CRA to address any modifications of the Agreement—all allegedly unnecessary—if executive action were in fact involved. Indeed, many employment decisions are executive in nature and are never the subject of a public hearing. Those decisions are usually made entirely by the city manager without being reviewed by the city's governing body at a public hearing. There is nothing for an appellate court to review in those scenarios. However, this is clearly not one of those decisions. Based on the factors outlined above, along with an examination of the record and case law, I conclude that this matter is quasi-judicial and that this court has jurisdiction to address the merits of the petition for writ of certiorari.

Standard of Review

This court reviews the Board's decision to ensure that the Board afforded due process, that the decision is supported by competent substantial evidence, and that the decision complies with the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982). Petitioner asserts that none of these prongs of the standard of review were met. I agree with Petitioner that the essential requirements of the law and competent substantial evidence prongs were not met.

Essential Requirements of law

In *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citation omitted), the Supreme Court, in considering whether the essential requirements of the law were observed, held that "appl[ying] the correct law" is synonymous with "observing the essential requirements of law." Overlooking sources of established law or applying an incorrect analysis of the law results in a departure from the essential requirements of law. *See City of Tampa v. City Nat'l Bank of Fla.,* 974 So. 2d 408, 411 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1319a].

The Petitioner argues that the Board's decision to reduce his payout for unused sick leave was a material breach of the Agreement. This argument is properly considered under the rubric of whether the Board followed the essential requirements of the law.

Settlement agreements are contractual in nature and are therefore interpreted pursuant to and governed by contract law. *Com. Cap. Res., LLC v. Giovannetti,* 955 So. 2d 1151, 1153 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D814a]. As Petitioner never agreed to the material change to his unused sick time, Petitioner correctly maintains that the change to two and one-half weeks is a violation of the Agreement. Petitioner argues that the language in the Agreement is clear, unambiguous, and susceptible of only one interpretation, which is that the Board authorized and approved the severance pay to include 100% of Petitioner's unused sick leave. Also, I find that the language in the agreement is clear that "the Agreement may not be modified, altered, or changed except upon express written consent of both parties . . ." I find that the Board did not observe the essential requirements of law based on the quoted term in the Agreement.

Due Process

The Third District Court of Appeal has held that "quasi-judicial proceedings are not controlled by strict rules of evidence and procedure." *Jennings v. Dade Cty.,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). However, certain standards of basic fairness must be followed in order to afford due process. *Id.* "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Id.*

Petitioner argues that the Board violated his due process rights when it decided to reduce his severance pay without considering any of the evidence submitted at the February 7, 2022 hearing. Petitioner submitted an affidavit which stated that he was entitled to receive 100% of his earned, unused sick time, and that the Agreement was never negotiated in hours, days, or weeks, but only in percentages. As Petitioner was given notice of the meeting and was able to speak during the meeting, I find that Petitioner's argument that he was deprived of due process is without merit.

Competent substantial evidence

Competent substantial evidence has been defined as "sufficiently

relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Smith v. Dep't of Health & Rehab. Servs*., 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989) (citation omitted). The test is whether there exists any competent substantial evidence to support the decision maker's conclusion, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*., 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Quasi-judicial decisions must be based on evidence submitted at the hearing, and the administrative officers, boards, or commissioners cannot base their decision on their own information. *Miami-Dade Cty. v. City of Miami, supra.*, 315 So. 3d at 126. Petitioner contends that the Board's decision is not supported by competent substantial evidence. I agree. The only evidence addressing a reduction of the sick time payout was an inter-office memorandum which discussed that there was a dispute as to the proper amount of sick time due to the Petitioner.[6] The only substantial competent evidence was the Agreement submitted by the Petitioner, and that evidenced the payout of 100% of unused sick time. Nothing presented at the hearing supported the award of two and one-half weeks of sick time. The testimony and the affidavit of Petitioner were unrebutted. While Petitioner did not verbally challenge the Board about the two and one-half weeks of payment, silence does not equate to consent to alter the terms of an Agreement that "may not be modified, alerted, or changed except upon express written consent of both Parties. . .". Accordingly, I find that there was a lack of competent substantial evidence in the record to support the Board's decision.

For the foregoing reasons, I respectfully dissent and would grant the Petition, quashing Resolution No. CRA-R-22-0006 in its entirety.

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[1]Rendered on March 1, 2022.

[2]This is the only factor that favors a finding that the meeting was quasi-judicial in nature. This single factor, however, does not outweigh the others—particularly given the nature of these proceedings.

[3]Edited to remove references to quasi-legislative acts, which are not at issue in this case.

[4]Respondent's Appendix is attached to its Response in Opposition to Petitioner's Petition for Writ of Certiorari.

[5]Petitioner concedes he was not entitled to remain on the job. Petitioner also made no argument that he was entitled to any severance package. *See* Separation Agreement signed on November 18, 2021; *see also, generally,* Minutes of November 18, 2021 Meeting, attached as Appx. A to Respondent's Response (stating the new chairman had a "100 percent" right to appoint his/her preferred executive director).

[6]The Board approved the Agreement by Resolution CRA-R-21-0050 on November 18, 2021. The CRA inter-office memorandum in question states: "[t]here is a dispute as to how many hours of accrued sick leave should be paid out pursuant to the Agreement. Until the sick time issue is resolved it is not in the best interest of the SEOPW CRA **to enter into the Agreement**". (emphasis added). That memorandum is dated January 25, 2022, *after* the Agreement was approved.

* * *

THOMAS DONOHUE, Petitioner, v. STATE OF FLORIDA, DEPT. OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-012517 (AW). September 28, 2023. Petition for Writ of Certiorari for review of a decision rendered by the State of Florida, Dept. of Highway Safety and Motor Vehicles. Counsel: Leonard Feuer, Law Office of Leonard Feuer, P.A., West Palm Beach, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, Dept. of Highway Safety & Motor Vehicles, Tallahassee, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition, the Response, the Hearing Transcript, and the applicable law, without oral argument, the Petition for Writ of Certiorari is hereby **DENIED** on the merits. (BOWMAN, LEVENSON, and GAMM, JJ., concur.)

* * *

2118 NE 15 ST, LLC, Appellant, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-001532 (AP). L.T. Case No. CE22110162. October 12, 2023. Appeal from the City of Fort Lauderdale, Broward County; Thomas Ansbro, Special Magistrate. Counsel: Anna Galica, Pro se, Manager for 2118 NE 15 St. LLC, Miami, for Appellant. D'Wayne Spence, for the City of Fort Lauderdale, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final judgment is hereby **AFFIRMED**. (BOWMAN, LEVENSON, and GAMM, JJ., concur.)

* * *

KATHLEEN CORNEILSEN, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-015572 (AW). September 28, 2023. Petition for Writ of Certiorari from Petitioner Kathleen Corneilsen. Counsel: Kathleen Corneilsen, Pro se, West Palm Beach, Petitioner. Kathy A. Jimenez-Morales, Tallahassee, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(**PER CURIAM**.) This cause comes before the Court for consideration on Petitioner, Kathleen Corneilsen's Petition for Writ of Certiorari. Having carefully considered the Petition for Writ of Certiorari, the Response, the Reply, the Exhibits and appendixes, the record, and the applicable law, and being otherwise duly advised, this Court dispenses with oral argument, and the Petition for Writ of Certiorari is hereby **DENIED**. (B. BOWMAN, J. LEVENSON and Y. GAMM, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Property—Conditions precedent—Ten-day notice—Insured's presuit notice of intent to initiate litigation based on acts or omissions other than denial coverage did not comply with statute where notice did not provide disputed amount or properly characterize claims decision on which notice was based—Complaint dismissed without prejudice

MUHAMMAD AKHTAR, FAREED ISMAEEL, and AKHTAR ISMAEEL TRUST, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2022-CA-000507. April 18, 2023. Don Lester, Judge. Counsel: David S. Magram and Jeremy T. Schilling, Schilling & Silvers, for Plaintiffs. Jason D. Hall and David Hildreth, Lewis Brisbois Bisgaard & Smith LLP, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR FAILURE TO COMPLY WITH PROCEDURES PRECEDENT, ETC.; AND ON DEFENDANT'S MOTION TO STAY DISCOVERY

THIS CAUSE, having come before this Court upon *Defendant's Motion to Dismiss Plaintiffs' Amended Complaint for Failure to Comply with Procedures Precedent, or Alternative Motion for a More Definite Statement* (hereinafter "Motion to Dismiss") (filed on 10/24/2022) and upon *Defendant's Amended Motion to Stay Discovery and/or, In the Alternative, Motion for Protective Order Regarding Plaintiffs' Request to Take Deposition of Defendant's Corporate Representative* (hereinafter "Motion to Stay") (filed on 11/09/2022), and the Court having reviewed the Motions and heard the arguments of the parties regarding the Motions via videoconference hearing on April 3, 2023, it hereby:

ORDERED AND ADJUDGED that:

1. Defendant did not deny the subject Claim, and the Plaintiffs' Pre-Suit Notice did not provide a "disputed amount" pursuant to § 627.70152(3)(a)(5)(b). Accordingly, the Plaintiffs have failed to comply with the requirements imposed by Fla. Stat. § 627.70152.

2. Defendant's Motion to Dismiss is ***GRANTED*;**

3. Plaintiffs' Amended Complaint is ***DISMISSED WITHOUT PREJUDICE*;**

4. If Plaintiffs choose to re-file the instant action, Plaintiffs shall properly file a new and/or amended "Notice of Intent to Initiate Litigation" pursuant to Fla. Stat. § 627.70152, and such Notice must fully comply with any and all applicable provisions contained within the Statute. Specifically, but without limitation, any new or amended Notice shall include the "disputed amount" pursuant to Fla. Stat. § 627.70152 (3) (a) (5) (b), and the Notice shall properly characterize the claims decision upon which such Notice is founded;

5. Defendant's Motion to Stay is ***GRANTED.***

* * *

Criminal law—Competency to stand trial—Detention pending competency determination—Court is authorized to hold defendant in custody pending competency determination where experts have been appointed to evaluate defendant before competency hearing, but defendant will not submit to evaluation or is unlikely to appear for evaluation—Defendant may be held in custody pending competency determination even though court, in separate case involving other charges, has previously adjudicated defendant incompetent to proceed and found that there was not a substantial probability that defendant would gain competency in foreseeable future

STATE OF FLORIDA, Plaintiff, v. TELVIN GRAY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case Nos. F23015025; F23015043; F23010364; F23010313; F22004385; F21020448; F21018862. Section 09. October 18, 2023. Joseph D. Perkins, Judge. Counsel: Ian Muir, Assistant State Attorney, for Plaintiff. Jennifer Rodriguez, Assistant Public Defender, for Defendant.

ORDER ON RENEWED MOTION FOR RELEASE

This case is before the Court on Telvin Gray's September 27, 2023 Renewed Motion for Release ("Renewed Motion"), which the Court **GRANTS IN PART** as to Case Numbers F21-18862, F21-20448, F22-4385 and F23-10313, F23-10364, and **DENIES IN PART** as to Case Numbers F23-15025, and F23-15043.

QUESTIONS PRESENTED

1. Where the Court has appointed experts to evaluate whether a defendant has been restored to competency and has determined that the defendant will not submit to an evaluation and is not likely to appear for the scheduled evaluation, may the Court order the defendant taken into custody pursuant to Rule 3.210(b)(3) of the Florida Rules of Criminal Procedure until determination of the defendant's competency to proceed, even if a court in a separate case years ago adjudicated the defendant incompetent to proceed and found that there was not a substantial probability that the defendant would gain competency to proceed in the foreseeable future?

2. (a) In general, is holding a defendant and (b) on the facts of this case, is holding Gray, in jail for a reasonable period of time necessary to determine his competency and whether there is a substantial probability that he will gain competency to proceed in the foreseeable future consistent with the Due Process Clause of the United States Constitution?

SHORT ANSWER

1. Yes. Rule 3.210(b)(3), applicable when the Court has appointed experts to evaluate a defendant ***before*** a competency hearing, expressly provides that "[i]f the court determines that the defendant will not submit to the evaluation or that the defendant is not likely to appear for the scheduled evaluation, the court may order the defendant taken into custody until the determination of the defendant's competency to proceed." Rule 3.212(d), which the Supreme Court enacted in 2021 to conform to *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) as applied in *Schofield v. Judd*, 268 So. 3d 890 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D850a],[1] and which requires the release of an incompetent defendant the Court finds to be non-restorable,[2] does not limit Rule 3.210(b)(3) (which the Supreme Court left intact) because it expressly applies when the Court makes a restorability finding ***after*** a competency hearing. If any unidentified common law presumption of non-restorability exists in addition to the firmly established common law presumption of incompetency, Rule 3.210(b)(3) abrogates it to the extent it would affect release pending a competency hearing. Finally, cases holding that the Court cannot hold a defendant accused of violating "Conditional Release"[3] in jail solely to facilitate a competency evaluation are inapplicable because they apply Rule 3.219 and section 916.13, Florida Statutes, which do not govern here because Gray is not on Conditional Release.

2. Yes.

a. The United States Supreme Court in *Jackson* held that an incompetent defendant can "be held . . . [for a] reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." 406 U.S. at 738. As *Schofield* demonstrates, the reach of *Jackson* is not limited to cases involving hospitalization. Rule 3.210(b)(3), left intact when the Supreme Court amended Rule 3.212(d) to conform with *Jackson* as applied in *Schofield*, is consistent with those cases because it does not authorize the Court to hold a defendant in custody indefinitely but, rather, only until it holds a competency hearing. Once the Court

makes findings after a competency hearing, Rule 3.210(b)(3) stops governing and, depending on the Court's findings, Rules 3.212(c) and/or (d) (and, if applicable, *Schofield*) start governing. Finally, *Paolercio v. State*, 129 So. 3d 1174 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D153a] does not apply for the same reason *Schofield* does not apply: both cases involved a trial court's holding a non-restorable defendant in jail (1) indefinitely pursuant to section 903.0471, Florida Statutes, (2) in the same case in which the Court previously found the defendant to be non-restorable.

b. The facts of this case strengthen the Court's resolve that Gray is receiving appropriate process. At every turn, the Court has treated Gray's competency determination and release motion as an emergency. The Court immediately scheduled a competency hearing when Gray was arrested on his most recent cases and commenced the hearing a mere thirteen days after his arrest. The Court has had to continue the competency hearing largely due to Gray's refusal to participate in the evaluations. Both doctors who evaluated Gray for incompetency due to mental illness and testified at the first part of the competency hearing did not observe any indicators of mental illness. Both opined that Gray was strategically choosing not to participate, as opposed to not participating due to mental illness. (One doctor administered the Test of Memory Malingering ("TOMM"), the results of which indicated that Gray is, indeed, capable of answering questions). Both doctors questioned whether Gray is even incompetent to proceed, let alone non-restorable. One doctor opined that Gray is restorable, and the other was unable to render an opinion due to Gray's lack of participation. Additionally, the doctor who evaluated Gray for incompetency due to intellectual disability did not find that Gray meets the definition for intellectual disability. That doctor also administered the TOMM, and the results indicated that if Gray was not malingering, he at least was not making effort to participate.

LIMITS OF THIS ORDER

The Court grants in part the Renewed Motion and orders that Gray be released in his 2021 and 2022 cases and in F23-10313 and F23-10364. It purposely limits this Order to the question of whether the Court can temporarily hold a defendant in custody pursuant to Rule 3.210(b)(3) in Case # 2 when the defendant was adjudicated incompetent and found to be non-restorable in Case # 1 (or, in Gray's case, in Cases # 11-12 when the defendant was adjudicated incompetent and found to be non-restorable in Cases # 1-2). It does so for four reasons. First, in Gray's 2021 and 2022 cases, the Court adjudicated Gray to be incompetent to proceed and found that he was non-restorable based on the Court's then (unchallenged) understanding that Florida's common law presumption of incompetency included a presumption of non-restorability. The Court now has doubt regarding whether a presumption of non-restorability exists under Florida law, and the parties are separately briefing this issue, which may or may not be material to the Court's findings at Gray's upcoming continued competency hearing. Second, at the August 10 and October 11, 2023 hearings, the thrust of the State's argument was that Gray had never been adjudicated incompetent in his 2023 cases, thereby requiring the Court to go through all the steps in Rules 3.210-3.212 in the 2023 cases. Third, at the parties' suggestion, after appointing Dr. Richardson in F23-10313 and F23-10364, the Court did not schedule a competency hearing within twenty days but, rather, scheduled a future date as a placeholder approximately ten months later.[4] Granting the Renewed Motion as to these cases moots any issues relating to the timing of the competency hearing. Fourth, there is no practical need for the Court to hold Gray in his 2021 and 2022 cases and in F23-10313 and F23-10364 because the Court is denying in part the Renewed Motion and holding him pending a competency hearing in F23-15025 and F23-15043.

BACKGROUND

On August 30, 2019, in different cases (Case Nos. F17-11104 and F17-16151) before a different judge, the Court adjudicated Gray incompetent to proceed due to mental illness and found that his competency was not restorable. Since then, Gray has been arrested in ten additional cases for felonies (and in many more for misdemeanors), and he currently has seven cases pending before the Court.

On July 26, 2023, Gray was arrested in F23-15025 and F23-15043. The Court immediately appointed Dr. Ralph Richardson and Dr. Lina Haji to evaluate Gray and commenced a competency hearing thirteen days later, receiving testimony on August 8 and 10, 2023.[5] As discussed below, both doctors testified that Gray refused to participate in the evaluations. Neither observed any evidence of an active defect or mental illness, and both opined based on their observations that Gray was strategically choosing not to participate in the evaluations. Dr. Haji opined that Gray is restorable. Dr. Richardson felt he lacked sufficient data to opine on restorability due to Gray's non-cooperation. Both doctors agreed that due to past concerns about whether Gray suffered from intellectual disability, an evaluation by the Agency for Persons with Disabilities ("APD") would inform their opinions on restorability and competency. Based on this testimony, the court continued the competency hearing to have Gray evaluated for incompetency due to suspected intellectual disability, which is pending.

A. Dr. Richardson's First Evaluation

Dr. Richardson attempted to evaluate Gray via videoconference on August 2, 2023 and in person on August 9, 2023. 8/8 Tr. at 11. On August 2nd, Dr. Richardson interacted with Gray for 35-40 minutes, *id.* at 33, and Gray initially cooperated. When they got to the competency potion of the assessment, however, Gray got up, left the area, and refused further cooperation. *Id.* at 12. Gray's interaction with Dr. Richardson did not reveal active symptoms of major mental illness, and his performance when initially cooperating was consistent with that of a competent individual. Dr. Richardson felt, however, that he lacked sufficient data to opine regarding competency or restorability. *Id.* at 12-13, 21-26.

B. Questioning by the Court

At the August 8th hearing, the Court attempted to question Gray regarding competency factors. A few questions into the colloquy, Gray testified that he was under the influence of Molly. The Court stopped questioning Gray and, based on probable cause that Gray was under the influence of illicit drugs,[6] ordered that he be drug tested. *Id.* at 52-55. After the drug test came back negative, the Court continued asking Gray competency related questions. Based on the nature of his answers, the State requested that Drs. Richardson and Haji test Gray for malingering. *Id.* at 68-73.

C. Dr. Richardson's Second Evaluation

At the Court's request at the August 8th hearing, Dr. Richardson attempted to evaluate Gray in person on August 9th. Dr. Richardson interviewed Gray for approximately 20 minutes and administered the Test of Memory Malingering ("TOMM"). Gray engaged and responded verbally to Dr. Richardson's questions, and his errors were within the acceptable cutoff suggestive of an individual who was not feigning memory or putting forth inadequate effort. Dr. Richardson interpreted the TOMM as evidence that Gray was able to attune to the task and respond appropriately, meaning his mental state was not impaired to an extent that would preclude him from having appropriately engaged and performed on the task as expected. 8/10 Tr. at 27-30.

Immediately upon completing the TOMM, Dr. Richardson told Gray that he was going to pick up where he had left off during his prior attempt to evaluate him, and Dr. Richardson started asking competency-related questions. Despite Gray's having no difficulty speaking and attuning to and responding verbally and appropriately to Dr. Richardson's questions just moments earlier, Gray immediately put his head down, looked away from Dr. Richardson, and stopped responding. *Id*. at 28-30.

Dr. Richardson opined based on his observations and Gray's performance on the TOMM that Gray was choosing not to cooperate. Like on August 2nd, on August 9th Dr. Richardson did not observe any signs of psychosis or indicators that underlying mental illness was driving Gray's failure to cooperate. Had Gray not had prior diagnoses, Dr Richardson would opine based on the same data that there was no present evidence of an active defect or mental illness. *Id*. at 31-34, 40-41. Dr. Richardson still felt, however, that due to Gray's lack of cooperation, he lacked sufficient data to opine regarding Gray's current competency and restorability. *Id*. at 41, 63, 68.

D. Dr. Haji

Dr. Haji made herself available on only a few hours' notice and attempted to evaluate Gray in person on August 9, 2023. After introducing herself and explaining the purpose of the evaluation, Gray refused to make eye contact or engage with Dr. Haji verbally. Gray responded to a series of yes-or-no questions with nods, and when Dr. Haji again explained to Gray the benefits of speaking with her, Gray responded "I don't need this." Dr. Haji attempted to engage with Gray for a few more minutes and terminated the evaluation when it became clear that Gray would not speak with her. *Id*. at 9-10.

Gray did not show any outward signs of psychosis or intellectual disability when she attempted to evaluate him. Additionally, Gray's recent jail records contained no indication of psychiatric systems. *Id*. at 11-12, 16. Like Dr. Richardson, Dr. Haji opined based on her observations and the information available to her that Gray understood her questions and was choosing not to engage with her. *Id*. at 21, 45. In the end, Dr. Haji opined that there was a substantial probability that Gray, if incompetent to proceed, would respond to treatment in the relatively near future and could be restored to competency. *Id*. at 22. Indeed, based on the information available to her, Dr. Haji doubted whether Gray was ever truly non-restorable. *Id*. at 20-21.

E. Evaluation for Intellectual Disability

At the August 10, 2023 hearing, both doctors recommended that Gray be evaluated for intellectual disability and indicated that the results of such evaluation would be informative to them. *Id.* at 13, 38-40, 63-64.[7] The Court appointed the Agency for Persons with Disabilities ("APD") to evaluate Gray for incompetency due to intellectual disability. Dr. Alejandro Arias evaluated Gray on behalf of APD and in his written report did not find that Gray met the definition of intellectual disability. *See* Fla. Stat. § 916.3012(2).

Notably, Dr. Arias administered the TOMM—the test designed to detect attempts at feigning cognitive impairment and malingering—which Dr. Richardson had administered on August 9th. This time, Gray's score reflected insufficient effort at answering the questions correctly.

The statutorily required[8] second evaluation from Dr. Damus regarding incompetency due to suspected intellectual disability is pending.[9] As soon as Dr. Damus submits his report, the Court will reconvene the competency hearing to hear at least from Drs. Richardson and Haji and, depending on the parties' stipulations, additional doctors.[10]

F. Court's Findings at the August 10, 2023 Hearing

At the August 10, 2023 hearing, the Court and the parties proceeded with the assumption that both a presumption of incompetency and a presumption of non-restorability existed. *Id.* at 50, 68. The Court indicated that it had serious questions regarding whether Gray was truly incompetent or malingering. *Id*. at 62. The Court indicated that it would reopen the competency hearing after receiving the intellectual disability evaluations. *Id*. at 70. The State and defense agreed, however, that Gray met criteria for an *ex parte* evaluation under the Baker Act. *Id*. at 47.

G. Motion for Release

On August 18, 2023, to make it clear that Gray's competency proceeding is still pending, the Court vacated its findings from the August 10, 2023 hearing and asked the parties for additional briefing.[11] The Court asked the parties to submit separate briefing on legal questions relating to the upcoming continued competency hearing[12] and to Gray's motion for release.

With respect to the release motion, the Court asked the parties to address whether the Court has the authority, consistent with *Jackson*, to hold Gray in jail pending his competency hearing and whether Rule 3.212(d) and *Schofield* prohibit the Court from doing so. The Court indicated that it would treat the motion for release as an emergency and that the defense should file its supplemental release motion as quickly as possible while taking sufficient time to present thoughtful argument. 8/18 Tr. at 17. At a subsequent status hearing, the defense indicated it was working on the briefing for the release motion and would submit the briefing shortly. The defense filed its Renewed Motion on September 27, 2023. The Court ordered an expedited response from the State, which it received on October 6, 2023, and held a hearing on October 11, 2023.

DISCUSSION

I. RULE 3.210(b)(3) EXPRESSLY AUTHORIZES THE COURT TO HOLD A DEFENDANT IN CUSTODY PENDING A COMPETENCY DETERMINATION IN APPROPRIATE CIRCUMSTANCES, EVEN WHERE A COURT IN A SEPARATE CASE PREVIOUSLY ADJUDICATED THE DEFENDANT INCOMPETENT TO PROCEED AND FOUND THAT THERE WAS NOT A SUBSTANTIAL PROBABILITY THAT THE DEFENDANT WOULD GAIN COMPETENCY IN THE FORESEEABLE FUTURE.

A. Rules 3.210-3.212 contain mandatory procedures governing each phase of competency proceedings.

Florida Rules of Criminal Procedure 3.210-3.212 contain detailed procedures governing the raising of competency, appointment of experts, evaluation of defendants by experts, required findings from the Court, and options available to the Court depending on its findings. The rules are not mere niceties but are mandatory, and they apply both to initial competency proceedings and proceedings to determine whether an incompetent defendant has been restored to competency. *Dougherty v. State*, 149 So. 3d 672, 677 (Fla. 2014) [39 Fla. L. Weekly S636a] (holding that Rules 3.210-3.212 contain "the required competency hearing procedures for determining whether a defendant is competent to proceed or has been restored to competency"). As a result, they apply even when a defendant is presumed to be incompetent to proceed due to a prior adjudication of incompetency.[13] *See id.*; *Ross v. State*, 155 So. 3d 1259, 1259-60 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D329a] (holding that where a defendant has been previously been adjudicated incompetent to proceed, the trial court still must hold a competency hearing, review evidence from experts, independently determine whether the defendant's competency has been restored, and enter a written order to that effect, and the parties cannot waive these mandatory requirements by stipulation).

B. The rules and statutes governing competency proceedings contain various provisions governing the Court's (in)ability to jail a defendant in different circumstances.

The Florida Rules of Criminal Procedure and Florida Statutes contain various provisions relating to the ability or inability of the Court to hold a defendant in jail pending competency proceedings or after a competency hearing.

1. Raising competency as an issue generally does not affect the Court's (in)ability to hold a defendant in custody.

As a starting point, the mere raising of a defendant's competency, Fla. R. Crim. P. 3.210(b), neither minimizes a defendant's right to pretrial release, Fla. R. Crim. P. 3.210(b)(3), nor diminishes the Court's authority to hold a defendant in jail. *See* Fla. Stat. § 916.115(1) ("The experts may evaluate the defendant in jail . . . .").

2. The Court may hold a defendant in custody when necessary to facilitate expert evaluation.

When competency is raised, the Court must[14] appoint experts to evaluate the defendant. Fla. R. Crim. P. 3.210(b). Rule 3.210(b)(3) expressly authorizes the Court to take a defendant in custody pending the determination of the defendant's competency to proceed when necessary to facilitate the expert evaluation:

> If the defendant has been released on bail or other release provision, the court may order the defendant to appear at a designated place for evaluation at a specific time as a condition of such release. **If the court determines that the defendant will not submit to the evaluation or that the defendant is not likely to appear for the scheduled evaluation, the court may order the defendant taken into custody until the determination of the defendant's competency to proceed.** A motion made for evaluation under this subdivision shall not otherwise affect the defendant's right to release.

Fla. R. Crim. P. 3.210(b)(3) (emphasis added).

3. The Court's ability to jail a defendant after adjudicating a defendant incompetent to proceed depends in part on whether the Court determines that the defendant is restorable.

Rule 3.212 governs the findings the Court must make after a competency hearing and the options available to the Court depending on its findings. It contains two provisions relating to the Court's ability to jail a defendant it determines to be incompetent to proceed. If the Court determines that there is a substantial probability that the defendant will gain competency to proceed in the foreseeable future and the defendant is in jail, the Court may order that treatment be administered at the jail. Fla. R. Crim. P. 3.212(c)(2) & (d) (first sentence); *see State v. Miranda*, 137 So. 3d 1133, 1142 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D693a] (trial court could order incompetent but restorable defendant to receive treatment at current custodial facility where defendant was incarcerated due to violation of initial pretrial release conditions); *Graham v. Jenne*, 837 So. 2d 554, 559 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D447d] (Rule 3.212(c)(2) authorized incarceration of incompetent defendant where defendant satisfied requirements for pretrial detention); *Marino v. State*, 277 So. 3d 219, 221-22 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1848a] (same).

If the Court determines that there is not a substantial probability that the defendant will gain competency to proceed in the foreseeable future, the Court must release the defendant, or the State must initiate civil commitment proceedings. *Id*., Rule 3.212(d) (last sentence); *Schofield*, 268 So. 3d at 900.

C. Rule 3.210(b)(3) exists in harmony with Rules 3.212(c)(2) and (d).

"[T]he rules of construction applicable to statutes also apply to the construction of rules." *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) [23 Fla. L. Weekly S266a]. "Thus, when the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning." *Id*. The plain and ordinary meaning of Rules 3.210(b)(3) and 3.212(d) is unambiguous. The plain text of Rule 3.210(b)(3) expressly governs the Court's ability to hold a defendant in jail to facilitate expert evaluation of the defendant's competency. Rule 3.212(c)(2) and (d) expressly govern the Court's ability to hold a defendant in jail after a competency hearing "if the court finds the defendant is incompetent to proceed" depending on whether the Court also finds that there is a substantial probability that the defendant will gain competency to proceed in the foreseeable future. Rule 3.210(b)(3) plainly governs before a competency hearing and Rule 3.212 plainly governs after a competency hearing.

Even if, *arguendo*, the rules were ambiguous, various canons of construction lead to the same result. The rules governing competency proceedings must be read *in pari materia* so they are compatible and do not clash. *See Morgan v. State*, 295 So. 3d 833, 836 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1354a]. The determination of an incompetent defendant's restorability is a major finding affecting the options available to the Court under Rule 3.212(d). Experts must consider and report on an incompetent defendant's restorability, Fla. R. Crim. P. 3.211(d)(4), and the Court must consider expert evidence before making restorability findings.[15] Thus, Rule 3.210(b)(3) operates in harmony with Rule 3.212(d) because it empowers the Court to take a defendant into custody when necessary to facilitate mandatory expert evaluation the Court must consider to make informed restorability findings material to Rule 3.212(d).

The title-and-headings canon is also helpful. *See State v. Demons*, 351 So. 3d 10, 16 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2278a] (using the "title-and-headings" canon for guidance in interpreting a criminal procedure rule). The title of Rule 3.210 is "Incompetence to Proceed: Procedure for Raising the Issue," and the title of Rule 3.212 is "Competence to Proceed: Hearing and Disposition." The former indicates that it applies when competency is raised, and the latter indicates that applies after a competency hearing.

Finally, Rule 3.210 has authorized the Court to take a defendant into custody to facilitate expert evaluation since 1977. *See In re Fla. R. Crim. P.*, 343 So. 2d 1247, 1256 (Fla. 1977). The Supreme Court knew Rule 3.210(b)(3) existed when it amended Rule 3.212(d) in 2021 but chose to leave it intact. Thus, Rule 3.212(d) should be construed to operate separately from Rule 3.210(b)(3) and not as implicitly repealing it. *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978) ("There is a general presumption that later statutes are passed with knowledge of prior existing laws, and a construction is favored which gives each one a field of operation, rather than have the former repealed by implication."); *Barnett Bank of S. Florida v. State Dept. of Revenue*, 571 So. 2d 527, 529 (Fla. 3d DCA 1990) (same).

D. The express language of Rule 3.210(b)(3) abrogates any common law presumption of non-restorability.

The parties have not cited, and the Court has not been able to locate, any case addressing whether at common law a defendant adjudicated incompetent and found to be non-restorable is presumed not only to be incompetent but also non-restorable in future cases. There is certainly no on-point statute or rule, and the United States Supreme Court's 1972 opinion in *Jackson* prompted the first mention of restorability the Court could locate in the rules of procedure. *See In re Fla. R. Crim. P.*, 272 So. 2d 65, 105 (Fla. 1972).[16] If any such common law presumption exists, the express language of Rule 3.210(b)(3) abrogates it to the extent it would limit the Court's authority to hold a defendant in custody to facilitate a competency evaluation. *See Lamb v. State*, 107 So. 535, 537 (Fla. 1926) (rules of procedure may regulate common law procedure); *Richardson v. State*,

546 So. 2d 1037, 1039 (Fla. 1989) (holding that criminal procedure rule abrogated common law writ of procedure); *Wood v. State*, 750 So. 2d 592, 595 (Fla. 1999) [24 Fla. L. Weekly S240a] (same).

E. Gray's cases standing for the proposition that the Court cannot jail an incompetent defendant simply to facilitate a new competency evaluation involve section 916.17 / Rule 3.219 "Conditional Release" and are inapplicable here.

Gray cites *Pagan v. State*, 333 So. 3d 814 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D516b], *Dodd v. State*, 259 So. 3d 311 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D2709a], *Paolercio v. State*, 129 So. 3d 1174 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D153a], and *Smith v. State*, 247 So. 3d 77 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1076b] for the proposition that the Court cannot jail an incompetent defendant simply to facilitate a new evaluation. These cases all involve limits on the options available to the Court under Rule 3.219 and § 916.17, Florida Statutes, when a defendant violates the terms of a Conditional Release plan.[17] They correctly recognize that section 916.17(2) leaves the Court with only two options in such circumstances: modify the Conditional Release plan or involuntarily commit the defendant to DCF for treatment. *See* Rule 3.219(b) (same).

As the defense acknowledged at the October 11, 2023 hearing, Gray is not on a Conditional Release plan. Just as limits on the Court's authority under Rule 3.213 should not be confused with Rule 3.212(d), they should also not be confused with Rule 3.210(b)(3). *See Amaya*, 10 So. 3d at 157 ("The conditions placed on release under Rule 3.212(d) . . . should not be confused with the 'conditional release' that is permitted under section 916.17 as an alternative to commitment to a treatment facility under section 916.13.").

II. HOLDING A DEFENDANT IN JAIL AND, MORE SPECIFICALLY, HOLDING GRAY IN JAIL PURSUANT TO RULE 3.210(b)(3) PENDING HIS COMPETENCY HEARING DOES NOT VIOLATE DUE PROCESS.

A. Rule 3.210(b) is consistent with the Due Process Clause.

Rule 3.210(b)(3)'s authorizing the Court to temporarily hold a defendant in jail until it determines the defendant's competency is consistent with the Due Process Clause of the United States Constitution. Indeed, the United States Supreme Court already held in *Jackson* that an incompetent defendant can "be held . . . [for a] reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." 406 U.S. at 738.

At the October 11, 2023 hearing, the defense argued that *Jackson* is limited to situations involving the involuntarily hospitalization of an incompetent defendant. The defense also argued that *Schofield* and *Paolercio v. State*, 129 So. 3d 1174, 1176 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D153a] prohibit the Court from temporarily holding Gray in custody pursuant to Rule 3.210(b)(3). The Court disagrees. With respect to *Jackson*'s applicability outside of the involuntary hospitalization context, the Second District Court of Appeal in *Schofield* applied *Jackson* in the context of a trial court's inability to impose release conditions on an incompetent defendant found, after a competency hearing, to be non-restorable. Additionally, neither *Schofield* nor *Paolercio* limits the Court's authority under Rule 3.210(b)(3) because those cases involved the trial court's holding an incompetent defendant in jail (1) indefinitely pursuant to § 903.0471, (2) in the same case in which the court previously found that the defendant's competency was non-restorable.

1. Jackson v. Indiana

In *Jackson*, the United States Supreme Court held that Indiana's statutory scheme for ***indefinite*** commitment of incompetent defendants ran afoul of the Due Process Clause:

> The issue in *Jackson* was the constitutionality of Indiana's statutory scheme for pretrial commitment of incompetent defendants, which permitted involuntary commitment until such time as the Department of Mental Health certified there was evidence that Jackson, who was identified as a "mentally defective deaf mute with a mental level of a pre-school child," was competent. *Jackson,* 406 U.S. at 717-19. Under that statutory scheme, Jackson's involuntary commitment could potentially constitute a life sentence. The *Jackson* Court found that such an ***indefinite commitment*** of a criminal defendant based solely on his incompetence to stand trial violated the Fourteenth Amendment's guarantee of due process. Thus, the Court held that where a person is charged with a criminal offense and is committed solely due to his incompetency to proceed to trial, he cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain the requisite capacity in the foreseeable future. *Id.* at 738-39. If not, the State must either institute civil commitment proceedings or release the defendant under those circumstances.

State v. Miranda, 137 So. 3d 1133, 1141 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D693a] (some emphasis omitted; remaining emphasis in original); *Dept. of Children & Families v. State*, 201 So. 3d 78, 80-81 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2105a] ("[T]he liberty interests, which lie at the heart of our nation's heritage, preclude the State from holding an individual indefinitely against his will on criminal charges when it is plain that he can never be brought to court to answer for his crimes." (citing *Jackson*)).

2. Schofield v. Judd

The Second District Court of Appeal in *Schofield* applied *Jackson* in the context of a trial court's inability to impose release conditions on an incompetent defendant found, after a competency hearing, to be non-restorable. In *Schofield*, the trial court imposed ten release conditions on the defendant after finding that the defendant's competency was non-restorable. After finding probable cause that the defendant committed a crime while on release, the trial court took the defendant into custody—in the same case—and held him no bond pursuant to § 903.0471, Florida Statutes. 268 So. 3d at 892-93. Applying *Jackson*, the Second District Court of Appeals held that "[t]here was no lawful basis for the trial court to impose conditions on Mr. Schofield's release or to jail him for the violation of any of those conditions." *Id*. at 900.

3. Paolercio v. State

In *Paolercio*, like in *Schofield*, the trial court took a defendant into custody and held him no bond pursuant to § 903.0471 in the same case in which it had previously found the defendant's competency to be non-restorable. The Fifth District Court of Appeals explained why such action was impermissible:

> It is a violation of essential fairness to detain an accused in a jail indefinitely when he is incompetent to proceed. While so detained he cannot be tried precisely because he is incompetent to proceed, yet jailhouse treatment for his incompetency is unlikely. It is illogical to hold that an incompetent defendant who commits a new offense thereby loses the protection afforded to those who are incapable of defending themselves. If that were the case, such persons could be detained indefinitely without any finding of guilt.

Paolercio, 129 So. 3d at 1176 (quoting *Douse v. State*, 930 So. 2d 838, 840 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1613a]).

4. Rule 3.210(b)(3), unlike § 903.0471, does not authorize indefinite detention.

Schofield and *Paolercio* do not apply because Rule 3.210(b)(3), unlike § 903.0471, does not authorize indefinite detention, which is the evil *Jackson* sought to remedy. Section 903.0471 authorizes a court, *sua sponte*, to "revoke pretrial release and order pretrial

detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release." Once a court revokes pretrial release pursuant to § 903.0471, the court may refuse further release in the case. *See Williams v. Spears*, 814 So. 2d 1167, 1169 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D865a]. Holding an incompetent, non-restorable defendant in jail pursuant to § 903.0471 would amount to an indefinite detention because the defendant has no ability to demand a trial or resolve the case by plea while incompetent. *See* Fla. R. Crim. P. 3.210(a)(1).[18]

Rule 3.210(b)(3), on the other hand, does not result in a defendant's indefinite detention. It authorizes the trial court to hold a defendant in custody only until it determines the defendant's competency to proceed.

5. Here, unlike in Schofield and Paolercio, the Court is not holding Gray in custody in the same cases in which it found Gray to be non-restorable.

Both *Schofield* and *Paolercio* involved trial courts holding defendants in jail without bond in the same cases in which they previously found the defendants' competency to be non-restorable. Since Rule 3.210(b)(3) does not result in indefinite detention, it would seem that temporarily holding a defendant pursuant to Rule 3.210(b)(3) pending competency reevaluation in the same case as a prior non-restorability determination would comport with due process. There is no need for the Court to decide this question, however, because the Court is granting the Renewed Motion in all cases with prior restorability determinations. It is denying the Renewed Motion only in cases where there have been no competency findings. *See State v. Miranda,* 137 So. 3d 1133 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D693a].

B. Holding Gray in custody pursuant to Rule 3.210(b)(3) is reasonable.

Temporarily holding Gray in custody to facilitate his competency evaluations is reasonable. At every turn the Court has treated Gray's competency proceeding and release motion as an emergency. It commenced Gray's competency hearing a mere thirteen days after Gray was arrested, cleared its August 10th afternoon calendar on two days' notice to continue the hearing, and ordered expedited briefing and scheduled an expedited hearing on Gray's release motion. Gray's refusal to participate in the evaluations prompted the need to continue the hearing, and the expert evidence before the Court is that Gray' refusal was volitional and that Gray does not manifest any indicators of active mental illness. The Court will continue to treat the competency proceeding as an emergency.

CONCLUSION

For the foregoing reasons, Gray's Renewed Motion for Release is **GRANTED IN PART** and **DENIED IN PART**. Gray shall be released from custody in Case Numbers F21-18862, F21-20448, F22-4385, F23-10313 and F23-10364. The Court will continue to hold Gray in custody pursuant to Rule 3.210(b)(3) in Case Numbers F23-15025 and F23-15043.

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[1]*See In re Amendments to Fla. R. Crim. P. 3.212*, 324 So. 3d 457 (Fla. 2021) [46 Fla. L. Weekly S231a].

[2]Whenever the Court refers to "restorability," "non-restorability," or whether the defendant is "restorable" or "non-restorable," it is referring to whether "there is a substantial probability that the defendant will gain competency to proceed in the foreseeable future." Fla. R. Crim. P. 3.212(d).

[3]For clarity, this Order capitalizes Conditional Release when referring to the term-of-art form of release described in Rule 3.219, Florida Rules of Criminal Procedure and section 916.13, Florida Statutes, and refers generally to release conditions when referring to conditions imposed on pretrial release pursuant to Rules 3.212(c)(1) and (d).

[4]The parties would have to order the transcript for the precise reasoning. The Court vaguely recalls it being due to there being no way for Dr. Richardson to contact Gray to schedule an evaluation. The Court had previously granted Gray's motion for release one day after first appearance based on the incorrect belief that *Schofield* required immediate release, and Gray has a history of failing to appear and leaving care settings. Although the Court's granting the Renewed Motion as to F23-10313 and F23-10364 moots any issues relating to the timing of the competency hearing, anyone seeking to delve further into this component of the procedural history should at least read the May 23, 2023 and June 20, 2023 transcripts and potentially read the transcripts from June 12, 13, and 16, 2023.

[5]The Court added Gray's cases to its August 9, 2023 calendar solely to facilitate Miami-Dade Correction's bringing Gray to an empty courtroom so Drs. Richardson and Haji could attempt to evaluate (or, in Dr. Richardson's case, reevaluate) Gray in person. Thus, despite appearing on the docket, there will be no August 9, 2023 transcript.

[6]*See Miranda v. Reyes*, 359 So. 3d 381 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D635a].

[7]At the August 10, 2023 hearing, the court was under the mistaken impression that Gray's competency to proceed had been found to be non-restorable due both to mental illness and intellectual disability. The misunderstanding was because the Court's 2019 non-restorability finding was based in part on the August 28, 2019 report of Dr. Gustavo Fonte, which referenced a June 30, 2019 (apparently a scrivener's error) report from the South Florida State Hospital ("SFSH"). The July 1, 2019 SFSH report, in turn, indicated that Gray was not showing symptoms of psychosis or mood disturbance, but diagnosed Gray with mild intellectual disability. As the defense correctly clarified at the October 11, 2023 hearing, on August 28, 2019 the Court adjudicated Gray to be incompetent to proceed and found him to be non-restorable solely due to mental illness and not due to intellectual disability.

[8]Fla. Stat. § 916.301(2)(a)-(b).

[9]On October 17, 2023, Dr. Damus submitted a report, but he evaluated Gray for incompetency to proceed due to mental illness, not due to intellectual disability. Dr. Damus opines that Gray is incompetent due to mental illness and that "[t]he prognosis of Mr. Gray's restoration to competence is good." On October 18, 2023 the Court requested that Dr. Damus supplement his report to address intellectual disability as previously ordered.

[10]After the August 10th hearing, the Court also appointed Dr. Bodan to evaluate Gray for incompetency due to mental illness. Gray was uncooperative, but Dr. Bodan was able to opine that Gray is incompetent and restorable within three months. Defense counsel then contacted Dr. Bodan to advise her that Gray was found to be incompetent to proceed on multiple occasions in the past and hospitalized and that he had previously been diagnosed with mild intellectual disability. Based on this additional information, Dr. Bodan supplemented her report and opined that Gray was non-restorable.

[11]The vacating of the findings probably was unnecessary in light of the Court's ordering at the August 10th hearing evaluations of whether Gray was incompetent due to intellectual disability and indicating that it would reopen the competency hearing to determine whether the additional evaluations informed Dr. Richardson's and Dr. Haji's opinions.

[12]The parties are separately briefing whether (1) in addition to a common law presumption of incompetency, there is also a common law presumption of non-restorability, and (2) whether the Court may lawfully initiate civil contempt proceedings with a purge provision to facilitate Gray's cooperation with the competency evaluations.

[13]In Florida a defendant is presumed to be competent and has the initial burden of proving incompetency by a preponderance of the evidence. *See Brock v. State*, 69 So. 2d 344, 346 (Fla. 1954); *Brown v. State*, 245 So. 2d 68, 71 (Fla. 1971), *vacated in part on other grounds*, 408 U.S. 938 (1972); *King v. State*, 387 So. 2d 463, 464 (Fla. 1st DCA 1980); *Sallee v. State*, 244 So. 3d 1143, 1145 & n.1 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D817a] (also noting that older cases use the terms "sane" and "insane" to refer to competency to proceed). Where a court adjudicates a defendant incompetent to proceed, the presumption shifts, and the defendant is subsequently presumed in future proceedings to remain incompetent until a court adjudicates the defendant competent. *Dougherty v. State*, 149 So. 3d 672, 676 (Fla. 2014) [39 Fla. L. Weekly S636a] (citing *Corbin v. State*, 176 So. 435, 436 (1937)). The presumption applies even where the prior adjudication of incompetency occurred in a different proceeding or a different jurisdiction, *Eason v. State*, 421 So. 2d 35 (Fla. 3d DCA 1982), and shifts the burden of proving competency to the State. *King*, 387 So. 2d at 464.

[14]Rule 3.210(b) provides that the court "may order the defendant to be examined by no more than 3 experts," but the word "may" must be read in conjunction with sections 916.115(1) and 916.12(2), Florida Statutes. Section 916.115(1) requires the court to appoint no more than three experts to evaluate a defendant. Section 916.12(2) requires that a defendant be evaluated by no fewer than two experts before the court commits the defendant or takes other action (*i.e.*, adjudicating the defendant competent or incompetent), except that if one expert finds that the defendant is incompetent to proceed and the parties stipulate that finding, the court may commit the defendant or take other action (*i.e.*, independently adjudicating the defendant incompetent) without appointing additional experts. That is, Rule 3.210(b) and § 916.115(1) provide a ceiling and § 916.12(2) a floor regarding the number of experts who must evaluate a defendant.

[15]Rule 3.212(a) provides that the appointed experts "may" be called at the competency hearing, but once again the word "may" must be considered in context. The parties can stipulate to authorize the judge to decide the issue of competency based on the experts' written reports alone. *Dougherty*, 149 So. 3d at 677-78; *Auerbach v. State*, 273 So. 3d 134, 136-37 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D530b]. Even

with such a stipulation, however, "[a] requirement of a proper competency hearing is that the trial court actually review the expert's report." *McNeill v. State*, 318 So. 3d 636, 638 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1053a]; *accord Hernandez v. State*, 250 So. 3d 183, 186 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1408a] ("There is nothing in the record to suggest that the trial court reviewed or considered the expert's report, or made an independent assessment or finding of Hernandez's competency.").

[16]The Court does not decide in this Order whether a common law presumption of non-restorability exists. As mentioned earlier, to expedite resolution of the Renewed Motion, the Court ordered separate briefing of that issue in advance of the upcoming continued competency hearing.

[17]"Conditional Release" is a term-of-art form of releasing an incompetent defendant to receive appropriate outpatient care and treatment "in lieu of an involuntary commitment to [the Department of Children and Families ('DCF') for competency restoration]." Fla. Stat. 916.17(1). It is an alternative for defendants already committed to DCF under § 916.13. *Dept. of Children & Family Services v. Amaya*, 10 So. 3d 152, 155-56 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D632a]. To qualify for a Conditional Release plan, a defendant must, by definition, meet the criteria for involuntary hospitalization, including the requirement that the defendant's competency be restorable. *See Dept. of Children & Families v. State*, 201 So. 3d 78, 83 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2105a]; *Schofield*, 268 So. 3d at 895. Thus, the Court's prior finding that Gray was non-restorable disqualified him from being released on a Conditional Release plan.

[18]Due process aside, the Court does not see how § 903.0471 could provide even a statutory basis to hold an incompetent, non-restorable defendant in jail. Rule 3.212(d) requires a trial court finding an incompetent defendant to be non-restorable to "release" the defendant. A "released" defendant is not on "pretrial release." *See Griglen v. Ryan*, 138 So. 3d 1172, 1173 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1070a].

* * *

Administrative law—Department of Highway Safety and Motor Vehicles—Titles—Plaintiffs lack standing to demand administrative hearing on claims that are based on administrative holds that are temporary in nature because these holds are not final agency action—Plaintiffs failed to plead ultimate facts showing that agency procedure is an unadopted rule that goes beyond statutory requirements

BEST LIEN SERVICES, INC., et al., Plaintiffs, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-017228-CA-01. Section CA06. September 15, 2023. Charles Johnson, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

THIS CAUSE came before this Court on the Defendant's Motion to Dismiss (DE 23) Plaintiff's Amended Complaint (DE 15). Plaintiffs filed a Response to the Motion (DE 31), and Defendant filed a Reply (DE 32). The Court heard argument on the Motion at a specially set hearing on September 12, 2023. Upon review of the Motion, Response and Reply, and having considered the parties' arguments, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED, without prejudice, as specified below:

1. Defendant is entitled to dismissal of this action as to all claims by Best Lien Services, Inc., due to a lack of standing, as argued in Defendant's Motion.

2. Both Plaintiffs lack standing for the claims based on administrative holds that are temporary in nature because such holds are not final agency action and, thus, Plaintiffs lack standing to demand an administrative hearing as to those holds. Plaintiff Auto Clinic has, however, alleged standing as to the two vehicles for which titles were recalled by DHSMV to the extent that Plaintiff is seeking guidance on whether the Plaintiff has the right to a formal hearing before agency action.

3. Plaintiffs have not sufficiently pled ultimate facts showing that DHSMV Procedure TL-25 is an unadopted rule, that goes beyond the statutory requirements.

4. This Order of Dismissal is entered without prejudice to Plaintiff Auto Clinic filing a Second Amended Complaint consistent with this Order.

* * *

Criminal law—Driving under influence—Evidence—Positive test for cannabis metabolite—Reference to cannabis metabolite is excluded—State may move for reconsideration if it can establish, through expert testimony, that metabolite could have affected defendant at relevant time—Cannabis found in vehicle is excluded absent evidence that defendant could have recently used it or been under its effect

STATE OF FLORIDA, Plaintiff, v. JORDAN EUGENE MERLET, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2023 CT 004086 NC. September 14, 2023. Erika Nikla Quartermaine, Judge. Counsel: Trinidad Peraza, Assistant State Attorney, for Plaintiff. Claudia Rojas Sousa, for Defendant.

ORDER ON MOTIONS IN LIMINE

This matter came before the Court on the Motion in Limine to exclude reference to the Defendant's positive test for a cannabis metabolite and the Defendant's Motion in Limine to exclude reference to cannabis found in the vehicle. The Court has considered these motions and argument from counsel and has been otherwise advised in the premises.

It is hereby ORDERED and ADJUDGED that:

1. The Motion in Limine to exclude reference to the metabolite is GRANTED pursuant to section 90.402 of the Florida Statutes. This ruling is without prejudice for the State to move the Court for reconsideration if the State can establish, through expert testimony, that the metabolite could have affected the Defendant at the relevant time. *Estrich v. State,* 995 So. 2d 316 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2726b].

2. The Motion in Limine to exclude reference to the cannabis located in the vehicle is GRANTED. Absent evidence that the Defendant could have recently used cannabis or been under its effect (which appears to be disproved by the presence of a metabolite only), the State cannot meet the four prong test as set forth in *Varney v. State,* 18 Fla. L. Weekly Supp. 780a (Fla. 6th Cir. 2010).

* * *

Torts—Negligence—Nursing homes—Action by estate administrator alleging that decedent's rights under chapter 400 were violated by nursing home staff and such violations led to his untimely death—Defendant's motion for summary judgment is granted where plaintiff's designated nursing expert has been stricken, and plaintiff has no other designated experts to present testimony as to causation, violation of standard of care, or damages

CYNTHIA HUGHES, as Administrator Ad Litem, for the Estate of WILLIE OSCAR MARSHALL, JR., Plaintiff, v. 1507 SOUTH TUTTLE AVENUE OPERATIONS, LLC, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County, Civil Division. Case No. 2019-CA-1482. October 1, 2023. Stephen Walker, Judge. Counsel: Mark W. Lord, Sarasota, for Plaintiff. Kimberly A. Potter Richardson, Dias & Associates, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S SECOND AMENDED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on *Defendant's Second Amended Motion for Summary Judgment and Plaintiff's Response to Defendant's Second Amended Motion for Summary Judgment,* heard by the Court on September 14, 2023, and the Court having heard argument of Counsel, reviewed the Motions and/or Responses by counsel, and being otherwise advised in the premises,

The Court makes the following **FINDINGS:**

1. In Plaintiff's Second Amended Complaint, Plaintiff alleged that the resident's rights under Chapter 400, Florida Statutes, of the decedent, WILLIE MARSHALL, JR., were violated by Defendant and such violations led to WILLIE MARSHALL, JR.'s untimely death on January 1, 2017.

2. On June 2, 2023, this Court struck Plaintiff's only designated expert witness, Michelle Glower, nursing expert, thereby prohibiting her from providing any testimony in the trial of this cause.

3. On June 12, 2023, Defendant filed its "Defendant's Second Amended Motion for Summary Judgment", in which Defendant alleged that there was no credible record evidence to establish a genuine issue of material fact as to two elements of Plaintiff's cause of action for negligence namely—causation and damages.

4. The Court heard oral argument by counsel for both parties on September 14, 2023, as to Defendant's Second Amended Motion for Summary Judgment.

5. As will be set forth below, the Court finds there is no credible record evidence to establish a causal connection to any alleged deviation by Defendant in its provision of care and services to WILLIE MARSHALL, JR. while was a resident of Defendant's nursing home facility.

6. Florida appellate courts have held that "[g]enerally, expert testimony is required to establish the standard of care prevalent in a particular medical field." *Moisan v. Frank K. Kriz, Jr., M.D., P.A.,* 531 So. 2d 398, 399 (Fla. 2d DCA 1988).

7. Florida law also requires that causation in a negligence action be established by the "more likely than not" standard and requires "proof that the negligence probably caused the plaintiff's injury". *Gooding v. Univ. Hosp. Bld., Inc.,* 445 So. 2d 1015, 1018 (Fla. 1984) (plaintiff failed to meet the required burden by presenting evidence of a greater than even chance of survival in the absence of negligence); *Chaskes v. Gutierrez,* 116 So. 3d 479, 487 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1082a] (finding that although the plaintiff's experts' testimony might have supported the conclusion that within a reasonable degree of medical certainty, the defendants owed a duty to the plaintiff and breached that duty, it could not support the conclusion that this "breach" was the proximate cause of the injury to the plaintiff).

8. With respect to nursing home negligence under Chapter 400, Florida Statutes, a nursing expert is required to establish the prevailing standard of care for a similarly situated nursing professional. See, e.g., Fla. Stat. §400.0236. That section provides:

> The prevailing professional standard of care for a nurse is that level of care, skill, and treatment which in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar nurses.

Fla. Stat. §400.0236.

9. Florida law also requires a medical expert testify as to causation in nursing home negligence matters. See, e.g., *Green v. Flewelling*, 366 So. 2d 777 (Fla. 2d DCA 1978).

10. Plaintiff offers no evidence to the Court that supports her claim that WILLIE MARSHALL, JR.'s injuries were proximately caused by the negligence of Defendant's nursing home facility staff.

11. Importantly, given that Ms. Glower was stricken as an expert witness, any affidavit to which she had previously attested, would be inadmissible at the trial of this cause. *See generally Fortune v. Fortune*, 61 So. 3d 441 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D869a]; *Doug Sears Consulting, Inc. v. ATS Servs., Inc.,* 752 So. 2d 668 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D341a]; *BCS v. Wise,* 910 So. 2d 871 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1886b]; *Spurdute v. Household Realty Corp.*, 585 So. 2d 1168 (Fla. 4th DCA 1991).

12. Plaintiff has no designated experts to present testimony as to causation and damage, two required elements to establish a claim for negligence in Florida.

13. Plaintiff fails to present credible record evidence to the Court to establish medical causation in this matter; similarly, Plaintiff fails to present credible record evidence as to a violation of the standard of care by Defendant's nursing home facility staff.

14. Finally, Plaintiff has not proffered countervailing evidence by form of affidavit or otherwise to show a genuine issue of material fact to be presented to a jury.

In light of the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Second Amended Motion for Summary Judgment is hereby **GRANTED.**

2. Final judgment is entered for Defendant, 1507 SOUTH TUTTLE OPERATIONS, LLC, and against Plaintiff, CYNTHIA HUGHES, as Administrator Ad Litem, for the Estate of WILLIE OSCAR MARSHALL, JR. The Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees.

3. Plaintiff, CYNTHIA HUGHES, as Administrator Ad Litem, for the Estate of WILLIE OSCAR MARSHALL, JR., shall take nothing by this action and Defendant, 1507 SOUTH TUTTLE OPERATIONS, LLC, shall go hence without day.

* * *

Dissolution of marriage—Contempt—Nonpayment of child support—Attorney's fees—Timeliness of motion—Former wife's motion for award of fees incurred in enforcing child support obligation is time-barred where, although magistrate recommended that court reserve jurisdiction to address issue of attorney's fees requested by former wife, former wife waited over four years to file motion for award of fees

IN RE: THE FORMER MARRIAGE OF: TERESA R. TRAVIS., Petitioner, and LESLEY W. TRAVIS, Respondent. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Family Law Division. Case No. 16-DR-017576. Division T. August 17, 2023. James S. Moody III, Judge. Philip S. Wartenberg, General Magistrate. Counsel: Joshua A. Law, Tampa, for Petitioner. L.W.T., Plant City, Respondent.

ORDER CONFIRMING RECOMMENDATIONS OF GENERAL MAGISTRATE

THIS CAUSE came before the Court this date for consideration upon the Findings and Recommended Order of General Magistrate of August 16th, 2023, and the Court having examined the Court file and being otherwise fully advised in the premises, it is, thereupon,

ORDERED AND ADJUDGED:

1. The foregoing Recommended Order of the General Magistrate dated August 16th, 2023, is hereby approved, ratified, confirmed, and adopted as the Order of this Court, as though set forth herein in full, and all parties shall be governed thereby and shall comply with the same.

2. All provisions of the prior orders and judgments of the Court shall remain in full force and effect, and the Court reserves and retains jurisdiction over the parties and subject matter of this proceeding.

FINDINGS AND RECOMMENDED ORDER OF GENERAL MAGISTRATE and ORDER CONFIRMING RECOMMENDATION OF GENERAL MAGISTRATE

(Summarily Denying, with Prejudice, Petitioner's Motion for Award of Attorney Fees and Sanctions, dated 08/02/2023)

THIS CAUSE has come before the undersigned Magistrate, without a hearing, pursuant to the "Motion for Award of Attorney Fees and Sanctions" filed by the Petitioner on August 2nd, 2023; and upon the Petitioner's subsequent scheduling request for an evidentiary hearing on same. The undersigned General Magistrate has authored this Recommended Order.

The undersigned has reviewed the entire Court file, including the underlying enforcement proceeding that the Petitioner's Motion stems from; as well as the Report and Recommendation and subsequent Order Confirming Report of General Magistrate entered by the Court on May 29, 2019. Being otherwise duly advised in the premises, the

undersigned makes the following findings of fact, conclusions of law, and recommends the following order for immediate entry:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This Court has continuing jurisdiction over the parties and the subject matter of this proceeding.

2. This case was first initiated by the Petitioner/Former Wife on November 17, 2016, just a few days shy of the sixth anniversary of the parties' marriage date of November 20, 2010. A Final Judgment of Dissolution of Marriage was soon entered by this Court on June 9th, 2017, dissolving the parties' almost-six-year marriage. An Amended Final Judgment was entered that same day. This Amended Final Judgment ratified a Marital Settlement Agreement and Parenting Plan that had been entered into by the parties on April 24th, 2017. The Former Wife's present counsel of record was also her counsel of record during that dissolution proceeding.

3. On February 4th, 2019, the Former Wife filed her first "Motion for Contempt and Enforcement of Final Judgment and Settlement Agreement and Parenting Plan." Therein, she alleged that the Former Husband had willfully failed to comply with the Amended Final Judgment by failing to pay $17,24.66 in court-ordered child support to the Former Wife. She further alleged that the Former Husband "is in direct contempt of the Amended Final Judgment, and Settlement Agreement." She requested entry of an Order by this Court consistent with the ten (10) separate paragraph "Wherefore" section setting forth the relief she was requesting. Amongst those requests was a specific request for an award of her *"legal and attorney fees and costs associated with seeking the Motion for Contempt and compliance with the Amended Final Judgment as the prevailing party within [thirty] days."* (Emphasis added.)

4. The Motion was duly noticed for an evidentiary hearing on May 1st, 2019, with this GM-1 division's prior General Magistrate, the Hon. Mary Lou Cuellar Stilo.

5. An Amended Motion for Contempt was later filed by Former Wife on April 18th, 2019, to request additional enforcement relief in advance of the May 1st hearing. Notably, the request for an award of attorney's fees and costs remained the same.

6. Following the hearing on May 1st, 2019, Magistrate Cuellar Stilo issued a Report and Recommended Order that acknowledged that a stipulation had been reached by the parties during the hearing, for the entry of an Income Withholding Order for purposes of enforcing the Former Husband's child support obligation. Of key importance, no other factual findings were made and no other relief was granted by the Court as to any of the other allegations or requests made by the Former Wife in her Amended Motion. However, the Magistrate's recommendation at that time was for the Court to reserve jurisdiction "to address the issue of attorney's fees." The Court's Order ratifying the Magistrate's Report was entered on May 29th, 2019.

7. The Court's Order dated May 29th, 2019, was not appealed nor was it challenged in any way by either party.

8. Subsequently, ***over four (4) full years elapsed*** before Former Wife's counsel made his first attempt to address this reservation of fees made by the Court in its 2019 Order. That first attempt, occurring on or around May 9th, 2023, involved the setting of a hearing with the undersigned Magistrate for May 24th, 2023, on the matter of "Reserves on Enforcement and Modification from Recommended Order (sic)".

9. Shortly thereafter, on May 12th, 2023, the undersigned Magistrate, *sua sponte,* cancelled this May 24th hearing due to "no underlying motion [having] been filed in this proceeding to properly reopen this case." The undersigned further concluded that "it would be prejudicial to the Respondent to have to proceed to a hearing without advance notice (via motion) of the specific issue(s) to be raised at said hearing."

10. Roughly three (3) months after that first attempt, on August 2nd, 2023, Former Wife's counsel pursued his second attempt to have the Court take up the matter of this fees reservation, by filing the instant "Motion for Award of Attorney Fees and Sanctions."

11. Former Wife's Motion contains no mention whatsoever as to why the Former Wife waited for over four years to pursue this award. It additionally contains no mention of the specific amount that Former Wife now seeks to have awarded to her; and it does not include any kind of Affidavit from either the Former Wife or her counsel as to how much is being specifically sought.

12. There is presently no family law rule of procedure that specifically governs fee proceedings.[1] However, requests for attorney fees and costs in family law matters still must be made in a *timely* manner. Appellate case law informs us on what "timeliness" means in this context. In the case of *Harvey v. Harvey,* 716 So.2d 847 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2035a], the Fourth District affirmed a lower court's dismissal of a party's motion for attorney's fees and costs as untimely. There, the lower court's final judgment of modification contained a reservation to rule later on the former wife's claim for attorney's fees and costs. The former wife had waited until nine (9) months later to file her motion for fee and costs. She then waited an additional five (5) months to move to set the hearing on her motion. In affirming the lower court's denial of the former wife's motion for seeking fees and costs "in a timely manner," the Fourth District noted that "[n]either the [former] wife nor her counsel gave any explanation for the delay." *Id.* at 848.

13. Later, in the case of *McGlothin v. Hughes,* 751 So.2d 677 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D253b], the Fourth District cited to *Harvey* in denying a party's petition for writ of certiorari that was brought following a lower court's denial of a postjudgment fees motion in a family law proceeding. In that case, too, the lower court had entered a fees reservation to determine entitlement to, and the amount of, attorney fees by way of a subsequent motion. There, the former wife did not file her motion for attorney's fees until roughly five (5) months after the final judgment of modification had been entered. Following that, the former wife's counsel withdrew from the case a couple of months later, with no mention in either the motion to withdraw or the order granting same regarding the still-unresolved reservation on the attorney's fees matter. The former wife finally requested a ruling from the judge on that reserved fees matter roughly three (3) years after the reservation had been made. The Fourth District denied the former wife's petition on appeal, holding that "[w]e find no departure from the essential requirements of law in the conclusion of the [lower] court that the claim was stale and barred by laches." *Id*. at 678.

14. In the instant case, the Former Wife's delay in bringing her Motion has not been roughly a year (as in *Harvey*) or roughly three years (as in *McGlothin*), but rather, has been ***over four years.*** And, similar to the *Harvey* case, there was no effort by Former Wife or her counsel to provide an explanation for the delay in her Motion to the Court.

15. It bears notice that the Former Wife has had the same counsel the entire time—this being the same counsel who was actually present at the May 1st, 2019 hearing. And the Order from that hearing bears out the fact that the Former Wife chose during the hearing to stipulate in open court to the entry of an Income Withholding Order, while ostensibly abandoning all of the other relief that she had requested in her Amended Motion for Contempt. It is somewhat perplexing, and also troubling, to the undersigned Magistrate that the Former Wife was even able to successfully persuade the prior Magistrate to provide her a reservation on fees, when Former Wife ostensibly could have just gone forward and made the request right then and there at the May

1st hearing for a ruling on her fees and costs request (or certainly at least a ruling as to her entitlement to an award of fees and costs). But ultimately, the reservation was made, and to be clear, this was a reservation made to the Former Wife's clear benefit since she, as the moving party, chose for whatever reason to not present that issue for resolution to the prior Magistrate on May 1st, 2019. To be clear, though, the Magistrate's Report from the May 2019 hearing is devoid of any explanation as to why the Former Wife was being relieved of her obligation as the moving party to have presented to the Court *at that time* her case as to why the Court should grant to her an award of fees, costs and/or other sanctions relative to her Amended Motion for Contempt; and why it was that the matter was being deferred for another day.

16. Irrespective of the fact that the Former Wife very well could have (and probably *should have*) presented the fees and costs issue to the Court for resolution in May 2019, there is simply no excuse for this matter to have then been delayed **for over four years.** It has quite obviously been delayed to a point where the Magistrate who initially heard the case in May 2019 is no longer even the presiding Magistrate in this case. As the successor Magistrate, the undersigned is thus being asked by Former Wife to evaluate essentially "from scratch" the merits of the Former Wife's fees and costs claim, and sanctions claim for that matter, when the Former Wife already had her day in court on that matter back in May 2019. The unreasonable length of time for Former Wife to finally bring her request, and the fact that the undersigned did not ever hear the underlying contempt matter in 2019, are both factors that support the conclusion that Former Wife should be deemed time-barred in bringing her instant Motion at this time.

17. Based on the foregoing analysis and considerations, the undersigned finds that the Former Wife's fees and costs claim for fees and costs relating to her 2019 Amended Motion for Contempt, is now stale as a matter of law, and is time-barred by laches. This finding is wholly consistent with the *Harvey* and *McGlothin* cases, cited hereinabove, whose reported facts were not even quite as egregious as the facts in this particular case as far as the amount of delay that has occurred. Accordingly, the Court must deny the Former Wife's Motion. Further, this denial should be made with prejudice, as the undersigned finds that the Motion is not capable of being amended and refiled by the Petitioner so as to remedy its legal deficiencies.

RECOMMENDED ORDER

Based on the preceding findings of fact, the undersigned Magistrate recommends that the Court immediately enter an Order as follows:

1. The Petitioner's "Motion for Award of Attorney Fees and Sanctions, dated August 2nd, 2023, is hereupon **DENIED** with prejudice. No hearings will be scheduled on same.

2. All provisions of the prior orders and judgments of the Court shall remain in full force and effect, and tte Court reserves and retains jurisdiction over the parties and subject matter of this proceeding.

WHEREFORE, the undersigned Magistrate files this Recommended Order with the Court and recommends the entry of an Order confirming same.

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[1]At one point in time, Rule 1.525 of the Florida Rules of Civil Procedure was applicable to family law matters in creating a 30-day deadline for the filing of fee motions after entry of a final judgment in a family law case. However, in 2005, a specific family law rule (Rule 12.525) was promulgated to supersede Rule 1.525 by merely stating that Rule 1.525 did not apply in family law proceedings. In 2017, when the family law rules were amended to be a stand-alone set of rules to govern family law proceedings, Rule 12.525 was deleted, as it had become superfluous. *See Juhl v. Juhl,* 328 So.3d 1031 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1837a].

* * *

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COUNTY COURTS

Limitation of actions—Contracts—Quasi-contracts—Open account—Unjust enrichment—Action for unpaid anesthesia bill—Statute of limitations for both open account and unjust enrichment causes of action for unpaid medical bill began to run on day after due date for first bill rendered by medical provider—Although limitations period for open account count typically begins to run upon completion of services, and period for unjust enrichment count typically begins to run at time benefit is conferred, defendant's use of insurance plan evinces agreement for payment to become due at later date after insurer made its contribution—Further, statute of limitations was tolled by defendant's absence from state for more than two days during limitations period and by insurer's partial payment

NORTH FLORIDA ANESTHESIA CONSULTANTS, INC., Plaintiff, v. ERICA PICKETT, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2022-SC-016773-XXXX-MA. June 20, 2023. Robin Lanigan, Judge. Counsel: Evan Kidd, Consuegra & Duffy P.L.L.C., Tampa, for Plaintiff. Annie York Rodriguez, Jacksonville, for Defendant.

FINAL SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF

THIS MATTER was heard upon Plaintiff's Motion for Summary Disposition against Defendant on the 24th day of April, 2023 and, the Court having heard arguments of counsel, reviewed the filings, having considered same and being duly advised in the premises, makes the following findings of fact in this matter.

1. On July 29, 2022, the Plainitff in this matter filed a two-count Complaint against the Defendant for non-payment of an anesthesia bill. The Causes of Action stated were "Open Account" and Unjust Enrichment".

2. The Defendant failed to appear at the Pre-Trial Conference on September 15, 2022 and a Default was entered against the Defendant.

3. The following day, Counsel for the Defendant filed a Notice of Appearance and an Answer and Affirmative Defenses alleging only two affirmative defeneses: Equitable Estoppel and Statute of Limitations. The Court finds neither of these Defeneses to be valid in this case.

4. Counsel for Defendant filed a Motion to Set Aside Default on September 28, 2022, which was unopposed by the Plaintiff and accordingly, the Court entered an Order Setting Aside the Default on October 6, 2022.

5. Plaintiff filed a Motion for Summary Disposition on March 15, 2023 along with affidavits supporting Its position.

6. The Defendant filed a Motion for Summary Disposition and an Affidavit in Opposition to Plaintiff's Motion for Summary Disposition on April 6, 2023 along with Its own supporting affidavit.

7. Plaintiff filed a Motion to Amend Its Complaint on April 8, 2023 and a Notice of Filing Supplemental Authority on April 24, 2023. and The Defendant filed a Memorandum in Opposition to Plaintiff's Motion for Leave to Amend on April 21, 2023 but the Plaintiff orally withdrew the Motion for Leave to amend at the hearing on this matter and so these filings are moot.

8. Plaintiff and Defendants' Motions for Summary Disposition were heard on April 24, 2023.

9. At the Summary Disposition hearing and in their filings submitted prior to (and after) the hearing, the Defendant's position was that the statute of limitations for both causes of action stated began to run on the date that the anesthesia services were rendered to the Defendant. Conversely, Plaintiff's position throughout the case was that the statute of limitations in this matter began to run on the date that the Defendant failed to pay the amount due and owing within the statement rendered to the Defendant.

10. The Court finds that the Plainitff sufficiently stated a cause of action for Open Account, along with Unjust Enrichment and that the Statue of Limitations for both causes of Action in this matter began to run on September 30, 2018, the day after the due date of the first bill rendered by Plaintiff to Defendant.

11. As to Plaintiff's Open Account Count: typically, the Statue of Limitations begins to run on an Open Account, upon completion of services or labor rendered, or upon completion of sale for any goods sold. However, the parties can agree to a later date. *Hawkins v. Barnes*, 661 So. 2d 1271 (Fla. Dist. Ct. App. 1995) [20 Fla. L. Weekly D2403a] The contractual relationship between Plaintiff and the Defendant's insurance company dictates that the insurance company receive the bill and apply coverage before the patient may be billed for any amount remaining due. The Defendant's exercise of her insurance plan evidences an agreement for payment to become due at a later date, said date being after her insurance plan makes their contribution. Additionally, it is also clear to this Court that if the Defendant did, in fact, have insurance, the completion of services rendered wouldn't be complete until the insurance company either paid or denied coverage. Accordingly, the contention that the statute of limitations in this matter would run on the treatment date is not persausive.

12. As to Plaintiff's Unjust Enrichment Count: "The statute of limitations for an unjust enrichment claim begins to run at the time the alleged benefit is conferred and received by the defendant." *Flatirons Bank v. Alan W. Steinberg Ltd. P'ship*, 233 So.3d 1207, 1213 (Fla. 3rd DCA 2017) [42 Fla. L. Weekly D2560b]. The Court's above analysis in relation to Open Account applies equally to a claim for unjust enrichment as in this case, the benefit conferred to the Defendant would not end on the treatment date as part of the continued obligation of the Plaintiff would be to bill the patient's insurance company.

13. As a matter of clarity, even if the Court found the Defendant's argument persuasive, in this case, the statute of limitations was tolled, on both claims, by the absence of the Defendant from the state under Fla. Stat. § 95.051. The initial filing of this case was two days beyond four years from the treatment date in this matter, and via her interrogatory responses, the Defendant admitted to having been absent from the state for a greater period of time than two days, during the relevant four year period.

14. Finally, even if the Defendant had not been absent from the state during the aforementioned time period, the partial payment by the insurance company on the account would have tolled the statute of limitations in this matter at the very least to the date that the partial payment was made.

Accordingly, for all of the foregoing reasons, it is hereby

ORDERED AND ADJUDGED:

Therefore, Plaintiff's Motion for Summary Disposition is **GRANTED** and Defendant's Motion For Summary Disposition is **DENIED.** The Court reserves jurisidciton to determine damages.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—Breath test results are inadmissible where officer stepped outside of police vehicle holding defendant for one and a half minutes during twenty-minute observation period, and officer was not in position to maintain close and continuous observation of defendant from outside vehicle

STATE OF FLORIDA, v. ROBERT JAMES BARCUS, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. A779YKE. UCN Case No. 522023CT000415000APC. October 12, 2023. Diane Croff, Judge. Counsel: J. Kevin

Hayslett, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE comes before the Court on the Defendant's Motion to Suppress. On October 11, 2023, the Court conducted a hearing on the motion. The Court, having considered the testimony of witnesses, argument of counsel, and relevant law, makes the following findings of fact and conclusion of law:

1. On January 4, 2023, the Defendant was placed under arrest for DUI and transported to the Central Breath Testing facility where he provided breath samples of .183/.186.

2. The twenty-minute observation period required by Florida Administrative Code Rule 11D-8.007(3) (2022) began at 2:20 a.m. and the breath test was administered at 2:49 a.m.

3. During this observation period, at approximately 2:31 a.m., the arresting officer stepped out of his cruiser for approximately a minute and a half, during which time the Defendant was left alone in the vehicle with all the doors shut and windows rolled up.

4. Once the officer stepped out of his vehicle, he was no longer in a position to maintain close and continuous observation of the Defendant and it would have been impossible for him to have detected any belching or regurgitation during this time.

5. Because the Defendant was not under proper observation for a portion of the required twenty minutes, the State is unable to prove substantial compliance with Rule 11D-8007(3) and the breath test results are therefore inadmissible.

WHEREFORE, it is ordered and adjudged that the Defendant's motion to suppress is hereby GRANTED and the State is prohibited from introducing the results of the breath test.

* * *

Insurance—Personal injury protection—Coverage—Home medical equipment—Medical provider that both ordered and sold chiropractic pillow and heating pad to insured and did not hold itself out to public as company providing home medical equipment was not required to have home medical equipment license—Alleged licensing deficiency does not bar provider's claim for equipment

MARGATE CHIROPRACTIC CLINIC, INC., Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-000744-SP-24. Section MB01. October 2, 2023. Stephanie Silver, Judge. Counsel: Ryan Peterson, for Plaintiff. Ivan Asencion, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND MOTION FOR F.S. 57.105 SANCTIONS

In this claim for personal injury protection benefits, the Defendant claims that Plaintiff's sale of a chiropractic pillow and a heating pad to the patient violated the law. Defendant claims that Plaintiff needed to have a Home Medical Equipment License to sell these items as spelled out in Part VII of Chapter 400, found in Fla. Stat. 400.92 (2014), et seq. First, the Defendant claims that the failure to have a home medical equipment license means that none of the services should be paid, including the physical therapies. The Defendant also reasons that even if the other services may be paid, there is still a licensing deficiency regarding the pillow and hot pad, and those services should not be paid.

The Court rejects any allegations of fraud in this case. There is no allegation herein that the Plaintiff did not render the services provided. Rather, the only contention is whether the pillow prescribed to the patient requires the insurance company to pay the plaintiff. The Defendant cites to *Allstate v. Vizcay*, to support its position. 826 F.3d 1326 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C435a]. In that case, the insurance company contended that the medical provider was not reviewing any of the billing statements and had failed in her duties as a medical provider. In this case, there is nothing similar.

The Court now analyzes whether the prescription and delivery of a chiropractic pillow and a heating pad require the Plaintiff to have an HME license. The Plaintiff argues that these two items are not for sale to the public generally, but only to specific patients of the medical facility incidental to the chiropractic treatment provided upon medical need, and so no license is required.

The Court must look to the words of the statute, as the Legislature's intent must be determined primarily from the language of the statute. See *e.g., Aetna Cas. Sur. Co. v. Huntington Nat'l Bank*, 609 So.2d 1315, 1317 (Fla. 1992). Accordingly, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Modder v. American Nat'l Life Ins. Co.*, 688 So.2d 330, 333 (Fla. 1997) [22 Fla. L. Weekly S87a] (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)).

Here, the statute suggests who is required to have a license. The statute says that "Any person or entity that holds itself out to the public as providing home medical equipment and services or accepts physician orders for home medical equipment and services is subject to licensure under this part."

The Defendant reasons that the Plaintiff "accepts physician orders for home medical equipment". However, this argument is unavailing. Here, the Plaintiff is the entity both ordering and selling the items. The physician who prescribed the pillow and hot pad, Dr. Barry Goldsmith, DC, is the one who the Defendant admits is the owner of the facility. There is no evidence that other physicians order this equipment from the Plaintiff and the Plaintiff provides the equipment to their patients.

Next, the Defendant reasons that the Plaintiff "holds itself out to the public as providing home medical equipment" by selling these items to the patient. The Defendant has provided no advertisements, no internet webpages, and no evidence that the Plaintiff has ever publicly held itself out as a purveyor in medical equipment to the public or advertised itself as such. The Defendant suggests that holding oneself out to the public is the same as selling something, regardless of advertising or not. However, this argument is belied by the caselaw.

The First District Court of Appeal has ruled that just because one provides something for sale does not necessarily mean that one holds oneself out to the public. In *Associated Home Health Ind. of Fla. v. AHCA*, 677 So.2d 60 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1603b], the court discussed a very similar medical licensing chapter, 400.462(6) (1995). That statute suggests that people who provide medical services in a private residence must have a "home health license." That court ruled that just because medical services were provided in a home does not mean a home health provider license is required. The Court found that the statute only applied to "those providing home health services who hold themselves out to the public as licensed home health agency personnel. . ." So there is clearly a difference between just providing something commercially to a customer and holding oneself out to the public.

In *McClash v. DPBR*, 798 So.2d 775 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2070c], the DPBR attempted to discipline a property owner claiming that he was subject to Chapter 509 regulations regarding public lodgings. The Court held that the DPBR failed to establish that "duplexes are advertised or held out to the public as a place regularly rented to guests," suggesting that advertisement is a factor in holding out to the public.

This language "held out to the public" is also described in cases involving whether a transportation company is a common carrier or

not. The common carrier "holds himself out to the public as engaged in the business of transporting persons or property. . . offering his services to the public generally" and will accept anyone from the public, whereas the private carrier may transport people privately but does not accept just anyone. See i.e., *Ruke Transport Line, Inc. v. Green*, 156 So.2d 176 (Fla. 1st DCA 1963).

Here, there has been no evidence submitted by the Defendant that Plaintiff either advertised to the public or held itself out as a company that it was providing home medical equipment, including pillows, heating pads, or any other home medical equipment. Further, there has been no evidence filed by the Defendant that Plaintiff would sell these items to any random person just walking in off of the street, or to members of the public generally. The only evidence presented by the Defendant is that the Plaintiff sold these items to this specific patient on this specific occasion, which is simply not enough to demonstrate that the Plaintiff requires a home medical equipment license. As such, the Court must respectfully DENY the Defendant's Motion.

The Court will consider a Motion for Reconsideration.

* * *

Insurance—Personal injury protection—Attorney's fees—Prevailing party—Confession of judgment—Under *lex loci contractus rule*, medical provider's claim to attorney's fees following insurer's confession of judgment is governed by New York law, the state in which parties formed insurance contract—To fall within public policy exception of Florida's choice of law provision, there must be a Florida citizen in need of protection and a paramount Florida public policy, and the insurer must be on reasonable notice that the insured is a Florida citizen; and none of these factors is satisfied in instant case—Even if Florida law prevailed, plaintiff would not be entitled to attorney's fees under chapter 627 because section 627.401(2) states that chapter 627 does not apply to policies not issued for delivery in state or delivered in state

MANUEL V. FEIJOO, M.D., et al., Plaintiff, v. GARRISON PROPERTY AND CASUALTY INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-008555-SP-25. Section CG04. February 24, 2021. Scott M. Janowitz, Judge. Counsel: Kenneth B. Schurr, Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Stephen Mellor, Roig Lawyers, Deerfield Beach, for Defendant.

ORDER GRANTING PLAINTIFF ATTORNEY'S FEES UNDER NEW YORK LAW

THIS CAUSE comes before the Court on the Plaintiff's Motion for Fees and Defendant's Objection to Plaintiff's Motion for Fees. Having reviewed the court file, heard argument of the parties, and been advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

Naattamon Phochachan ("Insured") obtained an automobile policy from Garrison Property and Casualty Ins. Co. ("Defendant") which was in effect between August 15, 2014 and February 15, 2015. Notably, the policy of insurance contains the following:

1. The address for the Insured is listed as [Editor's note: Address redacted] , Watertown, NY 13601-4473;
2. ID cards stating that it is a New York State Insurance Auto ID card and that the Defendant is an authorized New York insurer issuing a policy in compliance with New York law;
3. The principal garaging address is in Watertown, New York;
4. Numerous references and required disclosures of New York law;
5. Policy amendments because the policy is applying New York law; and
6. Provision that uninsured motorist coverage only applies in the State of New York.

Notably, the policy contains no reference to Florida, though the policy does cover accidents and loses throughout the United States and its territories.

On January 1, 2015, the Insured was injured in an auto accident and sought medical care from Plaintiff under an assignment of benefits on January 8, 2015, and again on March 24, 2015. Plaintiff submitted its bill to Defendant. Defendant did not pay the full bill. On May 26, 2016, Plaintiff sent a pre-suit demand letter to Defendant pursuant to F. S. §627.736(10). Ultimately, the instant case ensued with a Complaint on September 13, 2016 and an Amended Complaint on December 21, 2016. Notably, Plaintiff alleged that the policy at issue was issued by the Defendant in Miami, FL. In its Answer & Affirmative Defenses, Defendant basically denied all material allegations and stated that reimbursement was property made under the applicable New York law. Underscoring the affirmative defenses was a *lex loci contractus* defense, that the jurisdiction where the contract was executed governs the rights and liabilities of the parties. *See Sturiano v. Brooks,* 523 So.2d 1126 (Fla.1988); *see also* Restatement (Second) of Conflicts of Law Sec. 188 (1971).

After several years of litigation, Defendant abandoned all of its defenses and served a 'Notice of Confession of Judgment' on December 20, 2018, in which it specifically stated that it was confessing judgment for all unpaid PIP benefits which Plaintiff was claiming. In confessing judgment, Defendant issued a payment to Plaintiff for all of the unpaid PIP benefits due and owing which Defendant refused to pay prior to the initiation of this action, plus accrued interest.

Plaintiff has moved for attorney's fees based on the confession of judgment. Defendant does not dispute Plaintiff's request for attorney's fees but argues that the law regarding attorney's fees for this case is governed by New York, not Florida. The Court agrees with the Defendant.

Defendant never sought or obtained summary judgment on any of its defenses, including its defense alleging the existence of a New York policy. Defendant never *proved* that the subject policy was a New York Policy; Defendant never *proved* that the policy it issued was not required to conform with Florida law as alleged by Plaintiff in the pleadings; Defendant never *proved* that the insured patient did not reside in Florida. Plaintiff argues that since Defendant abandoned its defenses and paid the Plaintiff's claim, that Plaintiff's *lex loci contractus* was waived and abandoned.

The Court finds that the Plaintiff is conflating "confession of judgment" with a default or "motion to dismiss." Fla. Stat. §627.428 provides for the award of attorney's fees to an insured "upon the rendition of a judgment" against an insurer in an action between the insurer and its insured. Traditionally, this statute has been applied in first-party cases between an insured and its insurer where judgment is actually entered against the insurer. *See Ivey v. Allstate Ins. Co.,* 774 So.2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a]. "By using the legal fiction of a 'confession of judgment,' our supreme court extended the statute's application" to cases in which the insurer settles or pays a disputed claim before rendition of judgment. *Basik Exports & Imports, Inc. v. Preferred Nat'l Ins. Co.,* 911 So.2d 291, 293 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2359a] (citing *Wollard v. Lloyd's & Cos. of Lloyd's,* 439 So.2d 217 (Fla.1983)). While a confession of judgment serves as a formal notice that the defendant is declining to defend its position and therefore it is liable for attorney's fees and costs, it does not serve as an admission as to all facts and allegations in the complaint.[1] The Court need not get into the decision as to why the Defendant confessed judgment, whether it believe it would lose under Florida law, NY law, or both. While *Wollard* is cited as the sentinel confession of judgment case in insurance, it is the rationale that is most important here. "Requiring the plaintiff to continue litigation in spite of an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, fails to protect any

interest—the insured's, the insurer's or the public's—and discourages any attempt at settlement." *Wollard* at 218. Simply put, Defendant confessed judgment and admitted it owed damages and an entitlement to fees but did not make an admission as to which legal standard fees were owed.

The parties, with no indication either are Florida residents, contracted under a New York contract. The Florida Supreme Court rejected the most significant relationship test in favor of the certainty of the *lex loci contractus* rule for insurance contract disputes. *State Farm Mut. v. Roach,* 945 So.2d 1160, 1165 (Fla. 2006) [31 Fla. L. Weekly S840b].To fall within the public policy exception of Florida's choice of law provision, there must be a Florida citizen in need of protection, a paramount Florida public policy, and the insurer must be on reasonable notice that the insured is a Florida citizen. *Id.* The Plaintiff cannot satisfy **any** of those factors, much less all three.

Regardless, even if the Court were to adopt Plaintiff's argument in full that Florida law prevails, Plaintiff would still not be entitled to attorney's fees. Fla. Stat. § 627.401 (2) states that Fla. Stat. 627 does not apply to "[p]olicies or contracts not issued for delivery in this state nor delivered in this state. . ." *Id.* "A court's determination of the meaning of a statute begins with the language of the statute." *Halifax Hosp. Med. Ctr. v. State,* 278 So. 3d 545, 547 (Fla. 2019) [44 Fla. L. Weekly S149a] (citing *Lopez v. Hall,* 233 So. 3d 451, 453 (Fla. 2018) [43 Fla. L. Weekly S11a]). If the language of the statute is clear, "the statute is given its plain meaning, and the court does not 'look behind the statute's plain language for legislative intent or resort to rules of statutory construction.' " *Id.* (quoting *City of Parker v. State,* 992 So. 2d 171, 176 (Fla. 2008) [33 Fla. L. Weekly S671a]).When questioned at the hearing, Plaintiff's counsel had no facts or support that the policy was delivered in Florida. *See Holub v. Holub*, 54 So.3d 585, 587 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D332a] (a party is bound by a factual concession made by that party's attorney before a judge in a legal proceeding). As stated *supra*, a confession of judgment did not equate to making a factual determination that the policy was delivered in Florida.

While Plaintiff's argument rests on the confession of judgment, the Court is bound to rule on the proper law to apply based on precedent. *See generally Pardo v. State,* 596 So. 2d 665 (Fla. 1992). The Florida Supreme Court held in *Roach* that *lex loci contractus* applies in automobile policies for non-Florida residents (even if living in Florida part-time). *Roach,* 945 So.2d at 1160. **More significantly and more directly**, the Third District Court of Appeal has looked at the issue of confession of judgment and attorney's fees under a breach of an automobile policy. *Lopez v. State Farm Mut. Auto.,* 139 So. 3d 402 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1058a]. In *Lopez,* the Third District Court of appeal held that in the **exact** scenario of the instant case (except Texas instead of New York), regardless that the complaint alleges application of Florida law, the confession of judgment did not equate to entitlement under Florida law, but rather entitlement under the foreign state law. *Id.* This Court is bound by *Lopez* and *Roach* and finds them directly applicable to the instant case.

Accordingly, the Court **GRANTS IN PART** Plaintiff's Motion to the extent that Plaintiff is entitled to attorney's fees and costs. The Court finds Plaintiff is entitled to attorney's fees under New York law. As the hearing before the Court primarily focused on which state law to apply, the Court does not rule as to which specific New York laws apply, nor what the amount of attorney's fees shall be.

The parties shall try to reach an agreement to submit a proposed final judgment on this case. If the parties dispute the amount or the applicale New York laws, the parties shall set the matter for a special set hearing.

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[1]Adopting Plaintiff's position means that a plaintiff medical provider in Miami could sue for PIP benefits relating to a car accident in Miami, assert any choice of law provision from any state most favorable to a Plaintiff (including attorney's fees), and the defendant insurer, upon realizing it owes benefits under the **policy** (regardless of any state law), would be forced to litigate all the tangential issues and allegations instead of resolving what should have been an automatic payment. This is patently contrary to *Ivey* and *Wollard.*

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident—Insurer could not rescind policy based upon failure to disclose household resident where insurer's underwriting manual provides that there must be both material misrepresentation and unacceptable risk for policy to be rescinded, and failure to disclose household resident is not listed as unacceptable risk in manual

UNIVERSAL X RAYS CORPORATION, a/a/o Ivan Celorio-Rodriguez, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-016090-SP-23. Section ND06. October 3, 2023. Ayana Harris, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT RE: NO COVERAGE DUE TO MATERIAL MISREPRESENTATION AND GRANTING PLAINTIFF'S CROSS- MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant's Motion for Final Summary Judgment re: No Coverage Due to Material Misrepresentation and Plaintiff's Cross-Motion for Summary Judgment, and the Court having reviewed the motions, the summary judgment evidence, having heard arguments of counsel, consulted the applicable law, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment re: No Coverage Due to Material Misrepresentation is DENIED and Plaintiff's Cross-Motion for Summary Judgment is GRANTED, for the reasons set forth below:

There are no genuine issues as to any material fact. According to the summary judgment evidence, Carmen Martinez-Reinaldo submitted an application for an automobile insurance policy (the "Policy") to United Automobile Insurance Company ("United Auto"), neglecting to disclose Ivan Celorio-Rodriguez as a household resident. Had Carmen Martinez-Reinaldo listed Ivan Celorio-Rodriguez in her insurance application as a household resident, the additional policy premium would have amounted to $672.00. United Auto rescinded the Policy, based upon Carmen Martinez-Reinaldo's having failed to disclose Ivan Celorio-Rodriguez as a household resident.

According to ¶14B of United Auto's Underwriting Manual, "coverage will be rescinded/rejected if a risk is materially misrepresented *and unacceptable by the rules in this manual*." The United Auto Underwriting Manual does not include as an "Unacceptable Risk" the additional risk created as a result of the addition of previously undisclosed household residents. More particularly, the Underwriting Manual sets forth the following 18 categories of Unacceptable Risks:

A. More than 18 underwriting points in the past 36 months.

B. Applications without the Insured's street and/or residence address.

C. Vehicles over twenty-five (25) model years for liability as a single vehicle and up to thirty (30) years if it is a 2nd or 3rd vehicle; vehicles over twenty (20) model years for Comprehensive/Collision. Exception: This does not apply to renewal policies.

D. The number of vehicles exceeds the number of drivers in the household by more than one (1).

E. Polices with multiple garaging addresses, except students attending school in FL.

F. Drivers over the age of seventy five (75) are required to submit UAIC'S approved medical statement signed by a physician indicating ability to operate a motor vehicle.

G. Comprehensive must always include Collision, and Collision must include Comprehensive on Full Coverage Policies.

H. Vehicles with ACV over $65,000 (NADA) or ISO Symbol or higher (26 or higher for Model Years 2010 and prior) for Comprehensive/Collision.

I. Students attending school outside Florida.

J. Military operators (acceptable if driver is to be stationed in Florida for a minimum of one (1) year from inception of the policy).

K. Vehicles not registered in Florida or vehicles that will be operated outside of Florida in the scope of one's business.

AX. The following occupations are unacceptable: real estate salespersons, chauffeur, valet parkers, taxi cab drivers, jitney drivers, day care drivers, patient transporter, for-hire or ride sharing drivers (including but not limited to Uber/Lyft drivers), or any other occupation which requires more than 4 hours per work day in any vehicle. EXCEPTION: Truck drivers that can provide proof of a trucker's policy which includes PIP insurance will be allowed.

ALL. Applicants/drivers with a revoked driver's license.

N. Vehicles garaged outside the state of Florida.

O. Drivers with three or more accidents, regardless of fault, within the last 36 months.

P. Vehicles with an out of state (non-Florida) mailing address.

Q. Applicants and drivers with a felony conviction, including anything drug related, unless the applicant or driver is granted a restoration of civil rights by the Governor and the Board of Executive Clemency. This rule only applies to new business.

R. Drivers with adverse prior claim history. Adverse prior claims history means any driver with one or more claim(s) or a household with one or more claim(s) in the past 36 months prior to the original effective date involving personal injury protection. This rule only applies to new business.

ANALYSIS

The Florida Supreme Court amended Rule 1.510, Fla. R. Civ. P. to "align Florida's summary judgment standard with that of the federal courts and of the supermajority of states that have already adopted the federal summary judgment standard." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So.3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. In connection therewith, the summary judgment standard provided for in Rule 1.510 "shall be construed and applied in accordance with the federal summary judgment standard articulated 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"). Those cases stand for the proposition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action". *Celotex*, 477 U.S. at 327.

The Florida Supreme Court has articulated the following "key points" while observing that "embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state"—

1. There is a fundamental similarity between the summary judgment standard and the directed verdict standard. Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury".

2. A moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under the new rule, such a movant can satisfy its initial burden of production in either of two ways: "If 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. A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial."

3. The correct test for the existence of a genuine factual dispute is "whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Under the new rule, "when 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." It will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised."

UNITED AUTO IMPROPERLY RESCINDED THE POLICY, WHERE THE ADDITION OF IVAN CELORIO-RODRIGUEZ DID NOT PRESENT AN UNACCEPTABLE RISK UNDER UNITED AUTO'S UNDERWRITING MANUAL

In *South Broward Hospital District a/a/o Carolina Gonzalez Rodriguez v. United Automobile Insurance Company*, 27 Fla. L. Weekly Supp. 654a (Broward County, September 5, 2019), *per curiam aff'd*, 326 So.3d 1110 (Fla. 4th DCA, 2021), United Auto had rescinded an auto insurance policy based upon the named insured's failure to advise United Auto as to his correct address at the time of the policy renewal. In that case, as here, United Auto's Underwriting Supervisor, Jorge de la O, testified that had the named insured provided the correct information, United Auto would have charged an additional premium based upon that correct information.

However, Judge Mardi Levey Cohen recognized that in addition to a material misrepresentation, the United Auto Underwriting Manual also required an unacceptable risk in order to permit rescission of the United Auto policy. Jorge de la O had testified that the correct address did not present an unacceptable risk and that United Auto was bound to follow the rules in its own Underwriting Manual. Accordingly, Judge Mardi Levey Cohen granted plaintiff's motion for final summary judgment, concluding:

> Even if Mr. Samur's failure to disclose his Miramar address as the correct garaging address constituted a material misrepresentation, since the Miramar address did not constitute an unacceptable risk or violate any of the rules in the United Auto Underwriting Manual, United Auto was not permitted to rescind the Policy, under ¶14B of its Underwriting Manual.

In the case now before this Court, even if the failure on the part of Carmen Martinez-Reinaldo to disclose Ivan Celorio-Rodriguez as a household resident constituted a material misrepresentation, that material misrepresentation did not give rise to an unacceptable risk. Had the addition of Ivan Celorio-Rodriguez to the policy presented an unacceptable risk, Jorge de la O would have so testified, instead of testifying that had Carmen Martinez-Reinaldo listed Ivan Celorio-Rodriguez in her insurance application as a household resident, the additional policy premium would have amounted to $672.00. Clearly, a risk cannot be unacceptable if the insurer is able to quantify the premium it would charge in order to assume that risk. In addition, the United Auto Underwriting Manual clearly spells out eighteen (18) categories of unacceptable risks, none of which include the additional risk created as a result of the addition of previously undisclosed household residents. *See also Universal X Rays Corp. (a/a/o Carlos*

Marchan) v. United Auto. Ins. Co., 30 Fla. L. Weekly Supp. 574a (Miami-Dade County, Judge Ihekwaba, Oct. 26, 2022); *Presgar Imaging of CMI North (a/a/o Fair, Lashura) v. United Auto. Ins. Co*., Miami-Dade County, Case Number 2018-019835-SP-23, January 29, 2023, (Judge Ihekwaba), [31 Fla. L. Weekly Supp. 87a]; *Universal X Rays Corp. (a/a/o Gonzalez, Mariam 2) v. United Auto. Ins. Co.*, Miami-Dade County Case Number 2019-024266-SP-23, March 29, 2023 (Judge Moore), [31 Fla. L. Weekly Supp. 89a]; *Universal X Rays Corp. (a/a/o Portales, Jasiel) v. United Auto. Ins. Co*., Miami-Dade County Case Number 2019-016150-SP-23, April 17, 2023 (Judge Singer Stein), [31 Fla. L. Weekly Supp. 85a]; *Universal X Rays Corp. (a/a/o Tapanes, Yaime) v. United Auto. Ins. Co.*, Miami-Dade County Case Number 2019-017781-SP-23, April 17, 2023 (Judge Singer Stein).

The summary judgment evidence demonstrates that there is no genuine dispute as to any material fact. The evidence is such that a reasonable jury could not return a verdict for United Auto on the issue of whether United Auto was entitled to rescind the Policy, whereas a reasonable jury certainly could return a verdict for Plaintiff on the issue. Clearly, the summary judgment evidence does not present a sufficient disagreement to require submission to a jury. It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment Re: No Coverage Due to Material Misrepresentation is DENIED and Plaintiff's Cross Motion for Summary Judgment is GRANTED. The Court reerves jurisdiction to enter any other relief deemed just and proper.

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Demand letter—Amended complaint including additional dates of service that occurred after initial complaint was filed is dismissed where it would have been impossible for medical provider to satisfy pre-suit demand letter requirement for those dates of service

THRIVE CHIROPRACTIC HEALTH CENTER INCORPORATED, a/a/o Haley Arnold, Plaintiff, v. SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-014550-SP-05. Section CC06. October 23, 2023. Luis Perez-Medina, Judge. Counsel: Travis Greene, Fort Lauderdale, for Plaintiff. Madison O'Connell, Conroy Simberg, West Palm Beach, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT, DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT, DEFENDANT'S MOTION TO COMPEL, PLAINTIFF'S MOTION TO STRIKE, AND DEFENDANT'S CROSS MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court upon Plaintiff's Motion to Amend Complaint, Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Defendant's Motion to Compel, Plaintiff's Motion to Strike and Defendant's Cross Motion for Summary Judgment and the Court being otherwise fully advised in the premises thereof, it is hereby

ORDERED and ADJUDGED, as follows:

1. Plaintiff's Motion to Amend Complaint to include additional dates of service, is GRANTED.

2. Defendant's Motion to Dismiss Plaintiff's Amended Complaint is GRANTED WITHOUT PREJUDICE. Plaintiff's Amended Complaint included additional dates of service that occurred after the filing of Plaintiff's Initial Complaint. At the hearing, Plaintiff conceded that the additional dates of service and demand were submitted after the initial Complaint was filed. Further, a review of the Complaint and Amended Complaint on their face demonstrate that the additional dates of service and demand were submitted after the Plaintiff filed suit. There was no Motion to Abate made by Plaintiff. While the Plaintiff's Amended Complaint alleged compliance with conditions precedent, the date of the Original Complaint demonstrated Plaintiff could not have complied with the pre-suit demand letter requirement of subsection 627.736(10) for dates of services that occurred after suit was filed. Plaintiff's supplemental demand sent after suit was filed could not cure the obligations of 627.736(10). Plaintiff would need to serve a new compliant pre-suit demand letter so that Defendant has a legally sufficient opportunity to avoid litigation of those claims, and to avoid subjecting Defendant to the risk that any payment of those disputed claims would constitute a confession of judgment. As such, this Court finds that dismissal is the proper remedy in this case. *See Progressive Express Ins. Co., Inc. v. Menendez,* 979 So.2d 324, 333 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D811a] (holding that where a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, not abatement, is the proper remedy).

3. The Clerk is Ordered to Close the Case.

4. In light of the Court's Dismissal, the remaining Motions are rendered moot and not considered by the Court.

* * *

Consumer law—Debt collection—Attorney's fees—Amount—Contingency risk multiplier of 2.0 is applicable where relevant market requires multiplier in order to obtain competent counsel when creditor has sued to collect consumer debt, defendant's attorney could not mitigate risk of nonpayment of attorney's fees, small amount at issue is not desirable amount for attorney to handle on contingency basis, defendant's attorneys obtained dismissal of lawsuit, and defendant entered into valid retainer agreement with counsel

CITIBANK, N.A., Plaintiff, v. SHARON ATRIA, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 58-2020-SC-001977-XXXASC. September 27, 2023. Maryann Olson Uzabel, Judge. Counsel: Drew Linen, RAS LaVrar, LLC, Plantation, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

FINAL JUDGMENT AWARDING ATTORNEYS' FEES AND COSTS TO DEFENDANT, SHARON ATRIA, AGAINST PLAINTIFF, CITIBANK. N.A.

THIS CAUSE, came before the Court on September 20, 2023, at an evidentiary hearing in the above-styled cause of action, to determine the reasonable hourly rates, time expended, fees and multiplier, if any, to be awarded to Defendant, SHARON ATRIA, with respect to Defendant's claim for an award of reasonable attorneys' fees and costs as the prevailing party in this cause of action. At the hearing, Defendant, SHARON ATRIA, Defendant's attorney, Arthur Rubin, and Defendant's expert witness, attorney Ian Leavengood appeared and testified. No one testified on behalf of the Plaintiff. Also at the hearing, Counsel for Plaintiff, Attorney Drew Linen, indicated to the Court that Plaintiff was not contesting the number of hours claimed by Defendant (29.0 hours) or the hourly rate requested by Defendant ($450.00 an hour) and that Plaintiff was solely contesting the request that Defendant be awarded a contingency risk multiplier. After observing the demeanor and credibility of the witnesses, weighing the testimony and other evidence presented, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED as follows:

A. Factors consiciourly rates and multiplier

1. In determining the hourly rates, time, fees to be awarded, and whether a contingency risk multiplier for an enhanced fee is appropriate, this Court has considered the various factors set forth in Florida Rule of Professional Conduct 4-1.5(b)(1)(A)(H), as well as the applicable case law governing the award of reasonable attorney's fees and costs and contingency risk multipliers, including *Florida Pa-*

tient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990) and *William Joyce, et al. v. Federated National Ins. Co.,* 228 So.3d 1122 (Fla. 2017) [42 Fla. L. Weekly S852a].

2. Rule 4-1.5(b)(1)(A)-(H) sets forth a list of factors as guidelines for determining a reasonable attorneys' fee. According to Rule 4-1.5(b)(1). "[f]actors to be considered as guides in determining a reasonable fee include" the following:

> (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
>
> (F) the nature and length of the professional relationship with the client;
>
> (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

See, Fla. St. Bar Rule 4-1.5(b)(1)(A)-(H). In addition to the foregoing guidelines, case law must also be considered.

3. In *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985), the Florida Supreme Court adopted the federal "lodestar" approach for awarding reasonable attorneys' fees and addressed the ability to recover a multiplier. The Florida Supreme Court has subsequently refined the standards for recovery of a multiplier in *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla.1990) and *William Joyce, et al. v. Federated National Ins. Co.,* 228 So.3d 1122 (Fla. 2017) [42 Fla. L. Weekly S852a].

B. Reasonable Hourly Rates Awarded in this Case

4. After considering the evidence presented and the applicable factors as stated above as well as the fact that Plaintiff did not contest the hourly rate requested by Defendant, the Court finds that the reasonable hourly rate for Defendant's counsel, Arthur D. Rubin, Esquire, of We Protect Consumers. P.A., is $450.00.

C. Reasonable Time Expended in this Case

5. After considering the evidence presented and the applicable factors as stated above, as well as the fact that Plaintiff did not contest the number of hours requested by Defendant, the Court finds the reasonable time expended for Defendant's counsel, Arthur D. Rubin, Esquire, is 29.0 hours.

D. Loadstar Amount Based on Reasonable Hourly Rates and Hours Expended

6. Based on the testimony of Defendant, SHARON ATRIA, and the testimony of Attorney Rubin, this Court finds that the Defendant entered into a Lawyer Retainer Agreement with We Protect Consumers, P.A. for representation of the Defendant in this cause of action. A copy of the Lawyer Retainer Agreement was filed with the Court on August 11, 2023.

7. Based upon the language of the Lawyer Retainer Agreement, the subject matter of the Lawyer Retainer Agreement, the object and purpose of the Lawyer Retainer Agreement, and the testimony of Defendant, SHARON ATRIA, and the testimony of Attorney Rubin, this Court finds that that the Lawyer Retainer Agreement was a contingency fee agreement that enables this Court to determine a reasonable fee to be awarded the Defendant on an hourly basis.

8. Based on the foregoing findings by this Court, the Court finds that the total loadstar amount for the reasonable number of hours expended in the defense of this cause of action is $13,050.00 (29.0 hours at $450.00 an hour).

E. Taxable Costs

9. Defendant did not seek or present evidence with respect to an award of taxable costs, other than the costs of her expert.

10. The Court finds that 10.7 hours is a reasonable number of hours expended by Defendant's expert, Ian Leavengood, Esquire, and finds his hourly rate of $400.00 is reasonable. The Court therefore awards the Defendant the following costs of her expert: $4,280.00.

F. Applicability of Contingency Risk Multiplier

11. In *Quanstrom,* the Florida Supreme Court stated that the following 12 factors must be considered in deciding to award a contingency risk multiplier:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Quanstrom, 555 So.2d at 834. While worded and arranged slightly different, the foregoing 12 factors of *Quanstrom* (and also set forth in *Rowe*) are, for all intents and purposes, the same factors listed in Rule 4-1.5(b)(1)(A)-(H), Florida Rules of Professional Conduct.

12. Per *Quanstrom,* the trial court must also consider three additional factors:

> Here, we reaffirm the principles set forth in *Rowe,* including the code provisions, and find that the trial court should consider the following factors in determining whether a multiplier is necessary: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Evidence of these factors must be presented to justify the utilization of a multiplier. We find that the multiplier is still a useful tool which can assist trial courts in determining a reasonable fee in this category of cases when a risk of nonpayment is established. *Id*., 555 So.2d at 834. *Accord, Bell v. U.S.B. Acquisition Co.,* 734 So.2d 403, 412 (Fla. 1999) [24 Fla. L. Weekly S220a].

13. After considering the controlling case law and, based upon the evidence presented at the hearing, including the testimony of counsel for the Defendant and her expert witness, Attorney Ian Leavengood, the Court finds that a contingency risk multiplier of 2.0 is applicable as an enhancement to the fee in this matter under Florida law, including the cases of *Standard Guaranty Ins. Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990) and *William Joyce, et al. v. Federated National Ins. Co.,* 228 So.3d 1122 (Fla. 2017) [42 Fla. L. Weekly S852a]. The Court finds that the factors for application, as articulated in the above-referenced cases of a contingency risk multiplier, are present in this case, including, but not limited to: 1) that the relevant market requires a contingency risk multiplier in order to obtain competent counsel on a contingency basis in cases in which a creditor has sued a consumer to collect a consumer debt, as there was substantial, competent testimony of the counsel for Defendant and her expert that, at the time

she retained her attorneys, there were very few attorneys in and around Sarasota County who would have undertaken the defense of cases like the subject case filed by the Plaintiff, on a contingency fee basis, and those that would have done so, including counsel for Defendant, would have expected that, if successful in defending such an action, the Court would apply a contingency fee multiplier, and that such a case would not be taken on a contingency fee basis without the possibility of a multiplier; 2) that Defendant's attorneys could not mitigate the risk of nonpayment of their attorneys' fees for legal services rendered in this case; 3) that the amount involved, which was within the jurisdiction of the Small Claims Court, warrants the application of a multiplier to obtain competent counsel on a contingency basis, as it is not a desirable case for an attorney to handle on a contingency basis; 4) that Defendant's attorneys competently represented the Defendant and obtained a very favorable result for Defendant, specifically, a dismissal of the lawsuit; and 5) that the Defendant entered into a valid retainer agreement with her counsel, We Protect Consumers, P.A., and that the fee arrangement set forth therein was a purely contingency fee arrangement that entitles Defendant's counsel to fees and costs awarded to the Defendant by this Court.

THEREFORE, IT IS HEREBY FURTHER ORDERED AND ADJUDGED that

1. This Court enters Judgment in favor of Defendant, SHARON ATRIA, and against Plaintiff, CITIBANK, N.A., as follows:

a. Reasonable attorneys' fees of $13,050.00; and

b. A contingency risk multiplier of 2.0, resulting in an enhanced fee award of $26,100.00.

c. Expert witness costs of $4,280.00.

2. The total final judgment of $30,380.00, comprising reasonable loadstar amount of attorneys' fees, as enhanced by the contingency risk multiplier determined by this Court, and costs, shall bear interest at the prevailing statutory rate of as provided by Florida Statute 55.03(1), Florida Statutes, from the date of the entry of the Order Granting Defendant's Motion for Entitlement to Prevailing Party Attorney Fees, entered on August 10, 2023, for which let execution issue.

* * *

Insurance—Default—Sanction for insurer's willful failure to comply with order requiring that parties cooperate in presenting joint pretrial stipulation

UNITED HEALTH GROUP & ASSOCIATES, LLC, a/a/o Krista Martinez, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-000565. October 12, 2023. Richard H. Martin, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Matthew Chamoff, McFarlane & Dolan, for Defendant.

ORDER ENTERING DEFAULT JUDGMENT AGAINST DEFENDANT

THIS MATTER having come before the court on October 10, 2023 on a Pre-Trial Conference. The court having having reviewed the Order Setting Pre-Trial Conference and Jury Trial entered May 2, 2023, along with all requirements imposed on all parties per said Order, the court file, applicable law, and being otherwise fully advised, finds,

1. On or about October 9, 2023, Defendant filed a Motion to Continue Trial and/or Extend Trial Deadlines. The Court finds that Defendant's Motion fails to satisfy the requirements of F.R.C.P. 1.460 and, as such, is **HEREBY DENIED**.

2. On or about October 9, 2023, Defendant filed a Motion for Leave to Add Third-Party Defendant Allison Zapata. The Court finds that Defendant's Motion is untimely and, as such, is **HEREBY DENIED**.

3. Provision No. 5 of the Order Setting Pre-Trial Conference and Jury Trial required "A Joint Pre-Trial Stipulation must be filed and delivered to the Court by all counsel of record no later than 10 days before the Pre-Trial Conference". On or about October 4, 2023, Plaintiff did submit a unilateral Notice of Filing proposed Pre-Trial Conference Order. Defendant did not submit its own proposed Pre-Trial Conference Order. The Court finds that it is rejecting the unilateral proposed Pre-Trial Conference Order submitted by Plaintiff. The Court finds that the Defendant is responsible for their failure to cooperate in presenting a Joint Pre-Trial Conference Stipulation to the Court, including Defendant's failure to provide its exhibit list, witness list, joint jury instructions and joint verdict form.

4. The Court finds that there was a willful refusal to comply with the Order Setting Pre-Trial Conference and Jury Trial by the Defendant. Based upon the aforementioned refusal to cooperate by the Defendant, a Default is entered against the Defendant. As such, the Defendant is deemed to have admitted all allegations of Plaintiff's Petition for Declaratory Judgment seeking a coverage declaration.

5. The Court finds that Plaintiff's Second Amended Motion for Final Summary Judgment is untimely, and, as such, is **HEREBY DENIED**.

6. A status conference should be scheduled to occur within 30 days from the date of this Order

* * *

Civil procedure—Discovery—Depositions—Failure to appear—Sanctions

FLORES MEDICAL CENTER, INC., a/a/o Angelo Ramos, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-038127. October 18, 2023. Michael J. Hooi, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER having come before the court on October 12, 2023 on Plaintiff's Motion for Sanctions. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff's Motion for Sanctions alleges that Defendant's Corporate Representative and Defendant's counsel failed to appear for a duly noticed deposition on June 8, 2023 at 1:00 PM and that Defendant failed to set its Motion for Protective Order for hearing at any time.

2. The Court reserves on sanctions requested by Plaintiff.

3. The deposition of Defendant's Corporate Representative must occur within 30 days from October 12, 2023.

* * *

Insurance—More definite statement ordered

SAME DAY CALIBRATIONS, LLC, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23046662. Division 53. September 28, 2023. Robert W. Lee, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT

This cause came before the Court this day for hearing of the Defendant's Motion for More Definite Statement. Counsel appeared for the Defendant. No appearance for the Plaintiff.

The Motion is GRANTED. No later than ten (10) days from the date of this Order, the Plaintiff shall FILE a More Definite Statement that includes the following: (1) the PRECISE AMOUNT claimed due; (2) a copy of the invoice referenced in the Complaint; and (3) a copy of the Assignment of Benefits referenced in the Complaint, failing

which this case shall be dismissed without further notice or hearing.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—BOLO report—Continued detention—Arrest—State failed to prove that deputy had rasonable suspicion for detention or probable cause for arrest of driver that was stopped following BOLO report of possibly impaired driver—Deputy's testimony regarding indicia of impairment exhibited by defendant was contradicted by video from his body camera, testimony of fellow deputy and jail nurse, and inconsistences in deputy's own testimony—Moreover, where BOLO did not include any explanation of the basis for belief that driver was impaired, deputy's observations that defendant had bloodshot eyes and odor of alcohol were insufficient to support reasonable articulable suspicion justifying detention—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. ASHLEY ROSARIN PLAZA, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2021-CT-1677-A. August 17, 2023. John Woodard, Judge. Counsel: Helen Haynie, Office of the State Attorney, Sanford, for Plaintiff. Matthews R. Bark and Ethan W. Carlos, Matthews R. Bark, P.A., Altamonte Springs, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS COURT, having reviewed the testimony, evidence and argument of the parties hereby:

GRANTS Defendant's Motion to Suppress Evidence and Motion to Suppress Statements, Confessions and Admissions. The Court finds as follows:

On May 30, 2021, Deputy Jerome Grunat arrested the Defendant, Ms. Ashley Plaza, for the offense of Driving Under the Influence. On June 9, 2022, the undersigned filed a Motion to Suppress Evidence Pursuant to Florida Statute 901.15 and 901.151(6) and Motion to Suppress Confessions, Statements, and Admissions, and a Motion to Suppress or Limin to Exclude Defendant's Alleged Refusal to Take a Breath Test. A hearing was held on said motions on September 9, 2022, and March 2, 2023.

At the hearing Deputy Patrick Rehder, Deputy Jerome Grunat, Breath Technician Ray Garcia, Analyst Sean Ryan, and Nurse Christine Davies all tesitfied. Deputy Rehder tesitfied that he was off duty and in his personal car when he observed Ms. Plaza driving. He allegedly observed her to be speeding, swerving in her lane, and roll through a red light. Deputy Rheder did not describe for how long he observed Ms. Plaza speeding or swerving in her lane. Deputy Rehder followed Ms. Plaza to a gas station and testified that he observed her walk in and out of the store with no difficulties. Deputy Rehder relayed his observations to dispatch, but testified that he was not sure if he relayed them to Deputy Grunat prior to stopping Ms. Plaza's vehicle.

Deputy Grunat testified that he was notified by dispatch about a driver who may be intoxicated. How dispatch got this information was not testified to by Deputy Grunat. A helicopter located the vehicle and guided Deputy Grunat to it as his lights and sirens were on. Deputy Grunat pulled behind Ms. Plaza while another officer blocked her from the front of her vehicle. Upon approaching Ms. Plaza, Deputy Grunat testified that he observed the odor of alcohol coming from her breath and that she had bloodshot and glassy eyes, but that she denied drinking any alcohol. Deputy Grunat then ordered Ms. Plaza out of her vehicle and requested her to perform field sobriety exercises (hereinafter "FSEs").

After performaning well on the FSEs as depicted on the body camera video, Deputy Grunat arrested Ms. Plaza for the offense of DUI. Before being transported to the Seminole County Jail, Ms. Plaza requested to speak with an attorney but was denied this request.

While at the jail, Ms. Plaza allegedly refused to take a breath test. Prior to and after "refusing" to take a breath test, Ms. Plaza was not provided access to a phone, but was sent to medical to see Nurse Christine Davies.

Nurse Davies testified that she did not smell alcohol on Ms. Plaza and specifically stated that Ms. Plaza did not appear impaired. Nurse Davies also testified that Ms. Plaza had no problems speaking, no problems walking, and appeared completely coherent.

Having recited the testimony the Court now holds that the State did not meet its burden of proving a lawful detention of the defendant to conduct a DUI investigation. The Court commends Deputy Grunat on his candor before the Court as it allows the Court to properly complete its truth finding mission. With that said, the Court notes that Deputy Grunat had not been a sworn law enforcement officer long at the time of the arrest of the defendant. Deputy Grunat, himself, acknowledged that he had not received the proper training he has now received post this arrest.

While the Court believes Deputy Grunat has learned a lot and become more familiar with the courts, after this particular arrest, the Court is required to analyze the case from the perspective of what occurred on the particular day of the arrest, what training and experience the officer had, and to determine the credibility of the observations and opinions testified thereto.[1] Prior to Ms. Plaza's arrest, Deputy Grunat had only been involved in five DUI investigations and the only formal training he had was from the police academy and one hour from the sheriff's office. Notably, Deputy Grunat testified that he has gone through more training and learned a lot more since this arrest, *including the fact that he should have given Ms. Plaza another chance to complete the walk and turn exercise*. While it is not necessarily wrong that Deputy Grunat did not have much training, it is important for this Court to consider because his decision that Ms. Plaza's faculties were impaired must have been based on proper training and experience. *See Belsky v. State,* 831 So.2d 803, 804 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2630b]; *State v. Lewis,* 27 Fla. L. Weekly Supp. 559a (Fla. Seminole Cty. Ct. 2019) (18th Judicial Circuit).

Many of Deputy Grunat's observations are in contradiction with the video footage (body camera and in car cameras) admitted into evidence, other witness testimony, and even his own testimony. The assertion that Ms. Plaza's eyes were bloodshot and glassy is rebutted by the video footage. Multiple points in Deputy Grunat's body camera video capture Ms. Plaza's eyes and she does not have bloodshot and/or glassy eyes. (See e.g., State's Exhibit 1—Deputy Grunat's body camera from 05:05-05:20 and 09:45-10:10).

Deputy Grunat also testified that Ms. Plaza had slurred speech. The video footage and testimony presented contradict this assertion. Throughout the entirety of the videos admitted into evidence Ms. Plaza is speaking clearly and is not slurring her words, mumbling, or otherwise having trouble speaking. (See e.g., Defense's Exhibit 1—Deputy Grunat's dash camera from 15:45-end, and Deputy Grunat's backseat camera from 15:30-end; State's Exhibit 1—Deputy Grunat's body camera from 04:45-15:00). Ms. Davies, the jail nurse, also testified that Ms. Plaza had no problems speaking, no problems walking, and appeared completely coherent.

There are also inconsistencies within Deputy Grunat's own testimony regarding his observations of Ms. Plaza's performance of the FSEs. At the first day of hearing, Deputy Grunat testified that during the pen and eye exercise Ms. Plaza's eyes did not follow smoothly and that she moved her head. At the continued hearing, Deputy Grunat changed his testimony and testified that Ms. Plaza did *not* move her head during the pen and eye exercise. For the one leg stand, Deputy Grunat tesitifed at the first day of hearing that Ms. Plaza used her arms for balance and was swaying during the exercise. However, at the continued hearing Deputy Grunat changed his

testimony and stated that Ms. Plaza was *not swaying* during the one leg stand. The video confirms that Ms. Plaza was indeed not swaying and that she counted out loud correctly. (See State's Exhibit 1—Deputy Grunat's body camera from 12:30-12:41).

Further contradicting Deputy Grunat's observation that Ms. Plaza was swaying includes Deputy Rheder's testimony that he did not witness Ms. Plaza swaying or stumbling as she got out of her car and walked into the gas station. In fact, Deputy Grunat's body camera shows that Ms. Plaza got out of her vehicle without swaying, stumbing, or using anything for support. (See Defense's Exhibit 1—Deputy Grunat's body camera from 07:55-08:08). While these inconsistencies may go to a probable cause determination, as opposed to reasaonable suspicion analysis, the inconsistencies taken with the other evidence in the hearing, effect this Court's view of Deputy Grunat's observations and opinions.

Additionally, testimony was presented which contradicted Deputy Grunat's observation that Ms. Plaza smelled of alcohol. After being transported to the jail Ms. Plaza was evaluated by the jail nurse, Ms. Christine Davies. Ms. Davies, who has been a licensed nurse since 1977, tesitified that she *did not smell alcohol* on Ms. Plaza. She further testified that during her evaluation of Ms. Plaza she determined that Ms. Plaza *was not under the influence of alcohol, muchless displaying any impairment*.

Ultimately, there is evidence and testimony regarding observations from both pre-arrest and post-arrest which contradict what Deputy Grunat allegedly observed. In light of the inconsistent and contradicted testimony from Deputy Grunat, in comparison with the other evidence admitted, this Court finds that the State has not met its burden to substantiate the lawfulness of the detention and search conducted to administer the FSEs. In other words, there is not competent substantial evidence to support the warrantless seizure. *Carter v. State,* 120 So.3d 207 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1802a] ("[R]easonable suspicion depends on both the content of information that law enforcement possesses and its degree of reliability. Both quantity and quality of information are considered in the 'totality of the circumstances—the whole picture,' that must be taken into account when evaluating whether there is reasonable suspicion. *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (quoting *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981))."

In light of Deputy Grunat's lack of experience, training and knowledge, the conflicts in the evidence, including but not limited to the videos admitted into evidence, the contemporaneus state witness, Deputy Rheder, and the more seasoned, trained and experienced nurse Davies contradicting observations and opinions, this Court holds that the State has not met its burden of proving a legal search and seizure; i.e, the seizure was not supported by reasonable articulable suspicion and thus, grants the Defendant's Motion to Suppress Evidence and Motion to Suppress Statements, Confessions, and Admissions.

The Court further finds Deputy Grunat testified that after approaching Ms. Plaza he observed her to have bloodshot and glassy eyes and the odor of alcohol was coming from her breath. It was at this point that Deputy Grunat ordered Ms. Plaza out of her vehicle and requested her to perform FSEs. Thus, the only observations articulated by Deputy Grunat prior to requesting FSEs were the dispatch that the vehicle may be driven by an impaired person (without further explantion articulated), her eyes, and the odor of alcohol.

The BOLO for a possibly impaired driver from dispatch to Deputy Grunat did not articulate the basis for this belief. Thus, this observation should not be included in the analysis of reasonable articulable suspicion. Deputy Grunat would have been justified in relying on Deputy Rheder's or any other law enforcement observations, if those observations had been communicated to him. *Carter,* 120 So.3d at 209; citing *e.g., State v. Peterson ,* 739 So.2d 561, 564-65 (Fla.1999) [24 Fla. L. Weekly S288a]; *see also State v. Kelly,* 27 Fla. L. Weekly Supp. 210a, Seminole County County Court Order, (2019, J. Woodard); citing *Montes-Valeton v. State*, 216 So.3d 475, 478 (Fla. 2017) [42 Fla. L. Weekly S210a]. (" '[G]eneral communications' with [an officer] . . . regarding the same investigation,' does not mean that there has been compliance with the fellow officer rule. 216 So.3d at 479. 'The officer conducting the search or arrest must be 'act[ing] . . . based upon what he or she is told by a fellow officer.' *Id*. Citing *State v. Bowers,* 87 So.3d at 708.").

Because the alleged observations of the actual driving pattern were not provided to Deputy Grunat, and at best a general communication was, all that is left are the bloodshot eyes, and smell of alcohol. These observations alone are insufficient to support a finding that the State has overcome its burden to prove the legality of the search and seizure, as it does not meet the requisite level of reasonable articulable suspicion as set forth by the 18th Judicial Circuit Court sitting in its appellate capacity in *Hall v. State,* in Brevard County Circuit Court Appellate Division, No. 05-2005-AP-035128 (18th Judicial Circuit 2005). ("It is not, by itself, illegal to conume alcohol and then drive, if the driver is not impaired or does not have the requisite blodd alcohol level. Operating a vehicle with the odor of alcohol on the breath is not illegal, nor is driving with some 'glassy eyes.' "). And thus, the Court also grants the Defendant's Motion to Suppress Evidence and Motion to Suppress Statements, Confessions, and Admissions under this analysis.

The Court, although unnecessary based on the above, also finds that Deputy Grunat did not have probable cause to arrest the defendant for DUI. "[P]robable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a probablity that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *State v. Kliphouse,* 771 So.2d 16, 21 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f].

Deputy Grunat testified that he based his probable cause to arrest Ms. Plaza on the odor of alcohol, her bloodshot and glassy eyes, slurred speech, and her performance of the FSEs. As previously explained, however, many of Deputy Grunat's observations were contradicted by testimony and video footage admitted into evidence. For example, there are multiple points in Deputy Grunat's body camera video which capture Ms. Plaza's eyes and she clearly does not have bloodshot and glassy eyes. (See e.g., State's Exhibit 1—Deputy Grunat's body camera from 05:05-05:20 and 09:45-10:10). Additionally, it is important to note that the jail nurse testified she did not smell alcohol on Ms. Plaza and specifically said she did not believe Ms. Plaza was impaired. The nurse further testified that Ms. Plaza had no problems speaking, no problems walking, and appeared completely coherent. The videos submitted into evidence also corroborate that Ms. Plaza was speaking clearly and was not slurring her words, mumbling, or otherwise having trouble speaking. (See e.g., Defense's Exhibit 1—Deputy Grunat's dash camera from 15:45-end and Deputy Grunat's backseat camera from 15:30-end; State's Exhibit 1—Deputy Grunat's body camera from 04:45-15:00). Deputy Grunat also testified and his bodycamera video shows that Ms. Plaza got out of her vehicle without stumbling or using anything for support prior to performing FSEs. (See Defense's Exhibit 1—Deputy Grunat's body camera from 07:55-08:08).

As for the FSEs, Deputy Grunat administered the pen and eye exercise, the walk and turn exercise, and the one leg stand exercise. At the first day of hearing, Deputy Grunat testified that during the pen and eye exercise Ms. Plaza's eyes did not follow smoothly and that she moved her head. At the continued hearing, Deputy Grunat changed his testimony and testified that Ms. Plaza did *not* move her

head during the pen and eye exercise. He also testified that she kept her feet together and kept her arms by her side as instructed. In light of Deputy Grunat's inconsistent testimony, the body camera video is the most reliable source as to how Ms. Plaza appeared and performed on this exercise. *See Maurer v. State,* 668 So.2d 1077, 1079 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D559b] (holding that a Judge acting as a fact finder is not required to believe testimony of police officers in suppression hearings, even when that is the only evidence presented.); *see also Lewis,* 979 So.2d at 1200 ("[T]he court must weigh the testimony of all the witnesses and determine the issue based upon the totality of the circumstances. The court is not required to accept at face value the testimony of any witness."). The video confirms that Ms. Plaza was in fact not swaying or moving her head at all during the pen and eye exercise. (See State's Exhibit 1—Deputy Grunat's bodycamera from 09:40-10:10).

Deputy Grunat testified that Ms. Plaza did not complete the walk and turn exercise properly because she started performing the exercise before he was finished with the instructions. Deputy Grunat did tesitify that Ms. Plaza stood in the starting position without any problems, but he could not recall if she was swaying, using her arms for balance or if she walked heel to toe. Even though Ms. Plaza started the walk and turn exercise before instructed, Deputy Grunat stopped her from completing it or otherwise giving her another chance to perform it. The portion that she was allowed to complete was captured on Deputy Grunat's body camera, which shows that Ms. Plaza performed it without stumbling or using her arms for balance. (See State's Exhibit 1—Deputy Grunat's body camera from 11:19-11:27). Deputy Grunat admitted that since this investigation he has received additional proper training on DUI investigations and that he should have allowed Ms. Plaza another chance to do the walk and turn exercise upon his directive to begin the exercise.

The last exercise was the one leg stand. Deputy Grunat tesitifed at the first day of hearing that Ms. Plaza used her arms for balance and was swaying during the exercise. However, at the continued hearing Deputy Grunat changed his testimony and stated that Ms. Plaza was *not* swaying during the one leg stand. Once again, the body camera video is the most reliable source of her performance on the exercise. The video confirms that Ms. Plaza was indeed not swaying and that she counted out loud correctly. (See State's Exhibit 1—Deputy Grunat's body camera from 12:30-12:41).

These inconsistencies once again raise concerns of the reliability of Deputy Grunat's reported observations and opinions. The Court relies on the video footage admitted into evidence over Deputy Grunat's testimony. *See Maurer,* 668 So.2d at 1079. And in doing so, grants the Defendant's Motion to Suppress Evidence and Motion to Suppress Statements, Confessions, and Admissions on this basis.

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[1]*See Lewis v. State*, 979 So.2d 1197, 1200 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1128a] quoting *Miles v. State,* 953 So.2d 778, 779 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1081a]. "A warrantless search constitutes a prima facie showing which shifts to the state the burden of showing the searches legality." *Id.* citing *Andress v. State,* 351 So.2d 350 (Fla. 4th DCA 1977). Even if the only evidence presented at a suppression hearing is the testimony of police officers, the court may disbelieve the evidence presented from the state even if it is uncontradicted. *Id.* citing *Maurer v. State,* 668 So.2d 1077, 1079 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D559b].

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