Volume 31, Number 9, January 31, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 425-456

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CRIMINAL LAW—EVIDENCE—BLOOD TEST RESULTS. A circuit court rejected a defendant's argument that the portion of Florida's implied consent statutes which delegate to the Florida Department of Law Enforcement the responsibility for regulating blood tests and allows for their admissibility without a hearing to determine their reliability is unconstitutional because it is a procedural law which should have been enacted or adopted by the Supreme Court. The court concluded that the challenged portions of the implied consent statutes were intimately intertwined with the Legislature's enactments regarding the testing of the blood alcohol level of motorists suspected of driving under the influence and, accordingly, were actually substantive in nature. The court further reasoned that, even if the challenged statutes were considered procedural, the defendant in the case before the court had failed to allege that there was a rule or holding of the Supreme Court which conflicted with the challenged statutes. Finally, the court found that the challenged implied consent laws were not unconstitutional under article V, section 21, Florida Constitution. The statutes did not require the FDLE to interpret them, but even if they did, article V, section 21, merely states that a court cannot defer to the agency's interpretation.** *STATE v. BRIMMER. Circuit Court, Eighteenth Judicial Circuit in and for Brevard County. Filed December 14, 2023. Full Text at Circuit Courts-Original Section, page 432a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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20CIR 10	Circuit Court - Original (20th Circuit, page 10)
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M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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LICENSING

LIENS

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TRAFFIC INFRACTIONS

* * *

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

* * *

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Due process—Hearing officer did not deny licensee due process by admitting documents received from law enforcement into record before affording licensee opportunity to object where hearing officer was statutorily required to admit documents into record—Conduct of hearing telephonically by hearing officer located in Tallahassee, instead of Tampa, did not deny licensee due process—Hearing officer did not depart from essential requirements of law by admitting breath test affidavit into record without agency inspection report or by failing to provide legal analysis of case law submitted by licensee—Claim that hearing officer failed to admit certain of licensee's exhibits into record is refuted by record—Decision to uphold suspension is supported by competent substantial evidence

ROBERT CORNELIO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2021-CA-000490. October 16, 2023. Petition for Writ of Certiorari. Counsel: Keeley R. Karatinos, for Petitioner. Mark L. Mason, Former Assistant General Counsel, DHSMV, for Respondent.

[Prior report at 30 Fla. L. Weekly Supp. 136a]

ORDER DENYNG PETITION FOR WRIT OF CERTIORARI

(BARTHLE, WESTINE, and DISKEY, JJ.) **THIS CAUSE** came before the Court on remand from the Mandate, entered March 14, 2023, from the Second District Court of Appeal, Case No. 2D22-1683. As set forth in its Order and Opinion, entered February 24, 2023, the above-styled Petition for Writ of Certiorari is not moot as the "capable-of-repetition-but-evading-review exception to mootness applies." The Second District Court of Appeal clarified its earlier holding, set forth in *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a], which concluded that because the suspension had expired, the issue of the validity of the suspension of the petitioner's driver license was moot.[1] Hence, upon review of the briefs, record, and being otherwise fully advised, the Court finds that the Petition for Writ of Certiorari must be denied.

STANDARD OF REVIEW

The circuit court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent and substantial evidence. *Haines City v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citations omitted*). This Court, sitting in its appellate capacity, is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dept. of Highway Safety & Motor Vehicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*). "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.,* 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

BACKGROUND FACTS

Petitioner, Robert Cornelio ("Cornelio"), appeals the Findings of Fact, Conclusions of Law and Decision ("DMV Order"), entered January 27, 2021, by Samantha Simpkins, Field Hearing Officer ("Hearing Officer"), affirming the license suspension imposed by the Respondent, State of Florida, Department of Highway Safety and Motor Vehicles ("DMV"). The Hearing Officer upheld Cornelio's six-month driver's license suspension, effective December 8, 2020, for driving under the influence after Cornelio's breath tests showed an unlawful alcohol level.[2]

The underlying traffic stop occurred during the early morning hours of December 8, 2020, after Cornelio was stopped by the Pasco County Sheriff's Office ("PCSO") for driving 78 miles per hour in a posted 45 miles per hour zone. Cornelio submitted to a breath test which showed a breath alcohol level of .151 g/210L, at 3:15 a.m., and .147 g/210L, at 3:18 p.m. Cornelio was arrested for DUI and his driver's license was suspended for a period of six months.

Cornelio timely requested an administrative hearing before the DMV's Bureau of Administrative Reviews ("BAR") to challenge the lawfulness of his license suspension. A telephonic hearing was held on January 15, 2021, with the Hearing Officer placing the call from Tallahassee.[3] The Hearing Officer admitted eight documents received from the PCSO into evidence, to include the Breath Alcohol Test Affidavit, over the objection of Cornelio. As set forth in the transcript of the administrative hearing, the following exhibits were admitted:

DDL-1—FL DUI Uniform Traffic Citation AC393CE;
DDL-2—Photocopy of FL Driver License;
DDL-3—Pasco County Complaint Affidavit;
DDL-4—Alcohol/Drug Influence Report;
DDL-5—Breath Alcohol Test Affidavit;
DDL-6—Alcohol Influence Report—Initial Contact Supplement;
DDL-7—Breath Test Report;
DDL-8—Florida Uniform Traffic Citations;
Driver Ex. 1—Email Thread and Attachments; and,
Driver Ex. 2—12-16-20 Letter.[4]

The transcript shows that the Hearing Officer listened to Cornelio's objections and case law argument. The Hearing Officer stated she would reserve ruling until she had a chance to thoroughly review the cited statutes and case law. After the hearing, the Hearing Officer took the matter under advisement before entering the DMV Order on January 27, 2021, affirming Cornelio's license suspension.

ISSUES RAISED

Before this Court, Cornelio has raised several issues, which are consolidated according to the standard of review. The issues are:

(1) Cornelio was denied due process of law when the Hearing Officer entered all documents it received from law enforcement, before giving Cornelio an opportunity to object; and, Cornelio was denied due process of law when the telephonic hearing originated in Tallahassee instead of Tampa (which Cornelio asserts also departs from the essential requirements of law);

(2) The DMV Order and proceedings before the Hearing Officer departed from the essential requirements of law because Cornelio's Breath Test Affidavit was admitted into evidence over Cornelio's objection; the Hearing Officer failed to consider the case law submitted by Cornelio, or provide legal analysis in her decision; and, the Hearing Officer failed to admit into evidence Petitioner's Exhibits 1 and 2, which were composite email chains; and, lastly,

(3) The DMV Order is not supported by competent substantial evidence as the DMV failed to show that the administered breath tests were scientifically reliable.

The DMV counters these arguments with citations to the record and case law.

LAW AND ANALYSIS

In addressing the first prong, due process of law, the Court finds that Cornelio was afforded due process during the administrative hearing below. Initially, the Court finds that Cornelio was not denied due process by the Hearing Officer admitting the documents before

giving Cornelio the opportunity to object. Section 322.2615(2)(b), Florida Statutes, states that "[m]aterials submitted to the department by a law enforcement agency or correctional agency *shall* be considered self-authenticating and *shall* be in the record for consideration by the hearing officer." (*emphasis added)*. The Hearing Officer was statutorily required to admit the documents into the record, regardless of when Cornelio was given the opportunity to object.

Next, the Court finds that Cornelio's argument that the Hearing Officer denied him due process because the telephonic hearing originated from Tallahassee, instead of Tampa, is without merit. Florida Administrative Code Rule 15A-6.009, location of hearings, requires that hearings be held at the nearest BAR office to the arresting county. The Court finds this section applies only to in-person hearings.[5] The hearing also occurred during a pandemic wherein the Florida Supreme Court issued several orders permitting the use of telephonic hearings. Lastly, section 322.2615(6)(b), Fla. Stat., specifically provides that "[t]he hearing officer may conduct hearings using communications technology."

In addressing the second prong, whether the Hearing Officer departed from the essential requirements of law, the Court first finds that the Breath Test Affidavit was lawfully admitted into evidence. *See* § 322.2615(2)(b), Fla. Stat.; Rule 15A-6.013(2), Fla. Admin. Code. There is no rule or law that requires the Hearing Officer, in this administrative review proceeding, to exclude the Breath Test Affidavit without an agency inspection report. Florida Administrative Code Rule 15A-6.013(2), introduction of evidence, states:

> (2) The hearing officer *may* consider any report or photocopies of such report submitted by a law enforcement officer, correctional officer or law enforcement or correctional agency relating to the suspension of the driver, the administration or analysis of a breath or blood test, *the maintenance of a breath testing instrument,* or a refusal to submit to a breath, blood, or urine test, which has been filed prior to or at the review. *Any such reports submitted to the hearing officer shall be in the record for consideration by the hearing officer.*
>
> No extrinsic evidence of authenticity as a condition precedent to admissibility is required. *(emphasis added).*

Therefore, the lack of an agency inspection report does not negate the Hearing Officer's requirement to admit the Breath Test Affidavit, and then give it whatever weight, relevance, and credibility she deems appropriate. *See* Rule 15A-6.013(7)(c)(stating "[t]he hearing officer is the sole decision maker as to the weight, relevance and credibility of any evidence presented").

The next two issues raised under this prong of review, whether the DMV Order and Hearing Officer departed from the essential requirements of law, are without merit. The Hearing Officer is not required to provide a legal analysis of the case law submitted by Cornelio in its decision, and the record shows that the Hearing Officer did admit into evidence Petitioner's Exhibits 1 and 2, which were composite email chains.

Turning to the last prong of review, the Court finds that there is competent substantial evidence to support the DMV Order. The test for competent substantial evidence is whether there exists any competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *Dusseau,* 794 So.2d at 1276; *Stenmark,* 941 So.2d at 1249. This Court is prohibited from reweighing the evidence and substituting its judgement for that of the Hearing Officer. *Dept. of Highway Safety and Motor Vehicles v. Silva,* 806 So.2d 551, 553 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (*citations omitted).* Accordingly, the Court finds that the DMV Order is supported by competent substantial evidence and adheres to the essential requirements of law, and that there is no basis to grant certiorari relief under the facts of this case.

WHEREFORE, it is hereby, **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is hereby DENIED.

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[1]The Florida Supreme Court, on December 9, 2021, declined to accept jurisdiction to resolve the inter-district conflict between *McLaughlin* and other cases on this matter. *See Cordaro v. Dep't. of Highway Safety & Motor Vehicles,* 2021 WL 5853778 (Fla. Dec. 9, 2021) [46 Fla. L. Weekly D1916a].

[2]The Court notes that, while this appeal was pending, Cornelio arrested a second time for DUI in Hillsborough County, Case No. 2021-CT-006872.

[3]Robert Cornelio did not appear for this hearing, but was represented by counsel. While Cornelio had the right to request the presence of a. witness, no witnesses were subpoenaed for this hearing. *See* § 322.2615(6)(b), Fla. Stat.

[4]While these Exhibits were not expressly stated in the DMV Order, the transcript clearly shows that Driver's Exhibits 1 and 2 were admitted into the record.

[5]At least one other circuit court, sitting in its appellate capacity, has also concluded that Rule 15A-6.009 applies only to in-person hearings. *See Celaj v. Dept. of Highway Safety and Motor Vehicles,* Case No. 2021-CA-000240 (Fla. 7th Cir. Ct. Oct. 4, 2021)]29 Fla. L. Weekly Supp. 566a].

* * *

Appeals—Certiorari—Timeliness—Petition for writ of certiorari challenging final order must be filed within 30 days of rendition of challenged order, not within 30 days of date counsel became aware of order—Motion to dismiss is granted

PIERRE PUENTE, Plaintiff, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23017416. Division AW. November 1, 2023.

ORDER GRANTING MOTION TO DISMISS AS UNTIMELY AND FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.,) **THIS CAUSE** came before the Court, in its appellate capacity, upon Respondent's Motion to Dismiss Petition for Certiorari as Untimely, dated September 15, 2023. This Court, after review of the Motion to Dismiss, Petitioner's Response to Order to Show Cause dated October 23, 2023, applicable law, and being otherwise duly advised finds as follows:

Respondent argues that Petitioner's Petition for Writ of Certiorari ("Petition") should be dismissed as it was untimely filed pursuant to Florida Rules of Appellate Procedure 9.100(c). Per Rule 9.100(c) Petitioner was required to file her Petition no later than 30 days from the rendition of Order being challenged. The Final Order titled "Finding of Fact, Conclusions of Law and Decision" (hereafter "Final Order") was rendered on July 10, 2023. The Petition was filed on August 23, 2023, greater than 30 days after rendition of the Final Order.

Prior to filing the instant Petition, Petitioner filed a Petition for Writ of Certiorari in Palm Beach County on August 18, 2023. Pursuant to Florida Rule of Judicial Administration 2.514 a petition challenging the Final Order was required to be filed no later than August 9, 2023. Therefore, Petitioner's Palm Beach County filing was untimely filed.

Petitioner argues that the Court should overlook this 30-day deadline due to notice deficiencies on the part of Respondent and Hearing Officer Jrade. Petitioner claims to have not learned about the Final Order until July 28, 2023, and to not have received the Final Order via email. It is unclear as to when/if Petitioner received the Final Order via regular mail. Petitioner asks this Court to base the deadline for the Petition and the corresponding time calculation on the day in which Petitioner's Counsel became *aware* of the Final Order. Petitioner has provided no legal authority to support this position. Florida law requires the filing of the Petition for Writ of Certiorari within 30-days of *rendition* of the Final Order, not within 30-days of *awareness* of the Final Order or even within 30-days of *receipt* of the Final Order. Moreover, Petitioner's Counsel became aware of the Final Order on July 28, 2023, approximately 13 days prior to the filing deadline.

Accordingly, it is:

ORDERED that Respondent's Motion to Dismiss Petition for

Certiorari as Untimely is hereby **GRANTED**. This Appellate proceeding is hereby **DISMISSED** as untimely filed and the Clerk of Court is **DIRECTED** to close this case.

* * *

Mandamus—Clear legal right to relief—Mandamus is unavailable to compel clerk of circuit court to make and record a certificate showing transfer of a judgment lien against real property to other security, in accordance with section 55.10(5), where the amount required to effect the transfer was not deposited into the court registry—Although petitioner's escrow agent deposited amount required to satisfy judgment, this was less than the amount required to transfer lien

NIKOLAY IZMERLI, Petitioner, v. The honorable CINDY STUART, in her official capacity as the CLERK OF THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-8917. Division F. February 13, 2023. Jennifer Gabbard, Judge. Counsel: Nikolay Izmerli, Pro se, Tampa, Petitioner. Kristen M. Fiore, Akerman LLP, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

THIS CAUSE is before the Court on Petitioner Nikolay Izmerli's Petition for Writ of Mandamus (hereinafter the "Petition"), filed on October 24, 2022, seeking a writ to compel Cindy Stuart, Clerk of the Circuit Court of Hillsborough County (hereinafter, "the Clerk"), to transfer a lien from real property to other security and record a certificate showing the transfer of the lien to the security in the court registry in accordance with section 55.10(5), Florida Statutes. The Court denies the Petition because Petitioner has not demonstrated a clear legal right to the requested relief. Mandamus is unavailable to compel the Clerk to make and record a certificate showing the transfer of the lien where the amount required to do so under section 55.10(5), Florida Statutes, was not deposited into the court registry.

FACTS AND PROCEDURAL HISTORY

On August 4, 2022, a final judgment was entered against Petitioner in the amount of $25,954.30 as principal and $1,232.30 in interest in *U.S.A. Motors Group, LLC v. Nikolay Izmerli,* Case No. 21-CC-077189, in which Petitioner is the defendant and judgment debtor. Petitioner appealed this judgment to the Second District Court of Appeal on September 2, 2022.

On August 31, 2022, Petitioner asked the Clerk to calculate the amount of money required to be submitted into the court registry to transfer the judgment lien pursuant to section 55.10(5), Florida Statutes. The Clerk provided Petitioner with a Computation Form for Transfer of Judgment F.S. 55.10, which indicated that Petitioner was required to deposit $31,736.85[1] into the court registry to transfer the judgment lien.

On September 14, 2022, the Clerk calculated the amount to satisfy the judgment as $27,334.80, plus costs, and the escrow agent for Petitioner, Peer Title Inc., deposited $27,334.80 into the court registry on the same day. The Clerk then filed a satisfaction of judgment. On September 15, 2022, Plaintiff filed an emergency motion in *U.S.A. Motors* for an Order Directing Clerk to Prepare and Record Certificate of Transfer of Lien. U.S.A. Motors Group LLC filed a Motion to Disburse Funds Held in Registry on September 16, 2022. A hearing was held on these motions on December 14, 2022, but the Court has not yet entered an order.

STANDARD OF REVIEW

Mandamus lies to compel a public official to perform a ministerial duty. *See Huffman v. State,* 813 So. 2d 10, 11 (Fla. 2001) [26 Fla. L. Weekly S741a]. (citing *Smith v. State,* 696 So. 2d 814 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D694a]. Before a court may issue the writ, a petitioner must first establish that he has a clear legal right to the performance of the requested act, that the public official has an indisputable legal duty to act, and that the petitioner has no other adequate remedy at law. *See Smith v. State,* 696 So. 2d 814, 815 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D694a]. If a petition for writ of mandamus is not facially sufficient, a court may dismiss it. *See Radford v. Brock,* 914 So. 2d 1066, 1067 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2675b].

DISCUSSION

In the performance of her duties as the court's record keeper, the clerk is a ministerial officer of the court devoid of discretion. *Phillips v. Pritchett Trucking, Inc.,* 328 So. 3d 380, 382 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2206a] (citing *Times Publ'g Co. v. Ake,* 645 So. 2d 1003, 1005 (Fla. 2d DCA 1994)). Accordingly, mandamus is appropriate when the Clerk fails to carry out her statutory duties. Petitioner claims that the Clerk violated her duties by failing to make and record a certificate of transfer of a judgment lien, pursuant to section 55.10(5), Florida Statutes. Instead, she satisfied the judgment while the judgment was being appealed. Under section 55.10(5), a judgment lien may be transferred from real property to other security by either depositing in the clerk's office a sum of money or filing in the clerk's office a bond executed as surety by a surety insurer. Section 55.10(5) further provides that

> [s]uch a deposit or bond shall be made in an amount *equal to the amount demanded in such claim of lien plus interest thereon at the legal rate for 3 years plus $500* to apply on any court costs which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment, order, or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded and costs plus $500 for court costs. *Upon such a deposit being made* or such bond being filed, the clerk shall make and record a certificate showing the transfer of the lien. . ."

§55.10(5), Fla. Stat. (emphasis added).

A review of the appendix shows that Petitioner was required to deposit $31,736.85 into the court registry to transfer the judgment lien (Izmerli Ex. 2). However, Peer Title Inc., Petitioner's escrow agent, deposited $27,334.80 into the court registry, which was the amount required to satisfy the judgment. (Izmerli Ex. 7). Petitioner has not asserted that he deposited an amount equal to the amount required to transfer the judgment lien. Under section 55.10(5), the Clerk has a ministerial duty to record a certificate showing the transfer of the lien only "upon such a deposit being made." Because Petitioner has not shown that he deposited an amount equal to the amount required to transfer the judgment lien, he has failed to establish that he has a clear legal right to have the Clerk make and record a certificate showing the transfer of the lien under section 55.10(5).

Petitioner also argues that by refusing to correct the record by recording the certificate showing the transfer of the lien, the clerk violated her ministerial duty to correct imperfectly or erroneously recorded records under section 695.12, Florida Statutes. Section 695.12 provides that the Clerk shall record any instrument anew "[w]henever any instrument authorized or required by law to be recorded. . .either has been or may be so imperfectly or erroneously recorded as to require a new record." As stated before, the clerk was not required by law to record a certificate showing the transfer of the lien because Petitioner failed to tender the amount required. Accordingly, Petitioner does not have a clear legal right to an error correction.

Petitioner's request for declaratory relief fails for the same reason. Petitioner is not entitled to have a certificate showing transfer of the lien from the real property to the security in the court registry because he has not shown that he deposited the amount necessary to transfer the judgment. By failing to do so, Petitioner failed to meet the condition precedent of the statute and thus, he cannot state a cause of action. Accordingly, Petitioner's request for declaratory relief is

hereby **DISMISSED with prejudice.**

It is therefore **ORDERED AND ADJUDGED** that the Petition for Writ of Mandamus is hereby **DENIED** in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

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[1]The computation form calculated that amount to be $31,736.5456, which is properly rounded up to $31, 736.85.

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CIRCUIT COURTS—ORIGINAL

Insurance—Evidence—Witnesses—Insurer's designated corporate representative lacked personal knowledge required to testify as fact witness where representative only reviewed documents created by others after litigation was initiated—Representative may testify as records custodian upon showing that requirements of section 90.803(6) are met

A.J. WELLS ROOFING & CONSTRUCTION, a/a/o Mavis Williams, Plaintiff, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County, Civil Division. Case No. 2022-CA-000052. November 7, 2023. Robert M. Dees, Judge. Counsel: Charles P. Pearson and Dale S. Shelton, Shelton Law, PLLC, Tallahassee, for Plaintiff. Sylvie Rampal, Senior Associate General Counsel, Fort Lauderdale, for Defendant.

ORDER ON PLAINTIFF'S MOTION IN LIMINE

This cause came before the Court upon *Plaintiff's Motion in Limine to Exclude and Limit the Testimony of Defendant's Names Witnesses*[1] and having reviewed the record and heard this matter on October 11, 2023, and again at the pre-trial conference on October 31, 2023, this Court ORDERS as follows:

This Court GRANTS Plaintiff's motion in limine, as follows:

1. Regarding Jimmy Casas as Defendant's corporate representative:

a. This Court finds that Defendant's corporate representative, Jimmy Casas, does not have personal knowledge relating to the facts of the insurance claim underlying this litigation, as Mr Casas did not participate in handling the insurance claim but rather only reviewed documents created by others after litigation was initiated.

b. Following the precedent set forth in *Mesa v. Citizens Property Insurance Corporation,* 358 So. 3d 452 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D465a], which considered the legal question at hand, this Court rules that reviewing documents does not confer upon the reviewer 'personal knowledge' as required by Florida Statute § 90.604 and that the corporate representative designation under Florida Rule of Civil Procedure 1.310(b)(6) does not constitute an exception to the evidence code's personal knowledge requirement.

c. Considering the foregoing, this Court rules that Jimmy Casas, Defendant's corporate representative, is precluded from testifying as a fact witness.

2. Regarding Jimmy Casas as Defendant's records custodian: Defendant may call Jimmy Casas as Defendant's records custodian under Florida Statutes § 90.803(6), but only for the purpose of authenticating documents and subject to Defendant's showing at trial that the requirements of Florida Statutes § 90.803(6) have been met.

[1]Dckt. 48.

* * *

Criminal law—Evidence—Blood test results—Sufficiency of administrative rules—Primary jurisdiction—Motion to exclude blood test results based on insufficiency of rule governing preservation of blood samples for later testing and needle gauge size challenges sufficiency of existing rule, not compliance with rule—Division of Administrative Hearings is more suitable forum and venue for resolution of issue—Motion to invoke primary jurisdiction is granted

STATE OF FLORIDA, v. JOHN B. GOODMAN, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Criminal Division W. Case No. 502010CF005829AXXXMB. March 21, 2014. Jeffrey Colbath, Judge. Counsel: Sherri Collins, for State. Elizabeth Parker, for Defendant.

ORDER GRANTING STATE'S MOTION TO INVOKE THE DOCTRINE OF PRIMARY JURISDICTION

THIS CAUSE came before the Court on Defendant's "Motion to Exlude [sic] Blood Test Results Based upon the Insuffieciency [sic] of the FDLE Regulations and the Lack of Scientific Reliability of the Test Results" ("Motion to Exclude") filed on February 24, 2014 and the State's Motion to Strike [Defendant's Motion] and to Invoke the Doctrine of Primary Jurisdiction," ("Motion to Invoke") filed March 7, 2014. After a review of both motions, the argument of counsel at the hearing held on March 14, 2014, and relevant case law, the Court finds as follows:

In support of his argument that the results of a blood draw taken while he was a patient at Wellington Regional Hospital after the crash should be excluded, Defendant asserts that Florida Department of Law Enforcement ("FDLE") Rule 11D.8.012 is inadequate, deficient, and scientifically unsound for a variety of reasons. (*See* Def. Mot. at 4-6.) Defendant specifically attacks the preservation of a blood sample for later analysis and the type of needle to be used to draw the blood sample. The lengthy Motion to Exclude contains a substantial number scientific diagrams, hypotheses, and analyses of the effect of following certain testing techniques. (*Id.* at 8-30.) Key to Defendant's argument is the fact that in his case, a different gauge needle than the one provided in the standard law enforcement kit. According to Defendant, these kits are made widely available throughout the State to law enforcement agencies and all contain a specific gauge needle. (*See Id.* at 8-9.)

In response to Defendant's arguments, the State asserts in its Motion to Invoke that the more proper venue for challenges to the sufficiency of rules promulgated by administrative agencies, like FDLE, is to file a petition with the Department of Administrative Hearings ("DOAH"), pursuant to the Administrative Procedure Act, Chapter 120, Florida Statutes. (*See* State Mot. at 2.) This section provides that "[a]ny person substantially affected by a rule or proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is n invalid exercise of delegated legislative authority." § 120.56(1), Fla. Stat. (2013). The procedure calls for an affected party to file a petition with DOAH and then an administrative law judge would rule on the merits of the petition within thirty days of filing the petition. § 120.56(1)(c), Fla. Stat. (2013). The State acknowledges that the trial court still possesses jurisdiction over this matter, but explains that it is discretionary when confronted with an administrative rules challenge. (State Mot. at 3.)

"The doctrine of primary jurisdiction dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been rule upon by the agency." *Flo-Sun, Inc. v. Kirk,* 783 So. 2d 1029, 1036-37 (Fla. 2001) [26 Fla. L. Weekly S189a]. Where a defendant challenges the sufficiency of the rules as promulgated by FDLE rather than a lack of compliance with the rules, a trial court can defer action on those issues to the DOAH based on the doctrine of primary jurisdiction. *See State v. Sabates,* 17 Fla. L. Weekly Supp. 45a (Fla. Broward Cty. Ct. Sept. 23, 2009).

The Court finds that Defendant's challenge goes more to the sufficiency of FDLE Rule 11D.8.012, rather than an allegation of lack of compliance with the Rule. *See State v. Waller*, 17 Fla. L. Weekly Supp. 139a (Fla. Broward Cty. Ct. June 10, 2009). Therefore, the Court concludes this matter would be better addressed as a petition to DOAH. The matters raised by Defendant's Motion present an issue of statewide concern beyond the facts of his own case and DOAH would provide a fair and efficient forum for its resolution. The Court is comfortable with adopting this procedure because of its prior successful use in this Circuit with respect to challenging an FDLE

Rule. *Morales v. State,* 20 Fla. L. Weekly Supp. 608a (Fla. Palm Beach Cty. Ct. August 15, 2012). Accordingly, it is hereby

ORDERED AND ADJUDGED the State's Motion to Invoke Primary Jurisdiction is **GRANTED**. The Court reserves ruling on Defendant's Motion to Exclude pending the outcome of the proceedings before the Department of Administrative Hearings. This order has no impact on the Court's ability to rule on other pretrial motions pending before the Court. It is further,

ORDERED AND ADJUDGED that Defendant shall file his petition challenging FDLE Rule 11D.8.012 pursuant to section 120.56(1)(c), Florida Statutes within twenty (20) days of the date of this Order. Defendant shall file a status report thirty (30) days from the date of this Order and each thirty (30) days thereafter to update the Court on the progress of the proceedings.

* * *

Criminal law—Evidence—Blood test results—Sufficiency of administrative rules—Motion to suppress on ground that Florida Department of Law Enforcement rules failed to substantially comply with "core policies" of implied consent law is denied, and state is entitled to presumptions of impairment associated with implied consent law—Motion to suppress based on argument that needle used to draw defendant's blood was of different gauge than needles provided in standard law enforcement blood draw kits is denied, as there is no reliable science to suggest that clotting, needle gauge, hemoanalysis, tourniquet application, or hemoconcentration had any effect on defendant's blood alcohol concentration result

STATE OF FLORIDA, v. JOHN B. GOODMAN, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Criminal Division W. Case No. 502010CF005829AXXXMB. October 3, 2014. Jeffrey Colbath, Judge. Counsel: Sherri Collins, for State. Elizabeth Parker, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE BLOOD TEST RESULTS BASED UPON THE INSUFFICIENCY OF THE FDLE REGULATIONS AND THE LACK OF SCIENTIFIC RELIABILITY OF THE TEST RESULTS

THIS CAUSE came before the Court on Defendant's Motion to Exclude Blood Test Results Based upon the Insufficiency of the FDLE Regulations and the Lack of Scientific Reliability of the Test Results ("Motion"), filed February 24, 2014. The Court received evidence and heard argument on the matter during hearings held on September 22, 23, 24, and 29, 2014. Having considered the Motion, argument of counsel, record evidence, and relevant law, the Court hereby finds and rules as follows:

In response to Defendant's Motion, the State filed its Motion to Strike and to Invoke the Doctrine of Primary Jurisdiction on March 7, 2014. The State argued that Defendant's challenge to the Florida Department of Law Enforcement ("FDLE") regulations on blood testing should be heard before the Department of Administrative Hearings ("DOAH"). On March 21, 2014, the Court entered its Order Granting State's Motion to Invoke the Doctrine of Primary Jurisdiction. Defendant then filed a Petition to Determine the Invalidity of an Existing Rule with DOAH on April 24, 2014. The DOAH hearing was held on June 10 and 11, 2014 before Administrative Law Judge William Quattlebaum. On July 30, 2014, Judge Quattlebaum entered a Final Order denying Defendant's Petition. The Court adopts Judge Quattlebaum's findings of fact and conclusions of law.

During the September hearings on the matter before this Court, the Court simultaneously considered the instant Motion and the State's *Daubert* Objection to the opinions that substantiate the Motion. On October 3, 2014, the Court entered an order granting the State's *Daubert* Objection to the testimony of Laura Barfield. The Court hereby incorporates by reference its findings of fact and rulings of law contained in its order granting the State's *Daubert* Objection.

During the September hearings, Defendant and the State narrowed the scope of the Motion. Defendant withdrew pages 30 through 78 of his Motion. Defendant and the State agreed that the only two arguments that remained before the Court were: (1) whether the FDLE rules failed to comply with the core policies of Florida's Implied Consent Law pursuant to *State v. Miles,* 775 So. 2d 950 (Fla. 2000) [25 Fla. L. Weekly S1082a] (Motion at 4 ¶¶ 3-4) and (2) whether the blood alcohol tests were reliable in light of the needle gauge issue (Motion at 6 ¶¶ 9-10).

The first issue to be considered is whether the FDLE rules failed to comply with the core policies of Florida's Implied Consent Law pursuant to *Miles.* The Court finds that Defendant failed to demonstrate that the FDLE rules are inadequate and inconsistent with the purpose of the Implied Consent Law as it relates to ensuring the reliability of test results. Accordingly, the State is entitled to the presumptions of impairment associated with the implied consent statutory scheme. *See Miles,* 775 So. 2d at 955.

The second issue to be considered is whether the blood alcohol test in this case was reliable in light of the needle gauge issue. The State demonstrated that there was substantial compliance with the FDLE rules in this case. Thus, the State is entitled to the presumptions of impairment. *See* § 316.1934, Fla. Stat. (2014). Even if the blood test did not substantially comply with the FDLE rules and the Implied Consent Law, the results would be admissible pursuant to traditional rules of evidence. *State v. St. Pierre,* 693 So. 2d 102, 104 (Fla. 5th DCA (1997) [22 Fla. L. Weekly D1181a].

The Court finds that the scientific test conducted in this case was performed reliably. No *Daubert* hearing is required to establish the reliability of gas chromatography analysis of blood alcohol concentration. Gas chromatography is routinely admitted as a reliable analysis and is generally accepted in the relevant scientific community. *State v. Sercey,* 825 So. 2d 959, 980-81 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1415b]; *see also United States v. Vitek Supply Corp.,* 144. F.3d 476, 485 (7th Cir. 1998); *United States v. Crockett,* 586 F. Supp. 2d 877, 886 (E.D. Mich. 2008) ("Gas chromatography and infrared spectrometry have long been recognized as valid technological methods for determining the composition of physical substances."). Furthermore, Defendant does not find gas chromatography objectionable; rather, Defendant took issue with the needle gauge issue, and a *Daubert* hearing was held on the needle gauge issue. In light of the Courts previous findings that there is no reliable science to suggest that the clotting, needle gauge, hemolysis, tourniquet application, and/or hemoconcentration had any effect on the blood alcohol concentration result in this case, the Court finds that the blood evidence in this case is reliable and admissible. Accordingly, it is hereby

ORDERED that Defendant's Motion to Exclude Blood Test Results Based upon the Insufficiency of the FDLE Regulations and the Lack of Scientific Reliability of the Test Results is **DENIED**.

* * *

Criminal law—DUI manslaughter—Evidence—Medical records—State's lack of good faith in obtaining defendant's medical records by subpoena without notice does not warrant exclusion of records subsequently obtained by search warrant—State's single attempt to obtain records by subpoena was not sufficiently deliberate that exclusion can meaningfully deter it or sufficiently culpable that deterrence is worth price paid by justice system—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. JENNIFER C. DUSAN, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2014-CF-017383-

AXXX-XX. November 13, 2023. Tesha Scolaro Ballou, Judge. Counsel: William Scheiner, Assistant State Attorney, and Kerri-Ann McGuire, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. William Ponall, Maitland, and Whitney S. Boan, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM DEFENDANT'S CONFIDENTIAL MEDICAL RECORDS

THIS CAUSE came before the Court on November 6, 2023, upon the Defendant's "Motion to Suppress Evidence Obtained from Defendant's Confidential Medical Records" filed on August 17, 2023. Upon consideration of the Motion, court file, written and oral argument of counsel, and the relevant legal authority, the Court finds the following:

On April 28, 2014, the Defendant was charged by Information with DUI Manslaughter and Driving Under the Influence and Causing Damage or Injury based upon a car crash resulting in the death of Nicole Diaz which occurred on March 1, 2014.

The Defendant was transported to Parrish Medical Center where blood was drawn for medical treatment purposes and blood was drawn for legal purposes. The legal blood draw is inadmissible based upon the failure of law enforcement to obtain a search warrant pursuant to *Missouri v. McNeely,* 569 U.S. 141 (2013) [24 Fla. L. Weekly Fed. S150a].

Prior to the filing of an Information in this case, the toxicology reports from the Defendant's medical blood and urine were obtained from Parrish Medical Center on March 28, 2014, without prior notice to the Defendant. After the Information was filed, the State filed its Notice of Intent to Seek Subpoena Duces Tecum on April 30, 2014. The Defendant filed her objection on May 1, 2014. The Court Granted the State Leave to Issue the Subpoena Duces Tecum after holding a hearing on the Defendant's Objection. On July 30, 2015, the Defendant filed a "Motion to Exclude Illegally-Obtained Medical Records for Violation of Her Right to Privacy." The Defendant argued that *State v. Kutik,* 914 So. 2d 484 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2534b] prohibited the admission of legally subpoenaed medical records if the had already been obtained illegally. The Defendant argued that the initial receipt of Defendant's medical records on March 28, 2014 was predicated upon bad faith of the State and the Trooper requesting the initial subpoena. Although a hearing was held on October 9, 2015 on the Defendant's Motion, the Court did not issue an Order as the parties stipulated to the exclusion of these medical records at trial.

The case was tried in July, 2019 and the Defendant was found guilty. The Defendant's conviction was reversed with a Mandate issued on September 14, 2021. Thereafter, the State sought to obtain the Defendant's medical records via a search warrant. The State's affidavit included the fact that the medical records had previously been improperly obtained and that the legal blood results had been suppressed. A search warrant was issued on October 5, 2021.

Based upon the State's prior stipulation, it can be assumed there was a lack of a good faith effort to comply with section 395.2035(4)(d), Florida Statutes when the Defendant's toxicology reports were initially obtained without notice while the case was in the State's Intake division. The Defendant argues the assistant state attorney assigned to the case intentionally sought to deceive the Court when he requested a subpoena duces tecum (with notice) after the Information was filed. According to the Defendant, the assistant state attorney was assigned to the case on April 29, 2014 and the Notice of Intent was filed the following day. Defense counsel proposes the theory that counsel took the time to read all of the case notes and intentionally deceived the Court regarding the issuance of a subpoena by failing to acknowledge that the records had previously been obtained without notice to the Defendant. It is far more realistic or reasonable to believe that assigned counsel referred to the Information, noted the charged offenses, and determined that a subpoena was necessary to obtain the medical records in support of the State's case. Based upon the state of the law at the time, had counsel known of the previous improper subpoena, he could have simply applied for a search warrant as suggested by the Court in *Frank v. State,* 912 So. 2d 329, 332 n.2 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2534b] which provides:

> An individual's constitutional right of privacy in medical records is not implicated by the State's seizure and review of medical records under a valid search warrant without prior notice or hearing. *Limbaugh v. State*, 887 So.2d 387, 397 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2213a], *review denied*, 903 So.2d 189 (Fla. 2005). Consequently, the State has an available alternative if for some reason it is unwilling, or, unable, to comply with the requirements of section 395.3025(4)(d).

Regardless of the state attorney's thought process in obtaining the medical records pursuant to the second subpoena, they have been properly excluded pursuant to both *Kutik* and *Frank.*

The State has now obtained the Defendant's medical records through the execution of a search warrant. The Defendant argues the taint regarding the improperly subpoenaed records attaches to the search warrant. However, the lack of good faith, characterized as egregious conduct by the Defendant, is related to a single attempt to obtain the Defendant's medical records without notice. That same notice is not required when the State seeks medical records pursuant to a search warrant subject to probable cause and relevance requirements. As in *Dinkins v. State,* 278 So. 3d 828 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2150a], the search warrant requirements were met in this case and the search warrant issued. The lack of good faith in obtaining a subpoena for medial records should be, and is, deterred by the exclusion of those records. To then exclude records obtained by a search warrant on the same basis, would require a finding that the conduct was "sufficiently deliberate that exclusion [of the records] can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. Furthermore, the application of the rule should typically be only as a "last resort," such that the deterrence of suppression must outweigh the heavy costs that society sustains in many cases where a defendant is ultimately turned loose without punishment." *Dinkins* at 836-37 (internal citations omitted). The facts of this case do not support the exclusion of the Defendant's medical records obtained by execution of a search warrant.

Accordingly, it is

ORDERED AND ADJUDGED:

Defendant's Motion to Suppress Evidence Obtained from Defendant's Confidential Medical Records is **DENIED**.

* * *

Criminal law—DUI manslaughter—Evidence—Blood test—Implied consent—Constitutionality of statute—Court rejects argument that portion of implied consent statutes which delegate to the Florida Department of Law Enforcement the responsibility for regulating blood tests and allows for their admissibility without a hearing to determine their reliability is unconstitutional because it is procedural law which needs to be enacted or adopted by the supreme court—Challenged portions of implied consent statutes are substantive in nature and do not need to be adopted by the supreme court where they are intimately intertwined with legislature's enactments regarding the testing of the blood alcohol level of motorists suspected of driving under the influence—Even if implied consent statutes were considered procedural, defendant has failed to allege that there is a rule or holding of the supreme court which conflicts with the statutes—Implied consent laws are not unconstitutional under Article V, section 21, Florida Constitution—Implied consent laws do not require FDLE to interpret the statutes and, even if they did, article V, section 21, merely states that a court cannot defer to the agency's interpretation

STATE OF FLORIDA, Plaintiff, v. GLENN BRIMMER, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CF-28322-AXXX-XX. December 14, 2023. Samuel Bookhardt III, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND/OR IN LIMINE BASED UPON THE LEGISLATURE'S AND FDLE'S UNCONSTITUTIONAL DELEGATION OF RULE INTERPRETATION TO FDLE AND FDLE'S INFRINGEMENT OF THE FLORIDA SUPREME COURT'S RULE MAKING AUTHORITY AND THE COURT'S NEED TO HOLD DAUBERT HEARING ON THE SCIENTIFIC SUFFICIENCY OF THE FDLE RULES PERTAINING TO BLOOD TESTING

THIS CAUSE came to be heard before the Court on October 30, 2023 upon the Defendant's Motion to Dismiss and/or in Limine Based Upon the Legislature's and FDLE's Unconstitutional Delegation of Rule Interpretation to FDLE and FDLE's Infringement of the Florida Supreme Court's Rule Making Authority and the Court's Need to Hold Daubert Hearing on the Scientific Sufficiency of the FDLE Rules Pertaining to Blood Testing, filed on March 4, 2022. On October 23, 2023, the State filed a reply to the Defendant's motion. The Court has heard and considered the arguments of counsel and has carefully reviewed the motion and reply. Based upon this review, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

a. On May 16, 2018, the Defendant was charged with DUI Manslaughter. A sample of the Defendant's blood was collected and tested after the accident that resulted in the charge.

b. The Defendant claims that sections 316.1932, 316.1933, and 316.1934, Florida Statutes are unconstitutional and that the blood test results in this case are not admissible under those statutes. He claims that the case should be dismissed or in the alternative that a Daubert hearing is needed to determine the admissibility of the blood test results. These statutes are known as the implied consent statutes. Section 316.1932(1)(a), Florida Statutes (2018) states in pertinent part:

> 1. a. Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. The administration of a breath test does not preclude the administration of another type of test. The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she commits a misdemeanor in addition to any other penalties. The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding.
>
> 2. The Alcohol Testing Program within the Department of Law Enforcement is responsible for the regulation of the operation, inspection, and registration of breath test instruments utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program is responsible for the regulation of the individuals who operate, inspect, and instruct on the breath test instruments utilized in the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program is further responsible for the regulation of blood analysts who conduct blood testing to be utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program shall:
>
> a. Establish uniform criteria for the issuance of permits to breath test operators, agency inspectors, instructors, blood analysts, and instruments.
>
> b. Have the authority to permit breath test operators, agency inspectors, instructors, blood analysts, and instruments.
>
> c. Have the authority to discipline and suspend, revoke, or renew the permits of breath test operators, agency inspectors, instructors, blood analysts, and instruments.
>
> d. Establish uniform requirements for instruction and curricula for the operation and inspection of approved instruments.
>
> e. Have the authority to specify one approved curriculum for the operation and inspection of approved instruments.
>
> f. Establish a procedure for the approval of breath test operator and agency inspector classes.
>
> g. Have the authority to approve or disapprove breath test instruments and accompanying paraphernalia for use pursuant to the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.
>
> h. With the approval of the executive director of the Department of Law Enforcement, make and enter into contracts and agreements with other agencies, organizations, associations, corporations, individuals, or federal agencies as are necessary, expedient, or incidental to the performance of duties.
>
> i. Issue final orders which include findings of fact and conclusions of law and which constitute final agency action for the purpose of chapter 120.
>
> j. Enforce compliance with the provisions of this section through civil or administrative proceedings.
>
> k. Make recommendations concerning any matter within the purview of this section, this chapter, chapter 322, or chapter 327.

1. Promulgate rules for the administration and implementation of this section, including definitions of terms.

m. Consult and cooperate with other entities for the purpose of implementing the mandates of this section.

n. Have the authority to approve the type of blood test utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.

o. Have the authority to specify techniques and methods for breath alcohol testing and blood testing utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.

p. Have the authority to approve repair facilities for the approved breath test instruments, including the authority to set criteria for approval.

Nothing in this section shall be construed to supersede provisions in this chapter and chapters 322 and 327. The specifications in this section are derived from the power and authority previously and currently possessed by the Department of Law Enforcement and are enumerated to conform with the mandates of chapter 99-379, Laws of Florida.

Under Section 316.1933(1)(a):

(1)(a) If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages, any chemical substances, or any controlled substances has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving or in actual physical control of the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances as set forth in s. 877.111 or any substance controlled under chapter 893. The law enforcement officer may use reasonable force if necessary to require such person to submit to the administration of the blood test. The blood test shall be performed in a reasonable manner. Notwithstanding s. 316.1932, the testing required by this paragraph need not be incidental to a lawful arrest of the person.

Section 316.1934 states in part:

(2) At the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible. . .

(3) A chemical analysis of a person's blood to determine alcoholic content or a chemical or physical test of a person's breath, in order to be considered valid under this section, must have been performed substantially in accordance with methods approved by the Department of Law Enforcement and by an individual possessing a valid permit issued by the department for this purpose. Any insubstantial differences between approved techniques and actual testing procedures or any insubstantial defects concerning the permit issued by the department, in any individual case do not render the test or test results invalid. The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation in accordance with rules adopted by the department.

c. The Defendant claims that the portion of these statutes which delegate to FDLE the responsibility for regulating these tests and allows for their admissibility without a hearing to determine their reliability is unconstitutional because it is a procedural rather than a substantive law. Therefore, according to the Defendant, the Florida Supreme Court rather than the legislature needed to enact it or it needed to be adopted by the Florida Supreme Court.

d. In *State v. Bender,* 382 So. 2d 697 (Fla. 1980), the Supreme Court of Florida rejected the argument that the implied consent statutes unlawfully delegated legislative powers to executive agencies (at the time the authority over the operation, inspection, and registration of the tests was delegated to the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles). The Court discussed the complexity of the tests in defending the importance of delegating the responsibility over them. The Court also pointed out that the legislature had not delegated their law making powers, stating:

> The legislature merely assigned to the agencies the responsibility to establish proper uniform testing procedures for the protection of the public who must submit to the test or lose their driving privilege. There is a clear distinction between delegating to an executive agency law-making functions and assigning an executive agency supervisory responsibility over a police power function that already exists.

Id. at 700. Although the Court did not address whether the statutes were procedural or substantive, the Florida Supreme Court did approve of the statutes in this case and found them to be constitutional.

e. The Defendant cites to *State v. Fardelman,* 453 So. 2d 1183 (Fla. 5th DCA 1984) and *Drury v. Harding,* 443 So. 2d 360 (Fla. 1st DCA 1983), which held that rules adopted by HRS under Section 316.1932, Florida Statutes, applied retrospectively because they were procedural in nature. However, in *Drury v. Harding,* 461 So. 2d 104 (Fla. 1984), the Florida Supreme Court came to the same result by applying different reasoning and quashed the portion of the district court opinion related to retrospective application.

f. The Defendant also cites to *DeLisle v. Crane Co.,* 258 So. 3d 1219 (Fla. 2018) [43 Fla. L. Weekly S459a], which held that an amendment to the evidence code which adopted the method prescribed by *Daubert v. Merrell Dow Pharmaceuticals, Ind.,* 509 U.S. 579 (1993) rather than *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) regarding the admissibility of expert testimony was procedural. The Supreme Court had declined to adopt this rule. The Court held that the legislature could not enact this amendment to the evidence code unless it was adopted by the Supreme Court. *DeLisle,* 258 So. 3d at 1229. However, *DeLisle* concerns an amendment to the evidence code which differs from the implied consent statutes at issue here. Furthermore, under *DeLisle,* even if the implied consent statutes were considered to be procedural, they would only be unconstitutional if they conflicted with a rule or a holding of the Florida Supreme Court. Id. The Defendant does not allege that there is a rule or holding of the Supreme Court which conflicts with these statutes.

g. The Court finds that the implied consent statutes are similar to section 316.1905(3)(b), Florida Statutes, the statute at issue in *State v. McEldowney,* 99 So. 3d 610 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2464c]. Under section 316.1905(1), a device used to determine the speed of a vehicle must be "approved by the department and shall have been tested to determine that it is operating accurately. Tests for this purpose shall be made not less than once each 6 months, according to procedures and at regular intervals of time prescribed by the department." Section 316.1905(3)(b) creates a presumption that a device was tested and working properly where a signed and witnessed certificate showing this to be true is produced. In *McEldowney,* the Court held that while the statute has some procedural aspects, it is "intimately intertwined with the legislature's substantive enactments regulating the conduct of motorists on the state's streets and highways." *Id.* at 611. The Court, quoting *Massey v. David,* 979 So. 2d 931, 937 (Fla. 2008) [33 Fla. L. Weekly S229a], stated, "[W]here a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the

statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail." *Id*. Therefore, the fact that the statute had not been adopted by the Supreme Court did not render the statute unconstitutional. Here, the challenged portions of the implied consent statutes are intimately intertwined with the legislature's enactments regarding the testing of the blood alcohol level of motorists suspected of driving under the influence. Therefore, the statutes are substantive in nature.

h. The Defendant also claims that the implied consent statutes are unconstitutional under Article V, Section 21 of the Florida Constitution, enacted in 2018, which states:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

The Defendant claims that under this constitutional amendment the implied consent statutes are unconstitutional because they allow FDLE to interpret the statutes in determining the predicate necessary for the admissibility of scientific evidence. However, the implied consent statutes do not require FDLE to interpret the statutes, they delegate to FDLE the responsibility for the operation, inspection, and registration of breath and blood testing in the state. Furthermore, Article V, Section 21 does not state that an administrative agency cannot interpret a statute or rule, it merely states that a court cannot defer to the agency's interpretation. Article V, Section 21 does not render the implied consent laws unconstitutional. The implied consent statutes are intimately intertwined with the legislature's enactments regulating motorists and are therefore substantive in nature and do not need to be adopted by the Supreme Court.

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

The Defendant's Motion to Dismiss and/or in Limine Based Upon the Legislature's and FDLE's Unconstitutional Delegation of Rule Interpretation to FDLE and FDLE's Infringement of the Florida Supreme Court's Rule Making Authority and the Court's Need to Hold Daubert Hearing on the Scientific Sufficiency of the FDLE Rules Pertaining to Blood Testing is **DENIED.**

* * *

Insurance—Property—Insured's action against insurer—Complaint filed less than ten days after filing notice of intent to initiate litigation is premature

JOHN SCALISI, Plaintiff, v. SAFE HARBOR INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 23-CA-000066. August 31, 2023. Michael McHugh, Judge. Counsel: Chad M. Weatherstone, for Plaintiff. Dayana Hernandez, Salehi, Boyer, Lavigne, Lombana, P.A., for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, ABATE PREMATURE LITIGATION

THIS CAUSE having come on to be heard on the Defendant's Motion to Dismiss, or in the Alternative, Abate Premature Litigation, for the Hearing on July 17th, 2023, the Court having reviewed the Motion, heard argument of counsel, and being otherwise fully advised in the premises, it is hereby **ORDERED** that:

1. Defendant's Motion to Dismiss, or in the Alternative, Abate Premature Litigation is hereby **GRANTED.**

2. Pursuant to Florida Statute 627.70152 an insured must wait ten (10) days after filing their "Notice of Intent" before filing suit. In this case it was not controverted that suit was filed seven (7) days after the filing of the "Notice of Intent"

3. The statute makes clear that this requirement is a condition precedent to filing suit. Based on that language the case is dismissed without prejudice, but a new case must be filed after the condition precedent is met. Therefore, this case is closed.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Medical provider's action against insurer—Conditions precedent—Demand letter—Sufficiency—Demand letter to which itemized statement is attached satisfied condition precedent—Letter is not required to account for all prior payments, state exact amount owed, or account for alleged inconsistencies with prior demand letter

ATM HEALTHCARE, INC., d/b/a/ INJURY CARE CENTERS, a/a/o Benjamin Sanchez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2022-SC-004143. July 6, 2023. Scott Mitchell, Judge. Counsel: Adam Saben, Shuster Saben & Estevez, Jacksonville, for Plaintiff. Robyn Crawford, Andrews Biernacki Davis, Orlando, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO COMPLIANCE WITH F.S. 627.736 (10) (DEMAND LETTER)

THIS CAUSE came before the Court for hearing on June 13, 2023 on Cross-Motions for Summary Judgment on compliance with Florida Statutes § 627.736 (10). The Court, having reviewed the motions and entire Court file, read relevant legal authority, heard argument, and been sufficiently advised in the premises, finds as follows:

The issue before the court involves the level of sufficiency needed to place an insurer on notice of an intent to initiate litigation for unpaid personal injury protection ("PIP") benefits pursuant § 627.736(10), Florida Statutes. This issue has now been addressed numerous times in the Fourth Circuit and sister courts and at least twice before by this Court.[1] The enumerated requirements of a pre-suit demand letter ("PDL") are contained within § 627.736 (10), Fla. Stat. which states, in pertinent part:

> DEMAND LETTER.—
>
> (a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice required shall state that it is a "demand letter under s. 627.736(10)"and shall state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary. (emphasis added).

The Defendant's position is that the Plaintiff's PDL is defective because it "fails to account for all prior payments" and fails to "state an amount due and owing in order to cure the demand" as required by §627.736(10)(b)3, Fla. Stat.

A plain reading of the statute shows that if the Plaintiff attaches an itemized statement to its PDL, it has complied with the requirement of the condition precedent. An itemized statement containing the information above (underlined) gives the insurance carrier all the information it needs to confirm the dates and services at issue as well as each exact amount for that treatment, service, accommodation, or supply. Once the carrier is sent a PDL by a potential litigant, the Plaintiff cannot initiate litigation for thirty days. This "safe harbor" gives the insurance carrier a second opportunity to review the bills sent in by the provider during the treatment period and confirm that the bills were all properly received and adjusted by the insurance carrier. In this case, the facts are not in dispute. The Plaintiff attached an itemized statement giving the insurance carrier the requisite information it needed to confirm the dates at issue, the services rendered, and the exact charge for each service. The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement stating each exact amount for each date of service, it complied with the requirements of § 627.736(10). See, *MRI Associates of America, LLC a/a/o Ebba Register v. State Farm Fire & Casualty Company,* 61 So.3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b].

The purpose of the PDL is to give the insurance carrier a second opportunity to review the bills and dates of service at issue; eliminating the opportunity for "gotcha litigation" on the part of the Plaintiff in case the insurer missed a charge or date of service when initially submitted. The insurance company can then: a) make a supplemental payment; or, b) stand on its original adjustment of the claim. The requirement of "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due" assures the insurer that the parties are litigating over the same bills and services.

This Court notes that the statute does not require the PDL to state an exact amount *owed* or to account for alleged inconsistencies with a prior PDL. It is difficult to understand how a Plaintiff (usually a medical provider) would be able to account for such an amount. As this Court noted in *Advanced MRI Diagnostic a/a/o Richard Avendano v. State Farm Mut. Auto. Ins. Co.,* ("*Avendano*") 22 Fla. L. Weekly Supp. 357a:

> [T]he Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount *owed*. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible. A strict construction of the statute *only* says that a pre-suit demand must specify "[t]o the extent applicable . . . an itemized statement specifying each exact amount . . . ." With the various factors that must be considered by the carrier when determining the exact amount to pay on a claim, and the fact that this information is readily available to the carrier and virtually never readily available to the medical provider submitting a claim, it is not reasonable to expect the provider to know the "exact amount owed" since said amount could vary amongst PIP applicants (depending on the language of each individual policy). Further, the Defendant fails to convince this Court of the consequence of failing to list the exact amount owed. This Court could surmise

endless scenarios where the provider (or claimant) would need to know certain information in order to properly compute the exact amount owed based on a multitude of factors, including the ones listed above." *Id.,* citing, *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a.

Again, the burden to adjust the claim is on the insurance company, not the provider. Therefore, once the provider supplied the relevant information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736.[2]

Finally, the Defendant argues that the amount ultimately sought in the Complaint does not match the amount listed in the PDL. As already discussed, the medical provider is not required to enumerate the exact amount owed or ultimately sought in its PDL. Thus any "inconsistencies" do not invalidate the PDL. A PDL is a condition precedent that a litigant must first overcome in order to avail itself of the Court. Once this low threshold has been met, the Court then looks onward to the pleadings and the evidence; not backwards to a condition precedent that has otherwise been met. See, *First Health Chiropractic a/a/o Jesenia Narvaez v. Allstate Fire and Cas. Ins. Co.,* 29 Fla. L. Weekly Supp. 730a (Fla. Miami-Dade Cty. November 29, 2021)(rejecting the insurance company's similar claim of inconsistencies between the PDL and the amount sought in the Complaint).

THIS COURT chooses to follow its reasoning and prior rulings in *Bray* and *Avendano* and finds that by attaching its itemized statement to its PDL, the Plaintiff met the requirements of §627.736(10), Florida Statutes. Therefore, it is ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment is GRANTED and the Defendant's Motion for Summary Judgement is DENIED.

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[1]This Court ruled on this issue in *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. August 7, 2014) ("*Bray*") and *Advanced MRI a/a/o Ricardo Avendano v. State Farm Mut. Auto. Ins. Co.* 22 Fla. L. Weekly Supp. 357a (Fla. Duval Cty. Ct. Aug. 15, 2014); also see, *EBM Internal Medicine a/a/o Jasmine Gaskin v. State Farm Mutual Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 382a (Fla. Duval Cty. Ct. Dec. 9, 2011); *First Coast Medical Center, Inc. a/a/o Barbara Derouen v. State Farm Mut. Auto, Ins. Co.,* 17 Fla. L. Weekly Supp. 118a (Fla. Duval Cty. Ct. November 12, 2009); *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct. February 8, 2012); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Wendy Brody v. State Farm Mutual Automobile Insurance Company,* (Fla. Duval Cty. July 23, 2014); Case No.: 2012-SC-4885, Fla. Duval Cty. Ct. July 23, 2014); and, *Physicians Medical Center Jax a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 359a (Fla. Duval Cty. Ct. August 25, 2014). All of these sister courts in the Fourth Circuit found no requirement to include prior payments made or an accounting for the exact amount owed in order to comply with the requirements of F.S. 627.736(10).

[2]Also see, *Zaluski Chiropractic & Bond Family Medicine a/a/o Jasmine Montgomery v. State Farm Mut. Auto. Ins. Co.,* 31 Fla. L. Weekly Supp. 75a (Fla. Escambia Cty, March 30, 2023); *Global DX Imaging One, LLC a/a/o Bjorn Brown v. State Farm Mut. Auto. Ins. Co.,* 31 Fla. L. Weekly Supp. 77a (Fla. Duval Cty, April 18, 2023); *Neurology Partners, P.A. a/a/o Danny Whitener v. Mercury Indemnity Co.,* 31 Fla. L. Weekly Supp. 79a (Fla. Duval Cty. December 9, 2022).

* * *

Criminal law—Driving under influence—Evidence—Breath test results—Substantial compliance with administrative rules—Twenty-minute observation period—Where breath test operator did not observe defendant for entire twenty-minute observation period, but arresting officer had unobstructed view of defendant from four to five feet away for entire period and did not hear or see defendant ingest anything or regurgitate, there was substantial compliance with observation requirement

STATE OF FLORIDA, v. LAURIE A. TEASLEY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023-305398 MMDB. Division 80. November 13, 2023. Bryan A. Feigenbaum, Judge.

ORDER DENYING AMENDED MOTION TO SUPPRESS

THIS CAUSE came before the Court on November 1, 2023 for a hearing on Defendant's Amended Motion to Suppress Unlawfully Obtained Evidence filed pursuant to Rule 3.190, Fla. R. Crim. P.; the Fourth Amendment of the United States Constitution; Article 1, Section 12 of the Florida Constitution; and Fla. Stat. 901.15. The Court, having taken notice of the court file, listened to the testimony of the witnesses, reviewed the BWC [body worn camera] video evidence, and considered arguments from counsel, makes the following findings upon which it enters this Order:

On June 5, 2023, Off. Smith of the New Smyrna Beach Police Department investigated a hit-and-run crash and eventually located the Defendant. After making observations and conducting field sobriety tests, the Defendant was placed under arrest for DUI with Damage to Person/Property and Leaving the Scene of an Accident Involving Damage. The Defendant was transported to the New Smyrna Beach Police Department.

Cpl. Jenkins met them at the police station and asked the Defendant for, and was given consent for, a breath test. As the police report and BWC video shows, there was a twenty-minute observation from 8:47 p.m. to 9:08 p.m. It is not the length, but the nature and quality of the observation that is the focus of this hearing.

Per the police report, Cpl. Jenkins began the observation period at 8:47 p.m. Through the testimony at the hearing and the BWC, during the next twenty-one minutes, Off. Smith sat directly across from the Defendant. Off. Smith was only four to five feet away from the Defendant, separated only by plexiglass. During this period, Off. Smith was asking the Defendant questions as she was filling out her police report. Although she was not constantly staring at the Defendant, she was close enough to feel confident the Defendant did not ingest anything nor hear her regurgitate or audibly burp. Off. Smith was looking down most of the time as she was working on her report, but the distance was very close, there was a fairly constant conversation, and there was no barrier of substance between the two. Off. Smith testified that even though she had not explicitly been delegated the duty to observe her, that she watched and listened to the Defendant.

The BWC does show that that the Defendant was unhandcuffed at the beginning of the observation period and there were multiple times the Defendant put her hands to her mouth and at times put her head down, once between her knees. There was testimony that she had been searched by a female police officer beforehand so the likelihood she had secreted something on her person and later ingested it is very unlikely.

Cpl. Jenkins was the breath test operator and was the one who allegedly began the twenty-minute observation period. At the outset, he unhandcuffed her and asked if she had anything in her mouth and asked to verify that as well. It was his BWC which was placed in a vantage point to record this twenty-one minute interval. The breath test instrument is in a separate room visible well behind the Defendant. Cpl. Jenkins spends the majority of the time in the separate room presumably getting the breath test instrument ready to go. There is a cinderblock half-wall between the breath test room and where the Defendant sat facing Off. Smith, her back to the open room where the breath test instrument is kept. For over fourteen of the twenty-one minutes, Cpl. Jenkins was not in a position to see the Defendant due to that half-wall and since the Defendant had her back to him. He was at times fifteen feet away. He would walk back and forth, sometimes engaging in conversation with the Defendant, and was able to overhear the conversation between her and Off. Smith. He was always visible on the BWC. Cpl. Jenkins testified that he was close enough to hear her if she regurgitated, but conceded he couldn't see when she put her hands to her mouth or if she had burped. Cpl. Jenkins relied on the fact that the Defendant had previously been searched and that Off. Smith sat four to five feet away from her the whole time, facing her,

though he admitted he never designated her to help observe the Defendant.[1]

As a starting point, the Court must consider Florida Statutes § 316.1932 (1)(b)(2) which states, in part: "An analysis of a person's breath, in order to be considered valid under this section, must have been performed *substantially* according to methods approved by the Department of Law Enforcement. . . . *Any insubstantial differences* between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid." [emphasis added]

Next, the Court considers Florida Administrative Code 11D-8.007 (3) which states that "[t]he breath test operator, agency inspector, arresting officer, *or* person designated by the permit holder *shall reasonably ensure* that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. . . ." [emphasis added]

An officer does not have to "stare fixedly" nor have "continuous face to face observation" with a defendant for twenty minutes in order to show substantial compliance with the observation rule and "[m]inor deviations in compliance will not render the test results invalid." *Kaiser v. State,* 609 So. 2d 768, 770 (Fla. 2d DCA 1992). *See also State v. Donaldson,* 579 So. 2d 728 (Fla. 1991).

At the time of the *Kaiser* decision, the Department of Health and Rehabilitative Services (HRS) was responsible for the test procedures and the pertinent regulation was Florida Administrative Code Rule 10D-42.24(1)(f). Under that Rule, "[t]he technician, arresting officer, or person administering the collection of the breath sample must make certain the subject has not taken anything by mouth or has not regurgitated for at least twenty minutes before administering the test."

In *State v. Orlando Cala,* 7 Fla. L. Weekly Supp. 342a (Fla. 11th Jud. Cir., Miami-Dade County Ct., March 6, 2000), it was pointed out that the HRS Rule in effect at the time of the *Kaiser* decision was more stringent (". . . must make certain the subject . . ." had not burped, regurgitated, or taken anything by mouth) than the later rule promulgated in 1993 (F.A.C. 11D-8.007(3) ". . . shall reasonably ensure . . .") when FDLE took over from HRS. According to the judge in *Orlando Cala,* who had been provided copies of the rule changes and correspondence from the Office of the General Counsel about the reasoning behind this change, "[t]he purpose was to relax the standard of observation while continuing to recognize the obligation to protect the suspect from inaccurate readings from the Intoxilyzer instrument." *See also State v. Alain,* 27 Fla. L. Weekly Supp. 388a (Fla. 7th Jud. Cir., Volusia County Ct., May 15, 2019).

In *Department of Highway Safety and Motor Vehicles v. Farley,* 633 So. 2d 69 (Fla. 5th DCA 1994), the State failed to show substantial compliance with the observation rule when they only presented testimony from the testing officer for 17 minutes preceding the test. There was an unidentified third party present for the first three minutes and neither that person nor the arresting officer, the only two persons who were with the defendant between the arrest and the testing officer's arrival, testified about that period of time. "The state could have called the lay witness (assuming he was such) who was with Farley for the crucial three minute period to testify that he did not notice any ingestion or regurgitation by Farley during that period, *even though he was not specifically observing Farley for that purpose. See, e.g., Kaiser.* Such testimony could have sustained the hearing officer's finding of substantial compliance, but the state, as noted by the circuit court, failed to produce any evidence whatsoever in regard to the three minute period." *Id*. at 71-72. [emphasis added]

Contrast that with the instant facts, where there is no missing three minute gap and even if Off. Smith was not specifically observing the Defendant for the purpose of making sure she was not ingesting anything nor regurgitating, she sat unobstructed four to five feet away and did not hear or see any such issue of concern. This was not a textbook observation period but it does not have to be perfect. There is substantial compliance with the observation requirement. There might very well be a different result if Off. Smith was not there and if the Defendant had not been searched beforehand. *See also Siple v. State, Department of Highway Safety and Motor Vehicles,* 29 Fla. L. Weekly Supp. 747a (Fla. 7th Jud. Cir. Ct., Sept. 20, 2021) ("there is no requirement that the permit holder must pass their responsibility of observation to any specifically listed individual."; there does not have to be a strict delegation between the breath test operator and another listed individual, such as the arresting officer); *Nuss v. State, Department of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 926a (Fla. 6th Jud. Cir. Ct., Dec. 18, 2018)("The law does not require the observation to be conducted by only one individual."); *Hamann v. State, Department of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 315a (Fla. 9th Jud. Cir. Ct., Oct. 18, 2012); *Pagnotto v. Department of Highway Safety and Motor Vehicles,* 14 Fla. L. Weekly Supp. 115b (Fla. 4th Jud. Cir. Ct., Dec. 4, 2006); *State v. Hurt,* 19 Fla. L. Weekly Supp. 856b (Fla. 18th Jud. Cir., Brevard County Ct., June 18, 2012); *Kolb v. State, Department of Highway Safety and Motor Vehicles,* 18 Fla. L. Weekly Supp. 1111a (Fla. 20th Jud. Cir. Ct., Sept. 5, 2011); and *State v. Ramsay,* 19 Fla. L. Weekly Supp. 396a (Fla. 15th Jud. Cir., Palm Beach County Ct., Jan. 24, 2012).

Once substantial compliance is determined, and the breath test is admissible, ". . . whether the technician was able to make sure that [Defendant] did not regurgitate or ingest anything goes to the weight of the evidence" and is a ". . . recognition that the jury may consider the weight to be given to the test if the defense challenges its reliability." *Kaiser* at 770. *See also Chiaravalle v. State,* 2023 WL 6612975 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1995b] (one officer was in the "immediate area" and "within earshot" throughout the entire observation period) and *Schofield v. State,* 867 So. 2d 446, 448-49 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D334a] (holding, on a motion to suppress, that evidence of the use of dentures during a breath alcohol test went to the weight accorded to the test, not the admissibility of the test result). If the presence of dentures, which can possibly trap alcohol, does not render a test inadmissible, the fact the Defendant put her hands in or around her mouth does not automatically cause the breath test results to be inadmissible. "Florida law does not require the removal of dental devices nor does the law impose an obligation on the officer to inquire about the use of dentures prior to or during the administration of alcohol tests." *Schofield* at 448. The same can be said about putting one's fingers near one's mouth during the observation period. *See Potts v. Florida Department of Highway Safety and Motor Vehicles,* 27 Fla. L. Weekly Supp. 850d (Fla. 10th Jud. Cir. Ct., Nov. 7, 2019).

The defense cited to several county court cases that are distinguishable by their facts such as discrepancies between the officers and either the defendant or the video evidence regarding the observation period. *See State v. Kozlak,* 22 Fla. L. Weekly Supp. 607b (Fla. 7th Jud. Cir., Volusia County Ct., June 24, 2013); *State v. Hutchinson,* unpublished order 7th Jud. Cir., case no. 2005-45423-mmaes, March 7, 2006; *State v. Verdin,* 22 Fla. L. Weekly Supp. 371a (Fla. 7th Jud. Cir., Volusia County Ct., July 29, 2014); and *State v. Chaya,* 29 Fla. L. Weekly Supp. 134a (Fla. 7th Jud. Cir., Flagler County Ct., Oct. 28, 2019). In another case cited, *State v. Miller,* 19 Fla. L. Weekly Supp. 593a (Fla. 12th Jud. Cir., Sarasota County Ct., Sept,. 12, 2010), the video showed the defendant walked away from the observing officer and spoke to an unknown corrections officer, who, as in the *Farley* case, obviously did not testify at the hearing, for six minutes and no testifying officer could say whether she ingested or regurgitated during that gap. The defendant there also had been given hand

sanitizer which she put to her face and walked in a restroom alone.

There is no such gap or discrepancy in this case. Substantial compliance with the law has been shown. Off. Smith was in a position to have noticed her ingesting or regurgitating during the times Cpl. Jenkins was not close enough to do so.

ORDERED and ADJUDGED that the Amended Motion to Suppress is **DENIED**.

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[1]The Defense's witness correctly pointed out that there was a chair and bench in the room where the breath test instrument is kept and if Cpl. Jenkins was working alone or if was the only observer, that would have been the ideal place to stand by her while he got the breath test instrument ready.

* * *

Insurance—Personal injury protection—Attorney's fees—Timeliness of motion—Medical provider's motion to establish entitlement to attorney's fees and costs is stricken as untimely where motion was filed 712 days after entry of final judgment and 203 days after motion for clarification of judgment was granted—Fact that court reserved jurisdiction to consider entitlement to fees and costs in final judgment did not extend time for provider to file motion

ST. AUGUSTINE PHYSICIANS ASSOCIATES, INC., a/a/o Amelia Wiggs, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 7th Judicial Circuit in and for St. Johns County. Case No. SP19-0221. November 2, 2023. Alexander R. Christine, Jr., Judge. Counsel: Ellis W. Peetluk, Jacksonville, for Plaintiff. Nathalie V. Acosta, Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO ESTABLISH ENTITLEMENT FOR REASONABLE ATTORNEY'S FEES AND COSTS AS PREVAILING PARTY IN THIS LITIGATION AND GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S UNTIMELY MOTION TO ESTABLISH ENTITLEMENT FOR REASONABLE ATTORNEY'S FEES AND COSTS AS PREVAILING PARTY IN THIS LITIGATION

THIS CAUSE having come before the Court for a hearing held on August 25, 2023, on Plaintiff's Motion to Establish Entitlement for Reasonable Attorney's Fees and Costs as Prevailing Party in this Litigation and Defendant's Motion to Strike Plaintiff's Untimely Motion to Establish Entitlement for Reasonable Attorney's Fees and Costs as Prevailing Party in this Litigation. The Court having heard argument of counsel on August 25, 2023, reviewed the record and being otherwise advised in the Premises, finds as follows:

FACTS AND PROCEDURAL HISTORY

On October 31, 2013, Amelia Wiggs ("the Claimant") was involved in an automobile accident and received medical treatment from St. Augustine Physicians Associates, Inc. ("the Plaintiff"). The Claimant's subject automobile insurance policy included a limit of $10,000.00 in Personal Injury Protection ("PIP") benefits with a $1,000.00 PIP deductible and claim number 92A595707 was assigned. Three pre-suit demand letters were submitted on behalf of Plaintiff dated: July 31, 2014, September 24, 2014, and November 18, 2014.

On June 5, 2015, the Plaintiff filed its first lawsuit against Peak Property in *St. Augustine Physicians Associates, Inc. as assignee of Amelia Wiggs v. Peak Property and Casualty Insurance Corporation,* St. Johns County Case Number SP15-0850. The Plaintiff and Peak Property resolved that lawsuit including attorney's fees, and the Plaintiff voluntarily dismissed that action with prejudice on September 07, 2015.

On January 25, 2019, the Plaintiff filed the instant lawsuit in St. Johns County, Case No. SP19-0221, for the same motor vehicle accident, on behalf of the same Claimant, against the same insurance company and under the same claim number. Plaintiff claims that this new lawsuit was only to recover additional benefits under the deductible. The Defendant alleged that the Plaintiff's subject claim was barred by the Doctrine of *Res Judicata* since the Plaintiff had filed and dismissed with prejudice a prior lawsuit for the same parties, the same motor vehicle accident, and PIP claim. Alternatively, the Defendant alleged that, the Plaintiff had not shown good cause for bringing two lawsuits, and therefore, the Plaintiff should be denied attorney's fees for this second lawsuit.

On August 12, 2020, this Court denied Defendant's Motion for Final Summary Disposition regarding the Doctrine of *Res Judicata* and Florida Statute § 627.736(15) and determined that the underlying causes of action pertaining to Defendant's misapplication of the deductible were sufficiently distinct from the prior 2015 lawsuit, which was premised on a specific dispute concerning the medical necessity, reasonableness, and relatedness of the medical treatment the Claimant received from Plaintiff. The parties also disputed when the cause of action occurred. That Order denied with prejudice the Defendant's position on the doctrine of *Res Judicata.* The Court also denied, at that time, the Defendant's alternative argument regarding Plaintiff's failure to show good cause and entitlement to attorney's fees as premature.

On August 13, 2020, this Court granted Plaintiff's Motion to Strike Affirmative Defense of *Res Judicata.* On August 14, 2020, this Court granted Summary Disposition and Awarded Final Judgment in Favor of Plaintiff. In that Order the Court reserved jurisdiction for Plaintiff to seek entitlement to attorney's fees and costs and to satisfy the requirements of Fla. Stat. 627.736 (15).

On October 12, 2020, Defendant filed its Motion for Clarification. Defendant sought clarification as to whether the parties should interpret the Court's Orders to mean that the Defendant can proceed with paying the Plaintiff the PIP benefits owed, without thereby waiving its right to continue litigating and developing the issue of good cause and entitlement to attorney's fees.

On January 4, 2022, the Court granted Defendant's Motion for Clarification ruling that Defendant may proceed paying the underlying PIP benefit responsibility without waiving its argument as to Plaintiff's entitlement to attorney's fees and costs. The Court's Order further stated that as indicated in Final Judgment in favor of Plaintiff, jurisdiction remains reserved on the issue of Plaintiff's entitlement to attorney's fees and costs and whether Fla. Sta. 627.736 (15) operates to preclude the court from awarding attorney's fees in this matter.

ANALYSIS

Florida Rule of Civil Procedure 1.525 states,

> "Any party seeking a judgment taxing costs, attorney's fees, or both shall serve a motion *no later than 30 days after the filing of the judgement,* including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party."
>
> *Amended by 52 So.3d579, effective e 1/1/2011; amended by 917 So.2d 176, effective 1/1/2006; amended by 858 So.2d 1013, effective 1/1/2004; added by 773 So.2d 1098, effective 1/1/2001.*[1]

Florida Procedural Rules and subsequent Florida case law have made clear that a bright-line time requirement of thirty (30) days has been established for filing a motion for attorney's fees and costs after a Final Judgment has been issued. Plaintiff failed to adhere to the thirty-day time requirement set forth by Florida Rule of Civil Procedure 1.525, by filing its motion to establish entitlement for fees and costs seven-hundred and twelve (712) days after the Final Judgment was entered by the Court. Even after Defendant's Motion for Clarification was granted on January 4, 2022, Plaintiff did not file its motion for entitlement for attorney fees and costs until some two hundred and three (203) days later. The purpose of the bright-line interpretation of Rule 1.525 was to promote predictability and to

avoid unfair prejudice to the losing party for tardy motions for fees and costs. *Amerus Life Ins. Co. v. Lait,* 2 So. 3d 203 (Fla. 2009) [34 Fla. L. Weekly S49a].

While in this instant action the court reserved jurisdiction to consider attorney's fees and costs, the Florida Supreme Court in *Saia Motor Freight Line, Inc. v. Reid,* 930 So. 2d 600 (Fla. 2006) [31 Fla. L. Weekly S281a] held that a reservation of jurisdiction in a final judgment does not extend the time for a party to seek attorney's fees and costs, further holding that the thirty-day time requirement as set forth by the Florida Rule of Civil Procedure 1.525 requires strict compliance by the party seeking attorney fees and costs. See also *Clampitt v. Britts,* 897 So.2d 557 (Fla 2nd DCA 2005) [30 Fla. L. Weekly D938a] rejecting the argument that the time for filing a Motion for Attorney's Fees and Costs is tolled by a Motion for Rehearing or extended by a judgment's reservation of jurisdiction to address attorney's fees.

Finally, the Final Judgment in this case clearly reserved jurisdiction to consider "entitlement to attorney fees." The Supreme Court in *Amerus* made clear that where entitlement to attorney's fees has yet to be determined in the Court's Final Judgment, the 30-day requirement of Florida Rules of Civil Procedure 1.525 applies. Only where the trial court has already determined entitlement to attorney's fees in its Final Judgement but reserves jurisdiction to determine their amount, is the rule inapplicable. *Amerus Life Ins. Co. v. Lait,* 2 So. 3d 203, 207 (Fla. 2009) [34 Fla. L. Weekly S49a].

As the Plaintiff's Motion to Determine Attorney's Fees is untimely, the Court need not address the issue of their further preclusion by Fla. Statute 627.736(15). However, the Court notes that the Plaintiff had its day in court and voluntarily dismissed with prejudice its initial 2015 lawsuit, filing a separate lawsuit which arose from the same transaction, claimant, insurer, health care provider, insurance policy, and claim number.

It is therefore ORDERED and ADJUDGED as follows:

- Plaintiff's Motion to Establish Entitlement for Reasonable Attorney's Fees and Costs as Prevailing Party in this Litigation is DENIED.
- Defendant's Motion to Strike Plaintiff's Untimely Motion to Establish Entitlement for Reasonable Attorney's Fees and Costs as Prevailing Party in this Litigation is GRANTED.

[1]Florida Small Claims Rule 7.175 also states: "Any party seeking a judgment taxing costs or attorney's fees, or both shall serve a motion *no later than 30 days after filing of the judgment,* including a judgment of dismissal, or the service of a notice of voluntary dismissal." *Amended by 285 So.3d 896, effective 1/1/2020; added by 931 So.2d, effective 1/1/2006.*

* * *

Criminal law—Driving under influence—Evidence—Breath test—Motion to exclude expert testimony that defendant's breath alcohol level was equal to or above the results of two breath samples that were invalid due to insufficient volume is denied—Expert witness's testimony at hearing indicated that expert's trial testimony and opinion met *Daubert* standard

STATE OF FLORIDA, Plaintiff, v. AMANDA PRESCOTT, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2022-CT-000295-A. Division III. November 27, 2023. Walter M. Green, Judge.

ORDER DENYING MOTION TO EXCLUDE IMPROPER OPINION EVIDENCE

THIS CAUSE comes before the Court upon Defendant's "Motion to Exclude Improper Opinion Evidence," filed October 14, 2023, pursuant to section 90.702, Florida Statutes. A hearing was held on the motion on November 21, 2023. Upon consideration of the motion, the testimony presented at the hearing, the legal argument of the parties, and the record, this Court finds and concludes as follows:

1. The State has charged Defendant in this case with the offense of Driving under the Influence (DUBAL/Breath)—1st Offense in violation of section 316.193(1)(c), Florida Statutes. During trial, the State intends to use the expert testimony of Phillip Nicodemo to establish that Defendant's breath alcohol was above 0.08 grams of alcohol per 210 liters of breath based on Defendant's invalid Intoxilyzer 8000 breath test results of 0.174 and 0.182.

2. Defendant moves the Court to exclude Mr. Nicodemo's expert testimony based on the argument that it does not meet the admissibility requirements of section 90.702, Florida Statutes, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

3. Section 90.702, Florida, which codifies the *Daubert* standard, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

3. As the Fourth District Court of Appeal explained in *Kemp v. State,*

> Under *Daubert,* a trial judge has a gatekeeping role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 113 S.Ct. 2786. The trial judge is "charged with this gatekeeping function 'to ensure that speculative, unreliable expert testimony does not reach the jury' under the mantle of reliability that accompanies the appellation 'expert testimony.' " *Rink v. Cheminova, Inc.,* 400 F.3d 1286, 1291 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C255a] (citation omitted).
>
> A trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592-93, 113 S.Ct. 2786. This basic gatekeeping obligation applies not only to scientific testimony, but "to all expert testimony." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).
>
> The Supreme Court in *Daubert* outlined a list of factors that bear on the reliability inquiry: (1) whether the theory can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of a particular scientific technique, as well as the existence of standards controlling the technique's operation; and (4) general acceptance in the scientific community. 509 U.S. at 593-94, 113 S.Ct. 2786. The *Daubert* "test of reliability is flexible, and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire,* 526 U.S. at 141, 119 S.Ct. 1167 (internal quotation marks omitted).
>
> "[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*"). However, an expert's opinion must be based upon "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786. Nothing in *Daubert* requires a court "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert," and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

Kemp v. State, 280 So. 3d 81, 88-89 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1246a], *review denied,* SC19-1931, 2020 WL 1066018 (Fla. Mar. 5, 2020). "*Daubert* provides that expert testimony is admissible if it is relevant and reliable." *Vitiello v. State,* 281 So. 3d 554, 560 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2480e], *review denied,* SC19-2033, 2020 WL 2316636 (Fla. May 11, 2020). "The results of scientific tests are admissible if they are demonstrated to be sufficiently reliable." *State v. Burke,* 599 So. 2d 1339, 1341 (Fla. 1st DCA 1992) (citing *Ramirez v. State,* 542 So.2d 352 (Fla.1989); *Copeland v. State,* 566 So.2d 856 (Fla. 1st DCA 1990). "Reliability may be proven by a showing of general acceptance within the scientific community." *Id.* (citing *Stokes v. State,* 548 So.2d 188 (Fla. 1989)).

4. Florida Administrative Code Rule 11D-8.002(12) sets forth the standard for administering a breath alcohol test and governs what constitutes refusal to submit to such test:

> Approved Breath Alcohol Test - a minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level, on a single Form 38 affidavit. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

Fla. Admin. Code R. 11D-8.002(12). "A minimum of two results are required for comparison, with a third being required in the event that the difference between the first two results exceeds a specified margin." *Williams v. State,* 331 So. 3d 826, 829-30 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2457a]. "However, each result can independently be acceptable as a valid breath alcohol level if it is proved to be reliable." *Id.* "[T]he rule language unequivocally establishes that an inadequate number of results cannot be grounds for unreliability[.]" *Id.*; *see also State v. Abalo,* 26 Fla. L. Weekly Supp. 499a (Escambia Cty. Ct. August 1, 2018) ("The plain reading of the Rule indicates that if the required number of valid breath samples is not obtained, any result, or results, obtained will be acceptable as a valid breath alcohol level if proven to be reliable. This is consistent with the Florida Supreme Court's holdings in *State v. Bender,* 382 So. 2d 697 (Fla. 1980); and *Robertson v. State,* 604 So. 2d 783 (Fla. 1992)."); *see also,* David A. Demers, *Florida DUI Handbook* §6:8, 619-620 (2017-2018 ed. 2017). "[U]nder *Robertson v. State,* 604 So. 2d 783 (Fla. 1992), the State may seek admission of the breath test results by establishing a traditional scientific predicate, including 1) the reliability of the test; 2) that the test was performed by a qualified operator with proper equipment; and 3) an expert explanation of the meaning of the test." *State v. Berfield,* 23 Fla. L. Weekly Supp. 258a (Fla. 7th Cir. Ct. March 4, 2015); *see also State v. Jacobson,* 14 Fla. L. Weekly Supp. 714a (Fla. 14th Cir. Ct. Aug. 10, 2006).

5. State expert Phillip Nicodemo testified during the motion hearing that he is the Quality Assurance Manager at the Alcohol Testing Program at the Florida Department of Law Enforcement (FDLE). Mr. Nicodemo has been employed by FDLE for approximately three years. And, prior to his current position, Mr. Nicodemo was the Department Inspector for the Alcohol Testing Program. Mr. Nicodemo has a Bachelor of Science degree in Ecology and Natural Resources from Rutgers University; a Master of Science degree in Biological Sciences from the University of Cincinnati; and a Master of Science degree in Biomedical Sciences from Stony Brook University. Based on his education, Mr. Nicodemo has routinely applied scientific principles related to biology, anatomy, physiology, physics, and mathematics in his positions at FDLE. Further, while at FDLE, Mr. Nicodemo has completed a Department Inspector training program, which covers the fundamentals of alcohol, basic biochemistry, the science of breath testing, in general, and the Intoxilyzer, specifically; basic pharmacology and pharmacokinetics of alcohol; and the relevant rules and regulations related to breath testing in Florida. Additionally, Mr. Nicodemo received a Breath Test Operator permit, an Agency Inspector permit, and a Department Inspector certificate. Mr. Nicodemo is also a breath test instructor. And he is involved in the International Association of Chemical Testing yearly training and workshops. In 2022, Mr. Nicodemo attended and completed an Intoxilyzer 8000 training, maintenance, and repair instructor course. He has never testified at trial as an expert nor been accepted by an expert by any court in Florida.

6. In reaching an opinion in this case, Mr. Nicodemo reviewed the relevant breath testing documents in this case.

7. During the hearing, Mr. Nicodemo explained that infrared spectroscopy is the accepted method of determining breath/blood alcohol content. Breath test machines rely on the scientific principle known as Beer Lambert's Law to measure alcohol content in a breath sample. Further, Mr. Nicodemo further explained that the Intoxilyzer measures breath alcohol based on time, volume, and slope. The time, volume, and slope components of a breath sample are intended to ensure a deep lung sample, i.e., that the breath alcohol concentration is coming from the alveoli where the blood and air meet in a person's lungs. According to Mr. Nicodemo, a person cannot give a breath sample that reflects an amount of alcohol that is greater than what is in their body. Further, Mr. Nicodemo pointed out that volume is not part of the Beer Lambert equation; nor is it a requisite factor is how the Intoxilyzer measures breath alcohol. Thus, according to Mr. Nicodemo, the Intoxilyzer can accurately measure breath alcohol without volume being a necessary variable. And, as more volume of a sample is produced, it would be expected that the alcohol content of the sample would either remain constant or increase. It would not be expected for the alcohol content to decrease as the volume increased.

8. According to Mr. Nicodemo, even though Defendant's two breath samples did not contain sufficient breath volume to be considered a valid result by the Intoxilyzer 8000, the machine does generate a reading of a breath alcohol level on each of the two samples. And both those samples reflected an alcohol content above the legal limit of 0.08. Thus, according to Mr. Nicodemo, it can be concluded that had Defendant's samples been of sufficient volume for the Intoxilyzer to render a valid result, that alcohol content of that result would have been the same or greater than the amount that was contained in the invalid results. Further, according to Mr. Nicodemo, it is undisputed that alcohol is present in the two samples provided by Defendant; and that given the 40-minute observation period of Defendant which specifically occurred in this case, it can be concluded that the alcohol in the sample provided by Defendant did not come from her mouth (burping, belching, emesis, or drinking) or from the ambient air in the breath testing room. It can be concluded that the alcohol came from Defendant's lungs.

9. Finally, Mr. Nicodemo will not be testifying at trial what Defendant's breath alcohol concentration was at the time of the breath test. He will only be testifying that the breath tests results are reliable to establish that alcohol is present; the alcohol reflected in the sample came from Defendant's body; and that results accurately reflect a breath alcohol amount higher than 0.08. Mr. Nicodemo notes, further, that the two samples at issue here are within 0.02 of each other, which supports their reliability.

10. Defense expert Matthew Malhiot testified at the hearing that prior to being a private expert on breath testing and on the Intoxilyzer, he was the Quality Assurance Manager at the Alcohol Testing

Program at FDLE, i.e. he held Mr. Nicodemo's position. It is Mr. Malhiot's opinion that low volume breath samples from the Intoxilyzer are not scientifically reliable; and that when he was the Quality Assurance Manager at the Alcohol Testing Program at FDLE, it was FDLE's policy to make it clear in writing on the breath test affidavit that low breath volume samples are not scientifically reliable. Further, the purpose of a sufficient volume in the breath sample is to ensure reliability of the result. Here, it is Mr. Malhiot's opinion that Defendant's breath test samples came from her oral cavity or upper respiratory tract, which does not produce a reliable indicator of her blood alcohol content because the alcohol content in the sample could have come from a burp, a belch, or "anything." Mr. Malhiot additionally noted that Mr. Nicodemo's opinion does not factor in slope, which cannot be determined based on the invalid Intoxilyzer breath test results in this case.

11. Here, based on Mr. Nicodemo's testimony during the hearing, this Court finds that his trial testimony and opinion will be based on sufficient facts and data; and is the product of reliable principles and methods. Further, it is clear to this Court that Mr. Nicodemo has applied the relevant principles and methods reliably to the facts of the case. It is not the role of this Court to opine on the correctness of Mr. Nicodemo's opinion. *See Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*") ("[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology.").

12. This Court acknowledges that "[i]n cases where the Intoxilyzer 8000 registered a reading or readings of 'volume not met' . . . it appears that the circuit courts have routinely concluded that such a reading was unreliable and, therefore, not valid." *Dep't of Highway Safety & Motor Vehicles v. Cherry,* 91 So. 3d 849, 856-57 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1562a] (citing *Kenyon v. Dep't of High. Saf. & Motor Veh.,* 16 Fla. L. Weekly Supp. 899a (Fla. 4th Cir.Ct.2009) ("The machine produced a print-out that read "volume not met" which means that Petitioner was not providing a sufficient amount of breath in order for the machine to produce a valid test result."); *Underwood v. Dep't of High. Saf. & Motor Veh.,* 15 Fla. L. Weekly Supp. 299a (Fla. 4th Cir.Ct.2008) ("The printout from the machine established that both of the samples given by Petitioner were designated as 'Volume Not Met,' and the machine indicated that because of this, both samples were not reliable to determine breath alcohol level"); *Saladino v. State of Florida, Dep't of High. Saf. & Motor Veh.,* 15 Fla. L. Weekly Supp. 222a (Fla. 12th Cir.Ct.2008) ("The Petitioner submitted two breath samples, but the results for both indicated 'volume not met,' meaning the samples were insufficient to determine Petitioner's breath alcohol level."). However, no District Court of Appeal nor the Florida Supreme Court has conclusively opined on the issue before this Court.

13. "When there is no binding precedent from the [U.S. Supreme Court or the Florida Supreme Court], a trial judge is bound to follow the decisions of other district courts of appeal on point." *McGauley v. Goldstein,* 653 So. 2d 1108, 1109 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D966a]. "In the absence of other district court precedent, the judge must make an independent exercise of judgment." *Id.*; *see also Adams v. State,* 289 So. 3d 958, 959 n.1 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D60a] ("Absent precedent from an appellate court, a trial court is obligated to independently exercise its judgment and make its own determination as to the merits of the issue before it."), *reh'g denied* (Feb. 7, 2020), *review denied,* SC20-337, 2020 WL 4463105 (Fla. Aug. 4, 2020); *Rosen By & Through Rosen v. Zorzos,* 449 So. 2d 359, 361 (Fla. 5th DCA 1984), *decision quashed,* 467 So. 2d 305 (Fla. 1985) ("[L]ack of precedent alone does not take away a common-law court's responsibility to decide each claim presented before it on its own merit."). Here, there is no precedent from any appellate court on the issue of whether two "volume not met" results from an Intoxilyzer 8000 can otherwise be reliable if they meet the scientific predicate. Accordingly, this Court is independently exercising its judgment and making its own determination as to the merits of the issue before it. In doing so, this Court is considering the testimony presented before it during the hearing as well as the applicable scientific principles and theory related to breath testing which the experts are relying on in reaching their opinions.

14. The State is reminded that "[a]dmission of blood-alcohol evidence under the common law predicate does not trigger any presumption regarding impairment." *Cardenas v. State,* 867 So. 2d 384, 390 (Fla. 2004) [29 Fla. L. Weekly S90a]. "[N]oncompliance with [the implied consent law] precludes the State from relying on the presumption of impairment [at trial]." *Id.* "[T]here [i]s a clear trade-off in conditioning the grant of presumptions on the integrity of the testing process." *State v. Miles,* 775 So. 2d 950, 953 (Fla. 2000) [25 Fla. L. Weekly S1082a].

Based on the foregoing, it is **ORDERED AND ADJUDGED** that: Defendant's motion is hereby **DENIED**.

* * *

Insurance—Automobile—Windshield repair—Attorney's fees—Confession of judgment—Where plaintiff's action for unpaid balance of windshield repair bill was stayed pending appraisal, and insurer thereafter paid additional amount that appraiser found to be due, filing of suit was necessary catalyst to resolve dispute and force insurer to satisfy its obligations under policy—Plaintiff is entitled to award of attorney's fees and costs

RAPID AUTO GLASS, a/a/o Alex Felch, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-005258-O. September 6, 2023. David P. Johnson, Judge. Counsel: Matthew Quattrochi and Juan Torrico, Quattrochi, Torres & Taormina, P.A., Casselberry, for Plaintiff. Britney N. Wotton, Banker Lopez Gassler P.A., for Defendant.

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

THIS CAUSE having come before to Court on Plaintiff's Motion to Tax Attorney's Fees and Costs and Defendant's Motion to Dismiss and Strike Plaintiff's Claim for Attorney's Fees, in the above-captioned matter, and upon review of the pleadings and court file and being otherwise fully advised in the matter, the Court makes the following FINDINGS OF FACT:

1. Rapid Auto Glass ("Plaintiff") submitted an invoice to Progressive Select Insurance Company ("Defendant"), dated January 05, 2021, seeking $2,864.95 for replacing the windshield of Alex Felch's motor vehicle.

2. On or about January 15, 2021, Defendant sent Plaintiff, and Alex Felch ("Insured") communication invoking appraisal.

3. On or about January 26, 2021, Defendant issued payment to Plaintiff in the amount of $486.04, which Plaintiff subsequently deposited.

4. On February 09, 2022, Plaintiff sued Defendant for breach of contract and declaratory relief, seeking judgment against the Defendant for unpaid insurance benefits, together with pre-judgment interest, costs, and attorneys' fees, pursuant to Florida Stutes §627.428, §57.104, §92.231, and §57.041.

5. On September 07, 2022, Defendant filed its Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal.

6. On February 03, 2023, this Court entered an Order denying Defendant's Motion to Dismiss but granting Defendant's Motion to Stay and Compel appraisal. The Order also required the Plaintiff to name its appraiser within 30 days, and the case was STAYED for 60 days to conduct an Appraisal.

7. Appraisal was completed on February 21, 2023.

8. The parties elected appraisers agreed that the amount of loss for the windshield replacement of the Insured's motor vehicle was $1,037.43.

9. On or about March 5, 2023, Defendant sent Plaintiff a draft in the amount of $718.21 representing payment of the appraisal amount claim disputed.

10. On March 31, 2023, Defendant filed its Motion to Dismiss and Strike Plaintiff's Claim for Attorney Fees.

11. On April 27, 2023, Plaintiff filed its Motion to Tax Attorney's Fees and Costs, moving this Court to enter an Order holding Defendant's payment of insurance benefits, whether in whole or in part, constitutes, or is the functional equivalent of, a confession of judgment and entitles the Plaintiff to recover reasonable attorney's fees and costs pursuant to Florida Statutes §627.428, §57.041, and §57.104.

BASED ON THE FOREGOING, it is hereby, **ORDERED AND ADJUDGED** that:

1. This Court follows the decisions of well-established Florida jurisprudence determining that Defendant's payment of insurance benefits after this lawsuit was filed operates as a confession of judgment. *Wollard v. Lloyd's &Cos. of Lloyd's,* 439 So.2d 217, 218 (Fla.1983); *see Lopez v. Scottsdale Ins. Co.,* No. 20-20112-CIV-COOKE/GOODMAN, 2021 U.S. Dist. LEXIS 222127, at *3 (S.D. Fla. Nov. 17, 2021); *State Farm Fire & Cas. Ins. Co. v. Palma,* 629 So. 2d 830, 832 (Fla. 1993); *Goff v. State Farm Florida Ins. Co.,* 999 So. 2d 684 (Fla. 2nd DCA 2008) [33 Fla. L. Weekly D2833a]; *Do v. Geico Gen'l Ins. Co.,* 137 So. 3d 1039 (Fla. 3rd DCA 2014) [39 Fla. L. Weekly D455b]; *see also Pepper's Steel & Alloys, Inc. v. United States,* 850 So. 2d 462, 465 (Fla. 2003) [28 Fla. L. Weekly S455a] ("In Florida, the payment of a settlement claim is the functional equivalent of a confession of judgment or a verdict in favor of the insured").

2. The filing of this lawsuit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract. *Clifton v. United Cas. Ins. Co. of Am.,* 31 So. 3d 826, 829 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D364e]; *see Goff v. State Farm Fla. Ins. Co.,* 999 So. 2d 684, 686 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2833a] (holding that insureds were entitled to § 627.428, Fla. Stat. attorney's fees because their lawsuit forced the insurer to pay additional amounts).

3. Plaintiff is entitled to recover reasonable attorney's fees and costs because the filing of this lawsuit was reasonably necessary for the insured to claim insurance benefits. *Travelers of Fla. v. Stormont,* 43 So. 3d 941, 944 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2059a]; *see also Pepper's Steel & Alloys,* 850 So. 2d at 465; *Latin Am. Prop. & Cas. Ins. Co. v. Pastor,* 561 So. 2d 1302, 1303 (Fla. 3d DCA 1990).

4. The appraisal process and its completion would not go forward without the filing of this lawsuit and the oversight of this Court. *Lopez v. Scottsdale Ins. Co.,* No. 20-20112-CIV-COOKE/GOODMAN, 2021 U.S. Dist. LEXIS 222127, at *4 (S.D. Fla. Nov. 17, 2021).

It is further, **ORDERED AND ADJUDGED** that:

1. Defendant's Motion to Dismiss and Strike Plaintiff's Claim for Attorney's Fees is **DENIED.**

2. Plaintiff's Motion to Tax Attorney's Fees and Costs is hereby **GRANTED.**

3. Plaintiff is entitled to reasonable attorney's fees and costs pursuant to Florida Statutes §627.428, §57.041, and §57.104 to be determined by this Court.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Insurer is required to reimburse medical provider for CPT code 99072 for supplies and additional staff time related to ensuring that insured was treated safely during COVID public health emergency

UNIVERSITY DIAGNOSTIC INSTITUTE WINTER PARK, PLLC., a/a/o Ashlee Oliver, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-SC-021763-O. August 15, 2023. Evellen Jewett, Judge. Counsel: Matthew Quattrochi and Juan Torrico, Quattrochi, Torres, & Taormina, P.A., Casselberry, for Plaintiff. Stacia Godkin, Geico Staff Counsel, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGEMENT

THIS CAUSE came before the Court on University Diagnostic Institute Winter Park, Pllc. A/A/O Ashlee Oliver's ("Plaintiff") Motion for Final Summary Judgement, the Court, having considered the Motion, and being otherwise fully advised in the premises, grants the Motion and states as follows. It is hereby:

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Final Summary Judgement is **GRANTED.**

2. Defendant GEICO GENERAL INSURANCE COMPANY ("Defendant") shall reimburse Plaintiff for CPT code 99072 billed to Defendant with date of service October 10, 2020.

FACTUAL BACKGROUND

1. Plaintiff is a medical provider that provided diagnostic medical services to Ashlee Oliver.

2. GEICO GENERAL INSURANCE COMPANY (hereinafter referred to as "Defendant") is an auto insurance company that insured Ashlee Oliver in relation to a 09/03/2020 motor vehicle accident.

3. Ashlee Oliver assigned Plaintiff all rights, claims, and causes of action against Defendant arising out of the medical services Ashlee Oliver received from Plaintiff.

4. Ashlee Oliver received diagnostic medical treatment from Plaintiff on 10/10/2020.

5. At the time of Ashlee Oliver's treatment, the United States and the rest of the world were in the midst of a public health emergency in the form of a global pandemic. On January 31, 2020 Alex Azar of the Secretary of Health and Human Services stated:

> As a result of confirmed cases of 2019 Novel Coronavirus (2019-nCoV), on this date and after consultation with public health officials as necessary, I, Alex M. Azar II, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby determine that a public health emergency exists and has existed since January 27, 2020, nationwide.[1]

6. As part of Ashlee Oliver's treatment with Plaintiff, Plaintiff utilized supplies and additional clinical staff time related to the public health emergency to ensure that Ashlee Oliver was treated safely and without additional risks associated with the public health emergency. Plaintiff billed for the additional practice expenses incurred via CPT Code 99072.

7. CPT code 99072 was approved in response to measures adopted by medical practices and health care organizations to stem the spread of the novel coronavirus (SARS-CoV-2), while safely providing patients with access to high-quality care during in-person interactions with health care professionals. The additional supplies and clinical staff time to perform safety protocols described by code 99072 allow for the provision of evaluation, treatment or procedural services during a public health emergency in a setting where extra precautions are taken to ensure the safety of patients as well as health care professionals.[2]

8. Plaintiff billed Ashlee Oliver's treatment to Defendant, Defendant received Plaintiff's bill for Ashlee Oliver's treatment on 10/16/2020 and Defendant paid a total of $879.28 in PIP Benefits.

9. Defendant denied payment for CPT Code 99072. In support of this denial, Defendant stated that the treatment was not reimbursable under Medicare or Workers compensation, therefore they are not required to pay for the treatment.

ANALYSIS

10. The Court was faced with the issue of whether CPT Code 99072 was reimbursable and whether Defendant's failure to pay for the treatment was a breach of contract. Plaintiff's position was that they satisfied their burden to prove that the charge was reasonably priced and medically necessary in relation to Ashlee Oliver's 9/3/2020 motor vehicle accident. Defendant's position was that the treatment is not reimbursable under Medicare or Workers Compensation, therefore they are not responsible for payment.

11. The Court is convinced by Plaintiff's argument that the treatment is compensable and reimbursable pursuant to Florida Statute 627.736(1)(a) and 627.736(5)(a)(1) as well as Defendant's Insurance Policy. Plaintiff met its burden of proof with two Affidavits, which support their position that the charge is reimbursable pursuant to Florida law.

12. In summary, this Court finds that the Defendant is required to reimburse Plaintiff for the outstanding treatment because it is compensable.

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[1]https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx

[2]https://www.ama-assn.org/system/files/2020-09/cpt-assistant-guide-coronavirus-September-2020.pdf

* * *

Landlord-tenant—Public housing—Eviction—Criminal activity by guest or person under tenant's control—Use of gym on premises by tenant's son without tenant's permission four months earlier does not establish that he was "guest" or "under tenant's control" on night that he entered property and carjacked another resident—Summary judgment is entered in favor of tenant where there is no evidence that son was staying in tenant's unit or that tenant invited son to premises or received call from son from intercom call box to gain access to property on night of crime

TUSCAN PLACE LIMITED PARTNERSHIP, Plaintiff, v. KIMBERLY KING, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-001600-CC-05. Section CC08. November 7, 2023. Diana Gonzalez-Whyte, Judge. Counsel: Kaye-Ann Baxter, Pembroke Pines, for Plaintiff. Jeffrey M. Hearne, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant's Motion for Summary Judgment. The Court held a hearing on October 31, 2023, and heard arguments of counsel.

FINDINGS OF FACTS

Defendant lives in affordable housing subsidized under the Low-Income Housing Tax Credit program. Plaintiff seeks to evict Defendant from her apartment because her son, Kieron Womble, came to the property and carjacked another resident. Mr. Womble came to the property on December 12, 2022. Plaintiff has a security video which shows Defendant's son using the intercom call box to gain access to the property on the night of the incident. Plaintiff does not know whom Defendant's son called on the intercom call box and it does not have any records of the call. Defendant testified that her son did not call her from the callbox on December 12, and she did not give him access to the property through the callbox. Defendant provided subpoenaed phone records to corroborate this fact. Ms. King's cell phone records from December 12, 2022, show no calls to Ms. King from the call box number, [Editor's note: Number redacted]. Ms. King's affidavit states she was at dinner in Fort Lauderdale with friends. She was not expecting Womble to visit her home. There is no evidence whatsoever that Mr. Womble went to Ms. King's door or that she knew he was there at all.

The plaintiff relies on the testimony of Mr. Andres Duran. Mr. Duran testified at his deposition and in his affidavit that Mr. Womble gained entry to Tuscan Place and accessed the gym on August 21, 2022. The plaintiff also stated: "Tuscan Place employees stated in their sworn depositions that, (a) Ms. King admitted that Mr. Womble had visited her residence earlier in 2022, (b) Ms. King stated that Mr. Womble may have obtained her resident access card to access a restricted area on the premises when he visited her, (c) Mr. Womble was never issued a resident access card, (d) Ms. King did not ask to have her son trespassed from the property after she learned of his unauthorized entry on August 21, 2022, and (e) Ms. King did not state in any of her conversations with staff that Mr. Womble had any friends or relatives at Tuscan Place other than herself who could have given him access to the premises."

There is no evidence that Mr. Womble visited the Defendant during the four months between the date of August 21, 2022, and the date of the crime was committed. Much of the testimony is speculation and hearsay. Which boils down to the fact that almost four months earlier the defendant's son entered the premises and used the gym without her permission and without the permission of management. It is not reasonable to conclude that because he was there in August ***without*** her permission he must have been there in December ***with*** her permission.

Paragraph 45 of Defendant's lease says: "Resident, any member of Resident's household, or a guest or other person under the Resident's control shall not engage in criminal activity which threatens the health, safety, or right to peaceful enjoyment of other residents or persons residing in or visiting the apartment community or any on any on-site property management staff responsible for managing the Premises."

ARGUMENTS

Defendant argues it is entitled to summary judgment because Plaintiff lacks evidence that Defendant's son was a guest or person under the tenant's control.

Although not defined in the lease, Defendant argues that "guest" and "person under the resident's control" are technical, defined terms from HUD-subsidized housing. *See* 24 C.F.R. § 5.100. "Guest" is defined as a "person temporarily staying in the unit" with the consent of the tenant. *Id.* A "person under the tenant's control" is defined as a person not staying as a guest in the unit but being on the premises at the time of the activity because of "an invitation from the tenant." *Id.*

Defendant argues Plaintiff has no evidence that Defendant's son was staying in her unit and therefore cannot be a guest. Plaintiffs' witness testified at the deposition that he had no knowledge that Defendant's son was staying in her unit. There is no video footage of her son entering her unit or being anywhere near Defendant's unit.

Defendant argues Plaintiff has no evidence that Defendant invited her son to the property on December 12, 2022. Plaintiff does not know which unit Mr. Womble called that evening and has no records of the call. Defendant provided an affidavit that her son did not call her that evening from the intercom call box and Defendant provided subpoenaed telephone records to corroborate her testimony. Plaintiff did not provide any direct evidence to contradict Defendant's testimony. Defendant argued that her son could have called any apartment and gained access to the building.

In response to Defendant's motion, Plaintiff argues that Defendant's son should be considered a guest or a person under the tenant's

control because he previously came to the Property. Defendant argues that prior visits are not material as to whether Defendant invited him to the property on December 12, 2022, and cites to *Broward Cty. Hous. Auth. v. Davis*, 10 Fla. L. Weekly Supp. 266a (Broward Cty. Ct. Feb. 12, 2003) (holding previous visits of the individuals that committed the criminal activity did not establish them as guests or under tenant's control on the day at issue) and *Waukegan Hous. Auth. v. Stinnette*, 2011 WL 10457458, Case No. 2-10-1148, at *11 (Ill. App. 2 Dist., Oct. 25, 2011) (finding prior frequent visits of tenant's ex-husband to the tenant's unit did not establish him as a "guest" or "under tenant's control").

Plaintiff also argues that Defendant did not request a trespass order to keep her son from coming to the property and she did not ask to have her locks changed. Defendant argues these facts are not material as to whether Defendant invited her son to the Property on December 12, 2022.

Finally, Plaintiff provided an affidavit from Damian Boyne who is a former employee of Verizon Date Services Company and is currently a computer systems analyst with GDK Computer Systems & Services. His affidavit says that "phone bills generated by a telephone company are not always 100% accurate." It does not specifically address any relevant issues in this proceeding, said statements are not reliable relevant information. Furthermore, his affidavit is speculation. The affidavit states he is, "a former employee of Verizon." It does not state how he would know T-Mobile's procedure or system.

Defendant argues the affidavit is not admissible expert testimony because it does not apply reliable principles and methods to the facts of the case as required by Florida Evidence Code § 90.702(3). Defendant also argues Mr. Boyne's statements merely raise metaphysical doubt about the accuracy of the subpoenaed phone records.

LAW

Florida Rule of Civil Procedure 1.510(a) provides that the court shall grant summary judgment "if the movant shows there is no genuine issue dispute as to any materials fact and the movant is entitled to judgment as a matter of law." A dispute of fact is only genuine when the evidence would sufficiently enable a reasonable jury to find in favor of the nonmoving party. *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a]. When contesting a motion for summary judgment, an opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So.3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a] (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986)).

RULING

For the reasons argued by Defendant, the Court grants Defendant's Motion for Summary Judgment. The Court finds that Plaintiff failed to demonstrate through any admissible evidence that Defendant's son was a guest or person under Defendant's control.

The plaintiff submitted Mr. Boyne's affidavit. is not an expert. His affidavit is speculation. The affidavit states he is, "a former employee of Verizon." It does not state how long he worked there; it does not state in what capacity he worked. The affidavit is hearsay and inadmissible. The affidavit provides no specific opinion as to how subpoenaed phone records could be altered or whether he is of the opinion that the phone records in this case were altered. The son's prior visits to the property are not so numerous nor do they show any pattern that would indicate that he was a guest or person under the tenant's control on December 12.

Finally, there is nothing in the lease which would have required Defendant to trespass her son from the property. A reasonable jury could not find that Defendant's son was a guest or person under her control on December 12. Therefore, Defendant is entitled to summary judgment.

It is ORDERED AND ADJUDGED:

A. Defendant's Motion for Summary Judgment is GRANTED, and final judgment is entered in favor of Defendant and against Plaintiff.

B. Plaintiff shall take nothing by this suit and Defendant shall go hence without day.

C. Defendant shall remain in possession of [Editor's note: Address redacted], Miami, Florida 33136.

D. The rent in the court registry will be released to Plaintiff. The parties will submit a separate proposed order releasing the rent in the court registry to Plaintiff.

E. The court reserves jurisdiction to award attorney's fees and costs.

F. This is a final order, and the Clerk is instructed to close this case.

* * *

Landlord-tenant—Eviction—Landlord waived ability to execute on final judgment and writ of possession where, after court issued final judgment against tenant and issued writ of possession, landlord entered into settlement agreement with tenant and accepted rent due and owing under agreement—Final judgment is vacated and writ of possession is quashed

SADRUDDIN JIVANI, Plaintiff, v. CRYSTAL MCRAE, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-074466-CC-23. Section ND01. October 16, 2023. Myriam Lehr, Judge. Counsel: Salina Jivavi, Key Biscayne, for Plaintiff. Brittany Rosen and Alexandra Lasher, co-counsel, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER VACATING FINAL JUDGMENT AND ORDER OF DISMISSAL

THIS CAUSE, having come before the Court on the Defendant's Verified Motion to Stay Writ of Possession and Motion to Vacate Final Judgment, and this Court having held a hearing on October 13, 2023, it is ORDERED AND ADJUDGED as follows:

1. On September 5, 2023, this Court ordered the Defendant to post funds into the court registry, but the Defendant did not post the funds.

2. As a result, the Court entered a Default Final Judgment against the Defendant, and a Writ of Possession was issued and posted.

3. After the Final Judgment was entered, Plaintiff and Defendant entered into a settlement agreement, which both parties signed. The agreement resolved the rent due and owing. Per the terms of the agreement, Defendant paid the full amount ordered to be posted and then made a subsequent payment pursuant to the agreement to the Plaintiff. Plaintiff accepted that payment amount, resolving the rent due and owing as referenced by the Court's previous order.

4. After entering this agreement and accepting the payment from the Defendant, Plaintiff then sought to execute on the writ of possession.

5. An Emergency Verified Motion to Stay Writ of Possession was filed and a hearing on the motion was held.

6. This Court finds that Plaintiff's acceptance of the rent due and owing under the subsequent settlement agreement that both parties entered into after Final Judgment was entered, constituted waiver of Plaintiff's ability to execute on the Final Judgment and Writ of Possession.

7. This Court therefore finds that Defendant is entitled to the relief from the judgment pursuant to rule 1.540 and the judgment should be vacated.

8. Additionally, the action should be dismissed due to waiver since Plaintiff has accepted the funds demanded in the complaint.

9. Accordingly, the Final Judgment entered in this case is vacated

and the Writ of Possession is quashed.

10. Further, the eviction action is DISMISSED.

* * *

Landlord-tenant—Eviction—Deposit of rent into court registry—Holdover tenant—Landlord's request that tenant be required to post double rent into court registry as holdover tenant is denied—Court has not yet determined whether tenancy was legally terminated, and landlord did not allege that tenant was holdover tenant or demand double rent in complaint and notice

ARMINICAN PARTNERS, LLC, Plaintiff, v. ROXANA ALVAREZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-087994-CC-20, Section CL02. August 24, 2023. Christopher Green, Judge. Counsel: Natalia Marrero, Miami, for Plaintiff. Alexandra Lasher, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE, DETERMINATION OF RENT, ORDER FOR MEDIATION AND NON-JURY TRIAL (DOCKET #20)

THIS CAUSE, having come before the Court on the Defendant's Motion to Determine Rent on August 21, 2023, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion to Strike is denied.

2. On the 1st of every month, so long as these proceedings continue, Defendant must post $294.00 to the court registry, the rent contribution amount of the Section 8 contract.

3. At the hearing, Plaintiff argued that tenant was a "holdover" tenant and pursuant to Florida Statute Section 83.58 and the amount required to be posted should be double the rent.

4. However, this argument that double the rent must be posted at this stage fails since the Court has not adjudicated the merits of this case. Specifically, this Court has not determined that the tenancy was legally terminated.

5. Further, Plaintiff failed to allege Defendant was a holdover tenant and failed to demand double rent due and owing in the Complaint and in the Notice. Due to Plaintiff's failure to demand double rent in the Complaint and in the Notice, Defendant does not need to pay double rent into the court registry. *See Lincoln Oldsmobile Inc., v. Brach,* 574 So. 2d 1111(Fla. 2nd DCA 1990).

6. This case is further set for Mediation on September 13, 2023 at 11:30 over Zoom.

7. This case will be set for a Non-Jury Trial, should the Parties not reach an agreement during Mediation, three weeks later on or around the week of October 5, 2023.

* * *

Insurance—Trial—Continuance—Insurer's motion to continue trial is denied where insurer had knowledge of all defenses when it conducted examinations under oath—Where insurer failed to comply with order requiring filing of proposed jury instructions and verdict forms, those filed by plaintiff are accepted subject only to objections based on fundamental or reversible error—Evidence—EUO transcript of nonparty named insured is hearsay—Motion to exclude argument regarding named insured's ability to speak, read, or write English is denied because issue is highly relevant

JOHANNA HERRERA GUZMAN, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 22-CC-090055. November 1, 2023. Matthew A. Smith, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER ON PRE-TRIAL CONFERENCE

THIS MATTER having come before the court on October 31, 2023 on a Pre-Trial Conference. The court having having reviewed the Uniform Order Setting Pre-Trial Conference and Jury Trial entered June 30, 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 30, 2023, Defendant filed a Motion to Continue Trial. The Court finds that Defendant had knowledge of all of its defenses when it conducted EUO's of the named insured and Plaintiff in 2022. Although signed by the Defendant party, Defendant's motion fails to satisfy the good cause requirement of F.R.C.P. 1.460 and, as such, Defendant's Motion to Continue Trial is **HEREBY DENIED**.

2. Plaintiff withdrew Plaintiff's Motion to Strike Defendant's Fact and Witness List.

3. Provision No. 9 of the Order Setting Pre-Trial Conference and Jury Trial required Jury instructions and Verdict Forms to be submitted to the Court no later than Pre-Trial Conference. On or about October 30, 2023, Plaintiff filed Plaintiff's Proposed Jury Instructions and verdict forms. Defendant failed to timely file its own Proposed Jury Instructions and verdict forms. As such, the Court will accept Plaintiff's Proposed Jury Instructions and verdict forms. The only objections allowed from the Defendant will be if Defendant can show that any of Plaintiff's Proposed Jury Instructions and verdict forms will cause fundamental or reversible error. The Court will of course review all of said jury instructions on its own to ensure compliance.

4. Defendant's Motion in Limine Regarding EUO Transcript argues that the EUO transcript of Martin Herrera, the named insured, should be admissible. The Court finds that an EUO transcript of a party/opponent is admissible as an admission, but that the EUO transcript of Mr. Martin, a non party, is rank hearsay, and is inadmissible, unless Defendant can show an exception to the hearsay rule. As such, Defendant's Motion in Limine Regarding EUO Transcript is **HEREBY DENIED**.

5. Defendant's Second Motion in Limine contains subparts. The Court grants the subparts which refer to the term "liars", along with provision No. 5 regarding settlement discussions. The Court reserves as to the remaining provisions of Defendant's motion.

6. Defendant's First Motion in Limine Regarding Interest Issue was agreed to by the Plaintiff and, as such, is **HEREBY GRANTED**.

7. Defendant's Third Motion in Limine Regarding Improper Arguments contains subparts. Provision A of said motion addresses arguments regarding Martin Herrera's inability to speak, read or write in English is **HEREBY DENIED** as the Court finds this issue to be highly relevant. Provision B of said motion addresses parole evidence is **HEREBY RESERVED.** Provision C of said motion addresses arguments regarding Defendant's having no duty to or obligation to investigate the information in the insurance application is **HEREBY RESERVED.**

8. On or about October 30, 2023 in the evening hours, Defendant filed a Motion to Extend Deadlines in Court Order Dated June 30, 2023. The Court finds Defendant's Motion is untimely, and, as such, is **HEREBY DENIED**.

9. Defendant's Motion to Have Trial Witnesses Appear Via Zoom is **HEREBY DENIED.**

10. Jury selection shall occur on November 27, 2023 at 1:30 PM. The jury trial shall commence as ordered on November 30, 2023 at 9:00 AM.

* * *

Insurance—Personal injury protection—Coverage—Declaratory action—Existence of remedy at law for denial of coverage does not preclude medical provider from bringing declaratory action

AJ THERAPY CENTER, INC., a/a/o Alfredo Silveria Garcia, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-060056. November 13, 2023. Miriam V. Valkenburg, Judge. Counsel: Timothy A.

Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come before the court on November 8, 2023 on Defendant's Motion to Dismiss. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action seeking a coverage declaration regarding the Defendant's denial of PIP coverage as a result of the multiple EUO no shows by the name insured.

2. Defendant motion argues that Plaintiff's action is better addressed as a breach of contract action.

3. The Court finds that the Plaintiff has the right to choose its legal strategy and the right to pursue its chosen legal path. The mere existence of another remedy at law does not preclude a judgment for declaratory relief. As such, Defendant's Motion to Dismiss is **HEREBY DENIED**.

4. Defendant has 20 days to file its answer. Plaintiff thereafter has 10 days to file its Reply if necessary.

* * *

Insurance—Discovery—Depositions—Failure to provide deposition dates and failure to appear for noticed deposition—Sanctions

AJ THERAPY CENTER, INC., a/a/o Alfredo Silveria Garcia, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-060056. November 29, 2023. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS CAUSE having come before the Court on November 28, 2023 on Plaintiff's Motion for Sanctions, Plaintiff's Motion to Compel Discovery and Plaintiff's Objection to Defendant's Ex-Parte Motion to Compel Discovery. Upon consideration of the motions, the record filings and the arguments of the parties,

1. The Court finds that Plaintiff's counsel submitted multiple requests to Defendant's counsel in an attempt to mutually coordinate the deposition of Defendant's claims Corporate Representative. Plaintiff's counsel received no cooperation from Defendant's counsel, to wit, on May 10, 2023, Plaintiff filed a Notice of Taking Deposition Duces Tecum for said deposition to occur on June 12, 2023 at 10:00 AM.

2. Defendant waited until June 9, 2023 to file a Motion for Protective Order. However, Defendant made no attempts to set the Motion for Protective Order for hearing until 3 days before the scheduled deposition.

3. The Court finds that prior to a party refusing to appear for a duly noticed deposition, said party must both file and schedule for hearing a Motion for Protective Order prior to failing to appear for said deposition. Defendant and Defendant's counsel failed to appear at the deposition on June 12, 2023, to wit, a Certificate of Non-Appearance was taken. As such, Plaintiff's Motion for Sanctions is **HEREBY GRANTED.**

4. Plaintiff's counsel is entitled to reasonable attorneys' fees for all time spent related to the deposition, the filing of Plaintiff's Motion for Sanctions and attending a hearing on same.

5. The deposition of Defendant's Corporate Representative must be scheduled within 5 days and the deposition must occur within 30 days of the date of this hearing.

6. The parties are given twenty 20 days to attempt to reach a resolution on the total amount of attorney's fees to be awarded as sanctions. Should the parties not be able to reach an agreement, the matter shall be set for an evidentiary fee hearing.

7. The parties are directed to review all discovery objections as to Plaintiff's Motion to Compel Discovery and Plaintiff's Objection to Defendant's Ex-Parte Motion to Compel Discovery. The Court directs the parties to the applicable Administrative Order addressing an Ex-Parte Motion to Compel Discovery.

* * *

Insurance—Personal injury protection—Answer—Amendment—Renewed motion to amend answer to assert new demand letter and CPT coding defenses is denied—Insurer filed renewed motion after discovery cutoff and filing of pretrial stipulation and did not diligently move motion to hearing, insurer should have clearly been aware of defenses if it had acted diligently in preparing its case, and granting late request for amendment would unfairly prejudice medical provider and administration of justice

NORTHWEST FLORIDA PHYSICIANS GROUP, LLC, Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23000703, Division 53. November 13, 2023. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S RENEWED MOTION TO AMEND ANSWER AND AFFIRMATIVE DEFENSES UPON A FINDING OF PREJUDICE

This cause came before the Court on November 9, 2023 for hearing of the Defendant's Renewed Motion for Leave to Amend Answer and Affirmative Defenses. The Court's having reviewed the Motion and entire Court file, having heard argument, and having considered the relevant legal authorities, finds as follows:

The Defendant filed its Answer in this case on March 28, 2023, and the case is now in a jury trial posture, with the pretrial conference set for December 22, 2023.

The Court entered its Uniform Order Setting Pretrial Deadlines on May 5, 2023. Due to the nature of this case, the Court issued a streamlined pretrial order. The same day, the Court set a case management conference for August 18, 2023, with discovery cutoff occurring on August 3, 2023, prior to the case management conference. After the discovery cutoff, the Defendant filed its Motion to Amend Answer and Affirmative Defenses on August 7, 2023. The joint pretrial stipulation was filed on August 14, 2023. Noting that the joint pretrial stipulation had been filed, the Court canceled the case management conference and by Order of August 17, 2023, the Court set the pretrial conference for jury trial for December 22, 2023. At the same time the Court referred the parties to mandatory non-binding arbitration, with a deadline of December 15, 2023. No motion has been made to extend any deadline in the pretrial order. Further, on August 17, the Court entered an Order Denying Defendant's Motion to Amend for failure to set forth in the Motion what the Defendant was actually seeking to amend.

On August 20, 2023, the Defendant filed its Renewed Motion to Amend. Although the discovery deadline had passed, and the joint pretrial stipulation had already been filed, the Defendant did not diligently move its Motion forward to hearing. Rather, a month later, on September 19, 2023, the Defendant filed its Notice of Hearing setting the Motion for hearing for November 9, 2023, notwithstanding that the Court has had plenty of hearing availability.

The Court notes that the proposed new defenses (demand letter and CPT coding issues) were of a nature that, in the Court's view, the Defendant should have clearly been aware had it acted diligently in preparing its case. The Defendant argues that it resulted from staffing issues, particularly new counsel coming into the case late in the game. That it "found out" about these possible defenses late in the game was through no fault of the Plaintiff. Indeed, Defendant clearly should have known about the possibility of these defenses before discovery cutoff and before the parties had filed their joint pretrial stipulation.

Further, the Defendant waited to set a hearing date more than three months after it acknowledges it was aware of these new defenses, with the Court having plenty of much earlier available hearing time. The Defendant ignored the pretrial deadlines and is trying to reap the reward of its own recalcitrance.

More importantly, the Court concludes that granting this late request would unfairly prejudice the Plaintiff, as well as the administration of justice. These new defenses are not merely a restated emanation of what the parties had already prepared for. Rather, the proposed new defenses would inject new issues into the case and advance new theories for the first time. Discovery would have to be reopened, as the proposed added new defenses were not something that the Plaintiff was anticipating, as they were not previously raised at any point in this case. At some reasonable point, a plaintiff is entitled to prepare its case and accept the rules at face value—a defense not raised is waived. Rule 1.140(h)(1) . Additionally, arbitration would have to be extended, the joint pretrial stipulation would have to be amended, as to witnesses, exhibits, and jury instructions. The pretrial conference and jury trial would have to be postponed further. Such amendment under these circumstances would be both prejudicial to the Plaintiff and the administration of justice in this case. *See State Farm Mutual Auto. Ins. Co. v. Baum Chiropractic Clinic PA*, 323 So.3d 756, 757 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1548a]; *Alliance Spine & Joint III, LLC v. GEICO Gen. Ins. Co.*, 321 So.3d 242, 245 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1149a]. As a result, it is respectfully

ORDERED that the Defendant's Motion is DENIED upon a finding of prejudice.

* * *

Consumer law—Debt collection—Eviction notice—Action alleging that landlord violated Florida Consumer Collection Practices Act by posting outward-facing three-day eviction notice on door of leased premises is dismissed—Posting was required by Florida Residential Landlord and Tenant Act and is protected by litigation privilege—Even if litigation privilege applied, plaintiff, a limited liability company to which tenant assigned his statutory rights, lacked standing where plaintiff did not allege that it is "debtor" under FCCPA or owes any debt to landlord—Further, assignment to plaintiff was invalid under Florida law, as purely personal claims cannot be assigned—Even if plaintiff has standing, complaint failed to state causes of action under sections 559.72(5) and (14) where there was no allegation that information on notice was disclosed to any person other than tenant and his family or that tenant's name was posted before the general public

KAC 2021-1, LLC, a/a/o Johnny Jones, Plaintiff, v. TRUE NORTH PROPERTY OWNER A, LLC, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO23001418. Division 71. October 27, 2023. Louis H. Schiff, Judge. Counsel: Daniel W. Bialczak, Korte & Associates, LLC, Singer Island, for Plaintiff. Ryan C. Reinert and Bridget M. Dennis, Shutts & Bowen, LLP, Tampa, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT.

THIS CAUSE came before the Court on October 4, 2023 on Defendant's Motion to Dismiss Amended Complaint of the Plaintiff, KAC 2021-1, LLC (KAC). The Defendant, True North Property Owner A, LLC (TN) filed its motion on September 15, 2023. The Court has reviewed the Motion and heard argument of counsel.

The Court Finds and it is so Ordered:

1. The Motion is GRANTED, and this case is dismissed with prejudice.

2. The Court considered and reviewed the Amended Complaint of KAC, in which KAC alleged Johnny Jones (a non-party tenant of TN) had assigned to KAC his statutory rights to sue TN for abusive debt-collection practices. The Amended Complaint alleged TN violated sections 559.72(5) and 559.72(14), Florida Statutes, when TN posted on Jones' front door a 3-Day Notice pursuant to sections 83.56(3) and 83.56(4), Florida Statutes (2023). KAC alleged that although section 83.56 required the landlord (TN) to deliver to the tenant a 3-Day Notice, TN's effected delivery by affixing the notice to Jones' front door, facing outward, "disclosing to the world at large" (¶ 14 of KAC Am. Compl.) Jones owed back rent and faced immediate eviction if Jones did not pay within three days. KAC has alleged TN's method of notice delivery also violated section 559.72(14), which makes actionable a debt collector publicly posting a debtor's name in an attempt to collect a consumer debt.

3. Dismissal with prejudice is in order in this case because of the judicial immunity arising from the litigation privilege relating to the posting of the 3-Day notice of eviction is mandated by section 83.56.

4. This Court in *KAC 2021-1, LLC, as Assignee of Kanesha Stokes v. Yoss Prashkovsky, LLC,* Case No. CONO 22-008130 (71) (Feb. 27, 2023) in an almost identical case as the one at bar, granted defendant's motion to dismiss the statement of claim with prejudice for alleged violations of the FCCPA relating to the posting of a 3-Day eviction notice pursuant to section 83.56, stating that said posting was proper. In *KAC v. Prashkovsky*, this Court wrote, "the accepted definition of 'posting' means to ensure the notice is immediately visible, akin to something being posted on a bulletin board, and that posting the notice face-down does not advance the purpose of the statute." Further, this Court wrote, "the Defendant is protected by the 'litigation privilege' which provides immunity for actions that occur in judicial proceedings." This Court then concluded, "Defendant is immune from liability due to the litigation privilege. . .if the legislature intended the 3-Day notice to be posted backwards or face down, then it was up to the legislature to state [the] same in the statute." Here, KAC comes before the Court to argue the same as it did in *KAC v. Prashkovsky*, without there having been no appellate cases, statutes or rules that have reversed or changed the February 27, 2023 decision of the Court.[1]

5. Even if the Court was to assume for a moment that TN did not have the litigation privilege to provide judicial immunity, the Court finds that dismissal with prejudice is appropriate because KAC lacks the standing to bring this cause of action for violations of the Florida Consumer Collection Practices Act, § 559.55, et seq. ("FCCPA"). *See, e.g.*, *Condon v. Global Credit & Collection Corp.*, No. 8:10-CV-1526-T-TGW, 2010 WL 5071014 (M.D. Fla. Dec. 7, 2010) (dismissing complaint because plaintiff, as an attorney, was not obligated to pay any debt to defendant and therefore lacked standing to assert a claim under the Fair Debt Collection Practices Act). Here, KAC is a limited liability company claiming it acquired the FCCPA cause of action from Johnny Jones, the tenant, through an "Irrevocable Assignment" which was attached to the Amended Complaint. The Amended Complaint does not allege that TN as a limited liability company is a "debtor" under the FCCPA or that it owes any "debt" to TN as required to have standing under the FCCPA. *See* § 559.77(1), Fla. Stat. (2023) ("A debtor may bring a civil action against a person violating the provisions of s. 559.72.") (emphasis added); § 559.55(8), Fla. Stat. (2023) (defining "debtor" as "any natural person obligated or allegedly obligated to pay any debt") (emphasis added); § 559.55(6), Fla. Stat. (2023) (defining "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes"). As such, the Amended Complaint is dismissed for Plaintiff's lack of standing under the FCCPA.

6. The "Irrevocable Assignment" mentioned in paragraph 5 is invalid under Florida law as purely personal claims cannot be

assigned. *See Anaford AG v. Sharp Kemm P.A.*, No. 8:12-CV-1264-T-35-TBM, 2013 WL 12156824 (M.D. Fla. Mar. 29, 2013) (applying Florida law) (citing *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 559 (Fla. 1997) [22 Fla. L. Weekly S704a] (compiling cases)). As with a claim for invasion of privacy, the basis for the FCCPA claims asserted here are peculiar to the individual tenant and are thus not assignable. *See LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C647a] (finding the FCCPA was enacted by the Florida Legislature to "define[ ] and protect[ ] an individual's right to privacy with regards to consumer collections practices in the state) (emphasis added) (citing *Laughlin v. Household Bank, Ltd.*, 969 So. 2d 509, 513 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2761c]); *see also Loft v. Fuller*, 408 So. 2d 619, 622 (Fla. 4th DCA 1981) ("The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons . . . unless their own privacy is invaded along with his."). In this case, KAC has failed to make the necessary allegations to support that its corporate privacy or reputation was in fact violated.

7. Going one step further, if KAC did in fact have standing to sue for violations under FCCPA, the Court finds the Amended Complaint fails to state a cause of action for violations of section 559.72(5). In order for KAC to assert a viable claim under section 559.72(5), KAC must have sufficiently alleged:

> (i) the information on the subject 3-Day notice was "disclosed" to any person other than Jones or Jones' family;
>
> (ii) the person it was disclosed to did not have a legitimate business need for the information; and
>
> (iii) the disclosure of such information affected Jones' reputation.

See §559.72(5), Fla. Stat. (2023); *see also Heard v. Mathis*, 344 So. 2d 651, 655 (Fla. 1st DCA 1977); *Liste v. Cedar Fin.*, No. 8:13-CV-3001-T-30AEP, 2014 WL 4059881 (M.D. Fla. Aug. 14, 2014). The Amended Complaint has failed to meet the requirement that the information on the subject 3-Day eviction notice was actually "disclosed" to any person other than Jones or Jones' family.

8. To complete its findings regarding the dismissal with prejudice of the Amended Complaint filed by KAC, the Court finds the Amended Complaint failed to state a cause of action for violations of section 559.72(14). The Amended Complaint has failed to sufficiently allege that the Jones' individual name was posted or published "before the general public" for the purpose of enforcing or attempting to enforce collection of a consumer debt as required to assert a viable claim under section 559.72(14).

9. The Court retains jurisdiction to determine issues of entitlement and amount of attorney's fees and costs, if any.

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[1]Additionally, and upon review of the statute, the Court finds it imperative to discuss the following.

Section 83.56(3) states that the 3-Day Notice shall contain a statement in substantially the following form:

> You are hereby notified that you are indebted to me in the sum of ___ dollars for the rent and use of the premises (address of leased premises, including county), Florida, now occupied by you and that I demand payment of the rent or possession of the premises within 3 days (excluding Saturday, Sunday, and legal holidays) from the date of delivery of this notice, to wit: on or before the ___ day of ___, (year). (landlords name, address and phone number)

§ 83.56(3), Fla. Stat. (emphasis added). The Court recognizes that KAC never argued that the 3-Day Notice was insufficient in form but that it was improperly "posted." Here, KAC claimed that the Notice should not have been affixed to the door (facing outward) as this improperly disclosed to the public of Jones' outstanding debt and thus, violated the laws concerning debt-collection practices. However, the Court is not convinced for the following reasons. As provided in the statute, the 3-Day Notice is required to state the exact amount demanded. The statute also requires that in the event the tenant is absent from the premises, it is sufficient to leave a copy of the Notice at the residence. See § 83.56(4), Fla. Stat. It is undisputed that TN left a copy of the Notice affixed to the door. Furthermore, while the Notice attached as Exhibit B to the Amended Complaint is completely illegible, since no arguments were made stating that the language provided in the Notice itself was insufficient, the Court can only assume that the Notice was sufficient in form to meet the requirements set forth in section 83.56(3). The "posting" of the 3-Day Notice on the door pursuant to section 83.56 was proper. The Court also notes that the 3-Day Notice is not solely a demand for payment of monies; it gives the tenant the option to pay the rent or surrender ***"possession of the premises within 3 days."*** The parties did not disclose to the Court if tenant Jones chose to pay the money to TN or chose to vacate the property as cited in the 3-Day Notice.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Motion to suppress defendant's statements was legally insufficient where motion alleged that defendant was subjected to custodial interrogation without waiver of *Miranda* rights and sought suppression of "all statements that are made," but motion did not allege any actual statements made or identify facts or reasons that form basis for suppression

STATE OF FLORIDA, Plaintiff, v. JAMES JOHNSON, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 2023-CT-037836-AXXX-XX. November 14, 2023. Kimberly Musselman, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

ORDER GRANTING STATE'S MOTION TO STRIKE OR SUMMARILY DENY DEFENDANT'S MOTION TO SUPPRESS CONFESSIONS, STATEMENTS AND ADMISSIONS

THIS CAUSE having come on to be heard on October 9, 2023 on the "State's Motion to Strike or Summarily Deny Defendant's Motion to Suppress Confessions, Statements and Admissions." After hearing argument from both counsel, and after reviewing the Defendant's Motion to Suppress, the applicable rule of criminal procedure, and all of the case law provided by counsel, the Court finds as follows:

Fla. R. Crim. P. 3.190(h) is the rule regulating a motion to suppress a confession or admission illegally obtained. Rule 3.190(h)(2) states: "Every motion made by a defendant to suppress a confession or admission *shall identify with particularity* any statement sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based." (Emphasis added). The Court looked at the definition of "particularity" and found "fullness or minuteness of detail in the treatment of something."

The State contends that the Defendant's Motion to Suppress does not comply with rule 3.190(h)(2). Therefore, the State says, the Motion is legally insufficient and should be stricken or summarily denied without the necessity of hearing evidence. The State's position is that the Motion is "boilerplate," in that it presents no factual or legal basis—other than legal and factual conclusions—to support any grounds for suppression. The State relies primarily on *Sanchez v. State,* 81 So.3d 604 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D562a] (holding that defendant's motion to suppress his confession was legally insufficient for failing to comply with rule 3.190(h)(2) and was properly stricken by trial court)[1] and *State v. Christmas,* 133 So.3d 1093, 1096 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d] (noting that the use of "the catch-all phrase: 'Other grounds to be argued ore tenus' . . . in the context of a 3.190 motion to suppress is meaningless because it is the antithesis of the specificity required by the rule and serves no useful purpose.").

The Motion to Suppress in this case alleges, in pertinent part, that the Defendant was subjected to "custodial interrogation" without a lawful waiver of Miranda rights. However, the allegations do not put the State or the Court on notice of the statements sought to be suppressed. In fact, the Motion alleges no actual statements at all; it just says, "all statements that are made."[2] The Motion also does not identify any facts or reasons that form the basis for suppression. Accordingly, this Court agrees with the State that the allegations in

Defendant's Motion to Suppress are legally insufficient under rule 3.190(h)(2).

The Court recognizes that the "boilerplate" term is used a lot, but the Court would prefer to say that the Motion to Suppress in this case is "generic." This is because the Motion says nothing about the Defendant's actual statements and because it does not provide "specificity" as to the facts nor as to why the undisclosed statements should be suppressed.

Accordingly, it is hereby ORDERED and ADJUDGED that the State's Motion to Strike or Summarily Deny the Defendant's Motion to Suppress is GRANTED, without prejudice for the Defendant to amend the Motion to Suppress, so as to provide proper notice to the State and the Court. It has been agreed that the Defendant shall have 15 days from October 10, 2023 to file an Amended Motion to Suppress that meets the requirements of rule 3.190(h)(2).

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[1]The motion to suppress in *Sanchez,* in pertinent part, stated only that "[c]oercive measures and impropriety were used, compelling the defendant to involuntarily confess to the crime charged in violation of the defendant's privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution and Article I, § 12, of the Florida Constitution." 81 So.3d at 606.

[2]The Court notes that DUI cases typically involve statements from the beginning of a traffic stop throughout the investigation, including post-arrest statements that may occur during and after when a defendant is transported to the jail, for which there could be hours' worth of statements. Statements may be verbal statements told to the officer and some statements may be recorded on the video. The Court does not know yet whether there are recorded statements of this Defendant on the video but the Court knows from experience that it can be taxing to determine the admissibility of a large volume of statements from a lengthy video. However, the Court has been told that the entire video in this case is only 23 minutes long.

* * *

Criminal law—Competency to stand trial—Defendant who has basic understanding of legal system, role of all parties, charges against her, and possible punishment, and who can consult with her lawyer with reasonable degree of rational understanding is competent to stand trial

STATE OF FLORIDA, Plaintiff, v. MARIA G. DECATUR, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-CT-060744. December 29, 2022. Rhonda E. Babb, Judge. Counsel: Andrew Dressler, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Steven Rice, Assistant Public Defender, Public Defender's Office, Viera, for Defendant.

ORDER FINDING DEFENDANT COMPETENT TO STAND TRIAL

This matter came before the Court on November 29, 2022, for a hearing on the Defendant's Motion to Determine Competency. The Defendant's counsel, Steven Rice, Esq. appeared and he waived the Defendant's appearance. The State of Florida appeared by Andrew Dressler, Esq. Dr. Kathy Oses appeared as the State's witness and Dr. Wende Anderson appeared as the Defendant's witness. All witnesses provided testimony. Based on the testimony, evidence and argument of counsel the Court finds and rules as follows:

On December 31, 2019, Maria Decatur was arrested for Driving Under the Influence in Brevard County Florida. In January, 2020, defense counsel was appointed at the arraignment and she entered a plea of not guilty. On January 8, 2021, defense counsel filed a Motion to Determine Ms. Decatur's Competency to stand trial. The said motion alleged that defense counsel had concerns about Ms. Decatur's ability to communicate with her attorney. She alleged also that Ms. Decatur did not understand /appreciate the charges against her and possible punishment. Further, defense counsel questioned Ms. Decatur's understanding of the role of the attorney, prosecutor, judge, and the criminal justice system as a whole. On March 22, 2021, as the defense counsel requested, the Court appointed Dr. Wende Anderson, the psychiatric expert, to determine competency.

DR. ANDERSON'S REPORT

On April 20, 2021, Dr. Anderson completed her report with her findings after completion of the evaluation. She indicated that she had interviewed Ms. Decatur via a telehealth platform. The Court notes that this evaluation occurred during the COVID-19 Pandemic. Her findings explained that Ms. Decatur was difficult to engage. She was irritable and her impulse control fell below normal limits. During the interview, she had an anxiety attack and left the room to vomit. Her speech was normal, and her thought was remarkable.

In terms of educational history, Dr. Anderson reported that Ms. Decatur completed the German equivalent of high school and trained and worked as a nurse while in Germany. When she moved to the United States she trained and worked as a CNA and also worked cleaning houses. She was involved in a motor vehicle accident in 2007 and since then experienced panic attacks. She now receives social security disability, which commenced in 2009.

Dr. Anderson's diagnostic impressions were Panic-Disorders and Unspecified Anxiety Disorder. Although she found her capacity to appreciate the charges or allegations acceptable, she found unacceptable her appreciation of the range and nature of the possible penalties, the adversarial nature of the charges, the capacity to consult, with a reasonable degree of rational understanding, the ability to manifest appropriate courtroom behavior, and the capacity to testify relevantly.

Dr. Anderson's found Ms Decatur did not appear to grasp the distinction between a plea of not guilty and the ultimate outcome of the case. She did not understand her right to remain silent.

Although she could provide the names of the charges against her, she could not exhibit an understanding of the distinction between the two. She had limitations in her ability to recall substantive information. Although, her ability to manifest courtroom behavior was questionable. Dr. Anderson found that overall she was able to describe appropriate courtroom behavior.

Dr. Anderson's summary found Ms. Decatur incompetent to understand the nature of the proceedings, to participate intelligently in her defense and to exercise her right of allocution. She recommended the Court find her incompetent to proceed due to the anxiety disorder and co-occurring Panic-Disorder. Finally, Dr. Anderson found Ms. Decatur did not appear to be restorable to competency and for purely clinical reasons, recommended a return to counseling and a psychiatric evaluation.

On May 7, 2021, the Court held a status hearing regarding competency and found Ms. Decatur incompetent to proceed for trial. The State and the Defense Stipulated to this finding. The case was continued for several dockets regarding the issue of competency. On March 6, 2022, the State filed a Motion for a Competency Evaluation. The State requested a second evaluation. After a hearing on the issue, the Court signed an order appointing Katherine Oses, M.D., second expert, to perform a competency evaluation.

DR. OSES' REPORT

Dr. Oses performed an in-person evaluation on May 18, 2022. Her findings indicated that Ms. Decatur was oriented to place, time, person, date and situation. Her eye contact was fair and her speech was normal. Her immediate, recent, and remote memory were within normal limits. She cried on occasion during the interview and stood at times due to back pain. Her intellectual functioning appeared to be in the average range with attention and concentration mildly impaired. She could spell words backwards and forward and could identify similarities in objects: banana and apple are both fruits.

Unlike Dr. Anderson, Dr. Oses found Ms. Decatur acceptable in all of the statutorily specified competency to proceed criteria. She could appreciate the charges and allegations. She could provide additional facts for her attorney. She was aware of the current charges and the seriousness of same. She appreciated the range and nature of the penalties to be imposed. She described jail, probation and their differences. She recognized she would not be able to be around

alcohol if convicted of a DUI.

Ms Decatur understood the adversarial nature of the legal process. She could identify the judge by name and identified his role and the role of the jury and witnesses.

Ms. Decatur's capacity to disclose facts pertinent to the proceedings were acceptable also. She could discuss all interactions with various/previous court appointed counsel and provide information which would assist her attorney in her defense.

She also understood the concept of attorney-client privilege. She understood the confidentiality involved in the relationship.

Dr. Oses found Ms. Decatur's ability to behave in court acceptable. She described appropriate courtroom behavior and behaved appropriately during the interview. Her capacity to testify relevantly was also acceptable. She understood the role of the witness. She understood the concept of telling the truth and the consequences of perjury.

Dr. Oses' diagnostic impressions was Unspecified Anxiety Disorder. She found Ms. Decatur presented an adequate level of motivation and that she had sufficient present ability to consult with her attorney to aid in her defense. She found Ms. Decatur to be competent to proceed to trial

On May 23, 2022, the Court provided copies of Dr. Oses' report to all parties. On May 26, 2022, the Court conducted a Competency Status Hearing regarding the issue of whether the case should be dismissed pursuant to the one year mark in Rule 3.213(a). After argument, the Court ruled that a competency hearing was needed in order to make appropriate findings about competency. The defense counsel requested an updated report from Dr. Anderson before any further hearings. The Court granted this request and ordered a second updated evaluation by Dr. Anderson. The Court denied the defense's Motion to Dismiss pursuant to the one year mark.

On November 29, 2022, a competency hearing occurred with the respective doctors as witnesses. Both doctors testified, explained their findings and their reasons for the conflicting results. It should be noted that Dr. Anderson performed an updated evaluation on June 30, 2022, finding the following overall recommendations:

1. Incompetent to proceed due to a psychiatric condition
2. Unrestorable to competency
3. Meets Baker Act criteria

SUMMARY OF DR. ANDERSON'S TESTIMONY

Dr. Anderson explained her findings in the second evaluation basically mirrored the prior findings. She was concerned primarily because Ms. Decatur did not understand her right to remain silent. She gave a hypothetical, asking if Ms. Decatur would understand that she could refuse to answer incriminating questions. Ms. Decatur did not understand the hypothetical and adversarial nature of the legal system and could not understand her rights. This was of major concern to Dr. Anderson.

Dr. Anderson was also concerned that Ms. Decatur could not respond to specific questions and instead followed her own train of thought. In addition, she believed she continuously fell off topic. She also had no emotional control, a short attention span and no ability to concentrate. These characteristics she believes would negatively impact Ms. Decatur's ability to testify in court.

During the second interview, Dr. Anderson noted Ms. Decatur was hyperventilating. In the first interview she vomited. During the second interview she appeared older with bags under her eyes.

Dr. Anderson explained that because of the panic disorder diagnosis, Ms. Decatur would likely behave in a poor manner while in the courtroom, and would have difficulty controlling her emotions when not on the stand. She knew appropriate courtroom behavior. However, the concern is can she implement them.

At the second interview, Dr. Anderson determined Ms. Decatur met the criteria for Baker Act. She was suicidal and expressed a desire to be hit by a car. She continued to be emotionally erratic throughout the interview.

Although Dr. Anderson agreed that all of the emotions and behavior alone do not make Ms. Decatur incompetent, when viewed together, she is concerned that Ms. Decatur will not be able to manage her emotions in an appropriate manner during a trial or assist her attorney satisfactorily. She stands firmly on her findings of incompetency.

SUMMARY OF DR. OSES' TESTIMONY

Dr. Oses is a forensic psychologist who has been doing evaluations since 2000. She interviewed Ms. Decatur in person at the office of the defense counsel.

Dr. Oses agreed with Dr. Anderson that there was no evidence of malingering. She believes Ms. Decatur is competent to stand trial.

Dr. Oses outlined that Ms. Decatur gave extensive details about her case. Her information was relevant. She understood the charges and explained that there was a motor vehicle accident and sobriety exercises occurred.

Dr. Oses found that Ms. Decatur understood jail, incarceration, probation and could explain the unique difference. She understood different penalties including house arrest, electronic monitoring and that alcohol is not allowed if on probation.

Ms. Decatur understood the role of all the involved parties. She knew the judge was there to make sure fairness occurred. The jury she understood, determined guilty or not guilty. She knew witnesses were those who saw it happen. Although Ms. Decatur was tearful at times, she exhibited no impulse control issues.

Dr. Oses diagnosed Ms. Decatur with an unspecified anxiety disorder. However, she noted that, Ms. Decatur is prescribed medication, is working and is involved in the legal system. She is attempting to obtain an injunction against her son and is handling that with a complete understanding of the legal system. She believes she functions appropriately in he community and responded adequately to all questions.

Dr. Oses believes levels of stress may make someone go off topic and sometimes they need to be brought back on tropic. Although she does not dispute Dr. Anderson's findings, she does not agree with them.

Ms. Decatur gave appropriate responses to all of her hypotheticals. There were no red flags. She believes that Ms. Decatur is competent to stand trial based on her review and observations of the totality of all circumstances considered.

In considering the entire record, the testimony and evidence provided, the Court finds that Ms. Decatur is competent to stand trial. It has been established that Ms. Decatur may have some anxiety issues but they do not preclude her from meeting the statutorily defined criteria in an acceptable manner. She obviously has a basic understanding of the legal system as she represented herself in a legal matter obtaining an injunction against her son. She understands the role of all parties and is able to assist her attorney and behave appropriately in court. She has a basic understanding of the charges against her and the possible punishment. The Court believes she can consult with her lawyer with a reasonable degree of rational understanding.

It is therefore **ORDERED** that the Defendant, Maria Decatur, is declared competent to stand trial. This case is scheduled for Pretrial Conference on **January 18, 2023, at 9:00am** before Judge Kimberly Musselman in **Div 10** at the Moore Justice Center, 2825 Judge Fran Jamieson Way, Brevard County, Viera, FL.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Motion to suppress stop was legally insufficient where grounds alleged in motion were general or generic in nature and provided only factual and legal conclusions

STATE OF FLORIDA, Plaintiff, v. JAMES JOHNSON, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 2023-CT-037836-AXXX-XX. November 14, 2023. Kimberly Musselman, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

ORDER GRANTING STATE'S MOTION TO STRIKE OR SUMMARILY DENY DEFENDANT'S MOTION TO SUPPRESS (SEARCH AND SEIZURE GROUNDS)

THIS CAUSE having come on to be heard on October 9, 2023 on the "State's Motion to Strike or Summarily Deny Defendant's Motion to Suppress." The Motion to Suppress at issue is based on search and seizure grounds.[1] After hearing argument from both counsel, and after reviewing the Defendant's Motion to Suppress, the applicable rule of criminal procedure, and all of the case law provided by counsel, the Court finds as follows:

Fla. R. Crim. P. 3.190(g) is the rule regulating a motion to suppress evidence obtained by unlawful search or seizure. Rule 3.190(g)(2) states: "Every motion to suppress shall state clearly the particular evidence sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based." Rule 3.190(g)(3) states, in pertinent part: "Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied. . . ."

The State contends that the Defendant's Motion to Suppress does not comply with rule 3.190(g)(2). Therefore, according to the State, the Motion is not "legally insufficient" as required by rule 3.190(g)(3) and should be stricken or summarily denied without the necessity of hearing evidence. The State's position is that the Defendant's Motion is "boilerplate," in that it presents no factual or legal basis—other than legal and factual conclusions—to support any grounds for suppression.

The State relies primarily on *State v. Butterfield,* 285 So.2d 626, 627 (Fla. 4th DCA 1973) (Court stated: "Patently, the motion was defective as it contained only legal conclusions which were in nowise supported by specific reasons or allegation of fact."); *State v. Hernandez,* 841 So.2d 469, 470-71 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2568a] (appellate court agreed with the State that the motion therein was "more or less a boilerplate motion" where motion contained only factual and legal conclusions and was thus legally insufficient); *State v. Gay,* 823 So.2d 153, 153-54 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1390c] ("While the motion alleged that the evidence was seized pursuant to an unlawful search of Gay's premises, it failed to supply any facts concerning a search."); *State v. Christmas,* 133 So.3d 1093, 1096 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d] (noting that the use of "the catch-all phrase: 'Other grounds to be argued ore tenus' . . . in the context of a 3.190 motion to suppress is meaningless because it is the antithesis of the specificity required by the rule and serves no useful purpose.").

The Defendant relied on *Irons v. State,* 498 So.2d 958 (Fla. 2d DCA 1986) (finding a motion to suppress to be legally sufficient where the motion contained a general statement of the facts concerning the stop, listed in detail the evidence sought to be suppressed, stated that the stop was not justified by articulable suspicion, and stated that, but for the stop, the search and seizure by the State would not have obtained the evidence).

Defendant's Motion to Suppress consists of 20 paragraphs which contain nine separate grounds for suppression. However, it appears to this Court that all of these grounds are general or generic in nature and provide only legal and factual conclusions. Reviewing paragraphs 1 through 20 of the Motion, the only particular facts that the Court could find were the date of the stop, the deputy's name, and the law enforcement agency. Everything else could be used in almost any DUI stop because of the generalized nature of the way the Motion is worded. The Court acknowledges the ruling in the *Irons* case, but the Court believes that the allegations in the instant case are very general and could apply to every stop.[2]

Accordingly, this Court agrees with the State that the allegations in Defendant's Motion to Suppress are legally insufficient under rule 3.190(g)(2). The Court recognizes that the "boilerplate" term is used a lot, but the Court would prefer to say that the Motion to Suppress in this case is "generic." This is because the Motion does not contain the specificity required in rule 3.190(g)(2); it does not contain the specific facts and specific reasons for those facts. In particular, similar to what occurred in *Butterfield, supra,* the Motion does not provide the facts and the reasons for *why* the alleged stop was illegal, and *why* probable cause did not exist for the arrest, and *why* or *how* the Defendant's rights under various Constitutional provisions and under Florida Statute 901.151 were violated, etc.

Accordingly, it is hereby ORDERED and ADJUDGED that the State's Motion to Strike or Summarily Deny the Defendant's Motion to Suppress is GRANTED, without prejudice for the Defendant to amend the Motion to Suppress, so as to provide proper notice to the State and the Court. It has been agreed that the Defendant shall have 15 days from October 10, 2023 to file an Amended Motion to Suppress that meets the requirements of rule 3.190(g)(2).

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[1]The Defendant also filed a "Motion to Suppress Confessions, Statements and Admissions." The State's Motion to Strike that Motion is the subject of a separate Order.

[2]Moreover, the *Irons* case involved only one ground: an allegedly invalid traffic stop. In the instant case, Defendant's Motion to Suppress goes beyond a single claim involving a traffic stop; it contains a total of nine separate generic grounds for suppression.

* * *

Traffic infractions—Driving while license suspended or revoked without knowledge—Plea—Motion to withdraw plea to civil DWLS infraction is untimely where motion was filed more than 180 days after imposition of penalty—Fact that defendant was not advised that his plea to civil DWLS could result in designation as habitual traffic offender if he committed future crimes does not establish good cause to justify untimeliness of motion that was not filed until after HTO designation

STATE OF FLORIDA, Plaintiff, v. JOHN SCAPIN, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-TR-003353-AXXX-XX. September 22, 2023. Thomas J. Brown, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Alex Kontos, Viera, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE PLEA AND SENTENCE OR IN THE ALTERNATIVE TO WITHHOLD ADJUDICATION

This cause came on to be heard on July 21, 2023 on the Defendant's Motion to Set Aside Plea and Sentence or In the Alternative to Withhold Adjudication, filed July 6, 2023. Having heard argument of counsel and the Court being otherwise fully advised in the premises, the Court finds as follows:

The Defendant was issued the instant non-criminal traffic citation for Driving While License Suspended (DWLS) Without Knowledge on February 7, 2023. He paid the civil fine for that charge on April 19, 2022. Subsequently, on November 17, 2022, the Defendant entered a plea to, and was convicted of, the criminal offense of DWLS With Knowledge in Indian River County. Thereafter, on January 20, 2023,

Defendant entered a plea to, and was convicted of, the criminal offense of DUI in Brevard County. As a result of having convictions on these three charges within five years, the Department of Highway Safety and Motor Vehicles (DHSMV) designated the Defendant a Habitual Traffic Offender (HTO). Accordingly, effective January 20, 2023, DHSMV revoked Defendant's driver's license for five years.

Defendant's Motion alleges that the Defendant was unaware that paying the fine on the instant DWLS Without Knowledge citation would count as a strike toward a five year HTO revocation. The Motion alleges also that the Defendant had not spoken to a lawyer before paying the citation, "nor did he have a court date where a judge or magistrate could inform him of the future consequences of an adjudication of guilt on the non-criminal DWLS/R charge." The Motion further indicates that the Defendant needs his driver's license to maintain his livelihood. It also indicates that if the disposition in this matter were changed to a withhold of adjudication, the Defendant might be able to obtain a valid driver's license.

The Motion alleges that the authority for Defendant's request to change his adjudication to a withhold arises from Fla. R. Traf. Ct. 6.490. More specifically, the Motion alleges that this rule "allows for an official to reduce a legal infraction penalty if good cause is shown" and that "[g]ood cause is established in this case based on Mr. Scapin's failure to be informed of the consequences of a plea to a civil DWLS/R citation." During the hearing on the Motion, Defense Counsel also argued that good cause was shown based on Defendant's having subsequently paid off many of his unpaid tickets and based on Defendant's need to have a driver's license to maintain his livelihood.

Rule 6.490(b)(1) states, in pertinent part:

> **(b) Reduction of Penalty**. An official may reduce a legal penalty:
>
> (1) within 180 days after its imposition, *or thereafter with good cause shown*; . . .[1]

(Emphasis added).

The Court notes that, as argued by the State, the issue of "good cause" arises only with respect to an untimely filed motion, not with regard to whether there is good cause to reduce the sentence. That is, in order for the court to have jurisdiction to consider an untimely filed motion under this rule, the Defendant must show that there was good cause to *justify its untimeliness.*[2] Here, the Defendant's Motion asserts that there is good cause for the untimely filing of his Motion because at the time the Defendant paid the fine for the instant citation, he was unaware, and no one informed him, of the future consequences of an adjudication of guilt on the non-criminal DWLS charge. However, as the State argues, this assertion cannot qualify as good cause based on applicable case law.

In the instant case, the Motion pertained only to the *first* of the three strikes that generated an HTO designation and resulting five year driver's license revocation. Case law provides that in criminal cases, a trial court is not required to advise a defendant about the consequences of entering a guilty or no contest plea on any *future* crimes that the defendant might commit. As stated in *Kemp v. State,* 245 So.3d 987 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D992a], "neither the trial court nor counsel has a duty to advise a defendant that the defendant's plea in a pending case may have sentence enhancing consequences on a sentence imposed for a crime committed in the future." (Quoting *Major v. State,* 790 So.2d 550 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1731b], *approved,* 814 So.2d 424, 431 (Fla. 2002) [27 Fla. L. Weekly S269a]). *See also, McKowen v. State,* 831 So.2d 794, 796 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2601b] ("a defendant is not entitled to receive postconviction relief based on a claim that he relied on the misadvice of counsel that his plea would have no adverse sentencing effect *should he decide to commit future crimes.* To rule otherwise would be to encourage recidivism and frustrate the purpose of the statutory sentencing scheme which enhances sentences based on past criminal behavior."). (Emphasis added). Thus, there is no reason why a person charged with only a non-criminal traffic infraction must be advised before paying the fine on that citation of the consequences of committing any future offenses, whether those offenses are criminal charges or non-criminal infractions.

Accordingly, based on the above case law, this Court finds that the instant Motion was untimely filed pursuant to Fla. R. Traf. Ct. 6.490(b) and that there is no "good cause" to justify the delay. Therefore, this Court does not have jurisdiction to grant the Defendant's Motion.[3]

Accordingly, it is ORDERED and AJUDGED that the Defendant's Motion is DENIED.

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[1]The Court notes that this rule was amended effective July 1, 2023 to expand the time frame within which a legal penalty may be reduced. Previously, the rule provided for a 60 day time limit in the absence of good cause shown. After the amendment, that time limit (in the absence of good cause shown) became 180 days. As the instant Motion was filed over 14 months after the citation was paid, it is undisputed that the Motion was untimely filed regardless of the rule's amendment.

[2]*See, State v. Grate,* 252 So.3d 351, 352, n.2 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1696a] (with regard to an untimely filed motion to modify a sentence from an adjudication to a withhold under then-existing rule 6.490—which did not at that time have a "good cause" alternative—the Fifth District stated in dictum: "We agree with the State that the county court lacked jurisdiction to enter the subject orders. *See* Fla. R. Traf. Ct. 6.490.").

[3]This ruling is without prejudice in the event the parties reach an agreement to resolve this case in conjunction with any potential post-conviction action taken on Defendant's January 20, 2023 DUI conviction that gave rise to Defendant's five year HTO revocation.

* * *

Criminal law—Torts—Anti-SLAPP statute, which prohibits strategic lawsuits against public participation, does not apply to criminal actions

STATE OF FLORIDA, v. RITA ELLIS LYNAR, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-MM-028083-AXXX-XX. October 31, 2023. Judy Atkin, Judge. Counsel: Howard Swerbilow, Assistant State Attorney, State Attorney's Office, Viera, for State. Nicholas A. Vidoni, Cocoa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION FOR ATTORNEY'S FEES UNDER THE ANTI-SLAPP STATUTE FLA. STAT. 768.295

THIS CAUSE came before the Court upon the Defendant's Motion To Dismiss and Motion For Attorney's Fees Under the Anti-SLAPP Statute Fla. Stat. 768.295 (Dkt. No. 124) and the Court having considered the motion, and being otherwise advised of the premises, it is hereby ADJUDGED:

1. The Anti-SLAPP Statute Fla. Stat. 768.295 does not apply to criminal actions. Therefore, Defendant's Motion To Dismiss and Motion For Attorney's Fees Under the Anti-SLAPP Statute Fla. Stat. 768.295 (Dkt. No. 124) is DENIED.

* * *

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MISCELLANEOUS REPORTS

Municipal corporations—Code enforcement—Reasonable accommodation—Special magistrate—Application for reasonable accommodation from land development code requirement that house include a fully enclosed two-car garage to allow use of garage as applicant's bedroom is granted—Applicant has demonstrated that, because of amputation of her foot, she has disability that substantially limits major life activity and is expected to exist long-term—Bedroom shall be converted back to garage if home is sold or if applicant recovers or passes away

IN RE: PETITION FOR REASONABLE ACCOMMODATION REQUEST 7511 NW 40th STREET, CORAL SPRINGS, FLORIDA. Applicant, Judy Pagliaro. Case No. RA 23-0001. October 24, 2023. Harry Hipler, Special Magistrate of the City of Coral Springs. Counsel: Judy Pagliaro, Pro se, Applicant. Christina Gomez, Assistant City Attorney, City of Coral Springs, for Respondent.

FINAL ORDER

THIS CAUSE having come before the Special Magistrate of the City of Coral Springs, upon the Reasonable Accommodation Request submitted by the Applicant, and after holding a public hearing on October 19, 2023 beginning at 1:30 p.m., with the City of Coral Springs ("the City") appearing through counsel, Christina Gomez, Assistant City Attorney, and Elizabeth Chang, Zoning Manager, and the Applicant, Judy Pagliaro, having appeared after proper notice by the City on Applicant's request, the Special Magistrate does hereby issue its findings of fact, conclusions of law, and order as follows:

I. FINDINGS OF FACT

A. Applicant and her husband own the property located at 7511 NW 40th Street in The Dells neighborhood, which is zoned One-Family Dwellings (RS-4). The single-family home was constructed in the 1970s as a three-bedroom home with a two car garage on approximately 0.17 acres.

B. The Applicant has indicated that she has acquired legal guardianship of her four grandchildren over the years, all of which reside in the dwelling.

C. The Applicant advised the City that a bedroom was constructed in the garage in order to accommodate the addition of her four grandchildren. She is the primary caregiver of her four grandchildren and which she is legal guardian.

D. In 2017, the Applicant replaced the garage door, and, during inspections performed by the Building Department, it was determined that drywall and air ducts had been installed to create a bedroom in the garage, without permits.

E. The Applicant was informed that the bedroom would need to be removed as it was constructed without permits, and subsequently the Applicant obtained a demolition permit; however, the work was never completed and the permit expired.

F. The Code Compliance Division cited the Applicant for open permits and requested that the permits either be closed out or cancelled, and the Applicant was granted an extension in order to receive the proper approvals and permits for the garage conversion.

G. The Applicant is requesting a reasonable accommodation from the off-street parking requirements set forth in Section 250816 of the City's Land Development Code, which requires that one-family dwellings, containing four bedrooms, have a fully enclosed garage designed for storage of at least two automobiles.

H. According to the Applicant, the reasonable accommodation is necessary to accommodate all of the residents of the dwelling. Additionally, the bedroom in the garage is in close proximity to the entire house and exterior access ways which is where Applicant needs to sleep due to her mobility limitations. Applicant is age 63, and her husband is age 69, and he is the only breadwinner of the household.

I. The Applicant has provided information from her medical care provider stating that she has limited mobility and lack of accessibility to portions of her home and, therefore, she has requested the use of her garage as a bedroom. The Applicant also indicated that one foot was amputated some years ago, she has a lumbar dysfunction that includes a herniated disc(s) in the lumbar spine, she takes daily pain medications and receives epidural injections and physical therapy, and she has long standing diabetes requiring her to take medications by mouth to maintain control of her blood sugar levels, and also has peripheral neuropathy that all impact her mobility limitations and walking and sleeping and manual tasks.

J. The following documents were introduced into evidence and considered by the Special Magistrate:

1. Memorandum of Development Services, Exhibit 1.

2. Reasonable Accommodation (RA) Request Petition and Attachments, Exhibit 2.

3. Chad Frank, DO, letter, Exhibit 3 which was also part of Attachments considered in the RA Petition, Exhibit 2.

II. THE LAW

K. A request for a reasonable accommodation shall be based on the following factors:

a. Whether the requesting party has established that he/she, or the individual on whose behalf the application was submitted, is protected under the FHA and/or ADA by demonstrating that they are handicapped or disabled, as defined in the FHA and/or ADA. Although the definition of disability is subject to judicial interpretation, for purposes of this section the disabled and/or handicapped individual must show:

i. A physical or mental impairment which substantially limits one of more major life activities; or

ii. A record of having such impairment; or

iii. That they are regarded as having such impairment.

b. Whether the requested accommodation is reasonable and necessary to afford the handicapped/disabled individual an equal opportunity to use and enjoy the dwelling.

c. Whether the requested accommodation would impose an undue financial or administrative burden on the City of Coral Springs.

d. Whether the requested accommodation would require a fundamental alteration in the nature of the land use and zoning regulations of the City of Coral Springs.

K. Judicial decisions have wrestled with what may be a disability under the ADA which must "substantially limit" a major life activity of an applicant. "Substantially limit" means "unable to perform a major life activity that the average person in the general population can perform. . . ." See *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195-96 (2002) [15 Fla. L. Weekly Fed. S39a]; *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 565-66 (1999). In considering whether a disability "substantially limits" a major life activity, courts have considered the nature and severity of the impairment, the expected duration of the impairment, and the expected long term impact of the impairment. See *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 195-96 (2002) [15 Fla. L. Weekly Fed. S39a]; *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 565-66 (1999). Each case requires a fact intensive analysis, and each case requires an individual assessment of the facts and circumstances of the Applicant.

L. As defined under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 to 12213 and the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), disability includes, but is not limited to breathing, walking, talking, hearing, seeing, sleeping, caring for one's self, performing manual tasks, and working. The definition also includes major bodily functions such as

immune system functions, normal cell growth, digestive, bowel, bladder, neurological, brain, respirator, circulatory, endocrine [diabetes], and reproductive.

CONCLUSIONS OF LAW

A. Section 250816 of the City's Land Development Code currently requires each individual dwelling which contains four bedrooms for which primary access is by a street less than fifty feet in width, a fully enclosed garage designed for storage of at least two automobiles.

B. The Applicant has provided evidence from her own testimony and that of her medical care providers by way of attachments that she has limited mobility that results in lack of accessibility to portions of her home, and therefore, she has requested the use of her garage as a bedroom. She has shown that she has limited mobility due to her amputation of her foot, long term diabetes resulting in peripheral neuropathy, walking problems, various back and spine dysfunctions resulting in chronic pain, chronic ulcers and infections of her foot that resulted in amputation of one of her limbs which show by substantial competent evidence that her disability falls within the City code and the ADA. These conditions and infirmities "substantially limit" at least one major life activity of the daily life of the Applicant, which is walking and sleeping and performing manual tasks which the average person in the general population can and should be able to perform.

C. In considering whether a disability "substantially limits" a major life activity, the Special Magistrate has considered the nature and severity of the impairments, the expected duration of the impairment, and the expected long term impact of the impairment, which have existed for some time and is expected to exist long term.

D. The Applicant has established that her major life activities have been impacted, and therefore is protected under the ADA and the City's code by demonstrating that she is handicapped, as defined in the ADA and the City's code, and as evidenced by her attending physician.

II. ORDER

Based upon the above, the Applicant has demonstrated that she needs the requested reasonable accommodation as she falls within the City code and ADA. Accordingly, the request for reasonable accommodation shall be granted, with the following special conditions:

a. The residence shall be used strictly for residential purposes. No business or occupational license shall be permitted at the residence;

b. The residence shall not be rented while owned by the Applicant;

c. Once sold by the Applicant, this reasonable accommodation shall expire, and the bedroom shall be converted back to a two car garage;

d. The Applicant shall be required to obtain the necessary permits within ninety (90) days from the date of this Order, including inspections and compliance with City directives including close out of the permit.

e. Should the Applicant ever recover from the disability, then she shall advise the City which shall have sole discretion to require that the bedroom shall be converted back to a two car garage;

f. Should the Applicant pass away, then this reasonable accommodation shall expire, and the bedroom shall be converted back to a two car garage.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Family member affiliations—A judge may preside over criminal cases where the judge's spouse works at state attorney's office in supervisory capacity, but does not supervise any attorney appearing before the judge

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-09. Date of Issue: November 13, 2023.

ISSUES

May the inquiring judge preside over criminal cases if the judge's spouse works at the state attorney's office in a supervisory capacity over non-attorney staff, but has no supervision over any assistant state attorney.

ANSWER: Yes.

FACTS

The inquiring judge currently presides over a docket that includes circuit and county criminal cases. The judge's spouse has been asked to serve as the Executive Director in the local state attorney's office. The judge's spouse is a lawyer; however, the position of Executive Director is an administrative post. The inquiring judge is aware of our past opinions that conclude that a judge's spouse serving as a supervisor to any lawyer appearing before the judge would require disqualification. Here, however, the judge advises the Executive Director's job will not involve supervising any lawyers. Instead, the Executive Director is responsible for administrative functions including finance, human resources, information technology, supervising non-attorney staff, etc.[1] Assistant state attorneys are under a separate command and would not be supervised by the judge's spouse. The judge advises the only work-related interaction the Executive Director will have with assistant state attorneys involves processing leave and travel requests, reimbursements, payroll and similar administrative duties. Occasionally, the Executive Director may be asked to sit in on interviews with prospective hires including prospective assistant state attorneys. The judge asks what impact, if any, the judge's spouse decision to accept the Executive Director's position would have on the judge's ability to preside over criminal cases.

DISCUSSION

After considering the question presented, we believe the following Canons of Judicial Conduct offer guidance:

- Canon 2B states, "a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."
- Canon 3E(1) states, "a judge shall disqualify himself or herself where his or her impartiality might reasonably be questioned.
- Canon 3E(1)(d)(iii) advises a judge shall disqualify himself or herself where the judge or the "judge's spouse . . . is known by the judge to have more than a *de minimis* interest that could be substantially affected by the proceeding; or is to the judge's knowledge likely to be a witness in the proceeding."

A judge's relative working in the Office of the State Attorney or the Office of the Public Defender is not automatically cause for a judge's disqualification. *See* Fla. JEAC Ops. 2021-18 [29 Fla. L. Weekly Supp. 693b], 2001-05 [8 Fla. L. Weekly Supp. 471a], 1977-12, and 1977-04. Instead, inquiries related to the employment of a judge's spouse must be considered on a case-by-case basis. Fla. JEAC Op. 2023-05 [31 Fla. L. Weekly Supp. 281a]; and Fla. JEAC Op. 2003-08 [10 Fla. L. Weekly Supp. 1064a]. *See also,* Fla. JEAC Op. 2002-15 [9 Fla. L. Weekly Supp. 647b] (whether a judge may preside over cases that have some intersection with the employment of the judge's spouse depends upon the relationship of the employing entity to the judge and the spouse's degree of participation). The inquiring judge is correct in that our past opinions have counseled against a judge serving in a judicial division where the judge's spouse works in a supervisory capacity over the lawyers appearing before the judge. *See* Fla. JEAC Op. 2018-13 [26 Fla. L. Weekly Supp. 251a] (The presiding judge should not preside over cases where the judge's spouse supervises lawyers who appear before the judge in the office of the Public Defender); Fla. JEAC Op. 2011-21 [19 Fla. L. Weekly Supp. 306a] (A judge may not preside over felony arraignments in a county where the judge's spouse is the supervisor of the state attor-

ney's office for that county); Fla. JEAC Op. 01-05 [8 Fla. L. Weekly Supp. 471a] (A judge, married to the elected public defender, may not preside over cases in which the public defender's office is assigned); and Fla. JEAC Op. 2010-09 [17 Fla. L. Weekly Supp. 611a] (A judge married to the elected public defender may not preside over cases where private lawyers are contracted to defend public defender clients). However, in Fla. JEAC Op. 2018-13 [26 Fla. L. Weekly Supp. 251a] we concluded that a judge whose spouse was an assistant public defender could preside over cases involving the public defender's office where the judge's spouse did not serve in the judge's division and had no supervisory authority over the lawyers appearing before the judge.

Here, the inquiring judge has clarified that the Executive Director post the judge's spouse seeks to undertake will not involve supervision over any assistant state attorney nor will the judge's spouse be involved in the prosecution of pending cases. The fact that the judge's spouse will have some non-supervisory contact with assistant state attorneys related to administrative matters is not disqualifying. *See* Fla. JEAC Op. 2021-18 [29 Fla. L. Weekly Supp. 693b] (Judge was not required to recuse where the judge's spouse worked as the supervising administrative assistant in the state attorney's office). As long as the judge's spouse does not decide to assist in any way in the prosecution of any case before the inquiring judge, disqualification is not required. However, if the inquiring judge's spouse offers any assistance or participates in any way in the prosecution of any case before the judge, disqualification is required. Additionally, if the circumstances of any case somehow place the judge's impartiality in question, the judge should disqualify. Canon 3E(1).

REFERENCES

Fla. Code Jud. Conduct, Canons 2B; 3E(1); and 3E(1)(d)(iii).
Fla. JEAC Ops. 1977-04, 1977-12, 2001-05, 2002-15, 2003-08, 2010-09, 2011-21, 2018-13; Op. 2021-18; 2023-05.

[1]The inquiring judge attached the posted and advertised job description of the duties and responsibilities of the Executive Director, which does not include supervising assistant state attorneys.

* * *

Judges—Judicial Ethics Advisory Committee—Practice of law—Matters prior to becoming judge—Newly elected judge may continue handling cases between date of selection and date judge takes office

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-10. Date of Issue: November 21, 2023.

ISSUE

May a newly appointed judge who currently works as an assistant state attorney continue to practice law until he/she begins their judicial appointment.

ANSWER: Yes.

FACTS

The inquirer is an assistant state attorney who has recently been appointed to the County Court. The attorney has been the lead attorney on a homicide case that has been tried to verdict. The inquiring appointee asks whether he/she will be able to handle the sentencing hearing in the case on December 1, which will occur prior to commencing their judicial service on December 4.

DISCUSSION

JEAC Op. 1974-13 is directly on point. In that opinion, the Committee determined that a circuit judge-elect could continue to act as an assistant state attorney in the trial of cases in the Circuit Court until he assumed office as circuit judge. Other opinions have determined that attorneys elected or appointed to judicial office may continue to practice before courts of the circuit where that attorney is to preside, prior to being sworn in. *See* Fla. JEAC Ops. 1984-21, 2000-39 and 1988-29. The Committee has previously recognized that many newly selected judges leave an active law practice prior to their appointment or election to the bench. It would, therefore, be impractical for the Code to prohibit the newly selected judge from handling any cases between the date of the selection and the date of the judge's taking office. JEAC Op. 2005-08 [12 Fla. L. Weekly Supp. 598a].

As such, the Committee is of the opinion that the newly appointed judge may continue to practice law and attend the sentencing hearing prior to the commencement of their judicial service.

REFERENCES

Fla. JEAC Ops.1974-13, 1984-21, 1988-29, 2000-39 and 2005-08.

* * *

Judges—Judicial Ethics Advisory Committee—Extra-judicial activities—Fundraising—Conduct towards lawyers, parties, witnesses and court personnel—A judge presiding over criminal cases may attend a softball game between the county sheriff's office and police department so long as judge's attendance is not promoted, advertised, or made a focal point during the game, and would not cast reasonable doubt on judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties—While attending game, Canon 2A requires the judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-11. Date of Issue: November 28, 2023.

ISSUE

Whether a judge presiding over criminal cases may pay for a ticket and attend a softball game between the county sheriff's office and police department.

ANSWER: Yes, the inquiring judge's mere attendance at the game would be permissible so long as the judge's attendance is neither promoted, advertised, or made a focal point during the game; would not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties. While attending the game, Canon 2A requires the judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

FACTS

The inquiring judge wishes to attend a softball game held one-time per year between the county sheriff's office and police department, but seeks an opinion as to whether doing so would conflict with the judicial canons. The event is not promoted as a fundraiser, but tickets for seats at the softball field are sold on-line through an unrelated third party. The flyer indicates "*proceeds going towards both sides on the field*." The inquiring judge presides over criminal cases where members of both the police and sheriff's office come before them.

DISCUSSION

Canon 2A is applicable to this inquiry. Canon 2A provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

If the inquiring judge attends the softball game, the inquiring judge must avoid all appearances of impropriety. "The test for the appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Commentary to Canon 2A.

In addition, Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b] provides a list of "factors for a judge to consider when deciding

whether to engage in an extrajudicial or quasi-judicial activity with or without compensation." We explained that "[i]f the answer to any one of the following eight questions is yes, then it is recommended the judge decline to engage in the activity." The eight factors are:

1. Whether the activity will detract from full time duties;

2. Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice;

3. Whether the activity will appear to trade on judicial office for the judge's personal advantage;

4. Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters;

5. Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation;

6. Whether the activity will create any other conflict of interest for the judge;

7. Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court; and

8. Whether the activity will lack dignity or demean judicial office in any way.

In Fla. JEAC Op. 1992-34, our Committee agreed that a felony judge may attend ceremonies during Law Enforcement Recognition Week to honor officers killed in the line of duty. The JEAC concluded that there was not an appearance of impropriety, because it did not believe that reasonable people would conclude that the judge's appearance at those ceremonies would significantly undermine public confidence in the integrity and impartiality of the judiciary. Some Committee members suggested that the judge should not attend the ceremonies if the judge were presiding over the case involving the death of the police officer being honored.

In Fla. JEAC Op. 1995-41 [3 Fla. L. Weekly Supp. 603b], our Committee agreed that it was permissible for the inquiring judge to attend a Mothers' Against Drunk Driving (MADD) candlelight vigil. There was no advocacy involved, the judge was not participating in any way except as an attendee, and their attendance was not announced or promoted. With these particular facts, the Committee concluded that the judge's mere attendance would not run afoul of the Canons. Three Committee members advised the inquiring judge not to attend if their presence was going to be given any type of special recognition.

Canons 5A, B and C are also applicable to this inquiry. Canon 5A provides that:

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office;

(3) interfere with the proper performance of judicial duties.

Canon 5B provides that "[a] judge may. . .participate in other extrajudicial activities concerning non-legal subject, subject to the requirements of this Code."

Canon 5C(3)(b)(1) provides that a judge "shall not personally participate. . . in the solicitation of funds."

The softball game is not being promoted as a fundraiser. However, one article about the event indicated proceeds from ticket sales will be divided between the teams. Nevertheless, the Commentary to Canon 5C(3)(b) states that "mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of Canon 5C(3)(b)." *See also*, Fla. JEAC Op. 1998-32 (commentary to Canon 5C(3) states mere attendance at a fundraising event is permissible so long as judge does not personally participate in the solicitation of funds or other fund-raising activities.)

This Committee concludes that the inquiring judge may attend the softball game if doing so would not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties. The Committee cautions the judge to be careful while attending the game to not comment on pending criminal cases, or make remarks that could lead to disqualification. Additionally, the inquiring judge may wish to caution the organizers of the event to not promote, advertise, or make the judge's attendance a focal point during or after the game ends. Of course, while attending the game, Canon 2A requires the judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 5A, 5B 5C, and Commentary to Canon 2A, 5A, 5B, 5C(3), 5C(3)b.

Fla. JEAC Ops. 1992-34, 1995-41, 1998-32, and 2019-02.

* * *