Volume 32, Number 1, May 31, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 1-63

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—DISCOVERY—DEPOSITIONS—VICTIM OF SEXUAL OFFENSE UNDER AGE TWELVE—CONSTITUTIONALITY OF STATUTE. A circuit court judge held that section 92.55(6), which requires that a court determine whether it is appropriate to take the deposition of a victim of a sexual offense who is under the age 16, creates a presumption that taking the deposition of a victim under age 12 is not appropriate if the state is not seeking the death penalty. The statute, which also allows a court to impose limitations and conditions on the depositions, creates a substantive right for victims who are minors and does not unconstitutionally infringe on the Florida Supreme Court's rulemaking authority.** *STATE v. HOWARD. Circuit Court, First Judicial Circuit in and for Santa Rosa County. Filed March 5, 2024. Full Text at Circuit Courts-Original Section, page 13a.*

- **CRIMINAL LAW—PRETRIAL DETENTION—COMMISSION OF DANGEROUS CRIME. Section 907.041(5)(d) provides that the prosecution "or the court on its own motion" must move for pretrial detention if a defendant is arrested for certain dangerous crimes and the court determines at first appearance that there is probable cause to believe that the defendant actually committed the charged offense. A circuit court judge held that the statute violates the constitutional principle of separation of powers. The statute "constitutes legislative usurpation of the core executive-branch function of determining whether, and upon what conditions, to oppose a criminal defendant's application for pretrial release and constitutes legislative usurpation of the judiciary's role in the making of strictly procedural law."** *STATE v. FRY. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed March 19, 2024. Full Text at Circuit Courts-Original Section, page 36a.*

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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

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CO	County Court
M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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TABLE OF CASES TREATED (continued)

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Revocation—Early reinstatement—Denial—Hearing officer did not err in denying request for early reinstatement where licensee continued to operate motor vehicle after license revocation

LARRY DION TUCKER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2023-AP-4. Division AP-A. February 2, 2024. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Larry Dion Tucker, Pro se, Petitioner. Kathy A. Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

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

Petitioner's license was suspended for five years, starting on December 12,2020. Less than six months later, law enforcement stopped Petitioner and cited him for driving without a valid license while his license was canceled, revoked, or suspended.

At a hearing, Petitioner requested early reinstatement and presented evidence of necessity, but the hearing officer denied his request based on his "continued operation of a motor vehicle after the revocation began." Finding no error with the hearing officer's determination, the Petition is **DENIED**. (ANDERSON, HUTTON, and HORKAN, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Request incident to lawful arrest—Although records shows that licensee was arrested for battery before request for breath test, evidence was insufficient to show that request was made after defendant was arrested for an offense allegedly committed while driving or in actual physical control of motor vehicle—Remand with instructions to invalidate suspension

BRIAN JAMES KERVIN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2023-12662-CIDL. February 5, 2024.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(KATHRYN D. WESTON, J.) THIS CAUSE came before the Court for argument on January 24, 2024, on the Petition for Writ of Certiorari (filed November 11, 2023), the Response to Petition for Writ of Certiorari (filed December 21, 2023), and the Reply to Response to Petition for Writ of Certiorari (filed December 28, 2023), and the Court having carefully reviewed the entire record, heard argument of the parties, and being otherwise fully advised in the premises, makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

BACKGROUND

On or about June 18, 2023, Petitioner was involved in a motor vehicle crash in Volusia County, Florida. Petitioner suffered injuries and was transported by ambulance to the hospital for medical treatment. While in the ambulance, Petitioner became combative with medical personnel. As a result, Volusia Sheriff's Deputy Childs charged Petitioner with battery.

Florida Highway Patrol Trooper Steiner investigated the motor vehicle crash and charged Petitioner with driving under the influence. Steiner also issued a citation to Petitioner for refusing to submit to a breath, urine, or blood test. As a result, Petitioner's driving privileges were suspended pursuant to Section 322.2615, Fla. Stat.

After a formal review hearing on October 5, 2023, Hearing Officer Bischoff upheld the suspension of Petitioner's driver's license. No witnesses testified at the formal review hearing.

STANDARD OF REVIEW

The Supreme Court of Florida in *Wiggins v. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a] set forth the applicable standard of review:

> [U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence.

Id. at 1174 (citations omitted). With respect to the competent, substantial evidence standard, the *Wiggins* Court explained the difference between weight and sufficiency of the evidence, stating "sufficiency tests the adequacy and credibility of the evidence, whereas weight refers to the balance of the evidence." *Id.* at 1173.

This Court, as the reviewing court, is not permitted to reweigh the evidence that the administrative judge considered. *See Id.*; *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1086 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. Evidence, however, that gives equal support to inconsistent inferences cannot be considered competent, substantial evidence. *Trimble,* 821 So. 2d. at 1087.

While the Petition raises multiple issues, Petitioner's primary argument is that the record fails to include competent, substantial evidence that any law enforcement officer informed Petitioner that he was under arrest for DUI or any other offense which would trigger an obligation to submit to a breath test under applicable Florida law, prior to being read implied consent and allegedly refusing to submit.

LEGAL ANALYSIS

The applicable portion of Fla. Stat. § 316.1932 states:

> (1)(a) 1. a. A person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by 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.***

(Emphasis added.)

A lawful arrest must precede the reading of implied consent. *See*, Fla. Stat. § 316.1932(1)(a)1.a.; *Dep't of Highway Safety Motor Vehicles v. Pelham,* 979 So. 2d 304, 306 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D765a] *rev. den'd,* 984 So. 2d 519 (Fla. 2008).

Petitioner argued that the record does not include competent, substantial evidence that Petitioner was a "person 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," as required by Fla. Stat. § 316.1932(1)(a)1.a.

Respondent contended that the record contains competent, substantial evidence that Petitioner was arrested for DUI and that said arrest took place at the hospital by Trooper Steiner, based upon the sworn arrest reports. Respondent further contended that any error by the hearing officer in relying upon the prior arrest, if error, was harmless based upon the documentation showing that Petitioner was arrested for DUI at the hospital.

The record includes the following evidence regarding the purported arrest and reading of implied consent to Petitioner:

1. The Traffic Crash Report completed by Trooper Steiner states that the crash occurred June 18, 2023, at 1:30 a.m. and that Trooper Steiner arrived on scene at 1:44 a.m. **A—12.**

2. The narrative portion of the Traffic Crash Report states,

> While working the crash scene, I was notified by The Volusia County Sheriffs Office that Driver 1 had become combative with the EMT staff in the ambulance and had been placed under arrest. I asked the deputies on scene at the hospital with Kervin if he would submit to a breath sample to which he refused. This information was obtained via FHP dispatch.
>
> ***
>
> [After responding to Advent Health,] I again asked Kervins if he would consent to a breath test to which he would not answer. Implied consent was read at 4:05 a.m. in the presence of Deputy Childs.

A—13.

3. The Affidavit of Refusal to Submit to Breath, Urine or Blood Test completed by Trooper Steiner states that on or about June 18, 2023, at 1:30 a.m., Petitioner refused to submit to testing. **A—16**.

4. The Implied Consent Warning completed by Trooper Steiner reflects that it was given to Petitioner at 4:04 or 4:05 a.m. on June 18, 2023. The Implied Consent Warning does not have a box checked in Section 2, which is to be read if a driver initially refused to comply with a request for testing. **A—15**.

The hearing officer considered and overruled Petitioner's objections to the lack of evidence of an arrest for DUI and lack of evidence of a refusal to submit to testing.

This Court's review of the record, reveals that it contains no evidence whatsoever regarding the actual arrest of Petitioner for an "offense allegedly committed while Petitioner was driving or in actual physical control of a motor vehicle."

The record evidence regarding Petitioner's alleged refusal to submit to testing is contradictory. The Affidavit of Refusal states that implied consent was given by Trooper Stiner at 1:30 a.m. The Implied Consent Warning indicates that it was given at 4:04 a.m. or 4:05 a.m. but does not reflect that Section 2 was read to Petitioner. This is evidence "that gives equal support to inconsistent inferences," which cannot be considered competent, substantial evidence. See *Trimble,* 821 So. 2d at 1087.

It is, therefore, unnecessary to consider the additional arguments raised by Petitioner.

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

1. The Petition for Writ of Certiorari is **GRANTED;**

2. The Order sustaining/affirming the suspension of Petitioner's driving privilege entered by Respondent is **QUASHED.**

3. This cause is remanded with directions to the Respondent to invalidate the suspension at issue; *See Dep't of Highway Safety & Motor Vehicles v. Azbell,* 154 So. 3d 461, 462 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D108c].

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath or blood alcohol level—Lawfulness of detention—Sixteen-minute detention between completion of traffic citation and initiation of DUI investigation was reasonable where stopping deputy had reasonable suspicion of impairment based on observations of licensee's erratic driving, speeding, odor of alcohol, and bloodshot eyes and licensee's admission to drinking—No merit to argument that hearing officer's finding that there was probable cause for arrest was not supported by competent substantial evidence because video evidence contradicts testimony and documentary evidence—Video tends to corroborate reports of licensee's erratic driving and speeding and does not clearly contradict testimony regarding licensee's performance on field sobriety exercises—Evidence—Scientific evidence—Breath test—No merit to argument that hearing officer erred by admitting breath test results into evidence without proper predicate for scientific evidence

TIMOTHY M. SHENUSKI, JR., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Osceola County. Case No. 2021-AP-000002. February 15, 2024. Petition for Writ of Certiorari from the decision of the Department of Highway Safety and Motor Vehicles Kenneth Russell, Hearing Officer. Counsel: Stuart I. Hyman, for Petitioner. Mark L. Mason, Former Assistant General Counsel, DHSMV, for Respondent.

(Before KRAYNICK, CARSTEN, and YOUNG, JJ.) Petitioner seeks review of the Final Order issued by a hearing officer of the Department of Highway Safety and Motor Vehicles ("DHSMV") which affirmed an order suspending Petitioner's driving privilege for driving with an unlawful breath or blood alcohol level under section 322.2615, Florida Statutes (2021). The Court, having reviewed the Petition, the Response of DHSMV, and Petitioner's Reply, and being otherwise advised of the premises, finds as follows:

STANDARD OF REVIEW

The Court's certiorari review of the administrative decisions of a DHSMV hearing officer requires a three-prong determination. The Court must determine "whether (1) procedural due process has been accorded; (2) the essential requirements of law have been observed; and (3) the administrative findings and judgment are supported by competent, substantial evidence." *Nader v. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a].

ANALYSIS

In the instant case, Petitioner does not question whether he was afforded procedural due process in the context of his administrative hearing before the hearing officer. However, Petitioner does make several due process arguments related to the length of his detention, the existence of reasonable suspicion and probable cause, and the admission of the blood alcohol test affidavit. With respect to these arguments, Petitioner argues that the hearing officer departed from the essential requirements of law by affirming DHSMV's suspension and that the hearing officer's decision was not supported by competent, substantial evidence. For the reasons discussed below, the Court finds that hearing officer did not depart from the essential requirements of law and that the hearing officer's decision was supported by competent, substantial evidence.

Reasonable Suspicion and the Length of Detention

Petitioner alleges that Sgt. Griffin lacked reasonable suspicion of impairment and that accordingly, the sixteen minutes between the time Sgt. Griffin completed the traffic citation and Deputy Whobrey began the DUI investigation amounted to an unreasonably long detention. Petitioner cites to numerous cases in which courts in this State have held that detentions of lengths varying from ten minutes to as much as forty-five minutes have been deemed unreasonable and illegal. *See State v. Swick*, 24 Fla. L. Weekly Supp. 543a (Cty. Ct. 7th Jud. Cir. 2016), *State v. Morros*, 27 Fla. L. Weekly Supp. 827b (Cty. Ct. 6th Jud. Cir. Pasco County 2013), *State v. Vanwinkle*, 27 Fla. L. Weekly Supp. 827a (Cty. Ct. 6th Jud. Cir. Pinellas County 2016),

State v. Nicholson, 21 Fla. L. Weekly Supp. 582b (Cty. Ct. 12th Jud. Cir. Sarasota County 2013).[1]

Both Petitioner and Respondent cite to the decision of the United States Supreme Court in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) [25 Fla. L. Weekly Fed. S191a]. In *Rodriguez*, the Supreme Court found that a driver cannot be detained for any longer than necessary to issue a traffic citation without probable cause or a founded suspicion of criminal activity for a continued detention. Florida appellate courts have also maintained that the duration of a traffic stop should be limited to the preparation of a citation unless an officer "possesses a reasonable or well-founded suspicion of criminal activity so as to justify an investigatory stop." *State v. Pye*, 551 So. 2d 1237 (Fla. 5th DCA 1989).

Accordingly, the question of whether the sixteen minutes Petitioner was detained after Sgt. Griffin completed the traffic citation was unreasonably long turns on whether Sgt. Griffin had reasonable suspicion sufficient to warrant an extended detention for investigatory purposes. According to the affidavits and testimony of Sgt. Griffin, he observed Petitioner making a turn at a high rate of speed, accelerating quickly to seventy miles per hour in a fifty mile per hour zone, following too closely, failing to signal a change of lane causing another vehicle to hit its brakes, and failing to stay in one lane. Sgt. Griffin further indicated that Petitioner took longer than normal to pull over after he initiated lights and sirens. Sgt. Griffin testified that he identified the driver of the vehicle as Petitioner, that Petitioner's eyes were glassy and bloodshot, his movements were somewhat slow and exaggerated, and that he smelled a moderate to strong odor of alcohol on Petitioner's breath. Sgt. Griffin testified that he asked Petitioner if he had had anything to drink and that Petitioner at first responded no but when confronted with the officer's observations responded that he did drink alcohol but it had been hours before.

The hearing officer concluded on the basis of the testimony and reports made by Sgt. Griffin that the duration of the initial stop was reasonable. The Court agrees. While Petitioner has cited to numerous cases in which stops of duration ranging from ten minutes to an hour or more were held to be unreasonable, the overriding holding in these cases indicate that the question of reasonability is not determined by the duration alone. As opposed to cases cited by Petitioner which found traffic stops to be unreasonable where the only evidence of potential impairment was bloodshot eyes or an admission to drinking many hours earlier in isolation, in the instant case Petitioner had also been observed speeding, erratically changing lanes, and drifting between lanes. These observations, along with the further observations regarding the odor of alcohol, bloodshot eyes, and an admission to drinking, made by both Sgt. Griffin and eventually confirmed by Dep. Whobrey, satisfy the reasonable suspicion standard required to justify Petitioner's detention pending Dep. Whobrey's DUI investigation.

Probable Cause and the Video Evidence

Upon Deputy Whobrey's arrival, Dep. Griffin updated him regarding the observed driving patterns which led to the stop. Dep. Whobrey then made contact with Petitioner and himself observed the odor of alcohol and bloodshot-watery-glassy eyes. Dep. Whobrey asked Petitioner to step out of the vehicle for a field sobriety test and Petitioner complied. Dep. Whobrey testified at the hearing consistent with his investigatory report that Petitioner, while not falling over, exhibited certain indicators of impairment during the course of the field sobriety test. These indicators included missing the center line on a couple steps during a heel to toe walking exercise, struggling to complete the one-leg-stand exercise, and missing the tip of his nose on multiple instances during a finger to nose exercise. Dep. Whobrey also noted a lack of convergence with Petitioner's eyes when tasked with following a pen light. Dep. Whobrey ultimately arrested Petitioner for DUI. The hearing officer concluded, based on the testimony and reports of Dep. Whobrey that he had established probable cause to effect the arrest of Petitioner for DUI.

Petitioner claims that the video evidence wholly contradicts the documentary evidence relied upon by the hearing officer. Petitioner relies heavily on the Florida Supreme Court's decision in *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a]. In that case, the Florida Supreme Court concluded that where evidence is "totally contradicted and totally negated and refuted by video evidence of record" it does not qualify as competent, substantial evidence. *Id.* at 1166. However, the instant case is easily distinguished from *Wiggins.* The Court in *Wiggins* was primarily concerned with the rationale for the initial traffic stop. The video evidence in *Wiggins* completely contradicted the purported existence of traffic violations which were included in the police report and testified to by the officer on-scene.

However, there are no such clear contradictions present between the video evidence and the documentary evidence in the instant case. In fact, the video evidence tends to corroborate Sgt. Griffin's testimony and report regarding the erratic driving and speeding which led to the initial stop. Further, the video does not clearly contradict Dep. Whobrey's testimony regarding Petitioner's performance during the field sobriety exercises. Key portions of the video are partially obscured, however, certain details of Dep. Whobrey's recounting are visible. While it is true that the video does not show Petitioner to be "falling over drunk" it does not so clearly refute the documentary evidence such that the hearing officer's decision was based on a lack of competent, substantial evidence. Further, short of falling within the *Wiggins* holding of clear refutation, the law clearly does not allow this Court to substitute its judgment for the hearing officer by wholly reweighing the evidence in the case. *See Melick v. Dep't of Highway Safety & Motor Vehicles,* 27 Fla. L. Weekly Supp. 429b (Fla. 4th Cir. Ct. June 19, 2019).

Breath Test Results

Finally, Petitioner argues that the admission of the breath test results which were conducted at the Osceola County Jail subsequent to Petitioner's arrest was improper in the absence of a proper predicate under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Petitioner argues that Respondent did not introduce a scientific predicate for the admission of the breath results test as required by Section 90.702, Florida Statutes. However, the rules of evidence "do not strictly apply in administrative proceedings." *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142, 1146 (Fla. 2017) [42 Fla. L. Weekly S42a]. In fact, circuit courts across the state including the Ninth Circuit, have consistently rejected Petitioner's argument requiring a scientific predicate for consideration of breath test results in these hearings. *See Scanlon v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 83a (Fla. 9th Cir. Ct. Aug. 6, 2014), *Torrence v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 37a (Fla. 9th Cir. Ct. July 8, 2014).

Instead, Section 322.2615(2)(b), Fla. Stat., 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." Florida law requires only that an affidavit be submitted attesting to the type of test administered and procedures followed, the time of the collection of the breath sample, the numerical results of the test, the type and status of any permit issues to the law enforcement entity which performed the test, and the date of the most recent required maintenance of the instrument. *See* § 316.1934(5), Fla. Stat. In the instant case, the report was accompanied by an affidavit including all of the information

required by this statute. Accordingly, the hearing officer did not err by relying on the result of Petitioner's breath tests which provided numerical results of 0.102g/210L and 0.100g/210L, respectively, in concluding that Petitioner had an unlawful blood-alcohol level of 0.08 or higher and thereby sustained the suspension of Petitioner's driving privilege under Section 322.2615, Fla. Stat.

Based on the foregoing, the Court **DENIES** Petitioner's Petition for Writ of Certiorari, filed May 10, 2021. (CARSTEN and YOUNG, JJ., concur.)

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[1]The Court notes that these cases cited by Petitioner each originated in the County Court, rather than being on first-tier certiorari review in the Circuit Court.

* * *

Licensing—Driver's license—Suspension—Party to obtaining license by fraud—No merit to argument that hearing officer erred by implicitly applying constructive knowledge standard in determining that licensee submitted counterfeit motorcycle endorsement card to Department of Highway Safety and Motor Vehicles—Hearing officer's finding that licensee was knowingly a party to obtaining driver's license by fraud invoked appropriate actual knowledge standard—Finding that licensee had actual knowledge of fraud is supported by circumstantial evidence that licensee traveled and paid higher than usual cost for rider skills training program to obtain endorsement and by licensee's failure to present any evidence that he complied with training requirement

EVELIO SALVADOR ONGAY PEREZ, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2021-AP-000006-O. February 15, 2024. Petition for Writ of Certiorari from the decision of the Department of Highway Safety and Motor Vehicles Shavonya Poole, Hearing Officer. Counsel: Andrew B. Greenlee, for Petitioner. Elana J. Jones, Former Assistant General Counsel, DHSMV, for Respondent.

(Before KRAYNICK, CARSTEN, and YOUNG, JJ.) Petitioner seeks review of the Final Order issued by a hearing officer of the Department of Highway Safety and Motor Vehicles ("DHSMV") which affirmed an order suspending Petitioner's driving privilege for knowingly having been a party to obtaining a driver's license by fraud, under section 322.12(5)(a), Florida Statutes (2021). The Court, having reviewed the Petition, the Response of DHSMV, and Petitioner's Reply, and being otherwise advised of the premises, finds as follows:

STANDARD OF REVIEW

The Court's certiorari review of the administrative decisions of a DHSMV hearing officer requires a three-prong determination. The Court must determine "whether (1) procedural due process has been accorded; (2) the essential requirements of law have been observed; and (3) the administrative findings and judgment are supported by competent, substantial evidence." *Nader v. Dep't of Highway Safety & Motor Vehicles,* 87 So. 3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a].

ANALYSIS

In the instant case, Petitioner does not question whether he was afforded procedural due process. Instead, Petitioner argues that DHSMV departed from the essential requirements of law by applying the incorrect statutory standard regarding Petitioner's knowledge of the alleged fraudulent scheme. In addition, Petitioner argues that DHSMV's decision was not supported by competent, substantial evidence. For the reasons discussed below, the Court finds that DHSMV did not depart from the essential requirements of law and that the hearing officer's decision was supported by competent, substantial evidence.

Section 322.27(1)(d), Florida Statutes, authorizes DHSMV to suspend the driving license of any person who "has permitted an unlawful or fraudulent use of the license or identification card or has knowingly been a party to the obtaining of a license or identification card by fraud or misrepresentation." Similarly, section 322.212 makes it unlawful for any person to "knowingly" possess or display an unlawfully issued driver license.

Essential Requirements of the Law

Petitioner concedes that the motorcycle endorsement card which he submitted to and was accepted by DHSMV was indeed counterfeit. However, Petitioner contends that he did not have actual knowledge that the card he submitted was counterfeit and argues that DHSMV erroneously concluded that he had constructive knowledge of the card's counterfeit nature. In support of this argument, Petitioner points to two instances in the transcript of the hearing where counsel for DHSMV seems to invoke a constructive knowledge standard. First, counsel for Respondent stated, "any reasonably prudent person knew—would have known or should have known . . . that something was hinky." Then again, a few paragraphs further down counsel states, ". . . this further shows that there is an ongoing source of fraud here, which again, Mr. Velez and Mr. Perez should have known."

DHSMV contends that in spite of these references to a constructive knowledge standard, the hearing officer ultimately applied the correct actual knowledge standard. Petitioner argues in his Reply that the Court should conclude that based on the cited evidence, as well as DHSMV's references to constructive knowledge at the hearing, that the hearing officer implicitly applied a constructive knowledge standard. *See Orix Capital Markets, LLC v. Park Avenue Assoc., Ltd.,* 881 So. 2d 646, 650 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1847b] (reversing denial of attorney's fees where trial court "implicitly" applied "net judgment" rule to determine who was the prevailing party). In support of this argument, Petitioner states that while the final order makes no reference to a "constructive knowledge" standard it also does not make any reference to an "actual knowledge" standard. However, this is incorrect. The final order states that based on the "preponderance of the evidence, the Petitioner has knowingly been a party to the obtaining a diver license by fraud." This conclusion explicitly and correctly invokes the appropriate "actual knowledge" standard. Accordingly, the Court finds that the hearing officer did not depart from the essential requirements of law by implicitly applying a constructive knowledge standard relating to the alleged fraud.

Competent, Substantial Evidence

The remaining question then is whether the hearing officer's conclusion was based on competent, substantial evidence. The final order contains several findings of fact. The first of these facts are related to the testimony of Sergeant Nathan Stidham of Florida Highway Patrol who testified regarding his own investigation in which he contacted, paid, and received a counterfeit motorcycle endorsement for $300 from a Mr. Santos Davila. The order connects Sergeant Stidham's investigation to Petitioner based on the fact that Mr. Davila's cellphone contained text messages from Petitioner (among 370 other text or picture messages from various people), as well as a photograph of Petitioner's driver's license. The order then finds that Petitioner presented a counterfeit motorcycle endorsement card, which contained a serial number associated with another person's driving record, at a driver license issuance office. The order states that "authentic motorcycle endorsement cards have perforated edges, and the edges of the card the Petitioner presented were smooth." Furthermore, the order finds that Petitioner traveled from Orange County to Pasco County to pay $300 to Mr. Davila, which was more than the cost of local motorcycle safety courses.

Petitioner challenges whether competent, substantial evidence existed to support the hearing officer's conclusion that he knowingly obtained a license by fraud. It is true that much of the evidence cited to by the hearing officer was circumstantial in nature. Although the

endorsement card did not have the perforated edges indicative of a legitimate card, there was no evidence that a lay person would be able to discern between a counterfeit and a legitimate card on this basis. The fact that the DHSMV official took and scanned the card supports this conclusion. Further, the fact that the price was higher and that Petitioner drove further than necessary to obtain the card does not necessarily indicate that Petitioner knew he was obtaining a fraudulent card. Petitioner may have had any number of reasons to travel to Pasco County to obtain the card and may have believed the price to reflect a certain level of convenience. However, these pieces of circumstantial evidence were not central to the hearing officer's conclusion.

Ultimately, the presentation of a counterfeit motorcycle endorsement card enabled Petitioner to obtain the privilege of driving a motorcycle without completion of the required motorcycle safety course or examination. The face of the counterfeit card stated that "the bearer has successfully completed a rider skills training course" and referenced the requirements of section 322.12(5)(a), Florida Statutes. Therefore, when the only evidence of compliance with section 322.12(5)(a) provided by Petitioner was ultimately determined to be counterfeit, DHSMV was entitled to suspend Petitioner's driver's license for fraud. Due to the suspension, Petitioner was entitled to a show cause hearing, at which he was permitted to "present evidence showing why [his] driving privilege should not have been cancelled, suspended, or revoked." Rule 15A-1, F.A.C. (2021). Petitioner requested such a hearing and therefore had an opportunity to present evidence that he had, in fact, complied with the statutory requirements despite his presentation of a counterfeit motorcycle endorsement card. He did not do so, and therefore the only evidence of statutory compliance before DHSMV remained the counterfeit endorsement card submitted by Petitioner. This fact, in conjunction with the circumstantial evidence described above, constitutes competent, substantial evidence to support the hearing officer's decision.

Accordingly, the Court **DENIES** Petitioner's Petition for Writ of Certiorari, filed August 18, 2021. Further, the Court **DENIES** Petitioner's Motion for Appellate Costs. (CARSTEN and YOUNG, J.J., concur.)

* * *

Counties—Code enforcement—Open burn—Property owner's letter stating that he was not at property during open burn is competent substantial evidence supporting hearing officer's conclusion that owner was involved in unattended open burn—In light of evidence supporting conclusion that burn was unattended, owner's countervailing testimony that he was probably at property legally burning plastics is irrelevant—Claim that burn is exempt under Florida Right to Farm Act fails where there is competent substantial evidence of safety concerns that are wholly inconsistent with open burn conditions allowed under Act, and there is no record below of evidence that property falls within definitions and provisions of Act

DIEGO RODRIGUEZ, Appellant, v. MIAMI-DADE COUNTY, FLORIDA CODE ENFORCEMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-13-AP-01. March 20, 2024. An Appeal from a March 3, 2022 Final Order of Miami-Dade County, Florida Code Enforcement bearing Citation # 2021-G177360. Counsel: Adam S. Feldman, Cernitz, Shanbron, LLC, for Appellant. Ryan Carlin, Assistant County Attorney, Miami-Dade County Attorney's Office, for Appellee.

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

OPINION

(SANTOVENIA, J.)

Factual History

On May 10, 2021, Miami-Dade Police Sergeant Wilhelm issued a citation to Appellant Diego Daniel Rodriguez ("Appellant" or "Rodriguez") for an open burn in violation of Sec. 24-41.4 of the Miami Dade County Code of Ordinances. Rodriguez elected to appeal the citation and a hearing was held on March 3, 2022 before Hearing Officer Charles Everett ("Hearing Officer").

Sergeant Wilhelm, of the agricultural patrol section, testified at the hearing that he smelled smoke and found the open burn pit with smoke emanating from the inside of a metal garbage container on Rodriguez's property ("Property"), which was unattended. He knew it was Rodriguez's property because Rodriguez had identified himself as the Property owner when Wilhelm had been there on a previous occasion for another incident involving the same violation. Rodriguez was given a verbal warning for the prior incident.

Wilhelm showed body-worn camera footage of the scene, and also testified that there was no permit obtained to conduct the open burn. The fire was burning within 100 feet of a building. Wilhelm testified that as the fire was unattended, it could have spread to other property or structures in the area. Wilhelm also testified that the smoke could have become heavy and thick, causing the roadway nearby to be obscured and dangerous for travelers.

Wilhelm testified that permits for open burns are normally issued by the Miami-Dade County Fire Rescue Department depending on weather conditions.

Rodriguez did not cross-examine the officer, but disputed that the nighttime burn was unattended and testified that he was *probably* on the Property. He also disputed that he needed a permit and argued that Section 823.145, Florida Statutes, exempted him from the requirement of obtaining a permit to conduct the burn. He did not present the Hearing Officer with a copy of the statute, but quoted the statutory terms to the Hearing Officer.

The Hearing Officer subsequently found in favor of Miami-Dade County, relying on the evidence and testimony of Sergeant Wilhelm. Rodriguez was found to be in violation of County Ordinance 24-41.4 and fined a civil penalty and costs, for a total of $452.00. This appeal followed.

Standard of Review

The applicable standard of review of an administrative decision by the circuit court includes a determination of: (1) whether procedural due process is accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *See Broward County v. G.B.V. International, Ltd.,* 787 So. 2d 838 (Fla. 2001) [26 Fla. L. Weekly S389a]; *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

A departure from the essential requirements of law means an inherent illegality or irregularity, an abuse of judicial power, or an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. *Haines, supra.*, *Id.* at 527. As long as the record contains competent substantial evidence to support the underlying decision, the decision is presumed lawful and the court's job is ended. *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs,* 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a].

Procedural Due Process

Procedural due process requires notice and an opportunity to be heard. *Kupke v. Orange County,* 838 So. 2d 598 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a]. Moreover, "[d]ue process is a flexible concept and requires only that the proceeding be 'essentially fair.' " *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1467a]. "The extent of procedural due process varies with the character of the interest and the nature of the proceedings involved." *Id.*

Procedural due process in the administrative setting does not always require application of the judicial model. *Hadley v. Dept. of*

Admin., 411 So. 2d 184 (Fla. 1982); *Seminole Ent., Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2822a]. Consequently, such hearings are not controlled by strict rules of evidence and procedure. *Id.* Under all circumstances, due process requires notice reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Dawson v. Saada,* 608 So. 2d 806 (Fla. 1992). A party to a quasi-judicial hearing "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Kupke, supra*., 838 So. 2d at 599 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a] (citing *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996 (Fla. 2d DCA 1993)).

The Appellant here was provided the opportunity to present evidence without being curtailed in any way in his presentation[1] and to cross-examine witnesses if he so chose (he chose not to cross-examine Sergeant Wilhelm). He was also presented with the facts upon which the Hearing Officer's ruling was based. Accordingly, due process was afforded to Appellant.[2]

Competent Substantial Evidence

The Appellant's Initial Brief does not argue that the Hearing Officer's decision is not supported by competent substantial evidence. Notwithstanding, the Court addresses that there is competent substantial evidence supporting the Hearing Officer's decision.

Notably, the record below includes Appellant's May 23, 2021 letter addressed to Code Enforcement and signed by Appellant which attempts to negate any involvement by Appellant with the open burn on the night in question and with ownership of the Property. The letter states that:

> I have received this violation **yet I never was at this property on 5/10/2021 at 2:20 am.** The owner of the property is FLAVORUS INC with a mailing address of 2780 SW 37th Ave., Suite #100, Miami, Florida 33133.

(R. 1, 5, 8) (emphasis added). Conversely, Appellant testified at the hearing that he *was probably* at the Property legally burning plastic remnants as allowed by Section 823.145, Fla. Stat., titled "Disposal by open burning of certain materials used in agricultural operations."

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

If any competent substantial countervailing evidence exists, it is legally irrelevant. See *Dusseau*, 794 So. 2d at 1274 ("[C]ontrary evidence . . . is irrelevant to the lawfulness of the decision[.]"); *see also State, Dep't of Hwy. Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a] ("The sole starting (and ending) point is a search of the record for competent substantial evidence *supporting* the decision.") (emphasis in original).

Appellant's admission in his May 23, 2021 letter addressed to Code Enforcement that he *was not* at the Property on the night in question is competent substantial evidence in the record supporting the Hearing Officer's conclusion. Thus, we find no error in the Hearing Officer's rejection of a statutory legal argument which ultimately requires acceptance as true of a contrary factual assertion that Petitioner *was probably* at the Property on the night in question. (R. 73:12-14). Of course, such credibility determinations are for the Hearing Officer to make and are not subject to our review.

Appellant did quote the provisions of the specific statute upon which he relied, Section 823.145, Fla. Stat., to the Hearing Officer, as follows:

> I have 823.145, which exempts me from any open burn. Its disposal of open burning of certain materials used in agricultural operations. Polyethylene, agricultural p1astic; damaged, nonsalvageable, untreated wood pallets; packing material that cannot be feasibly recycled, which are used in connection with agricultural operations related to the growing, harvesting, or maintenance of crops, may be disposed of by open burning **provided that no public nuisance or any condition adversely affects the environment or the public health is created thereby and that state or federal national ambient air quality standards are not violated**.

(R. 71:14-72:7) (emphasis added).

Even assuming *arguendo* that Section 823.145 did apply to Appellant's open burn, the statute clearly only allows the burning of certain materials and for limited purposes, explicitly listed in the statute, and requires conditions that do not create a public nuisance, a condition adversely affecting the public health, or a violation of air quality standards. Appellant did not address below how the open burn complied with the highlighted proviso in Section 823.145, Fla. Stat.

Sergeant Wilhelm's testimony is competent substantial evidence for the Hearing Officer's findings and conclusion that:

> there was no one present at the time that the officer was on the scene, at least when the fire was still there and at least smoldering. I see evidence of the smoke in the photograph itself.

(R. 74:18-75:5). Specifically, Sergeant Wilhelm testified regarding safety concerns of another property catching on fire, a concern that the building which was within 100 feet of the open burn may be occupied, and the possibility of heavy and thick smoke causing the roadway nearby to be obscured so that travelers could not see where they were travelling, and that "there's a lot of danger in the area". (R. 66:21-67:6; 69:14-24). That testimony of the open burn conditions present on the night in question is also wholly inconsistent with the open burn conditions that are allowed by Section 823.145 in any event.

As to Appellant's mere mention at the hearing of Section 823.14, the Florida Right to Farm Act, beyond Appellant arguing that "I'm a farmer and I'm exempt from any permit", there is no record below of any evidence having been presented by Appellant as to how the Property allegedly falls within the definitions of "farm" and "farm operation" and other provisions of Section 823.14. *See, e.g., Haines Cnty*, 658 So. 2d at 529 ("the circuit court functions as an appellate court, and, among other things, may not reweigh the evidence or substitute its judgment for that of the [Commission.]"); *G.B.V. Int'l*, 787 So. 2d at 843 (the circuit court "should review the record to determine simply whether the Commission's decision is supported by competent substantial evidence."); *Dusseau*, 794 So. 2d at 1275 (evidence contrary to the decision is "irrelevant").

Essential Requirements of Law

Notwithstanding the Hearing Officer's lack of familiarity with the provisions of the Florida Right to Farm Act, the Hearing Officer's conclusion is nonetheless mandated by Appellant's failure to establish any facts supporting application of the Florida Right to Farm Act to Appellant's prohibited open burning activity without a permit.

The only specific statute upon which Appellant relied at the hearing, Section 823.145, Fla. Stat., is a separate statute from Section 823.14, the Florida Right to Farm Act. Appellant merely mentioned at the hearing the Florida Right to Farm Act without mentioning how it allegedly applies to Appellant. The court notes that the stated legislative intent and purpose of the Florida Right to Farm Act is "to protect reasonable agricultural and complementary agritourism activities conducted on farm land [sic] from nuisance suits and other similar lawsuits". Section 823.14(2), Fla. Stat. The Florida Right to Farm Act provides, in relevant part, that:

> **4) Farm operation not to be or become a nuisance.—**(a) No farm operation which has been in operation for 1 year or more since its established date of operation and which was not a nuisance at the time of its established date of operation shall be a public or private nuisance if the farm operation conforms to generally accepted agricultural and management practices. . .

It is significant to note that Appellant was not sued for creating a nuisance by his open burning activity. Rather, he was cited for violating a Miami-Dade County ordinance for conducting an unattended, open burn without a permit. There is also no record below of any evidence having been presented by Appellant as to how the Florida Right to Farm Act somehow pre-empts the County's ordinance. Being a farmer, standing alone, does not exempt one from complying with local ordinances and permitting requirements.

Additionally, in a similar case where a county sought a summary judgment that its zoning permit regulations regarding nurseries are not governed by the Florida Right to Farm Act because they are not intended to limit farming operations, the Fourth District Court of Appeal held that the Act does not prohibit enforcement of ordinances in existence at the time of the adoption of the Act. *Wilson v. Palm Beach Cnty.,* 62 So. 3d 1247, 1248 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1258b]. Rather, the Act restricts local governments from adopting new ordinances that "prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural land pursuant to s. 193.461, where such activity is regulated through implemented best management practices or interim measures developed by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or water management districts and adopted under chapter 120 as part of a statewide or regional program".[3] *Id.* at 1250-1251.

The Hearing Officer's decision followed a hearing at which due process was afforded the Appellant, as he received notice of and participated in the hearing, but presented no evidence. The decision is also supported by competent substantial evidence and complies with the essential requirements of law. For the foregoing reasons, the Hearing Officer's decision is affirmed.

Additionally, this Court denies Appellant's motion for attorney's fees under Section 57.105 (5), Fla. Stat. (TRAWICK, J., concurs.)

(ARECES, R., J., dissents). I dissent.

The basic requirements of due process are "notice and a *meaningful* opportunity to be heard." *Pena v. Rodriguez*, 273 So. 3d 237, 240 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a] (emphasis added). The Florida Supreme Court has, moreover, explained that "[t]here is. . .no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met." *Hadley v. Dept. of Administration*, 411 So. 2d 184, 187 (Fla. 1982); *see also Volynsky v. Park Tree Investments 21, LLC*, 322 So. 2d 714, 715 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1343a] ("the specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding.").

Additionally, Florida courts have long held that due process must not be illusory. *See e.g. Redman v. Kyle*, 76 Fla. 79 (Fla. 1919) ("the hearing allowed must be such as is practicable and reasonable in the particular case, not merely colorable and illusory."). Florida courts have, in fact, held that "due process requires that judicial decisions be reached by a means that preserves both the appearance and reality of fairness." *Pena*, 273 So. 3d at 240.

In this case, Petitioner was denied due process. Petitioner was cited for an open burn in violation of Sec. 24-41.4 of the Miami Dade County Code of Ordinances. A remote hearing was held on March 3, 2022. At said hearing, Petitioner appeared remotely and, among other things, attempted to explain that he was exempt from Sec. 24-41.4, because, as a farmer, he is permitted to open burn certain materials. Specifically, Petitioner said,

> Sir, under Florida Statute 8213—823-14, which is the Florida Right to Farm Act, I have 823.145, which exempts me from any open burn. Its disposal of open burning of certain materials used in agricultural operations. Polyethylene, agricultural plastic; damaged, non-salvageable, untreated wood pallets; packing material that cannot be feasibly recycled, which are used in connection with agricultural operations related to the growing, harvesting, or maintenance of crops, may be disposed of by open burning provided that no public nuisance or any condition adversely effects the environment or the public health is created thereby and that state or federal national ambient air quality standards are not violated.

R. at 13:14-14:7. Petitioner's recitation of the law is largely consistent with its actual language. *See* § 823.145, Fla. Stat. The Petitioner went on to argue that he fell under the statutory provision's protection.

The Hearing Officer then completely ignored Petitioner's argument and ruled against him because he "[did] not have" the statute "in front of him." R. 16:12-17. Specifically, the Hearing Officer stated,

> All right. Based upon the evidence and testimony that I've received, **notwithstanding the Florida Statute, which I do not have in front of me**, I'm going to give you an opportunity, once I make a ruling, for either side to appeal my decision.

R. 16:11-17. Telling a litigant—let alone a *pro se* litigant and member of the community—that the tribunal has ruled against him, not because the law did not favor him, but merely because no one could be bothered to look up the law on their computer or smartphone and apply it to the facts, or not, as may be appropriate, is not due process. This is particularly true where the Hearing Officer acknowledges that said law, if applicable to Petitioner, could preempt the very Ordinance under which Petitioner was cited. Specifically, the Hearing Officer in this case stated,

> I am going to find in favor of the department, notwithstanding the Respondent's citing of the statute itself. That will be handled on appeal. I do—I will assert and will assert [sic] that **if that statute does exist**,[4] it does trump county court law. State law is superior to county court law. **I do not have the statute in front of me. So I'm ruling in favor of the department**.

R. 17:6-11.

This is unacceptable.

I do not know whether sec. 823.145, Fla. Stat. applies to Petitioner, nor whether it can, or should, afford Petitioner a defense to the specific charges against him. The problem is that the Hearing Officer doesn't know either.

Petitioner was not afforded a *meaningful* opportunity to be heard. The due process afforded to him was illusory.

I would grant the Petition for Writ and remand for the Hearing Officer to conduct an actual hearing where the laws that are cited by the Parties are read, considered, and applied to the facts, or not, as may appropriate.

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[1]When given the opportunity to cross-examine the County's witness and to present his own testimony, Appellant argued that "the statute speaks for itself. So I don't know what more to say". (R. 72)

[2]The Hearing Officer should not infer from this finding that his failure to read the Florida Right to Farm Act exemplifies a model of procedural due process.

[3]Appellant made no factual argument below regarding its alleged bona fide farming operation, how that operation is otherwise regulated on the state level, or how the County's ordinance is pre-empted by the Florida Right to Farm Act. *Wilson* notes that the Florida Right to Farm Act "limit[s] adoption of new ordinances from the date the Legislature first prohibited such adoption, which occurred on June 16, 2000." *Id.* at 1249. Appellant also did not address below or in its initial or reply briefs whether the County's ordinance was first enacted before or after the Florida Right to Farm Act.

[4]The statute does, in fact, exist.

* * *

Public records—Mandamus—Second amended petition for writ of mandamus seeking to compel university and professor to respond to multiple public record requests seeking correspondence related to article co-authored by professor is dismissed—University made repeated unsuccessful attempts to have petitioner clarify vague records request, petitioner's requests were not sufficiently clear to allow search other than unsatisfactory search that produced nineteen emails, and petitioner has no clear legal right to inspect emails when she has not paid redaction charges—Petitioner cannot allege that there is no adequate remedy at law where she can still request public records with sufficient specificity to allow for search that would provide additional results

FEDENA FANORD, Petitioner, v. UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES and DR. VINAY GUPTA, Respondents. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 22-CA-010404. Division F. January 12, 2024. Counsel: Jonah Kanter Dickstein, Dickstein Law PA, Tampa, for Petitioner. Nathan Aldrich Adams IV, Holland & Knight LLP, Tallahassee, for Respondents.

ORDER GRANTING RESPONDENTS' MOTION TO QUASH OR DISMISS ALTERNATIVE WRIT OF MANDAMUS

(JENNIFER GABBARD, J.) **THIS MATTER** is before the Court on Respondents' Motion to Quash or Dismiss Alternative Writ of Mandamus filed on March 3, 2023. (Doc. 22). On review of the Petition, the Respondents' Motion, the Petitioner's response, all exhibits and applicable legal authority, the Court finds that the Respondents Motion to Dismiss shall be **GRANTED** and the Alternative Writ **QUASHED** because the Second Amended Petition is facially insufficient.

INTRODUCTION

The Second Amended Petition for Writ of Mandamus arises from multiple public record requests made by Petitioner to the University of South Florida ("the University") and Dr. Vinay Gupta ("Dr. Gupta"). The requests begin as early as April 8, 2019, and stem from an article that Petitioner Co-Authored with Dr. Gupta, a professor at the University. Petitioner made several vague requests to the University to provide public records related to the article entitled *Bisphosphonate-modified Gold Nanoparticles: A Useful Vehicle to Study the Treatment of Osteonecrosis of the Femoral Head* ("the Article"). After and exchange of several emails seeking to clarify search parameters, the University ultimately ran a search, which yielded 19 results. The University provided an invoice for $26.50, which was required to be paid prior to release of the records. Petitioner is unsatisfied with the low yielding search results but has not provided any meaningful search parameters. Additionally, Petitioner has not paid the invoice for the costs incurred in redacting confidential information in the 19 records that were found. Petitioner filed a Writ of Mandamus seeking to compel the University to make a proper search for the records before making payment. Subsequently, Petitioner filed an Amended Petition and a Second Amended Petition. The Second Amended Petition (the "Petition") is the operative petition upon which the Court ordered Respondents to show cause why a writ of mandamus should not be granted. Respondents timely filed the Motion to Quash or Dismiss the Alternative Writ of Mandamus.

FACTUAL BACKGROUND

Petitioner's first vague and unelaborated request was made on April 8, 2019, via a short email stating "[g]ood afternoon, I would like to request: Date Range: 11/1/2018 - 12/2/2018 Email vkgupta@usf.edu. Sincerely, Fedena Fanord." (Pet. Comp. Ex. D, Pg 16). The University's initial response included an invoice and was sent within seven days.[1] *Id*. Petitioner never arranged for payment for the first records search but on February 5, 2021, almost two years after her first request, sent a second request seeking "all documents submitted to the corresponding author" and attached a link to the article that had 6 co-authors.[2] On February 9, 2021, the University promptly responded after determining the request was overbroad and asked Petitioner to "clarify and identify with specificity the records you are requesting." (Pet. Comp. Ex. D. Pg 26). Petitioner's response lacked search parameters but instead, contended that "any and all specificity lies at the hand of your faculty member." Petitioner further contended that the University should have a faculty member determine what records Petitioner was requesting and create their own search parameters without providing any other details other than a link to her article. The next day, on February 10, 2021, in response to Petitioner's email, the University asked Petitioner, to identify which faculty member she was referring to and again requested that Petitioner "please clarify with specificity the records you are requesting to ensure an accurate search." (Pet. Comp. Ex. D, Page 28).

On February 18, 2021, after several unclarified but contentious responses from Petitioner, which still did not contain additional parameters or different search terms, Petitioner sent another email to a different email address for the Public Records Custodian seeking "[a]ll correspondence pertaining to the article at the following link."[3] Ultimately on March 3, 2021, the University responded via email advising there were 19 results based on Petitioner's February 18th, 2021 request. In its response, the University acknowledged that it performed "[a] search for all emails with the keyword 'Bisphosphonate-modified gold nanoparticles: a useful vehicle to study the treatment of osteonecrosis of the femoral head,' " which yielded the 19 results containing confidential student information. The University attached an estimate to the email to cover the cost for review and redaction, estimated to be $26.50, which was required to be paid prior to inspection or copying of the public records. Petitioner did not respond to the University with any additional parameters, search terms or dates, and did not pay the $26.50. In May 2022, a letter from Petitioner's prior counsel to the University, reopened the public records request but did not yield any different results. The letter simply reiterated Petitioner's demands but did not acknowledge that the University had already found 19 records or that payment had not been made for those records. The University responded with the search parameters that were used in the search and again included the invoice for the 19 records that was sent previously "on March 8, 2021 and March 23, 2021." Petitioner then filed a Petition for Writ of Mandamus with this Court, which was twice amended.

It is undisputed that the University made at least three attempts to clarify the records requested by Petitioner. Each time, Petitioner responded without providing any clarification. Once the University searched using the best possible terms from the vague request, Petitioner responded that the results were inaccurate and concluded that there must be more records than the 19 emails responsive to the request. However, Petitioner failed to provide additional search parameters, more detailed search parameters, or different search terms. It is also undisputed that Petitioner has not paid the fee invoiced in the amount of $26.50 for the records responsive to the February 18, 2021, record request.

The Court issued an Alternative Writ on February 13, 2023, to which Respondents responded by filing a Motion to Quash or Dismiss the Alternative Writ. The grounds cited in the response include: a failure of the Petition to contain material facts; failure to state a claim; that Mandamus is not available because of a lack of sufficiency in identifying the records requested, required discretion for redaction, and lack of advanced payment; mootness; lack of service; and

controverted facts making mandamus inappropriate.[4]

LEGAL STANDARD

A motion to quash or dismiss the alternative writ of mandamus admits as true the facts well pleaded for the purpose of testing its sufficiency. *State ex rel. Harrington v. City of Pompano*, 182 So. 290, 290 (Fla. 1938) citing *State ex rel. Peacock v. Latham*, 125 Fla. 69, 169 So. 597. However, when exhibits are attached, the exhibits become part of the pleading and may be reviewed accordingly. *Ginsberg v. Lennard Fla. Holdings Inc.,* 645 So. 2d 490, 494 (Fla. 3d DCA 1994). Bare legal conclusions, as opposed to factual allegations need not be taken as true when deciding a Motion to Dismiss. *Id*. In fact, "where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." *Id*. (*citing Affordable Homes v. Devil's Run*, 408 So. 2d 679, 680 (Fla. 1st DCA 1982).

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 2005) [30 Fla. L. Weekly D2675b]. To state a prima facia case for mandamus relief, a petitioner must allege "a clear legal right to performance of the act requested, an indisputable legal duty, and no adequate remedy at law." *Morse v. State*, 50 So.3d 750, 750 (Fla. 2d DCA 2010) [36 Fla. L. Weekly D2a] (quoting *Radford v. Brock*, 914 So.2d 1066, 1067 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2675b]).

Pursuant to section 119.07, Florida Statutes, public records shall be made available to be inspected subject to limited statutory exceptions. Further, section 119.07(1)(c), Florida Statutes (2022), requires both prompt acknowledgement of a request for public records and a prompt good faith response: "[a] custodian of public records . . . must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith." *Consumer Rights, LLC v. Bradford Cnty*., 153 So. 3d 394, 397 (Fla. 1st DCA 2014) [40 Fla. L. Weekly D28a]. The statute further requires that a custodian must furnish a copy of records "*upon payment* of the fee prescribed by law" or as defined in section 119.07(4)(d), which includes "a special service charge" under certain circumstances. §119.07(4), Fla. Stat. (Emphasis added).

However, to inspect or copy public records, a person must make a request which sufficiently enables the custodian to identify records. *See Wootton v. Cook,* 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (If a requester identifies a record with sufficient specificity to permit the custodian to locate the record, they must furnish the record); Op. Att'y Gen. Fla. 80-57 (1980) (Custodian must honor a request for copies of records which is sufficient to identify record desired); *see also State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935).

LEGAL ANALYSIS

Petitioner argues that mandamus is appropriate to compel the University to do a proper search for all records related to the article, which was co-authored by Petitioner. It is axiomatic that for an agency to make an adequate search for public records, the person making a public record request must adequately identify the records sought. *Cook,* 590 So.2d 1039.

The Public Records Act compels an agency to provide access to public records when the records sought are sufficiently identified. *Id.* Here however, Petitioners request was not sufficient to enable a proper search of records. In response to Petitioners multiple requests and Petitioner's dissatisfaction with the yielded results, the University sought to clarify what search terms Petitioner would like to be used in searching for the public records she sought. Although Petitioner was afforded many opportunities, she never articulated what search parameters should be used in searching for the records sought. Moreover, Petitioner did not consistently identify date ranges, types of records sought, or which emails should be searched. As such, Petitioner's responses to requests for clarification have not provided sufficient parameters to yield any different or additional results.

Generally, a court must take uncontradicted factual allegations as true. However, a court need not take as true conclusions or allegations that are contradicted by exhibits attached to the petition. *See Ginsberg v. Lennar Fla Holdings, Inc*., 645 So. 2d 490 (Fla. 3d DCA 1994). Petitioner alleges that the requests were clear, and that Respondent has not provided the public records as required by section 119. The Court finds that these allegations lack merit.

The Court notes discrepancies within the requests based on the exhibits filed in this action and also in the relief the Petition itself seeks. One request asked for all *documents*, (Pet. Comp. Ex. C, Pg. 1) then upon a request for clarification the Petitioner asked for all *emails*, (Pet. Comp. Ex. C, Pg. 3) and finally the petition itself asks for records "including but not limited to any document, paper letter, map, book tape, photo, film, sound recording, data processing software or other material, *regardless of physical form*, characteristics, or means of transmission." (Amended Petition) (Emphasis Added). Some requests ask for emails to "the corresponding author"[5] (Pet. Ex. C Pg. 1), other requests ask for emails directed to "vkgupta@usf.edu." (Pet. Comp. Ex. C Pg 9) and some requests ask for all records without clarifying whose email records should be searched (Pet. Comp. Ex. C pg. 8). Based on the undisputed facts as alleged, the Court finds the Petitioners requests were not sufficiently clear to allow a search other than the searches that the University performed.

Petitioner's public records request contained overly broad parameters that were insufficiently tailored to illicit what Petitioner classifies as a "proper" search for the purported records sought in this case. The University promptly acknowledged each request, responded by asking for more specificity, and ultimately made a good faith effort, which yielded results that Petitioner failed to pay for and failed to correct or add to the search parameters. Without further search parameters, no additional search could be made that would alter the results of the March 3, 2021, search.[6]

As for the 19 records which were ultimately found, Petitioner does not allege, and the Court does not find, that Petitioner is entitled to the 19 records free of charge. A custodian of public records does not have the legal duty to provide copies of records until the person requesting them arranges for payment of the fees prescribed by law. S*ee* §119.07(4), Fla. Stat. Thus, there is no clear legal right to inspection to the records where payment is demanded but the requestor does not pay the reasonable charges.

Further, the Petition does not and cannot allege that there is an inadequate remedy at law. Petitioner could have and still can request public records with sufficient specificity to allow the University to use additional parameters, keywords or alternative search terms that may alter the results of the search and provide additional or different results.[7]

CONCLUSION

The University responded without unreasonable delay to multiple requests and sought clarification of the search terms or keywords to be searched. While Petitioner's responses did not sufficiently include any additional parameters or clarification on search terms, the University ultimately construed the request as best as possible and found 19 records that pertain to the request. The University then offered to redact personal confidential information and produce the records upon payment of $26.50. Petitioner never attempted to pay this reasonable fee.

As such, Petitioner does not have a clear legal right to the production of the 19 records. The Petition also fails to sufficiently allege that no other adequate remedy at law exists for inspection of additional records. Therefore, the Court finds the Petition is facially insufficient and dismisses it.

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

1. The Respondents Motion to Quash Alternative Writ of Mandamus is **GRANTED** and the alternative writ is hereby **QUASHED**; and

2. Respondent's Motion to Dismiss Petition for Writ of Mandamus is hereby **GRANTED**; and

3. The Petition for Writ of Mandamus and this cause are hereby **DISMISSED**.

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[1]This invoice was not attached as an Exhibit and there was no mention of how many results this search yielded.

[2]The article lists Fedena Fanord, Korie Fairbairn, Harry Kim, Amanda Garces, Venkat Bhethanabotla and Vinay Gupta as co-authors.

[3]The link was a reference to the article " 'Bisphosphonate-modified gold nanoparticles: a useful vehicle to study the treatment of osteonecrosis of the femoral head.' "

[4]Because the Court finds merit in the arguments that the requests were not sufficiently specific and that petitioner has not paid the fees for redaction, the Court need not address Respondents other arguments.

[5]There are a total of 6 co-authors listed.

[6]USF sought clarification and additional search parameters on Feb 9, 2021, February 10, 2021, February 18, 2021, and March 9, 2021.

[7]The Court will not reframe a public record request substituting its own judgment as to proper search terms or to include or exclude certain parameters.

* * *

Licensing—Driver's license—Suspension—Financial responsibility—Certiorari challenge to license suspension for failure to make installment payments on final judgment for damages arising out of ownership, maintenance, or use of motor vehicle is denied—No merit to argument that license should be reinstated because judgment is no longer lien on property—Expiration of lien does not affect validity of judgment or judgment creditor's ability to collect on it

NDIDI OSUJI, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 23-CA-14964. Division D. January 9, 2024. Counsel: Ndidi Osuji, Pro se, Tampa, Petitioner. Bethany Connelly and Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, Tampa, for Respondent.

ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

(EMILY PEACOCK, J.) THIS MATTER is before the Court on Amended Petition for Writ of Certiorari (Doc. 8) filed January 8, 2024. The original petition was timely, and this Court has jurisdiction. §§322.31; 322.2615(13), Fla. Stat. The Court has reviewed the amended petition, appendix, and applicable law. Because Petitioner conflates the status of a judgment *lien* with the validity of the judgment itself as a basis for the license suspension, the petition is denied without need for a response.

Petitioner's driving privilege was suspended because he stopped installment payments on a final judgment in violation of section 324.141, Florida Statutes.[1] He requested and received a formal review hearing under section 322.2615, Florida Statutes. The hearing was held August 2, 2023. At the hearing Petitioner argued that the suspension was invalid because the court judgment, which had been recorded in the public records in 2006 but not re-recorded in 2016, had lapsed and would not support upholding his license suspension. In support of that argument Petitioner cited section 55.10, Florida Statutes.

Petitioner appears to be under the impression that the judgment creditor's failure to re-record the deed somehow invalidated the judgment or that the ability to collect on it has expired. He is mistaken. Section 55.10(1) provides that a judgment becomes a *lien* on property when a certified copy is recorded in the official records of the county if certain other criteria are met. Such lien is good for 10 years, and it may be extended another 10 years if it is re-recorded before the expiration of lien. §55.10(2), Fla. Stat. Petitioner contends an extension was not sought by the judgment creditor; therefore, his license should be reinstated.

The fact that a judgment is no longer a lien on property does not affect its validity, however. Not all judgments become liens on property, and a judgment creditor may collect on a judgment that is not a lien. Judgments of Florida courts remain actionable for 20 years. §95.11(1), Fla. Stat. If, as Petitioner contends, the judgment is a 2006 judgment, the creditor's ability to collect it has not expired. It is therefore

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

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[1]The Order incorrectly cited section 322.27, Florida Statutes, as authority for the suspension of driving privileges on financial responsibility grounds.

* * *

Counties—Code enforcement—Remedy—It was not improper for county to give property owner two options for remedying code violation, including removing unpermitted driveway or obtaining permit for driveway

2944 LAND TRUST AND CARR INVESTMENT PROPERTIES, INC., AS TRUSTEE, Appellant, v. PALM BEACH COUNTY, PLANNING ZONING AND BUILDING DEPARTMENT, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Case No. 50-2021-CA-010307-XXXX-MB. February 23, 2023. Appeal from the County of Palm Beach Code Enforcement. Counsel: Richard L. Ruben, Sunrise, for Appellant. Yelizaveta B. Herman and Shannon Fox, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, 2944 Land Trust and Carr Investment Properties, Inc. as Trustees ("2944 Land Trust"), appeals to the Court to quash the lower tribunal's August 4, 2021 Order (the "Order"). On appeal, we affirm on all points raised by the briefs, and write to clarify the issue of the remedy.

With respect to the remedy, the Order provides the following: "Corrective action may include, but is not limited to, those methods set forth in the requirements for Correction Section of the Notice of Violation . . . ." The Notice of Violation in turn calls for, under the "Requirements for Correction" heading, the following remedies:

> 1. Obtain required building permits for the new driveway made of aggregate/pebbles or remove the new driveway made of aggregate/pebbles.
>
> 2. Permit # (B-2018-009892-0000) has expired. Obtain a new permit or reactivate permit # (B-2018-009892-0000)."

The Appellant is thus given two options to remedy the violation. That is not improper.

Accordingly, we **AFFIRM** the Order. (NUTT, BONAVITA, and SHERMAN, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Party to obtaining license by fraud—No merit to argument that hearing officer erred by implicitly applying constructive knowledge standard in determining that licensee submitted counterfeit motorcycle endorsement card to Department of Highway Safety and Motor Vehicles where hearing officer's finding that licensee was knowingly a party to obtaining driver's license by fraud invokes appropriate actual knowledge standard—Finding that licensee had actual knowledge of fraud is supported by circumstantial evidence that licensee traveled and paid more than cost of usual rider skills training program to obtain endorsement and licensee's failure to present any evidence that he complied with training requirement

FRANCISCO JAVIER PEREZ VELEZ, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2021-AP-000007-O.

February 15, 2024. Petition for Writ of Certiorari from the decision of the Department of Highway Safety and Motor Vehicles, Shavonya Poole, Hearing Officer. Counsel: Andrew B. Greenlee, for Petitioner. Mark L. Mason, Former Assistant General Counsel, DHSMV, for Respondent.

(Before KRAYNICK, CARSTEN, and YOUNG, JJ.) Petitioner seeks review of the Final Order issued by a hearing officer of the Department of Highway Safety and Motor Vehicles ("DHSMV") which affirmed an order suspending Petitioner's driving privilege for knowingly having been a party to obtaining a driver's license by fraud, under section 322.12(5)(a), Florida Statutes (2021). The Court, having reviewed the Petition, the Response of DHSMV, and Petitioner's Reply, and being otherwise advised of the premises, finds as follows:

STANDARD OF REVIEW

The Court's certiorari review of the administrative decisions of a DHSMV hearing officer requires a three-prong determination. The Court must determine "whether (1) procedural due process has been accorded; (2) the essential requirements of law have been observed; and (3) the administrative findings and judgment are supported by competent, substantial evidence." *Nader v. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a].

ANALYSIS

In the instant case, Petitioner does not question whether he was afforded procedural due process. Instead, Petitioner argues that DHSMV departed from the essential requirements of law by applying the incorrect statutory standard regarding Petitioner's knowledge of the alleged fraudulent scheme. In addition, Petitioner argues that DHSMV's decision was not supported by competent, substantial evidence. For the reasons discussed below, the Court finds that DHSMV did not depart from the essential requirements of law and that the hearing officer's decision was supported by competent, substantial evidence.

Section 322.27(1)(d), Florida Statutes, authorizes DHSMV to suspend the driving license of any person who "has permitted an unlawful or fraudulent use of the license or identification card or has knowingly been a party to the obtaining of a license or identification card by fraud or misrepresentation." Similarly, section 322.212 makes it unlawful for any person to "knowingly" possess or display an unlawfully issued driver license.

Essential Requirements of the Law

Petitioner concedes that the motorcycle endorsement card which he submitted to and was accepted by DHSMV was indeed counterfeit. However, Petitioner contends that he did not have actual knowledge that the card he submitted was counterfeit and argues that DHSMV erroneously concluded that he had constructive knowledge of the card's counterfeit nature. In support of this argument, Petitioner points to two instances in the transcript of the hearing where counsel for DHSMV seems to invoke a constructive knowledge standard. First, counsel for Respondent stated, "any reasonably prudent person knew—would have known or should have known . . . that something was hinky." Then again, a few paragraphs further down counsel states, ". . . this further shows that there is an ongoing source of fraud here, which again, Mr. Velez and Mr. Perez should have known."

DHSMV contends that in spite of these references to a constructive knowledge standard, the hearing officer ultimately applied the correct actual knowledge standard. Petitioner argues in his Reply that the Court should conclude that based on the cited evidence, as well as DHSMV's references to constructive knowledge at the hearing, that the hearing officer implicitly applied a constructive knowledge standard. *See Orix Capital Markets, LLC v. Park Avenue Assoc., Ltd.*, 881 So. 2d 646, 650 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1847b] (reversing denial of attorney's fees where trial court "implicitly" applied "net judgment" rule to determine who was the prevailing party). In support of this argument, Petitioner states that while the final order makes no reference to a "constructive knowledge" standard it also does not make any reference to an "actual knowledge" standard. However, this is incorrect. The final order states that based on the "preponderance of the evidence, the Petitioner has knowingly been a party to the obtaining a diver license by fraud." This conclusion explicitly and correctly invokes the appropriate "actual knowledge" standard. Accordingly, the Court finds that the hearing officer did not depart from the essential requirements of law by implicitly applying a constructive knowledge standard relating to the alleged fraud.

Competent, Substantial Evidence

The remaining question then is whether the hearing officer's conclusion was based on competent, substantial evidence. The final order contains several findings of fact. The first of these facts are related to the testimony of Sergeant Nathan Stidham of Florida Highway Patrol who testified regarding his own investigation in which he contacted, paid, and received a counterfeit motorcycle endorsement for $300 from a Mr. Santos Davila. The order connects Sergeant Stidham's investigation to Petitioner based on the fact that Mr. Davila's cellphone contained text messages from Petitioner (among 370 other text or picture messages from various people), as well as a photograph of Petitioner's driver's license. The order then finds that Petitioner presented a counterfeit motorcycle endorsement card, which contained a serial number associated with another person's driving record, at a driver license issuance office. The order states that "authentic motorcycle endorsement cards have perforated edges, and the edges of the card the Petitioner presented were smooth." Furthermore, the order finds that Petitioner traveled from Orange County to Pasco County to pay $300 to Mr. Davila, which was more than the cost of local motorcycle safety courses.

Petitioner challenges whether competent, substantial evidence existed to support the hearing officer's conclusion that he knowingly obtained a license by fraud. It is true that much of the evidence cited to by the hearing officer was circumstantial in nature. Although the endorsement card did not have the perforated edges indicative of a legitimate card, there was no evidence that a lay person would be able to discern between a counterfeit and a legitimate card on this basis. The fact that the DHSMV official took and scanned the card supports this conclusion. Further, the fact that the price was higher and that Petitioner drove further than necessary to obtain the card does not necessarily indicate that Petitioner knew he was obtaining a fraudulent card. Petitioner may have had any number of reasons to travel to Pasco County to obtain the card and may have believed the price to reflect a certain level of convenience. However, these pieces of circumstantial evidence were not central to the hearing officer's conclusion.

Ultimately, the presentation of a counterfeit motorcycle endorsement card enabled Petitioner to obtain the privilege of driving a motorcycle without completion of the required motorcycle safety course or examination. The face of the counterfeit card stated that "the bearer has successfully completed a rider skills training course" and referenced the requirements of section 322.12(5)(a), Florida Statutes. Therefore, when the only evidence of compliance with section 322.12(5)(a) provided by Petitioner was ultimately determined to be counterfeit, DHSMV was entitled to suspend Petitioner's driver's license for fraud. Due to the suspension, Petitioner was entitled to a show cause hearing, at which he was permitted to "present evidence showing why [his] driving privilege should not have been cancelled, suspended, or revoked." Rule 15A-1, F.A.C. (2021). Petitioner requested such a hearing and therefore had an opportunity to present evidence that he had, in fact, complied with the statutory requirements despite his presentation of a counterfeit motorcycle endorsement card.

He did not do so, and therefore the only evidence of statutory compliance before DHSMV remained the counterfeit endorsement card submitted by Petitioner. This fact, in conjunction with the circumstantial evidence described above, constitutes competent, substantial evidence to support the hearing officer's decision.

Accordingly, the Court **DENIES** Petitioner's Petition for Writ of Certiorari, filed August 18, 2021. Further, the Court **DENIES** Petitioner's Motion for Appellate Costs. (CARSTEN and YOUNG, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Criminal law—Discovery—Depositions—Victim of sexual offense under age of 12—Constitutionality of statute—Section 92.55(6), which requires that court determine whether it is appropriate to take deposition of victim of sexual offense who is under age 16, creates presumption that taking deposition of victim under age 12 is not appropriate if state is not seeking death penalty and allows court to impose limitations and conditions on depositions—Statute creates substantive right for victims who are minors and does not unconstitutionally infringe on Florida Supreme Court's rulemaking authority

STATE OF FLORIDA, v. GREGORY HOWARD, Defendant. Circuit Court, 1st Judicial Circuit in and for Santa Rosa County. Case No. 23-001120-CF. March 5, 2024. J. Scott Duncan, Judge. Counsel: Stephanie Pace, Office of the State Attorney, Milton, for State. Barry Beroset, Beroset and Keene, Pensacola, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DECLARE FLORIDA STATUTE SECTION 92.55(6) UNCONSTITUTIONAL

THIS CAUSE came before the Court upon the Defendant's Motion. A hearing was held on February 19, 2023. The Court having heard arguments of counsel, analyzed caselaw and the applicable statutes, and being otherwise fully advised in the premises, denies the Defendant's Motion as follows:

FACTS

Defendant is charged with one count of Using a Computer to Facilitate or Solicit the Sexual Conduct of a Child and one count of Giving Obscene Material to a Minor. The Defendant wishes to take the deposition of the alleged victim. The alleged victim is currently 11 years old. The State opposes the deposition of the alleged victim pursuant to Section 92.55(6), Florida Statutes which became effective July 1, 2023. The applicable portion of the statute reads as follows:

> (6)(a) In any criminal proceeding, before the defendant may take a discovery deposition of a victim of a sexual offense who is under the age of 16, the court must conduct a hearing to determine whether it is appropriate to take a deposition of the victim and, if so, whether to order any limitations or other specific conditions under which the victim's deposition may be conducted.
>
> (b) Except as provided in paragraph (c), in determining whether it is appropriate to take a deposition of a victim of a sexual offense who is under the age of 16, the court must consider:
>
> 1. The mental and physical age and maturity of the victim.
>
> 2. The nature and duration of the offense.
>
> 3. The relationship of the victim to the defendant.
>
> 4. The complexity of the issues involved.
>
> 5. Whether the evidence sought is reasonably available by other means, including whether the victim was the subject of a forensic interview related to the sexual offense.
>
> 6. Any other factors the court deems relevant to ensure the protection of the victim and the integrity of the judicial process.
>
> (c) If the victim of a sexual offense is under the age of 12, there is a presumption that the taking of the victim's deposition is not appropriate if:
>
> 1. The State has not filed a notice of intent to seek the death penalty; and
>
> 2. A forensic interview of the sexual offense victim is available to the defendant.
>
> (d) If the court determines the taking of the victim's deposition is appropriate, in addition to any other condition required by law, the court may order limitations or other specific conditions including, but no limited to:
>
> 1. Requiring the defendant to submit questions to the court before the victim's deposition.
>
> 2. Setting the appropriate place and conditions under which the victim's deposition may be conducted.
>
> 3. Permitting or prohibiting the attendance of any person at the victim's deposition.
>
> 4. Limiting the duration of the victim's deposition.
>
> 5. Any other condition the court finds just and appropriate.

Thus, because the alleged victim in this case is under 12 years of age, the State asserts a deposition should not occur.

The Defendant asserts that 92.55(6) is unconstitutional because it encroaches upon the Florida Supreme Court's exclusive authority to promulgate rules regulating the practice of law and procedure. The Defendant submits the new statute is not substantive, but rather procedural, and that the Legislature usurped the Florida Supreme Court's rulemaking authority by imposing limitations on the discovery and deposition process in criminal cases which are governed by Rule 3.220 of the Florida Rules of Criminal Procedure. The Defendant requests this Court to declare the statute unconstitutional and allow the Defendant to take the deposition of the alleged victim.[1]

LAW AND ANALYSIS

Before the Court begins its analysis of whether the statute is substantive or procedural, the Court notes that statutes which come before courts are clothed with a presumption of constitutionality. *Sunset Harbour Condominium Ass'n v. Robbins*, 914 So.2d 925, 929 (Fla. 2005) [30 Fla. L. Weekly S763a]. Therefore, it is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *Id.* Courts are bound to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well with the legislative intent. *State v. Elder*, 382 So.2d 687, 690 (Fla. 1980).

A determination as to whether a statute is substantive or procedural at times can be a very difficult task. In *Love v. State*, 286 So.3d 177, 183 (Fla. 2019) [44 Fla. L. Weekly S293a], the Florida Supreme Court recognized that sometimes the distinction between substantive and procedural law is neither simple nor certain. In *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972) the concurring opinion of Justice Adkins stated that "The entire area of substance and procedure may be described as a "twilight zone"…" The waters as to whether statutory changes are substantive or procedural have become even murkier today as reflected in competing appellate court decisions pertaining to the application of pre-suit notice requirements to actions founded upon insurance contracts. *See Hughes v. Universal Property & Casualty Insurance Company*, 374 So.3d 900 (Fla. 6th DCA 2023) [49 Fla. L. Weekly D153a]; *Cole v. Universal Property & Casualty Insurance Company*, 363 So.3d 1089 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D916a]; and *Cantens v. Certain Underwriters at Lloyd's London*, 2024 WL 591695 (Fla. 3rd DCA 2024) [49 Fla. L. Weekly D360a].

As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. *State v. Garcia*, 229 So.2d 236, 238 (Fla. 1969). When examining the language of *Garcia,* it seems the Defendant has a valid point. Section 92.55(6) does not declare an act to be a crime and does not regulate punishment. Rather, the statute is part of the process through which a person uses when prosecuted for a crime.

However, other cases have provided more layers to the analysis in determining whether a statute is substantive or procedural. In *Adams*

v. Wright, 403 So.2d 391, 394 (Fla. 1981), the Florida Supreme Court, quoting Justice Adkins concurring opinion in *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972), stated that substantive law has been further defined to include those rules and principles which fix and declare primary rights of individuals with respect towards their persons and property. Further, a law is considered substantive when it both creates and conditions a right. *DeLisle v. Crane Co.*, 258 So.3d 1219, 1225 (Fla. 2018) [43 Fla. L. Weekly S459a]. Finally, even if a statute is procedural in nature, changes in the statute can be considered substantive additions. *See Walker v. Cash Register Auto Ins. of Leon County, Inc.*, 946 So.2d 66, 71-72 (Fla. 1st DCA 2006) [32 Fla. L. Weekly D73b].

In this case, the Court finds that Section 92.55(6) is a substantive addition of rights that apply within a procedural process. The purpose of the statute is to create substantive rights for those minors 16 and younger who are the alleged victims of sexual crimes. The Legislature believed that young victims of sexual abuse should be protected from giving a deposition about facts concerning their abuse and therefore enacted the statute to further a legitimate public policy objective. The amended statute not only declares the rights of a select group of individuals, but it also places conditions on those rights and would permit depositions under limited circumstances.

Because the statute has conveyed rights to a group of individuals its enactment does not infringe upon the Florida Supreme Court's rulemaking authority. The Legislature is authorized to create and condition rights that further public policy objectives and did so by limiting depositions of minors who are alleged victims of sexual crimes. While the discovery process for criminal cases is largely procedural, rights to individuals within that process can be conveyed by legislative enactment. Therefore, Section 92.55(6) is constitutional, and the Defendant's Motion should be denied.

Therefore, it is **ORDERED and ADJUDGED** that the Defendant's Motion to is **DENIED**.

---

[1]In a separate Motion, the Defendant has requested he be allowed to take the deposition of the alleged victim. This present Motion only addressed the constitutionality of the statute.

* * *

Torts—Premises liability—Slip and fall—Continuance—Second motion to continue trial in slip and fall case that does not qualify for treatment as complex litigation is denied—Good cause—Neither discovery issues that defense did not diligently move to resolve, overextension of counsel, fact that case was recently taken over by new counsel replacing retiring attorney, nor fact that counsel is currently set to be in trial in another case during same trial term constitutes good cause for exception to strict policy governing continuances—Defendant and counsel are ordered to appear to show cause why sanctions should not be imposed for conduct related to filing of motion

DEBORAH YOUMAS, Plaintiff, v. ARBOR CREST HOUSING, LP, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2022-CA-000429. March 1, 2024. David Frank, Judge. Counsel: Craig Richards, Fasig Brooks, Tallahassee, for Plaintiff. Joshua Golembe, Tampa, for Defendant.

AMENDED ORDER DENYING CONTINUANCE AND ORDER TO SHOW CAUSE

This cause came before the Court upon active case management and the filing of defendant's February 28, 2024 motion to continue the jury trial currently set in this case, and the Court having reviewed the motion and any other documents submitted in support or opposition to the motion and the court file, and being otherwise fully advised in the premises, finds

As a preliminary matter, the Court has been advised via email from plaintiff's counsel that the present defense motion was not "agreed" to by the plaintiff, clearly contrary to the representation made by defense counsel when defense counsel's office emailed a proposed order to the Judicial Assistant that states in the first sentence, "THIS CAUSE having come before the Court upon agreement of the parties. . . ." This is troubling.

I. Procedural History

The present lawsuit was filed on July 15, 2022. It is a simple negligence action against two alleged co-owners of an apartment building for a single plaintiff's slip and fall.

On January 13, 2023, after the parties allowed the case to sit idle for an unacceptable amount of time, the Court issued an order requiring action.

On September 21, 2023, plaintiff filed an amended complaint, making a minor correction to the exact name of one of the alleged co-owners. The amendment did not affect any claims or defenses.

On October 2, 2023, defendants answered the amended complaint.

Defendants were served the Circuit's Uniform Order that provided:

> Orders setting firm trial dates and addressing scheduling matters will be issued by the presiding judge for each case. Absent good cause, trials for all streamlined and general cases will be completed no later than: 12 months from the date of filing for STREAMLINED CASES (County Court cases and non-jury Circuit Court cases); 18 months from the date of filing for GENERAL CASES (Circuit Court cases where the complaint demands a jury trial).[1]

On November 27, 2023, plaintiff filed a Notice for Trial.

On November 30, 2023, the Court issued its Order Setting Pretrial Conference and Jury Trial, setting the jury trial for March 4, 2024.

On December 8, 2023, defendants filed a Motion to Modify Trial Date as Referenced in Section I of the Trial Order, which was nothing more than a motion for continuance of the jury trial.

On December 18, 2023, the Court granted in part defendants' requested continuance, stating:

> The Unopposed Motion to Modify Trial Date as Referenced in Section I of the Trial Order is GRANTED IN PART. The amended complaint was filed on September 1, 2023, and it clarified any ambiguity regarding the status of the plaintiff at the time of the alleged incident and the specific location. She was not a resident; there are no issues regarding arbitration. ***This case has been pending for an unacceptable length of time. There are no more excuses for a delay. This case will be set for the trial term beginning May 13, 2024. There will be no further continuances absent extraordinary circumstance.*** (Emphasis added).

II. The Current Second Motion for Continuance

Despite the Court's instruction above, defendant now files another motion to continue the trial because a lawyer in defense counsel's firm who had previously been handling the case retired and because, "Defendant has propounded discovery on the Plaintiff and is scheduling the deposition of the Plaintiff."

This case does not involve numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve; does not require management of a large number of separately represented parties; does not require coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; does not require pretrial management of a large number of witnesses or a substantial amount of documentary evidence; does not require substantial time to complete the trial; will not require special management at trial of a large number of experts, witnesses, attorneys, or exhibits; will not require substantial post-judgment judicial supervision; and there are no other analytical factors identified by the Court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

In other words, the present case does not qualify for treatment as complex litigation under the rules. This case is either a streamlined case or general case. *See* Uniform Order above.

Our Florida Supreme Court's directives on active differential case management require trial court judges "To maximize the resolution of all cases. . .to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown." *Florida Supreme Court Administrative Order No. AOSC21-17.*

It appears that there are some discovery matters pending that the parties have done little or nothing to responsibly resolve or bring to the Court's attention.

Parties may not fail to take the next step in the litigation of the case or fail to call up a pending matter for hearing and expect to sit without activity for months as the case withers. *Totura & Co. v. Williams*, 754 So.2d 671 (Fla. 2000) [25 Fla. L. Weekly S141a].

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

A party will not be granted a continuance if it has caused its own problems by failing to diligently move the case forward, even if it means the party will not have certain witnesses or evidence at trial. *HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1293 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a]. This means discovery difficulties must be brought to the Court and resolved when they arise, not months later. Also, the fact that a party has overextended itself with work is not good cause for a continuance. *Id.* at 1292.

This Court will not condone excessive delays, to include the practice of buying time by filing a pleading or motion and then letting it sit.

The difficulties about which the movant complains are not good cause for an exception to the Florida Supreme Court's strict policy governing continuances. This includes situations where an attorney has recently taken over a case. As the Fifth District so aptly put it, "When a lawyer steps into a case in this posture, he or she should expect to proceed to trial immediately. If that is unacceptable, he or she should not take the case. *Merino v. Powell*, 325 So.3d 960, 961-62 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1507a].

Finally, the fact that an attorney involved in this case is currently set to be in trial during the same trial term in another case is not good cause for a continuance. See the Court's order setting pretrial conference and jury trial. Scheduling conflicts with other courts will be resolved at the pretrial conference.

III. Conclusion

Accordingly, it is ORDERED and ADJUDGED that the motion for continuance is DENIED.

IT IS FURTHER ORDERED that defendant's corporate representative and defendant's attorney will appear in person in Courtroom 3, Guy A. Rice Judicial Complex, 13 N. Monroe Street, Quincy, Florida, on Friday, March 8, 2024 at 2:00 p.m., and show cause why sanctions, including the limitation of evidence and the assessment of attorney's fees and costs, should not be entered against defendant and/or defendant's attorney for:

1) Representing to the Court that plaintiff agreed to a motion when plaintiff did not agree.

2) Filing a second motion for continuance after the Court ordered that there will be no more delays and no continuances absent extraordinary circumstances and relying on less than ordinary circumstances (conducting discovery and a different attorney taking the case).

3) Explaining how plaintiff would be "severely prejudiced" without a continuance.

4) Explaining what exactly defendant did as part of its certified, "good faith effort to resolve the issues" in the motion.

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[1]At this point, the firm trial date has not been set. The projected dates were clearly given as "no later than" dates. In other words, the maximum not to exceed dates. The purpose is to avoid setting trials close to the Florida Supreme Court time limits for resolving a civil case. See Florida Rule of General Practice and Judicial Administration 2.250(a). In fact, the Supreme Court's concern and determination that civil cases should resolve by these deadlines was serious enough to require trial courts to report when they do not. Fla. R. Gen. Prac. & Jud. Admin. 2.250(b).

* * *

Dependent children—Termination of parental rights of mother and father is ordered—Harmful continuing involvement—Failure to substantially comply with case plan—Three or more out-of-home placements—Chronic substance abuse—Mother has history of chronic unrelenting substance abuse such that continuing involvement in parent-child relationship threatens health of child, mother's four other children have been placed in out-of-home care, and neither mother nor father have substantially complied with case plans—Clear and convincing evidence establishes that termination of both parents' parental rights is in manifest best interest of child, who will be adopted by foster parents who have already adopted her siblings, and is least restrictive means to protect child from harm

IN THE INTEREST OF: E.G., Minor Child. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 22-DP-1. January 4, 2024. David Frank, Judge. Counsel: Amanda Riyad Thopni, Tallahassee, for Plaintiff. Ronald P. Newlin, Tallahassee, for Mother. James Harrison and Ouida Dawn Talley, Tallahassee, for Father. Pauline Robinson Evans, Tallahassee, for Guardian Ad Litem.

FINAL JUDGMENT TERMINATING PARENTAL RIGHTS

This cause came before the Court on January 4, 2024, for a non-jury trial on the petition for termination of parental rights. The mother and father were present with counsel and all persons entitled to notice of this hearing were duly notified.

I. Introduction

"Few consequences of judicial action are so grave as the severance of natural family ties." *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (Rehnquist, J., dissenting).

There are many difficult decisions a trial court must make. There are many searing and unfortunate circumstances and facts a trial court must experience through the testimony and other evidence of a trial, like the present. But few are quite as difficult as the decision to terminate a person's right to be a parent to a child.[1]

We do not need a lengthy discussion of the legislative intent and purpose driving dependency actions. At the end of the day, it is pretty simple. The state must act in the best interests of the child and time is of the essence for establishing permanency. Our First District said it well:

> The focus of chapter 39 (inclusive of both dependency and TPR proceedings) is not the best interests of the parent or the correction of a parent's bad behavior. From beginning to end, proceedings under chapter 39 are centered on the protection and welfare of the child, balanced against the right of a parent to be a parent to that child.

J.M. v. Dep't of Children & Families, 48 Fla. L. Weekly D2229c (Fla. 1st DCA Nov. 27, 2023); *see also Statewide Guardian Ad Litem Office v. J.B.*, 361 So.3d 419, 422 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1043a].

II. Preliminary Matters

This Court has subject matter jurisdiction over this proceeding and personal jurisdiction over the minor child, E.G. ("E."), whose date of birth is December 29, 2021, her mother, K.E. ("mother"), and her father, D.G. ("father").

Prior to the start of the hearing, counsel for both parents stated on the record that, should the Court terminate parental rights, the current foster parents, [names redacted], should be approved to adopt E. because all of her siblings are there and because they would provide a good home for her.

Prior to the testimony of Mr. Tuazon, the Department of Children and Families ("Department") moved to amend the petition to add Florida Statute 39.806(1)(l) as an additional ground for termination, which provides:

> On three or more occasions the child or another child of the parent or parents has been placed in out-of-home care pursuant to this chapter or the law of any state, territory, or jurisdiction of the United States which is substantially similar to this chapter, and the conditions that led to the child's out-of-home placement were caused by the parent or parents.

The department argued that the ground should have been obvious, was supposed to have been included, and was simply inadvertently left out of the petition. The mother objected arguing that it was too late to amend the petition, and that she would be prejudiced because there was no time or opportunity to prepare her defense against the new ground. The father took no position on it. The Guardian Ad Litem Program ("GAL") did not have an objection.

The Court asked counsel for the mother to explain the prejudice, since it was indeed well known by all that the mother had three prior removals and that fact was not in doubt and, therefore, there really was nothing to defend or do about it. He was unable to offer an explanation.

The Court found that there was no prejudice and granted the motion. *See* Florida Rule of Juvenile Procedure 8.500(d); *and see B.T. v. Dep't of Children & Families*, 300 So.3d 1273, 1281 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1906a].

Initially, both parents conceded that the trial was properly noticed and timed and that there was no good faith basis to request a continuance. After the Department moved to amend the petition, the mother requested a continuance to have time to defend against the new ground. That motion was denied for the same reason the motion to amend was granted, no prejudice.

The parties agreed to waive opening statements.

During closing arguments, the Department again moved to amend the petition, this time to conform the petition to the evidence presented on abandonment. The Court reserved its ruling on that matter and the termination and instructed the parties to file proposed findings of fact and conclusions of law addressing the evidence presented, the application of the grounds for termination to the facts and conforming the petition to the evidence. In its proposed findings, the Department conceded error on this issue and withdrew the motion.

At the close of the Department's evidence, both parents moved for a judgment of dismissal pursuant to Florida Rule of Juvenile Procedure 8.525(h). "Motions for judgment of dismissal in dependency cases are akin to motions for directed verdicts in civil cases." *Dep't of Children & Families v. A.L.*, 307 So.3d 978, 982 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2613a]. "A directed verdict is appropriate 'only when the evidence considered in its entirety and the reasonable inferences to be drawn therefrom fail to prove the plaintiff's case under the issues made by the pleadings.' " *Id*. (citation omitted). The evidence presented, along with the inferences drawn, did not support a directed verdict. The motions were denied.

After the trial, the parties acknowledged that the testimony and argument regarding the father's "acquittal" for his last criminal case was in error. There was no judgment of acquittal. Rather, he entered into a plea agreement that was accepted by the court. Accordingly, the Court will not consider his incarceration to be "unjustly caused by the state." Incarceration is a consequence of an action, causing a parent to be absent from the child's daily life. *B.V. v. Dep't of Children & Families*, 328 So.3d 48, 51 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2079a] (citation omitted).

The parties stipulated to the Department's Exhibit 1—the timeline of the case, and the Department's Exhibit 2—judicial notice of 10 orders, as they were filed on January 3, 2024. Both were entered into evidence as follows:

A. THE CASE TIMELINE

i. On [Editor's note: Redacted], the above-named child was born.

ii. On January 1, 2022, the above-named child was sheltered.

iii. On March 3, 2022, the above-named child was adjudicated to be dependent based on the mother's consent.

iv. On June 9, 2022, the father, D.G., was adjudicated to be the father of the child.

v. On June 28, 2022, both parents were ordered to comply with the Reunification Case Plan filed on June 14, 2022, with the following tasks:

As to the Mother:

a. Substance evaluation and follow all recommendations

b. Random drug/alcohol screening within 24 hours of request

c. Individual counseling and follow all recommendations

d. Active engagement in child-parent psychotherapy/infant mental health services and follow all recommendations

e. Face to face contact with case management from the 1st of the month to the 15th of the month as outlined in statute 39.6012(1)(d)

f. Attend the majority of the child's medical/school appointments

g. Sign Releases of Information with service providers for Disc Case Management

h. Stable Housing

i. Stable Income

As to the Father:

a. Substance abuse evaluation and follow all recommendations

b. Random drug/alcohol screening within 24 hours of request

c. Individual counseling and follow all recommendations

d. Active engagement in child-parent psychotherapy/infant mental health services and follow all recommendations

e. Face to face contact with case management from the 1st of the month to the 15th of the month as outlined in statute 39.6012(1)(d)

f. Attend the majority of the child's medical/school appointments

g. Sign Releases of Information with service providers for Disc Case Management

h. Stable Housing

i. Stable Income

vi. On November 22, 2022, the goal was changed to Adoption.

vii. On January 5, 2023, supplemental findings were entered as to the father.

viii. On June 19, 2023, the Department filed a Termination of Parental Rights Petition.

B. ORDERS JUDICIALLY NOTICED

i. Liberty County Case No. 2017 DP 04 Order for Placement in Emergency Shelter

ii. Liberty County Case No. 2017 DP 04 Order on Motion for Acceptance of the Case Plan, filed on March 9, 2018

iii. Liberty County Case No. 2019 DP 03 Order as to Shelter

iv. Liberty County Case No. 2019 DP 03 Order on Arraignment of the Parents Acceptance of the Parents Consent to Adjudication of Dependency Adjudicating the Minor Child C.B. Dependent and Continuing Disposition Hearing Heard on January 9, 2020

v. Liberty County Case No. 2019 DP 03 Order on Disposition and Judicial Review Hearing heard on April 5, 2020

vi. Liberty County Case No. 2022 DP 01 Dependency Shelter Order

vii. Liberty County Case No. 2022 DP 01 Unopposed Order on the Motion to Accept the Reunification Case Plan Filed on June 14, 2022

viii. Liberty County Case No. 2022 DP 01 Order on Supplemental Order of Adjudication of Dependency and Disposition Heard on January 5, 2023

ix. Liberty County Case No. 2022 DP 01 Amended Order on Judicial Review / Permanency Review and Adjudication of Paternity Heard on June 9, 2022

x. Liberty County Case No. 2023 CF(A) 55 First Appearance Order

III. Grounds for Termination

The amended petition filed on July 13, 2023, asserts three grounds for termination as to both parents—Florida Statute 39.806(1)(c) harmful continuing involvement, Florida Statute 39.806(1)(e)(1) failed case plan, and Florida Statute 39.806(1)(j) chronic substance abuse. The additional ground of Florida Statute 39.806(1)(l) three or more out of home placements as to the mother was added by amendment at trial.

IV. 39.806(1)(c) Harmful Continuing Involvement

When the parent or parents engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services. Provision of services may be evidenced by proof that services were provided through a previous plan or offered as a case plan from a child welfare agency.

A. As to the Mother

1. Findings of Fact

On the evidence presented, to include the stipulated exhibits and the testimony of the mother, the father, case manager Charles Tuazon, case manager Dominique Grant, foster father Derrick Burrus, foster mother Kendra Burrus, and guardian ad litem program case advocate manager Toi Herring, and upon careful consideration of credibility and weight, the Court finds

The mother testified that her first three children were sheltered in 2018. Their ages were 7, 4, and 2. She was sent to prison for the incident that caused the shelter. She was never reunified with the children, and they were adopted by E.'s current foster parents, the Burruses.

The mother's first case actually started on October 7, 2017, when the mother had three children removed from her care based, in part, on the following grounds:

> The Department has received a report of the Mother, K.E. (hereinafter "Mother"), and the Father, V.B. (hereinafter "Father"), engaging in domestic violence and substance misuse around the Children. The Mother and Father have a seven-year history of domestic violence including violence in front of the children. There are document reports of the ongoing domestic violence going on in the home. The Mother and Father have a history of substance abuse, including abusing marijuana, meth, and prescription pills. The Children are in the home when the parents are visibly high on drugs. Both the Mother and the Father refused to take a urinalysis when the Child Protective Investigator, Latavia Williams, (hereinafter "CPI Williams") asked them for a sample. Both the Father and Mother have admitted to having domestic violence in the past. The Mother has admitted to substance abuse in the past. Collaterals state both parents are currently abusing drugs.

The reasons for removal were domestic violence and substance misuse. Mr. Tuazon assisted the mother with a case plan at that time, which included services for substance misuse. The Department provided the mother a reunification case plan. The mother was not reunified with the three children, nor did she complete that case plan.

Although the mother did not cover it, Mr. Tuazon testified that the mother's fourth child, S., was removed from her home on December 19, 2019, because he tested positive for methamphetamine at birth (substance exposed). The removal was based, in part, on the following grounds:

> On November 24, 2019, the Department received a new abuse report concerning the Mother, K.E. Medical records showed that the Child's [umbilical] cord results were positive for methamphetamines. Medical records also indicated that the Mother tested positive for methamphetamines and marijuana at the time of the Child's birth. The Child did subsequently suffer complications from respiratory issues and had to be transferred for medical care to Panama City, Florida. The Child is due to be discharged at this time. After the Child's birth, the Mother left the hospital and Case Management has not had contact from the Mother or with the Mother at this time. The Mother was subsequently arrested for a violation of probation in Jackson County, Florida, from a 2018 Possession of a Controlled Substance and Possession of Drug Paraphernalia. Two affidavits for violation of probation have been filed in that matter for the Mother changing residences and for her failure to complete drug treatment. The Mother's past criminal charges also include a 2018 Possession of Paraphernalia in Bay County, Florida, and a 2015 Possession of a Controlled Substance in Calhoun County, Florida.

Mr. Tuazon assisted the mother with a second reunification case plan at that time, which included services for substance misuse. The mother was not reunified with that child, nor did she complete that case plan. Her parental rights were terminated. S. also was adopted by the Burruses and joined his three siblings.

E. was born on [redacted], and immediately sheltered and placed with the Burruses. This was the mother's third case, the present case. The case started on January 1, 2022, *while the case plan for her second case was still pending*, when E. was removed from her care due, in part, to the following grounds:

> CPI Franklin went to Jackson County Hospital that same day and saw the child and mother. The mother underwent a field drug screen for CPI Franklin and tested positive for marijuana and methamphetamines.

The primary reason for removal was substance misuse with this being the mother's second child to test positive for drugs at birth. Pursuant to Florida Statute 39.806(2), the Department was not required to provide the mother with a reunification case plan at that time, but it did.

This third case plan included the following:

a. Substance evaluation and follow all recommendations

b. Random drug/alcohol screening within 24 hours of request

c. Individual counseling and follow all recommendations

d. Active engagement in child-parent psychotherapy/infant mental health services and follow all recommendations

e. Face to face contact with case management from the 1st of the month to the 15th of the month as outlined in statute 39.6012(1)(d)

f. Attend the majority of the child's medical/school appointments

g. Sign Releases of Information with service providers for Disc Case Management

h. Stable Housing

i. Stable Income

Among other things, the mother was ordered to submit to a substance abuse evaluation and follow all recommendations and to submit to random drug/alcohol screening within 24 hours of a request.

As of November 22, 2022, the mother was not substantially compliant with her case plan, and because of that, Mr. Tuazon recommended the goal be changed and it was changed to adoption. At no point during any of the mother's cases did the mother ever progress enough for her to be left unsupervised with any of her children. The mother had multiple positive UA's, did not attend all of her therapies as offered, was inconsistent with family and individual counseling, and failed to complete the rehab program at Sisters of Sobriety. Mr. Tuazon testified that she did not possess the ability to parent or care for E. and had never bonded with her. *All of this occurred before the mother was incarcerated*.

After Mr. Tuazon left in November of 2022, Ms. Grant became the case manager and is the current case manager. The mother was not incarcerated when she first got the case.

Prior to the parents' incarceration, after the goal had changed to adoption, Ms. Grant tried to meet with both parents. She was frustrated because she learned that they had to come to the probation office, right next to her office, and she still could not get them to meet with her. She met with the father only once, the parents were no shows on all other occasions. Neither were present nor allowed access to their house when she conducted random visits. Texts and telephone calls went unanswered. The mother's visitation with E. was "sporadic." Ms. Grant also testified that the mother provided no financial or other support to E. She did not maintain stable housing or income and did not complete her case plan.

Foster father, Mr. Burrus, testified that he supervised visitations. He testified that the parents' visitations, prior to their incarceration, were riddled with tardy appearances and absenteeism. At one point, he even offered to pay for gas and to repair a tire, but the parents declined. Mr. Burrus tried to accommodate their difficulties, to include travel, to no avail.

The mother was arrested in April 2023 on drug related charges.

Mr. Burrus testified that, after incarceration, the mother sent one card and the father one Facebook message, but otherwise there were no letters from jail from either parent, no attempt by either to reach out and coordinate or request a call or visit. On cross examination by counsel for the parents, the Department witnesses conceded that they did not make any serious efforts to coordinate communication or visitation.

On June 19, 2023, after the mother's incarceration and approximately 17 months after the child was placed into shelter care, the Department filed a Termination of Parental Rights Petition.

The mother is currently incarcerated. She has received a substance abuse evaluation and is engaged in two substance misuse services. The mother testified that she did not know when she would be released, hoped to be released the following week, but further testified that she would need more substance misuse services. The mother testified that by her estimation she would need 60 days to get into a rehab facility, preferably Sisters in Sobriety, where she would stay from six months to a year. Despite the mother's optimism, Mr. Tuazon testified that the mother had already been enrolled in that program in the past and did not successfully complete it.

The mother is participating in wellness and recovery services while currently incarcerated. These were services required as part of the most recent case plan. She loves her daughter and would love to get her back. She testified that she was not in a good place before, but if given the chance, she believes she can turn it around.

On closing, the mother argued that she was drug free while incarcerated and that should be significant or at least meaningful to her status. It is true that there was no indication that she, or the father, somehow used drugs while incarcerated. However, Ms. Grant testified that, although she could not predict continued use with precision, the fact that the parents likely had no access to drugs while incarcerated, along with their substance abuse history, did not bode well for them.

On cross examination, counsel for the parents made the correct point that neither case manager was a medical expert or drug rehabilitation expert to rebut their lay opinions that the parents had not demonstrated that their substance abuse was under control. When Ms. Grant was asked whether, in all the time she was employed as a case manager (four years), had she ever had a parent with substance abuse issues be released from jail and then stay sober. She answered "no."

Ms. Grant testified that up to the day of the trial, the case plan remained unfinished. However, upon cross examination, Ms. Grant conceded that during the period of the mother's incarceration she did not initiate one or two case plan component referrals and did not go to the jail for any face-to-face meetings.

The last time the mother saw E. was before her current incarceration, in April 2023. She has not had any contact since.

The present trial was held on January 4, 2024 and the mother's first case commenced October 7, 2017—*six years and three months ago*. The mother has been involved with the dependency system and has had the benefit of services for that exceptionally long period of time.

2. Conclusions of Law

Although there was disagreement about context and meaning, none of the facts described above were credibly disputed. The mother herself testified she still needs more time. Specifically, the mother stated, "if given the opportunity, I believe I could turn it around." The mother is essentially asking for a fourth case plan, sacrificing another year of a child's life before getting to permanency, a child who has already spent her entire two-year life in the dependency system. Chapter 39 does not condone or tolerate such a course.

". . .[T]he statutory ground at issue—section 39.806(1)(c)—expressly does not require proof of actual harm. Instead, termination is permissible when DCF can show that 'a parent's past conduct or current medical condition makes the risk of future harm to the child likely.' Put differently, '[t]he issue in prospective neglect or abuse cases is whether future behavior, which will adversely affect the child, can be clearly and certainly predicted.' " *Florida Dep't of Children & Families v. M.H.*, 369 So.3d 780, 786 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1719a](citations omitted). Moreover, "[r]easonable efforts to preserve and reunify families are not required if a court of competent jurisdiction has determined that any of the events described in [Florida Statute 39.806] paragraphs (1)(b)-(d) or paragraphs (1)(f)-(m) have occurred." *Id*. at 785.

A failure to show sufficient progress with drug rehabilitation, stable housing, and stable income, along with a criminal history, can support a determination that future harm is clearly and certainly predictable.[2] For example, in *R.K. v. Dep't of Children & Families*, 898 So.2d 998, 1001 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D644a]:

> Although there was no evidence that the mother had abused drugs between the time she entered the rehabilitation center and the day of trial, for most of that time, she was incarcerated or under the supervision of the rehabilitation center. . . . The trial court found that the mother had admitted that she had a 15-year history of drug abuse and criminal activity. Further, the court found that she did not avail herself of the opportunities available to her to safeguard A.K. Rather, she failed to take the proper steps to deal with her cocaine addiction, with her lack of stable housing, and employment, and with her ongoing criminal associations. The court thought she entered the center so A.K. would be born drug-free and left once that goal had been accomplished. Thus, the court found that the mother did not have the ability to care for A.K. to the extent that A.K.'s safety, well-being, and physical, mental, and emotional health would not be endangered if A.K. were returned to her.
>
> Here, the mother has a long history of persistent and unrelenting drug use and abuse, to the point where she landed in jail. After being provided services, specifically for drug use and abuse, she consumed enough methamphetamines to cause two subsequent babies to be damaged by the drug in their systems at birth. She has failed to visit or communicate with her child in any meaningful way, failed to obtain stable housing and income, and failed to provide support. She has consistently shown that she is unwilling to make required progress by failing to complete three case plans and having all four of her other children adopted by the Burruses. She has demonstrated that she will satisfy her desire for drugs at the absolute expense of the health and welfare of her children.
>
> ". . .Florida law does not require an indefinite provision of services when a parent shows the inability to safely reunify within a reasonable time." *A.P. v. Dep't of Children & Families*, 327 So. 3d 879, 885 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1967a].

The mother argues that there should be no termination because she is presently doing better.[3] A recent temporal improvement does not erase the relevant history of the parent's performance during a dependency case. The mother in *K.D. v. Dep't of Children & Families*, 242 So.3d 522 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D787a] suggested at trial that she was doing well in an AWARE program and should have had another chance to engage in a case plan and services. The First District noted, "The mother's narrow view of the past decade ignores her chronic substance abuse that led to the removal of seven of her children. Most importantly, she glosses over her own admitted drug use while pregnant with C.D., who was born suffering the consequences. The trial court received evidence that the mother was presently doing well, and acknowledged her progress, but appropriately recognized that the case was not all about the mother as the ultimate welfare of the child remains paramount." 242 So.3d at 524.

The mother (and the father) argued that they should not be punished for their inaction while incarcerated because, well, they were incarcerated and had limited control over their lives. They argued that the Department must coordinate and supervise all plan activities and contact with dependent children. They in essence argue that only the Department must act, that incarcerated parents have no responsibility in this regard. The argument is not helpful for either parent because both had ample time outside of jail and they failed to meet the requirements of the case plan during those periods as well. Moreover, it simply is not true; parental responsibilities are not shelved during incarceration.

Of course, "[T]he parent's efforts, or lack thereof, to assume parental duties while incarcerated must be considered in light of the limited opportunities to assume those duties while in prison." *C.P. v. Dep't of Children & Families*, 323 So.3d 204, 207 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1625a] (citation omitted). But incarceration does not relieve a parent of all parental obligations. For example, the obligation to try to communicate with one's child steadfastly remains. A good example is *C.P. v. Dep't of Children & Families* where the court described a father's lack of effort as a basis for termination:[4]

> The father argues that the lack of relationship between him and the children was due to his incarceration, the children's age, and DCF's lack of efforts to assist him in maintaining contact with the children. However, the evidence showed that DCF provided opportunities for the father to maintain contact with the children, but he failed to take advantage of them. He could have asked the advocate to send letters to the children on his behalf or to facilitate a call with them, but he did not. *See M.D.*, 187 So. 3d at 1277 (finding of abandonment despite father sending two letters to his daughter during the two years he was incarcerated was supported by competent, substantial evidence). The fact that the children were too young to read the letters did not negate the father's duty to send them if that was his only means of maintaining his relationship with them while he was in prison. *See B.F.*, 237 So. 3d at 393 (finding that the father was able to maintain a relationship with his two-year-old son while he was incarcerated); *T.C.S. v. State, Dep't of Health & Rehab. Servs.* (*In re G.R.S.*), 647 So. 2d 1025, 1028 (Fla. 4th DCA 1994) (finding the father made attempts to maintain two-way communication between himself and his thirteen-month-old child by communicating through the child's custodians).

323 So. 3d 204, 207 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1625a].

Our own First District provides a good example in *A.F. v. Dep't of Children & Families*. In *A.F.*, among other things, the court reasoned that the trial court's termination findings were supported by the following competent, substantial evidence introduced at trial:

> . . .Appellant was found with illegal drugs in amounts indicative of drug dealing and that he admitted to selling drugs. A witness for the guardian ad litem program testified that Appellant did not initiate any of his case plan tasks, had no ability or disposition to provide for A.S.'s needs, and had no capacity to care for A.S. without endangering the child. The guardian ad litem testified that the child developed relationships with substitute parental figures and recommended terminating Appellant's parental rights. A child welfare manager testified that Appellant never engaged in the parenting program or infant mental health services, despite referrals being made for him. She stated that although Appellant was consistent with visitation, he never reached substantial compliance with his case plan or changed his behavior to satisfy the conditions of return.
>
> Another case manager testified that services were available for Appellant to progress on his case plan while incarcerated, but he did not take advantage of any of those services.

276 So.3d 61, 63-64 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1441d].

Importantly, the First District noted that case plan services were "available" while the father was incarcerated. The standard was not whether the case manager constantly and aggressively communicated and visited the father in jail, nor did it measure the aggressiveness with which case management sought to engage the father in services. It was simply whether the services were available.

In the present case, even though it was acknowledged that referrals for one or two services for the mother were not made, there was evidence that case plan component services were available during the incarceration of both parents. For example, the mother had her substance abuse evaluation and was able to enroll in wellness and recovery counseling, even though she did not complete it. Case management must have been assisting the mother while incarcerated, doing something right, or this would never have happened. It is competent and substantial evidence that, contrary to the contention of the parents, the Department was engaged, and it is a strong inference that the parents knew how to interact with Mr. Tuazon and Ms. Grant

when they wanted to.

It is important to note that parental responsibility to be engaged while incarcerated does not simply mean we count how many letters had been sent to the child. There was no evidence that the parents were somehow prohibited from using Liberty County jail's procedure for telephone calls. Both parents could have called the foster parents, Mr. and Ms. Burrus, to talk to E. even just so she could hear their voice. They also could have inquired about E.'s daily routine, check on her milestones, see if there were any medical issues, verify financial resources, and check on her daycare and nutritional needs. Neither parent did any of this.

Also important in *A.F.* was the determination that regardless of impediments caused by incarceration, the father had enough time prior to incarceration to demonstrate compliance and progress with his case plan. 276 So.3d at 65 ("Although Appellant blamed his inability to begin his case plan on his incarceration. . .[c]ompetent, substantial testimony established that [ ] Appellant had several months to work on his case plan before his incarceration."). That is exactly the same for the father here, and even more so for the mother.

The Department has proven this ground by clear and convincing evidence as to the mother.

B. As to the Father

In its post-trial proposed findings, the Department conceded that it did not prove this ground by clear and convincing evidence as to the father.

V. 39.806(1)(e)(1) Failed Case Plan

When a child has been adjudicated dependent, a case plan has been filed with the court, and the child continues to be abused, neglected, or abandoned by the parent or parents. The failure of the parent or parents to substantially comply with the case plan for a period of 12 months after an adjudication of the child as a dependent child or the child's placement into shelter care, whichever occurs first, constitutes evidence of continuing abuse, neglect, or abandonment unless the failure to substantially comply with the case plan was due to the parent's lack of financial resources or to the failure of the department to make reasonable efforts to reunify the parent and child. The 12-month period begins to run only after the child's placement into shelter care or the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the court's approval of a case plan having the goal of reunification with the parent, whichever occurs first.

A. As to the Mother

1. Findings of Fact

On the evidence presented, to include the stipulated exhibits and the testimony of the mother, the father, case manager Charles Tuazon, case manager Dominique Grant, foster father Derrick Burrus, foster mother Kendra Burrus, and guardian ad litem program case advocate manager Toi Herring, and upon careful consideration of credibility and weight, the Court finds

See findings of fact in section IV(A)(1) above.

E. was sheltered on January 1, 2022.

E. was adjudicated to be dependent on March 3, 2022.

On June 28, 2022, the parents were ordered to comply with a reunification case plan that was filed on June 14, 2022.

The mother's case plan tasks were:

a. Substance evaluation and follow all recommendations;

b. Random drug/alcohol screening within 24 hours of request;

c. Individual counseling and follow all recommendations;

d. Active engagement in child-parent psychotherapy/infant mental health services and follow all recommendations;

e. Face to face contact with case management from the 1st of the month to the 15th of the month as outlined in statute 39.6012(1)(d);

f. Attend the majority of the child's medical/school appointments;

2. Conclusions of Law

The mother has had over 24 months to complete this most recent case plan. Yet, as clearly laid out in the paragraphs above, the mother has not substantially complied with her case plan. This was unrebutted by the mother. In fact, the mother herself testified that she needs more time to complete her case plan and to achieve sobriety. The mother is currently incarcerated and by her own testimony, she will need at least another 6 months and 60 days to a year to achieve sobriety—well beyond the 12 months laid out in section 39.806(1)(e)1, Florida Statutes.

"Substantial compliance is obtained when 'the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent.' § 39.01(84), Fla. Stat." *D.M. v. Dep't of Children & Families*, 360 So.3d 824 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1020a].

The mother's drug addiction, abuse, and misuse are precisely "circumstances which caused the creation of the case plan." They have not been "remedied." The mother did not argue or present any competent and credible evidence that she failed to complete her case plan due to a lack of financial resources.

". . .Florida law does not require an indefinite provision of services when a parent shows the inability to safely reunify within a reasonable time." *A.P. v. Dep't of Children & Families*, 327 So. 3d 879, 885 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1967a].

The Department has proven this ground by clear and convincing evidence as to the mother.

B. As to the Father

1. Findings of Fact

On the evidence presented, to include the stipulated exhibits and the testimony of the mother, the father, case manager Charles Tuazon, case manager Dominique Grant, foster father Derrick Burrus, foster mother Kendra Burrus, and guardian ad litem program case advocate manager Toi Herring, and upon careful consideration of credibility and weight, the Court finds

See findings of fact in section IV(A)(1) above.

E. was sheltered on January 1, 2022.

E. was adjudicated to be dependent on March 3, 2022.

On June 28, 2022, the parents were ordered to comply with a reunification case plan that was filed on June 14, 2022.

The father's case plan tasks were:

a. Substance abuse evaluation and follow all recommendations;

b. Random drug/alcohol screening within 24 hours of request;

c. Individual counseling and follow all recommendations;

d. Active engagement in child-parent psychotherapy/infant mental health services and follow all recommendations;

e. Face to face contact with case management from the 1st of the month to the 15th of the month as outlined in statute 39.6012(1)(d);

f. Attend the majority of the child's medical/school appointments;

g. Sign Releases of Information with service providers for Disc Case Management;

h. Stable Housing, and

i. Stable Income.

Mr. Tuazon had approximately one year with the father before he left the Department. He was the father's case manager from the birth of E. to November 2022.

Initially, the father was not incarcerated. Mr. Tuazon testified that the father was using substances with the mother while she was pregnant with the child. The father himself testified that he was at the hospital when the child was born.

The expiration date for completion of the case plan that both parents agreed to was December 29, 2022—at least 4 months prior to the father's most recent incarceration.

Although the father did the substance abuse evaluation, he failed to follow through on the recommendations and more importantly, he failed to consistently submit to urinalysis testing.

The father started individual counseling but never completed it. He failed to comply with the case plan requirement of random UA's. He had at least three UA's positive for methamphetamine. Although he was on probation and had to go to the probation office right next to Mr. Tuazon's office, he was a frequent no show for his appointments with case management. Mr. Tuazon had to "search for him." He only visited E. a few times and was almost always late. He provided no financial or other support to the child. He did not maintain stable housing or stable income. He never developed a bond with E.

Mr. Tuazon testified that the father was arrested with no bond in March-April 2023 for a violation of probation that he was on for underlying drug charges that included trafficking, maintaining a drug house, and drug paraphernalia. Mr. Tuazon visited him at the Liberty County Jail.

In summary, Mr. Tuazon testified that regarding the case plan, the father "never completed anything." The father's compliance was so deficient that the case plan goal was changed to adoption well before the incarceration he relies upon to explain his non-compliance. Perhaps most troubling was the father's own testimony at trial that he does not "understand why he has to do a case plan."

After Ms. Grant took over case management, she tried to meet with the father, but he only made it to one appointment. When she tried to call him, she learned the telephone number was no longer working. He never checked in with her. He did not "work the case plan" in an effort to reunify with E. He never "demonstrated sobriety," and continued to have drug abuse issues and criminal drug charges. Methamphetamine continued to be his drug of choice.

The father never visited E. without the mother. The mother was always the one to initiate the visits. The father did contact the foster father after the father was released from his most recent incarceration, but the father did not ask to see the child. The father only asked to see a picture, which was immediately provided to him.

From the time he was released up to the trial, the father never visited or talked to E.

The testimony of Mr. Tuazon and Ms. Grant was unrebutted.

The father did not argue or present any competent and credible evidence that he failed to complete his case plan due to financial resources or the Department's failure to use reasonable efforts to reunify. He mentioned a previous job and stated that he was currently staying with his mother without any details from which the Court could find that he has, and will have, stable housing and income.

2. Conclusions of Law

The parties disagreed over exactly when the clock started for the father's "12-month period." The statute itself, however, clearly answers the question. It reads: "The 12-month period begins to run only after the child's placement into shelter care or the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the court's approval of a case plan having the goal of reunification with the parent, whichever occurs first." Here, the shelter occurred first, on January 1, 2022.

The father made the point that he should not have been expected to do anything until he was established the legal parent; a point that appeals to logic. If the Court were to accept that argument, the father would have decreased the time period for which he is accountable only by a few months, approximately five. Unfortunately, Chapter 39 does not agree with such a reduction or credit. Florida Statute 39.0136(1) states "the Legislature finds that time is of the essence for establishing permanency for a child in the dependency system. Time limitations are a right of the child which may not be waived, extended, or continued at the request of any party except as provided in this section." Florida Statute 39.01(1) states "a man's acknowledgement of paternity of the child does not limit the period of time considered in determining whether the child was abandoned." Although the statute refers to the analysis for abandonment, there is no reason to belief that the same would not apply to a failure to parent under any of the grounds relevant in this case.

Also, as noted above, the father was present in the hospital at the birth of E. He was there to see and hear the damage done to E.'s body as she was born with methamphetamine in her system.

The father not only started calculating the 12 months incorrectly, but also improperly ends it at the start of his most recent incarceration. The father was incarcerated due to his own actions, regardless of his inaccurate assertions to the contrary and, in any event, parental responsibilities are not shelved during a parent's time in jail, *see* discussion in IV(A)(2) above.

Even if parental responsibilities were suspended while incarcerated, the father still was not substantially compliant with his case plan prior to jail, which was roughly 5 months after the goal had already been changed to adoption due to noncompliance and 4 months after the reunification case plan expired—which was 16 months after the child's placement into shelter care.

Even if you subtract from the accountable time periods of 9 months for jail, and 5 months waiting to be deemed the legal father, that leaves 10 months. *That means the father's position is that failing to do what is necessary for almost half of E.'s life is not enough for termination*. The Court cannot accept that.

The Department has proven this ground by clear and convincing evidence as to the father.

VI. 39.806(1)(l) Three or More Out of Home Placements

Section 39.806(1)(l), Florida Statutes: On three or more occasions the child or another child of the parent or parents has been placed in out-of-home care pursuant to this chapter or the law of any state, territory, or jurisdiction of the United States which is substantially similar to this chapter, and the conditions that led to the child's out-of-home placement were caused by the parent or parents.

A. As to the Mother

1. Findings of Fact

The mother's children (VB, CB, and KB) were removed from her care and placed in out-of-home care as evidenced by Liberty County Case No. 2017 DP 04 Order for Placement in Emergency Shelter, which was stipulated to by the parties and admitted into evidence.

The mother's child (SB) was removed from her care and placed in out-of-home care as evidenced by Liberty County Case No. 2019 DP 03 Order as to Shelter, which was stipulated to by the parties and admitted into evidence.

E., was removed from the mother and placed in out-of-home care on January 1, 2022, as stated in the Case Timeline, stipulated to by the parties and submitted into evidence, as well as evidenced by Liberty County Case No. 2022 DP 01 Dependency Shelter Order, which was also stipulated to by the parties and admitted into evidence.

All evidence regarding this ground was stipulated to and unrebutted.

2. Conclusions of Law

Pursuant to Florida Statute39.806(2), "reasonable efforts to preserve and reunify families are not required if a court of competent jurisdiction has determined that any of the events described in paragraphs (1)(b)-(d) or paragraphs (1)(f)-(m) have occurred."

The Department has proven this ground with clear and convincing evidence as to the mother.

VII. 39.806(1)(J) Chronic Substance Abuse

The parent or parents have a history of extensive, abusive, and chronic use of alcohol or a controlled substance which renders them incapable of caring for the child and have refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for termination of parental rights.

A. As to the Mother

1. Findings of Fact

See section IV(A)(1) above.

2. Conclusions of Law

See section IV(A)(2) above.

The Department has proven this ground by clear and convincing evidence as to the mother.

B. As to the Father

Although this ground was included in the amended petition as to the father, the Department abandoned the ground by not addressing it either at trial or in its post-trial proposed findings.

VIII. Manifest Best Interests

Pursuant to Florida Statute 39.810(1)-(11), the Department has proven by clear and convincing evidence that it is in the manifest best interest of the child for the parental rights of each parent be terminated for reasons which include, but are not limited to, the following:

A. Any suitable permanent custody arrangement with a relative

There are no relatives available to take custody of the child. However, the child is currently placed with the former foster parents, current legal parents, of all her biological siblings, the Burruses, and the Burruses are willing to adopt E.

B. The ability and disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child

The foster father testified that the parents provided them with a single pack of diapers throughout the entirety of the case. However, the foster mother testified that the diapers had to be thrown away and could not be used due to the strong smell of smoke. There was no evidence that either parent was involved or assisted in any medical or remedial care. The parents have not demonstrated the ability to meet the child's basic needs.

C. The capacity of the parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home

Both parents stated they want to keep E., but even by their own testimony could not articulate how that would be in E.'s best interest or how they would be able to take care of her. The father testified he did not know her daily routine and that he had not thought to ask. The mother is currently incarcerated and testified she needs additional substance abuse services upon her release.

D. The present mental and physical health needs of the child and such further needs to the extent that such future needs can be ascertained based on the present condition of the child

Because of the quality care she receives from her current foster parents, E. does not have any specific current or known future physical or mental health needs. She is meeting all her milestones.

E. The love, affection, or other emotional ties existing between the children and parent or parents, siblings, and other relatives, and the degree of harm to the children that would arise from the termination of parental rights and duties

The child has no bond or emotional ties with either parent, as the parents sporadically visited over her lifetime, and she has not seen them in at least 9 months. The foster father testified that E. possibly recognized the parents, but that he knew the child was done with the visit when she would come back to him. When visits were not consistent, it would take the child a while to warm up to the parents. The child is placed with her biological siblings and would maintain those bonds after the parents' rights are terminated. The evidence strongly indicates that the child would not suffer any harm if the parents' rights were terminated.

F. The likelihood of the older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child

The foster parents testified that they intend to adopt E. and have already adopted her four biological siblings.

G. The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties

The child has formed a significant relationship with her foster parents. The child calls the foster parents mommy and daddy. Ms. Herring testified that the child views the foster parents as her parents and to the child, she is home when with them.

H. The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity

The foster parents have had custody of E. since she was removed from her parents' care January 1, 2022, essentially her whole life. E. is thriving in her current placement with the Burruses. She is well adjusted, happy, and healthy. She is meeting all of her milestones. She shares a room with her biological sister and is bonding with all four of her siblings.

I. The depth of the relationship existing between the child and the present custodian

The totality of evidence shows a very deep and loving relationship existing between E. and the Burruses.

J. The reasonable preferences and wishes of the children, if the Court deems the children to be of sufficient intelligence, understanding and experience to express a preference insert whether the children are of an age to provide meaningful input concerning adoption and if they are what their stance is

E. is 2 years old; too young to express a preference.

K. The recommendations for the child provided by the child's Guardian ad Litem

Ms. Herring testified on behalf of the Guardian ad Litem Program that she supports terminating the mother's and father's parental rights and that she believes it is in the best interest of E. to do so.

IX. Least Restrictive Means

The [least restrictive means] test is not intended to preserve parental bonds at the cost of the child's future." *Florida Dep't of Children & Families v. M.H.*, 369 So.3d 780, 789 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1719a].

As to the mother, the Department does not need to separately establish that termination was the least restrictive means to protect E., ". . .because it met its burden to show that termination was proper under sections 39.806(1)(c) . . . ." 369 So.3d at 789.

Moreover, the least restrictive means analysis is less applicable where there is no bond between the child and the parent. *See as example F.L.C. v. G.C.*, 24 So.3d 669, 671 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2593a] ("Where there is little or no bond to protect and there was never a parent/child relationship to re-establish, termination of parental rights is not barred by the application of the least restrictive means test."). In the present case, there was no bond between E. and either parent.

Nonetheless, to the extent that it is applicable, based on the totality of the clear and convincing evidence, the Department has passed the least restrictive means test as to both parents.

Least-restrictive means is not at issue where a case plan previously had been provided, and the parent otherwise had notice and an opportunity to be heard. *J.M. v. Dep't of Children & Families*, 48 Fla. L. Weekly D2229c (Fla. 1st DCA Nov. 27, 2023). If so, the parent, ". . .has been afforded the process constitutionally due [him or] her." Both parents were given a case plan and had notice and an opportunity to be heard.

The Department providing the mother with 3 separate case plans for 5 different children over the span of more than 6 years is more than a good faith effort.

Mr. Tuazon assisted the father with a case plan for roughly a year before leaving DISC Village in November 2022. Ms. Grant testified that she attempting to help the father with a case plan prior to the father's incarceration on drug related charges. Despite her office being next to the father's parole officer's office and her offering to meet with the father at the same time, Ms. Grant testified the father would not meet with her. The Department made a good faith effort, but the father made little to no effort in return.

The case history for the present parents, especially the mother, is similar to the mother in *S.M. v. Florida Dept. of Children & Families*, 202 So.3d 769 (Fla. 2016) [41 Fla. L. Weekly S362a]. In *S.M.*,

> . . .DCF made good faith efforts over a four-year period to work toward reunification by offering the mother three case plans. Despite DCF's efforts, the mother [had] "no commitment to treatment" for her drug problem and has shown a "pervasive pattern of putting herself first." In the two years following her children's removal, S.M. never passed a drug screening, nor did she successfully complete any drug treatment program. DCF has more than satisfied its burden under the least restrictive means test in this case. The children are entitled to permanency.

202 So.3d at 784.

During closing arguments, counsel for the Department asked, "At what point do we think of E.? That point is now.

The Department has proven by clear and convincing evidence that terminating the parents' rights is the least restrictive means to protecting the child from harm.

X. Conclusion

Accordingly, it is ADJUDGED that

1. The Department's petition for termination of parental rights is GRANTED as to the mother and the father.

2. The mother K.E.'s parental rights are terminated.

3. The father D.G.'s parental rights are terminated.

4. The minor child E.G. shall remain in the care and custody of the Department for adoption.

5. The parents have thirty (30) days to appeal this order to the First District Court of Appeal.

6. The parents have twenty (20) days to file a motion claiming ineffective assistance of counsel, pursuant to Florida Rule of Juvenile Procedure 8.530. The parent claiming ineffective assistance of counsel must serve the motion on all parties to the termination of parental rights proceeding and to the attorney the parent claims provided ineffective assistance. The motion must identify specific acts or omissions in the attorney's representation of the parent during the termination of parental rights proceedings that constituted a failure to provide reasonable, professional assistance and explain how the acts or omissions prejudiced the parent's case to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated.

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[1]It is the dedicated work of dependency teams that provide the safeguards and guiderails to ensure this solemn responsibility is conducted with due regard to the rights and interests of children, parents, and the state. That includes counsel for the Department, counsel for the Guardian Ad Litem program, regional and private counsel for parents, child protection investigators, guardian ad litem volunteers, foster parents, case managers, and other program representatives. They must endure the pressure of demanding court review, necessary nonetheless, in the face of unacceptable shortages of personnel and resources.

[2]Regarding the mother's contention that the Department must present expert testimony, ". . .there are many circumstances in which expert testimony may not be necessary to establish that a parent is not amenable to treatment. *See, e.g., R.K. v. Dep't of Children & Families*, 898 So. 2d 998, 1000-01 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D644a] . . .; *S.J. v. Dep't of Children & Family Servs.*, 866 So. 2d 770, 771 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D473a] (affirming termination of parental rights where mother was twice unsuccessfully discharged from outpatient substance abuse treatment, refused inpatient treatment, and was arrested four times while under Department supervision)." *B.A. v. State Dep't of Children & Families*, 297 So.3d 586, 590 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1255a].

[3]During cross examination, mother's counsel suggested that the mother should get credit for staying sober while in jail because it is possible to get illegal drugs while incarcerated. Ms. Grant's response was simply that she did not have access to drugs and there was no evidence to the contrary. Indeed, the fact that the mother would argue credit for not using illegal drugs in jail highlighted how little the mother had to show true progress.

[4]The ground in the case was abandonment, which is not applicable to this case. However, the facts and treatment by the court are instructive for what the state and society expect from a parent who is incarcerated and claims to be a proper parent who cares about a child and for whom parental rights should not be terminated.

* * *

Elections—Municipal recall petitions—Attorney's fees—Enforcement of settlement agreement—Attorney's fees incurred in enforcing settlement agreement resolving various appeals of successful challenge to recall election are assessed against plaintiff's counsel—No merit to claim that collaborative work between city attorney and outside counsel was duplicative

IN RE: CITY OF QUINCY, FLORIDA RECALL CASES. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case Nos. 2022 CA 401, 2022 CA 443, 2022 CA 029, and 2022 CA 1498 (Consolidated). February 25, 2024. David Frank, Judge. Counsel: Jack L. Mclean, Jr., Tallahassee; Louis Thaler, Louis Thaler, P.A., Coral Gables; and Larry K. White, Larry K. White, LLC, Tallahassee, for Plaintiffs. Robert E. Larkin, III and Benjamin M. Lagos, Allen, Norton & Blue, P.A., Tallahassee; and Mohammad O. Jazil and Michael Beato, Holtzman Vogel Baran Torchin Sky & Josefiak, PLLC, Tallahassee, for Defendants.

ORDER ON ATTORNEYS' FEES

This cause came before the Court for an evidentiary hearing on February 12, 2024 to determine the amount of attorneys' fees to be assessed pursuant to the granting of the parties' joint motion to enforce settlement filed by the City of Quincy, Commissioner Ronte Harris, and Commissioner Keith Dowdell ("defendants"), against Plaintiff Emanuel Sapp and his three attorneys, Jack L. McLean Jr., Louis Thaler, and Larry K. White ("plaintiff's counsel"), and the Court having reviewed the papers submitted in support and opposition to the fee requests, heard and considered evidence, heard argument of counsel, and being otherwise fully advised in the premises, finds

I. Introduction

Plaintiff Sapp and his three attorneys refused to comply with a simple and unambiguous term of a settlement reached, a final

resolution that should have occurred a year earlier in a case that defendants have argued should never have been brought. The parties who had to litigate five additional months to enforce the agreement now seek reimbursement for the time spent by their lawyers.

Abraham Lincoln is said to have provided the following sage advice to young lawyers: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."[1]

The purpose of our civil justice system is to provide a forum to handle disputes without having to resort to self-help as often happened in the days of the gun fighting old west. The goal is not litigation, the goal is resolution. We are not in it for the fight, as they say. As such, the role of settlement agreements in our present day system of civil justice is significant. "Settlement agreements are highly favored and the policy of this Court is to enforce such agreements whenever possible." *Robbie v. City of Miami*, 469 So.2d 1384 (Fla. 1985). "Generally, Florida courts enforce general releases to further the policy of encouraging settlements." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So.2d 306, 314 (Fla. 2000) [25 Fla. L. Weekly S446a] (citations omitted).

In that light, "Florida Rule of Civil Procedure 1.730(c)[2] affords trial courts 'broad powers to grant relief as to settlement agreements reached through mediation.' " *Garvin v. Tidwell*, 126 So.3d 1224, 1228 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2506a] (citation omitted).

The City is represented by City Attorney Gary Roberts and outside counsel Mohammad Jazil and Michael Beato. Mr. Jazil and Mr. Beato were assisted by their paralegal, Zackary Bennington, and law clerk, Colson Douglas. The commissioners are represented by attorneys Rob Larkin and Benjamin Lagos. Collectively these attorneys will be referred to as "defense counsel."

II. Procedural History

A. The Long Path to Here

Where to begin? In a previous order, this Court recounted part of the "long and tortuous" progression of the present consolidated cases. *See Order Granting Motion to Enforce Settlement* at 1-4.

The root of this odyssey was the firing of City Manager Jack Mclean on November 16, 2021. Rather than challenge the legal adequacy of the discharge itself, Mr. Mclean, as both a plaintiff and his own lawyer, chose to recruit a co-plaintiff, Mr. Sapp, and sue the City of Quincy, Commissioners Harris, Dowdell, and Canidate, Commissioner Canidate's husband Willie Candidate, and Rolanda Jackson. Mr. McLean brought in attorneys White and Thaler to co-counsel on the case. All three lawyers signed each of the complaints and petitions in the present consolidated cases and all related cases.

Mr. Sapp and Mr. McLean sued for violations of Florida's Sunshine Law, Florida Statute 286.011, based on alleged improper notice and "exchanges and discussions" alleged to have occurred prior to the commission's meeting at which Mr. McLean was fired. *See* Verified Declaratory Judgment Complaint and Motion for a Preliminary Injunction [Expedited Hearing Requested], Case No. 21-CA-824 (Doc. 2). They demanded a court order declaring his discharge void ab initio and an injunction prohibiting the city from hiring another manager.

There were no genuine disputes of material fact on these two issues, so the Court entered summary judgment in favor of defendants. The evidence showed the meeting was clearly and properly noticed; so much so that Mr. Sapp himself attended and was given ample time to speak to the commission. On the matter of pre-meeting discussions, the Court ruled, "This Court will follow the guidance of Florida's Supreme Court and the First District Court of Appeal, and finds that any alleged improper pre-meeting discussion were cured by the November 16, 2021 meeting with independent, final action in the sunshine." (Doc. 214).

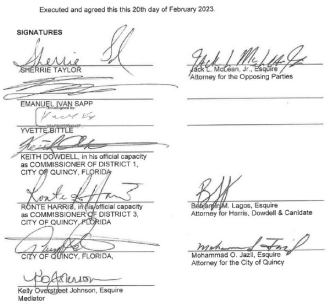
The First District per curium affirmed.

Defendants thought the answers were so clear that they moved for sanctions against Mr. Sapp and his attorneys. The Court gave Mr. Sapp and his attorneys a huge benefit of the doubt and denied defendants' aggressive pursuit of an attorneys' fee sanction. The Court ruled that, *at its inception*, the lawsuit was not in bad faith or frivolous, which was required under the controlling statute. (Doc. 246).

Unfortunately, this was not the end. Mr. Mclean, Mr. White, and Mr. Thaler remained counsel for continued attacks on the City of Quincy and its commissioners with several lawsuits, motions and petitions for injunctive relief and declaratory judgments, even a recall election initiate targeting two of the commissioners, and then lawsuits related to the attempted recall. At one point they even filed papers in Leon County, asking the Chief Judge to intercede on something for which he had no connection or authority.[3]

Every single one of these actions filed in this Court was either affirmed on appeal or dismissed.

Three of the remaining cases were consolidated into the present case, Case No. 22-CA-401, and referred to mediation for a global settlement. A global and final settlement was reached at mediation and the mediator reported it to the Court. Mr. Sapp and Mr. McLean attended the mediation and signed the agreement:


Executed and agreed this this 20th day of February 2023.

SIGNATURES

SHERRIE TAYLOR

Jack L. Mclean, Jr., Esquire
Attorney for the Opposing Parties

EMANUEL IVAN SAPP

YVETTE BITTLE

KEITH DOWDELL, in his official capacity as COMMISSIONER OF DISTRICT 1, CITY OF QUINCY, FLORIDA

RONTE HARRIS, in his official capacity as COMMISSIONER OF DISTRICT 3, CITY OF QUINCY, FLORIDA

Benjamin M. Lagos, Esquire
Attorney for Harris, Dowdell & Canidate

CITY OF QUINCY, FLORIDA,

Mohammad O. Jazil, Esquire
Attorney for the City of Quincy

Kelly Overstreet Johnson, Esquire
Mediator

The mediated settlement required Mr. Sapp to sign and deliver a general release.

Defendants agreed that Mr. Sapp would get a "carve out" in the General Release Agreement, acknowledging the parties' inability to resolve Case No. 21-CA-824, and noted that nothing within the general release would preclude Mr. Sapp from continuing that claim. Defendants included this carve out in their proposed draft of the General Release Agreement. *See* "Movants' Proposed General Release Agreement," attached as Exhibit D to defendants' Joint Motion to Enforce Settlement Agreement (Doc. 259).[4]

For varying purported reasons, Mr. Sapp refused to sign and deliver a general release form, as required by the agreement. Mr. Sapp and his attorneys first contended that a general release form was not required—contrary to the clear words of the mediation settlement agreement. Mr. Sapp and his attorneys then made numerous attempts to rewrite the terms of the mediation settlement agreement, before finally arguing that Mr. Sapp lacked capacity to sign the agreement in the first place.

B. The Hearing on Defendants' Motion to Enforce Settlement

On June 23, 2023, defendants filed a joint motion to enforce the settlement and asked the Court to require that, ". . .Mr. Sapp and his counsel pay the reasonable expenses incurred by Movants as a result of Mr. Sapp and his counsel's refusal to comply with the terms of the Mediation Settlement Agreement, and award any further relief this

Court deems just and proper."

In their supplemental brief, defendants stated that the specific ground for the attorneys' fee request in their motion to enforce is Florida Rule of Civil Procedure 1.730(d), which reads:

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

On July 14, 2023, the Court conducted a properly noticed evidentiary hearing on the motion to enforce the settlement at which plaintiff were given ample time to present his evidence and oppose the motion to enforce the settlement.

Based on the evidence presented and uncontested facts discussed at the hearing, the Court found and ruled that Mr. Sapp and his three attorneys voluntarily and knowingly entered into the mediated settlement, were not confused about the general release requirement, had no valid reason not to comply with the requirement, and that their resistance to providing a general release was in bad faith.

The Court ruled that, "Defendants' motion to enforce settlement is GRANTED. Within ten (10) days from the date of this order Mr. Sapp will execute a General Release of defendants of all claims, known and/or unknown, up to and including the date of execution of the General Release agreement . . . [and] defendants' request for attorney's fees for the expense incurred enforcing the settlement to be assessed against Mr. Sapp and his three attorneys is GRANTED, in an amount to be determined at a subsequent hearing."

III. Evidence at the Present Hearing on Amount

Based on the Court's consideration and weighing of the evidence, to include the credibility and reliability of the witnesses who testified, and the documents admitted as exhibits, the Court finds as follows.

Rather than stipulate, plaintiff's counsel insisted that defendants lay the foundation for defense counsel's time records supporting the amount of time worked by each applicant. Defendants then laid a proper foundation for the business records exception to hearsay and the time records were admitted into evidence. Ex. 1, 3, and 5. The time records were sufficiently detailed and there was no block billing. Defendants also put on the testimony of their attorneys, Gary Robert, Michael Beato, and Benjamin Lagos, to explain the nature of their work, the keeping of contemporaneous time records, and the basis for their hourly rates.

The hours worked and hourly rates were established as follows:

Entity	Person	Description	Hours	Rate	Amount
City of Quincy	Gary Roberts	City Attorney	43.4	$175	$7,595.00
	Mohammad Jazil	Partner, Holtzman Vogel Baran Torchinsky & Josefiak PLLC	8	$295	$2,360.00
	Michael Beato	Associate, Holtzman Vogel Baran Torchinsky & Josefiak PLLC	14.25	$295	$4,203.75
	Zackary Bennington	Paralegal, Holtzman Vogel Baran Torchinsky & Josefiak PLLC	1.5	$150	$225.00
	Colson Douglas	Law Clerk, Holtzman Vogel Baran Torchinsky & Josefiak PLLC	2	$100	$200.00
					TOTAL: $14,583.75
Commissioners	Rob Larkin	Partner, Allen Norton & Blue, P.A.	2.9	$250	$725.00
	Benjamin Lagos	Associate, Allen Norton & Blue, P.A.	63	$250	$15,750.00
					TOTAL: $16,475.00
					GRAND TOTAL: $31,058.75

Defendants called fee expert H. Matthew Fuqua, an experienced attorney who practices in this circuit, to testify on the reasonableness of the time expended and hourly rates. Mr. Fuqua testified about his experience representing North Florida governmental entities and his familiarity with the rates charged to governmental entities for legal services in North Florida, particularly the Second Judicial Circuit. Mr. Fuqua explained that he reviewed the attorney invoices and conducted interviews of the attorneys and questioned them about the billing entries. He also testified that he is familiar with the lodestar method of assessing attorneys' fees and with the factors mentioned in *Florida Patient's Compensation Fund v. Rowe* (see below). Relying on those factors, Mr. Fuqua concluded that that the hours expended, and rates charged, to the City and commissioners were reasonable.

In forming his expert opinion, Mr. Fuqua reviewed other invoices sent to the City for legal services. Two invoices came from the very lawyers opposing fees in this case, Mr. White and Mr. Thaler, for legal work unrelated to this case (both defended a commissioner in an ethics case). Mr. White and Mr. Thaler charged the City a rate of $400 an hour for their services, well above any of the rates presently requested. Those invoices were also entered into evidence. Ex. 10. Mr. Fuqua opined that even the higher rates charged by Mr. White and Mr. Thaler in that case were reasonable, further reinforcing that the subject rates he reviewed for this case were very conservative or low if anything.

Defendants have used extensive billing discretion to waive or reduce a considerable amount of expense from their request. For example, they could have requested reimbursement for their fee expert in the amount $4,775.00 (Ex. 11). *Capital Health Plan v. Moore*, 281 So.3d 613, 617 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2590a] ("[I]t is well settled that the testimony of an expert witness concerning a reasonable attorney's fee is necessary to support the establishment of [an attorney's fee award]."); *and see United Auto. Ins. Co. v. Feijoo*, 356 So.3d 304, 305-06 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D287a]. Defendants' attorneys also testified that there were various activities related to the subject motion to enforce that they performed but did not include in their time records.

For their part, plaintiff and plaintiff's counsel literally put on no evidence to dispute the time expended or the hourly rates claimed by defendants. They offered no testimony, no exhibits, no fee expert. They did, however, put attorney McLean himself on the stand, but he offered no relevant or admissible evidence, only legal argument, so the Court asked him to reserve his argument for summation.

In addition, this Court independently reviewed the City's and commissioners' invoices and analyzed them using the lodestar method and *Rowe* factors (see below), and its own experience and familiarity with hourly rates charged by attorneys in this circuit doing similar work.

IV. The Applicable Standard

"Florida has adopted the federal lodestar approach for an award of attorney's fees. . . . The party who seeks the fees carries the burden of establishing the prevailing market rate, i.e., the [hourly billing] rate charged in that community by lawyers of reasonably comparable skill,

experience and reputation, for similar services." *Philip Morris USA Inc. v. Jordan*, 333 So.3d 300, 304 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D259a], review denied, SC22-236, 2022 WL 1039972 (Fla. Apr. 7, 2022), citing *Fla. Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985) (internal citations omitted).

The criteria for the lodestar analysis ("*Rowe* factors") are:

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

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

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Joyce v. Federated Nat'l Ins. Co., 228 So.3d 1122, 1126 (Fla. 2017) [42 Fla. L. Weekly S852a].

"In calculating the hourly rate, the trial court should look to all eight Rowe factors except the time and labor required, the novelty and difficulty of the question involved, the results obtained, and whether the fee is fixed or contingent." *Id*. (citations and internal quotations omitted). "The 'novelty and difficulty of the question involved' should normally be reflected by the number of hours reasonably expended on the litigation." *Rowe* at 1150. "Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a 'contingency risk' factor and the 'results obtained.' " *Rowe* at 1151.

V. Findings of Fact

A. The time and labor required and the novelty and difficulty of the question involved;

The testimony of Mr. Beato, Mr. Lagos, and Mr. Roberts was credible and reliable. They testified on the hours expended to compel compliance with the settlement and nature of that work. This Court also finds Mr. Fuqua, their fee expert, credible and his work as an expert witness in this case thorough. The Court agrees with his conclusion that the hours charged to the City and commissioners were reasonable, with one minor exception, *see* section VI below.

B. The skill requisite to perform the legal service properly;

The skill required for counsel in the present consolidated cases was high. The attorneys had to understand and effectively argue vibrant and often amended Florida statutes and appellate case law, to include Sunshine laws and election laws, procedural requirements for declaratory judgments and injunctive relief and appeals.

C. The likelihood that undertaking the case would preclude other employment;

The parties did not present related evidence or argue this factor. Nonetheless, it is apparent from the mere nature and extent of the multitude of hearings and filings that such a level of effort would have affected any law practice's ability to focus on other clients.

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

The court heard credible and reliable testimony from defense counsel and from defendant's fee expert, Mr. Fuqua. Mr. Fuqua testified that the hourly rates sought by defendants are quite low and certainly in keeping with similar attorneys doing similar work in this circuit. This is consistent with the Court's own experience and analysis. Even the plaintiff must agree, at some level, because two of the three attorneys representing him charged the City (in another matter) $400 an hour for legal services.

The Court finds that the customary or market rate for services in this circuit is the range of $250 per hour to $400 per hour, likely dependent on whether the specific client provides occasional work or volume business. All of the hourly rates claimed by defendants fall within or below this range; most below. They are undoubtedly reasonable.

E. The amount involved;

The plaintiffs in the consolidated cases did not seek any compensatory damages per se, except for possible payments to Mr. McLean for back pay or benefits. However, they sought attorneys' fees and costs for declaratory and injunctive relief that, had it been granted, would have caused the revision of city business and a special election, all for which the end tally of attorneys' fees and costs to the City would have been very high.

F. The time limitations imposed by the client or by the circumstances;

The time limitations for these cases were severe. Because of the nature of declaratory and injunctive relief, especially regarding the discharge of a city manager and a special election, the timetables for discovery and preparation for hearings were short. The plaintiffs contributed to this pressure by requesting expedited proceedings and hearings on preliminary injunctive relief.

G. The nature and length of the professional relationship with the client; and

The parties did not present evidence on this factor.

H. The experience, reputation, and ability of the lawyers performing the services.

Although their time as practicing attorneys varied, some are more senior than others, all of the attorneys requesting reimbursement for their work to compel compliance with the settlement are experienced attorneys who handle litigation to include trial work.

VI. Conclusions of Law

Plaintiff and plaintiff's counsel offered four legal arguments against the present fee request. Three of the four were without merit and fail.

First, they argued that defendants did not "use their best efforts" to agree on an amount to be awarded as ordered by the Court. It was undisputed that defendants offered, along with conditions, to reduce the fee request to $25,000 to settle the matter and that plaintiff and plaintiff's counsel never responded with their own offer or counteroffer. As a matter of law, this argument is specious.

Second, they argued that defendants never actually moved or requested attorneys' fees. This argument is also specious, *see* procedural history above.

Third, they argued that the start date for time expended should not be the date proposed by defendants. Unfortunately, plaintiff was unable to provide a credible or persuasive rationale why another date would have been more appropriate; they basically just stated that the date should be later. To the contrary, defendants did provide a rational for their proposed start date—the date it became clear that plaintiff was not providing a general release as required by the settlement and, instead, was coming up with meritless reasons why he should not.

Fourth, they vaguely argued that attorney Roberts' work, in his role as liaison between the City and outside counsel, was duplicative of or superfluous to the work performed by the other attorneys.

Collaborative work between a city attorney and outside counsel is not automatically duplicative:

> Duplicative time charged by multiple attorneys working on the case are generally not compensable. However, the mere fact that multiple lawyers collaborated on a particular task does not necessarily mean that their work was duplicative. An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation. Thus, a reduction is warranted only if the attorneys are unreasonably doing the same work. . . . Still, time spent in attorney conferences is generally compensable for each participant. This is because attorneys must spend at least some of their time conferring with colleagues, particularly their subordinates, to ensure that a case is managed in an effective as well as efficient manner. Also, the delegation of work to attorneys who bill at a lower rate than lead counsel can reduce the overall amount of attorney's fees incurred.

Spanakos v. Hawk Sys., Inc., 362 So.3d 226, 241 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D808a].

As in *Spanakos*, the collaboration here, "reflected the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation. *Id*. It reflected Mr. Roberts doing exactly what a city attorney is supposed to do.

Although the plaintiff did not challenge specific time entries in this regard, the Court independently reviewed the time records and will give the plaintiff the benefit of the doubt, again, and strike three hours from Mr. Roberts' fee request.

Finally, there is a matter that deserves mention. The exact contours of Rule 1.730(d) sanctions are not very well defined in our appellate case law. For example, it is not clear whether the attorney's fee assessment for enforcing a settlement condition is paid by the client, by the lawyers, or both, and there is no apparent guidance as to how an assessment is divided among multiple lawyers. Luckily, the parties agreed at the hearing to have the assessment levied against the lawyers only and to be split three ways equally.

More confounding is a holding by the Fourth District that applies the strict procedure of an inherent authority sanction (inequitable conduct doctrine) under *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002) [27 Fla. L. Weekly S357b], which involved the imposition of attorney's fees against a party's attorney, and which requires bad faith findings. *Cox v. Great Am. Ins. Co.*, 88 So.3d 1048, 1049 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1271c].

In the very same case, the Fourth District went on to note the following when addressing whether there should be fees awarded for litigating the amount of the assessment:[5]

> While judgments for fees under the rule, the statute, and the doctrine could all be classified as sanctions, the law in this district is that when it comes to awarding fees for fees, not all sanctions are created equal. Rule 1.730(c) appears to allow for sanctions after relatively mild transgressions—a breach or failure to perform under a mediation agreement. Section 57.105 fees were awarded in Wood where the lawsuit was without merit from its inception. 54 So.3d at 1083-84. Fees could be justified under rule 1.730(c) for conduct that does not come close to triggering entitlement under the inequitable conduct doctrine.

Cox at 1050.

So the Fourth District has held that Rule 1.730(d) sanctions are serious enough to come under the equitable conduct doctrine (*Moakley*), but also mild enough to preclude fees for determining the amount of fees.

The real relevance of this discussion is whether this Court is required to make the strict findings required under the inequitable conduct doctrine regarding the present matter. The Fourt District appears to say yes. *Cox* at 1049 ("Rather than make the findings with the 'high degree of specificity' that Moakley requires, the final judgment summarily grants Great American's motion for attorney's fees.").

Importantly, in the only published opinion on the matter that this Court can find, our district court, the First District, was given a chance to address the contours of Rule 1.730(d)[6] in *Massey v. Beagle*:

> The trial court found Appellant attended the mediation without the required authority to settle and entered a judgment of $2,248.17 against him, as a sanction under Rule 1.720(b), Florida Rules of Civil Procedure. The court denied Appellant's motion for sanctions against Appellees.
>
> Pursuant to the Florida Rules of Civil Procedure, sanctions are applicable in mediation only where a party fails to appear for mediation, or a party fails to perform under the terms of a mediation agreement. Fla. R. Civ. P. 1.720(b) & 1.730(c).

754 So.2d 146, 147 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D755b] (citation omitted).

The First District did not engraft the inequitable conduct doctrine upon the rule. And the doctrine had been around for a long time prior to *Massey*. *See Bitterman v. Bitterman*, 714 So.2d 356, 365 (Fla. 1998) [23 Fla. L. Weekly S168a] ("The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith."). In fact, the Fourth District cited to *Bitterman* in *Cox* to presumably support its application of the inequitable conduct doctrine. *Cox* at 1049. The First District apparently did not get the same message from *Bitterman*, or at least did not think it needed comment.

Accordingly, this Court respectfully disagrees with the Fourth District's conclusion that bad faith findings are required under Rule 1.370(d). Of paramount importance here is that the First District has not followed that path.

Nonetheless, should this Court be wrong, and the First District reach the same conclusion as the Fourth, bad faith findings for the present matter have been issued and, thus, this Court has complied with the requirement. In its Order Granting Motion to Enforce Settlement (Doc. 377), the Court made the following findings:

> 1. Mr. Sapp attended a Court ordered mediation, in person, with his attorneys who were also physically present, with him, in the same room.
>
> 2. Mr. Sapp and his attorneys signed and duly executed the settlement agreement that included the general release requirement stated above.
>
> 3. During the weeks following mediation, Mr. Sapp's attorney attempted to negotiate a "carve out" for Mr. Sapp that would allow him to get around the general release. The attempt was ultimately unsuccessful.
>
> 4. Months after mediation, when it was clear that a carve out would not be given to Mr. Sapp, Mr. Sapp's attorneys argued that he was mentally incapacitated at the time of mediation and, therefore, the settlement, or at least the condition of a general release, should be invalidated.
>
> 5. Contrary to their argument, the evidence indicated references to Mr. Sapp's ongoing medical appointments and medical condition around the time of mediation were unrelated to the conduct of mediation.

Id. at 3.

There is, however, one thing about which the Fourth District is sure. Failure "to execute the release as required under the Settlement . . . was a 'failure to perform' the terms of the Settlement,' " as provided in Rule 1.730(d). *Pompano Masonry Corp. v. Anastasi*, 125 So.3d 210, 213 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D295a].

VII. Final Words (Conclusion)

Not only were the defendants convinced that plaintiffs had pursued frivolous and bad faith litigation in the first case; they also filed motions for sanctions in two of the current consolidated cases—2022

CA 401 and 2022 CA 1498. Defendants agreed to withdraw those two additional sanctions motions as part of the very settlement that Mr. Sapp and Mr. Mclean violated by not providing Mr. Sapp's general release; the reason we are here. This Court agrees with defendants in that the nature of litigation in all of these cases is troublesome to say the least, but especially the current release matter. *See Cent. Square Tarragon LLC v. Great Divide Ins. Co.*, 82 So.3d 911, 915 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1467a] ("Our system of justice depends upon lawyers as officers of the court. Here, [ ] counsel abandoned that role and engaged in gamesmanship by failing to honor the stipulation.").

It is hard not to conclude that political and personal motivations related to Mr. McLean's discharge have driven this multitude of lawsuits targeting the City of Quincy and its commissioners over the last two years. The city's public officials deserve better. This community deserves better. The Second Judicial Circuit courts deserve better. As one federal district court noted when sanctioning of lawyers in Michigan: "Plaintiffs' counsel's politically motivated accusations, allegations, and gamesmanship may be protected by the First Amendment when posted on Twitter, shared on Telegram, or repeated on television. The nation's courts, however, are reserved for hearing legitimate causes of action." *Timothy King, et al. v. Gretchen Whitmer, et al.*, Civil Case No. 20-13134, p. 101, Opinion and Order, United States District Court, Eastern District of Michigan, Southern Division, Honorable Linda V. Parker.

To be clear, the assessments issued in this order are not a punishment; they are strictly compensation for additional, unnecessary work. Nonetheless, the Court hopes that plaintiff's counsel will at some level be deterred and reconsider their standards for accepting and litigating cases.

Therefore, it is ORDERED and ADJUDGED that:

1. The City's motion for taxation of attorneys' fees is GRANTED.

2. Commissioner Harris and Dowdell's motion for taxation of attorneys' fees is GRANTED.

3. Attorneys' fees in the amount of $30,533.75 are assessed against Mr. McLean, Mr. White, and Mr. Thaler. Each attorney is responsible for a third of that amount.

4. Mr. McLean, Mr. White, and Mr. Thaler must comply with this order and reimburse the City $30,533.75 within a reasonably prompt time period or be subject to post-judgment collection. A final judgment will be separately entered against each attorney.

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[1]*Abraham Lincoln's Notes for a Law Lecture*. This document fragment was dated July 1, 1850 by Abraham Lincoln's White House secretaries, John Nicolay and John Hay, who collected many of his manuscripts after his death. The note in the Collected Works of Abraham Lincoln indicates that Lincoln could have written these observations several years later than 1850. It is not known, however, if Lincoln ever delivered this lecture.

[2]Rule 1.730(c) was moved to subsection (d) by amendment in 2022. The wording was not altered.

[3]They also filed a federal case, Case No. 4:23-cv-00354-WS-MJF, *Jack McLean, Jr. v. The City of Quincy, Florida; Commissioner Ronte Harris; Commissioner Keith Dowdell; Janice Shackelford Clemons, City Clerk*.

[4]The carve out is of no consequence since the case carved out, 21-CA-824, was resolved by summary judgment in favor of defendants and an affirmance on appeal.

[5]Defendants did not request the recovery fees for the conduct of the hearing on amount

[6]Referred to as Rule 1.730(c) because the opinion was issued before the amendment.

* * *

Mortgage foreclosure—Homestead—Abatement—Death of mortgagor—Guardian ad litem—Motion to abate foreclosure action pending appointment of legal representative for estate of deceased mortgagor—Homestead property passed to mortgagor's heirs outside the estate, and no deficiency judgment is being sought—The legal owner of the property being foreclosed is the proper defendant in a suit to foreclose a mortgage—Because property at issue is homestead property, the legal owners in instant action are the heirs—Mortgagors who have conveyed to other parties all rights and interests in and to the mortgaged property are not necessary parties to the foreclosure suit unless there is a deficiency decree

U.S. BANK TRUST NATIONAL ASSOCIATION, Plaintiff, v. JAMES JONES, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2019-CA-1123. April 14, 2024. David Frank, Judge. Counsel: David Dilts, Howard Law, Boca Raton, for Plaintiff. T. Whitney Strickland, Guardian Ad Litem, Tallahassee, for Defendant.

ORDER GRANTING IN PART PLAINTIFF'S *ORE TENUS* MOTION TO ABATE CASE PURSUANT TO DESBRUNES V. U.S. BANK

This cause came before the Court for final hearing on April 9, 2024, during which plaintiff made an *ore tenus* motion to continue or otherwise abate the case pending a resolution of the Fourth District's recent opinion in *Desbrunes v. US Bank Nat'l Ass'n as Tr. for Structured Asset Sec. Corp. Mortgage Pass-Through Certificates, Series 2006-AM1*, 49 Fla. L. Weekly D373a (Fla. 4th DCA Feb. 14, 2024) and on the duly appointed Guardian Ad Litem's *Trial Memorandum Regarding US Bank vs. Desbrunes* (sic), and the Court having reviewed the papers filed and the court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

The Fourth District in *Desbrunes* issued a short opinion virtually striking the GAL procedure as to heirs in a foreclosure setting. When the mortgagor in *Desbrunes* died, the trial court did what the Court did here, it appointed a GAL to represent the unknown heirs and granted the mortgagee's motion to amend its complaint to add the known heirs of the decedent as party defendants. The Fourth District reasoned, "[t]hough timely filed and served, this motion was clearly improper under Florida Rule of Civil Procedure 1.260(a), which requires the joinder of the 'proper parties.' For a deceased party, the joinder of the estate's legal representative, such as the personal representative, is required." *Desbrunes* at 1.

At the hearing, both plaintiff and defendant expressed concerns that the opinion might be controlling on this Court. They are concerned because eviscerating the GAL procedure in foreclosures would cause a huge disruption. It would increase the time and expense involved in foreclosure litigation and has no apparent advantage to any party. The parties agreed that a continuance or stay may be best to give the *Desbrunes* case time to be reheard and appealed if applicable.

Florida Statute 49.31 provides:

> The court may appoint an ad litem for any party, whether known or unknown, upon whom service of process by publication under this chapter has been properly made and who has failed to file or serve any paper in the action within the time required by law. . . . If the court has appointed an ad litem to represent an interest and the ad litem discovers that the person whose interest he or she represents is deceased and there is no personal representative, guardian of property, or trustee to represent the decedent's interest, the ad litem must make a reasonable attempt to locate any spouse, heir, devisee, or beneficiary of the decedent, must report to the court the name and address of all such persons whom the ad litem locates, and must petition for discharge as to any interest of the person located.

There are two important points regarding this statute.

First, the appointment of a guardian ad litem (GAL) to search for heirs and represent unknown heirs has been used for decades in this state to address due process concerns created when a mortgagor in foreclosure dies. It has literally been the accepted procedure in every corner of this state without challenge. The concern is that a family member—heir—may have an interest in the property being foreclosed and has a right to be noticed and to be given the opportunity to assert

the interest in hopes of keeping the property in the family. The procedure of appointing a GAL to find or represent unknow interested parties in matters where property is at stake goes back to at least 1924, and likely earlier. *Wilson v. Drumright*, 99 So. 553, 553 (Fla. 1924).

Second, the clear wording of the statute above expresses the intent of the Legislature to provide a GAL procedure to complement probate procedures handled by a personal representative. They clearly are not repugnant to each other.

Critically important here is that the *Desbrunes* case conflicts with the holdings of the Third and Fifth Districts,

The core principle driving the *Desbrunes* opinion is that *the estate* of a decedent is the "party" that must be added to a foreclosure action via personal representative. The Third District disagrees.

The Third District makes it clear that it is the *legal owner* of the property being foreclosed who is the proper party. "One who holds the legal title to mortgaged property is not only necessary, but is an indispensable, party defendant in a suit to foreclose a mortgage." *DMG Inv. Tr., LLC v. Cepeda*, 49 Fla. L. Weekly D282c (Fla. 3d DCA Jan. 31, 2024), citing *Oakland Props. Corp. v. Hogan*, 96 Fla. 40, 117 So. 846, 848 (1928).

The Fifth District agrees with the Third and further explains that "...mortgagors who have conveyed all their rights and interests in and to the mortgaged property to other parties . . . [are not] necessary . . . parties to a suit to foreclose unless a deficiency decree is sought." *Sudhoff v. Fed. Nat. Mortg. Ass'n*, 942 So.2d 425, 428 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2613a] (internal quotations omitted), citing *Dennis v. Ivey*, 134 Fla. 181, 185, 183 So. 624 (1938).

All districts agree that "...title to the homestead passes to a person who is a member of the class described as the surviving spouse or heirs of the owner, the homestead will be exempt from forced sale for the claims of the deceased owner's creditors. . . . After the decedent's death, the heir has legal ownership of the property, and he or she may sell it without regard to decedent's creditors or administrative expenses. Where a decedent is survived by a spouse or lineal descendants, homestead property is not regarded as an asset of the estate and is not subject to administration by a personal representative. Under such circumstances, the homestead passes to the heirs completely outside of the will, by operation of law. *Morey v. Everbank*, 93 So.3d 482, 488 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1739a] (citations and internal quotations omitted).

In the present case, the property is homestead, passed to lineal heirs outside of any estate, the legal owners are the heirs, and there is no deficiency judgment sought. Although the *Desbrunes* case is light on factual details, it appears the present case is similar and, thus, this Court must decide to follow it or follow the approach of the Fourt and Fifth Districts. *Pardo v. State*, 596 So.2d 665, 667 (Fla. 1992). This Court adopts the approach used by the Third and Fifth Districts.[1]

Accordingly, it is ORDERED and ADJUDGED that plaintiff's motion to abate pursuant to *Desbrunes* is unnecessary and therefore DENIED as to that ground. However, the motion to continue is GRANTED as to the agreement of the parties to postpone the hearing until the *Desbrunes* case is reheard. The parties will contact the Judicial Assistant to re-set the final hearing at that time.

[1]Of primary importance is any holding on this matter by the First District, which would have obvious control here. The Court has found some language in First District holdings that suggest it agrees with the Third, but not expressly stated. What is certain is that there is no holding issued by the First District that agrees with the Fourth.

* * *

Baker Act—Involuntary commitment—Habeas corpus—Petitioner was unlawfully detained where hospital failed to file petition for involuntary commitment within 72 hours allowed for involuntary examination—Request for summary judgment as to petitioner's claims that he did not meet criteria for involuntary commitment is denied as there are factual issues raised by medical records—Petitioner not entitled to summary judgment on claims that his requests for habeas corpus petition, access to witnesses and documents, and correspondence from his attorney were denied given absence of reference to any such requests in petitioner's clinical record—Hospital is ordered to comply strictly with time standards for filing petitions for involuntary commitment under Baker Act

IN RE: J.R.G., Petitioner, and SPRINGBROOK HOSPITAL, Respondent. Circuit Court, 5th Judicial Circuit in and for Hernando County. Case No. 2021-MH-000167. July 14, 2023. Daniel B. Merritt, Jr., Judge. Counsel: Justin Seth Drach, Thoele | Drach, Jacksonville, for Petitioner. Frances Paula Allegra and Isabella Sanchez, Cole, Scott & Kissane, P.A., Miami, for Respondent.

ORDER GRANTING IN PART and DENYING IN PART PETITIONER'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court for hearing on April 26, 2023, upon the Petitioner's Motion for Summary Judgment with attachments and the Respondent's Opposition to Petitioner's Motion for Summary Judgment with attachments. The Court reviewed the Motion and Opposition thereto, the attachments, the Court file and record filings therein, heard argument of respective counsel, and the Court being otherwise more fully informed and advised in the premises, does make the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

I. Facts and Procedural History

1. On July 13, 2021, Petitioner, J.R.G., filed his Second Amended Petition for Writ of Habeas Corpus with Supporting Memorandum of Law and Demand for Judicial Inquiry pursuant to *Fla. Stat.* §394.459(8)(b).

2. The Affidavit of Petitioner, J.R.G., attached to the Petition avers under oath the following assertions:

a. Petitioner was held against his will by Springbrook Hospital (the "Respondent") at 7007 Grove Road, Brooksville, FL 34609.

b. Despite Petitioner requesting discharge, Petitioner was illegally detained against his will by Respondent.

c. Petitioner's confinement was illegal because Petitioner was not a threat to himself or to others and no authority or basis for confining Petitioner involuntarily existed at the time.

d. As of the filing of this action on February 14, 2021, Petitioner did not meet the criteria for involuntary inpatient placement. *Fla. Stat.* §394.467(6)(b) states in pertinent part that "The facility shall discharge a patient any time the patient no longer meets the criteria for involuntary inpatient placement, unless the patient has transferred to voluntary status."

e. Petitioner posed no threat of harm to himself or others.

f. Petitioner was capable of surviving with the help of his family.

g. Pursuant to *Fla. Stat,* §79.01, Petitioner was not a criminal defendant in the State of Florida nor was Petitioner being held pending any criminal proceeding.

h. Contrary to *Fla. Stat.* §394.459(8)(b), Respondent deprived Petitioner of the right to habeas corpus because Respondent unlawfully refused to provide to Petitioner with a petition for writ of habeas corpus.

i. Respondent inhibited representation of Petitioner by unlawfully failing and/or refusing to allow Petitioner's attorney access to witnesses. *Fla. Stat.* §394.467(4) states in pertinent part that "Any attorney representing the patient shall have access to the patient, witnesses, and records relevant to the presentation of the patient's case and shall represent the interests of the patient."

j. Respondent inhibited representation of Petitioner by failing and/or refusing to provide to Petitioner's attorney the documents pertaining to Petitioner's case, including the clinical record, Petition for Involuntary Placement, the first and second opinions in support, as required by *Fla. Stat.* §394.467(4) which states in pertinent part that "Any attorney representing the patient shall have access to the patient, witnesses, and records relevant to the presentation of the patient's case and shall represent the interests of the patient."

k. Respondent inhibited representation of Petitioner by unlawfully failing and/or refusing to provide to Petitioner correspondence sent to him by his attorney. *Fla. Stat.* §394.459(5)(b) states that "Each patient admitted to a facility under the provisions of this part shall be allowed to receive, send, and mail sealed, unopened correspondence; and no patient's incoming or outgoing correspondence shall be opened, delayed, held, or censored by the facility unless there is reason to believe that it contains items or substances which may be harmful to the patient or others, in which case the administrator may direct reasonable examination of such mail and may regulate the disposition of such items or substances."

3. The Petitioner's Second Amended Petition and Motion for Summary Judgment seeks redress in five (5) areas generally as outlined in oral argument by Petitioner at hearing which are correspondingly broken down to the below identified paragraphs of the Petitioner's Second Amended Petition as follows:

a. Petitioner was held unlawfully. *See Petition*, **¶7a through g.**

b. Respondent unlawfully refused to provide to Petitioner with a petition for writ of habeas corpus. *See Petition*, **¶7h.**

c. Respondent inhibited representation of Petitioner by unlawfully failing and/or refusing to allow Petitioner's attorney access to witnesses contrary to *Fla. Stat.* § 394.467(4). *See Petition,* **¶7i.**

d. Respondent inhibited representation of Petitioner by failing and/or refusing to provide to Petitioner's attorney the documents pertaining to Petitioner's case, including the clinical record, Petition for Involuntary Placement, the first and second opinions in support, as required by *Fla. Stat.* §394.467(4). *See Petition*, **¶7j.**; and

e. Respondent inhibited representation of Petitioner by unlawfully failing and/or refusing to provide to Petitioner correspondence sent to him by his attorney. *See Petition*, **¶7k.**

4. On June 8, 2022, Respondent, SPRINGBROOK HOSPITAL, filed a general denial by its Answer to Petitioner's Second Amended Petition for Writ Of Habeas Corpus and Demand for Judicial Inquiry pursuant to *Fla. Stat.* §394.459(8)(b) and raising the following Affirmative Defenses:

- Petitioner's Second Amended Petition for Writ of Habeas Corpus and Demand for Judicial Inquiry Pursuant to *Fla. Stat.* §394.459(8)(b) is moot and was moot when filed on 7/13/21 as Petitioner was discharged on 2/15/21.

- Petitioner's Second Amended Petition for Writ of Habeas Corpus and Demand for Judicial Inquiry Pursuant to *Fla. Stat.* §394.459(8)(b) fails to allege any facts articulating how his issue could be repeated or how it was of sufficient importance to merit a ruling.

- Petitioner's Second Amended Petition for Writ of Habeas Corpus and Demand for Judicial Inquiry Pursuant to *Fla. Stat.* §394.459(8)(b) fails to state a cause of action and should be dismissed.

- Pursuant to *Fla, Stat.* §394.459(8)(b), the Court's jurisdiction and authority is statutorily restricted to conducing a judicial inquiry and issuing any order that is needed to correct an abuse of the provisions of Section 394.459, Florida Statues.

- Respondent reserves the right to raise any additional affirmative defenses that may be appropriate and gives notice that the filing of this Answer should not be construed as a waiver of any appellate rights.

5. On September 8, 2022, Respondent filed Respondent's Opposition to Petitioner's Motion for Summary Judgment and the Affidavit of Martha Lenderman, MSW, (the "Lenderman Affidavit").

6. On December 6, 2022, the Court took judicial notice of the filings in Hernando County Circuit Court Case #2021-MH-000188 which reflects that a Petition for Involuntary Placement was not filed by Respondent until February 16, 2021.

7. On January 3, 2023, Frances Paula Allegra, Esq. and Amanda Nicole Lopez-Cardet, Esq. were substituted as counsel of record for Respondent and continued to adopt the claims and defenses made by Springbrook Hospital and their original attorneys and filed Respondent's Notice of Joinder and Adoption of Respondent's Opposition to Petitioner's Motion for Summary Judgment on February 21, 2023.

8. On Match 17, 2023, Respondent filed the Affidavit of Oren Wunderman, Ph.D. ("Wunderman Affidavit"), which was near identical to the Lenderman Affidavit.

II. Florida Summary Judgment Legal Standard

9. The Florida Supreme Court recently amended *Fla. R. Civ. Pro. 1.510* to adopt a new summary judgment standard. See *Tank Tech, Inc. v. Valley Tank Testino, LLC,* 334 So. 3d 658, (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1264b]. As amended, the Florida Rules of Civil Procedure provide that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law". *Fla. R. Civ. P. 1.510(a)*. This amended Rule 1.510 adopts the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), collectively the "federal summary judgment standard". On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact. *Wilder v. Meyer,* 779 F. Supp. 164, 166 (S.D. Fla. 1991). Additionally, all reasonable doubts about facts should be resolved in favor of the non-movant. *Id*. at 167.

10. Even under the newly adopted summary judgment standard, the focus remains "whether the evidence presents a sufficient disagreement to require submission to a jury". The appropriate test to determine the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the non-moving party" or "whether it is so one-sided that one party must prevail as a matter of law" or "where one party's version of the facts is blatantly contradicted by the record so that no reasonable jury could believe it". *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Of course, in this instance the Court is the trier of fact, not a jury, as there has been no demand or suggestion by the Petitioner of a right to a jury trial on the Petitioner's claims, but the legal principles remain the same as far as the Court's fact finding role.

III. Factual and Legal Analysis

11. As to the Petitioner's claims set forth in **¶7a and b** of the Second Amended Petition, *Fla. Stat.* §394.463(2)(g) unambiguously states that "The examination period must be for up to 72 hours." *Fla. Stat.* §394.463(2)(g) also requires that the petition must be filed "within the examination period". The record deposition transcripts, court filings, and medical chart and notes reflect the following: Petitioner was Baker Acted on February 6, 2021, at Ocala Regional Hospital. Petitioner was medically cleared on February 9, 2021, at 11:40 at the latest, thus starting the 72 hour involuntary examination

period at that time. Springbrook agreed that a Petition for Involuntary Placement had to be filed at least before 11:40 a.m. on February 12, 2021. Springbrook agreed that the admission time of a patient coming from Ocala Regional Hospital is not when the 72 hour involuntary examination period begins. Springbrook agreed that it is and has been Springbrook Hospital's policy and procedure to use the admission time to calculate the 72 hours. Springbrook agreed that the policy and procedure violated the 72 hours allowed for an involuntary examination under Florida's Baker Act as to the Petitioner. Martha Lenderman, MSW, Respondent's expert and author of the Lenderman Affidavit, agreed that Springbrook Hospital did in fact violate *Fla. Stat.* §394.463 because they held J.R.G. longer than the 72 hours allowed for an involuntary examination without filing a timely petition. Lenderman swore by deposition testimony that Springbrook Hospital missed the deadline to file a Petition for Involuntary Inpatient Placement. Lenderman conceded that Springbrook Hospital did not act in full compliance with Chapter 394 and all applicable Florida Administrative Codes, contradicting ¶24 of her Lenderman Affidavit.

The time for the filing of a Petition for Involuntary Commitment under the Baker Act by the Respondent expired on Friday, February 12, 2021, and filing thereof on February 16, 2021, was untimely. The Respondent first received demand for discharge of the Petitioner/patient from the facility by correspondence from Petitioner's attorney on Sunday, February 14, 2021, which is also by record indication of when the Respondent first became aware the Petitioner was represented by an attorney. The Petitioner/Patient was found stable for release and was released the next day on February 15, 2021.

There is nothing in the record, pleadings, filings, exhibits, and attachments suggesting the Petitioner was there at Respondent's facility after the expiration of the time for filing a Petition for Involuntary Commitment on a voluntary admission status basis. Though the Petitioner may have been lawfully held at Respondent's facility in compliance with law initially as set forth below, but being disputed by the Petitioner, once the Respondent facility failed to file the Petition for Involuntary Commitment in a timely fashion, the Petitioner was illegally and unlawfully detained until released on February 15, 2021, and the Court so finds. The Respondent argues "good faith" compliance with the time period requirement within which a Petition for Involuntary Commitment must be filed but cites to no legal authority in support. As such, Petitioner is entitled to summary judgment as to his claims in **¶7a and b** because there is no genuine issue of disputed material fact as to this claim and the Petitioner is entitled to judgment as a matter of law.

12. As to the Petitioner's claims set forth in **¶7c through f**, the Report of Law Enforcement Initiating Involuntary Examination, First and Second Opinions supporting Petition for Involuntary Placement, medical chart/patient records/notes, and discharge summary reflect the following: Petitioner initially caused himself to be Baker Acted by his own suicidal drug overdose self-harming conduct.[1] He is alleged to have taken a full bottle of prescription medication, becoming unconscious as a result and requiring transport to a medical hospital in Ocala, Florida, and subsequent transport to the Respondent's mental health facility. There is indication from the Petitioner himself that he ingested 15-20 seroquel pills and approximately 10 hydroxyzine pills. He was further indicated to have a history of seizures and strokes. His admitting diagnosis was bi-polar disorder current episode hypomanic with indication of impulsive behavior and poor insight. He was further indicated to be suffering from paranoia and delusional thinking. His then current medications upon admission were Effexor, Wellbutrin, Vimpat, Seroquel, Phenobarbital, Atarax, Imitrex, Valtoco, Xcopri, and Aptiom and, other than that . . . no other medications upon admission were indicated. Additionally, he was observed as tearful, extremely anxious, rapidly shaking both legs, moving his hands multiple times from the table to his chair, poor eye contact, unable to sit still, and admitting of chronic suicidal ideation. Further, the Petitioner/Patient suffered from poor coping skills, poor insight and judgment, relationship stressors, and medical comorbidity. Pursuant to the Petitioner's Discharge Summary, the Court notes that the Petitioner was Baker Acted because "he was not getting any sleep and took too much medications". He was further indicated to have a "history of seizure disorder as well as a traumatic brain injury".

Additionally, "the patient gave consent for case management to speak with his girlfriend" (but, interestingly, consent to speak with anyone else, including an attorney, was nowhere mentioned in any of the Petitioner/patient records). The patient's anxiety was noted to be very high and by the time of his release his mood, depression, and anxiety had improved though he had also suffered one seizure episode while at the facility and transported to a medical hospital for medical clearance and then was returned to Springbrook. His discharge diagnosis was bipolar disorder, depressed, severe without psychotic features, generalized anxiety disorder, seizure disorder, migraines, and traumatic brain injury. He was discharged with outpatient care.

Petitioner's bald assertions set forth in his Second Amended Petition and Affidavit as to **¶7c through f** are refuted by the record, constitute mixed conclusions of law and medical expert opinion (areas in which the Respondent is not competent to opine as a lay person), and are patently not credible in light of the medical records substantially reflecting the Petitioner to be in the midst of a substantial medical and mental health crisis at the time, which by implication, additionally undermines the veracity of his further sworn assertions in **¶7h through k** below.

Accordingly, there remains a genuine issue of disputed material fact on these claims for the reasons herein and as argued and set forth in the Respondent's Opposition to the Petitioner's Motion for Summary Judgment and Petitioner's request for summary judgment should be denied as to these claims.

13. As to the Petitioner's claim set forth in **¶7g**, the Petitioner was not a criminal defendant nor being held pursuant to criminal proceedings. However, this claim is irrelevant as the basis of the Petitioner's lawful detention was pursuant to the Florida Baker Act, not criminal proceedings. Therefore, any relief requested by Petitioner's Motion for Summary Judgment as to this claim should be denied.

14. As to the Petitioner's claims set forth in **¶7h through k**, it is not disputed that the Petitioner/Patient was provided with written Notice of Right to Petition for Writ of Habeas Corpus or for Redress of Grievances informing him that he would be provided a copy of the recommended Habeas Petition form upon his request.

By judicial notice, the Court has presided weekly over the Baker Act docket in Hernando County, Florida, since November 30, 2010. During that time and not infrequently the Court has on multiple occasions presided over hearings upon habeas petitions filed *pro se* by patients at Springbrook, filed upon the same form referenced by Petitioner, and at the same referenced facility of the Respondent whereat the Petitioner was a patient. There was also deposition testimony in the record consistent therewith that when a patient asks for one (a petition for habeas corpus) a form petition is provided to them. However, in this case there is nothing in the extensive medical notes and filings in this cause suggesting the Petitioner specifically "requested" a habeas corpus petition from someone at the Respondent's facility, that Respondent "refused to provide" to Petitioner the same, that the Respondent ever asked to have contact with or speak to an attorney then representing him at the time, or that the Respondent inhibited attorney representation as referenced in **¶7i, j, and k,** other than as baldly asserted in Petitioner's Affidavit approximately five (5) months after his hospitalization at Springbrook where he was at the time then indicated to be suffering from severe mental health issues affecting his faculties.

The absence of evidence is evidence, i.e., meaning, the fact that there is no documentation or notation of a request by Petitioner of a Respondent facility staff member for a petition for habeas corpus or to contact or speak with an attorney in any of the Petitioner's medical records, notes, and charts, is also evidence of the non-existence of such requests having ever been made by Petitioner. This is a common sense assumption by this Court especially in the context of medical chart and patient medical note record keeping and general professional business record and documentation practices. *Surely*, one must reasonably ask, if a request had been made for a habeas corpus petition or to speak with his attorney by Petitioner or a request to speak with witnesses or staff by an attorney or a request for documents and clinical record by an attorney on behalf of the Petitioner/Patient or a request to provide correspondence to the Petitioner/Patient by his attorney, then there would be a note *somewhere* in the Petitioner/Patient's medical chart, notes, and records. There is none. The Petitioner's proposition that the Court simply accept the Petitioner's bald assertions by affidavit as fact under the circumstances of this case when combined with Respondent's mental health related confinement and condition at the time defies credulity, absent a belief by the Court of a wholesale orchestrated conspiracy by what one would have to reasonably assume would involve multiple individuals in the Respondent's employ and near facility wide and encompassing, which the Court . . . declines to do procedurally at summary judgment stage. The Court at this procedural juncture and as fact finder, having never seen or evaluated the credibility of any testimony the Petitioner might give in a trial setting or that of any other witnesses in this cause, cannot conclude that the evidence is such that a reasonable jury (or Judge) could not return a verdict (or judgment) for the non-moving party (the Respondent in this instance) or that the matter is so one-sided that Petitioner must prevail as a matter of law or that Respondent's version of the facts is blatantly contradicted by the record so that no reasonable jury could believe it. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). The Court finds genuine issues of disputed fact as to Petitioner's claims set forth in **¶7h through k** and Petitioner's Motion for Summary Judgment as to those claims should be denied for the reasons here set forth and upon the reasons, citations, and argument set forth in Respondent's Opposition to Petitioner's Motion for Summary Judgment.

IT IS THEREFORE,

ORDERED and **ADJUDGED** as follows:

1. The Petitioner's Motion for Summary Judgment as to claims set forth in **¶7a and b** of the Second Amended Petition be and the same are hereby **GRANTED**. The Respondent shall henceforth strictly comply with the time standards for filing Petitions for Involuntary Commitment under the Florida Baker Act as made and provided by law.

2. The Petitioner's Motion for Summary Judgment as to claims set forth in **¶7c and k** of the Second Amended Petition be and the same are hereby **DENIED**.

3. Pre-Trial Conference is hereby scheduled for **August 16, 2023, at 11:00 a.m.** At said pre-trial conference, scheduling of Trial of the remainder of the cause will be discussed and calendared. The hearing can be attended by zoom.

[1]To some extent perhaps and simply being dicta, the Court notes without prejudgment of any relevant factual and legal issues that remain pending before Court, that the Petitioner has ironically suffered the hoist of his own self-created legal petard, albeit perhaps when in an unstable mental state and lacking insight or control of his actions at the time. Yet now, he seeks legal redress and complains of the manner in which he was made stable for release by Respondent lessening the likelihood that he would re-attempt to take his life or, more cynically . . . . . , present opportunity to try again and do a better job of it which unfortunately happens all too often with repeat mental health related suicide attempts in the Court's experience.

* * *

Contracts—Construction—Code violations—Evidence—Defendants may not present evidence or argument suggesting that defendants merely followed custom in industry or community as defense or excuse for code violations

LAKESIDE VILLAGE TOWNHOMES HOMEOWNERS ASSOCIATION, INC., Plaintiff, v. BAILEY HOMES, INC.; A.R. BAILEY HOMES, LLC; WINDERMERE DEVELOPMENT CO., LLC, KEESEE AND ASSOCIATES, INC.; JAMES A. GARRITANI; ROBERT E. SMITH; SMITH-DAVIS CONSTRUCTION, LLC; GB CONSTRUCTION SERVICES, INC.; PROFESSIONAL SUNSHINE ROOFING, INC.; ALLIANCE PAVERS, LLC; BRANCO PREMIER STUCCO, LLC; J & N STONE, INC.; ALQ PAINTING, INC. d/b/a UNIQUE CUSTOM PAINTING, INC.; MADDUX ALUMINUM, INC.; 84 LUMBER COMPANY; and AMERICAN BUILDERS SUPPLY, INC., Defendants. A.R. BAILEY HOMES, LLC, Third-Party Plaintiff, v. SMITH-DAVIS CONSTRUCTION, LLC, GB CONSTRUCTION SERVICES, INC. PROFESSIONAL SUNSHINE ROOFING, INC., ALLIANCE PAVERS, LLC, BRANCO PREMIER STUCCO, LLC, J & N STONE, INC., ALQ PAINTING, INC. d/b/a UNIQUE CUSTOM PAINTING, INC., and MADDUX ALUMINUM, INC., Third-Party Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CA-007616-O. Division 43. John E. Jordan, Judge. Counsel: Brett J. Roth, Ball Janik, LLP, Orlando, for Plaintiff. Jayne A. Pittman, Conroy Simberg; and Robert E. Anderson, Yeslow, Koeppel & Anderson, P.A., for A.R. Bailey Homes, LLC, Defendant.

ORDER GRANTING IN PART PLAINTIFF'S MOTION IN LIMINE REGARDING CUSTOM AND PRACTICE IN THE COMMUNITY

THIS CAUSE came before the Court on "Plaintiff's Motion In Limine Regarding Custom and Practice in the Community," filed on January 30, 2024, and noticed as fully briefed on February 21, 2024 (the "Motion"). The Court, having reviewed the file, the Motion, noting that a response in opposition to the Motion was not submitted, and being otherwise fully advised of the premises, hereby

ORDERS and **ADJUDGES**:

1. The Motion is **GRANTED in part**, as outlined in this Order.

2. At trial, A.R. Bailey, their counsel, witnesses, and experts may not elicit testimony, make any arguments, or present any evidence suggesting or claiming that A.R. Bailey or its subcontractors merely followed what others in the industry/community have done as an explanation, defense, or excuse for any code violations present at the Lakeside Village Townhomes. *See Henry v. Britt,* 220 So. 2d 917, 920 (Fla. 4th DCA 1969) (internal citations omitted).

3. Nothing in this Order prevents any party from offering at trial evidence of custom and/or practice in the industry/community for purposes other than as an explanation, defense, or excuse for any code violations present at the Lakeside Village Townhomes. The Court will rule on any such instances during trial upon the offering party proffering the required predicate.

4. A.R. Bailey shall provide a copy of this Order to all witnesses to ensure the rulings outlined in this Order are followed at trial.

* * *

Contracts—Construction—Code violations—Evidence—Defendants may not present evidence or argument suggesting that there are no code violations on property or that violations were approved as result of any inspection or issuance of certificate of occupancy

LAKESIDE VILLAGE TOWNHOMES HOMEOWNERS ASSOCIATION, INC., Plaintiff, v. BAILEY HOMES, INC.; A.R. BAILEY HOMES, LLC; WINDERMERE DEVELOPMENT CO., LLC, KEESEE AND ASSOCIATES, INC.; JAMES A. GARRITANI; ROBERT E. SMITH; SMITH-DAVIS CONSTRUCTION, LLC; GB CONSTRUCTION SERVICES, INC.; PROFESSIONAL SUNSHINE ROOFING, INC.; ALLIANCE PAVERS, LLC; BRANCO PREMIER STUCCO, LLC; J & N STONE, INC.; ALQ PAINTING, INC. d/b/a UNIQUE CUSTOM PAINTING, INC.; MADDUX ALUMINUM, INC.; 84 LUMBER COMPANY; and AMERICAN BUILDERS SUPPLY, INC. Defendants. A.R. BAILEY HOMES, LLC, Third-Party Plaintiff, v. SMITH-DAVIS CONSTRUCTION, LLC, GB CONSTRUCTION SERVICES, INC. PROFESSIONAL SUNSHINE ROOFING, INC., ALLIANCE PAVERS, LLC, BRANCO PREMIER STUCCO, LLC, J & N STONE, INC., ALQ

PAINTING, INC. d/b/a UNIQUE CUSTOM PAINTING, INC., and MADDUX ALUMINUM, INC., Third-Party Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CA-007616-O. Division 43. March 11, 2024. John E. Jordan, Judge. Counsel: Brett J. Roth, Ball Janik, LLP, Orlando, for Plaintiff. Jayne A. Pittman, Conroy Simberg; and Robert E. Anderson, Yeslow, Koeppel, & Anderson, for Defendant, A.R. Bailey Homes, LLC.

ORDER GRANTING IN PART PLAINTIFF'S MOTION IN LIMINE REGARDING IMPROPER DEFENSE ARGUMENTS RELATING TO INSPECTIONS BY BUILDING DEPARTMENT AS APPROVALS OF CODE VIOLATIONS

THIS CAUSE came before the Court on "Plaintiff's Motion In Limine Regarding Improper Defense Arguments Relating To Inspections By Building Department As Approvals Of Code Violations," filed January 30, 2024, and noticed as fully briefed on February 21, 2024 (the "Motion"). The Court, having reviewed the file, the Motion, noting that a response in opposition to the Motion was not submitted, and being otherwise fully advised of the premises, hereby

ORDERS and **ADJUDGES**:

1. The Motion is **GRANTED in part**, as outlined in this Order.

2. At trial, A.R. Bailey, their counsel, witnesses, and experts may not present or elicit any testimony, evidence, or argument suggesting in any way that there are no building code violations at the subject property as a result of the fact that a Certificate of Occupancy was issued by Orange County, any building official, or any building inspector.

3. At trial, A.R. Bailey, their counsel, witnesses, and experts may not present or elicit any testimony, evidence, or argument suggesting in any way that there are no building code violations at the project as a result of the fact that Orange County, the building official, or any building inspector "passed" all inspections.

4. At trial, A.R. Bailey, their counsel, witnesses, and experts may not present or elicit any testimony, evidence, or argument suggesting that Orange County, the building official, or any building inspector approved of any code violation as a result of any inspection or issuance of a Certificate of Occupancy.

5. This Order does not prevent any party from calling the building official personally to testify at trial and inquire as to his/her observations.

6. A.R. Bailey shall provide a copy of this Order to all witnesses to ensure the rulings outlined in this Order are followed at trial.

* * *

Contracts—Construction—Code violations—Evidence—Defendants may not present evidence or argument suggesting that plaintiff's management company, repair contractors, or county and its inspectors are responsible for damages

LAKESIDE VILLAGE TOWNHOMES HOMEOWNERS ASSOCIATION, INC., Plaintiff, v. BAILEY HOMES, INC.; A.R. BAILEY HOMES, LLC; WINDERMERE DEVELOPMENT CO., LLC, KEESEE AND ASSOCIATES, INC.; JAMES A. GARRITANI; ROBERT E. SMITH; SMITH-DAVIS CONSTRUCTION, LLC; GB CONSTRUCTION SERVICES, INC.; PROFESSIONAL SUNSHINE ROOFING, INC.; ALLIANCE PAVERS, LLC; BRANCO PREMIER STUCCO, LLC; J & N STONE, INC.; ALQ PAINTING, INC. d/b/a UNIQUE CUSTOM PAINTING, INC.; MADDUX ALUMINUM, INC.; 84 LUMBER COMPANY; and AMERICAN BUILDERS SUPPLY, INC., Defendants. A.R. BAILEY HOMES, LLC, Third-Party Plaintiff, v. SMITH-DAVIS CONSTRUCTION, LLC, GB CONSTRUCTION SERVICES, INC. PROFESSIONAL SUNSHINE ROOFING, INC., ALLIANCE PAVERS, LLC, BRANCO PREMIER STUCCO, LLC, J & N STONE, INC., ALQ PAINTING, INC. d/b/a UNIQUE CUSTOM PAINTING, INC., and MADDUX ALUMINUM, INC., Third-Party Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CA-007616-O. Division 43. March 18, 2024. John E. Jordan, Judge. Counsel: Brett J. Roth, Ball Janik, LLP, Orlando, for Plaintiff. Jayne A. Pittman, Conroy Simberg; and Robert E. Anderson, Yeslow, Koeppel, & Anderson, for A.R. Bailey Homes, LLC, Defendant.

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE DEFENDANTS A.R. BAILEY HOMES, LLC AND ROBERT E. SMITH FROM ELICITING TESTIMONY, MAKING ARGUMENT, OR INSINUATING IN ANY WAY THAT THE ASSOCIATION'S MANAGEMENT COMPANY, THE ASSOCIATION'S REPAIR CONTRACTORS, OR ORANGE COUNTY AND ITS INSPECTORS WERE IN ANY WAY RESPONSIBLE FOR ANY OF THE DAMAGES

THIS CAUSE came before the Court on "Plaintiff's Motion in Limine to Preclude Defendants A.R. Bailey Homes, LLC and Robert E. Smith From Eliciting Testimony, Making Argument, or Insinuating In Any Way that the Association's Management Company, the Association's Repair Contractors, or Orange County and Its Inspectors Were in Any Way Responsible for Any of the Damages," filed January 30, 2024, and noticed as fully briefed on February 21, 2024 (the "Motion").

The Court, having reviewed the file, the Motion, noting that a response in opposition to the Motion was not submitted, and being otherwise fully advised of the premises, hereby

ORDERS and **ADJUDGES**:

1. The Motion is **GRANTED**.

2. A.R. Bailey Homes, LLC, its defense counsel, its witnesses, are precluded from presenting any evidence, argument, or testimony, that the Association's management companies, the Association's repair contractors, Orange County or any of its inspectors, and any other individual or nonparty not specifically named in A.R. Bailey Homes, LLC's affirmative defense are in any way liable for the damages in this case.

3. A.R. Bailey Homes, LLC, shall provide a copy of this Order to all witnesses to ensure the Court's rulings are followed at trial.

* * *

Contracts—Real property sale—Specific performance—Seller's failure to use reasonably diligent efforts to discharge financing statement naming seller as debtor and satisfy judgment that was valid lien against property—Decree of specific performance is granted to buyer—If seller fails to discharge financing statement and satisfy judgment prior to closing, closing agent shall use proceeds of sale to satisfy those obligations

SIMPLY SOLD ORLANDO, LLC, a Florida Limited Liability Company, Plaintiff, v. IVONNE L. REVERON, individually, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CA-001517-O. February 16, 2024. Margaret H. Schreiber, Judge. Counsel: Robert W. Anthony and Spencer M. Gledhill, Fassett, Anthony & Taylor, P.A., Orlando, for Plaintiff. David P. Reiner, II, Reiner & Reiner, P.A., Miami, for Defendant.

FINAL JUDGMENT GRANTING SPECIFIC PERFORMANCE

THIS ACTION came before the Court for a non-jury trial on January 2, 2024. The Court has considered the presentation of testimony, the documentary evidence admitted and arguments of counsel. Upon consideration, the Court enters the following Final Judgment.

FINDINGS OF FACTS

1. Plaintiff, SIMPLY SOLD ORLANDO, LLC, entered into a Residential Real Estate Contract (the "Contract") with the Defendant, IVONNE L. REVERON to buy her house in Orlando, Florida for $202,500. The Contract was prepared by Defendant's counsel, the law firm of Bogin, Munn & Munns, PA (Defendant's law firm or Seller's law firm).

2. The Contract was prepared on or about September 28, 2021. On that date, the Contract was emailed by Seller's law firm to the Plaintiff, was signed by the Plaintiff and returned the same day. *Exhibit 24, page 247-258.*

3. Also on September 28, 2021, the Seller's law firm, acting as the Defendant's attorney and the Closing Agent for the transaction, sent the Contract to the Defendant, who lived in New York and was in New York at the time.

4. Defendant signed the Contract on September 29, 2021 and on October 5, 2021 the Contract was received back by overnight delivery from the Defendant to the Seller's law firm. The Defendant's law firm then sent a copy of the Contract signed by the Defendant to Plaintiff and Plaintiff signed the Contract again on October 5, 2021, the same day it was delivered to the Plaintiff by the Defendant's law firm.

5. On October 5, 2021, Plaintiff delivered the fully-signed Contract to Seller's law firm. *Exhibit 25, page 912-925.*

6. The Contract called for the Plaintiff to deposit $5,000 with the Defendant's law firm. The $5,000 was timely deposited by the Plaintiff on October 5, 2021, and continues to be held in the escrow account of the Defendant's law firm. The Contract called for a closing date of October 15, 2021.

7. The Contract also called for the issuance of a Title Commitment and contained the following provisions in paragraph 18:

> A. Title:
>
> (i) TITLE EVIDENCE; RESTRICTIONS; EASEMENTS; LIMITATIONS: Within the time period provided in Paragraph 9(c), the Title Commitment, with legible copies of instruments listed as exceptions attached thereto, shall be issued and delivered to Buyer. **The Title Commitment shall set forth those matters to be discharged by Seller at or before Closing** and shall provide that, upon recording of the deed to Buyer, **an owner's policy of title insurance** in the amount of the Purchase Price, **shall be issued to Buyer insuring Buyer's marketable title to the Real Property, subject only to the following matters:** (a) comprehensive land use plans, zoning, and other land use restrictions, prohibitions and requirements imposed by governmental authority; (b) restrictions and matters appearing on the Plat or otherwise common to the subdivision; (c) outstanding oil, gas and mineral rights of record without right of entry; (d) unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to rear or front lines and 7 ½ feet in width as to side lines); (e) taxes for year of Closing and subsequent years; and (f) assumed mortgages and purchase money mortgages, if any **(if additional items, attach addendum);** provided, that, none prevent use of Property for RESIDENTIAL PURPOSES. If there exists at Closing any violation of items identified in (b)-(f) above, then the same shall be deemed a title defect. Marketable title shall be determined according to applicable Title Standards adopted by authority of The Florida Bar and in accordance with law.

(emphasis added).

8. The Contract had no addendum, therefore no "additional items" were part of the Contract for purposes of the Buyer's owner's policy of title insurance.

9. The Title Commitment required the following matters to be discharged by the Seller under a section referred to as "Requirements". Among the requirements were the following:

> 13. Record the termination of UCC Financing Statement naming ISPC, as secured party, and Isabel Reveron and Paula Reveron, as debtor, filed 03/13/2008 of record in Official Records Book 9626, Page 4895 and continuation recorded in Official Records Book 10517, Page 1067, and continuation recorded in Official Records Instrument No. 20180029892, of the Public Records of Orange County, Florida.
>
> 14. Satisfaction of Judgment in favor of The Independent Savings Plan Company d/b/a ISPC against Isabel Reveron and Paula Reveron, in the amount of $8,838.36 plus court costs & interest, entered on 10/25/2010 as Case Number 10-023085-CC and recorded 10/19/2020, in Official Records Instrument No. 20200544064, of the Public Records of Orange County, Florida.
>
> 10. There were no mortgages or other liens on the subject property.

The Final Judgment referred to in item 14 was related to the UCC Financing Statement referred to in item 13 and the same creditor, The Independent Savings Plan Company d/b/a ISPC, was the creditor under both instruments. The 2010 Final Judgment had been re-recorded on October 19, 2020 and constituted a valid lien against the property that needed to be removed according to the Title Commitment.

11. Title to the subject property was previously in the names of both Isabel A. Reveron and Ivonne L. Reveron, as joint tenants with rights of survivorship. When Isabel A. Reveron, Defendant's aunt, passed away on February 24, 2018, title to the subject property was solely owned by the Defendant. Paula Reveron, also named on the Final Judgment, is Defendant's mother. No one currently resides at the subject property and no one has for years.

12. Defendant was made aware of items 13 and 14 prior to September 15, 2021. She also received an email from her attorney Jeremy Holt of Bogin, Munns & Munns on September 15, 2021 specifically outlining the title search results, including a description of the money judgment which was a certified judgment and valid lien until 2030. Although the Defendant had actual knowledge of items 13 and 14 no later than September 15, 2021, she nevertheless signed the Contract on September 29, 2021 and did not expressly mention either the Final Judgment or UCC Financing Statement in the Contract.

13. The Contract did mention in paragraph 20 that the Buyer would pay all "closing costs except Seller attorneys' fees." Paragraph 9 of the Contract detailed what closing costs would normally be paid by a seller and what closing costs would be normally paid by a buyer and line 158 of the Contract checked the box where the Defendant would designate the Closing Agent and would pay various closing costs. Consequently, paragraph 20 was a provision that was typed in as a special additional provision and in accordance with Standard 18(R) on line 524 of the Contract, the typed written provision in paragraph 20 controlled the printed provisions in paragraph 9.

14. The undisputed testimony was that the phrase "closing costs" included within paragraph 20 referred to all of the detailed closing costs identified in paragraph 9. Paragraph 9 also included a section for both seller closing costs and buyer closing costs identified as "Other" with a blank line; nothing was inserted on either of the blank lines.

15. An email was sent to Defendant's husband on August 26, 2021 by Plaintiff's representative which stated that the buyer would pay the seller's "traditional closing costs." The email also provided: "now do keep in mind that this doesn't include any liens, lines of credit or mortgages owned on the house if any." *See Exhibit 24, page 214-215.* Defendant also referred to "traditional closing costs" in her 3rd and 4th Affirmative Defenses. No testimony contradicted the testimony of several witnesses that closing costs did not include discharging the debt to ISPC referenced in items 13 and 14 of the Title Commitment.

16. The Final Judgment against Isabel Reveron was for the total amount of $8,838.36. Seller's law firm calculated that the amount owed as of September 20, 2021 was slightly less than $15,000. Defendant was advised on September 14, 2021 by Mel Taft of Bogin, Munns & Munns that she had contacted ISPC and was advised the debt related to a "loan for a water conditioner for the house that was installed by The Water Source in 2008." *Exhibit 24, page 197-198.* This email advised Defendant "the debt needs to be paid off."

17. The Plaintiff, as the buyer, had no responsibility under the Contract to pay the Final Judgment or make efforts to resolve items 13 and 14 on the Title Commitment.

18. The Defendant, as the seller of the property, had the legal responsibility under the Contract to discharge those matters in order for a title insurance policy to be issued for the Plaintiff. No competent, substantial evidence was provided by the Defendant to support the defense that Defendant used reasonable diligent efforts to discharge the obligations and requirements as set forth in items 13 and 14.

19. Paragraph 15 (b) of the Contract contained a provision that upon a default by the seller, the buyer had the right to seek specific performance of the Contract. Paragraph 17 of the Contract contained a provision that the prevailing party shall be entitled to recover from the non-prevailing party costs and fees, including reasonable attorneys' fees incurred in conducting any litigation related to the Contract.

20. The Contract in Standard 18(O) on line 510-512 states: Notice and delivery given by or to the attorney. . . representing any party shall be as effective as if given by or to that party.

21. In this case, after the Defendant retained the Seller's law firm, the Plaintiff's representatives dealt directly with the Seller's law firm related to the notice and delivery of the Contract itself.

22. An Agreement to Assign Contract For Sale and Purchase was entered by the Plaintiff with a third-party company dated October 5, 2021. *Exhibit 24, page 231.* When the Contract did not close on October 15, 2021 or within 60 days thereafter, the assignee under this agreement agreed with Plaintiff to transfer its down payment under the agreement to another property, which was done in December 2021. Those two parties agreed that the assignment related to this case was no longer effective. This agreement did not involve the Defendant and Defendant was not a party to this agreement. The undisputed testimony from two of Plaintiff's witnesses was that the Plaintiff agreed to terminate the effectiveness of the agreement related to 528 Southern Charm Drive when the third party agreed to deal with a different property because of the delays in getting to a closing for the property of 528 Southern Charm Drive.

23. During the period between the date of the Contract and January 20, 2022, Plaintiff's representatives continued to communicate with either Defendant or Defendant's representatives and continued to actively seek a closing to buy the property. Those communications included one on January 17, 2022 when Josh Black spoke to Defendant's husband who said if the lien is legitimate they would "just pay it." *Exhibit 18.* When those efforts failed, Plaintiff filed this lawsuit in February, 2022.

24. No evidence was presented by the Defendant as to any efforts to get a homestead determination done while she was being represented by Bogin, Munns & Munns, PA. Testimony was presented and argument made that a Notice of Homestead as set forth in Section 222.01, Florida Statutes, was attempted at some point in time, but was rejected by the recording department. Section 222.01(2), Florida Statutes, states "a person who is entitled to the benefit of the provisions of the State Constitution exempting real property as homestead and who has a contract to sell or a commitment from a lender for a mortgage on the homestead may file a Notice of Homestead in the public records of the county in which the homestead property is located". The statute provides a suggested form to be used. Defendant did not present any evidence of any actual Notice of Homestead signed by her or rejected by the recording department or Clerk of Court. Further, Defendant admitted she did not initiate a probate proceeding for Isabel A. Reveron in order to record a Notice of Homestead signed by a court-appointed personal representative of Isabel A. Reveron.

25. Despite options available to Defendant (*e.g.* transferring the lien to security through Florida Statute Section 55.01, escrow holdbacks, negotiating a payoff), Defendant made no attempts to discharge or clear the matters set forth in items 13 and 14.

26. Defendant asserted that the Contract was invalid pursuant to paragraph 3 because the Plaintiff did not sign the Contract until after the stated date of acceptance. The Court finds this argument to be without merit.

27. The Plaintiff was at all times ready, willing and able to purchase the property and proceed to closing. The Plaintiff had the ability to make the necessary financial arrangements to purchase the property in its own name if necessary.

28. The Plaintiff hired the law firm of Fassett, Anthony & Taylor, PA to initiate this action in February, 2022 and Plaintiff has agreed to compensate the law firm on an hourly rate basis. The Contract in paragraph 16 contains a prevailing party attorneys' fee provision.

29. Plaintiff did not produce any evidence of any specific incidental monetary damages suffered other than its obligation to pay attorneys' fees in order to obtain a decree of specific performance. Likewise, Defendant presented no evidence of any specific incidental monetary damages that the Defendant would suffer by a decree of specific performance. Testimony related to the value of the house and the payment of the real estate taxes and maintenance expenses by the Defendant were general in nature and no specific evidence was presented to substantiate such testimony.

CONCLUSIONS OF LAW

30. The Court is guided by the following principles related to the Contract at issue in this case: "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing." *Gendzier v. Bielecki,* 97 So. 2d 604, 608 (Fla. 1957).

31. The Contract in this case was a valid contract between the Plaintiff as the buyer and the Defendant as the seller. There is no "legally sound" reason not to enforce the Contract through a decree of specific performance. *Muñiz v. Crystal Lake Project, LLC,* 947 So. 2d 464, 469 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2650a].

32. The deadline of September 29, 2021 set forth in paragraph 3 of the Contract does not bar enforcement of the Contract as a legally binding agreement. Plaintiff actually did sign the Contract on September 28, 2021 and delivered the signed Contract to Seller's law firm on that same date. Additionally, the September 29, 2021 deadline was waived by the Defendant returning the Contract to Defendant's law firm after September 29, 2021 and by the Defendant's law firm delivering the Contract to the Plaintiff after the deadline had passed. Because the deadline had passed, "an acceptance term is deemed waived, (and) the offeree has a reasonable period of time within which to accept the offer." *Hammond v. DSY Developers,* LLC, 951 So. 2d 985, 988 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D708a] (holding "as a matter of law" that the actions "constituted an implied waiver of the acceptance date."). The Court construes the two signed Contracts together as constituting one Contract. *See Cushman v. Smith,* 528 So.2d 962, 964-965 (Fla. 1st DCA 1988).

33. Based upon the facts, the Defendant is precluded from defending against enforcement of the Contract due to Defendant's own failure to agree to discharge the matters which she was obligated to discharge under the Contract. *See D & E Real Estate, LLC v. Jose Vitto,* 260 So. 3d 429, 435 (Fla. 3rd DCA 2018) [43 Fla. L. Weekly D2654b] (holding that the title clauses of the Contract are "put in place for the benefit of the buyer," therefore a seller cannot rely on such clauses to avoid seller's own contractual obligations.)

34. The Defendant did not exercise reasonably diligent efforts to discharge items 13 and 14 which were Defendant's responsibility. *See D & E Real Estate, LLC v. Jose Vitto,* 260 So. 3d 429, 436-437 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2654b].

35. The Defendant has defaulted by failing to close and by failing to discharge items 13 and 14 set forth in the Title Commitment. The Plaintiff had no legal responsibility to discharge either item 13 or 14; the sole responsibility to satisfy those requirements were on the Defendant. The affirmative defenses asserted by the Defendant failed by the greater weight of the evidence.

Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff, SIMPLY SOLD ORLANDO, LLC, is hereby granted a decree of specific performance against Defendant, IVONNE L. REVERON, for the following described property at 528 Southern Charm Drive, Orlando, FL 32807:

Legal Description: Lot 26A, Forsyth Cove, according to the Plat thereof as recorded in Plat Book 29, Pages 90 and 91, Public Records of Orange County, Florida.

2. A closing shall be scheduled within **120** days. At the closing the Defendant is obligated to discharge items 13 and 14 on the Title Commitment related to the UCC-1 Financing Statement and the certified Final Judgment and otherwise cooperate to conclude the closing pursuant to the Contract. If the Defendant does not obtain a discharge or termination of the UCC-1 Financing Statement and a satisfaction of the Final Judgment prior to closing, then the closing agent shall use the closing proceeds to satisfy those obligations.

3. A hearing shall be set within the next **90** days to determine the amount of attorneys fees and costs to be awarded to Plaintiff for having brought this action. Those attorneys' fees and costs shall be deducted from the purchase price at the closing to reimburse Plaintiff.

4. The Lis Pendens shall remain in effect until the closing is concluded.

5. The Court reserves jurisdiction to enforce this decree of specific performance and enter any orders necessary to compel compliance.

* * *

Criminal law—Sexual battery—Pretrial detention—Constitutionality of statute—Separation of powers—Section 907.041(5)(d), which provides that state attorney or court shall move for pretrial detention if court determines at first appearance that there is probable cause to believe that defendant arrested for certain dangerous crimes committed the crime, is unconstitutional violation of separation of powers—Statute usurps both core executive branch function of determining whether, and under what conditions, to oppose defendant's application for pretrial release and judicial branch function of making procedural rules—If prosecutor can represent that motion for pretrial detention is brought in exercise of prosecutor's discretion, not pursuant to statute, motion will be adjudicated as provided in rule 3.132

STATE OF FLORIDA, Plaintiff, v. DEVONTE CHASE FRY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F24-3631. March 19, 2024. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION TO DECLARE FLA. STAT. § 907.041(5)(d) UNCONSTITUTIONAL

I. Introduction

Devonte Fry is charged with crimes punishable by life imprisonment, including sexual battery, Fla. Stat. § 794.011, Florida's statutory successor to the common-law crime of rape. Such crimes are referred to in the argot of the courthouse as "non-bondables," because no substantive constitutional entitlement to bail extends to persons accused of such crimes. *See* Fla. Const. Art. I § 14 ("*Unless charged with a crime . . . punishable by life imprisonment* . . .every person charged with a crime . . . shall be entitled to pretrial release on reasonable conditions") (emphasis added); *see also* Fla. R. Crim. P. 3.131(a). Thus absent the filing of defense motions, the convening of an evidentiary hearing, and the making of specific findings by the court, Mr. Fry will continue to be held without bail till time of trial.

The foregoing notwithstanding, the prosecution has moved for an order of pretrial detention as to Mr. Fry. *See* Fla. Stat. § 907.041; Fla. R. Crim. P. 3.132. Such a motion—asking for an order that, if granted, orders nothing that has not already been ordered as a matter of law—may seem pointless, and an abuse of resources. But the prosecution has no choice. Section 907.041, Florida Statutes, has been recently amended to add subsection (5)(d), which provides, in pertinent part, that, "If a defendant is arrested for a dangerous crime [as defined in subsection (5)(a)] that is a capital felony, a life felony, or a felony of the first degree, and the court determines [at first appearance, *see* Fla. R. Crim. P. 3.130, that] there is probable cause to believe the defendant committed the crime, the state attorney, or the court on its own motion, *shall* motion [*sic*; move[1]] for pretrial detention." (Emphasis added.)

Mr. Fry alleges in the motion at bar that subsection (5)(d) violates the constitutional principle of separation of powers. In his view, it violates that principle twice over: once, because it constitutes legislative usurpation of the core executive-branch function of determining whether, and upon what conditions, to oppose a criminal defendant's application for pretrial release; and again, because it constitutes legislative usurpation of the judiciary's role in the making of strictly procedural law.[2] I consider those arguments in turn.[3]

But first, some context about the law of bail and pretrial detention.

II. Bail, then and now

For things we never mention,
For Art misunderstood
For excellent intention
That did not turn to good;
From ancient tales' renewing,
From clouds we could not clear
Beyond the Law's pursuing
We fled, and settled here.
. . .
God bless the thoughtful islands
Where warrants never come;
God bless the just Republics
That give a man a home,
That ask no foolish questions,
But set him on his feet;
And save his wife and daughters
From the workhouse and the street!
. . .
You'll find us up and waiting
To treat you at the bar;
You'll find us less exclusive
Than the average English are.
We'll meet you with a carriage,
Too glad to show you round,
But we can't lunch on your steamship
For that is English ground.

— Rudyard Kipling, *The Broken Men*

Bail is a custom of long standing.[4] Pretrial detention arrived on the American jurisprudential scene about half a century ago, which makes it a young whippersnapper compared to bail, but old enough to have developed its own large body of decisional law. The law of bail and of pretrial detention has evolved, particularly in recent decades, to refine the power and ability of prosecutors to determine when to oppose and when not to oppose the admission of a criminal defendant to some form of pretrial release; and to refine the power and ability of judges to determine when, and upon what conditions, to grant some form of pretrial release.

In the days when Kipling's broken men committed crimes and fled

their consequences, bail had one purpose and one purpose only: to provide reasonable assurance that a defendant would appear before the court when he was called upon to do so. Wm. Blackstone, III *Commentaries on the Laws of England* 290 (Univ. of Chicago ed. 1979) (1769); *Id*., vol. IV at 294; *United States v. Foster,* 278 F. 2d 567, 570 (2d Cir. 1960) ("The function of bail is to assure the presence of the accused when required by the court in a pending criminal case"); *United States v. Stevens,* 16 F. 101, 107 (C.C.W.D. Tenn. 1883) ("The object of bail in a criminal case is to secure the appearance of the defendant in court to answer the charge there pending or to be brought against him").

Kipling's broken men, if at liberty prior to trial, could depart to "the thoughtful islands/Where warrants never come" or to the "just Republics"—to America, to India, to Australia. They could not be tracked by their passports, because passports were virtually unknown prior to World War I. *See* https://www.nationalgeographic.com/history/article/a-history-of-the-passport. They could not be tracked by their cellphones, their credit cards, or their photo identification, because none of these things existed. An Englishman, or an American, was free to travel to another country, give what name he pleased, invent a personal history, and start life anew. The prospect of his being found out and extradited for trial was remote.[5]

For some time now, circumstances have been very different. What heavyweight boxing champion Joe Louis said of challenger Billy Conn is true of today's criminal defendant: He can run, but he can't hide. *See* https://www.bookbrowse.com/expressions/detail/index.cfm/expression_number/238/you-can-run-but-you-cant-hide. His fingerprints and DNA are on record. His whereabouts can be tracked by his cellphone, or by surveillance cameras, or by license-plate readers. If he makes a purchase, commits a traffic offense, telephones or texts or emails a friend or relative for assistance, he will be found. Bail is no longer the principal means of assuring that the defendant will likely appear in court. In truth bail adds very little to the likelihood that the defendant will appear in court. There are no longer "thoughtful islands/Where warrants never come." Today the criminal defendant who flees will be caught and prosecuted—perhaps a little sooner, perhaps a little later, but inevitably.

As the traditional need for bail has waned, concerns regarding the conduct of criminal defendants while out on bail have waxed. Although it had once been entirely impennissible to use bail for any purpose but to assure the defendant's presence at trial, in recent decades statutes and rules have been altered to provide that an equally important purpose is to pretermit any danger to the community posed by the defendant. *See, e.g.,* Fla. Stat. § 903.046(1) ("The purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings *and to protect the community against unreasonable danger from the criminal defendant*") (emphasis added). As an expression of that concern, a new concept entered the scene: that of pretrial detention. Its focus was more upon the risk of danger to the community if the defendant were at liberty than upon the risk of the defendant absconding if he were at liberty. If the risk of danger were deemed great enough, the defendant was to be held without bail. This novel concept was initially resisted by elements of the bench, bar, and academy, *see, e.g.,* Laurence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 Virginia L. Rev. 371 *et. seq.* (April 1970), on a host of grounds. How, for example, is a judge to predict whether a defendant will engage in criminal misconduct in the future? By what right does society incarcerate based, not upon what a man has done, but upon what it is imagined he may yet do?

Whatever its conceptual shortcomings, pretrial detention did address one problem that needed addressing. Recall that a Florida defendant charged with a "non-bondable" offense could still move for bail, and at the ensuing hearing the prosecution would be called upon to prove the defendant's guilt to a level of proof exceeding proof beyond a reasonable doubt. This impossible, or all-but-impossible, standard carried with it a relentless temptation to judicial hypocrisy. Bail hearings are customarily held within days, not more than weeks, of arrest. Police reports are unwritten, lab tests unperformed, witnesses unlocated. And yet a judge, to deny bail to a defendant charged with a bloody and dangerous crime, was obliged to pretend that guilt had been established to a degree even greater than that which would justify conviction at trial.[6]

Enter pretrial detention. Whatever its shortcomings, pretrial detention puts an end to such judicial dissembling. Most iterations of pretrial detention require proof only of a "substantial probability" that the defendant committed the charged crimes, provided certain other conditions are established. That is a standard that can be met even in the early stage of a criminal prosecution—the stage when hearings addressing the defendant's pretrial release status are customarily conducted.

Thus as matters stand—or stood, prior to the enactment of Fla. Stat. § 907.041(5)(d)—the law of bail and pretrial detention had evolved to afford the prosecution the tools, and the discretion, to determine what forms of pretrial release to agree to or oppose in a given case; and to afford the court the tools, and the discretion, to detelinine what terms and conditions of pretrial release to impose if pretrial release is to be granted at all. The new statutory enactment adds nothing to the tools, and detracts a great deal from the discretion. The question is whether the discretion from which it detracts is constitutionally protected.

III. As to the executive branch

It determining whether to oppose bail, or to oppose specific terms and conditions of bail, the prosecution must consider not only the sorts of issues of fact and law set out in Fla. R. Crim. P. 3.131(b)(3),[7] but also a host of policy issues and tactical choices. As a practical matter, not all defendants—not even most defendants—can be housed in the local jails. There is simply no room for them. Some will be released because their crimes are non-violent in nature. Some will be released to mental-health programs, or to programs designed to remediate drug addiction. Some will be released to assist in the investigation and prosecution of more dangerous offenders. And so on.

The making of these kinds of policy decisions and tactical choices is at the heart and soul of the prosecution function. Just as the Office of the State Attorney must have discretion to determine what charges to file, what charges not to file, what plea offers to make, and what plea offers to accept or reject, *see, e.g., State v. Mancuso,* 355 So. 3d 942, 944-45 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D233c] ("the decision to charge and prosecute is an executive function, and the State Attorney has complete discretion in deciding whether and how to prosecute"); so too the Office of the State Attorney must have discretion to determine what terms and conditions of bail to oppose and what terms and conditions of bail not to oppose. Deprived of that discretion, the prosecution simply cannot do its job.

"[I]t is well-settled that '[p]rosecutorial discretion is by its very nature exceedingly broad,' *In Re J.S.*, 19 A. 3d 328, 331 n.2 (D.C. 2011) (quoting *United States v. Wilson,* 342 A. 2d 27, 30 (D.C. 1975))." *Vanegas v. State,* 360 So. 3d 1195, 1199-1200 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D851b]. This breadth of discretion is, in Florida, a constitutional command. The Florida constitution provides, at Art. II § 3, that, "No person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches." "In construing our constitution, [Florida courts] have 'traditionally applied a strict separation of powers doctrine.' " *Florida House of Reps.v. Crist,* 999 So. 2d 601, 611 (Fla. 2008) [33 Fla. L. Weekly S437a] (quoting *Bush v. Schiavo,* 885 So. 2d 321, 329 (Fla.

2004) [29 Fla. L. Weekly S515a]). Thus "the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice." *State v. Cain,* 381 So. 2d 1361, 1367 (Fla. 1980). *See also United States v. Cox,* 342 F. 2d 167, *esp.* 182 *et. seq.* (5th Cir. 1965) (John Minor Wisdom, J., concurring); *State ex rel. Unnamed Petitioners v. Connors,* 401 N.W. 2d 782 (Wisc. 1987); *State v. Brosky,* 79 So. 3d 134 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D296a]. *NB* the language employed by the Florida Supreme Court in *Cain*: the discretion vested in the Office of the State Attorney extends to both "whether and how to prosecute." *Cain,* 381 So. 2d at 1367. The decision "whether . . . to prosecute" encompasses the choice of what charges to pursue; what charges not to pursue, or having pursued, to dismiss by *nolle prosequi*; what plea offer to extend; what counter-offer to accept, or to reject; and more. But the decision "how to prosecute" surely includes the countless very material tactical choices that must be made in every case—notably, whether to oppose the defendant's release on bail, or his release on certain conditions of bail but not others. These countless tactical decisions are, as an expression of the doctrine of separation of powers, vested entirely in the prosecution. So, for example, the decision whether to permit a defendant to be referred to a pretrial diversionary program is a matter left entirely to prosecutorial discretion. *State v. Mancuso,* 355 So. 3d 942 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D233c]; *State v. Cleveland,* 390 So. 2d 364 (Fla. 4th DCA 1980).

Of course the prosecution's position with respect to pretrial release is not binding on the court, while the prosecution's decision to file or not file charges is largely unreviewable. This distinction detracts not at all from the separation of powers problem raised by the motion at bar. As noted *supra,* the prosecution may have tactical reasons—reasons known or unknown to the court—for seeking or opposing certain conditions of pretrial release. Those tactical reasons may be part of the prosecution's larger strategy with respect to the prosecution of this defendant; or other defendants; or individuals not yet but soon to become defendants; or the entire category of persons charged with this particular crime. The court, aware that the prosecution alone is responsible for the weighing and balancing of such tactical reasons (even if the court may not know, in any given case, precisely what the reasons are) will likely give great weight to the prosecution's position. This differs very little from the exercise of prosecutorial discretion over the acceptance or rejection of plea agreements. The prosecution may inform the court that it has struck a plea agreement with the defense, but the court is not obliged to accept, and may choose to reject, that agreement. *Goins v. State,* 672 So. 2d 30 (Fla. 1996) [21 Fla. L. Weekly S158a]. No serious suggestion can be made that because a court has this power to reject a negotiated plea, the discretion to resolve cases by plea agreement is not vested in the prosecution. So, too, no suggestion should be made that because a court has the power to reject the prosecution's proposed terms of pretrial release, the discretion to negotiate and propose appropriate terms of release is not vested in the prosecution. Prior to the recent statutory change, a prosecutor could say to defense counsel at first appearance, "I'll stipulate to bail on X conditions if your client will make a controlled phone call to, or arrange a meeting with, his friend Mr. So-and-so. That's the guy we really want." After the statutory change, the prosecutor is without power to do so at first appearance.

Newly-enacted subsection (5)(d) of Fla. Stat. § 907.041 makes hash of powers clearly consigned to the prosecution pursuant to the doctrine of separation of powers. An assistant state attorney assigned to a given case, having made as careful a study of the facts of that case as circumstances permit, and having concluded in good faith that there exist reasonable conditions of pretrial release to which the defendant can safely be admitted, *see* Fla. Cont. Art. I § 14 (reflecting a general presumption that "every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions" if reasonable conditions exist), is commanded by Section 907.041(5)(d), in gross derogation of the doctrine of separation of powers (to say nothing of the lawyer's professional ethical obligations), to move for pretrial detention.

Section 907.041(5)(d) is intended to be applied at the first appearance provided for by Fla. R. Crim. P. 3.130. At that proceeding, a judge typically has nothing more before him or her than a police officer's arrest form. On the basis of that document, the judge must make an assessment—a non-evidentiary, non-adversarial assessment—of probable cause. If such a finding is made, and if the defendant is charged with any one of dozens of life or first-degree felonies, the assigned prosecutor *must* move for pretrial detention. It matters not whether the prosecutor, in the exercise of that discretion consigned to him by the Florida constitution, has concluded that reasonable conditions of pretrial release can and should be set. It matters not at all.

It would be difficult to conjure up a more heavy-handed violation of Florida's scrupulously-enforced notions of separation of powers. Subsection (5)(d) is unconstitutional.

IV. As to the judicial branch

The separation-of-power dividing line drawn by the Florida constitution between the legislative and judicial branches has no congener in the United States Constitution, or in many state constitutions. Article V § 2(a) of Florida's constitution provides:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The foregoing language is generally understood to mean that the legislature makes substantive law, but that the judiciary makes procedural law. *See, e.g., Allen v. Butterworth,* 756 So. 2d 52, 59 (Fla. 2000) [25 Fla. L. Weekly S277a] ("Generally, the Legislature has the power to enact substantive law, while the [Florida Supreme] Court has the power to enact procedural law." For this purpose, substantive law

> has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses.

Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla 1991) (quoting *In re Fla. Rules of Crim. Pro.,* 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)). The Florida Supreme Court has discharged its responsibility to formulate procedural law with respect to bail and pretrial detention. Rule 3.131, Fla. R. Crim. P., comprising no fewer than a dozen subsections, sets forth in plenary detail "the course, form, manner, means, method, mode, order, process, or steps by which" bail is set or denied. Rule 3.132 performs the same function for pretrial detention. *NB* subsection (a) of Rule 3.132, which provides that, "The state *may* file with the judicial officer at first appearance a

motion seeking pretrial detention, signed by the state attorney or an assistant, setting forth with particularity the grounds and the essential facts on which pretrial detention is sought." (Emphasis added.) The Florida Supreme Court, in the exercise of its rule-making power, has determined that the prosecution may—not must, but may—move for pretrial detention at first appearance if the prosecution, in the exercise of its proper discretion, has assessed "with particularity the grounds and the essential facts on which pretrial detention is sought" and determined that a motion for pretrial detention is in the best interest of the people of the State of Florida in this particular case at this particular time. Newly-enacted section 907.041(5)(d) purports to deracinate the procedural rule properly enacted by our state Supreme Court, and at the same time dismast the exercise of judgment and discretion properly engaged in by our local State Attorney's Office. The new subsection trespasses on both separation-of-powers borders: that which consigns the making of procedural law to the judiciary, and that which consigns core prosecutorial discretionary decisions to the executive.

And what, exactly, does the new subsection instruct the first-appearance judge to do? The statutory language provides that the prosecution, "or the court on its own motion," must move for pretrial detention. If the prosecution, intentionally or through inadvertence, fails to move for pretrial detention at first appearance, is the judge to order the prosecutor to so move? In separation-of-powers terms, a judge could with as good a grace order a prosecutor to move to exclude a witness at trial, or to file a notice of intent to rely on evidence of uncharged crimes pursuant to Fla. Stat. § 90.404(2)(d). Or does the statute contemplate that, if the prosecution omits to move for pretrial detention, the court shall so move? If so, is the court obliged to grant its own motion? Or is the court at liberty to deny its own motion? If the former, could statutes be drafted commanding courts to move *sua sponte* for judgment of acquittal, *see* Fla. R. Crim. P. 3.380, when in the court's estimation the entry of such a judgment would be entirely unwarranted? Could a greater offense against the doctrine of separation of powers be imagined? And if the latter—if the court *must* move *sua sponte* for pretrial detention but *may* deny its own motion—was it seriously the intent of the drafters of the new statutory subsection that Florida's first-appearance judges make a burlesque of the criminal justice system by stating, for the record and in open court, "I move for pretrial detention—and my motion is denied"?

As noted *supra,* "In construing our constitution, [Florida courts] have 'traditionally applied a strict separation of powers doctrine.' " *Florida House of Reps. v. Crist,* 999 So. 2d 601, 611 (Fla. 2008) [33 Fla. L. Weekly S437a] (quoting *Bush v. Schiavo,* 885 So. 2d 321, 329 (Fla. 2004) [29 Fla. L. Weekly S515a]). But even the application of a slipshod separation of powers doctrine would compel a determination that subsection (5)(d) of Fla. Stat. § 907.041 violates that doctrine, on both the legislative/executive axis and the legislative/judicial axis.

V. Conclusion

Defendant's motion to declare § 907.041(5)(d) unconstitutional is respectfully granted. I trust that it is unnecessary to add that this ruling does not, emphatically does not, insulate Mr. Fry from the possibility of his being detained pretrial. If the assistant state attorney assigned to this case can represent, as an officer of the court, that a motion for Mr. Fry's detention is brought, not pursuant to the statutory command of § 907.041(5)(d) but in the exercise of the prosecutor's considered discretion, that motion will be promptly adjudicated as provided for in Rule 3.132.

[1]"Motion," when used as a verb, means "to make a signal to someone, usually with the hand or head." *See, e.g.*, https://dictionary.cambridge.org/us/dictionary/english/motion.

[2]The prosecution has filed no written response to the motion at bar. Of course that is not the same as conceding the motion. But I cannot help but suspect that the prosecution opposes this motion, if at all, only with reluctance. The effect of the statutory change at issue here is to oblige the prosecution to participate in a hearing—to invest its time and effort, to disclose its witnesses and their testimony—in order to achieve what already exists.

[3]Although Mr. Fry is presently being held without bail, he has a stake in the outcome of this motion. To support an order of pretrial detention, the prosecution must prove a defendant's guilt by nothing more than a "substantial probability." *See* Fla. Stat. 907.041(5)(c). If Fry, or any defendant similarly situated, challenges his "non-bondable" status, however, the prosecution must prove his guilt to a standard *higher than* proof beyond reasonable doubt. *See State v. Perry,* 605 So. 2d 94, 96 (Fla. 3d DCA 1922) (quoting *State ex rel. Van Eeghen v. Williams,* 87 So. 2d 45, 46 (Fla. 1956)). Clearly Fry would rather foist upon the State the latter, seemingly-insuperable burden of proof as a condition of his continued detention, in preference to the not-much-of-a-burden burden of "substantial probability."

[4]Oliver Wendell Holmes traces bail to the tribal custom of offering and holding hostages. O. W. Holmes, *The Common Law* 249 (Dover ed., 1991) (1881). So firmly entrenched was the "hostage" theory of bail that "[a]s late as the reign of Edward III, Shard, an English judge, after stating . . . that bail [*i.e.,* the sureties] are a prisoner's keepers, and shall be charged if he escapes, observes, that some say that the bail shall be hanged in his place." *Id.* at 249-50.

[5]Although Kipling's broken men go unwhipped of justice in the conventional sense, they are plagued by the cruel punishment of nostalgia:

> Ah, God! One sniff of England—
> To greet our flesh and blood—
> To hear the traffic slurring
> Once more through London mud!
> Our towns of wasted honour—
> Our streets of lost delight!
> How stands the old Lord Warden?
> Are Dover's cliffs still white?

("The old Lord Warden" refers to the first hotel in Dover that one saw when making landfall. Its name derives from the ancient title of "Lord Warden of the Cinque Ports" on England's southern coast.)

[6]In the alternative, even if the judge were candid enough to acknowledge that the prosecution had not met the all-but-insuperable burden of proof thrust upon it, there was yet another way to game the system and deny the defendant pretrial release. As I wrote on a prior occasion:

> I understand perfectly well how the game is customarily played: I choose a bail amount far, far beyond anything that the defendant could ever dream of meeting (perhaps the $300,000 suggested by the prosecution); declare it to be "reasonable;" and set that as the bail in this case. Some weeks go by, and the defendant moves for reduction of bail. The hearing on the motion is simply another round of our game of charades: The defendant seeks to show that the bail is hopelessly beyond his means; the prosecution insists that the bail is reasonable by reference to factors other than the defendant's means; and I leave the bail amount intact, or perhaps reduce it by $5,000 (confident that such a token reduction will render the defendant no more able to procure his conditional liberty than he was beforehand).
>
> This is pretrial detention in fact, albeit not in name. Perhaps it is intended to afford the defendant the solatium of false hope. I am far from sure that it does so. And even if it does, my duty to the defendant is to provide him with a just, lawful, and candid adjudication of his claim, not to provide him with false hope. I am his judge, not his bartender.

State v. Rapoza, 19 Fla. L. Weekly Supp. 640a, * (Fla. Cir. Ct. 2012).

[7]In determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court may consider the nature and circumstances of the offense charged and the penalty provided by law; the weight of the evidence against the defendant; the defendant's family ties, length of residence in the community, employment history, financial resources, need for substance abuse evaluation and/or treatment, and mental condition; the defendant's past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings; the nature and probability of danger that the defendant's release poses to the community; the source of funds used to post bail; whether the defendant is already on release pending resolution of another criminal proceeding or is on probation, community control, parole, or other release pending completion of sentence; and any other facts the court considers relevant.

* * *

Torts—Legal malpractice—Mishandling of insurance litigation—Summary judgment granted in favor of plaintiff—Award of damages consisting of attorney's fees and costs incurred in underlying litigation

CHRIS THOMPSON, P.A., Plaintiff, v. LAW OFFICES OF FRANK T. NOSKA, III, PA, et al., Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE23005730. Division 09. February 26, 2024. Jeffrey R. Levenson, Judge. Counsel: Ben Murphy, Lawlor White & Murphey, LLP, Ft. Lauderdale, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case came before the Court on February 26, 2024 on Plaintiff's Motion for Summary Judgment. The Court heard oral argument on the Motion and **FINDS:**

Plaintiff sued Defendants for legal malpractice for allegedly mishandling an underlying PIP case. (Compl. *passim.*) Plaintiff settled with Defendants, Cris Boyar, Esq. and Boyar & Freeman, PA. (Plf's Ntc. of Dropping Certain Parties with Prejudice.) So, the only remaining claims are against Mr. Noska and his law firm. As to those remaining Defendants, Plaintiff alleged damages of "payment of attorney's fees and costs in the underlying litigation." (Compl. ¶¶ 39, 45.) On November 7, 2023, this Court entered a default Final Judgment on the liability of Mr. Noska and his law firm.

On December 12, 2023, Plaintiff filed and served its Motion for Summary Judgment on Mr. Noska and his law firm. (MSJ, p. 4.) In that Motion, Plaintiff moved for summary judgment on the damages consisting of "payment of attorney's fees and costs in the underlying litigation." (MSJ ¶¶ I(2)-(3).) Plaintiff attached the underlying judgments for attorney's fees and costs to its Motion. (MSJ ¶¶ I(2)-(3).) Plaintiff requested judicial notice of those underlying judgments. (MSJ ¶¶ I(2)-(3).) Plaintiff noticed its Motion for hearing and served Mr. Noska and his law firm with the hearing notice. (MSJ Hrg. Ntc., p. 2.) Neither Mr. Noska nor his law firm filed anything in response to Plaintiff's Motion.

Plaintiff's damages consisting of "payment of attorney's fees and costs in the underlying litigation" are liquidated because they can be determined by Plaintiff's pleading and arithmetical calculation from the underlying judgments which this Court judicially notices per Plaintiff's request. *See, e.g., Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 662 (Fla. 5th DCA 1983) (discussing liquidated damages); *see also* §§ 90.202(6), .203, Fla. Stat. (discussing judicial notice). Alternatively, if Plaintiff's damages are unliquidated, then this Court grants Plaintiff's Motion for Summary Judgment under *Specialty Solutions, Inc. v. Baxter Gypsum & Concrete, LLC*, 325 So. 3d 192 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1439b] (affirming summary judgment determination of liquidated damages after default and notice of summary judgment motion and hearing).

Wherefore, this Court **ORDERS:**

Plaintiff's Motion for Summary Judgment against Mr. Noska and his law firm is GRANTED. Plaintiff shall submit a Final Judgment against Mr. Noska and his law firm for a total of $56,440 ($20,000 with prejudgment interest running on the $20,000 from August 2, 2021 plus $36,440 with prejudgment interest running on the $36,440 from December 15, 2022). The trial set in this case for the April 1, 2024 docket is cancelled.

* * *

Insurance—Insolvent insurer—Florida Insurance Guaranty Association—FIGA cannot be held liable for breach of insurance contract to which it was not party—Attorney's fees and costs cannot be recovered where FIGA did not deny covered claim by affirmative action other than delay—Interest is not recoverable from FIGA

NATISHA SILLS, Plaintiff, v. FLORIDA INSURANCE GUARANTY ASSOCIATION (FIGA), Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21010154. Division 04. February 15, 2024. William W. Haury, Jr., Judge. Counsel: Azoy Socorro, LLP, Coral Gables, for Plaintiff. Hernandez & Valois, P.A., Ft. Lauderdale, for Defendant.

ORDER ON FLORIDA INSURANCE GUARANTY ASSOCIATION'S MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT

THIS CAUSE having come before this Court on FLORIDA INSURANCE GUARANTY ASSOCIATION's ("FIGA") Motion to Dismiss the Plaintiff's Amended Complaint, and the Court having heard argument of counsel on February 1, 2024, and being otherwise duly advised in the premises, it is thereupon;

ORDERED AND ADJUDGED:

1. FIGA's Motion to Dismiss is **GRANTED**.

2. Plaintiff's Amended Complaint for breach of contract is dismissed as FIGA cannot be held liable for breach of insurance contract which it is not a party.

3. Plaintiff's claims for attorney's fees and costs are stricken as they are not recoverable against FIGA pursuant to Fla. Stat. § 631.70 unless FIGA denies a covered claim by affirmative action other than delay.

4. Plaintiff's claim for interest is stricken pursuant to Fla. Stat. § 631.57(4)(b).

5. Plaintiff shall have ten (10) days leave to file a Second Amended Complaint to plead a cause of action for breach of statutory duties against FIGA.

6. FIGA is ordered to file its motions or response within ten (10) days, thereafter.

* * *

Criminal law—Leaving scene of accident resulting in injury—Driving under influence with injury—Evidence—Statements of defendant—Accident report privilege does not apply to shield statements made by defendant who left scene of accident—Custodial interrogation—Defendant whose disabled vehicle was obstructing traffic on busy roadway was not in custody for purposes of *Miranda* where he was seated in back of patrol vehicle without restraints for his safety, was transported to nearby parking lot for roadside exercises ,and was not told that he could not leave area—Because officers were not required to give *Miranda* warnings during roadside stop, fact that they gave incomplete warnings is immaterial—Motion to suppress defendant's statements is denied

STATE OF FLORIDA, Plaintiff, v. ROLANDO JESUS MATOS, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2021-CF-019268-AXXX-XX. February 12, 2024. Aaron Peacock, Judge. Counsel: Andrew Dressler, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Gregory W. Eisenmenger and R. Scott Robinson, Eisenmenger, Robinson, & Peters P.A., Viera, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court on January 9, 2024, on the Defendant's Motion to Suppress Evidence filed herein on December 8, 2023, pursuant to Rule 3.190(h)(2), Florida Rules of Criminal Procedure. (electronic docket #98). A hearing on the Defendant's motion to suppress was held on January 9, 2024, before the undersigned judge, at which the Defendant was represented by Attorney Greg Eisenmenger and the State was represented by Assistant State Attorney Andrew Dressler. At the hearing, the Court heard from two witnesses called by the State: (1) Dana Seals and (2) Darin Morgan, both officers with the Palm Bay Police Department on Order Denying Defendant's Motion to Suppress the date of the alleged offenses occurred in this case. The Court also heard testimony from the Defendant called by the defense.

On January 19, 2024, the Defendant filed written closing arguments styled as a "Memorandum of Law." (electronic court docket #103). On February 2, 2024, the State filed writing closing arguments styled as "State's Post-Hearing Closing Arguments and Memorandum of Law Regarding Defendant's Amended Motion to Suppress Statements." (electronic court docket #106).

Based on a review of the Defendant's motion, the official Court file, testimony heard, evidence introduced, and authorities submitted, the Court makes the following findings of fact and conclusions of law:

a. The Defendant is currently charged in the above-styled case with committing on March 10, 2021, one felony offense of leaving the scene of a crash resulting in injury (Count One) and three misdemeanor offenses of driving under the influence and causing damage or injury (Counts Two, Three, and Four).

b. On March 10, 2021, an auto crash occurred at the intersection of Emerson Drive and Culver Drive in Palm Bay, Brevard County, Florida. The driver of a vehicle (a gray colored 2-door BMW vehicle) that allegedly hit another vehicle resulting in injuries, left the scene of the accident.

c. Around 9:08 A.M., on March 10, 2021, Officer Dana Seals with the Palm Bay Police Department received a dispatch regarding a gray colored vehicle involved in a hit and run in the area of Culver Drive and Emerson Drive in Palm Bay, Brevard County, Florida. Officer Seals searched the area and found the vehicle, near the curb at the DR Horton home construction company building in Palm Bay, Brevard County, Florida. The vehicle had front-end damage, was not able to be driven, and was obstructing traffic on a busy roadway.

d. Officer Seals testified that because he did not want to get hit, he activated his emergency lights on his marked patrol vehicle around 9:14 A.M., and initially parked his vehicle behind the Defendant's disabled vehicle.

e. Officer Seals testified that upon approaching the Defendant, he immediately could smell alcohol on the Defendant's person when the vehicle's window was rolled down. Officer Seals, dressed in official police uniform, asked the Defendant if he was okay.

f. Officer Seals testified that he next requested the Defendant to step out of the vehicle, and then Officer Seals asked the Defendant to sit in the back of the marked patrol vehicle so they would not be hit by traffic. The Defendant agreed.

g. The Defendant was not handcuffed or shackled.

h. Then, they waited for Officer Darin Morgan of the Palm Bay Police Department to arrive, which took about twenty to thirty minutes.

i. Officer Morgan testified that he initially had responded to the scene at Culver and Emerson where the hit and run crash had occurred. It was reported that a gray or silver BMW two-door vehicle driven by a Hispanic male wearing a hat had left the scene of the crash. Officer Morgan testified that he then received a dispatch that the vehicle had been located, one-half to one mile away near the DR Horton building.

j. Around 9:40 A.M., Officer Morgan responded to the DR Horton driveway, and saw the silver BMW with front-end damage, obstructing traffic at a major thoroughfare in Palm Bay.

k. Officer Morgan testified that he asked the Defendant if it was okay for Officer Shields to transport him into the parking lot at DR Horton where it would be safer for all and out of traffic. The Defendant said "sure."

l. The transport of the Defendant to the parking lot took one to two minutes. The Defendant was not handcuffed or retrained in the police cruiser. The Defendant was seated in the back seat of the patrol vehicle of Officer Shields.

m. Once in the parking lot, the Defendant stepped out of the police cruiser. State's Exhibit #2, a video and audio recording, captured this point forward.

n. Officer Morgan told the Defendant that because he was involved in a crash, the officer has "to let you know about a couple of things that are going on." Officer Morgan advised that he was no longer doing a traffic crash investigation, but rather a "criminal investigation." Officer Morgan said, "I do not know if you are impaired or not, but I have to let you know that." Officer Morgan then provided the Defendant with *Miranda*[1] warnings, including that he had the right to remain silent, and had the right to attorney, but failed to tell the Defendant that if he could not afford an attorney one would be appointed for him.

o. Officer Morgan's report indicates that the "defendant agreed to speak with me without an attorney." However, the video shows that there is no audible response from the Defendant. At the motion to suppress hearing, Officer Morgan could not recall the Defendant providing a verbal response.

p. The Defendant thereafter admitted to law enforcement to being in the crash, fleeing the scene, and never calling police to report the crash.

q. In the subject motion, the Defendant seeks to suppress all statements he made to law enforcement on March 10, 2021.

r. The Defendant first concedes that the accident report privilege does not apply when a driver improperly leaves the scene, as what is alleged to have occurred in the subject case with the Defendant. As recognized by the Defendant, Florida law is well-established that the accident report privilege under section 316.066(4), Florida Statutes, does not apply to the statements of suspected hit-and-run drivers who leave the scene of an accident and abandon their duty to remain on scene. *State v. Hepburn,* 460 So. 2d 422, 425 (Fla. 5th DCA 1984); *Williams v. State,* 208 So. 3d 196 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2405a]; *Cummings v. State,* 780 So. 2d 149, 150 (Fla. 2d DCA 2000) [26 Fla. L. Weekly D126a].

s. Next, the Defendant asserts that "[e]ven if the Court determines the privilege does not apply, the Pre-*Miranda* questioning amounted to a custodial interrogation and Mr. Matos' statements should be suppressed on those grounds." The Defendant continues, "DUI investigations are not immune from the requirement that *Miranda* warnings be given if police are conducting a custodial interrogation." The Defendant argues that he was in custody, subject to custodial interrogation, and therefore, should have been administered *Miranda* rights prior to questioning. The State argued to the contrary that the Defendant's statements to law enforcement are admissible because the Defendant was not yet in custody.

t. The safeguards of *Miranda* only apply if an individual is in custody and subject to interrogation; if either prong is absent, *Miranda* does not require warnings. *State v. Bender*, 357 So. 3d 697, 701 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D102a].

u. The Court finds that the Defendant was not in custody for purposes of *Miranda.* " 'Persons temporarily detained' in a roadside stop 'are not 'in custody' for purposes of *Miranda*." *State v. Whelan*, 728 So. 2d 807, 809 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D640b] (citing *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). "In *Berkemer,* the Supreme Court held that the roadside questioning of a motorist detained pursuant to a traffic stop did not constitute 'custodial interrogation' for *Miranda* purposes." *State v. Blocker,* 360 So. 3d 742, 749 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a] (citing *Berkemer*, 468 U.S. at 442)). The fact that the Defendant was transported in a patrol car from the busy and dangerous roadway to the very close nearby parking lot which was a safer location for all involved did not convert this roadside stop into a custodial situation. *State v. Bender*, 357 So. 3d 697 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D102a]; *State v. Blocker*, 360 So. 3d 742, 751 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a] (Transporting a defendant to a safer location to perform field sobriety tests did not transform a traffic stop into a de facto arrest). The Defendant was not handcuffed in the patrol car. *Cf. Hudson v. State*, 344 So. 3d 642 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1785b] (Defendant in custody for *Miranda* purposes when the officers stopped her vehicle, handcuffed her, held her in a patrol car over half an hour, and was not allowed to leave the patrol car with an officer to find her inhaler). The Defendant was not subject to custodial interrogation inside the patrol vehicle and was only questioned related to the roadside stop once outside the patrol vehicle

in the parking lot with the video camera filming the interaction. Law enforcement was investigating a hit and run and driving under the influence; the Defendant was not accused of anything. Although the Defendant's freedom may have been "curtailed, as it is in any detention," the Defendant was not subjected to any restraints comparable to those found in a formal arrest and therefore was not in custody for purposes of *Miranda. Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *State v. Burns,* 661 So. 2d 842, 844 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a]; *State v. Blocker*, 360 So. 3d 742 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a]; *State v. Bender*, 357 So. 3d 697 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D102a]; *Johnson v. State*, 800 So. 2d 275 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2477a].

v. The Defendant cited to *State v. Evans*, 692 So. 2d 305 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1084b], in support of his argument that the Defendant experienced restraints comparable to those associated with a formal arrest. The Court finds that unlike *Evans*, the circumstances in the Defendant's case were not coercive. Law enforcement specifically told Evans that he could not leave the area before being placed in the back seat of a patrol vehicle and driven to a nearby gas station. The Defendant was not told that he could not leave the area. Officer Shields simply asked the Defendant to sit in his patrol vehicle so they could get out of the busy roadway for their safety.

w. Because the Defendant was not in custody, and not even entitled to *Miranda* protections, law enforcement was not required to provide the Defendant *Miranda* warnings, the incomplete *Miranda* right recitation is immaterial, and there was no obligation on law enforcement's part to cease questioning and seek clarification of any *Miranda* rights. *State v. Blocker*, 360 So. 3d 742, 751 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a].

Accordingly, it is **ORDERED AND ADJUDGED** that the Defendant's Motion to Suppress is DENIED.

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

* * *

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COUNTY COURTS

Criminal law—Search and seizure—Vehicle stop—Traffic infractions—Officer had reasonable suspicion justifying stop of vehicle after observing defendant speed away from area in which gunshots were heard, cross over stop bar at intersection, and drive though two stop signs in store parking lot—Seizure of defendant did not occur when deputy activated his emergency lights—Although defendant paused in turn lane upon activation of lights, defendant subsequently drove into parking lot and did not acquiesce to officer's show of authority until he finally stopped near fast food restaurant—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. JOHNNIE LEE MCQUAY, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2023-CT-000108-A. Division II. January 26, 2024. Susan Miller-Jones, Judge.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE was brought before the Court on January 4, 2024, for a hearing on the Defendant's Motion to Suppress. The Defendant and attorneys for both the Defendant and the State were present. Having reviewed the Defendant's Motion to Suppress and the Defendant's Memoranda of Law and Argument, having heard the testimony of Deputy Clayton Litzkow, having viewed the video in evidence, and having listened to arguments of counsels, the Court finds and orders as follows:

1. Deputy Litzkow testified that he has been employed as a deputy sheriff for five and a half years at the Alachua County Sheriff's Office. He completed a basic speed measurement course, where he was trained to use laser, radar devices and to visually estimate a vehicle's speed. As part of said training, he drove around the city performing visual observations of vehicles, making speed estimations, and had those observations verified against radar measurements. He successfully completed that training. Accordingly, for the past 5.5 years, he has utilized the skill of visual speed estimates and confirming those estimations via radar as part of his normal, daily duties.

2. Deputy Litzkow further testified that on January 10, 2023, there were gunshots heard in the area where he was patrolling. Soon after hearing shots, the Deputy observed the Defendant's vehicle leave the area where the shots were heard. He testified that he visually estimated the Defendant to be driving at 60 miles per hour in a posted 45-miles-per-hour speed zone. Deputy Litzkow did not recall whether he was stationary or moving when he first saw the Defendant driving. Nonetheless, the Deputy did recall the direction he was initially traveling in, and the direction the Defendant traveled. The Deputy recalled having to drive faster than the speed limit to catch up to the Defendant, and it took the deputy until a second traffic light before he was able to catch up to the Defendant's vehicle, where the Defendant had stopped for a red light. The Deputy did not waiver in his observations of the Defendant's speed. Deputy Litzkow finally attempted to stop the Defendant some 3.5 miles away from the initial observation. He turned on his over-head emergency lights. The defendant turned into a right-turn lane and paused very briefly. However, as Deputy Litzkow opened his door to exit his patrol car, the Defendant immediately began driving again at a slow speed, turning into a well-lit Publix parking lot, rolled through (2) stop signs before finally stopping near a Checkers.

3. Defense Counsel argues that this Court should not find Deputy Litzkow's testimony sufficiently detailed to justify a stop for speeding, and alternatively that Deputy Litzkow manufactured the statements in his longer report (that he saw the Defendant speeding) after realizing that crossing over a solid white line near the intersection was not a traffic violation. But the stop occurred around 1:00 am toward the end of his shift. He testified that he dropped the Defendant off at the jail, quickly wrote the probable cause narrative, and then responded to another call which is the typical practice. The deputy confirmed he wrote his longer supplemental narrative some fourteen hours later at the end of his shift. The Court finds this explanation reasonable. Moreover, Deputy Litzkow's training and experience with visual estimations and his visual observations of the Defendant driving provided the deputy with reasonable suspicion to believe that the Defendant had violated the posted speed limit and Florida Statute section 316.187. The stop was therefore lawful. *See, e.g., Gallardo v. State,* 204 So. 3d 979 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2691d]; *Young v. State,* 33 So. 3d 151 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1070a]; *State v. Joy,* 637 So. 2d 946 (Fla. 3d DCA 1994).

4. Defense Counsel argues that the seizure occurred the moment that the emergency lights went on and the Defendant altered his course of travel. However, if it were in fact a seizure as outlined in *G.M. v. State,* 19 So. 3d 973 (Fla. 2009) [34 Fla. L. Weekly S568a], the Defendant would have finally stopped in the turn lane where he initially paused—actually acquiescing to the deputy's show of authority. Contrary to that, the Defendant was captured on video continuing to drive after the deputy's shows of authority, initially through the activation of his overhead lights and eventually the repeated use of his siren. The Defendant continued to drive through two different stop signs without complying with those traffic control devices or the deputy's stop commands. The Defendant was driving through a well-lit, empty parking lot during that time. He continuously passed safe and well-lit places to stop. The Defendant did not acquiesce to the show of authority until the Defendant finally stopped his vehicle near the Checkers. The seizure therefore did not happen until that point. Deputy Litzkow therefore had a second objective basis for the stop because the Defendant had violated Florida Statute section 316.074 by passing two stop signs without stopping.

5. Deputy Litzkow testified that there were additional traffic law violations committed by the defendant. Namely the Defendant crossed over a solid white line in the 100 feet preceding an intersection. The deputy was unsure which statute number was appropriate. The in-car video was played which captured this part of the incident. A judge of this Circuit has recently entered an order that a person does violate Florida Statute section 316.074 when the person crosses over a solid white line marker. See Order Denying Defendant's Motion to Suppress, *State v. Vila Ortiz,* 012020cf000355a (Fla. 8th Cir. Ct. Dec. 15, 2020). Defense Counsel argues that ruling was error.

6. Multiple traffic law violations were captured on the in-car video, which were a sufficient basis for the stop.

The Court therefore denies the Motion to Suppress.

* * *

Traffic infractions—Citations—Speeding in excess of 50 mph—Failure to include applicable penalty in citation—Case is dismissed without prejudice

STATE OF FLORIDA, Plaintiff, v. JALEN JOSE SOTO, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2023 TR 044999. March 20, 2024. Gabrielle N. Sanders-Morency, Judge. Counsel: Ira D. Karmelin, The Ticket Clinic, Kissimmee, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE

THIS MATTER came before the Court on Defendant's Motion to Dismiss on January 17, 2024. The Court having reviewed the court file and being fully advised in the premises finds as follows:

1. On September 12, 2023, Defendant was cited for speeding in excess of 50mph pursuant to Florida statutes §316.183(2), §316.187 or §316.189.

2. The above matter was set for an infraction hearing and Defense moved for dismissal due to the traffic citation failing to comport with section 318.14(2), Florida Statutes which states*: (2) any person cited for a violation requiring a mandatory hearing listed in s. 318.19 or any other criminal traffic violation listed in chapter 316 must sign and accept a citation indicating a promise to appear. **The officer may indicate on the traffic citation the time and location of the scheduled hearing and must indicate the applicable civil penalty established in s. 318.18.** For all other infractions under this section, except for infractions under s. 316.1001, the officer must certify by electronic, electronic facsimile, or written signature that the citation was delivered to the person cited. This certification is prima facie evidence that the person cited was served with the citation.*

3. Reading the plain language of the statute, the Court finds the citation in this matter did not indicate the applicable civil penalty and failed comply with section 318.14(2), Florida statute.

WHEREFORE IT IS ORDERED AND ADJUDGED, that the Instant Caused is **DISMISSED WITHOUT PREJUDICE**. The law enforcement officer may issue Defendant another Uniform Traffic Citation that comports with all requirements of law within ten (10) days of this order. **The Clerk of Court shall set this for Infraction hearing on 21 of February 2024.**

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Summary judgment—Evidence—Examination under oath is admissible as statement of party opponent in summary judgment proceeding—Motion to strike EUO is denied

MANUEL V. FEIJOO, M.D., et al., a/a/o Luz Martinez, Plaintiff, v. THE RESPONSIVE AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-025033-SP-25. Section CG02. February 26, 2021. Elijah A. Levitt, Judge. Counsel: Kenneth Schurr, Law Offices of Kenneth B. Schurr, Coral Gables, for Plaintiff. Brittany Brooks, Leiter, Belsky & Brooks, Fort Lauderdale, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE THE EXAMINATION UNDER OATH OF LUZ MARTINEZ

This matter having come before the Court on February 17, 2021, on Plaintiff's Motion to Strike the Examination Under Oath ("EUO") Transcript of Luz Martinez, and the Court having considered the motion, having heard the arguments of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion to Strike the EUO is DENIED. In support of this Order, the Court provides the following:

Summary of Relevant Facts

This is an action filed pursuant to section 627.736, Florida Statutes, for alleged overdue personal injury protection ("PIP") benefits owed to Plaintiff for medical services that Plaintiff provided to Defendant's insured Luz Martinez ("Martinez") resulting from a March 13, 2016, car accident. On March 14, 2016, and April 25, 2016, Plaintiff allegedly provided medical services to Martinez and obtained an assignment of benefits from Martinez to be paid her PIP benefits. Defendant did not pay Plaintiff what it sought to be paid.

On April 19, 2016, at Defendant's request, Martinez appeared before a court reporter for an EUO. *See* Defendant's October 8, 2020, Motion for Summary Judgment at Exhibit D. Martinez was represented by counsel at the EUO and had the assistance of a Spanish-speaking interpreter. The Court reporter, a notary public, certified that she swore in Martinez. During the EUO, Martinez informed Defendant, allegedly for the first time, that she had six (6) other individuals residing in her home that she did not disclose on her insurance application.

On November 5, 2018, Plaintiff brought this action. Defendant seeks to void the policy *ab initio* for a material misrepresentation in Martinez's application based on the conflict in the application of the number of individuals residing in her residence.

ANALYSIS

The greater weight of authority in the Eleventh Judicial Circuit of Florida is that an EUO is admissible evidence in a summary judgment proceeding. On similar facts, the Eleventh Circuit, sitting in its appellate capacity, ruled that an EUO is an admission of a party opponent under section 90.803(18), Florida Statutes (2014). *Star Cas. Ins. Co. v. Eduardo J. Garrido, D.C., P.A. a/a/o Huegette D. Garay,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. Oct. 3, 2017). The appellate court continued to find that it is error for a trial court to disregard an EUO during a summary judgment proceeding. *Id.* Another Eleventh Circuit appellate panel, in a *per curiam* opinion, affirmed the trial court's granting of Defendant's Motion for Summary Judgment for a material misrepresentation based on an EUO. *See Eduardo J. Garrido, D.C., P.A. a/a/o Francisco Garay v. Star Cas. Ins. Co.*, 23 Fla. L. Weekly Supp. 557c (Miami-Dade Cty. Ct. Jan. 14, 2015), *aff'd per curiam,* No. 15-133-AP-01 (Fla. 11th Cir. Ct. June 21, 2016), *cert. denied,* 2017 WL 2561208 (Fla. 3d DCA 2017) (without opinion). Thus, six (6) Eleventh Circuit Appellate Judges have opined that an EUO is valid summary judgment evidence.

Further, other Eleventh Circuit trial courts have found that an EUO is admissible evidence. *See Imperial Fire and Cas. Ins. Co. v. Ernesto Ramon Torres Celorio,* 28 Fla. L. Weekly Supp. 487a (Fla. 11th Cir. Ct. July 30, 2020); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.,* 14 Fla. L. Weekly Supp. 84a (Miami-Dade Cty. Ct. October 12, 2006); *Dade Injury Rehab. Ctr., Inc., a/a/o Gwendolyn Green v. Equity Ins. Co.,* 24 Fla. L. Weekly Supp. 637a (Miami-Dade Cty. Ct. Oct. 18, 2016); *but see Gables MR(A) a/a/o Jose Villaroel v. State Farm Mut. Auto. Ins. Co.,* 26 Fla. L. Weekly Supp. 766a (Miami-Dade Cty. Ct. Oct. 22, 2018) (striking an EUO from being considered for summary judgment because an EUO lacks the trustworthiness required by section 90.802, Florida Statutes (2018) and holding that an EUO is inadmissible hearsay). Thus, save for *Gables MR(A),* the precedent in Florida's Eleventh Circuit, including a reversal of a trial court for holding otherwise, is that an EUO is admissible as a statement of a party opponent and is proper summary judgment evidence. *See, e.g., Star Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 502a.

This Court will follow the predominant local jurisprudence and, based on the reasons provided therein, will permit Martinez's EUO to be utilized as summary judgment evidence.[1] A contrary finding constitutes reversible error. *Star Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 502a. Wherefore, Plaintiff's Motion to Strike the EUO is denied.

[1]The Court heard no evidence as to the lack of trustworthiness of the EUO transcript other than argument that the EUO was conducted at Defendant's request for the purpose of litigation.

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Wireless service carrier—Administrative fees—Motion to dismiss is denied—Documents and website referenced in motion to dismiss cannot be considered in ruling on motion where authenticity cannot be verified—Complaint alleging that wireless service carrier charged administrative fee that was not used to defray expenses carrier pays to third parties associated with providing wireless service but, rather, to charge more for service without advertising higher price states cause of action for FDUTPA violation for damages, declaratory relief, and unjust enrichment—Carrier's claim of preemption by Federal Communications Act fails as matter of law on motion to dismiss

STEVEN BRAVERMAN, Plaintiff, v. AT&T MOBILITY, LLC, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-047425-SP-25. Section CG03. Patricia Marino Pedraza, Judge. Counsel: Maury L. Udell, Beighley, Myrick, Udell, Lynne & Zeichman, P.A., Miami, and Kenneth B. Schurr, Coral Gables, for Plaintiff. Manny Garcia-Linares and Andrew Ingalls, Day Pitney, LLP, Miami, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE having come before the Court on [D.E. 21] Defendant's Motion to Dismiss Amended Statement of Claim on January 17, 2024, having heard argument of counsel, having fully reviewed the record and materials and case law submitted by the parties, and being otherwise fully advised in the premises therein, it is hereby:

PROCEDURAL BACKGROUND

Plaintiff filed an amended statement of claim on August 30, 2023 [D.E.14] which pled four (4) counts: (1) FDUPTA damages, (2) FDUPTA declaratory relief (3) Unjust Enrichment and (4) Pure Bill of Discovery. Plaintiff has withdrawn Count 4 without prejudice at the hearing. For the following reasons AT&T's Motion to Dismiss Amended Counts 1-3 of the Amended Statement of Claim is DENIED.

LEGAL STANDARD

Generally, a motion to dismiss tests only the legal sufficiency of a complaint and it is not intended to determine issues of ultimate fact. "[T]he trial court is necessarily confined to the well-pled facts alleged in the four corners of the complaint." *Lewis v. Barnett Bank of S. Florida, N.A.,* 604 So. 2d 937 (Fla. 3d DCA 1992). The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]. The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* Thus, the question for this Court to decide is whether, assuming the well pleaded factual allegations in the amended statement of claim are true, Plaintiff would be entitled to the relief requested. A motion to dismiss that attempts to contest the merits of the claims is procedurally improper. *See Hill v. Murphy,* 872 So. 2d 919, 921 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2145a]; *see also HSBC Bank USA, N.A. v. Nelson,* 246 So.3d 486, 489 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D949a] ("[m]otions to dismiss and for summary judgment are not interchangeable, and may not be substituted for another").

ANALYSIS

I. **This Court Cannot Rely Unauthenticated Documents not Attached to the Complaint in Ruling on a Motion to Dismiss**

A trial court may not rely on any documents that are not attached to the complaint when considering the motion to dismiss. *Kidwell Grp., LLC. v. Am. Integrity Ins. Co. of Fla.,* 339 So. 3d 1068 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1152a]. AT&T has provided no case law to support its claim that something outside the pleadings can be considered on a motion to dismiss. The authenticity of AT&T's documents and website referenced in AT&T's motion—as well as the question whether the complete website is appended to the motion, cannot be verified and therefore cannot be considered on a motion to dismiss. See *Legacy Entm't Grp., LLC v. Endemol USA,* 2015 WL 12838795, at *4 (M.D. Fla. Oct. 1, 2015) (Declining to consider "excerpts from a third-party website" on the ground that a defendant " 'must attach the entirety of the document, not just excerpts' or summaries, because it is not possible to determine a document's authenticity or accuracy without a complete picture." (ellipsis and citation omitted). Therefore, Defendant's Motion to Dismiss based on language referenced in the purported contracts and documents would be an attempted short-cut of the Court's function.

II. **Plaintiff's Amended Statement of Claim States a Cause of Action for Violation of FDUPTA**

Defendant does not suggest that Plaintiff's Complaint has failed to plead the elements of a cause of action for FDUTPA. In reviewing the complaint in the light most favorable to the Plaintiff, courts have held that misrepresentations regarding similar charges support FDUTPA claims. See, e.g., *James D. Hinson Elec. Contracting Co., Inc. v. Bell South Telecommunications, Inc.,* 796 F. Supp. 2d 1341, 1353 (M.D. Fla. 2011) (inclusion of unrecoverable charges for "claims processing" in costs of damage to underground facilities billed to excavators); *Turner Greenberg Assocs., Inc. v. Pathman,* 885 So.2d 1004, 1008 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2457b] (furniture store's collection of a freight/insurance charge in connection with financed furniture sales was a "[A] claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."). *See also Rollins v. Butland,* 951 So. 2d 860, 867-69 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3148a]. Plaintiffs' amended statement of claim has pled the necessary elements under Florida law. See paragraphs 50-63 of the amended statement of claim. In *Gundel v. AV Homes, Inc.,* 290 So. 3d 1080 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D405a], the Second District Court of Appeal reiterated the law of Florida that reliance is not an element of a claim for damages under the FDUTPA.

Moreover, FDUTPA claims can be based on deceptive or unfair practices that do not involve fraud . . . and need not be pled with particularity. *SIG, Inc. v. AT & T Digital Life, Inc.,* 971 F. Supp. 2d 1178, 1195 (S.D. Fla. 2013); See *Perret v. Wyndham Vacation Resorts, Inc.,* 846 F.Supp. 2d 1327, 1333 (S.D. Fla. 2012); *Hill v. Hoover Co.,* 899 F. Supp. 2d 1259, 1263 (N.D. Fla. 2012). Courts routinely refuse to excise "in line item fashion" portions of a complaint where the claim at hand is otherwise adequately stated. See, e.g., *Fox v. Loews Corp.,* 309 F. Supp. 3d 1241, 1251 (S.D. Fla. 2018); *Mansoorian v. Brock & Scott, PLLC,* No. 8:18-cv-1876-T33TGW, 2018 WL 6413484, at *5 (M.D. Fla. Dec. 6, 2018) (denying motion to dismiss and refusing to strike certain allegations "merely because [defendant]contends that some of the allegations are insufficient" and even though plaintiffs "may not be entitled to relief on all claims." Because the statute is designed to protect consumers, the scope of the conduct that may constitute an "unfair or deceptive" practice is "extremely broad." *Day v. Le-Jo Enters., Inc.,* 521 So. 2d 175, 177 (Fla. 3d DCA 1988). A "claim under FDUTPA is not defined by the express terms of a contract, but instead encompasses unfair and deceptive practices arising out of business relationships." See *Siever v. BWGaskets, Inc.,* 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009).

Whether a practice is "deceptive or unfair" is determined by an objective analysis, and ordinarily is a question of fact for the jury to determine. See *Calderon v. Sixt Rental Car, LLC,* 2020 WL 700381 (S.D. Fla. 2020). In *Calderon,* the plaintiff alleged that Sixt Rental attempted to merge the two contracts in order to perpetuate their "systematic scheme" of charging customers fraudulent fees to bring

in additional revenue. The Court held that the complaint states a cause of action based on the allegation of an illegal profit scheme through the use of "fees". Similarly in in *Deere Construction, LLC v. Cemex Construction Materials Fla., LLC,* 198 F. Supp. 3d 1332 (S.D. Fla. 2016), the district court in ruling on the viability of a FDUPTA claim held that:

> [W]ith regard to the claimed deceptive act or unfair practice, the Amended Complaint makes abundantly clear Plaintiff's claim is not that it did not know about the "fuel surcharge" and "environmental charge. Those fees are undoubtedly disclosed in the agreement and Defendants' invoices. What is allegedly deceptive is that the so called "fuel surcharges" and "environmental charges," labeled as such by Defendants, were not in fact designed to cover anything related to fuel or the environment. Defendants chose the two adjectives that describe the fees being assessed. Each adjective carries meaning. But the messages, according to Plaintiff, are deceptive." *Id*. at 1338 (emphasis added).

The amended statement of claim alleges that AT&T kept the fee for itself, as additional revenue, and did not use it to defray expenses. For example, it is alleged in paragraph 18:

"The so-called Administrative Fee is not, in fact, a bona fide administrative fee, but rather is simply a means for AT&T to charge more per month for the service itself without having to advertise the higher prices as a scheme to increase revenue. AT&T Mobility, LLC's previous in court public admissions (filed by its corporate counsel, Patricia Cruz, Esq.) to the conduct alleged via its filing of its "consent to payment for conduct for the claims asserted or which could have been asserted" in the cases of *Erin Young v. AT&T Mobility, LLC*, Case No. 2019-2027-SP-26, EFiling#87601121 or *Tamara Crespo v. AT&T Mobility, LLC*, Case No. 2019-2026-SP26, E-Filing#87600869 both of which alleged AT&T's violation of FDUTPA for illegal data throttling and bogus administrative fee, is further evidence of AT&T Mobility, LLC's illegal, immoral and unethical conduct."

Hence, at its core, the issue is whether, as a matter of fact, AT&T used the administrative fee to defray expenses paid to third parties, or whether it kept it for itself. This presents a fact question that cannot be resolved on a motion to dismiss the complaints. See *Advance Mold Servs. v. Universal N. Am. Ins. Co.,* 2023 WL 8793260 (Fla. 3d DCA Dec. 20, 2023) [49 Fla. L. Weekly D7a]. In *Advance Mold Servs.,* the defendant moved to dismiss an assignee's breach of insurance contract action, contending that a fee designated on an estimate as "Hazardous Waste/Mold Cleaning Supervisory/Admin-per hour" constituted a statutorily prohibited "administrative fee." The plaintiff asserted that the fee was used to 23 | Page pay a supervisor and not as a clerical fee associated with administering the contract. This court held that a question of fact existed, precluding dismissal of complaint, as to whether the fee constituted an "administrative fee."

The Third District Court of Appeal's decision in *Advance Mold Servs.* is on point. Here, a fact question exists as to whether the administrative fee was what it was represented to be: a fee assessed to defray or recover expenses AT&T pays to third parties associated with providing wireless service. The issue of whether AT&T uses the revenue generated from the administrative fee to defray or recover such expenses, or instead keeps it for itself, is one of fact that cannot be determined on a motion to dismiss the complaint. The allegations of Plaintiff's Count I clearly state a cause of action for FDUPTA violation for damages and Defendant's Motion to Dismiss Said Count is DENIED.

III. **Plaintiff's Amended Statement of Claim States a Cause of Action for Declaratory Relief**

In *Imperial Fire & Cas. Ins. Co. v. Acosta,* 337 So. 3d 89, 92 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2410a], the Third District Court of Appeal held that a viable complaint for declaratory relief must allege, at a minimum, that: "(1) there is a bona fide dispute between the parties; (2) the plaintiff has a justiciable question as to the existence or nonexistence of some right, status, immunity, power or privilege, or as to some fact upon which existence of such a claim may depend; (3) the plaintiff is in doubt as to the claim; and (4) there is a bona fide, actual, present need for the declaration." *Ribaya,* 162 So. 3d at 352. A review of the amended statement of claim shows that Plaintiff has pled the necessary elements for declaratory relief under Florida law. Moreover, the FDUTPA statute itself recognizes a claim for declaratory relief. See *Orkin Exterminating Co. v. Petsch,* 872 So. 2d 259, 264 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D352a] (Florida Statutes section "501.211(1) authorizes injunctive relief, even if that relief does not benefit the customer who filed the suit."); *Schauer v. Morse Operations, Inc.,* 5 So. 3d 2 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D81a] (noting that section "501.211 provides that a person aggrieved by a violation of FDUTPA may obtain a declaratory judgment that an act or practice violates FDUTPA"). Defendant's Motion takes no issue as to whether Plaintiff has properly pled a claim for declaratory relief under FDUTPA. Therefore, Plaintiff has stated a cause of action for declaratory relief under FDUTPA and Defendant's Motion to Dismiss is DENIED.

IV. **Plaintiff's Amended Statement of Claim States a Cause of Action for Unjust Enrichment**

Defendant takes no issue as to whether Plaintiff has pled a claim for unjust enrichment but instead relies on documents outside the four (4) corners of the pleading. The plaintiff can allege the existence of a contract and simultaneously plead unjust enrichment in the alternative, pending proof of an express contract concerning the same subject matter. *See Bowe,* 2014 U.S. Dist. LEXIS 19556 at 12 (defendant's motion to dismiss unjust enrichment count held to be premature because it is "upon a showing that an express contract exists that the unjust enrichment count fails"), quoting *Martorella v. Deutsche Bank Nat'l Trust Co.,* 931 F. Supp. 2d 1218, 1228 (S.D. Fla. 2013); *Real Estate Value Co., Inc. v. Carnival Corp.,* 92 So. 3d 255, 263 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1461a] ("Under Florida law, a party may simultaneously allege the existence of an express contract and alternatively plead a claim for unjust enrichment. . . . Of course, upon a showing that an express contract concerning the same subject matter exists, the unjust enrichment claim necessarily fails," citing *Hazen v. Cobb,* 96 Fla. 151, 117 So. 853, 857- 58 (1928)); *Williams v. Bear Stearns & Co.,* 725 So. 2d 397, 400 (Fla. 5th DCA 1998) [24 Fla. L. Weekly D50b] ("Until an express contract is proven, a motion to dismiss a claim for. . . unjust enrichment. . . is premature"). If an express contract is proven, the Court will entertain dismissal of the unjust enrichment count if not withdrawn by Plaintiff.

V. **Pre-emption Does not Apply Based on the Allegations of the Amended Statement of Claim**

While a defendant may assert preemption on a motion to dismiss, the court must determine the issue as a matter of law based only on the well-pleaded allegations in the complaint, assuming the facts asserted. *See Hanft v. Phelan*, 488 So.2d 531, 532 n. 1 (Fla.1986); *Boca Burger, Inc. v. Forum,* 912 So. 2d 561, 568-69 (Fla. 2005) [30 Fla. L. Weekly S649a], *as revised on denial of reh'g* (Sept. 29, 2005). Nowhere in the well-pled complaint is there any reference to or even a discussion of the Federal Communications Act or the basis of Defendant's preemption defense. In fact, paragraph 5 of the amended statement of claim states that "this claim is not preempted by any federal statute." Based on the four-corners of the complaint and viewing the allegations in the light most favorable to the Plaintiff, Defendant's claim of preemption fails as a matter of law on a motion

to dismiss.

CONCLUSION

As stated above, a motion to dismiss tests only the legal sufficiency of a complaint and it is not intended to determine issues of ultimate fact, and the court is confined to the well-pled facts contained within in the four corners of the complaint." *Lewis v. Barnett Bank of S. Florida, N.A.*, supra. The question for this Court to decide is whether, assuming the well-pleaded factual allegations in the amended statement of claim are true, Plaintiff would be entitled to the relief requested. In light of the analysis set forth above, this Court finds that Plaintiff states a cause of action as to Counts 1-3 and therefore Defendant's motion to dismiss is hereby DENIED.

Defendant shall serve its answer within 10 days from the date of this order.

* * *

Landlord-tenant—Return of security deposit—Tenant entitled to summary judgment on claim for return of security deposit where parties do not dispute that landlords failed to return security deposit, and landlords affirmatively waived any defense that they were entitled to retain deposit based on breach of lease—Further, landlords technically admitted that tenant did not cause damage and that damage predated tenant's move into property, and evidence does not contradict these admissions

ORIT TAL, Plaintiff, v. GARY LEMAN and ANNA LEMAN, Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-031850-SP-05. Section CC04. September 28, 2023. Diana Gonzalez-Whyte, Judge. Counsel: Rami Shmuley, Chavin Mitchell Shmuley, North Miami, for Plaintiff. Peter Solnick and Daniel Rudoy, AR Law Group, North Miami Beach, for Defendants.

ORDER ON PLAINTIFF ORIT TAL'S MOTION FOR SUMMARY JUDGMENT DOCKET INDEX NUMBER: 45

This matter having come before the Court on Plaintiff, Orit Tal's Motion for Summary Judgment against Defendants, Gary Leman and Anna Leman and the Court having reviewed the Motion and supporting evidence, Defendant's response in opposition to the Motion and supporting evidence, and Plaintiff's Reply thereto, hearing argument of counsel, and being otherwise fully advised in the premises, it is hereby.

ORDERED AND ADJUDGED:

1. Plaintiff's Motion is **GRANTED**.
2. The matter at issue is fully resolved by way of this Order.
3. The Court makes the following findings of fact:

1. Orit Tal has rented the home at issue in this case since November 1, 2017.

2. The home is located in Aventura, Florida.

3. The original owner of the home and original lessor was Johnny Graterol.

4. On December 23, 2021, Mr. Graterol sold the home to Gary and Anna Leman.

5. At the time of the closing, Mr. Leman was located in Ukraine.

6. Orit Tal's lease was assigned from Mr. Graterol to the Lemans on December 23, 2021.

7.On July 31, 2022, Orit Tal vacated the premises.

8. On August 31, 2022, Defendants via written communication advised Plaintiff of their intention to retain the Plaintiff's entire security deposit.

9. On September 12, 2022, Plaintiff initiated this action against Defendants for recovery of the security deposit.

10. It is undisputed that, to date, Defendants have not returned the security deposit to Plaintiff.

11. On February 14, 2023, Plaintiff's Amended Complaint was deemed filed by this Court.

12. On March 27, 2023, Defendants filed their Answer to the Amended Complaint including one Affirmative Defense alleging Plaintiff breached the contract.

13. On March 28, 2023, Plaintiff moved for Summary Judgment on Defendants' Affirmative Defense of Breach of Contract.

14. On May 24, 2023, on the eve of the scheduled hearing on Plaintiff's Motion for Summary Judgment, Defendants filed their Notice of Withdrawing their Affirmative Defense. No additional Affirmative Defenses exist.

15. On November 28, 2022, Plaintiff filed its First Request for Admissions.

16. Defendant failed to timely respond to Plaintiff's Request for Admissions.

17. On May 25, 2023, Plaintiff filed its Motion for Summary Judgment, based in part on Florida Rule of Civil Procedure 1.370 providing that if a party fails to timely respond to a request for admissions, the matter is deemed admitted.

18. On June 23, 2023, Defendant improperly filed its Answers to Admissions without first seeking leave of Court as Required by Fla. R. Civ. Pro. 1.370(b). The record further reflects that **Defendant at no time sought leave of Court to withdraw its Admissions.**

19. On August 25, 2023, Defendant filed "Landlord's Opposition to Motion for Summary Judgement."

20. On September 1, 2023, Plaintiff filed "Plaintiff's Reply to Landlord's Opposition to Summary Judgement" outlining deficiencies within "Landlord's Opposition to Motion for Summary Judgement."

21. On September 14, 2023, Plaintiff Orit Tal's Motion for Summary Judgement was argued before the Court.

4. As a matter of law, the Court determines that:

1. Plaintiff alleged that Defendants breached the lease by retaining Plaintiff's security deposit. Defendants have not disputed that they retained Plaintiff's security deposit and have waived any affirmative defense that they were entitled to retain it due to any alleged breach of the lease by Plaintiff. An Affirmative Defense is waived unless it is pleaded. The failure to raise an affirmative defense prior to a Plaintiff's motion for summary judgment constitutes a waiver of that defense. *Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D752a]; *Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46, 48 (Fla. 1988).

2. Nor may a defendant raise an unpled affirmative defense as a basis for resisting a motion for summary judgement. *Capotosto v. Fifth Third Bank*, 230 So. 3d 891, 892 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2471a]. When Defendants *withdrew* their breach of contract affirmative defense, they affirmatively waived any defense that they were excused from their obligation to return the security deposit based on Plaintiff's alleged breach of the lease and cannot rely on such unpled affirmative defenses to oppose summary judgment. Because the parties do not dispute that Defendants failed to return the security deposit, and Defendants affirmatively waived any defense that they were entitled to retain the security deposit based on Plaintiff's breach of the lease, Plaintiff is entitled to summary judgment.

3. Even if Defendants had not waived their affirmative defenses, Plaintiff would still be entitled to summary judgment based on the record evidence in this case. When a party fails to timely respond to requests for admissions served under Florida Rule of Civil Procedure 1.370(a), the admissions requested are deemed admitted. *Fla. R. Civ. P. 1.370* ("The matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter within 30 days after service of the request"). As Mr. Leman failed to timely respond to the requests for admission, he was deemed to have admitted those facts. *Perry v. Fairbanks Cap. Corp.*, 888 So. 2d 725, 726 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D2773a].

4. Florida Rule of Civil Procedure 1.370(b) states: "[a]ny matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission." Defendants have failed to seek leave of court to withdraw or amend Mr. Leman's admissions. As such, the admissions stand. *Singer v. Nationwide Mut. Fire Ins. Co.*, 512 So. 2d 1125, 1126 (Fla. 4th DCA 1987) (trial court did not abuse its discretion in failing to grant party relief from the conclusively established admissions, where no motion for relief from the admissions was made). Defendants' filing of responses to the requests for admissions over half a year after the requests for admissions were served was done without leave of Court, in violation of Rule 1.370(b), rendering them a nullity. The Defendants never sought leave of Court to withdraw or amend their admissions, and Defendant technically admitted that the Plaintiff did not cause the alleged damage and that the alleged damages predated Plaintiff's move into the property.

5. Defendant's technical admissions are valid, and Plaintiff properly relied on them because the Motion for Summary Judgment was filed after the time for Defendant to respond expired and before any response was filed. *Asset Mgmt. Consultants of Va., Inc. v. City of Tamarac*, 913 So. 2d 1179, 1180 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2415a] (trial court properly granted motion for summary judgment based on technical admissions because the party opposing summary judgment had "more than enough time to file" a motion for relief from admissions prior to the summary judgment hearing, but failed to do so, and the tardy request for relief from admissions prejudiced the party seeking summary judgment). Here, Defendant did not file its response to the request for admissions until half a year *after* its response to the requests for admission were due and not until *after* Plaintiff had already filed its motion for summary judgment. When it did file its response, it did so without leave of Court, in violation of Rule 1.370(b).

6. The Court has reviewed the Landlord's Opposition to Motion for Summary Judgment and its supporting documents, including the Sworn Declaration of Gary Leman. Defendant has failed to provide the Court with any credible evidence that would contradict Mr. Leman's prior admissions or otherwise permit a jury to find in favor of the Defendants.

7. In opposition to Plaintiff's Motion for Summary Judgment, Defendant Gary Leman filed a Sworn Declaration. Only paragraphs 13 and 14 of the Sworn Declaration address the damage issue in this matter. Defendant's statements are conclusory, self-serving and are based upon speculation and assumption. These statements lack any supporting details or the basis for Defendant's alleged personal knowledge of his statement that Plaintiff caused damage to the property. The statements are therefore legally insufficient to create a disputed issue of fact. *Verchick v. Hecht Investments, Ltd.,* 924 So. 2d 944, 946-47 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D977a] (conclusory affidavits which lacked specific details on disputed issue were insufficient to oppose summary judgment); *Carter v. Cessna Fin. Corp.,* 498 So. 2d 1319 (Fla. 4th DCA 1986); *Morgan v. Continental Casualty Co.,* 382 So. 2d 351 (Fla. 3d DCA 1980).

8. The Court finds that, as evidenced by the record, the pleadings and other record evidence in this case do not contradict the admissions. Even considering Defendants' belated "Answer to Admissions," Defendants admit that they "do not have any photos prior to November 1, 2017, depicting the items claimed to be damaged" and that "Defendants do not have any documents that purport to show that Plaintiff caused the alleged damages." *See* Answers to Admissions ¶¶ 8-9. Similarly, Defendants' Renewed Response to First and Second Interrogatories admitted that they did "not have sufficient knowledge" to answer interrogatories asking about the condition of the items Plaintiff allegedly damaged prior to Plaintiff's tenancy and have no photographs of the damaged areas prior to Plaintiff's tenancy. *See* Interrogatory responses ¶¶ 10-13. In short, Defendants have no way of knowing or proving the condition of the home at issue prior to Plaintiff moving in on November 1, 2017, and introduced no credible evidence of the condition of the home prior to Plaintiff's vacation of the premises. No reasonable jury could find, based on Defendant's conclusory assertions alone, that *Plaintiff* caused the alleged damage to the property.

9. The only relevant evidence Defendants proffered in opposition to summary judgment were Mr. Leman's self-serving statements in his sworn declaration that Plaintiff damaged the property. In his declaration, Mr. Leman did not provide any detail as to the prior condition of the property, or as to how he could have had personal knowledge of this allegation. Defendants failed to provide any other evidence regarding the condition of the property prior to Plaintiffs' tenancy or her vacation of the premises, and no reasonable jury could have found in Defendants' favor based only on Mr. Leman's self-serving and conclusory statements that Plaintiff caused the damage. This, coupled with Defendants' technical admissions, entitles Plaintiff to summary judgment.

5. As the prevailing party, Orit Tal is entitled to a full return of her security deposit in the amount of $3,900.00 plus interest beginning August 31, 2022, until paid. Additionally, Plaintiff is entitled to recover her attorney's fees and costs expended in this action pursuant to Florida Statutes Section 83.48 and Section 26 of the lease between the parties upon issuance of judgment. All for which let execution issue forthwith.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Unsignalled lane change that did not affect other traffic give rise to reasonable suspicion justifying stop—Request for defendant to perform field sobriety exercises based solely on hint of alcohol on his breath was unlawful—Stop and arrest were unlawful where neither defendant's driving pattern, hint of alcohol on his breath, nor performance on field sobriety exercises rose to level of demonstrating that defendant was impaired—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. UNAI URTIZBEREA-MARTINEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Traffic Division. Case Nos. AADY4LE, et al. March 18, 2024. Raul Cuervo, Judge. Counsel: Jonathan Burton, Assistant State Attorney, for Plaintiff. Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

THIS CAUSE, having come on to be heard before me upon the Defendant's Omnibus Motion to Suppress Evidence, and the Court, having taken testimony, having heard the argument of counsel, and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is hereby **GRANTED** and this Court hereby suppresses any and all evidence obtained by the police as a result of the defendant's unlawful stop and subsequent arrest. As grounds for the foregoing, the Court hereby makes the following findings of fact and law:

On Saturday, July 16, 2022, the defendant was observed by Officer Michael Spanks[1] formerly with the City of Coral Gables police department as he was changing lanes on the 400-blk of Bird Rd. Officer Spanks testified that the defendant did not signal when he changed lanes. However, as the officer admitted in his cross-examination, the defendant did not impede or interfere with any other vehicles or traffic when he changed lanes, and the officer further admitted that he did not know why the defendant was driving that way, or whether the driving pattern that he observed was for non-offensive reasons.

After the stop of the defendant's car, the officer testified that he smelled a strong odor of an alcoholic beverage emitting from the defendant's breath. However, when asked by defense counsel to clarify the officer's notation on his report made at the time of the stop, the officer changed his testimony, stating that he smelled only the "*hint*" of an alcoholic beverage from the defendant.

The officer immediately asked the defendant to exit his car. When he did so, the officer testified that the defendant exited the car without difficulty and that he then walked, at the officer's direction, normally, to an area directly behind the officer's police car.

The officer testified that this was the first DUI investigation that he had ever handled in his brief career as a police officer. After the defendant had walked normally behind his police car, the officer asked the defendant to submit to a battery of field sobriety exercises to determine his impairment, *if any*.[2]

During the horizontal gaze nystagmus exercise, which the officer conducted in only 30-seconds instead of the standard minimum of 82-seconds, the defendant did *not* exhibit nystagmus prior to a 45-degree angle or at maximum deviation.

After the completion of the field sobriety exercises, the officer did *not* arrest the defendant. Instead, the defendant was driven first to the Coral Gables police station even though the officer knew that the Coral Gables station's breath testing device was broken and that a breath test could not be completed there, and subsequently to a Miami Dade police station. Additionally, when the defendant was offered the breath test over four (4) hours after his initial contact with the officer, the defendant was, according to the officer, merely being *detained* by him, even though Florida requires that an individual must be under lawful arrest for an officer to request a test from him. *See* 316.1932, *Fla. Stat.* (the administration of a breath test may be conducted only ***after*** a person is under lawful arrest for "any offense allegedly committed while [d]riving or [i]n actual physical control of a motor vehicle while under the influence."). According to the officer's testimony, the defendant was arrested only *after* he refused to submit to the breath test. This further calls into question whether the officer believed that he had probable cause to arrest the defendant until *after* he declined to submit a breath test. Clearly driving around for 4 hours with the defendant in the back seat of a police car is a possible unlawful seizure calling into question the initial detention of the defendant. In short, while the officer's testimony appeared truthful, the Court finds that the officer's memory was less than accurate and not credible with regard to key points in the interaction with the defendant.

The Court notes that all warrantless seizures are presumptively unreasonable and invalid. *See generally Katz v. United States*, 389 U.S. 347 (1967); and *Hornblower v. State,* 351 So.2d 716 (Fla. 1977). It is undisputed that the defendant's seizure was conducted without a warrant. *State v. Hinton*, 305 So.2d 804 (Fla. 4th DCA 1975) (court may review court file to take judicial notice of the fact that no warrant has been filed, thereby placing burden on the prosecution to prove the validity of the police's actions under the Fourth Amendment).

Thus, where a defendant is seized without a warrant, the burden rests upon the state to produce evidence that the detaining officer had probable cause to arrest or, at a minimum, a founded suspicion to detain the suspect. *See Terry v, Ohio*, 392 U.S. 16 (1968). *See also D'Angostino v. State*, 310 So.2d 12 (Fla. 1975); and *Benefield v. State*, 160 So.2d 706 (Fla. 1964). This the prosecution did not do for several reasons.

First, the officer did not have the legal justification for his stop of the defendant's vehicle. A lesser standard, *reasonable suspicion*, was created in order to permit brief, investigatory detentions for the detection of criminal activity by a law enforcement officer.[3] *See Terry v. Ohio*, 392 U.S. 1 (1968). In order for an *investigatory stop* to meet the *Terry* standard, it must be supported by some objective manifestation that the person stopped is, or is about to be engaged in some criminal activity. *See also United States v. Cortez,* 449 U.S. 411, 417 (1981). Whenever the police lack a factual foundation for their *reasonable suspicion*, however, they may not rely on good faith and inarticulable hunches to meet the standard. *See Terry*, *supra.* and *Ybarra*, *supra.*

The *reasonable suspicion* standard has been codified in 901.151(2), *Fla. Stat.,* which states:

> Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, he may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding his presence abroad which led the officer to believe that he had committed, was committing, or was about to commit a criminal offense.

Simply put, the officer did not have a reasonable suspicion that the defendant in this case had committed or was about to commit a criminal violation in order to justify the initial warrantless seizure of him. This case is very similar to *Hurd v. State,* 958 So.2d 600 (Fla 4th DCA 2007) [32 Fla. L. Weekly D1594a]. In *Hurd* the officer who made the arrest testified that he followed the defendant for 2 miles and noticed erratic driving. The defendant was in the far-left lane and without warning crossed a solid white line without using his turn signal. The officer admitted that there were no other cars around. The officer testified he observed two traffic violations, failure to maintain a single lane and failure to signal.

In reversing the trial court's denial of the motion to suppress, the Court found that the Florida Supreme Court requires a signal only if another vehicle would be affected by the turn. 958 So.2d at 603. The *Hurd* held that if a signal is not required, a traffic stop predicated on failure to use the turn signal "is illegal and any evidence obtained as a result of that stop must be suppressed." *Id.*

The Florida Supreme Court decision cited by the *Hurd* court was *State v. Riley*, 638 So.2d 507 (Fla. 1994), where a defendant was stopped because he failed to use his turn signal when changing the lane of travel, even though he did not obstruct or otherwise interfere with other traffic. In declaring the stop unlawful, the Florida Supreme Court held that the wording of the statute [316.155, *Fla. Stat*.] indicated that a turn signal was only necessary when other traffic would be affected by the driver's actions. *See also Doctor v. State*, 596 So.2d 442 (Fla. 1992) (broken tail light was in fact in compliance with the law, rendering subsequent stop invalid); *Collins v. State*, 65 So.2d 61 (Fla. 1953) (defendant who on three occasions drove one foot over center line of highway did not violate the law, justifying his stop); *Reems v. State*, 492 So.2d 1139 (Fla. 1st DCA 1986) (officer stopped defendant to issue verbal warning as he was unsure if it was his vehicle that was speeding); *Wilhelm v. State*, 515 So.2d 1343 (Fla. 2d DCA 1987) (one cracked tail light out of four tail lights, the other of which were operable, did not justify traffic stop); *State v. Glasscock,* 676 N.E. 2d 179 (Ohio App. 1996) (minor lane dividing incursions insufficient to establish reasonable suspicion to stop vehicle); *State v. Solano,* 2 Fla. L. Weekly Supp. 229a (Fla. 7th Jud. Cir. Cty. Ct. 1994) (officer lacked reasonable suspicion to stop vehicle that turned left without signaling at the intersection where there was no other traffic); *State v. Stahr,* 4 Fla. L. Weekly Supp. 225a (Fla. Cty. Ct. - Clay Cty. 1996) (drifting and weaving within a single lane and crossing another lane do not constitute founded suspicion justifying stop of vehicle unless another vehicle is endangered); *State v. Fitzgerald*, 5 Fla. L. Weekly Supp. 131a (Fla. 17th Jud. Cir. Cty. Ct. 1997) (defendant's act of momentarily stopping vehicle on roadway such that vehicle was not obstructing the flow of traffic did not provide officer with founded suspicion for the stop); *State v. Boyhan*, 4 Fla. L. Weekly Supp. 1b (Fla. 7th Jud. Cir. 1996) (minor drifting inside traffic lane insufficient); *State v. Giachinta*, 3 Fla. L. Weekly Supp. 700a (Fla. 17th Jud. Cir. Cty. 1996) (stop of vehicle for failure to maintain a single lane was unlawful where no other traffic was affected by the defendant's

driving pattern); *State v. Gonzales*, 3 Fla. L. Weekly Supp. 701b (Fla. 17th Jud. Cir. Cty. 1995) (same); *State v. Myer*, 2 Fla. L. Weekly Supp. 484a (Fla. 17th Jud. Cir. Cty. 1994) (same).

This Court also finds that the officer's request that the defendant perform field sobriety exercises was unlawful. A law enforcement officer cannot request that a citizen perform field sobriety exercises unless the officer *at least* has a reasonable suspicion to believe that the driver is DUI. *See*, *e.g.*, *Jones v. State*, 459 So. 2d 1068, 1080 (Fla. 2d Dist. Ct. App. 1984), *affirmed*, 483 So. 2d 433 (Fla. 1986); *State v. Wood*, 662 A.2d 919 (Me. 1995); *Department of Highway Safety & Motor Vehicles v. Guthrie*, 662 So. 2d 404 (Fla. 1st Dist. Ct. App. 1995) [20 Fla. L. Weekly D2480b]. The mere *hint* of an odor of an alcoholic beverage upon an individual's breath, as the officer testified that he detected from the defendant, is not inconsistent with the ability to operate a motor vehicle in compliance with the law. *See State v. Kliphouse,* 771 So. 2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]

To meet the standard noted above, a police officer must point to specific and articulable facts, together with rational inferences drawn from those facts, that reasonably suggest that criminal activity has occurred or is imminent. Neither an officer's good faith nor his inarticulable hunch will satisfy these constitutional prerequisites.

Finally, this Court addresses the unusual handling of the field sobriety exercises in this case and the delay in the request for the defendant to submit to a breath test nearly 4 hours after the initial contact with the police.

Physical sobriety exercises are often *the* pivotal, pre-arrest tool to assist police in making DUI arrests, for they are specifically designed to divide a suspect's attention to assess mental acuity, judgment, and physical coordination. *See State v. Taylor*, 625 So.2d 911, 912 (Fla. 2d DCA 1993) (pre-arrest field sobriety exercises are "law enforcement tools to confirm an officer's determination that an individual is intoxicated"), *reversed on other grounds,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]. This too, though, necessitates an officer's purely subjective opinion of performance and impairment. It is for this reason also that probable cause for DUI must be scrutinized.

The officer admitted that the defendant was made to attempt to perform the exercises in flip-flops in the middle of the street, in wet and uneven terrain. Moreover, the fact that this was the *first* time this officer had ever administered such exercises in the field makes the officer's conclusions even more problematic. The officer seemingly ignored the fact that the defendant did *not* have nystagmus prior to a 45 degree angle supporting the a conclusion that the defendant was *not* impaired. And the fact that it took the officer almost four hours to offer the defendant a breath test, **and that the officer did *not* formally place the defendant under arrest until *after* he refused the breath test**, troubles this court even more. While it might be said that the failure to arrest the defendant immediately does not affect the officer's ability to request a breath test in spite of the clear language requiring any such tests being offered *post*-arrest, *see* 316.1932, *Fla. Stat.*, because the defendant was functionally arrested after he was transported from the scene of the arrest, *see State v. Rivas-Marmol*, 679 So. 2d 808 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1719c], it supports the Court's belief that the officer was so unsure of his arrest that he wanted to wait until *after* a breath test could be administered before deciding whether he was going to arrest the defendant for the DUI offense.

In the present case, nothing, not the driving pattern, not the *hint* of an odor of alcohol—and certainly not his performance of the sobriety exercises—rose to the level of demonstrating that the defendant was under the influence of alcohol and impaired as required by law. As a consequence, viewing this incident in its entirety, the court finds that the totality of the circumstances evidences a lack of probable cause and that the stop and the arrest were unlawful.

For all the independent reasons stated above, both individually and collectively, this Court finds that all of the evidence against the defendant must be suppressed.

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[1]The officer testified that he left the employment of the Coral Gables police department, and law enforcement entirely, in September of 2022, after only serving as a police officer for just over two (2) years.

[2]There was no body worn camera footage.

[3]The Fourth Amendment is applicable to state officials through the due process clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28, 33 (1949).

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Demand letter that demanded and included HCFA forms for total amount billed but did not account for prior payments by insurer did not satisfy statutory condition precedent

FIRST HEALTH CHIROPRACTIC, a/a/o Kyara Medina, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-024780-SP-25. Section CG04. February 27, 2024. Jacqueline Woodward, Judge. Counsel: Adriana De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S FINAL SUMMARY JUDGMENT.

This court signed the agreed order on the motion for summary judgments on August 11, 2023, after *Mercury Indem. Co. of Am. v. Pan Am Diagnostic of Orlando,* 368 So. 3d 27 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1131a] was decided, and reserved on a final decision on the issue of whether or not the claimants pre-suit demand letter needed to reflect payments made by the insurer. This issue was briefed by both sides and an oral argument was held on October 6, 2023. Upon reconsideration and based on the appellate decisions in this District, the Defendant's Motion for Summary Judgment is **GRANTED.**

Undisputed Facts

On or about December 6, 2017, Allstate's insured, Kyara Medina ("Medina"), was involved in a motor vehicle accident in which she sustained personal injuries. She was treated at First Health Chiropractic ("FIRST"), to which she assigned her rights to recover PIP benefits. According to the Demand Letter, FIRST treated Medina between January 11, 2017, and March 28, 2018, and FIRST billed Allstate a total of $6,246.00 on the $10,000.00 PIP Policy. Prior to the demand letter being sent, Allstate made payments to First in the amount of $4,552.40. On June 13, 2019, Pacin & Levine, the attorneys for FIRST sent Allstate a pre-suit demand letter which stated that the "Amount Billed" was "$6,246.00" and attached the previously submitted CMS-1500 form (also referred to as a Health Insurance Claim Form ("HCFA")) in lieu of an itemized statement. The demand letter stated, "This is a request for ***PIP benefits*** pursuant to Florida statute §627.736 in the amount of $4,996.80 for date of service January 11, 2017, through March 28, 2018" (Empasis in the original). However, there was no reference to the $4,552.40 that had been paid on these invoices, nor was there any indication of which of the attached invoices were being disputed as not paid or overdue, and none of the attached HCFAs had the amount due as required in the Box/Item #29 which states "Amount Paid." Box/Item #29 was left blank, which is the determining factor in granting the motion for summary judgment.

FIRST filed the instant Complaint on August 15, 2019 (amended on September 25, 2020) One of Allstate's affirmative defenses was that Plaintiff's Demand Letter failed to comply with the statutory conditions precedent to filing suit as outlined in §627.736 (10) Fla. Stat (2021) because Plaintiff had demanded an amount in its pre-suit demand which exceeded the amount allowed under the PIP statute as

the demand letter (and in this case the HCFA Form) failed to account for prior payments to the Provider.

ANALYSIS

This case comes before the court on consideration of whether the pre-suit demand letter complies with the statute. The correct remedy when a party has failed to comply with pre-suit notice requirements is summary judgment. *See Bridgeport, Inc. v. Tampa Roofing Co.,* 903 So. 2d 306 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1445b].

The pre-suit demand letter is governed by §627.736 (10). The relevant sections of the relevant paragraphs are the following:

> (a)As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b)The notice must state that it is a "demand letter under s. *627.736*" and state with specificity: . . .
>
> 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. . . .
>
> (d)If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer. . . .

There is a conflict in the circuits on how specific a pre-suit demand letter must be.[1] However, there are three cases that are binding on this court. *Venus Health Ctr. (a/a/o Joaly Rojas) v. State Farm Fire & Cas. Co.* 21 Fla. L. Weekly Supp. 496a, 2014 WL 12992180 (Fla. 11th Cir. Ct. Mar. 13, 2014); *Rivera v. State Farm Mutual Automobile Insurance Co.* 317 So. 3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]; and *Mercury Indem. Co. of Am. v. Pan Am Diagnostic of Orlando,* 368 So. 3d 27 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1131a].

Venus is an Eleventh Judicial Circuit, Miami-Dade County, Appellate decision that is directly on point.

> *The issue presented by this appeal is whether § 627.736 (10) Fla. Stat. (2012) requires a claimant's pre-suit Demand Letter to reflect payment(s) made by an insurer. We answer this question in the affirmative and therefore affirm the summary judgment entered below.* *Venus* at 1.

The language in §627.736 (10) has not changed from 2012 to 2021. Therefore, this court is bound by this decision in the absence of a subsequent appellate court decision that reverses or calls the ruling into question.

The *Rivera* decision is not directly on point, but strongly suggests that the 3d DCA believes that the statute requires a pre-suit demand letter to be specific. The *Rivera* decision required a more precise or specific demand amount but is restricted in its applicability to those cases that used the choice of an itemized list and not a (5)d form such as a HCFA. Therefore, under *Venus* and *Rivera,* this claim fails.

While the instant case was pending, the 3d DCA addressed the specificity requirement of a demand letter in *Mercury.* In July of 2023, the 3d DCA clarified that §627.736(10)(b)3 allows for a demand letter to ***either*** (1) provide an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due **OR** (2) a **completed** form satisfying the requirements of paragraph (5)(d) which may be used as the itemized statement, for example a **completed** HCFA. The 3d DCA concluded,

> *Because Pan Am's pre-suit demand letter to Mercury satisfied the requirements of section 627.736(10)(b) 3., Florida Statutes (2017), by attaching a "completed form satisfying the requirements of paragraph (5)(d)1. . . [which] may be used as the itemized statement," we affirm the trial court's entry of summary judgment in favor of Pan Am.* *Mercury* at 32.

The demand letter in this case also fails under the *Mercury* analysis because the Plaintiff failed to attach **completed** HCFAs. The attached HCFAs were not complete as Item/box #29 was left blank. Item/box #29 of the HCFA is the "Amount Paid" box. Proof that prior payments must be reflected in a HCFA that is sued to comply with the pre-suit demand requirement, is found in the wording of the statute. The itemized list ends with "claimed to be due" and the fact that Section §627.736(10)(a) requires that a demand letter may not be sent until after the insurance company has had the time to pay the bills. (See Section 627.736(10)(a) which states that the Demand Letter "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).")

Therefore, while a **completed** form that satisfies the requirements of paragraph (5)(d) may be used as the itemized statement; given that it cannot be sent until after the bills have been paid, a **completed** HCFA must include the entry of the previously paid amount in Item/Box # 29.

Therefore, given that *Venus* found that the demand letter did not comply with the statute §627.763(10) because it did not account for the amounts paid and that the decision in *Mercury* found that a demand letter requires a **completed** HCFA; this court finds that the demand letter in this case was not in compliance with the statute as interpreted by the decisions in *Venus* and *Mercury,* and therefore summary judgement must be granted. Florida courts have repeatedly held that words may not be excised from a statute and a statute must be read in its entirety.

Conclusion

For the foregoing reasons, it is ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED.

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[1]This court is mindful of the principles of statutory construction referred to in *Mercury Indem. Co. of Am. v. Cent. Fla. Med. & Chiropractic Ctr., Inc.,* No. 5D22-603, 2023 WL 7096641, at *4 (Fla. 5th DCA Oct. 27, 2023) [48 Fla. L. Weekly D2090a] which hold that a court should not determine statutory construction on what "makes sense" and instead to be guided by Scalia & Garner (See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2011). And this Court recognizes that the 5th DCA disagrees with the findings of *Venus* and *Rivera* because the 5th DCA believes that the basis of those decisions were what "makes sense" rather than strict textual interpretation.

* * *

Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Plaintiff is entitled to award of attorney's fees where defendant did not withdraw meritless motion for sanctions until long after expiration of 21-day safe harbor period

BLACKSTONE MEDICAL SERVICES, Plaintiff, v. AT&T MOBILITY, LLC, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-024852-SP-26. Section SD03. January 25, 2024. Lissette De la Rosa, Judge. Counsel: Maury L. Udell, Beighley, Myrick, Udell, Lynne & Zeichman, P.A., Miami, for Plaintiff. Manny Garcia-Linares and Andrew Ingalls, Day Pitney, LLP, Miami, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SANCTION (D.E. #64)

Based on the record evidence presented during the hearing on January 18, 2024, the Court finds that on August 30, 2023, Defendant AT&T served a motion for sanctions onto the Plaintiff in which Defendant demanded an award of sanctions against Plaintiff (and its

counsel) claiming that Plaintiff had asserted a frivolous Administrative Fee claim (D.E. 59) and that Plaintiff had failed to withdraw that Administrative Fee claim within 21 days. Specifically, Defendant alleged that Plaintiff's Administrative Fee claim lacked merit because Plaintiff allegedly failed to provide proof to the Defendant's satisfaction that a pre-suit notice was actually sent to Defendant.

Believing that Defendant's motion for sanctions was baseless and not well taken, Plaintiff proceeded to serve its own motion for sanctions against Defendant (and its counsel) on September 28, 2023, (which was later filed with the Court on October 24, 2023) (D.E. 64) in which Plaintiff seeks sanctions based on F.S. 57.105 because, according to Plaintiff, Defendant's motion for sanctions lacked merit and was frivolous. Florida jurisprudence provides that a party can seek its attorney's fees and costs as a result of another party's frivolous motion for attorney's fees and costs pursuant to §57.105, Fla. Stat. See, *Albritton v. Ferrera,* 913 So. 2d 5 (Fla. 1 DCA 2005) [30 Fla. L. Weekly D2099a].

On January 17, 2024, Defendant voluntarily withdrew its earlier-filed motion for sanctions based on F.S. 57.105, but by the time it had done so, the 21-day safe harbor provision on Plaintiff's motion for sanctions had long expired. (D.E. 108). Defendant argued that it was unable to withdraw its motion for sanctions until and unless Plaintiff provided Defendant with the proof of mail referenced above, despite not being required to do so under the law or the contract. In fact, there is nothing in the law that allows a litigant to extend the 21-day safe harbor provision and Defendant failed to withdraw its baseless motion for sanctions within the time allotted by F.S. 57.105.

During the hearing on January 18, 2024, Plaintiff demonstrated that Defendant's earlier-filed motion for sanctions was lacked merit, and that Defendant and its counsel should have known that their earlier filed motion for sanctions "was not supported by the material facts necessary to establish the claim" or "would not be supported by the application of then-existing law to those material facts." Defendant failed to withdraw the offensive claim within the 21-day safe harbor period and therefore the Court is required to grant Plaintiff's motion for sanctions. See, *Mark W. Rickard, P.A. v. Nature's Sleep Factory Direct, LLC,* 261 So. 3d 567 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2438b]

Plaintiff is hereby entitled to recover an award of sanctions in the form of attorney's fees to be paid by Defendant and its counsel in equal parts.

The parties shall attempt to reach an agreement on the amount of sanctions to be awarded. However, If the parties are unable to reach an agreement then Plaintiff may proceed to schedule an evidentiary hearing to determine the amount.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose felony conviction of household member—Insurer's motion for summary judgment denied because there is question of fact as to whether material representation occurred

OLIDIA FERNANDEZ, Plaintiff, v. IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-029284. February 23, 2024. Lisa A. Allen, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on February 14, 204 on Defendant's Motion for Final Summary Judgment. 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 based upon Defendant's rescission of the subject policy and denial of coverage based upon an allegation of a material misrepresentation by the Plaintiff. Defendant alleged that Plaintiff failed to disclose a prior felony conviction of her son who was listed as a driver and household member on the application for insurance.

2. The Court finds there is a question of fact as to whether a material misrepresentation occurred. As such, Defendant's Motion for Final Summary Judgment is **HEREBY DENIED**.

* * *

Insurance—Personal injury protection—Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—It was inappropriate for insurer to file motion for section 57.105 sanctions against medical provider for arguing against enforceability of declaratory judgment ruling that insurer was not obligated to provide coverage to its insured—Provider was not joined as party to declaratory judgment action, there were trial court rulings favoring both sides of issue, and no binding caselaw holding that a declaratory judgment could be enforced against a non-party to that declaratory action—Because insurer knew or should have known that its request for sanctions was frivolous and would not be supported by application of then-existing law to facts, attorney's fees are awarded to provider

CLEARCARE LLC, a/a/o Elizabeth Rosario Fernandez, Plaintiff, v. GRANADA INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX-21-052149 (71). February 28, 2024. Louis Schiff, Judge. Counsel: Thomas J. Wenzel, Steinger, Green & Feiner, Plantation, for Plaintiff.

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO FLA. STAT. §57.105

THIS CAUSE having come before the court on January 29, 2024, and the Court, having reviewed the motions and the court file, having heard argument of counsel, and being otherwise sufficiently advised in the premises, the Court finds as follows:

Factual and Procedural Background

This case concerns a coverage dispute between the parties and has a lengthy procedural background. Plaintiff, as assignee of Elizabeth Rosario Fernandez, filed an action against Defendant, an insurance company related to Personal Injury Protection Benefits. A review of some relevant points on the timeline of this case give context to the motion under consideration.

In August 2020, Ms. Fernandez assigned her PIP benefits to Plaintiff. In November 2020, Plaintiff sent Defendant a presuit demand letter seeking payment of PIP benefits. In response, Defendant denied coverage. In September 2021, the instant action was filed by Plaintiff against Defendant. In March 2022, in a case it filed in Miami-Dade, Defendant obtained declaratory judgment against various other parties finding that Defendant did not owe coverage. Clearcare was not a party to that Miami-Dade declaratory action.

On March 18, 2022, the Court ordered the parties conduct an in-person hearing to address a discovery dispute. After the hearing, and undisputed in the record, counsel for Plaintiff, Mr. Wenzel, spoke with defense counsel, Ms. Gillinov, concerning the Miami action and whether such an action would have any legal significance in the case *sub judice.* During that conversation, Mr. Wenzel disclosed to Ms. Gillinov that this Court as well as other judges at the North Broward Satellite Courthouse had ruled in a manner that would be favorable to Granada's position. These rulings were unpublished and it would be unlikely that anyone not a party to those actions would see the rulings perhaps with the exception of one of his cases which was, at the time, pending on appeal and partially briefed: *Tower Radiology Center v. Direct General Ins. Co.*[1] Mr. Wenzel's position was that a District Court needed to rule on this issue to bring clarity on whether an

insurer could do what Granada did here as he had seen several of such cases filed by insurers. The idea was that the parties could expedite proceedings in the interests of judicial and litigant economy and this case could follow the *Tower* case already pending at the 4th DCA with the appellate court potentially bringing finality to this issue.

Defendant ultimately decided to file a motion for summary disposition. On May 19, 2022, Granada sent Plaintiff's counsel a motion for sanctions pursuant to §57.105, Fla. Stat. triggering the 21-day safe harbor period. Defendant would later file this motion. It's motion was based on the enforceability of the Miami-Dade declaratory judgment against Plaintiff.

On June 28, 2022, the Court heard Defendant's summary disposition motion. As it had done previously, the Court ruled in Granada's favor agreeing that Granada could enforce the Miami-Dade declaratory judgment against Plaintiff. The Court did specifically take note of Mr. Wenzel's professionalism in disclosing the prior adverse rulings and owing the case to expeditiously reach its (at the time) procedural close and allowing the 4th DCA to make the final decision on this point of law. Final judgment was entered in Defendant's favor and Plaintiff took a timely appeal of this Court's order.

On July 22, 2022, Defendant noticed its motion for sanctions to be heard on August 29, 2022. Plaintiff sent Defendant its own motion for sanctions pursuant to §57.105, Fla. Stat. The motion was not directed at the main issue, but instead was, directed at Defendant's previously filed motion for sanctions and its good faith letter triggering a 21-day safe harbor. The sum of Plaintiff's motion was that there was no binding caselaw holding that a declaratory judgment could be enforced against a non-party to that declaratory action and, thus, Defendant's motion for sanctions was frivolous because Plaintiff had a right to maintain its action under such circumstances. Defendant did not withdraw its motion for sanctions during this new safe harbor period and, instead, doubled down on its request for sanctions and filed a supplemental memorandum of law on August 29, 2022. Plaintiff's motion for sanctions was also filed on this day. The Court heard Defendant's argument in favor of its motion for sanctions, but deferred ruling because the Court did not believe it had jurisdiction to issue any further rulings on the merits of the *res judicata* issue while the appeal was pending before the 4th DCA. The Court told defense counsel she would have to request relinquishment so the Court could rule. Granada never requested relinquishment.

On September 21, 2022, the 4th DCA issued its opinion in *Tower Radiology Center v. Direct General Ins. Co.*, 348 So.3d 1147 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1927a]. This opinion echoed the arguments made by Plaintiff's counsel in the instant case. The 4th DCA would later reject Granada's attempt to distinguish this case from *Tower and* reversed this Court's final judgment. *See Clearcare, LLC v. Granada Ins. Co.,* 367 So.3d 540 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1511a]. This reversal mirrored the arguments made by Mr. Wenzel at the trial level.

Plaintiff set its motion for sanctions for hearing on September 8, 2023. This Court deferred ruling allowing the parties to mediate. The parties did so on December 1, 2023, but reached an impasse. Thus a reset hearing on Plaintiff's motion was ordered by the Court at the December 13, 2023 status conference.

Findings of the Court

§57.105, Fla. Stat. provides, in pertinent part:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

Thus, the Court must review Granada's §57.105 motion under this rubric.

In its motion for sanctions, Granada cited **no** case law supporting its position that a declaratory judgment could be enforced against a non-party to the declaratory action. In their memorandum, Defendant could not identify any binding case law. Defendant merely identified some trial court orders. At the time Granada filed its motion for sanctions, both parties could point to trial court rulings that favored each respective position. Plaintiff also relied on §86.091 and, similarly, Defendant could point to no case law binding on this Court that would hold that Plaintiff's interpretation of §86.091 was erroneous.

Essentially, the Court finds that each party had an absolute right to make the arguments *on the merits* in good faith. This Court initially agreed with Granada's position. And the District Court ultimately ended up agreeing with the position advanced by Clearcare. But such an event reflects the normal functioning of our justice system and §57.105(1) sanctions are not intended to be granted in every case.

The Court finds that it is wholly inappropriate to file a motion for sanctions pursuant to §57.105 directed to an issue, such as this, where trial court rulings go both ways, where there is no binding law from the District Courts or Supreme Court, and where attorneys for both sides can make colorable legal arguments. Clearcare and its counsel had the right to make and preserve its position for appellate review, even though it knew that this trial Court would rule against its position.

The Court finds that Defendant's attorneys knew or should have known that its request for §57.105 sanctions against Plaintiff's counsel was frivolous and would not be supported by the application of then-existing law to the material facts of this case. This Court is mindful of the fact that sanctions under §57.105 are a serious request and only should be used when the situation merits. But the Court finds Defense counsel filing such a motion, under the circumstances explained above, was an unwarranted use trying to influence Plaintiff's counsel in this matter. Granada's motion should never have been filed in the first instance and certainly should have been withdrawn during the safe harbor period afforded by Plaintiff's motion for sanctions.

To be clear, nothing in this order should be construed as a sanction against Mr. Palanda personally. It is clear from the record that Mr. Palanda had no involvement in the sanctionable conduct and only became involved in this case after the relevant time period.

Based on the foregoing, the Court ORDERS AND ADJUDGES:

1. Plaintiff's motion is granted.

2. Plaintiff is entitled to an award of attorney's fees and costs pursuant to §57.105(1), Fla. Stat.

3. Plaintiff's counsel shall provide to Defense counsel the amount of fees it is seeking pursuant to this order. If the parties are unable to reach agreement, the parties shall mediate the amount of fees.

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[1]L.T. Case No. CONO-21-001163

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Where insurer made gratuitous and invalid payments to another medical provider, insurer acted in bad faith when it counted those payments against available PIP benefits to determine that policy limits were exhausted—Where insurer failed to file response to provider's motion for summary judgment within 20 days of hearing, insurer's late-filed response and motion for summary judgment will not be considered in ruling on provider's motion—No merit to argument that documents attached to provider's motion, which were produced by insurer in discovery, require affidavit of authenticity—Where insurer has adopted statutory fee schedule in PIP policy, insurer is required to remit payment for billed amounts that are greater than 80% of 200% of Medicare Part B fee schedule but less than 200% of Medicare Part B fee schedule at 80% of 200% of Medicare Part B fee schedule, not 80% of billed amount—Insurer improperly underpaid for two CPT codes

ALLIANCE SPINE & JOINT II, INC., Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20008747. Division 61. June 8, 2022. Corey Amanda Cawthon, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Brittany Jones, for Defendant.

ORDER ON Plaintiff's Motion for Partial Summary Judgment

This cause having come before the Court on June 1, 2022 on Plaintiff's Motion for Partial Summary Judgement with respect to (1) the declaratory issue presented in count III of Plaintiff's Statement of Claim which asks the Court to determine if the Defendant improperly exhausted benefits; (2) the declaratory issue presented in count II of Plaintiff's Statement of Claim which asks the Court to determine if the Defendant is able to remit payment based upon the billed amount when a charge for a service is made above 80% of 200% of the Medicare Part B participating physician's fee schedule but below 200% of the Medicare Part B participating physician's fee schedule; and (3) whether the Defendant improperly paid CPT 97535 and 97530, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment is granted for the reasons set forth below.

(1)The Court finds that the Defendant improperly exhausted benefits.

The Court finds that the Defendant made gratuitous and / or invalid payments to Titan Wellness / Hoa Nguyen DC for CPT 99070. Based on the American Medical Association (AMA) CPT Assistant editorial panel attached to Plaintiff's motion (which this Court takes judicial notice of pursuant to Florida Statute 90.803(17)) CPT 99070 is used for billing "additional supplies provided over and above those usually included with a specific service such as drugs, intravenous (IV) catheters, or trays." The Court finds that CPT 99070 is not reimbursable under the 2018 or 2007 Medicare Part B Participating physician's fee schedule based on the documents attached to Plaintiff's motion which were printed from CMS.gov (which this Court takes judicial notice of pursuant to Florida Statute 90.803(17)). The Court further finds that CPT 99070 is reimbursable under Worker's Compensation by "BR." Under the Worker's Compensation Reimbursement Manual portions, which were attached to Plaintiff's motion, (which this Court takes judicial notice of pursuant to Florida Statute 90.803(17)) payment for BR can only be made if the provider gives a complete description of the service, sets forth the medical necessity for same and the cost of any additional supplies.

The Plaintiff attached to their motion the entirety of what the Defendant produced in discovery from Titan Wellness / Hoa Nguyen DC. Nowhere in the documentation from Titan Wellness / Hoa Nguyen DC was a description of the service represented by CPT 99070, the medical necessity of same or the cost for same. In addition, said medical records contain a specific section for "supplies." In this section no "supplies" are identified as being provided nor did the patient or therapist sign off indicating that supplies were used—as occurred with all other services that were administered. The only inference that can be drawn from the foregoing is that no supplies, much less additional supplies, were used.

The Court finds that the Plaintiff has set forth a prima facie case that the billings for CPT 99070 by Titan Wellness / Hoa Nguyen DC are not reimbursable under the fee schedule set forth in Florida Statute 627.736(5)(a) and therefore do not qualify as "medical expenses" under the instant policy and are therefore not reimbursable under the instant policy. The payments for CPT 99070 are therefore gratuitous and / or invalid and cannot be counted against the available benefits and the Defendant acted in bad faith when they counted same against the available benefits. The Court finds that a reasonable jury would not return a verdict for the Defendant based upon the presented evidence. Based on the number of CPT 99070 units the Defendant paid and the amount they paid finds that the Defendant made gratuitous payments totaling $240.00. As such benefits are not exhausted and there are $240.00 in benefits remaining.

The Court finds that the Defendant did not file a response to Plaintiff's motion along with their factual position 20 days prior to the hearing as required under Florida Rule of Civil Procedure 1.510. Defendant's objection that they were not required to adhere to Rule 1.510 because the rules were not invoked is without merit. The Florida Rules of Civil Procedure were automatically invoked in this case based upon administrative order. The Court notes that the Defendant on Friday, May 27, 2022 at 11:22 a.m. filed a response to Plaintiff's motion and then on Tuesday May 31, 2022 at 1:56 p.m. filed a memo of law in support of their own Motion for Final Summary Judgment which was not set for hearing and only filed on Friday May 27, 2022. The Court is mindful of the Supreme Court's commentary on the new Florida Rule of Civil Procedure 1.510 (SC 20-1490) that the new rule was, in part, designed "to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions . . . [and] "that the nonmovant must respond with its supporting factual position at least 20 days before the hearing." Given the Defendant's failure to comply with the rule and given that the second filing by the Defendant was not even filed in opposition to the Plaintiff's motion (as required in order to be considered in opposition) the Court will not consider the Defendant's filings and argument therein in ruling on Plaintiff's motion.

The Court does not agree with Defendant's argument that the documents that they produced in discovery (and which the Plaintiff attached to their motion) require an affidavit of authenticity to have merit. See Trawicks 22-9—A document produced by an opposing party in response to a request for production should be admissible as far as authenticity is concerned and *Casamassina v. U.S. Life Ins. Co. in City of New York*, 958 So. 2d 1093, 1099 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1522a] holding:

> Authentication by circumstantial evidence is permissible; "evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances." *Id*. at 751. A court may consider circumstances of discovery in determining prima facie authenticity. *See U.S. v. Elkins*, 885 F.2d 775 (11th Cir. 1989); *U.S. v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005). The trial court has great latitude in determining whether the proponent of evidence has met the burden of establishing a prima facie case of authenticity.

The Court is also aware that Rule 1.510 is based on federal Rule 56(a) and *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) which

specifically says that affidavits are not necessary to support summary judgment and *Martin v. Allied Interstate, LLC,* 192 F.Supp3d 1296 (2016) where the court interpreted *Celotex, supra,* to mean that "otherwise admissible evidence may be submitted in inadmissible form at the summary judgment stage." *See also Jacoby v. Keers,* 779 Fed.Appx. 676 (2019) where the eleventh circuit holding that at summary judgment a court may consider summary judgment evidence "so long as the proffering party can 'show that the material is admissible as presented or . . . explain the admissible form that is anticipated.' " During the hearing the Plaintiff asserted that the Titan Wellness / Hoa Nguyen DC records would and could be authenticated through a record custodian at trial.

(2) the issue presented in count II of Plaintiff's Statement of Claim which asks the Court to determine if the Defendant is able to remit payment based upon the billed amount when a charge for a service is made above 80% of 200% of the Medicare Part B participating physician's fee schedule but below 200% of the Medicare Part B participating physician's fee schedule

Having found that benefits are not exhausted the Court turns to the issue presented in count II of Plaintiff's Statement of Claim which is a declaratory count which asks the Court to determine if the Defendant is able to remit payment based upon the billed amount when a charge for a service is made above 80% of 200% of the Medicare Part B participating physician's fee schedule but below 200% of the Medicare Part B participating physician's fee schedule.

The Plaintiff billed, in part, for 97530 on April 26, 2018 and charged $75.00. The amount charged was greater than 80% of 200% of the Medicare Part B physician's fee schedule but less than 200% of the Medicare Part B physician's fee schedule. The Defendant remitted payment for said services at 80% of the billed amount.

The Defendant contends that their policy specifically elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1. The Plaintiff does not contest the Defendant's position that the at-issue policy elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1 for paying related and necessary bills.

The Court finds that the fee schedule set forth in Florida Statute 627.736 which was adopted by the Defendant into their policy to remit payment for related and necessary treatment does not permit an insurer to ever remit payment based upon 80% of the billed amount. The Court finds that said fee schedule compels an insurer, who has adopted same, to remit payment for amounts charged that are greater than 80% of 200% of the Medicare Part B physician's fee schedule but less than 200% of the Medicare Part B physician's fee schedule at 80% of 200% of the Medicare Part B physician's fee schedule. See *Geico Ind. Co. v. Accident & Injury Clinic a/a/o Frank Irizarry* , 290 So.3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b] and *Geico Indemnity Company v. Muransky Chiropractic a/a/o Carlos Dieste* , 4D21-457, 2021 WL 2584107, (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a]. The *Irizarry* court in answering the certified question "Does the plain language of the PIP statute preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule?" held that "as for payment of the charges, the statute authorizes insurers to limit reimbursement to 80% of an amount fixed through a fee schedule, see 627.736(5)(a)1.a-f" and that "80% of the fee schedule" is "the required amount an insurer must pay" if the insurer elected the fee schedule method. *Id.* The Fifth District held that the only exception is when a provider's charge is less than 80% of 200% of the Medicare fee schedule amount and in such as case an insurer would have the option of paying 80% of 200% of the Medicare Part B physician's fee schedule or 100% of the billed amount. *Id.* The Fourth District Court of Appeals in *Muransky* cited the *Irizarry* opinion with approval and held that "80% of the fee schedule [is] (the required amount an insurer must pay)." *Id*.

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment as to the declaratory count is Granted. The Court finds that the Defendant, having adopted the fee schedule set forth in Florida Statute 627.736, is required to remit payment for charges that are greater than 80% of 200% of the applicable Medicare Part B physician's fee schedule but also less than 200% of the applicable Medicare Part B physician's fee schedule at 80% of 200% of the applicable Medicare Part B physician's fee schedule and that paying 80% of the billed amount is an improper underpayment.

As noted with the previous section the Defendant did not comply with their obligations under Rule 1.510 and did not file a response with their factual position 20 days prior to the hearing.

(3) whether the Defendant improperly paid CPT 97535 and 97530

Having found in favor of the Plaintiff on the declaratory counts the Court addresses the breach of contract claim.

The Defendant processed both codes and partially paid both. The Defendant's documentation and affirmative defense asserts that the bills were paid pursuant to the policy and Florida Statute 627.736. Given that the policy and statute only provide for the payment of benefits that are related and necessary the only inference that can be drawn is that the subject services, having been paid pursuant to the policy and statute are related and necessary. Reasonableness is not an issue as the policy provides for the payment of all related and necessary expenses based upon 80% of 200% of the Medicare Part B participating physician's fee schedule. The Plaintiff attached to their motion copies of the relevant pages from CMS.gov which establishes the Medicare Part B participating physician's fee schedule for both codes (which this Court takes judicial notice of pursuant to Florida Statute 90.803(17)). Based on same the Court finds that the Defendant underpaid 97535 and 97530 by a combined $14.53.

Based on the evidence presented this Court finds that the Plaintiff has established a prima facie case to the entitlement of additional benefits and finds that no reasonable jury would find otherwise.

As noted with the previous section the Defendant did not comply with their obligations under Rule 1.510 and did not file a response with their factual position 20 days prior to the hearing.

The Plaintiff is directed to submit a proposed Final Judgment consistent with this ruling.

* * *

Insurance—Automobile—Discovery—Motion to compel auto repair shop to produce all repair estimates and invoices for three-month period regardless of method of reimbursement is denied

ALLTECH COLLISION & PAINT, LLC, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23038989. Division 72. March 15, 2024. John Hurley, Judge. Counsel: Kenneth J. Dorchak, Buchalter Hoffman and Dorchak, North Miami, for Plaintiff. Miguel Rodriguez and Johanna Clark, for Defendant.

ORDER DENYING DEFENDANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION TO COMPEL DOCUMENTS RESPONSIVE TO FIRST REQUEST FOR PRODUCTION

THIS MATTER having come before the Court on 3/14/2024 on the Defendant's Motion to Compel Documents Responsive to First Request for Production and after hearing argument of counsel for the parties and being otherwise fully advises of the premises thereof it is:

` ORDERED AND ADJUDGED as follows:

The Defendant sought a better response to Request for Production number 11 which stated as follows:

> For the months of February 2023, March 2023, and April 2023, please produce all repair estimates and invoices for each and every vehicle repaired by your shop, regardless of whether the company or individual paying for or bartering for the repairs had a DRP ("direct repair program") relationship with your shop, did not have a DRP, was a self payor, or traded goods/services for the repairs.

The Plaintiff responded to Request for Production number 11 as follows:

> Objection to the request as being overly broad in scope, unduly burdensome, harassing, is not being relevant to the subject matter of this lawsuit and therefore not likely to lead to the discovery of admissible evidence.

The Defendant's motion is DENIED and the Plaintiff's objections are sustained.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Motions alleging that medical provider should be sanctioned for challenging policy's election of statutory fee schedule are denied where provider acted within safe harbor period to amend complaint to stipulate that policy elected fee schedule and filed motion stipulating that election of fee schedule was not at issue

ADVANCED DIAGNOSTIC GROUP, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21071489. Division 50. July 11, 2023. Mardi Levey Cohen, Judge. Counsel: Thomas J. Wenzel, Steinger, Greene & Feiner, Plantation, for Plaintiff.

ORDER ON DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO §57.105, FLA. STAT.

THIS CAUSE having come before the court and the Court, having reviewed the motions and the court file, having heard argument of counsel on July 6, 2023, and being otherwise sufficiently advised in the premises, the Court finds as follows:

The Defendant filed two virtually identical motions for sanctions pursuant to §57.105, Fla. Stat. The first was filed on November 1, 2022 during the pendency of the litigation. The second was filed on January 13, 2023, the day after this case was voluntarily dismissed. Defendant confirmed during the hearing that it was proceeding on both of its motions.

Both of Defendant's motions make a similar allegation—that Plaintiff should be sanctioned for challenging Defendant's 9810a policy election of the statutory schedule of maximum charges to govern reimbursements.

However, Plaintiff did not challenge Defendant's policy election in the first place. Plaintiff confirmed in writing to Defendant that it was not challenging Defendant's 9810a policy election.

Plaintiff's pleadings are devoid of any mention of a fee schedule election challenge. *More than a month prior* to Defendant initiating the 21-day "safe harbor" period for its motion for sanctions, Plaintiff sought amendment of its pleadings. The amended pleadings specifically included a stipulation that Defendant's policy elected the statutory schedule of maximum charges. Moreover, two days following Defendant's initiation of the "safe harbor" period, Plaintiff filed a motion which, again, stipulated that whether the 9810a policy elected the statutory schedule of maximum charges was not an issue for dispute in this case. Plaintiff set its motion for leave to amend to occur during the safe harbor period.

Quite frankly, there's nothing more which Plaintiff could have done to signal that it was not challenging Defendant's policy election and was merely claiming an underpayment under the schedule of maximum charges. Even assuming *arguendo* that Plaintiff's original complaint was somehow violative of §57.105(1) (which the Court does not find), the Court would nevertheless be precluded from sanctioning a non-moving party when, during the 21-day safe harbor period, the non-moving party took the curative action like Plaintiff did in this case such as pursuing amendment of its complaint or giving written notice that it was not challenging the issue. *See* §57.105(4), Fla. Stat.

Accordingly, the Court ORDERS AND ADJUDGES as follows:

Defendant's motions for sanctions pursuant to §57.105, Fla. Stat. are hereby **DENIED**.

* * *

Venue—Motion to transfer venue from Broward County, where venue is proper, to Miami-Dade County, where it is not proper, because several other similar cases are pending in Miami-Dade County is denied—Although defendant could have consented to venue in Miami-Dade County if case had originally been brought there, court cannot transfer case where Broward County is not wrong venue and Miami-Dade County is not proper venue—Forum non conveniens does not allow transfer of case where Miami-Dade County is not venue in which case "might have been brought," and having to litigate similar issues in different forums does not constitute inconvenience

BETTY JAMES, Plaintiff, v. MAXIMUS, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE23083929, Division 53. March 14, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO TRANSFER

This cause came before the Court on March 13, 2024 for hearing of the Defendant's Motion to Transfer. The Court finds as follows:

The Plaintiff chose to file its case in Broward County, which neither party disputes is a proper venue. Fla. Stat. §47.051. The Defendant is a corporation with its headquarters in Virginia. It seeks to have this case transferred to Miami-Dade County because there are several other similar cases pending there, although not involving this Plaintiff. Miami-Dade County, however, is not a proper venue for this particular case. Nevertheless, Plaintiff's counsel does not object to the transfer of this case, because it is also counsel for the unrelated plaintiffs in the Miami-Dade cases. Certainly, had the Plaintiff originally filed its case in Miami-Dade County, the Defendant could have consented to venue there although it was not "proper" venue. But that's not what we have in this case. Instead, the Court is limited to what the law permits it do when a party wants to transfer a case. First, the Court could find that Broward is the "wrong" court, and then transfer this case to a "proper" court. Rule 1.060(b). But Broward is not the "wrong" court, and neither is Miami-Dade the "proper" court.

As a second option, the Court could determine that Broward is an inconvenient forum. Fla. Stat. §47.122. However, that statute requires the case to be transferred to a court where the case "might have been brought." As this case would not have been properly brought in Miami-Dade to begin with, this Court cannot transfer it there even if the parties suffer inconvenience by it remaining here. Further, that being said, the only inconvenience is having to litigate similar legal issues before two different courts. Trial courts routinely face issues that are pending in multiple counties. That cannot, standing alone, constitute "inconvenience." As a result,

The Defendant's Motion is DENIED. (Certainly, the Plaintiff may take a dismissal and refile its case in Miami-Dade if it so chooses.)

* * *

Civil procedure—Service of process—Motion to quash service of process is denied where process server's testimony was clear and consistent, and defendant's attempts to impeach that testimony were not credible—Court will enter default on its own motion unless defendant files response to complaint within ten days

JACQUELINE SEIDNER, Plaintiff, v. ISABEL LIEBER, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE23037689. Division 53. March 8, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS, WITH NOTICE OF IMPENDING DEFAULT

This matter came before the Court on March 6, 2024 for evidentiary hearing of the Defendant's Motion to Quash Service of Process. Upon receiving evidence and argument, the Court finds as follows:

The Motion is DENIED. The Court finds that the Defendant has failed to meet her burden of demonstrating that the Defendant was not properly served. The process server's testimony was clear and consistent. He was hired to do a "stake-out" because of the Defendant's clear documented efforts of avoiding service. He had been provided photos of both the Defendant and her husband, as well as her husband's name. The Defendant's attempts to impeach this testimony were simply not credible. Importantly, while the Defendant produced residential security camera video from four angles from the time the process dropped the papers at the door step until a few moments thereafter, the Defendant failed to include the minutes before this point that clearly go to the crux of the process server's narrative—i.e., that he saw a woman who looked like the Defendant who went back inside the home, that he approached the driveway and then saw a man who looked like the husband, that he called out the Defendant's husband's name from the bottom of the driveway, that the Defendant turned towards him, that the process server advised he had papers to serve, and that the husband then quickly went into the house. The portion of the video presented to the Court starts at a point where the process server is already on the scene. The Court is frankly baffled that the Defendant would have gone through all the trouble of obtaining the video footage, but omitting the part at which the process server actually arrives at the scene forward. This suggests to the Court that there is something in the video that would not support the Defendant's position. Added to this, the Defendant testified that she could not have been home, because she was in Jacksonville at that time. But she produced nothing to corroborate that point—no airline tickets, no gas receipt, no meal receipt, any of which she should have clearly been able to produce. Further, the husband's testimony was questionable—while he is employed as a pharmacist, he could not remember whether he was at home or at work at that time, which again he could have simply obtained prior to the hearing and which would have been a critical means of substantially impeaching the process server's testimony.

As a result, the Defendant is advised that the Court, on its own motion pursuant to Rule 1.500(b), shall enter a default against the Defendant without further notice or hearing unless within 10 days of the date of this Order, the Defendant shall FILE a response to the Complaint.

* * *

Civil procedure—Default—Notice of hearing—Where court requested that plaintiff's counsel set motion for default judgment for hearing, but plaintiff did not serve copy of motion or notice of hearing on defendant, motion is denied pending being reset upon filing of certificate of service of motion and service of notice of hearing

US CONCRETE PRODUCTS CORPORATION, Plaintiff, v. EVERGREEN REAL SOLUTIONS, LLC, et al., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE23083910. Division 53. March 18, 2024. Robert W. Lee, Judge.

ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AS TO DEFENDANT NGM INSURANCE COMPANY

This cause came before the Court on March 14, 2024 for hearing of the Defendant's Motion for Default Judgment as to the Defendant NGM Insurance Company, and the Court's having reviewed the Motion and docket, having heard argument, and having reviewed the relevant legal authorities, finds as follows:

This is not the ordinary run-of-the-mill motion for default judgment. This case involves five (5) defendants, with an amended complaint sounding in five (5) counts. Not each count pertains to all the defendants—some counts pertain to more than one defendant, and some defendants are facing more than one count. A default was entered as to some of the defendants prior to the amended complaint being filed. At the time the instant motion for default judgment was entered in this case, the amended complaint had been filed, and the docket reflected 33 separate filed documents. Further, one of the defendants had counsel file an appearance. While typically the Court entertains these type of motions without formal hearing, the Court requested that Plaintiff's counsel set this matter for hearing due to the complexities apparent on the docket.

At hearing, it became apparent that Plaintiff did not serve a copy of the Motion, nor the related Notice of Hearing, on the Defendant. The Plaintiff was adamant that the Defendant was not entitled to notice under the Rules, notwithstanding the Court's request that a hearing would be necessary. Setting aside the due process concerns of matters being addressed without notice, certainly the Court may in its discretion require notice be provided, even when a defendant has been defaulted. *Stevenson v. Arnold*, 250 So.2d 270, 272 (Fla. 1971). Accordingly, it is hereby

ORDERED that the Defendant's Motion is DENIED pending being reset upon the filing of a certificate of service indicating that a copy of the Motion for Default Judgment was mailed to the Defendant NGM Insurance Company, as well as a Notice of Hearing being served on that Defendant, as a special set 15-minute hearing by zoom appearance.

Pursuant to Rule 2.516(h)(1), the Court hereby orders counsel to furnish copies of this Order/Judgment to any party who does not have an email address shown on this document.

* * *

Contracts—Retail installment contract—Action by assignee of motor vehicle loan against purchaser of vehicle that had unfixable safety and mechanical problems—Under terms of agreement, purchaser who has valid and meritorious defenses against seller of vehicle can assert those defenses against assignee of loan—Unilateral attorney's fees provision in installment contract is deemed reciprocal

WESTLAKE SERVICES, d/b/a WESTLAKE FINANCIAL SERVICES, Plaintiff, v. DANIELLE GUMP, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2022-CC-001448. March 5, 2024. Wayne Culver, Judge. Counsel: Ramiro Kruss, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. N. James Turner, Debt Relief Law Center, Orlando, for Defendant.

FINAL JUDGMENT FOR DEFENDANT

THIS CAUSE having come before the Court for a non-jury trial on February 26, 2024 at 9:00 am and the Court, having heard the testimony and reviewed the exhibits in evidence, and otherwise being fully advised in the premises, the Court makes the following Findings of Fact and Conclusion of Law:

FINDINGS OF FACT

1. On December 21, 2016, Defendant purchased a 2008 BMW 5 Series from Autosport, LLC for $11,842.71.

2. This sale of the 2008 BMW was memorialized by a Retail

Installment Contract and Security Agreement (RISC) dated December 21, 2016. A copy of the RISC is attached to the Complaint.

3. The same night that she purchased the vehicle, Defendant realized both headlights were not functional, an obvious safety hazard, so she could not drive the car at night.

4. Defendant took the vehicle back to Autosports the next day for them to fix the headlights. Autosports' service department examined the issue and claimed they could not fix the headlights and that the entire headlight assembly had to be replaced.

5. Defendant then took the vehicle to the Winter Park BMW dealership to confirm that diagnosis and was quoted $6,000 to replace the headlight assembly.

6. One week after she purchased the vehicle, its engine light came on and the car began running very rough. Defendant took the vehicle back to Autosports again for them to diagnose this additional issue. Autosport service department advised Defendant that they would need to keep the vehicle to work on it and provided her with a loaner VW Jetta.

7. Autosports kept the vehicle for several months, claiming they had to obtain various parts on the secondary market in order to fix the vehicle and replace the headlights.

8. Finally, in April of 2017, after many complaints in person and during phone calls about major safety and mechanical problems, Autosports advised that they would not be able to fix the vehicle and told Defendant to return it along with the VW Jetta loaner.

9. Plaintiff, WESTLAKE SERVICES, d/b/a WESTLAKE FINANCIAL SERVICES, was not a party to the RISC but solely bases its claim herein against the Defendant as a "holder in due course" as an assignee of the auto loan.

10. Defendant had possession of the 2008 BMW for a total of 7 days.

11. Based on the uncontroverted facts, Autosports breached its contract with Defendant by selling her a seriously mechanically defective motor vehicle.

CONCLUSIONS OF LAW

1. The Retail Installment Contract and Security Agreement dated December 21, 2016, contains the following language, which is required by federal law, *See* 16 C.F.R. Sec. 433.2 (1997):

> NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJ.ECT TO ALL CLAIMS AND DEFENSES-WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES [AUTOSPORT] OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF, RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. (bracketed language not in original)

2. "The effect of th[is] federal rule is to defeat the holder in due course status of the assignee institutional lender, thus removing the lender's insulation from claims and defenses which could be asserted against the seller by the consumer." *Tinker v. De Maria Porsche Audi, Inc.,* 459 So. 2d 487, 492 (Fla. 3d DCA 1984), review denied, 471 So. 2d 43 (Fla. 1985).

3. Based on the undisputed facts, Defendant has a valid and meritorious defense to this action against the seller of the vehicle, Autosports, LLC, and these defenses can be and are being asserted against the Plaintiff, WESTLAKE SERVICES. *Fla. Auto. Fin. Corp. v. Reyes,* 710 So.2d. 216 (Fla 3d DCA 1998) [23 Fla. L. Weekly D1133c].

4. The Retail Installment Contract and Security Agreement dated December 21, 2016 also contains the following language:

> If you default, you agree to pay our court costs and fees for repossession, repair, storage, and sale of the Per securing this Contract. You also agree to pay reasonable attorney's fees after default and referral to an attorney not a salaried employee of ours.

5. Pursuant to section 57.105(7) of the Florida Statutes, unilateral attorney's fees provisions in a contract are deemed reciprocal. The entitlement to fees under section 57.105(7) applies when the party seeking fees prevails and is a party to the contract containing the fee provision. *Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC,* 197 So. 3d 1112, 1115 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1358a].

IT IS ORDERED and ADJUDGED:

1. Plaintiff, WESTLAKE SERVICES, d/b/a WESTLAKE FINANCIAL SERVICES, shall take nothing by this action and that Defendant, DANIELLE GUMP, shall go hence without day.

2. Jurisdiction of this case is retained to determine entitlement to and amount of attorney's fees for Defendant pursuant to Section 57.105(7) of the Florida Statutes and for such other relief as may be proper.

* * *

Criminal law—Exposure of sexual organs— Discovery— Depositions—Motion to take depositions of law enforcement officers involved in undercover operation in park restroom and arrest of defendant for exposure of sexual organs is denied—Defense has not shown good cause for taking depositions in misdemeanor case

STATE OF FLORIDA, Plaintiff, v. GEAR STORY, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2023-MM-032385-AXXX-XX. January 29, 2024. Kimberly Musselman, Judge. Counsel: Christine Cavagnaro, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Laura D. Siemers, Melbourne, for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO TAKE DEPOSITIONS

This cause came before this Court on January 24, 2024 upon Defendant's Motion to Take Depositions filed on January 7, 2024. The defendant was represented by Laura Siemers, Esquire and the State of Florida was represented by Assistant State Attorney Christine Cavagnaro. At the beginning of the hearing, defense counsel informed the Court that an Amended Motion to Take Depositions was efiled on this date and a copy was provided to the Assistant State Attorney. A.S.A. Cavagnaro initially objected but after hearing that the only amendment to the Motion was the addition of one sentence to paragraph 11 which was typed in bold ink, the Court allowed the Amended Motion to be heard.

On May 30, 2023, the defendant was arrested for exposure of sexual organs by the Rockledge Police Department. The Rockledge Police Department was conducting an investigative operation at Dick Blake Park in the City of Rockledge.

Pursuant to Rule 3.220(h)(1)(D), Florida Rules of Criminal Procedure (Fla.R.Crim.P.), a defendant charged with a misdemeanor offense may not take the deposition of a witness unless good cause is shown to the trial court. The moving party has the burden to establish good cause for a court to allow the requested deposition of witnesses. "In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition." Fla.R.Crim.P. 3.220(h)(1)(D)

Having reviewed the Motion, the file including the arrest report, argument from the parties, and the relevant law, including the considerations listed in Fla.R.Crim.P. 3.220(h)(1)(D), the Court finds that good cause has not been shown to allow depositions of the State witnesses. Regarding the consequences to the defendant, defense counsel argued that having this type of charge pending against him and a potential conviction in the future would have a negative impact on the defendant's reputation and employment. This argument can be

made for all pending charges and the maximum penalties for this offense are at the level of a first-degree misdemeanor.

As to the complexity of the issues involved, it appears this offense was a part of an investigative operation that lasted for a short time inside a bathroom in the park. The undercover officer was present in or entered the bathroom, allegedly observed and/or interacted with the defendant, and communicated to the investigative team that an arrest could be made. Two officers entered and arrested the defendant and the 'undercover officer.' Based on this information, the issues and the witness' testimony do not appear complex as the offense is alleged to have happened during a short period of time and none of the officers have been identified as experts. The witnesses are all law enforcement officers from the same police agency and their testimony would include observations and/or conversations with the defendant before, during, and after his arrest. There is no audio or video evidence.

The Court recognizes that since the initial discovery response was filed, the State has supplemented witnesses and provided supplemental discovery regarding a conversation with one of the State's witnesses. When asked during the hearing about two of the officers' involvement in the case, the State advised that one officer arrested the defendant and one officer "arrested" the undercover officer.

Defense counsel, at the suggestion of this Court after a previous motion hearing, has had a few conversations with officers to aid the defense in getting more information regarding the details of this offense. Defense counsel raised some possible inconsistencies in officer testimony and pursuant to Fla.R.Crim.P. 3.220(h)(1)(D), has other opportunities available to address these inconsistencies and/or to discover the information being sought by having a deposition.

ORDERED AND ADJUDGED that the Defendant's Amended Motion to take Depositions is DENIED this 29th day of January 2024.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—A judge is not automatically disqualified from all cases involving public defender's office if an assistant public defender who is not assigned to judge's division becomes a candidate running against judge in upcoming election—Judge is not required to place on record in every case where an assistant public defender is assigned the fact that an unrelated assistant public defender is challenging judge in an upcoming election— A judge is not required to recuse himself/herself if an associate of judicial candidate, who openly supports the judicial candidate but who is not assigned to judge's division, appears infrequently before judge—Judge would be required to be disqualified from civil cases where judicial candidate's relatives were witnesses—However, where judge is only judge in a geographical region who presides over civil county court matters, the rule of necessity may permit judge to preside over a conflict case in order to avoid undue prejudice to parties, witnesses, attorneys, and other members of judiciary

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-02. Date of Issue: March 11, 2024.

ISSUES

1. A judicial candidate challenging the inquiring judge works in the Office of the Public Defender ("OPD"). The candidate will not be appearing in front of the inquiring judge, however, other colleagues from the office will. If the OPD does not move for the inquiring judge to disqualify on cases the OPD is appointed to and that are handled in court by a colleague of the judicial candidate, is there a conflict?

No.

2. If there is a conflict should the inquiring judge recuse himself/herself from the case?

No, because there is no conflict if the judicial candidate does not appear before the inquiring judge.

3. If no, should the inquiring judge place on the record that the OPD has no objection to the inquiring judge presiding over each case individually and has discussed such with their client and/or take other proactive measures to ensure transparency?

No.

4. If an attorney colleague of the judicial candidate who works in the same regional office is actively supporting and campaigning for the judicial candidate, should the inquiring judge recuse himself/herself from matters involving the colleague if they appear before the inquiring judge?

No, under the circumstances presented here.

5. If no, would it make a difference if the attorney colleague is a member of the judicial candidate's committee of responsible persons?

No.

6. The judicial candidate has a relative within the third degree who appears in civil matters before the inquiring judge as a landlord's agent/property manager. The relative files complaints and appears as a witness in hearings. Should the inquiring judge recuse from these cases, where the judicial candidate's relative in the third degree is also the judicial candidate's campaign treasurer?

Yes, unless necessity requires other considerations.

7. Is there a difference if the landlord-tenant matter is uncontested?

No.

FACTS

The inquiring judge is a solo county judge in a rural area. There are no other county level judges in the area who can readily switch assignments with the inquiring judge. The judge handles all county court related matters for the entire region. The judge is facing declared opposition for the upcoming election. The judicial candidate is employed by the local OPD. The judicial candidate is assigned to circuit level cases and does not regularly appear before the inquiring judge. There are four regularly assigned assistant public defenders in the judge's division; however, on occasion, the candidate has appeared before the judge to cover a county court docket or when fulfilling a duty assignment. Additionally, the judicial candidate has the active support of the office supervisor who has posted his support on the candidate's webpage. The supervisor also handles circuit level cases and does not regularly appear before the judge. The supervisor does cover cases on the judge's docket when filling in. Finally, the judicial candidate has a relative within the third-degree who appears before the inquiring judge on a regular basis in landlord and tenant matters. The relative is the property manager of property owned by the candidate's brother and father. The property manager is also the candidate's campaign treasurer. The candidate's relatives including the property manager, brother and father have all been witness in the landlord and tenant cases but it is the property manager/campaign treasurer who most frequently appears. The judge wants to know if automatic disqualification is required considering the relationship between the candidate, the property manager relative and the relative's role as campaign treasurer.

DISCUSSION

Canon 2A provides in part that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B further cautions that a judge "shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment." Where a judge's impartiality might reasonably be questioned, Canon 3E(1) requires a judge to disqualify himself or herself. If a political opponent of the judge has cases pending before a presiding judge, that judge should disqualify himself or herself. Fla. JEAC Op. 1984-12. Where the political opponent is a member of the OPD, but is not assigned to the judge's courtroom and does not regularly appear before the judge, automatic disqualification from all cases involving the OPD is not required. Fla. JEAC Op. 1994-28 [2 Fla. L. Weekly Supp. 496b] (automatic disqualification was not required where supervising assistant state attorney who was also a judicial political opponent was not assigned to the judge's division). Because the candidate is not assigned to the judge's division and does not regularly appear before the inquiring judge, there is no conflict that requires automatic disqualification on all public defender cases. There is also no need for the inquiring judge to announce on the record that the OPD is waiving a conflict that does not exist.

The inquiring judge is concerned about the rare occasions where the judicial candidate may be assigned to appear before the judge to cover a calendar for an absent assistant public defender. We recommend the inquiring judge seek an administrative solution through discussion between the chief judge and the public defender to avoid any such potential conflicts, which could include the OPD not assigning the candidate to cover any calendar over which the judge will preside. *See* Fla. JEAC Op. 1993-47 [1 Fla. L. Weekly Supp. 499a] (judge being challenged by an assistant public defender should seek an "administrative solution" to avoid having the assistant public defender appear before the judge). *See also* Fla. JEAC Op. 1994-28 [2 Fla. L. Weekly Supp. 496b] (conflict with assistant state attorney who was also a judicial candidate would not exist if the assistant was transferred to another county). We are advised that there are four assistant public defenders assigned to the judge's division. Perhaps it

is possible for the potential conflict to administratively be avoided.

The inquiring judge also asks whether he or she is automatically disqualified from presiding over matters involving an attorney colleague of the judicial candidate who also works in the OPD and is actively supporting the candidate's judicial campaign. This colleague serves as a supervisor in the OPD and, on occasion, has handled cases before the presiding judge where needed. The colleague's active support consists of offering an endorsement on the candidate's website and serving on the candidate's committee of responsible persons. Similar to the candidate, because the supervisor is not assigned to the judge's division and does not often appear before the judge, we do not believe that automatic disqualification is required from all public defender cases. Fla. JEAC Op. 1994-28. An administrative solution should also be sought to avoid presiding over cases involving this attorney.

The judicial candidate has a relative within the third degree who also serves as the candidate's campaign treasurer. The relative works as a property manager and in that capacity, the relative appears and testifies before the inquiring judge on a regular basis while handling landlord and tenant cases. Less frequently, the candidate's brother or father will also appear as witnesses. The judge wants to know if disqualification is required, because of the relative's relationship and association with the candidate and the campaign. The judge also inquires as to whether it makes a difference if the landlord and tenant matters in which the relatives appear before the judge are uncontested.

A family member and campaign treasurer who often appears before the inquiring judge while actively supporting the judge's opposition would have reason to be concerned about the judge's impartiality. *See* Commentary to Canon 3E(1) ("Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply."). Likewise, the candidate's father and brother would also have reason to question the judge's impartiality. Under most circumstances, we would recommend the judge automatically disqualify himself or herself from cases involving these family members. However, the facts as presented here require further consideration. If the judge were to file notice of disqualification in all cases involving these family members, the potential hardship created would involve more than just the candidate's family or family member/treasurer alone. Consideration must also be given to the impact automatic disqualification will have on other judges, the lawyers, litigants, witnesses, and families who will be impacted by the inquiring judge's recusal. *See* Fla. JEAC Op. 2019-12 [27 Fla. L. Weekly Supp. 104a] ("[A]utomatic disqualification could serve as a hardship to all involved including unfair redistribution of judicial workloads, requiring travel to a distant court house, and scheduling difficulties for attorneys and their clients."). There are occasions where necessity will outweigh the requirement of automatic disqualification. *See* Commentary to Canon 3E(1) ("By decisional law, the rule of necessity may override the rule of disqualification."). We do not mean to suggest that the court has no obligation to acknowledge the conflict. The judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification. Canon 3E(1). The judge should consult with the chief judge to find an administrative solution to resolving the conflict if one can be found. Where it is possible to conduct the entire hearing via Zoom, that is, all of the litigants and their witnesses have access to a computer and can appear via Zoom, it may be possible and not overly burdensome to have another county judge in a different county cover the hearings. We do not believe that the judge would have any less of an obligation to disclose or to disqualify if the civil matters are uncontested.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 2B, 3E(1)
Commentary to Canon 3E(1)
Fla. JEAC Ops. 1984-12, 1993-47, 1994-28, 2019-12

* * *

Judges—Judicial Ethics Advisory Committee—Practice of law—Work on behalf of family—Sending a letter to each beneficiary of a trust is a proper way to determine if beneficiaries object to a sitting judge being paid a reasonable fee for serving as personal representative and trustee of a trust of a member of the judge's family—Nothing in Code of Judicial Conduct prevents judge from being paid a reasonable fee, even if there are beneficiaries who object—Any payment judge receives is reportable as income under Canon 6B(1)

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-03. Date of Issue: April 1, 2024.

ISSUES

1. Is sending a letter to the beneficiaries of a trust an acceptable way to inquire whether they object to a sitting judge, who has been named the personal representative and successor trustee of a trust of a member of the judge's family, being paid a reasonable fee pursuant to Florida Statutes?

ANSWER: Yes.

2. Can a judge who has been named the personal representative and successor trustee of a trust of a member of the judge's family be paid a fee even if there are any beneficiaries who object?

ANSWER: Yes.

FACTS

The inquiring judge was named personal representative and successor trustee of a trust in the will of the judge's stepfather. The judge does not believe that serving in these roles will interfere with the performance of the judge's judicial duties; the judge has retained an attorney for the probate action and the estate will be probated in a separate circuit from the judge's assigned circuit.

The trust requires distributions to several beneficiaries. The inquiring judge plans to send a letter to the beneficiaries asking if they object to the judge being paid a reasonable fee pursuant to service, as provided by the Florida Statutes, as the personal representative and successor trustee of a trust.

DISCUSSION

The service of a sitting judge as a personal representative and successor trustee of a trust of a member of the judge's family is allowed by the Code of Judicial Conduct as long as that service does not interfere with the judge's judicial duties. Fla. Code Jud. Conduct, Canon 5E(1) provides:

> A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

The inquiring judge has advised that the judge does not believe the service will interfere with the judge's judicial duties. To that, the judge advised that the judge has retained an attorney to represent them in the probate of the estate, which will occur in a circuit other than where the judge sits. *See* Fla. JEAC Op. 2017-13 [25 Fla. L. Weekly Supp. 397a] (agreeing that a judge may serve as an executor, a guardian, and/or a trustee on behalf of close relatives so long as the service would not interfere with the proper performance of judicial duties and the activities do not pose a likelihood of litigation before the court on which the judge serves).

Florida Statutes §§ 733.617 and 736.0708 provide for a personal representative and trustee to be paid a reasonable fee for their services. In Fla. JEAC Op. 1990-11, this Committee answered affirmatively

that it was proper for a judge to be paid a reasonable fee for services as personal representative and trustee. The facts of that inquiry were that no other beneficiary objected to the payment of the reasonable fee.

The current inquiry is whether a letter to each beneficiary would be a proper way to determine if the beneficiaries object to the payment of a reasonable fee to the judge pursuant to the applicable Florida Statutes for service as personal representative and trustee. The Committee agrees that such a letter to each beneficiary that affords a reasonable time to object in writing if they chose to do so is an acceptable manner to determine whether any beneficiary objects.

If there is an objection, the Committee finds that as long as the fee is reasonable pursuant to the applicable Florida law, there is nothing in the Code that would prevent payment of the fee. Any compensation that is received is reportable as income under Canon 6B(1).

REFERENCES

Flat. Stat. §§ 733.617, and 736.0708.
Fla. Code Jud. Conduct, Canons 5E(1) and 6B(1)
Fla. JEAC Ops. 1990-11 and 2017-13

* * *