Volume 32, Number 10, February 28, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 403-440

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.

- **MUNICIPAL CORPORATIONS—CODE ENFORCEMENT—HOME-BASED BUSINESS. The provision of section 559.955(1) that prohibits local governments from enacting or enforcing ordinances regulating home-based businesses does not prohibit a town from regulating a business in a residential area that does not comply with the criteria outlined in section 559.955(3), including the requirement that any business activities be secondary to the property's use as a dwelling. The circuit court, acting in its appellate capacity, affirmed a special magistrate's final order finding that a home-based dog boarding, breeding, and grooming business was in violation of section 559.955.** *INVESTMENT MANAGEMENT MARLA, LLC v. TOWN OF SOUTHWEST RANCHES. Circuit Court, Seventeenth Judicial Circuit (Appellate) in and for Broward County. Filed November 21, 2024. Full Text at Circuit Courts-Appellate Section, page 408a.*

FLW SUPPLEMENT (ISSN10684050) is published monthly by Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Tallahassee, FL 32303. All rights reserved. Subscription price is $300 per year plus tax. Internet subscription available at www.FloridaLawWeekly.com. Periodical postage paid at Tallahassee, FL. POSTMASTER: Send address changes to FLW Supplement, P.O. Box 4284, Tallahassee, FL 32315. Telephone (800)

FLW SUPPLEMENT

CASES REPORTED.

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

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

Subject Matter Index and Tables

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

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

Bold denotes decision by circuit court in its appellate capacity.

MUNICIPAL CORPORATIONS (continued)

REAL PROPERTY

TAXATION

ZONING

* * *

TABLE OF CASES REPORTED

* * *

TABLE OF STATUTES CONSTRUED

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

FLORIDA STATUTES

RULES OF CIVIL PROCEDURE

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

* * *

REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

* * *

Volume 32, Number 10
February 28, 2025
Cite as 32 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Counties—Construction contracts—Wages—In applying county ordinance requiring that apprentices on county construction projects be paid at mandated minimum wage rate for journeyworkers if number of apprentices on project is greater than permitted journeyworker-apprentice ratio, ratio is calculated per contractor, not per job site

POWER DESIGN, INC., Appellant, v. MIAMI-DADE COUNTY, Appellee. Circuit Court. 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2024-5-AP-01. December 4, 2024. On Administrative Appeal from Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations. Counsel: George McArdle, Xavier A. Franco, Victor Arca, of McArdle Franco PLLC, for Appellant. Geraldine Bonzon-Keenan, Dale P. Clarke, for Appellee.

(Before TRAWICK, DE LA O, and ARECES, R., JJ.)

OPINION

(De la O, J.) Appellant, Power Design, Inc. ("PDI"), is a subcontractor on a construction project on county land.[1] PDI seeks to reverse the hearing officer's decision rendered pursuant to an administrative appeal of a Notice of Violation issued by Miami-Dade County. The Notice of Violation was issued pursuant to the Miami-Dade County Code Section 2-11.16, known as the "Responsible Wages and Benefits for County Construction Contracts Ordinance" ("Ordinance"). The Notice alleged that PDI's subcontractor, EHA All Solutions Electric Corp. ("EHA"), misclassified and underpaid several employees who were doing electrical work on the "Grove Central Project," a mixed-use construction project on County-owned land.[2]

The Ordinance requires that workers be paid as set forth in the Responsible Wages and Benefits Schedule ("Schedule"). All contractors on the Grove Central project were advised about the Ordinance and the Schedule through the Supplemental General Conditions. Appellee's App. at 83. Section 6 of the Supplemental General Conditions addresses apprentices and trainees.

> The number of apprentices shall not be greater than the ratio listed in the Wages and Benefits Schedule. If the number of apprentices working on the project, is greater than the ratio permitted, the apprentices must be paid the wage rate on the Wages and Benefits Schedule for the work performed.

Appellee's App. at 151.

The sole issue in this appeal is whether the ratio required by the Ordinance is calculated per contractor or per job site. In other words, can PDI and EHA combine the journeyworkers and apprentices they each supply to the job site to meet the ratio, or must PDI and EHA each meet the ratio without counting the other's employees? The hearing officer ruled that each contractor must independently satisfy the ratio. PDI disagrees.

This Court reviews the hearing officer's ruling *de novo. See Rodriguez v. Dep't of Bus. & Prof'l Regulation,* 326 So. 3d 796, 798 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1923c] ("We review an issue of law in a final administrative order *de novo*.").

We agree with Miami-Dade County and the hearing officer's conclusion that the Ordinance requires PDI and EHA to each individually meet the journeyworker-to-apprentice ratio. We reach this conclusion because PDI's interpretation of the Ordinance is not reasonable considering the purpose and goal of the apprentice program.

We first note that a "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *State ex rel. City of Casselberry v. Mager,* 356 So. 2d 267, 269 n.5 (Fla. 1978). "[S]tatutory phrases are not to be read in isolation, but rather within the context of the entire section." *Jackson v. State,* 634 So. 2d 1103, 1105 (Fla. 4th DCA 1994). This rule is especially important here, where PDI isolates the phrase "on the project" and ascribes a meaning to it that is inconsistent with the purpose of the Ordinance and the apprentice program. *See Anderson v. State,* 87 So. 3d 774, 777 (Fla. 2012) [37 Fla. L. Weekly S227a] ("Legislative intent is the polestar that guides the interpretation and construction of a statute. . . ."). "We must not literally interpret a statutory provision if doing so would lead to an unreasonable conclusion or defeat legislative intent." *Raik v. Dep't of Legal Affairs, Bureau of Victim Comp.,* 344 So. 3d 540, 546 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1510a] (citations omitted).

We turn, then, to the legislative intent of the Ordinance and the apprentice program. The intent of the Ordinance is obvious on its face, it is to ensure that a "responsible wage" (in common parlance, a living wage) is paid to employees performing work on County construction contracts and privately funded construction on County-owned land. There are some exceptions to the minimum wages mandated by the Ordinance. One exception is the wages paid to apprentices. Apprentices registered with the State of Florida are "permitted to work at less than the rate listed in the Wages and Benefits Schedule." Schedule for Electrical Workers (Appellee's App. at 95). As a result of this exception, if contractors could use apprentices exclusively on a job site, they could easily circumvent the Ordinance's minimum wage requirements. Therefore, the purpose of the journeyworker-to-apprentice ratio in the Ordinance is obviously to avoid such a scenario while simultaneously meeting the goals of the apprentice program.

We find the goal of the apprentice program within the Florida Administrative Code. Rule 6A-23.004 of the Code outlines the standards for the apprenticeship program in the State of Florida. Even a cursory review of the program's guidelines reveals that apprentice training and supervision is the central goal of the program.

We first look to the definition of apprentice.

> (2) "Apprentice" means a person at least sixteen (16) years of age and who has entered into an apprenticeship agreement with a registered apprenticeship program sponsor and who is *engaged in learning an apprenticeable occupation through actual work experience under the supervision of journeyworkers.* The apprentice must be a paid employee of the sponsor or participating employer.

Rule 6A-23.002, Florida Administrative Code (emphasis added).

The program relies on the ratio to meet its goal of appropriate supervision and training.

> (g) A numeric ratio of apprentices to journeyworkers consistent with proper supervision, training, safety, and continuity of employment and provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements.

Rule 6A-23.004 of the Florida Administrative Code. In short, the Ordinance imposes minimum wage requirements, and the apprentice program seeks to foster training of new journeyworkers.

In determining the meaning of the ratio provisions of the Ordinance, therefore, we look for the interpretation that fosters, furthers, and fulfills the goals and intent of both statutes. Only interpreting the ratio as applying per contractor, rather than per job site, is consistent with the goals and intent of the statutes at issue.

We reach this conclusion because the contractual relationship between PDI and EHA proves inimical to the goals of the apprentice program. PDI had no control, training, or supervisory authority over EHA's employees, and vice versa.[3]

> [EHA] is an independent contractor and hereby assumes all of the

rights, duties, obligations and liabilities thereby arising. [EHA] shall provide the necessary supervision, tools and equipment to perform the Work. [EHA] shall be solely responsible for all training, hiring, firing, promotion, demotion or disciplinary decisions of its workers . . . . Neither Owner nor [PDI] shall be responsible for or have control or charge over the acts or omissions of any of [EHA's] Subcontractors or their agents or employees.

Appellee's App. at 346.

Nor were PDI and EHA joint employers.

Nothing in this Agreement shall operate or be construed as making Contractor and Subcontractor either partners, joint venturers, principals, joint employers, fiduciaries, agents or employees of the other. The relationship between Contractor and Subcontractor will be that of an independent contractor relationship. No employee, worker, or other individual or company retained by Subcontractor to perform work on behalf of the Contractor under this Agreement will be deemed to be an employee of the Contractor.

Appellee's App. at 353.

Because PDI was not responsible for training or supervising EHA's apprentices, it is an unreasonable interpretation of the Ordinance to claim PDI's journeyworkers could be counted along with EHA's apprentices to determine the journeyworker-to-apprentice ratio.

Additionally, it is evident that the Florida Administrative Code apprentice program requirements apply to each individual employer. To use apprentices on the job, EHA had to be a participating employer in the State's Apprenticeship program.

(19) "Participating Employer" means a business entity which:

(a) Is actively engaged by and through its own employees in the actual work of the occupation being apprenticed;

(b) Employs, hires, and pays the wages of the apprentice and the journeyworker training the apprentice;

(c) Evaluates the apprentice; and

(d) Is signatory to a collective bargaining agreement or signatory to a participating employer agreement with the program sponsor which is registered with the Department.

Rule 6A-23.002, Florida Administrative Code.

Each participating employer is responsible for training the apprentices it sponsors. These obligations imposed on EHA as a participating employer are inconsistent with PDI's argument that its journeyworkers should be counted against EHA's apprentices in the ratio determination. The "participating employer" (*i.e.,* EHA) is required to hire and pay "the apprentice and the journeyworker training the apprentice." *Id.* However, as we have noted, PDI's journeyworkers had no responsibility for EHA's apprentices under the PDI-EHA contract and all training responsibility was expressly delegated to EHA by the Florida Administrative Code.

To accept PDI's interpretation of the Ordinance would mean that EHA was in flagrant violation of the apprentice program requirements because its apprentices were unsupervised by EHA journeyworkers, were not trained by EHA journeyworkers, and EHA was not paying the wages of the journeyworkers who were supposed to be training and supervising its apprentices.

PDI claims that Miami-Dade is without jurisdiction to enforce the terms of the Florida Administrative Code. Miami-Dade County is doing no such thing. It is enforcing the Ordinance which PDI agreed to abide by when it submitted a bid. *See* Supplemental General Conditions to Bidders at 9 ("All Miami-Dade County contracts require contractors to comply with all applicable state and federal wage laws including payment of overtime.") (Appellant's App. at 153); *id.* at 7 ("Apprentices will be permitted to work at less than the rate listed in the Wages and Benefits Schedule for the work they perform when they are employed pursuant to and individually registered in a legitimate apprenticeship program registered . . . with a state apprenticeship agency recognized by the Bureau,") (Appellant's App. at 151).

AFFIRMED. (TRAWICK and ARECES, R., JJ., concur.)

---

[1]Juneau Construction Co., Inc., as the Construction Manager for the project, executed a subcontract agreement with PDI to perform electrical work. PDI, in turn, subcontracted a portion of the electrical work to EHA.

[2]Pursuant to the Ordinance, the prime contractor is responsible for compliance by all subcontractors and their lower tier subcontractors, and shall be liable to any underpaid employee of the subcontractor for any such underpayment. Section 2-11.16(b).

[3]The PDI-EHA contract—unsurprisingly—contains a merger clause. Appellee's App. at 346.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Where stopping officer testified that he observed licensee fail to stop at stop sign before entering intersection, and video evidence does not contradict his testimony but merely suggests possibility that testimony was incorrect, petition for writ of certiorari is denied

JARED DAVIDSON, Petitioner, v. STATE OF 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-014017. Division K. November 12, 12024. Counsel: Linsey Sims-Bohnenstiehl, Acting General Counsel, DHSMV, for Respondent.

ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

(LINDSAY M. ALVAREZ, J.) THIS MATTER is before the Court on Amended Petition for Writ of Certiorari filed September 8, 2023. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner contends that the Department's decision to suspend his driving privileges was not supported by competent, substantial evidence of a lawful arrest because there is video evidence that Petitioner argues directly conflicts with the arresting officer's testimony presented at the license suspension hearing. After reviewing the petition, response, reply, appendix, relevant statutes, and case law, the court finds that the hearing officer's decision was supported by competent, substantial evidence because video evidence is not hopelessly in conflict with the officer's testimony.

On April 2, 2023, Tampa Police Officer Baden stopped Petitioner after observing Petitioner fail to stop at a stop sign and then weave within his lane after making a left turn. Petitioner displayed multiple signs of impairment and admitted to having consumed three beers. Petitioner performed poorly on multiple field sobriety exercises, was arrested for DUI. His driving privileges were administratively suspended as a result of the arrest. Petitioner requested a hearing to challenge the lawfulness of the suspension, which was held June 21, 2023. The hearing officer considered written reports, video evidence, photographic evidence, and the arresting officer's testimony. Specifically, the hearing officer watched the video of Petitioner driving prior to being stopped, looked at photographs of the intersection where Petitioner was stopped, and Petitioner's counsel had an opportunity to argue that the video directly conflicted with the other evidence presented. The Department affirmed Petitioner's license suspension the following day.

Petitioner correctly states that reasonable suspicion is required to justify a warrantless stop where the driver is suspected of a misdemeanor offense, that an arrest as the result of an unlawful stop is likewise unlawful, and that a license suspension subsequent to an unlawful arrest must be overturned. *See Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1080 (Fla. 2011) [36 Fla. L. Weekly S243a]; *Arenas v. Dep't of Highway Safety & Motor Vehicles*, 90 So. 3d 828, 832 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1024a]. Petitioner asserts that the hearing officer lacked competent,

substantial evidence to support a finding of a lawful arrest because the video evidence taken prior to Petitioner's arrest shows a brief period where the headlights of Petitioner's vehicle were out of sight of the officer's camera, and thus out of sight of the officer. Petitioner's argument primarily relies on *Wiggins v. Department of Highway Safety and Motor Vehicles*, which states that, in the limited context of a DUI license suspension, a circuit court is correct to reject "officer testimony as being competent, substantial evidence when that testimony is contrary to and refuted by objective real-time video evidence." 209 So. 3d 1165, 1175 (Fla. 2017) [42 Fla. L. Weekly S85a]. This case is distinguishable from *Wiggins*. In that case, the video showed Wiggins driving "totally within the proper lines" but the officer testified that Wiggins' vehicle "appeared to swerve from one lane to another." In this case, Petitioner is asking the Court to accept a negative as proof of a positive.

The Court need not reweigh evidence to reach its conclusion. Based on Petitioner's own arguments, the testimony in this case is not contrary to or refuted by objective real-time video evidence. First, Petitioner submitted screenshots of photos of the intersection taken from an online map. Those photographs may constitute competent evidence, and they were considered by the hearing officer, but they are not objective real-time video evidence. Second, Petitioner submitted objective real-time video evidence, which shows Petitioner's vehicle approaching the intersection, the headlights of Petitioner's vehicle becoming obscured for a few seconds, and then Petitioner's vehicle turning into the intersection. Petitioner and the Department agree that Petitioner's vehicle did not stop in the time between the headlights becoming visible and the vehicle entering the intersection. The position of the officer's vehicle on the intersecting roadway is not contested.

As the Department points out, where there is a stop sign but no clearly marked stop line, Florida law requires drivers to stop "at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection." Fla. Stat. § 316.123(2)(a). Petitioner argues that it is impossible to say with certainty that the officer saw Petitioner fail to stop before entering the intersection because the headlights were obscured for a few seconds. In its response, the Department cites section 316.123, arguing that even if Petitioner stopped while his headlights were obscured, he still failed to stop at the point nearest the intersecting roadway where he had a clear view of traffic on the intersecting roadway, making the logical inference that if the officer's view of Petitioner's vehicle was completely obscured, Petitioner's view of the officer's vehicle on the intersecting roadway was likewise obscured, meaning Petitioner should have stopped after his headlights became visible and before entering the intersection.

The officer in this case testified that he observed Petitioner fail to stop before entering the intersection, and the video evidence does not contradict his testimony. If Petitioner stopped while the officer's view of the vehicle was totally obscured, Petitioner's view of traffic on the intersecting roadway was likewise obscured and Petitioner should have stopped once his view was clear. If Petitioner stopped while his headlights were obscured but he had a clear view from his vantage point in the upper half of the vehicle, this Court cannot say with certainly that the officer did not likewise have a clear view of the upper half of Petitioner's vehicle despite the headlights being obscured. To find otherwise, the Court would have to impermissibly reweigh the evidence.

Hearing officers and circuit courts are required to reject testimony that is contrary to and refuted by objective real-time video evidence. *Wiggins*, 209 So. 3d at 1175. That requirement does not extend to unverified screenshots taken from the internet or video evidence that, based on Petitioner's own argument, merely suggests a possibility that the testimony was incorrect.

It is therefore ORDERED that:

1. The Petition is DENIED, and;
2. Petitioner's Request for Oral Argument is DENIED.

* * *

Municipal corporations—Code enforcement—Animals—Special magistrate departed from essential requirements of law by assigning liability for dog attack to owner of property on which attack occurred without evidence that she was dog's owner or keeper, was in control of dog prior to or at time of attack, or was aware of dog's presence on property or its propensity for viciousness

CARMELIA NEWBOLD, Appellant, v. CITY OF MIRAMAR, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 23-017936. L.T. Case No. 23060087. November 21, 2024. Counsel: Michael J. Alterman, Boca Raton, for Appellant. Michelle Austin Pamies, Austin Pamies Norris Weeks Powell, PLLC, Fort Lauderdale, for Appellee. Vincent T. Brown, Special Magistrate, City of Miramar.

OPINION

(PER CURIAM.) Having carefully considered the Appellant's Initial Brief, with supporting documentation and the applicable law, without oral argument, the August 7, 2023, Final Order, is hereby **REVERSED** and as set forth below:

This Court's role in reviewing an administrative decision is limited to a three-part standard. *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The Court must review the record to determine whether: (1) procedural due process is accorded; (2) essential requirements of the law have been observed; and (3) administrative findings and judgment are supported by competent, substantial evidence. *Id.*

On August 7, 2023, a Final Order was issued against Carmelia Newold, Appellant, for violations under Miramar Code of Ordinances sections 6-3 and 6-9[1]; the Magistrate imposed a fine in the amount of $500.00 for administrative fees and a one-time fine of $15,000.00.

In her Initial Brief, Appellant's argument rests on the fact that she is not owner and or keeper of the subject dog, or was in custody or control of the dog as described under Miramar's Code of Ordinances, sections 6-3 and 6-9, and therefore, not chargeable to the current violations issued upon Appellant.

Section 162.11, Florida States, states:

> "[a]n aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed."

§ 162.11, Fla. Stat. In other words, this Court's review is limited to the record created at the August 7, 2023, hearing before the Special Magistrate. In appellate proceedings, the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979).

The record evidences that on August 7, 2023, a hearing was conducted, to address an incident of a dog attack with injuries that occurred on June 20, 2023. Testimony was taken of the parties and at its conclusion the Magistrate issued fines and citations on Appellant as property owner and on the individual who owned the dog that committed the injuries.

At the hearing it was not established that Appellant was the dog's owner and or keeper, or that Appellant was in control of this dog prior to, or at the time of the incident. Further, there is was no evidence to indicate that Appellant was aware of the dog's presence in her home

or had knowledge of the dog's propensity for viciousness. Nevertheless, the City attempted to assign liability on the homeowner for the actions of the dog owner by raising previous dog violations as related to Appellant, but which did not have casual connection with the June 20, 2023 incident at issue.

The City's codes are clear and do not suggest impugning fault on another by association of unrelated past bad deeds. In assigning liability to Appellant pursuant to the City's code of ordinances section 6-3 and section 6-9, the Magistrate deviated from the essential requirements of law.

Herein, the record as it currently stands, demonstrates that the decision by the Magistrate is not supported by competent substantial evidence, as neither the Final Order nor the record, include findings of fact and conclusions of law that explains the culpability of Appellant in the August 20, 2023 incident.

Accordingly, the Special Magistrate's decision is hereby **REVERSED AND REMANDED specifically as to the Appellant**. (J. BOWMAN, M. GARCIA-WOOD, and G. ODOM, JJ., concur.)

---

[1]Sec. 6-3. - Dogs at large prohibited; Sec. 6-9. - Animal bites with injuries

* * *

LUXY PEREZ HIDALGO, Petitioner, v. BROWARD COUNTY, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24-008957. L.T. Case No. DD-6-7-2024. November 21, 2024. Petition for Writ of Certiorari. Counsel: Luxy Hidalgo Perez, Pro se, Petitioner. Kristin M. Carter, Andrew J. Meyers Broward County Attorney, for Respondent.

FINAL ORDER
DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) **THIS CAUSE**, comes before the Court for consideration on Petitioner's, Luxy Hidalgo Perez, Petition for Writ of Common Law Certiorari, filed on June 27, 2024. Having carefully considered the Petition, Response and Appendix, and the applicable law, being otherwise duly advised, the Petition for Writ of Certiorari is hereby **DENIED.** (BOWMAN, GARCIA-WOOD and ODOM, JR., JJ., concur.)

* * *

SHMUEL DRUIN, Appellant, v. BROWARD COUNTY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 23-018721 (AP). L.T. Case No. 18-1685. September 18, 2024. Counsel: Shmuel Druin, Pro se, North Miami Beach, Appellant. Deanna Kalil, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief and the applicable law, without oral argument, the Special Magistrate's September 23, 2023, Final Order, is hereby **AFFIRMED.** (J. BOWMAN, M. GARCIA-WOOD and G. ODOM JR., JJ., Concur.)

* * *

Licensing—Driver's license—Suspension—Failure to stop and render aid at crash involving death or personal injury—Final order of license suspension is constitutional on its face where records show that licensee committed offense of failing to stop and render aid at crash involving death, which is offense requiring mandatory license revocation upon conviction—Arguments that suspension order violates separation of powers doctrine and is unconstitutional as applied to licensee were not preserved for appeal where issues were not raised before hearing officer—Due process—Licensee received valid notice of suspension and opportunity to be heard where she received letter notifying her of statutory basis for suspension, received citation and was arrested for failure to stop at crash involving death, and took part in administrative hearing

GISELLE GUZMAN, Petitioner, v. STATE OF FLORIDA, DEPT. OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 23-CA-5643. March 4, 2024. Counsel: Linsey Sims-Bohnenstiehl, Acting General Counsel, DHSMV, for Respondent.

ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

(ALANE LABODA, J.) THIS CAUSE comes before the Court on Petitioner's "Appeal of Final Order of Suspension of the Florida Department of Highway Safety & Motor Vehicles" filed on June 2, 2023, pursuant to Fla. Stat. § 322.31, which the Court will construe as if it had been properly filed as a petition for writ of certiorari. Having reviewed the motion, the court file, and any applicable law, the Court finds as follows:

On January 4, 2023, Petitioner was provided notice that her driving privilege would be "suspended for one year effective February 3, 2023," for committing an offense requiring a mandatory revocation of driving privileges if convicted, pursuant to section Fla. Stat. § 322.27.

Petitioner sought a review hearing and a notice of hearing was provided by mail to the address of her attorney, Donald Day. The review hearing was conducted on March 13, 2023, before Hearing Officer Jeannine George. Petitioner was represented by her counsel at the hearing.

At the hearing, two State exhibits were introduced into evidence. State Exhibit 1 was a copy of the comprehensive case information system of Petitioner for her failure to stop and remain at a crash involving death. State Exhibit 2 was a copy of the Florida Highway Patrol Department's arrest report. Petitioner did not offer any evidence at the hearing and proceeded to argument. Petitioner's counsel argued that the mailed notice was improper because it did not include the basis for the suspension or any attached documents or records. Specifically, Mr. Day stated that "a hearing was requested and this hearing was set." As a result, Mr. Day argued Petitioner was not advised of the basis for suspension prior to the hearing, which allegedly violated her due process rights.

The Hearing Officer sustained Respondent's suspension of Petitioner's driving privileges pursuant to Fla. Stat. § 322.27 by order on March 15, 2023.

In the current proceedings, Petitioner argues a single ground, **Ground I,** which alleges that the Department's Final Order of Suspension and actions are unconstitutional on its face and as applied to the Petitioner. Petitioner further breaks down **Ground I** into three separate sub-grounds that go towards proving the overall alleged unconstitutionality of the Department's Final Order:

> **Sub Ground A:** The Department's suspension order violates the Separation of Powers Doctrine.
>
> **Sub Ground B:** The Department deprived the Petitioner of her Constitutional right to Due Process by failing to provide adequate notice and opportunity to be heard.
>
> **Sub Ground C:** The Final Order of Suspension is unconstitutional as applied to the Petitioner.

Petitioner requests that the Court enter an order quashing the Department's Final Order of Suspension and restore her driving privilege. Petitioner also requested oral argument on this issue.

The decision of the Hearing Officer is appealable by a petition for writ of certiorari filed in the circuit court. The applicable standard of review by a circuit court of an administrative agency decision, such as the present case, is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *See Campbell v. Vetter,* 392 So.2d 6 (Fla. 4th DCA 1980), review denied, 399 So.2d

1140 (Fla. 1981). The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *See Haines City Community Development v. Heggs,* 658 So.2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

Under § 322.2615(13), the certiorari process is explicitly not the same as a *de novo* appeal. "It is neither the function nor the prerogative of a circuit court to reweigh the evidence and make findings when it undertakes a review of a decision of an administrative forum." *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So.2d 20, 21 (Fla. 5th DCA 1989). Rather, the hearing officer's responsibility is to act as the trier of fact, assess witness credibility and resolve conflicts in the evidence. *Id.* When applying the "competent, substantial evidence" standard, a court must "review the record to assess the evidentiary support for the agency's decision. . . [T]he reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence. . . As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So.2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a].

As it relates to **Ground I**, the Court finds the Department's Final Order of Suspension to be constitutional both on its face and for the reasons provided in the analysis of the three sub grounds below. As to the issue of the constitutionality of the order on its face, the Court finds Petitioner failed to raise the issue before the hearing officer and preserve it for appeal. However, the order would be constitutional on its face even if the issue had been preserved for appeal.

Fla. Stat. § 322.27 provides:

> " (1) Notwithstanding any provisions to the contrary in chapter 120, the department may suspend the license or identification card of any person without preliminary hearing upon a showing of its records or other sufficient evidence that the licensee or cardholder: (a) Has committed an offense for which mandatory revocation of license is required upon conviction."

The statute requires the **commission** of an offense for which mandatory revocation of license is required upon conviction. Fla. Stat. § 322.26 provides:

> "The department shall forthwith revoke the license or driving privilege of any person upon receiving a record of such person's conviction of any of the following offenses: . . . (4) Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle crash resulting in the death or personal injury of another."

Failure to stop and render aid in the event of a crash resulting in death is an offense requiring mandatory license revocation. As a result, the Court denies Petitioner's **Ground I**.

As it relates to **Sub Grounds A** and **C**, the Court denies both grounds due to Petitioner's failure to raise these issues before the hearing officer and preserve them for appeal.

An appellant is limited on appeal to the same reasons they asserted in the trial court. *Tillman v. State,* 471 So. 2d 32 (Fla. 1985); *Steinhorst v. State,* 412 So. 2d 332 (Fla. 1982) (appellate court will not consider an issue unless it was presented to the lower court except in cases of fundamental error). A claim that was neither presented to, nor ruled upon by the trial court, cannot be raised as an issue on appeal. *Trepal v. State,* 621 So. 2d 1361 (Fla. 1993); *Herskovitz v. Hershkovich,* 910 So. 2d 366 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2209a] (finding that where party did not present arguments and documents to the trial court, the issue was waived for appellate review). Preservation requirements apply in certiorari actions. *Fla. Dep't of Highway Safety & Motor Vehicles v. Marshall,* 848 So. 2d 482, 485 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b] ("The circuit court review should have been limited to the issues raised before the hearing officer"). If an issue has not been raised at the suspension hearing, the argument is waived. *Scritchfield v. Fla. Dep't of Highway Safety & Motor Vehicles,* 648 So. 2d 1246, 1247 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D233e].

In the present instance, Petitioner only raised the procedural due process portion of her claim at the hearing. As a result, the other claims are procedurally barred from appeal and are denied.

As it relates to **Sub Ground B**, Petitioner did preserve the argument for appeal but the ground is denied for the reasons outlined below.

Petitioner alleges that her due process rights were violated when her license was suspended without notice. Petitioner alleges that she has not been contacted by the Department, by phone or otherwise, to allow her to present evidence as to the suspension action. Rather, Petitioner alleges that the Department issued a "Final Order" affirming its order without providing her with any disclosure or description as to the "evidence" reviewed or considered in reaching the determination.

A review of the record indicates Petitioner received a Notice of Suspension and Final Order provided on January 4, 2023, one month prior to her license being suspended. The notice provides that Petitioner's license was suspended for "committing an offense requiring a mandatory revocation . . . if convicted per section 322.27 F.S." Petitioner then took part in an administrative hearing and was represented by counsel. Petitioner's counsel did not present evidence and, as a result, waived any evidentiary issue for appellate review. The transcripts of the hearing also indicate the hearing officer included two State's exhibits. State's Exhibit 2 from the hearing, which was the Florida Highway Patrol arrest report. Petitioner was provided with the evidence the hearing officer used to come to a decision.

Furthermore, Petitioner was issued a citation for the offense of failure to stop at a crash causing death, which she signed upon receipt. Petitioner was also arrested for the offense. The appellate courts have upheld a license suspension where the petitioner has actual notice of the reason for license suspension. *See Gurry v. Dep't of Highway Safety,* 902 So. 2d 881, 885 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1358a]. The notice of suspension received on January 4, 2023 stated her license was being suspended "for commit[ing] an offense requiring a mandatory revocation of your driving privilege if convicted per section F.S. 322.27." F.S. 322.27(1)(a) provides that the Department may suspend a license without a preliminary hearing upon a showing that an individual has ". . . committed an offense for which mandatory revocation of license is required upon conviction. A law enforcement agency must provide information to the department within 24 hours after any traffic fatality."

When a driver receives a summons for an offense and appears pursuant to the summons, the notice requirement has been met if the letter of suspension made the basis of suspension "sufficiently clear under the circumstances." *See, e.g., Jones v. Kirkman,* 138 So. 2d 513, 516 (Fla. 1962). In the present instance, the letter notified Petitioner of the statutory basis for the suspension, Fla. Stat. § 322.27, and the fact that she had committed an offense which would require mandatory revocation upon conviction. Petitioner received valid notice and had an opportunity to be heard. *See, e.g., Keys Citizens For Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] ("Procedural due process requires both fair notice and a real opportunity to be heard"); *Fla. Dep't. of Highway Safety & Motor Vehicles v. Hofer,* 5 So. 3d 766, 771 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D583a].

The Department provided Petitioner with proper procedural due process. The Hearing Officer had the opportunity to view evidence presented by both parties and came to a decision following the hearing. This Court finds the evidence to be competent substantial

evidence. Finally, the Hearing Officer's decision was based off competent substantial evidence and the essential requirements of the law were met. The Court denies Petitioner's petition.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Certiorari is **DENIED**. Petitioner has thirty (30) days in which to appeal.

* * *

Municipal corporations—Code enforcement—Home-based business—Special magistrate's order finding home-based dog boarding, breeding, and grooming business to be in violation of section 559.955 is affirmed—Provision of section 559.955(1) that prohibits local governments from enacting or enforcing ordinances to regulate home-based businesses does not prohibit town from regulating business in residential area that does not comply with section 559.955(3)(d) criteria to qualify as home-based business, specifically requirement that business activities be secondary to property's use as dwelling—Fact that dog boarding, breeding, and grooming business was issued two certificates of use that allowed total of 62 dogs to be at property does not preclude finding that business is primary use of property where COUs were conditioned on compliance with statutory requirement that business use be secondary to use as residence—Further, magistrate was correct in finding that veterinarian and dog trainer that visit property counted towards statutory limit on employees and independent contractors who do not reside at residence—Magistrate's finding that 10 - 12 vehicles were parked at property daily is supported by competent substantial evidence—Determination that parking volume violated statutory restriction on parking to no more than would normally be expected at residence where no business is conducted is affirmed—Absent photographic and video evidence that was before magistrate, appellate court cannot conclude that there was no evidence to support finding that business sign and cloth fence violated requirement that external modifications to residence to accommodate business conform to residential character and architectural aesthetics of neighborhood

INVESTMENT MANAGEMENT MARLA, LLC, Appellant, v. TOWN OF SOUTHWEST RANCHES, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-021028 (AP). L.T. Case Nos. 2023-108 and 2023-118. November 21, 2024. Appeal from the Town of Southwest Ranches, Broward County; Eugene M. Steinfeld, Special Magistrate. Counsel: Ryan A. Abrams, Abrams Law Firm, P.A., Fort Lauderdale, for Appellant. Richard J. Dewitt III, Andrew Jake Ingber, and Alan G. Kipnis, Government Law Group, PLLC, Fort Lauderdale, for Appellee.

[Original Opinion at 32 Fla. L. Weekly Supp. 279a]

(PER CURIAM.) On August 22, 2024, this Court entered a Per Curium Affirmed Opinion in this appeal. September 6, 2024, Appellant filed a Motion for Written Opinion. Appellant requested that due to the fact that the issues decided were ones of first impression for the Court and there generally existed a lack of precedent on the issues presented. On November 21, 2024, this Court Granted Appellant's Motion for Written Opinion.

Accordingly, the Opinion of this Court entered in this appeal on August 22, 2024, is hereby withdrawn and the following Opinion is hereby entered by this Court.

OPINION

Having carefully considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief and the applicable law, without oral argument, the Special Investment Management Marla, LLC v. Town of Southwest Ranches CACE23021028 Magistrate's October 5, 2023, Order, and December 5, 2023, Order, are hereby **AFFIRMED**.

Investment Management Marla, LLC ("Appellant") operates a kennel, grooming, training, and breeding business for dogs, called Bruno Happy Dogs, LLC ("Bruno"), on a residential property ("the Property") located within the Town of Southwest Ranches ("Appellee"). The Property is located within a Rural and Agricultural District of the town. The District permits such uses as single-family homes, the keeping and breeding of animals, commercial equestrian operations and veterinary clinics. However, "kennels, commercial boarding and breeding," are specifically not permitted by the Unified Land Development Code Town of Southwest Ranches, Florida ("the Code").

In 2021, the Florida Legislature enacted section 559.955, Florida Statutes. Section 559.955 prohibits local governments from "enact[ing] or enforc[ing] any ordinance, regulation, or policy or tak[ing] any action to license or otherwise regulate a home-based business in violation of this section." Fla. Stat. 559.955(1). The statute dictates that so long as a home-based business complies with certain criteria outlined in subsection (3), the home-based business may operate in an area zoned for residential use and may not be not be prohibited, restricted, regulated, or licensed in a manner that is different from other businesses in a local government's jurisdiction. Fla. Stat. 559.955(2).

On August 19, 2022, Appellee issued to Bruno a Certificate of Use ("COU") permitting the business to engage in dog care, boarding, and training. The COU further states that the business "will be limited to a maximum number of (16) dogs on the property for dog care and boarding." On August 24, 2022, Appellant issued Bruno a second COU. The August 24, 2022, COU permits the business to engage in dog breeding and grooming and limits the number of dogs on the property for these purposes to 46 dogs. Both COUs indicate that the proposed uses are permitted under section 559.955, Florida Statutes.

The Property on which Appellant runs its business spans about two acres and is the residence of the Baiz-Prisco family. The family has five members. The family all reside within the house to help with the business. In addition, two employees of Bruno reside and work on the Property. The record shows an additional two employees reside off-property and travel to the Property to work. Bruno also hires a mobile veterinarian to come to the Property and service the dogs. The veterinarian regularly visits the property, at least twice a week. Bruno additionally hires a dog trainer who regularly visits the Property, about twice per month, to train dogs.

The Bruno business is operational 6 days out of the week. There are about 10-12 cars parked at the Property at any given time. There is a sign at the entrance of the Property that reads "Bruno Happy Dogs." The property is surrounded by a fence, and portions of the fence have a cloth or netting attached to the fence.

During April 2023, Appellee issued two separate Notices of Violation against Appellant citing several violations of the Code centered around operating a primarily commercial operation in a residentially zoned area and failing to comply with the requirements of section 559.955, Florida Statutes. Both citations were heard before a Special Magistrate, who issued a Final Order finding the Property in violation of section 559.955 and the Code. This Appeal followed.

The Standard of Review

"An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed." § 162.11, Fla. Stat. (2022); *see also Cent. Florida Investments, Inc. v. Orange Cnty.*, 295 So. 3d 292, 293-294 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. This Court has described the nature of such an appeal as plenary." *Cent. Florida Investments, Inc.*, 295 So. 3d at 294. "That is, on appeal, all errors below may be corrected: jurisdictional, procedural, and

substantive; and judgments below may be modified, reversed, remanded with directions, or affirmed." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 526 n. 3 (Fla. 1995) [20 Fla. L. Weekly S318a].

I. Business Use Secondary to the Property's Use as a Residential Dwelling

Section 559.955(3)(d), Florida Statutes, requires that "the activities of the home based-business are secondary to the property's use as a residential dwelling." Fla. Stat. 559.955(3)(d). The statute is silent as to how to determine whether the activities of the home-based business are secondary to the property's use as a residential dwelling. The statute does not limit what may be taken into consideration in order to determine whether the business's use is secondary in nature. However, we are not without guidance in making this determination. A careful reading of the statute reveals that although the Legislature meant to allow for business to operate out of residential areas, it was critical that these home-run businesses did not disturb the otherwise residential character of the surrounding area Through this lens, we review the Magistrate's determination that the Bruno business was not secondary to the Property's use as a residence.

After reviewing evidence, the Special Magistrate found that although the Property was used for residential purposes, the operation of the Bruno business predominates as the primary use of the Property. In support of this, the Special Magistrate found: 1) that Bruno grooms 40-50 dogs per month and owns 3 male studs, 10 female dogs and a number of puppies, 2) the dogs are let out three to four times daily for approximately 25 minutes, 3) the dogs bark, 4) the dog's waste must be gathered and disposed of daily and 5) the Bruno website advertises breeding, dog care, training and boarding. The Magistrate acknowledges in his decision that the Appellant was issued two COUs which facially permitted a certain number of dogs to be on the Property, but determined that the COUs were conditionally issued on Bruno's compliance with section 559.955.

Appellant argues that the Special Magistrate's Final Order "is internally inconsistent and precludes a finding that the business is the primary use of the Property." Appellant points out that the Magistrate specifically found that the Breeding and Dog Boarding COUs provided for a total of 62 dogs at the property. Appellant posits that because the record establishes that Bruno was in compliance with the number of dogs contemplated by the COUs, which were issued by Appellee according to their own calculations, Bruno's business operations conducted on the Property should be considered a secondary use and therefore in compliance with section 559.955(3), Florida Statutes.

This argument misstates the requirements of section 559.955. Section 559.955(1), Florida Statutes, states: "[l]ocal governments may not enact or enforce any ordinance, regulation, or policy or take any action to license or otherwise regulate a home-based business in violation of this section." Furthermore, in order to be considered a home-based business by the statute, section 559.955(2) requires that a business comply with all of the criteria listed under section 559.955(3). Section 559.955(3)(d) requires that the activities of the home-based business are secondary to the property's use as a dwelling. Therefore, regardless of Appellant's compliance with the COUs issued by Appellee, if Appellant's business activities on the Property are not secondary to the Property's use as a residence, then Appelle cannot license the business because the business would be in violation of section 559.955. Accordingly, the Magistrate's determination that the COUs were issued contingent on Bruno's compliance with section 559.955 is correct.

The question now becomes whether the Magistrate's determination that the activities of the Bruno business were primary to the Property's use as a residential dwelling was based on competent substantial evidence. The review of the record shows the owners of a neighboring home appear to testify regarding the activity of the property. Further, the record contained evidence that demonstrated that most of the Property was devoted to the activities of the business. Therefore, the record contained sufficient competent and substantial evidence for the Magistrate to decide that Bruno's activities were not secondary to the Property's use as a dwelling.

II. Limit of Employees and Independent Contractors

Section 559.955(3)(a) requires that "[t]he employees of the business who work *at the residential dwelling* must also reside in the residential dwelling, except that up to a total of two *employees or independent contractors* who do not reside at the residential dwelling may work at the business." The statute does not define the words "employee" or "independent contractor."

Appellant argues that the Magistrate erred when he found that Appellants were in violation of section 559.955(3)(a). Appellant argues the veterinarian and dog trainer should not be counted towards the employee/independent contractor limit because they are both unaffiliated with Bruno and do not work "at the residential dwelling," as contemplated by the statute but rather have their own business separate and apart from Bruno. In the case of the veterinarian, Appellant points out that she has her own business and therefore does not work for Bruno. In the case of the dog trainer, Appellant emphases that Bruno does not earn money from referrals to the trainer.

Section 559.955(3)(a), Florida Statutes, does not limit its application to employees or independent contractors to those who are formal employees or work at the business everyday. By its terms, the statute applies to those employees or independent contractors who work at the residential dwelling. Thus, the Special Magistrate was correct in finding that the veterinarian and dog trainer both counted towards the statutory limit of employees.

This interpretation is reinforced when considering the purpose of the statute, to allow for home-run business while preserving the residential quality of the surrounding neighborhood. It is conceivable that the regular and recurring nature of the work performed by the veterinarian and dog trainer for the Bruno business would necessarily function to busy the Property and therefore disturb the residential quality of the surrounding neighborhood, thereby possibly frustrating the intent of the statute.

For the reasons stated above, the Magistrate's determination that the veterinarian and dog trainer are independent contractors for the purposes of section 559.955(3)(a) is correct.

III. Parking Needs Generated by Bruno

Section 559.955(3)(b) requires that the "[p]arking related to the business activities of the home-based business complies with local zoning requirements and the need for parking generated by the business may *not be greater in volume than would normally be expected at a similar residence where no business is conducted. . .*"

The Final Order finds that unrebutted testimony on the record below, provided by Ms. Parish and Mr. Cohen, shows that as many as 10-12 vehicles would park at the property daily. The Special Magistrate determined that to be "clearly excessive," and therefore found that Appellants had violated section 559.955(3)(b).

On appeal, Appellant seems to argue that the Special Magistrate lacked substantial and competent evidence to make this determination. Appellant points out that Ms. Parrish had acknowledged as part of her testimony that the hedges surrounding the Property obscured her vision into the Property, and therefore she could not reliably testify as to the parking generated by the Property.

It is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the finder of fact. *Helman v. Seaboard Coast Line R.R.,* 349 So.2d 1187, 1189 (Fla. 1977). A trial

court's findings of fact are presumed correct and will not be disturbed on appeal absent a showing that such findings are clearly erroneous or totally without evidentiary support. *Credit Counseling Found., Inc. v. Hylkema,* 958 So. 2d 1059, 1061 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1469a]. The record shows that Mr. Cohen closely observed the Property and witnessed the parking needs of the Property himself There was no other testimony on this issue. Therefore, the Special Magistrate properly weighed the evidence and credibility of the witnesses below.

IV. Signage and Cloth Fence

Section 559.955(3)(c) states "as viewed from the street, the use of the residential property is consistent with the uses of the residential areas that surround the property. External modifications made to a residential dwelling to accommodate a home-based business must conform to the residential character and architectural aesthetics of the neighborhood."

In his Order, the Special Magistrate determined the sign for Bruno was not consistent with the "farm and residential estate signs in the neighborhood in shape and color." The Magistrate further found that the netting surrounding the property is not "consistent with the residential and farm appearances of the neighborhood." The Order does not otherwise make findings of fact to support these determinations.

Appellant argues that the record contains no showing that the signage or the netting are prevented by the Code and are in fact consistent with the Code's requirements. Therefore, Appellant argues that there was no basis for the Magistrate to find that Bruno was in violation of section 559.955(c) for failing to conform to the aesthetic of the surrounding properties. Appellant additionally points out that a separate subsection of 559.955 governs the signage of home businesses. Section 559.955(e) states in relevant part: "the business activities [must] comply with any relevant local or state regulations with respect to signage. . ."

However, we find no reason that signage for a home-based business cannot be held to comply with the requirements of sections 559.955(3)(c) and (e). Furthermore, on this issue, the only evidence available to this Court on appeal are the transcripts of the proceedings below. The exhibits which were added to the record during the proceedings below were not transmitted to the Court. Instead, the record only contains the appendix submitted by Appellant containing some documents which were considered below, and some which were not. The transcript indicates that the Special Magistrate had before him photo and video evidence depicting Bruno's sign and cloth fence, as well as signage from nearby properties, when he made this determination.

As noted above, findings of fact come to the appellate court with a presumption of correctness, and this presumption will not be disturbed unless the findings are clearly erroneous or unsupported by substantial evidence. *Helman,* 349 So.2d at 1189. "The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant." Fla. R. App. P. 9.200(e); *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979) ("[w]ithout a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal."). Without access to the evidence used by the Special Magistrate in making his determination, this Court cannot properly resolve the underlying factual issues so as to conclude that the Special Magistrate's decision was unsupported by the evidence. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979). Nor can the Court conclude that the Special Magistrate so misconceived the law as to review reversal. *Id.*

Accordingly, because the Appellant has failed to demonstrate reversible error, the Magistrate's October 5, 2023, Final Order is **AFFIRMED.** (J. BOWMAN, M. GARCIA-WOOD and G. ODOM, JR., JJ., concur.)

* * *

Volume 32, Number 10
February 28, 2025
Cite as 32 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Civil procedure—Service of process—School boards—Service was valid where return of service stated that school superintendent was served "in absence of chair"— Section1001.40 allows service of process on superintendent when school board chair cannot be found

BROOKLYNN DANIELS, Plaintiff, v. LIBERTY COUNTY SCHOOL BOARD, Defendant. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 2024 CA 0020, Civil Division. November 12, 2024. David Frank, Judge. Counsel: Gregory M. Noonan and Brent J. Berben, The Corry Law Firm, P.A., Tallahassee, for Plaintiff. Bob L. Harris, Cameron H. Carstens, and Nicholas R. Cleary, Messer Caparello, P.A., Tallahassee, for Defendant.

ORDER ON DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS

THIS CAUSE having come before the Court on Defendant's Motion to Quash Service of Process, the Court having reviewed the motion and Plaintiff's response, and being otherwise fully advised in the premises, finds:

The defendant school board argues that service of process in this case should be quashed because it recites Florida Statute 48.111 rather than Florida Statute 1001.40, and does not exactly demonstrate compliance with Florida Statute 1001.40.

The party who seeks to invoke the court's jurisdiction bears the burden of proving proper service. This burden requires the party to demonstrate that the return of service is, under [the appropriate statute], facially valid or regular on its face. . . . [If it is], the service of process is presumed to be valid and [the movant] has the burden of overcoming that presumption by clear and convincing evidence." *KMG Properties, LLC v. Owl Constr., LLC,* 393 So.3d 240, 249 (Fla. 2d DCA 2024) [49 Fla. L. Weekly D893a], quoting *Koster v. Sullivan*, 160 So.3d 385, 388 (Fla. 2015) [40 Fla. L. Weekly S63a].

"The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." *Dozier v. Duval Cnty. Sch. Bd.*, 312 So.3d 187, 194 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D398a], quoting *Fla. Dep't of State v. Martin*, 916 So.2d 763, 768 (Fla. 2005) [30 Fla. L. Weekly S780a].

Florida Statutes 48.21 and 1001.40 both address a public "body corporate," such as a school board. They can be read in harmony to permit service on the school superintendent when the board chair is "absent." The return "is regular on its face" because it states that Superintendent Peddie was served "in the absence of" the "chair" (as one of several).

Accordingly, it is ORDERED and ADJUDGED that the defendant has not met the required burden. The motion is DENIED. Defendant shall have ten (10) days from the date of this order to respond to plaintiff's complaint, and twenty (20) days from the date of this order to respond to plaintiff's discovery requests that were served with the complaint.

* * *

Estates—Real property—Homestead—Taxation—Ad valorem—Creditors' claims—Exemptions—Constitutional exemption of homestead property from claims of decedent's creditors inured to decedent's heirs to whom property title descended—Descent of homestead property as life estate to surviving spouse who maintained property as her residence during marriage and after decedent's death was not an "ownership change" within meaning of section 193.155(3)(a), so as to require property appraiser to remove homestead exemption—Property appraiser is directed to restore homestead exemption, including "Save Our Homes" amendment cap, and provide new tax bill

IN RE: ESTATE OF WESLEY E. MILLS, Deceased. Circuit Court, 7th Judicial Circuit in and for Putnam County. Case No. 2021 000688 CP. Division 53. December 3, 2024. Kenneth J. Janesk, II, Judge. Counsel: Leigh Cangelosi, for Beneficiary, Mary Lynn Mills. Preston J. Fields, for Beneficiary, Wesley E. Mills, Jr. J. Russell Collins, for Petitioner, Mary Lynn Mills.

AMENDED ORDER DETERMINING HOMESTEAD STATUS OF REAL PROPERTY

(Intestate—with Spouse and Lineal Descendant—Exempt from Claims)

On the petition of Mary Lynn Mills for an *amended* order determining homestead status of real property (the "Property"), all interested persons having been served proper notice of the petition and hearing, or having waived notice thereof, the court finds that:

1. The decedent died intestate and was domiciled in Putnam County, Florida;

2. The decedent was not survived by a spouse;

3. The decedent was survived by at least one descendant;

4. At the time of death, the decedent owned and resided on the real property described in the petition; it is

ADJUDGED that the following-described Property:

Lots 5 & 6[1], Block 31, Unit 18, Dunham Woods, INTERLACHEN LAKES ESTATES, as recorded in Plat Book 5, Page 14 of the public records of Putnam County, Florida, together[2] with a 2002 Homes of Merit mobile home ID #FLHML3F167025278A, and FLHML3F167025278B, known by the physical addresses of **115 and 121 Pine Tree Drive, Hollister, Florida 32147** with Tax Parcel Numbers of **33-09-25-4077-0310-0050** and **33-09-25-4077-0310-0060**,

constituted the homestead of the decedent within the meaning of Section 4 of Article X of the Constitution of the State of Florida.

ADJUDGED FURTHER that title to the Property descended, as of the decedent's date of death, and the constitutional exemption from claims of the decedent's creditors inured to the following heirs of the decedent:

Name	Address	Relationship	Share
Mary Lynn Mills	115 Pine Tree Drive Hollister, Florida 32147	Spouse	Life Estate Interest
Wesley E. Mills, Jr.	107 Sabrina Lane Palatka, Florida 32177-8564	Son	Remainder Interest

ADJUDGED FURTHER that the personal representative is authorized and directed to surrender all of the Property which may be in the possession or control of the personal representative, to the said heirs, and the personal representative shall have no further responsibility with respect to it.

ADDITIONAL FINDINGS AS TO LOT 6 ONLY

The Court finds that the decedent qualified to claim a homestead tax exemption for Lot 6 because the decedent was a "natural person"; intended to make Lot 6 the permanent residence for the decedent and decedent's family, and Lot 6 met the size requirement of article X, section 4(a)(1) of the Florida Constitution. *See, Aronson v. Aronson*, 81 So. 3d 515, 518 n.2) (citing *Cutler v. Cutler*, 994 So. 2d 341, 344 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2103a]). The Court finds that since the homestead exemption had been granted by the Property Appraiser, it did not need to be re-applied for unless there had been a change affecting the property's homestead status. *See*, *Mastroianni v. Mem'l Med. Ctr. of Jacksonville, Inc.*, 606 So. 2d 759, 761-62 (Fla. 1st DCA 1992).

The Court finds that Mary Lynn Mills (the "Surviving Spouse"), moved into Lot 6 when the decedent moved in and obtained his homestead exemption; then, the Surviving Spouse maintained Lot 6 as her residence during the marriage and after decedent passed away.

Therefore, the Court finds that the descent of the decedent's homestead to the Surviving Spouse was not an "ownership change" within the definition provided by Florida Statute § 193.155(3)(a) as the statute specifically provides that "a change or transfer to a surviving spouse" is not an "ownership change." Therefore, the Court further finds that the descent of the decedent's homestead to the Surviving Spouse did not cause the homestead to "change in any manner" that would require the Property Appraiser to remove the homestead exemptions within the meaning of Florida Statute § 196.011(8)(a). It is therefore

ADJUDGED FURTHER, and specifically as to Lot 6 and the attached mobile home only:

1) The Putnam County Property Appraiser (the "Property Appraiser"), is hereby directed to restore the homestead tax exemption, including the assessment cap provided by the "Save Our Homes" amendment, *Article VII § 4(d), Fla. Const.* as codified in Florida Statute § 193.15, for Parcel Number 33-09-25-4077-0310-0060 (Lot 6) for assessment years 2022, 2023, and 2024 and provide the resulting "taxable value" for each year to the Putnam County Tax Collector (the "Tax Collector").

2) The Clerk of the Circuit Court (the "Clerk") is hereby directed to immediately cancel the tax deed sale for Parcel Number 33-09-25-4077-0310-0060 scheduled for December 11th, 2024 (if not already cancelled); however, the Clerk may reschedule the tax deed sale at the Clerk's discretion.

3) Upon receipt of the new "taxable value" for assessment years 2022, 2023, and 2024, the Tax Collector is hereby directed to recalculate the real estate taxes for Parcel Number 33-09-25-4077-0310-0060 for each year and provide a new tax bill to the Surviving Spouse.

4) The Property Appraiser, Tax Collector, and Clerk shall proceed accordingly.

---

[1]Lots 5 and 6 have different parcel numbers and have separate chains of title; however, the lots are contiguous and within the acreage limits of a Florida Constitutional Homestead as provided by Article X, Section 4 of the Florida Constitution.

[2]The herein described mobile home is attached to Lot 6 only.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Continued detention—Officer did not have reasonable suspicion to detain defendant for DUI investigation where officer testified that he observed defendant deviate from lane of travel and that she had slurred speech and mirrored glassy eyes, but there was no evidence as to the degree of deviation or any effect on other drivers, and no slurred speech was evident in video of stop—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. NICOLE LYNN DIAZ, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case Nos. 2024-CT-300639-A-E and 2024-CT-300690-A-E. Division 83. December 11, 2024. Martha C. Adams, Judge. Counsel: Matthew P. Ferry, Lindsey, Ferry & Parker, P.A., Maitland, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come before the Court on the Defendant's Motion to Suppress, a hearing was held on November 22, 2024, and the Court having heard argument from Counsel and having reviewed the Court file and being otherwise duly advised, determines the following facts:

On March 27, 2024, Officer Nickolas Lawrence of the Maitland Police Department was behind a black Tesla at the stoplight at the intersection of Horatio and Highway 17-92. As the Tesla made the left turn on to 19-92, Officer Lawrence testified he sees the car make drastic lane changes (going back and forth three separate times, making serpentine movements). He also watched the car rapidly accelerate and then deaccelerate at least two times. Based on this driving pattern, he believed the driver may be ill, impaired or need medical attention.

Officer Lawrence makes a traffic stop and finds a woman behind the wheel in the driver's seat. When he contacts her, he notices her speech is slow and he can see she has mirrored, glassy eyes. He requests her driver's license and insurance. She can produce her driver's license from the wallet in her purse and she is identified as Nicole Diaz. While Officer Lawrence testifies, he is not able to smell any odor of alcoholic beverages and Ms. Diaz denies having had any alcohol to drink, he later requests her to step out of her vehicle for a DUI investigation. Lawrence admits he never asks her if she is sick, injured or in need of any medical assistance.

The defense argues there is no evidence for a valid traffic stop. Defense cites to *Crooks v. State,* 710 So.2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b], *Jordan v. State,* 831 So.2d 1241 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2651a], and *Hurd v. State,* 958 So.2d 600 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a], claiming no other vehicles were affected by the Defendant's driving pattern and there was no testimony that while there may have been some deviation from lanes of traffic, Officer Lawrence could not recall where these specific events occurred or recall how far she deviated from her lane of travel. Finally, they argue that while Lawrence may have believed Diaz was sick or injured, he never asked her any questions about her health or the if she needed medical assistance.

Furthermore, Defense argues the detention of Diaz to then complete a DUI investigation without further evidence of impairment was illegal. Lawrence was unable to testify to the smell of an odor of alcoholic beverage. Diaz denied she had anything to drink that night. Lawrence also testified Diaz had slow speech which was not evident in the video. This left only an observation of her eyes being mirrored and glassy. Therefore, this court agrees with the Defense that there was not enough reasonable suspicion to order the Defendant out of the car for a DUI investigation. Therefore, it is hereby

ORDERED and ADJUDGED as follows:

The Defendant's Motion to Suppress is **GRANTED**.

* * *

Contracts—Rental property management—Failure to adequately perform services under multiple short-term rental management contracts—Arbitration—Defendant's motion to compel arbitration is granted with respect to disputes governed by agreements containing mandatory arbitration clauses—Disputed issues were arbitrable and defendant has not acted inconsistently with right to arbitrate or otherwise waived right—Motion denied as to contracts that have not been proven to contain arbitration clauses

DREAMSTAY HOMES, LLC, et al., Plaintiffs, v. HFA CONSULTING, LLC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-003189-CA-01. Section CA31. November 27, 2024. Migna Sanchez-Llorens, Judge. Counsel: David P. Reiner, II, for Plaintiffs. Thomas L. Hunker and V. Ashley Paxton, Hunker Paxton Appeals & Trials, Fort Lauderdale, for Defendants.

ORDER ON COMPELLING ARBITRATION

THIS MATTER came before the Court upon Defendant HFA's May 28, 2024, Amended Motion to Compel Arbitration [D.E. 139] ("**Motion**"). The Court, having reviewed the Motion; the Response; having reviewed the Confidential Contracts [D.E. 133] and being duly advised on the premises, **FINDS**:

BACKGROUND/PROCEDURAL HISTORY

The amended complaint attaches affidavits from each plaintiff stating it signed a written contract with HFA. (Am. Compl., Ex. C [D.E. 61].). The plaintiffs allege that—pursuant to the terms of their "written contracts"—they each individually paid (1) initial service fees and (2) management fees to utilize HFA's proprietary software, data, and staff to facilitate a presentation of the plaintiffs' automated

vacation rental businesses on websites like Airbnb and Vrbo. *Id.*

Plaintiffs allege that HFA breached the contracts by failing to "adequately perform" its services as required by the terms of the 24 separate and discrete written contracts. *Id.* However, none of Plaintiffs' contracts with HFA were incorporated into or attached to the original or amended complaints notwithstanding that clear and unambiguous requirement pursuant to Rule 1.130 that contracts upon which a complaint is based are attached to the complaint.

The contracts expressly require disputes among the parties to be resolved through arbitration, and because the Court wasn't obliged to dismiss the complaint based on HFA's representation that this was the case (or on the grounds that the plaintiffs failed to present a single one of the contracts), HFA, with its hired counsel, tracked down 23 (of the 24) contracts, served them to Plaintiffs' counsel, provided them to the Court, and filed them in the record under seal. (See Notice of Filing Confidential Cont. [D.E. 133].). As HFA explained at the hearing, of the 23 contracts HFA was able to proffer to the Court, 21 provide mandatory arbitration clauses.

LEGAL ANALYSIS

A trial court must consider three factors when determining if a case shall be submitted to arbitration: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. *Wick v. Orange Park Mgt., LLC,* 327 So. 3d 369, 372 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1905a] (citing *Basulto v. Hialeah Auto.,* 141 So. 3d 1145, 1152 (Fla. 2014) [39 Fla. L. Weekly S140b]) (quoting *Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]).

Disputes include those "arising out of or related to" the services, the agreement, or the relationship between the parties. *M.P. v. Guiribitey Cosmetic & Beauty Inst., Inc.,* 389 So. 3d 598, 601 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1947a] "[W]here the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of the agreement should be resolved in favor of the arbitration." *Id.* at 602 (citing *Idearc Media Corp. v. M.R. Friedman & G.A. Friedman, P.A.*, 985 So. 2d 1159, 1161 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1592d]). In this case, there's no question of the existence of a "dispute" between the contracting parties. Twenty-one contracts clearly and unambiguously, in plain language, present a dispute resolution clause requiring arbitration and an adjudication of claims on an individual basis. (Notice of Filing Confidential Cont. at 0022).

In determining whether a party has waived the right to arbitration, the "essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistent with the arbitration right." *Raymond James Fin. v. Saldukas,* 896 So. 2d. 707, 711 (Fla. 2005) [30 Fla. L. Weekly S115a] (quoting *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987)). As the Court already ruled and memorialized by signing an order back in September of 2023, the defendants have not acted inconsistent with their right to arbitrate. Nor have the defendants otherwise waived their right to arbitrate. (Order Granting in Part Defs.' Mot. to Dismiss [D.E. 56].).

Consistent with the Court's prior ruling and rationale stated on the record on August 24, 2023, hearing (Def.'s Mot. to Dismiss Pl.'s Compl. & Mot. to Sever Claims H'rg Tr. 24:24-25—25:1-5; [D.E. 91]) the Court hereby dismisses the complaint as to the following Plaintiffs and compels arbitration as to every claim, against every defendant, (all of whom have agreed to arbitrate any and all disputes pursuant to their contracts with the defendants):

Airbnb Automation Management Services Agreement (18 pages)	**Vacation Rental Automation Service Agreement (6 pages)**	
(1) Edward Johnson Jr.	(10) James Braxton	(17) Derek Lindsey
(2) David Ditommaso	(11) Derek Brown	(18) Ryan Sullivan
(3) Vincent Luongo	(12) FJC Online Enterprises	(19) Charming Stays LLC
(4) Anna Kyupelyan	(13) Erik Scholl	(20) Dreamstay Homes LLC
(5) Adam Elliot	(14) Francis Domawee	(21) Daniel Ha [1]
	(15) Trion Eventures	(22) Jacquelynn Hylick
(7) Daryn Can	(16) Jonathan Miller	(23) Philip Young
(8) Media Swazo		
(9) Syla Muni		

Only three of the Plaintiffs are not subject to this ruling: *Giftware City LLC/Michelle Tran*[2] *Kashanna Robinson and Daniel Haban*. Giftware City LLC/Michelle Tran is the only plaintiff whose contract with HFA doesn't contain an arbitration provision and Kashanna Robinson (her contract has not been located). (See Notice of Filing Confidential Cont. at 0001, 0004-0006.). As for Daniel Haban, his contract was not located in the confidential contracts only an individual "Daniel Ha" appeared to have signed a contract. (Notice of Filing Confidential Cont. at 0250-0254.) Accordingly, this matter will proceed with Tran's claims, Kashanna Robinson's claims and Daniel Haban's claims against Defendants.

As it relates to the remaining Plaintiffs, the 18-page and 6-page versions of the remaining Plaintiffs' contracts with HFA contain the following pertinent language:

Airbnb Automation Management Services Agreement (18 pages)	**Vacation Rental Automation Service Agreement (6 pages)**
If Owner has a complaint, dispute, or controversy, Owner agrees to first contact Agent [. . .] to attempt to resolve the dispute or controversy informally. Any controversy or claim arising out of or related to the use of the Services, Applications, Websites or any other thing governed under this Agreement, any content, services, or materials, or Owner's relationship with Agent that cannot be resolved through such informal process or through negotiation within 120 days shall be resolved by binding, confidential arbitration administered by the American Arbitration Association ("AAA"), and judgment on the award rendered may be entered in any court having jurisdiction thereof.	Client shall provide notice of any question, concern, or complaint to Consultants, with one hundred twenty(120) days opportunity to cure. Any controversy or claim arising out of or related to this Agreement or Client's relationship with Consultants, shall be resolved by binding, confidential arbitration administered by the American Arbitration Association ("AAA") under its rules in Miami, Florida, applying the laws of the State of Florida, without regard to conflicts of law principles.

The arbitrator shall have the exclusive and sole authority to resolve any dispute relating to the interpretation, construction, validity, applicability, or enforceability of this Agreement, Agent's Terms and Conditions of Use, the Privacy Policy, this arbitration provision, and any other terms incorporated by reference into Agreement [. . .] to determine whether any dispute is arbitrable [and] whether a non-signatory to this agreement can enforce this provision against you or us.	The arbitrator shall have the exclusive and sole authority to resolve any dispute relating to this Agreement or the relationship between Client and Consultants.
Owner understands that it would have had a right to litigate through a court, to have a judge or jury decide its case, and to be party to a class or representative action. However, Owner understands and agrees to have any claims decided individually and only through binding, final, and confidential arbitration in accordance with this arbitration provision.	The parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any right they might have to a trial by jury in any legal proceeding directly or indirectly arising out of or relating to this Agreement. [. . .] The parties agree that any claims will be adjudicated on an individual basis, and each waives the right to participate in a class, collective, or other joint action with respect to the claims.
This Agreement constitutes the entire agreement between the Parties and supersedes all prior memoranda or agreements relating thereto, whether oral or in writing. Any and/or all prior agreements, whether express or implied, are hereby revoked in their entirety, regardless if such express or implied terms are in contradiction to the terms of this Agreement or are not addressed by the terms of this Agreement.	This Agreement constitutes the complete and exclusive agreement between the parties concerning its subject matter and supersedes all prior or contemporaneous contracts or understandings, written or oral, concerning the subject matter described herein [. . .] No changes or modifications or waivers to this Agreement will be effective unless in writing and signed by both parties.

(See Notice of Filing Confidential Cont. at 0009-268) (emphasis added).

Florida public policy favors resolving disputes through arbitration when the parties have agreed to arbitrate. *Orkin Exterminating Co. v. Petsch,* 872 So. 2d 259, 263 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D352a]. All doubts regarding the scope of an arbitration agreement must be resolved in favor of arbitration. *Qubty v. Nagda,* 817 So. 2d 952, 956 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1225a]. While "no party must submit a dispute to arbitration it did not intend to arbitrate"—*Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]—"[i]t is the intention as expressed by the language employed in the agreements that governs, not the after-the-fact testimony of the parties." *See Bill Heard Chevrolet Corp. v. Wilson,* 877 So. 2d 15, 18 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1119b].

A Florida court analyzing a contractual arbitration provision "should resolve all doubts in favor of arbitration rather than against it." *Prudential Sec., Inc. v. Katz,* 807 So. 2d 173, 174 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D389a]. The Court finds that, in this *case, except* for Plaintiffs Giftware City LLC/Michelle Tran, Kashanna Robinson and Daniel Haban, as it relates to the remaining Plaintiffs' contract provision, all the essential elements weigh in favor of compelling arbitration.

ORDERED AND ADJUDGED as follows:

For the reasons stated in this order, the Court **GRANTS** in **PART** Defendant's Motion to Compel Arbitration and **DENIES IN PART** as it relates to Plaintiffs Giftware City LLC/Michelle Tran, Kashanna Robinson and Daniel Haban. All claims asserted by 21 of the 24 Plaintiffs against all Defendants in this action are hereby **DISMISSED** without prejudice with leave to reassert them in arbitration pursuant to the terms of Plaintiffs' written contracts with HFA.

---

[1]Confidential Contracts has Daniel Ha. (Notice of Filing Confidential Cont. at 0250-0254.). The Court cannot assume Daniel Ha is Daniel Haban.

[2]Defendants do not seek to compel arbitration of the claims asserted by Plaintiff Giftware City LLC/Michelle Tran ("**Tran**") because it is the only plaintiff whose contract with HFA that did not contain an arbitration provision. (Notice of Filing Confidential Cont. at 0004-0006.).

* * *

Civil procedure—Class actions—Settlement—Approval—Court finds that settlement agreement provides reasonable and adequate recovery fair to all class members and there is no suggestion of fraud or collusion between parties or their counsel—Attorney's fees award for class counsel and incentive award to class representatives are also found to be reasonable

HERE-U-GO DELIVERY SERVICES, LLC, et al., Plaintiffs, v. MAKO FUND I, LLC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-019911-CA-01. Section CA15. December 20, 2024. Jose Rodriguez, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood; Robert W. Murphy, Charlottesville, Virginia; and Craig Carley Marchiando, Williamsburg, Virginia, for Plaintiffs. Alejandro Mauricio Miyar, Miami, for Mako Fund I, LLC, Defendant. Michael W. Ullman, Boca Raton, for Eduardo Del Rio, Defendant.

FINAL APPROVAL ORDER

THIS CAUSE came before the Court on December 20, 2024 on the Motion for Final Approval of Class Action Settlement Agreement and the Stipulation and Settlement Agreement between the Class Representatives, Here-U-Go Delivery Services, LLC and Rijkaard Benoit, on behalf of themselves and all others similarly situated, and Defendants, Mako Fund I, LLC and Eduardo Del Rio. Based on the record, the evidence and argument presented, the Court makes the following findings concerning the fairness, reasonableness and adequacy of the Class Settlement:

A. On October 11, 2024, after extensive settlement discussions and prior mediation efforts, the respective parties entered into a Stipulation and Settlement Agreement ("Settlement Agreement"), which has been previously filed with the Court.

B. Upon the review of the record and for the reasons set forth below, this Court hereby gives its final approval of the Settlement Agreement and finds that the Settlement to be fair, reasonable and adequate.

C. The Court finds that the Class Members are receiving fair, reasonable and adequate Settlement Benefits pursuant to the Settlement Agreement in this action.

D. In its Order of Preliminary Approval, the Court preliminarily approved the Class Notice, and found that the proposed form and content of the Class Notice satisfied the requirements of due process, Rule 1.220, Florida Rules of Civil Procedure. The Court reaffirms that finding and holds that the best practical notice was given to Class Members.

E. Class Counsel timely caused the Class Notice to be mailed by first-class mail, postage prepaid, to each of the Class Members at their last known address. The Class Notice advised the Class Members of, among other things, the allegations of the claims by the Class Representatives, the terms of the proposed settlement, the requirements for exclusion from the settlement, the process for objecting to the proposed settlement, and the scheduled approval hearing. The Class Notice further identified Class Counsel and set forth that Class Counsel was seeking an award of attorney's fees and expense and that

said attorney's fees and expense would be deducted from the Class Fund. The Class Notice also set forth in full the claims released as part of the Settlement and advised such persons to read the notice carefully because it would affect their rights, if they failed to exclude themselves from the Settlement.

F. No Class Members have requested to be excluded; and, to-wit, no Class Members have objected to the proposed Settlement.

G. The Court finds that the Class Members were given an opportunity to opt out and were adequately represented by the Class Representative and Class Counsel.

H. The Court must determine whether the proposed Settlement is "fair, adequate and reasonable and that it is not the product of collusion" between the parties. *Grosso v. Fidelity Nat. Title Ins. Co.*, 982 So. 2d 1165 (Fla 3d DCA 2008) [33 Fla. L. Weekly D241a]; *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984). In making this determination, the Court considers six factors:

1. The likelihood that plaintiffs would prevail at trial;
2. The range of possible recovery if plaintiffs prevailed at trial;
3. The fairness of settlement compared to the range of possible recovery, discounted for the risk associated with litigation;
4. The complexity, expense and duration of the litigation;
5. The substance and amount of opposition to the settlement; and
6. The stage of the proceedings at which the settlement was achieved.

Bennett, 737 F. 2d 986.

I. In determining the adequacy of the proposed Settlement, the Court need not and does not decide the merits of the case. This Court has considered the submissions of the parties, which demonstrates a degree of uncertainty in Class Representatives prevailing in their claims. The Settlement Benefits set forth in the Settlement Agreement and noted above represent a significant benefit to the Class Members. Given the factual legal obstacles standing in the way of a full recovery if this case were litigated to a conclusion, and the perils of maintaining an action through a final judgment or appeal, this Court finds that the Settlement provides for a reasonable and adequate recovery that is fair to all Class Members. If this case were to proceed without settlement, the resulting litigation would be complex, lengthy and expensive. The Settlement eliminates a substantial risk that the Class Members would walk away empty-handed after trial.

J. Further, Defendants have defended this action vigorously and have indicated they would continue to do so, absent settlement. Because of resulting motion practice, trial and appeals, it could be a lengthy period before the Class Members would see any recovery even if they were to prevail on the merits, which would not produce a better recovery than they may have achieved in this Settlement.

K. The Parties negotiated the Settlement after a thorough review and analysis of the legal issues involved for nearly a year after the filing of the lawsuit. The facts demonstrate that the Class Representatives were sufficiently informed to negotiate, execute and recommend approval of the Settlement. *See, e.g., Davies v. Continental Bank,* 122 F.R.D. 475, 479-80 (ED Pa.1996).

L. This Court may also consider the opinions of the participants, including Class Counsel. *Parker v. Anderson*, 667 F. 2d 1204, 1209 (5th Cir. 1984), cert. denied, 459 U.S. 828 (1985). Class Counsel has considerable experience in the prosecution of large and complex consumer class actions. Counsel for the Defendants is likewise experienced. This Court gives credence to the opinion of counsel, amply supported by the court's independent review, that this settlement is a beneficial resolution of the class action claims.

M. In addition to finding that the terms of the proposed settlement are fair, reasonable and adequate, the Court must determine there is no fraud or collusion between the parties or their counsel negotiating the settlement terms. *Bennett*, 737 F.2d 986*; Miller v. Republic National Life Insurance Company*, 559 F.2d 426, 428-29 (5th Cir. 1977). In this case, there is no suggestion of fraud or collusion between the parties. Furthermore, the terms of the Settlement make it clear that the process by which the settlement was achieved was fair. *Miller,* 559 F.2d at 429.

N. Due to the efforts of Class Counsel, a class action consisting of 70 accounts has been certified for compensatory damages and equitable relief. The Settlement Agreement negotiated by Class Counsel provides for the waiver and discharge of deficiencies against the Class Members in excess of $1,625,076.24 in principal and interest.

O. The relief to the Class has significant value, both with respect to monetary compensation to the Class and other non-monetary benefits. In addition to the discharge of a significant deficiency obligation, each Class Member will have the benefit of improved credit upon clearance of their respective consumer reports.

P. The terms of the Settlement Agreement, including all exhibits thereto, are fully and finally approved as fair, reasonable, and adequate as to, and in the best interest of, the Class.

Q. Through the Settlement Agreement, the parties agreed that Class Counsel would be paid reasonable attorney's fees and litigation expense, including court costs, mediation fees and settlement administration expense ("Attorney Fee Award"), in the sum of $165,000.

R. As for the Attorney Fee Award, the request for $165,000 by Class Counsel is fair and reasonable compensation to Class Counsel in accordance with Rule 1.220, Florida Rules of Civil Procedure, and the factors set forth therein.

S. Through the Settlement Agreement, the Parties agreed that the Class Representatives would receive, in addition to the class benefits, an incentive award of Ten Thousand Dollars ($10,000.00) ("Class Representative Incentive Award") for their efforts in obtaining the above- described benefits to the Class. The Court finds that such an award is reasonable and appropriate in light of the results obtained.

Based on the foregoing, it is ORDERED AND ADJUDGED that:

1. The Settlement Agreement is hereby approved in final.

2. Without limiting any term of the Settlement Agreement, including the release of claims as set forth in full in the Settlement Agreement at paragraph 3, it is hereby ordered and adjudged that the terms of the Settlement Agreement and of this Final Approval Order shall forever be binding upon, and shall have *res judicata* and preclusive effect, in any and all pending and future lawsuits maintained by the Class Representatives and any and all other Class Members, as well as their heirs, executors, administrators, successors and assigns.

3. The Attorney's Fee Award and the Class Representative Incentive Award shall be paid by Defendants in accordance with the provisions of the Settlement Agreement.

4. This action and all claims asserted herein are DISMISSED with prejudice in accordance with the provisions of the Settlement Agreement. The Court retains jurisdiction over this matter to the extent necessary to enforce the terms of the Settlement Agreement. The Court directs the Clerk to administratively close the file.

* * *

Arbitration—Waiver—Active participation in litigation—Court approves and adopts magistrate's order recommending that motion to dismiss be denied where defendant did not assert right to arbitration until after filing motion challenging subject matter jurisdiction of circuit court

RYAN PERSAUD, Plaintiff, v. GULF COAST AUTO BROKERS INC, GROW FINANCIAL CREDIT UNION, Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2023 CA 006884 NC. Division C Circuit. January 6, 2025. Hunter W. Carroll, Judge. Bradley J. Ellis, General Magistrate. Magistrate's

Order dated December 19, 2024. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Gregg Martin Horowitz, Sarasota, for Gulf Coast Auto Brokers, Inc., Defendant. Sammy Hatem Hamed, Tampa, for Grow Financial Credit Union, Defendant.

ORDER ADOPTING AND APPROVING MAGISTRATE'S RECOMMENDED ORDER
(No Exceptions Filed)

BEFORE THE COURT without hearing is the Recommended Order filed by Magistrate Bradley J. Ellis, rendered on December 19, 2024, docketed at DIN 84, and attached to this Order ("Recommended Order"). The Court considered the findings, if any, legal conclusions, and the recommendation. It is,

ORDERED AND ADJUDGED that:

1. The Court approves this Recommended Order. The Court adopts as its own all findings and recommendations contained with the Recommended Order.

2. The parties are ordered to abide by all findings and recommendations contained in the Recommended Order, which is now the Order of the Court.

3. Special additional instructions (none if blank):

RECOMMENDED ORDER OF MAGISTRATE RE:
(1) DEFENSIVE MOTIONS [DIN 44]; AND
(2) AMENDMENT TO DEFENSIVE MOTIONS [DIN 46]

This matter came for hearing on November 12, 2024 and December 17, 2024 on Defendant Gulf Coast Auto Brokers, Inc.'s: **(1)** *defensive motions* [DIN 44]; *and* **(2)** *amendment to defensive motions* [DIN 46]. The Magistrate has jurisdiction pursuant to Rule 1.490, *Fla. R. Civ. P.*, and Fla. 12th Jud. Cir. AO ##2024-03.4 & 2024-04.1. The Magistrate submits this *recommended order* for approval by the Court.

For the reasons stated on the Record, and as supplemented herein, the Magistrate recommends as follows:

1. Filed November 16, 2023, Defendant Gulf Coast Auto Brokers, Inc.'s initial *defensive motions* is at [DIN 18]. Defendant's initial *defensive motions* [DIN 18], in pertinent part, raised lack of Circuit Court subject matter jurisdiction based on the amount in controversy. Defendant cited §34.01(c), *Fla. R. Civ. P.*, which is the County Court's amount in controversy limits for subject matter jurisdiction. In effect, Defendant asserted that County Court and not Circuit Court was the appropriate jurisdiction for Plaintiff's claims. *See also* Rules 1.060(a) & 1.170(j), *Fla. R. Civ. P.* (governing the transfer of cases filed in the wrong court). Defendant did not assert a right to arbitration contemporaneous with the initial *defensive motions* [DIN 18]. Defendant's initial *defensive motions* [DIN 18] resulted in the Circuit Court without hearing *sua sponte* issuing an order to show cause on jurisdiction, ordering a transfer to County Court, and then vacating the order to transfer after Plaintiff responded to the show cause order. [DINs 19, 28, 29, 26, & 27]. Additionally, Defendant's *motion to stay discovery* [DIN 25] sought to stay discovery based, in pertinent part, on Defendant's argument that the Circuit Court lacked subject matter jurisdiction and the Circuit Court's pending order to show cause. [DIN 25].

2. The Court's *order adopting and approving Magistrate's recommended order* is at [DIN 81]. The *order adopting* [DIN 81] granted Plaintiff Ryan Persaud's *motion to amend Plaintiff's first amended complaint by interlineation nunc pro tunc* [DIN 75]. The *order adopting* [DIN 81] deemed the interlined *amended complaint* [DIN 75], "Exhibit A" operative, and all filings directed towards the initial *amended complaint* [DIN 31] to be deemed filed towards the interlined *amended complaint* [DIN 75], "Exhibit A," without necessitating any Party re-filing such documents.

3. Filed December 18, 2023, Defendant Gulf Coast Auto Brokers, Inc.'s renewed/second *defensive motions* is at [DIN 44]. Defendant's renewed/second *defensive motions* [DIN 44] did not assert a right to arbitration.

4. Filed February 21, 2024, Defendant Gulf Coast Auto Brokers, Inc.'s *amendment to defensive motions* is at [DIN 64]. For the first time, Defendant asserted a right to arbitration in the *amendment to defensive motions* [DIN 64].

5. *Plaintiff's response in opposition to Defendant's second set of "defensive motions"* is at [DIN 76].

6. Regarding arbitration and motions to compel / dismiss, *see GMRI, Inc. v. Brautigan*, No. 1D2023-2141, 2024 WL 3805116, at *2 (Fla. 1st DCA, Aug. 14, 2024) [49 Fla. L. Weekly D1717c]:

> We begin with the premise that "arbitration agreements are favored" in Florida. *See Wick v. Orange Park Mgt, LLC*, 327 So. 3d 369, 372 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1905a] (*citing Jackson v. Shakespeare Found., Inc.*, 108 So.3d 587, 593 (Fla. 2013) [38 Fla. L. Weekly S67a]). ***Longhorn filed its motion to dismiss because of an alleged binding arbitration agreement between the parties. Thus, we treat the motion as one to compel arbitration and stay the proceeding***. *See AMS Staff Leasing, Inc. v. Ocha Eng'g Corp.*, 139 So.3d 452, 453 n.1 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1133a] ("***A motion to dismiss based on a contractual arbitration clause is to be treated as a motion to compel arbitration."*** (*citing Balboa Ins. Co. v. W.G. Mills, Inc.*, 403 So.2d 1149, 1150-51 (Fla. 2d DCA 1981))).
>
> ***"When evaluating a motion to compel arbitration, a trial court must consider three factors: '(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitrate was waived.' "*** *Wick*, 327 So.3d at 372 (*quoting Basulto v. Hialeah Auto.*, 141 So.3d 1145, 1152 (Fla. 2014) [39 Fla. L. Weekly S140b]). Here, however, the trial court denied the motion before reaching any of these three factors.
>
> Some courts have construed the first factor, "whether a valid written agreement to arbitrate exists," to include contract formation, but "[a] difference exists. . .between the validity of a contract and the formation of a contract." *HHH Motors, LLP v. Holt*, 152 So.3d 745, 748 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2509b] (emphasis supplied) (*citing Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 992 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C806a]); *compare* §682.02(1), *Fla. Stat.* ("***An agreement contained in a record to submit to arbitration. . .is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract***." (emphasis added)) *with* §682.02(2), *Fla. Stat.* ("The court shall decide whether an agreement to arbitrate exists. . . ." (emphasis supplied)).
>
> Thus, the trial court's order rests on contract formation, not the validity of the agreement—post-formation. ***A contract to arbitrate must exist before a court can determine whether said contract is valid so as to adjudicate on a motion to compel arbitration***. *See* §682.02(2), *Fla. Stat.* ("***The court shall decide whether an agreement to arbitrate exists***. . . ." (emphasis supplied)); §682.03(2), *Fla. Stat.* ("***If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate***." (emphasis supplied)).

[***emphasis added***]; *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005) [30 Fla. L. Weekly S115a]:

> We have held that under both the Federal Arbitration Act and Florida's Arbitration Code ***there are three elements for courts to consider in ruling on a motion to compel the arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2)***

whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Seifert v. U.S. Home Corp*., 750 So.2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]. ***We have long held that a party's contract rights may be waived by actually participating in a lawsuit or taking action inconsistent with that right***. *Klosters Rederi A/S v. Arison Shipping Co*., 280 So.2d 678, 680 (Fla. 1973).

In our decisions we have not held that there is a requirement for proof of prejudice in order for there to be an effective waiver of the right to arbitrate. We have defined "waiver" as the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077 n. 12 (Fla. 2001) [26 Fla. L. Weekly S465a]. This general definition of waiver is applicable to a right to arbitrate. We agree with Judge Mikva's opinion in *National Foundation for Cancer Research*, 821 F.2d at 774:

> We cannot agree that any of these points justify a reversal of the district court's decision. The right to arbitration, like any contract right, can be waived. *See* [*Cornell & Co. v. Barber & Ross Co*., 360 F.2d 512, 513 (D.C.Cir. 1966)]. The Supreme Court has made clear that the "strong federal policy in favor of enforcing arbitration agreements" is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism. [*Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-24, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)]. ***Thus, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context. The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right***. *See Cornell*, 360 F.2d at 513.

Therefore, ***we conclude that the conflict among the district courts should be resolved in accord with the Second District's decision that there is no requirement for proof of prejudice in order for there to be an effective waiver of the right to arbitrate***.

Arbitration is a valuable right that is inserted into contracts for the purpose of enhancing the effective and efficient resolution of disputes. Arbitration provisions are generally favored by the courts. *Seifert*, 750 So.2d at 636. ***However, an arbitration right must be safeguarded by a party who seeks to rely upon that right and the party must not act inconsistently with the right***.

[***emphasis added***]; *Truly Nolen of Am., Inc. v. King Cole Condo. Ass'n, Inc*., 143 So.3d 1015, 1017-18 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1535a]:

> ***Florida courts have routinely held that a party's active participation in a lawsuit (including filing a lawsuit, filing an answer that does not assert the right to arbitrate, moving for summary judgment, or conducting discovery) is inconsistent with the right to compel arbitration***. *See Green Tree Servicing, LLC v. McLeod*, 15 So.3d 682, 687-88 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1311c], and cases cited therein. ***However, Florida courts have also routinely held that the filing of pre-answer motions, particularly when filed simultaneously with the motion to compel arbitration, does not waive the right to compel arbitration***. *See, e.g*., 13 Parcels, 104 So.3d at 380 (finding that a party who filed a motion to transfer venue after demanding arbitration had not waived the right to compel arbitration); *Houchins v. King Motor Co. of Fort Lauderdale, Inc*., 906 So.2d 325, 328 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1668b] (***finding no waiver when the defendant filed a motion to dismiss for failure to state a cause of action and then filed its motion to compel arbitration***); *Hirschfeld v. Crescent Heights, X, Inc*., 707 So.2d 955, 956 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D814b] (filing of motion to dismiss and then motion to compel arbitration did not waive right to arbitration); *Graham Contracting Inc. v. Flagler Cnty*., 444 So.2d 971 (Fla. 5th DCA 1984) (same).
>
> Here, Truly Nolen asserted its right to compel arbitration simultaneously with its motion to transfer venue and as its first action in the lawsuit. Such action can hardly be considered inconsistent with the right to compel arbitration. Indeed, Truly Nolen took the only action it could to protect both its right to compel arbitration and its right to seek a convenient transfer because the motion to transfer could have been waived if not filed in its first motion or pleading. *See Fla. R. Civ. P.* 1.140(b) (requiring a motion to transfer venue to be filed prior to any pleadings); *Jerolaman v. Van Buren*, 512 So.2d 1138, 1140-41 (Fla. 1st DCA 1987) (finding that a defendant who filed an answer waived any right to seek transfer of venue).
>
> In finding that Truly Nolen waived the right to arbitrate, the trial court below relied heavily on *R.W. Roberts Construction Co. v. Masters & Co*., a 1981 case from the Fifth District Court of Appeal finding that a defendant who unsuccessfully moved to dismiss the complaint for failure to state a cause of action and also to transfer venue could not later move to compel arbitration. 403 So.2d 1114, 1115 (Fla. 5th DCA 1981). The trial court's reliance on *R.W. Roberts* was, however, misplaced, as it is easily distinguishable based on the timing of the filings. Additionally, as explained above, cases from this Court establish that a party's simultaneous filing of a pre-answer motion with a motion to compel arbitration does not constitute a waiver. Furthermore, the Fifth District itself expressly distinguished *R.W. Roberts* on facts similar to the facts in the instant case by finding that the simultaneous filing of a motion to dismiss with a motion to compel arbitration is not inconsistent with the right to compel arbitration. *Duckworth v. Plant*, 697 So.2d 1257, 1259 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1797b].

[***emphasis added***]; *R. W. Roberts Const. Co. v. Masters & Co*., 403 So.2d 1114, 1115 (Fla. 5th DCA 1981):

> On December 3, 1980, petitioner filed a motion to dismiss and to transfer the action, alleging that the contract clearly provided for venue in Orange County, rather than Putnam County. After hearing, this motion was denied by order entered February 16, 1981. On March 3, 1981, petitioner filed its answer and affirmative defenses and its motion to compel arbitration, the denial of which motion forms the basis for this petition.
>
> . . .
>
> Assuming the arbitration clause in question to be valid (a point not conceded by respondent and not decided here), ***the trial court could have concluded that by submitting a motion to dismiss and to transfer action, and after an adverse ruling thereon, any right to arbitration was waived. A party's contract right to arbitration may be waived by active participation in a lawsuit or by taking action inconsistent with that right***. *Klosters Rederi A/S v. Arison Shipping Co*., 280 So.2d 678 (Fla. 1973). ***Waiver of the right does not necessarily depend on the timing of the motion to compel arbitration, but rather on the prior taking of an inconsistent position by the party moving therefor***. *Ojus Industries v. Mann*, 221 So.2d 780 (Fla.3d DCA 1969); *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc*., 352 So.2d 1235 (Fla.4th DCA 1977).
>
> ***Petitioner's motion to dismiss and transfer the action is a contention that the proceeding is in the court of the wrong county, not that it doesn't belong in court at all. This position seems totally inconsistent with petitioner's later assertion that no court was the proper forum, because arbitration was appropriate***.

[***emphasis added***]; *Paine, Webber, Jackson & Curtis, Inc. v. Fredray, Inc*., 521 So. 2d 271, 272-73 (Fla. 5th DCA 1988):

> Faced with an almost identical factual situation in *R.W. Roberts Construction Co. Inc. v. Masters & Co*., 403 So.2d 1114 (Fla. 5th DCA 1981), this court stated:
>
> > A party's contract right to arbitration may be waived by active participation in a law suit or by taking action inconsistent with that

right. *Klosters Rederi A/S v. Arison Shipping Co*., 280 So.2d 678 (Fla.1973).

Waiver of the right does not necessarily depend on the timing of the motion to compel arbitration, but rather on the prior taking of an inconsistent position by the party moving therefor. *Ojus Industries v. Mann*, 221 So.2d 780 (Fla. 3d DCA 1969); *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc*., 352 So.2d 1235 (Fla. 4th DCA 1977).

Sub Judice the appellee/defendant below not only filed an answer and affirmative defenses to the initial proceedings brought in county court but also filed a counterclaim including a claim for damages in excess of $5,000.00, resulting in its motion to transfer to circuit court jurisdiction. Fredray thereafter continued to sit on whatever rights might have accrued to it according to the terms of the Client Commodity Agreement for over a year while the case became at issue and was set for trial by the court.

[***emphasis added***]; *Duckworth v. Plant*, 697 So. 2d 1257, 1259 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1797b]:

In R.*W. Roberts Construction Co., Inc. v. Masters & Co., Inc.*, 403 So.2d 1114 (Fla. 5th DCA 1981), this court discussed the issue of conduct which constitutes a waiver of arbitration. In *Roberts*, the defendant, who was perhaps entitled to arbitration, moved to transfer venue of the plaintiff's pending lawsuit. After the trial court denied the motion to transfer venue as well as a motion to dismiss, the defendant moved to compel arbitration under the terms of the parties' contract. ***This court ruled that a party's active participation in litigation could constitute a waiver of that party's contractual right to arbitrate, and that the defendant's filing of a motion to dismiss and a motion to transfer venue constituted such a waiver***.

Here, Duckworth's only participation in the lawsuit was the filing of a motion to dismiss. This motion was Duckworth's first opportunity to raise the question of mandatory arbitration. The simultaneous raising of other grounds did not constitute a waiver. *See Graham Contracting, Inc., v. Flagler County*, 444 So.2d 971 (Fla. 5th DCA 1983), *rev. denied*, 451 So.2d 848 (Fla.1984).

[***emphasis added***]; *and Morrell v. Wayne Frier Manufactured Home Ctr*., 834 So.2d 395, 397 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D256b]:

A party waives its right to arbitrate by: (1) actively participating in the lawsuit; or (2) taking action which is inconsistent with the right to arbitrate. *Klosters Rederi; R.W. Roberts Construction Co., Inc. v. Masters & Co., Inc*., 403 So.2d 1114 (Fla. 5th DCA 1981) (***the defendant's motion to transfer the action, a contention that the case was in the court of the wrong county, rather than that the case should not be in court at all, waived the right to arbitration***).

[***emphasis added***].

7. **Motion to Dismiss**:

a. **Contractual Arbitration**: **DENY**, for the reasons stated by the Magistrate on the Record during the December 17, 2024 hearing. *See also* [DINs 18, 24, 25, 26, 27, 28, 29, 40, 44, & 64].

b. **Count II—Breach of Express Warranty**: Motion **WITHDRAWN** by Defendant's counsel on the Record during the December 17, 2024 hearing; without prejudice for Defendant to continue to assert this argument as defenses and/or affirmative defenses.

c. **Count IV—Violation of the Florida Consumer Collection Practices Act**: Motion **WITHDRAWN** by Defendant's counsel on the Record during the December 17, 2024 hearing; without prejudice for Defendant to continue to assert this argument as defenses and/or affirmative defenses.

8. **Motion to Strike**:

a. **"Constructive Knowledge**": Motion **WITHDRAWN** by Defendant's counsel on the Record during the December 17, 2024 hearing; without prejudice for Defendant to continue to assert this argument as defenses and/or affirmative defenses.

b. **§501.211(3)(c), *Fla. Stat*.**: Motion **MOOT**, due to the Court's *order adopting* [DIN 81].

c. **Demand for Declaratory Relief and Injunctive Relief**: Motion **WITHDRAWN** by Defendant's counsel on the Record during the December 17, 2024 hearing; without prejudice for Defendant to continue to assert this argument as defenses and/or affirmative defenses.

9. No later than twenty (20) days after the date the Court renders its *order adopting* this *recommended order*, Defendant Gulf Coast Auto Brokers, Inc. shall file its answer the interlined *amended complaint* [DIN 75], "Exhibit A."

[X] IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH *FLORIDA RULE OF CIVIL PROCEDURE* 1.490(I). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

[ ] The parties are aware of their ability to serve exceptions pursuant to *Fla. R. Civ. P.* 1.490(h), and are waiving their right to serve exceptions.

* * *

Insurance—Uninsured motorist—Coverage—Policy exclusion for insured who sustains bodily injury while occupying vehicle owned by insured if it is not a newly acquired car excludes UM coverage for accident that occurred while insured's son was occupying motorcycle newly acquired by insured—No merit to arguments that form approved by Office of Insurance Regulation rejecting stacking form of UM coverage was invalid and prevents insurer from relying on exclusion, that OIR-approved form and renewal notice render policy ambiguous, or that it is against public policy for insurer to extend UM coverage to insured operating newly acquired vehicles with four or more wheels but not those with only two wheels

BENDIX THOERMER, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, et al., Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE24001618. Division 09. December 11, 2024. Jeffrey R. Levenson, Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT STATE FARM'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court for a hearing on November 26, 2024 on Plaintiff's October 11, 2024 Motion for Summary Judgment on the Declaratory Judgment Count Against the Defendant State Farm (hereinafter "Plaintiff's Motion") and Defendant State Farm's October 24, 2024 Motion for Final Summary Judgment (hereinafter "State Farm's Motion"), and the Court having reviewed the motions and supporting material, having heard the argument of counsel, having reviewed the file, and having otherwise been duly advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. This action arises from a motor-vehicle accident that occurred on November 26, 2022 involving Plaintiff BENDIX THOERMER and Defendant BROOKE L. NOBIL. Plaintiff's Complaint raises four counts. Count I seeks a declaratory judgment against STATE FARM

FIRE & CASUALTY COMPANY (hereinafter "State Farm") as to whether an insurance policy issued to his parents provides underinsured-motorist ("UM") coverage for the accident. Count II is an action for UM coverage against State Farm. Counts III and IV are against BROOKE L. NOBIL and SYDNEY L. NOBIL, respectively.

2. In Plaintiff's Motion, Plaintiff seeks summary judgment as to the coverage question set forth in Count I. In State Farm's Motion, State Farm seeks final summary judgment as to Counts I and II. At the hearing held November 26, 2024, counsel for Plaintiff and State Farm both agreed that the material facts were not in dispute and that only questions of law remained.

3. The Court finds that there is no genuine issue of material fact with regard to the following:

a. State Farm issued an insurance policy to Carsten and Bianca Thoermer covering their 2018 Volkswagen Atlas (hereinafter the "Volkswagen Policy"). The Volkswagen Policy carried nonstacking uninsured/underinsured-motorist coverage ("UM coverage") with a limit of $1,000,000. Carsten Thoermer signed a form approved by the Office of Insurance Regulation rejecting the stacking form of UM coverage.[1]

b. Carsten Thoermer thereafter purchased a motorcycle, but he did not purchase a separate insurance policy for the motorcycle right away. Three days after purchasing the motorcycle, his son, BENDIX THOERMER, was driving it and was involved in a motor-vehicle crash with another vehicle driven by Defendant BROOKE L. NOBIL. After the accident, Carsten Thoermer called State Farm and requested coverage for the motorcycle.

c. The Volkswagen Policy contains an exclusion stating: "THERE IS NO COVREAGE FOR AN ***INSURED*** WHO SUSTAINS ***BODILY INJURY*** [. . .] while ***OCCUPYING*** A VEHICLE ***OWNED BY YOU*** IF IT IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***[.]"

d. BENDIX THOERMER was occupying the motorcycle at the time of the accident, and the motorcycle was owned by Carsten Thoermer, who falls within the Volkswagen Policy's definition of "**you**." The motorcycle does not fall within the Volkswagen Policy's definition of "**your car**" or "**newly acquired car**."

4. The Court concludes that the exclusion quoted above is unambiguous and excludes UM coverage for BENDIX THOERMER's accident of November 26, 2022.

5. BENDIX THOERMER argues that the OIR-approved form signed by Carsten Thoermer is defective or invalid and that therefore State Farm was not authorized to rely on the above-quoted exclusion. BENDIX THOERMER further argues that the OIR-approved form and/or a renewal notice sent to his parents by State Farm are part of the policy and render the policy ambiguous. The Court rejects both of these arguments.

6. Lastly, BENDIX THOERMER argues that because the Volkswagen Policy defines a "***newly acquired car***" as a "***car*** newly ***owned by you*** or a ***resident relative***" and a "***car***" as a "land motor vehicle with four or more wheels designed for use primarily on public roads . . .," the Volkswagen Policy would have covered the accident if the two-wheeled motorcycle had been a four-wheeled "***car***" instead. Plaintiff argues that it is against Florida public policy for the policy to provide UM coverage to insureds operating newly acquired vehicles with four or more wheels but not newly acquired vehicles with only two wheels. State Farm responds that nothing in section 627.727, Florida Statutes, requires nonstacking UM coverage to extend to newly acquired vehicles at all, and it is free to provide greater coverage than the statute requires by extending coverage to newly acquired "***cars***," even if it does not also extend coverage to newly acquired motorcycles. The Court agrees with State Farm.

7. The Court therefore finds that there are no genuine issues of material fact and that State Farm is entitled to a judgment as a matter of law as to Counts I and II of BENDIX THOERMER's Complaint. Accordingly, the Court hereby enters final summary judgment in favor of Defendant STATE FARM FIRE & CASULATY COMPANY and against Plaintiff, BENDIX THOERMER. The Court shall enter a separate Final Declaratory Judgment declaring, as to Count I of the Complaint, that the Volkswagen Policy does not obligate State Farm to provide UM coverage to BENDIX THOERMER as a result of the accident alleged in the Complaint, and providing, as to Count II, that Plaintiff, BENDIX THOERMER, shall take nothing from STATE FARM FIRE & CASULATY COMPANY and that STATE FARM FIRE & CASULATY COMPANY shall go hence without day.

8. The Court will retain jurisdiction to consider and rule upon any motion for costs under section 57.041, Florida Statutes.

---

[1]The Court recognizes that Plaintiff professed to be without knowledge as to whether the form was approved by the Florida Office of Insurance Regulation, but the Court takes judicial notice that it was.

* * *

Insurance—Property—Bad faith—Insured that obtained final judgment for significantly less damages than requested in suit against insurer cannot seek "second bite at the apple" by relitigating its first-party insurance contract damages claim through action for statutory bad faith—Amended complaint is dismissed with prejudice

HEALTHY FOOD EXPERTS, LLC, Plaintiff, v. AMGUARD INSURANCE COMPANY, Defendant. Circuit Court, 19th Judicial Circuit in and for Martin County. Case No. 23001559CAXMX. December 17, 2024. Elizabeth A. Metzger, Judge. Counsel: Eduardo Ramirez, StrubleCohen, for Plaintiff. Julius F. Parker III, Butler Weihmuller Katz Craig LLP, Tallahassee, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE

THIS CAUSE having come before the Court on Defendant, Amguard Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint (the "Motion") and the Court having considered the Motion, applicable law, argument of counsel and being otherwise fully advised in the premises, it is hereby

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

Plaintiff filed the Amended Complaint on 6/28/2024 (the "Complaint"). The Complaint alleges among other things that: "[t]his is an action for statutory bad-faith. ."; "[o]n August 26, 2017, the subject property sustained a covered loss. . ." (the "Loss"); Amguard Insurance Company ("Amguard") insured Healthy Food Experts, LLC's ("Healthy") "business and property. . ."; Healthy timely reported the Loss; on May 22, 2018, Healthy filed a lawsuit against Amguard for breach of contract for the Loss.[1] The 2018 Suit was tried by jury trial and the jury awarded Healthy $31,330 (reduced by the applicable $1,000 deductible)[2]; Final Judgment was entered on May 6, 2022 in favor of Healthy (the "Final Judgment"). It is further undisputed for purposes of the Motion: that Healthy did not cross appeal the Final Judgment; that Healthy filed a Civil Remedy Notice on July 7, 2022 after the Final Judgment was entered **while the timely filed appeal of the Final Judgment was pending in the Fourth District Court of Appeal** (the "CRN"). Per the CRN, Healthy claimed Amguard filed an appeal of the Final Judgment "when there are no appealable issues and no issues preserved" and that Amguard engaged in various statutory misconduct in initially denying the claim filed on the Loss.[3]

Healthy's counsel admits (and does not dispute for purposes of the Motion) in Healthy's response filed on 5/24/2024 that Amguard appealed the Final Judgment. The Final Judgment was affirmed, per curiam, *Amguard Ins. Co. v. Healthy Food Experts, LLC,* 357 So. 3d

680 (Fla. 4th DCA 2023).

ANALYSIS/CONCLUSION

A case involving a first-party property insurance claim with facts similar to the unique facts of this case has not been located by this court.[4] Although a first-party UIM case, *Fridman v. Safeco Ins. Co. of Ill.,* 185 So. 3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a] is instructive.

As stated in *Fridman*:

> Certainly, the insured is not *obligated* to obtain the determination of liability and the full extent of his or her damages through a trial and may utilize other means of doing so, such as an agreed settlement, arbitration, or stipulation before initiating a bad faith cause of action. . .But the availability of other alternatives does not change the insured's entitlement to a determination of liability and the full extent of damages in the first instance. **Therefore, for all these reasons, we conclude that an insured is entitled to a determination of liability and the full extent of his or her damages in the UM case prior to filing a first-party bad faith action**.
>
> * * *
>
> First, it is obvious that the UM verdict to which the insured is entitled must be binding in the bad faith action. Because a determination of the full extent of the insured's damages is one of the prerequisites to a bad faith cause of action, to preclude a UM verdict in excess of the policy limits from being used in the bad faith case would force the parties to relitigate the issue of damages a second time prior to the bad faith trial. This would be an obvious waste of judicial and litigant resources. It would also result in serious, unintended consequences, such as "running the almost-certain risk of inconsistent verdicts; potentially raising comity issues between state and federal courts; creating a discrepancy . . . between first- and third-party bad faith claims; placing an inexplicable burden on plaintiffs to prove their cases twice; and causing a great deal of judicial inefficiency."
>
> If the amount of the UM verdict is not binding as an element of damages in the bad faith litigation, it would allow the insurer—**or the insured, if the verdict were less than anticipated**—a second bite at the proverbial apple. As the Fourth District Court of Appeal stated in *GEICO General Insurance Co. v. Paton,* it would be "such bad policy" that there is not "even a hint of its existence in any case the Supreme Court has decided in this area." 150 So.3d 804, 807 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1988a]. Where the insurer "participated fully in the first trial with an opportunity to challenge the plaintiff's evidence and a powerful motive to suppress the amount of damages," Florida's "policy is not to give multiple bites at the same apple absent some legal infirmity in the first trial." *Id.*
>
> * * *
>
> We agree with Safeco that there must be an opportunity for both parties to obtain appellate review of any timely raised claims of error in the determination of damages obtained in the UM trial, for the very reason that it becomes binding as an element of damages in the subsequent bad faith case. However, we do not agree—nor does Fridman suggest—that the appellate court is without jurisdiction to review the UM verdict.

Id. at 1224, 1225, 1226. (Emphasis added).

Here, applying the rationale and holding of *Fridman*, where first-party damages are fixed by verdict and judgment, such damages are binding on this subsequent bad faith action brought by Healthy per the Complaint. Healthy litigated its damages against Amguard in the 2018 Suit, and if Healthy believed the jury verdict/Final Judgment were in error ("if the verdict were less than anticipated"), it had a right to appellate review of the damages; Healthy did not do so. As a result, Healthy cannot now seek a "second bite at the apple" to re-litigate its first-party insurance contract damage claims through the Complaint. Healthy's remedy, if there was to be one, was to appeal to the Fourth District Court of Appeal and argue why the jury should have awarded all its claimed losses. Plaintiff waived that right, and therefore, Healthy's damages are fixed by the judgment in the 2018 Suit, which Amguard has paid.[5]

Healthy's amended complaint only seeks damages for "statutory bad faith" claims due to alleged violations of sections 624.155(1)(b)(1) and 626.9541(1)(i)3, Florida Statutes, and the Court has determined that it can recover no additional damages beyond those awarded in the 2018 Suit, applying *Fridman*'s rationale. The Court has provided Healthy an opportunity to amend its complaint, and any further amendment would be futile. Healthy cannot prove any set of facts to state a cause of action for additional damages based on bad faith. *Rocks v. McLaughlin Eng'g Co.,* 49 So. 3d 823, 826 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2627a] ("The test for a motion to dismiss under rule 1.140(b)(6) is whether the pleader could prove any set of facts whatever in support of the claim."). Accordingly, Healthy Food Experts, LLC's amended complaint is hereby **DISMISSED with prejudice**.

---

[1]See *Healthy Food Experts, LLC v. Amguard Insurance Company,* 2018 CA 496 (Martin Cnty. Cir. Ct.) (the "2018 Suit").

[2]The jury verdict was significantly less that what was requested by Healthy.

[3]The CRN also stated that Amguard "can cure this Civil Remedy Notice by issuing payment for the judgment plus interest." Healthy's CRN cure request was in essence a request that would deny Amguard's right to appeal the Final Judgment as the appellate court had not yet rendered a decision.

[4]Plaintiff's counsel admitted at the hearing on the Motion that she was not able to cite to such a case however, counsel argued that *Barton v. Capitol Preferred Ins. Co.,* 208 So. 3d 239, 243 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2736b] was instructive. However, *Barton* is distinguishable inasmuch as the insured property owner and insurer reached ***a settlement*** that did not bar the insured's subsequent bad faith claim against the insurer. Importantly, *Barton* did not address the issue of whether the settlement amount involved would serve to bind the parties on the damages awardable as *Fridman v. Safeco Ins. Co. of Ill.,* 185 So. 3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a] held where the damages were resolved through a verdict and judgment.

[5]Amguard's counsel admits in the 5/24/2024 response that a settlement of fees and costs was indeed reached in the 2018 Suit and a release was executed.

* * *

Arbitration—Agreement—Ruling on motion to compel arbitration is deferred pending evidentiary hearing on factual issues regarding formation of agreement containing arbitration clause and whether plaintiff opted out of agreement to arbitrate

CARL NEFF, Plaintiff, v. MOTORSPORTS OF STUART, LLC, d/b/a TREASURE COAST HARLEY-DAVIDSON, a Florida limited liability company, Defendant. Circuit Court, 19th Judicial Circuit in and for Martin County. Case No. 2023-CA-001539. November 13, 2024. Elizabeth A. Metzger, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Michael David Siegel, Peter W. Homer, and Gregory J. Trask, Palm Harbor, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL ARBITRATION/ORDER REQUIRING SETTING OF LIMITED EVIDENTIARY HEARING/ORDER PERMITTING LIMITED DISCOVERY

THIS CAUSE came before the Court on the Defendant's Motion to Compel Arbitration (the "Motion"). The Court, after fully considering the Motion, applicable law, argument of counsel and being otherwise duly advised in the premises, hereby finds and concludes as follows.

Arbitration agreements are strongly favored as a matter of public policy and will be enforced whenever possible. *See AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1745 (2011) [22 Fla. L. Weekly Fed. S957a]. In ruling on a motion to compel arbitration, the trial court must consider three elements: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue has been raised; and (3) whether the right to compel arbitration has been waived. *See Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]. Arbitration provisions are creatures of contract and must be construed as a matter of contract interpretation. *Id.*

"When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." *Beach Towing Servs., Inc. v. Sunset Land Assocs., LLC*, 278 So. 3d 857 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2195a]. "Intent unexpressed will be unavailing. . . ." *Id.*

"When a party seeks to compel arbitration and the other party opposes the motion, the trial court must first determine whether there are disputed factual issues regarding the making of the arbitration agreement. A disputed factual issue can be established by argument of counsel, the filing of a written response in opposition, or by the filing of affidavits or other documents." *Am. Mgmt. Services, Inc. v. Merced,* 186 So. 3d 612, 614 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D530b]. If the court determines that there is a substantial disputed issue regarding the making of an arbitration agreement, then an evidentiary hearing is to be set.

The record before the Court at the hearing on the Motion establishes that there are substantial issues of fact regarding the making of or formation of an agreement between the parties containing an arbitration clause and/or if Plaintiff opted out of an agreement to arbitrate.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that ruling on the Motion is deferred pending an evidentiary hearing limited to the disputed factual issues regarding the making of or formation of an agreement to arbitrate between the parties and/or Plaintiff opted out of an agreement to arbitrate. Counsel are directed to special set the limited evidentiary hearing via the Court's on-line scheduling platform.

IT IS FURTHER ORDERED that the Court will permit discovery limited to the disputed issues of fact pertaining to the making of or formation of an agreement to arbitrate and/or if Plaintiff opted out of an agreement to arbitrate.

* * *

Volume 32, Number 10
February 28, 2025
Cite as 32 Fla. L. Weekly Supp. ____

COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Detention—Delay of 40 - 60 minutes while awaiting officer to conduct DUI investigation, during which time neither officer at scene of fender-bender took any action to issue citation or investigate possible DUI, was unlawful—Pre-Miranda statements made during crash investigation are suppressed pursuant to accident report privilege—Officers lacked reasonable suspicion to detain defendant for DUI investigation following minor accident where 2 of 3 officers present observed no odor of alcohol, all observed normal speech and no difficulty with walking or balance and observations of nervousness and flushed face are attributable to defendant's concern for well-being of child involved in accident and defendant's fair complexion—Where, in addition to lack of physical indicia of impairment, defendant performed flawlessly on field sobriety exercises, there was no probable cause for arrest—All evidence, observations, statements, performance on exercises, and refusal to submit to breath test are suppressed

STATE OF FLORIDA, v. ERIK NOREN, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2023CT005420. Division K. November 15, 2024. Kimberly A. Sadler, Judge. Counsel: Tucker David Watters, Office of the State Attorney, Jacksonville, for State. Janet E. Johnson, Janet E. Johnson, P.A., Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This cause having come before the Court on the Defendant's Motion to Suppress any and all evidence seized, including all statements and physical observations, as well as any refusals of breath test and observations of Defendant's field sobriety exercises, the Motion to Suppress is hereby **GRANTED** as to Issues One, Two, Three, and Four.

ANALYSIS

Defendant was involved in an accident described as a "fender bender." Officer Bonner of the Jacksonville Sheriff's Officer was the initial responding officer. Officer Dedic of JSO arrived after Ofc. Bonner, spoke with Ofc. Bonner and the Defendant and called for a DUI unit within three (3) minutes of arriving. After a delay of 40-60 minutes, Ofc. Hixson arrived on scene and conducted his own crash investigation and, after "switching hats," requested Defendant perform Field Sobriety Exercises, which he did. Ofc. Hixson placed Defendant under arrest for DUI. Defendant was transported to the Pretrial Detention Facility where he refused the breath tests.

Ofc. Bonner testified that she told Ofc. Dedic that she was not "getting any indicators of impairment." Both officers Dedic and Bonner did not observe an odor of alcohol on Defendant's breath, both testified that Defendant had normal speech, and neither officer noted any difficulty with Defendant's walking or balance. While the officers waited for a DUI unit, Ofc. Dedic testified that they did "nothing" to investigate a possible DUI, despite both officers having been trained in conducting DUI investigations, both having actually conducted DUI investigations, and Ofc. Dedic having attended advanced training in DUI detection and having conducted what he estimated were "hundreds" of DUI investigations, including investigations where he "switched hats" from the crash investigation to the DUI investigation. They also did not issue any citations.

Ofc. Hixson, after administering Miranda rights and Defendant acknowledging he understood them and agreeing to perform Field Sobriety Exercises, conducted those exercises and testified as follows: On the Walk and Turn, two clues out of eight were observed (Defendant never missed heel to toe, never stepped off of the line, never used his arms for balance, and took the correct number of steps); on the One Leg Stand. one clue out of four was observed (Defendant never put his foot down during the 30 seconds. never used his arms, never hopped, exhibited "sway" during the middle 10 second interval); and on the Rhomberg Balance, Defendant estimated 30 seconds as 30 seconds, maintaining closed eyes and his head back. There was observed a sway. After the Field Sobriety Exercises, Defendant, who was described as "very cooperative," was arrested and transported to the Pretrial Detention Facility, where he declined a breath test. Officer Hixson wrote all of the citations, including the Careless Driving citation, after he arrested Defendant.

The Defendant argues that suppression is appropriate under four theories: (1) Unreasonable Delay; (2) Pre Miranda/Crash Investigation Privilege; (3) No Reasonable Suspicion to Detain Defendant to Conduct a DUI Investigation; and (4) No Probable Cause to Arrest. The Court agrees that suppression should be granted on each argument.

ISSUE NUMBER ONE: UNREASONABLE DELAY:

The evidence was uncontroverted that the delay in this case was, at a minimum 40 minutes, and up to one hour. During that time, the evidence was also uncontroverted that two officers who had training and experience in DUI detection and traffic crashes, did nothing to write a traffic citation or investigate a possible crime. Pursuant to *State v. Mennens,* 19 Fla. L. Weekly Supp. 1038a (5th Jud. Cir., Marion County, Dec. 7, 2011), where an officer stopped a defendant for an infraction and noticed signs of impairment, a delay of ten minutes without addressing the citation nor any possible crime, to await another officer, was deemed unreasonable and Defendant's Motion to Suppress was properly granted. A delay of fifteen minutes where stopping officer and fellow officer were both qualified to conduct DUI investigations but detained Defendant to await the arrival of another officer to conduct the DUI investigation, was deemed unreasonable where neither officer did anything to address the traffic infraction or to investigate a possible DUI during the detention in *State v. Swick,* 24 Fla. L. Weekly Supp. 543a (7th Judicial Circuit, Volusia County, June 20, 2016). Twenty-four minute detention has been found to be unreasonable where a stopping deputy was capable of conducting a DUI investigation, did not initiate the investigation or issue citations during detention, but awaited the arrival of a DUI investigation. *State v. Lakeman,* 20 Fla. L. Weekly Supp. 601a (16th Judicial Circuit, Monroe County, November 27, 2012). A six-to-seventeen-minute detention was unlawful where officer who stopped defendant and issued warning for speeding did nothing to investigate a suspected DUI while waiting for a back-up officer. *State v. Nicholson,* 21 Fla. L. Weekly Supp. 582b (12th Judicial Circuit, Sarasota County, September 20, 2013).

The delay in this case of forty to sixty minutes during which time nothing was done to issue a citation nor to investigate a possible DUI was unlawful and all observations, statements of defendant, field sobriety exercise results, and refusal to submit to breath test are suppressed.

ISSUE NUMBER TWO: PRE-MIRANDA STATEMENTS AND CRASH INVESTIGATION:

It was uncontroverted that Defendant was not read his Miranda rights prior to Ofc. Hixson's arrival which was about 40 minutes after the incident. He was also subjected to a crash investigation during this time and the accident report privilege, FS 316.066. was applicable. All statements made prior to Miranda rights being administered and the conclusion of the crash investigation are suppressed.

ISSUE NUMBER THREE: NO REASONABLE SUSPICION TO DETAIN TO CONDUCT A DUI INVESTIGATION:

Pursuant to *Mendez v. State,* 678 So.2d 388 (Fla. 4th Dist. Ct. App. 1996) [21 Fla. L. Weekly D1592a], an officer must have a "well-founded suspicion" that a suspect is impaired to request the performance of field sobriety exercises. *State v. Taylor* is illustrative of the kind of evidence that would rise to the level of reasonable suspicion. 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b]. In that case, a defendant who staggered, exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol, combined with a high rate of speed on a highway, was determined to possess indicators sufficient to meet the reasonable suspicion standard. In the present case, we have what was described as a "fender bender," two out of three officers observing no odor of alcohol. Three out of three officers observed normal speech and no difficulty with walking or balance. Each officer described Defendant as cooperative and, while he had "flushed" face, he was described as fair. He was also described as nervous, however testimony on cross examination revealed that a child was involved in the accident and Defendant was concerned for the child's well-being. The observations, including what Ofc. Bonner described as "not getting any indicators of impairment," do not provide the requisite reasonable suspicion to detain Defendant to conduct a DUI investigation and, as such, all evidence, observations, statements, performance on the field sobriety exercises, and the subsequent refusal to submit to a breath test are suppressed.

ISSUE NUMBER FOUR:
NO PROBABLE CAUSE TO ARREST:

Pursuant *to State v. Kliphouse,* 771 So.2d 16 (Fla. App. 4th Dist. 2000) [25 Fla. L. Weekly D2309f], "'under the influence' means something more than just having consumed an alcoholic beverage." "Probable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." In the present case, in addition to the above-stated facts. Defendant performed almost flawlessly on the Field Sobriety Exercises, according to the testimony of Ofc. Hixson. In light of the totality of the circumstances, there was no probable cause to arrest Defendant for DUI.

ADJUDGED: the Motion to Suppress evidence seized after the Unreasonable Delay, the Pre-Miranda/Crash Investigation Statements; evidence seized without reasonable suspicion to detain for a DUI investigation, and evidence seized without probable cause to arrest, including observations, statements, and any refusals to submit to breath tests, are hereby suppressed and the Motion to Suppress is hereby granted.

* * *

Criminal law—Driving under influence—Search and seizure—Motion to suppress is granted where deputy who encountered defendant asleep in vehicle in roadside ditch opened vehicle door, ordered defendant to turn off vehicle, and seized keys despite observing only faint odor of alcohol and no other signs of impairment

STATE OF FLORIDA, v. WILLIAM HOWARD SCOTT, Defendant. County Court, 7th Judicial Circuit in and for Putnam County. Case No. 20240091CT. November 1, 2024. Anne Marie Gennusa, Judge. Counsel: Ray Cauthon, Office of the State Attorney, Seventh Judicial Circuit, Palatka, for State. Janet E. Johnson, Janet E. Johnson, P.A., Jacksonville, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION TO SUPPRESS

This cause having come before the Court on October 28, 2024, on the Defendant's Motion to Suppress Evidence and Statements. Present for the State of Florda was Assistant State Attorney, Ray Cauthon and the Defendant, William Howard Scott represented by Attorney, Janet E. Johnson, Esquire. Deputy Derrick Holmes from the Putnam County Sheriff's Office testified.

BACKGROUND and ANALYSIS

A video of the interactions between Defendant, William Howard Scott (SCOTT) and Deputy Derrick Holmes (HOLMES) that occurred the evening/early morning of January 7, 2024 was played for the court but not entered into evidence. The video showed that Defendant, SCOTT was approached by Deputy, HOLMES while SCOTT was inside of a truck that was running, in a ditch, on the side of the road at the intersection of SR 100 and SR 26 near "Putnam Hall". There was no testimony presented about how long the truck had been in that location or how long it was running. Deputy HOLMES approached the truck and without knowing who or who what inside of it, opened the door, to which Defendant, SCOTT was found to be "sleeping or passed out". Deputy HOLMES immediately began ordering the Defendant to "turn off the car, multiple times in quick succession startling and waking up Defendant, SCOTT.

Defendant, SCOTT complied with the Deputy's order and handed the keys to him. At this point, it was apparent from the Deputy's testimony and the video played by the State, that the Defendant was not free to leave. After the Defendant handed over his keys to Deputy HOLMES, and before exiting the vehicle, Deputy HOLMES testified that he noticed a "faint odor" of an alcohol that he believed was emanating from the Defendant. At this point, he testified began questioning, Defendant SCOTT.

At some point after Deputy, HOLMES was in possession of Defendant, Scott's Keys, Deputy HOLMES also asked SCOTT to exit the vehicle, which was "in a ditch" requiring Defendant, SCOTT to climb into the passenger seat by climbing over the center console to do so, which he did without any difficulty. The Court noticed that during the entirety of the conversation with Deputy HOLMES, Defendant, SCOTT did not exhibit any slurred speech while speaking with the Deputy HOLMES. Also, at no time after Deputy HOLMES took Defendant's key and began questioning him, did Deputy HOLMES read him his Miranda warnings.

Deputy HOLMES asked Defendant, SCOTT if he had any family in the area? Defendant, who was camping in the area and was from Bradenton, informed Deputy HOLMES, he did not. At that point, Deputy HOLMES said he had to make a phone call which, he revealed during his testimony, was to ask another deputy who was not present for any of the interactions between the Defendant and Deputy HOLMES for advice on whether to conduct a DUI investigation. Only after that phone call with another deputy did Deputy HOLMES request SCOTT perform Field Sobriety Exercises and a breath test which the Defendant refused.

At that point, SCOTT was "arrested", although Deputy HOLMES admittedly had already made it clear that Defendant, SCOTT was in custody and not free to leave. At this point, Deputy HOLMES read Defendant, SCOTT his Miranda rights, post-arrest. The investigation is on video, portions of which were presented by the State Attorney in the hearing.

The Defendant argued that suppression is appropriate because the deputy, seeing a person asleep in a vehicle, immediately opened the car door and ordered Defendant to turn the car off, then seizing the keys, at a time when the only "indicator of impairment" was a faint odor of alcohol. Defendant argues that, pursuant to *Danielewicz v. State,* 730 So.2d 363 (Fla. App.2 Dist. 1999) [24 Fla. L. Weekly D793a], this constituted an illegal search and seizure. This Court agrees. The Deputy testified candidly that his memory was better on the date on January 7, 2024, when he authored the reports, than it was on the hearing date, October 28, 2024. He only noted a "faint odor" of alcohol and never indicated in his reports any other observations regarding possible impairment including, impaired speech or bloodshot/watery eyes. Further, Deputy HOLMES testified that he must not have noticed those things and that he had him exit the vehicle

without additional indicia of impairment.

Pursuant to *State v. Kliphouse,* 771 So.2d 16 (Fla. App. 4th Dist. 2000) [25 Fla. L. Weekly D2309f], cited by the State, "Probable cause for a driving under the influence (DUI) arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." Here, the only indicator of impairment that Deputy Holmes raised in his testimony regarding impairment was a "faint smell of alcohol". That, however, is not enough.

It is therefore **ADJUDGED**: the Motion to Suppress Evidence and Statements seized from the Defendant after the "stop" in this case, including observations, statements, and any refusals to submit to field sobriety exercises and breath tests, is hereby **GRANTED.**

* * *

Attorney's fees—Insurance—Automobile—Insured is not entitled to award of attorney's fees and costs where insurer acknowledged coverage and paid claim for total loss of vehicle, insured disputed calculation of actual cash value of vehicle after initially accepting payment of claim, insurer advised insured that policy required appraisal to resolve dispute, and insurer paid appraisal award—Insured's lawsuit was not necessary catalyst for appraisal award, and insurer's payment of appraisal award did not constitute confession of judgment—Case is dismissed with prejudice

ALIECE GORMAN, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-CC-008996-O. November 22, 2024. Cherish Adams, Judge. Counsel: Austin Hogan, Hogan Smith Law, Orlando, for Plaintiff. Miguel A. Rodriguez and Johanna Clark, Carlton Fields P.A., Orlando, for Defendant.

ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS AND GRANTING STATE FARM'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

This Matter having come before the Court on November 6, 2024 at 10:00 a.m. on Plaintiff's Amended Motion for Attorney's and costs, and State Farm's Response in Opposition and Motion for Summary Judgment of Dismissal, and the Court, having reviewed the parties' motions and evidence filed in support, having considered the argument of counsel, and being otherwise fully advised of the premises, hereby sets forth the following background information, undisputed facts, and conclusions of law:

FACTS

1. This matter involves a first-party breach of contract claim asserted by Plaintiff, a State Farm insured, who claims State Farm underpaid her for the actual cash value ("ACV") of her 2019 Nissan Maxima (the "Vehicle") after she filed a property damage claim and the Vehicle was deemed a total loss.

2. Plaintiff filed a property damage claim with State Farm under her State Farm automobile insurance policy no J01 7315-C29-59A (the "Policy"), which insured the Vehicle. Compl. at ¶ 8.

3. After inspecting the Vehicle several times, State Farm determined the Vehicle was a total loss and that the ACV of the Vehicle was $31,246 before applying taxes, tag and title fees, and the $250 deductible.

4. On January 23, 2023, State Farm sent Plaintiff a letter advising of the Vehicle's ACV and that because the Vehicle had a lien, $3,120.53[1] would be payable to her after the $29,857.08 payment to the Vehicle's lien/lease holder.

5. State Farm issued the $3,120.53 settlement payment to Plaintiff, which Plaintiff accepted.

6. In addition to accepting the $3,120.53 settlement payment, Plaintiff signed a Power of Attorney and Odometer Statement without objection, which enabled State Farm to transfer the title of the Vehicle.

7. On March 13, 2023, State Farm received a letter from Plaintiff disputing the amount she had received and stating, "[t]he fair market value. . .should have been. . .$33,225.00 plus the tax, tag, and title fee for a total of $35,348.35."

8. On March 22, 2023, Plaintiff filed a Civil Remedy Notice ("CRN") that alleged "the total proper valuation for [the] insured's vehicle is $35,348.35."

9. On April 25, 2025, State Farm sent Plaintiff's counsel a letter advising that because the parties did not agree on the ACV, the Policy mandated mediation or appraisal to resolve the dispute. State Farm's letter recited the Policy's appraisal clause governing ACV disputes.

10. The Policy includes the following provision governing the resolution of a dispute regarding the ACV of the Vehicle:

> **PHYSICAL DAMAGE COVERAGES**
>
> . . .
>
> **Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage**
>
> . . .
>
> The owner of the ***covered vehicle*** and ***we*** must agree upon the actual cash value of the ***covered vehicle.*** If there is disagreement as to the actual cash value of the ***covered vehicle,*** then the disagreement **will be resolved** by mediation or appraisal. Either the owner or ***we*** may request mediation or appraisal.

Policy at p. 33. (Emphasis on "covered vehicle" in original).

11. The Policy also states that legal action may not be brought against State Farm until there has been full compliance with all provisions of the policy:

> **Legal Action Against Us**
>
> . . .
>
> b. Legal Action may not be brought against ***us*** until there has been full compliance with all the provisions of this Policy.

Id. at 61.

12. Plaintiff did not respond to the April 25, 2023 letter , nor did she otherwise communicate with State Farm regarding mediation or appraisal.

13. Instead, on May 15, 2023, Plaintiff filed this lawsuit against State Farm alleging breach of contract.

14. On October 24, 2023, State Farm moved to dismiss the case, or, in the alternative, to stay the case and compel appraisal of the ACV dispute in accordance with the terms of the policy.

15. The parties agreed to stay the case for appraisal, and on November 2, 2023, the Court entered an Order directing the parties to complete appraisal in accordance with the terms of the policy.

16. The parties completed appraisal, and on May 6, 2024, State Farm paid the appraisal award.

17. On July 10, 2024, Plaintiff filed an Amended Motion for Attorney's Fees and Costs.

18. On September 5, 2024, State Farm filed a Motion for Summary Judgment of Dismissal and Response in Opposition to Plaintiff's Amended Motion for Attorney's Fees and Costs.

19. On September 26, 2024, Plaintiff filed a Response in Opposition to State Farm's Motion for Final Summary Judgment.

20. Because the ACV dispute was resolved through appraisal as required by the subject policy, the only remaining issue before the Court is Plaintiff's claim to entitlement to attorneys' fees and costs.

CONCLUSIONS OF LAW

Summary Judgment Standard

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

summary judgment standard.

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

23. As the Florida Supreme Court explained, the "correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 317 So. 3d 72, 75 (internal citation omitted). No longer is it plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *Id.* at 76 (citation omitted).

Summary Judgment in Insurance Contract Cases

24. Disputes arising from the meaning of a contract are generally questions of law. As such, they are to be determined by the courts. *See e.g., Palm Beach Cnty. v. Trinity Indus., Inc.,* 661 So. 2d 942, 944 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2379a] ("Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment"); *Langford v. Paravant, Inc.,* 912 So. 2d 359, 306 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1890a] ("Contract interpretation is generally a question of law for the court, rather than a question of fact"); *Gen. Tool Indus., Inc. v. Premier Machinery, Inc.,* 790 So. 2d 449, 451 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1026b] ("If the terms of a written contract are clear and undisputed, the construction of the contract is a question of law, and therefore, can be resolved by summary judgment").

25. The parties' intent must be discerned from the four corners of the document, and courts must give the contract's language, which is the best evidence of the parties' intent, its plain meaning. *Zimmerman v. Olympus Fidelity Trust, LLC,* 936 So. 2d 652, 655 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1822a]; *Dows v. Nike, Inc.,* 846 So. 2d 595, 601 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1130a] ("It is fundamental that where a contract is clear and unambiguous in its terms, the court may not give those terms any meaning beyond the plain meaning of the words contained therein"); *Barakat v. Broward Cnty. Hous. Authority,* 771 So. 2d 1193, 1194-95 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2474a]. ("[I]t is a well-settled principle of contract law that where the terms of a contract arc unambiguous, the parties' intent must be determined from within the four corners of the document"). Courts may not rewrite the parties' contract; rather, they must honor the terms and enforce them. *Dows,* 846 So. 2d at 601.

26. These points are true for an insurance contract just as with any other contract. *See, e.g., Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Underwriters at Lloyd's, London,* 971 So. 2d 885, 889 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2827b] ("The construction of an insurance policy is a question of law for the court and may be appropriately decided on motions for summary judgment"). Where an insurance policy's contractual language is clear, courts may not indulge in construction or modification, and the express terms of the contract control. *Security Ins. Co. of Hartford v. Puig,* 728 So. 2d 292, 294 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D456a].

The Appraisal Clause[2]

27. The uncontroverted evidence provided by State Farm's Total Loss Team Manager, Jeff Grabill, established that Plaintiff accepted State Farm's January 23, 2023 total loss settlement which valued the Vehicle's ACV at $31,246 before accounting for title and transfer fees and the $250 deductible.

28. Plaintiff not only accepted State Farm's ACV valuation and $3,120.53 settlement payment, but on February 9, 2023, she also executed a Power of Attorney and Odometer Statement so that State Farm may transfer the title of the Vehicle.

29. After State Farm received Plaintiff's $35,348.35 payment demand and CRN which demanded more money than she previously agreed to accept, State Farm responded to Plaintiff on April 25, 2023 advising that because the parties disputed the ACV, mediation or appraisal was mandated by the Policy to resolve the dispute.

30. The Policy clearly and unambiguously required mediation or appraisal because the parties disputed the ACV of the Vehicle:

> **PHYSICAL DAMAGE COVERAGES**
>
> . . .
>
> **Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage**
>
> . . .
>
> The owner of the ***covered vehicle*** and ***we*** must agree upon the actual cash value of the ***covered vehicle.*** If there is disagreement as to the actual cash value of the ***covered vehicle,*** then the disagreement will be resolved by mediation or appraisal. Either the owner or ***we*** may request mediation or appraisal.

Policy at p. 33 (the "Appraisal Clause") (emphasis to "covered vehicle" in original).

31. It is undisputed that on April 25, 2023, State Farm advised Plaintiff of the Policy's requirement that the ACV dispute must be resolved through mediation or appraisal and that neither Plaintiff nor her counsel responded to State Farm's April 25, 2023 letter before filing this action.

32. In light of these facts, the Court finds that this lawsuit was not a necessary catalyst for the appraisal award and that State Farm's payment of the award did not constitute a confession of judgment. State Farm acknowledged coverage, settled and paid the claim, and after Plaintiff accepted the settlement payment but later had a change of heart, State Farm advised her the Policy mandated mediation or appraisal. State Farm did not deny Plaintiff's claim, and it follows that State Farm did not agree to pay a previously-denied claim, but only paid the appraisal award (pursuant to the Policy) after Plaintiff did not respond to its April 25, 2023 letter.

33. Plaintiff is therefore not entitled to recover any fees or costs and the matter should be dismissed with prejudice.

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

1. Plaintiff's Amended Motion for Attorney's Fees and Costs is **DENIED**.

2. State Farm's Motion for Summary Judgment is **GRANTED**.

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

4. This case is **DISMISSED WITH PREJUDICE**.

---

[1]After including the applicable taxes and fees and deducting the Policy's $250 deductible.

[2]The provision quoted *infra* also provides for mediation, but the Court defines the provision as the "Appraisal Clause" because the ACV dispute was resolved through appraisal.

* * *

Insurance—Personal injury protection—Fraud—Insurer's motion for summary judgment on fraud defense, asserting that accident was staged, is denied because insurer relies on affidavit of claims adjuster who has no personal knowledge of accident events and inadmissible examination under oath of insured—EUO is not admissible summary judgment evidence where it is untrustworthy; it is hearsay not subject to any hearsay exception; it is not deposition or signed affidavit; it was not given during course of trial or other legal proceeding; there was no opportunity for cross examination or objection; and there is no evidence in record that it was signed, adopted or acknowledged by insured or that it was provided to insured at time it was taken—Demand letter—Medical provider substantially complied with demand letter requirement by providing demand letter that contained all required information to insurer's parent company, which forwarded letter to insurer—Further, insurer cannot complain of contents of letter where it had already expressed its intent to withhold payment due to belief that claim was fraudulent

MANUEL V. FEIJOO, M.D., et al., a/a/o Richard Remedios, Plaintiff, v. GREENWICH INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-024669-SP-25. Section CG02. December 11, 2024. Gloria Gonzalez-Meyer, Judge. Counsel: Kenneth Schurr and Maylin Castaneda, Schurr & Castaneda, P.A., for Plaintiff. Rumberger | Kirk, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO THE FRAUD DEFENSE

This matter having come before the Court on December 6, 2024, on Defendant's Motion for Summary Judgment as to its affirmative defense alleging fraud, and the Court being otherwise fully advised therein, finds as follows:

DEFENDANT'S MOTION

This is an action seeking to recover unpaid medical bills pursuant to the PIP coverage afforded by Defendant under the insurance policy it issued for the benefit of Richard Remedios. Defendant claims it is not liable for the unpaid medical bills because—according to Defendant—(a) there is no proof of an accident occurring on April 5, 2020; (b) this case involved fraud; and (c) Plaintiff failed to provide Greenwich with a pre-suit demand letter that complies with the requirements of Fla. Stat §627.736(10).

BACKGROUND FACTS & EVIDENCE

On April 5, 2020, the insured patient, Richard Remedios ("Remedios"), was injured in an accident and sought medical care from Plaintiff, who accepted an assignment of PIP benefits from the insured patient. When Defendant did not pay Plaintiff's medical bills, Plaintiff submitted a pre-suit demand letter to the Defendant on September 17, 2020. When the pre-suit demand letter failed to trigger a payment by Defendant, Plaintiff filed the instant action on December 31, 2020.

On March 1, 2023, Defendant filed its motion for summary judgment claiming it owes nothing to Plaintiff because (a) it contends there is no proof of an accident occurring on April 5, 2020; (b) this case involved fraud; and (c) Plaintiff failed to provide Defendant Greenwich with a statutorily compliant pre-suit demand letter pursuant to with the Fla. Stat §627.736(10).

In support of its motion, Defendant relies on the affidavit of its own claims adjuster, Ms. Vickey Strom ("Strom"). The Strom affidavit states that the subject loss 'must have been staged' because a passenger in the vehicle allegedly signed a note indicating that he was involved in an unrelated staged accident on February 19, 2020. Strom also relies on a pre-suit EUO transcript of the claimant, Remedios, taken on June 24, 2020.

To the contrary, Plaintiff contends that the Strom affidavit and the EUO are both inadmissible as summary judgment evidence. Aside from parroting the Remedios EUO transcript, Strom would not be in a position to testify via affidavit about whether or not an accident actually occurred or how it occurred because Strom has no personal knowledge regarding the April 5, 2020, automobile accident, nor would she have any personal knowledge about the medical care provided to Remedios after the accident.

Plaintiff also argues that nearly every document attached to Defendant's Motion for Summary Judgment (except the policy), is inadmissible as summary judgment evidence. Specifically, Plaintiff argues that the Court cannot consider the Strom affidavit because it is hearsay and not based on personal knowledge and that it relies entirely on the hearsay EUO transcript. Additionally, Plaintiff argues that the second EUO transcript taken the same day is equally inadmissible as are the unauthenticated and inadmissible police reports; the unauthenticated letters and emails from a personal injury attorney; the unauthenticated medical bills; the unauthenticated police department case card; the handwritten unsworn letter with an illegible signature bearing a notary stamp but without a notary signature; and the documents and pleadings taken from unrelated cases. According to Plaintiff, unfortunately, none of these materials have been properly authenticated and as such they cannot be used as summary judgment evidence. Plaintiff submits that Defendant has not met its burden on summary judgment because it does not have any affidavits or other admissible evidence to prove its defense.

The sole source of the factual representations contained in Defendant's Motion for Summary Judgment was cut & pasted from the Strom affidavit, which in turn was cut & pasted from the Remedios EUO transcript, which is an out of court statement offered to prove the truth of the matter asserted. Plaintiff argues that aside from the actual insurance policy attached to Defendant's Motion for Summary Judgment, there is no other admissible record evidence that can be used to support Defendant's Motion for Summary Judgment claiming that Remedios was not involved or injured in an accident on April 5, 2020.

Plaintiff contends that Defendant cannot prove its defense and that there is sufficient evidence showing that Remedios was in fact involved and injured in an auto accident. In support of that position, Plaintiff submitted the affidavit of Dr. Manual Feijoo, M.D. (Plaintiff advised that this affidavit was timely filed with the Court on November 14, 2024, but it does not appear on the docket. Notwithstanding, Plaintiff proffered the affidavit and represented that it contains a clerk's document filing number on the top margin, which was put on the record).

The Feijoo affidavit and incorporated medical records establish that Dr. Feijoo provided medical care to Remedios for injuries he sustained in an auto accident that occurred on April 5, 2020. Plaintiff argues that the Feijoo affidavit serves to establish that Remedios was involved and injured in an auto accident on April 5, 2020, while Defendant argues that no such accident occurred. This alone serves to create a genuine issue of material fact sufficient to deny Defendant's Motion for Summary Judgment.

ANALYSIS

Fraud claims are rarely ripe for summary judgment. See, *Gimenez v. Napoles* 928 So. 2d 506 (Fla 3rd DCA 2006) [31 Fla. L. Weekly D1343e] citing to See, *Cohen v. Kravit Estate Buyers, Inc.*, 843 So.2d 989, 991 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1071a] where the court found that summary judgment is rarely proper in fraud cases because the issue usually turns on the axis of circumstances surrounding the complete transaction, including circumstantial evidence of intent and knowledge. Notwithstanding, the Court will analyze the more significant pieces of evidence proffered in support of Defendant's motion.

As indicated above, the affidavit of Defendant's claims adjuster, Strom, is not based on personal knowledge. Rather, Strom clearly

indicates that her knowledge of the underlying facts was derived from the EUO transcript(s) as well the unsworn letter signed by an unknown author (exhibit "I" to Defendant's motion) which contains a notary stamp but not a notary signature, and it fails to satisfy the requirements of Fla. Stat. §117 to qualify as an affidavit.

In her affidavit, Strom concludes that the accident was staged based solely on the EUO transcript, which has no evidentiary value for the reasons that follow. Worse, Strom is obviously being used as conduit for inadmissible hearsay evidence by executing an affidavit which parrots someone else's out of court statements.

The rule's (1.510, which is now identical to Fed. Rule 56) personal knowledge requirement is clear and ambiguous. To be sufficient, an affidavit must be based on personal knowledge. See *Duke v. NorthStar Mortgage, LLC,* 893 F. 3d 1238 (S.D. Fla. 2012). An affidavit based on anything less than personal knowledge is insufficient. See, *Duke*, supra, citing to *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C316a] (citing *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 851 (11th Cir. 2000) ("upon information and belief" is insufficient); *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 154 (5th Cir. 1965) ("upon knowledge, information and belief" is insufficient); *Robbins v. Gould,* 278 F.2d 116, 118 (5th Cir. 1960) ("knowledge and belief" is insufficient)). Additionally, the affidavit or declaration must state the basis for such personal knowledge. *See Bruce Constr. Corp. v. United States*, 242 F.2d 873, 877 (5th Cir. 1957).

The Strom affidavit is based on the out-of-court statements of a non-party / third person, which was neither signed, adopted, nor ratified by the declarant and which is clearly not a deposition. Obviously, Strom has no personal knowledge about the subject automobile accident, nor does Strom have any first-hand knowledge of Remedios' medical care, and her affidavit offers nothing to establish how she would obtain that knowledge.

According to Fed.R.Evid. 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." For a matter to be considered within a witness's personal knowledge, it must be "derived from the exercise of his own senses, not from the reports of others—in other words, [it] must be founded on personal observation' " *U.S. v. Evans*, 484 F.2d 1178, 1181 (2nd Cir. 1973) (quoting 2 Wigmore, Evidence, 3d ed. 1940, § 657) (emphasis supplied).

The court in *Pashoian v. GTE Directories* 208 F. 2d 1293 (M.D. Fla 2002) [15 Fla. L. Weekly Fed. D389a], discussed improper summary judgment affidavits submitted in connection with a summary judgment motion, and held that an affidavit is subject to a motion to strike if it does not meet the standards set forth under Rule 56(e) of the Federal Rules of Civil Procedure. *Id.* (citing *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512 (M.D.Fla.1989)). Rule 56(e) provides that an affidavit in support of summary judgment "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein." Fed.R.Civ.P. 56(e). As such, an affidavit must be stricken when it is a conclusory argument, rather than a statement of fact, or when the affidavit is not based on personal knowledge. *Story v. Sunshine Foliage* 120 F. Supp. 2d 1027 (M.D.Fla. 2000). Moreover, because affidavits must be based on personal knowledge, an affidavit based on nothing more than "information and belief" is not sufficient as a matter of law and is subject to a motion to strike. *Id.* (citing *Barnebey*, 715 F.Supp. at 1512). Finally, because the court may only consider evidence that would be admissible at trial, the court may not consider inadmissible hearsay when deciding a motion for summary judgment and the court may strike the inadmissible portions of the affidavit and consider the rest. *Id.*

ADMISSIBILITY OF THE EUO

The EUO transcript relied upon by Defendant is not admissible as summary judgment evidence because under Fla. Stat. §90.802,the EUO transcript is not a deposition; there was no opportunity for anyone to cross-examine the witness; there is no opportunity for anyone to assert any objections; it was not obtained in the course of a judicial proceeding; the EUO was never signed or even acknowledged by the declarant; and, an EUO is a pre-suit investigatory tool obtained by the Defendant pursuant to the terms of an insurance policy. Further, the EUO is not a party admission nor is it a statement against interest, nor a past recollection recorded.

Florida Statute §90.804(2) states:

> Hearsay Exceptions—The following are not excluded under section 90.802, provided that the declarant is unavailable as a witness:
>
> a. *Former testimony* - Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The "former testimony" rule found in section 90.804(2)(a) is the counterpart of Federal Rule of Evidence 804(b)(1) and it basically codifies the common law rule of evidence previously recognized. Florida has long permitted the use of former testimony. *Putnal v. State*, 47 So. 864 (Fla.1908); *Habig v. Bastian*, 158 So. 508 (Fla. 1935).

However, the rule only applies if the following requirements are met: (a) the former testimony was **taken in the course of a judicial proceeding** in a competent tribunal; (b) the party against whom the evidence is offered, or his privy, was a party to the former trial; (c) the issues are substantially the same in both cases; (d) a substantial reason is shown why the original witness is not available; (e) the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness. See, *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984).

"The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great weight and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness, in any subsequent suit between the same parties." *Putnal,* supra.

A witness in a deposition taken pursuant to the civil procedural rules in connection with a judicial proceeding is always given an opportunity to read his or her testimony to confirm the accuracy of the transcribed testimony (and he or she can even submit an errata sheet to correct any errors in the transcribed testimony). See, Rule 1.310(e) (**'Witness Review' which provides "[I**f the testimony is transcribed, the transcript must be furnished to the witness for examination and must be read to or by the witness unless the examination and reading are waived by the witness and by the parties). The 'witness review' safeguards found in Rule 1.310 are not available in a pre-suit EUO. The witness in a Rule 1.310 deposition is always subject to cross examination. And for the foregoing reasons, depositions are specifically authorized as summary judgment evidence pursuant to Rule 1.510. And for the same reasons, EUO's are not admissible as summary judgment evidence.

In further support of the position that an EUO is inadmissible summary judgment evidence, Plaintiff relies on *McElroy v. Perry* 753

So. 2d 121 (Fla. 2nd DCA 2000) [25 Fla. L. Weekly D111a] (IME report prepared solely for the purpose of litigation lacks the trustworthiness that business records are presumed to have, and therefore, is not admissible under the business records exception), and suggests that an EUO transcript is untrustworthy because it is a document prepared at Defendant's direction and submitted to the Court for the sole purpose of supporting Defendant's Motion for Summary Judgment. Additionally, the EUO in this case was taken as part of the requirements of an insurance policy; it was taken prior to this lawsuit being filed; it was not taken in connection with a judicial proceeding; there was no opportunity for cross examination or objection; and it is not a deposition. See, *Goldman v. State Farm*, 660 So. 2d 300 (Fla 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and Depositions are not the same and they serve vastly different purposes).

There is even statutory support for Plaintiff's argument that EUO's are not to be used in civil proceedings. Florida Statute §92.33 prohibits the use of an EUO transcript as summary judgment evidence under the facts of this case. Fla. Stat. §92.33 provides that "*Every person who shall take a written statement by any injured person with respect to any accident or with respect to any injury to person or property shall, at the time of taking such statement, furnish to the person making such statement a true and complete copy thereof.*" Fla. Stat. §92.33 goes on to state that "**No written statement by an injured person shall be admissible in evidence or otherwise used in any manner in any civil action relating to the subject matter thereof unless it shall be made to appear that a true and complete copy thereof was furnished to the person making such statement at the time of the making thereof. . . .**" (emphasis supplied).

This statutory provision was discussed in *Fendrick v. Faeges*, 117 So. 2d 858 (Fla. 3rd DCA 1960), where the court held that the statement made by the declarant prior to suit was properly excluded from evidence where it was not shown that the statement was given to the declarant as required by § 92.33, Fla. Stat., "Clearly, this statute makes inadmissible any statement by an injured person . . . until it is shown that a copy of the statement made was furnished to the person making the same. The *Fendrick* court went on to say that ". . .the trial judge was eminently correct in excluding it from evidence."

This statutory provision is clear and unambiguous. Allowing Defendant to use an EUO transcript under the facts of this case would violate F.S. §92.33. As a result, Defendant is statutorily precluded from using the EUO for any purpose in any civil action. Allowing Defendant to circumvent this prohibition by using its claims adjuster as a conduit for inadmissible evidence is also prohibited.

Additionally, the EUO in this case was taken as part of the requirements of an insurance policy; it was taken prior to this lawsuit being filed; it was not taken in connection with a judicial proceeding; there was no opportunity for cross examination or objection; and, it is not a deposition. See, *Goldman v. State Farm*, 660 So. 2d 300 (Fla 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and Depositions are not the same and they serve vastly different purposes).

Defendant argues that EUO's are substantially similar to affidavits and in support of that position it relies on *Stinnett v. Longi, Inc.*, 460 So. 2d 528 (Fla. 2d DCA 1984) and *Avampato v. Markus*, 245 So. 2d 676 (Fla. 4th DCA 1971) for the proposition that a sworn statement is admissible summary judgment evidence. However, *Stinnett* and *Avampato* did not involve the use of affidavits or sworn statements at a summary judgment. Instead, those cases involved the use of a duly noticed deposition taken in connection with a judicial proceeding in which the opposing party chose not to attend. More importantly, Depositions are expressly authorized by Rule 1.510 (c). EUO's are neither depositions, nor affidavits.

An EUO is also inadmissible hearsay evidence because it is an out of court statement allegedly made by the declarant and then offered by Defendant to prove the truth of the matter asserted, but once it is transcribed, then it becomes hearsay within hearsay because EUO transcripts are not statements of the insured but rather statements of a stenographer purporting to memorialize what the insured allegedly said. "An oral statement transcribed by a third party which is not read to or adopted by the Defendant is inadmissible in evidence" See, *Williams v. State*, 185 So. 2d 718 (Fla. 3d DCA 1966) citing to *Jenkins v. State*, 35 Fla. 737, 18 So. 182 ("The transcribed record was not a statement of the appellant and consequently, was not admissible in evidence as such."). An EUO which involves the use of an interpreter is even more attenuated.

Fla. Stat. 90.803(18) states:

> (18) ADMISSIONS- A statement that is offered against a party is:
>
> a. The party's own statement in either an individual or representative capacity;
>
> b. A statement of which the party has manifested an adoption or belief in its truth;
>
> c. A statement by a person specifically authorized by the party to make a statement concerning the subject:
>
> d. A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship;
>
> e. A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be establish by independent evidence, either before the introduction or any evidence or before evidence is admitted under this paragraph.

The EUO does not fall under any of these subsections as the claimant is not the party; the Plaintiff medical provider is. The EUO does not qualify as a statement of the party because the statement is not of the Plaintiff, nor does the declarant fall into any of the other categories of relationship listed in the Rule. Even assuming arguendo, the EUO is still inadmissible under Fla. Stat. 92.33.

Second 92.33, Florida Statures, provides:

> Every person who shall take a written statement by any injured person with respect to any accident or with response to any injury to person or property shall, at the time of taking such statement, furnish to the person making such statement a true and complete copy thereof. . . *No written statement by an injured person shall be admissible in evidence* or otherwise used in any manner in any civil action relating to the subject matter thereof unless it shall be made to appear that a true and complete copy thereof was furnished to the person making such statement at the time of the making thereof. . .
>
> (Emphasis added).

Here, there is no evidence that the declarant ever received a copy of the EUO transcript because it was never provided to the declarant. In *Fendrick v Faeges*, 117 So.2d 858, 860 (Fla. 3rd DCA 1960), The Third DCA concluded that a pre-suit statement made by an insured person and given to an employee of appellant's counsel was inadmissible because a copy of that statement was not provided to the injured person.

The statute broadly applies where any person takes any kind of written statement (*e.g.*, under oath, signed, transcribed, not transcribed, notes) from an injured person concerning certain subject matter. If that written statement is not provided to the person making the statement at the time it is made, then the penalty for not letting the person who made the statement see the statement when the statement was made is inadmissibility as evidence or for any use in any manner in any civil action. This sanction is harsh. Justice Drew's dissent in *United Sand & Material Corp. v. Florida Indus. Comm'n*, 201 So. 2d 451, 453 (Fla. 1967), explains why:

> We can take judicial knowledge of the fact that written statements by any person made at the time they are given carry far more probative value before a court or jury than oral statements so made. If such statements are to be used as the statute said 'in any manner in any civil action relating to the subject matter thereof', the law provides and common justice requires that the person making such statement shall have an opportunity promptly to examine the same and then register any objection to the accuracy thereof rather than being required at some distant date in the future to pit his memory against a written document taken down and transcribed by a fallible human being.
>
> *Id.* at 454-55 (Drew, J., dissenting).

It is not hard to see why the public policy concern addressed in section 92.33, Florida Statutes, matters here.

Accordingly, the EUO transcript(s) submitted by Defendant in support of its motion for summary judgment is not admissible as substantive evidence at summary judgment. For the same reasons, the affidavit of Defendant's claims adjuster Strom cannot be used as a conduit for the same inadmissible evidence.

THE EUO IS NOT A BUSINESS RECORD

To determine if the EUO transcript satisfies the business records exception of the hearsay rule, we must look at Florida Statute §90.803, Hearsay Exceptions; availability of declarant immaterial:

> **(6) Records of regularly conducted business activity.—**
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> (b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.
>
> (c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing p[Editor's note: quote interrupted on court document.]

It is undisputed that the content of the EUO transcript did not come from anyone within Defendant's business organization, and no one within Defendant's business organization has any personal knowledge regarding the accuracy of the information contained within that document. Furthermore, the proffered statement was not made at or near the time of the event, nor was it made by a person within Defendant's business organization with information or knowledge of the facts contained in the statement. The EUO is not admissible under Fla. Stat. §90.803(6) because it was allegedly created pre-suit and in anticipation of litigation; there was no opportunity for anyone to cross-examine the witness or person that compiled the information contained therein; and it was not obtained in the course of a judicial proceeding. The document is also neither signed, acknowledged, nor authenticated by the declarant. In fact, there is no one that even attempts to authenticate the information contained in that document.

In order to qualify for the business record exception to the hearsay rule, a 'business record' must satisfy these criteria: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. See F. S. 90.803(6) and See also, *M.S. v. Dept. of Children and Families,* 6 So. 3d 102 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D679a] citing to *See Quinn v. State*, 662 So.2d 947, 953 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1633c]; § 90.803(6)(a), Fla. Stat. (2002).

A record is not a business record simply because it appears in the proponent's file. It must be generated by the business. For example, the Plaintiff's medical records, which are contained in Defendant's claim file, were not created by Defendant and Defendant would not be able to authenticate those records. The proffered statement in this case was not created by Defendant nor by anyone within Defendant's business organization. It was actually created by a person (court reporter) outside Defendant's organization. See, *Reichenberg v. Davis*, 846 So. 2d 1233 (Fla 5th DCA 2003) [28 Fla. L. Weekly D1355a], (father in a paternity action sought to introduce investigative reports from the Dep't of Children and Families over the mother's hearsay objections and the court found that reports of DCF investigators which contained witness interviews were not admissible under the business or public records exception to the hearsay rule because the statements in the reports were not based upon the personal knowledge of an agent of DCF). See, *Van Zant v. State,* 372 So.2d 502 (Fla. 1st DCA 1979) and *Harris v. Game & Fresh Water Fish Comm'n*, 495 So.2d 806, 809 (Fla. 1st DCA 1986) (quoting Charles Ehrhardt, Florida Evidence § 90.805, (2d ed. 1984) "For example, if a business record includes a statement of a bystander to an accident, the bystander's statement is hearsay and not included within the business records exception because the statement was not made by a person with knowledge who was acting within the regular course of the business activity."). So, the EUO transcript proffered by Defendant does not qualify as Defendant's business record.

OTHER COURTS AGREE - EUO IS NOT ADMISSIBLE

Many other courts have found that an EUO transcript is inadmissible as summary judgment evidence. Below are a few of those decisions: See, *Manuel V. Feijoo, M.D.*, and *Manuel V. Feijoo, M.D., P.A., a/a/o Nestor Hernandez v. GREENWICH*, Case No,: 20-12523 SP 26, Judge King, Aug. 5, 2021; *All X-Ray Diag. Services Corp., v. Greenwich*, Case No.: 19-4466 SP 26, Judge King, Aug. 2021 (Order Granting Plaintiff's Motion to Strike EUO Transcript and Order Denying Defendant's Response to Plaintiff's Motion to Strike EUO Transcript and Request for 57.105 Sanctions); *Manuel V. Feijoo, M.D.*, and *Manuel V. Feijoo, M.D., P.A., a/a/o Angel Cordovi v. Greenwich*, Case No.: 18-5349 SP 25, Judge Janowitz, March 2021 [29 Fla. L. Weekly Supp. 40a] (Order Granting Plaintiff's Motion to Strike and Denying Defendant's Motion for Summary Judgment); *Gables MR (A) a/a/o Jose Villaroel v. State Farm Mutual Auto Ins. Co.*, Case No.: 12-25944 SP 25, Judge Diaz, Oct. 2018 [26 Fla. L. Weekly Supp. 766a] (Order on Plaintiff's Motion to Strike EUO Transcript), and most recently, *Manuel V. Feijoo, M.D.*, and *Manuel V. Feijoo, M.D., P.A., a/a/o Jose Maradiaga v. Ascendant Commercial Ins. Inc.*, Case No.: 17-13187 SP 25, Judge Perez-Santiago, November, 2024 (Order Denying Motion for Reconsideration) [32 Fla. L. Weekly Supp. 382a].

For the reasons set forth above, the Strom affidavit, and the

proffered EUO transcript(s) upon which it relies are not and cannot be admissible as summary judgment evidence because the EUO does not qualify under any hearsay exception under 90.802, 90.803, or 90.804 because the EUO was not taken in the course of a judicial proceeding; it is not the statement of a party opponent; it is not a statement against interest; it is not Defendant's business record; it was not made in the course of Defendant's regularly conducted business activity; it was created solely for purposes of the instant insurance claim; it was not created at or near the time of the occurrence of the event; it is inherently untrustworthy; it is unsigned; it was never provided to the declarant; it was never adopted or ratified by the declarant; there was no opportunity for cross examination of the declarant; and no one within Defendant's business organization has any personal knowledge regarding the content of that statement, and Fla. Stat. §92.33 prohibits the use of the EUO in any civil action unless Defendant demonstrate that it was provided to the declarant at the time the statement was given. Therefore, the court finds that the EUO is inadmissible as summary judgment evidence.

PRE-SUIT DEMAND LETTER

Next, Defendant contends it is entitled to summary judgment because—according to Defendant—Plaintiff's pre-suit demand letter was defective because it was submitted to its parent company, Traveler's Insurance Company, when it should have been sent to Greenwich. However, Defendant obviously received the pre-suit demand letter and had its Third-Party Administrator, Constitution State Services, prepare a response which served to advise Plaintiff that no payments would be issued based on its belief that the subject claim was based on fraud. So, irrespective of any defects in Plaintiff's pre-suit demand letter, Defendant had no intention of remitting any payments.

Pursuant to Fla. Stat. §627.736 (10) (a), as a condition precedent to filing a PIP suit the insured or the provider is required to serve the insurer with a written notice of its intent to initiate litigation pursuant to Fla. Stat. §627.736 (10) (b) which states:

> (b)The notice must state that it is a "demand letter under s.627.736" and state with specificity:
>
> 1.The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2.The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3.To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

It is undisputed that Plaintiff's pre-suit demand letter states the name of the insured and it included a copy of the Assignment of Benefits as well as the claim number and the policy number. It also appears that the demand letter included the name of the provider who rendered services as well as a HCFA form itemizing each and every service provided by Plaintiff, the amount billed, the date of treatment, the amount paid, the amount owed, etc.

Pursuant to Fla. Stat. §627.736(10), the legislature wanted the insurer to be provided with written notice of the intent to initiate litigation and Plaintiff satisfied that requirement. Defendant's argument is not supported by the requirements of Fla. Stat. §627.736(10) and the plain wording of the statute. Defendant concedes that it received the pre-suit demand letter from Plaintiff (vis-a-vie Traveler and Constitution State Services) and therefore Defendant knew it would be sued if it didn't pay what was owed. But the reality is that no matter what the pre-suit demand letter contained, Defendant had already made it known that it was never going to pay the subject medical bill. The intent of the legislature in giving Defendant a last clear chance to make payment before suit would be filed was accomplished and Defendant made a conscious and knowing decision not to pay for the services provided to its insured. Defendant cannot complain that it did not receive a perfect notice letter. Moreover, Plaintiff argues that the Defendant's own Explanation of Benefits contained a reference to Travelers Insurance Company as being the appropriate insurer. This is an issue that Plaintiff advised would have been an area of inquiry during the deposition of Defendant's corporate representative. However, the witness produced by Defendant for the court-ordered deposition on November 15, 2024, unequivocally testified that she was not the Defendant's Rule 1.310 corporate representative and therefore Plaintiff was unable to explore those issues before the hearing on Defendant's Motion for Summary Judgment.

And finally, the Plaintiff substantially complied with the demand letter requirement since a demand letter was in fact provided. The language of the statute itself provides for "substantial compliance." As used in section 627.730-627.7405—which includes §627.736(10)—the term "properly completed" is defined as "providing truthful, *substantially complete*, and *substantially accurate* responses as to all material elements to each applicable request for information or statement by a means that may lawfully be provided and that complies with this section, or as agreed by the parties." Fla. Stat. §627.732(13). Thus, by the statute's own language, substantial compliance satisfies the statute's requirements. Defendant's argument that there must be "absolute" or "strict" compliance with the demand letter requirements is not supported. The goal is "notice." The goal was met when the insurer received Plaintiff's "notice" of the intent to litigate. In light of the foregoing, the Court finds that Defendant's defense that the pre-suit demand letter was deficient, lacks merit.

DISCOVERY IS NOT COMPLETE

Despite court orders compelling the Defendant to produce its corporate representative for deposition, the Defendant appeared on November 15, 2024, but the witness it produced unequivocally testified that she was not the corporate representative for Defendant Greenwich. As a result, Plaintiff adjourned the deposition pending guidance from the Court. During the hearing on Defendant's Motion for Summary Judgment, the Court instructed Defendant to produce its corporate representative for deposition so that Plaintiff may complete its discovery.

CONCLUSION

Defendant cannot prevail on its Motion for Summary Judgment as a matter of law because it failed to meet its burden to show the absence of a genuine issue of material fact. Defendant has failed to provide any admissible evidence to prove its fraud defense. Instead, Defendant relies heavily on the inadmissible EUO transcript(s) and the Strom affidavit which parrots the EUO's. Unfortunately, Strom has no personal knowledge of the facts contained in her affidavit and relies exclusively on the out-of-court statements allegedly made by a non-party / third party in the form of an unsigned, unsworn document created by a court reporter and purporting to be an EUO transcript, which is neither an affidavit nor a deposition. Additionally, Fla. Stat. §92.33 prohibits the use of EUO's as summary judgment evidence

under the facts of this case. For the reasons set forth above, the EUO is not Defendant's business record; it is not an admission against interest; and it is not a statement of a party opponent. The EUO transcript and the affidavit which relies upon it are inadmissible summary judgment evidence because (1) it is untrustworthy; (2) it is hearsay, not subject to any exception to the hearsay rule; (3) it is not a deposition nor a signed affidavit; (4) it was not given during the course of a trial or other legal proceeding; (5) there was no opportunity for cross examination, or objection; and, (6) there is no evidence in the court record indicating that the EUO was ever signed, adopted nor acknowledged by the declarant; and (7) there is no evidence in the court record indicating that the EUO was ever provided to the declarant at the time it was taken, in violation of Fla. Stat. §92.33.;and the declarant did not sign nor ratify the statements contained in the EUO.

Defendant cannot be heard to complain about the pre-suit demand letter because the Defendant received the letter and it contained all of the statutorily required information and Defendant had already expressed its intent to withhold payment because it believed the subject claim was fraudulent.

Accordingly, Defendant has not met its burden on summary judgment and as a result, Defendant's Motion for Summary Judgment must be denied as a matter of law.

Within 15 days from the date of this Order, the parties will coordinate the date and time for the deposition of Defendant's Rule 1.310 corporate designee so that the deposition commences within 45 days from the date of this order.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Garaging address of insured vehicles—Evidence—Examination under oath—Court declines to strike insured's affidavit attesting to vehicles' garaging address despite fact that affidavit conflicts with insured's statements in EUO—*Ellison* rule, which prohibits a party from submitting affidavit that baldly repudiates their prior deposition testimony, is not applicable where insured never gave sworn testimony, only a presuit EUO that he never saw, signed or adopted—EUO is not admissible summary judgment evidence where it is untrustworthy; it is hearsay not subject to any hearsay exception; it is not deposition or signed affidavit; it was not given during course of trial or other legal proceeding; there was no opportunity for cross examination or objection; and there is no evidence in record that it was signed, adopted or acknowledged by insured or that it was provided to insured at time it was taken—Insurer's motion for summary judgment on misrepresentation defense is denied where only admissible evidence is insured's affidavit in which he testified that insured vehicles were garaged at policy address

JJZ MEDICAL CENTER, INC., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-008456-SP-26. Section SD05. December 19, 2024. Michaelle Gonzalez-Paulson, Judge. Counsel: Kenneth Schurr and Maylin Castaneda, Schurr & Castaneda, P.A., Coral Gables, for Plaintiff. United Auto House Counsel, for Defendant.

ORDER DENYING DEFENDANT'S REVISED MOTION FOR SUMMARY JUDGMENT

This matter having come before the Court on December 5, 2024, on Defendant's Motion for Summary Judgment as to its affirmative defense alleging a material misrepresentation defense, and the Court being otherwise fully advised therein, finds as follows:

BACKGROUND

This is an action seeking to recover unpaid medical bills pursuant to the PIP coverage afforded by Defendant under the insurance policy it issued to the named insured, Marlon Fernandez. On February 28, 2018, Defendant issued an insurance policy to Marlon Fernandez which included coverage for his parents, Raquel Vazquez and Jose Fernandez. The policy provided coverage for two vehicles, a 2010 Nissan and a 2012 Honda and the policy's garaging address was listed as 20701 SW 118th Avenue, Miami, FL. During the policy period, both Raquel Vazquez and Jose Fernandez were injured in an accident on July 7, 2018, while occupying the 2012 Honda, and both sought medical care from the Plaintiff. The Medical bills were timely submitted to the Defendant for payment, but Defendant refused to remit any payment. Thereafter, Plaintiff initiated this action to recover the unpaid PIP benefits. In response, Defendant answered the complaint and alleged that the policy was deemed void *ab initio* based on Defendant's belief that there was a material misrepresentation on the policy application regarding the garaging address of the insured vehicles.

On January 17, 2024, Defendant filed its Motion for Summary Judgment in which it argued that there was no coverage under the subject policy as a result of the alleged misrepresentation and that had it known about the alleged misrepresentation, it would not have issued the policy. According to the Defendant, the vehicles were not garaged at the address set forth on the policy application but were instead garaged at another address. In support of its position, Defendant relies on the affidavit of its claims adjuster, Idalmis Gil ("Gil"), and its underwriter, Jorge DeLaO ("DeLaO"), to support its claim that the insured vehicles were not being garaged at the policy address. Obviously, neither Gil nor DeLaO were ever in a position to have personal knowledge regarding the actual garaging address of the insured vehicles and so their affidavits are based entirely on an EUO allegedly provided by the insured, Marlon Fernandez.

To the contrary, Plaintiff submits that the Defendant failed to meet its burden on summary judgment because there is no admissible evidence supporting Defendant's defense. Specifically, Plaintiff argues that the affidavits of Gil and DeLaO are not admissible because they are not based on personal knowledge and are instead being used as conduits for inadmissible hearsay testimony lifted from the Marlon Fernandez EUO. And, according to the Plaintiff, the EUO of Marlon Fernandez is inadmissible as summary judgment evidence and that any affidavits seeking to parrot the EUO would not be admissible as summary judgment evidence. Plaintiff contends that the Gil and De La O affidavits serve no legitimate purpose, aside from repeating the out of court hearsay statements allegedly uttered by non-party Marlon Fernandez in an EUO. Plaintiff further contends that the insured vehicles were at all times garaged at the policy address. In support of that position, Plaintiff submitted the affidavit of the named insured, Marlon Fernandez, in which he unambiguously testified that at all times material, the insured vehicles were garaged at 20701 SW 118th Avenue, Miami, FL. (the Court notes that the Fernandez Affidavit contains a typographical error in which 2 digits of the house number were inadvertently transposed to read 20710, instead of 20701). Plaintiff also points out that of the three affidavit witnesses (Gil, DeLaO, and Fernandez) only one of them would be in a position to know where the insured vehicles were actually garaged, to wit: the named insured, Marlon Fernandez—not Gill or DeLaO. Accordingly, the Gil and DeLaO affidavits are not and could not possibly be based on personal knowledge and both affiants concede that their only source of information was the EUO transcript.

It is undisputed that the EUO was never provided to the non-party declarant, Marlon Fernandez. It is also undisputed that Fernandez never signed the EUO; never adopted the EUO; and never ratified the EUO. And, there is no evidence that the named insured ever even received a copy of the EUO transcript because it was never provided to the declarant. In *Fendrick v. Faeges*, 117 So.2d 858, 860 (Fla. 3rd DCA 1960), The Third DCA held that a pre-suit statement made by an

insured person was not admissible because it was never provided to the declarant.

ANALYSIS

Rule 1.510's (which is now identical to Fed. Rule 56) personal knowledge requirement is clear and ambiguous. To be sufficient, an affidavit must be based on personal knowledge. See *Duke v. NorthStar Mortgage, LLC,* 893 F. 3d 1238 (S.D. Fla. 2012). An affidavit based on anything less than personal knowledge is insufficient. *Duke*, supra, citing to *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C316a] (citing *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 851 (11th Cir. 2000) ("upon information and belief" is insufficient); *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 154 (5th Cir. 1965) ("upon knowledge, information and belief" is insufficient); *Robbins v. Gould*, 278 F.2d 116, 118 (5th Cir. 1960) ("knowledge and belief" is insufficient)). Additionally, the affidavit or declaration must state the basis for such personal knowledge. *See Bruce Constr. Corp. v. United States*, 242 F.2d 873, 877 (5th Cir. 1957).

According to *Fed.R.Evid. 602*, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." For a matter to be considered within a witness's personal knowledge, it must be "derived from the exercise of his own senses, *not from the reports of others*—in other words, [it] must be founded on personal observation' *" U.S. v. Evans*, 484 F.2d 1178, 1181 (2nd Cir. 1973) (quoting 2 Wigmore, Evidence, 3d ed. 1940, § 657) (emphasis supplied).

The court in *Pashoian v. GTE Directories*, 208 F. 2d 1293 (M.D. Fla. 2002) [15 Fla. L. Weekly Fed. D389a], discussed improper summary judgment affidavits submitted in connection with a summary judgment motion, and held that an affidavit is subject to a motion to strike if it does not meet the standards set forth under *Rule 56(e) of the Federal Rules of Civil Procedure. Id.* (citing *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512 (M.D.Fla.1989)). *Rule 56(e)* provides that an affidavit in support of summary judgment "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein." *Fed.R.Civ.P. 56(e).* As such, an affidavit must be stricken when it is a conclusory argument, rather than a statement of fact, or when the affidavit is not based on personal knowledge. *Story v. Sunshine Foliage* 120 F. Supp. 2d 1027 (M.D.Fla. 2000). Moreover, because affidavits must be based on personal knowledge, an affidavit based on nothing more than "information and belief" is not sufficient as a matter of law and is subject to a motion to strike. *Id.* (citing *Barnebey*, 715 F.Supp. at 1512). Finally, because the court may only consider evidence that would be admissible at trial, the court may not consider inadmissible hearsay evidence when deciding a motion for summary judgment and the court may strike the inadmissible portions of the affidavit and consider the rest. *Id.*

Defendant counters that the Fernandez affidavit should be stricken (despite having failed to file a motion to strike it) and posits that the Fernandez affidavit is barred by the *Ellison* Rule promulgated by the Florida Supreme Court's decision in *Ellison v. Anderson*, 74 So.2d 680 (Fla. 1954). The *Ellison* rule holds that a litigant cannot avoid summary judgment by submitting an affidavit that 'baldly repudiates' his/her prior deposition testimony. However, the *Ellison* rule does not apply to the facts of the instant case because Marlon Fernandez never submitted to a deposition—and was never asked to do so. Instead, Marlon Fernandez simply submitted to a pre-suit EUO (as required by the subject policy) which was never presented to him and he never signed it nor adopted it. And it is well established that depositions and EUO's serve vastly different purposes. See, *Goldman v. State Farm*, 660 So. 2d 300 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and Depositions are not the same and they serve vastly different purposes).

In *Regis v. West Sunrise Development*, 943 So. 2d 330 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3141a], the Court found that the *Ellison* rule did not apply to an affidavit of a witness purporting to be the first expression by the witness under oath in the litigation regarding a fact in dispute even though it contradicted a prior out-of-court statement by the same witness. See also*, Andrews v. Midland Nat'l Ins. Co.*, 208 So.2d 136, 137 (Fla. 3d DCA 1968) (holding that a witness is not irrevocably bound by his first written statement upon the issues of a case); *see also Lawrence v. Pep Boys Manny Moe & Jack Inc.*, 842 So.2d 303, 305 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D978c] (holding that the court is required to view record evidence, including properly asserted supporting affidavits, in light most favorable to non-moving party. An examination of the cases cited above reveals that the full extent of the *Ellison* rule is that a ***Party*** may *not*, after having given a *deposition* in a civil action, subsequently change his testimony in order to create an issue upon his opponent's motion for summary judgment. Aside from his affidavit filed in this case, Marlon Fernandez never gave any other sworn testimony *in this action.* The EUO, which Defendant heavily relies on, was a pre-suit investigatory tool used by Defendant, and Fernandez never saw, signed, nor adopted the EUO.

Just as in the *Andrews* case, supra, the question here is whether the *Ellison* rule can be extended to a situation where a witness who has signed an affidavit later signs another affidavit which states facts contrary to the first affidavit. As the other courts have found, the *Ellison* rule only applies to *parties* who submit an *affidavit in the litigation* which baldly repudiates that same witness' prior *deposition* testimony and therefore *Ellison* does not apply to the facts of this case. Accordingly, there is no rule prohibiting Fernandez from submitting an affidavit in this action as his first expression under oath in the litigation regarding a fact in dispute, even though it might partially contradict a prior out-of-court statement (i.e., the EUO). See, *Ellison*, *Regis*, and Andrews, supra. Accordingly, the Court declines to strike the Fernandez affidavit.

ADMISSIBILITY OF THE EUO

The EUO transcript relied upon by Defendant is not admissible summary judgment evidence because, under Fla. Stat. §90.802, the EUO transcript is not a deposition; there was no opportunity for anyone to cross-examine the witness; there is no opportunity for anyone to assert any objections; it was not obtained in the course of a judicial proceeding; the EUO was never signed or even acknowledged by the declarant; and, an EUO is a pre-suit investigatory tool obtained by the Defendant pursuant to the terms of an insurance policy. Absent an opportunity to cross examine the witness, EUO's suffer from a lack of trustworthiness. In *Wright v. State*, 278 So. 3d 805 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2114b], the Court reiterated the well-established concept that "[C]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested"; "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *McDuffie v. State*, 970 So. 2d 312, 324 (Fla. 2007) [32 Fla. L. Weekly S763a] (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Further, the EUO is not a party admission nor is it a statement against interest, nor a past recollection recorded. Florida Statute §90.804(2) states:

> Hearsay Exceptions—The following are not excluded under section 90.802, provided that the declarant is unavailable as a

witness:

a. *Former testimony* - Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The "former testimony" rule found in section 90.804(2)(a) is the counterpart of Federal Rule of Evidence 804(b)(1) and it basically codifies the common law rule of evidence previously recognized. Florida has long permitted the use of former testimony. *Putnal v. State*, 47 So. 864 (Fla. 1908); *Habig v. Bastian*, 158 So. 508 (Fla. 1935).

However, the 'rule' only applies if the following requirements are met: (a) the former testimony was ***taken in the course of a judicial proceeding*** in a competent tribunal; (b) the party against whom the evidence is offered, or his privy, was a party to the former trial; (c) the issues are substantially the same in both cases; (d) a substantial reason is shown why the original witness is not available; (e) the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness. See, *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984).

"The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath *and of any opportunity to cross-examine the witness.* But where the testimony was given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great weight and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness, in any subsequent suit between the same parties." *Putnal,* supra.

A witness in a deposition taken pursuant to the civil procedural rules in connection with a judicial proceeding is always given an opportunity to read his or her testimony to confirm the accuracy of the transcribed testimony (and he or she can even submit an errata sheet to correct any errors in the transcribed testimony). See, Rule 1.310(e) (**'Witness Review' which provides "[I**f the testimony is transcribed, the transcript must be furnished to the witness for examination and must be read to or by the witness unless the examination and reading are waived by the witness and by the parties). The 'witness review' safeguards found in Rule 1.310 are not available in a pre-suit EUO. The witness in a 1.310 deposition is always subject to cross examination. And for the foregoing reasons, depositions are specifically authorized as summary judgment evidence pursuant to Rule 1.510. And for the same reasons, EUO's are not admissible as summary judgment evidence.

In further support of the position that an EUO is inadmissible summary judgment evidence, Plaintiff relies on *McElroy v. Perry*, 753 So. 2d 121 (Fla. 2nd DCA 2000) [25 Fla. L. Weekly D111a] (IME report prepared solely for the purpose of litigation lacks the trustworthiness that business records are presumed to have, and therefore, is not admissible under the business records exception), and suggests that an EUO transcript is inherently untrustworthy because it is a document prepared at Defendant's direction and submitted to the Court for the sole purpose of supporting Defendant's Motion for Summary Judgment.

Additionally, the EUO in this case was taken as part of the requirements of an insurance policy; it was taken prior to this lawsuit being filed; it was not taken in connection with a judicial proceeding; there was no opportunity for cross examination or objection; and, it is not a deposition. See, *Goldman v. State Farm*, 660 So. 2d 300 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO's and Depositions are not the same and they serve vastly different purposes).

Defendant will likely argue that EUO's are substantially similar to affidavits and in support of that position, it relies on *Stinnett v. Longi, Inc.*, 460 So. 2d 528 (Fla. 2d DCA 1984) and *Avampato v. Markus*, 245 So. 2d 676 (Fla. 4th DCA 1971) for the proposition that a sworn statement is admissible summary judgment evidence. However, *Stinnett* and *Avampato* did not involve the use of EUO's at a summary judgment. Instead, those cases involved the use of a duly noticed deposition taken in connection with a judicial proceeding in which the opposing party chose not to attend or cross examine the witness. More importantly, Depositions are expressly authorized by Rule 1.510 (c). EUO's are neither depositions, nor affidavits. Affidavits are always signed by the declarant, which provides a modicum of trustworthiness, unlike an EUO, which is neither signed, seen, nor even ratified by the declarant.

An EUO is also inadmissible hearsay evidence because it is an out of court statement allegedly made by the declarant and then offered by Defendant to prove the truth of the matter asserted, but once it is transcribed then it becomes hearsay within hearsay because EUO transcripts are not statements of the insured but rather statements of a stenographer purporting to memorialize what the insured allegedly said. "*An oral statement transcribed by a third party which is not read to or adopted by the Defendant is inadmissible in evidence*" See, *Williams v. State,* 185 So. 2d 718 (Fla. 3d DCA 1966) citing to *Jenkins v. State*, 35 Fla. 737, 18 So. 182 ("The transcribed record was not a statement of the appellant and consequently, was not admissible in evidence as such."). An EUO which involves the use of an interpreter is even more attenuated.

Defendant argues that the EUO should be admissible under F.S.§90.803(18). However, this provision provides no help for the Defendant because it pertains to the statements of a *party* (or a party's authorized representative) and Marlon Fernandez is not a party. Fla. Stat. 90.803(18) states:

(18) ADMISSIONS- A statement that is offered against a party is:

a. The party's own statement in either an individual or representative capacity;

b. A statement of which the party has manifested an adoption or belief in its truth;

c. A statement by a person specifically authorized by the party to make a statement concerning the subject:

d. A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship;

e. A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be establish by independent evidence, either before the introduction or any evidence or before evidence is admitted under this paragraph.

The Fernandez EUO does not fall under any of the foregoing subsections because Marlon Fernandez is not a party to this action.

The EUO proffered by Defendant also fails to qualify as a business record. To determine if the EUO transcript satisfies the business records exception of the hearsay rule, we must look at Florida Statute §90.803, Hearsay exceptions; availability of declarant immaterial:

(6) Records of regularly conducted business activity.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or

as shown by a certification or declaration that complies with paragraph (c) and *s. 90.902(11),* unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under *ss. 90.701-90.705* if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing p[Editor's note: quote interrupted on court document.]

It is undisputed that the content of the EUO transcript did not come from anyone within Defendant's business organization and no one within Defendant's business organization has any personal knowledge regarding the accuracy of the information contained within that document. Furthermore, the proffered statement was not made at or near the time of the event, nor was it made by a person within Defendant's business organization with information or knowledge of the facts contained in the statement. The EUO is not admissible under Fla. Stat. §90.803(6) because it was allegedly created pre-suit and in anticipation of litigation; there was no opportunity for anyone to cross-examine the witness or person that compiled the information contained therein; and it was not obtained in the course of a judicial proceeding. The document is also neither signed, acknowledged, nor authenticated by the declarant. In fact, there is no one that even attempts to authenticate the information contained in that document.

In order to qualify for the business record exception to the hearsay rule, a 'business record' must satisfy these criteria: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. See F. S. 90.803(6) and See also, *M.S. v. Dept. of Children and Families,* 6 So. 3d 102 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D679a] citing to *See Quinn v. State*, 662 So.2d 947, 953 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1633c]; § *90.803(6)(a), Fla. Stat. (2002).*

A record is not a business record simply because it appears in the proponent's file. It must be generated by the business. For example, the Plaintiff's medical records, which are contained in Defendant's claim file, were not created by Defendant and Defendant would not be able to authenticate those records. The proffered statement in this case was not created by Defendant nor by anyone within Defendant's business organization. It was actually created by a person (court reporter) outside Defendant's organization. See, *Reichenberg v. Davis*, 846 So. 2d 1233 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1355a], (father in a paternity action sought to introduce investigative reports from the Dep't of Children and Families over the mother's hearsay objections and the court found that reports of DCF investigators which contained witness interviews were not admissible under the business or public records exception to the hearsay rule because the statements in the reports were not based upon the personal knowledge of an agent of DCF). See, *Van Zant v. State*, 372 So.2d 502 (Fla. 1st DCA 1979) and *Harris v. Game & Fresh Water Fish Comm'n*, 495 So.2d 806, 809 (Fla. 1st DCA 1986) (quoting Charles Ehrhardt, Florida Evidence § 90.805, (2d ed. 1984) ("For example, if a business record includes a statement of a bystander to an accident, the bystander's statement is hearsay and not included within the business records exception because the statement was not made by a person with knowledge who was acting within the regular course of the business activity."). So, the EUO transcript proffered by Defendant does not qualify as Defendant's business record.

OTHER COURTS AGREE - EUO IS NOT ADMISSIBLE

Many other courts have found that an EUO transcript is inadmissible as summary judgment evidence. Below are a few of those decisions: See, *Manuel V. Feijoo, M.D.*, and *Manuel V. Feijoo, M.D., P.A., a/a/o Nestor Hernandez v. UAIC*, Case No,: 20-12523 SP 26, Judge King, Aug. 5, 2021; *All X-Ray Diag. Services Corp., v. UAIC*, Case No.: 19-4466 SP 26, Judge King, Aug. 2021 (Order Granting Plaintiff's Motion to Strike EUO Transcript and Order Denying Defendant's Response to Plaintiff's Motion to Strike EUO Transcript and Request for 57.105 Sanctions); *Manuel V. Feijoo, M.D.*, and *Manuel V. Feijoo, M.D., P.A., a/a/o Angel Cordovi v. UAIC*, Case No.: 18-5349 SP 25, Judge Janowitz, March 2021 [29 Fla. L. Weekly Supp. 40a] (Order Granting Plaintiff's Motion to Strike and Denying Defendant's Motion for Summary Judgment); *Gables MR (A) a/a/o Jose Villaroel v. State Farm Mutual Auto Ins. Co.*, Case No.: 12-25944 SP 25, Judge Diaz, Oct. 2018 [26 Fla. L. Weekly Supp. 766a] (Order on Plaintiff's Motion to Strike EUO Transcript), and most recently, *Manuel V. Feijoo, M.D.*, and *Manuel V. Feijoo, M.D., P.A., a/a/o Jose Maradiaga v. Ascendant Commercial Ins. Inc.*, Case No.: 17-13187 SP 25, Judge Perez-Santiago, November, 2024 (Order Denying Motion for Reconsideration) [32 Fla. L. Weekly. Supp. 382a]. These Orders have been made a part of the Court record in this action.

CONCLUSION

Defendant cannot prevail on its Motion for Summary Judgment as a matter of law because it failed to meet its burden to show the absence of a genuine issue of material fact. Defendant's motion alleges that the named insured made a misrepresentation on the insurance policy application, which was allegedly material to the risk assumed by Defendant.

The EUO transcript (and the two affidavits which rely upon it) is inadmissible summary judgment evidence because it is: (1) untrustworthy; (2) it is hearsay and not subject to any exception to the hearsay rule; (3) it is not a deposition nor a signed affidavit; (4) it was not given during the course of a trial or other legal proceeding; (5) there was no opportunity for cross examination, or objection; and, (6) there is no evidence in the court record indicating that the EUO was ever signed, adopted nor acknowledged by the declarant; and (7) there is no evidence in the court record indicating that the EUO was ever provided to the declarant at the time it was taken.

For the reasons set forth above, the EUO transcript proffered and relied upon by Defendant is not admissible as summary judgment evidence. And since the EUO is inadmissible, then the affidavits of Gil and DeLaO are equally inadmissible because neither Gil nor DeLaO have any personal knowledge as to where the insured vehicles were actually garaged and their affidavit testimony is designed to serve as a conduit for inadmissible hearsay evidence which parrots the inadmissible EUO. Hence, the only admissible summary judgment evidence before the Court is the affidavit of Marlon Fernandez in which he testified that both insured vehicles were garaged at the policy address. Even if this Court were to consider the inadmissible hearsay EUO, then the Court would be left with the pre-suit EUO and the in-suit Fernandez affidavit, which together clearly create a triable

issue of fact for the jury and this Court is prohibited from weighing the credibility of any witness on summary judgment.

Accordingly, Defendant's Motion for Summary Judgment is DENIED.

* * *

Landlord-tenant—Eviction—Notice—Defects—Section 83.56(3) requires separate notice for termination of each rental agreement when terminating multiple agreements—Notice demanding rent for two rental agreements is defective

RAHEL CAMPBELL, Plaintiff, v. JACQUELINE RODRIGUEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-031033-CC-26. Section SD06. May 15, 2024. Christopher Green, Judge. Counsel: Philippe Revah, Revah Law Group, Miami, for Plaintiff. Alexander Maza, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

THIS MATTER came before the court on Defendant's Motion to Dismiss Plaintiff's Complaint. A hearing was held on May 14, 2024, via zoom. With the court being fully advised,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiff filed an eviction complaint for nonpayment of rent. The complaint was based on a three-day notice to pay rent or vacate.

2. While only one three-day notice was served, the eviction action is based on two separate leases for two separate rental units.

3. Defendant filed a motion to dismiss asserting, among other things, that the action must be dismissed because Plaintiff cannot proceed with a cause of action for two separate leases when only one three day notice was served.

4. Florida statute §83.56(3):

"**If the tenant fails to pay rent when due and the default continues for 3 days, excluding Saturday, Sunday, and legal holidays, after delivery of written demand by the landlord for payment of the rent or possession of the premises, the landlord may terminate the rental agreement."**

5. Under the plain text of the statute, the termination of the rental agreement is the termination of a single rental agreement.

6. Therefore, Fla. Stat. §83.56(3) requires a notice for each individual rental agreement to terminate multiple rental agreements.

7. Accordingly, Plaintiff's notice is defective pursuant to Fla. Stat. §83.56(3) because the notice demanded rent for two rental agreements.

8. Based on the above, Defendant's Motion to Dismiss Plaintiff's Complaint is GRANTED.

9. The Defendant's counterclaim remains pending and the parties will attend mediation.

10. The trial set for May 23 is canceled and the matter will be re-set by the court as needed.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose accurate marital status—Motion for summary judgment based on rescission of policy due to insured's disclosure on policy application that he was married and that other resident driver was also married and failure to disclose that insured was married to third party, not other resident driver, is denied where there is factual issue as to marital status of insured and other resident driver

THERAPY CENTER OF TAMPA, LLC., Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-007657-SP-21. Section CL01. November 22, 2024. Gordon Murray, Judge. Counsel: George Milev, The Evolution Law Group P.A., Weston, for Plaintiff. Jacqueline Zewiski, Kubicki Draper, Fort Lauderdale, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE, having come before this Honorable Court on November 6, 2024 on Defendant's Motion for Summary Judgment, the Court having heard arguments by counsels for the parties that and being otherwise fully advised in the premises, hereby,

FINDS, ORDERS AND ADJUDGES as follows:

1. This is a PIP lawsuit based on alleged breach of automobile insurance contract.

2. Claudia Mendez was a Named Insured on a policy of automobile insurance issued by Defendant.

3. The effective dates of the subject policy were 2/13/20 through 8/13/20.

4. Claudia Mendez was involved in an automobile accident on 2/13/20.

5. The subject policy of insurance was issued based on an application for insurance executed by Carlos Frometa Mayner, another Named Insured in regard to the policy at issue.

6. Carlos Frometa Mayner disclosed his marital status as "married" on the application for insurance and listed Claudia Mendez as a Household Resident and Driver.

7. Carlos Frometa Mayner listed Claudia Mendez marital status as "married" on the application for insurance.

8. On 3/25/20 Defendant rescinded the policy at issue for the following reason: "Material Misrepresentation. Failure to disclose accurate marital status at policy inception."

9. Defendant's coverage investigation revealed that Carlos Frometa Mayner was legally married to a different lady, not residing in the same household and as a result post facto Defendant rated both Carlos Frometa Mayner and Claudia Mendez as "single" which resulted in increase of the insurance premium.

10. Defendant did not offer Carlos Frometa Mayner to pay the difference in the insurance premium calculated by Defendant, but instead voided the subject policy of automobile insurance ab initio.

11. Defendant argues that the policy was properly rescinded based on the alleged misrepresentation on the application—failure to disclose accurate marital status.

12. Plaintiff's argues that Defendant improperly voided the subject policy of insurance as Carlos Frometa Mayner in fact properly listed his marital status as "married" on the application for insurance, as Defendant did not offer Carlos Frometa Mayner the opportunity to pay the difference in the premium before voiding the policy, and as Defendant did not include interest with the insurance premium refund issued to Carlos Frometa Mayner.

13. Plaintiff further argues that Defendant's underwriting guidelines assigning higher insurance premiums to "single" versus "married" applicants is in violation of Section Florida Statute 626.9541(o)9, Unfair Methods of Competition and Unfair and Deceptive Acts, reads in its pertinent part: "No insurer shall, with respect to premiums charged for motor vehicle insurance, unfairly discriminate solely on the basis of age, sex, marital status, or scholastic achievement" (emphasis added), that forfeiture of rights under an insurance policy is not favored by the law, especially where, as here, a forfeiture is sought after the happening of the event giving rise to the insurer's liability, and that the materiality of a misrepresentation on an application for insurance is a question for the trier of fact.

14. It doesn't appear that the parties are disputing that Carlos Frometa Mayner was legally married at the time of the application for insurance.

15. It should be noted that there were no depositions taken of Carlos Frometa Mayner and Claudia Mendez, and presented before the Court, and there is no other admissible summary judgment evidence showing what the applicants' marital status was at the time

of the application for insurance.

16. Defendant has filed a request for judicial notice of Hillsborough County's docket for case number 20-DR-001960 purporting to show that a Carlos Frometa Mayner had filed for dissolution of marriage from a 3rd party which was not finalized until following the date of the application for insurance at issue. However, the Court is unconvinced that the evidence presented is conclusive proof of the insured's marital status as it relates to his relationship with Claudia Mendez.

17. The Court would have to make factual determinations as to the marital status of the applicants and what exactly is meant by the subject policy of insurance in order to rule in favor of Defendant.

18. Pursuant to Florida Rule of Civil Procedure 1.510(a) "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

19. Defendant has failed to meet its burden of proof that there is no genuine issue of material fact before the Court and that Defendant's Motion for Summary Judgment should be granted as a matter of law.

20. Wherefore, Defendant's Motion for Summary Judgment is hereby Denied.

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Event data recorder information—Motion for summary judgment on claim that there is no coverage because insured refused or failed to comply with requests for recorded data in vehicle's EDR is denied—Motion raises unpled issue since insurer's answer asserted that plaintiff medical provider, not insured, failed to provide EDR data—Further, insurer has conceded that provider has no obligation to provide EDR data

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Jean Doree, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-000022-CC-25. Section CG04. December 1, 2024. Jacqueline Woodward, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Adrian Rivera and Mariana Suarez, Law Offices of Terry M. Torres and Associates, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER, having come before the Court for hearing on November 20, 2024, on Defendant's Motion for Final Summary Judgment, the Court having reviewed the respective motion and response, read relevant legal authority, heard argument from counsel of each party, and having been sufficiently advised in the premises, finds as follows:

The subject action, filed on January 3, 2022, is a Personal Injury Protection (PIP) case in which the Plaintiff alleges that the Defendant has failed to fully comply with the terms and conditions of the subject policy of insurance, as well as Fla. Stat. 627.736. As reflected per the docket, on March 21, 2022, the Defendant filed its Answer and Affirmative Defenses alleging that the there is no coverage for the respective claim declaring "Specifically, Plaintiff has refused and/or omitted to comply with the Defendants request for the recorded data contained within the insured auto's event data recorder (EDR), global position system (GPS) or similar device."

Rule 1.140(h) of the Florida Rules of Civil Procedure requires a defendant to give proper notice of all defenses the defendant intends to assert. It states in pertinent part: A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2). Florida law is clear in that "At a summary judgment hearing, the court must only consider those issues made by the pleadings." *BSP, supra* citing *Reina v. Gingerale Corp*. 472 So.2d 530, 531 (Fla. 3d DCA 1985). Stated otherwise, it is reversible error to grant summary judgment on an unpled issue. *See Arky, Freed, Stearns et al. v. Bomar Instrument Corp., etc*., 537 So.2d 561 (Fla. 1989). *See also Dober v. Worrell,* 401 So.2d 1322 (Fla. 1981).

The Defendant attempts to circumvent the rules as promulgated by the Florida Supreme Court, by raising an unpled issue for the first time via summary judgment. Defendant's Motion for Final Summary Judgment, filed on August 20, 2024, alleges that "the insured refused to comply with the condition precedent of consent to recovery of the EDR information, and the failure to comply with a condition precedent is a bar to recover of PIP benefits under section 627.736(6)(g), Florida Statutes." This Court finds that the Plaintiff in this action is a medical provider, not the claimant/patient. Furthermore, Defendant has conceded that the Plaintiff has no obligation to turn over any recorded data that may be contained within the insured auto's EDR. As such, this Court cannot grant summary judgment on an unpled issue. This is especially true when the Defendant, by way of a Joint Pretrial Stipulation, stipulated that the issue in this case is whether the Defendant may deny coverage for the respective claim on the basis that "Plaintiff has refused and/or omitted to comply with the Defendants requests for the recorded data contained within the insured auto's event data recorder (EDR), global position system (GPS) or similar device."

Therefore, for the reasons stated on the record, it is ORDERED and ADJUDGED that as a matter of law, Defendant's Motion for Final Summary Judgment is hereby DENIED.

* * *

Attorney's fees—Insurance—Personal injury protection—Declaratory judgment—Insured is entitled to attorney's fees and costs incurred declaratory action filed after insurer made total coverage denial of claim where action resulted in settlement which required insurer to pay disputed medical expenses

JUAN CALDERON, Plaintiff, v. GEICO CASUALTY COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 24-CC-21211. Division U. December 30, 2024. Frances M. Perrone, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Anthony Prieto and Alex Licznerski, Morgan & Morgan, for Plaintiff.

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES, COSTS, INTEREST ON FEES AND COSTS FROM DATE OF ENTITLEMENT, RISK MULTIPLIER, TAXATION OF ATTORNEY FEE EXPERT COSTS AND FOR ENTRY OF FINAL JUDGMENT

THIS MATTER came before the Court upon Plaintiff's Motion for Award of Attorney's Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and for Entry of Final Judgment.

1. A Petition for Declaratory Judgment was filed April 16, 2024. It is undisputed Plaintiff is a named insured on a policy issued by Geico Casualty Company, Defendant, hereinafter, "Geico."

2. It is undisputed Plaintiff maintained a policy through Geico which was in full force and effect on October 3, 2023.

3. On or about October 3, 2023 Plaintiff was injured in an automo-bile accident. Plaintiff's medical providers filed claims for PIP benefits through Geico.

4. It is undisputed one of Plaintiff's medical providers, Busch Rehabilitation Center, submitted claims for PIP benefits to Geico in accordance with Florida Statutes §627.6131(2).

5. On or about January 1, 2024, Geico notified Busch Rehabilita-tion Center and Plaintiff via written communication the claim would not be covered citing, "misrepresentations have been made in the subject billing and medical records and bills and records have been submitted for services which were not rendered and/or not rendered as billed. Moreover, the services are not lawful." (Exhibit A attached

to Complaint, Docket Entry #5).

6. The letter goes on to state, "it has been determined that no payment is due in response to your correspondence." *Id.*

7. Plaintiff filed the instant declaratory action seeking:

a. A declaration Geico wrongfully denied coverage of Plaintiff's and Busch Rehabilitation Center's PIP claims.

b. Geico did not prove Busch Rehabilitation Center billed for unlawful services.

c. Plaintiff requested attorney's fees and costs pursuant to Florida Statutes §§ 86.121 and 57.104.

8. On June 11, 2024, counsel for Geico filed a "Joint Notice of Settlement," indicating, "the parties have come to a settlement of the underlying issues of this lawsuit." The notice goes on to indicate the parties could not come to an agreement regarding whether Plaintiff is entitled to attorney's fees and Defendant disputes such entitlement.[1]

9. On June 11, 2024, Plaintiff filed, "Plaintiff's Motion for Attorney's Fees, Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and For Entry of Final Judgment."

10. The full text of Florida Statutes §86.121 is as follows:

86.121 Attorney fees; actions for declaratory relief to determine insurance coverage after total coverage denial of claim.

(1) In an action brought for declaratory relief in state or federal court to determine insurance coverage after the insurer has made a total coverage denial of a claim:

(a) Either party is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar.

(b) The court shall award reasonable attorney fees to the named insured, omnibus insured, or named beneficiary under a policy issued by the insurer upon rendition of a declaratory judgment in favor of the named insured, omnibus insured, or named beneficiary. This right may not be transferred to, assigned to, or acquired in any other manner by anyone other than a named or omnibus insured or a named beneficiary. A defense offered by an insurer pursuant to a reservation of rights does not constitute a coverage denial of a claim. Such fees are limited to those incurred in the action brought under this chapter for declaratory relief to determine coverage of insurance issued under the Florida Insurance Code.

(2) This section does not apply to any action arising under a residential or commercial property insurance policy.

11. The Complaint in the instant case is based on the denial by Geico to pay the claim submitted by Busch Rehabilitation for treatment rendered to Plaintiff.

12. The Court finds the only way to view the request for payment from Geico for PIP benefits after an automobile accident is to consider the request for payment a "claim."

13. The only way to view Geico's determination "that no payment is due in response to your correspondence," (Exhibit A attached to Complaint, Docket Entry #5, *emphasis added*) is that the insurer made a total coverage denial of the claim.

14. It is evident the litigation resulted in a settlement through which Geico indeed rendered payment for the medical expenses incurred for treatment by Busch Rehabilitation Center.

15. Because this action was brought for declaratory relief after Geico made a total coverage denial of a claim, the Court finds Plaintiff is entitled to reasonable attorney's fees and costs.

16. The Court reserves ruling as to the amount of fees and costs.

17. The parties are directed to complete mediation by March 31, 2025 as to the amount of fees and costs due to Plaintiff. If no agreement as to amount can be reached at mediation, the parties shall schedule a fee hearing with the Court within 10 days after a mediation impasse and said hearing shall take place within 60 days after a mediation impasse.

[1]At the hearing on the instant motion, it was undisputed a payment of approximately $7,747.60 was issued by Geico pursuant to the settlement.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Overdue claim—PIP benefits were overdue, requiring payment of interest, where benefits were not paid within 30 days of receipt of bill for services—Insurer cannot extend 30-day period for paying PIP benefits by requiring that claims be submitted on specified in-house claims forms—Demand letter sent after insurer failed to pay claim within 30 days of receipt of bill was not premature—Accordingly, insurer was also required to pay overdue interest, penalty, and postage—Insurer's motion for summary judgment based on accord and satisfaction raises genuine issue of material fact which must be submitted to jury

PINES IMAGING CENTER, LLC, a/a/o Roberto Castilla, Plaintiff, v. AMERICAN FAMILY HOME INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23010381. Division 80. December 10, 2024. Olga Levine, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck and Baxter P.A., West Palm Beach, for Plaintiff. Anna Torres, West Palm Beach, for Defendant.

ORDER DENYING DEFENDANT, AMERICAN FAMILY HOME INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on November 21, 2024, upon Defendant, American Family Home Insurance Company's Motion for Final Summary Judgment, the Court having reviewed the parties filings and heard the arguments of counsel, and being otherwise fully advised in the premises, finds as follows:

BACKGROUND

The Plaintiff, PINES IMAGING CENTER, LLC, filed suit seeking reimbursement of Personal Injury Protection ("PIP") benefits from Defendant, AMERICAN FAMILY HOME INSURANCE COMPANY, (hereinafter "Defendant and/or "AMERICAN FAMILY"), in connection with medical services rendered to its Insured, Roberto Castilla (hereinafter "INSURED") on October 3, 2022, as a result of injuries he sustained in automobile accident which occurred on September 22, 2022. Following admission to PINES, the INSURED executed a written Assignment of Benefits (AOB), thereby assigning his benefits and payments under his insurance policy to Plaintiff and providing Plaintiff withstanding to file this lawsuit.

On or about October 4, 2022, Plaintiff submitted its bill to Defendant, along with a copy of the AOB, the signed Disclosure and Acknowledgement Form, and the medical notes seeking reimbursement of PIP benefits for the medical services rendered to the INSURED on October 3, 2022.

The Defendant failed to issue payment of the PIP benefits owed to the Plaintiff, within 30 days of receipt of Plaintiff's bill for the services rendered on October 3, 2022. Thereafter, on December 19, 2022, Plaintiff sent Defendant a pre-suit Demand Letter seeking the overdue PIP benefits, along with interest, penalty, and postage pursuant to the requirements set forth under F.S. 627.736(10). Said Demand Letter was received by Defendant on December 24, 2022.

On or about 1/18/23, Defendant issued payment, in the amount of $1,366.42, as payment of PIP benefits and mailed the check directly to the Plaintiff, PINES at 9696 Pines Blvd, Pembroke Pines, Fl, 33024. Defendant did not issue any payment for interest, penalty, or postage within 30 days of receipt of Plaintiff's Demand Letter dated December 19, 2022.

On February 17, 2023, Plaintiff filed this lawsuit against Defendant seeking to recover the additional overdue PIP benefits, plus the unpaid statutory interest, penalty, and postage. On May 3, 2023, Plaintiff filed an Amended Complaint, amending the name of the Defendant from

AMERICAN COLLECTORS' INSURANCE to AMERICAN FAMILY HOME INSURANCE COMPANY. Defendant was served with Plaintiff's Amended Complaint on June 8, 2023.

Thereafter, on or about May 19, 2023, Defendant issued a check, made payable to The Intellectual Property Law Firm dba Johnson/Dalal, in the amount of $22.33, as payment of $14.23 in interest and $8.10 for postage.

DEFENDANT'S ARGUMENT

On June 26, 2024, the Defendant filed its Motion for Final Summary Judgment alleging the following:

i. The defendant has issued payment in full to the Plaintiff in accordance with its Policy terms and provisions and Florida Statutes before the Plaintiff initiated this lawsuit.

ii. Plaintiff has failed to comply with conditions precedent under F.S. 627.736 by failing to provide a statutorily compliant pre-suit Notice of Intent to Initiate Litigation

iii. Plaintiff has failed to comply with conditions precedent under F.S. 627.736 because the Notice of Intent was served prematurely; and

iv. Plaintiff's claim is barred by the doctrine of accord and satisfaction in as much as upon receipt of a Notice of a timely served Intent to Initiate Litigation after the payment for services had been tendered, American Family also tendered payments for interest and postage.

PLAINTIFF'S ARGUMENT

On October 16, 2024, Plaintiff filed its Motion for Final Summary Judgment and memorandum of law in opposition to Defendant's Motion for Final Summary Judgment, alleging as follows:

i. Plaintiff furnished Defendant with written notice of the fact of a covered loss and of the amount of same in accordance with the requirements set forth under the Florida No-Fault Statute, F.S. 627.736(4)(b)

ii. Defendant failed to comply with the requirements set forth under F.S. 627.736(4)(b) to either pay any PIP benefits due and owing to the Plaintiff, nor provide Plaintiff with any reasoning as to why Defendant was refusing to issue payment and has failed to establish that it had reasonable proof that it was not responsible for payment of the subject medical bills; thereby making said PIP benefits overdue

iii. Plaintiff has complied with all conditions precedent to the filing of this lawsuit, including compliance with Section 627.736(10), Florida Statutes.

iv. Defendant failed to timely issue payment of all overdue claims set forth in Plaintiff's Demand Letter and in accordance with the notice requirements within thirty (30) days of the insurers receipt of Plaintiff's Notice as required under F.S. 627.736(10)(d) therefore entitling Plaintiff to move forward with the filing of the lawsuit including pursuing the obligation for Defendant to pay fees.

v. Defendant has failed to meet its burden of proving the existence of its accord and satisfaction defense.

As Plaintiff's MSJ was not filed 40 days in advance of the hearing on November 21, 2024, the Court was only able to consider it as a response in opposition to Defendant's Motion for Final Summary Judgment.

FINDINGS

This Court hereby finds that Defendant failed to comply with the requirements set forth under F.S. 627.736(4)(b) as Defendant did not issue payment of the PIP benefits owed to the Plaintiff within 30 days of receipt of the Plaintiff's bill for the services rendered to the insured on October 3, 2022. An insurer is put on notice of a covered claim by the submission of a substantially complete claim form. 627.736(5). The burden to verify the claim within 30 days is on insurer, and insurer could not excuse its noncompliance with this statutory requirement based on insured's failure to submit claim on approved in-house claims form. A PIP insurer cannot extend the 30-day period for paying PIP benefits by requiring claims to be submitted only on specified in-house claims forms as a condition precedent to payment.

Therefore, this Court hereby finds that Defendant's failure to timely issue payment of the PIP benefits owed to Plaintiff within 30 days of the date of receipt of Plaintiff's bill, resulted in the PIP benefits being considered overdue. Furthermore, Defendant has failed to produce any evidence that proves that the claim was not overdue. Therefore, Defendant's payment of PIP benefits outside of the 30-day deadline is found to be late thereby requiring the Defendant to also pay Plaintiff the overdue interest owed in accordance with F.S 627.736(5).

Additionally, this Court finds that Plaintiff's Demand Letter is in compliance with the requirements set forth under F.S. 627.736(10) in that it was not sent premature and it is clear that at the time the Plaintiff sent the Demand Letter no PIP benefits had been paid by Defendant. Based upon this, the Court hereby finds that in addition to the payment of PIP benefits issued in response to the Demand Letter, the Defendant was also required to pay overdue interest, penalty, and postage. As Defendant failed to timely issue payment of PIP benefits, interest, penalty, and postage in compliance with the requirements set forth under F.S. 627.736(5) and F.S. 627.736(10), this Court hereby finds that Defendant has failed to issue payment in full of all outstanding PIP benefits, interest, penalty, and postage owed to the Plaintiff in compliance with the requirements set forth in F.S 627.736.

As to Defendant's affirmative defense of accord and satisfaction, this Court hereby finds that there is a genuine issue of material fact which is required to be submitted to a jury for determination. Accordingly, it is hereby,

ORDERED AND ADJUDGED that for the reasons set forth in detail above, Defendant's Motion for Final Summary Judgment is hereby **DENIED**

* * *

Jurisdiction—Service of process—Where plaintiff failed to effectuate timely personal service on certain defendant, case is dismissed without prejudice as to that defendant—Plaintiff's assertion that it would be attempting to make service on defendant through secretary of state is unavailing—Plaintiff is unable to explain legal basis for substitute service on defendant who is merely guarantor of debt at issue and is not alleged to be doing business in State of Florida

FOX FUNDING GROUP, LLC, Plaintiff, v. FELIX WILLIAMS ELECTRIC, LLC, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24048726. Division 53. December 20, 2024. Robert W. Lee, Judge.

ORDER OF DISMISSAL AS TO DEFENDANT, FELIX A. WILLIAMS, ONLY

The Plaintiff's having failed to comply with Rule 1.070(j) and this Court's Order of December 4, 2024, this case is DISMISSED without prejudice as to the Defendant Felix A. Williams for failure to timely serve.

At the case management of conference on November 21, 2024, Plaintiff's counsel advised that they would be attempting to serve process on Mr. Williams through the Secretary of State because of the inability to effectuate personal service. As stated in the Court's Order dated November 21, 2024, "Counsel was unable to explain [the] legal basis for service on Secretary of State when individual Defendant [Williams] is merely guarantor of debt, and no allegations that the individual Defendant is doing business in the State of Florida." The Court further advised that a notice of impending dismissal for lack of timely service would be issued in due course with a deadline to provide good cause for failure to timely serve.

On December 4, 2024, the Court issued its Notice of Impending Dismissal as previously advised. Thereafter, the Plaintiff filed its Memorandum of Law attempting to explain why substitute service

could be effectuated on Mr. Williams via the Secretary of State. In its Memorandum, the Plaintiff concedes that under Florida case law, merely being a guarantor of debt does not automatically equate with "doing business in Florida." However, the Plaintiff suggests that Mr. Williams is in fact "doing business in Florida," but without any supporting proffer of facts to demonstrate that point. Further, the Plaintiff argues that the Court has personal jurisdiction over the Defendant. That argument misses the point—certainly the Court could have personal jurisdiction over a party, but that doesn't eliminate the requirement that the party must be served with process. Simply put, the Plaintiff has continued to fail to explain, as noted in this Court's order of November 21, how service on the Secretary of State would be proper as to this individual Defendant.

* * *

Homeowners associations—Trial—Bifurcation of claims—Equitable and legal claims—Claim for injunctive relief and claims for damages arose out of separate incidents and sets of facts related to parties' relationship and are not intertwined—Claim for injunctive relief to be tried to bench—Damages claims will be tried together before a jury

ABUTAHIR MUSTAFA, Plaintiff, v. COBBLESTONE WALK HOMEOWNERS ASSOCIATION, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24006658. Division 53. November 27, 2024. Robert W. Lee, Judge.

ORDER OF BIFURCATION

This cause came before the Court on November 8, 2024 for pretrial conference on the parties' demands for jury trial. This case involves a three-count Amended Complaint, one of which seeks injunctive relief, and the other two damages. The Court raised the issue of the role of a jury on the claim for injunctive relief, but neither party was able to provide the Court any legal authority on the issue one way or the other. Since then, the Court has received nothing further, and as a result, conducted its own research. A claim for injunctive relief does not trigger the right to a jury trial, while a claim for damages does. The proper procedure for handling claims for both legal and equitable relief is set forth in *Marlette v. Carullo*, 347 So.3d 556 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1980a]. If the factual issues are intertwined, the jury trial should generally proceed first, with any factual decisions of the jury on damages controlling on the bench trial for injunctive relief. However, when the factual issues are not intertwined, the Court may bifurcate the claims and try the bench case first at its discretion.

Here, the equitable claims are not intertwined with the legal claims. They involve two completely separate incidents and sets of facts related to the relationship of the parties. As a result, it is hereby ORDERED that Count I shall be bifurcated from Counts II and III so that Count I is tried to the bench, and Counts II and III tried together to a jury. The Court will issue appropriate trial orders.

* * *