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FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 481-522

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—REVOCATION. The Department of Highway Safety and Motor Vehicles did not depart from the essential requirements of law by upholding the revocation of a Florida driver's license and requiring the installation of an ignition interlock device for licensee who was convicted of a second DUI in Massachusetts six years prior.** *BROWN v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. Circuit Court, Thirteenth Judicial Circuit (Appellate) in and for Hillsborough County. Filed January 21, 2025. Full Text at Circuit Courts-Appellate Section, page 494a.*
- **MORTGAGES—FORECLOSURE—SUMMARY JUDGMENT—DEFAULTED PARTY. Pursuant to out-of-district precedent, a trial court may not enter a final judgment of foreclosure against a defaulted party after a properly noticed summary judgment hearing, not a trial, where the judgment figures include unliquidated amounts established by competent and uncontradicted summary judgment evidence.** *GREENSPRING CAPITAL MANAGEMENT AS ADMINISTRATOR OF RMH 2023-1 TRUST v. TATEISHI. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed February 16, 2025. Full Text at Circuit Courts-Original Section, page 503b.*
- **CRIMINAL LAW—DRIVING UNDER INFLUENCE—SEARCH AND SEIZURE—CURTILAGE. The area of a defendant's property that deputies entered while following the tracks of a truck that had been involved in a minor traffic offense constituted the curtilage of the home. The area was not intended to be open to passersby and encompassed the backyard of the property, given the distance of the area from the road, the foliage along the front of the property concealing the visibility of the structures, and the proximity of the area to a barn at the rear of the property.** *STATE v. HELM. County Court, Seventh Judicial Circuit in and for Flagler County. Filed January 26, 2025. Full Text at County Courts Section, page 510a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

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CO	County Court
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Bold denotes decision by circuit court in its appellate capacity.

MUNICIPAL CORPORATIONS

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* * *

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CIRCUIT COURTS—APPELLATE

Criminal law—Prisoners—Mandamus—Habeas corpus—Petition for writ of mandamus or, alternatively, writ of habeas corpus claiming that petitioner continues to be held in prison despite expiration of his sentences is denied—Because petitioner was sentenced to concurrent sentences of equal length with differing amounts of jail credit attached to each, petitioner must remain incarcerated until sentence with least amount of jail credit is served

LARRY HENDERSON, Petitioner, v. FLORIDA DEPARTMENT OF CORRECTIONS, Respondent. Circuit Court, 5th Judicial Circuit (Appellate) in and for Lake County. Case No. 2023-CA-00393. May 26, 2023.

ORDER DENYING DEFENDANT'S PETITION FOR ISSUANCE OF WRIT OF MANDAMUS OR IN THE ALTERNATIVE OF AN ISSUANCE FOR AN ORDER TO SHOW CAUSE OPPORTUNITY AND/OR ISSUANCE OF WRIT OF HABEAS CORPUS TO THE FIFTH JUDICIAL CIRCUIT

(LARRY METZ, J.) THIS CAUSE came before the Court pursuant to Defendant's Petition for Issuance of Writ of Mandamus or in the Alternative of an Issuance for an Order to Show Cause Opportunity and/or Issuance of Writ of Habeas Corpus to the Fifth Judicial Circuit filed March 7, 2023 ("Petition"), and the Respondent Florida Department of Corrections' Response to Court's April 26, 2023 Order filed May 18, 2023 ("Response"). The Court, having reviewed the Defendant's Petition, the Response from the Florida Department of Corrections ("FDOC"), and other pertinent documents in the Court file, reviewed the relevant legal authorities, and being otherwise fully advised in the premises, finds and concludes as follows:

1. On March 30, 2021 Petitioner was sentenced to thirty-six (36) months incarceration with FDOC, and with three hundred forty-six (346) days jail credit.

2. The Petitioner claims he should have been released from the FDOC in October 2022, but due to a miscalculation of his awarded jail credit he was not released.

3. The Petitioner filed his Petition with the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County on January 17, 2023.

4. The Petition was transferred to the Circuit Court of the Fifth Judicial Circuit in and for Lake County on March 7, 2023, pursuant to Section 79.09, Florida Statutes.

5. On April 26, 2023, the Court ordered the Respondent, FDOC, to show cause on why the Petitioner's requested relief should not be granted.

6. On May 18, 2023, the Respondent filed a response to the Order to Show Cause stating that "Concurrent sentences of equal length may end on different dates depending on how much jail credit and gain-time is associated with each sentence." *Respondent Florida Department of Corrections' Response to Court's April 26, 2023* Order, a true copy of which is attached as Exhibit A.

7. The Respondent also responded "Defendant's sentences are all the same length; however the amount of jail credit on each differs. DOC is required to apply jail credit to each sentence exactly as ordered by the Court." *Id.*

8. Additionally, the Respondent showed "The sentence in Case No. 20-14747 was reduced by only 115 days jail credit. Since this case has the least amount of jail credit, it will end last and control his release date." *Id.*

9. The Respondent exhibited an accurate and correct release date of June 24, 2023 for the Petitioner.

In-view of the foregoing findings, the pertinent portions of the record, and applicable law, it is **ORDERED** and **ADJUDGED** that the Defendant's Petition for Issuance of Writ of Mandamus or in the Alternative of an Issuance for an Order to Show Cause Opportunity and/or Issuance of Writ of Habeas Corpus to the Fifth Judicial Circuit filed March 7, 2023, is **DENIED.**

* * *

Municipal corporations—Variances—Denial of variance to build new dock exceeding length allowed by city land development code did not violate homeowners' substantive due process rights—There is no substantive due process protection for state-created property rights—Board satisfied essential requirements of law by applying code and authorizing dock that was minimum variance necessary for reasonable use of property—Competent substantial evidence supported board's findings—Board did not infringe on riparian rights of homeowners where it approved dock that could reach minimum water depth necessary for boat slip at mean low tide

JONATHON G. TILL and KATHLEEN A. TILL, Petitioners, v. CITY OF DUNEDIN, FLORIDA, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 21-000005AP-88A. UCN Case No. 522021CA000005XXXXCI. May 16, 2022. Petition for Writ of Certiorari of Board of Adjustment and Appeal, City of Dunedin's Findings of Fact, Conclusions of Law and Order. Counsel: Gale M. Bobenhausen, for Petitioners. Nikki C. Day and Isabella E. Sobel, for Respondent.

(**PER CURIAM**.) Petitioners, Jonathon and Kathleen Till, seek certiorari review of the decision the Findings of Fact, Conclusion of Law and Order of Respondent, Board of Adjustment and Appeal of the City of Dunedin ("Board") in denying the variance sought for construction of a new dock. For the reasons set forth below, the Petition is denied.

Statement of Facts

Petitioners own waterfront property on Curlew Creek located at 563 Baywood Drive South, Dunedin, FL ("Property"). The Property is zoned Single Family Residential (R-60) and Marine Park (MP) and is developed with a single family home and a dock. Petitioners are seeking construction of a new dock that would extend 35 feet from the seawall. Currently, a "viewing platform" is in place where Petitioners seek to build the dock, however there was testimony that Petitioners do moor a boat to the viewing platform.

The City has enacted the Land Development Code of the City of Dunedin ("Land Development Code") which provides:

> "Private docks to be constructed in the Waters of the County shall be constructed so that the length of the dock shall not extend from the mean high water line or seawall of the property further than one-half the width of the property at waterfront."
>
> DUNEDIN, FLA., LAND DEVELOPMENT CODE § 103-23.3.6.3(a)(9).

Under the above section of the Land Development Code, Petitioners could build a 25 foot-long-dock. Petitioners have applied for a variance to construct a 35-foot-long dock, to allow them to reach navigable waters from the Property. A variance is necessary as the proposed dock extends more than 50 percent of the waterfront width of the Property by 9.54 feet and Petitioners were unable to obtain consent of the adjacent landowner. Had both adjacent landowners consented to the proposed dock, a variance could have been approved at the administrative level. There are docks in the canal that extend past 35 feet, however, those variances were granted at the administrative level as the adjacent landowners to those docks did not object.

On January 20, 2021, Petitioners' variance request to build a 35-foot-long dock was brought before the City's Board of Adjustment

and Appeal ("Board") for a quasi-judicial evidentiary hearing. Petitioners were represented by counsel and testified as to the need for the variance. The City's assistant director of community development, Mr. Dipasqua, presented the Staff Report to the Board. Mr. Dipasqua testified that the existing dock was built in 1998 inside the center one-third of the waterfront property and did not project out more than 50 percent. The proposed dock consists of a 5 ½ foot by 11-foot wide angled walkout to a 5 ½ foot wide by 24 foot straight platform. On the left side of the straight platform, Petitioners propose a boat lift with a roof. The dimensions of the roof are 14 feet wide by 26 ½ feet long and the boat would be moored perpendicular to the seawall rather than parallel. Petitioners argue that in order for them to have reasonable access to the navigable waters, the proposed dock needs to extend 35 feet from the seawall. The Pinellas County Water and Navigation Control Authority Regulations, Section 58-543 (f)-Dock permit requirements and restrictions provides that

> "in tidal waters, all docks shall have at least 18 inches of water depth at the slip at mean low tide and shall have a continuous channel with a minimum of 18 inches of water depth at mean low tide to allow access to the structure from open waters."

Mr. Dipasqua testified that based upon a hydrographic survey by George F. Young, Inc., a professional surveyor and mapping firm, commissioned by Petitioners, at 28.9 feet from the seawall the 18 inches of water depth is achieved, which would be the minimum necessary to put a vessel in water deep enough to moor a vessel. (Transcript page 19). The Staff Report recommendation was to approve the application with the conditions described below:

> "The new private dock shall not extend further than 29 feet or approximately 57percent of the waterfront width of the property from the seawall and shall be permitted to be located outside the center one-third of the width of the property at the waterfront to the west a maximum of 2 feet but not to the east. And the roof structure over the boat slip shall not be permitted."

Petitioners' main concern is that they will not have sufficient access to navigable waters if the dock is restricted to 29 feet rather than 35 feet, notwithstanding that the survey of the channel states that the depth of 18 inches at mean low tide is at 28.9 feet, due to the collection of silt in the channel.

Standard of Review

This Court in its appellate capacity has jurisdiction to review this matter under Florida Rule of Appellate procedure 9.100. The Court must decide (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent, substantial evidence to support the administrative findings. See *Falk v. Scott*, 19 So.3d 1103, 1104 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2060b]. The appellate court is not "permitted to re-weigh conflicting evidence and is primarily relegated to assaying the record to determine whether the applicable law was applied in accordance with established procedure." *Dade County v. Gayer*, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980). This Court cannot grant Petitioners' request for remand with directions to grant the requested 35 foot variance. In an appeal by petition for writ of certiorari, a court has only two options; it may either (1) deny the petition or (2) grant it and quash the order at which the petition is directed. The court may not enter any judgment on the merits of the underlying controversy, or direct the lower tribunal to enter any particular order. *Clay Cty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1180-1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a]

Discussion

Due Process

A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). The parties must be able to present evidence and cross-examine witnesses. Petitioners appeared at the variance hearing and were permitted to testify. There is no allegation by Petitioners that there was a due process violation; however, Appellants argue that they have "fundamental rights via the federal and state constitutional property rights" and the Order deprives them of substantive due process. "Fundamental rights are those rights created by the Constitution." *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 n. 6 (11th Cir. 1997). "Property interests, of course, are not created by the Constitution[, but rather] , , , by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)." *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1317a]. "As a result, there is generally no substantive due process protection for state-created property rights." *Id*. at 1279. The Court finds that there has been no violation of substantive due process in this case.

Essential Requirements of Law

A variance must be the "minimum variance that will make possible the reasonable use of the property." Dunedin Land Development Code § 104.22.7.5. If there are any other methods available to a property owner to make a reasonable use of their property without the need for a variance, or if an alternative variance is available which requires less deviation from the existing zoning regulations, then the requested variance is not the minimum necessary. See *Town of Indialantic v. Nance*, 485 So. 2d 1318 (Fla. 5th DCA 1986). The Pinellas County Water and Navigation Control Authority Regulations, Section 58-543 (f)-Dock permit requirements and restrictions provides that "in tidal waters, all docks shall have at least 18 inches of water depth at the slip at mean low tide and shall have a continuous channel with a minimum of 18 inches of water depth at mean low tide to allow access to the structure from open waters." Based on the hydrographic survey prepared by George F. Young, Inc., the minimum variance necessary for reasonable use of the Property was to permit a private dock that extended 28.9 feet from the seawall.

The Land Development Code establishes seven specific criteria for a variance to be granted. The Staff Report addresses each of the criteria:

104.22.7.1-Uniqueness: The need for the requested arises out of the physical surroundings, shape, topographical conditions, or other physical or environmental conditions that are unique to the specific property involved, and which do not apply generally to the property located in the same zoning district.

The Staff Report analysis found that the Property does not meet the requirement of uniqueness stating "The subject property is a typical waterfront residential lot in the area. . . Insufficient water depth outside of the Curlew Creek channel itself at mean low tide appears to be somewhat of a common condition for waterfront properties along this segment of Curlew Creek including this property. Curlew Creek is tidal so all waterfront properties should experience the same changes during normal tides but silt and/or sedimentation levels may differ, which in turn can affect water depth in certain areas more than others."

104.22.7.2-Tree Preservation: Preservation of a protected tree(s), but not an invasive tree(s), as defined in 1.5-42 Landscaping and 1.5-43 Trees of the LDC, may be considered as a relevant environmental condition under this subsection.

The Staff Report's analysis is that there are no impacts to trees as a result of this request.

104.22.7.3-Historic Property: A property which meets all of the criteria in order to be listed in the National Register of Historic Places,

but is not necessarily listed on the register, may be considered unique for the purpose of granting a variance.

The Staff Report's analysis found that the subject property is not a historic property.

1.4-22.7.4-Self—Imposed Circumstances: Conditions or special circumstances peculiar to the property must not have been self-created or have resulted from an action by the applicant, or with prior knowledge of approval of the applicant. Specifically, no variance may be granted arising from the illegal construction of a structure or an illegal use of the premises which would have otherwise required a building permit or other specific approval to be issued, and which construction or which use was commenced unlawfully. Under such conditions, the property owner shall have no legal right to apply for a variance and the Board will have no legal right to grant such a variance.

The Staff Report's analysis found that conditions or special circumstances peculiar to the property have not been self-created or have resulted from an action by the applicant. However, the applicant's proposed dock design to moor a vessel perpendicular to the seawall versus the existing parallel mooring configuration means that a vessel needs to navigate closer to the seawall where the water depths are shallower. Staff considers this to be a self-imposed circumstance created by the applicant.

104-22.7.5-Minimum Variance: The requested variance is the minimum variance that will make possible the reasonable use of the property.

The Staff Report's analysis found in pertinent part, "It is the staff's determination that the minimum variance necessary for reasonable use of the property is to permit a private dock that extends far enough from the seawall to reach adequate water depth for a vessel. The county's regulations, found in Sec. 58-543(f) of the County's code, which are adopted by reference in the city's code, provide that a minimum water depth of 18 inches (1.5 feet) at mean low tide is necessary for a boat slip. Based on the hydrographic survey supplied by the applicant and prepared by George F. Young, Inc. in July 2020 this can be achieved at 28.9 feet from the seawall." The Staff Report's analysis also states "Finally, staff does not consider a roof structure over the boat slip to be the minimum necessary for reasonable use of the property, particularly if the roof extends further than 50 percent of the waterfront width of the property as proposed by the applicant's design."

104-22.7.6- Special Privilege: Granting the variance will not confer any special privilege that is not allowed for other lands, buildings or structures in the same zoning district; no variance will be granted that extends to the applicant a use of property that is not commonly enjoyed by other persons in similar circumstances.

The Staff Report's analysis states "granting the variance as conditioned and recommended by staff in Section IX below will not confer any special privilege."

104-22.7.7-Surrounding Property: Granting the variance will not substantially interfere with, or injure the rights of others whose property would be affected by approval of the variance, alter the essential character of the neighborhood, or create a nuisance.

The Staff Report's analysis states: "Granting the variance as conditioned and recommended by staff in Section IX below will not substantially interfere with, or injure the rights of others properties in the area."

At the variance hearing, the Staff Report addressing these factors was read into the record and Mr. Dipasqua, the assistant director of community development testified concerning the report. Appellants testified and the witnesses were subject to cross-examination. Upon review of the evidence and the testimony presented at the variance hearing, the Court concludes the Board complied with the essential requirements of law.

Competent Substantial Evidence

Competent substantial evidence has been defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). It has also been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Fla. Public Serv. Commission*, 380 So. 2d 1028, 1031 (Fla. 1980). The circuit court is not to reweigh the evidence presented to the Board, but merely to determine if competent, substantial evidence supports its findings. *Dade County v. Gayer*, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980). Here, the Board determined the minimum variance necessary for reasonable use of the Property was to permit a private dock that extends far enough from the seawall to reach adequate water depth for a vessel under the county's regulations and the City's Land Development Code. Upon review of the evidence and the testimony presented at the variance hearing, the Board complied with the essential requirements of law.

Petitioners argue that the Board's action denied them of their riparian rights. Petitioners site *Hayes v. Carbonell*, 532 So. 2d 746 (Fla. 3d DCA 1988) for the definition of riparian rights as "legal rights incident to lands bounded by navigable waters and are derived from the common law as modified by statute." The word "riparian" technically refers "to land abutting non-tidal [sic] or navigable river waters whereas 'littoral' refers to the land abutting navigable oceans, sea, or lake waters." *Brannon v. Boldt*, 958 So. 2d 367, 372 n.3 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D288b]. "Although the use of 'riparian' in this case is technically incorrect, it is consistent with the accepted usage in Florida cases." *5F, LLC v. Hawthorne*, 317 So. 3d 220, 224 n. 1 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D465a]. Petitioners rely on *Hayes v. Bowman*, 91 So. 2d 795, 801 (Fla. 1957) wherein the Florida Supreme Court stated that "An upland owner must in all cases be permitted a direct, unobstructed view of the Channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the Channel. If the exercise of these rights is prevented the upland owner is entitled to relief." Petitioners argued that "The BAA's conditions to the reduced and conditioned Variance granted still preclude the Tills from exercising one of the most important of their special riparian rights, i.e. access from the Property to the navigable waters." Appellants Initial Brief, page 22.

The Findings of Fact, Conclusions of Law and Order of the Board does not infringe on the riparian rights of Appellants. The Board found that based on the hydrographic survey supplied by the applicant and prepared by George F. Young, Inc. in July 2020, the minimum water depth of 18 inches at mean low tide is necessary for a boat slip. The survey found that "this can be achieved at 28.9 feet from the seawall." and the Board approved a variance for 29 feet.

Conclusion

Based upon the forgoing, the Petition for Writ of Certiorari is denied. (SHERWOOD COLEMAN, KEITH MEYER, and GEORGE M. JIROTKA, JJ.)

* * *

Counties—Public employees—Dismissal—Career service review board did not afford due process to sheriff's employee who was dismissed after he was arrested for domestic violence charges that were later dropped—Board departed from essential requirements of law when it failed to conduct evidentiary hearing and then failed to make findings of fact and determinations of just cause for disciplinary action as set forth in its governing code—On remand, board must conduct evidentiary hearing and determine whether there was just cause to dismiss employee for charge of committing a misdemeanor, specifically whether employee committed any act or crime which would constitute a misdemeanor, irrespective of whether charges were filed—Employee's arrest alone is not dispositive of whether he committed act or crime that would constitute misdemeanor

STEVEN NAPOLEON, Petitioner, v. PASCO COUNTY SHERIFF'S OFFICE, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2022-CA-001170-ES. December 19, 2022. Petition for Writ of Certiorari. Counsel: Paul A. Daragjati, for Petitioner. Matthew D. Stefany, for Respondent.

ORDER AND OPINION

Steven Napoleon was not afforded due process and the Pasco County Sheriff's Office departed from the essential requirements of law in the proceedings below. The Written Decision of Career Service Appeal Board is not supported by competent substantial evidence. The Written Decision of Career Service Appeal Board is quashed and this matter remanded for action consistent with this Order and Opinion.

STANDARD OF REVIEW

The circuit court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent and substantial evidence. *See Haines City v. Heggs,* 658 So.2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

BACKGROUND FACTS

Steven Napoleon ("Napoleon") was employed with the Pasco County Sheriff's Office ("PCSO") for over 14 years when, on the morning of November 29, 2021, he was arrested for battery (domestic violence) in Manatee County. The Probable Cause Affidavit ("PCA") shows that Napoleon and his former paramour ("victim") were in a verbal altercation at a WaWa in Bradenton when law enforcement ("LE") responded. Napoleon stopped at the WaWa so that the victim could find another ride home. LE observed the victim sitting in Napoleon's truck and observed Napoleon picking up scattered personal belongings that had been thrown from his truck. Both Napoleon and the victim stated their argument was verbal only and no physical violence occurred.

The victim informed LE that Napoleon became emotional the night before, after they broke up,[1] and Napoleon pushed the victim's leg with both hands toward the wall. The victim then went to the bedroom and used her body weight to keep the door closed, as Napoleon tried to push his way into the bedroom.[2] The victim did not call 911. The victim stated she was intimidated by Napoleon and didn't want to be around him. No injuries were observed and the victim changed her story regarding which leg had been pushed. Napoleon denied ever touching the victim and stated that he had worked the night shift on the evening of the 28th. At the direction of Sergeant Huff, of the Manatee County Sheriff's Office, Napoleon was arrested for battery and transported to the Manatee County jail.

The same day, the PCSO arrived at the Manatee County jail and served Napoleon with a letter terminating his employment for violating "Pasco Sheriff's Office General Order 26.1, Standards of Conduct, Section II(D)(2), Commission of Misdemeanor." This Section states:

> D. Unlawful Conduct Offenses: Disciplinary measures resulting from unlawful conduct may be imposed independently of, or concurrent with, civil and criminal prosecutions. The administration of internal disciplinary measures for unlawful conduct depends upon individual case circumstances and will be determined by the Sheriff.
>
> 2. Commission of Misdemeanor: Members will adhere to all federal, state, and local laws and will not commit any act or crime which, if committed in the State of Florida, would constitute a misdemeanor, whether charges are filed or not."

The following morning, the Manatee County judge made a finding of probable cause and Napoleon was released on his own recognizance. The State subsequently decided to take no action due to insufficient credible evidence to support the charge of battery. Napoleon timely appealed his dismissal to the 5-member Career Service Appeal Board ("Board")[3] and a hearing was held on March 25, 2022. The Board upheld Napoleon's termination and Napoleon timely sought review before this Court.

PROCEEDINGS BEFORE THE BOARD

At the Board hearing, Captain Wetherington, Board chairman, agreed with the position of Mr. Stefany, counsel for the Board, that the only issue before the Board was whether or not Napoleon was arrested. As stated by Mr. Stefany:

> ". . .the reason that Mr. Napoleon was terminated from his employment is because he was arrested for domestic battery, and so we would submit that the evidence and testimony that's relevant in this proceeding is limited to whether or not he was, in fact, arrested for domestic battery. And that's pretty much the end of it."[4]
>
> ...
>
> "And so, again, our position is that Mr. Napoleon was terminated because he was arrested. . . it was the arrest that is the reason for the disciplinary action in this case."[5]
>
> ...
>
> "The issue is his arrest."[6]

In support of his position, Mr. Stefany produced a previous decision by the Board, titled "Written Decision of Career Service Appeal Board," entered October 27, 2021, and also signed by Captain Wetherington,[7] wherein it sustained the termination of employment of James Stephens, allegedly under similar circumstances.[8] Mr. Stefany objected to any documents coming into evidence that went beyond the actual arrest and First Appearance Order, to include the PCA, PCA supplemental report, and the State Attorney's Interdepartmental Memorandum.

Mr. Daragjati argued that Napoleon was dismissed due to a violation of standard of conduct, a commission of a misdemeanor, and that "just the fact of getting arrested does not constitute a commission of a misdemeanor." Mr. Daragjati objected to the exclusion of testimony and evidence that he intended to put on to show Napoleon did not commit the crime he was arrested for. Mr. Daragjati also objected to the burden of proof shifting to Napoleon and argued that PCSO had the burden to demonstrate cause for Napoleon's termination. Mr. Stefany then agreed that PCSO had the burden to demonstrate cause for the disciplinary action, but maintained that the arrest itself was cause for termination.

Captain Wetherington concluded that the Board's sole decision was to determine whether or not Napoleon was arrested, and that the Board could not consider any evidence or testimony outside of that single question. Captain Wetherington indicated that he felt uncomfortable with the narrow scope of review, stating it was "unfortunate" and "very unfortunate" several times.[9] The Board voted to uphold Napoleon's termination, with Corporal Jones commenting "I don't like how it. . .played out"[10] and Debby Jenkins commenting, "I really disagree with the whole thing."[11] The Board entered its Written Decision of Career Service Appeal Board, on March 30, 2022, with the sole finding, "As to the charge of Commission of a Misdemeanor, General Order 26.1, Standards of Conduct, Section II, (D)(2), the determination of just cause for disciplinary action is hereby: X

Sustained by majority vote."

LAW AND ANALYSIS

Initially, the Court finds that Napoleon's disciplinary action is governed by the Pasco County's Code of Ordinances, specifically Article II, Chapter 54 ("Code"). Those sections, with pertinent provisions italicized, are as follows:

Section 54-37, Disciplinary Action:

(a) The sheriff may take the disciplinary action, including the demotion, suspension or dismissal of an employee who has achieved permanent status under this article, for any cause which, in the sheriff's opinion, will promote the efficiency of the office of sheriff. Prior to such action, the employee shall be furnished written notice of the proposed action and offered an opportunity to respond to the reasons for such disciplinary action. *However, in extraordinary situations, such as when delay could adversely impact the public safety or welfare or unduly interfere with the efficient operation of the office of sheriff or otherwise result in damage or injury, an employee covered by the article may be immediately suspended or dismissed.* In such a situation, the employee shall be provided notice of the reasons for the disciplinary action within five days after the disciplinary action occurs.

(b) *For the purpose of this article, cause for disciplinary actions shall include, but not be limited to, the following*: untruthfulness; insubordination; negligence; inefficiency; inability to perform assigned duties; incompetence; *violation of the provisions of law, including arrest*; criminal charges by indictment or information; violation of office rules, regulations, policy or procedures; conduct unbecoming a public employee; misconduct; alcohol or drug abuse; adjudication of guilt by a court, a plea of guilty or nolo contendere or a court verdict of guilty when an adjudication of guilt is withheld and the accused is placed on probation with respect to any felony, misdemeanor or serious traffic infraction; and, suspension, removal or revocation of any employee's certification.[12]

Section 54-39. Duties and Powers of career service appeal board.

. . .

(b) The career service appeal board shall have the power, subject to this article to: (2) *Review matters properly brought before it and determine if just cause for discipline exists.* All matters concerning the form or manner of discipline *upon a finding of just cause* shall be within the sole province and discretion of the sheriff.

(c) The board shall meet for the *purpose of conducting an evidentiary hearing* regarding a timely and properly filed appeal of disciplinary action as defined in this article. The board shall, in the conduct of such hearings, have power to administer oaths, issue subpoenas, compel the attendance of witnesses and require the production of books, records, accounts, papers, documents, testimony and other evidence. . .

Section 54-40. Career service appeal procedure.

. . .

(c) . . .Any such hearing will be conducted as informally as is compatible with justice, and *both the office of sheriff and the employee will be afforded an opportunity to present documentary evidence and witnesses on their behalf and to examine and cross examine witnesses. Testimony and evidence will be restricted to the charges or reasons given for the disciplinary action taken. . .*

(d) The career service appeal board shall by majority vote to dispose of the appeal *by making findings of fact and determinations of just cause for disciplinary action, if any,* and issuing a written decision within the time period provided by rule. Such decision shall either sustain or not sustain a finding of just cause for disciplinary action taken by the sheriff. If an action by the sheriff is not sustained by the board, the board shall offer such remedial relief as will make the employee whole by the payment of back pay, restoration of employment and pension benefits and reinstatement to the employee's former or substantially equivalent position of employment.

It is clear that the Board failed to follow its own Code in Napoleon's administrative appeal. Napoleon should have been permitted an opportunity to present documentary evidence and witnesses on his behalf and to examine and cross examine witnesses. As explained by the Second District Court of Appeal in *Vollmer v. Key Development Properties*, 966 So.2d 1022, 1027 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2505a]:

> The right to be heard at an evidentiary hearing includes more than simply being allowed to be present and to speak. Instead, the right to be heard includes the right to "introduce evidence at a meaningful time and in a meaningful manner." It also includes the opportunity to cross-examine witnesses and to be heard on questions of law. The violation of a litigant's due process right to be heard requires reversal.

Napoleon has a property interest in his continued employment with PCSO and was entitled to due process in his disciplinary hearing. *See Krieger v. Fla. Fish and Wildlife Conservation Commission*, 220 So.3d 511, 514 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1222a] (explaining that a public employee has a property interest in continued employment and is entitled to due process in disciplinary proceeding)(citing *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985)). The Board did not afford Napoleon due process and departed from the essential requirements of law when it failed to conduct an evidentiary hearing and then failed to make findings of fact and determinations of just cause for disciplinary action as set forth in its governing code. *See Thomas v. Office of the Sheriff*, 507 So.2d 145, 146 (Fla. 1st DCA 1987)(finding that absence of findings of fact by the Board and its failure to determine the rules or regulations pertinent to the matter being reviewed by it renders its order defective and subject to reversal on due process grounds)(*citations omitted); See also, Higgs v. Property Appraisal Board of Monroe County*, 411 So.2d 307, 308 (Fla. 3d DCA 1982)(finding that, regardless of which party bears the burden of proof, an agency's failure to make adequate findings of fact in its order constitutes a departure from the essential requirements of law).

PCSO has the burden of proof of showing, by a preponderance of the evidence, just cause for Napoleon's termination. *See Dept. of Agriculture and Consumer Servs. v. Edwards*, 654 So.2d 628, 631 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1092a] (holding that when an agency terminates employment of career service employee on certain stated grounds, agency must affirmatively prove essence of allegations by preponderance of evidence)(*citations omitted)*; *See also, Falk v. Scott,* 19 So.3d 1103, 1105 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2060b] (finding that the sheriff had the burden of proof in a termination of employment appeal hearing, explaining "[w]here an agency terminates an employee for certain stated grounds, reason, logic and the law would require that the agency affirmatively carry the burden of proving the essence of its allegations")(*citation omitted).*

CONCLUSION

The Board failed to afford Napoleon due process and departed from the essential requirements of law in the proceedings below. As the Board made no findings of fact, the decision to uphold Napoleon's termination is not supported by competent substantial evidence

On remand, the Board must conduct an evidentiary hearing and determine whether there was just cause for Napoleon's termination for the charge of Commission of Misdemeanor, specifically whether Napoleon committed "any act or crime which, if committed in the State of Florida, would constitute a misdemeanor, whether charges are filed or not." While it is one factor to consider, Napoleon's arrest is not dispositive of whether Napoleon committed any act or crime that would constitute a misdemeanor.

The Board must then make findings of fact and determinations of

just cause for the disciplinary action, if any, and issue a written decision as provided in Section 54-40(d). If the action by the Sheriff is not sustained by the Board, it must offer such remedial relief as will make the employee whole.

WHEREFORE, it is hereby, **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is hereby GRANTED and the Written Decision of Career Service Board is QUASHED. This matter is remanded for action consistent with this Order and Opinion. (KIMBERLY BYRD, KIMBERLY CAMPBELL, and DANIEL DISKEY, JJ.)

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[1]The State Attorney's interdepartmental Memorandum states that Napoleon and victim met at a domestic violence support group in August and became involved in September or October, presumably in 2021.

[2]The victim stated that the bedroom door lock was broken.

[3]Board members present were: Captain Justin Wetherington; Lieutenant James Linsalata; Debby Jenkins (citizen member); CPI Supervisor Michelle Douhitt; and, Corporal Eric Jones.

[4]Transcript, Page 5.

[5]Transcript, Page 9.

[6]Transcript, Page 10.

[7]The Board "cut and paste" for its Written Decision of Career Service Appeal Board, as to Napoleon, erroneously using James Stephens' name in the body of the Napoleon's order. With the exception of Napoleon's name in the case style, the two orders are identical.

[8]Mr. Stefany recounted that James Stephens was a PCSO correctional officer and was arrested for battery by another agency while driving to Gainesville, and was immediately terminated.

[9]Transcript, pages 6, 12, 15 and 19.

[10]Transcript, page 19.

[11]Transcript, page 19-20.

[12]It appears Mr. Stefany focused solely on Napoleon's arrest based on the Board's prior action in James Stephens' case. Mr. Stefany could have easily focused on other proscribed behavior, i.e. conduct unbecoming a public employee.

* * *

Counties—Zoning—Type 2 use—Variances—Appeal of denial of after-the-fact application for Type 2 use and variances to allow continued operation of small dog rescue shelter on property zoned as Residential Agriculture—No merit to argument that variances from Type 2 requirements regarding minimum lot size and kennel setbacks were not required because setback requirements were implemented after applicant began using property as shelter, and reduction in lot size was due to previous owner's sale of portion of property to county—Lot, structure, and use of property were not legally non-conforming where use of property as a kennel was never legally established—In order to establish new Type 2 use on property, applicant was required to apply for and obtain variances—Competent substantial evidence, including planning staff report, supported decision to deny variances—No merit to claim that board of adjustment departed from essential requirements of law by basing decision on objections of adjoining landowners—Record contains expert testimony and analyses regarding consistency of use and variances with rural community overlay and county comprehensive plan

JAYNE SIDWELL, as Trustee of The Jayne Sidwell Trust, Petitioner, v. PINELLAS COUNTY FLORIDA, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000045AP-88A. UCN Case No. 522019AP000045XXXXCI. October 21, 2022. Petition for Writ of Certiorari from decision of Board of Adjustment, Pinellas County. Counsel: David Smolker, for Petitioner. Anne M. Morris, for Respondent.

(**PER CURIAM**.) Petitioner, Jayne Sidwell, as Trustee of The Jayne Sidwell Trust, seeks certiorari review of the decision of Respondent, Pinellas County Board of Adjustment's ("Board") denial of Petitioner's application for a Type 2 Use Application and two variances from the Pinellas County Land Development Code ("LDC"). Petitioner's application for the Type-2 Use and the two variances from the (LDC) will be referred to as the "Application". Upon review of the briefs, the record and appeal and the applicable law, this Court dispenses with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. For the reasons stated herein, the Petition for Writ of Certiorari is denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The property at issue is a home located at 2825 Pine Hill Road, Palm Harbor, Florida 34683 (the "Property"). The Property is a masonry single family residence built in 1978. The Property abuts Alderman Road, a four-lane arterial road to the south, vacant wooded land to the east, and large residential lots to the north and west. The Property has a land use designation of Residential Rural, a zoning designation of Residential Agriculture (R-A) and is located within the Alderman Residential Rural Community Overlay established by the Pinellas County Comprehensive Plan ("Plan"). Properties in the Alderman overlay are regulated by the Pinellas County Comprehensive Plan ("Plan"). Policy 1.174 provides that decision by Pinellas County and its representatives will take into consideration the need to preserve and support the Community's rural character.

As originally platted, the Property was approximately 2.104 acres in size. On September 18, 1993, the Property was reduced to approximately 1.73 acres as a result of acquisition of the southern strip of the Property by the County Right of Way Division to widen Alderman Road. The structure on the Property is 46′ from the northern property line. The structure meets the 15′ setback requirement for residential structure in R-A zones.

Petitioner purchased the Property on March 28, 2012 with the intention of using the home as a shelter for small rescued dogs. To manage the adoption service and obtain funding for the shelter, Petitioner created a non-for-profit corporation, known as Canine Estate, Inc. Prior to March 28, 2012, Canine Estates, Inc. was not in existence. The Petitioner has never utilized the Property as her residence. Sybil Freeman, one of the primary Canine Estates members involved in day-to-day operations, testified that on December 1, 2018 she moved into the facility and at the time of the hearing utilized the Property as her residence. The Property is not currently homesteaded.

Shortly after the purchase of the property, Petitioner began utilizing the Property as a shelter to house dogs. Petitioner states that the number of dogs is limited to 25 and the size of each dog to 25 pounds. Common breed kept at the Property include Chihuahua, Dachshund and Maltese or mixtures thereof. The supporters of Canine Estates, Inc. refer to the site as an organization or facility, not as a residential home. Petitioner's land use planner referred to the Property as a "facility" or "rescue center". Petitioner states that the dogs are kept inside the structure at night and are let outside during the day in enclosed fenced-in play areas for limited periods of time to recreate and use the restroom. Canine Estates' business and adoption activities occur at its office at 292 B U.S. Alternate 19 North, Palm Harbor, Florida, 34683. Petitioner states that no business or adoption activities occur at the the Property.

A kennel/pet care facility is defined by the Pinellas County Land Development Code ("LDC") as "an establishment where domestic animals are bred, boarded, sold or treated for profit of public service, and housed. This includes personal service functions for pets." LDC § 138-166. Kennels are classified a "commercial and office uses" in the LCD. LDC § 138-355. Indoor kennels are expressly allowed as of right in two of six office and commercial zoning districts (C-2 and CP) and two of four industrial districts (E-2 and IPD) and may potentially be permitted as a Type 2 use after a Type 2 review and approval in the remaining industrial districts , the mixed-use special district and the R-A district. Ind. Outdoor kennels are not allowed as of right in any zoning district, but may be permitted pursuant to a Type 2 review and approval in the four industrial districts and the R-A district. The R-A district is the only residential district allowing the possible establishment of an indoor or outdoor kennel after a Type 2 review and

approval. LDC § 138-155.

At the time of the purchase of the Property in 2012, the LDC did not allow the Property to be utilized for a kennel without review and approval by the Board of County Commissioners ("BCC"). Effective January 1, 2019, as a result of an update of the entire LDC, review and approval authority for such use was delegated to the Board of Adjustment and Appeals ("BAA"). (LDC § 138-66). In addition, the updated LDC included additional kennel-specific requirements, including but not limited to a minimum lot size of 2 acres in R-A zones, and the structure housing the dogs in R-A zones must be at least 50′ from all adjacent residential properties.

The County received numerous code violation complaints in 2015, 2018 and 2019 due to Petitioner's unlawful use of the Property as a kennel. In late December, County Code Enforcement cited Petitioner for operating a dog sanctuary/kennel without obtaining a special use permit. County staff advised Petitioner that to proceed with the Type 2 Use Application, Petitioner would also need to submit variances for the two kennel criteria that they did not satisfy which were that (1) the structure housing dogs shall be setback at least 50 feet from any residential district; and (2) the site must be two acres or more. Thereafter, Petitioner submitted the Application on April 10, 2019 to allow an after-the-fact kennel to remain on the Property.

The BAA held a hearing to consider the Application June 5, 2019. Petitioner raises no objection to the procedure employed for notice and conduct of the hearing. The required general criteria for a Type 2 use pursuant to LDC §138-124 and testimony and evidence entered into the record of the hearing as to each criteria is listed as follows:

§ 138-124(a) Use is consistent with the Pinellas County Comprehensive Plan and purpose and intent of the applicable zoning district.

Pinellas County professional planning staff testified that operating a kennel is a nonresidential use and is directly contrary with the purpose and intent of the Alderman Residential Rural Community Overly that was put in place to further strengthen and preserve the rural and residential character of the surrounding community. Staff cited Plan Objective 1.17, which states "Pinellas County shall preserve and seek to enhance established community values, a community's unique identity, and their social support structure, and will make decisions that are in concert with a community's established vision for their future. Associated Plan Policy 1.172 prohibits Pinellas County from making decision that "detract from the established community identity and social support structure but, instead, serve to preserve and enhance that identity and structure." Staff also testified that the Property is located within a scenic non-commercial corridor designated by the Plan and allowing non-residential uses in this corridor is contrary to the corridor's intent. Respondent's land use planning expert Robert Pergolizzi testified that Staff's recommendation that the Property's use as a kennel is inconsistent with the community's residential identity. Petitioner's land use planner expert, Cyndi Tarapani, testified that the Applications met the approval criteria. Ms. Tarapani testified that the scenic non-commercial corridor policy only applies when requesting a Comprehensive Plan amendment, which is not the case here. Ms. Tarapani stated the Property is residential because no commercial activity occurs there. Finally, Ms. Tarapani testified that the limitation under the Alderman Overlay relates to discouraging increases in density and was not applicable. Mr. Pergolizzi agreed on that the density issue was not applicable.

Numerous nearby property owners testified to personal experiences and observations of activities at the Property that each felt were inconsistent with the community's identity and Overlay. Numerous witnesses testified in support of the use of the Property and their support of the Application.

§ 138-241(b) Adequate separation of the proposed use and related structures from adjacent and nearby uses by screen devices, buffer area and /or other appropriate means.

Staff testified that the proposed use has the potential to create noise and visual impacts on the surrounding residential uses and the variance was necessary because the structure on the Property does not meet the residential setback requirements. There was conflicting evidence presented to the BAA. An adjacent property owner testified that a fenced-in dog area was 10 feet from her property line. Ms. Trapani testified the one residence is 189 feet away and another northern neighbor 600 feet away and that the area is separated by extensive vegetation and tress which serve as noise and visual buffers.

§ 138-241(c) Adequate drives, walkways and parking are available so no vehicular circulation or parking problems are created.

Staff and Ms. Tarapani testified that no impacts were anticipated. Neighboring landowners provided written statements that multiple vehicles parked in front of the property blocked them from turning west on Alderman Road.

§ 138-241(d) The proposed use will not create excessive vehicular traffic or other traffic problems.

Staff and Ms. Tarapani both testified no impacts were anticipated, although adjacent property owners disagreed with that assessment. Testimony from an adjacent landowner and written correspondence was that the use would create traffic problems.

§ 138-241(e) Draining problems will not be created.

Staff testified no impacts were anticipated

§ 138-214(f) All provision and requirements of the applicable zoning district will be met, unless otherwise varied by the authorized reviewing body as authorized by this Code.

Staff testified that the use does not meet the LDC kennel requirements because the Property is 1.73 acres and a 2 acre minimum is required and the structure housing the dogs is 46′ from the northern property line where 50′ is required, therefore a variance for each requirement is needed. Ms. Tarapani testified that the variance for the lot size should not be needed as the lot had been conforming but was made non-conforming by the County's exercise of eminent domain in 1993

The hearing before the BAA then addressed each of the criteria required to grant a variance pursuant to LDC §§ 138-21:

§ 138-231(a) Special Conditions-special conditions and circumstances exist which are peculiar to the land, structure or building.

Staff testified that the eminent domain that reduced the size of the Property from 2 acres to 1.73 acres occurred prior to the purchase by Petitioner. Staff testified that after the County's purchase of the land and at the time of the hearing, the structure met the LDC's residential requirement, but not the requirements for a kennel. Ms. Tarapani disagreed stating that the reduction of the lot size was caused by the County and not Petitioner and therefore it was not a self-created hardship.

§ 138-231(c) Unnecessary hardship That literal interpretation of the provisions of this Code would deprive or make it practically difficult for the applicant to achieve the same proportion of development potential commonly enjoyed by other properties in the same zoning district under the terms of this chapter. The hardship shall not be self-imposed.

Staff testified that the existing single family structure and its sole use as a residence constitutes a reasonable use of the Property. Ms. Tarapani rebutted that there are many permitted allowable uses in the R-A district, one of which is a Type 2 use for a kennel. The Court notes that a variance would be needed to meet the requirements for the LCD.

§138-231(d) Consistency with the land development code. That the granting of the request will be in harmony with the general intent, purpose, and spirit of this Coed.

Staff testified that the kennel regulations requiring the lot size and setback are to mitigate the impacts they impose on surrounding properties and the variances requested by Petitioner are contrary to this purpose.

§138-231(e) Consideration of rezoning. That a rezoning of the property has been considered and determined not to be appropriate and/or determined not to meet the objective of the request.

Staff testified that rezoning from R-A to a commercial zone where kennels are allowed by right is not appropriate because the Property is located within the Alderman Residential Rural community Overlay and a scenic non-commercial corridor; both of which significantly limit establishing non-residential uses.

§138-231(f) Consistency with Comprehensive Plan. That the granting of the request will be consistent with the intent and limits of the Comprehensive Plan.

Staff testified that the kennel use was inconsistent with the Pinellas County Comprehensive Plan. Ms. Tarapani testified that the variances would not affect the density and a kennel is a Type 2 use allowed in the site's zoning district. Several residents within the Overlay testified that the kennel use was inconsistent with the area.

§138-231(g) Detriment to public welfare. That such request will not be injurious to the area involved or otherwise detrimental to the public welfare.

Staff testified that the specific use criteria, specifically setback requirements, have been put in place to mitigate the impacts kennels impose on the surrounding area and that variances to the kennel requirements are inconsistent with this intent. Neighboring landowners provided written objections based on their personal experiences regarding the noise from the incessant barking of the dogs as well as traffic issues. Ms. Tarapani presented evidence that the Property does not produce noise at levels in violation of the County's LDC. Ms. Tarapani also provide testimony and letters from the public that the use of the Property benefitted society because Petitioner rescues dogs that are in need.

§ 138-231(h) Circumvent Board Approval. That the granting of the request does not circumvent a condition placed upon the subject property by the Board of Adjustment and Appeals and/or the Board of County Commissioners. This shall not apply to new variances reviewed by the same board that originally placed the condition.

Staff and Ms. Tarapani both testified that this criterion was not applicable.

The BAA hearing included testimony from members of the public and neighboring landowners, professional staff analysis and professional opinions both in support and opposition. Letters of support and of opposition were from both landowners near the Property and those that did not live in the area. After the submission and presentation of all the evidence, the BAA determined that operating a kennel is a non-residential use. The BAA determined that such non-residential use is inconsistent with the Plan and Overlay, which the BAA determined limited such non-residential uses. The vote denying the Application was unanimous. The BAA did not issue an order making any findings of fact or conclusions of law; the BAA issued a one-page letter dated June 5, 2019 stating "your request to allow for a Type 2 Use (Kennel/Pet Care Facility) and associated variances . . was not approved. This was based on the Board's determination that the request did not meet the criteria for granting of the Type 2 use and variances."

STANDARD OF REVIEW

This Court in its appellate capacity has jurisdiction to review this matter under Florida Rule of Appellate Procedure 9.100. The Court must decide (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent substantial evidence to support the administrative findings. *See Falk v. Scott*, 19 So. 3d 1103, 1104 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2060b]. The appellate court is not "permitted to re-weigh conflicting evidence and is primarily relegated to assaying the record to determine whether the applicable law was applied in accordance with established procedure." *Dade County v. Gayer*, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980). "On first-tier certiorari review, the circuit court's task is to review the record for evidence that supports the agency's decision, not that rebuts it - for the court cannot reweigh the evidence." *Broward County v. G.B.V. Int'l*, 787 So. 2d 838, 846 (Fla. 2001) [26 Fla. L. Weekly S389a]. Petitioner does not argue that due process was accorded. The opinion is restricted to the whether the essential requirements of law were observed and whether there was competent substantial evidence to support the administrative findings.

DISCUSSION

Petitioner's first argument is that BAA's requirement that Petitioner submit the Application failed to observe the essential requirements of law. "Whether the essential requirements of law were observed: means whether the correct law was applied. *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. A departure from the essential requirement of the law necessary for the issuance of a writ of certiorari is something greater than simple legal error. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) [28 Fla. L. Weekly S287a]. Certiorari review should only be granted "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id*. at 889. Even a misapplication of correct law does not constitute a departure from the essential requirements of law. *Stilson v. Allstate Insurance Co*., 692 So. 2d 979, 982-82 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1088b]. A departure from the essential requirements of law must be so egregious that it cases irreparable harm. *Novartis Pharm. Corp. v. Carnoto*, 782 So. 2d 22, 23 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2441a]. "Clearly, established law can derive from a variety of sources, including ordinances". *City of Tampa v. City Nat'l Bank of Fla*., 974 So. 2d 408, 410 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1319a].

Petitioner incorrectly argues that the variances from the Type 2 requirements regarding minimum lot size and structure setbacks were not required because the kennel setback requirement was not implemented until January 1, 2019 after the Petitioner began using the structure as a kennel and that the reduction in lot size below 2 acres was a result of a previous owner's sale to Pinellas County. Petitioner's position is that the lot, the structure thereon and the use of the Property are all legally nonconforming. However, the use of the Property as a kennel was never legally established. Petitioner argues that once the lot was made nonconforming as a result of the eminent domain purchase, the later "shall be deemed to be deemed to be a conforming lot or parcel for all purposes without the necessity for a variance from any land development standard." § 138-212, LDC. "Nonconforming means a use, structure, lot or parcel, or combination thereof, which was lawfully established according to the rules and regulations in force at the time of its establishment, but would be prohibited, restricted or further regulated under the terms of the current land development code." LDC § 138-1. Nonconforming situations are categorized into three different groups in the LDC; (1) nonconforming lots/parcels (2) nonconforming structures and (3) nonconforming uses. LDC §§ 138-201-213. Each category of nonconformities are distinct, and a nonconformity as to one does not automatically create a nonconformity in another. Nonconformities "shall not be used as grounds for adding prohibited uses or structures on the site or in the

area." LDC §138-201(c). Nothing in the nonconformity regulations "shall be deemed to allow the use, change in use, repair, alteration, expansion, enlargement, or reconstruction of an illegal use or structure." LDC § 138-201(f). "It is the general intent that the new development, land usage, and lots/parcels conform to the Pinellas County Code." LDC § 138-201(e).

Petitioner is correct that the Property became a nonconforming R-A lot as a result of the purchase by Pinellas County and under LDC § 138-212 Petitioner was not required to obtain a variance for "previously existing and legal uses of the property". LDC § 38-212 is specific to nonconforming lots or parcels, not nonconforming structures or uses. LDC § 138-201(c) states the "the continuation of nonconformities shall not be used as grounds for adding other prohibited uses or structures". LDC § 138-201(f) states that "the nonconforming regulations shall not be deemed to allow the use or change in use of an illegal use or structures. A nonconforming lot does not allow the conversion to a new property use without meeting the requirements to establish the new use. The Property lot's existing and lawfully established 1.73 acre size does not allow the conversion to a brand new use without meeting the requirements existing at the time the new use is sought, absent a variance. LDC § 138-201(f). The structure on the Property was constructed as a residential home in 1978. From its original construction and even after the reduction of the lot's size, the structure continued to conform to all rules and regulations applicable to residential structures, including but not limited to the 15′ setback requirements for residential structures in F-A zones. The 50′ setback requirement is specific to kennels. It was not until the use of the structure was unlawfully converted to a kennel that the 50′ setback requirement became applicable to the structure. In order to establish a new Type 2 use, Petitioner had to apply for and obtain a variance.

Petitioner's second argument is that BAA's denial of the Applications were not supported by competent substantial evidence. Competent evidence must be credible, factually-based, must amount to more than bare allegations or conjecture, and must support a reasonable foundation for the conclusions reached. *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1086-87 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. It is evidence which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). If any competent substantial evidence was presented, the decision must be upheld on appeal. *Martin v. First Apostolic Church*, 321 So. 2d 471 (Fla. 4th DCA 1975). A circuit court siting in its appellate capacity is not permitted to reweight the factual evidence and testimony considered during the hearing. See, *Orange County v. Butler*, 877 So. 2d 810. "A local government's quasi-judicial decision must be upheld if there is any competent evidence support it." *Dorian v. Davis*, 874 So. 2d 661 (Fla. 5th DCA 2005) [29 Fla. L. Weekly D1110b]; *Eckler v. Orange County*, 763 So. 2d 545 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1793a]. Here, Pinellas County professional planning staff report on the variance request analyzed all of the criteria required for a variance and recommended that the request be denied. The BAA reviewed and confirmed the recommendation. The record reflects competent substantial evidence to support the decision.

Petitioner's third argument is that the BAA failed to observe the essential requirements of law by not following the approval criteria set forth in County LDC. "Quasi-judicial boards cannot make decisions based on anything by the local criteria enacted to govern their actions. Quasi- judicial boards do not have the power to ignore, add to or detract from the legislated criteria they utilize in making their determinations." *Miami-Dade Cty. v. Omnipoint Holdings, Inc*., 863 So. 2d 375, 376-77 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2839a]. Petitioner cites to *City of Apopka v. Orange Cty*, 299 So. 2d 657, 659-60 (Fla. 4th DCA 1974). Quasi-judicial functions should not be controlled or even unduly influenced by opinions and desires expressed by interested persons at public hearings. Numerous objections by adjoining landowners may not properly be given even a cumulative effect. A mere poll of neighboring landowners does not serve to assist the local government in deciding a special exception application. *Id*.; see also *Conetta v. City of Sarasota*, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981). Petitioner states that 378 letters and 5,104 electronic petition signatures were submitted in favor of the Applications and 12 letter and 75 petition signatures were submitted in opposition. Clearly, the BAA was not assisted in its decision by the poll of neighboring landowners. A Type 2 process requires the board of adjustment and appeals to determine the appropriateness of certain applications/requests at specific locations within the county." LDC § 138-82(1). The record of the BAA hearing contains expert testimony from land use planners both in support and opposition to the Application, which each included separate analyses on whether each relevant Application criterion was met based upon the facts presented at the hearing. The record also contains relevant and fact-based testimony from adjacent and nearby community members in opposition and relevant and fact based testimony from other Pinellas County residents in support of the Application. The record includes correspondence as to the violations on the Property, Property Appraiser records, photographs, and voluminous support and objection letters. All such evidence is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support a conclusion." *DeGroot*, 95 So. 2d at 916. The BAA deliberation at the close of the public hearing was focused on applying the evidence presented to the relevant criteria, most notably the requirement that both the Type 2 use and variances must be consistent with the Alderman Residential Rural Community Overlay and the Plan. The record reflects that the BAA relied on substantial competent evidence applied to each of the approval criteria set forth in the County LDC.

CONCLUSION

This Court concludes based on the facts and analysis set forth above that procedural due process was accorded and the BAA's decision to deny Petitioner's application is supported by competent substantial evidence and the essential requirements of law have been observed. The Petition for Writ of Certiorari is denied. (SHERWOOD COLEMAN, KEITH MEYER, and GEORGE M. JIROTKA, JJ.)

* * *

Criminal law—Prisoners—Conditional release—Revocation—Habeas corpus—No merit to argument that Commission on Offender Review's release of hold on petitioner as he was held in jail following arrest for violation of his conditional release and new law violations constituted dismissal of violation proceedings—Even if commission had dismissed violation proceedings as alleged, reinstatement of parole proceedings at later date is not barred by double jeopardy—Commission complied with due process requirements in conducting revocation hearing and acted within its discretionary power to conduct revocation proceedings after petitioner pled guilty to new law violations—Petition for writ of habeas corpus is denied

TONY SMITH, a/k/a Daniel J. Smith, Petitioner, v. RICKY DIXON, Secretary of Florida Department of Corrections, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent. Circuit Court, 12th Judicial Circuit (Appellate) in and for Desoto County. Case No. 2023-CA-0018. May 8, 2023.

ORDER DENYING *PRO SE* PETITION FOR WRIT OF HABEAS CORPUS

(DON T. HALL, J.) THIS CAUSE comes before the Court on a *pro se* Petition for Writ of Habeas Corpus, filed January 11, 2023. The

Court has carefully reviewed Defendant's Petition, the court file, applicable law, and is otherwise duly advised of the premises.

Petitioner is currently incarcerated at the DeSoto Annex, pursuant to his 1995 convictions in the Eleventh Judicial Circuit Court, in and for Miami-Dade County. He is serving an overall thirty-year sentence imposed for the offense of Felon in Possession of a Firearm/Ammunition as a Habitual Violent Felony Offender. Petitioner alleges he was placed on Conditional Release for almost nine years pursuant to § 947.1405, Fla. Stat., on September 9, 2018, by the Florida Commission on Offender Review ("the Commission"). On September 11, 2020, Petitioner admits he violated his Conditional Release terms by failing a urine analysis and a warrant was issued for his arrest. Petitioner was subsequently arrested on or about September 15, 2020, and charged with three new law violations including possession of cocaine, possession with intent to sell or deliver a controlled substance, and driving without a license.

On April 28, 2022, the Florida Department of Corrections notified the Miami-Dade Booking/Jail release officer they were removing their hold on Petitioner, stating they had "no further interest in the above referenced case(s)" (allegedly referring to the new law violations). Defendant then plead guilty to the new criminal charges on May 3, 2022, and was sentenced to time served. Two days later Petitioner received a document titled "Record of Inmate Discharge," which he alleges maintained or renewed his Conditional Release status with the Department of Corrections. However, he admits he remained at the Miami-Dade jail until he was transferred to the custody of the Department of Corrections on May 22, 2022.

On May 27, 2022, a panel of three commissioners held a hearing concerning Petitioner's September 11 and 15, 2020 violations. After the hearing, the Commission revoked Petitioner's Conditional Release and ordered him returned to the custody of the Florida Department of Corrections to serve the remainder of his sentence for the 1995 conviction referenced *supra*.

Petitioner now seeks immediate release claiming the Commission exceeded its authority in renewing the revocation proceedings for violations which occurred *after* they previously released their jail hold upon him. Petitioner further alleges that, as he did not commit any new law violations between the date the hold was lifted (April 28, 2022) and/or the date he was again "released on Conditional Release" (May 5, 2022) and the date of the revocation, his Conditional Release was improperly revoked. As a result, he alleges he is being detained illegally and seeks immediate release from custody.

Applicable Legal Standard

An inmate claiming entitlement to immediate release from custody may seek judicial relief in the county in which he or she his incarcerated through a petition for a writ of habeas corpus, filed pursuant to § 79.01 et seq., Fla. Stat., and Fla. R. Civ. P. 1.630.[1] In order to state a prima facie case for habeas relief, a petitioner must (1) file a complaint alleging that he or she is currently detained in custody; and (2) show "by affidavit or evidence probable cause to believe that he or she is detained without lawful authority."[2]

Cognizable challenges to illegal detention through habeas corpus have been interpreted by our courts to include challenges to the lawfulness of decisions by the Commission on Offender Review to revoke an offender's Conditional Release and direct his or her reincarceration, where the result is an illegal detention.[3] The Commission has broad authority to determine issues surrounding parole, the conditions of release, and revocations of release regarding a prisoner's Conditional Release.[4] The Commission retains this authority until the term of supervised release terminates and during that time "upon violation of any of the terms and conditions of release, the Commission may revoke the conditional release."[5] Because the Commission has such a broad discretionary authority it should not be interfered with by the courts absent a showing of "flagrant or unauthorized action."[6]

Once release has been granted, however, a Petitioner is entitled to "a conditional liberty interest protected by the Fourteenth Amendment entitling them to certain minimum due process requirements."[7] This requires that during a revocation proceeding, the Petitioner must receive:

> (1) written notice of the claimed violations of parole; (2) disclosure of the evidence against the parolee; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body such as a parole board; and (6) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[8]

Analysis

The Court initially notes that releasing a "hold" on a prisoner for a pending violation of probation or parole, does not relieve him from the consequences of the underlying violation. "[A] detainer merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial upon his release from prison."[9] Further, even had the Commission dismissed the violation proceedings on April 28, 2022, as inferred by Petitioner, it was entitled to reinstate the same alleged violations at a later date.[10] The Double Jeopardy clause does not bar a second parole proceeding for the same alleged violations under these circumstances.[11]

In reviewing the Petition and exhibits provided by Petitioner, he appeared at a revocation hearing held before "three commissioners or designees" on May 27, 2022. The findings from that hearing indicate Petitioner admitted to having used non-prescribed narcotics on September 11 and 15, 2022 (Conditions 4c(1) and (2)), and admitted having three new law violations (Conditions 7(1) - 7(3). Petitioner testified and cross-examined Officer Champagne at the hearing regarding the only contested violation regarding his mandatory curfew (Condition 16). On July 19, 2022, the Commission issued a written order finding Petitioner had willfully violated substantial conditions of his Conditional Release. This order contained detailed findings of fact regarding the violations and deemed it "in the best interests of society and the Conditional Releasee" that Petitioner "be returned to custody of the Department of Corrections." Based upon these facts, the Court finds the Commission complied with the due process requirements as outlined in *Morrisey*. Further, the Commission acted within their discretionary power to hold the revocation proceedings after Petitioner pled guilty to the new law violations, and he was still under their authority during the pendency of his Conditional Release.

It is, therefore,

ORDERED AND ADJUDGED that the instant Petition for Writ of Habeas Corpus is hereby **DENIED**.

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[1]*See Alachua Regional Juvenile Detention Center v. T.O.*, 684 So. 2d 814, 816 (Fla. 1996) [21 Fla. L. Weekly S563a]; *Harris v. State*, 133 So. 3d 1169, 1170 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D461a]; *cf. Stang v. State*, 24 So. 3d 566, 569 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1402a] (treating certiorari petition as one for habeas relief based on claim of entitlement to immediate release from custody).

[2]Fla. Stat § 79.01; *Quarles v. State*, 56 So. 3d 857, 858 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D469a].

[3]*See, e.g., Burnsed v. Florida Commission on Offender Review*, 279 So. 3d 196 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2601c] (reviewing, on cert petition, circuit court's denial of habeas petition challenging lawfulness of Commission's revocation of Conditional Release based on allegedly illegal condition); *Duncan v. Florida Parole Commission*, 939 So. 2d 176 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2497b]

(quashing circuit court's order denying habeas petition that challenged sufficiency of evidence supporting Commission's decision to revoke petitioner's Conditional Release); and compare with *Logan v. State*, 964 So. 2d 209 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2047a] (finding challenge to Commission's decision to place incarcerated inmate on Conditional Release properly raised in mandamus petition rather than habeas petition).

[4]*See Fla. Parole Comm'n v. Taylor*, 132 So. 3d 780, 785 (Fla. 2014) [39 Fla. L. Weekly S42a]; *Mayes v. Moore*, 827 So. 2d 967, 972 (Fla. 2002) [27 Fla. L. Weekly S770a]; *Rivera v. Singletary*, 707 So. 2d 326, 327 (Fla. 1998) [23 Fla. L. Weekly S94a]; *David v. Meadows*, 881 So. 2d 653, 655 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1894a]; *Nord v. Fla. Parole and Prob. Comm'n*, 417 So. 2d 1176, 1177 (Fla. 1st DCA 1982).

[5]*Crump v. State*, 137 So. 3d 1148, 1149-50 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D692b].

[6]*Thomas v. Sellers*, 691 F.2d 487, 489 (11th Cir. 1982); *See also Florida Parole Com'n v. Taylor*, 132 So. 3d at 785 (The court cannot substitute its judgment for that of an administrative agency, charged with implementing and enforcing its own statute, when that agency has imposed a penalty within the permissible range of penalties.)

[7]*Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

[8]*Id.* at 489.

[9]*Bryant v. State*, 787 So. 2d 68, 70 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D693b], *abrogated by Gethers v. State*, 838 So. 2d 504 (Fla. 2003) [28 Fla. L. Weekly S44a] (quoting *Price v. State*, 598 So.2d 215 (Fla. 5th DCA 1992)).

[10]*Scott v. State*, 937 So. 2d 746, 748 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2302a].

[11]*Id.; see also Thompson v. Reivitz*, 746 F.2d 397, 399 (7th Cir. 1983), cert. den., 471 U.S. 1103, 105 S.Ct. 2332, 85 L.Ed.2d 849 (1985) (declining to extend the due process protections of *Morrissey* to include "a double jeopardy bar" in a situation similar to the one presented in this case); *Jonas v. Wainwright*, 779 F.2d 1576, 1577 (11th Cir. 1986) (stating that "double jeopardy clause does not apply to parole revocation proceedings"); *Duke v. State*, 2 S.W.3d 512, 515-16 (Tex.Crim.App.1999) (holding that double jeopardy does not apply in a probation revocation hearing, which results in "neither a conviction nor an acquittal," but in "a finding on which the trial court can then exercise its discretion by revoking or continuing probation").

* * *

Municipal corporations—Code enforcement—Short-term rentals—Improper length of stay—Due process—Hearing—Property owner was not deprived of due process by denial of motion to continue hearing on code violation—Owner who had over a year's notice of violations and waited until morning of hearing to request continuance was not deprived of meaningful, full, and fair opportunity to be heard—Competent substantial evidence supported order finding owner in violation of code where inspectors testified to personal observations of property and exchanges with tenants renting for less than required minimum stay and provided photographs of property and evidence of online advertisement of property for less than required minimum stay

3605 GULF DR, LLC, a Florida limited liability company, Appellant, v. CITY OF HOLMES BEACH, FLORIDA, a municipal corporation, Appellee. Circuit Court, 12th Judicial Circuit (Appellate) in and for Manatee County. Case No. 2022-AP-000055. L.T. Case No. 21-004819. May 8, 2023. Appeal from the Code Enforcement Special Magistrate Manatee County. Counsel: Michelle A. Grantham and Louis J. Najmy, Najmy Thompson, P.L., West Bradenton, for Appellant. Randol D. Mora, Trask Daigneault, LLP, Clearwater, for Appellee.

(CHARLES SNIFFEN, J.) 3605 GULF DR, LLC, a Florida limited liability company ("Appellant") appeals from a January 28, 2022, Final Administrative Order, entered by the City of Holmes Beach Code Compliance Special Magistrate ("Magistrate"), after a duly noticed hearing, finding Appellant violated Chapter 4, Section 4-11, of the Holmes Beach Code of Ordinances ("Holmes Beach Code" or "HBCO") by renting the real property located at 3605 Gulf Drive, Units 1, 4, and 5 (the "Property"), for an improper length of stay (less than 7 nights). This appeal is pursuant to § 162.11, Fla. Stat.

I. Statement of the Case

On October 18, 2019, a Code Enforcement Officer for the City of Holmes Beach ("City" or "Appellee") issued a Notice of Violation to Appellant for renting and advertising the Property for less than seven nights.[1] On December 16, 2021, a Code Enforcement Officer for the City issued another Notice of Violation (the "Second Notice of Violation") for renting the Property for an improper length of stay (less than 7 nights).[2] The City sent a copy of the Second Notice of Violation to Appellant via certified mail, called representatives for Appellant letting them know the notice was posted on the Property[3] and delivered the notice to Appellant's office.[4] On January 7, 2022, the City issued a Notice of Hearing ordering Appellant to appear in front of the Magistrate on January 19, 2022, at 10:00 A.M. to answer the charges of renting the Property for an improper length of stay and to present Appellant's side of the case.[5] The City sent the Notice of Hearing to Appellant via certified mail[6] and delivered the notice to Appellant's office.[7]

At the duly noticed hearing on January 19, 2022, after receiving evidence, testimony, and legal arguments the Magistrate found Appellant violated the restriction on minimum rental period contained in Section 4-11 of the Holmes Beach Code. Notably, Appellant did not present any evidence or testimony; rather, Appellant requested a continuance, which was denied by the Magistrate. On January 28, 2022, the Magistrate issued its Final Administrative Order memorializing his ruling. Appellant noticed this appeal on February 28, 2022.

II. Applicable Law

As a preliminary matter, the parties disagree as to whether the standard of review for appeals or for certiorari proceedings should apply to an appeal to the circuit court pursuant to Section 162.11, F.S. The Court finds that the Second District's ruling in *Sarasota County v. Bow Point on Gulf Condominium Developers, LLC*, 974 So.2d 431 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2551b] controlling on this court. *See Pardo v. State*, 596 So.2d 665 (Fla. 1992) (citing to *State v. Hayes*, 333 So.2d 51, 53 (Fla. 4th DCA 1976) (explaining that 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; between District Courts of Appeal, a sister district's opinion is merely persuasive). Therefore, the Court's review of the record is limited to determining whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *Bow Point*, 974 So. 2d 431, 432 n. 3 (Fla. 2d DCA 2007).

III. Analysis

Appellant raises two grounds on appeal: (1) It was deprived of its right to a meaningful opportunity to be heard when the Magistrate denied Appellant's request for a continuance; and (2) Insufficient evidence existed to sustain the Magistrate's finding that a violation occurred. The Court does not find merit in either of Appellant's grounds and as such the Magistrate's rulings in the FAO are affirmed.

A. Due Process Claim

Appellant first claims it was deprived of its right to a meaningful opportunity to be heard when the Magistrate denied its motion to continue. Appellant claims such denial prevented it from having a "meaningful, full, and fair opportunity to be heard, which created an injustice for Appellant."[8] The Court finds that Appellant was not deprived of a meaningful opportunity to be heard by the Magistrate's denial of its motion to continue and affirms the Magistrate's ruling in holding the Appellant violated Section 4-11, of the Holmes Beach Code.

As stated above, part of this Court's limited review includes a determination of whether procedural due process was afforded. *Bow Point*, 974 So. 2d 431, 432 n. 3 (Fla. 2d DCA 2007). Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interest. *Massey v. Charlotte County*, 842 So.2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (*citing County of Pasco v. Riehl*, 620 So.2d, 231 (Fla. 2d DCA 1993). Procedural due process requires both fair notice and a real opportunity to be heard "at a meaningful time and in a meaningful manner." *Keys*

Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So.2d 940, 948) [26 Fla. L. Weekly S502a] (*citing Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. *Keys Citizens*, 795 So.2d at 948 (*citing Gilbert v. Homar*, 520 U.S. 924 (1997)). In the case of quasi-judicial proceedings such as code enforcement hearings under Chapter 162, Florida Statues, the extent of procedural due process afforded to a party is not as great as that afforded to a party in a judicial hearing and consequently, such hearings are not controlled by strict rules of evidence and procedure. *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So.2d 693, 696 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2822a]; *See also Hadley v. Department of Administration*, 411 So.2d 184, 187-88 (Fla. 1982). "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991). The Court, in considering a procedural due process claim under Chapter 162, Florida Statutes, must fill the procedural gaps in Chapter 162 with common-sense application of basic principals of due process. *See Massey*, 842 So.2d 142, 145 (Fla. 2d DCA 2003) (citing *City of Tampa v. Brown*, 711 So.2d 1188 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1061b]).

Chapter 162, Florida Statutes, establishes the procedures that code enforcement boards must follow to enforce local building codes and ordinances. The City of Holmes Beach enacted municipal ordinances largely mirroring the framework of Chapter 162, Florida Statutes.[9] Notably, a code enforcement officer who discovers a violation must notify the violator and give him or her a reasonable time to correct the violation.[10] Should the violation continue beyond the time for correction, the code enforcement officer is required to notify the Magistrate and request a hearing on the violation. The violator must be provided a written notice of the hearing sent either certified mail, return receipt requested, at the address listed in the tax collector's office for tax notices (or any other address provided to the city by the owner), hand delivery to the violator by an appropriate code inspector, or by leaving the notice at the violator's usual place of residence with any person 15 years or older, or, in the case of a commercial premises, leaving the notice with the manager or other person in charge.[11]

In the present case, Appellant's sole due process claim is that it did not receive a meaningful, full and fair opportunity to be heard by the Magistrate failing to grant its request for continuance. The record from the January 19, 2022, hearing reflects that after the City presented its testimony and evidence, Appellant, via counsel, requested the Court grant a continuance to collect information to show and demonstrate that the Property is "grandfathered in for this use."[12] Counsel for Appellant specifically argued:

> "*So, I just haven't had the opportunity to collect all that [information], . . . even if I got the Notice on the 7th, I wouldn't have had the opportunity. I need at least four weeks . . . to pull up this information. . .and develop my case. It's a significant issue. The City can't deny that its let properties like this rent nightly for years and years and now they're just starting to crack down on it. We just need the ability, a short period of time, which is longer than 10 days to put evidence together, to convince the City that this is a grandfathered use.*"[13]

In consideration of Appellant's motion to continue, the Magistrate asked the City's Code Enforcement Officer if he spoke with counsel for Appellant in December 2021 to discuss the improper length of stay violations at the Property. The Code Enforcement Officer confirmed discussing the violations with counsel for Appellant in December 2021.[14] Counsel for the City then clarified that the request for continuance came at 8:30 A.M. the morning of the 10 A.M. hearing and submitted evidence against Appellant's grandfathering argument.[15] After considering the above, the Magistrate denied Appellant's motion to continue.

The Magistrate's decision to deny the continuance did not deprive Appellant of a meaningful, full and fair opportunity to be heard. The record establishes that the City provided notice of the January 19, 2021, hearing to Appellant pursuant to Chapter 162, Florida Statutes, and Section 2-119 of the Holmes Beach Code.[16] Appellant was on notice as far back as October 2019, and more recently in December 2021, that the Property was in violation of Section 4-11 of the Holmes Beach Code. When Appellant received the Notice of Hearing, Appellant failed to notify the Magistrate or the City that he required further time to obtain his evidence and waited until the morning of the hearing to first notify either of the need for a continuance. Furthermore, in his reasoning for a continuance, counsel for Appellant did not specify the efforts he or the Appellant undertook since the Notice of Violation, Second Notice of Violation, or Notice of Hearing were issued to obtain the grandfathered use evidence and failed to elaborate how this grandfathered use evidence relates to the violations of Section 4-11, HBCO. Appellant further failed to specify what the evidence consists of or explain why it could not be obtained prior to the hearing.

Under these facts the Court finds that Appellant was afforded procedural due process and received a meaningful, full and fair opportunity to be heard. Appellant's failure to identify the evidence at issue, present steps taken to acquire the evidence prior to the hearing, or explain any particular need for additional time, after receiving proper notice of the hearing pursuant to Chapter 162, Florida Statutes, and Section 2-125, HBCO, does not render the process afforded or opportunity to be heard inadequate. *See Rodriguez v. Allied Universal Corp*., 473 So.2d 1351 (Fla. 3d DCA 1985) (holding that a request for continuance is properly denied when record shows counsel was completely neglectful in preparation of the case); *Cf. Baron v. Baron*, 941 So.2d 1233 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2903a]. Accordingly, Appellant's claim in ground 1 is denied.

B. Competent, Substantial Evidence

Appellant's second claim is that "there was insufficient evidence to support the Magistrate's finding that Appellant was renting the property for an improper length of stay." The Court finds that there was competent, substantial evidence to support the Magistrate's finding that Appellant violated Section 4-11 of the Holmes Beach Code.

Part of this Court's function is to review the record to determine whether a decision is supported by competent substantial evidence. *Bow Point*, 974 So. 2d 431, 432 n. 3 (Fla. 2d DCA 2007); *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270, 1273-75 (Fla. 2001) [26 Fla. L. Weekly S329a]. Competent substantial evidence is defined as "sufficiently relevant and material" evidence "from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). In its review, the Court may not reweigh the evidence or substitute its judgement for that of the agency. *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

The record reflects the City presented evidence in the form of testimony of its code inspector describing the various dates of his inspections, his personal observations and photographs of the Property evidencing a violation, exchanges with tenants of the Property renting for less than the required time, and the dates and methods of providing appropriate notice of the violation and hearing to the Appellant. The City further presented testimony from a second code inspector that as of the morning of January 19, 2021, the Property was being advertised online for less than the required

minimum stay. As previously mentioned, Appellant did not present any evidence during the January 19, 2021, hearing to support its claim that it was not in violation of Section 4-11. The Court finds that the record contains competent substantial evidence to support the findings and decisions made by the Magistrate in the FAO and therefore denies the present claim.

Based on the foregoing, the Magistrate's January 28, 2022, Final Administrative Order is **AFFIRMED**.

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[1]Record ("R.") at 18.
[2]R. at 29.
[3]R. at 5:19-21.
[4]R. at 6:24-25; 7:1-2.
[5]R. at 23, 33.
[6]R. at 24, 27.
[7]R. at 5:13-18; 6:24-25; 7:1-3.
[8]Initial Brief at 3.
[9]*See* Chapter 2, Article V (Code Enforcement), HBCO.
[10]Section 2-119, HBCO.
[11]*Id.*; Section 2-125, HBCO.
[12]R. at 9:6-25; 10:1-8.
[13]R. at 9:15-25; 10:1-3.
[14]R. at 10:9-25; 11:1.
[15]R. at 11:4-25; 12:1-2.
[16]R. at 6:24-25; 7:1-3; 23, 33

* * *

Municipal corporations—Code enforcement—Operating bar/lounge area without approved site plan—Special magistrate's finding that hotel operator violated land development code by converting hotel multi-purpose room to bar/lounge area and eventually into spa area without site plan approval was supported by competent substantial evidence where inspectors testified about conversion and entered photographs into evidence, and hotel operator failed to present any evidence establishing exemption from site plan requirement

BALI HAI, JV, LLC, a Florida limited liability company, Appellant, v. CITY OF HOLMES BEACH, FLORIDA, a municipal corporation, Appellee. Circuit Court, 12th Judicial Circuit (Appellate) in and for Manatee County. Case No. 2022-AP-000063. L.T. Case No. 21-002482. May 16, 2023. Appeal from the Code Enforcement Special Magistrate Manatee County, Florida. Counsel: Michelle A. Grantham and Louis J. Najmy, Najmy Thompson, P.L., West Bradenton, for Appellant. Randol D. Mora, Trask Daigneault, LLP, Clearwater, for Appellee.

(EDWARD NICHOLAS, J.) BALI HAI, JV, LLC, a Florida limited liability company ("*Appellant*") appeals from a January 28, 2022, Final Administrative Order and Order Imposing Fine, entered by the City of Holmes Beach Code Compliance Special Magistrate ("*Magistrate*"), after a duly noticed hearing, finding that Appellant violated Section 3.5 of the Land Development Code for undertaking additional changes in use for the real property located at 6900 Gulf Drive, Holmes Beach, Florida (the "*Property*") without a site plan approval. This appeal is pursuant to §162.11, Fla. Stat.

I. Statement of the Case

On August 24, 2020, the Magistrate issued a Final Administrative Order in the City of Holmes Beach Code Compliance Cases 20-000759 and 20-000779 (the "*Initial Violation Order*"), wherein the Magistrate found that the Appellant had, *inter alia*, violated Article III, Permits and Development Approvals, Section 3.5, Site plan Review, of the Land Development Code by undertaking a change in use of the Property without site plan approval.[1] Specifically, the Magistrate found by a preponderance of the evidence that Appellant was offering food and alcoholic beverages on the Property and that the 4COP alcoholic beverage license held by Appellant established a change in use on the Property.[2]

On January 6, 2022, a code enforcement officer for the City of Holmes Beach ("*Appellee*" or the "*City*") issued a Notice of Repeat Violation against Appellant in the City of Holmes Beach Code Compliance Case 21-002482 for violating Section 3.5 of the Land Development Code by continuing to operate a bar/lounge without an approved site plan.[3] The code enforcement officer also issued a Notice of Hearing for Repeat Violation and set the repeat violation of Section 3.5 of the Land Development Code for hearing in front of the Magistrate on January 19, 2022.[4]

At the January 19, 2022, hearing, Appellee offered testimony and introduced evidence by the City's code enforcement officers and building official on Appellant's conversion of a multi-purpose room into a bar/lounge area resulting in the Initial Violation Order, the City's subsequent inspection of the Property after the Initial Violation Order and discovery of continued use of the bar/lounge area and a new spa area, the requirement for approval by the City via site plan for change in use for a bar/lounge or spa, and Appellee's recommended corrective action and fine for a repeat violation of Section 3.5 of the Land Development Code.[5] Counsel for Appellant cross-examined the City's code enforcement officers but otherwise did not present evidence. Rather, counsel for Appellant argued that the Appellee had not proven their case of a repeat violation of Section 3.5 of the Land Development Code as the City "provided no evidence that any sale was actually occurring with respect to the operation of a bar,"[6] and, even if sales were occurring, the City failed to provide any evidence that these sales were to individuals other than guest of Appellant, as their interpretation paragraph 4 of the Initial Violation Order makes "very clear. . .that the only violation was offering for sale to people. . .who were not guests of. . . [Appellant]."[7] Appellant also raised the defense that the change in use of the multipurpose room to a bar/lounge is exempt from Site plan approval under the Land Development Code but failed to provide specific facts or evidence supporting its defense.[8]

At the conclusion of the hearing, the Magistrate found Appellant to be in repeat violation of Section 3.5 of the Land Development Code, required the Appellant to apply for and obtain an approved site plan specifically for the bar/lounge area, imposed a fine of $500 per day from October 12, 2021 until the Property is brought into compliance, leveled costs of $127.24 against Appellant, and required Appellant to notify the City once the Property is brought into compliance.[9]

The Magistrate issued a Final Administrative Order and Order Imposing Fine (the "*FAO*") on January 28, 2022, memorializing his oral ruling. Appellant filed a Notice of Appeal of Final Administrative Order on February 28, 2022, seeking review by this Court of the FAO.[10]

II. Applicable Law

On review of a code enforcement determination under Section 162.11, Fla. Stat., the Court is limited to determining whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *Sarasota County, Florida v. Bow Point*, 974 So. 2d 431, 432 n. 3 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2551b].

III. Analysis

On appeal, Appellant's argument is that the competent, substantial evidence does not support the Magistrate's finding that a site plan approval was required. Competent, substantial evidence is defined as "sufficiently relevant and material" evidence "from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). It is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* Evidence contrary to the decision is outside of the scope of the inquiry and the Court is prohibited from reweighing evidence or substituting its judgement for that of the agency. *Dusseau v. Metropolitan Dade*

County Bd. Of County Com'rs, 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]. The determination the Court must make is whether the decision is lawful. *Dusseau*, 794 So.2d 1270, 1276 (Fla. 2001). If the record contains competent substantial evidence supporting "the decision it is presumed lawful and the court's job is ended." *Id*. In the present case, the Court's requirement is to determine whether there is competent substantial evidence to support the Magistrate's finding that Appellant violated Section 3.5 of the Land Development Code.

Appellant posits that during the January 19, 2022, hearing, it "argued that at least one exemption from the site plan approval requirement applied."[11] Appellant cites to the record where counsel for Appellant states during closing arguments that Section 3.5(B)(5) does not require site plan approval in "situations like this."[12] Appellant argues that the City failed to present evidence rebutting or addressing such exemptions and such failure supports Appellant's argument that site plan approval exemptions applied.

Appellant's argument is flawed. Section 3.5(A) provides that "[a]pplications for all uses permitted with site plan review shall require the submission of a site development plan in accordance with the provisions of this section unless the same is waived in accordance herewith." The Property is a hotel located in the A-1 zoning district,[13] and an accessory use of a restaurant, bar, cocktail lounge, or recreational facility requires site plan review under Section 6.6(F)(2)(a)(2).

As explained *supra*, the record reflects that the City presented testimony from a code compliance inspector on his experience performing on-site inspections at the Property from January 2020 to January 2022 and seeing a multi-purpose room converted into a bar/lounge area and eventual spa area. The City also entered into evidence the code inspector's photographs during the inspections showing the conversion, Appellant's subsequent use of the space, and Appellant's advertising of the bar/lounge and spa. A second code compliance inspector testified to recent customer reviews evidencing patrons paying for drinks and confirming the presence of a spa. The City's building official testified to observing the conversion of this multi-purpose room, explaining such conversion is a change in use of the space requiring a site plan approval, and confirming that no approved site plan was on file with the City.

Section 3.5(B)(5) provides exemptions from site plan review in certain circumstances. However, despite Appellant's assertion that "at least one" of the exemptions applies in this case, Appellant presented no evidence at the hearing to support this conclusory argument. Because Appellant failed to present any evidence establishing an applicable exemption, there was nothing for the City to rebut. Accordingly, the Court finds that there is competent, substantial evidence to support the Magistrate's finding that Appellant violated Section 3.5 of the Land Development Code by undertaking a change in use without site plan approval.

Based on the foregoing, the Magistrate's January 28, 2022, Final Administrative Order, is **AFFIRMED**.

[1]Record ("R.") at p. 121-125.
[2]R. at 122 ¶4.
[3]R. at 72.
[4]R. at 71.
[5]R. at 6-16; 21-23; 40-61.
[6]R. at 25: 3-14.
[7]*Id*.
[8]R. at 31:1-9; 36:4-7.
[9]R. at 37: 6-24.
[10]R. at 130-135.
[11]Initial Brief at 5.
[12]R. at 36: 6-7.
[13]R. at 2:24; 28:10-15.

* * *

Licensing—Driver's license—Revocation—Appeals—Certiorari—Department of Highway Safety and Motor Vehicles did not depart from essential requirements of law by upholding revocation of Florida driver's license and requirement to install ignition interlock device for licensee who was convicted of second DUI in Massachusetts six years ago—Competent substantial evidence supported license revocation where licensee held Florida ID card requiring proof of Florida residency at time of his Massachusetts conviction and thereafter, during revocation of his Massachusetts license, was able to obtain a Florida license because Florida driving record had not been updated to show his Massachusetts conviction

MATTHEW FRANCIS BROWN, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 23-CA-15642. Division C. January 21, 2025. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MELISSA M. POLO, J.) THIS MATTER is before the Court on Amended Petition for Writ of Certiorari filed January 2, 2024 (Doc. 11). The petition is timely. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner argues that the Department departed from the essential requirements of the law by upholding the revocation of his driving privileges and the requirement that he have an ignition interlock device installed in his vehicle because of a DUI offense committed out of state which was Petitioner's second DUI conviction. Having reviewed the Petition, Amended Petition, Response, transcript, appendix, and being otherwise fully informed, the Court finds as follows:

A decision by the Department to uphold or invalidate a suspension may be reviewed by a petition for writ of certiorari to the circuit court in the county in which formal or informal review was conducted. §§ 322.31; 322.2615(13), Fla. Stat. This Court, therefore, has jurisdiction to review the Department's decision in this case. This review is not de novo. § 322.2615(13), Fla. Stat. Rather, the Court "must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and 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). The Court may not reweigh evidence. *Dep't of Highway Safety & Motor Vehicles v. Rose,* 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

On June 26, 2017, Petitioner was convicted of DUI in Massachusetts and his Massachusetts driving privileges were revoked for one year. At that time, Petitioner had a Florida ID card. On October 10, 2017, Petitioner applied for and received a Florida driver license. In May 2023, Petitioner was notified that his license was revoked for one year, effective June 26, 2017. Petitioner was notified that he would need to install an ignition interlock device in his vehicle because the 2017 DUI conviction in Massachusetts was his second offense.

Florida Statutes § 322.24 authorizes license revocation based on out-of-state convictions for DUI. Section 322.24 states that "[t]he department is authorized to suspend or revoke the license of any resident of the state, upon receiving notice of the conviction of such person in another state or foreign country of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of his or her license." Where a DUI conviction occurs in another state, Florida may impose sanctions for the out-of-state conviction on the Florida licensee. § 322.2715(2), Fla. Stat. Florida law requires the Department to impose the ignition interlock requirement when reinstating a driver license following a revocation for a second DUI conviction. § 322.2725(3), Fla. Stat. ("if a person is

convicted of: . . . [a] second offense of driving under the influence, the ignition interlock device shall be installed for a period of at least 1 continuous year").

Petitioner argues that the Department departed from the essential requirements of the law by revoking his license without competent, substantial evidence. Petitioner asserts that he was subjected to a second license revocation for the same conviction six years after his license was revoked in Massachusetts, upon becoming a Florida resident. However, based on the record, Petitioner obtained a Florida ID card four days after his DUI arrest in Massachusetts and approximately one month prior to his conviction. In obtaining a Florida ID card, Petitioner must have shown proof of Florida residency. Five months later, in October 2017, while Petitioner's Massachusetts license revocation was still in effect, Petitioner applied for and received a Florida driver license. Petitioner was able to do so because his Florida driving record was not updated to reflect the Massachusetts conviction until approximately two years later, in August 2019.

It is therefore ORDERED that the Petition for Writ of Certiorari is DENIED.

* * *

Counties—Code enforcement—Fines—Mitigation—Appeals—Petition for writ of certiorari challenging order finding violation of county code due to deterioration of hurricane-damaged dock and imposing fine is untimely where petition was filed more than two years after order was issued—Order imposing mitigated fine is affirmed—Special magistrate considered all required factors when determining amount of fine, and there was competent substantial evidence supporting decision to grant relief and substantially reduce fine

TRAVIS J. MANTER, Appellant, v. MONROE COUNTY, FLORIDA, Appellee. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 22-AP-03-K. L.T. Case No. CE19070109. March 1, 2024.

OPINION

(TIMOTHY KOENIG, J.) **THIS CAUSE** comes before the Court upon the Appellant, Travis Manter's, "Notice of Administrative Appeal" filed on April 22, 2022. The Court, having considered the Appellant's Notice of Appeal, the Answer Brief of Monroe County, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellant is the owner of property located at 31581 Avenue A, Big Pine Key, Florida (hereinafter the "subject property"). The subject property has a dock that was damaged during Hurricane Irma and that was subsequently deemed unsafe by the Building Official. A Notice of Violation of Monroe County Code ("MCC") section 6-27(b)(2)b: Unsafe /Structural Deterioration of Pier's Structure or Structural Parts, was issued, and a hearing was held before a Special Magistrate on February 27, 2020. In the Final Order entered on February 27, 2020, the Special Magistrate found the subject property to be in violation of MCC 6-27(b)(2)b and directed Appellant to correct the violation no later than May 27, 2020, or be penalized $100.00 per day with the fine continuing to accrue until the date of compliance.

The subject property was not brought into compliance by May 27, 2020. However, the County suspended the fine until December 31, 2020, due to Appellant's efforts to bring the subject property into compliance. The dock permit process took many months. The daily fine began accruing on January 1, 2021. The dock permit was issued on May 27, 2021, and the subject property was deemed compliant as of July 19, 2021. By this time, the daily fine had accrued for 199 days, amounting to a total fine of $19,900.00. Additionally, the County sought to recover costs incurred for prosecuting the case in the amount of $1,246.78. Thus, the total amount owed was $21,146.78.

On January 27, 2022, this case came before the Special Magistrate upon the Appellant's written request for a reduction in fines arising from the Final Order entered on February 27, 2020. At the mitigation hearing, the Special Magistrate heard testimony from both the County and the Appellant and took the matter under advisement. On March 24, 2022, the Special Magistrate entered an Order Imposing Fine in the amount of $1,990.00 for the violations previously found to exist on the subject property and ordering Appellant to pay $1,246.78 in costs for a total of $3,236.78.

On April 22, 2022, Appellant filed this "Notice of Administrative Appeal" seeking to "remove the fines, fees, costs, and/or lien on my property over this code violation on the dock."

II. STANDARD OF REVIEW

Pursuant to section 162.11, Florida Statutes, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Central Florida Investments v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." § 162.11, Fla. Stat. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Id.* at 294; § 162.11, Fla. Stat.

III. DISCUSSION

The Appellant appears to be seeking review of both the Final Order finding the violation of MCC 6-27(b)(2)b entered on February 27, 2020, as well as the Order Imposing Fine entered on March 24, 2022. The challenge to the Final Order is untimely, and the Court finds no error that would warrant granting an appeal of the Order Imposing Fine.

I. The Final Order

Appellant asserts that he should not have been fined because the code violation "was by no fault of my own." However, any attack on the underlying violation established in the Final Order is untimely. If Appellant disagreed with the finding of violation, the proper recourse was to appeal the Final Order pursuant to section 162.11, Florida Statutes. The Appellant did not timely appeal the Special Magistrate's Final Order, and therefore, Appellant cannot now challenge the findings therein in this action.

II. The Order Imposing Fine

Appellant requests the Court to remove the fines imposed in the Order Imposing Fines but does not specifically identify any alleged error. The Court will review the Order to determine: 1) whether procedural due process was accorded, 2) whether the essential requirements of the law were observed, and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *See Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a].

A. Due Process

Procedural due process requires fair notice and a real opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]. In this case, due process was afforded to the Appellant. The Appellant requested a mitigation hearing and was afforded a hearing before the Special Magistrate. Appellant was also given the opportunity to submit additional documentation that was considered by the Special Magistrate in determining the appropriate fine.

B. Essential Requirements of Law

A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with

"observing the essential requirements of law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. In this case, the Special Magistrate applied the correct laws and correctly applied those laws.

Section 162.09(2)(b), Florida Statutes, and MCC section 8-31(b) require a code enforcement board determining the amount of a fine to consider: 1) the gravity of the violation, 2) any actions taken by the violator to correct the violation, and 3) any previous violations committed by the violator. MCC 8-31(d) provides six enumerated factors for consideration in mitigating fines. In the Order Imposing Fine, the Special Magistrate explicitly states that he has carefully considered all of these factors in determining the amount of the fine to be imposed in this case.

C. Competent Substantial Evidence

In code enforcement cases, a magistrate's findings will not be disturbed if they are based on competent substantial evidence. *Monroe County v. Carter*, 41 So. 3d 954, 957 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1638d]. Competent substantial evidence is evidence that "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred [and] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *DeGroot v. L.S. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). In this case, there is sufficient evidence supporting the Special Magistrate's decision to grant relief and substantially reduce the fine. In the Order Imposing Fine, the Special Magistrate lays out the timeline of events, noting the efforts taken by the Appellant to correct the violation and the hardships faced during this process. The Special Magistrate notes additional factors weighing in favor of mitigation including financial hardship and the Appellant's status as a caretaker for a disabled minor. Appellant and the County also provided testimony as to the enumerated factors to be considered.

The evidence presented to the Special Magistrate addressed all of the enumerated statutory factors, including additional factors and hardships that may be considered. The Special Magistrate considered this evidence in light of the enumerated factors. The evidence supports the Special Magistrate's decision.

IV. CONCLUSION

For the foregoing reasons, the matter is **AFFIRMED**.

* * *

Counties—Zoning—Variances—Boat ramp parking—Appeals—Certiorari— Challenge to planning commission's approval of variance to reduce number of boat trailer parking spaces required at boat ramp on resort's property—Standing—Proximity to property and participation in variance hearing before commission gave adjoining landowners standing to participate in appellate review—Due process—No merit to arguments that adjoining landowners were denied due process by inadequate notice signs and holding of hybrid in-person/zoom hearing during tropical storm warning where landowners received notice of hearing and participated in hearing via zoom—Denial of motion for reconsideration by commission's general counsel did not violate due process where motion did not move for "more complete resolution" as required by commission rules, but instead sought different resolution—Hardship—Commission departed from essential requirements of law by failing to properly consider law of hardships in assessing the variance request—Competent substantial evidence did not support finding that failure to grant variance would result in exceptional hardship—Claim that resort will not be able to efficiently use property if required to comply with land development code is not a hardship recognized in Florida law—There is no exceptional hardship where resort created claimed hardship by developing site plan that did not account for required trailer parking, and reasonable use can be made of property by either altering site plan to accommodate parking or eliminating boat ramp—Resolution granting variance quashed

PIRATES SAVING PARADISE, INC., and JULEE MARZELLA, in her personal capacity, Petitioners, v. LITTLE PALM DOLPHIN RESORT DEVELOPMENT, LLC, and MONROE COUNTY PLANNING COMMISSION, Respondents. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 24-CA-1074-K. February 3, 2025. Counsel: Jane C. Graham, Sunshine City Law, Land O'Lakes, for Petitioners. Glenn T. Burhans, Jr. and Christopher Roy Clark, Stearns, Weaver, Miller, Weissler Alhadeff & Sitterson. P.A., Tallahassee; Nicole Alexis Neugebauer, Tampa; and Erica Hughes Sterling and Richard J. McChesney, Spottswood, Spottswood, Spottswood & Sterling, Key West, for Little Palm Dolphin Resort Development, LLC, Defendant. Peter H. Morris, Monroe County Attorney's Office, Key West, for Monroe County Planning Commission, Defendant.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(TIMOTHY KOENIG, J.) THIS CAUSE is before the Court on a Petition for Writ of Certiorari (the "Petition"), challenging Monroe County, Florida Planning Commission Resolution No. P01-24 which approved a variance request to reduce boat ramp parking on property owned by Little Palm Dolphin Resort Development, LLC ("Little Palm"). The Court, having considered the Petition, Little Palm's Response in Opposition to the Petition, Monroe County's Joinder in Little Palm's Response in Opposition to Petition for Writ of Certiorari, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. Factual and Procedural Background

Little Palm owns the property located at 28550 Overseas Highway on Little Torch Key, Florida (the "Property"). The Property includes a private boat ramp that is used by Little Palm Resort vessels to transport guests to and from the offshore Little Palm Dolphin Resort. (Pet. Ex. A.128). Pursuant to the Monroe County Land Development Code ("LDC") section 114-67(c), boat ramps must contain six (6) parking spaces per ramp to accommodate trailers and oversized vehicles. However, in redeveloping the Property, Little Palm submitted a site plan that maintained the boat ramp but proposed no boat trailer parking spaces. (Pet. Ex. A.2).

On December 5, 2023, the Monroe County Planning Commission, in Resolution No. P41-23, approved a Major Conditional Use Permit ("Development Order") for the redevelopment of the Property with a hotel use consisting of thirty-eight hotel units and eight affordable employee housing dwelling units. (Pet. Ex. A.1). Section 6 of the Development Order imposed the following condition from the Planning Commission: "[t]he boat ramp is not permitted for use by guests and boat trailer parking is not permitted on-site as no area was approved for trailer parking or storage space." (Pet. Ex. A.2).

On February 7, 2023, the Applicant filed a Variance Application on behalf of Little Palm to "[e]liminate boat ramp parking requirement due to private ramp use only. No public use allowed." (Pet. Ex. A.119). Monroe County Planning and Environment Resources Department Staff reviewed the Variance Application and prepared a nine-page professional staff report ("Staff Report") that considered the variance criteria set forth in the County's code. The Staff Report found the Variance Application "in compliance" with all the enumerated code standards and recommended approval of the Variance Application. (Pet. Ex. A.48).

On September 25, 2024, the Planning Commission held a hearing on the Variance Application. At the hearing, the Planning Commission considered evidence including sworn testimony from Emily Schemper, Senior Director of the Monroe County Planning & Environmental Resources Department, and Donald Craig, who the Planning Commission recognized as an expert in the field of planning. (Pet. Ex. A.4). The Planning Commission also considered sworn testimony of members of the public speaking in opposition to the Variance Application and argument from counsel on behalf of Petitioners in opposition to the Variance. (Pet. Ex. A.4). Ultimately,

the Planning Commission voted to approve the Variance in a 4-1 vote. (Pet. Ex. A.6). The Planning Commission memorialized its approval of the Variance in Resolution No. P01-24. The Planning Commission accepted all findings of fact and conclusions of law from the Staff Report and adopted them as the Planning Commission's own findings of fact and conclusions of law in the Resolution. (Pet. Ex. A.5).

On October 25, 2024, Petitioners filed this Petition seeking to quash Planning Commission Resolution No. P01-24.

II. Standard of Review

First-tier certiorari review is limited to reviewing whether procedural due process is accorded, whether the essential requirements of the law have been observed, and 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).

III. Discussion

A. Standing

Little Palm argues that Petitioners cannot demonstrate they are aggrieved or adversely affected by the Planning Commission's approval of the Variance Application and the Petition should be dismissed for lack of standing.

Standing is a threshold issue which must be resolved before reaching the merits of a case. *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]. When acting in its appellate capacity, a circuit court is prohibited from exercising jurisdiction over a petition for writ of certiorari if the petitioner lacks standing. *F&R Builders, Inc., v. Durant*, 390 So. 2d 784, 785-786 (Fla. 3d DCA 1980).

In land use cases, abutting homeowners ordinarily have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc. v. Miami-Dade County*, 335 So. 3d 534, 540 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D224a]. "Such proximity generally establishes that the homeowners have an interest greater than 'the general interest in community good share[d] in common with all citizens.' " *Id.* quoting *Renard v. Dade County*, 261 So. 2d 832, 837 (Fla. 1972). In this case, Petitioner Julee Marzella owns the property at 133 Blackbeard Road, Little Torch Key, FL, which is 55.5 feet from the Property separated by a canal. (Pet. Ex. A.35; A. 104). Marzella is a board member of Pirates Saving Paradise, Inc., which is a Florida non-profit composed of property owners in the immediate neighborhood surrounding Little Palm Dolphin Resort in Little Torch Key. (Pet. Ex. A.102-103). At the hearing, counsel for Petitioners stated that Pirates Saving Paradise has standing to intervene in this matter because "they have a special injury above and beyond that of someone within Monroe County due to the direct proximity of this approval to their property that impacts the safety, recreation, access and compatibility." (Tr. P. 28 15-19).

Monroe County Code Section 102-186(k) provides an opportunity for adversely affected property owners or residents of real property located in the County to request a public hearing on the application for a variance within 30 calendar days of posting written notice. On November 8, 2023, Julee Marzella filed a request for the Variance Application to go to the Monroe County Planning Commission for a public hearing and a decision by the Planning Commission. (Pet. Ex. A.3). The Planning Commission found that Ms. Marzella satisfied the option to request such hearing based on "her capacity as a putatively adversely affected owner of a non-homesteaded property in the County." (Pet. Ex. A.3). Further, Respondent Monroe County, stipulated to Petitioners' standing at the hearing. ("Notice of Monroe County's Joinder in the Response in Opposition to Petition for Writ of Certiorari" P. 1).

The County Code allowed Petitioners to request the public hearing and to present their opposition to the Variance Application, and Monroe County recognized Petitioners' right to request and participate in the hearing. Petitioners' proximity to the Property along with their participation in the proceedings below give Petitioners standing to participate in the appellate review of the Planning Commission's Resolution.

B. Procedural Due Process

"Generally, due process requirements are met in a quasi-judicial proceeding if the parties are provided notice of the hearing and an opportunity to be heard." *A & S Entm't, LLC v. Fla. Dep't of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2341b]. Here, Petitioners claim that the Planning Commission violated procedural due process by 1) failing to comply with notice requirements for location of posting, size of signs, and visibility; 2) holding the public hearing during a tropical storm warning; and 3) failing to consider the Motion for Reconsideration.

Petitioners argue that the notice of the public hearing was inadequate because the notice signs were too small and not posted correctly. The Court finds that Little Palm properly noticed the Variance Hearing in Accordance with MCC Sections 102-187(c) and 110-5 which provide that notice be posted at the subject property with a waterproof sign(s) that is easily visible from all public streets and roads abutting the property. In this case, the County provided the signs, and Little Palm posted them in multiple locations on the Property and signed a notarized Notice Affidavit and provided photos demonstrating compliance. (Resp. Ex. 5-14). The Code does not contain a minimum size requirement for notice signs, and the photos attached to the Notice Affidavit demonstrate that the signs were visible from the public streets. Finally, Petitioners saw the signs and attended the hearing so they are estopped from claiming that they received improper notice because they cannot demonstrate any prejudice. See *Schumacher v. Town of Jupiter*, 643 So. 2d 8, 9 (Fla. 4th DCA 1994) (holding that property owner waived statutory notice requirements where property owner, through counsel, had substantial and continuous knowledge of pending proceedings and appeared at final hearing on proposed ordinance and expressed his objections).

Petitioners argue the public hearing should have been rescheduled because the hearing occurred while Monroe County was under a tropical storm warning. The hearing was a hybrid hearing and members of the public could appear in person or via Zoom. Counsel for the Petitioners attended and spoke at the hearing via Zoom. (Pet. Appendix: Transcript). Petitioners have not demonstrated that a violation of due process occurred because a hybrid hearing was held during a tropical storm warning when counsel appeared and participated in the hearing.

Petitioners allege they were denied due process because County staff denied them the opportunity for the Planning Commission to review their Motion for Reconsideration. On October 9, 2024, Petitioners filed a Motion for Reconsideration of Planning Commission Resolution No. P01-24 alleging the following deficiencies: 1) improper notice of the public hearing; 2) improper finding of a hardship; and 3) improper finding that the boat ramp was peculiar or unique. (Petition at P. 24-25). In response, on October 15, 2024, General Counsel to the Planning Commission sent a letter that denied the Motion for Reconsideration for failing to demonstrate legal error, the existence of new evidence, or a change in circumstances or the law that could affect the Planning Commission's decision. (Pet. Ex. A.58-60).

Monroe County Planning Commission Rule 4(f) lays out the procedure for motions for reconsideration and requires the motion to "exhaustively identify any and all alleged deficiencies and move for execution of a more complete resolution addressing the alleged deficiencies. . ." The Petitioners' Motion for Reconsideration did not move for "a more complete resolution"; it requested a different

resolution. Petitioners have maintained their appellate rights which they were attempting to exercise in the Motion for Reconsideration and now challenge the Planning Commission's decision in this Petition before the Court.

C. Hardship

The crux of the matter is whether the failure to grant the request to reduce the required boat trailer parking spots would result in exceptional hardship to the Applicant. The Planning Commission answered this question in the affirmative, but its decision failed to comply with the essential requirements of law, and it was not supported by competent substantial evidence.

A circuit court reviewing an agency action looks to whether the agency "applied the correct law," which is synonymous with "observing the essential requirements of law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Competent substantial evidence has been defined as "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Fla. Pub. Serv. Comm'n,* 380 So. 2d 1028, 1031 (Fla. 1980). The applicant has the burden of proof to introduce competent substantial evidence to prove all of the variance standards. *City of Satellite Beach v. Goersch*, 217 So. 3d 1143, 1145 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D959e].

LDC Section 102-187(d) provides the following eight (8) standards that must be met for variance approval by the Monroe County Planning Commission:

> Standards. The Planning Commission has the authority to grant a variance to the standards described in (b)(1) through (6), with or without conditions, if and only if the applicant demonstrates that all of the following standards are met:
>
> (1) The applicant shall demonstrate a showing of good and sufficient cause;
>
> (2) Failure to grant the variance would result in exceptional hardship to the applicant;
>
> (3) Granting the variance will not result in increased public expenses, create a threat to public health and safety, create a public nuisance, or cause fraud or victimization of the public;
>
> (4) Property has unique or peculiar circumstances;
>
> (5) Granting the variance will not give the applicant any special privilege denied to another property owner in the immediate vicinity;
>
> (6) Granting the variance is not based on disabilities, handicaps or health of the applicant or members of his or her family;
>
> (7) Granting the variance is not based on the domestic difficulties of the applicant or his or her family; and
>
> (8) The variance is the minimum necessary to provide relief to the applicant.

LDC Section 101-1 defines "exceptional hardship" as "a burden on a property owner that substantially differs in kind or magnitude from the burden imposed on other similarly situated property owners. Financial difficulty/hardship does not qualify as exceptional hardship."

In this case, the "exceptional hardship" has been described in different ways, but almost all the descriptions pertain to the owner's alleged failure to be able to use the Property efficiently.

In the Variance Application, when explaining how the failure to grant the variance would result in exceptional hardship the Applicant stated the following:

> Having to provide the required (6) 14′ x 55′ parking spaces for trailers on site would result in hardship by the need to redesign the site, eliminating units and thereby lessening the values of the property. The addition of these unusable spaces will also affect a part of the "Back of House" building which also contains employee housing. Trailer parking is not a need for this property and therefore will not be utilized. This prevents the owner from providing an efficient site plan with the best use of space.

(Pet. Ex. A.119)

At the hearing on the Variance Application, counsel for Little Palm told the Commission that "[t"he hardship is that the Code is requiring us to provide parking for a use that is no longer going to be on the property per other redevelopment." (Tr. P. 56 11-14). Counsel went on to state, ". . .the hardship being that if required to provide these boat parking spaces, it will prevent the owner from efficiently using their project, using their space in accordance with the entitlements that the County has provided to them." (Tr. P. 56 16-21).

The Planning Department Staff Report found the variance application to be "in compliance" with standard (2), "failure to grant the variance would result in exceptional hardship to the applicant." The Staff Report states: "Likewise, as noted, boat trailers are not permitted on site; therefore, if still required, the six (6) boat trailer parking spaces would unreasonably take up a large area of the property and not allow for reasonably better utilization of the site." (Pet. Ex. A.45).

The Staff Report goes on to state a different reason for granting the variance that is not included in the standards enumerated in LDC Section 102-187(d). It states, "In addition, the alternative of having the Applicant-property owner instead voluntarily fill in the existing boat ramp to eliminate the Code's boat trailer parking requirements may result in unnecessary adverse impacts to nearshore waters and benthic habitat during such an alternative process to negate the subject boat ramp boat trailer parking requirement." (Pet. Ex. A.45). This is a conclusory statement that is not supported by evidence in the record, and such concerns are not included in the standards enumerated in LDC Section 102-187(d) to be considered in reviewing a variance request.

After receiving testimony and evidence related to the alleged hardship, the Planning Commission concluded that the Applicant demonstrated that all the required standards set forth in the LDC, including exceptional hardship, had been met. The Planning Commission entered Resolution P01-24 which states that the Planning Commission concurs with the documentary and testimonial contentions and legal argument of the applicant and its professional planning consultant and the Staff Report which is incorporated into the Resolution, and its analysis and determinations are accepted and adopted as the Planning Commission's own. (Pet. Ex. A.5).

In granting the Variance, the Planning Commission failed to consider the law on hardships which constitutes a departure from the essential requirements of the law, and its finding that the failure to grant the variance would result in exceptional hardship is not supported by competent substantial evidence.

"The necessity of proving unnecessary hardship in order to obtain a variance is well settled in Florida." *Thompson v. Planning Com'n of City of Jacksonville*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985). The requisite hardship may not be found unless there is a showing that under present zoning, no reasonable use can be made of the property. *Elwyn v. City of Miami*, 113 So. 2d 849, 852 (Fla. 3d DCA 1959). In seeking a variance on the grounds of hardship, a property owner cannot assert the benefit of a self-created hardship. *Clarke v. Morgan*, 327 So. 2d 769, 770 (Fla. 1975). Hardship must arise from circumstances peculiar to the realty alone, unrelated to the conduct or to the self-originated expectations of any of its owners or buyers. *Maturo v. City of Coral Gables*, 619 So. 2d 455, 456-57 (Fla. 3d DCA 1993). Economic disadvantage alone does not constitute a hardship sufficient to warrant the granting of a variance. *Burger King Corp. v. Metropolitan Dade County*, 349 So. 2d 210, 212 (Fla. 3d DCA 1977).

Here, the evidence and testimony presented at the hearing establish

that the claimed hardship is that if the owner is required to comply with the LDC parking requirements, the owner will not be able to efficiently use the property, which is not a hardship recognized in Florida law. Thus, the finding of hardship and the subsequent granting of the variance is not supported by substantial competent evidence.

The Staff Report states that, "pursuant to Section 6 of the Development Order, the Development Order prohibits use of the boat ramp by guests and prohibits boat trailer parking on the property." (Pet. Ex.45). This statement would lead one to believe that the Planning Commission decided to eliminate the boat trailer parking, and that the Development Order actually prohibited trailer parking on the Property. However, in the record, Section 6 of the Development Order is quoted to say, "The boat ramp is not permitted for use by guests and boat trailer parking is not permitted on site *as no area was approved for trailer parking or storage space*." (Emphasis added). No area was approved for trailer parking because the site plan, submitted by the owner, did not include trailer parking or storage space because the owner does not think there is a need for it because the boat ramp is only used by Little Palm Resort vessels and the trailers used to remove the vessels are stored off site. (Pet. Ex. A.119). As the Applicant stated, "trailer parking is not a need for this property" and if the variance is not granted, it "would result in hardship by the need to redesign the site, eliminating units and thereby lessening the values of the property." (Pet. Ex. A.119). The Applicant goes on to state, the "addition of these unusable spaces will also affect a part of the "Back of House" building which also contains employee housing." (Pet. Ex. A.119). These statements make clear that units, including employee housing units, were included in the site plan in the boat trailer parking area. Thus, the Development Order was not prohibiting boat trailer parking on the Property, but rather, it was referencing an issue created by the site plan submitted by the Applicant and its failure to account for the LDC boat trailer parking requirement.

This is a self-created hardship because the owner was on notice as to the property size, the existence of the boat ramp, and the LDC parking requirement. The owner nonetheless developed a site plan that did not account for the required boat trailer parking spaces and then requested a variance after the fact. The facts are distinguishable from cases that hold that variances are necessary where no reasonable use can be made of the property. In this case, there are options: the owner can keep the code-required boat trailer parking spots and change the site plan, or the owner can fill in the boat ramp, so the boat trailer parking code provision no longer applies. The failure to consider the applicable legal principles related to establishing a hardship when assessing the variance request is a departure from the essential requirements of law.

Since the Court has found that there is insufficient evidence to support the exceptional hardship standard and that the applicable law related to a finding of hardship was not properly applied here, the Court need not address the remaining standards in LDC 102-187(d) that must be met for variance approval by the Monroe County Planning Commission.

IV. Conclusion

The Court finds that while due process was accorded, there is not substantial competent evidence in the record to establish the exceptional hardship standard, and the Planning Commission departed from the essential requirements of the law in granting the variance. Therefore, the Petition for Writ of Certiorari is **GRANTED**, and Resolution No. P01-24 granting the variance is **QUASHED**.

* * *

Municipal corporations—Zoning—Variances—Board of adjustment's decision to approve five variances for already-constructed chickee hut structure on residential property was not supported by competent substantial evidence and departed from essential requirements of law where board failed to address whether applicant met criteria of unique hardship attributable to land—Final order approving variances is quashed

DEREK FERNANDEZ FONT, Petitioner, v. CITY OF FORT LAUDERDALE, PAULA JEAN EHMKE and RICHARD EHMKE, Respondents. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-001804. January 18, 2024. Admin. Hearing: PLN-BOA 2208005, October 12, and December 14, 2022. Counsel: Andrew B. Greenlee, Sanford, for Petitioner. Hudson C. Gill, Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., Fort Lauderdale, for Respondent, City of Fort Lauderdale. Stephanie Toothaker, Fort Lauderdale, for Respondents, Paula Jean Ehmke and Richard Ehmke.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition and its Appendix, Responses and the applicable law, the Petition for Writ of Certiorari is hereby **GRANTED** and the Final Order dated January 11, 2023 is hereby **QUASHED** for the reasons discussed below.

On December 14, 2022, the City of Fort Lauderdale's ("City" or "Respondent") Board of Adjustment ("The Board") held a public hearing to address an "After-the-fact Variance Requests" for a "chickee hut" structure situated on a property owned by Paula Jean Ehmke and Richard Ehmke's ("Applicants" or "Respondents"). At the conclusion of the hearing, the Board approved all five requested variances.

Following the entry of the final order by the Board for the approval of the variances, Derek Fernandez Font ("Petitioner"), neighbor to the Ehmkes, filed the instant Petition.

A Petition for Writ of Certiorari seeking review of the decision of an administrative agency is strictly limited to consideration of whether: (1) the parties were afforded procedural due process; (2) the essential requirements of law were observed; and (3) the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citing City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

Upon careful review of the record, this Court finds that the decision by the Board in approving the Ehmkes five variance requests, is not supported by competent substantial evidence, and departed from the essential requirements of the law.

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *See De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). Petitioner alleges that the Applicants failed to satisfy all of the criteria as required under the Unified Land Development Regulation of the City's ordinances ("ULDR") Section 47-24.12.A.4. Furthermore, Petitioner alleges that the Board in arriving at their decision failed to address the required issues that are mandated within section 47-24.12. A. 4. Pursuant to section 47-24.12.A.4, prior to the review of *any* variance request, an Applicant must *first* demonstrate and prove the existence of a unique hardship attributable to the land.

The record shows that the Applicants built a "chickee hut" on their property and included accessories which transformed the structure into an outdoor kitchen. The structure, as well as all of the add-ons were done without permits. As a result, the application submitted for review applied to "After-the-fact Variance Requests".

Section 47-24.12. of the Fort Lauderdale Municipal Code of Ordinances, sets forth the protocol that must be adhered to with regards to *Variances, special exceptions and interpretation of Unified Land Development Regulations,* amongst its requirements, is the *Criteria-Variance* under subsection A.4. In this subsection, the Applicant must demonstrate a unique hardship attributable to the land, which must be proven by a preponderance of the evidence, addressing each of the five components. As an antecedent requirement, once this

section is satisfied, the Board can then consider the particular variance requests by Applicant.

The record shows that the testimony posed by the Board regarding the structure was primarily focused on its location, applicable setbacks and the determination of the front and rear yard of the property. The Board also addressed issues related to noise and possible safety concerns, although these matters are derivative of the structure and its after-the-fact accessories, they are not germane to the criteria under section 47-24.12.A.4.

The record shows there was a component of section 47-24.12.A.4, addressed, specifically the "self-created" issues, but fails to further include any information that demonstrates other substantive evidence addressing the additional conditions of the criteria section. The evidence demonstrates that the Board repeatedly failed to address the first mandated hurdle under the ULDR section 47-24.12. A.4 in detemining whether the Applicant meets the unique hardship criteria.

The record demonstrates that the Board's decision in granting the five variances, did not include an analysis or discussion of section 47-24.12.A.4 of the Fort Lauderdale Municipal Code of Ordinances, which addresses the initial criteria requiring the determination as to whether the applicant would qualify for the consideration. The Board by failing to adhere to the mandated code provisions, constituted a failure and departure in faithfully adhering to the essential requirements of the law, as well as failure to support a decision by competent and substantial evidence.

As such, having carefully considered the Petition and its Appendix, Response and the applicable law, the Petition for Writ of Certiorari is hereby **GRANTED** and the Final Order dated January 11, 2023 is hereby **QUASHED**. (J. BOWMAN, M. TOWBIN-SINGER and M. USAN, JJ., concur.)

* * *

SAND CASTLE APARTMENTS, Plaintiff, v. CITY OF MARGATE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24011961. Division AP. February 5, 2025.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the parties' Joint Stipulation for Dismissal dated December 16, 2024. The parties have agreed to dismiss this appeal due to the Lower Tribunal's recession of its Order.

Accordingly, it is hereby **ORDERED** that this Appellate proceeding is **DISMISSED** and the Clerk of Court is **DIRECTED** to close this case.

* * *

SAND CASTLE APARTMENTS, Plaintiff, v. CITY OF MARGATE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24011962. Division AP. February 5, 2025.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the parties' Joint Stipulation for Dismissal dated December 16, 2024. The parties have agreed to dismiss this appeal due to the Lower Tribunal's recession of its Order.

Accordingly, it is hereby **ORDERED** that this Appellate proceeding is **DISMISSED** and the Clerk of Court is **DIRECTED** to close this case.

* * *

SAND CASTLE APARTMENTS, Plaintiff, v. CITY OF MARGATE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24011963. Division AP. February 5, 2025.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the parties' Joint Stipulation for Dismissal dated December 16, 2024. The parties have agreed to dismiss this appeal due to the Lower Tribunal's recession of its Order.

Accordingly, it is hereby **ORDERED** that this Appellate proceeding is **DISMISSED** and the Clerk of Court is **DIRECTED** to close this case.

* * *

SAND CASTLE APARTMENTS, Plaintiff, v. CITY OF MARGATE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24011964. Division AP. February 5, 2025.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon the parties' Joint Stipulation for Dismissal dated December 16, 2024. The parties have agreed to dismiss this appeal due to the Lower Tribunal's recession of its Order.

Accordingly, it is hereby **ORDERED** that this Appellate proceeding is **DISMISSED** and the Clerk of Court is **DIRECTED** to close this case.

* * *

JUST LIKE HOME, LLC, Appellant, v. CITY OF WILTON MANORS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24-010931 (AP). L.T. Case No. 24-000731. January 16, 2025. Appeal from City of Wilton Manors, Special Magistrate. Counsel: Maria Sanchez, Manager for Just like Home LLC, Hallandale Beach, for Appellant. City of Wilton Manors, Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial brief, the record, and the applicable law, the Special Magistrate Final Order-Finding of Fact rendered on January 10, 2024 is hereby **AFFIRMED**. Appellant provided insufficient documentary support for the Court to properly render any other ruling. (BOWMAN, ALPERSTEIN, and MOON, JJ., concur.)

* * *

Licensing—Driver's license—Revocation—Early reinstatement—Denial— Continued driving while license was revoked based on designation as habitual traffic offender—Hearing officer did not err in denying request for early reinstatement of driver's license where licensee had record of continued traffic violations and admitted that he drove during revocation period—Although hearing officer mistakenly found that licensee was driving for 3-4 weeks during license revocation when licensee actually testified that he had been driving 3-4 times a week during revocation, this is a distinction without a meaningful difference

ANGUS BLACK, 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. 24-03-AP. January 27, 2025. Counsel: Kathy A. Jimenez-Morales, Chief Counsel, Driver Licenses, DHSMV, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

(MICHAEL J. RUDISILL, J.) Petitioner Angus Black seeks certiorari review of the Department of Highway Safety and Motor Vehicles' (Department) June 27, 2024 final order denying Petitioner's application for early reinstatement of his driving privileges. This Court has jurisdiction pursuant to section 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

BACKGROUND

On December 21, 2021, a Habitual Traffic Offender ("HTO") Revocation was placed on Petitioner's driving record for five years. An individual who is an HTO is someone whose record shows that

such person has accumulated the specified number of convictions for offenses described in section 322.264, Florida Statutes, including driving a motor vehicle while his or her license is suspended or revoked. Petitioner has a history of prior suspensions and revocations on his driving record before and after his 2021 revocation, including those due to a violation of child support and failure to pay financial obligation in 2017, a violation of child support and two failures to pay financial obligations in 2018, failures to pay financial obligations in 2019 and 2020, a violation of child support in 2021, a failure to attend school elected by a county court in 2022, two failures to pay obligations in 2022, and two failures to pay financial obligations and a violation of child support in 2023. Also, Petitioner has a history of prior traffic convictions, including a driving while license suspended or cancelled in 2019, 2020, and 2021, and improper backing and crash on October 26, 2021. Then, on March 21, 2024, Petitioner was stopped by law enforcement and issued a citation for driving while his license was revoked.

Petitioner requested a hearing for early reinstatement of his license. A hearing was held on June 21, 2024, and his qualification, fitness, and need to drive were investigated. When asked on the record if he was driving on a regular basis without a valid license, Petitioner stated that he had been driving three or four times a week to and from work. Also, Petitioner stated on the record "that the habits that I have of driving even though my license is suspended are unacceptable and can endanger others' lives, jeopardizing my freedom." The Department issued its Final Order Denying Early Reinstatement on June 27, 2024.

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) [47 Fla. L. Weekly D1742b]. "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

Upon expiration of twelve months from the date of Petitioner's revocation, the Petitioner may petition the Department for a hearing and early reinstatement of his driving privilege. § 322.271(2)(c), Fla. Stat. (2024). The hearing officer may reinstate Petitioner's driving privilege on a restricted basis solely for purposes of business or employment. § 322.271(1)(b), Fla. Stat. (2024). At the hearing, the Petitioner may show that such revocation of his license causes a serious hardship and precludes him from carrying out his normal business, occupation, trade, or employment and that the use of his license in the normal course of his business is necessary to the proper support of him or his family. § 322.271(2), Fla. Stat. (2024). Petitioner was granted a hearing but denied early reinstatement. So, he seeks certiorari review in this Court.

Petitioner requests that this Court grant the petition for a writ of certiorari because (1) he is on a payment agreement for past-due child support and making current payments, (2) he has paid Linebarger Collections in full, paid Orange County Court requirements and was able to setup a payment plan agreement for Orange County and Seminole County, (3) he has an affidavit to reinstate his driving privileges under section 322.245, Florida Statutes, (4) he has enrolled and completed a 12-hour advanced driver improvement course, and (5) he disputes the Department's finding that Petitioner stated he was driving for three to four weeks while his license was revoked.

However, this Court finds that procedural due process was accorded, the essential requirements of the law have been observed, and the hearing officer's administrative order was supported by competent substantial evidence. It is clear from the hearing transcript that Petitioner was given an opportunity to be heard, and the hearing officer considered the hardships that Petitioner might be experiencing as a result of not having a license. *See* § 322.271, Fla. Stat. (2024). Also, the hearing officer considered Petitioner's need for a license to support his family and carry out his normal employment. *Id.* After their investigation, the hearing officer took all of the evidence into consideration and denied early reinstatement of Petitioner's license due to his continued traffic violations.

Petitioner contends that his license should be reinstated because he has an affidavit to reinstate his driver's license under section 322.245, Florida Statutes. However, the statute is inapplicable. Petitioner's license was revoked due to him being a HTO, under section 322.27, Florida Statutes, and not suspended for the reasons stated under section 322.245. Under section 322.27(5)(a), "The department shall revoke the license of any person designated a habitual offender, as set forth in s. 322.264, and such person is not eligible to be relicensed for a minimum of 5 years from the date of revocation, except as provided for in s. 322.271."

Petitioner contends that his license should be reinstated because he is on a payment agreement for past due child support, he has paid his debts and setup a payment plan for those still owed, and he has completed a 12-hour advanced driver improvement course. However, this Court's standard of review is whether the hearing officer accorded procedural due process, observed the essential requirement of the law, and supported their order with competent substantial evidence. *Luttrell*, 983 So. 2d at 1217. The hearing officer's duty was to review the Petitioner's qualification, fitness, and need to drive and make a decision based upon the findings. *See* § 322.271, Fla. Stat. (2024). This Court finds that the hearing officer has met her duty, observed the essential requirements of the law and supported her order with competent substantial evidence. The hearing officer based her decision on a wealth of evidence, particularly that which showed that Petitioner continued to drive even though his license was revoked. Someone who continually violates the traffic laws in such a way cannot be trusted to be qualified and fit to drive. *See Ware v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 791a (Fla. 12th Cir. Ct. Apr. 12, 2004) ("Hearing Officer relied on his discretion to deny relief based on his belief that Petitioner could not be trusted to operate a motor vehicle based on his driving history.").

Petitioner contends that the hearing officer made a mistake in finding that Petitioner was driving for three to four weeks while his license was revoked. This Court notes that the hearing transcript shows that Petitioner stated he was driving three to four times a week and not three to four weeks. However, the competent, substantial evidence standard requires this Court to defer to the hearing officer's findings of fact. *Hirtzel*, 163 So. 3d at 529. Further, whether Petitioner was driving three to four times a week or three to four weeks is a distinction without a meaningful difference. Petitioner clearly continued to drive while his license was revoked, which, along with Petitioner's driving record, was the basis for the hearing officer's Final Order Denying Early Reinstatement.

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

* * *

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CIRCUIT COURTS—ORIGINAL

Attorney's fees—Voluntary dismissal—Motion for attorney's fees following entry of voluntary dismissal is denied on ground that contract requires final award through trial or arbitration in order for there to be prevailing party—Enforcement of contract does not offend public policy since neither side has prevailed in on "significant issues" in action

MCS OF TAMPA, INC., Plaintiff, v. SAUER CONSTRUCTION, LLC, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2024-CA-002168-AXXX-MA. Division CV-A. February 18, 2025. Waddell A. Wallace, III, Judge. Counsel: Andrew Mayts, Jr. and Sarah Glaser, for Plaintiff. Christopher M. Cobb and Nicholas J. Elder, for Defendant.

ORDER DENYING MOTION FOR ATTORNEYS' FEES

This case is before the Court for consideration of the Motion for Attorneys' Fees and Costs, filed September 11, 2024, on behalf of Defendant, Sauer Construction, LLC. The motion follows the filing of a notice of dismissal of this action without prejudice, by Plaintiff, MCS of Tampa, Inc.

Ordinarily, when a voluntary dismissal of a civil action is filed by a plaintiff, the defendant is deemed the prevailing party under statutes authorizing the award of attorney's fees or costs. *See Ajax Paving Industries, Inc. v. The Hardaway Co.,* 824 So.2d 1026, 1029 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1949c]. In this action, Defendant's right to recover attorney's fees is based on a provision in the operative contract between the parties. This contractual provision contains a detailed definition of "prevailing party." This provision contemplates, and for its application requires, the entry of a final award following trial or arbitration. To this extent, Defendant's motion is analogous to the motion for attorney's fees in *Sal's Abatement Corp. v. Sid Harvey Ind., Inc.,* 718 So.2d 885 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2067d], in which the plaintiff filed a voluntary dismissal. The district court affirmed the denial of attorney's fees because the authorizing statute at issue required the rendition of a judgment in order for there to be a prevailing party. *Id*. Citing to this decision, Plaintiff argues that because the contractual provision in this action requires there to be a final award, whether through trial or arbitration, the dismissal without prejudice does not provide a basis for an award of fees. See also *O.A.G. Corp. v. Britamco Underwriters, Inc.,* 707 So.2d 785, 786 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D208e].

In *Moritz v. Hoyt Enterprises, Inc.,* 604 So.2d 807, 810 (Fla. 1992), the Supreme Court held that "the fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the Court." In *Port-A-Weld, Inc. v. Padula & Wadsworth Construction, Inc.,* 984 So.2d 564 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1358a], the trial court denied the plaintiff attorneys fees as a prevailing party based upon the language of the contract requiring that a party shall not be considered as a "prevailing party" if his recovery shall be less than 75% of its claim amount. On appeal, the district court found that the plaintiff had prevailed on the significant issues and to apply the contractual provision to deny plaintiff attorneys fees would be contrary to public policy. According to the district court, the Supreme Court's "significant issues" test for prevailing party attorney's fees could not be contractually modified. *Id*. at 570. *See also P & C Thompson Bros. Construction Co. v. Rowe,* 433 So.2d 1388, 1389 (Fla. 5th DCA 1983).

In this action, unlike *P&C Thomson Bros.* or *Port-A-Weld,* there has been no trial or adjudication on the merits of the parties' claims. According to the language of the contract, Defendant is not a prevailing party. There has been no occasion for a trial court or arbitration panel to determine which side has prevailed on the "significant issues" in the action. No one has yet prevailed in fact. Accordingly, enforcement of the parties' contract does not offend public policy in the same manner as in the decisions under review in *P &C Thomson Bros.* or *Port-A-Weld.*

Accordingly, for the reasons stated, it is

ORDERED:

The Motion for Attorneys' Fees and Costs, filed on behalf of Defendant, Sauer Construction, LLC, is DENIED.

* * *

Mortgages—Foreclosure—Summary judgment—Defaulted parties—Court may not grant final summary judgment of foreclosure seeking judgment for unliquidated damages against defaulted party—Extensive discussion—Motion for reconsideration is denied

GREENSPRING CAPITAL MANAGEMENT AS ADMINISTRATOR OF RMH 2023-1 TRUST, Plaintiff, v. ROGER G. TATEISHI, et al., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-025794-CA-01. Section CA23. February 16, 2025. Joseph Perkins, Judge.

CORRECTED ORDER DENYING MOTION FOR RECONSIDERATION OF PLAINTIFF'S MOTION FOR SUMMARY FINAL JUDGMENT OF FORECLOSURE AND FOR AWARD OF ATTORNEYS' FEES AND COSTS

May a trial court enter final judgment of foreclosure against a defaulted party after a properly noticed summary judgment hearing (not a trial) where the judgment figures include unliquidated amounts established by competent and uncontradicted summary judgment evidence?

Fidelity to the supremacy-of-text principle and even a cursory review of Rules 1.440(d), 1.500(e), and 1.510 of the Florida Rules of Civil Procedure indicate that the answer should be a resounding yes. This Court, however, is constrained to follow out-of-district precedent holding otherwise.

KEY PROCEDURAL HISTORY

After a hearing (#102), the Court entered an Order (#103) denying Plaintiff's Motion for Summary Final Judgment of Foreclosure because it sought judgment for unliquidated damages against defaulted parties. Plaintiff then filed a motion for reconsideration (#104) asserting three non-controversial propositions with which the Court completely agrees: (1) A trial court may not enter default judgment for unliquidated damages, (2) default judgment and summary judgment are not the same thing, and (3) a trial court can enter summary final judgment for unliquidated damages.

THE PROBLEM CASES

It ***should*** follow from the above propositions that the Court can enter summary judgment for unliquidated damages against a defaulted party after a properly noticed summary judgment hearing when competent summary judgment evidence establishes the lack of genuine issue of fact, even when the Court would abuse its discretion entering default judgment for such amounts. The Court is constrained, however, to following binding decisions from the Second, Fourth, and Fifth District Courts of Appeal.[1]

A. *Lauxmont Farms, Inc. v. Flavin*, 514 So. 2d 1133 (Fla. 5th DCA 1987)

In *Lauxmont Farms, Inc. v. Flavin*, 514 So. 2d 1133 (Fla. 5th DCA 1987), the trial court granted summary judgment against a defaulted party for unliquidated damages. The Fifth District Court of Appeal reversed, holding that "[a]lthough a default judgment can be entered to establish liability[2] a trial is necessary to establish unliquidated damages." *Id*. at 1134. The court reasoned that "a party has a due

process entitlement to notice and an opportunity to be heard on unliquidated damages pursuant to [Rule] 1.440." *Id*.

Later district court opinions agree that *Lauxmont Farms* held that a trial court may not enter summary judgment for unliquidated damages against a defaulted party but, rather, may award such damages only after trial. *See Mourning v. Ballast Nedam Const., Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2292d] ("Although a default judgment can be entered to establish liability, a trial is necessary to establish unliquidated damages. The *Lauxmont Farms* court held that the award of unliquidated compensatory damages by summary judgment is error."); *Specialty Solutions, Inc. v. Baxter Gypsum & Concrete, LLC*, 325 So. 3d 192 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1439b] (*en banc*) ("In our relatively-unelaborated opinion in *Lauxmont Farms*, we reversed on direct appeal a final summary judgment awarding unliquidated damages against a defaulted defendant, writing that '[a]lthough a default judgment can be entered to establish liability a trial is necessary to establish unliquidated damages.' ").

B. ***Szucs v. Qualico Dev., Inc.*, 893 So. 2d 708 (Fla. 2d DCA 2005)**

In *Szucs v. Qualico Dev., Inc.*, 893 So. 2d 708 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D522a], plaintiff obtained a default against defendant and then filed a motion for summary judgment. The defendant filed a motion to set aside the default and affidavits both supporting that motion and opposing the motion for summary judgment. The trial court denied the motion to set aside default and granted plaintiff's motion for summary judgment. On appeal, the Second District reversed the granting of summary judgment as to the issue of damages, holding without elaboration that damages were unliquidated and, therefore, the defendant was entitled to a trial. *Id*.

C. ***Yanofsky v. Isaacs*, 277 So. 3d 1132 (Fla. 4th DCA 2019)**

In *Yanofsky v. Isaacs*, 277 So. 3d 1132 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1972a], the plaintiff filed a motion for summary judgment against a defaulted defendant. The trial court gave the defaulted defendant an opportunity to respond, but rather than doing so, the defaulted defendant moved to strike the plaintiff's affidavit in support of summary judgment, arguing that plaintiff's damages were unliquidated. On appeal of the trial court's granting summary judgment, the district court reversed, holding without elaboration that "because the damages were not liquidated, it was improper to enter judgment based on the amount set forth in [plaintiff's] damages affidavit." *Id*. at 134.

DISCUSSION

I. CRITICISM OF *LAUXMONT FARMS*

Various decisions have chipped away at *Lauxmont Farms*.

A. **Criticism from Judge Dauksch, the author of the panel opinion**

In *Sloan v. Freedom Sav. & Loan Assn.*, 525 So. 2d 1000 (Fla. 5th DCA 1988), Judge Dauksch, the author of *Lauxmont Farms*, clarified:

> We are advised that this *Lauxmont* opinion has been taken to mean that attorneys fees and costs cannot be determined and awarded by summary judgment. This interpretation is reasonable because we said ". . . the award of unliquidated compensatory damages by *summary judgment*" is error. We should have said (and this author protests he meant to say!) "the award of unliquidated damages by *default*" is error.
>
> So, any claim for damages, liquidated or unliquidated, or for attorneys fees and costs can be decided by summary judgment. Unliquidated damages cannot be awarded after default without notice to the defendant of the hearing or trial where the damages are to be assessed and awarded.

Id. at 1011 (footnote omitted; emphasis in original).

This clarification has only limited value. First, *Sloan* did not involve a defaulted party, so its holding (as opposed to its dicta) stands for the unremarkable proposition that "any claim for damages, liquidated or unliquidated, or for attorneys fees and costs can be decided by summary judgment." *R. Plants, Inc. v. Dome Enterprises, Inc.*, 221 So. 3d 752, 754 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1319a] (quoting *Sloan*, 525 So. 2d at 1001).

Second, the proposition that a court may not award unliquidated damages by default is also unremarkable. *See Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a].

Third, the question here is whether the Court may enter summary final judgment for unliquidated amounts after a properly noticed summary judgment hearing against a defaulted party. It is not clear from *Sloan* or *Lauxmont Farms* whether *Sloan*'s clarification is that the plaintiff in *Lauxmont* obtained default judgment pursuant to Rule 1.500(e) rather than summary judgment or, rather, that *Lauxmont Farm*'s prohibition on summary judgment for unliquidated damages is limited to situations involving defaulted defendants. The *Sloan* dicta's use of the word "by default" instead of "after default" suggests the former, but the failure to correct the other instances of *Lauxmont*'s reference to summary judgment suggests otherwise. This Court's role is not to guess what the author of a district court panel opinion really meant to say but did not actually say.

Fourth, even if *Sloan*'s clarification of *Lauxmont Farms* were clear, when faced with the choice of whether to follow the holding of an earlier panel opinion or (arguably) inconsistent dicta from a later panel opinion, this Court is obligated to follow the former.

B. ***Specialty Solutions, Inc. v. Baxter Gypsum & Concrete, LLC*, 325 So. 3d 192 (Fla. 5th DCA 2021) (en banc)**

In *Specialty Solutions, Inc. v. Baxter Gypsum & Concrete, LLC*, 325 So. 3d 192 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1439b], in an *en banc* opinion by then Judge (now Justice) Grosshans, the court held that a final summary judgment for unliquidated damages entered against a defaulted party after a properly noticed summary judgment hearing was not ***void*** under Rule 1.540(b)(4). The court expressly limited its ruling to addressing whether a judgment against a defaulted party pursuant to summary judgment procedures rather than a trial is void and disclaimed ruling on whether entry of such a judgment constitutes reversable error. *Id*. at 197; *see also id. at* 200 (concurring opinion of Judge Eisnaugle in which then Judge (now Justice) Sasso joined recognizing the limited reach of the holding).

The court addressed a prior panel opinion in *Ciprian-Escapa v. City of Orlando*, 172 So. 3d 485 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1670a] and acknowledged that it

> may arguably be interpreted to mean that, absent a trial following proper notice given under rule 1.440(c), any final judgment entered thereafter awarding unliquidated damages against a defaulted defendant constitutes fundamental error that may be set aside as void pursuant to a rule 1.540(b)(4) motion.

Id. at 98. It then analyzed the text of Rule 1.440(c) and explained why such a requirement is unfounded:

> Rule 1.440 is succinctly titled "Setting Action for Trial." Pertinent to the present appeal, subsection (c) of this rule . . . states:
>
> > **Setting for Trial.** If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial. In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with Florida Rule of Judicial Administration 2.516.
>
> Fla. R. Civ. P. 1.440(c).
>
> Other than [a] recent [non-material] amendment . . ., the last

sentence of rule 1.440(c), providing that in cases involving unliquidated damages the defaulted defendant is to be served with the order setting the case for trial, became effective on January 1, 1977. Prior to this 1977 amendment, such notice was not required.

. . .

The question nonetheless remains whether this last sentence of rule 1.440(c) is properly construed to require a trial on all claims for unliquidated damages against a defaulted defendant, thus causing any final judgment for unliquidated damages entered without such a trial, as the final summary judgment entered here under Florida Rule of Civil Procedure 1.510, to be void.

It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction. When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation.

Applying this principle, the plain language of rule 1.440 simply states that when the damages being sought are unliquidated and a trial is scheduled to determine the unliquidated damages, a defaulted defendant must be served with the order setting the trial date. Nothing within this rule mentions or addresses, one way or another, the resolution of a claim for unliquidated damages by summary judgment against a defaulted defendant.

Stated somewhat differently, we fail to discern how a defendant who, after being properly served with process, chooses not to respond to the complaint and is thereafter defaulted, can, years later, have a final summary judgment that was entered after a properly-noticed hearing under rule 1.510, readily set aside as void under rule 1.540(b)(4) because no trial was held pursuant to rule 1.440(c), yet a non-defaulted co-defendant, who either filed an answer admitting to the allegations of a complaint or an unelaborated answer generally denying the allegations of a complaint, arguably may not have the same final summary judgment that awarded the same unliquidated damages at the properly-noticed summary judgment hearing set aside by the court as void.

Under these scenarios, both defendants in the same case were provided with their due process rights of notice and an opportunity to be heard. Yet, if both elected not to attend a properly-noticed summary judgment hearing or otherwise to contest the legal arguments made in the motion or the summary judgment evidence provided in support of the motion, under our decision in *Ciprian-Escapa*, the defaulted defendant apparently retains the ability, at any time, to have the final judgment set aside as void under rule 1.540(b)(4), while the non-defaulted defendant would not. We do not believe that rule 1.440(c) requires such a result.

Specialty Sols., Inc., 325 So. 3d at 198-200 (footnotes and some internal citations and quotations omitted).

II. **OTHER FLORIDA CASES**

As of February 13, 2025, Westlaw reports 48 opinions—eleven from the Third District Court of Appeal—containing the words "summary judgment," "unliquidated," and some form of the word "default." The Court has reviewed all of them, and none expressly holds that a trial court may enter judgment for unliquidated damages against a defaulted party following a properly noticed summary judgment hearing.

Some hold (or seem to hold) that unliquidated damages may be liquidated against a defaulted party only after a properly noticed trial. *See Sec. Bank, N.A. v. BellSouth Advert. & Pub. Corp.*, 679 So. 2d 795, 798 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1673a] (holding that the trial court committed fundamental error by setting unliquidated damages without proof of damages at a hearing after notice to the defaulted party; either holding or stating in dicta that "[t]he required procedure was the same as in any suit for an unliquidated sum where there has been a default. Notice of trial on damages had to be given to the Bank as required by Rules 1.080(h)(1), 1.440(c), and 1.500(e)."), *approved,* 698 So. 2d 254 (Fla. 1997) [22 Fla. L. Weekly S503a]; *Hill v. Murphy*, 872 So. 2d 919, 922 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2145a] (holding, without elaboration, that because plaintiff's "damages were unliquidated, [the defendant] was entitled to an evidentiary hearing on the amount of damages even though he had been defaulted. Further, under rule 1.440(c), he was entitled to notice of that hearing.").

Some suggest, without holding, that a court may enter judgment for unliquidated damages against a defaulted party after a properly noticed summary judgment hearing. *See Minkoff v. Caterpillar Fin. Services Corp.*, 103 So. 3d 1049, 1052 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D112a] (holding that the trial court erred in entering a final judgment including unliquidated damages without providing for an evidentiary hearing; also noting in a footnote that plaintiff "did not move for summary judgment on the issue, giving appropriate notice to the defendants and alerting them to the requirement to offer opposing affidavits should they contest the amount of attorney's fees."); *McMullen v. HSBC Bank USA, Nat. Ass'n,* 149 So. 3d 156, 157 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2159a] (reversing order denying motion to vacate an ***improperly noticed*** summary judgment of foreclosure for unliquidated damages against defaulted party and remanding for a "hearing" on unliquidated damages); *Kaplan v. Morse*, 870 So. 2d 934 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1007b] (reversing summary judgment for unliquidated damages against defaulted party, despite neither party raising the issue of the effect of the default; suggesting that reversal was due to plaintiff's failure to present competent summary judgment evidence establishing a lack of genuine issue of fact regarding the amount of unliquidated damages).

Others focus on whether judgment for unliquidated damages was entered after providing the defaulted defendant notice and an opportunity to be heard. *See, e.g., Crimson 27, LLC v. Taylor Made Lending, LLC*, 341 So. 3d 419 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1223a] (reversing summary judgment of foreclosure to the extent it liquidated previously unliquidated damages and remanding for an evidentiary hearing on whether notice regarding the unliquidated damages was proper); *Rodriguez-Faro v. M. Escarda Contractor, Inc.*, 69 So. 3d 1097, 1098 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2142b] (reversing order denying motion to vacate summary judgment for unliquidated damages against defaulted party; facts are silent as to whether defaulted party had notice of summary judgment hearing but indicate that trial court did not give defaulted party an opportunity to be heard).

III. **THE COURT SHOULD BE ABLE TO ENTER JUDGMENT FOR UNLIQUIDATED DAMAGES AFTER A PROPERLY NOTICED SUMMARY JUDGMENT HEARING.**

A. **Text of Rule 1.440**

(Now) Justice Grosshans said it best in *Specialty Solutions*:

> The plain language of rule 1.440 simply states that when the damages being sought are unliquidated and a trial is scheduled to determine the unliquidated damages, a defaulted defendant must be served with the order setting the trial date. Nothing within this rule mentions or addresses, one way or another, the resolution of a claim for unliquidated damages by summary judgment against a defaulted defendant.

Id. at 199.

B. **Text of Rule 1.500(e)**

Rule 1.500(e) expressly contemplates that unliquidated damages may be liquidated by affidavits at hearings that are not trials:

> If it is necessary to take an account or ***to determine the amount of***

damages or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, ***the court may receive affidavits***, make references, or ***conduct hearings as it deems necessary*** and must accord a right of trial by jury to the parties when required by the Constitution or any statute.

Fla. R. Civ. P. 1.500(e) (emphasis added).

C. **Summary judgment and default judgment are not the same thing.**

The key analytical consideration regarding whether the Court may enter judgment for unliquidated damages against a defaulted party after a properly noticed summary judgment hearing is due process. "It is well settled that a defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages." *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 666 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D944a].

Default judgment and summary final judgment are distinct procedural vehicles. *Citizens Prop. Ins. Corp. v. JD Restoration, Inc.*, 331 So. 3d 197 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2565a] (recognizing that default judgment and summary judgment are not the same). Default judgment, by definition, does not afford a defaulted party notice and an opportunity to be heard. Rather, "[f]inal judgments after default may be entered by the court at any time . . ." Fla. R. Civ. P. 1.500(e). "In cases where the damages are liquidated, a defaulted defendant is not entitled to further notice or a hearing prior to entry of a final judgment for such damages." *Ciotti v. Hubsch*, 302 So. 3d 497, 499 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D2091a].

The procedure before entry of summary judgment pursuant to Rule 1.510, unlike the procedure for entry of default judgment, has built in due process. "The rule is designed to prevent ambush by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing." *Design Neuroscience Centers, P.L. v. Preston J. Fields, P.A.*, 359 So. 3d 1232, 1234 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D695a] (quotation omitted). At least until recently, Rule 1.510(c) contemplated a hearing on a summary judgment motion and did not provide the trial court with discretion to decide whether a hearing is required. *State Farm Fire & Cas. Co. v. Lezcano*, 22 So. 3d 632, 634 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2105a].[3] Additionally, the rule contains timeframes that allow the non-movant to garner and present its summary judgment evidence and the movant to analyze it before the summary judgment hearing, *see* Fla. R. Civ. P. 1.510(5)-(6), and a court commits reversible error when it does not honor such timeframes. *Design Neuroscience Centers, P.L. v. Preston J. Fields, P.A.*, 359 So. 3d 1232, 1234 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D695a].

Summary judgment procedure is "an integral part of rules aimed at the just, speedy and inexpensive determination of every action." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a]. If a court can enter summary judgment for unliquidated damages against a non-defaulted party without violating due process, *R. Plants, Inc.*, 221 So. 3d at 754, there is no principled reason why it could not also do so against a defaulted party.

CONCLUSION

Nothing in the text of Rule 1.440 or 1.500(e) requires that judgment for unliquidated damages against a defaulted defendant be entered only after trial. There is also no principled reason founded in notions of due process to require a trial in every case involving a defaulted defendant and prohibit summary judgment.

The Court appreciates it may be difficult to get this matter before the Third District Court of Appeal, which, unlike this Court, is not constrained to follow out of district precedent. The Court copies the Civil Procedure Rules Committee and encourages it to amend the last sentence of Rule 1.500(e) to add ", including a hearing pursuant to Rule 1.510," after the word "hearings."

For the foregoing reasons, the Motion for Reconsideration is **DENIED**.

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[1]"[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

[2]It is not clear to this Court what default judgment for liability, as distinguished from a default pursuant to Rule 1.500(b) or final judgment pursuant to Rule 1.500(e), even means. Any such "judgment" would, by definition, be non-final. This question, however, is not before the Court.

[3]This Order does not address whether the current version of Rule 1.510 effective January 1, 2025 requires a hearing. *See* Fla. R. Civ. P. 1.510(6) (2025) ("***Any*** hearing on a motion for summary judgment must be set for a date at least 10 days after the deadline for serving a response, unless the parties stipulate or the court orders otherwise." (emphasis added)).

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Attorney's fees—Prevailing plaintiff—Amount

AHMED SABER AL-ABOODY, An Individual, Plaintiff, v. TAMPA AUTO SOURCE, INC., a Florida corporation, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CA-015007. February 10, 2025. Jennifer X. Gabbard, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Robert Sickles, Tampa, for Defendant.

FINAL JUDGMENT AND ORDER GRANTING PLAINTIFF AHMED SABER AL-ABOODY'S MOTION FOR DETERMINATION OF AMOUNT OF REASONABLE ATTORNEY'S FEES

THIS CAUSE having come on to be heard on February 22, 2023 at 10:00 a.m. via Zoom, for consideration of Plaintiff Ahmed Saber Al-Aboody's ("Plaintiff") Motion for Determination of Amount of Reasonable Attorney's Fees. Attorney Joshua Feygin, Esq. appeared on behalf of the Plaintiff. Despite being properly noticed of the hearing, Defendant, TAMPA AUTO SOURCE, INC., a Florida corporation, failed to appear. The Court, having reviewed Plaintiff's counsel's invoices along with counsel's declaration of attorneys' fees and costs, the declaration of Plaintiff's expert witness, Attorney Robert W. Murphy, and having heard argument of Plaintiff's Counsel, and being otherwise advised in the premises, the Court makes the following findings:

1. The Court previously found that Plaintiff is the prevailing party in a claim arising from a violation of the Florida Deceptive and Unfair Trade Practices Act, and that Plaintiff is entitled to his reasonable attorneys' fees and costs pursuant to § 501.211, Florida Statutes.

2. Plaintiff asserts that the time expended and rate charged by his attorney is reasonable. Plaintiff claims 32.9 hours by Joshua Feygin, Esq. at $450/hour.

3. The Court finds that the Plaintiff's requested hourly rate, $450 for Mr. Feygin, is reasonable.

4. The Court finds that the 32.9 hours and $437.21 in costs expended by all attorneys and legal professionals combined is reasonable in consideration of the particular issues presented in this case.

5. In reaching these findings and determinations, the Court considered the factors enunciated in *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

6. Based on these findings of fact and conclusions of law, it is hereby:

ORDERED AND ADJUDGED:

The Court enters a Final Judgment on attorney's fees in favor of Plaintiff Ahmed Saber Al-Aboody, 1515 Northgate St, Westland, MI

48186, c/o Joshua Feygin, Esq., 1930 Harrison St. Suite 208, Hollywood, FL 33020 and against Defendant, Tampa Auto Source, Inc., 7610 N. Florida Ave, Tampa, Florida 33604, in the aggregate amount of $15,242.21, for which let execution issue forthwith.

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 final judgment is satisfied or post-judgment discover is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor(s) 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 is not represented by an attorney. The judgment shall bear the legal interest rate. Jurisdiction is retained to enforce this judgment and to enter post-judgment relief.

* * *

Criminal law—Driving under influence—Evidence—Suppression—Successive motion—Second motion to suppress is summarily denied where motion raises same reasonable suspicion issue that was previously ruled upon and relies on case that does not have any bearing on reasonable suspicion to conduct DUI investigation

STATE OF FLORIDA, v. CHANDLER LOCKEREMYNGTON POWELL, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2024-CF-003906-AXXX-MB. Criminal Division (S)-Circuit. February 12, 2025. Daliah H. Weiss, Judge.

ORDER DENYING DEFENDANT'S SECOND MOTION TO SUPPRESS

THIS CAUSE having come before the Court upon the Defense's Second Motion to Suppress; it is hereby

ORDERED AND ADJUDGED that Defendant's Second Motion to Suppress is **DENIED**.

On December 19th, 2024, this Court heard Defendant's First Motion to Suppress, in which the Defense argued that the arresting officer, Deputy Kevin Mellers of the Palm Beach County Sheriff's Office, had no reasonable suspicion to conduct a DUI investigation. At the hearing, the Deputy explained his training and experience with DUI investigations and his experience with individuals that are under the influence of controlled substances. On the day of the arrest, the Deputy responded to a parking lot to conduct a welfare check, where he found the Defendant unconscious in the driver's seat of his vehicle, which was improperly parked against a curb in the parking lot rather than in a parking space. Dispatch, through a 9-1-1 call, informed the Deputy the Defendant had been unconscious for at least two hours. Upon approach of the Defendant's driver's side door, the Deputy found him still unconscious. After finally waking up, the Deputy noted that the Defendant appeared to be confused and disoriented. The Deputy noticed dried mucus under the Defendant's nose and that he was sweating profusely. The Deputy detected no odor of alcohol from the Defendant. Deputy Mellers, based on his training and experience, believed that the Defendant was under the influence, and conducted a DUI investigation. The Defendant was ultimately arrested for DUI, and in searches of his car and person, Deputies found the Defendant to be in possession of controlled substances.

The entire interaction was captured on Deputy Meller's Body Worn Camera. The State introduced approximately one and a half minutes of the body worn camera, stopping the video after the DUI investigation began. The Court watched the video in open court. At the first Motion to Suppress hearing, the Court found that Deputy Mellers had reasonable suspicion to conduct a DUI investigation. The standard for an officer to ask for field sobriety tasks is reasonable suspicion. *State v. Taylor*, 648 So.2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b]; *State v. Ameqrane*, 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. The Fourth District Court of Appeals routinely holds that reasonable suspicion is a low threshold. *State v. Tyson*, 382 So. 3d 714 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D532a]. In the present case, Deputy Mellers observed multiple signs of impairment that gave him a reasonable suspicion to conduct his DUI investigation. The Court denied the First Motion to Suppress.

Following the first denial, the Defendant filed a Second Motion to Suppress, arguing again that the Deputy lacked reasonable suspicion to conduct a DUI investigation. In the Second Motion to Suppress, the Defendant relies heavily on *State v. Kliphouse*, arguing that the lack of odor of alcohol would prevent the Deputy from forming reasonable suspicion. *State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. However, *Kliphouse* is clearly distinguishable from the matter before this Court. *Kliphouse* found that there was no probable cause to force a blood draw from an unconscious defendant when the only indicator of impairment was an odor of alcohol coming from them. *Id. Kliphouse,* as the State argued in its second written response, does not have any bearing on reasonable suspicion. Since there have been no change in circumstances to require a rehearing, and that the Court has previously ruled on the issue of reasonable suspicion, the Court declines to set another evidentiary hearing. "[S]uccessive motions raising the same issue may be summarily denied." *Spivey v. State*, 733 So. 2d. 1225 (Fla. 3rd DCA 2000); *Bolender v. State*, 658 So. 2d 82, 85 (Fla. 1995) [20 Fla. L. Weekly S341c]. The Second Motion to Suppress is **DENIED.**

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Community caretaking—Motion to suppress is granted where dash cam video refutes trooper's testimony that defendant was drifting or "hopping around" in lane—Driving pattern of traveling at safe speed, albeit off-center in lane, and making appropriate stop and start at traffic signal without affecting any traffic was insufficient to justify stop for welfare check

STATE OF FLORIDA, v. EDDIE RIVERA, Defendant. County Court, 5th Judicial Circuit in and for Hernando County. Case No. 2024-CT-1047. January 29, 2025. Barbara-Jo Bell, Judge. Counsel: Rachel Bagnasco and Kyle Doty, Assistant State Attorneys, Brooksville, for State. Keeley R. Karatinos, Karatinos Law, PLLC, Dade City, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

THIS CAUSE, having come to be heard on December 15, 2024 on Defendant's Motion to Suppress Evidence and Statements, filed June 3, 2024, this Court having heard testimony from Florida Highway Patrol Troopers Grant Galloway and Kevin Dion, having received evidence in the form of a dashcam video recording of Defendant's driving pattern and traffic stop, and having heard argument from the State of Florida, Assistant State Attorneys Rachel Bagnasco and Kyle Doty, and from defense counsel Keeley R. Karatinos with Karatinos Law, PLLC, and being otherwise fully advised in the premises, rules as follows:

FACTUAL FINDINGS

In the early morning hours of March 28, 2024, Trooper Grant Galloway with the Florida Highway Patrol was travelling northbound on US 19 in the inside lane when he came upon Mr. Rivera's vehicle, which was travelling in the same direction in the middle lane. Mr. Rivera was driving 45 mph in a 55 mph zone. Mr. Rivera did not have a warrant, there were no calls for service relating to Mr. Rivera or his vehicle, and there were no BOLOs for his vehicle. There were no vehicles near Mr. Rivera or even travelling in the same direction. Mr. Rivera's speed, albeit 10 mph slower than the posted speed limit, did not affect traffic in any way. Mr. Rivera's driving did not impede or block the normal and reasonable movement of traffic at all.

On direct, Trooper Galloway testified that Mr. Rivera's vehicle was "hugging the left line, dotted line and traveling slower than the speed limit" which drew his attention as it approached State Road 50 and US Highway 19. The Trooper further testified that "the vehicle sped up quickly, then slowed down once he realized the light changed to red. . . [and] drifted into the potholes" which he found odd as the vehicle came to a stop at the intersection. Once the light cycled to green, the Trooper initiated a traffic stop because of a concern for the driver, if the vehicle was in complete functioning order, if the driver was sleepy, impaired, or had something medically going on with him. The Trooper acknowledged that the traffic stop was to conduct a welfare check. Mr. Rivera's driving pattern was captured on the Trooper's front facing dashcam.[1]

During cross-examination, the Trooper conceded the following:

i. Mr. Rivera did not commit a traffic violation of any kind.

ii. Mr. Rivera did not weave outside or inside his lane.

iii. The trooper never observed Mr. Rivera's tires even touch the lane demarcation lines.

iv. Mr. Rivera did not nearly strike a vehicle, object, pedestrian, or otherwise affect or otherwise impact the safety of anyone on the road.

v. No vehicles other than the Trooper's were near Mr. Rivera's vehicle prior to the traffic stop.

vi. Mr. Rivera did not make any furtive movements while the Trooper was behind his vehicle.

vii. Mr. Rivera came to a smooth stop at the intersection, stopped straight in its lane, and stopped legally and appropriately behind the stop bar.

viii. Mr. Rivera waited for the light to cycle green before entering the intersection at a reasonable speed and reasonable acceleration, where then the Trooper effectuated the traffic stop.

During direct examination the following testimony was elicited:

Trooper: And as you can see in the video, he is hugging the left center lane **which was cause for concern as someone could be sleepy or impaired or having a medical episode, having a hard time maintaining control of their vehicle even with a mechanical issue as well.**

State: And for the record, we're at two seconds into the video.

But then on cross-examination, the Trooper changes his testimony:

Trooper: So, as he's traveling north, he's hugging that left lane. Right.

Defense: So, this is where we stopped at two seconds. Correct? And at the two second mark, that's where you're like, "This is where I believe that he was tired or impaired or had a medical issue going on"?

Trooper: No, that's when I observed that there was an issue with the vehicle. I wouldn't have necessarily said that he was impaired physically, mentally, vehicle impairments or whatever. **That's something I have to determine after making contact with the driver.**

Later in cross-examination, the Trooper further testifies:

Defense: Alright, so let's be clear. You didn't observe him to have any mechanical problems with his vehicle, right?

Trooper: I can't tell you. I'm not a mechanic and I can't give you a ayes or no from a video from yards away. **That's something I have to make contact with Mr. Rivera about if he's having mechanical issues, only he would know definitely if he's having mechanical issues.**

Defense: You didn't observe mechanical issues with his vehicle, correct?

Trooper: Not obvious ones, no.

***

Defense: You didn't suspect Mr. Rivera was experiencing a life-threatening emergency correct?

Trooper: **Can't tell you yes or no. Unless I speak to Mr. Rivera, his driving pattern could indicate that he's having some form of medical episode. Again, that's something I have to make contact with Mr. Rivera about.**

Having reviewed the dashcam video footage, this Court finds Mr. Rivera's driving pattern leading up to the traffic stop was neither erratic nor irregular.

LEGAL ANALYSIS

The only issue presented in the Motion to Suppress is the lawfulness of the traffic stop. Specifically, Mr. Rivera argues that Trooper Galloway did not have a lawful basis to exercise his community caretaking responsibilities by conducting a welfare check. The Court notes that all warrantless seizures are presumptively unreasonable and invalid. *See generally Katz v. United States,* 389 U.S. 347 (1967); and *Hornblower v. State,* 351 So.2d 716 (Fla. 1977). It is undisputed that the defendant's seizure was conducted without a warrant. *State v. Hinton,* 305 So.2d 804 (Fla. 4th DCA 1975) (court may review the court file to take judicial notice of the fact that no warrant has been filed, thereby placing the burden on the prosecution to prove the validity of the police's actions under the Fourth Amendment).

Thus, where a defendant is seized without a warrant, the burden

rests upon the state to produce evidence that the detaining officer had probable cause to arrest or, at a minimum, a founded suspicion to detain the suspect. See *Terry v, Ohio,* 392 U.S. 16 (1968); *see also D'Angostino v. State,* 310 So.2d 12 (Fla. 1975); and *Benefield v. State,* 160 So.2d 706 (Fla. 1964).

"Welfare checks fall under the so-called 'community caretaking doctrine,' which is a judicial creation that carves out an exception to the Fourth Amendment's warrant requirement by allowing police officers to engage in a seizure or search of a person or property solely for safety reasons." *State v. Brumelow,* 289 So. 3d 955, 956 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D3025a]. "The community caretaker exception to the warrant requirement, arising from the duty of police officers to ensure the safety and welfare of the citizenry at large, functions focus on concern for the safety of the general public; thus, a warrantless search may be justified by exigent circumstances, which are those characterized by grave emergency, imperativeness for safety, and compelling need for action, as judged by the totality of the circumstances." Tracy Batement Farrell, et. al., "Exigent or Emergency Circumstances Exception for Warrantless Search, generally", 14A Fla. Jur 2d Criminal Law—Procedure § 771 (Nov. 2024 update).

"Searches and seizures conducted under the community caretaker doctrine are solely for safety reasons and must be 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' " *Brumelow,* 289 So. at 956 (citing *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973); *State v. Johnson,* 208 So. 3d 843, 844 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D281b]. "Under the community caretaking doctrine, an officer may stop a vehicle without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare." *Majors v. State,* 70 So. 3d 655, 659 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a]; *Shively v. State,* 61 So. 3d 484, 485-86 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1111b]; *Gentles v. State,* 50 So.3d 1192, 1198-99 (Fla. 4th DCA 2010)[35 Fla. L. Weekly D2900a]. Even a stop pursuant to an officer's community caretaking responsibilities, however, must be based on specific articulable facts showing that the stop was necessary for the protection of the public. *State v. Sheldon,* 394 So. 3d 1263, 1266 (Fla. 5th DCA 2024) [49 Fla. L. Weekly D2034a]; *Majors*, 70 So. 3d at 661; *Agreda v. State,* 152 So. 3d 114, 116 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2516a]. Under the community caretaking doctrine, law enforcement "may make warrantless searches and seizures in circumstances in which they reasonably believe that their action is required to deal with a life-threatening emergency." *Castella v. State,* 959 So. 2d 1285, 1292 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a].

This Court concludes that the video evidence refutes Trooper Galloway's testimony that Mr. Rivera was "drifting" or "hopping around in his lane." An unbiased review of the dashcam video further requires this Court to find that Mr. Rivera's driving did not cause a legitimate concern for the safety of the public, did not cause a reasonable belief that a life-threatening emergency existed, and certainly did not show any concern for the driver being tired, ill, impaired, or that his vehicle was experiencing a mechanical issue. *Wiggins v. DHSMV,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a] ("We respect the authority and expertise of law enforcement officers, and thus rely on an officer's memory when necessary. But we would be remiss if we failed to acknowledge that at times, an officer's human recollection and report may be contrary to that which actually happened as evinced in the real time video. This is the reality of human imperfection; we cannot expect officers to retain information as if he or she were a computer. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection.").

Having heard the testimony of Trooper Galloway under oath, coupled with the dashcam video recording of Mr. Rivera's driving, the Court finds that as a factual matter, the driving pattern, which included travelling at safe speed of 45mph in the center lane, albeit closer to the left line than the right line demarcation, an appropriate and prudent stop at the intersection of US 19 and State Road 50, followed by an appropriate and prudent entry into the intersection after the light cycled to green, without affecting any traffic, pedestrians, or bicyclists, was insufficient to justify the traffic stop of Mr. Rivera's vehicle for a welfare check.

Therefore, the Court finds that the State failed to meet its burden and concludes that, based upon the totality of the circumstances, there was insufficient reasonable cause for Trooper Galloway to perform a traffic stop on Mr. Rivera's vehicle.

ORDERED

a. that the Motion is GRANTED.

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[1]The dashcam video, marked as State's Exhibit 1, is an objective, unaltered depiction of Mr. Rivera's driving pattern.

* * *

Criminal law—Driving under influence—Search and seizure—Curtilage—Area of defendant's property that deputies entered while following tracks of truck that had run into and been towed out of ditch constitutes curtilage of home where area was near barn at rear of property and concealed from passersby by long driveway and foliage—Exigent circumstances do not justify warrantless entry onto defendant's property for minor offense of leaving scene of accident or DUI—There was no fresh pursuit of defendant, who was in backyard of his home, and no potential for destruction of evidence—Evidence does not support emergency aid exception to warrant requirement where it is questionable that deputies could see defendant allegedly slumped over in driver's seat of truck from roadway, and body cam video disputes deputies' claim that defendant was unconscious and indicates that deputies were not interacting with defendant with intent to ascertain his well-being—Motion to suppress is granted

STATE OF FLORIDA, v. ROBERT HELM, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2024 CT 807. January 26, 2025. D. Melissa Distler, Judge. Counsel: G. Kipling Miller, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER came to be heard on the Defendant's Motion to Suppress. The Court, having heard testimony from Deputy Mark Rexford, Debbie Ann Savage, and Simon Katz, having reviewed the AXON recordings, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Deputy Rexford testified that he was on duty as road patrol for the Flagler County Sheriff's Office on June 16, 2024 when he was dispatched to County Road 305 between County Road 302 and West State Road 100 to look for a black pickup in a ditch, called in by a good Samaritan. When he and other deputies arrived to the area, no vehicle was observed in a ditch along that stretch of County Road 305. Three deputies exited their patrol cars and began to walk along the edges of County Road 305 to look for a disturbance in the ditch. Deputy Rexford testified that while walking on edge of 305 on the west side, he observed a disturbance in the ditch. The deputy testified that he was able to follow muddy tire tracks out of the ditch and northbound on County Road 305 into the driveway of 500 CR 305. Deputy Rexford testified that he observed the tracks down the length of the driveway with his flashlight and spotted a muddy black pickup in the driveway with its interior lights on and the driver's door open. Deputy Rexford testified that he could see the hump of the back of someone, possibly unconscious, in the driver's seat. Due to the

possible medical emergency, the deputies got into their individual patrol cars and drove down the driveway.

Deputy Rexford testified that when he approached the truck, he observed a white male unconscious in the driver's seat. Deputy Rexford testified that the Defendant ROBERT HELM did not wake up to verbal commands, which prompted Deputy Yoeman to touch and shake him before he sat up and spoke with the deputies. Deputy Rexford's AXON recording was admitted into evidence and reviewed during the hearing. The AXON recording contradicts Deputy Rexford's testimony. The AXON recording reflects the deputy approach on foot and pass Deputy Yoemans' vehicle, which is parked closer to the Defendants vehicle. Deputy Yoemans is standing next to the open driver's side peering into the truck. The Defendant ROBERT HELM is seen seated in the driver's seat, with his head down but still seated upright, not slumped all the way forward as testified. Deputy Yoemans says "hey" one time and then taps the Defendant on the shoulder, at which time he immediately lifts his head and responds. The following occurs:

Deputy: Hey, sheriff's office.
Defendant: Yes.
Deputy: How you doing?
Defendant: Sitting here.
Deputy: Sitting at home?
Defendant: Yeah. What's up?
Deputy: You wrecked your car. And then you -
Defendant: I didn't wreck my car.
Deputy: Then you pulled in your driveway and you fall asleep in your truck.
Defendant: No I didn't wreck my truck. It was a misunderstanding.
Deputy: A misunderstanding? You missed your driveway and ran into your ditch.
Defendant: (unintelligible)
Deputy: You been drinking a little bit?
Defendant: I did earlier.
Deputy: Mind stepping out of the car for me?

The Defendant ROBERT HELM then steps out of his truck and hands his keys to Deputy Rexford after being asked to do so. There are no questions asked of the Defendant ROBERT HELM as to whether he is experiencing any medical issue whatsoever. The ensuing conversation revolves around the possibilities implicated by him wrecking into the ditch. Lastly, Deputy Rexford explained that there was no damage to any vehicle or entity; therefore, a crash investigation was not conducted. Deputy Rexford acknowledged that while he believed the deputies were performing a community caretaking function, he conceded that Deputy Yoemans' interaction with the Defendant did not reflect such.

The Court then heard from Debbie Ann Savage, the Defendant's ex-wife. She testified that she had been passing by the Defendant's house and saw his truck in the ditch. When she saw no one was in the truck, she testified that she pulled into his driveway and saw the Defendant sitting in his garage drinking moonshine. She explained that she observed the truck about 1:45am and that she stayed at the home for at least an hour until Mr. Simon Katz happened to drive by and help her relocate the truck from the ditch to the driveway of the home. She further explained that Simon hooked the truck up while she drove it forward and pulled it around to the barn garage. The Defendant then went into the house, at which time she left. Ms. Savage also testified that she saw no deputies on County Road 305 when she left the Defendant's home.

Lastly Simon Katz testified. He explained that he was driving back to his home along County Road 305 and noticed the Defendant's truck in the ditch with no one inside of it. He then looked up his driveway and saw Ms. Savage's car and lights on in the barn, so he pulled into the driveway and offered his assistance. He testified that Ms. Savage drove the truck back to the barn area after he pulled it out. Mr. Katz also measured the distance from the roadway to the rear barn area, where the truck was ultimately parked, which was 72 yards, equaling 225 feet. He also testified that it would be "pretty hard" to see into a vehicle parked at the barn garage 72 yards away at night.

An aerial photograph of the property was used as demonstrative aid during the hearing:

The property's driveway begins as an unpaved dirt ingress and egress. Either side of the dirty driveway has trees and bushes mostly blocking the view of the structures. There is a main house structure with a fence around it. Behind the main house is a barn, the entrance to which is enclosed by the fence around the house. There are a few other structures on the property. The uncontradicted testimony was that the truck was parked towards the rear of the property next to the barn but on the outside of the fence.

It is this sequence of events on which the Defendant bases his Motion to Suppress. The Defendant argued that law enforcement entered the curtilage of the home without a warrant for, at best, a criminal traffic citation of leaving the scene of an accident, or for a community caretaker function. Based on the conflicting evidence presented as to the intention and actions of the officers, the Defendant argues that law enforcement was not providing a community caretaker function but rather were on the property with the intent to investigate a crime. The Defendant argues that all information obtained from the warrantless entry into the curtilage of the home must be suppressed. The Defendant cited *State v. Markus,* 211 So. 3d 894 (Fla. 2017) [42 Fla. L. Weekly S98a]; *Welsh v. Wisconsin,* 104 S. Ct. 2091 (1984); *Oliver v. State,* 989 So. 2d 16 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1582c]; *Waldo v. State,* 975 So. 2d 542 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D417b]; *State v. Witherington,* 702 So. 2d 263 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2716b]. The State argued that deputies were not on the curtilage of the property but instead were on the Defendant's driveway, and that a DUI arrest can be made on a person's sole property, citing *Felts v. State,* 2 Fla. L. Weekly Supp. 397a (Fla. 7th Cir. 1994). The State further argued that this was a lawful well-being check, pursuant to the community caretaker doctrine, which ultimately developed a sufficient basis for a DUI investigation.

The Fourth Amendment protects homes from unreasonable searches and seizures absent a warrant, with limited exigent circumstance exceptions. These protections extend to the curtilage of the home. Curtilage is defined by Black's Law Dictionary as "the land or yard adjoining a house, usually within an enclosure." *Black's Law Dictionary* (12th ed. 2024). To determine whether an area constitutes curtilage, the inquiry centers on whether the area "harbors the intimate activity associated with the 'sanctity of a man's home and privacies of life.' " *Davis. v. State,* 257 So. 3d 1159 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2457a], citing *Oliver v. United State,* 466 U.S. 170, 180

(1984). *United States v. Dunn,* 480 U.S. 294 (1987) sets forth a four part test to determine whether an area constitutes curtilage: (1) the proximity of the area at issue to the home; (2) whether the area is within the enclosure surrounding the home; (3) the particular use of the area; (4) the steps taken to protect the area from observation from individuals passing by.

As applied to the instant case, the demonstrative aid reflects that the area of the property that law enforcement entered onto was beyond the threshold of the home, towards the rear of the property next to the barn. Although it is not surrounded by an enclosure, it is deeper into the property than the home itself. The use of the area seems to be that of a garage, backyard, and barn area. The Defendant was, in fact, in his garage area when his ex-wife arrived, seemingly extending it to the recreational space of the home. *See, e.g., State v. Markus,* 211 So. 3d 894 (Fla. 2017) [42 Fla. L. Weekly S98a]; *see also State v. Witherington,* 702 So. 2d 263 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2716b] (finding that Fourth Amendment protections extend to a screened porch in the back yard of a home). Due to its distance from the road, over 200 feet, the foliage along the front of the property concealing the visibility of the structures, and the fact that the barn structure behind the home, this area of the property is not intended to be open to passersby and encompasses the backyard of the property. The Court finds that the area in which law enforcement entered onto constitutes the curtilage of the home.

Warrantless searches of homes are presumed unreasonable absent exigent circumstances. *Markus,* 211 So. 3d at 906-7 (Fla. 2017). The limited exceptions involve emergency aid, to prevent imminent destruction of evidence, and hot pursuit. *Id*. at 907. The State argues that the emergency aid exception applies here. However, Fourth Amendment exceptions have extremely limited applicability to "minor" offenses, as would have been the circumstance of the instant case. The *Welsh* Court held that a warrantless, nighttime entry into a home to arrest for driving under the influence was prohibited by the Fourth Amendment. In so holding, the Court wrote,

> Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense,[12] that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh v. Wisconsin, 104 S. Ct. at 2098 (1984).

Again, similarly to *Welsh,* in the instant case, there was no fresh pursuit of the Defendant, as he was at his home and in his backyard, with his truck out of the ditch, when law enforcement arrived in the area. Because the entry onto the curtilage of the property was for a minor offense, either potentially leaving the scene of an accident as first thought by officers or of Driving Under the Influence as ultimately charged, exigent circumstances do not justify the warrantless entry under the Fourth Amendment under fresh pursuit or destruction of evidence exceptions.

Addressing the potential emergency aid exception, the Court relies on the AXON recording itself. The Court has the obligation to determine credibility and veracity of evidence presented. There is a conflict as to whether the deputies would have been able to see the Defendant seated in his vehicle 225 feet away from the roadway using their department-issued flashlights. Even assuming that they could, the AXON recording disputes the deputies' testimony as to the Defendants' appearance within the vehicle. The Defendant was not slumped forward with only his back visible as testified to; rather, his head was leaning forward and down but his body was still completely upright. Once the deputies approach him, it is clear that they were not interacting with the Defendant with an intent to aid him. Rather all questions were directed to the fact that he "wrecked his truck" in the ditch, seemingly concerned about investigating the accident and asking no questions about his well-being. *See, e.g., State v. Perez,* 12 Fla. L. Weekly Supp. 35a (Fla. Miami Circuit Court October 5, 2004). The evidence simply does not support the emergency aid exception in this case.

The Court finds that the warrantless entry onto the curtilage of the Defendant's property by the deputies were not motivated by an intent to aid or protect but rather than solve a crime. Such warrantless entry for a minor offense is prohibited by the Fourth Amendment. Based upon the above findings of fact, it is therefore ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is GRANTED. Any and all evidence obtained by law enforcement's entry onto the property is SUPPRESSED.

* * *

Landlord-tenant—Public housing—Eviction—Noncompliance with lease—Waiver—Landlord waived right to evict by failing to file eviction complaint within 45 days of actual knowledge of lease violation and by accepting rent with actual knowledge of alleged violation—Notice of noncompliance was vague and was not proper notice for alleged incurable violations—Emergency motion for entry of final judgment based on allegations not asserted in complaint deprived tenant of notice required by due process—Complaint dismissed with prejudice

LHC COLONIAL APARTMENTS, LLC, Plaintiff, v. LETASHA WALLACE, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-083612-CC-05. Section CC04. August 8, 2024. Diana Gonzalez-Whyte, Judge. Counsel: Jacqueline Salcines, Coral Gables, for Plaintiff. Karina A. Bodnieks, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Court on August 1, 2024, during the evidentiary hearing on Plaintiff's Complaint for judgment and the pending motions filed by Defendant. The Court having heard the argument of counsel and testimony of the Plaintiff's witness, reviewed the file, exhibits, and pertinent case law, and being otherwise fully advised, the Court makes the following findings:

1. Defendant is a Section 8 Moderate Rehabilitation Program participant.

2. On April 26, 2024, Plaintiff instituted this residential eviction against Defendant.

3. Plaintiff served Defendant with a 7-Day Notice to Cure on February 28, 2024, alleging that the following lease violations had occurred:

> (1) All remaining unauthorized persons must be vacated from your unit immediately.
>
> (2) Television, radio, and musical instruments must be played at an appropriate volume, to not disturb other residents, and also must not violate any noise ordinances.
>
> (3) The volume of your inter-family communications, arguments, and/or conversations must be at an appropriate level, so as to not disturb other tenants. Several tenants have expressed their frustration at hearing yelling and screaming until very late hours.
>
> (4) Children must be supervised at all times. Not only is it a matter of disturbance, but, most importantly, it is a matter of safety. Children are prohibited from playing/running/riding bikes or performing any act, within the hallways and/or stairwells, which causes a disturbance to your neighbors.

4. Based on the 7-Day Notice attached to its Complaint, Plaintiff

had actual knowledge of an alleged lease violation on February 28, 2024. On May 9, 2024, the Defendant filed her Answer, Affirmative Defenses, Motion to Dismiss, and Motion to Determine Rent.

5. Plaintiff filed its Complaint for Tenant Removal on April 26, 2026, 57 days after the February 28, 2024 Notice.

6. Florida Statute Section 83.56(5)(c) states that a landlord who receives a rent subsidy waives its right to evict if it fails to institute an action within 45 days of actual knowledge of the lease violation.

7. Plaintiff waived its right to evict by failing to file its Complaint for Removal of Tenant within 45 days of having actual knowledge of the lease violation.

8. Additionally, Plaintiff waived the ability to proceed with the eviction by accepting rent with actual knowledge of the alleged non-compliance in violation of Florida Statute 83.56(5)(a). Specifically, since Plaintiff accepted rent for March, April, and May 2024, it has waived the ability to proceed with the eviction based on the allegations contained in the February 2024 notice.

9. Further, Plaintiff's notice was vague and failed to provide sufficient specificity pursuant to Florida Statute Section 83.56(2) regarding the alleged lease violations.

10. Lastly, Plaintiff did not serve a proper notice pursuant to Florida Statute 83.56(2)(a) for any alleged incurable lease violations.

11. The court also notes that the Plaintiff's Emergency Motion for Entry of Final Judgment was based upon allegations not asserted in Plaintiff's Complaint, thereby depriving the Defendant of due process by failing to provide the Defendant with sufficient notice of the alleged new grounds for eviction.

It is ORDERED AND ADJUDGED:

1. Judgment is entered for Defendant.

2. Plaintiff's Emergency Motion for Final Judgment is DENIED.

3. The eviction case is DISMISSED with PREJUDICE.

4. Defendant is the prevailing party entitled to seek recovery of attorney's fees and costs. The court reserves jurisdiction to determine the amount of attorney fees and costs to be awarded.

* * *

Insurance—Medical provider's action against insurer—Dismissal—Service of process—Timeliness—Complaint dismissed without prejudice where medical provider failed to serve complaint on insurer within 120 days, did not show good cause or excusable neglect for failure to effect timely service, and failed to timely move for extension of time

DORAL MEDICAL IMAGING, a/a/o Pedro Valdes, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-018685-SP-26. Section SD04. February 13, 2025. Lawrence D. King, Judge. Counsel: Patric Jones and John Mollaghan, Law Office of Gabriel O. Fundora & Associates, Employees of Infinity Insurance Company, Tampa, for Defendant.

ORDER OF DISMISSAL WITHOUT PREJUDICE

THE COURT, hereby, GRANTS the Defendant's "Motion to Dismiss Plaintiff's Complaint" filed on January 23, 2024, in case 2023-018685-SP-26. Having reviewed and considered the motions and the applicable law, and being otherwise fully advised, the Court finds in this case as follows:

I. PROCEDURAL BACKGROUND

On or about March 22, 2023, Plaintiff filed its multi-count complaint alleging breach of contract and seeking declaratory judgment. Plaintiff served the complaint on or about January 5, 2024. Plaintiff did not serve the Defendant within the time frame outlined in Fla. R. Civ. Pro 1.070(j). Defendant moved to dismiss said complaint due to Plaintiff's failure to timely serve, move to extend the time to serve, or show good cause why service was not made within that time. See *Hodges v. Noel,* 675 So. 2d 248, 248 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1421d]. Plaintiff failed to demonstrate either good cause or excusable neglect, as reasons for Plaintiff's failure to timely serve the complaint. Plaintiff failed to allege that the statute of limitations would bar refiling this matter.

II. DISCUSSION

A. PLAINTIFF FAILED TO TIMELY SERVE THEIR COMPLAINT WITHIN THE MANDATED 120 DAYS AS REQUIRED BY FLA. R. CIV PRO. 1.070(J)

The 4th DCA ruled that "Florida Rule of Civil Procedure 1.070(i) requires dismissal of an action if a plaintiff fails to serve the initial pleading and process upon a defendant within 120 days of filing, unless the plaintiff shows good cause why service was not made within that time." *Hodges v. Noel,* 675 So. 2d 248, 248 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1421d]. As in Hodges, the Court found that Plaintiff failed to timely serve the complaint and failed to provide any good cause or excusable neglect to explain said failure.

B. PLAINTIFF FAILED TO TIMELY MOVE FOR AN EXTENSION OF TIME TO SERVE THE MATTER OR DEMONSTRATE THAT THE DISMISSAL WOULD BE WITH PREJUDICE, DUE TO THE OPERATION OF THE STATUTE OF LIMITATIONS.

Plaintiff argued that the Court should not dismiss the matter, as dismissal was not mandated. *Contra Fernandez v. Cohn,* 54 So. 3d 1040, 1043 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D303a]. The *Cohn* court overturned the dismissal of a complaint for failure to timely serve as Plaintiff demonstrated good cause, due to the diligent efforts taken to serve the defendant. "In this case, the record demonstrates diligence and good cause for failure to serve Cohn within 120 days of filing the complaint. The time for serving Cohn should, therefore, have been extended. Even if Fernandez had not acted diligently and had failed to demonstrate either good cause or excusable neglect, he still should have been afforded an opportunity to serve Cohn because the statute of limitations on Fernandez' negligence claim has now run. This is so, as has already been explained, because Rule 1.070(j) is a rule of administrative convenience which should not trump the preference for trials on the merits:" *Id*.

The Court relies on *Hodges v. Noel*, 675 So. 2d 248, 248 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1421d] and *Fernandez v. Cohn*, 54 So. 3d 1040. Plaintiff failed to show good cause, such as timely filing a motion for extension of time, or excusable neglect. The statute of limitations would not bar refiling. The Court does not find that a dismissal of the matter would amount to a dismiss with prejudice. The Court also denied Plaintiff's *ore tenus* Motion to Amend, as the dismissal was for failure to timely serve, which the Court analogized to a dismissal for failure to prosecute, and not to correct a facial pleading deficit. Therefore, this matter is dismissed without prejudice, and without leave to amend.

* * *

Insurance—Personal injury protection—Overdue claims—Interest—Attorney's fees—Entitlement—Where insurer did not pay overdue claim for benefits within thirty days of receiving demand letter, prevailing medical provider was entitled to attorney's fees incurred in subsequent action to recover interest, penalty, and postage on overdue claim—Insurer was not entitled to protection of safe harbor under section 627.736(10)(d) where insurer did not pay overdue claim within thirty days of receiving demand letter

CALIXTO ALFONSO, JR., D.C., P.A., a/a/o Sorany Perez, Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-000878-SP-23. Section ND05. February 17, 2025. Chiaka Ihekwaba, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES

AND COSTS PURSUANT TO FINAL JUDGMENT

THIS CAUSE came before the Court on January 21, 2025, upon Plaintiff's motion to determine entitlement to attorney's fees and costs subsequent to this Court's August 12, 2024 Agreed Order Granting Plaintiff's Motion for Final Summary Judgment and August 16, 2024 Final Judgment in favor of the Plaintiff, and the Court having considered the motion, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Plaintiff's Motion for Entitlement to Attorney's Fees and Costs is GRANTED, for the reasons set forth below.

FACTS AND PROCEDURAL HISTORY

1. On August 1, 2020, Sorany Perez was involved in a motor vehicle accident and made a PIP claim against a Star Casualty automobile insurance policy that was effective from August 22, 2019 to August 22, 2020.

2. On August 7, 2020, Sorany Perez executed an Assignment of Insurance Benefits in favor of the Plaintiff, Calixto Alfonso, Jr., D.C., P.A., who provided treatment for Mr. Perez' injuries sustained as a result of the motor vehicle accident.

3. In response to Plaintiff's September 22, 2022 presuit demand letter, Star Casualty mailed a check for benefits on November 9, 2022, 47 days from the date on which the Demand Letter had been mailed to Star Casualty.

4. As a result of Star Casualty's failure to issue payment for PIP penalty, postage and interest to the correct payee, on January 6, 2023, Plaintiff filed this suit to recover $18.24 in statutory penalty, postage and interest.

5. On August 8, 2024, this Court granted Plaintiff's Motion for Final Summary Judgment, providing that Plaintiff may submit a proposed Final Judgment for entry, together with a motion to determine entitlement to reasonable attorney's fees and costs.

6. On August 16, 2024, this Court entered Final Judgment in favor of the Plaintiff, providing that Plaintiff shall recover from Defendant penalty, postage and interest in the amount of $18.24; and Plaintiff filed its Motion to Tax Attorney's Fees and Costs, asserting that as the prevailing party, Plaintiff is entitled to recover reasonable attorney's fees and costs for this action.

7. On October 9, 2024, long after this lawsuit was filed and subsequent to the entry of Final Judgment in favor of the Plaintiff, Star Casualty re-issued the check for PIP penalty, postage and interest in the amount of $18.24 to the correct payee.

ANALYSIS

In *United Automobile Insurance Company v. Coral Gables Chiropractic PLLC, a/a/o Johander Santa C. Hernandez*, 49 Fla. L. Weekly D2164a (Fla. 3d DCA 2024), the Third District Court of Appeal held that a PIP insurer's payment within 30 days of all but statutory interest demanded in a presuit demand letter precluded the recovery of attorney's fees. In that case, the Court based its ruling upon § 627.736(10)(d) of the Florida Statutes, which provides, in pertinent part, as follows:

> (d) If within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer . . . the insurer is not obligated to pay any attorney's fees if the insurer pays the claim within the time prescribed by this subsection.

In considering the construction and purpose of § 627.736(10)(d), the *Coral Gables Chiropractic* Court observed that "where (i) the insurer pays the overdue claim within thirty days of the demand letter but fails to pay the interest and/or penalty, and (ii) the claimant files a successful legal action to recover the unpaid interest and/or penalty, then the insurer is not liable for the claimant's attorney's fees."

More specifically, because United Auto paid the medical provider's overdue claim for the claimant's PIP benefits within thirty days of the medical provider's pre-suit demand letter, United Auto was not obligated to pay attorney's fees in the medical provider's successful action to recover the unpaid statutory interest that accrued on the overdue claim. The clear and unmistakable implication is that where the insurer fails to pay the overdue claim within thirty days of the demand letter and a successful legal action is thereafter brought to recover the unpaid interest and/or penalty, then the insurer is obligated to pay attorney's fees in the medical provider's successful action to recover unpaid statutory interest that accrues on the overdue claim.

This precise issue was addressed in *Baker Family Chiropractic, LLC a/a/o Hahn Dinh v. Liberty Mutual Ins. Co.*, 356 So. 3d 281 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D269a]. In that case, Baker Family Chiropractic sent a demand letter to Liberty Mutual on March 12, 2019, seeking payment of the overdue claim together with interest, postage and penalty. Under §627.736(10)(d), Liberty Mutual had 30 days from receipt of the demand letter within which to pay the overdue claim together with interest and a ten percent penalty. However, Liberty Mutual waited until April 22, 2019 (day 41) to pay the overdue claim plus the amount it calculated to be due as interest, $16.60. Baker Family Chiropractic subsequently filed suit to recover unpaid interest and obtained a judgment in the amount of $1.48. After Liberty Mutual appealed and then dismissed the appeal of the $1.48 judgment, the trial court denied Baker Family Chiropractic's entitlement to attorney's fees.

In its analysis of the issue, the 5th DCA observed that the underlying dispute focused on the parties' disagreement over the calculation of interest to which Baker Family Chiropractic was entitled under § 627.736(6)(d), Fla. Stat., further recognizing that "obviously, Baker Chiro was entitled to receive the proper amount of interest on the overdue claim; it was not obligated to accept anything less." The Court then addressed § 627.736(8), Fla. Stat.[1]:

> Section 627.736(8) provides in pertinent part: 'with respect to **any dispute** under the provisions of ss. 627.730-627.7405 . . . between an assignee of an insured's rights and the insurer, the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15).' Given that the parties' dispute arose under one or more of the above provisions, Baker Chiro would be entitled to recover attorney's fees under 627.428, unless one of the specifically mentioned exceptions applied. The parties agreed that the subsection (15) exception did not apply;[2] therefore, we will focus on subsection (10).
>
> The legislative goal of achieving swift payment of PIP benefits is furthered by the operation of section 627.736(10)(d). That subsection contains two safe harbor provisions for an insurer that timely pays the second time around, after it receives a demand letter seeking payment of a claim that became overdue because it was not paid within 30 days of the insurer's initial receipt of the written claim.
>
> The first safe harbor is one of complete protection from suit. "[N]o action may be brought against the insurer," if within 30 days after receipt of the demand letter it pays (1) the overdue claim, (2) applicable interest, and (3) a penalty of 10 percent of the overdue claim, not to exceed $250. Liberty Mutual is not entitled to the absolute protection of the first safe harbor because it was not until the 41st day after receiving the demand letter that it paid the admittedly overdue claim of $168 together with the incorrect amount of interest.
>
> The second safe harbor provided under subsection (10) protects the insurer only, but importantly, from payment of attorney's fees. "The insurer is not obligated to pay any attorney's fees if the insurer pays . . . within the time prescribed by this subsection."[3] If Liberty Mutual had paid the $168 and nothing more within 30 days, no attorney's fees would be owed. However, Liberty Mutual is not entitled to the protection of this second safe harbor because it failed to pay the claim,

$168, within the 30-day time frame provided by this subsection. It was eleven days late.

By delaying payment until the 41st day after receipt of the demand letter, Liberty Mutual sailed past both safe harbors, leaving it open to suit for the underpaid interest and attorney's fees under section 627.736(10)(d). Because of its failure to make 'swift payment,' Liberty has no protection under either safe harbor provision of 627.736(10)(d). Moreover, given the insured's assignment of contract rights under the policy and because the parties' dispute was 'any dispute under the provisions of ss. 627.730-627.7405,' Baker Chiro may recover reasonable attorney's fees under section 627.428.

Liberty Mutual's failure to pay the overdue benefits within 30 days from receipt of the demand letter resulted in Baker Family Chiropractic's entitlement to attorney's fees for having recovered a judgment in the amount of $1.48 for unpaid interest. Similarly, in this case, by delaying payment until 47 days from the postmarked date on which the demand letter had been mailed, Star Casualty "sailed past both safe harbors", leaving it open to suit for unpaid PIP penalty, postage and interest and attorney's fees under §§ 627.736(10)(d) and 627.428.

This Court rejects Defendant's assertion that *Liberty Mut. Ins. Co. v. Pan Am Diagnostic Servs., Inc. d/b/a Pan Am Diagnostic of Orlando a/a/o Claudine Jean,* 347 So. 3d 7 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1724] compels the denial of Plaintiff's motion for entitlement to attorney's fees. In that case, the facts are clearly distinguishable. Pan Am Diagnostic had filed suit because 14 cents of statutory interest was not paid when Liberty Mutual paid an overdue PIP benefit. Most importantly, Liberty Mutual asserted that all benefits and interest due and owing were paid presuit, and that no benefits, interest, penalties or postage were due at the time the complaint was filed. This is not the situation we have in the facts at hand.

In light of the Third DCA's recent decision in *Coral Gables Chiropractic* and the Fifth DCA's decision in *Baker Family Chiropractic*, the Fourth DCA's decision in *Pan Am Diagnostic* is not binding on this court. In *Coral Gables Chiropractic*, the basis for the determination that the plaintiff was not entitled to attorney's fees was the fact that the insurer had paid the overdue claim for PIP benefits within 30 days of the pre-suit demand letter. Similarly, in *Baker Family Chiropractic*, the Court ruled in favor of entitlement to attorney's fees, where the plaintiff recovered a judgment for unpaid interest and the insurer had failed to pay the overdue benefits within 30 days from receipt of the demand letter, which is the same situation in the present case.

Additionally, unlike *Pan Am Diagnostic* where no benefits, interest, penalties or postage were due at the time that the complaint was filed, in this case, it took the filing of a complaint and a Final Judgment entered on August 16, 2024 in order for Star Casualty to send a check for the unpaid penalty, postage and interest. The case is therefore distinguishable on its facts. If Star Casualty had not wanted to pay Attorney's fees, it should have re-issued the check for PIP penalty, postage and interest in the amount of $18.24 to the correct payee in a timely fashion (within 30 days from receipt of the demand letter).

Plaintiff is entitled to recover its reasonable attorney's fees and costs in this case.[4]

[1]§ 627.736(8), Fla. Stat. was repealed, effective March 24, 2023. However, the policy in this case is governed by the law as it existed as of August 22, 2019, when the policy issued. *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873, 876 (Fla. 2010) [35 Fla. L. Weekly S222b]; *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996) [21 Fla. L. Weekly S102c] ("[I]t is generally accepted that the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract.")

[2]§ 627.736(15) provides that if the court determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant.

[3]The 5th DCA recognized in a footnote that "it is clear from the language used in the first safe harbor provision that 'claim' refers only to the past due benefit amount; it does not include interest, penalty or postage."

[4]See also *United Automobile Ins. Co. v. 5-Star Rehabilitation Center, Inc.*, 28 Fla. L. Weekly Supp. 797a (11th Jud. Cir. (Appellate) in and for Miami-Dade County, Oct. 27, 2020), (where the medical provider recovered a judgment for the demand penalty, the Court held that "[o]nce the final judgment below was entered in the Provider's favor, *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a] makes clear that 'attorney's fees shall be awarded to the insured.' "; *Orlando Injury Center, Inc. a/a/o Carmen Maldonado v. USAA General Indemnity Company*, 30 Fla. L. Weekly Supp. 108a (Miami-Dade County, March 22, 2022) (where the insurer failed to issue the payment for penalty and postage until 42 days after Plaintiff filed suit, Judge Pedraza granted Plaintiff's Motion for Entitlement to Attorney's Fees and Costs, noting that "a plain reading of Florida's No-Fault Law not only does not limit the type of dispute between an insured, or assignee of the insured, and an insurer, but it further entitles the Plaintiff to its reasonable attorney's fees and costs if a judgment is entered in its favor and against the insurer"); *Hands Professional Center Corp. (a/a/o Yosvany Perez) v. Windhaven Ins. Co.*, 25 Fla. L. Weekly Supp. 903a (Miami-Dade County, Judge Gloria Gonzalez-Meyer, July 26, 2017) (the postage and penalties to which the Plaintiff was entitled satisfied the §627.428 requirement that the insured obtain "an order or decree" in its favor in any suit in which recovery is had); *Doctor Ralph Miniet Practice (a/a/o Roberto Moreira) v. GEICO Gen. Ins. Co.*, 25 Fla. L. Weekly Supp. 477a (Miami-Dade Cty., Judge Lawrence D. King, June 6, 2016) (medical provider entitled to prevailing party attorney's fees in suit for penalty and postage).

* * *

Landlord-tenant—Eviction—Notice—Defects—Three-day notice was fatally deficient where dates listed were insufficient—Standing—Non-attorney trustee of property owned by trust lacks standing to bring eviction action

FRANK BERNADIN, Plaintiff, v. PRINCESS WRIGHT, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-149864-CC-20. Section CL02. January 30, 2025. Kevin Hellmann, Judge. Counsel: Eric Cvelbar, Miami, for Plaintiff. Kiara Bodnieks, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT

THIS CAUSE having been brought before the Court on Defendant's Answer and Motion to Dismiss (Index 9), which was filed on August 13, 2024, and the Court having heard argument from both parties on January 9, 2025, and the Court having reviewed the entire case file and being fully apprised of the facts and law relevant to the case, it is hereby

ORDERED AND ADJUDGED:

that Defendant's Motion to Dismiss is GRANTED and the Complaint for Eviction is dismissed with prejudice based on the following reasons:

1) the three-day notice provided as attached to the Complaint for Eviction (Index 3), which was filed with the Court Clerk on August 2, 2024, is insufficient as to the dates listed and therefore fails to comply with the requirements of Florida Statute 83.56 to provide defendant adequate service of eviction proceedings;

2) plaintiff Frank Bernadin lacks standing to bring a complaint of eviction against defendant as a non-attorney trustee of property owned by a trust. See *Lavine v. JPMorgan Chase Bank*, 226 So.3d 327 (5th DCA 2017) [42 Fla. L. Weekly D1629b]; *Griner v. Rockridge Prop. Owners Association*, 59 So.3d 1143 (2nd DCA 2011); *Finlayson v. Condon*, 25 Fla. L. Weekly Supp. 679c (Collier County, 2017).

* * *

Insurance—Personal injury protection—Coverage—Summary judgment granted in favor of plaintiff where plaintiff attached deposition of defendant's corporate representative admitting that defendant does not have any statements under oath to support its coverage denial defenses, and defendant did not file any countervailing affidavits or evidence to support its coverage defenses

SURGERY CONSULTANTS OF FLORIDA, LLC, a/a/o Pedro Zeledon, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, Civil Division. Case No. 2024 SC 006091 NC. March 5, 2025. Mary Ann Olson Uzabel, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Nicholas Chiappetta, for Plaintiff. Wade T. Conner, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on March 3, 2025 on Plaintiff's Motion for Final Summary Judgment, The Court, having reviewed the record, considered the motions, the arguments of counsel, and the applicable law, and being otherwise advised in the premises, finds:

1. Plaintiff filed this PIP breach of contract action based upon Defendant's wrongful denial of coverage and failure to pay Plaintiff's medical bills.

2. Plaintiff attached the deposition of Defendant's designated Corporate Representative, Iran Rieche.

3. Defendant's two (2) affirmative defenses both alleged that there is no PIP coverage asserting that Pedro Zeledon is not a resident relative of the insured and his wife own a vehicle which was operable on the date of loss.

4. However, Defendant's Corporate Representative admitted that it does not have any statements under oath of any kind to support its coverage denial defenses.

5. The Defendant did not file any countervailing affidavits or evidence to support its affirmative defenses. As such, the only evidence for the Court to consider is Plaintiff's deposition transcript and exhibits attached to its Motion.

6. Pursuant to the current version of Florida Rule of Civil Procedure 1.510(a), "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Moreover, this standard must be construed and applied using the same standards applicable under Federal Rule of Civil Procedure 56, as construed by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *and Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), commonly referred to as the "Celotex trilogy", as well as the overall body of case law interpreting Rule 56.

7. This Court finds that there is no genuine dispute as to any material fact. Accordingly, the Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

8. The Court reserves jurisdiction on all other matters.

* * *

Insurance—Discovery—Admissions—Request for relief from technical admissions is denied where no evidence was presented that contradicted the admissions

PRESGAR IMAGING OF ROCKLEDGE LLC, a/a/o Amanda McDonald, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 23-CC-061715. Division I. January 31, 2025. Christine Edwards, Judge. Counsel: Stephen J. Bell, Hamilton, Miller & Birthisel, LLP, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DECLARE REQUEST FOR ADMISSIONS ADMITTED AND PLAINTIFF'S MOTION FOR RELIEF FROM TECHNICAL ADMISSIONS

This matter came before the Court on January 29, 2025 on Defendant's Motion to Declare Defendant's Request for Admissions Admitted on October 18, 2024 and Plaintiff's Motion for Relief from Technical Admissions. Present before the Court were Keith Petrochko, Esquire for the Plaintiff and Stephen Bell, Esquire for the Defendant. The Court reviewed the Court file and heard argument from the Parties. The Court allowed time for both Parties to supplement the record with supporting case law. Both Parties filed timely Memorandums in support of their respective positions for consideration. The Court being fully advised in the premises, **FINDS** as follows:

1. On May 31, 2024, the Defendant propounded upon the Plaintiff Requests for Admissions, numbered one (1) through eight (8). The Parties agree the responses were due July 1, 2024, pursuant to Rule 1.370, Florida Rules of Civil Procedure.

2. On July 1, 2024, the Plaintiff filed a request for extension of time to respond to Defendant's request. No hearing was set nor order entered.

3. On October 23, 2024, the Plaintiff filed their Response to Request for Admissions, as well as a Motion for Relief from Technical Admissions. The response was late by three (3) months and twenty-two (22) days.

4. During the hearing, the Court expressed a concern regarding the timeliness of the Plaintiff's motion and agrees while Plaintiff moved for relief nearly four (4) months after the responses were due, relief from technical admissions has previously been granted when sought over a year after being due. *See Wells Fargo Bank, N.A., v. Shelton*, 223 So. 3d 414 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1526a].

5. During the hearing, the Plaintiff argued excusable neglect at the hearing, but concedes Rule 1.370, Florida Rules of Civil Procedure, does not require a showing of excusable neglect to permit relief from a technical admission. For that reason, the Court makes no finding as to whether there was neglect, excusable or otherwise.

6. The Parties agree the admissions are deemed admitted pursuant to Rule 1.370, Florida Rules of Civil Procedure.

7. The Defendant contends Rule 1.370, Florida Rules of Civil Procedure, is dispositive absent a motion supported by sworn record evidence that contradicts the technical admission. A motion for relief was filed without sworn allegations contradicting the technical admission (emphasis added). *See Sudman v. O'Brien*, 218 So.3d 986 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1035a].

8. In response, the Plaintiff cites to a variety of case law, including *Wells Fargo Bank, N.A. v. Voorhees*, 194 So.3d 448 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1159e], which is in line with the proposition in *Sudman* (holding denial of relief from technical admissions is an abuse of discretion when the record contains evidence that contradicts the admission. . .) and goes on to say "and the opposing party has not shown it would prejudiced by the withdrawal of the admissions" (emphasis added).

9. The Defendant's prejudice is incurred additional defense costs that would have been avoided. The Plaintiff does not counter that the Defendant has not been prejudiced, but emphasizes the significant prejudice the Plaintiff would bear and the liberal standard in favor of relief (emphasis added). The Plaintiff would indeed be prejudiced. However, it is the prejudice of the Defendant that is at issue, not the Plaintiff's, at least according to *Wells Fargo v. Voorhee*s.

10. Rule 1.370(b), Florida Rules of Civil Procedure, permits withdrawal or amendment in favor of a disposition on the merits. It is well established Courts have consistently applied a liberal

standard in relieving a party from the effect of technical admissions. *See Ramos v. Growing Together, Inc.*, 672 So. 2d 103 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D991b]. The case law advanced by the Plaintiff to persuade this Court extend a liberal standard to the instant case are distinguishable. (a) *Wells Fargo Bank, Nat'l Ass'n v. Voorhees*, 194 So.3d 448, (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1159e]- relief from technical admissions proper where evidence that admission was contrary to facts of case. (b) *Wells Fargo Bank, N.A. v. Shelton*, 223 So.3d 414 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1526a]- error to use a technically deemed admission to support summary judgment if the record contains evidence to the contrary of the admission. (c) *Ramos v. Growing Together, Inc.*, 672 So. 2d 103 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D991b]- relief should be granted here Defendant properly filed a motion for relief from admissions, requesting permission to amend and alleging that his technical admissions were contrary to the true facts of the case. (d) *PennyMac Corp. v. Labeau*, 180 So. 3d 1216 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2786a]- relief from technical admissions proper where evidence contradicted technical admissions. (e) *United Auto. Ins. Co. v. W. Hollywood Pain & Rehab. Ctr.*, 162 So. 3d 98 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2178a]- abuse of discretion to deny a motion for relief from technical admissions where it is contrary to the true facts of the case. (f) *Sterling v. City of West Palm Beach*, 595 So. 2d 284 (Fla. 4th DCA 1992)- trial court should not have used the technically deemed admission to support a final summary judgment because the record was replete with evidence to the contrary of the supposed admission. (g) *Clemens v. Namnum*, 233 So. 3d 1146 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2622a] and *Chelminsky v. Branch Banking & Tr. Co*., 184 So. 3d 1245 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D405b]- granting relief from technical admission promotes presentation on the merits. A party satisfies this requirement by showing that the technical admissions damage its claims or defenses and conflict with the true facts of the case as established by the record evidence.

11. The Court agrees with Defendant's assertion that Plaintiff "has not presented any evidence that contradicts the technical admissions in this matter and the Court should not grant Plaintiff relief unless Plaintiff's counsel can provide contradictory evidence to said technical admissions." *See Defendant's Memorandum of Law in Support of Defendant's Motion to Declare Request for Admissions Admitted*.

12. Defendant's allegation of prejudice, specifically attorney fees incurred in the preparation and presentation of this Motion, could be easily cured by the award of fees in favor of the liberal standard, nevertheless the Court is bound by the holdings in the case law wherein the prejudice inquiry was conducted only in cases where evidence contradicted the technical admissions.

It is therefore **ORDERED AND ADJUDGED**

1. Defendant's Motion to Declare Defendant's Request for Admissions Admitted on October 18, 2024 is hereby **GRANTED**.

2. Plaintiff's Motion for Relief from Technical Admissions is hereby **DENIED**.

3. All deadlines in Differentiated Case Management (DCM) Order of May 1, 2023 have expired. The Parties shall confer and submit an Amended DCM with proposed deadlines within fifteen (15) days of this Order.

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—There is no record evidence to suggest insured was provided with proper notice of EUO where only showing that EUO notices were mailed to insured was testimony based on hearsay rather than first-hand knowledge of insurer's routine mailing practices—Judgment is entered for medical provider

AJ THERAPY CENTER, INC., a/a/o Alfredo Silveria Garcia, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-060056. Division I. January 26, 2025. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa; and Scott P. Distasio, for Plaintiff. Jessica Zlotnik Martin and Miguel Roura, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before this Court on December 6 and 9, 2024 for a non-jury trial. After observing and assessing the demeanor and credibility of the witnesses and weighing the evidence, considering the arguments of counsel, and being otherwise advised in the premises, this Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

1. On March 27, 2023 Plaintiff filed the instant action as a Petition for Declaratory Judgment, seeking a declaration regarding Personal Injury Protection ("PIP") coverage to the named insured, Alfredo Garcia, pertaining to an automobile accident that occurred on or about July 22, 2022.

2. The Defendant filed an Answer and Affirmative Defenses on November 21, 2023 asserting that the named insured, Alfredo Garcia failed to comply with a condition precedent to the filing of a lawsuit by failing to attend the scheduled examinations under oath on October 17, 2022, and October 26, 2022.

4. This matter proceeded to a Bench Trial on December 6, 2024, and December 9, 2024.

4. Pursuant to the parties Joint Pretrial Stipulation, the parties agreed to the following undisputed facts:

a. Defendant issued a policy (number 938141487, Form 9611A FL (07/17) to named insured Alfredo Garcia that included up to $10,000.00 in PIP benefits for the six-month period of May 1, 2022, through November 1, 2022.

b. On July 22, 2022, Alfredo Garcia was involved in an automobile accident.

c. Plaintiff, AJ Therapy Center, Inc., treated Mr. Garcia and timely submitted medical bills to Mr. Garcia's automobile insurer, Progressive, for payment of Mr. Garcia's PIP benefits.

d. Progressive investigated the claim for PIP benefits and requested that Alfredo Garcia submit to an EUO on October 17, 2022, and October 26, 2022. Mr. Garcia did not submit to an EUO on either date.

e. Submitting to an Examination Under Oath is a condition precedent to receive coverage pursuant to the subject policy and Fla. Stat. 627.736(6)(g).

f. Progressive denied PIP benefits to Plaintiff for Alfredo Garcia's failure to submit to an EUO as a condition precedent to receiving PIP benefits.

5. Before trial, the parties further stipulated to the disputed law and facts as follows:

a. Whether Progressive provided proper notice of the EUO's to Alfredo Garcia; and

b. Whether Alfredo Garcia's failure to attend the EUO's is a breach of a condition precedent to receiving PIP benefits rendering the denial of these PIP benefits for this claim proper.

6. At trial, the Defendant presented two witnesses: Nicole Perrelli, the Defendant's Corporate Representative, and assigned PIP Litigation Claims Adjustor; and Custodian of Records for FedEx, Tracey Chapell. The Plaintiff did not present any witnesses.

FINDINGS OF FACTS AND LAW

The two issues before the Court are: (a) whether Progressive provided proper notice of the EUO's to Alfredo Garcia; and (b) whether Alfredo Garcia's failure to attend the scheduled EUO's is a breach of a condition precedent to receiving PIP benefits, rendering the Defendant's denial of these PIP benefits for this claim proper.

The Defendant contends that the claim denial is based upon the named insured, Alfredo Garcia's, non-appearance at two scheduled examinations under oath (EUO). Specifically, Defendant argues that an insured's non-appearance at an EUO constitutes a material breach of the policy contract and as such no benefits are due and owing under the policy. In support of their position, Defendant relies upon section 627.736(6)(g), Florida Statutes, and specific language from the subject policy. Section 627.736(6)(g), Florida Statutes, requires an insured seeking benefits under sections 627.730-627.7405 to comply with the underlying terms of the insurance policy including submitting to an examination under oath when properly noticed. Additionally, section 627.736(6)(g) provides that "[c]compliance with this paragraph is a *condition precedent* to receiving benefits." *Emphasis added.* Defendant argues that under Florida law Plaintiff is barred from pursing this cause of action for unpaid benefits because no benefits are due and owing in light of the insured's alleged failure to submit to a properly scheduled and noticed EUO.

Whereas the Plaintiff argues that there is insufficient evidence that Alfredo Garcia did in fact receive the two separate EUO notices because a return receipt with a signature was not requested. The Plaintiff further argued that the Defendant's testifying corporate representative lacked personal knowledge about the Defendant's routine mailing practices and thus her testimony is inadmissible to establish that the EUO requests were in fact mailed. In support of its argument, the Plaintiff relies upon *Mace v. M&T Bank*, wherein the Florida Second District Court of Appeals held that the testimony of a mortgagee's assistant was not based upon personal knowledge and was therefore inadmissible. 292 So.3d 1215 (Fla. 2nd DCA, 2020) [45 Fla. L. Weekly D719a]. In *Mace*, the Court further found that a copy of the certified mail alone did not establish that the default letter was mailed. *Id.*

The unrefuted testimony and evidence at trial evinces that a total of three EUO's were scheduled by the Defendant. The first EUO was scheduled directly with Alfredo Garcia during a telephone conversation between Mr. Garcia and a claims adjuster for the Defendant, Stacey Feeney. During that telephone conversation, the claims adjuster used the services of a Spanish speaking translator because Mr. Garcia's primary language is Spanish. Furthermore, during the course of that conversation, Mr. Garcia agreed to attend an EUO scheduled on September 28, 2022. However, due to a weather emergency (impending Hurricane), out of the control of Mr. Garcia and the Defendant, the EUO was cancelled. There was no evidence elicited or presented as to how the Defendant noticed Mr. Garcia about the cancellation.

On October 6, 2022, the Defendant unilaterally rescheduled the EUO to October 17, 2022. The Defendant's witness, Ms. Perrelli, testified that to her knowledge an EUO letter was prepared and mailed to Mr. Garcia. The EUO letter admitted into evidence is written in the English language, without any Spanish translation, and there was no testimony presented that any of the claims adjusters verbally communicated about the reschedule EUO with Mr. Garcia regarding his availability on that date and time. Subsequently, as a result of Mr. Garcia's nonappearance at the EUO on October 17, 2022, a third EUO was unilaterally rescheduled by the Defendant for October 26, 2022. The second EUO letter is dated October 17, 2022, and is also written in English, without any Spanish translation. Similarly, there was no evidence presented that anyone communicated with Mr. Garcia directly to determine his availability.

During Plaintiff's cross examination of the Defendant's corporate representative/custodian of records, Ms. Perrelli, conflicting testimony was elicited as to her personal knowledge of the Defendant's routine mailing practices. Ms. Perrelli testified that she knew of the mailing process for all Progressive employees, although she personally: never reviewed a mail log in this matter; never mailed correspondences for Progressive; had never been trained in their internal mailing procedures; and did not have any personal knowledge as to who mailed the letter to the insured. Instead, it was elicited that Ms. Perrelli relied upon her conversation with a non-testifying witness, claims adjustor Stacey Feeney, and her review of the claims file as a basis to establish her knowledge. The testimony at trial was also contrary to Ms. Perrelli's prior testimony under oath, taken during a deposition on January 9, 2024, wherein Ms. Perrelli testified that she was not familiar with the Defendant's internal routine mailing practices.

Under Florida Statute section 90.406, "evidence of the routine practice of an organization is admissible to prove that the conduct of the organization on a particular occasion was in conformity with routine practices." The Defendant in establishing its compliance with Florida Statues section 90.406 must present competent substantial evidence. While the Defendant argues that since the letter was mailed FedEx there is a rebuttable presumption that "mail properly addressed, stamped, and mailed is received by the addressee," the Court finds that the evidence as testimony presented lacks an indicia of reliability. See *Brown v. Giffen Indus., Inc.,* 281 So. 2d 897, 900 (Fla. 1973). It is clear that Ms. Perrelli did not have any personal knowledge about the Defendant's routine mailing practices, and instead testified based upon hearsay. *See Thorlton v. Nationstar Mort., LLC,* 257 So. 3d, 601-02 (Fla. 2d 2018) [43 Fla. L. Weekly D2341a] (holding that a plaintiff could rely on routine practices to establish mailing where a witness *with first-hand knowledge* testified as to what those practices are). Speculation about internal policies and procedures by a witness based upon informal discussions with a co-employee are insufficient to establish personal knowledge about routine practices of an organization. *See Spencer v. Ditech Financial, LLC,* 242 So.3d 1189 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D720a]. The mere fact that an EUO letter was drafted by the Defendant is insufficient to allow a trial court to infer that the letter was mailed, rather mailing must be proven by "producing additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt*." Allen v. Wilmington Tr., N.A.,* 216 So.3d 685, 687-88 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D691b] 3d at 1191; *see also Edmonds v. U.S. Bank Nat'l Assn'n,* 215 So. 3d 628, 630 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D774a].

Here, there is no record evidence to suggest that Mr. Garcia was provided with proper notice of the EUO's scheduled by the Defendant, outside of the first EUO that was canceled due to a force majeure weather event outside of Mr. Garcia and the Defendant's control. Based upon the findings above, judgment is entered in favor of the Plaintiff.

* * *

Insurance—Personal injury protection—Default—Failure to defend action—Entry of judicial default is appropriate where insurer failed to respond to discovery requests and order compelling discovery, and failed to appear at duly noticed deposition and hearing on motion for default

MRI ASSOCIATES OF ST. PETE, INC., a/a/o Kimberly Cruz, Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-065783 (O). January 30, 2025. Cory L. Chandler, Judge. Counsel: Alexander D. Licznerski, Morgan & Morgan, PA, St. Petersburg, for Plaintiff.

ORDER GRANTING PLAINTIFF' S MOTION FOR JUDICIAL DEFAULT

THIS CAUSE having come before this Honorable Court on Plaintiff's Motion for Judicial Default, on January 29, 2025, at 2:15pm, and with the Court having reviewed the motion and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

On June 10, 2021, Plaintiff, MRI Associates of St. Pete, Inc. ("Plaintiff") filed this case to recover Personal Injury Protection (PIP) benefits from the Defendant, Star Casualty Insurance Company ("Defendant"). Along with the Complaint, Plaintiff served its initial interrogatories, request for admission, and request for production (DN 7, 8, and 9) on the Defendant. On June 30, 2021, the case was properly served (DN 13) on the Defendant and Counsel for Defendant eventually filed its Answer and Affirmative Defenses (DN 16).

However, Defendant failed to respond to Plaintiff's initial discovery requests. On September 20, 2024, Plaintiff served Defendant with its supplemental discovery requests inclusive of supplemental requests for admissions and requests for production (DN 25, 26). Again, Defendant failed to respond to Plaintiff's discovery requests. Therefore, Plaintiff submitted an ex-parte motion to the Defendant pursuant to this Court's Administrative Order S-2024-071 (DN 27) and on October 1, 2024, the Court issued an order (DN 32) mandating that Defendant respond to all outstanding discovery within ten (10) days. The Defendant failed to comply to this Court's order.

Further, Plaintiff repeatedly attempted to coordinate the deposition of Defendant's Litigation Adjuster by requesting numerous times that Defendant provides dates for the deposition. (Exhibit A and B to DN 40). Defendant never responded to these requests and on October 16, 2024, Plaintiff filed its Unilateral Notice of Taking Deposition of Defendant's Litigation Adjuster (DN 31) which was set to take place on November 21, 2024. After receiving this Notice of Deposition, on November 12, 2024, Counsel for Defendant stated to Counsel for Plaintiff that they no longer represent the Defendant in this case. (Exhibit D to DN 40). That same e-mail contained the new e-mail address for the supposed "new counsel" which was "pleadings@starlawfl.com." (*Id.*). Therefore, because they were cc'd in that e-mail, the "new counsel" had notice of the case at that time. However, Counsel for Plaintiff notified in its response e-mail to Counsel for the Defendant that no Notice of Withdrawal of Counsel nor any subsequent counsel had made an appearance in this case (*Id.*) There was no response to Plaintiff Counsel's e-mail. Therefore, on November 21, 2024, despite having notice of the deposition, Defendant failed to appear and a Certificate of Non-Appearance (DN 34) was issued.

Finally, on November 22, 2024, Plaintiff filed its Motion for Default against Defendant for failure to defend this case (DN 33). On that same date, the Court via e-mail, *in addition to cc'ing the new pleadings@starlawfl.com e-mail,* was notified of the default hearing which was set for January 29, 2025 (Exhibit E to DN 40). Clearly, Defendant had notice of the upcoming hearing on Plaintiff's Motion for Judicial Default. Instead of responding to Plaintiff's Motion for Judicial Default, Counsel for Defendant filed its Motion to Withdraw two days after (DN 36). This motion was never coordinated nor set for hearing. On January 29, 2025, a hearing was held on Plaintiff's Motion for Default to which Defendant failed to appear again.

Florida Rule of Civil Procedure 1.500(b) allows a default to be granted by the Court, and states: "[w]hen a party against whom affirmative relief is sought has failed to plead *or otherwise defend* as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; *provided that if such party has filed or served any document in the action, that party must be served with notice of the application for default.* Fla. R. Civ. P. 1.500(b) (emphasis added).

Here, Defendant has clearly failed to defend this action. Defendant failed to respond to Plaintiff's initial discovery, Defendant failed to respond to Plaintiff's supplemental discovery, Defendant failed to comply with this Court's order compelling Defendant to produce all discovery responses and documentation, Defendant failed to appear at the duly noticed deposition, and Defendant failed to appear at the hearing on Plaintiff's Motion for Judicial Default, despite having notice.

The second part of 1.500(b) states that Defendant must have had notice of the default. Under Florida law, "[i]t is fundamental that when a party against whom affirmative relief is sought has appeared in an action by filing or serving papers, *that party shall be served with notice of the application for default* as required by Florida Rule of Civil Procedure 1.500(b)." *Falcon v. Wilmington Sav. Fund Soc'y, FSB*, 258 So. 3d 565, 566 (Fla. Dist. Ct. App. 2018) [43 Fla. L. Weekly D2586b] (emphasis added). "[T]he purpose of the [default] rule is to speed the action toward conclusion on the merits where possible, not to expedite litigation by ex parte actions and surprise. *Hendrix v. Dep't Stores Nat. Bank*, 177 So. 3d 288, 291 (Fla. Dist. Ct. App. 2015) [40 Fla. L. Weekly D2215f].

Here, on November 22, 2024, Defendant had notice of the impending default as Plaintiff, and this Court, notified Defendant, via its new e-mail, pleadings@starlawfl.com, that the hearing was to take place on January 29, 2025. (Exhibit E to DN 40). Further, current Counsel for Defendant had notice of the default hearing and, rather than file a response, filed a Motion to Withdraw as Counsel only two days after the filing of the Notice of Hearing on the default. Therefore, Defendant had adequate notice of the default hearing and also had over two (2) months to prepare for the default hearing. Thus, the second prong of Florida Rule of Civil Procedure 1.500(b) has been met in this case.

Therefore, for the reasons stated above, a judicial default under Florida Rule Civil Procedure 1.500(b) is appropriate.

Plaintiff's Motion for Judicial Default is **GRANTED**.

* * *

Insurance—Personal injury protection—CPT codes—More definitive statement

PRESGAR IMAGING OF CMI SOUTH, L.C., a/a/o Miguel Miranda, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 24-CC-006386. Division M. October 23, 2024. Lisa Allen, Judge. Counsel: Matthew Brumley, FL Legal Group, Tampa, for Plaintiff. John Mollaghan, Law Office of Gabriel O. Fundora & Associates, Employees of Infinity Insurance Company, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE, on Defendant's Motion for More Definite Statement, and the Court having been sufficiently advised in the premises, the Court Finds as follows:

1. Defendant's Motion for More Definite Statement is granted.

2. Plaintiff will file a Statement of Particulars within 20 days that will state the codes at issue, and the amount alleged overdue for said codes.

* * *

Insurance—Discovery—Failure to comply—Sanctions

TARPON TOTAL HEALTH CARE, INC., a/a/o Frances Guarraci, Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 24-CC-027893. February 10, 2025. Jessica G. Costello, Judge. Counsel: Jonathan Roberts, Sunrise, for Plaintiff. Christina Rothstein, Hamilton, Miller, & Birthisel, LLP, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO ENFORCE OCTOBER 14, 2024 COURT ORDER REGARDING DEFENDANT'S MOTION TO COMPEL DISCOVERY, AND FOR SANCTIONS

THIS matter having come before the Court on February 3, 2025 on Defendant's Motion to Enforce October 14, 2024 Court Order Regarding Defendant's Motion to Compel Discovery, and for Sanctions, and the Court having considered the record, motion, and argument of the parties, the Court finds as follows:

1. On June 24, 2024, Defendant served its Request to Produce and Interrogatories to Plaintiff; responses were due on or before July 24, 2024.

2. On August 14, 2024, Plaintiff was provided with a good faith letter regarding late discovery responses, as well as Defendant's unfiled Motion to Compel Discovery (filed on August 21, 2024), as well as a proposed order allowing an additional thirty (30) days for Plaintiff to respond to discovery.

3. On October 9, 2024, the parties agreed to the previously provided order allowing Plaintiff an additional thirty (30) days to respond to discovery, making the deadline to respond November 13, 2024; said order was signed by this Honorable Court on October 14, 2024.

4. On November 18, 2024, after receiving no responses, Defendant filed its Motion to Enforce October 14, 2024 Court Order Regarding Defendant's Motion to Compel Discovery, and for Sanctions.

5. On January 27, 2025, Plaintiff provided responses to Defendant's Request to Produce and Interrogatories; however responsive documents and verified Interrogatories were outstanding.

6. At the February 3, 2025 hearing, Defendant requested an Order compelling responsive documents and verified Interrogatories within ten (10) days, as well as sanctions.

It is therefore ORDERED AND ADJUDGED:

1. Defendant's Motion to Enforce October 14, 2024 Court Order Regarding Defendant's Motion to Compel Discovery, and for Sanctions, is **GRANTED**.

2. Plaintiff has ten (10) days from this signed order to provide responsive documents and verified Interrogatories.

3. Plaintiff must pay Defendant $1,000.00 in sanctions, to be paid in thirty (30) days from this signed order.

* * *

Criminal law—Refusal to submit to breath test—Evidence—Refusal—Defendant's act of talking over officer during reading of implied consent warning constituted refusal—Officer was not required to inquire again about submission to breath test—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. THEA DELIAN PULIATTI, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, Misdemeanor Division B. Case No. 50-2024-MM-006802-AXXX-NB. February 3, 2025. Marni A. Bryson, Judge.

ORDER

THIS CAUSE having come to be considered on the Defendant's Motion to Suppress and the Court having been otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that said motion is hereby DENIED. The officer read implied consent and provided adequate warning to make clear the consequences of refusal to submit to a breath test. The Defendant's own conduct, talking over the officer throughout the reading of implied consent, constituted a refusal. Defendant continuously stated that she wanted a lawyer during the reading of implied consent. The law is well settled that Defendant was not entitled to a lawyer at that time. *State v. Johnson*, 7 Fla. L. Weekly Supp. 237b (Fla. 9th Cir. Ct. Dec. 9, 1999). The Defendant's own words and conduct made clear that she would not submit to breath test. Therefore, the officer was not required to ask Defendant, yet again, whether she would submit to the test.

* * *

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MISCELLANEOUS REPORTS

Municipal corporations—Code enforcement—Fines and liens—Foreclosure—Town is authorized by special magistrate to file foreclosure of fines and liens/money judgment resulting from code enforcement violations that remain unpaid three months after filing of lien

THE TOWN OF SOUTHWEST RANCHES, Broward County, Florida, a Florida Municipal Corporation, Petitioner, v. INVESTMENT MANAGEMENT MARLA LLC, 6540 MELALEUCA ROAD, SOUTHWEST RANCHES, FL 33330, Respondent. Town of Southwest Ranches Code Enforcement Special Magistrate. Case No. 2023-118. January 15, 2025. Harry Hipler, Special Magistrate. Counsel: Richard DeWitt, Assistant Town Attorney, for Petitioner. Ryan Abrams, for Respondent.

FINAL ORDER AUTHORIZING FORECLOSURE OF FINES AND LIEN AND MONEY JUDGMENT

THIS CAUSE came before the Special Magistrate on the Town's Notice of Foreclosure/Money Judgment Hearing on January 14, 2025 beginning at 10:30 am. A Final Order was entered by Special Magistrate Eugene M. Steinfeld on October 5, 2023 requiring Respondent and any successor owners(s)[1] to comply with code enforcement violations stated in the aforementioned Final Order and pursuant to its findings, which has not occurred. The Final Order also provided for per diem fines that have accrued since the date set for compliance and that continue to run, until compliance occurs. The violations involve TSWR 1) SEC. 045-050, 045-060, Fla Stat. 559.955, and as otherwise provided in the Special Magistrate's Final Order entered on October 5, 2023 and the Notice of Foreclosure/Money Judgment Hearing.

OWNER(S): INVESTMENT MANAGEMENT MARLA LLC, now in the name of PRISCO CAMERINI ZULAY MARIA.[2] ADDRESS: 6540 MELALEUCA RD FOLIO: 5140 02 01 0173. THE SUBJECT REAL PROPERTY IS LOCATED AT 6540 MELALEUCA ROAD, and its legal description is as follows: EVERGLADES SUGAR & LAND CO SUB 2-39 D 2-51-40 TRACT 25 LESS N 990.51 & LESS W 40 & LESS S 40 FOR RDS.

After considering the evidence presented, including testimony, witnesses, exhibits, Town File, and argument of counsel, the Special Magistrate finds and orders as follows:

1. Fla. Stat. 162.09(3) provides a local government with authority to file a foreclosure and money judgment civil case and states:

> "After 3 months from the filing of any such lien which remains unpaid, the enforcement board [Special Magistrate] may authorize the local governing body attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest."

In the case of *City of Riviera Beach v J & B Motel Corp., et al.,* 213 So.3d 1102, 1103 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D624a], the appellate court stated as follows:

> "Chapter 162 outlines the ways in which a local government can enforce code violations against violating property owners. One such way is to impose a fine. § 162.09(1), Fla. Stat. (2003). If the violator does not pay the ordered fine, then the local government may record "a certified copy of an order imposing a fine" in the public records. § 162.09(3), Fla. Stat. (2003). The recorded order then becomes "a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." *Id.* If not paid within three months from the date of recording, the local government may "foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest." *Id."*

See also *City of Fellsmere v. Almanza,* 380 So.3d 1199 (Fla. 4th DCA 2024) [49 Fla. L. Weekly D542a].

2. Based on the sworn to personal knowledge of the Code Compliance Officer and the evidence presented and which was entered into the record, the Special Magistrate finds that as of the date of the hearing, there has been no compliance of the above cited code sections.

3. The Town's Notice of Foreclosure/Money Judgment is GRANTED, subject to the Town recording a certified copy of the order imposing a fine in the public records and it shall be entitled to file a foreclosure/ money judgment action after three months from the filing of such lien which remains unpaid. The Town is hereby authorized to file a Foreclosure of Fines and Liens/Money Judgment in accordance with Fla. Stat. 162.09 (3).

4. The evidence provided that there has been no compliance and satisfaction with said Special Magistrate's Final Order that has been entered imposing a per diem fine.

5. Respondent was served and notified of this hearing as provided by law, Respondent and Respondent's counsel were present at the hearing, and accordingly the sworn to testimony and evidence provided by the Petitioner is sustained.

6. Petitioner was represented by Richard DeWitt, Assistant Town Attorney, and Respondent was represented by Ryan A. Abrams, Esquire.

CONCLUSIONS OF LAW

7. The Town is hereby authorized to file a Foreclosure of Fines and Liens/Money Judgment in accordance with Fla. Stat. 162.09 (3).

ORDER

8. THE TOWN'S NOTICE OF FORECLOSURE/MONEY JUDGMENT IS HEREBY GRANTED, SUBJECT TO THE TOWN RECORDING A CERTIFIED COPY OF THE ORDER IMPOSING A FINE IN THE PUBLIC RECORDS AND IT SHALL BE ENTITLED TO FILE A FORECLOSURE/MONEY JUDGMENT ACTION AFTER THREE MONTHS FROM THE RECORDING AND FILING OF SUCH LIEN AND WHICH REMAINS UNPAID. SEE FLA. STAT. 162.09 (3).

9. THE SPECIAL MAGISTRATE RESERVES JURISDICTION TO ENTER SUCH FURTHER ORDERS AS ARE NECESSARY AND PROPER.

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[1]Florida law has held that code violations and liens "run with the land." See *Henley v. MacDonald*, 971 So. 2d 998, 1000 (Fla. Dist. Ct. App. 2008) [33 Fla. L. Weekly D198c]; *Monroe Cty. v. Whispering Pines Assocs*., 697 So. 2d 873, 875 (Fla. Dist. Ct. App. 1997) [22 Fla. L. Weekly D1434a]; see *City of Gainesville Code Enf't Bd. v. Lewis*, 536 So. 2d 1148, 1150 (Fla. Dist. Ct. App. 1988).

[2]By Quit Claim Deed dated October 4, 2023, this individual became the owner of the subject real property. The subject real property is not now, nor has it been homestead real property during their time of ownership.

* * *

Judges—Judicial Ethics Advisory Committee—Testimony—Judge may testify at Florida Bar admission hearing if subpoenaed

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2025-02. Date of Issue: February 6, 2025.

ISSUE

May a judge testify at a Florida Bar admission hearing if subpoenaed by a prior intern?

ANSWER: Yes. If subpoenaed, a judge must follow the law and appear under the subpoena.

FACTS

In the past, a legal intern worked with the inquiring judge. The intern was denied admission or reinstatement to the Florida Bar. The Florida Bar found that the intern was not truthful about the circumstances of her termination with a prior employer at a law firm and that

she was financially irresponsible. The intern is appealing the decision and wants to call the inquiring judge as a witness at the hearing.

The inquiring judge seeks guidance on whether a judge can testify on behalf of a prior intern at a hearing before The Florida Bar.

DISCUSSION

This Committee has written several times about when a judge may testify in a variety of proceedings. Canons 2A and B of the Florida Code of Judicial Conduct provides guidance on this issue.

Canon 2A provides that a judge shall respect and comply with the law and shall act in a manner that promotes public confidence in the judiciary. Canon 2B provides that a judge shall not lend the prestige of judicial office to advance the private interest of others. It also states that a judge shall not voluntarily testify as a character witness. The Commentary to Canon 2A and 2B explain that a judge must follow the law and allows a judge to testify if properly subpoenaed. Lastly, the Commentary advises judges to discourage a party from requiring a judge to testify as a character witness.

As indicated, the Committee has written several opinions involving the testimony of judges. In JEAC Op. 2024-09 [32 Fla. L. Weekly Supp. 267a], the Committee concluded a judge could testify, if duly subpoenaed, in a perjury case where the judge presided over the underlying case. That said, the Committee was divided as to whether the judge should testify about the weight and impact of the testimony in the underlying case. The Committee ultimately opined that the judge should not provide that opinion testimony. Additionally, in JEAC Op. 2021-13 [29 Fla. L. Weekly Supp. 489a], the Committee explained that a judge is permitted to provide a sworn statement pursuant to a written request by law enforcement investigating an incident in the judge's trial.

Additionally, in JEAC Op. 1986-10, the Committee responded to a nearly identical request. In that opinion, the inquiring judge asked "under what circumstances [the judge] may appear on behalf of a suspended Florida Bar member who is seeking reinstatement." The Committee responded that "[a]ll members agree that you may respond to an official inquiry or request from the Florida Bar, whereas you cannot do so with respect to an inquiry or request from the past member. You may also respond to a subpoena issued for the aforementioned purposes."

Similarly, in JEAC Op. 1991-05, the inquiring judge asked whether the judge could provide testimony to the Florida Board of Bar Examiners. The Committee concluded the inquiring judge "the proposed conduct is proscribed by Canon 2B if done voluntarily, but is permitted if done in response to a subpoena or an official inquiry or invitation from the Board of Bar Examiners."

Finally, in in JEAC Op. 1982-15, the Committee concluded that a judge could not voluntarily "furnish favorable information on behalf of an individual" seeking admission to the Florida Bar. Consistent with that opinion we explained that "that Canon 2(B) precludes a judge from submitting character letters or affidavits on behalf of a person involved in a Bar disciplinary proceeding." Fla. JEAC Op. 2004-22 [11 Fla. L. Weekly Supp. 761a]. But in that same opinion we concluded that "it is also clear that a judge may testify, pursuant to subpoena, as a character witness." *Id.*

Like the earlier opinions, here a prior intern is asking the inquiring judge to testify about the intern's performance during the internship. First, the Canons require a judge to discourage anyone from calling them as character witness. As the inquiring judge has done, the inquiring judge was prohibited from voluntarily testifying in the proceeding. That said, if subpoenaed to testify, the inquiring judge must follow the law and appear as requested.

REFERENCES

Fla. Code Jud. Conduct, Canon 2A and 2B

Fla. JEAC Ops. 2024-09 [32 Fla. L. Weekly Supp. 267a], 2021-13 [29 Fla. L. Weekly Supp. 489a], 2004-22 [11 Fla. L. Weekly Supp. 761a], 1991-05, and 1986-10, 1982-15.

* * *