Volume 32, Number 11, March 31, 2025

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 441-479

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.

- **LICENSING—DRIVER'S LICENSE—SUSPENSION—LAWFULNESS OF DETENTION. A reasonable person would not believe his or her freedom had been curtailed to the degree of a formal arrest when seated in the back of a patrol vehicle at the scene of a fatal crash to accommodate his or her complaints of injuries while awaiting to be interviewed where the person was not handcuffed, the vehicle windows were rolled down, and the person was allowed to freely call and text on his or her phone. The totality of this evidence amounts to no more than a second-level police-citizen encounter that consists of an investigative detention requiring only reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime.** *WEBB v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. Circuit Court, Fourth Judicial Circuit (Appellate) in and for Duval County. Filed December 13, 2024. Full Text at Circuit Courts-Appellate Section, page 441a.*
- **TORTS—BRIBERY—CITY COMMISSIONERS—LEGISLATIVE IMMUNITY. A city commissioner's acts of voting, texting, and meeting about the bid for a project were protected by legislative immunity irrespective of whether the activities were unethical or motivated by bad faith.** *PRIEGUEZ v. PORTILLA. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed February 13, 2025. Full Text at Circuit Courts-Original Section, page 456a.*
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FLW SUPPLEMENT

CASES REPORTED.

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

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Lawfulness of detention—Reasonable person would not believe that she was under arrest when seated in back of patrol vehicle at scene of fatal crash to accommodate her complaints of injuries while awaiting interview where licensee was not handcuffed, vehicle windows were rolled down, and licensee was allowed to freely call and text on her phone—Two-hour detention was reasonably related in scope to investigation of collision on interstate highway that caused two deaths—Officers had reasonable suspicion that licensee had committed vehicular homicide or DUI that authorized detention where licensee veered into car parked on road shoulder that had its emergency lights activated, crash was not explained by weather or road and traffic conditions, and officer smelled odor of alcohol on licensee's breath—Lawfulness of blood draw—Licensee's consent to blood draw was voluntary where licensee was educated and would have understood nature of police investigation, licensee was not threatened with license suspension or handcuffed, and officers did not interrogate licensee prior to requesting blood draw—Fact that licensee can point to contrary evidence regarding odor of alcohol or voluntariness of consent is not grounds to quash hearing officer's decision where it is supported by competent substantial evidence

ISABELLA LOUISE WEBB, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2024-AP-1. Division AP-A. December 13, 2024. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Curtis S. Fallgatter, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM.) Petitioner seeks certiorari review of the Department's decision to uphold the suspension of her driving privileges. On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. Petitioner mainly challenges the sufficiency of the evidence supporting the Hearing Officer's factual and legal determinations that Petitioner was properly detained following the collision and the legality of her blood draw at the scene.

In reviewing whether there is competent, substantial evidence to support a Hearing Officer's factual determinations, "[i]t involves a purely legal question: whether the record contains the necessary quantum of evidence. The circuit court is not permitted to go farther and reweigh that evidence (e.g., where there may be conflicts in the evidence), or to substitute its judgment about what should be done for that of the administrative agency." *Lee County v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993) (citing *Bell v. City of Sarasota*, 371 So. 2d 525 (Fla. 2d DCA 1979)). Here, the Department submitted evidence at the hearing that supported the Hearing Officer's findings in his thirty-one page order that (1) Petitioner's detention amounted to an investigatory stop or detention requiring only reasonable, articulable suspicion to justify it; (2) the investigating officers had reasonable suspicion to detain her; and (3) Petitioner consented to having her blood drawn at the scene which later revealed a blood alcohol level of .132 in the aftermath of the crash.

First, it is undisputed that law enforcement officers detained Petitioner after her vehicle collided with another killing two of its occupants, kept Petitioner at the scene for several hours before letting her leave with her commanding officer, and placed her in the back of a law enforcement vehicle during the detention. However, the Department presented evidence that the officers never handcuffed Petitioner, left the windows rolled down so she could get air, allowed Petitioner to freely call and text using her cell phone while waiting to be interviewed, and could only provide comfortable seating for Petitioner in a law enforcement vehicle after she complained of injuries sustained in the accident. Petitioner even texted her commanding officer to let him know she would be released soon. A reasonable person under such circumstances would not believe his or her freedom had been curtailed to the degree of a formal arrest. *See Ramirez v. State*, 739 So. 2d 568, 573 (Fla. 1999) [24 Fla. L. Weekly S353a] ("A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest") The totality of this evidence amounts to no more than a second-level police-citizen encounter that consists of an investigative detention requiring only reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime. *See Popple v. State*, 626 So. 2d 185, 186-87 (Fla. 1993).

Petitioner points to the undisputed facts that she was held for a lengthy period of time and placed in the back seat of a law enforcement vehicle as proof that her detention was a *de facto* arrest. Placement in a law enforcement vehicle during a stop, by itself, does not automatically elevate a stop to an arrest. *See Schoenwetter v. State*, 931 So. 2d 857, 867 (Fla. 2006) [31 Fla. L. Weekly S261a]. Likewise, the length of the detention and inquiry were "reasonably related in scope to the justification for their initiation." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 811 (1975) and *Terry v. Ohio*, 392 U.S. 1, 29 (1968)). Law enforcement officers were required to investigate and determine what happened in a vehicle collision causing the deaths of two individuals on an interstate highway. This investigation was necessarily going to take a tremendous amount of time to secure the scene, handle traffic, and get the appropriate personnel trained in accident investigation to the scene to document everything and interview the witnesses. Moreover, Petitioner disregards the additional evidence provided by the Department that demonstrates, when combined with the length of detention and her placement in the back of a law enforcement vehicle, Petitioner's encounter with law enforcement never rose above the level of an investigative detention.

The Department's evidence also supported the Hearing Officer's determination that the law enforcement officers investigating the accident had reasonable suspicion to detain Petitioner. The Department's evidence included (1) Petitioner's car veered from the lane of travel into a vehicle parked on the shoulder; (2) two people were killed almost instantly as a result of the collision; (3) the crash was not explained by inclement weather or any road condition; (4) the accident occurred in the early morning hours when traffic on Interstate 95 was light; (5) the collision occurred in a well-lit area; (6) the decedents' vehicle had its emergency lights on at the time; and (7) an officer smelled a faint odor of alcohol on Petitioner's breath in his initial interaction with Petitioner. Based on this evidence, law enforcement officers had a reasonable, particularized suspicion that Petitioner committed a traffic offense such as vehicular homicide or DUI that legally authorized them to detain her to conduct their investigation.

Petitioner points to evidence from other witnesses indicating they did not smell an odor of alcohol on Petitioner's person and she did not

display any signs of impairment. However, a reviewing court on certiorari review cannot reach the conclusion there was no evidentiary basis for a Hearing Officer's decision simply because there is contradictory evidence in the record. In light of all the record evidence, the Hearing Officer below was free to accept, reject, and give the weight he thought the Department's evidence and any contradictory evidence deserved. Petitioner's argument amounts to an improper request for this Court to reweigh the evidence in this case.

Finally, the Hearing Officer determined Petitioner voluntarily submitted to a blood draw at the scene that yielded a blood alcohol level at .132. This finding obviated the need for the Department to demonstrate that the investigating law enforcement officers had probable cause to believe Petitioner committed a crime and that exigent circumstances existed to avoid obtaining a search warrant. Whether consent is voluntary is a question of fact determined by the totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 557 (1980). The Florida Supreme Court has noted a list of non-exclusive factors to judge voluntary consent.

> (1) the time and place of the encounter; (2) the number of officers present; (3) the officers' words and actions; (4) the age and maturity of the defendant; (5) the defendant's prior contacts with the police; (6) whether the defendant executed a written consent form; (7) whether the defendant was informed that he or she could refuse to give consent; and (8) the length of time the defendant was interrogated before consent was given.

Montes-Valeton v. State, 216 So. 3d 475, 480 (Fla. 2017) [42 Fla. L. Weekly S210a].

Similar to the finding of reasonable suspicion, the Department provided sufficient evidence to support the Hearing Officer's factual determination that Petitioner voluntarily consented to the blood draw. The record demonstrates Petitioner, a college graduate serving in the Navy, would have understood the nature of the police investigation. The officers did not threaten Petitioner with suspension of her driver's license; they did not handcuff Petitioner; they permitted Petitioner to talk and to text on her phone; and they did not interrogate Petitioner prior to asking her to provide a sample. Moreover, Petitioner provided written consent to the blood draw. Furthermore, the record is devoid of evidence the officers were anything other than polite to Petitioner as they made no threats or promises to obtain her consent. The evidence is susceptible to the view that the officers, during a lawful detention, simply asked Petitioner to provide a blood sample and she agreed without any further discussion or efforts on the part of law enforcement to convince her. The fact that Petitioner can point to contradictory evidence, again, is not sufficient grounds to quash the Hearing Officer's decision.

Because the Hearing Officer's findings of fact and conclusions of law were amply supported by the record evidence, this Court finds no basis for reversal. Accordingly, the Petition is **DENIED**. (DEES, DANIEL, and HUTTON, JJ., concur.)

* * *

Counties—Utilities—Challenge by customer to water bill that exceeds more than six times customer's past year's average bill—Hearing officer misinterpreted county code provision providing that water meter reading is prima facie evidence of water consumption when he afforded county's meter flow test irrebuttable legal presumption of meter's accuracy and, therefore, failed to properly consider evidence that challenged accuracy of meter—Further, hearing officer failed to sufficiently address county's denial of customer's application for one-time lifetime credit based on notation of possible leak that is not supported by competent substantial evidence—Remand for further proceedings

SHARON TORRES, Appellant, v. MIAMI-DADE COUNTY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2024-17 AP 01. December 13, 2024. On Appeal from an administrative decision by a Miami-Dade County Hearing Officer. Counsel: Karen B. Parker, Karen B. Parker, P.A., for Petitioner. Geraldine Bonzon-Keenan, County Attorney, and Cristina Rabionet, Assistant County Attorney, Office of the County Attorney, for Respondent.

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

(TRAWICK, Judge.) This appeal, brought by Appellant Sharon Torres ("Appellant") against Miami-Dade County ("Appellee") seeks review of the Hearing Officer's Findings of Fact and Conclusions of Law entered on February 23, 2024, which affirmed water bill charges totaling over $8,000 dollars, and the decision of the Miami-Dade County Water and Sewer Department ("County") to deny Appellant's application for a One-Time Lifetime Credit adjustment of the high water bill.

The standard of review of a local administrative action under Florida Rule of Appellate Procedure 9.030(c) is as follows:

> [w]here a party is entitled as a matter of law to seek review in the circuit court from administrative action, the circuit court must determine [1] whether procedural due process is 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.

City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). *See also Dept. of Highway Safety and Motor Vehicles v. Alliston*, 813 So. 2d 141,144 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D610a]; *Florida Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a].

Procedural due process requires that the agency provide reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson,* 464 So. 2d 158, 164 (Fla. 2d DCA 1985).

> While "the concepts of due process in an administrative proceeding are less stringent than in a judicial proceeding, they nonetheless apply." *A.J. v. State, Dep't. of HRS,* 630 So. 2d 1187, 1189 (Fla. 2d DCA 1994); see also *Hadley v. Department of Admin.,* 411 So. 2d 184, 187 (Fla. 1982)("In such proceedings, it is sufficient if the accused . . . has reasonable opportunity to defend against attempted proof of such charges. . . ."). **This opportunity to be heard must be meaningful**. *See Metropolitan Dade County v. Sokolowski,* 439 So. 2d 932, 934 (Fla. 3d DCA 1983); *Rucker v. City of Ocala,* 684 So. 2d 836, 841 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2567a] ("To qualify under due process standards, **the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive** (sic)."). "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties." *Scull v. State,* 569 So. 2d 1251, 1252 (Fla. 1990).

Miami-Dade Cnty. v. Reyes, 772 So. 2d 24, 29 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2014b]. (emphasis added).

This Court must also determine whether the lower tribunal applied the correct law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 624 (Fla. 1982). A departure from the essential requirements of the law occurs when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983). Miami-Dade County Code Section 32-96 provides that "[t]he water and sewer service rendered by the Department, as measured by water meters, shall be *prima facie* evidence of the quantity of water delivered to the customer and of sewage collected from the customer."

The Appellant argues that the ruling below should be quashed because the hearing officer misapplied the law by effectively treating the County's meter flow test result as an irrebuttable legal presumption of the meter's accuracy, rather than considering the test result as

prima facie evidence that could be countered by Appellant. If Appellant's argument is correct, the hearing officer's use of the test result in making his determination was in direct contradiction of the holding in *Miami-Dade County v. Reyes,* where the court, in considering a similar factual scenario, stated:

> The County's guidelines for evidence at hearings, as stated in its October 24, 1997 letter to Reyes, violates this unambiguous mandate in section 32-96 by stating that when the meter is found to be within acceptable standards of accuracy, a "very strong presumption is created" in favor of the accuracy of the water bill. "**Prima facie evidence is evidence sufficient to establish a fact unless and until rebutted.**" ***State v. Kohler,*** **232 So. 2d 166, 168 (Fla.1970). Prima facie evidence does not amount to a legal presumption.** The natural evidence that an average consumer would have to challenge the accuracy of a water bill and attempt to rebut the County's evidence, such as much lower prior and subsequent billing history, testimony from family and friends on water consumption at the residence, and an inspection by a plumber, are automatically given "little weight" by the Hearing Officer, according to the October 24, 1997 letter. **Given the County's discounting of almost all evidence a customer could produce, short of hiring an expert in engineering, the County's evidentiary rules take what should be prima facie evidence of water consumption, the meter accuracy, and raise it to the level of a virtual irrebuttable presumption in favor of the County.** If Reyes had a water bill charging him for 1,000,000 gallons, what evidence could he possibly present that would be given serious weight to challenge such an astronomical bill if the County meter tested within the acceptable standards of accuracy? **These procedural rules regarding the weighing of evidence deny Reyes a reasonable, meaningful, full, and fair opportunity to challenge his water bill. Accordingly, Reyes has been denied his due process rights by the County's administrative hearing.**
>
> The findings of administrative hearing officers are to be given deference, but not at the expense of due process. While the circuit court erred in re-weighing the evidence, it was absolutely correct in holding that the County's evidentiary procedures **amounted to an irrebuttable presumption which was virtually impossible for Reyes to overcome.** A consumer should not be held hostage to an astronomically high water bill merely because the meter tests within acceptable standards and be left defenseless at a hearing on the matter. This is particularly important in a case such as this, where the amount in question, $2,300.55, can be financially devastating. To most people, an unexpected bill of this magnitude can obliterate all or a significant part of their savings, or force them to borrow the money necessary to maintain their water service.

Reyes, 772 So. 2d at 29-30 (emphasis added).

In the instant case, although the hearing officer stated that the meter test results constitute *prima facie* evidence, the hearing officer's verbal explanation betrayed a misinterpretation of the County Code and a misunderstanding of the term "*prima facie evidence*." This conclusion is borne out when, in announcing his findings, the hearing officer stated:

> My determination is, is that once that original meter was removed, and that was Meter 20219004, a new meter was placed in there, according to the testimony. **That old meter was tested and found to be within working—acceptable working parameters. That ends it for my determination because the rules say that once that is done and the evidence was presented by testimony, as it was today, that is prima facie evidence that that actual consumption of water went through that—the meter.**

Hearing Transcript at 36.

Rather than considering evidence that could have rebutted the meter test result, the hearing officer expressly stated that the County's meter test result evidence "ended" his "determination." This was error. Evidence presented by the Appellant that was not properly considered by the hearing officer due to the irrebuttable presumption he afforded the meter test result included:

1. Appellant's hiring of a plumbing company to conduct a check of her property. They determined that there were no leaks anywhere in the home. This countered the assertion that a leak may have caused the high meter reading.

2. When the meter was changed without notice to the Appellant, the recording of water consumption immediately returned to normal. Appellant testified as follows: "So when I received this bill and it showed that the meter had been changed on May 25th, immediately that that [*sic*] was changed the consumption went back to normal immediately." Hearing Transcript at 24. At the hearing, the County verified this as a fact, admitting as follows: "The customer stated that her consumption had gone back to normal after the meter change, which is true. Her consumption with the new meter did go back down to normal." Hearing Transcript at 8.

3. Miscommunications and mishaps occurred throughout the process of reviewing the high water bills. For instance, the Appellant was told that she could not have the meter re-tested or independently tested because the meter had been discarded. The Appellant testified:

> I had asked for the meter to be—for us to obtain the meter on October 4th of 2022, and I was told then that the meter had been disposed of. I know Ms. Lafargue said it was placed in a property in April of '23, but we had requested it because all of this was taking place back in '22. But, you know, finally in October I requested that the meter be tested, if we could have it independently tested. And at that point, I was told the meter had been disposed of.

Hearing Transcript at 33.

In response to the Appellant's testimony regarding this last issue, the County admitted that it likely did misinform Appellant that the meter was discarded even though it was not (explaining that old meters were usually discarded). The County also admitted that it did not actually discard the meter, but rather, it eventually placed the meter in operation at another location months later in 2023. The Appellant was ultimately denied the opportunity to have the meter retested or independently tested.

In failing to appropriately consider any of this evidence due to the irrebuttable presumption he gave the meter test, the hearing officer stated:

> I am finding that based upon the evidence presented to me, although it was done according to you in a haphazard fashion and **you weren't given an opportunity to—to contest it, either before—because of miscommunication or otherwise, I still cannot hold the department responsible**. So I am finding in favor of the department in terms of this matter . . . "although I feel and understand that there was a serious issue here on one side or the other, **it seems that under the rules, I have to find in favor the department and against you.**

Hearing Transcript at 37 (emphasis added).

Based upon our review of the record in this case, we find that the hearing officer denied Appellant due process and failed to observe the essential requirements of the law when he afforded the County's meter test result an irrebuttable legal presumption of correctness that could not be overcome. Due to the hearing officer's misinterpretation of the term "prima facie evidence," the hearing officer did not properly consider the evidence presented by the Appellant that challenged the accuracy of the meter.

Additionally, the hearing officer failed to sufficiently address the denial of the Appellant's application of the One-Time Lifetime Credit which is intended for situations such as in the instant case where the unrefuted evidence indicated that 1) there was an extremely high bill

exceeding six times the normal charges, 2) no leak was found after an investigation, and 3) there was no other explanation for the high water bill that would qualify the bill for any of the other types of available credits and adjustments. Miami-Dade County Code Section 32-101, entitled "One-Time Lifetime Credit for Customers," states that a customer may apply for a 50% credit adjustment for "a bill that exceeds six (6) times the past year's average, as applicable, monthly or quarterly consumption but is unable to show the Department that the high bill is due to a leak, concealed or visible, and cannot otherwise explain the high water bill." In the instant case, although the Appellant satisfied all of the requirements for applying for such credit, the application for the One-Time Lifetime Credit was expressly denied because of an unsupported notation, based on an unnoticed field test of the meter, of a "possible leak." This allegation was not supported by competent, substantial evidence. Countering this was an affidavit from a licensed plumber indicating that there were no concealed or visible leaks on the property. In not considering this affidavit and balancing it against the notation of a "possible leak," the hearing officer misinterpreted the law by giving the meter test result an irrebuttable presumption of correctness. Instead he improperly ignored the evidence presented by the Appellant that would have supported a One-Time Lifetime Credit.

Accordingly, the decision below is **QUASHED** and this matter is remanded for further proceedings consistent with this opinion. (DE LA O and ARECES, R., JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Commercial driver's license—Where licensee held commercial driver's license from another state, officer was not required to read CDL implied consent warning when requesting that licensee submit to breath test—Officer appropriately read implied consent warning required prior to suspension of driving privileges under section 322.2615(1)(a), rather than warning required for disqualification of CDL holder

PHILLIP BRADLEY DOWDY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 14th Judicial Circuit (Appellate) in and for Bay County. Case No. 23-CA-1400. December 20, 2024. Counsel: Kathy A. Jimenez-Morales, Chief Counsel, Driver Licenses, DHSMV, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(WILLIAM S. HENRY, J.) THIS MATTER came before the Court upon the Petitioner's Petition for Writ of Certiorari. Respondent filed a Response. Upon review of the Petition and Response, the Court finds as follows:

The Petition challenges the Hearing Officer's Findings of Fact, Conclusions of Law and Decision entered on October 24, 2023, (hereinafter "Decision") which upheld the suspension of Petitioner's driving privileges for his refusal to submit to a breath-alcohol test after being requested to do so by law enforcement. The sole basis of Petitioner's challenge is that the Decision is not supported by competent, substantial evidence and did not comport with the essential requirements of law because at the time of the arrest Petitioner possessed a commercial driver's license and the arresting officer did not read the CDL implied consent warning as provided in §322.64, Florida Statutes. This issue was raised by Petitioner, but the Hearing Officer denied the request to set aside the suspension and upheld the suspension under §322.2615. After review of the briefs and the applicable statutes, the Petition for Writ of Certiorari is denied.

The outcome here is determined by a plain reading of the applicable statutes. At the time of the arrest, Petitioner had a commercial driver's license, but it was issued in Alabama.

Section 322.64(1)(a) provides in pertinent part that an arresting officer "shall, on behalf of the department, ***disqualify the holder of a commercial driver license*** from operating any commercial motor vehicle if the licenseholder, while operating or in actual physical control of a motor vehicle, is arrested for" DUI or refused to submit to a breath, urine or blood test. (emphasis added).

"Commercial driver license" is defined in §322.01(7) as "a Class A, Class B, or Class C driver license ***issued in accordance with the requirements of this chapter***." (emphasis added) Section 322.54(2) discusses issuing driver licenses "pursuant to the requirements of this chapter" for various classifications, which specifically include Class A, B and C licenses. Hence, the use of the phrase "commercial driver license" for purposes of Chapter 322 applies to Class A, B and C drive licenses issued by the State of Florida.

This interpretation is further confirmed by §322.54(3), which states that "[a]ny nonresident who drives a commercial motor vehicle within this state must possess a valid commercial driver license issued in substantial compliance with the Commercial Motor Vehicle Safety Act of 1986," and §322.03(4)(a), which states, "The department may not issue a commercial driver license to any person who is not a resident of this state." Accordingly, a Class A commercial drive license issued in the State of Alabama, such as that possessed by Petitioner, is not a "commercial driver license" within the meaning of Chapter 322, nor could Petitioner possess a "commercial driver license" under the statute since he was a nonresident of Florida.

Since Petitioner did not and could not be a "holder of a commercial driver license" as contemplated under §322.64(1)(a), the provisions of the section are not applicable, and Petitioner's argument that the license suspension was improper for failure to read the CDL implied consent warning has no merit.

The Hearing Officer affirmed Petitioner's license suspension under §322.2615. This statute is worded differently. Where §322.64(1)(a) has the arresting officer disqualify the holder of a commercial driver license from operating any commercial motor vehicle, §322.2615(1)(a) provides that the arresting officer shall "suspend the driving privilege of a person" upon refusal to submit to a breath, blood or urine test.

" 'Disqualification' " means a prohibition, other than an out-of-service order, that precludes a person from driving a commercial motor vehicle." §322.01(15). " 'Suspension' " means the temporary withdrawal of a licensee's privilege to drive a motor vehicle. The term does not include a downgrade." §322.01(42). These are clearly two different things. "Disqualification" only pertains to operation of a commercial vehicle, and a "suspension" under §322.2615(1)(a) is much broader. This is apparent since a "commercial motor vehicle" under §322.01(8) is a subset of "motor vehicle" under §322.01(29).

Since Petitioner was not a "holder of a commercial driver license," it was appropriate for the arresting officer to read the implied consent contemplated by §322.2615(1)(a) rather than the CDL implied consent discussed in §322.64(1)(a). Accordingly, the Hearing Officer's decision to affirm the suspension of the Petitioner's driving privileges under §322.2615 was supported by competent, substantial evidence and comported with the essential requirements of the law.

Therefore, it is

ORDERED AND ADJUDGED that:

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

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

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Lawfulness of detention—Licensee was not unlawfully detained and subjected to de facto arrest when transported from site of roadside stop on highway off-ramp to nearby parking lot for performance of field sobriety exercises where move was made for licensee's safety, move took less than one minute, and licensee agreed to move—Lawfulness of arrest—Probable cause—Although licensee's alcohol level may not have greatly impaired his ability to converse, walk, and use phone, officer had probable cause to believe licensee's ability to operate vehicle in reasonable manner was impaired to a dangerous degree based upon licensee's speeding and erratic draving—Under ongoing investigation exception to color of office doctrine, officer retained authority to request that licensee submit to breath test at county jail that was outside territorial limits of his municipality

JACK MILLER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 24-01-AP. December 11, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

(JESSICA RECKSIEDLER, J.) Petitioner Jack Miller seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department") final order sustaining the suspension of his driver's license for driving or being in actual physical control of a motor vehicle while having an unlawful alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

BACKGROUND

On December 5, 2023, at approximately 10:54 p.m., Officer Noland of the Lake Mary Police Department stopped a vehicle for speeding while traveling in the area of eastbound Interstate 4 and West Lake Mary Boulevard. The vehicle, driven by Petitioner, was traveling at 106 miles per hour in a 65 mile-per-hour zone. Officer Noland positioned behind the Petitioner's vehicle, which then changed to the left though lane and back to the middle through lane. Officer Noland activated his lights and siren, Petitioner changed to the right through lane, and he reduced his speed to approximately 77 miles per hour. Petitioner then pulled off to the far-right shoulder and continued traveling eastbound at approximately 60 miles per hour. Petitioner changed back to the right through lane and began traveling on the exit ramp to County Road 46A, where the vehicle came to a stop behind other vehicles at the red light at County Road 46A and Interstate 4. The vehicle then made an abrupt turn and parked on the far-right shoulder.

Upon making contact with Petitioner, Officer Noland observed that the Petitioner's eyes were watery, he had the odor of an alcoholic beverage coming from his breath, and his speech was slurred. Officer Noland asked Petitioner why he was driving so fast, and Petitioner stated he was just trying to get home to Jacksonville and came from Eddie V's in Orlando, where he was playing as a musician. When Officer Noland asked if he had been drinking, Petitioner told Officer Noland that he had one shot of whisky around 8:00 p.m. near Eddie V's. Officer Noland asked Petitioner what city they were in, what year it was, who the current president was, and how many quarters make up one dollar. Petitioner answered all the questions correctly except for mistakenly stating they were in Orlando when they were in Lake Mary. Petitioner stated he had been taking prescription medications.

Officer Noland asked Petitioner to step out of the vehicle and told Petitioner that he wanted to conduct a field sobriety test but was concerned for their safety by performing it on the offramp of Interstate 4. So, Officer Noland directed Petitioner's attention to the ABC parking lot, down the road and within clear sight of where they stood, told Petitioner he would take him to the parking lot to perform the test, and, depending on the results of the test, drive Petitioner safely back to his vehicle on the offramp. Petitioner agreed and voluntarily got into Officer Noland's police vehicle unrestrained. Officer Noland drove off the ramp, past two lights, and into the ABC parking lot, all of which took approximately 60 seconds. Petitioner performed the field sobriety tests, failed to walk heal to toe on his first attempt and took one step more than Officer Noland instructed. Officer Noland placed the Petitioner under arrest for Driving Under the Influence ("DUI") and transported him to the Seminole County Jail in Sanford where Petitioner agreed to take a breath test. Petitioner's breath results were .100g/210L and .106g/210L.

Petitioner's driving privileges were suspended for six months for driving with an unlawful alcohol limit, and, on February 6, 2024, the Department affirmed the suspension with its Findings of Fact, Conclusions of Law and Decision after a formal review hearing.

STANDARD OF REVIEW

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D552a] (internal citation omitted).

"In reviewing a decision of an administrative body, a circuit court in its appellate capacity cannot reweigh the evidence where there may be conflicts in the evidence nor substitute its judgment about what should have been done for that of the administrative body." *Henley v. City of N. Miami,* 29 Fla. L. Weekly Supp. 749a (Fla. 11th Cir. Ct. Jan 21, 2022), *cert. denied,* 346 So. 3d 683 (Fla. 3d DCA 2022). "If the circuit court reweighs the evidence, it has applied an improper standard of review, which 'is tantamount to departing from the essential requirements of law[.]' " *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (citing *Broward County v. G.B.V. Int'l, Ltd.,* 787 So. 2d 838, 845 (Fla. 2001) [26 Fla. L. Weekly S389a]). "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." *Dep't of Highway Safety & Motor Vehicles v. Baird*, 175 So. 3d 363, 366 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2160a] (quoting *Dusseau v. Metro. Dade County Bd. of County Commr's,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]).

ANALYSIS

In a formal review hearing pursuant to section 322.2615 for suspension of a driver's license for driving with blood-alcohol or breath-alcohol level of 0.08 or higher, the hearing officer's scope of review is limited to the following issues:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; and
>
> 2. Whether the person whose license was suspended had an unlawful blood-alcohol or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615, Fla. Stat. (2024).

"The hearing officer shall determine whether the suspension . . . is

supported by a preponderance of the evidence," and "is the sole decision maker as to the weight, relevance and credibility of any evidence presented." Fla. Admin. Code R. 15A-6.013(7)(c).

Petitioner argues that: (1) he was illegally detained and subjected to a de facto arrest without probable cause when transported to the ABC parking lot; (2) there existed no probable cause for his arrest; and (3) Officer Noland had no authority to require Petitioner to submit to a breath test and unlawfully used the color of his office and violated section 316.1932(1)(a)1.a..

No De Facto Arrest when Transporting Petitioner to the ABC Parking Lot

Petitioner contends that the suspension should be invalidated because he was illegally detained and subjected to a de facto arrest when Officer Noland transported him from the scene of the stop to a nearby parking lot. Petitioner cites section 901.151(3), Florida Statutes, and a variety of cases as support. Section 901.151(3) states that:

> No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.

Petitioner cites *State v. Evans,* 692 So. 2d 305 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1084b], in which a police deputy took the defendant to a nearby gas station to conduct a DUI investigation. In doing so, the Fourth District Court of Appeal found that the defendant had been subjected to a functional equivalent of an arrest.

However, this Court finds *Evans* and the other cases cited by Petitioner to be distinguishable. The mere act of transporting an individual to a different location does not constitute a de facto arrest. *See State v. Blocker,* 360 So. 3d 742, 751 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D867a] ("Having the defendant walk a short distance to a safer location to perform field sobriety tests did not transform a traffic stop into a de facto arrest."); *Johnson v. Dep't of Highway Safety & Motor Vehicles,* 28 Fla. L. Weekly Supp. 1067a (Fla. 13th Cir. Ct. Jan. 25, 2021) ("It was also not improper to transport Petitioner to another, safer location to perform field sobriety exercises."); *Fairman v. Dep't of Highway Safety & Motor Vehicles,* 28 Fla. L. Weekly Supp. 971a (Fla. 4th Cir. Ct. Dec. 9, 2020 ("Transporting Petitioner to a nearby parking lot so he could perform field sobriety exercises did not transform the stop into an arrest.").

In reviewing the lawful parameters of an investigatory stop, the proper inquiry is to determine whether the officer's action was reasonable under the circumstances. *Goss v. State,* 744 So. 2d 1167, 1168 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2509b]. This requires a two-fold inquiry: (1) whether the officer's action was justified at its inception; and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.*

The hearing officer had a plethora of competent, substantial evidence to deny Petitioner's motion to invalidate the suspension for being placed under de facto arrest. Officer Noland told Petitioner that he would like to conduct the field sobriety tests elsewhere because he was concerned for the safety of Petitioner by conducting the test on the shoulder of an offramp of Interstate 4. Also, after viewing Officer Noland's bodycam footage presented to the hearing officer, this Court observed that it took only one minute driving time to get from the stop to the ABC parking lot, which was in clear view of the Petitioner and Officer Noland from the initial stop. Further, Petitioner agreed to travel to the parking lot in Officer Noland's vehicle to perform the tests. Under the circumstances, the transportation of Petitioner to the ABC parking lot was reasonable and no de facto arrest was made.

Probable Cause to Arrest Petitioner

Petitioner contends that there was no probable cause for the arrest made at the ABC parking lot. Firstly, Petitioner contends that the hearing officer's final decision was not based on competent, substantial evidence because Officer Noland's bodycam footage contradicts Noland's testimony. According to Petitioner, the video evidence shows that he was coherent, not slurring his words, walking normally, and able to perform the field sobriety tests. In support, Petitioner cites *Wiggins v. Dep't of Highway Safety and Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a], where real-time video established there was no competent, substantial evidence to support the suspension of Wiggins' driver's license despite allegations in the police report. The Florida Supreme Court in *Wiggins* stated:

> It follows that a competent, substantial evidence analysis demands an honest look at the evidence available. Otherwise, we are asking judges to simply parrot the findings of the hearing officer . . . . To hold that a judge on first-tier certiorari review must accept testimony that, as here, is clearly contradicted and totally refuted by objective video evidence, would be an injustice to Florida drivers.

Id. at 1173.

Secondly, Petitioner contends that he showed no signs of impairment to justify probable cause needed for the arrest. Petitioner cites *Shaw v. State,* 783 So. 2d 1097, 1098 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D701b], which defines "impaired" to mean a worsening or diminishment of normal faculties in some "material respect," and Petitioner claims that the facts do not show any material diminishment to his faculties as he was able to walk and talk normally. Petitioner notes that the odor of alcohol or watery eyes alone does not impair normal faculties. *See A.N.H. v. State,* 832 So. 2d 170, 172 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2433a].

This Court finds that the hearing officer had competent, substantial evidence to affirm that Officer Noland had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances. Probable cause to arrest exists where the totality of the facts and circumstances within the officer's knowledge are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." *Stone v. State,* 856 So. 2d 1109, 1111 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2415a]. A law enforcement officer need not eliminate all possible defenses to reach a finding of probable cause. *State v. Riehl,* 504 So. 2d 798, 800 (Fla. 2d DCA 1987). Many factors may contribute to a finding of probable cause for a DUI arrest, including the odor of alcohol, speeding, erratic driving, slurred speech, admissions, and poor performance on field sobriety exercises. *See Mathis v. Coats,* 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b]; *State v. Leifert,* 247 So. 2d 18, 19 (Fla. 2d DCA 1971) (weaving on roadway and odor of alcohol from vehicle constituted probable cause); *Dep't of Highway Safety & Motor Vehicles v. Jones,* 935 So. 2d 532, 534 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1518a] ("[F]ailure to maintain a single lane alone, can under appropriate circumstances, establish probable cause."); *Maharaj v. Dep't of Highway Safety and Motor Vehicles,* 27 Fla. L. Weekly Supp. 990c (Fla. 10th Cir. Ct. Jan. 7, 2020) (probable cause was found where petitioner was driving 96 mph in a 70 mph zone, officer observed odor of alcohol coming from petitioner, petitioner had bloodshot eyes and admitted to drinking).

Officer Noland observed many signs that, taken together, establish probable cause for Petitioner's arrest. Petitioner changed lanes erratically, admitted to drinking, slurred his speech, had an odor of alcohol coming from his face and watery eyes, and performed less than ideal on the field sobriety tests. Perhaps most importantly, when taken into consideration with signs of alcohol consumption, Petitioner was excessively speeding and traveling 40 miles per hour *over* the

speed limit and 60 miles per hour on the shoulder of Interstate 4. There is no evidence in the record to suggest that the reason for Petitioner's excessive speeding is the result of anything but his alcohol consumption or combined alcohol and prescription drug use.

This Court watched Officer Noland's bodycam footage and observed that the footage shows Petitioner being able to hold a conversation, keep his balance, and even navigate his phone to be able to bring up his insurance information. However, neither signs of general impairment nor mere impairment to one's ability to talk, walk, or use one's phone are ultimate tests for determining when a driver is "under the influence." The courts have recognized that "under the influence" pertains to:

> Any condition where intoxicating liquor [or chemical substances] has so far affected the nervous system, brain or muscles of the driver so as *to impair, to an applicable degree, his ability to operate his automobile* in the manner that an ordinary, prudent and cautious man, in full possession of his faculties, using reasonable care, would operate or drive under like conditions.

State v. Brown, 725 So. 2d 441, 443 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a] (quoting Black's Law Dictionary 1369 (5th ed. 1979)). Although Petitioner's alcohol use might not have greatly impaired his ability to converse, walk, or use his phone, there is competent, substantial evidence that it did impair, to an applicable and dangerous degree, his ability to operate his vehicle in a manner that an ordinary, prudent and cautious man, using reasonable care, would operate under like conditions.

Authority to Require Petitioner to Submit to a Breath Test

Petitioner contends that Officer Noland did not have the authority to require him to submit to a breath test because Noland took him to the Seminole County Jail in Sanford to conduct the test, which is outside Noland's Lake Mary jurisdiction. Petitioner cites *State v. Repple*,[1] a case in which the Sixth District Court of Appeal upheld the color of office doctrine,[2] by holding that a Maitland police officer did not have the authority to request the breath test of a DUI defendant when the officer was outside of his territorial limits of Maitland. *State v. Repple,* 49 Fla. L. Weekly D1296a (Fla. 6th DCA June 14, 2024). The Sixth District Court of Appeal acknowledged that its holding was in direct conflict with the Fifth District Court of Appeal's decision in *State v. Torres,* which recognized a court-created exception to the color of office doctrine. *Id.* (citing *State v. Torres,* 350 So. 3d 421 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2241a]). In *Torres,* the Fifth District Court of Appeal recognized an ongoing investigation exception to the color of office doctrine and held that an officer retained the authority to request the defendant submit to a breath test, while the officer was outside territorial limits of his municipality, as part of an ongoing DUI investigation. *Torres,* 350 So. 3d at 426. The court found that the color of office doctrine did not preclude the officer, as part of his ongoing investigation that originated inside the municipal city limits, from then taking the defendant to a breath test center outside of the city limits and requesting defendant to submit to a breath test there. *Id.*

This Court agrees with the Department that a hearing officer cannot be found to have departed from the essential requirements of law when he or she followed binding case law governing the issue. *See, e.g., Dep't of Highway Safety & Motor Vehicles v. Chakrin,* 304 So. 3d 822, 830-31 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2329a] ("it is not within the jurisdiction or task assigned to a circuit court reviewing an agency order in a petition for writ of certiorari to ignore or overturn otherwise binding precedent of the district court in which it sits"); *Nader v. Dep't of Highway Safety & Motor Vehicles,* 87 So. 3d 712, 724 (Fla. 2012) [37 Fla. L. Weekly S130a] ("if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it") (quoting *Pardo v. State,* 596 So. 2d 665, 667 (Fla. 1992)). *Torres* is binding case law; therefore, the ongoing investigation exception to the color of office doctrine applies in this case. As such, Officer Noland had the necessary authority to request that Petitioner submit to a breath test.

Based upon the foregoing, it is hereby **ORDERED** and **ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. (CHASE and SOUTO, JJ., concur.)

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[1]Also, Petitioner cites section 316.1932(1)(a)1 .a., Florida Statutes, which states that the breath test must be administered "at the request of a law enforcement officer."

[2]Color of office doctrine in this case pertains to the doctrine that when an officer obtains evidence by using the appearance of official power, in a jurisdiction where the officer has no power, the officer is said to act unlawfully under the "color of office." *See Repple,* 49 Fla. L. Weekly D1296a.

* * *

Municipal corporations—Code enforcement—Building permits—Special magistrate correctly found homeowners to be in violation of building code where permit for construction of their new home expired due to inaction, and homeowners did not act effectively to renew permit—Extension given after expiration of permit was invalid where request for extension did not meet requirements that extension be granted prior to expiration of permit and be based on written request citing valid justification—Section 252.363, Florida Statutes, which tolled the expiration of certain permits due to Hurricane Ian, does not provide relief where statute applied to valid permits existing as of September 2022, and homeowners' permit had expired in April 2022—No merit to argument that demolition of existing structure on property preparatory to construction of new home should count as construction work where demolition work was covered under separate permit, and floodplain code defines "start of construction" as first placement of permanent construction of building—No merit to argument that Village's adoption of FEMA's new Flood Insurance Rate Maps violated section 252.363 prohibition on taking advantage of regional destruction to adopt more stringent development requirements where building code in effect when permit was pulled provided that property would be subject to any revision of FIRMs, any such effect of statute would be preempted by federal law, and section 553.73(5) specifically permits adoption of new FIRMs—Equitable estoppel—Fact that building department staff erroneously issued "extension" of already expired permit and inspected work in response to subsequent inspection requests does not give rise to application of equitable estoppel where homeowners were on constructive, if not actual, notice of requirement to keep project moving or make timely supported request for extension and that mere issuance of permit was no guarantee of compliance with floodplain regulations—Mere fact that compliance with new floodplain regulations would be financially burdensome does not justify estoppel

ROBERT GRADY and LORI GRADY, Appellants, v. THE VILLAGE OF ESTERO, a Florida municipal corporation, Appellee. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County. Case No. 24-CA-6519. L.T. Case No. 24020027. January 21, 2025. On Appeal from the Village of Estero Code Compliance.

FINAL ORDER

(ALANE LABODA, J.) This is an appeal from a final administrative order rendered by the Village of Estero Special Magistrate following a code enforcement hearing finding the Appellants in violation of the Florida Building Code, adopted by the Village. This court has jurisdiction pursuant to Florida Statutes § 26.012(1) and § 162.11. The matter having come before the Court after brief for Oral Argument on January 7. 2025 and the Court having reviewed the pleadings, heard the argument of counsel and been duly advised in the premises, hereby finds as follows:

PROCEDURAL BACKGROUND

The Village's code enforcement hearing took place on July 18th 2024 before Special Magistrate Jospeh Faerber, who heard evidence and entertained arguments from counsel. Special Magistrate Faerber reserved ruling and required the parties to present legal memoranda to him within 15 days after the transcript had been prepared and sent to the parties. **R 232**. However, Magistrate Faerber passed away before the transcript was issued, and the Parties subsequently consented to allow the case proceed for final disposition to the Village's Acting Code Enforcement Special Magistrate, Robert Pritt, based on the record of the hearing that had taken place before Magistrate Faerber, legal arguments submitted by the Parties, as well as any final arguments at a subsequent hearing. **R 667**. Magistrate Pritt issued his initial order (**R 666-674**), and Appellants timely filed a motion for reconsideration. **R 677-683**. On September 23rd 2024, Magistrate Pritt issued an order denying Appellants' motion for reconsideration. **R 687-689**. This appeal followed.

The standard of review of the Village of Estero's Special Magistrate's conclusions of law is de novo. *Orange County Fire Fighters Association, I.A.F.F. Local 2057 v. Orange County Board of County Commissioners*, 363 So.3d 119 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1144b]. A lower court's factual findings are reviewed under a competent, substantial evidence standard. *MTGLQ Investors, L. P. v. Moore*, 293 So.3d 610 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D833a].

FACTS

This case came before Special Magistrate Joseph Faerber on the Village of Estero's Notice of Violation dated April 5, 2024, to the Appellants Robert Grady and Lori Grady, husband and wife, regarding the construction of a new home on property they own located at 4723 Riverside Drive, Estero FL 33928. **R 144-146**. The notice alleged "work being done to the property requires a building permit from the Village." At the hearing, the Village Building Official, Matt Ingersoll, clarified that, while there was a permit issued authorizing the work, the permit expired as of April 30, 2022, as "it went 180 days without a passed inspection." **R 310**.

It is undisputed that the Grady's received a building permit to construct a home at 4723 Riverside Drive on November 1st 2021. **R 70-74**. The original house on the parcel was built in the 1960s, and the Appellants bought it in 2017 intending to tear it down and build a new home for themselves. **R 400-01**. The Appellants have lived in another home in the same neighborhood, less than 1,000 feet from the subject property. **R 400**. Unfortunately (but relevant to this case which surrounds enforcement of flood prevention regulations), since Hurricane Ian the Appellants had to live in a trailer in front of their home (less than 1,000 feet from the subject property) for some time because their home flooded and incurred damage. **R 415**.

Village employee Robert Wiley reviewed the Village's records and developed the relevant timeline (**R 344**) leading to the code violation is as follows:

- Requirement: Must have its first partial/passed inspection within **180 days**
- Per the Building Code provisions cited in Appellants' Initial Brief *Initial Brief,* pgs. 19-21), the permit became null/void/invalid on April 30, 2022
- On October 18th 2022, Appellants' contractor sought a footer/foundation Inspection
- Time Interval between 11-1-21 and 10-18-22: **351 days**
- Under the relevant Building Code provision, the original permit had expired as a matter of law prior to this first inspection

On January 27th 2021, the Village adopted the current Florida Building Code (FBC) in Village Code § 1-902. **R 296**. In this case, the Building Official conceded that the Building Department should not have inspected the footer/foundation since the underlying permit was already void per the FBC. The record confirms this was not the only oversight on the part of the Building Department. On June 26th 2023, a Building Department employee granted a 90-day "permit extension."

- Building Code Requirement: Once the first partial/passed inspection occurs, permit holder has 90 days to have its next partial/passed inspection.
- The time interval from Footer/Foundation Inspection to Permit Extension: **251 days**
- Even setting aside the initial expiration of the 180 days, the permit had again expired a second time prior to the extension since 251 days is longer than 90 days

R 48; 113; 299; 345-348.

The Building Official concedes the June 2023 "extension" should not have been granted. As noted in Appellants' *Initial Brief*, on November 16th 2022, the Village Council had adopted new FEMA flood maps. This, in turn, changed the base flood elevation for construction, making revisions to the plans necessary if an extension were to be properly granted in a way which would be compliant with both the Florida Building Code and with the National Flood Insurance Program (NFIP).

Of further significance in the timeline begun herein;

From the "Permit Extension" to the next inspection:

- September 29th 2023: Underground Plumbing Inspection
- Time interval from permit extension to Underground Plumbing Inspection: **95 days**
- Again setting aside that the initial permit had become void, the "extended" permit had expired a third time as more than 90 days elapsed.

Underground Plumbing Inspection to Slab Inspection:

- October 6th 2023: Slab Inspection
- Time interval from Plumbing Inspection to Slab Inspection: **7 days**

Slab Inspection to Tie Beam Inspection:

- November 3rd 2023: Tie Beam Inspection
- Time interval from Slab Inspection to Tie Beam Inspection: **28 days**

Tie Beam Inspection to Sheathing Roof Inspection: [Sheathing Wall inspection on same date)

- April 9th 2024: Sheathing Roof Inspection
- Time interval from Tie Beam Inspection to Sheathing Roof Inspection: **158 days**
- Yet again, setting aside that the initial permit had become void, the "extended" permit had expired a fourth time as more than 90 days had elapsed.

R 48; 113; 299; 345-348.

On April 8th 2024, FEMA issued a formal notice to the Village of Estero indicating that FEMA had

> *determined that your community is no longer in compliance with the National Floodplain Insurance Program's (NFIP) Minimum Floodplain Management Standards" and that this finding was in part due to "the large amount of unpermitted work in the Special Flood Hazard Area (44 CFR 60.3(b)(1)), failure to maintain permit records for development in the SFHA (44 CFR 60.3(b)(1)), and failure to maintain substantial damage and substantial improvement records for development in the SFHA (44 CFR 60.3(b)(5); 44 CFR 59.22(9)(iii).*

R 108. FEMA gave the Village a deadline to take measures to address these deficiencies (**R 354**), and provided a list of properties to the Village which included that of Appellants. **R 274**. On April 18th 2024,

Village Project Manager Robert Wiley (**R 342**) (who was a point-person working with FEMA on the violations) emailed Building Official Ingersoll about Appellants' property which contained the following:

Are you going to cancel the permit and notify the owner this Friday (4-19-24). I need to provide some documentation to FEMA so (sic) show we either:

1. voided (cancelled, or whatever) the expired permit and notified the owner of what needs to be done, or

2. we improperly extended it in violation of the effective base flood elevation requirement.

Please let me know. I have a meeting with FEMA at 10:00 a.m. this Friday.

R 114. Mr. Wiley is a licensed engineer, and a certified floodplain manager. **R 343**. It is undisputed that the Building Official issued a Stop Work Order on the property on April 25th 2024 (**R 277; 299**), and that the Village's Code Compliance Manager issued code violation warnings and notices on January 8th, February 10th, and February 13th 2024 (**R 277-78**) which ultimately resulted in the Special Magistrate hearing.

LEGAL ANALYSIS

The initial permit (which was lawfully applied for and issued) expired by force of law (the Florida Building Code) on April 30th 2022 due to inaction. Appellants argue that staff review of inspection requests made by Appellants' contractor would not be enough to establish work was not progressing. However, the record confirms that this was not all the Village relied on. As Mr. Wiley testified, when he began examining the timeline in this matter, he not only reviewed the Village's permitting system's records, but he conducted online research using Google Earth and Google Street View features to view the parcel over the relevant period. He confirmed in his testimony that this photographic evidence also supported that the project was not moving up to the time the permit expired. **R 389-392**. While the Building Code provisions do allow for extensions of an existing permit *before it expires*, when the Building Official's extensions were granted, the Court finds that Appellants' permit had already expired as a matter of law, and no permit was then existing to "extend."

Even if a permit was validly existing at the points where the timeline shows extensions were given, the Court finds the June 26th 2023 extension given was invalid; as the the Florida Building Code expressly requires that extensions must be based on a *written request* citing valid justification, and the record confirms Appellants' contractor only submitted one written extension request on April 5th 2023 (stating the *"job was put on hold due to Hurricane Ian, estimated time to complete 14 months, footer was dug but not poured when Hurricane Ian hit, owner delayed construction due to his personal home damage from Hurricane Ian."*) The written justification does not explain or even reference the long delay between November 1st 2021 and April 30th 2022 (pre-Hurricane Ian). The Court finds this does not comport to the Florida Building Code requirements.

Appellants reference Florida Statutes § 252.363 (tolling the expiration of certain permits including building permits due to Hurricane Ian) but then also suggest they are not actually arguing same. However, for the sake of completeness, the Court notes that the statute referenced does not provide the relief suggested by Appellants. The statute was amended to include the *post* Hurricane-Ian tolling language via § 14 of Chapter Law 2023-304. Its terms clearly state it is retroactive to *valid permits* existing as of September 2022. But, as the timeline entered into the record and testified to by the Building Official and Mr. Wiley shows, Appellants' permit had expired as a matter of law in April of 2022. Thus, there was not permit in place on September 2022 for the statute to apply to.

Even if the 2023 amendments to the statute were to be read in the manner Appellants seek, it would be preempted by federal law (Mr. Wiley confirmed FEMA regulations require NFIP participants to adopt new flood maps), and would act as an impairment of the Village's agreement with FEMA to participate in the NFIP.

Returning to the record's support that the initial permit (which was lawfully applied for and issued) expired by force of law (the Florida Building Code) on April 30th 2022 due to inaction , Building Official Ingersoll testified:

So, once they had the permit in hand in November, the failure to have an inspection for any six-month period makes it null and void. So from that point on, they technically didn't have a permit.

R 298. Ingersoll admitted that the matter did not *"come onto [his] radar"* until April of 2024 after FEMA's letter (**R 302**), when it was brought to his attention, he *"did look up the permit that day, and I went ahead and moved it into the expired status in the system."* **R 303**. The Building Official also confirmed that thereafter, someone in his office still allowed the contractor to call for inspections. However, he confirmed that under the FBC, only the Building Official can make expiration determinations; thus those subsequent inspections were invalid, as they were based on an expired permit. **R 303**.

While the FBC provisions do allow for extensions of an existing permit *before it expires*, when the Building Official's extensions were granted, Appellants' permit had already expired as a matter of law, and no permit was then existing to "extend." See Appellants' own *Initial Brief* at pgs. 20-21 recounting Building Code provisions expressly providing a permit "shall become invalid" unless the work is "suspended or abandoned for a period of 6 months after the work is commenced", that if a permit becomes invalid, "a new permit covering the proposed construction shall be obtained" before continuing the work, and that the new permit would need to satisfy "any regulations which may have become effective between the date of expiration and the date of issuance of the new permit." While Appellants' *Initial Brief* takes issue with which FBC number the Building Official cited as the relevant Building Code section during his testimony, Appellants do not dispute the existence of these provisions, and it is these provisions which the Building Official testified he relied upon in finding (albeit only after FEMA's letter drew his attention to the matter) the permit had expired.

Appellants argue that the demolition of the residential structure which had previously been situated on the site should count toward the court's assessment of their keeping the project on track. Setting aside that Appellants admit that demolition was covered by a separate permit not the subject of the code enforcement action, § 7-303 of the Village's floodplain code defines "start of construction" as:

> The date of issuance of permits for new construction and substantial improvements, provided the actual start of construction, repair, reconstruction, rehabilitation, addition, placement, or other improvement is within 180 days of the date of the issuance. The actual start of construction means either the first placement of permanent construction of a building (including a manufactured home) on a site, such as the pouring of slab or footings, the installation of piles, the construction of columns.

https://library.municode.com/fl/estero/codes/land_development_code?nodeId=CH7NARE_S7-3FLHAREST_7-303DE.

Appellants argue that the Village's adoption of FEMA's new FIRM in November 2022 violated the 2023 version of Florida Statutes § 252.363 because the new FIRM was a "more restrictive or burdensome procedures concerning review, approval, or issuance of a site plan, development permit, or development order. . ." *Initial Brief*, pg. 13. The Court finds that the statute does not provide the relief argued by Appellants.

First, while Appellants are correct that the Village adopted FEMA's new Flood Insurance Rate Maps via Ordinance 2022-17[1] on November 16th 2022, their suggestion that this adoption would violate the Chapter Law 2023-304 is not be supported by the law. The FBC's definition section in effect prior to Appellants' permit being pulled and prior to the lookback period of the Chapter Law provides in relevant part:

CHAPTER 2 DEFINITIONS

SECTION 202 DEFINITIONS

BASE FLOOD ELEVATION. The elevation of the base flood, including wave height, relative to the National Geodetic Vertical Datum (NGVD), North American Vertical Datum (NAVD) or other datum specified on the Flood Insurance Rate Map (FIRM).

In addition, Village Code § 7-3 addresses *Flood Hazard Reduction Standards.* Section 7-301(A)(4), provides:

Warning. The degree of flood protection required by this section and the Florida Building Code, as amended by the Village of Estero, is considered the minimum reasonable for regulatory purposes and is based on scientific and engineering considerations. Larger floods can and will occur. Flood heights may be increased by man-made or natural causes. This section does not imply that land outside of mapped special flood hazard areas, or that uses permitted within such flood hazard areas, will be free from flooding or flood damage. The flood hazard areas and ***base flood elevations contained in the Flood Insurance Study and shown on Flood Insurance Rate Maps and the requirements of 44 CFR Secs. 59 and 60, may be revised by the Federal Emergency Management Agency, requiring this community to revise these regulations*** to remain eligible for participation in the National Flood Insurance Program. ***No guaranty of vested use, existing use, or future use is implied or expressed by compliance with this section.***

In sum, the Court finds Appellants had no vested right to rely on FEMA FIRMs to remain static, and they were on notice that if FEMA revised its FIRMs, their property would be subject to such changes, subject only to their being already under active construction via a valid (not expired/abandoned) permit.

Next, the Village's 2022 ordinance does not adopt any new "*procedures*." Rather, it adopts Flood Insurance Rate Maps. Using the plain meaning of the word "procedures", clearly the ordinance did not adopt a procedure. Even if § 14 of Chapter Law 2023-304 were to be read in the manner Appellants seek, it would act as an impairment of the Village's agreement with FEMA to participate in the NFIP. As a participant in the NFIP, the Village is responsible for making sure that its floodplain management regulations meet or exceed the minimum requirements of the NFIP. By law, the Department of Homeland Security's Federal Emergency Management Agency (FEMA) cannot offer flood insurance in communities that do not adopt and enforce those regulations, which can be found in Title 44 of the Code of Federal Regulations (CFR), § 60.3. As FEMA's own publication # 495, *Adoption of Flood Insurance Rate Maps by Participating Communities*, January 2019, provides:

What must an NFIP-participating community do when FEMA provides new or revised flood hazard data?

Each time FEMA provides your community with new or revised flood hazard data, you must either adopt new floodplain management regulations to incorporate the data into your ordinance or amend the existing ones to reference the new FIRM and FIS report.

When must a community adopt the new or revised flood hazard data?

Your community must amend its existing floodplain management regulations or adopt new regulations before the effective date of the FIRM and FIS report, which is identified in the LFD. The LFD initiates the six-month adoption period.

Communities are encouraged to adopt the appropriate floodplain management regulations as soon as possible after the LFD is issued. The adopted regulations must be submitted to FEMA and the State and be approved by FEMA before the effective date of the FIRM and FIS report.

https://www.fema.gov/sites/default/files/2020-07/fema_adoption-flood-insurance-rate-maps-participating-communities_bulletin.pdf.

Inasmuch as the Village is a participant in the NFIP, it is bound by federal law to adopt new FIRMs promulgated by FEMA. **R 350**. To the extent a court would ignore the Village's position that the adoption of the latest FIRM is not a new more restrictive regulation because the rules were already in the books for years that any new map would be adopted and warning owners of that fact, the court would be required to find that § 14 of Chapter Law 2023-304, as applied to the adoption of new FEMA FIRMs, would be preempted by federal law. Indeed, for the court to rule otherwise would mean that the Village would be removed from the NFIP, all properties in the Village would no longer be able to obtain flood insurance, which in turn would impair the ability to mortgage most properties in the Village, not to mention the Village's loss of ability to obtain FEMA disaster assistance and grants in the aftermath of a disaster. And all that just so Appellants could proceed with construction of a home which had (for whatever financial or logistical reasons), not been constructed according to the FBC/permit timelines.

Further, the common law rules of statutory construction adopted by Florida's courts over time further support that the statute does not apply in the manner advocated by Appellants:

if a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, the Court will examine the entire act and those *in pari materia* in order to ascertain the overall legislative intent.

Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So.2d 1260, 1265-66 (Fla. 2008) [33 Fla. L. Weekly S493a] (brackets omitted). "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." *Fla. Dep't of State v. Martin*, 916 So.2d 763, 768 (Fla. 2005) [30 Fla. L. Weekly S780a]. As part of this inquiry, we must address the legislation "as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence." *Bautista v. State*, 863 So.2d 1180, 1185 (Fla. 2003) [28 Fla. L. Weekly S849a].

In this case, the Legislature did adopt the post-hurricane amendments to Florida Statutes § 252.363 to, as a general proposition, preclude local governments from taking advantage of major regional destruction to adopt more stringent development requirements on landowners. However, Appellants ignore the existence of Florida Statutes § 553.73(5), which provides, in relevant part:

Notwithstanding subsection (4), counties and municipalities may adopt by ordinance an administrative or technical amendment to the Florida Building Code relating to flood resistance in order to implement the National Flood Insurance Program or incentives. Specifically, an administrative amendment may assign the duty to enforce all or portions of flood-related code provisions to the appropriate agencies of the local government and adopt procedures for variances and exceptions from flood-related code provisions other than provisions for structures seaward of the coastal construction control line consistent with the requirements in 44 C.F.R. s. 60.6. A technical amendment is authorized to the extent it is more stringent than the code. A technical amendment is not subject to the requirements of subsection (4) and may not be rendered void when the code is updated if the amendment is adopted for the purpose of participating in the

> Community Rating System promulgated pursuant to 42 U.S.C. s. 4022, the amendment had already been adopted by local ordinance prior to July 1, 2010, or the amendment requires a design flood elevation above the base flood elevation.

Read together, the two statutes can be interpreted as generally prohibiting adoption of more stringent regulations after the hurricane, but specifically allowing for the adoption of new FIRMs. Indeed, another rule of statutory construction reaches the same result. The Florida Supreme Court ruled in *Adams v. Culver*, 111 So.2d 665 (Fla. 1959), that

> [i]t is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation "the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any." It has been said that this rule "is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision."

Id. at 667 (citations omitted)

In this case, the Court finds Florida Statutes § 553.73(5) is the more specific statute and expressly permits the adoption of new FIRMs. Indeed, since this statute predates the Legislature's post-Ian amendments to Florida Statutes § 252.363, the fact that the Legislature did not seek to reference the former in the later, or to amend the former to be in accord with the later, is a strong indication of legislative intent to allow local governments to continue to adopt new FIRMs if and when FEMA issued them.

In sum, once FEMA issued its final 2022 flood maps covering the Village, the Village was well with in its rights to adopt those new flood maps. Indeed, adoption of the most current FEMA FIRM is a requirement of participation in the NFIP, and the Village had a legal obligation to FEMA (as an NFIP participant) to adopt the new FIRM. Were Florida Statutes § 252.363 to be interpreted as prohibiting the Village from complying with its contractual obligation as an NFIP participant to adopt the most current FIRM and to otherwise enforce FEMA's floodplain standards (which is the Village's contractual consideration in exchange for FEMA's willingness to sell flood insurance in the Village, and to provide post-disaster grants to the Village), it would arguably be an impairment of the Villages contract.

Turning next to Appellants' equity arguments, the Court concurs with the Village's position that possession of a building permit does not necessarily create a vested property right. *City of Boynton Beach v. Carroll*, 272 So.2d 171, 173 (Fla. 4th DCA 1973). While acknowledging that Appellants earnestly believe that the new flood elevation should not apply to them, when they obtain a new permit to resume construction, the Village would not be estopped from requiring compliance with the new base flood elevation mandated by the new FIRM, especially since the initial permit had become void due to the passage of 180 days from November 1st 2021. See, *City of Delray Beach v. DeLeonibus*, 379 So.3d 1177 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D284a] (when initial permit had been disavowed by city due to building official's erroneous action, and owners withdrew their application for a special exception and decided to proceed with construction under the initial permit (which the city had repudiated), and the city then changed the regulations, the owners were required to comply with the new regulations).

The basis of estoppel (an equitable doctrine) is that the alleged reliance must be reasonable. In this case, Appellants acted through a general contractor. The general contractor obtained the permit in November of 2021. The record confirms the permit had the following provision:

> **Once a permit is issued, it has 180 calendar days to have its first Partial/Passed inspection. Once the first Partial/Passed inspection occurs, the permit has 90 days to have it's next Partial/Passed inspection. Failure to meet these deadlines will result in expiration of the permit.**

While Appellants argue with the precision of this wording and lack of direct citation to the corresponding FBC sections, the legal point is that they (and their agent, the contractor) knew or should have known that they were required to obtain a first inspection by April 30th 2022, and to then keep the project moving, or to request an extension of the permit prior to it expiring. Appellants (through their contractor) failed to do so, and failed to submit a written request for extension prior to that time. None of which the Court finds reasonable. This then makes it a tenus argument at best to claim that equity allows them to benefit from the subsequent erroneous "extensions" given by the building department's staff to a permit that Appellants knew, or should have known, was void and expired as explained both in the Building Code, and on the face of the Permit document.

Further, while Mr. Grady testified at a significant expense to add 8 inches to his foundation, this is self-serving assertions of a substantial economic burden, with no actual cost documents, quotes from vendors, or similar evidence entered into the record, Appellants cannot make even a showing of substantial loss. See, *City of Jacksonville v. Coffield*, 18 So. 3d 589, 596 n.6 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D704a] (the party asserting equitable estoppel has the burden to prove facts giving rise to the estoppel).

Even if a permit was validly existing at the points where extensions were given, the June 26th 2023 extension was invalid since the law (the Florida Building Code) expressly requires that extensions must be based on a written request citing valid justification and your clients' contractor only submitted one written extension request on April 5th 2023 (stating the "job was put on hold due to Hurricane Ian, estimated time to complete 14 months, footer was dug but not poured when Hurricane Ian hit, owner delayed construction due to his personal home damage from Hurricane Ian".) and the written justification does not explain or even reference the long delay between November 1st 2021 and April 30th 2022 (pre-Ian).

While the doctrine of equitable estoppel certainly can apply to a local government exercising its zoning power, it can be invoked against a governmental entity "only in rare instances and under exceptional circumstances." *State Dep't of Rev. v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981). In this case, the Special Magistrate found that the building department did not have the authority to issue extensions of the building permit to Appellants' contractor because the permit had already expired under the Building Code due to lack of record activity. If the FBC provides that a permit "shall" expire, then the Building Official has no authority to "revive" one when it does. This conclusion is supported by appellate authority. See, *Corona Properties of Florida, Inc. v. Monroe County*, 485 So.2d 1314, 1317 (Fla. 3d DCA 1986):

> Since neither section grants the Monroe County Zoning Official the authority to determine when a property owner's rights have vested, the vested rights letter and the 1983 permit issued pursuant to such letter are *ultra vires* and *void ab initio.* See *Edwards v. Town of Lantana*, 77 So.2d 245 (Fla. 1955;) *Abenkay Realty Corp. v. Dade County*, 185 So.2d 777 (Fla. 3d DCA), appeal dismissed, 192 So.2d 495 (Fla. 1966).

It has been expressly held that "when there is no authority to grant the building permit, the governmental entity cannot be estopped from revoking the permit." *Town of Lauderdale-By-The Sea v. Meretsky*, 773 So. 2d 1245, 1249 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2846a]; *Corona Props. of Fla., Inc. v. Monroe County*, 485 So. 2d

1314, 1317 (Fla. 3d DCA 1986) ("Ordinarily, a governmental entity may not be estopped from the enforcement of its ordinances by an illegally issued permit."); *Dade County v. Gayer*, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980) ("[I]t would be inconceivable that public officials could issue a permit, either inadvertently, through error, or intentionally, by design, which would sanction a violation of an ordinance adopted by the legislative branch of the government.").

In this case, the building department staff erroneously issued an "extension" of an already expired permit, and responded to subsequent inspection requests by inspecting the work. Building Official Ingersoll accepted these were not properly done and expressed "the regret of our department." **R 325**. But these administrative errors (while not acceptable and demonstrating the need for greater tracking and coordination within the building department) do not give rise to the application of an equitable remedy for Appellants. Appellants were on constructive, if not actual notice of the Building Code's requirement to keep a project moving or to submit a timely, supported extension request prior to permit expiration. And Appellants were also on notice that the mere issuance of a building permit was no guarantee of compliance with the Village's floodplain regulations. For instance, Village Code § 7-301(D)(5) and (6) provide:

> The issuance of a floodplain development permit or approval in accordance with this section shall not be construed to be a permit for, or approval of, any violation of this section, the Florida Building Codes, or any other Village regulations. The issuance of permits based on submitted applications, construction documents, and information will not prevent the Floodplain Administrator from requiring the correction of errors and omissions.
>
> The Floodplain Administrator is authorized to suspend or revoke a floodplain development permit or approval if the permit was issued in error; on the basis of incorrect, inaccurate, or incomplete information; or in violation of this section or any other section, regulation, or requirement of the Village.

https://library.municode.com/fl/estero/codes/land_development_code?nodeId=CH7NARE_S7-3FLHAREST_7-30 lAD.

Assuming Appellants' contention that adding 8 inches to the stem wall of the structure (which as confirmed by the photographs remains exposed concrete) would be extremely financially burdensome, a "harsh result" alone cannot allow equity to mandate a building official take an unlawful act:

> [w]hile at first blush it seems that the application of the rule may be harsh, it would be inconceivable that public officials could issue a permit, either inadvertently, through error, or intentionally, by design, which would sanction a violation of an ordinance adopted by the legislative branch of government. Only the duly constituted members of the Metropolitan Dade County Commission enjoy that prerogative and then only in accordance with established procedure.

Dade County v. Gayer, 388 So.2d 1292, 1294 (Fla. 3d DCA 1980), review denied, 397 So.2d 777 (Fla. 1981).

The Court finds that Florida law does not stand for the proposition that the owner of a structure built pursuant to an illegally-issued permit is entitled to keep that structure so long as 'a lot of money' was spent. Indeed, if anything, the opposite is true. See, *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191 (Fla. 4th DCA 2001) [27 Fla. L. Weekly D66a], wherein the court required a developer to demolish and remove five multi-story apartment buildings it had built because the government's approval of the development was a violation of the county comprehensive plan. The developer had argued that the remedy of tearing the buildings down was inequitable as it would lose $3.3 million. While in this case the issue is not an illegally issued permit but instead a permit that became void as a matter of law, the analysis is the same. Building Official Ingersoll testified that in his application of the FBC, his department could not "extend" a permit that had already expired. **R 325**. In applying equity, the courts cannot order a regulatory official to do an act not permitted by law.

CONCLUSIONS OF LAW

The Court finds that the Building Official applied the correct Florida Building Code standard in this case, albeit in a delayed manner. The Grady's and their contractor were on actual and constructive notice of the need to advance their project in a timely manner or timely seek a permit extension. They did neither and the record does not support the Court's applying equitable doctrines; to which the Grady's had the harden of proving at the hearing and failed to do so.

WHEREFORE, based on the foregoing, the decision of the Estero Special Magistrate is therefore **AFFIRMED**.

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[1]Appellants suggest in their *Initial Brief* that they "did not receive notice" of the ordinance, hinting at a denial of due process. However, Florida Statutes § 166.041 provides for the procedure municipalities must use to adopt ordinances, and Mr. Grady admitted in his testimony that he was simply unaware of the ordinance, and was also unaware of the adoption process. **R 419**. Merely being personally unaware of an ordinance's adoption does not excuse a party from being governed by it so long as it was adopted pursuant to the statutory process (which the record confirms it was), and Mr. Grady admitted that simply because he did not personally see the title and public hearing advertisement did not make the ordinance invalid. **R 420**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Evidence—Unsigned DDL-1 traffic citation, was admissible at formal review hearing where issuing officer testified under oath that she had issued citation—Unsigned DDL-6, supplemental narrative report, was admissible where document was electronically signed—Actual physical control of motor vehicle—No merit to argument that there was no competent substantial evidence to support finding that there was probable cause to believe licensee was in control of motor vehicle while under influence where officers' reports and testimony reflect that licensee was only person in area of single vehicle crash, licensee had injuries consistent with crash, and officers observed multiple indicia of impairment

ELIZABETH JOAN CATUDAL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 23AP6. December 16, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JOSEPH G. FOSTER, J.) THIS CAUSE comes before the Court on Petitioner's "Petition for Writ of Certiorari," filed May 10, 2023, pursuant to Fla. Stat. § 332.2615(13) and Fla. Stat. § 322.31. Having reviewed the petition, the Department's response, the record provided and attached to the petition, and the appropriate case law, and upon due consideration, the Court finds as follows:

1. Petitioner was arrested for Driving Under the Influence after she refused to submit to a breath test. Her license was suspended after her refusal. She is challenging Respondent's Final Order of License Suspension issued after a formal review hearing, which sustained the suspension of Petitioner's driving privilege.

2. Petitioner raises two claims of error in her petition. First, she challenges the entry of two Exhibits, DDL-1 and DDL 6, as evidence at the hearing on the ground that there was no competent substantial evidence to support the decision to allow them in (Ground 1). Second, Petitioner claims' that there is no competent substantial evidence to support probable cause that Defendant was under the influence of a controlled substance or alcohol while operating a motor vehicle (Ground 2).

3. As an initial matter, this Court notes that Petitioner has not provided this Court with a copy of the Final Order of License

Suspension, despite having been given an opportunity to do so. Respondent was nevertheless directed to respond, and having reviewed the response and the legal authorities cited therein, this Court agrees with it and finds that Petitioner has failed to demonstrate any entitlement to relief. This will be set out below. References to the appendix will be designated "A," while references to the transcript will be designated T."

4. A formal review hearing was held on March 31, 2023. The documents reviewed by the Hearing Officer included the Florida DUI Uniform Traffic Citation (DDL 1), a photocopy of Petitioner's Florida Driver's License (DDL 2), the Marco Island Police Department probable cause arrest affidavit (DDL 3), the Refusal Affidavit (DDL 4), the Marco Island Police Department officer incident report (DDL5), the supplemental narrative report (DDL 6), Florida Uniform Traffic Citation transmittal form (DDL 7), and the notice of confidential information (DDL 8). The arresting officer, Marco Island Police Officer Melanie Lopez, testified for the State. Counsel for Petitioner was present. (T. 4-5).

5. The applicable standard of review by a circuit court of an administrative agency decision 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. 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. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

6. In Ground 1, Petitioner challenges the entry of two Exhibits, DDL-1 and DDL-6, as evidence at the hearing. Counsel for Petitioner had objected to them at that time on the basis that they were unsigned, but the Hearing Officer overruled the objections and allowed them to be considered as evidence. Petitioner claims that there is no competent substantial evidence to support the Hearing Officer's decision. These two Exhibits will be addressed in turn.

7. The document identified as DDL-1 is the traffic citation issued by Officer Lopez. Petitioner objected at the hearing to the admissibility of the exhibit on the basis that it was unsigned. In her petition, she cites to *Solon v. Dept. of HSMV,* 3 Fla. L. Weekly Supp. 676a (18th Judicial Circuit 1996), and posits that *Solon* establishes that "statements regarding probable cause contained in an unsworn affidavit are admissible and sufficient when said statements are incorporated in a properly sworn and attested affidavit." Petition, p. 5.[1] Presumably, Petitioner bases this claim on the absence of any affidavit by Officer Lopez supporting her probable cause statements.

8. In its Response, the Department argues that as Petitioner has failed to make any argument as to DDL-1, her challenge to its admissibility has been waived. Having reviewed the case law cited on pages 16 and 17 of the Response, this Court agrees.

9. The Court further agrees with Respondent that even had Petitioner presented an argument on this issue, DDL-1 was properly admitted into evidence. The matter was addressed at the hearing and Officer Lopez explained that DDL-1 was issued through the special software the police department uses; the software has her signature already uploaded on it; her signature is usually on all her citations; and that while she did not know that the instant citation did not have her signature, she knew she had issued the citation to Petitioner because she put the citation in Petitioner's property. T. 10-13. Officer Lopez was under oath when she gave this explanation. T. 9. Having considered the case law cited by both parties and the record before the Hearing Officer, which included the testimony of Officer Lopez, this Court finds that there was competent, substantial evidence to support the Hearing Officer's decision to admit DDL-1.

10. As to DDL-6, this Court notes that while Petitioner couches this claim as one challenging the evidence, it appears that she does so because she is basing her argument on the fact that Sgt. Kirsch did not testify at the hearing. However, in order to address the sufficiency of the evidence, this Court must determine the legal sufficiency of the exhibit itself.

11. The document identified as DDL-6 is the supplemental narrative report prepared by Sgt. Kirsch. Petitioner objected on the basis that it was unsigned. Respondent argues in its Response that DDL-6 was electronically signed and provides legal authority for the position that an electronic signature has the same force and effect as a written one. Having reviewed the legal authority on pages 11 through 16 of the Response, this Court agrees. The Court also agrees that DDL-6 bears Sgt. Kirsch's name, ID number, and unit name and that this demonstrates that Sgt. Kirsch used the electronic signature software to assert that the information provided was correct. Having considered the case law cited by both parties and the record before the Hearing Officer, this Court finds 1) that DDL-1 was legally sufficient and 2) that there was competent, substantial evidence to support the Hearing Officer's decision to admit DDL-6.

12. In Ground 2, Petitioner claims that there is no competent substantial evidence to support the Hearing Officer's finding that Petitioner was under the influence while operating a motor vehicle. Petitioner argues that there is "both an absence of evidence that establishes a wheel witness and any corroborating evidence contained in DDL-3 that places the Petitioner behind the wheel," and cites to *DHSMV v. Trimble,* 821 So. 2d 1084 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] for the position that inconsistencies in the evidence must be explained by sworn testimony. Petition, p. 6-7. Presumably, Petitioner believes that the only admissible evidence is DDL-3 based on her objection to DDL-6. However, as this Court has found that DDL-6 was properly entered, this assumption is incorrect.

13. Respondent argues that Petitioner has failed to identify any inconsistencies in the evidence, and having reviewed the response and the legal authorities cited therein, this Court agrees and finds that Petitioner has failed to demonstrate any entitlement to relief.

14. As mentioned above, no Final Order of License Suspension has been presented to this Court. Consequently, this Court is unable to determine what findings the Hearing Officer made. Nevertheless, to the extent that it can be inferred from the motion, response, and the limited record before this Court that the Hearing Officer found that there was probable cause that Petitioner had been driving while under the influence, this Court finds that there was competent, substantial evidence in the record to support that finding.

15. DDL-3 and DDL-6 establish that Officer Lopez responded to a single vehicle crash on March 3, 2023. A. 13. Upon arrival, she noted that a car was off the road and embedded in some bushes. A. 13. Petitioner was standing outside of the vehicle and explained to Officer Lopez what had happened. A. 13. Officer Stafford and Sgt. Kirsch were already on the scene when she arrived, and Officer Stafford had begun a crash investigation. A. 13. At that time, Sgt. Kirsch told Officer Lopez that he had observed signs of impairment in Petitioner. A. 13. Officer Lopez herself noted that Petitioner's speech was slurred and that there was a very strong odor of alcohol emanating from around her mouth. A. 13. She also observed that Petitioner had trouble maintaining her balance. She was very uneasy on her feet when standing and almost fell over while seated on the ground. A. 13. Officer Lopez further noted that Petitioner was "noncompliant when asked if she would participate in field sobriety exercises," and that she was arrested for this noncompliance. A. 13. Petitioner was read Miranda and implied consent twice—once prior to her arrival at the jail and again at the jail—and refused both times. A. 13.

16. Sgt. Kirsch's report likewise reflects that he had responded to a one-person crash. A. 15. Upon arrival at the scene, he observed that

the vehicle had left the roadway and driven through several bushes before crashing into the power pole. A. 15. Petitioner was the only person in the area and had a scrape that was consistent with having been the driver. A. 15. She also pulled the car keys from her pocket at one point in the investigation and the car was registered in her name. A. 15. Additionally, only the driver-side airbag had deployed during the crash, further indicating that the driver had been alone at the time. A. 15. Sgt. Kirsch also noted that there was a fresh smell of an alcoholic liquid on the passenger seat of the car. A. 15. He observed Petitioner swaying while she was standing and fall over while seated. Petitioner was unable to speak clearly, there was a strong odor of alcohol on her breath, and her eyes appeared glassy. Additionally, Petitioner's response to the officers' question if there was anything she needed to retrieve from the vehicle was to get into the car, start it, and attempt to back up and leave, despite the fact that the vehicle was "obviously not able to be driven." A. 15. Petitioner was thereafter arrested for not doing the field sobriety exercises. A. 15.

17. At the hearing, Officer Lopez affirmed that the statements provided by her were true and correct. T. 9-10. She also testified that Petitioner appeared to be impaired and explained why she, Officer Lopez, and her fellow officers believed Petitioner had been driving the vehicle at the time of the accident. T. 9-17. There is no discrepancy between the officer's testimony and the reports.

18. The record reflects that the Hearing Officer had before her DDL-3 and DDL6, as well as the testimony of Officer Lopez. This Court finds that it is possible that the Hearing Officer was able to determine, based on the record before her, that there was a sufficient basis in the record to justify the suspension. On certiorari review, this Court cannot substitute its findings for that of the Hearing Officer and cannot reweigh the evidence. Having considered the record, and being mindful of the limited scope of review, the Court finds that Petitioner has failed to demonstrate that there was no competent substantial evidence to support the decision of the Hearing Officer to uphold the suspension. Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

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[1]As the pages of the petition are unnumbered, this Court will herein number it.

* * *

Volume 32, Number 11
March 31, 2025
Cite as 32 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Torts—Premises liability—Municipal corporations—Trip and fall on sidewalk—Open and obvious condition—City was entitled to summary judgment where small height difference between two sidewalk panels that tripped plaintiff was open and obvious and was not dangerous condition as matter of law

WANDA OWENS, Plaintiff, v. CITY OF GAINESVILLE, Defendant. Circuit Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-23-CA-2260. Division K. November 12, 2024. Gloria R. Walker, Judge. Counsel: Dan Weisman, Senior Assistant City Attorney, City of Gainesville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FINAL JUDGMENT

This cause came to be heard on October 29, 2024, upon Defendants' Motion for Summary Judgment. The Court having reviewed the pleadings, heard argument from counsel, and having considered the record evidence, the Court finds, as follows:

Summary judgment must be granted "if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(a). At the summary judgment hearing, Defendant contends that the small height difference between one sidewalk panel and the next was open and obvious and not a dangerous condition, as a matter of law. Accordingly, Defendant did not breach any duty owed to the Plaintiff. See, e.g., *Durrah v. Bowling Breen Inn of Pensacola, LLC,* 3:20CV5234-TKW-EMT, 2021 WL 4120802 (N.D. Fla. Mar. 29, 2021).

As illustrated in the picture below, the Court finds that the condition of the sidewalk that Plaintiff tripped on was open and obvious and was not a dangerous condition as a matter of law. The Court further finds that Defendant did not breach any duty to Plaintiff. See *Kelley v. Sun Communities, Inc.,* 8:19-CV-1409-T-02AAS, 2021 WL 37595 (M.D. Fla. Jan. 5, 2021); *Durrah v. Bowling Breen Inn of Pensacola, LLC,* 3:20CV5234-TKW-EMT, 2021 WL 4120802 (N.D. Fla. Mar. 29, 2021); *Dent v. Fla. Dept. of Transp.,* 2022 WL 3593227 (Fla. Cir. Ct.).

There is no genuine dispute as to the fact that the Plaintiff tripped on the joint or seam running between the two panels of sidewalk, where one panel was elevated slightly as compared to the other, as depicted in this photograph above. Again, the Court finds the condition that Plaintiff tripped on was open and obvious and was not a dangerous condition.

It is **ORDERED AND ADJUDGED** that

1. Defendants' Motion for Summary Judgment is **GRANTED**;

2. A final judgment shall be entered in favor of the Defendant; and

3. Plaintiff, Wanda Owens, takes nothing by this action, and that Defendant City of Gainesville go hence without day.

* * *

Criminal law—Driving under influence—Scientific evidence—Breath test—Motion for *Daubert* hearing concerning reliability of breath test results is denied—Testimony regarding results of breath test machines is not expert testimony subject to *Daubert* standard—Evidence is not new or novel, and defendant failed to provide record support of serious, specific and substantial question as to continued reliability of the science, theory, or methodology

STATE OF FLORIDA, Plaintiff, v. DANIEL KLEINSCHNITZ, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2023CT006513AO. Division 81. February 13, 2025. Mark A. Skipper, Judge.

ORDER ON MOTION FOR DAUBERT HEARING

THIS MATTER is before the Court on Defendant's "Motion for Daubert Hearing" filed on February 16, 2024, pursuant to Florida Rule of Criminal Procedure 3.190 (a). The Court requested that each party file a Memorandum of Law addressing their respective arguments. The Court has reviewed each memo and appreciates the hard work of the respective counsel in putting it together for the Court. After reviewing the memos filed by counsel for the State and counsel for the Defense and the relevant case law, the Court makes the following findings of fact and conclusions of law:

The Defendant has filed a motion for a hearing pursuant to Daubert regarding the intoxilizer machine that is used in DUI cases. The Defendant argues that a hearing should be held to ensure that the breath test evidence used by the State from the machines is reliable. The Defendant contends that there are questions as to whether the results are scientically reliable and whether the results are based upon scientically reliable principles. The Defendant cites to cases that say that the Daubert factors not only apply to scientific knowledge, but other specialized knowledge as well.

The Florida legislature has adopted a statutory scheme to insure accurate and reliable breath test results. . . .[T]estimony regarding the result of a diagnostic instrument, such as Intoxilizer 8000, is not expert testimony" subject to the Daubert standard. *State v. Ullery,* 21 Fla. L. Weekly Supp. 1096a (18th Jud. Cir., County Court, 2014). Further, breath test evidence is not new or novel and the Defendant has failed to provide record support of a serious, specified and substantial question as to the continued reliability of the science, theory or methodology. See *State v. Regisme,* 24 Fla. L. Weekly Supp. 811a (Fla. 15th Cir. Ct., November 22, 2016), per curiam affirmed, *Regisme v. State,* 242 So.3d 405 (Fla. 4th DCA 2018).

The Defendant has not cited any cases in his memo wherein a hearing was held on the intoxilizer with the Daubert standard. The Defendant's memo all deals with expert testimony and not machine results. In fact, numerous cases from courts around the state have addressed this issue and found that the intoxilizer machine is diagnostic instrument and not expert testimony subject to Daubert. See *State v. Bennett,* 30 Fla. L. Weekly Supp. 371a (County Court, 9th Judicial Circuit 2022) and *State v. Fernandes,* 21 Fla. L. Weekly Supp. 192a (County Court, 17th Judicial Circuit 2013)

Based on the foregoing findings of fact and conclusions of law, the Defendant's Motion for Daubert hearing is hereby **DENIED**.

* * *

Torts—Bribery—City commissioners—Legislative immunity—Action against city commissioner alleging scheme for quid pro quo bribe requiring plaintiff to add partner to bid for marina redevelopment project in exchange for favorable vote on bid—Action dismissed with prejudice—City commissioner's acts of voting, texting, and meeting about bid were protected by legislative immunity irrespective of whether activities were unethical or motivated by bad faith—Argument that acceptance of bribe is not legislative conduct was unavailing—Plaintiff has not alleged acceptance of bribe, and plaintiff's civil claim would require delving into legislative conduct that is not necessary in bribery cases—Racketeer Influenced and Corrupt Organization Act—Plaintiff lacked standing to assert RICO claim where only harm alleged is emotional distress, which is not cognizable under RICO—Because of legislative immunity, plaintiff could not satisfy elements of claims for tortious interference with business relationship or conspiracy—Because of legislative immunity and fact that plaintiff did not have any personal contact or communication with commissioner, claim for intentional infliction of emotional distress also fails

MANUEL PRIEGUEZ, Plaintiff, v. ALEX DIAZ DE LA PORTILLA, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-022431-CA-01. Section CA04. February 13, 2025. Mavel Ruiz, Judge. Counsel: Juan-Carlos Planas, Juan-Carlos Planas, P.A., Miami; and Freddy Funes and Brian W. Toth, Toth Funes, Miami, for Plaintiff. Alex Diaz de la Portilla and Tucker Ronzetti, Tucker Ronzetti, P.A., Miami; and Benedict P. Kuehne, Kuehne Davis Law, P.A., Miami, for Alex Diaz de la Portilla, Defendant.

ORDER GRANTING DEFENDANT ALEX DIAZ DE LA PORTILLA'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE

THIS CAUSE came before the Court for hearing on September 19, 2024 on Defendant Alex Diaz de la Portilla's Motion to Dismiss Amended Complaint with Prejudice, with Incorporated Memorandum of Law, filed July 29, 2024 ("Defendant's Motion"). This Court having considered the pertinent pleadings and being otherwise fully advised on the premises, hereby finds as follows:

I. Procedural Background

Plaintiff Manuel Prieguez brings this action against the former City of Miami Commissioner Alex Diaz de la Portilla ("Portilla"), Humberto Hernandez, and Anibal Duarte-Viera. In his original Verified Complaint, Plaintiff alleged that Portilla betrayed the trust placed in him by the voters in the City of Miami by attempting to strike down an upstanding member of the community in order to financially benefit himself and two other Defendants. After not being able to unduly influence Manuel Prieguez and his client, Alex Diaz de La Portilla then orchestrated the canceling of a City of Miami RFP to allow more time to find a developer willing to bribe him to get a City of Miami lease.

Compl. 2. The Plaintiff asserted claims of Conspiracy; Civil Cause of Action for Violation of F.S. 895.05 Against Portilla; and Intentional Infliction of Emotional Distress Against Portilla, but the Court dismissed those claims in its Order Granting Alex Diaz de la Portilla's Motion to Dismiss, with Incorporated Memorandum of Law, filed June 27, 2024 ("Dismissal Order'). The Court's reasoning, as detailed in the Dismissal Order, was that legislative immunity applied, and based on that legislative immunity, Prieguez failed to establish the elements of his claims. The Court found that the two allegations specific to Portilla, voting and sending a text message about a meeting, were both legislative, and so immunity applied to both. See Dismissal Order at 6-7. Based on that immunity, Prieguez's claims failed. See *id*. at 8-10. The Court further observed that "[t]he allegations of intentional infliction of emotional distress against Portilla are weak at best." *Id*. at 10. The Court dismissed Preiguez's Verified Complaint without prejudice and with leave to amend his pleadings.

II. Amended Complaint

On July 17, 2024, Plaintiff filed an Amended Complaint, reasserting the dismissed claims and adding a new claim of tortious interference with business relationship. Specifically, the Amended Complaint's counts are: (I) Civil Cause of Action for Violation of F.S. § 895.05; (II) Tortuous Interference [with business relationship]; (III) Civil Conspiracy to Tortiously Interfere [with business relationship]; (IV) Civil Remedies for Criminal Practices Act (Section 772.104); and (V) Intentional Infliction of Emotional Distress Against Portilla.

The Amended Complaint removed some but not all the allegations regarding Portilla's legislative activity. It includes allegations about the Rickenbacker Marine request for proposal process and the involvement of Prieguez's client, Biscayne Marine, in that process, Am. Compl. ¶ 16-20; allegations about meetings regarding Senator Diaz de la Portilla while he acted as a Miami City Commissioner, *id*. ¶¶ 21-24, 59, 62; allegations about an October 8, 2020 Miami Commission meeting including debate and argument about proposals, *id*. ¶ 55-59; and allegations about a City of Miami public benefits proposal for a fire station, *Id*. ¶ 70.

The Amended Complaint alleges a scheme for a "quid pro quo bribe: If Biscayne Marine wanted to win redevelopment of the Rickenbacker Marina, PRIEGUEZ would have to convince his clients to add DUARTE-VIERA as a partner in the marina operation bId.' Am. Compl. ¶ 27. This "quid pro quo," as the Amended Complaint's factual allegations make clear, was for Portilla's vote on the Rickenbacker bid. As in the original Verified Complaint, Plaintiff alleges that at an October 1, 2020 dinner meeting with Defendants Duarte-Viera and Hernandez he was told his client Biscayne Marine "did not have the votes to win the bid without [Duarte-Viera's] partnership in the project and PORTILLA'S support would only come with that partnership." *Id*. ¶ 40 (emphasis added). This October 1, 2020 meeting repeatedly refers to City of Miami Commission votes on the bid. *Id*. ¶¶ 40 ("his team would then have three votes to win and possibly even four votes in favor"); 40 n.1 ("The City of Miami has five Commissioners, and three votes constitutes a majority in order to award a competitive bid."); 42 ("Biscayne Marine would lose the vote"); 46 ("You don't have the votes . . . . The ONLY way to get the votes is to have me be a partner in this deal."); 48 ("Portilla also knew that without his vote, Prieguez would not have the required votes for his client.") (emphasis added).

Plaintiff's allegations about this October 1, 2022 meeting are the only ones Plaintiff himself had with any of the Defendants about the Rickenbacker Marina project, and they are the only ones where Portilla's vote or support was discussed with Plaintiff or his client regarding Duarte-Viera's involvement with the Rickenbacker bid. Plaintiff does not allege he himself had any meeting, encounter, or communication with Portilla.

Besides the October 1, 2022 dinner meeting, Plaintiff alleges only one other encounter or communication he had with any of the Defendants, nine months earlier, on January 22, 2022, with Duarte-Viera regarding Plaintiff's former client Becker Boards. Am. Compl. ¶¶ 7-15. The remaining factual allegations concern not Plaintiff, but his client Aabad Melwani or his client's partner Diego Ardid: (1) several months before October 2020, Plaintiff's client Melwani had a lunch where Portilla introduced Duarte-Viera to talk about his "getting into the marina business," and Melwani "was not interested", *id*. ¶¶ 21-24; (2) some days later, Duarte-Viera told Ardid "the only way this project was going to be approved for Biscayne Marina" was for him to be a partner, and Melwani again rejected this "deal", *id*. ¶¶ 52-54; and (3) on October 8, 2020, Duarte-Viera texted Melwani about getting together, and he ignored it, after which Portilla set up a meeting, Duarte-Viera said "they needed a solution," and "Melwani again rejected all deals", *id*. ¶¶ 56-64.

Portilla argues that the Amended Complaint should be dismissed because he remains entitled to immunity and the Amended Complaint fails to state a claim on which relief can be granted.

III. Motion to Dismiss

On a motion to dismiss, the standard of review is whether the plaintiff has stated a cause of action on which relief can be granted. *Bell v. Indian River Memorial Hosp*., 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D400c]; Fla. R. Civ. P. 1.140(b). The purpose of a motion to dismiss is to test the legal sufficiency of the complaint, not to determine factual issues. *Landmark Funding, Inc., on Behalf of Naples Syndications, LLC, v. Chaluts*, 213 So. 3d 1078, 1079 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D610a]. When determining whether to grant a motion to dismiss, the trial court is limited to the four corners of the complaint and attachments incorporated into the complaint. *Id*. at 1079. "All allegations of the complaint must be taken as true and all reasonable inferences drawn therefrom must be construed in favor of the nonmoving party." *United Auto. Ins. Co. v. Law Off.'s of Michael I. Libman*, 46 So. 3d 1101 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2390a] (internal citations omitted). Plaintiffs' allegations, however, are only entitled to reasonable inferences, not inferences "drawn from mere speculation rather than from the complaint's allegations." *Conley v. Shutts & Bowen, P.A*., 616 So. 2d 523, 525 (Fla. 3d DCA 1993).

IV. Immunity

As explained in the Dismissal Order, the sole issue regarding legislative immunity is whether "the conduct undertaken is done within a commissioner's legislative function." Dismissal Order at 7. In determining this issue, the Court is "restricted from considering whether any conduct is 'unethical or motivated by bad faith' ". *Id*. (citing *Carollo v. Platinum Advisors, LLC*, 319 So. 3d 686, 689 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D632a]). Furthermore, "legislative immunity covers all aspects of the legislative function, including meetings, even if in secret." *Id*. (emphasis added). This includes all meetings and discussions outside of the legislature regarding the legislation. *Id*. at 6.

Based on this analysis, the Court has already ruled that the acts of Portilla of voting and sending a text message to arrange a meeting are protected by legislative immunity. *Id*. at 7. Although the Amended Complaint has removed some earlier allegations about Portilla's voting, it continues to contain the same earlier allegations about Portilla texting to arrange a meeting. Am. Compl. ¶ 21, 59, 62. That activity remains protected.

The only new allegations specific to Portilla that the Amended Complaint provides are regarding an alleged October 1, 2020 meeting solely among the Defendants at a business called DeMattress. Am. Compl. ¶¶ 25-28. This was one week before the October 8, 2020 Miami Commission meeting regarding the Rickenbacker Marina proposals. *Id*. ¶ 55. Portilla and the other Defendants allegedly agreed to coerce Plaintiff for a quid pro quo bribe and intimidate and extort Plaintiff. *Id*. ¶¶ 27-28. These allegations, like Plaintiff's similar allegations in the original Complaint,[1] do not save the Plaintiff's claims. Meetings regarding forthcoming legislation can constitute protected legislative activity. See Dismissal Order at 6. The immunity applies regardless of whether an activity was "unethical or motivated by bad faith." *Id*. at 5 (quoting *Carollo*, 319 So. 3d at 689). But even if this meeting was not protected legislative activity, Plaintiff is unable to establish his claims because all of Portilla's other activity beyond this closed-door meeting is clearly protected. This includes the conduct essential to Plaintiff's claims, Portilla's "vote," which the Plaintiff refers to throughout his allegations about the October 1, 2022 meeting. See Am. Compl. ¶¶ 40, 42, 46, 48.

Based on legislative immunity, courts have dismissed claims even where the defendant has admitted taking bribes where legislative activity formed a critical element—the causal element—of the plaintiff's claim. *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 522 (7th Cir. 2011) (dismissing claims against former Illinois governor Rod Blagojevich, finding that he was legislatively immune from civil RICO liability despite "some factual overlap with [his] federal prosecution), vacated in part on other grounds, 649 F.3d 799 (2011); *Chappell v. Robbins*, 73 F.3d 918, 920 (9th Cir. 1996) (dismissing a RICO claim against a California state senator who admitted taking bribes in exchange for legislative activity); *Thillens, Inc. v. Community Currency Exch. Ass'n of Illinois, Inc*., 729 F.2d 1128, 1131 (7th Cir. 1984); *NRP Holdings LLC v. City of Buffalo*, 11-CV-472S (W.D. N.Y. Feb 27, 2017).

Plaintiff argues that the acceptance of bribes is not legislative activity and so not protected by immunity. Pl.'s Resp at 6. Plaintiff, however, has not alleged acceptance of a bribe, and in any event a prosecution or claim that depends on protected legislative activity cannot go forward. The Supreme Court discussed how acceptance of a bribe is not protected by legislative immunity in *United States v. Brewster*, 408 U.S. 501 (1971). The Court explained that a bribery charge can go forward because acceptance of a bribe is not legislative and proof of legislative conduct is not necessary for the verdict. "To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, *for it is taking the bribe*, not performance of the illicit compact, that is a criminal act." [Emphasis added]. *Id*. at 526. In contrast, in cases like *Empress Casino, Chappell, Thillens*, and this case, the plaintiffs' civil claim for damages would require delving into legislative conduct. For that reason, the court rejected an argument similar to Plaintiff's in *Thillens*:

> Thillens' second argument is that because the complaint is directed principally at the defendants' acceptance of bribes, the defendants cannot be protected. Again we must disagree. Thillens will not be able to show that it is entitled to relief "without proof of a legislative act or the motives or purposes underlying such an act." As noted above, Thillens' causes of action are inextricably linked to allegations that the defendants misused their legislative authority and influence to enact legislation regulations detrimental to Thillens. Its conspiracy theories depend on proof of the defendants' motives and on a showing of actions taken after bribes were accepted. Thillens is challenging directly actions within the protected sphere of legislative activity. The defendants therefore are immune from liability for the allegedly wrongful acts stated in the complaint.

729 F.2d at 1131 (citations omitted; emphasis added).

Plaintiff's claims fail for the same reason. His causes of action are inextricably linked to allegations that Portilla acted to harm his client by voting against his interests or urging others to do so, which are core legislative functions.[2] The Plaintiff's claims cannot survive without the allegations which relate to legislative activity.

a. Legislative Acts

> Legislators have an absolute common-law immunity against civil suit for their legislative acts. . . . This immunity extends to those actions falling within "the sphere of legitimate legislative activity." . . . In this circuit, we determine whether a particular action is legislative by considering two primary factors. First, does the act involve ad hoc decisionmaking, or the formulation of policy? . . . Second, does the act apply to a few individuals, or the public at large? . . . While the question is necessarily one of degree, the more an action involves policymaking and applies to the entire community, the more likely it is to be classified legislative.

Chappell v. Robbins, 73 F.3d 918, 920-21 (9th Cir. 1996). *See Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062-63 (11th Cir. 1992) (ruling that the decision to hire, fire, and demote hospital personnel

were not legislative acts).

In *Yeldell*, 956 F.2d at 1063, the issue before the Court was "whether the act of refusing to introduce legislation for a vote is one which entitles the commissioners to legislative immunity." The Court ruled that it was. The Court stated:

> [i]n our opinion, the decision whether or not to introduce legislation is one of the most purely legislative acts that there is. Unlike the personnel matters which occupied the attention of Commissioner Davis, such decisions [decisions to introduce legislation] are an important part of the process by which legislators govern legislation and, therefore, entitle the decision-maker to the protection of legislative immunity. To conclude otherwise would require us to ignore the central purpose of the doctrine of legislative immunity. Legislative immunity evolved as a measure to protect the democratic integrity of the legislative process by guaranteeing that the other branches of government would not be able to exert undue influence over the decisions of democratically elected officials. When individuals can sue members of a legislative body to ensure that a certain piece of legislation is brought before that body for a vote, the process is no longer democratic.

b. Principles to Keep in Mind

i. Stripped of all Consideration of Motive or Intent: *Bogan v. Scott Harris,* 523 U.S. 44 (1998).

Caselaw holds that legislative immunity is very broad. In *Bogan*, the Supreme Court of the United States explained that whether legislative immunity applies is determined by the nature of the action taken by the legislator (i.e., whether it is a legislative action), without consideration of the legislator's intent or motive. In *Bogan*, Respondent was an administrator at the Department of Health and Human Services (DHHS). The Respondent's position was eliminated after the Mayor (Bogan) eliminated the DHHS in his budget proposal. This proposal came after Dorothy Biltcliffe terminated Respondent's employment after Respondent made racial and ethnic slurs to one of her colleagues. *Id*. at 46. Respondent filed suit against Bogan and other officials, on the basis that the elimination of her position was in retaliation against her for exercising her First Amendment rights in filing the complaint against Biltcliffe.

The Supreme Court began its analysis by providing that state, regional, and local legislators are entitled to absolute immunity from liability under section 1983 for their legislative activities. *Id*. at 49. It stated that:

> [a]bsolute immunity attaches to all actions taken 'in the sphere of legitimate legislative activity. . . . Whether an act is legislative turns on the nature of the act, rather than on motive or intent of the official performing it. The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'

Id. at 53-54.

It further provided that:

> [t]his leaves us with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative. We have little trouble concluding that they were. Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget that proposed the elimination of city jobs and his signing the ordinance into law also were formally legislative . . . .

Id. at 55.

ii. Not Considering Bad Faith or Unethical Conduct: *Carollo v. Platinum Advisors, LLC*, 319 So. 3d 686 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D632a].

The Third District Court of Appeal has also applied legislative immunity very broadly based on the nature of the action taken by the legislator, including recently in the case of *Carollo v. Platinum Advisors*. The pertinent facts of Platinum Advisors are as follows:

> [i]n 2016, during an interim when Carollo was not an elected official, he executed a one-year services agreement (the "Agreement") on behalf of his private consulting firm (Consulting Associates Group, Inc.) with Platinum Advisors. . . . The Agreement imposed a duty on Carollo not to disclose Platinum Advisors' confidential and proprietary information. . . . Eventually, Platinum Advisors and its affiliate Skyviews applied to the City of Miami for development approval of the observation wheel to be located at Bayside Marketplace on City of Miami property. . A hearing for final planning and zoning approval of the application was scheduled before the Miami City Commission on September 26, 2019. At that hearing, after Platinum Advisors' agenda item was removed from the consent agenda by the City Attorney, the City Commission took up a discussion of the project's economic benefits. Carollo participated in this public discussion [as a City Commissioner]. . . . [T]he City Commission approved the project, but apparently at a greater cost to the appellees.

Id. at 687-88.

Carollo raised the defense of absolute legislative immunity and qualified immunity. *Id*. at 688. The Third District Court of Appeal ruled that because the actions for which Carollo was sued occurred during a period in which Carollo was speaking from the dais from the "City Commission meeting on an agenda item properly before the City Commission," Carollo was entitled to absolute immunity. *Id*. The Court supported its ruling by stating that "[a] city commission enjoys absolute legislative immunity when acting in a legislative capacity. *Id*.

> Hence, irrespective of whether Carollo's participation in the City Commission discussion was *unethical or motivated by bad faith,* Carollo enjoyed absolute legislative immunity from civil suit of the comments he made at that meeting. . . . Because the appellees' complaint identifies only conduct undertaken by Carollo during a City Commission meeting in Carollo's capacity as a City Commissioner, Carollo is entitled to absolute legislative immunity for the actions identified in the appellees' complaint.

Id. at 689.

This point continues to be a significant hurdle for the Plaintiff. This legal barrier prevents this Court from speculating as to Portilla's ill motive and intent. Without that ability, the Court is left with a blanket analysis of actions only. If Portilla's actions were legislative, the Court is forbidden from delving into his ultimate intent. It goes without saying that this limitation does *not* extend to his cohorts. Their intent—unprotected by legislative immunity—can be speculated about and considered. Voting is the quintessential legislative act of an elected official.

V. Civil Causes of Action for Violation of F.S. Sections 895.05 and 772.104

In Counts I and IV, Plaintiff sues Portilla for violations of the Florida Racketeer Influenced and Corrupt Organization Practices Act ("RICO"). The elements of RICO are:

> (1) the existence of an enterprise, which [the defendant] was employed by or associated with in committing the crimes, (2) a pattern of racketeering activity, and (3) at least two 'incidents' of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

See Dismissal Order at 8-9; § 895.03, Fla. Stat.; *MP, LLC v. Sterling Holding, LLC*, 231 So. 3d 517, 524 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1465c] (citing *Shimek v. State*, 610 So. 2d 632, 634-35 (Fla. 1st DCA 1992)): *Boyd v. State*, 578 So. 2d 718 (Fla. 3d DCA 1991).

"Predicate acts" necessary to establish a RICO claim must be crimes as identified by Florida Statutes. *See* § 772.102(1), Fla. Stat.

(defining "criminal activity"); *Bowden v. State*, 402 So. 2d 1173, 1175 (Fla. 1981) (explaining RICO requires proving "predicate crimes"); Pl.'s Resp. at 9 (citing the list of crimes in § 895.02(8)(a), Fla. Stat.). Thus, for example, in MP, LLC, the Third District held that the plaintiffs had adequately pled a RICO enterprise that committed "the falsification and use of falsified documents" for a set of loans over many months. 231 So. 3d at 525-26.

Standing for a RICO claim also requires Plaintiff to show he suffered a compensable injury caused directly, without an intermediary, by the commission of a crime that is a predicate act. *Bambu v. E.I. Dupont De Nemours & Co. Inc.*, 881 So. 2d 565, 571 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1251a]; *O'Malley v. St. Thomas Univ., Inc.*, 599 So. 2d 999, 1000 (Fla. 3d DCA 1992) (adopting the reasoning in *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989)). Criminal activity directed at another such as an employer or contractual third party such a client like Melwani is insufficient, even if that ultimately harms the plaintiff. *Bortell v. White Mountains Ins. Group, Ltd.*, 2 So. 3d 1041, 1047 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D245b]. See also *Anza v. Ideal Steel Supply Corp.*, 457 U.S. 451, 458 (2006) [19 Fla. L. Weekly Fed. S218a] (relied upon in *Bortell*).[3] "[I]ndirect injuries, that is injuries sustained not as a direct result of predicate acts . . . will not allow recovery under Florida RICO." *O'Malley,* 599 So. 2d at 1000; *see also Bambu*, 881 So. 2d at 571-73); Dismissal Order at 9.

The Amended Complaint fails to establish these elements. As explained above, Portilla has legislative immunity for his acts of voting, texting, and meeting about the Rickenbacker bid. Plaintiff also lacks standing because the sole act to which he was subjected was the October 1, 2020 meeting. The Plaintiff alleges this resulted in only emotional distress during his ride home from dinner. Am. Compl. ¶ 49. That harm is not cognizable under RICO. *Pilkington v. United Airlines,* 112 F.3d 1532, 1536 (11th Cir. 1997). Therefore, Defendant's motion is granted.

VI. Tortious Interference with Business Relationship

To prove tortious interference with a business relationship, the plaintiff must show:

> (1) the existence of a business relationship;
>
> (2) knowledge of the relationship on the part of the defendant;
>
> (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.

Ozyesilpinar v. Reach PLC, 365 So. 3d 453, 460 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1004a]. These elements require proof of the inducement of a breach or the termination of a relationship, as well as the defendant's specific intent to cause that breach or termination, and damages caused by the termination. *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Fla., Inc.*, 832 So. 2d 810, 814 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2383a]; *Fiberglass Coatings v. Interstate Chemical*, 16 So. 3d 836, 838 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D454b].

Portilla has legislative immunity as to his acts of voting, texting, and meeting about the Rickenbacker bid, and so the Plaintiff cannot satisfy these elements. Therefore, Defendant's motion is granted.

VII. Intentional Infliction of Emotional Distress

To prove intentional infliction of emotional distress, the plaintiff must show:

> (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
>
> (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
>
> (3) the conduct caused emotional distress; and
>
> (4) the emotional distress was severe.

LeGrande v. Emmanuel, 889 So. 2d 991, 994 (Fla. 3d DCA 2004) [30 Fla. L. Weekly D33a]. See Dismissal Order at 10. "What constitutes outrageous conduct is a question that must be decided as a matter of law. . . . The plaintiff's 'subjective response' to the conduct 'does not control the question of whether the tort of intentional infliction of emotional distress occurred.' " *Deauville Hotel Mgmt., LLC v. Ward*, 219 So. 3d 949, 954-55 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1219a].

> [F]or one's actions to rise to the level of intentional infliction of emotional distress, it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D609a] (quotation omitted).

Deauville, 219 So. 3d at 955.

Plaintiff's claim is solely against Portilla, but he does not allege he personally had any contact or communication with Portilla.[4] Portilla also has legislative immunity as to his acts of voting, texting, and meeting about the Rickenbacker bid. The Court dismissed this claim previously, stating its allegations "are weak at best," Dismissal Order at 10, and the Plaintiff has not alleged additional facts as to this claim. Therefore, Defendant's motion is granted.

VIII. Conspiracy

"[A]n actionable conspiracy requires an actionable underlying tort or wrong." *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla 3d DCA 1997) [22 Fla. L. Weekly D2184j]. See Dismissal Order at 7. Plaintiff has failed to allege an actionable underlying tort or wrong. Moreover, the Plaintiff must show the alleged "conspirator knows of the scheme and assists in some way." *MP, LLC*, 231 So. 3d at 522. Portilla has legislative immunity for his acts as explained above, and so Plaintiff cannot show this. Therefore, Defendant's motion is granted.

IX. Dismissal with Prejudice

Where the plaintiff has been permitted one amendment and has not requested further amendment, dismissal with prejudice is appropriate. *See Mendelson v. City of Miami Beach*, 386 So. 2d 1276, 1277 (Fla. 3d DCA 1980) ("[T]he complaint was properly dismissed with prejudice as the plaintiffs were permitted one amendment to the complaint and did not thereafter seek any further amendments in the trial court."). Dismissal with prejudice is also appropriate where further amendment is futile. *See Murga v. United Property & Cas. Ins. Co.*, 941 So. 2d 482, 482-83 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2730a]. Further amendment appears futile here because Plaintiff's essential allegations, repeated twice in sworn pleadings, address legislative activity protected by immunity.

X. Attorney's Fees

The Court reserves jurisdiction as to the entitlement to attorney's fees.

WHEREFORE, it is ORDERED and ADJUDGED that DEFENDANT'S MOTION is GRANTED. The action against Defendant Diaz de la Portilla is DISMISSED WITH PREJUDICE. The Court reserves jurisdiction to consider an award of fees and costs.

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[1]See Verified Compl. ¶¶ 73-74 (alleging Defendants "concocted an illegal plan to influence the Rickenbacker Marina RFP to serve their personal benefit" and "attempt[ed] to threaten [Plaintiff] to participate in their criminal scheme").

[2]The same principles also apply to statutory immunity under § 768.28(9)(a). Portilla's conduct in voting and having meetings relating to a commission item was within his scope as a commissioner and does not satisfy the standard for malice.

[3]The Federal RICO statute, 18 U.S.C. § 1964(c), contains the same "by reason of" language as § 772.104(1), and so Federal law is considered persuasive in construing Florida's statute. See *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co.*, 881 So. 2d 565, 570 n.1 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1251a].

[4]Plaintiff argues his case is like that of *Lashley v. Bowman*, 561 So. 2d 406, 410 (Fla. 5th DCA 1990). See Pl's Resp. at 11. That is incorrect for two reasons. First, Plaintiff relies on acts by Duarte-Viera, not Portilla, who never had any interaction with Plaintiff. Second, the conduct at issue in *Lashley* was far more extreme than what Plaintiff experienced. There, the defendant, using a false affidavit, had the plaintiff "arrested, handcuffed, led out of the restaurant to a squad car and taken down to the police station where she was charged with defrauding an innkeeper." *Lashely*, 561 So. 2d at 407. In contrast, Plaintiff went to a dinner where he had wine and whiskey and finally drove home after Duarte-Viera had told him "either Biscayne Marine would lose the vote or the item could be deferred . . . if he were not one of Biscayne Marine's partners in the venture." Am. Compl. ¶¶ 33-34, 42, 49.

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Volume 32, Number 11
March 31, 2025
Cite as 32 Fla. L. Weekly Supp. ____

COUNTY COURTS

Landlord-tenant—Public housing — Eviction— Noncompliance with lease—Waiver—Landlord permanently waived right to evict tenants for alleged noncompliance where eviction action was filed more than 45 days after landlord acquired actual knowledge of tenants' alleged material noncompliance based on fire in unit—Notice—Defects—Further, complaint must be dismissed because landlord failed to serve valid 7-day notice to cure noncompliance—Landlord failed to allege that fire was result of intentional act or that there had been previous noncompliance by accidental fire so as to rise to level of incurable material noncompliance—Additionally, notice failed to satisfy notice requirements for eviction from USDA-RD financed community and failed to give tenants unfettered opportunity to cure noncompliance required by RD regulations

LIVE OAK-MEADOWS L.P., A LIMITED PARTNERSHIP, Plaintiff, v. JOHN MAULDEN and FRANKIE MAULDEN, Defendants. County Court, 3rd Judicial Circuit in and for Suwannee County. Case No. 61-2024-CC-000290. December 2, 2024. Jennifer Griffin, Judge. Counsel: Whitney H. Daly, The MGFD Law Firm, P.A., Clearwater, for Plaintiff. Kevin S. Rabin, Three Rivers Legal Services, Inc., Gainesville, for Defendants.

FINAL ORDER DISMISSING PLAINTIFF'S COMPLAINT FOR EVICTION

THIS MATTER came before the Court on Monday, November 25, 2024 for a duly-noticed hearing on Defendants' Motion to Dismiss. Having fully reviewed Defendants' Motion to Dismiss and all cited authorities, heard argument from counsel for Plaintiff and Defendants, and being fully advised in the premises, the Court **FINDS AS FOLLOWS:**

A. On August 12, 2024, Plaintiff served Defendants with a Notice of Lease Termination, citing incurable material noncompliance with Defendants' rental agreement as the cause. Pl.'s Compl. at 1, ¶¶ 4-5, 41, Ex. B.

B. As the underlying cause for termination, Plaintiff alleged that "T[his action is taken because]: *Fire in Unit on August 3, 2024*." *Id.*

C. On October 7, 2024, Plaintiff instituted this action against Defendants by filing a Complaint for Eviction.

D. In Plaintiff's Complaint for Eviction, Plaintiff alleges that Plaintiff served Defendants with the Notice of Lease Termination, Pl.'s Compl. at 1, ¶ 4, and that the termination occurred "because there was a fire in the unit which cause significant damage and is a serious immediate danger to the health and safety of the landlord's staff and other residents." *Id.*, ¶

E. On October 23, 2024, Defendants were served by personal service and substitute service at the residential dwelling rented from Plaintiff.

F. On October 30, 2024, Defendants timely filed an Answer, Motion to Dismiss, and Affirmative Defenses and timely deposited outstanding rent that Plaintiff had not accepted after service of its termination notice along with the rent that became due as the action was pending. *See* § 83.60(2), Fla. Stat. (2024) (requiring timely deposit to maintain defenses other than payment).

G. For three separate reasons, Plaintiff's Complaint for Eviction should be dismissed.

H. First, section 83.56(5)(c), Florida Statutes (2024) imposes a strict waiver on a subsidized housing provider's right to institute an action for eviction if that housing provider does not institute that action within 45 days of actual knowledge of material noncompliance by a tenant (often called the "45-Day Waiver Rule"). *See, e.g. SP OV Apts., LLC v. Thomas,* 29 Fla. L. Weekly Supp. 33b (Duval Cty. Ct. Dec. 14, 2020) (analyzing the 45-Day Waiver Rule and the definition of "institute" in depth and holding that "institute" is synonymous with "commenced" as used in Fla. R. Civ. P. 1.050); *Hous. Auth. of the City of Key West v. Jones,* 32 Fla. L. Weekly Supp. 151b (Monroe Cty. Ct. Mar. 11, 2024); *Garden Vista Preservation, L.P. v. Rember,* 31 Fla. L. Weekly Supp. 604a (Miami-Dade Cty. Ct. Jan. 24, 2024); *POAH Cutler Manor, LLC v. Bennett,* 31 Fla. L. Weekly Supp. 504a (Miami-Dade Cty. Ct. Dec. 5, 2023) (further finding that nothing in federal housing regulations preempts the 45-Day Waiver Rule); *POAH Cutler Manor, LLC v. Axen,* 30 Fla. L. Weekly Supp. 163a (Miami-Dade Cty. Ct. May 3, 2022); *Riverside Presbyterian Apts., Inc. v. Williams,* 18 Fla. L. Weekly Supp. 881a (Duval Cty. Ct. Mar. 21, 2011); *but see Hous. Auth. of the City of Key West v. Forde,* 18 Fla. L. Weekly Supp. 1197c (Monroe Cty. Ct. Sept. 16, 2011) (failing to engage in textual statutory interpretation and provide reasoning for the court's conclusion); *NHDC Hampton Court Apts., Inc. v. Jenkins,* 23 Fla. L. Weekly Supp. 469a (Alachua Cty. Ct. Aug. 7, 2015) (denying rehearing and adding language to statute to contort 45-Day Waiver Rule).

I. In the light most favorable to Plaintiff based on Plaintiff's Complaint for Eviction and its Notice of Lease Termination, Plaintiff acquired actual knowledge of Defendants' alleged material noncompliance on August 12, 2024.

J. Under the 45-Day Waiver Rule, Plaintiff needed to institute this action by filing its Complaint for Eviction by no later than Thursday, September 26, 2024 or face statutory waiver of its eviction claim premised on Defendants' alleged material noncompliance.

K. However, Plaintiff instituted this eviction action on Monday, October 7, 2024—the 56th day after the latest plausible date by which Plaintiff acquired actual knowledge of Defendants' alleged material noncompliance.

L. The Court recognizes that the 45-Day Waiver Rule deadline fell on the first day of a Suwannee County Court closure caused by Hurricane Helene that lasted from September 26 through September 30. However, fatally for Plaintiff, the Florida Supreme Court's extension of deadlines that fell within the period of court closure in Suwannee County only extended Plaintiff's deadline until Tuesday, October 1. *In re: Emerg. Req. to Extend Time Periods Under All Florida Rules of Procedure for Dixie, Hamilton, Madison, and Suwannee Counties in the Third Judicial Circuit,* No. AOSC24-74 (Fla. Oct. 10, 2024), available at https://supremecourt.flcourts.gov/content/download/2441862/28556785.

M. Due to Plaintiff's failure to timely institute this eviction action within the time limit imposed by the 45-Day Waiver Rule, Plaintiff has permanently waived any right to evict Defendants for the alleged material noncompliance within the Notice of Lease Termination.

N. Second, Plaintiff's Complaint should be dismissed because Plaintiff has failed to satisfy a condition precedent to filing an eviction action by serving an effective termination notice which states a cognizable basis for material noncompliance with the rental agreement, and has likewise failed to state a cause of action for eviction under the Florida Residential Landlord and Tenant Act (hereinafter "FRLTA").

O. Section 83.59(1), Florida Statutes (2024) provides a landlord the right to pursue an eviction action against a tenant where "the rental agreement is terminated and the tenant does not vacate the [rental dwelling]." Thus, the proper termination of a rental agreement is a condition precedent to the filing of an eviction action. *See Inv. and Income Realty, Inc. v. Bentley,* 480 So. 2d 219, 220 (Fla. 5th DCA 1985).

P. Section 83.56, Florida Statutes (2024) provides for the exclusive

set of causes for which a landlord may terminate a tenancy during the midst of its term for cause. *See* § 83.47, Fla. Stat. (2024) (prohibiting any rental agreement from authorizing other causes for mid-lease termination). Specifically, section 83.56(2) provides a landlord the option to terminate a rental agreement for material noncompliance committed by the tenant.

Q. However, FRLTA conditions the landlord's right to terminate based on the severity of material noncompliance—dividing the remedies based on whether the material noncompliance is curable and when it is not.

R. Section 83.56(2)(a) lists examples of material noncompliance which is of a nature that is incurable, such as destruction, damage, or misuse of the landlord's or other tenants' property by *intentional act*. By contrast, section 83.56(2)(b) lists examples of material noncompliance which is of a nature which is curable, such as activities in contravention of the rental agreement or FRLTA like unauthorized pets, guests, or vehicles; parking in an unauthorized manner or permitting such parking; or failing to keep the premises clean or sanitary.

S. In particular, section 83.56(2)(b) requires that, if the landlord wants to terminate the tenancy, the landlord *must* give the tenant a written notice specifying the material noncompliance *and* providing at least 7 days in which to cure the material noncompliance prior to any termination. It also specifically states that giving such a notice is a condition precedent to a later termination for a *subsequent* material noncompliance of a similar character. § 83.56(2)(b), Fla. Stat. (2024) ("If this same conduct or conduct of a similar nature is repeated within 12 months, your tenancy is subject to termination without further warning and without your being given an opportunity to cure the noncompliance.").

T. By omission, Plaintiff fails to allege that the fire was the result of an intentional act by Defendants or any related person, and fails to allege that any past fire in the unit was a subsequent or continuing material noncompliance of a character similar to a past incident of material noncompliance. *See* § 83.56(2)(a), Fla. Stat. (2024) (requiring the act be intentional to rise to incurable material noncompliance).

U. Since Plaintiff did not allege that the acts in causing the fire were intentionally caused by Defendants and since Plaintiff did not allege a predicate, previous notice of material noncompliance for an accidental fire, Plaintiff has both failed to state a cause of action for eviction premises on material noncompliance and failed to satisfy the condition precedent to eviction of serving a valid pre-termination of tenancy notice.

V. Finally, Plaintiff's Complaint should be dismissed because Plaintiff has failed to satisfy a condition precedent to filing an eviction action by serving an effective termination notice which provides the unfettered opportunity to cure required by federal regulation, and has likewise failed to state a cause of action for eviction under FRLTA.

W. As Plaintiff admits in its Complaint for Eviction, Plaintiff is the owner of a USDA-RD Financed Community, receiving federal funding through the United States Department of Agriculture. Pl.'s Compl. at 2, Ex. A. Plaintiff's rental agreement specifically incorporates and restricts the basis and procedures by which Plaintiff may terminate the rental agreement "as provided by state law *and RD regulations*." *Id.* at 5, Ex. A, ¶ 11.

X. Tenants in USDA-RD housing, unlike most other tenants in rental housing in Florida, possesses the right to an absolute opportunity to cure any lease violation prior to termination of their rental agreements. "Prior to terminating a lease, the borrower *must* give the tenant written notice of the violation *and* give the tenant an *opportunity to correct the violation*." 7 C.F.R. § 3560.159(a) (2024) (emphasis added). The regulation requires that a housing provider document the "incidences" related to the termination and makes clear that termination may only occur where the documentation exists and there is documentation that the tenant was given notice *prior to* the initiation of the termination action that their activities would result in occupancy termination. *Id.*

Y. Moreover, the termination notice must include certain specific information—(1) the specific date by which lease termination will occur; (2) a statement of the basis for lease termination *with specific reference* to the provisions of the lease or occupancy rules that, in the landlord's judgment, have been violated by the tenant in a manner constituting material noncompliance or good cause; and (3) a statement explaining the conditions under which the landlord may initiate judicial action to enforce the lease termination notice. 7 C.F.R. § 3560.159(b) (2024).

Z. A plain review of Plaintiff's Notice of Lease Termination demonstrates that it fails to comply with the USDA-RD regulations to which Plaintiff is bound and renders the notice ineffective as a matter of law.

AA. Plaintiff's Notice of Lease Termination does not include a specific date by which lease termination will occur and does not reference any specific provision of the rental agreement whatsoever. *Id.* The omissions alone render the terminate notice fatally defective. 7 C.F.R. § 3560.159(b) (2024); *Villas of Vero Beach Apts. v. Lynch,* 19 Fla. L. Weekly Supp. 1030b (Indian River Cty. Ct. Aug. 2, 2012) ("When an entity decides to be governed by more Federal regulations than normal, then the entity has to abide by those regulations."); *see also Hallmark Group Srvs. of Fla. LLC v. Horton,* 25 Fla. L. Weekly Supp. 80a (Highlands Cty. Ct. Feb. 13, 2017); *cf. American Apt. Mgmt. Co., Inc. v. Cornelison,* 27 Fla. L. Weekly Supp. 1037a (Polk Cty. Ct. July 1, 2019) (discussing other related deficiencies in the notice as fatal).

BB.

CC. Moreover, Plaintiff's Notice of Lease Termination fails to give Defendants the unfettered opportunity to cure the alleged material noncompliance with their rental agreement. There is nothing within the notice that indicates prior notice was given to Defendants concerning the events of August 3, 2024, does not indicate there has been a subsequent material noncompliance of the same or similar nature to the events of August 3, 2024, and does not offer Defendants any opportunity to cure whatsoever. Pl.'s Compl. at 41, Ex. B.

DD. Even if Defendants' conduct was material noncompliance with the rental agreement, Plaintiff has no option—it is bound by federal regulation incorporated into its own rental agreement that it must offer an opportunity to cure and it must subsequently document further noncompliance by Defendants. 7 C.F.R. § 3560.159(a) (2024); *see Lynch,* 19 Fla. L. Weekly Supp. 1030b.

EE. Plaintiff's multiple failures to serve an effective and regulatory-compliant notice renders the Noncompliance Without Opportunity to Cure notice of termination legally ineffective, and Plaintiff has both failed to state a cause of action for eviction premises on material noncompliance and failed to satisfy the condition precedent to eviction of serving a valid pre-termination of tenancy notice.

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

1. Defendants' Motion to Dismiss is **GRANTED** and Plaintiff's Complaint for Eviction is hereby finally **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND**.

2. This action is fully and finally resolved and Plaintiff shall take nothing from this action.

3. Defendants have consented to the release of $738.00 in monthly rent deposited by Defendants to the court registry to Plaintiff in satisfaction for the rent that came due in the months of September through November following service of the Notice of Lease Termination in this action. *See Noimbie v. Harvey,* 137 So. 3d 606, 608 (Fla.

4th DCA 2014) [39 Fla. L. Weekly D951b] (requiring tenant consent to release funds to landlord after dismissal in tenant's favor). The Court will release those funds to Plaintiff by separate order.

4. The Court reserves jurisdiction to resolve any appropriate and timely motions pursuant to Florida Rules of Civil Procedure 1.525 or 1.530.

* * *

Criminal law—Driving under influence—Search and seizure—Urine test—Officers investigating rear-end collision caused by defendant had reasonable cause to believe that defendant was under influence of chemical or controlled substance where defendant had poor balance and gait, slurred speech, constricted pupils, mental confusion, and odor of marijuana, and performed poorly on field sobriety exercises—Implied consent statute did not apply where consent for urine test was freely and voluntarily given—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. KENNETH JOHN MAYEAUX, III, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2022-CT-000126-A. County Criminal Division II. May 5, 2023. Susan Miller-Jones, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

The Court conducted a hearing on the Defendant's Motion to Suppress Evidence Obtained Unlawfully (Urine Test Results) on May 1, 2023. The Court heard testimony from Deputy Lloyd O'Quinn and Trooper Jonathon Bennett and reviewed video captured by each of their equipment on scene. The Court has heard and considered arguments by counsel for the respective parties. For the reasons set forth more fully below, because the Court finds both (1) that Trooper Bennett had reasonable cause to believe that the Defendant was under the influence of a chemical or controlled substance when Trooper Bennett asked the Defendant to provide a urine sample, and separately (2) that Defendant freely and voluntarily consented to the request and thus Trooper Bennett did not need reasonable cause, the Court denies the motion to suppress, and further finds and rules as follows:

Trooper Bennett Had Reasonable Cause to Require a Urine Sample

1. Florida Statute subsection 316.1932(1)(a)1.b. requires the State to prove three factors to rely on the implied consent law to require a person to submit to a urine sample for testing to determine the presence of chemical or controlled substances. *See also State v. Diaz*, 19 Fla. L. Weekly Supp. 572a (Fla. 13th Cir. Cty. Ct. Feb. 28, 2012). The three factors that must be present are, "first, the defendant must be under lawful arrest; second, the defendant must be in actual, physical control of a vehicle; and third, the officer must have reasonable cause to believe the defendant is under the influence of [a] chemical or controlled substance." *Id.* Reasonable cause is a lower standard than probable cause. *State v. Serrago*, 875 So. 2d 815, 818 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1571a].

2. The Defendant agreed that these factors correctly state the law in this regard. The Defendant stipulated that he was lawfully arrested and that he had been in actual physical control of a vehicle (which the video introduced by the State proves as well). The Defendant argues only that Trooper Bennett lacked reasonable cause to believe that the Defendant was under the influence of a chemical or controlled substance. However, the Court finds that Trooper Bennett had reasonable cause given the evidence presented.

3. Deputy O'Quinn and Trooper Bennett both have over 20 years of experience as law enforcement officers. Although neither was trained as a drug recognition expert, they both have plenty of training and practical experience relevant to the present investigation into the Defendant potentially driving under the influence.

4. As revealed by the videos and testimony:

a. This offense occurred on a clear day (January 24, 2022) with a chilly temperature. The Defendant nonetheless caused a rear-end collision. The Defendant's truck struck a passenger van filled with a driver and several passengers. The Defendant claimed he was going a low rate of speed, "less than 10 miles an hour." But his speed was significant enough that at least one of the passengers was laying on the ground and two or three of the passengers had to be taken to the emergency room via emergency medical services.

b. Deputy O'Quinn came upon the crash after it occurred but before the Defendant's truck and the van had moved off of the exit-ramp of I-75. The deputy had the vehicles moved to an abandoned gas station across the street.

c. The Defendant was constantly leaning against his own pickup truck for balance. When the Defendant took steps away from the driver's seat, he took wide steps in a wide arc as if he was moving carefully due to poor balance. As soon as he got to the front of his truck, he held onto it and leaned against it during most of his interactions with the officers. When not using the truck for balance, he was unsteady and his gait was off.

d. The Defendant kept dropping a blue card holder, lost it, and looked for it for a long period of time.

e. The Defendant's voice was slurred and mumbled throughout his interactions with both officers.

f. Both officers described his speech as repetitive as if he was forgetting that they had already discussed a topic. Even the redacted version of the video presented corroborates that the Defendant discussed the same topics multiple times.

g. The Defendant tried to put on his windbreaker and had a lot of trouble with the simple task. Initially, it was inside out, and he failed to recognize that until Deputy O'Quinn helped him. Even after knowing that, it took him a long time to put it on the right way. He was uncoordinated while doing so.

h. Deputy O'Quinn described him as lethargic and he presented that way in the video. He fell asleep in patrol car on the way to the station. At approximately 10:35am, he got in the patrol car and by approximately 10:50am he had fallen asleep. At times he fell sideways and fell forward leaning against his seatbelt as the car's movements cause his unconscious form to move.

i. The driver of the other vehicle in his short interaction with the Defendant prior to law enforcement arriving on the scene could even tell that something was wrong with the Defendant. The driver told that to Deputy O'Quinn, who relayed that to Trooper Bennett.

j. Trooper Bennett noticed that there was an empty holster in the Defendant's truck. The Defendant kept trying to go to his truck and to open his passenger door to retrieve the gun despite clear and repeated orders for him to not do so. The Defendant did not appear to follow instructions from the very beginning of that interaction. He did not appear to be trying to resist their efforts—indeed he appeared cooperative throughout his interaction with both officers. Instead, he seemed unable to follow their instructions despite wanting to follow them and wanting to be helpful to them.

k. The Defendant told Trooper Bennett that he was told to go home because he was "too tired and not on point." The Defendant stated he works as a soft-power washer.

l. The witnesses did not observe any indicators of alcohol consumption from the Defendant. Deputy O'Quinn did smell an odor of "weed" (marijuana) a couple times. Deputy O'Quinn testified that his K9 is not trained to alert to the odor of marijuana. The fact that Deputy O'Quinn's K9 did not alert for marijuana does not tend to prove or disprove that the Defendant's truck had marijuana in it recently or at the time of the crash investigation.

m. Defendant was asked if there was any reason that the Defendant would not be able to perform the field sobriety exercises—whether he could stand on one leg and walk heel-to-toe. The Defendant did not indicate any restrictions or limitation. He did not complain of being in any pain or having any prior physical or medical conditions. He did not complain of aches or pain while he waited for the Trooper. The

Defendant voluntarily and apparently without prompting removed his boots and then later, his socks. During that process, he never mentioned that he had any medical or physical conditions that would alter his performance—he was more concerned about his socks than the alleged fact that he had been shot in his right leg.

n. The Defendant was performing the walk and turn exercise on a white painted line in the abandoned parking lot. The Defendant was unable to walk the line straight during the walk and turn exercise. He fell off of it and ended up walking briefly next to the line. He also lost his balance when turning. He stopped to steady himself.

o. During the one-leg stand, the Defendant was unable to hold his foot up for more than a few seconds. He was unable to count as instructed. He failed to follow the instructions.

p. As the officer testified, being tired and being under the influence are two different things. Even being tired, the Defendant should have done better than he did.

5. Trooper Bennett observed the Defendant had constricted pupils. Trooper Bennett's training and experience informed him that constricted pupils are an indicator of controlled substance impairment—not of alcohol impairment. His training and experience told him that the Defendant's demeanor, indicators of impairment, and performance on field sobriety exercises were consistent with controlled substance impairment—not alcohol impairment. Trooper Bennett was thus focused on asking for a urine sample. It was the Defendant, who initiated the idea of giving a breath sample. Trooper Bennett confirmed the statement made by the Defendant regarding a breath sample, and immediately the Trooper followed with a request for urine, to which the Defendant acquiesced.

6. The Court finds that Trooper Bennett had reasonable cause to believe that the Defendant was under the influence of a controlled substance and as such his request of a urine sample from the Defendant was lawful. As a result, the Court denies the Defendant's motion to suppress.

The Defendant Freely and Voluntary Consented to Provide the Urine Sample

7. Where a Defendant is not given the warning described in the implied consent statute, and where the Defendant freely and voluntarily consents to provide a sample of their breath, urine, or blood, the implied consent statute does not apply. *Robertson v. State*, 604 So.2d 783, 790 (Fla. 1992) ("[I]t is clear that a person only needs the protection of the implied consent law if the testing provisions of that law actually are being invoked by the state. If the defendant has consented to the test, or consent is implied on some basis independent of the DUI laws, then the blood test falls wholly outside the scope of the implied consent law."); *State v. Meyers*, 261 So. 3d 573 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b] ("Because Appellee voluntarily consented to the blood draw, the provisions of the implied consent law did not apply."); *State v. Murray*, 51 So. 3d 593, 595-596 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b].

8. Based on the testimony provided and the video this Court reviewed, the Defendant was comfortable with Deputy O'Quinn and Trooper Bennett throughout their interactions. He was casual and independently initiated a variety of topics with the Officers. The Defendant felt comfortable enough to ask why the Trooper did not require the other driver to do field sobriety exercises. He felt comfortable enough to bring up case law that the Defendant had read about on the internet, about the legality of holding someone on scene for too long when waiting for a K9 to search for narcotics. The Defendant volunteered to provide a breath sample unprompted by the officers. He then agreed when Trooper Bennett asked if he would provide a urine sample. He did not hesitate before agreeing. While in the patrol car, they discussed the breath test and urine test again twice within a short period of time. The Defendant asked what would happen if there was nothing in his system. The Defendant did not withdraw his consent during these three discussions of providing a breath sample and a urine sample. He never expressed any hesitancy. And, no one ever informed the Defendant that there would be any negative consequence if he did not provide a urine sample.

9. The Court finds that the Defendant's consent was given freely and voluntary and that the State did not seek to invoke the provisions of the implied consent law. Thus, independent of this Court's determination that reasonable cause existed to require a urine sample, the Court denies the motion to suppress because the consent was free and voluntarily given outside the scope of the implied consent law.

* * *

Criminal law—Driving under influence—Evidence—Urine test results—Probative value of urine test that indicated presence of inactive metabolite of delta-9-THC but did not test for the drug itself was not outweighed by danger of unfair prejudice and undue confusion where defendant exhibited impairment consistent with delta-9-THC consumption and admitted to consuming delta-9-THC prior to traffic stop

STATE OF FLORIDA, Plaintiff, v. IAN ROURKE DINKLA, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2023-CT-001360-A. Division I. January 17, 2025. Meshon T. Rawls, Judge.

ORDER DENYING DEFENSE'S MOTION IN LIMINE TO EXCLUDE URINE RESULTS

THIS CAUSE having come to be heard upon the Motion of the Defense and this Court having held a hearing on November 5, 2024, as to the issue of whether or not the Defendant's urinalysis results should be excluded under section 90.403, Florida Statutes, having heard testimony from Deputy Malcolm Wilson of the Alachua County Sheriff's Office, Former Crime Laboratory Analyst with the Florida Department of Law Enforcement (FDLE) Ashley Pluer, and considered physical evidence. Following this Court having considered said Motion, and hearing argument of counsel as well as testimony from Deputy Wilson and Ms. Ashley Pluer, and being otherwise fully advised in the premises finds as follows:

FACTUAL FINDINGS

1) Defendant's vehicle was stopped on 11000 West Newberry Rd for an unusual driving pattern on October 3, 2023. Sergeant Frank Williams of the Alachua County Sheriff's Office called Deputy Malcolm Wilson to the scene of the traffic stop to conduct an investigation to determine if the Defendant was Driving Under the Influence (DUI).

2) During his initial conversation with the Defendant, Deputy Wilson observed that the Defendant was pale in the face, sweating profusely despite the relatively mild temperature, and "amped up" or talking excessively or energetically. Deputy Wilson also testified that the Defendant was at times, and as the investigation progressed increasingly, defensive or nervous seeming. Deputy Wilson observed that the Defendant had substantially dilated pupils despite the bright lights of the patrol vehicle in contrast to the otherwise darkness of the night.

3) Deputy Wilson was apprised by Sergeant Williams of the Defendant's driving pattern and inconsistent statements about his path of travel that night. Deputy Wilson confirmed with the Defendant his address. Deputy Wilson explained the inconsistency between the Defendant's stated address and destination and his current location on position, marking the three locations on a map and noting that the Defendant was currently west of both locations and headed east, in the direction of his address but not between the theater and his address.

4) Deputy Wilson testified that at this point, he believed that the Defendant was driving under the influence of alcohol or a controlled substance to the extent that his faculties were impaired. Then Deputy

Wilson proceeded to conduct field sobriety exercises with the Defendant.

5) Deputy Wilson explained that the purpose of field sobriety exercises is to allow an officer to gather observations of an individual's balance, comprehension, and ability to complete tasks that require motor skills and that field sobriety exercises contribute as one among many factors in his overall assessment of a suspect's impairment. During the field sobriety exercises Deputy Wilson conducted with the Defendant, Deputy Wilson observed the following:

a) The Defendant had extremely dilated pupils that were not responsive to the bright lights of the patrol vehicle during the Pen Light Exercise.

b) The Defendant attempted to start the Walk and Turn exercise too early despite repeated instructions to remain still and wait, had to have the instructions repeated numerous times, was imbalanced at times, and performed an improper turn by taking a large pivot rather than a series of small steps.

c) The Defendant used his arms for balance, held his foot out improperly—both too high and at the wrong angle and put his foot down to regain balance during the One Leg Stand exercise.

d) The Defendant's performance on field sobriety exercises was captured on the body worn camera of Deputy James, which was received into evidence.

6) As a result of the observations made by Deputy Wilson during the Defendant's performance of the field sobriety exercises and the rest of Deputy Wilson's observations up to this point, Deputy Wilson orally provided the Defendant with *Miranda* warnings from an agency issued card and proceeded to conduct a post-*Miranda* interview. During that interview, the Defendant admitted to taking a hit or hits from a "cart," which the Defendant explained, and Deputy Wilson affirmed was a product obtained from a dispensary containing THC and ingested in the form of a vape or electronic cigarette. The Defendant asserted that he had taken hit(s) off the "cart" before seeing the movie *Oppenheimer*, either two hours prior to the investigation or two hours prior to the film. The Defendant's post-*Miranda* interview and all his statements were captured on the body worn cameras of Deputy James and Deputy Wilson, both of which were received into evidence.

7) Following this conversation, Deputy Wilson inquired as to whether the Defendant would provide breath, blood, or urine. The Defendant said that he would provide at least breath, before asking whether the request for urine was because Deputy Wilson "wanted to see [the Defendant's] penis."

8) Deputy Wilson placed the defendant under arrest for driving under the influence and transported him to the Alachua County Jail, where a breath and urine sample were obtained.

9) Defendant's breath sample contained no alcohol content (.000g/210L of breath).

10) Defendant's urine sample was packaged and sealed by Deputy Wilson and placed into evidence at the Alachua County Sheriff's Office evidence department. The sample was then sent via the United Postal Service to the FDLE's Department of Toxicology.

11) The FDLE received the sample on November 15, 2023. The sample was tested by then Crime Laboratory Analyst Ashley Pluer using gas chromatography/mass spectrometry and liquid chromatography/tandem mass spectrometry.

12) The Defendant's urine sample tested positive for 11-Nor-9-carboxy-delta-9-tetrahydrocannabinol ("carboxy-THC"). As explained in Ashley Pluer's expert testimony, carboxy-THC is an inactive metabolite of the active psychoactive ingredient in marijuana, delta-9-tetrahydrocannabinol ("delta-9-THC"). Carboxy-THC is not an active ingredient that impairs an individual; however, it is created by the metabolization of the impairing delta-9- THC.

13) Ms. Pluer explained that the presence of carboxy-THC in an individual's urine is scientific evidence that at some point, that individual consumed impairing delta-9-THC. Carboxy-THC is detectable in an individual's urine 2-4 hours after ingesting delta-9-THC. Ms. Pluer testified that carboxy-THC can remain in an individual's urine for a variable period of time (days, weeks, and potentially longer) depending on a plethora of factors (frequency of delta-9-THC consumption, weight, body composition, etc.). Ms. Pluer also testified that delta-9- THC is not detectable with the urinalysis conducted by the FDLE and that FDLE urinalysis does not quantify the substances detected in the urine sample.

14) This Court received expert testimony from Ms. Pluer regarding the physiological symptoms of ingesting delta-9-THC and that it is a unique substance that can create hallucinogenic, depressive, and stimulant effects in its users. Dilated pupils, increased body temperature, lack of spatial awareness, possible balance issues, mental confusion or "fog", and an excited emotional state are all symptoms of being under the influence of delta-9-THC. Ms. Pluer explained that these symptoms could affect an individual's ability to operate a motor vehicle. Ms. Pluer also testified that delta-9-THC can impair an individual for up to 6 hours after ingestion.

LEGAL ANALYSIS

15) Relevant evidence is evidence tending to prove or disprove a material fact. Fla. Stat. 90.401.

16) Under Florida Statutes Section 90.403, relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

17) It is the contention of the Defense that due to carboxy-THC being an inactive, non-impairing metabolite of delta-9-THC, the urine results of the Defendant showing its presence on October 3, 2024, should be excluded due to its low probative value being substantially outweighed by its danger of unfair prejudice or possibility of confusing the jury.

18) The Defense cites to only one case in their motion, *Estrich v. State*, 995 So.2d 613 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2726b]. In *Estrich,* the court's appraisal of probative value of carboxy-THC being present in the Defendant's blood is clearly distinguishable from the Defendant's urine results in the present case before the Court. *Id.*

19) In *Estrich,* the State's case was mainly focused on impairment based upon the use of Xanax (Alprazolam), with the State conceding that the marijuana metabolite did not contribute to the Defendant's crash. *Id.* at 616-617. There were no admissions of marijuana usage close in time to the crash, with only an admission to smoking the night prior. *Id.* at 615. Also, that case dealt with a blood test for controlled substances, which can detect the presence of delta-9-THC. It appears that the State toxicologist in *Estrich* gave weight to that fact when he stated that "the fact that it is the metabolite and not the parent drug would lead me to conclude that there [would] be relatively little impact of that as opposed to what I consider to be a significant impact of [Xanax]." *Id.* at 616.

20) The presence of other drugs in the Defendant's blood which more directly explain the Defendant's impairment, impacted the probative value of the presence of carboxy-THC in the Defendant's system, this is clear in *Estrich. Id.* generally. This is seen as well in the Florida Supreme Court case *State v. McClain*, 525 So.2d 420, 422 (Fla.1988). In *McClain*, the Defendant had blood taken which demonstrated a blood alcohol level of .14 and a trace amount of cocaine. *Id.* at 421. The Court emphasized that "McClain's blood alcohol level substantially exceeded the figure necessary to raise a presumption of impairment. Therefore, evidence of a trace amount of

cocaine in McClain's blood added little to the state's proof of intoxication." *Id.* at 423.

21) The case before this Court differs drastically from *McClain* and *Estrich.* Here, there are no other drugs present or alcohol tests to explain the Defendant's apparent level of impairment. This case involves FDLE urinalysis as opposed to blood samples like *McClain* and *Etrich.* As Ms. Pluer testified, FDLE urinalysis does not provide quantification of the substances detected. This is in contrast to the blood testing that can detect delta-9-THC and provide the quantities of the substances detected. Therefore, there is not the same diminishing of the probative value of the drug detection that occurred in *McClain* and *Estrich*.

22) A case that is more analogous to the case before the Court is *State v. Weitz*, 500 So.2d 657 (Fla. 1st DCA 1987). In *Weitz*, the Defendant provided breath tests that demonstrated blood alcohol content that did not readily explain the Defendant's apparent impairment, so law enforcement took a urine sample. *Id.* at 657-658. In that urine sample there were unquantified amounts of methaqualone, cocaine, and phenobarbital detected. *Id.* The First D.C.A. determined that the urinalysis results' probative value was not substantially outweighed by its danger of unfair prejudice to the Defendant. *Id.* at 659. This is because the urinalysis results had probative value for determining that the Defendant is under the influence of a controlled substance. *Id.* at 658.

23) The same reasoning holds true when applied to the instant case. Here, the Defendant exhibited an apparent level of impairment. The Defendant exhibited indicators of impairment that are consistent with the physiological symptoms regarding delta-9-THC consumption as explained by Ms. Pluer (dilated pupils, balance issues, lack of spatial awareness, etc.). The Defendant provided a breath sample that contained no alcohol content.

24) Being that the Defendant's breath sample was inconsistent with his exhibited impairment, Deputy Malcolm Wilson collected a urine sample. The urinalysis conducted by Crime Laboratory Analyst Ashley Pluer on that urine sample detected carboxy-THC. As explained by Ms. Pluer, the presence of carboxy-THC is evidence that establishes that at some point the Defendant consumed delta-9-THC. The urinalysis results in this case tend to prove that the Defendant was under the influence of THC at the time of the incident. The probative value of the urinalysis in this case is buttressed by the Defendant's admissions to consuming delta-9- THC prior to the traffic stop.

25) The Court acknowledges, as acknowledged in *Weitz*, that the urinalysis results do not tend to prove impairment. *Id.* at 659. However, the probative value of the urinalysis results are not substantially outweighed by the unfair prejudice of admitting evidence that the Defendant took illegal drugs, nor is the probative value substantially outweighed by the danger of causing undue confusion. This Court comes to this finding in viewing the challenged evidence in light of its relationship to the other evidence in this case. *See State v. McClain*, 525 So.2d 420 at 423. Here the defendant admits to using THC, exhibits physiological symptoms consistent with that usage, and his urine sample tests positive for a THC metabolite (albeit an inactive metabolite). There is no other substance or alcohol content sample that diminishes the probative value of the urinalysis results. And in this Court's view the urinalysis results do not confuse, but in fact aid in explaining potentially what the Defendant was under the influence of on October 3, 2023.

It is therefore ORDERED and ADJUDGED that the Defense's Motion in Limine to Exclude Urine Results is DENIED.

* * *

Landlord-tenant—Return of security deposit—Tenant entitled to refund of monies landlord deducted from security deposit to cover items that were result of ordinary and reasonable use—Tenant awarded remaining balance of deposit in addition to attorney's fees and costs—Consumer law—Florida Consumer Collection Practices Act—Landlord violated FCCPA by attempting to collect debt while knowing that it was not legitimate

JOSH PHILLIPS, Plaintiff, v. ARIZONA27 LLC, a Florida Limited Liability Company, and CLARA HERRERA REALTY, INC., a Florida Corporation, Defendants. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2024-SC-033816-0. December 25, 2024. Jeramy C. Beasley, Judge. Counsel: Joseph M. Sternberg, Landers & Sternberg PLLC, Orlando, for Plaintiff.

FINAL JUDGMENT IN FAVOR OF PLAINTIFF JOSH PHILLIPS

THIS CAUSE came on to be heard before this Court upon Plaintiff's Statement of Claim. The Court having reviewed the Statement of Claim, and otherwise being advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

FINDINGS OF FACT

1. Plaintiff was a tenant at 602 N. Trinidad Ct., Unit 602, Winter Park, FL 32765 (the "Property").

2. A security deposit of $2,500 was paid by the Plaintiff as security for his tenancy at the Property.

3. After Plaintiff vacated the Property, his deposit was not returned to him.

4. The Defendants mailed a letter to Plaintiff after he vacated making a claim against the security deposit, and Plaintiff timely objected to the claims within 15 days.

5. After the filing of the Statement of Claim, on September 27, 2024, Defendant Clara Herrera Realty Inc., refunded Plaintiff $2,000 of the security deposit.

6. The Defendants did not pay back the remaining $500 deposit.

As to Count I, Plaintiff's Right to Security Deposit under Fla. Stat. § 83.49

7. Plaintiff's Statement of Claim was uncontested with regard to his Florida Residential Landlord and Tenant Act ("FRLTA") claim against Defendants for the return of his security deposit.

8. The Court finds that deductions from the Tenant's security deposit must comply with the standard of "wear and tear," which refers to the "deterioration or depreciation in value by ordinary and reasonable use." Ordinary and reasonable use includes the expected and natural effects of living in a rental property, such as minor scuffs, fading, or general wear over time, as long as the premises have been used in a reasonable manner. Reasonable use accounts for the daily activities of tenants.

9. The Court finds the following items claimed by the Defendants as deductions in the Claim Notice Letter (Exhibit B of Plaintiff's Statement of Claim) to be the result of ordinary use of the premises and not beyond normal wear and tear:

a) Painting: Regular painting of walls is part of normal maintenance associated with the reasonable duration of the tenancy and does not constitute damage caused by the Tenant.

b) Cleaning: Any cleaning necessary for turnover, such as deep cleaning after move-out, falls within the Landlord's routine responsibilities and is not attributable to the tenant.

c) Repairs to fixtures (e.g., blinds, range tops): Wear and tear from ordinary use, including minor scratches, discoloration, or wear on appliances and fixtures, is not recoverable from the security deposit.

10. The Court concludes that these deductions improperly attribute routine maintenance costs to the Tenant. Under Florida Statute §83.49, only damages exceeding normal wear and tear may be withheld from the security deposit. The deductions for these items are therefore disallowed, and the Tenant is entitled to a refund of the improperly withheld amounts.

11. The Plaintiff is entitled to the remaining balance of $500 that

has been withheld from his security deposit.

12. Fla. Stat. § 83.49(3)(C) states: "if either party institutes an action in a court of competent jurisdiction to adjudicate the party's right to the security deposit, the prevailing party is entitled to receive his or her court costs plus a reasonable fee for his or her attorney.

13. The court finds that the Plaintiff is the prevailing party for Count I.

As to Count II, the Florida Consumer Collection Practices Act, §559.55-9559.785

14. Plaintiff's Statement of Claim was uncontested with regard to his Florida Consumer Collection Practices Act Violation claim against Defendants. The Florida Consumer Collection Practices Act, §559.55-§559.785, Fla, Stat., "FCCPA" is a punitive consumer protection law meant to protect consumers from certain unfair, abusive, harassing, or misleading conduct in the collection of a debt. Unlike the federal Fair Debt Collection Practices Act, the FCCPA applies to any "person" as defined in the statute, not just "Debt Collectors."

15. For Plaintiff to prevail on a claim under the FCCPA he must prove the following elements: 1) they are a "debtor" or "consumer" 2) Defendant(s) is/are a "person," 3) that the "debt" is a "consumer debt" primarily for household or personal use (as opposed to a business debt), 4) that Defendants) committed one or more of the nineteen listed prohibited acts proscribed by §559.72, and 5) that Defendants had the requisite intent or knowledge.

16. Landlord tenant debts are "consumer debts" for purposes of the FCCPA, tenants are consumers *and* debtors, and both individuals and corporations are "persons" as defined under the statute. See, e.g., *Gaughan v. Watkins Realty Services, LLC,* 26 Fla. L. Weekly Supp. 223b (Fla. Pasco Cty. Ct. 2018) (finding a landlord could be held liable under the statute when they demanded money not lawfully owed in a three-day notice); *Wolk v. Goodman,* 22 Fla. L. Weekly Supp. 992a (Fla. 9th Cir. Ct. 2014) (holding a landlord liable under the Act for billing a tenant charges he did not owe).

17. This Court finds the first three elements have been satisfied. Defendants claims in Claim Notice Letter were for damages that were not beyond normal wear and tear, which is the sole responsibility of the landlord, which was an attempt to collect an alleged debt from Plaintiff. This Court finds this was an attempt to "claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate," and constitutes a violation of §559.72(9), Fla. Stat. Although Plaintiff has been awarded damages in Count I for the return of his security deposit, the tenant is not precluded from pursuing any other remedy at law or equity that the tenant may have. This Court therefore finds no issue awarding Plaintiff statutory damages under both Statutes.

18. The Court finds that the evidence supports a finding that the Plaintiff met his burden on proving the five elements. The Court therefore does find for the Plaintiff on Count II.

19. Therefore, the Plaintiff is the prevailing party for succeeding on Count I and Count II of the Statement of Claim and is entitled to his reasonable attorney's fees and costs.

IT IS THEREFORE ORDERED AND ADJUDGED:

20. Judgment is hereby entered in favor of the Plaintiff, and against the Defendants, ARIZONA27 LLC[1], and CLARA HERRERA REALTY, INC[2], jointly and severally, in the amount of $1,500, which consists of principal in the amount of $500 in damages for the security deposit, and $1,000 for violation of the FCCPA.

21. The judgment of $1,500 shall bear interest at the full legal interest rate prescribed by §55.03, Fla. Stat., (currently 9.50%) until satisfied, from the date of this Judgment, for which let execution issue forthwith.

22. It is further ordered and adjudged that the judgment debtors shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtors) to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney.

23. The Court finds Plaintiff, as prevailing party, is entitled to his attorney's fees and costs.

24. This Court reserves jurisdiction to award Plaintiff reasonable attorney's fees and costs upon timely motion by Plaintiff.

25. This Court reserves jurisdiction to enforce this Order and Judgment as necessary.

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[1]Arizona27 LLC's address is: 127 W Fairbanks, 214, Winter Park, FL 32789

[2]Clara Herrera Realty, Inc's address is: 941 West Morse Boulevard, Suite 100, Winter Park, FL 32789

* * *

Attorney's fees—Amount

SYNCHRONY BANK, Plaintiff, v. BASILIO GONZALES, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2023-SC-9624. December 23, 2024. Kevin Kohl, Judge. Counsel: Aldridge Pite and Haan, LLP, for Plaintiff. Bryan A. Dangler, Power Law Firm, Altamonte Springs, for Defendant.

FINAL JUDGMENT OF ATTORNEY'S FEES AND COSTS

THIS CAUSE CAME to be heard during an evidentiary proceeding on December 13, 2024[1], upon Defendants' Motion for Attorney Fees and Costs[2], and the Court having reviewed the entire court file, including the relevant time records and expert reports submitted, having heard uncontroverted testimony by both counsel and his expert, and being otherwise fully advised in the premises, finds as follows:

1. The issues for consideration by this Court are to determine the reasonable hours expended by Defendant's counsel, Bryan A. Dangler, Esq. ("Mr. Dangler"), for his work in connection with this action, and at what hourly rate.

2. In support of his request, Mr. Dangler submitted an "Affidavit of Attorney Fees and Costs" and an "Agreement for Legal Services" that was entered into between his office and the Defendant, Basilio Gonzales ("Defendant") ("retainer agreement").

3. Mr. Dangler's affidavit states that he has been a member of the Florida Bar in good standing for 10 years with his practice focused on the areas of consumer debt and insolvency law at both the trial and appellate level. The affidavit and attached time entries reflect a total time of 13.7 hours billed at an hourly rate of $450.00. The affidavit also states that no costs were incurred by Mr. Dangler during the case. No objections to the affidavit or any of its time entries were raised or filed with the Court.

4. The retainer agreement also reflected an agreed hourly rate of $450.00 for all work performed in the case, as well as reimbursement of all costs and expenses incurred. No objections to the retainer agreement or its provisions were raised or filed with the Court.

5. During the hearing, Mr. Dangler provided uncontroverted testimony attesting to the reasonableness of the time he incurred, that such time was commensurate with that of similar attorneys in similar locale and field, that none of the time he incurred was duplicative, and that his hourly rate was reasonable given his prior experience, past successes, and years of practice.

6. Mr. Dangler's time and costs were also supported by a "Decla-

ration" authored by Mr. Shawn Wayne, Esq. ("Mr. Wayne" or "fee expert") ("expert report"), a qualified attorney fee expert and active member of the Florida Bar for over a decade. In addition to his expert report, Mr. Wayne, who has previously testified as a fee expert in other cases, provided uncontroverted expert testimony during the hearing in support of the reasonableness of Mr. Dangler's time and costs incurred, given the issues that were presented and the result that he ultimately achieved. Mr. Wayne's expert report and his testimony during the hearing affirmed the work and skill displayed by Mr. Dangler in undertaking the case and bringing it to a successful end. He also affirmed Mr. Dangler's hourly rate as reasonable given his years of practice, experience, and success in prior cases, in combination with the customary fees charged for similar work by attorneys in the area, and the rates that Mr. Dangler has been awarded in prior cases as recently as this year.

7. The Court, acting in its fact-finding capacity, determines that the reasonable number of hours spent by Mr. Dangler in representing the Defendant in this case is 13.7 hours. No reduction in the amount of time spent is warranted.

8. The Court, acting in its fact-finding capacity, further determines that a reasonable hourly rate for Mr. Dangler's work in this case is $450.00. No reduction in the hourly rate is warranted.

9. These findings are based upon all the competent substantial evidence and testimony presented to the Court, together with all the factors enumerated both in the Florida Bar Code of Ethics 4-1.5, and *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom*, 472 So. 2d 1145 (Fla. 1985), and prior precedent finding Mr. Dangler's hourly rate of $450.00 in similar matters reasonable. *See Citibank, N.A. v. Youssef Lambaitil*, 32 Fla. L. Weekly Supp. 248a (Fla. 9th Jud. Cir., Aug. 16, 2024).

10. Accordingly, this Court finds that the reasonable hourly rate times the reasonable (respective) hours equal $6,165.00, which represents the "lodestar" for the attorney's fees to be awarded to Mr. Dangler in this case.

11. As for the Defendant's attorney fee expert, the Court finds that the contracted hourly rate of $450.00 to be reasonable for the work performed by Mr. Wayne, and that the 5.0 hours he incurred were reasonably expended, for a total of $2,250.00

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Bryan A. Dangler, Esq., as counsel for the Defendant, shall recover from the Plaintiff, Synchrony Bank ("Judgment Debtor"), the following: **$6,165.00** for attorney's fees, **$0.00** for costs, and **$2,250.00** for expert witness fees, for a total sum of **$8,415.00**, all of which shall bear post-judgment interest at the statutory rate from the date this Final Judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which amount let execution issue.

IT IS FURTHER ORDERED that the Judgment Debtor, whose mailing address is c/o Aldridge Pite Hann, LLP, 5300 West Atlantic Ave., Ste. 303, Delray Beach, FL 33484, shall complete under oath, Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the Judgement Creditor, Bryan A. Dangler, Esq. ("Judgment Creditor"), at The Power Law Firm, 5415 Lake Howell Rd., #189, Winter Park, FL 32792, within forty five (45) calendar days from the date of this Final Judgment, unless this Final Judgment is satisfied or post-judgment discovery is stayed.

IT IS FURTHER ORDERED that this Court reserves jurisdiction for purposes of enforcing this Final Judgment, to enter further orders that are proper and to compel the Judgment Debtor to complete Form 1.977, including all required attachments, and to serve it on the Judgement Creditor, and to award of any additional attorney's fees and costs that may be incurred to enforce this Final Judgment against the Judgment Debtor.

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[1]An *Order Setting Hearing* was provided to all parties electronically on October 21, 2024. Further notice was provided to the Plaintiff by Defendant's counsel, who mailed a copy of the *Order Setting Hearing* to Plaintiff's counsel on October 24, 2024. A copy of both the accompanying cover letter mailed by Mr. Dangler and its corresponding stamped mailing envelope were introduced as evidence during the hearing.

[2]Defendant's entitlement to recovery of his attorney fees and costs was previously granted via Agreed Order entered on September 23, 2024.

* * *

Warranties—Magnuson Moss Warranty Act—Affirmative defenses—Affirmative defenses that fail to include short and plain statement of ultimate facts supporting the avoidance or affirmative defense are stricken with leave to amend—Defendant's reservation of rights to amend or add additional affirmative defenses improperly usurps authority of court to grant leave to amend

RONY YEHUDA, Plaintiff, v. BMW OF NORTH AMERICA, LLC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-151147-CC-23. Section SD06. January 8, 2025. Christopher Green, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Kali Campbell, Tampa, for Defendant.

ORDER ON MOTION TO STRIKE AFFIRMATIVE DEFENSES

THIS CAUSE, having come before this Honorable Court on JANUARY 6, 2025 on the Plaintiff, RONY YEHUDA, an individual ("Plaintiff") Motion to Strike Affirmative Defenses ("Motion"). Plaintiff was represented at the hearing by Joshua Feygin, Esq. Defendant was represented by Kali Campbell, Esq. After hearing argument of counsel and being otherwise fully advised in the premises, the Court hereby finds as follows:

In the operative complaint at bar before this Court, Plaintiff has alleged a breach of the Magnusson Moss Warranty Act, 15 U.S.C. 2310(d)(1), *et. sequi*. On September 4, 2024, Defendant filed its Answers and Affirmative Defenses in this action. [DE 11]. Defendant interposed nineteen (19) affirmative defenses. *Id*., pgs. 5-7. Furthermore, Defendant included a purported reservation of rights to amend and/or add additional affirmative defenses upon discovery and subsequent proffer. *Id*. ¶20.

Effective July 1, 2024, Rule 1.110(d) was amended to state: "[a] pleading that sets forth an affirmative defense must contain a short and plain statement of the ultimate facts supporting the avoidance or affirmative defense." Fla. R. Civ. P. 1.110(d). This amendment conforms to well-established casel aw. Properly pled, "[a]ffirmative defenses are in the nature of confession and avoidance." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton,* 467 So.2d 311, 312 (Fla. 5th DCA 1985). "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse. *St. Paul Mercury Ins. Co. v. Coucher,* 837 So.2d 483 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D131b]. The pleader of an affirmative defense cannot simply state conclusions without alleging ultimate facts, which would support the defense alleged. *Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach*, 318 So.2d 175 (Fla. 3d DCA 1975), cert denied, 330 So.2d 23 (Fla. 1976).

Based upon the above authorities, the Court hereby strikes the following affirmative defenses with leave to amend:

3. Plaintiff is not in privity with BMWNA under Florida law.

4. To the extent that the alleged problems with the vehicle described in the Complaint are the result of Plaintiff's abuse, misuse or neglect of the vehicle, Plaintiff's recovery is barred.

5. To the extent that Plaintiff's warranty was voided by Plaintiff's alteration of the subject vehicle, Plaintiff's recovery is barred.

6. Plaintiff's damages, if any, were not the result of any act or omission on the part of BMWNA.

7. If the subject vehicle was altered or changed by the Plaintiff or some

third person, then BMWNA cannot be held liable to the Plaintiff.

8. If the subject vehicle was misused by the Plaintiff or some third person, then BMWNA cannot be held liable to the Plaintiff.

10. In the event that Plaintiff had an opportunity to mitigate his damages and failed to do so, then Plaintiff is barred from recovering those damages from BMWNA which result from her failure to mitigate.

11. BMWNA denies that it breached any warranties on the subject vehicle.

13. BMWNA denies that the subject vehicle contains any defects. In the event that any defect is proven, and said defect is the result of abuse, misuse, neglect, failure to properly maintain, unauthorized modifications, or alterations of the subject vehicle by the Plaintiff or some third person over whom BMWNA has no control or responsibility for, then BMWNA cannot be held liable to the Plaintiff.

14. As a matter of law, Plaintiff does not have a breach of express warranty action against BMWNA.

15. Plaintiff's claims in this action are governed by the plain language of any and all written warranties supplied with the subject vehicle.

16. If Plaintiff has failed to comply with the dispute resolution provisions of the applicable warranty, Plaintiff's claims are legally barred.

19. Any damages suffered by Plaintiff are the result of a superseding or intervening cause.

Lastly, Pursuant to Rule 1.190 the Court may grant leave to amend affirmative defenses. However, whether leave to amend is granted is solely at the discretion of this Court. Defendant cannot claim a "right" to amend and thereby usurp the Court's authority in this regard. As such, Defendant's "reservation of rights" found within their Affirmative Defenses is improper and stricken as an affirmative defense.

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

1. Plaintiff's Motion is hereby **GRANTED** in part and **DENIED** in part.

2. For the reasons stated above, affirmative defenses 3-8; 10-11; 13-16; and 19 are hereby **STRICKEN**, with leave to amend.

3. Defendant's reservation of rights to amend affirmative defenses is hereby **STRIC**KEN.

4. Defendant shall have TWENTY (20) days to amend their affirmative defenses.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Insurer properly denied coverage to claimant who was not married to insured, lived at her own address, and maintained her own vehicle with her own insurance at time of accident—No merit to argument that claimant's deposition testimony should be excluded on grounds that medical provider and its counsel were not present at deposition

DADE MEDICS AND REHAB CENTERS, LLC., et al., Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-014876-CC-25. Section CG02. November 14, 2024. Gloria Gonzalez-Meyer, Judge. Counsel: George David, Law Offices of George A. David, P.A., for Plaintiff. Robert Phaneuf, Law Office of Terry M. Torres & Associates, Doral, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court, and the Court being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED that:

THIS CAUSE, having come before the court on October 31, 2024, to be heard on Defendant's Motion for Final Summary Judgment based on the claimant, Elizabeth Artiles, claim for coverage under the policy. The court finds that the claimant did not reside at the policy address, nor was the claimant Elizabeth Artiles a spouse of the policy holder at the time of loss. Defendant moved for final summary judgment based on claimant Elizabeth Artiles not meeting the definition of relative nor insured in order to qualify for Personal Injury Protection coverage. The Court having reviewed the file, declarations, pleadings, record evidence, and considered the arguments of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

FACTS

1. Claimant Elizabeth Artiles was involved in a motor vehicle accident on July 28, 2019.

2. On September 9, 2019, Elizabeth Artiles provided a recorded statement to Infinity stating that she was a passenger in a Chevrolet SUV owned by her friend.

3. Based on the facts of loss, Infinity ultimately conducted an investigation including speaking with the claimant, reviewing the police report, as well as addresses of the parties.

4. Prior to the filing of this lawsuit, Infinity denied coverage in finding that Mrs. Artiles was neither a (1) household resident nor (2) relative of the Infinity policyholder at the time of loss.

5. Subsequent to the filing of this lawsuit, additional information was gathered through deposition of Mrs. Artiles as well as the Infinity adjuster assigned to this matter.

6. Specifically, January 23, 2023, Mrs. Artiles appeared with her personal attorney, Vidal Velis, Esq. to provide her sworn deposition testimony regarding this loss.

7. During her deposition, Mrs. Artiles testified to the following facts, among others:

1. Mrs. Artiles did not marry the Infinity named insured until July 17, 2021[1]

2. Mrs. Artiles lived at her own address at the time of loss (which matched her recorded statement)[2]

3. That she owned her own vehicle at the time of the loss, with her own policy. "A. No. My own personal policy with my own car, my name, everything is me."[3]

4. Mrs. Artiles further testified to maintaining her own insurance coverage through another carrier, specifically Geico.[4]

8. In prosecution of this action, the Plaintiff in this suit deposed Infinity's litigation adjuster Natalie Robinson on May 13, 2024, and inquired upon the facts listed above.

9. During this deposition, Mrs. Robinson referenced her internal notes, produced the documents requested and testified specifically that Mrs. Artiles furthermore was not in any vehicle which was listed on the declarations page of the named insured, Jimmy Garcia.

10. Mrs. Robinson testified specifically, "And on the police report it shows that [Elizabeth Artiles] was a passenger and none of those vehicles listed on a declarations page was involved in this particular"[5]

11. The Defendant filed its Motion for Summary Judgment on March 22, 2024.

12. Thereafter, the Plaintiff filed its Cross Motion for Summary Judgment on September 20, 2024.

13. In hearing, the court reviewed the testimony of both claimant Elizabeth Artiles as well as Adjuster Natalie Robinson.

14. Through the deposition testimony of Natalie Robinson, it was demonstrated that

1. Elizabeth Artiles was neither household resident, nor relative (including spouse), of an Infinity policy holder at the time of the accident;

2. Elizabeth Artiles lived at her own address at the time of the accident;

3. Elizabeth Artiles maintained her own insurance policy with her own car ("[Artiles]. No. My own personal policy with my own car, my name, everything is me." (*Id.*))

4. Elizabeth Artiles did not marry the Infinity customer until nearly

2 years after the date of loss, among other facts.

15. Also considered by this court were: the police report, the transcribed recorded statement referenced in deposition testimony, the deposition transcripts filed into the court record, the presuit demand, demand response, carrier information ascertained from deposition testimony, marital and household information obtained from deposition transcript, and other record evidence by the parties in support of their factual positions.

Summary Judgment Standard

"The summary judgment standard provided for in [Rule 1.510] shall be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317, . . . (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 . . . (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 . . . (1986)" *In re Amends. To Fla. Rule Civ. Proc. 1.510*, 317 So. 3d 72, 74 (Fla. 2021) [46 Fla. L. Weekly S95a] (citation omitted). "Summary judgment is warranted where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)." *Auriga Polymers Inc. v. PMCM2, LLC as Tr. For Beaulieu Liquidating Trust*, 40 F. 4th 1273, 1281 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1396a]. Under this standard, "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." *In re: Amendments*, 317 So. 3d at 75 (quoting *Anderson*, 477 U.S. at 248). This standard "mirrors the standard for a directed verdict . . ." *Chowdhury v. BankUnited, N.A.*, 366 So. 3d 1130, 1133 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D691a]. "When deciding the appropriateness of a directed verdict or JNOV, Florida trial and appellate courts use the test of whether the verdict is, for JNOVs, or would be, for directed verdicts supported by competent, substantial evidence." *Forbes v. Millionaire Gallery, Inc.*, 335 So. 3d 1260, 1262 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D281a] (citation omitted).

The focus for determining whether a genuine dispute exists, so as to bar summary judgment, is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Like the standard for directed verdict, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-252.

Legal Analysis

Florida Rule of Civil Procedure 1.510(c)(5)(5) provides a clear definition that opposition evidence must be provided with at least 20 days prior to the hearing. *See* "**Timing for Supporting Factual Positions.** At the time of filing a motion for summary judgment, the movant must also serve the movant's supporting factual position as provided in subdivision (1) above. **At least 20 days before the time fixed for the hearing**, the nonmovant must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1) above." *Emphasis supplied.*

In this case, the record evidence shows that Defendant denied coverage to Elizabeth Artiles because she did not reside at the policy address, nor was she a spouse or relative of the policy holder, Jimmy Garcia through its demand response issued September 9, 2019 to the Law Office of Jose R. Iglesia.

Thereafter, the Plaintiff filed its Complaint on August 14, 2020 seeking PIP benefits for the motor vehicle accident occurring July 28, 2019.

On November 30, 2020, the Defendant filed its Answer and Affirmative Defenses raising its sole affirmative defense that the claimant was not covered under the policy of PIP insurance as they failed to qualify for PIP coverage. Specifically, the claimant is not a household member and/or dependent resident relative of the insured, as she was not a spouse, child or family member of the insured, and did not reside with insured. As such the claimant does not qualify for PIP benefits under the Defendant's policy and thus no benefits are due or owed to Plaintiff.

Upon review of the deposition transcripts filed into the court record in this case, it is confirmed that Elizabeth Artiles appeared with her counsel and testified that she did not marry the Infinity named insured, Jimmy Garcia, until 2021. This is nearly two (2) years after the motor vehicle accident. Based on the factual information before the court and the Plaintiff's failure to rebut this information or provide any marital information to the contrary, this date of marriage is conclusively proven, as the motor vehicle accident pre-dates the date of Mrs. Artiles marriage to Infinity's insured.

The deposition transcript of the claimant also reveals that Mrs. Artiles indeed lived at her own address and stated that she maintained her own vehicle with her own insurance. Specifically, Mrs. Artiles testified to owning a Hyundai insured with Geico and also stated that she lived at her own address at the time of loss.

During the summary judgment hearing, the Plaintiff attempted to exclude Mrs. Artiles testimony from consideration by the Court. In support of its contention that this court should not consider the deposition testimony of claimant Elizabeth Artiles, Plaintiff counsel relies on Rule. 1.330(a)(1) and argues that Plaintiff and Plaintiff's counsel were not present at the deposition of Mrs. Artiles which occurred on January 23, 2023 to discuss the motor vehicle accident and subsequent treatment at issue.

This court finds that Plaintiff's argument is misplaced. It is established that the deposition of Elizabeth Artiles discussing her motor vehicle accident of July 28, 2019, which is the same thing contemplated by the instant suit is admissible. Additionally, this court finds that Elizabeth Artiles was adequately represented by her own legal counsel at the deposition occurring on January 23, 2023 and that her attorney, Mr. Velis, adequately protected her due process interests in order to facilitate her giving testimony to Infinity regarding her claim for PIP benefits, which is also the subject of this suit. Furthermore, Florida's Evidence code allows sworn statements and deposition transcripts regarding the matters at issue before the court to be admissible, assuming the same evidence would be admissible at trial. *See also In re Amendments to Fla. Rules of Civil Procedure*, 718 So. 2d 795 (Fla. 1998) [23 Fla. L. Weekly S508a].[6]

Taking facts in the light most favorable to the non-moving party, the Court provided due diligence to allow the Plaintiff to explain its position respecting evidence. Plaintiff counsel stated on record that he believed Mrs. Artiles to be a "paying customer" of Infinity and that the deposition of Mrs. Robinson shows that there should be coverage through the policy declarations page and the police report. At the same time, Plaintiff counsel also objects to certain documents being reviewed by this court, including but not limited to the deposition testimony of the claimant herself.

This court disagrees that the record evidence presented by Plaintiff and Defendant should be excluded or ignored in any part. The court has reviewed all record evidence including the testimony of both Elizabeth Artiles as well as the testimony of Natalie Robinson as exhibited to Plaintiff's court filing.

Therefore upon all review of evidence and in the light most favorable to the non-moving party, the court finds that the record shows that Defendant properly denied coverage to Elizabeth Artiles based on Mrs. Artiles' own admission that she was not married to Jimmy Garcia at the time of loss, lived at her own address, maintained her own vehicle "A. No. My own personal policy with my own car, my name, everything is me."[7] and furthermore finds that there is no genuine issue of material fact that Elizabeth Artiles maintained her

own vehicle with her own security as contemplated by Florida Statute on the date of loss July 28, 2019 as sued upon in Plaintiff's complaint.

Therefore the Defendant gained nothing by the way of its actions, and the Defendant properly evaluated and investigated the claim based on the recorded statement, police report, and subsequent two depositions. Additionally, the court considered the Plaintiff's opposition evidence but finds that such evidence did not raise any genuine issue of material fact contrary to the Defendant's evidence, arguments, and case law.

ACCORDINGLY, it is ORDERED and ADJUDGED that Defendant's Motion for Final Summary Judgment is hereby GRANTED;

It is further ORDERED and ADJUDGED that Plaintiff shall take nothing by this action and Defendant shall go hence without day. The Court shall reserve jurisdiction as to Defendant's attorneys' fees and taxable costs.

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[1]Artiles Dep. 10:3
[2]Artiles Dep. 14:14-17
[3]Artiles Dep. 39:4-5
[4]Artiles Dep. 13:18-19
[5]Robinson Dep. 15:23-25
[6]"Subdivision (a)(1) was amended to clarify that, in addition to the uses of depositions prescribed by these rules, **depositions may be used for any purpose permitted by the Florida Evidence Code** (chapter 90, Fla. Stat.). This amendment is consistent with the 1980 amendment to Rule 32 of the Federal Rules of Civil Procedure." *Castaneda v. Redlands Christian Migrant Ass'n*, 884 So. 2d 1087, 1090 (Fla 4th DCA 2004) [29 Fla. L. Weekly D2346a]. [Emphasis supplied].
[7]Artiles Dep. 39:4-5

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—Notice—Affidavit of insurer's litigation specialist attesting that insurer sent EUO notices to insured was inadmissible double hearsay where litigation specialist had never worked for law firm that actually sent notices and based attestation on record of notice provided to insurer by law firm—Insurer's motion for summary judgment is denied

PRINCIPLE CARE CENTER, INC., a/a/o Luis Thompson, Plaintiff, v. MENDOTA INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-013054-CC-21. Section HI01. January 9, 2025. Milena Abreu, Judge. Counsel: George Milev, The Evolution Law Group, P.A., Weston, for Plaintiff. William J. McFarlane, McFarlane Law, Coral Springs, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Court, after hearing on Defendant's Motion for Summary Judgment and Plaintiff's Response in Opposition and request for a cross Motion for Summary Judgment, reviewing the docket history, pleadings, consideration of the statutory authority, relevant case law and evidentiary rules, the Court hereby rules as follows:

FACTUAL BACKGROUND:

1. The insured, Luis Thompson was involved in a car accident on January 26, 2022.

2. As a result of the accident, Mr. Thompson sought medical treatment with the Plaintiff.

3. Defendant issued an auto policy of insurance to Enrique Gonzalez for which Luis Thompson was covered and sought coverage in a claim resulting from said accident.

4. Said policy was in full force and effect at the time of the accident in January 2022.

5. Mr. Thompson assigned his rights to PIP benefits under the subject policy to the Plaintiff.

6. The policy contained certain conditions precedent to coverage the claimant must satisfy, including the attendance at an Examination Under Oath (EUO).

7. Specifically, the policy language states: (as outlined under Person Injury Protection, paragraph 2: "at out request, insured persons must provide sworn ro recorded statements and exams under oath. . . . .An exam under oath is a condition precedent to receiving PIP benefits under this policy. . ."

8. In addition, section 627.736(6)(g), Florida statute requires: "an insured seeking benefits under section 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. . . . .compliance with this paragraph is a condition precedent to receiving benefits."

9. Defendant hired an attorney firm for the coordination and setting of EUOs and the law firm sent an email Notice of Examination Under Oath in April of 2023, scheduled to occur in May of 2023.

10. Mr.Thompson failed to appear for the EUO in for May 2022.

11. The same firm is alleged to have sent a second Notice of EUO via email to Mr. Thompson's lawyer for an EUO set to take place in June of 2022.

12. Mr. Thompson did not appear for the June 2022 EUO.

13. Defendant denied coverage as a result of Mr. Thompson's failure to attend the two EUO's.

14. Plaintiff thereafter filed the lawsuit for PIP benefits.

LEGAL ANALYSIS:

Florida Rule of Civil Procedure 1.510 states in relevant part:

> (a) (c) Motion and Proceedings Thereon. The Motion must state with particularity the grounds upon which it is based and the substantial matters of law to be argued and mustspecifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials *as would be admissible in evidence* on which the movant relies. . . (emphasis added).

Moreover, the *movant* has the burden of showing that there is no genuine issue of material fact. In support of its Motion for Summary Judgment, Defendant filed the affidavit of Lissett Nunez, the litigation specialist for the Defendant insurance company. Said affidavit attests to being familiar with the records kept in the ordinary course of business for Defendant, Mendota Insurance Company. The affidavit further states that Defendant sent to Mr. Thompson a request for an EUO compelling his attendance at two separate EUOs and that Mr. Thompson failed to appear for both EUOS. However, at hearing, it was revealed that Defendant in fact did *not* send any notices of EUO; rather, an attorney law firm *hired by* Defendant sent the EUO requests/notices via email. As a result, the Court finds the affidavit of the litigation specialist is double hearsay not based on personal knowledge and will not qualify as admissible evidence for purposes of summary judgment evidence because the litigation adjuster does not work nor has ever worked for the attorney law firm, cannot testify as to the business practices of the law firm, nor how documents of the law firm are created, when they are or were created or even how documents are kept in the normal course of the law firm's business. The record is void here of any affidavit from the appropriate party (ie, a custodian of records for the *law firm*) to attest to the preparation, retention and transmittal of the EUO notices in this case. Simply because the law firm is alleged to have provided their record of an EUO notice to the Defendant's litigation specialist, who then made the law firm's letter a part of their litigation/claims file, does not automatically make that document the Defendant's (insurance company) record. Defense counsel argued the law firm was acting as an agent for the insurance company but failed to provide any legal authority.

The document here- specifically, the EUO notices, were prepared by the law firm, presumably kept in the law firm's course of business

and a part of the law firm's records, NOT the Defendant's. Therefore, the Court finds the evidence in support of Defendant's Motion for Summary Judgment is entirely based upon two layers of inadmissible hearsay; because the Defendant here is the movant, the Court finds the Defendant has not met its burden of proof for summary judgment.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment is **denied**. Plaintiff's cross Motion for Summary Judgment is also **denied** as there was no legal basis in support of its Motion. Although the Notice of hearing referenced Plaintiff's Cross Motion for Summary judgment, the only document filed referencing summary judgment was "Plaintiff"s Response to Defendant's Motion for Summary Judgment and cross Motion for Summary Judgment." However, the motion is limited to Plaintiff's response to Defendant's motion and makes no mention of any legal basis for its own summary judgment. A ruling against the Defendant as to its summary judgment does not render an automatic summary judgment for Plaintiff.

The case will remain on the trial calendar.

* * *

Insurance—Declaratory judgments—Motion to dismiss count seeking declaratory judgment is denied—Complaint demonstrates bona fide, actual, present need for declaration

REHOBOTH CHIROPRACTIC CENTER, INC., a/a/o Jean St. Fort, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-099491-SP-21. Section CL02. December 26, 2024. Kevin Hellmann, Judge. Counsel: David S. Kuczenski, Schrier Law Group, Miami, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT 2 OF COMPLAINT

THIS CAUSE having been brought before the Court on Defendant's Motion to Dismiss Count 2 of Plaintiff's Complaint (Index 20), which was filed on January 30, 2024, and the Court being fully apprised of the facts and law relevant to the Case and having heard argument from both parties on December 5, 2024, it is hereby

ORDERED AND ADJUDGED:

that Defendant's Motion to Dismiss Count 2 of Plaintiff's Complaint which seeks declaratory judgment is DENIED based on the following:

1) the requirements of Florida Rule of Civil Procedure 1.140 and Florida Statute 86.111 and

2) factually, Plaintiff's complaint has "demonstrated a bona fide, actual, present need for a declaration," *Jackson v. Federal Insurance Company*, 643 So.2d 56, 58 (Fla. 4th DCA 1994) consistent with relevant case law, including *Cintron v. Edison Insurance Company*, 339 So. 3d 459 (Fla. 2nd DCA 2022) [47 Fla. L. Weekly D1079a], *Michael Marks v. GEICO General Insurance Company*, 332 So.3d 11 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D186a] and *Northwest Center for Integrative Medicine and Rehabilitation*, 214 So.3d 679 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D446b].

* * *

Insurance—Venue—Motion to transfer venue is denied—Neither convenience of parties and witnesses nor interest of justice necessitates transfer

REHOBOTH CHIROPRACTIC CENTER, INC., a/a/o Jean St. Fort, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-099491-SP-21. Section CL02. December 26, 2024. Kevin Hellmann, Judge. Counsel: David S. Kuczenski, Schrier Law Group, Miami, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO TRANSFER VENUE

THIS CAUSE having been brought before the Court on Defendant's Motion to Transfer Venue (Index 19), which was filed on October 11, 2023, and the Court having heard argument from both parties on December 5, 2024, and being fully apprised of the facts and law relevant to the case, it is hereby

ORDERED AND ADJUDGED:

that Defendant's Motion to Transfer Venue is DENIED based on

1) Florida Statutes 47.011 and 47.051 and

2) factually, there is neither a substantial inconvenience nor an undue expense for the parties or their witnesses to have the case adjudicated in Miami-Dade County nor is it necessary in the interest of justice to transfer venue out of Miami-Dade County. *See At Home Auto Glass, LLC, v. Mendota Insurance Company*, 345 So.3d 392 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1706a]; *Government Employees Insurance Company v. Burns*, 672 So.2d 834 (Fla. 3rd DCA 1996) [21 Fla. L. Weekly D181a]; *Touchton v. Atlantic Coastline Railroad Company*, 155 So.2d 738 (Fla. 3rd DCA 1963).

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Where deputy was furthering his investigation and instructing recruit on how to process citations during entire time of detention awaiting arrival of DUI unit, 26-minute detention was not unlawful

STATE OF FLORIDA, Plaintiff, v. CHAD STEVEN SILVA, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, South County Criminal Division. Case No. 2023 CT 2777 SC. October 19, 2024. Maryann Olson Uzabel, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE, having come before the Court upon Defendant's Motion to Suppress filed on July 25, 2023. At the hearing on said motion on October 5, 2023, the Court heard testimony and argument of counsel for the State and the Defense and was otherwise duly advised in the premises. After further review of the evidence presented, the Court finds as follows:

1. On March 22, 2023, Deputy Kyle Poinsett of the Sarasota Sheriff's Office stopped Defendant's vehicle for speeding. He testified that before coming to a stop, Defendant passed multiple side streets without pulling over and hit the curb a couple of times. He stopped the Defendant at 10:46 PM.

2. Deputy Poinsett testified that Defendant had issues with getting his power window down. Once he spoke to the Defendant, he smelled the odor of alcoholic beverage. Defendant had slurred speech and blood shot and watery eyes. He kept trying to hand the deputy a receipt instead of his driver's license. The deputy went around to the passenger side to help look for documents in the glove box. He testified that this took longer than normal.

3. Deputy Poinsett called for Deputy Watson from the traffic unit to respond. He stated that it was standard procedure to have the DUI unit called but the investigation does not stop while waiting for the deputy to arrive. It took 26 minutes for the DUI unit to respond. Deputy Watson arrived at 11:12 PM.

4. Deputy Poinsett testified that he was training a recruit that night and it took longer to process the citations because he was teaching him how to do them. The infractions were started at 10:59 PM. He stated that once the driver's license is put into the computer, the fields auto populate in the citations. However, he testified that he was still finishing the citations when Deputy Watson from the DUI unit arrived on scene. The citations were not completed until after Deputy Watson arrived.

5. After a subsequent investigation, the Defendant was arrested for DUI.

LEGAL ARGUMENT

Defendant argued that his detention by Deputy Poinsett was an illegal

detention because Defendant was detained longer than was reasonably necessary to either confirm or dispel the deputy's suspicions that the Defendant may be impaired. The Defendant cited several cases including *State v. Schepp,* 16 Fla. L. Weekly Supp. 766a (Fla. Sarasota County Ct. December 12, 2008), *affirmed* 16 Fla. L. Weekly Supp. 733a (Fla. 12th Cir. Court May 14, 2009); *State v. Bresnen,* Case No. 2021 CT 237 AX (Fla. Manatee County Court, May 2, 2023); *State v. Marquette,* Case No. 2012 CT 4127SC (Fla. Sarasota County Court, March 1, 2013); *State v. Gagan,* Case No. 1999 CT 14752NC (Fla. Sarasota County Court, June 21, 2000); and *State v. Nicholson,* 21 Fla. L. Weekly Supp. 582b (Fla. Sarasota County Court October 30, 2013).

In the instant case, the distinguishing issue is that the deputy testified that he was furthering his investigation the entire time while waiting for Deputy Watson to arrive to conduct the DUI investigation. He was not merely waiting, but instructing his recruit on how to process citations and did not finish the citations until after Deputy Watson arrived. The investigation did not stop while awaiting the arrival of the DUI unit deputy. This Court finds that there was no unlawful detention in this case based on the testimony and evidence presented.

Therefore, it is

ORDERED AND ADJUDGED that the Motion to Suppress is **DENIED.**

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Summary judgment—Factual dispute

CIELO SPORTS & FAMILY CHIROPRACTIC CENTRE, LLC, a/a/o Amir Beganovic, Plaintiff, v. STATE FARM FIRE & CASUALTY COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-019654. Division O. January 10, 2025. Cory Chandler, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Scott Distasio, for Plaintiff. Edwin Valen, for Defendant.

ORDER DENYING PLAINTIFF'S & DEFENDANT'S MOTIONS FOR FINAL SUMMARY JUDGMENT & DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S AFFIDAVIT OF TODD CIELO, D.C.

THIS CAUSE, having come upon the Court on November 7, 2024 on Defendant's Motion for Final Summary Judgment Regarding 9810A Policy, Proper Payments Rendered, Invalid Demand, Plaintiff's Motion for Final Summary Judgment, Defendant's Motion to Strike Plaintiff's Affidavit of Todd Cielo, D.C., Plaintiff's Motion for Entitlement to Attorney's Fees and Costs and Defendant's Motion to Strike Plaintiff's for Entitlement to Attorney's Fees and Costs. The Court having considered the motions, having heard arguments of the parties, and otherwise being duly advised in the premises, hereby ORDERED AND ADJUDGED:

1. Defendant's Motion to Strike Plaintiff's Affidavit of Todd Cielo, D.C. is **HEREBY DENIED** as the Court must consider the affidavit in the light most favorable to the moving party. Further, said affidavit states that it is based upon personal knowledge, as well as the CPT Guidelines.

2. Defendant's Motion for Final Summary Judgment Regarding 9810A Policy, Proper Payments Rendered, Invalid Demand and Plaintiff's Motion for Final Summary Judgment are **HEREBY DENIED**. The Court finds there is a factual dispute which precludes summary judgment as to whether Plaintiff properly billed CPT code 72040 on 11/30/21.

3. The Court does grant partial summary judgment to Defendant as to CPT codes 72030 and 74699 as Plaintiff confirmed it was no longer seeking said CPT codes in this action.

4. Defendant did attempt to argue that Plaintiff should have billed CPT code 72052 instead of CPT code 72040. However, Defendant's Motion for Final Summary Judgment made no mention of CPT code 72052 and Defendant did not file any affirmative defense alleging this defense.

5. Defendant declared that it was not presenting any arguments as to its Invalid Demand defense, to which Plaintiff had filed its Motion for Entitlement to Attorney's Fees and Costs. As such, Plaintiff's motion was not heard by the Court at this time.

6. By separate Order, the Court ordered the parties to Mediation within thirty (30) days.

* * *

Court records—Confidentiality—Standing—Nonparty has standing to challenge court records closure order—Clerk is ordered to unseal entire court file, including docket and parties' names

GP SERRANO LLC, a Limited Liability Company, Plaintiff, v. GEORGE WALKS and ELIZABETH SANCHEZ, Defendants. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2023-CC-016927. December 17, 2024. Danielle Sherriff, Judge.

AMENDED ORDER GRANTING MOTION TO VACATE AGREED ORDER ON PLAINTIFF'S MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORDS

THIS CAUSE came before the Court for hearing on December 2, 2024. After reviewing the pleadings, hearing the argument of counsel and the pro se nonparty, and otherwise being advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The Court grants the Motion to Vacate the Agreed Order on Plaintiff's Motion to Determine the Confidentiality of Court Records entered on July 5, 2024.

2. The Court finds that the decision in *Barfield v. Doe*, 348 So. 3d 1156 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1924a], is indistinguishable.

3. The Court also finds that Mr. Barfield has standing to challenge the entry of the sealing order. *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 118 (Fla. 1988) ("both the public and news media shall have standing to challenge any closure order."). *See also* Rule 2.420(e)(6), *Fla. R. Gen. Prac. & Jud. Admin*.

4. The Clerk of Court shall unseal the entire court file, including the progress docket, and make it available online to the public. The parties' names shall not be confidential.

5. The Clerk of Court is directed to publish this Order in accordance with Rule 2.420(e) (4), *Fla. R. Gen. Prac. & Jud. Admin*.

6. **The Court reserves jurisdiction to tax allowable costs incurred by the nonparty.**

* * *

Insurance—Personal injury protection—Settlement—Accord and satisfaction—No merit to argument that settlement check did not include final dates of service where insurer had received bills for all dates of service at the time it notified provider that it was disputing claim—Insurer's motion for summary judgment on accord and satisfaction is granted

B & D CHIROPRACTIC INC., Plaintiff, v. THE RESPONSIVE AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23030342. Division 52. December 30, 2024. Giuseppina Miranda, Judge. Counsel: Jenna Hope Levy, Florida Litigators PLLC, Wellington, for Plaintiff. Phillip F. Thomas and Charles L. Vaccaro, The Vaccaro Law Firm, P.A., Davie, for Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court for hearing[1] on October 4, 2024, for consideration of the following:

(a) Defendant's Motion for Summary Judgment/Disposition on Accord and Satisfaction and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (filed on September 13, 2024);

(b) Defendant's Notice of Filing in Support of Motion for Summary Judgment/Disposition and Affidavit of Jehan Fredericks in

Support of Defendant's Motion for Summary Judgment/Disposition as to Settlement Defense and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment/Disposition (file September 14, 2024);

(c) Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment/Disposition Re: Accord and Satisfaction and Cross Motion for Summary Judgment/Disposition (filed on September 30, 2024).

(d) Plaintiff's Notice of Filing Plaintiff's Affidavit (filed on October 1, 2024).

The Court, having reviewed the Motions, Memorandum, and Affidavits, having considered arguments of counsel, and being otherwise duly advised in the premises, makings the following findings of fact and conclusions of law:

This is a case for Personal Injury Protection (hereinafter "PIP") insurance benefits associated with a policy of insurance issued by Defendant to Colin Williams (hereinafter "Assignor"). Plaintiff filed suit on April 3, 2023.[2] During the hearings referenced herein, Plaintiff stipulated to narrowing the issues of this lawsuit to non-payment of medical bills for dates of service May 18, 2018 through May 23, 2018. Plaintiff argues these dates of service were not included in payment Defendant made.

It is undisputed the automobile accident that is the subject of this litigation occurred on April 10, 2018. It is further undisputed that Defendant received all the medical bills from the Plaintiff for dates of service April 10, 2018 through May 23, 2018.[3] Based on Plaintiff's stipulation, the Court is limiting its analysis to whether accord and satisfaction applies to the medical bills for dates of service April 10, 2018 through May 23, 2018

In support of its Motion, Defendant filed the Affidavit of its corporate representative, Jehan Fredericks. The Affidavit contains several exhibits, including correspondence dated July 10, 2018, an endorsed check[4], and medical bills. It is undisputed that on July 10, 2018, Defendant sent a letter to Plaintiff advising Plaintiff of Defendant's dispute regarding Plaintiff's claim for PIP benefits.[5] In that same letter, Defendant made an offer to settle Plaintiff's claim for benefits for a total amount of $4,127.79. Defendant's July 10, 2018 correspondence[6] stated the following:

Please be advised that our investigation revealed the following:

On 5/15/2018 a Responsive Auto Insurance Company field appraiser secured photos of Mr. Colin Williams's Dodge Ram that reveals less than $500.00 worth of damage. I have attached photos for your review. As one can see this is a low impact claim and yet billing has been excessive.

With the damage to the vehicle being a scrape and not a blunt hit, it is hard for one to see how a back injury or any kind of injury can arise from this sort of accident especially when Mr. Williams at the time of the EUO indicates that he is a "underwater welder" which is a labor intensive job. However, as a business decision, we are willing to settle this claim for a compromised amount even in light of the above. Enclosed is a full and final pip settlement check for $4,127.79.

The check[7] enclosed in the correspondence was made payable to Plaintiff in the amount of $4,127.79 and stated the following *directly above the payment amount of the check, printed in all capital letters in a single line* :[8]

MEMO: PIP PAYMENT F/A/O COLIN WILLIAMS AS FULL AND FINAL FOR ALL DOS

and the only medical bills received from Plaintiff at this juncture were for dates of service ("DOS") April 10, 2018 through May 23, 2018.

In response to Defendant's Motion, Plaintiff filed its Memorandum and Cross Motion, along with the affidavit of William Gerwig, D.C., the Owner of B&D CHIROPRACTIC INC. Even though Dr. Gerwin *admitted receiving of the letter and the check* , he claimed that "Plaintiff is not/was not aware of a "settlement" between" the parties.[9] This assertion is in direct contradiction to Dr. Gerwin's admission of Plaintiff's receipt of Defendant's correspondence and the fact that Plaintiff cashed the check.[10] Based on the medical bills sent by Plaintiff to date,[11] Defendant's correspondence clearly puts Plaintiff on notice that Defendant:

(1) is disputing the extent of the Assignor's injuries,

(2) has determined that the bills/medical services were excessive, and

(3) is making a "business decision" to "settle the claim for a comprised amount."

Additionally, the correspondence unequivocally states: "Enclosed is a full and final pip settlement check for $4,127.79" with an accompanying check that informs Plaintiff of Defendant's intention that payment is as "FULL AND FINAL" for all dates of service at this snapshot in time.

Plaintiff argues[12] that the bills for the dates of service May 18, 2018 through May 23, 2018 were not included in Defendant's payment of July 10, 2018. This argument is unpersuasive when considering that at the time Defendant notified Plaintiff that it was disputing the claim, Defendant had received all the then existing bills generated by Plaintiff.[13]

Florida Statute §673.3111, states in pertinent part, as follows:

(1) If a person against whom a claim is asserted proves that that person in good faith *tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument,* the following subsections apply.

(2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted *proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.*

(emphasis added). Here, the requirements of Florida Statute §673.3111(1) were met.

Based on the foregoing, the Court finds that Defendant has undisputedly demonstrated that it made an offer to settle the PIP benefits for dates of service April 10, 2018 through May 23, 2018, and Plaintiff accepted the offer by cashing the check.

Accordingly, it hereby ORDERED and ADJUDGED that:

1. Defendant's Motion for Summary Judgment/Disposition on Accord and Satisfaction GRANTED.

2. Plaintiff's Cross Motion for Summary Judgment/Disposition is DENIED.

3. Final Summary Judgment is entered in favor of the DEFENDANT.

4. Plaintiff, **B & D Chiropractic, Inc. (a/a/o Colin Williams)** shall take nothing from this action and Defendant, **The Responsive Auto Insurance Company**, shall hence go without day.

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[1]The Court conducted hearings and Case Management Conferences on June 28, 2024, August 30, 2024, and September 11, 2024 outlining the timetable for the filing of Motions and limiting consideration of the Motions to Florida Small Claims Rule 7.135 (Summary Disposition) as provided for in *Broward County Administrative Order 2020-85-CO (Amendment 1)*, Paragraph 2. (See Amended Order Setting Hearing on Defendant's Motion for Summary Disposition, Order on Case Management Conference and Order After Show Cause Hearing dated September 12, 2024.)

[2]Plaintiff's Complaint does not seek a liquidated amount of damages and only suggests "upon current information and belief, there is currently due and owing the sum of less than $100.00." See Plaintiff's Compliant at Paragraph 2.

[3]The last set of bills for dates of service April 10, 2018 through May 23, 2018 (May 18 through May 23, 2018) were dated May 25, 2018 and mailed to Defendant on June 1, 2018. The next set of bills (starting June 20, 2018) were not dated until July 18, 2018, which was *after* Defendant sent out its settlement correspondence. See Plaintiff's Affidavit at Paragraph 9 and attached exhibits.

[4]The check was negotiated and deposited into Plaintiff's account on July 17, 2018. See exhibit attached to Affidavit at page 47 of the PDF document.

[5]Plaintiff admits receiving the letter and accompanying check. See Plaintiff's Affidavit at Paragraph 11.

[6]See exhibit attached to Affidavit at page 37 and 48 of the PDF document. The Court finds that this correspondence clearly and unambiguously places Plaintiff on notice of Defendant's decision to dispute the medical bills and Defendant's offer to settle the bills received.

[7]See exhibit attached to Affidavit at page 36 of the PDF document. Plaintiff does not dispute cashing the check.

[8]The Court finds that this notation on the check is conspicuous and notifies Plaintiff that the payment is being made as a "full and final" payment for all dates of service. Fla. Stat. §671.201(11):

Whether a term is "conspicuous" is a decision for the court.

[9]See Plaintiff's Affidavit at Paragraph 13.

[10]Plaintiff cashed the check, retained the proceeds and waited to file suit for almost five years.

[11]The Assignor only received two more medical treatments: on June 20, 2018 (billing date July 18, 2018) and September 25, 2018 (billing date October 4, 2018). Defendant was unaware of this medical treatment and the time of tendering the check.

[12]Plaintiff also argues that Defendant failed to issue explanations of benefits and failed to calculate the fee schedule amount of reimbursement due for each CPT code. This Court finds this argument irrelevant to its determination of whether the affirmative defense of accord and satisfaction applies. Clearly, Defendant's payment was an offer to settle because Defendant disputed the assignor's injuries and disputed the need for medical treatment (ie: medical necessary and relatedness). Defendant made a business decision to make payment for an amount it felt would resolve the bills received up to the time of Defendant's correspondence.

[13]In fact, Defendant had all the medical bills from April 10, 2018 through May 23, 2018 in its possession for over a month when it made its business decision to "settle the claim for a compromised amount."

* * *

Insurance—Automobile—Windshield repair—Evidence—Sword and shield doctrine—Insurer is barred from utilizing its bid assessment sheet and repair estimate where insurer shielded itself from discovery regarding documents with claims of trade secret privilege

BROWARD INSURANCE RECOVERY CENTER, LLC, a/a/o Karen Milano, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23026056. Division 60. January 7, 2025. Allison Gilman, Judge. Counsel: Emilio R. Stillo and Rowena Maria Racca, for Plaintiff.

ORDER

THIS CAUSE having come on to be heard on January 6, 2025, on Plaintiff's Motion to Overrule Objections; or Motion in Limine to Exclude Defendant's Bid Assessment Sheet and Repair Estimate Pursuant to the Sword and Shield Doctrine, having reviewed the motion, having reviewed the pleadings, having reviewed the entire court file, having reviewed relevant legal authorities, having received argument of counsel, and having otherwise been duly advised in the premises, the Court finds as follows:

1. In paragraph 28 of the answer to the complaint, Defendant raised an affirmative defense as follows:

> 28. Defendant, STATE FARM, pleads as defenses any and all conditions, terms, definitions, limitations, and exclusions of Policy included but not limited to provisions related to limits of liability, insured's duties and post-loss obligations, and concealment or fraud.

2. Plaintiff argued that Defendant should precluded from utilizing State Farm's "bid assessment sheet" and "repair estimate" to support its affirmative defense related to limits of liability based upon Defendant's blanket assertion of trade secret privilege in response to Plaintiff's discovery regarding the creation, information and development of such documents.

3. The Court is persuaded by the rulings in the following cases: *ASAP Car Glass, LLC a/a/o Alex Montemayor v. State Farm Mut. Auto. Ins. Co.*, case number COINX23-025814 (Broward Cty. Ct., November 6, 2024) [32 Fla. L. Weekly Supp. 392b] *Fabio Castaneda v. Citizens Prop. Ins. Co.*, 19 Fla. L. Weekly Supp. 875a (Broward Cty. Ct. 2012); *Clear Vision Windshield Repair (a/a/o Richard Voss) v. Government Employees Ins. Co.*, 23 Fla. L. Weekly Supp. 649a (Broward Cty. Ct. 2015); *My Clear View Windshield Repair Inc. (a/a/o Gina Holden) v. Government Employees Ins. Co.*, 23 Fla. L. Weekly Supp. 648b (Broward Cty. Ct. 2015).

Therefore, it is hereby ORDERED and ADJUDGED that Plaintiff's Motion in Limine is GRANTED. The Defendant is not permitted to utilize the "bid assessment sheet" and "repair estimate" as evidence to support the affirmative defense raised in paragraph 28 as referenced above.

* * *

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March 31, 2025
Cite as 32 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—A judge may sign a letter of support and speak publicly to advocate naming a new courthouse after a deceased lawyer

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-01. Date of Issue: January 6, 2025.

ISSUE

May a judge sign a letter of support and speak publicly to advocate naming a new courthouse after a deceased lawyer.

ANSWER: Yes.

FACTS

A new civil courthouse was recently constructed in a Florida county. The County Commission is charged with naming this new building. A local bar association has published a letter, signed by several public figures and community leaders, advocating that the courthouse be named after a prominent lawyer who is now deceased (we will call him "Public Person A"). An inquiring judge wishes to know whether they can sign this letter of support to advocate naming the new courthouse after Public Person A. They also wish to appear before the County Commission to speak publicly in favor of naming the courthouse in honor of Public Person A. The inquiring judge informs us that other persons in the legal system are advocating naming the courthouse after a different public person, also deceased ("Public Person B").

DISCUSSION

We begin with the pertinent judicial canon addressing circumstances such as these, Fla. Code Jud. Conduct, Canon 5(C)(1), which provides, in pertinent part: "A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice. . . ." Construing this canon, this Committee has observed that judicial officers are generally prohibited "from affixing their signatures on petitions other than those that relate to the improvement of the law, the legal system or the administration of justice." Fla. JEAC Op. 1998-07 [5 Fla. L. Weekly Supp. 706a]. The question, then, is whether advocating for the name of a courthouse—whether verbally or in writing—could be construed as a "matter[ ] concerning the law, the legal system, or the administration of justice." We believe that it is.

Naming a public building after an individual is not only an extraordinary honor for that person's legacy, it also reflects an expression of the values and characteristics that the public building, so named, aspires to emblemize. Courthouses are no exception. Indeed, courthouses throughout our State bear the names of a variety of public figures, such as the Paul G. Rogers Federal Building and Courthouse in West Palm Beach (named after a former U.S. Congressman), the George Edgecomb Courthouse in Tampa (named after Hillsborough County's first African-American county judge), and the M.C. Blanchard Judicial Building in Pensacola (named after a former chief judge in Escambia County). Often, a courthouse named for a public figure will display a plaque or signage in a prominent place that explains that individual's biography, accomplishments, and contributions to the justice system.

In Fla. JEAC Op. 1995-43 [3 Fla. L. Weekly Supp. 604a], we opined that a judge could support renaming a street for a deceased judge because renaming the street was found to be "an activity that will raise awareness of the law, the legal system, and the administration of justice." We further stated that the inquiring judge could appear before the county commission to state their support for such a measure. If naming a street after a member of the judiciary would "raise awareness of the law, the legal system, and the administration of justice," certainly naming a courthouse after a public figure would, as well. Accordingly, we conclude that advocating for the name of a courthouse fits squarely within Canon 5(C)(1).

Of course, the judge should remain mindful that any advocacy does not interfere with the performance of any judicial duties or cast doubt on the judge's impartiality. *See* Fla. Code Jud. Conduct, Canon 5(A). Moreover, the judge must take care when advocating for the name of this courthouse not to lend the prestige of the judge's judicial office to any expressions of support. With those caveats, we answer the judge's inquiry in the affirmative. The opinion was unanimously approved by the committee with three members recused.

REFERENCES

Fla. Code Jud. Conduct, Canon 5(A), 5(C)(1)
Fla. JEAC Ops. 98-07 [5 Fla. L. Weekly Supp. 706a], 95-43 [3 Fla. L. Weekly Supp. 604a]

* * *

Municipal corporations—Code enforcement—Building safety inspection—Violation of building safety inspection program by failing to submit inspection reports for property at 40-, 50- and 60-year marks was proven—City's evidence that structures and buildings at issue constitute one building and structure for purposes of program, even though they may have been built at different times, was unrebutted—No merit to claim of selective prosecution

CITY OF HALLANDALE BEACH, FLORIDA, Petitioner, v. SAMMY'S PLACE INC., 484 SUNSET DR., HALLANDALE BEACH, FL 33009, Respondent. City of Hallandale Beach, Florida 400 South Federal Highway Special Magistrate Hearing. Case No. BVIO-24-00660. December 9, 2024. Harry Hipler, Special Magistrate. Counsel: Roget Bryan, Deputy City Attorney, City of Hallandale Beach, for Petitioner. Amanda Louise Quirke Hand, Miami, for Respondent, NCBT Global LLC.

FINAL ORDER

THIS CAUSE came on to be heard before the undersigned Special Magistrate on December 5, 2024 after service and due notice was provided to Respondent as provided by law. After considering the evidence and arguments presented, the Special Magistrate finds and orders as follows:

VIOLATIONS

BUILDING SAFETY INSPECTION PROGRAM VIOLATION. FAILURE TO SUBMIT BUILDING SAFETY INSPECTION REPORT FOR THE PROPERTY 40-YEAR MARK, 50-YEAR MARK BUILDING SAFETY INSPECTION REPORT, 60-YEAR MARK. FBC 110.15. BROWARD COUNTY ADMINISTRATIVE PROVISIONS—BUILDING SAFETY AND INSPECTION PROGRAM FOR BUILDING AND STRUCTURES THAT HAVE BEEN IN EXISTENCE FOR A PERIOD OF 25 YEARS OR LONGER. SUBSEQUENT BUILDING INSPECTIONS SHALL BE REQUIRED AT TEN YEAR INTERVALS REGARDLESS OF WHEN THE INSPECTION REPORT IS FINALIZED OR FILED.

Subject real property: 113 SE 4 AVENUE #1-8, HALLANDALE BEACH FL 33009

1. Respondent is charged with a violation of the aforementioned code of the CITY OF HALLANDALE BEACH, FLORIDA.

FINDINGS OF FACT

2. The evidence provided that Respondent is the owner of real property in the city of Hallandale Beach, Florida, Broward County,

and that is located at 113 SE 4 AVENUE #1-8, HALLANDALE BEACH FL 33009. The subject real property is more particularly described as follows: HOLLYWOOD ENTRADA AMENDED PLAT 10-2 B LOT 18,19 BLK 3. Folio/id number is 5142 27 24 0231.

3. At a hearing held on September 5, 2024, the Special Magistrate granted a continuance to Respondent so that Respondent may appeal to the Broward County Board of Rules and Appeals (BORA) as to whether the existing buildings and structures are covered by Broward County Administrative Provision for Building Safety and Inspection Program. BORA provided that the subject buildings are due for inspections pursuant to Section 110.15 of the Building Safety Inspection Program, III.C, and therefore, it was up to the local government to decide this question according to BORA and its Inspection Program.[1] Respondent argued at the prior hearing and the one held on December 5, 2024 that it is exempt from the Inspection Program on account of a multitude of reasons raised at the hearing on September 5, 2025 and the hearing held on December 5, 2024.

4. At the hearing held on December 5, 2024, it was determined that Respondent did not appeal BORA's decision by BORA that the subject buildings and structures are covered by the Inspection Program. As such, the Special Magistrate determined the applicability of the Inspection Program to the subject buildings and structures as it is up to the local government and ultimately up to the Special Magistrate to decide whether the buildings and structures are covered by the Inspection Program according to BORA. Further, both parties moved forward with this hearing without objection.

5. Petitioner, CITY OF HALLANDALE BEACH, presented sworn to evidence regarding the existence of the violation[2] stated herein above. The evidence included the undisputed evidence by the Building Official that the subject buildings and structures for purposes of the Inspection Program are attached and tied together and constitutes one single building on a single parcel of land in one folio and that have one value for the entire property and its buildings. The evidence presented by the City as well as the site of the Broward County Property Appraiser's Office indicates that the subject buildings and structures include eight (8) units and the same or similar number of parking spaces one for each unit based on that one site as well as its aerial view of the subject property and the photo submitted and considered. These structures are not "minor" in as much as one building is one story that contains four (4) units, while the addition is two stories that contains four (4) additional units containing stairs and a walkway on the second floor of the two story building based upon the photos and the Broward County Property Appraiser. The photos also show buildings connected by a common walkway and the Broward County Property Appraiser's aerial view showing connectivity at the roof of both that is dependent on one another without fire separation of the two buildings which when added became an addition to the existing building. The City's building official also independently testified that based on the plans, photos, and other related evidence that he reviewed and observed that the subject structures and buildings constitute One building and structure for purposes of the Inspection Program and fall within the Building Safety Inspection Program, even though they may have been built at different times. There is connectivity here based upon the evidence, which falls within Broward County Board of Rules and Appeals Policy #05-05 and any amendments thereto. In sum, based upon the sworn to testimony of the building official, the subject buildings are required to comply with the Inspection Program.

6. Based on the sworn to personal knowledge of the Building Official and his expertise and knowledge as a building official for many years that included his testimony, review of the photographs of the subject property and its plans, and the evidence presented, the Special Magistrate finds that there is a violation of the above cited code section. Respondent was served and notified of this hearing as provided by law, Respondent's counsel was present at the hearing, neither Respondent nor any witness on behalf of Respondent appeared, and accordingly the sworn to testimony and evidence provided by the Petitioner was not contested.

7. At the hearings, there was no sworn to testimony and evidence presented by Respondent to refute the City's evidence other than counsel's arguments. See *Echevarria v. Lennar Homes, LLC*, 306 So. 3d 327, 329 n.2 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1567a] (observing that "unsworn legal argument of counsel is not evidence"); *Chase Home Loans, LLC v. Sosa,* 104 So. 3d 1240, 1241 (Fla. 3d DCA 2012) [38 Fla. L. Weekly D59a] ("[U]nsworn representations of counsel about factual matters do not have any evidentiary weight in the absence of a stipulation"); *Certain Underwriters at Lloyd's, London v. Gables Court Condo. Ass'n, Inc.,* 357 So. 3d 759 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D461a]. As such, the Special Magistrate sustains the City's position based upon the evidence presented and no such sworn to testimony.

8. Respondent has also argued selective prosecution and submitted claims that Petitioner has selectively prosecuted Respondent. The Special Magistrate considered those arguments and finds that the City has acted properly and that there is no basis for selective prosecution here. The Inspection Program was enacted to protect the health, safety, and welfare of the residents. Building status and safety is critical to the safety and welfare of residents residing in said premises as well as the entire community. Respondent was provided with an opportunity to provide sworn to evidence of any selective prosecution and none was provided other than claims submitted via documents that other real property owners were in the same position but not prosecuted. It should be noted that each case is considered in a fact intensive analysis and the City has the discretion to decide which claims to bring, which it did. It should also be noted that the instant prosecution is one of many prosecutions involving a violation of the Inspection Program. For purposes of selective prosecution here, there is no basis to conclude that the City unequally applied this code provision for the purpose of discriminating against this owner, or that there was no rational basis for the Town's actions based upon the facts and circumstances. Respondent has suggested that the City may have targeted Respondent, or that it intentionally prosecuted Respondent. However, as stated in this Final Order, the Special Magistrate finds that after considering the Respondent's claims and documents submitted there was no evidence to support any action with a discriminatory purpose and to support selective prosecution. See *E & T Realty v. Strickland,* 830 F.2d 1107, 1114 (11th Cir. 1987) ("Even arbitrary administration of a statute, without purposeful discrimination, does not violate the equal protection clause."). Respondent was provided with due process to attempt to make its claim, there was no arbitrary application of a code provision, and based upon the evidence presented, the Special Magistrate concludes that there is no basis for Respondent's claim of selective enforcement. See also *Leona Harr v. City of Orlando,* Case No. CVA1 06-72 (Circuit Court 9th Judicial Circuit) (February 27, 2009 [16 Fla. L. Weekly Supp. 490a], pg. 8; *Hernandez v. City of Miami,* Case No. 2021-10-AP-01 (Circuit Court 11th Judicial Circuit), pgs. 6-11.

CONCLUSIONS OF LAW

9. Based upon the evidence presented by Petitioner that is stated above, Petitioner met its burden of proving by substantial competent evidence that the violation as alleged in the Notice of Violation does in fact exist on the subject real property.

ORDER

10. THEREFORE, BASED UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE SPECIAL MAGIS-

TRATE FINDS RESPONDENT GUILTY OF VIOLATING CITY CODE SECTIONS. RESPONDENT IS GIVEN UNTIL FEBRUARY 5, 2025 TO REMEDY AND BRING THE VIOLATION INTO COMPLIANCE, OR FACE A PER DIEM FINE OF TWO HUNDRED FIFTY DOLLARS ($250.00) FOR EACH DAY RESPONDENT'S REAL PROPERTY REMAINS IN VIOLATION BEYOND THE COMPLIANCE DATE. IF THE SUBJECT PROPERTY IS NOT BROUGHT INTO COMPLIANCE BY THE DATE SET OUT ABOVE, THIS MATTER SHALL BE REFERRED BACK TO THE SPECIAL MAGISTRATE FOR AN ORDER IMPOSING FINE AND THE SPECIAL MAGISTRATE IS HEREBY AUTHORIZED TO ENTER A FINAL ORDER CERTIFYING THE CODE ENFORCEMENT FINE THAT SHALL BE RECORDED IN THE PUBLIC RECORDS OF THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR BROWARD COUNTY, FLORIDA AND SAID FINAL ORDER IMPOSING FINE AND LIEN SHALL CONSTITUTE A LIEN.

11. A FINE AND LIEN IMPOSED BY THE A SPECIAL MAGISTRATE SHALL CONTINUE TO ACCRUE UNTIL THE RESPONDENT AND VIOLATOR COMES INTO COMPLIANCE WITH THE FINAL ORDER. RESPONDENT SHALL NOTIFY THE CITY'S CODE COMPLIANCE SPECIALIST AND BUILDING OFFICIAL, WHO SHALL INSPECT THE PROPERTY TO DETERMINE IF COMPLIANCE HAS OCCURRED AND CONFIRM THAT RESPONDENT HAS COMPLIED.

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[1]No appeal to BORA occurred here by Respondent, therefore, based upon the evidence presented it is up to the local government and ultimately the Special Magistrate to determine if the subject buildings and structures are covered by the Inspection Program, which is the subject of this proceeding.

[2]Violation in this instance concerns obtaining a 40, 50, and 60 year Building Inspection Report from a licensed engineer and architect in order to determine the condition of the buildings and structures as it affects its safety, including a determination of any necessary maintenance, repair, or replacement of any structural or electrical component of the subject buildings and structures. See Section 110.15 of the Building Safety Inspection Program, paragraphs C, D.

* * *