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FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 65-114

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CRIMINAL LAW—COMPETENCY TO STAND TRIAL—RESTORATION OF COMPETENCY—SUBSTANTIAL PROBABILITY. Where no efforts at competency restoration have been undertaken, a court does not have to make restorability findings after an initial determination of incompetency before ordering that an incarcerated defendant receive restoration treatment in jail. Before ordering that a defendant receive competency restoration training in jail, a court must determine whether appropriate treatment is available at the jail and implement procedures to periodically review the defendant's condition. The circuit court order included an extensive discussion of Rule 3.212.** *STATE v. BUSH. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed March 7, 2024. Full Text at Circuit Courts-Original Section, page 85a.*

- **INSURANCE—PERSONAL INJURY PROTECTION—DEMAND LETTER. The language of section 627.736(10)(b)3. requires that a presuit demand letter include an itemized statement specifying "each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The statute further provides that "[a] completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement." Forms which meet the statutory requirements include "a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office and adopted by the commission for purposes of this paragraph." The county court judge concluded that the ledger attached to a medical provider's demand letter in the case before the court did not satisfy this requirement. Moreover, the ledger was noncompliant because it reflected charges in excess of that permitted by the PIP statute.** *MARGATE CHIROPRACTIC CLINIC, INC. v. ALLSTATE FIRE & CASUALTY INSURANCE COMPANY. County Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed April 1, 2024. Full Text at County Courts Section, page 101a.*

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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.
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CO	County Court
M	Miscellaneous Reports

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CIRCUIT COURTS—APPELLATE

Municipal corporations—Pensions—Suspension or termination of benefits—Appeals—Certiorari—Because section 112.66(5) provides former city officials a valid method of review of decision by administrative committee and city commission to suspend all pension compensation payments through civil action, former officials may not seek redress through petition for writ of certiorari—Even absent a statute prescribing civil action as sole method of review, certiorari review would not be available to former officials because action of committee and commission was legislative, not quasi-judicial

PEDRO CABRERA, SANDRA RUIZ, JUAN CARLOS BERMUDEZ, and MICHAEL DIPIETRO, Petitioners, v. ADMINISTRATIVE COMMITTEE, CITY OF DORAL CITY ELECTED OFFICIALS RETIREMENT PLAN, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-000037-AP-01. April 3, 2024. An Appeal from a May 1, 2023 decision of the Respondent. Counsel: Jose Javier Rodriguez, Robert Sugarman, and Pedro Herrera, for Petitioners. Christopher J. Stearns and Hudson C. Gill, for Respondent.

(Before TRAWICK, BEOVIDES, and WATSON, JJ.)

(WATSON, J.)

Introduction

Petitioners' Verified Petition for Certiorari Review challenges a May 1, 2023 decision by the Administrative Committee (the "Committee"), City of Doral City Elected Officials Retirement Plan (the "Plan") to suspend all pension compensation payments under the Plan effective immediately and to suspend all payments of health insurance and life insurance premiums effective June 30, 2023. Petitioners ask this Court to order the Committee to "take corrective action by setting aside the termination of Petitioners' benefits, paying benefits withheld to date with interest and restoring their benefit payments." Pet. at 8, 12.

After review of the parties' briefs and the record, and with the benefit of oral argument, we deny the Petition.

Background

On February 10, 2021, the City of Doral City Council (the "City" or the "Council") passed Ordinance Number 2021-02, creating the Plan and the Committee to administer it.

The Plan provided pension benefits, death benefits in the form of a life insurance policy, and a credit toward the cost of health insurance to former City of Doral elected officials who serve at least two full terms of office or for a period of eight years, who had left office, and who applied for benefits after reaching the age of 60. The Plan provided that qualifying individuals were entitled to a pension equal to 50% of the average of their last 3 years of compensation (salary and any additional emoluments) and those who served 12 or more years were entitled to a pension equal to 100% of the average of their last 3 years of compensation, plus health and life insurance benefits.

Petitioners are Pedro Cabrera, former elected vice-mayor and a former elected councilperson; Sandra Ruiz, former elected vice-mayor and former elected councilperson; Juan Carlos Bermudez, former elected mayor and former elected councilperson; and Michael DiPietro, former elected vice-mayor and former elected councilperson. All Petitioners met the criteria to receive benefits under the Plan and had begun to do so.

Respondent is the Committee created by the City Council to administer the Plan.

Florida law required that, prior to adopting the Plan, the City perform an actuarial review of the Plan and issue a corresponding statement of actuarial impact of the Plan, certifying that the Plan and its funding complied with both Article X, Section 14 of the Florida Constitution and section 112.64 of the Florida Statutes. The City was also required, under section 112.3(3), to provide a copy of the actuarial impact statement to the Florida Division of Retirement. The City failed to comply with these pre-adoption requirements. Resp. at 6; Pet. App. at 33.

On February 8, 2023, the Council unanimously authorized retaining outside counsel to evaluate the validity of the Plan. Resp. App. at 15-17 (Resolution No. 23-28). On April 4, 2023, outside counsel issued its summary of initial findings, concluding that many of the pre-adoption requirements applicable to the Plan were not complied with and many of the post-adoption requirements applicable to the administration and funding of the Plan had also not been adhered to. Pet. App. at 31-37; Resp. App. at 25-31.

At the April 23, 2023, public Council meeting, outside counsel's findings were presented to the Council. In response, the Council unanimously voted to recommend that the Committee "take action to suspend payments under the Plan, and to direct the City Attorney to prepare an ordinance repealing the Plan." Resp. App. at 71 (Ordinance No. 2023-15 at 2).

On May 1, 2023, the Committee, at a duly noticed public meeting, reviewed outside counsel's findings and found that that the manner in which the Plan was adopted and funded violated Section 14, Article X of the Florida Constitution and Part VII, Chapter 112, of Florida Statutes. The Committee further found that since its adoption, the Plan had not been administered or funded in accordance with Florida law. Accordingly, the Committee voted to suspend all pension compensation payments under the Plan effective immediately and to suspend all payments of health insurance and life insurance premiums effective June 30, 2023. Petitioners received notices of suspension of benefits from the City Attorney on behalf of the Committee.

On May 10, 2023, the City Council held a public meeting and considered retroactively repealing the Ordinance which had created the Plan and Committee through proposed Ordinance 2023-13 (the "Repealing Ordinance"). On June 14, 2023, the City Council held a second public meeting and adopted the Repealing Ordinance. The agendas for both meetings show that an opportunity for public comments was provided. Resp. App. at 33, 51.

The Parties' Arguments

Petitioners argue that the Committee's challenged decision was quasi-judicial, and that this Court should find that procedural due process was not accorded to Petitioners and that the essential requirements of the law were not observed. Pet. at 8. Petitioners claim that they were not given notice of the May 1, 2023 meeting and were not given an opportunity to be heard on the Plan suspension. Pet. at 9. Petitioners also claim that the Committee was not empowered to suspend Petitioners' benefits. Pet. at 9-10.

Respondent contends that (1) section 112.66(5) of the Florida statutes limits any challenge to the Committee decision to a direct civil action, (2) the Committee decision was not quasi-judicial and thus not subject to certiorari review, and (3) the Petitioners' due process rights were not violated because the meeting at which the challenged Committee decision was adopted was noticed and open to the public. Pet. at 11-18.

Legal Analysis

1. Section 112.66(5) Prescribes the Sole Method of Review

Administrative action, whether quasi-judicial or quasi-legislative, must be challenged in the manner, if any, provided for by a governing statute. The Florida Supreme Court has explained that "[t]he initial problem involved in deciding the appropriate method of obtaining relief against administrative action is to look first to the statute under which the administrative agency operates." *Teston v. City of Tampa,* 143 So. 2d 473, 475 (Fla. 1962). "If a valid method of review is there

prescribed it should be followed." *Id.* Certiorari review is permitted only "[i]n the absence of specific valid statutory appellate procedures to review the particular order . . . ." *Id.* at 476.

Section 112.66(5), Florida Statutes (2023) provides:

> A civil action may be brought by a member or beneficiary of a retirement system or plan to recover benefits due to him or her under the terms of his or her retirement system or plan, to enforce the member's or beneficiary's rights, or to clarify his or her rights to future benefits under the terms of the retirement system or plan.

Section 112.66(5) thus provides Petitioners with a valid method of review of the Committee decision they challenge through a civil action. Indeed, such a civil action seeking to enforce alleged rights and benefits under the Plan has been brought by Petitioners and is ongoing. *See Cabrera, Ruiz, Bermudez, and DiPietro v. City of Doral, Florida; City of Doral City Elected Officials Retirement Plan; and Administrative Committee, City of Doral City Elected Officials Retirement Plan,* Case No. 2023-18115-CA-01 (Fla. 11th Jud. Cir.) (filed June 13, 2023). Petitioners must follow that method of review, and not through a petition for writ of certiorari brought in this Court.

2. The Challenged Action Was Not Quasi-Judicial, so Certiorari Review Does Not Lie

Even absent a statute prescribing a civil action as the sole method of review, certiorari review would not be available here. Petitioners invoke this Court's jurisdiction for certiorari review of "quasi-judicial action of agencies, boards, and commissions of local government . . . ." Fla. R. App. P. 9.100(c)(2); *see also* Fla. R. App. P. 9.030(c)(3), 9.190(b)(3). If the Committee's challenged action is "quad-judicial . . . then it is subject to review by certiorari." *Teston,* 143 So. 2d at 476; *De Groot v. Sheffield,* 95 So. 2d 912, 915-16 (Fla. 1957) ("certiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasi-judicial proceeding"). Respondent on the other hand contends that the actions of both the Committee and the City Commission were legislative and therefore not subject to certiorari review.

To determine whether the Committee and Commission's actions were legislative or quasi-judicial, we look to its nature. "Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy." *Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993). Building on this key distinction, Florida courts have identified four characteristics of a quasi-judicial decision:

> (1) quasi-judicial action results in the application of a general rule of policy, whereas legislative action formulates policy;
>
> (2) a quasi-judicial decision has an impact on a limited number of persons or property owners and on identifiable parties and interests, while a legislative action is open-ended and affects a broad class of individuals or situations;
>
> (3) a quasi-judicial decision is contingent on facts arrived at from distinct alternatives presented at a hearing, while a legislative action requires no basis in fact finding at a hearing;
>
> and
>
> (4) a quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions, while a legislative act prescribes what the rule or requirement shall be with respect to future acts.

Miami-Dade Cty. v. City of Miami, 315 So. 3d 115 120 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D19a] (internal quotation marks omitted).

We apply those factors here. First, the challenged Committee action directed that *all* pension compensation payments and *all* other benefits under the Plan would be suspended. As a result, this decision established a "general rule or policy," not the "application of a general rule or policy to *specific* individuals." *Snyder,* 627 So. 2d at 471. (emphasis added). Second, the action affected a broad class of individuals (*i.e.,* all beneficiaries under the Plan). Third, the suspension decision was not contingent on fact-finding arrived at from distinct alternatives presented at a hearing. All of the beneficiaries here were similarly situated for purposes of the Plan. No individualized fact-finding was necessary or performed. Fourth, the decision prescribed what the rule or requirement was to be with respect to future acts. It was not backward-looking. No *further* payments under the Plan would be made.

In *Snyder,* the Florida Supreme Court applied a similar analysis and found that the action at issue there affected a large number of people and was thus legislative in nature. 627 So.2d at 474. Here, the actions of the Committee and the Commission involved a comprehensive change of policy affecting the entire beneficiary population. The Committee's action was legislative, not quasi-judicial. It is therefore no subject to certiorari review.

Conclusion

There are two independent bases for denying the Petition. First, Section 112.66(5) requires that Petitioners' challenge to the Committee decision be made only in a direct civil action. Second, the Committee decision is not subject to certiorari review because it was not quasi-judicial. Having so concluded, we need not reach the due process claim.

The Petition for Writ of Certiorari is DENIED. (TRAWICK and BEOVIDES, JJ., concur.)

* * *

Municipal corporations—Historic preservation—Changes to property—Appeals—Certiorari—Challenge to decision of special magistrate affirming city historic preservation board's approval of application for certificate of appropriateness for second amended proposal to demolish, renovate, and build new additions to applicant's property is denied—Standing—Petitioners, as affected persons who own property within 375 feet of applicant's property, were authorized by city code to file appeal of board's decision to special magistrate and have special injury affording them standing to challenge magistrate's decision—Due process—Petitioners were not denied procedural due process by fact that revised plans were not resubmitted for staff review before issuance of COA and petitioners were not afforded a new hearing to review plans incorporating HPB-imposed conditions of approval that increased compatibility of project with neighborhood—Reviewing court declines to reweigh HPB determination that there was sufficient information to evaluate second amended proposal as modified by conditions of approval—No merit to argument that changes characterized as conditions of approval were, in fact, substantial redesign requiring quasi-judicial process where the conditions were required to effectuate COA criteria—HPB approval of second amended proposal with conditions and magistrate's conclusion that modifications increased compatibility of project are supported by competent substantial evidence

SETAI RESORT & RESIDENCES CONDOMINIUM ASSOCIATION, INC., a Florida Not for Profit Corporation; and DR. STEPHEN SOLOWAY, an individual, Petitioners, v. SHORE CLUB PROPERTY OWNER, LLC., a Foreign Limited Liability Company; and THE CITY OF MIAMI BEACH, a Florida municipal corporation, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-13 AP 01. April 11, 2024. On Petition for Writ of Certiorari from the Special Magistrate of the Historic Preservation Board's affirmance of an order from the City of Miami Beach Historic Preservation Board. Counsel: Kent Harrison Robbins, the Law Offices of Kent Harrison Robbins, P.A., for Setai Resort & Residences Condominium Association, Inc., and Dr. Stephen Soloway, Petitioners. Rafael A. Paz, City Attorney, Nicholas E. Kallergis, Deputy City Attorney, and Freddi R. Mack, Senior Assistant City Attorney, City Attorney's Office, for City of Miami Beach, Respondent. Michael W. Larkin and Nicholas J. Rodriguez, Bercow Radell Fernandez Larkin & Tapanes, PLLC, for Shore Club Property Owner, LLC, Respondent. Neisen O. Kasdin, Joni Armstrong Coffey, and Kristofer D. Machado, Akerman LLP, for Shore Club Property Owner, LLC, Respondent.

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

OPINION

(SANTOVENIA, J.)

Factual Background

Petitioner Setai Resort & Residences Condominium Association, Inc., ("Association" or "Setai") is the owner of the Setai Condominium property located at 2001 Collins Avenue, Miami Beach. Petitioner Dr. Stephen Soloway ("Dr. Soloway") owns residential unit 3701 at the Setai (collectively, the Association and Dr. Soloway are known as the "Petitioners").

Respondent, the City of Miami Beach's ("City") Historic Preservation Board reviews, *inter alia,* certificates of appropriateness in the City's designated historic districts. Respondent Shore Club Property Owner, LLC, ("Applicant" or "Shore Club") is the owner of property located at 1901 Collins Avenue in the City ("Property"). The Setai and Shore Club are located across the street from each other.

The Shore Club filed a Board Hearing Application ("Application") requesting a certificate of appropriateness ("COA") for the Property with the City of Miami Beach Historic Preservation Board ("HPB"), and the HPB held a hearing to consider the Application. The project for the Property envisions the demolition of, renovation of and new additions to the Shore Club ("Project").[1] The February 8, 2022, hearing was deferred at the request of the Applicant to March 8, 2022 in order to submit revised plans in response to HPB comment. On March 8, 2022, a second hearing was held by the HPB. The HPB discussed the Application, accepted testimony, denied the Application, by a 3-3 vote, and then continued the hearing to May 10, 2022, to revise plans pursuant to staff and HPB's comments.

The Shore Club revised its plans on April 18, 2022, and presented a second submittal of those revised plans ("Second Amended Proposal" or "Proffered Plans") before the May 10, 2022 HPB hearing. At that hearing, the HPB approved the Shore Club's Application for a COA.[2] Petitioners' rehearing request was denied. Petitioners then filed a petition for writ of certiorari to the HPB Special Magistrate requesting to quash the HPB's decision. The Special Magistrate affirmed the HPB decision, and Petitioner filed a Petition for Writ of Certiorari to this Court.

Standard of Review

On a petition for writ of certiorari, this Court reviews a local government's quasi-judicial orders under a three-part review that asks whether: (a) the procedural due process requirements were met; (b) the essential requirements of law have been observed; and (c) the findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Standing

Respondents argue that Petitioners were obligated to demonstrate the factual basis for their special injury conferring standing at the Special Magistrate hearing. *Renard v. Dade Cnty.,* 261 So. 2d 832, 837 (Fla. 1972) (holding that to maintain a judicial challenge to a zoning action, a party must demonstrate that the action will cause him or her to suffer a "special injury", i.e., an adverse impact upon a protected and legally sufficient interest.)

The Association is a condominium association regulated by Fla. Stat. Section 718.111(3)(b), which provides that such an association may "[i]nstitute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners. ." Further, Rule 1.221, Fla. R. Civ. P. similarly provides that a condominium association ". . .may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members."

Dr. Soloway is the Association President and a unit owner at the Setai. He appeared through counsel and made an extensive record through testimony of the condominium manager and the introduction of evidence. Moreover, written objections were submitted by the Setai and Dr. Soloway prior to the hearing.

In support of their "special injury", Petitioners argue that they have a common ownership interest in the Setai property that is the immediate neighbor to the Shore Club. They further contend that the HPB review process requires consideration of the adverse impact of new construction on neighboring properties. Thus, the Setai property and Petitioners as its owners would suffer a "special injury" should the HPB review process and review criteria not be considered.

Section 118-9(c)(3)(B)(iii), Rehearing and appeal procedures of the City of Miami Beach Code ("Code") states:

> (3) Eligible appeals of the design review board or historic preservation board shall be filed in accordance with the process as outlined in subsections A through D below:
>
> . . .
>
> B. Eligible parties to file an application for an appeal are limited to the following:
>
> . . .
>
> (iii) An affected person, which for purposes of this section shall mean either a person owning property within 375 feet of the applicant's project reviewed by the board, or a person that appeared before the board (directly or represented by counsel) and whose appearance is confirmed in the record of the board's public hearing(s) for such project;

We find that Petitioners are authorized by §118-9(c)(3)(B)(iii) of the Code to file an appeal of the decision of the HPB to the Special Magistrate as an "affected person" who owns property within 375 feet of the Applicants' Property and who "appeared at the board" through counsel and representatives at the hearing before the HPB. Thus, Petitioners have standing due to their special injury.

Similarly, applicable case law requires that in evaluating standing, ". . .a court must consider 'the proximity of [the party's] property to the property to be zoned or rezoned, the character of the neighborhood, . . . and the type of change proposed.' " *Renard, supra.,* 261 So. 2d at 837. Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc., v. Miami-Dade Cnty.,* 355 So. 3d 534, 540 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D224a]; *see Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986) (holding owner of single-family home directly across from rezoned property had standing to challenge proposed rezoning); see also *Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. 3d DCA 1959) ("Plaintiffs as abutting home owners [sic] were entitled to maintain the suit challenging the propriety, authority for and validity of the ordinance granting the variance."). 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." *Save Calusa*, *supra.*, 355 So. 3d at 540 (citing *Renard*, 261 So. 2d at 837); *Solares v. City of Miami*, 166 So. 3d 887, 889 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a] ("cases recognizing the standing of property owners and residents to challenge zoning decisions do not create an exception to the special injury requirement, they simply identify a type of special injury").

We thus hold that the Petitioners have standing to challenge the order of the Special Magistrate.

We note that we similarly found that the Setai had standing in Eleventh Judicial Circuit Court Appellate Division Case Nos. 2021-36-AP-01 and 2022-36-AP-01, two consolidated cases wherein the Setai filed a lawsuit against its other neighbor, BHI Miami Limited

Corp., and the City of Miami Beach.

Procedural Due Process

Generally, "due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure *before* judgment is rendered." *Richard v. Bank of America, N.A.*, 258 So. 3d 485, 489 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2531a] (citation omitted).

Petitioners argue that they were not afforded procedural due process because the HPB approved a redesign of the Project without Code-required plans and elevations of the redesign. Petitioners further contend that the Project was approved without a Code required staff review, analysis and recommendation, and that the HPB impermissibly delegated its duty to evaluate and determine compliance with the COA criteria to staff.

Section 118-561(b) of the Code states:

> Certificate of appropriateness conditions and safeguards. In granting a certificate of appropriateness, the historic preservation board and the planning department may prescribe appropriate conditions and safeguards, either as part of a written order or on approved plans. Violation of such conditions and safeguards, when made a part of the terms under which the certificate of appropriateness is granted, shall be deemed a violation of these land development regulations.

Section 118-564(d) of the Code states:

> An approved certificate of appropriateness, together with any conditions or limitations imposed by the board, shall be in written form and attached to the site plan and/or the schematics submitted as part of the applications. Copies of the certificate shall be kept on file with the board and shall be transmitted to the building official. The applicant shall receive a copy of the certificate of appropriateness.

The Special Magistrate agreed with the Respondents that there was no due process violation and stated in her Order: "Code Section 118-561(b) empowers the HPB to attach conditions at the same time it grants the COA." The Special Magistrate Order also explained that "Code Section 118-564(d) also empowers the HPB to attach written conditions to the COA without the need for another hearing." The Special Magistrate further held that the Petitioners have "no due process right to review revised plans at still another hearing when the Proffered Conditions reduced the size and length, and thus the intensity, of the Project, increasing its compatibility with the neighborhood." The Court finds that § 118-564(d) of the Code does not require HPB-imposed conditions to be included with the written application materials prior to receiving HPB approval.

Section 118-564(a)(3) of the Code states that "[t]he historic preservation board and planning department shall review plans based upon the below stated criteria and recommendations of the planning department may include, but not be limited to, comments from the building department".[3] Respondents also correctly cite §§ 118-562(b), 118-561(b) and 118-564(d) of the Code (*see supra*) for their argument that the Second Revised Plans did not need to go back to the staff for review. We find Respondents' argument compelling.

Petitioners next argue that the public was not provided notice and opportunity to submit objections, and that there was no evidentiary hearing. Petitioners proffer no legal authority to support their contention that the public need be given notice and an opportunity to submit objections to new plans. We find that Petitioners had ample notice of the hearings and the nature of the Application, were given multiple opportunities to be heard about the proposals (which reduced the intensity and massing of the project beyond what was noticed and supported by City staff). We believe that the Special Magistrate was correct to reject the Petitioners' argument.

The approval of the Second Amended Proposal with conditions did not deprive Petitioners of procedural due process. Thus, procedural due process requirements were met.

Essential Requirements of Law

Having found that Petitioners were accorded procedural due process, the second prong of the test to be considered is whether the essential requirements of law were followed. In *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a], the Supreme Court held that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, to warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Id.* at 527 (citation omitted).

Petitioners argue that the HPB failed to follow the essential requirements of law when it approved an incomplete application for a COA, and the Special Magistrate affirmed the decision. Respondents correctly contend that the HPB's decision to approve the COA is entitled to great deference. "It is axiomatic that 'zoning or rezoning is the function of the appropriate zoning authority and not the courts' " and that reviewing authorities on appeal "are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives." *Norwood-Norland Homeowners' Ass'n, Inc. v. Dade Cnty.*, 511 So. 2d 1009, 1012 (Fla. 3d DCA 1987) (citation omitted).

The HPB Order dated May 10, 2022, stated, in part:

> **1. Certificate of Appropriateness**
>
> C. The project would be consistent with the criteria and requirements of section 118-564 and 113-50(a) if the following conditions are met:
>
> 1g. The first eight (8) levels of the new tower addition shall be reduced in length by 30'-0" from the east, in a manner to be reviewed and approved by staff consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board.
>
> h. The maximum floor plate size for the portion of the new tower addition that exceeds 50'-0" in height shall be 15,000 square feet per floor in accordance with Section 142-246(e)(2) of the City Code.

Petitioners request this Court to reweigh the determination of the HPB that there was enough information to evaluate the Second Amended Proposal as modified by the conditions of approval. We decline to do so and will not substitute our judgment for that of the HBP in its effort to achieve a legitimate objective. *See Norwood-Norland Homeowners' Ass'n, Inc.*, *supra.*, 511 So. 2d at 1012.

Petitioners next argue that the Shore Club's proposed modification, later identified as conditions (g) and (h) in the May 10, 2022 HPB Order, was a substantial redesign that changed the site plan and architectural elevations. Petitioners assert that the proffered "modifications" to the project were renamed by Staff as "conditions." Petitioners maintain that these conditions which modified the plans specified new dimensions for the floor plates; substantially modified the elevations of the building, laterally shifting the building and footprint 30 feet to the west; substantially modified the rear setback; and modified the site plan. Petitioners contend that by deeming those "modifications" as "conditions," and considering those modifications as "concessions," the Special Magistrate erred in approving an HPB Order that did not comply with the City of Miami Beach COA review procedures and the City's ordinance requiring a quasi-judicial process as to those modifications.

Respondents correctly argue that the COA requires them to reduce the length of the first (8) levels of the proposed addition by 30 feet from the east, and floors numbered 5 and up do not exceed 15,000 sq. feet. We find that the conditions of approval in the COA Order are definite technical specifications clearly intended to effectuate the COA criteria as interpreted by the HPB members. The Special Magistrate correctly concluded that there is no discretion involved in carrying out these conditions, only non-discretionary ministerial

adjustments to specific technical elements.

Petitioners submitted a chart (Petition, p. 20) that purports to be a compilation of "data from the Second Resubmittal Plans (A. 000733) and the addition of the dimensions of the floor plate specified in the 'conditions' that are part of the HPB Order." Petitioners argue that over 23,000 square feet were being added to the upper floors of the new building addition, and on the higher floors the square footage of the floor plates increased by as much as 29%. In fact, this chart assumes that every floor above 50 feet would be built to 15,000 square feet. There is no record evidence of this. The chart is not only directly refuted by the testimony of Respondents' architect, but also by the testimony of the City and staff.

The City's professional staff prepared a detailed report and recommendation ("Staff Report"). The Staff Report noted: "[t]he applicant was previously requesting approval for floor plate sizes that range between 16,280 sq. ft. and 19,177 sq. ft. for levels 5 through 12. The applicant has submitted revised plans with all floor plates except for two levels within the 15,000 sq. ft and is currently requesting a floor plate size of 15,918 sq. ft. for levels 6 and 7 only." Moreover, the second revised plans (A. 733) state that the square foot area will decrease. Even assuming *arguendo* that the square foot area of floors above 50 feet would increase to 20,000 square feet, Respondents would still be compliant with the code.

We find that the Special Magistrate observed the essential requirements of the law.

Competent substantial evidence

"Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Florida Dep't of Highway Safety and Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a].

Petitioners argue that there was a lack of competent substantial evidence. Specifically, at the May 10, 2022 hearing, Petitioners contend that no competent substantial evidence was introduced after the redesign was first presented; accordingly, the May HPB Order that included that redesign is unsupported by competent substantial evidence.

Staff Reports alone constitute competent substantial evidence. *City of Hialeah Gardens v. Miami-Dade Charter Found. Inc.,* 857 So. 2d 202, 205 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1686a]. *See also Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.*, 128 So. 3d 19, 26-27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c]. In *Euroamerican Grp. Inc. v. City of Miami Beach,* 19 Fla. L. Weekly Supp. 310b (Fla. 11th Cir. Ct. Jan. 25, 2012), this Court held that oral testimony as well as staff reports and review constitute competent substantial evidence.

Competent substantial evidence supports the HPB's approval of the Second Amended Proposal with the conditions proffered at the May 10th hearing. Staff's recommendation of approval and analysis, both in writing and through testimony at the March 8th and May 10th HPB hearings, serves as competent substantial evidence to support the HPB's decision. Moreover, the testimony of Applicant's expert consultants, letters of intent, submitted plans and presentations constitute competent substantial evidence. Finally, testimony by members of the public, including the former Chairman of the HPB and two former members of the HPB, constitutes competent substantial evidence and confirms that the Project satisfies the COA criteria. Other testimony at the hearing by representatives from the nearby Nautilus Hotel, the Lincoln Road Business Improvement District, and the Betsy Hotel constitutes evidence that likewise supports the decision of the HBP.

Petitioners next assert that there was no competent substantial evidence to support the Special Magistrate's conclusion that the modifications' "proffered conditions" reduced the size and intensity of the Project and, therefore, there is no competent substantial evidence to support the Special Magistrate's conclusion that the modifications increased the compatibility of the Project.

The Special Magistrate found, and we agree, that the "HPB's expert Staff had advised it the design changes were specific and measurable, minor in nature and were in sufficient detail for staff to implement and enforce." Furthermore, the City's Historic Preservation and Architecture Officer Deborah Tackett testified that the Proffered Conditions were "crystal clear." Ms. Tackett further testified that the Proffered Conditions met the HPB criteria and the concerns expressed at the March 8, 2022, HPB meeting.

Thus, we find that the Special Magistrate correctly determined that substantial competent evidence supported the HPB's Order.

Finally, we note that at the appellate oral argument, Petitioners stated that they were abandoning their argument pertaining to off-street loading space requirements near the Setai. Thus, we need not address that issue as it is no longer before us.

Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari is **DENIED.** (TRAWICK and ARECES, R., JJ., concur.)

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[1]The Application requested a Certificate of Appropriateness for the partial demolition and renovation of two buildings on the site: the total demolition of the two buildings, the construction of two new additions, and landscape and hardscape modifications.

[2]At that hearing, the Shore Club submitted a revised proposal which reduced the floor area of the proposed addition by 48,500 feet and preserved and restored an adjacent building, the historic Grossman annex.

[3]The criteria referenced above are as follows:

a.The location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping structures, signs, and lighting and screening devices.

b.The dimensions of all buildings, structures, setbacks, parking spaces, floor area ratio, height, lot coverage and any other information that may be reasonably necessary to determine compliance with the requirements of the underlying zoning district, and any applicable overlays, for a particular application or project.

c.The color, design, surface finishes and selection of landscape materials and architectural elements of the exterior of all buildings and structures and primary public interior areas for developments requiring a building permit in areas of the city identified in section 118-503.

d.The proposed structure, and/or additions to an existing structure are appropriate to and compatible with the environment and adjacent structures, and enhance the appearance of the surrounding properties, or the purposes for which the district was created.

e.The design and layout of the proposed site plan, as well as all new and existing buildings and public interior spaces shall be reviewed so as to provide an efficient arrangement of land uses. Particular attention shall be given to safety, crime prevention and fire protection, relationship to the surrounding neighborhood, impact on preserving historic character of the neighborhood and district, contiguous and adjacent buildings and lands, pedestrian sight lines and view corridors.

f.Pedestrian and vehicular traffic movement within and adjacent to the site shall be reviewed to ensure that clearly defined, segregated pedestrian access to the site and all buildings is provided for and that any driveways and parking spaces are usable, safely and conveniently arranged and have a minimal impact on pedestrian circulation throughout the site. Access to the site from adjacent roads shall be designed so as to interfere as little as possible with vehicular traffic flow on these roads and pedestrian movement onto and within the site, as well as permit both pedestrians and vehicles a safe ingress and egress to the site.

g.Lighting shall be reviewed to ensure safe movement of persons and vehicles and reflection on public property for security purposes and to minimize glare and reflection on adjacent properties and consistent with a city master plan, where applicable.

h.Landscape and paving materials shall be reviewed to ensure an adequate relationship with and enhancement of the overall site plan design.

i.Buffering materials shall be reviewed to ensure that headlights of vehicles, noise, and light from structures are adequately shielded from public view, adjacent properties and pedestrian areas.

j.Any proposed new structure shall have an orientation and massing which is sensitive to and compatible with the building site and surrounding area and which creates or maintains important view corridor(s).

k.All buildings shall have, to the greatest extent possible, space in that part of the ground floor fronting a sidewalk, street or streets which is to be occupied for residential or commercial uses; likewise, the upper floors of the pedestal portion of the proposed building fronting a sidewalk street, or streets shall have residential or commercial spaces, or shall have the appearance of being a residential or commercial space or shall have an architectural treatment which shall buffer the appearance of a parking structure from the surrounding area and is integrated with the overall appearance of the project.

l.All buildings shall have an appropriate and fully integrated rooftop architectural treatment which substantially screens all mechanical equipment, stairs and elevator towers.

m.Any addition on a building site shall be designed, sited and massed in a manner which is sensitive to and compatible with the existing improvement(s).

n.All portions of a project fronting a street or sidewalk shall incorporate an amount of transparency at the first level necessary to achieve pedestrian compatibility.

o.The location, design, screening and buffering of all required service bays, delivery bays, trash and refuse receptacles, as well as trash rooms shall be arranged so as to have a minimal impact on adjacent properties.

p.In addition to the foregoing criteria, subsection [118-]104(6)(t), and the requirements of chapter 104, of the City Code shall apply to the historic preservation board's review of any proposal to place, construct, modify or maintain a wireless communications facility or other over the air radio transmission or radio reception facility in the public rights-of-way.

q.The granting of the variance will result in a structure and site that complies with the sea level rise and resiliency review criteria in chapter 133, article II, as applicable.

(ARECES, R., J., concurring.) I join the Court's Opinion in all respects except its discussion of section 118-9(c)(3)(B)(iii) of the City of Miami Beach Code. It is not necessary to reach the issue of whether a municipality can, by ordinance, dictate to a court of competent jurisdiction which persons or entities do, or do not, have standing to bring an action before a circuit court. For the other reasons mentioned in the Court's Opinion, the Petitioners in this case have standing.

* * *

Municipal corporations—Code enforcement—Noise violation—Evidence—Hearsay—Special magistrate's order upholding violation was not supported by competent substantial evidence where city code directs that code inspector must issue written warning before issuing notice of noise violation unless offending party has already been issued warning within preceding 12 months, and the only evidence of written warning being issued within preceding 12 months was hearsay—Computer records of prior warning could not be admitted under business records exception to hearsay rule where city did not seek to introduce warning as business record

1100 WEST INVESTMENTS, LLC, Appellant, v. CITY OF MIAMI BEACH, FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-000034-AP-01. April 11, 2024. On appeal from a decision of the Special Magistrate of the City of Miami Beach affirming a noise violation issued by the Miami Beach Code Compliance Department. Counsel: James E. Rauh, Greenspoon Marder LLP, for Appellant. Rafael A. Paz, City Attorney, and Woody Clermont, Assistant City Attorney II, City Attorney's Office, for Appellee.

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

OPINION

(DE LA O, Judge.)

Background

This matter is before the Court on an appeal filed by 1100 West Investments, LLC ("Appellant") to quash a Final Order issued by the City of Miami ("Appellee") Beach Code Compliance Department. The Final Order was rendered on May 4, 2023.

On December 9, 2022, Code Compliance Officer Danny Lazo ("Officer Lazo") from the Miami Beach Code Compliance Department responded to 1200 West Avenue, Unit 726, regarding a noise complaint. Officer Lazo met with the complainant, identified as "Andrean." Andrean told Officer Lazo that in his living space, the music was "very low," but when he went to the bedroom the music was "getting louder." Subsequently, Officer Lazo went next door at approximately 9:36 p.m. to 1100 West Avenue, (Appellant's property—Mondrian Hotel). Officer Lazo concluded that the "noise case was valid" and issued a Notice of Violation to 1100 West Avenue for a first offense, pursuant to Section 46-152(b) ("Noise Ordinance") of the City of Miami Beach Code ("Code").

A hearing was held on May 4, 2023. Officer Lazo testified about Andrean's noise complaint and about meeting with Appellant's manager on duty in reference to it. No documents, writings, or other physical objects were introduced into evidence.

The Special Magistrate subsequently found in favor of the Appellee, relying on the testimony of Officer Lazo. Appellant was found to be in violation of Section 46-152(b) and fined a civil penalty of $250. The Special Magistrate determined that there had been a warning previously issued within a one year prior to the Appellant. This appeal followed.

Standard of Review

Where the quasi-judicial decision of a local government is challenged, the Court conducts a "first-tier" certiorari review and evaluates: (1) whether the City observed the essential requirements of the law; (2) whether the City afforded due process; and (3) whether the decision is supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). Appellant challenges only whether there was competent substantial evidence.

Competent substantial evidence

"Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Florida Dep't of Highway Safety and Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a]. The test is whether there exists any competent substantial evidence to support the decisionmaker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Section 46-158 *Enforcement by code inspectors; notice of violation; warning; responsibility to provide current address.*

(b)(2) *Written warnings* states:

> A code inspector *shall* first issue a written warning to immediately cease the violation prior to issuing a notice of violation *unless* one written warning has been issued in the 12 months preceding the date of violation.
>
> The written warning shall be substantially in the same form as the notice of violation as stated in subsection 46-158(a) above. Failure to correct the violation within 15 minutes following the issuance of a written or oral warning shall result in the issuance of a notice of violation pursuant to this article.

City of Miami Beach, Fla. Code. (emphasis added).

A plain reading of the Code leads us to conclude that the existence of a proper written warning served on Appellant no earlier than December 9, 2021, is a material element of a first offense violation of the Noise Ordinance.

Appellant asserts there was a lack of competent substantial evidence that "one written warning ha[d] been issued in the 12 months preceding the date of violation." Appellant correctly argues that unless it had received a written warning within 12 months of December 9, 2022, pursuant to Section 46-158(b)(2), Code, Office Lazo could not issue a violation.

The Special Magistrate relied solely on Officer Lazo's hearsay testimony that Appellant had been warned in writing within the prior year.

The testimony pertaining to the alleged hearsay is as follows:

Mr. Rauh: [Appellant's attorney] Okay. And this case did you issue—did you issue any kind of a written warning that day prior to this?

Inspector Lazo: No, because prior they had already—well, this was the first offense for the noise. Yes, they were warned, the noise kept going. But there was a written offense already in the past for this particular location. So, remember, it carries within that 12-month period.

Mr. Rauh: And do you have a copy of that? It wasn't in your file. So I [inaudible] no warning in your file.

Inspector Lazo: Let me see. It was, the written warning was on 2/12/2022. Issued by Officer Russell.

Mr. Rauh: Yeah. So you didn't issue that? You don't know anything about it? You're weren't (sic) the issuing officer?

Inspector Lazo: No.

Mr. Rauh: Okay So—

Inspector Lazo: I was the issuing officer of the first offense, correct.

Mr. Rauh: I understand, but for the written—for the written warning you alleged that occurred, you weren't the issuing officer. You have no knowledge of it?

Inspector Lazo: No.

Mr. Rauh: Other than the [inaudible]—

Inspector Lazo: No.

Mr. Rauh:—computer screen, right? Okay You don't have a copy?

Mr. Rothstein: [Deputy City Attorney for Miami Beach] I mean, I could give you the case number, but I don't have a copy of it in front of me, no.

(App. App. 6:5-25; 7:1-17)[1]

While hearsay is admissible in administrative hearings, it may only be used for the limited purpose of either explaining or corroborating other evidence. The Third District Court of Appeal has consistently held that "[a]lthough hearsay evidence is admissible in an administrative hearing to corroborate or explain other evidence, it may not be used to support a finding not otherwise supported by competent substantial evidence." *MacPherson v. School Bd. of Monroe Cnty*., 505 So. 2d 682, 684 (Fla. 3d DCA 1987).

The only evidence of the required written warning being issued is Officer Lazo's testimony which he obtained from an unknown source on a computer screen.

Appellee first argues that the prior warning provision in Section 46-158 is a procedural element, which is not part of the substantive elements for determining a noise violation under Section 46-152(b)[2] of the Code. The import of this attempted distinction is unclear to the Court. The Code explicitly directs that a code inspector issue a written warning before issuing a violation, unless the offending party has already been issued a warning within the preceding 12 months.

Appellee next maintains that the testimony regarding the existence of a prior written warning was not offered to establish the truth of the matter. Appellee claims that it was offered instead to show its effect on the listener, Officer Lazo, and his subsequent conduct as to why he procedurally chose to issue a first-time offense rather than another written warning.

Appellee's argument is unpersuasive. Unless it was true that Appellant had received a prior written warning within the preceding 12 months, Officer Lazo could not issue a violation. Therefore, the testimony about a prior warning was, and could only be, offered to prove the truth of the statement—that Appellant had been given a prior written warning within the preceding 12 months.[3]

Appellee argues, in the alternative, that the Special Magistrate could have admitted the testimony regarding computer records based upon the statutory exception contained in Section 90.803(6)(a), Fla. Stat., (business record exception). Maybe, maybe not. It is unknowable because when Appellant objected to the testimony about a prior written warning as hearsay, Appellee did not seek to introduce the alleged prior written warning as a business record, with appropriate notice to the Appellant.

Consequently, the *only* testimony regarding a prior written warning was hearsay with no recognized exception allowing for its admission. Because we conclude there was no competent substantial evidence to support the Final Order, we need not address Appellee's remaining arguments.

We find that there was no competent substantial evidence to support the Department's findings. Accordingly, for the forgoing reasons, the Final Order of the Special Magistrate is **REVERSED**. (TRAWICK and ARECES, R., JJ., concur.)

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[1]("App. App.") stands for Appellant's Appendix, filed on August 28, 2023.

[2]We note that this Court previously found Section 46-152(b) (Noise Ordinance) of the Code to be unconstitutionally vague. *Kwartin v. City of Miami Beach,* No. 2022-10-AP-01, 2024 WL 249280 (Fla. 11th Cir. Ct., January 22, 2024) [31 Fla. L. Weekly Supp 520a].

[3]By contrast, if Officer Lazo received a reprimand for issuing an unlawful violation because there had been no prior written warning within the preceding 12 months, then the hearsay testimony that Officer Southwell had issued a prior warning would be admissible because it would be introduced for the effect it had on Officer Lazo and not to prove that such a prior warning was in fact issued.

* * *

Municipal corporations— Zoning — Variance— Appeals— Certiorari—Challenge to city's approval of variance application to allow redevelopment of two-story condominium into seventeen-story condominium—Applicant that was not a record title owner of property was not an authorized applicant under requirements of city code—City departed from essential requirements of law by granting variance pertaining to density calculations where applicant had withdrawn its request for that variance—Further, granting variance that has effect of increasing density was prohibited by city code—City also departed from essential requirements of law by granting variances without finding unnecessary or undue hardship, as required by city code

OCEAN'S EDGE AT SINGER ISLAND CONDOMINIUM ASSOCIATION INC., and SEAWINDS PROPERTY OWNERS ASSOCIATION, INC., Petitioners, v. CITY OF RIVIERA BEACH and INTEGRA REAL ESTATE, LLC, Respondents. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Appellate Division AY. Case No. 50-2023-CA-001502-XXXX-MB. April 10, 2024. On Petition for Writ of Certiorari from the City of Riviera Beach Development Special Magistrate. Counsel: Richard Dewitt and Julieta Gomez de Mello, Ft. Lauderdale; and Lisa A. Reves, West Palm Beach, for Petitioners. Christy L. Goddeau, West Palm Beach; and Thomas J. Baird, Alan J. Ciklin, and Lainey W. Francisco, Jupiter, for Respondents.

(PER CURIAM.) Ocean's Edge at Singer Island Condominium Association, Inc. ("Ocean's Edge"), filed an Amended Petition for Writ of Certiorari seeking review of the City of Riviera Beach's ("City") conditional[1] approval of a variance application submitted by Integra Real Estate, LLC ("Integra"). Integra requested the variances to redevelop a two-story condominium into a seventeen-story condominium. Pursuant to Florida Rule of Appellate Procedure 9.360(a), Seawinds Property Owners Association, Inc. ("Seawinds") elected to realign as a petitioner in the instant proceeding. Upon certiorari review, this Court remains limited to evaluating (1) whether the essential requirements of law have been observed, (2) whether the petitioner has been afforded procedural due process, and (3) whether competent, substantial evidence supports the findings and judgment under review. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

According to the City's Code of Ordinances, "[a]ny property owner. . .or authorized applicant if he or she meets the qualifications in section 31-39 below, shall have standing to apply for a variance". Code of Ordinances, Riviera Beach, Fla. ("Code"), § 31-38(a). For an application by an authorized applicant, "the record title owner shall also sign the application, and the applicant's interest in the real

property shall be disclosed." Code, § 31-39(a)(1). Integra, as the non-record title owner of the property on its variance application, failed to satisfy the requirements for authorized applicants. The record also reflects that the property owner executed an agent authorization form to assist Integra "with its potential purchase" but that "[n]o zoning or variance changes are to be finalized until Integra or its assignee has become the owner of the Property." In addition, the order rendered by the Development Special Magistrate listed the following variances for approval: front and side setbacks, high-rise building setbacks, floor area calculations, and density calculations. Given that Integra had apparently withdrawn its request for a variance pertaining to density calculations, the City improperly granted unrequested relief. *See Spiegel v. Dade Cnty.*, 567 So. 2d 558 (Fla. 3d DCA 1990). Moreover, the City's Code prohibits approval of "a variance which has the effect of increasing the density and the number of dwelling units to be allowed on residential property as defined in the applicable sections of the land development code." Code, § 31-42(d)(2). By approving Integra's application and by granting a density variance, the City failed to comply with its Code, which constitutes a departure from the essential requirements of the law. *Alvey v. City of N. Miami Beach*, 206 So. 3d 67, 73-74 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1028a].

Further, the Code requires an "unnecessary and undue hardship" for approval of variances. Code, §§ 31-42(b)(1)(d), 31-1. Such a hardship exists when a property would have no reasonable use or would be virtually unusable. *See, e.g., Thompson v. Planning Com'n of City of Jacksonville*, 464 So. 2d 1231, 1237 (Fla. 1st DCA 1985) (citation omitted); *Maturo v. City of Coral Gables*, 619 So. 2d 455, 456 (Fla. 3d DCA 1993) (citations omitted). The City's decision to grant the variances contains no articulable facts regarding consideration or application of the foregoing case law for establishing the requisite hardship. A failure to apply controlling law consists of "a classic departure from the essential requirements of the law." *Save Calusa, Inc. v. Miami-Dade Cnty.*, 355 So. 3d 534, 541 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D224a], *reh'g denied* (Feb. 12, 2023) (quoting *State v. Jones*, 283 So. 3d 1259, 1266 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2661f]). Based on the findings herein that the City neglected to observe the essential requirements of law, this Court declines to address the remaining arguments advanced by the parties. Accordingly, the Petition for Writ of Certiorari is GRANTED and the City's order is QUASHED. (ROWE, SMALL, and SHEPHERD, JJ., concur.)

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[1]The conditions imposed by the Development Special Magistrate varied from those initially recommended by the City's staff in their report, including omission of the second recommended condition relating to wetlands.

* * *

Licensing—Driver's license—Suspension—Hearings—Telephonic—Improper administration of telephonic oath—New hearing required

ALBERTO DANIEL SAAVEDRA, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Appellate Division AY. Case No. 50-2023-CA-003896-XXXX-MB. April 10, 2024. On Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles. Counsel: Jo Ann Barone, Palm Beach, for Petitioner. Linsey Sims-Bohnenstiehl, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) The Petition for Writ of Certiorari is GRANTED based on the improper administration of telephonic oaths. *See Cordaro v. Dep't of Highway Safety & Motor Vehicles*, Case No. 19CA15583, 29 Fla. L. Weekly Supp. 80a (Fla. 15th Cir. Ct. Apr. 21, 2021). Accordingly, the hearing officer's order rendered on February 16, 2023, is QUASHED and the matter is REMANDED for a new formal hearing. *See Gordon v. State, Dep't of Highway Safety & Motor Vehicles*, 166 So. 3d 902, 904-05 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1368b]. (SCHOSBERG FEUER, SIPERSTEIN, and BOORAS, JJ., concur.)

* * *

Appeals—Dismissal—Failure to file initial brief and appendix

AKHTER HOSSAIN, Plaintiff, v. BROWARD COUNTY CENTRAL EXAMINING BOARD DIVISION I, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23022221. Division AP. April 10, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated February 27, 2024. Appellant was directed by this Court to file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. As of the date of this Order Appellant has failed to comply with this Court's February 27, 2024, Order and file an Initial Brief and Appendix.

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

* * *

Volume 32, Number 2
June 28, 2024
Cite as 32 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Dependent children—Termination of parental rights—Due process—Remote proceedings—Zoom hearing—Motion to continue trial on petition for termination of parental rights conducted via Zoom until incarcerated mother who was attending by telephone with audio only is able to appear by both audio and video is denied—Interest of state in fairly, efficiently, and promptly conducting dependency proceedings to protect children outweighs private interest of mother who wanted to "see everyone's faces"—Further, mother waived any right to appear by video by failing to request continuance prior to day of trial despite lack of videoconferencing capability at prison being ascertainable prior to trial

IN THE INTEREST OF E.S.H., MINOR CHILD. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 21-DP-7. April 1, 2024. David Frank, Judge. Counsel: Amanda Thoni, Tallahassee, for Department of Children and Families. James Harrison, Tallahassee, for Mother. Richard Swaine, Havana, for Father. Pauline Robinson Evans, Tallahassee, for Guardian Ad Litem.

[Editor's note: Initials used in place of full names]

ORDER DENYING MOTHER'S MOTION FOR CONTINUANCE OF TERMINATION OF PARENTAL RIGHTS TRIAL DUE TO THE UNAVAILABILITY OF VIDEO APPEARANCE

This cause came before the Court on March 27, 2024 for trial on the Florida Department of Children and Families' ("Department") petition for termination of the mother's, D.K.'s, parental rights, and the mother's *ore tenus* motion for continuance, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, finds

I. Procedural History and Facts

This trial was a properly noticed and authorized Zoom videoconference session that allows for telephone only participation for those who do not have access to a device that enables video. There were no objections to conducting the trial by remote Zoom session, nor were there any requests for live appearances. All parties and their attorneys were in attendance. Counsel for the mother was attending with a computer (video and audio). The mother was attending by telephone (audio). Most, if not all, of the other participants were attending via computer or smartphone (video and audio).

At the beginning of the trial, mother's counsel objected to the mother's telephone attendance and moved for a continuance until she was able to appear both by audio and video.

The mother is currently incarcerated at Lowell Correctional Institution.

The grounds argued for the continuance were: 1) at this point in time it was ridiculous that Lowell had no videoconference capability anywhere on its grounds, and 2) audio remote participation, rather than audio-visual remote participation, was somehow constitutionally deficient, giving the mother a right to object and demand a continuance.

While the Court agrees with the first ground, it disagrees with the second.

The Court verified that Lowell actually had no videoconference capability anywhere on its campus. To do so, the Court questioned the mother's classification office and her supervisor. Both confirmed that none of the three facilities that comprise Lowell Correctional had any videoconference capabilities.

II. Understanding the Requirements of Constitutional Due Process

"Termination of parental rights cases are necessarily centered on the fundamental liberty interest in being a parent to a child." *S.M. v. Florida Dept. of Children & Families*, 202 So.3d 769, 777 (Fla. 2016) [41 Fla. L. Weekly S362a]; *See Santosky v. Kramer*, 455 U.S. 745, 753, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Fundamental liberty interests are protected by procedural due process rights. *B.T. v. Dep't of Children & Families*, 300 So.3d 1273, 1284 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1906a].

"Termination cases are frequently referred to as the civil death penalty for families." *M.M.W. v. J.W.*, 374 So.3d 58, 65 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1633a], reh'g denied (Oct. 7, 2022) (citations and internal quotations omitted).

But are they really *just* like death penalty cases?

Using the phrase "civil death penalty" is understandable. It drives home the important message that parental terminations are very serious business. "That is because [f]ew forms of state action are both so severe and irreversible as the termination of the parent-child relationship. Thus, [a] court may not deprive a parent of a fundamental liberty interest in his or her offspring without an opportunity to assess and rebut the alleged reasons for termination." *Id*.

However, there are important differences that are relevant for the present matter. *See E.T. v. State Dep't of Child. & Fams.*, 930 So.2d 721, 726 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1238a] ("The liberty interest at stake in criminal cases is simply not equivalent to that involved in custody cases involving children."); *see also N.S.H. v. Fla. Dep't of Child. & Fam. Servs.*, 843 So.2d 898, 902 (Fla. 2003) [28 Fla. L. Weekly S284a] ("Although we do not minimize the significant interests at stake in parental rights termination proceedings, the essential difference between termination proceedings and both criminal proceedings and civil commitment proceedings is that termination proceedings do not involve the risk of loss of physical liberty.").

For example, the right to counsel in termination proceedings, derived from the due process clause in the Florida Constitution and Florida Statutes, "is not equivalent to the right to counsel in criminal proceedings, which is derived from the Sixth Amendment in the U.S. Constitution." *K.R. v. Dep't of Children & Families*, 368 So.3d 986, 991 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1465c], citing *E.T.* at 726.

Naturally, the COVID pandemic focused our appellate courts on this question of live versus remote appearance, for obvious reasons. The answer for dependency proceedings, including termination trials, is now firmly established.[1] *See I.T. v. Dep't of Children & Families*, 338 So.3d 6, 11-12 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D539a].

The mother in *I.T.* challenged two aspects of remote appearance. She contended that using remote technology in any termination proceeding "runs contra to the fundamental liberty interests at stake in dependency cases," and that "technological issues impaired the quality of the trial." *Id*.

Regarding the fundamental liberty interest, the court held:[2]

> A major difference, relevant here, is whether due process demands the physical presence, or video presence, of a parent during a termination proceeding. It is scarcely debatable that the physical presence of a parent is preferred in termination proceedings. However, there is a vast body of persuasive authority holding that [t]here is no due process right mandating a parent's physical presence at a civil termination of parental rights trial when represented by counsel. Further, in various reported cases, Florida courts have authorized remote appearances in other similar high-stakes contexts, including at probation violation hearings, delinquency trials, and sentencing hearings. Similarly, several courts from other jurisdictions have determined that, for constitutional purposes, a meaningful opportunity to be heard may be afforded despite the absence of the physical presence of a parent.

Id. (citations and internal quotations omitted).

Regarding the quality of the trial, the *I.T.* court found remote appearances sufficient to meet the demands of due process. It determined that that the trial court, "ensured that the proceedings bore all of the hallmarks of a formal trial." *Id*. It noted specific facts of the case that augured allowing the remote appearance: the mother did not request to appear in person, she was granted access to all exhibits, she was permitted to privately consult with counsel, and she was afforded the opportunity to present opening statement, closing argument, and legal argument, examine and cross-examine witnesses, voice objections, and offer exhibits. *Id.*

Nor were there any strictly "technical" issues in *I.T.* because:

> Throughout the proceedings, the trial judge repeatedly instructed the participants to immediately alert him of any disruptions in the audio or visual feed. Although the mother correctly cites to portions of the record reflecting discussions regarding internet connectivity issues, video freezing, and low volume, in each cited instance, the court halted the proceedings until connectivity or sound was restored or asked the speaker to repeat the preceding statement or question. Given these preventative and remedial measures, we conclude the mother has failed to demonstrate any viable risk of an erroneous deprivation.

Id. at 12.

The trial in the present matter had each of these attributes.

The *I.T.* court's analysis for upholding remote appearances for termination trials was twofold. First, it accepted the persuasive rationale of rulings from a multitude of courts including Florida and several other states. Second, it did the required constitutional balancing.[3]

The appropriate constitutional balancing does not apply a rigid, automatic dictate; there is room for adaptations. "In this regard, due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Instead, it is ***a flexible concept*** and calls for such procedural protections as the particular situation demands." *I.T.* at 10 (citations and internal quotations omitted) (emphasis added).

The *I.T.* court weighed the competing interests as follows:

> Because termination proceedings seek not merely to infringe upon a fundamental liberty interest, but to end it, the private interest factors weigh heavily in favor of the mother. See *Santosky*, 455 U.S. at 759, 102 S.Ct. 1388. Conversely, the State's ***interest in protecting the welfare of the children and ensuring expeditious and cost-effective proceedings*** weigh against the mother. Although the private interest is arguably more compelling, as it is constitutionally derived, we are not persuaded that the mother has demonstrated the use of technology in all termination cases or in this particular case presents a risk of erroneous deprivation. Concluding the trial court afforded adequate procedural safeguards to comport with due process, we affirm the final judgment in all respects.

I.T. at 12 (emphasis added).

III. This Court's Balancing

No court is more anxious to return to in person proceedings than this one. Indeed, this Court has been concerned that the level of advocacy has deteriorated since lawyers and parties have been appearing for hearings and trials in their pajama pants from their kitchens. This absence from the courtroom has had a noticeable affect on attorneys, especially the younger ones who started practicing right before, during, and since the pandemic.

Nonetheless, there are certain proceedings that demand continued remote appearances and dependency is one of them.

There is a drastic shortage of attorneys and resources available for dependency proceedings in this circuit. The Department is short several attorneys and those positions remain unfilled. Those who are handling dependency cases seem to leave the department after a short stint. Essentially, there are only two attorneys who represent parents in dependency in Gadsden and Liberty Counties.

It is commonplace for attorneys to ask the Court for permission to join one of its dependency sessions late, or to leave early, because they are handling another dependency matter in Leon County or elsewhere at the same exact moment.

Requiring dependency attorneys to appear live in this Court at this time would degrade, and maybe even grind to a halt, the administration of justice in dependency cases.[4]

Similarly, there is a shortage of law enforcement resources available to transport parents from jails and prisons to the courtroom when they are parties in a dependency proceeding. Additionally, many parents, guardian ad litem volunteers, program specialists, and caregivers cannot effectively appear in person for work/financial, transportation, and other reasons.

These factors weigh heavy in favor of remote proceedings for dependency cases in this Court.

The mother's argument, however, takes a somewhat novel approach. She diverts from the established analysis of remote proceedings versus live proceedings. Instead, she argues that appearing remotely only by telephone (audio), rather than remotely by videoconference (audio and video), would somehow impair the fairness and thus constitutional soundness of the proceeding, requiring a continuance until she could appear by video. Mother's counsel mentioned not being able to see the other participants, the inference being that she was somehow disadvantaged.

Telephone appearances for evidentiary hearings, and even trials, are not new; they were not born in the pandemic. Telephone appearances, for good cause, have been commonplace in this circuit and across Florida for many years. Florida courts have allowed remote participation of parties and witnesses by telephone and considered it constitutionally sound. *See D.F. v. Florida Dept. of Children & Family Services*, 877 So.2d 733, 734 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D986b]; *C.W. v. Dep't of Children & Families*, 843 So.2d 362 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1072b] and *M.R.L. v. Dep't of Children & Families*, 835 So.2d 1261, 1262 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D380a].

The Florida Bar considers it the acceptable alternative to videoconferencing for remote proceedings. "If any participant does not have access to a device that allows for video conferencing, that participant may attend a remote proceeding by telephone. . . ." Florida Bar Recommended Best Practices for Remote Court Proceedings, updated July 2022, p. 4.

This makes both constitutional and practical sense.

Constitutionally, the only conceivable due process concern regarding the mother's telephone participation in the Zoom session would be the inability of her lawyer to effectively examine witnesses. But the fact that the mother's face was not shown during this time did not affect the cross examination of witnesses on her behalf. It is true that seeing the facial expressions and reactions of a witness during examination in court is useful. But in the present case, the mother's lawyer was a full Zoom participant with both audio and video. He conducted the direct and cross examination of witnesses. He was able to observe and gauge the credibility of the other witnesses and participants. In fact, the only witness who was not visible was the mother herself, which may have been a benefit to her during her testimony, and a hinderance to the other participants. The mother heard everything that was said during the trial from start to finish, was given time to speak privately to her attorney in a breakout room and had access to all of the trial exhibits that were stipulated to and filed prior to the trial.

Practically speaking, there are times when trial participants just cannot connect to the Zoom session with a computer or smart phone and, thus, will have to join with a telephone. Some cannot afford laptops or smartphones, some cannot understand the connection instructions, and some will have technical difficulties. Some, like the

present mother, will be incarcerated and not have access to videoconference equipment. Allowing them to participate via telephone is a favorable accommodation, not a constitutionally flawed deficit.

In the end, the interest of the state of Florida to fairly, efficiently and promptly conduct dependency proceedings in this Court to protect the children in its jurisdiction outweighs the private interest of the mother in this case who wanted to "see everyone's faces."

IV. Forfeiture of a Due Process Right

Even due process rights derived from the U.S. Constitution can be forfeited in certain circumstances. In addition to scores of federal courts, at least one Florida court also has held that a criminal defendant's conduct may be severe enough to warrant forfeiture of his right to court-appointed counsel. *See Jackson v. State*, 2 So.3d 1036 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D193b] (forfeiture of right to court-appointed upheld due to defendant's recalcitrance, antagonism and even personal attacks upon each of a lengthy series of court-appointed attorneys).

If we assume there is an automatic unwavering right to appear by video, and there is not (see above), might the mother in the present matter have waived such a right, given the exact nature of the liberty interest involved? To answer this question the Court must look to the current legal landscape regarding continuances of trials in Florida.

In April, 2021, the Florida Supreme Court took action to correct an identified problem with trial court case management. The problem was simple. Civil cases were not being resolved on a timely basis; the trial courts were backlogged.

The court issued an administrative order requiring chief judges to issue circuit administrative orders that:

> Shall direct all judges within their circuits to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown.

In re: Comprehensive Covid-19 Emergency Measures for Florida Trial Courts, Fla. Admin. Order No. AOSC20-23 Amendment 12 (April 13, 2021).

This was a palpable change. And it was a directive, not an aspirational goal. Trial judges across this state, including the undersigned, implemented the directive and will take the action necessary to maintain it.

Even though this was a new emphasis and direction, courts were starting to tighten the belt before the onset of the pandemic. In 2014, the First District held, ". . .continuances are generally disfavored and require a showing of good cause. Fla. R. Jud. Admin. 2.545(e) ('All judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge.')." *HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1292 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a].

Serban is instructive. In *Serban*, the trial court denied the foreclosure plaintiff's motion for continuance made at trial and dismissed the case due to plaintiff's "failure to appear at trial with a witness through which evidence might be presented to prove its case." *Id*. at 1288. The plaintiff requested a continuance because the defendant filed a last-minute amendment to his defenses which made the case not technically "at issue," and because plaintiff's counsel was told his client could not produce a witness for the trial as scheduled. *Id*. at 1290. The defendant objected on the ground that this did not constitute good cause. *Id*.

The First District reasoned that the denial of the continuance and dismissal of the case were not abuses of discretion because: the case had been pending for a long time, the parties were notified of the trial date by the court's order more than sixty days before the trial, the last-minute amendment to the answer, to which plaintiff replied prior to trial, did not prompt the plaintiff to move for continuance immediately, "to avoid wasted court time and parties' travel expenses," plaintiff knew of the witness' unavailability between seven and ten days before trial, and the failure to produce a witness was not due to circumstances beyond plaintiff's control.[5] *Id*. at 1290-93.

The First District also considered, ". . .whether denial [of continuance] will create injustice for the movant, whether the cause for the request was 'unforeseeable by the movant' and whether the opposing party would suffer any prejudice as a result of a continuance." *Id*. at 1292.

In the present matter the case has been pending since September 2, 2021. Delays in dependency cases are considerably more problematic than in foreclosure cases. ". . .[T]ime is of the essence for establishing permanency for a child in the dependency system." § 39.0136(1), Fla. Stat.; see also § 39.621(1), Fla. Stat. Courts are 'compelled to expedite proceedings to prevent children from languishing in the foster care system.' *A.W. v. Dep't of Child. & Fams.*, 969 So. 2d 496, 505 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2751a]." *Statewide Guardian Ad Litem Office v. J.B.*, 361 So.3d 419, 422 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1043a].

The mother in the present case did not request a continuance prior to the day the parties appeared for trial. There was nothing preventing her counsel from contacting the correctional institution to confirm videoconference capabilities well in advance of trial, and to seek redress if there were an issue.[6]

V. Conclusion

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

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[1]This Court has been conducting all dependency proceedings remotely since the pandemic without objection from any of the parties. In fact, the parties have urged the Court to do so.

[2]Important here is that none of the cites for this holding include temporary emergency procedures promulgated by the Florida Supreme Court during the pandemic.

[3]It is important to note that there are no cases to suggest that our First District would not apply this same analysis.

[4]The mother's objection has reminded the Court that it must monitor and take action to move its dependency proceedings back into the courtroom as soon as possible.

[5]The court noted that the "Bank's reason for failing to provide a witness for trial—the overscheduling of its employees or representatives in other cases—did not constitute good cause." *Id*. at 1292.

[6]Generally, it is the responsibility of the litigant's attorney to ensure all the equipment, applications, and internet connections are ready for the litigant's participation in a Zoom remote videoconference session. That responsibility fades but does not disappear when the litigant is incarcerated.

* * *

Dissolution of marriage—Marital settlement agreement—Coercion—Husband's motion to set aside marital settlement agreement is denied—Agreement is not unfair or unreasonable, and husband's testimony that he felt pressure to sign agreement was not sufficient to support finding that agreement was reached through fraud, duress, coercion, misrepresentation, or overreaching—Child custody—Parenting plan—Husband's motion to set aside relocation/long-distance parenting plan is granted—Husband signed plan in anticipation of out-of-state relocation that did not happen, and there is nothing to indicate that parenting plan giving wife sole parental responsibility is in best interest of children or that shared parental responsibility would be detrimental to children

IN RE: The Marriage of LINDSAY BROOKE HOLLANDSWORTH, Petitioner, and LUIS ANGEL MADERA, Respondent. Circuit Court, 5th Judicial Circuit in and for Marion County. Case No. 42-2022-DR-002615-FJ. March 9, 2023. Ann Melinda

Craggs, Judge. Barbara Kissner, General Magistrate. Counsel: Anne E. Raduns, Anne E. Raduns, P.A., Ocala, for Petitioner. Steven C. Fraser, Steven C. Fraser, P.A., Jacksonville, for Respondent.

ORDER DENYING MOTION TO SET ASIDE MARITAL SETTLEMENT AGREEMENT AND ORDER GRANTING MOTION TO SET ASIDE PARENTING PLAN ORDER

The Court, having reviewed the Recommended Order of the General Magistrate, and being otherwise fully advised in the premises, does hereby:

ORDER AND ADJUDGE that the Recommended Order of the General Magistrate is approved, ratified, confirmed and adopted as the order of this Court and is incorporated herein by reference. All parties shall be governed by said order and shall comply with the same in each and every one of its particulars.

(KISSNER, General Magistrate.) THIS CAUSE came before the General Magistrate Barbara Kissner, pursuant to Fla. Fam. L. R. P. 12.490, current Administrative Orders, and an Order of Referral, for hearing on *March 2, 2023*, on pending pleadings. Petitioner appeared with her attorney Anne E. Raduns, Esquire; Respondent appeared with his attorney Steven Fraser, Esquire. The General Magistrate, having reviewed the court file and considered the evidence presented, including the testimony of the parties present, and being otherwise fully advised in the premises, submits the following findings and recommendations.

FINDINGS

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. The General Magistrate has jurisdiction.

3. On August 5, 2022, Petitioner Lindsay Hollandsworth filed a Petition for Dissolution of Marriage with Dependent or Minor Children. Petitioner has been a resident of the State of Florida for at least six months prior to the filing of the Petition based upon testimony and proof of residency in the form of a Florida Driver's License. On August 5, 2022, Petitioner also filed a Relocation/Long Distance Parenting Plan and Marital Settlement Agreement signed and notarized by both parties. Respondent filed a Waiver of Service and an Answer.

On October 18, 2022, Respondent Luis Madera filed a Motion to Set Aside Settlement Agreement and Parenting Plan. On November 18, 2022, Respondent Luis Madera filed another Motion to Set Aside Settlement Agreement and Parenting Plan. Petitioner filed a response on November 29, 2022.

On December 9, 2022, Petitioner Lindsay Hollandsworth filed a Verified Motion to Enforce Signed Marital Settlement Agreement.

4. An evidentiary hearing was held on March 2, 2023. Respondent Luis Madera testified that he was provided two documents and felt pressure to sign them. He testified that Petitioner told him if he signed, he would still see the children but if he didn't sign, he would not see the children. He recalls signing the documents but did not recall any specific language. Respondent testified that he was supposed to move to North Carolina on August 5 but delayed the move until August 17. He lived in North Carolina from August 17, 2022 until mid-October 2022.

Petitioner testified that parties have two children. They discussed divorce after parties separated in May 2022. She testified that they sat down together and went over the agreements. She denied using any force or pressure. She has known Respondent 11 years and he did not seem confused. Both parties mentioned a marital home. Both parties filed sworn Financial Affidavits, which referenced a home.

Marital Settlement Agreement: In *Casto v. Casto*, the Florida Supreme Court established two grounds for setting aside a marital settlement agreement. *See,* 508 So. 2d 330 (Fla. 1987). A marital settlement agreement can be set aside if reached under fraud, duress, coercion, misrepresentation or overreaching. The second basis to set aside an agreement occurs when the challenging spouse proves the agreement is unfair or unreasonable, given the circumstances of the parties. This is the "fairness and reasonableness challenge." *See, Crupi v. Crupi*, 784 So.2d 611 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1288b]. Once litigation has begun, parties have an opportunity to obtain full disclosure through various discovery mechanisms, a spouse challenging a settlement agreement entered after litigation starts is limited to showing fraud, misrepresentation, or coercion. *See, Macar v. Macar*, 803 So.2d 707 (Fla. 2001) [26 Fla. L. Weekly S799a]. After litigation begins, inquiry into the "unfairness" is not permitted. *See, Crupi v. Crupi*, 784 So.2d 611, 613 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1288b] *citing Petracca v. Petracca*, 706 So.2d 904, 912, (Fla. 4th DCA 1998) [23 Fla. L. Weekly D481a].

Parties signed the Marital Settlement Agreement before the case was filed. The Court will examine the Motion to Set Aside the Marital Settlement Agreement under both standards.

To establish that an agreement is unreasonable, the challenging spouse must present evidence of the parties' relative situations, including their respective ages, health, education, and financial status. *See, Parra de Rey v. Rey*, 114 So.3d 371(Fla. 3rd DCA 2013) [38 Fla. L. Weekly D1107a]. The trial court may determine that the agreement on its face does not adequately provide for the challenging spouse and thus is unreasonable. *Id.* The court must find the agreement is "disproportionate" to the means of the defending spouse. Once it is determined to be unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached. *Id.* The defending spouse may rebut the presumptions by showing (a) a full, frank disclosure of all marital property and income before signing the agreement, or (b) a general an approximate knowledge of challenging spouse of the character and extent of the marital property and a general knowledge of the income of the parties. *Id.*

Although there was testimony regarding a marital home, the signed Marital Settlement Agreement (MSA) filed on August 5, 2022 does *not* list any marital assets or marital liabilities. The Court takes judicial notice of both parties' sworn Financial Affidavits, which both reference a marital home. *See,* §*90.202 Fla. Stat.*

The Marital Settlement Agreement provides that each party gives up any right to spousal support (alimony) and provides that child support will be as 'court decides'. The MSA states that Petitioner will maintain the health and dental insurance for the children and will also claim the children every year. Based upon the limited testimony provided, and few terms of the MSA, the Court is unable to find that the MSA is unfair or unreasonable.

Respondent failed to provide adequate testimony to support for the Court to find that the MSA was reached under fraud, duress, coercion, misrepresentation, or overreaching. He testified only that he felt 'pressure'.

The Motion to Set Aside the Marital Settlement Agreement will be denied. There is no legal basis to set aside the Marital Settlement Agreement; however, the Court is also not likely to accept the MSA if there is a marital home or other marital assets and/or marital liabilities that need to be distributed.

Parenting Plan: Unlike a Marital Settlement Agreement, a Court is not bound by an agreement of parents regarding child support, custody, or visitation. *See, Le v. Nguyen*, 98 So.3d 600, 601 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1604a] *citing Higgins v. Higgins*, 945 So.2d 593, 596 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3160c].

The court's responsibility to the children cannot be abdicated to any parent. *Id.* Instead, the trial court is required to "determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the children . . . ." *Id., citing* § *61.13(2) (c), Fla. Stat. (2021); see also, Jones v. Jones*, 674 So.2d 770, 774 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D964a] (reiterating that "best interests of the children are to govern the custody decision, regardless of any stipulation between the parties").

When asked about the Parenting Plan, Respondent testified he felt pressure to sign because he was leaving the state. He admitted that the Parenting Plan no longer benefits him since he returned to Florida. He admitted signing an 'agreement' to allow the Petitioner/Mother to get food stamps. Petitioner testified that parties have two children. She testified that the parents sat down together and went over the Parenting Plan. She denied using any force or pressure. She has known Respondent 11 years and he did not seem confused. Petitioner testified that she does not allow the Father extra timesharing and does not allow him to make decisions regarding the children.

The Relocation/Long Distance Parenting Plan filed on August 5, 2022 provided that the Petitioner will have sole parental responsibility of the children. Pursuant to Florida Statutes, the Court *shall* order that parental responsibility for a minor child be shared by both parents unless the Court finds that shared parental responsibility would be detrimental to the children. *See,* §*61.13(2)(c)(2) Fla. Stat(2021)(emphasis added).* Neither the testimony provided, nor did the Relocation/Long Distance Parenting Plan offered any indication as to why shared parental responsibility would be detrimental to the children. Respondent testified that he returned to Florida believing there should be more timesharing. Petitioner did not offer any testimony as to why the Relocation/Long Distance Parenting Plan should remain a 'long-distance' parenting plan or why limited timesharing is in the children's best interest. Florida public policy is that each child shall have frequent and continuing contact with both parents. *See,* §*61.13 Fla. Stat.(2021).*

Based upon the testimony provided, and the case law cited above, the Court is unable to find that the agreed Parenting Plan is in the best interest of the children or that shared parental responsibility would be detrimental to the children. The Motion to Set Aside the Parenting Plan is granted.

5. Exhibits: Petitioner's Exhibit 1 was admitted. The Court also takes judicial notice of documents in file and the case law attached to Verified Motion to Enforce. *See,* §*90.202 Fla. Stat.*

RECOMMENDATIONS

The General Magistrate hereby recommends that an Order be entered as follows:

A. Respondent Luis Madera's Motions to Set Aside Marital Settlement Agreement and Parenting Plan filed on October 18, 2022 and November 18, 2022 are granted in part and denied in part.

1. The Motions to Set Aside Marital Settlement Agreement are denied; however, the Court puts parties on notice that the MSA may not be accepted by the Court if there is a marital home or other marital assets and/or marital liabilities to be distributed.

2. The Motions to Set Aside the Parenting Plan are granted.

B. Petitioner Lindsay Hollandsworth's Verified Motion to Enforce Signed Marital Settlement Agreement filed on December 9, 2022, is granted with respect to the Marital Settlement Agreement and denied with respect to the Parenting Plan.

C. A Case Management Conference will be scheduled by separate notice.

* * *

Real property—Easements—Action for declaratory and injunctive relief and breach of contract against power company alleging power company interfered with plaintiffs' plans to construct stormwater facilities and a man-made wetland mitigation area on property encumbered by perpetual, non-exclusive easement owned by power company—Claim for declaratory relief as to development that has been sold by plaintiffs is moot—Easement that provides that no structures or obstacles will be located or constructed within easement by grantors unambiguously prohibits location and construction of stormwater facilities and man-made wetland within easement area—Further, constructing stormwater facilities and wetland within easement area constitutes, as matter of law, unreasonable interference with power company's lawful dominant use of easement where it is undisputed that company would not be able to use portions of area within which those facilities were located to exercise its perpetual right to construct, operate, or maintain additional powerlines and improvements—Summary judgment entered for power company on all claims

MITCHELL RANCH PARTNERSHIP, LTD, a Florida limited partnership and MITCHELL RANCH SOUTH, LTD, a Florida limited partnership, Plaintiffs, v. DUKE ENERGY FLORIDA, LLC, a Florida limited liability company, d/b/a DUKE ENERGY, Defendant. Circuit Court, 6th Judicial Circuit in and for Pasco County. Case No. 2018-CA-002835-CAAXWS. November 17, 2023. Kimberly Sharpe Byrd, Judge. Counsel: David Smolker and R. Clay Mathews, Smolker Mathews, P.A., Tampa, for Plaintiffs. Tirso M. Carreja, Jr., Michael P. Silver, Garrett A. Tozier, S. Elizabeth King, and Ashlyn Robinson Banks, Shutts & Bowen LLP, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S SECOND AMENDED MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on October 31, 2023, on Defendant's Second Amended Motion for Final Summary Judgment (the "**Defendant's Motion**") and Plaintiffs' Motion for Partial Summary Judgment (the "**Plaintiffs' Motion**" and together with Defendant's Motion, the "**Motions**"). The Court having read the Motions and related filings, having heard arguments of counsel, and being otherwise fully advised in the premises, finds that the parties have had ample opportunity to fully discover the case, that there is no genuine dispute as to any material fact precluding entry of summary judgment, and that Defendant is entitled to judgment as a matter of law. Pursuant to Florida Rule of Civil Procedure 1.510(a), the Defendant's Motion is granted and Plaintiffs' Motion is denied for the following reasons:

Introduction

This is an easement dispute in which Plaintiffs, Mitchel Ranch Partnership, LTD ("**Mitchell Partnership**") and Mitchell Ranch South, LTD ("**South Partnership**" and together with Mitchell Partnership, the "**Plaintiffs**"), allege that Defendant, Duke Energy Florida, LLC d/b/a Duke Energy ("**Duke Energy** or **Defendant**") has impermissibly interfered with their development of Mitchell Ranch South,[1] a residential development that has already been built, and that they fear Duke Energy will similarly interfere with their development of Mitchell Ranch East, a proposed residential development that has not yet been built. *See generally* Pls.' Compl. Specifically, in connection with their development of Mitchell Ranch South and Mitchell Ranch East, Plaintiffs have sought to construct stormwater facilities, including stormwater ponds, maintenance berms, and access roads (collectively, the "**Stormwater Facilities**"), and, solely in connection with the development of Mitchell Ranch South, a man-made wetland mitigation area (the "**Man-made Wetland**"), on a strip of property (the "**Easement Area**") encumbered by a perpetual, non-exclusive easement owned by Duke Energy (the "**Easement**").[2] *See id.* at ¶¶ 21-31. The central dispute between Plaintiffs and Duke

Energy is whether the Easement allows Plaintiffs to construct the Stormwater Facilities and Man-made Wetland within the Easement Area. Plaintiffs assert three (3) causes of action against Duke Energy, each premised on Plaintiffs' position that construction of the Stormwater Facilities and Man-made Wetland in the Easement Area is permitted as a matter of right and that Duke Energy does not have the right to oppose same: (i) Count I-Declaratory Relief; (ii) Count II-Injunctive Relief; and (iii) Count III-Breach of Contract (collectively, the "**Claims**"). *See generally id.*, Counts I-III.

In Defendant's Motion, Duke Energy asks this Court to (i) find that the Stormwater Facilities constitute "structures" prohibited within the Easement Area; (ii) find that the Stormwater Facilities constitute "obstacles" prohibited within the Easement Area; (iii) find that the Man-made Wetland constitutes an "obstacle" prohibited within the Easement Area; (iv) find that Plaintiffs' request for declaratory relief as to Mitchell Ranch South is moot; (v) find that Plaintiffs' claim for breach of contract fails because Duke Energy has no contractual obligation to consent to the placement of the Stormwater Facilities and Man-made Wetland within the Easement Area; and (vi) grant summary judgment against Plaintiffs and in favor of Duke Energy on all Claims in light of the Court's finding that the Stormwater Facilities and Man-made Wetland constitute "structures" and/or "obstacles" prohibited within the Easement Area. *See* Def.'s Mot. at 19.

In Plaintiffs' Motion, Plaintiffs ask this Court to find that the Easement does not prohibit Plaintiffs' placement of the Stormwater Facilities and Man-made Wetland within the Easement Area. *See* Pls.' Mot. at 19.

I. UNDISPUTED FACTS

The following undisputed material facts are apparent from materials in the record, including deposition transcripts, documents, and declarations:

1. On August 24, 1972, Duke Energy's predecessor, Florida Power Corporation, obtained the Easement across the Easement Area. *See* Declaration of Mark Ferrill in Support of Defendant's Motion for Final Summary Judgment (the "**Ferrill Dec.**"), attached to Defendant's Motion as Exhibit A, ¶¶ 4, 13; *accord* Compl. ¶ 13; Compl. at Ex. 4; Affidavit of D. Dewey Mitchell (the "**Mitchell Aff.**"), attached to Plaintiffs' Motion as Exhibit B, ¶ 5.

2. A true and accurate copy of the Easement is attached to the Ferrill Declaration as Exhibit 1. *See* Ferrill Dec. ¶ 5.

3. The Easement conveys to Florida Power Corporation, and its successors and assigns, the following perpetual rights within the Easement Area:

> [the right] **to construct**, **re-construct**, **operate and maintain** . . . **two or more underground**, **single pole**, **B-Frame and/or tower lines for the transmission and/or distribution of electricity**, including necessary communication and other wires, poles, guys, anchors, ground connections, attachments, fixtures, equipment and accessories desirable in connection therewith . . . . and the right to patrol, inspect, alter, improve, relocate, repair, rebuild or remove such lines, equipment and accessories, including the right to increase or decrease the number of wires and voltage, together with all rights and privileges reasonably necessary or convenient for the enjoyment or use thereof for the purposes described above . . .
>
> Grantee shall have the right **to construct a road and structure islands within said easement area** and the right to excavate, where necessary, within said easement area to obtain road and island fill dirt and to remove muck or any other unsuitable soil from the road bed and structure sites and the further right to deposit any unsuitable soil removed within the said easement area . . .
>
> Grantee shall have the further right, if desired, **to deposit within said easement areas suitable road and structure site fill** secured from sources other than on Grantor's property . . .

See Ferrill Dec. ¶¶ 6-8 (emphasis added) (citing Ex. 1); *accord* Compl. at Ex. 4 (emphasis added); Mitchell Aff at Ex. B (same).

4. Further, the Easement expressly prohibits certain uses within the Easement Area by the fee owners, and their heirs and assigns, as follows:

> **Grantors hereby agree that no** trees, other than citrus trees, and no buildings, **structures, or obstacles, other than fences, will he located or constructed within the Easement Area by the Grantors herein, their heirs and assigns.** The Grantors, however, reserve the right to use said Easement Area for general farming and pasture purposes.
>
> The Grantors covenant that they have the right to convey the said easement and the Grantee, its successors and assigns shall have quiet and peaceful possession, use and enjoyment of said easement.

See Ferrill Dec. ¶ 9 (emphasis added) (citing Ex. 1); *accord* Compl. at Ex. 4 (emphasis added); Mitchell Aff. at Ex. B (same).

5. Pursuant to its rights under the Easement, "Duke Energy has installed and currently operates and maintains two 230kV transmission pole lines and related facilities within the Easement Area." Ferrill Dec. ¶ 14. "Known as the Brooksville West to Lake Tarpon 230kV transmission line that loops into the Seven Springs Substation, the line at issue is a critical line for Southwest Pasco and Pinellas County as a whole." *Id.* "Not only does it provide a strong source for the Seven Springs load area (approximately 62,700 customers), it is also necessary to ensure power can be reliably imported into Pinellas County[,]" which is one of Duke Energy's "most densely populated load areas with around 500,000 customers." *Id.* "Due to geographical challenges, Pinellas County has limited transmission sources and this 230kV transmission line is one of four 230kV lines [Duke Energy] has into Pinellas County." *Id.* "Furthermore, this is one of two 230kV lines connecting other generation sources from the northern part of the system, which is critical to ensure power can be reliably imported into and throughout Pinellas County under various system conditions." *Id.*

6. In addition to using the Easement Area to operate and maintain its existing lines, Duke Energy maintains that the "Easement Area width is also necessary to construct new and/or temporary transmission facilities for storm response or for new construction." *Id.* ¶ 26.

7. Duke Energy owns Parcel ID 25-26-16-0000-00200-0000, Pasco County, Florida (the "**DEF Property**"), which is adjacent to the Easement Area and Mitchell Ranch East. *See* Declaration of Mark Ferrill in Opposition to Plaintiffs' Motion for Partial Summary Judgment (the "**Supp. Ferrill Dec.**"), attached to Defendant's October 11, 2023 Notice of Filing, ¶¶ 4-5.

8. Duke Energy "anticipates the DEF Property will in the future be developed to serve its customers." *Id.* ¶ 8.

9. Duke Energy maintains that it -must maintain flexibility to use its entire Easement Area for future design, development, operation and maintenance of additional facilities within the Easement Area required to service the DEF Property's future development." *Id.*

10. Beginning in 2014, Plaintiff South Partnership sought to develop Mitchell Ranch South into a residential subdivision. *See* Mitchell Aff. ¶ 8.

11. In connection with its proposed development of Mitchell Ranch South, South Partnership sought to construct two Stormwater Facilities and one Man-Made Wetland in the Easement Area (the "**Mitchell Ranch South Improvements**"). *See id.* ¶¶ 9-12.

12. More than a year ago, however, South Partnership constructed and sold Mitchell Ranch South after redesigning and developing it such that the proposed Mitchell Ranch South Improvements were not located within the Easement Area. *See* June 13, 2023 Mitchell Dep. Tr., attached to Defendant's Motion as Exhibit C, 31:2-4, 31:11-17

(all of Mitchell Ranch South as been developed and sold, with the last parcel of Mitchell Ranch South having been sold more than one year ago); *id.* at 89:4-7 (confirming Mitchell Ranch South "has been fully developed and sold"); *see also id.* at 130:9-131:3 (explaining that it was a "business decision" to redesign the development of Mitchell Ranch South); *accord* June 13, 2023 Mitchell Dep. Tr., attached to Plaintiffs' July 21, 2023 Notice of Filing Transcript, 31:2-4, 11-17; 89:4-7; 130:9-131:3.

13. Beginning around 2014, Plaintiff Mitchell Partnership sought to develop Mitchell Ranch East. *See* Mitchell Aff. ¶ 13.

14. In connection with its development of Mitchell Ranch East, Mitchell Partnership seeks to construct three (3) Stormwater Facilities in the Easement Area. (the "**Mitchell Ranch East Improvements**"). *See id.* ¶¶ 13-15.

15. Stormwater facilities such as those shown in the Complaint are "designed through a series of mathematical modeling computations" and "generally constructed by excavating a manmade water-storage structure in the ground, usually to a depth below the seasonal high groundwater table, that has a 2 to 1 side slopes to 2 feet below the water surface then changes to a 4 to 1 slopes up the pond bank to the maintenance berm, which is constructed above-ground level." *See* Declaration of Leland E. Moree, III, P.E., P.L.S. ("**Moree Dec.**"), attached to Defendant's Motion as Exhibit B, ¶ 5; *see also id.* at ¶ 6 (explaining what a maintenance berm is).

16. The Stormwater Facilities at issue in this case consist of the following:

a. Within Mitchell Ranch South, South Partnership proposed two (2) Stormwater Facilities totaling 2.93 acres: one Stormwater Facility 245 feet long and a second Stormwater Facility 161 feet long. *See* Affidavit of Jaime P. Girardi, P.E. ("**Girardi Aff.**"), attached to Pls.' Response in Opposition as Exhibit C, at Ex. 1; *see also* Moree Dec. ¶ 6.

b. Within Mitchell Ranch East, Mitchell Partnership proposed three (3) Stormwater Facilities totaling 13.33 acres: one Stormwater Facility 846 feet long, a second Stormwater Facility 459 feet long and a third Stormwater Facility 384 feet long. *See* Girardi Aff. at Ex. 2; *see also* Moree Dec. ¶ 6.

17. These Stormwater Facilities "consist of pond (12 foot deep excavation), concrete stormwater pipes, pipe mitered end sections, concrete outfall structure and berm" and would occupy over 16 acres of the Easement Area. *See* Moree Dec. ¶ 6 (detailing size of proposed project in relation to Easement Area).

18. The Stormwater Facilities must be constructed. *See, e.g.*, *id.* at ¶ 5; Compl. ¶¶ 23, 31, 33-35, 38, 43, 49-50, 52.

19. The construction of such facilities typically requires large scale ground excavation using commercial earthmoving machinery. *See* Moree Dec. ¶ 11.

20. Southwest Florida Water Management District ("**SWFWMD**") is "responsible for permitting the construction, alteration, operation, maintenance, repair, abandonment and removal of surface water management systems within its jurisdictional boundaries, including the Stormwater Facilities depicted in the Complaint." *Id*. ¶ 8.

21. SWFWMD has set forth in the Environmental Resource Permit Applicant's Handbook Volume II, Design Requirements for Stormwater Treatment and Management Systems, Water Quality and Water Quantify, effective June 1, 2018 (the "**ERP Water Treatment Handbook**"), a number of rules governing the design, engineering, construction, operation and maintenance of "Stormwater Management System Facilities". *See id.* ¶¶ 7, 9.

22. Plaintiffs' proposed Stormwater Facilities are "Stormwater Management System Facilities", as that term is defined in the ERP Water Treatment Handbook, and once constructed, "would require inspection and approval by appropriate SWFWMD and Pasco County personnel and ongoing inspections and maintenance to ensure that they continue to operate as designed and constructed." *Id.* ¶¶ 10, 12.

23. The Man-made Wetland was only proposed for Mitchell Ranch South. *See* Mitchell Aff. at Ex. A.

24. A wetland mitigation area, such as the Man-made Wetland, "is designed and permitted and is planted with wetland vegetation to replace jurisdictional wetland area removed with development." Moree Dec. ¶ 13.

25. "Wetland mitigation areas are required to be monitored with reports submitted to the water management district[,]" and "[a]ny dead or damaged vegetation is required to be replaced[.]" *Id.*

26. Further, "permitted wetland mitigation areas are placed in a conservation easement"; "[o]nce wetland mitigation areas are installed, these areas are protected from further development by applicable laws." *Id.*

27. The proposed Stormwater Facilities and Man-made Wetland servicing Plaintiffs' development projects are intended to be permitted permanent structures. *See id.* ¶ 17; *see* June 13, 2023 Mitchell Dep. Tr., attached to Defendant's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment as Exhibit A, 78:2-4 ("Q: Now, these three stormwater ponds . . . are they intended to be permanent structures? A: Yes."); *see also id.* at 96:7-13 (admitting understanding is that the two stormwater ponds proposed within Easement Area within Mitchell Ranch South were also intended to be "permanent structures"); *id.* at 138:3-9 ("Q:. . . in your mind, stormwater ponds are permitted structures. Correct? . . . A: Yes."); *accord* June 13, 2023 Mitchell Dep. Tr., attached to Plaintiffs' July 21, 2023 Notice of Filing Transcript, 78:2-4; 96:7-13; 138:3-9.

28. If the Stormwater Facilities and Man-made Wetland are constructed and placed within the Easement Area, Duke Energy would lose the use of those portions of the Easement Area containing the Stormwater Facilities and Man-made Wetland for the purposes permitted by the Easement, including future above-ground and underground power lines. *See* Moree Dec. ¶¶ 14, 16-17; Supp. Ferrill Dec. ¶ 10 ("The construction of Mitchell Ranch's proposed Stormwater Facilities and Man-made Wetlands within [Duke Energy]'s Easement Area would wipe away [Duke Energy]'s use of those areas for the development of these additional transmission lines.").

II. ANALYSIS

A. Plaintiffs' claim for declaratory judgment (Count I) as to Mitchell Ranch South is moot.

"The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings,* 661 So. 2d 1190, 1192 (Fla. 1995) [20 Fla. L. Weekly S333a] (citing *Martinez v. Scanlan,* 582 So. 2d 1167, 1170 (Fla. 1991)). A declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." *Ashe v. City of Boca Raton,* 133 So. 2d 122, 124 (Fla. 2d DCA 1961) (further explaining that "[t]here must be an existing adverse interest."); *see Ready v. Safeway Rock Co.,* 157 Fla. 27, 24 So. 2d 808, 811 (1946) (Brown, J., concurring specially) (explaining that it is well settled that declaratory judgment proceeding must be based on actual controversy, and that no proceeding lies under declaratory judgments act to obtain judgment that is merely advisory or merely answers moot or abstract question).

In Count I, Plaintiffs seek, in part, declaratory relief with respect to Mitchell Ranch South. Specifically, as to Mitchell Ranch South, Plaintiffs seek a declaratory judgment (i) that the Mitchell Ranch South Improvements are not buildings, structures or obstacles precluded under the Easement and (ii) that construction, operation and

maintenance of the Mitchell Ranch South Improvements do not unreasonably interfere with Duke Energy's rights to the Easement Area and that their construction is proper under the terms of the Easement. *See* Compl. at 11-12. However, the development of Mitchell Ranch South is complete, and Mitchell Ranch South has been sold; neither Plaintiff currently owns Mitchell Ranch South. Specifically, South Partnership made a "business decision" to redesign and develop Mitchell Ranch South such that the proposed Mitchell Ranch South Improvements were not constructed in the Easement Area. Because Plaintiffs no longer own Mitchell Ranch South, Plaintiffs do not have a bona fide, actual, or present need for the declaration it requests with respect to Mitchell Ranch South, and as such, this Court lacks jurisdiction to grant the requested declaratory relief. *See, e.g., Santa Rosa,* 661 So. 2d at 1193 (holding that because "there was no longer a bona fide, actual, or present need for [the requested] declaration . . . the circuit court lacked jurisdiction to grant declaratory and injunctive relief."). Thus, to the extent Count I seeks relief as to Mitchell Ranch South, the Court finds Plaintiffs' claims are moot, and Duke Energy is entitled to summary judgment as a matter of law.

B. The unambiguous terms of the Easement prohibit the location or construction of the Stormwater Facilities and Man-made Wetland within the Easement Area.

"The construction of the terms of an unambiguous contract is a question of law for the court." *Hartford Ins. Co. of the Midwest v. Atkinson,* 623 So. 2d 549, 550 (Fla. 2d DCA 1993). "In construing unambiguous contractual provisions, it is fundamental under Florida law that the best evidence of the intention of the parties is reflected by the actual contract terms used and, thus, the plain meaning of those terms is controlling." *Akers v. Canas,* 601 So. 2d 305, 306 (Fla. 3d DCA 1992). "Indeed, where there is 'an unambiguous contractual provision . . ., a trial court cannot give it any other meaning beyond that expressed and must construe the provision in accord with its ordinary meaning.' " *Razin v. A Milestone, LLC,* 67 So. 3d 391, 396 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1713a] (ellipses in original) (internal citation omitted); *see also Conage v. United States,* 346 So. 3d 594, 598 (Fla. 2022) [47 Fla. L. Weekly S199a] ("[J]udges must exhaust all the ***textual and structural clues*** that bear on the meaning of a disputed text. . . . That is because [t]he ***plainness or ambiguity*** of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." (emphasis added) (internal quotation marks and citations omitted) (modification in original)).

The terms of the Easement relevant to the parties' dispute are unambiguous.[3] Most notably, the text, structural clues and context of the Easement unambiguously provide that "**no** trees, other than citrus trees, and no buildings, **structures, or obstacles, other than fences, will be located or constructed within the Easement Area by the Grantors herein, their heirs and assigns**." Compl. at Ex. 4 (emphasis added). "The plain meaning of 'structure' is embodied in Webster's International Dictionary: 'Something constructed or built. . . .' " *Barrett v. Leiher,* 355 So. 2d 222, 225 (Fla. 2d DCA 1978); *see also Conage,* 346 So. 3d at 599 ("And we typically look to dictionaries for the best evidence of that ordinary meaning."). There is nothing ambiguous about the term "structure" as used in the Easement, and the Stormwater Facilities constitute structures within the ordinary meaning of that term because they must be constructed. Because the Easement unambiguously prohibits the location or construction of structures (other than fences) within the Easement Area, and because the Stormwater Facilities constitute structures with the plain meaning of that term, the Court finds Plaintiffs are prohibited from constructing the Stormwater Facilities within the Easement Area as a matter of law.

Further, the plain meaning of "obstacle" is "something that impedes progress or achievement[.]" *obstacle,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/obstacle (last visited Dec. 20, 2022). Both the Stormwater Facilities and the Man-made Wetland constitute obstacles within the ordinary meaning of that term, particularly when considered in the context of the Easement as a whole, because both would impede Duke Energy's ability to exercise its rights within all portions of the Easement Area proposed to be encumbered by the Stormwater Facilities and Man-made Wetland. For instance, it is undisputed that the Stormwater Facilities and Man-made Wetland are intended to be permanent improvements within the Easement Area and, once constructed, Duke Energy would lose the use of those areas for access, maintenance and the development of future transmission and distribution facilities. Accordingly, with respect to the rights conferred upon Duke Energy in the Easement, the Stormwater Facilities and Man-made Wetland would necessarily impede Duke Energy's ability to use the portions of the Easement Area they encumber. Thus, the Court finds, as a matter of law, that the Stormwater Facilities and Man-made Wetland are obstacles prohibited within the Easement Area.

The canons of construction cited in Plaintiffs' Motion support a conclusion that the Stormwater Facilities and Man-made Wetland are structures and/or obstacles. Specifically, the canon of *casus omissus pro omisso habendus est* (nothing is to be added to what the text states or reasonably implies) supports a conclusion that the Stormwater Facilities and Man-Made Wetland are prohibited by the Easement because the only structures/obstacles permitted under the plain language of the text are fences. Accordingly, pursuant to this canon, it would be inappropriate for the Court to add stormwater facilities and man-made wetlands as additional exceptions to the prohibition. Similarly, because the only exception to the prohibition of structures and obstacles are fences, the canon of *expression unius est exclusion alterius* (the mention of one thing implies the exclusion of another) also prohibits this Court from adding other exceptions such as stormwater facilities and man-made wetlands. Accordingly, the Court finds, as a matter of law, that the Stormwater Facilities and Man-made Wetland are structures and/or obstacles prohibited within the Easement Area.

C. The Stormwater Facilities and Man-made Wetland unreasonably interfere with the rights granted to Duke Energy under the Easement.

An "easement holder possesses the dominant tenement, while the owner of the land against which the easement exists possesses the servient tenement." *Dianne v. Wingate,* 84 So. 3d 427, 429 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D776a]. "The servient estate owner enjoys all rights to the property, except as limited by the easement, and may use the land burdened by the easement in any manner that does not unreasonably interfere with the lawful dominant use." *Id.* Here, as discussed above, the Easement's express prohibition on the location or placement of "structures, or obstacles, other than fences" prohibits Plaintiffs (the servient estate owners) from locating or constructing the Stormwater Facilities and the Man-made Wetland within the Easement Area. *See supra* section II.B. In addition, the Court finds that placement of the Stormwater Facilities and Man-made Wetland within the Easement constitutes, as a matter of law, an unreasonable interference with Duke Energy's "lawful dominant use" because it is undisputed that Duke Energy would not be able to use the portions of the Easement Area within which the Stormwater Facilities and Man-made Wetland are placed to construct, operate, or maintain additional powerlines and related improvements—which is a perpetual right granted to Duke Energy under the Easement.

D. Because the Easement prohibits the location or construction of the Stormwater Facilities and the Man-made Wetland within the Easement Area and/or because the placement of the Stormwater Facilities and Man-made Wetland within the Easement Area would unreasonably interfere with the rights granted to Duke Energy under the Easement, summary judgment in favor of Duke Energy is warranted on all Claims.

1. Declaratory Judgment (Count I)

In Count I, Plaintiffs seek declaratory relief pursuant to chapter 86, Florida Statutes, asking this Court to declare (i) that the Stormwater Facilities and Man-made Wetland are not buildings, structures, or obstacles under the terms of the Easement; (ii) that construction, operation and maintenance of the Stormwater Facilities and Man-made Wetland "do not unreasonably interfere with Duke's express, limited and intangible use rights to the Easement Area"; and (iii) that their construction within the Easement Area is proper under the terms of the Easement. *See* Compl. ¶¶ 54-65; *id.* at 11-12. As set forth above, to the extent Plaintiffs seek declaratory relief as to the Mitchell Ranch South, Plaintiffs' claims are moot and Duke Energy is entitled to summary judgment. *See supra* section II.A. To the extent Plaintiffs seek declaratory relief as to Mitchell Ranch East, the Mitchell Ranch East Improvements constitute structures and obstacles within the ordinary meaning of those terms, and as such, Plaintiffs are prohibited from constructing them within the Easement Area under the unambiguous terms of the Easement. Thus, the Court finds that Duke Energy also is entitled to summary judgment on Count I as to Mitchell Ranch East. The Court further finds that Duke Energy is entitled to summary judgment on Count I as to Mitchell Ranch East because the proposed Mitchell Ranch East Improvements unreasonably interfere with Duke Energy's rights under the Easement because the undisputed facts establish Duke Energy will not be able to use the portions of the Easement Area within which the Mitchell Ranch East Improvements are constructed to construct, operate, or maintain additional powerlines, including underground transmission and distribution facilities and related improvements.

2. Injunction (Count II)

"A mandatory injunction is proper where a clear legal right has been violated, irreparable harm has been threatened, and there is a lack of an adequate remedy at law." *Shaw v. Tampa Elec. Co.,* 949 So. 2d 1066, 1069 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D181a]. Further, granting a mandatory injunction is proper only where it will not disserve the public interest. *Id.* In Count II, Plaintiff Mitchell Partnership generally demands a judgment enjoining Duke Energy "from interfering or taking further action inconsistent with, the terms of [the Easement,]" but it is clear from the allegations that the claim for injunctive relief is primarily related only to the Stormwater Facilities associated with the development of Mitchell Ranch East. Compl. ¶¶ 66-73. Specifically, Mitchell Partnership seeks to enjoin Duke Energy from attempting to prevent the construction, operation and maintenance of the Mitchell Ranch East Improvements within the Easement Area. *Id.* at 13.

Here, Plaintiff Mitchell Partnership has not put forth evidence necessary to establish any of the elements necessary to warrant entry of the requested injunction. Most notably, because the Stormwater Facilities (including the Mitchell Ranch East Improvements) constitute structures and obstacles whose construction or location by the fee owners within the Easement Area is prohibited by the unambiguous terms of the Easement, *see supra* section II.B, and/or because the construction of the Stormwater Facilities (including the Mitchell Ranch East Improvements) would unreasonably interfere with Duke Energy's rights under the Easement, *see supra* section II.C, Mitchell Partnership cannot establish that a clear legal right has been violated by any alleged interference of Duke Energy with Mitchell Partnership's plans to construct the Mitchell Ranch East Improvements within the Easement Area. Likewise, because Mitchell Partnership seeks to do something that the Easement expressly prohibits it from doing, it cannot establish irreparable harm. Further, allowing the injunction is not in the public interest; to the contrary, "the public has a cognizable interest in the protection and enforcement of contractual rights[,]" *Telemundo Media, LLC v. Mintz,* 194 So. 3d 434, 436 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1098c] (internal quotation marks and citation omitted), and thus, enjoining Duke Energy from taking actions to enforce its rights under the Easement would disserve the public interest. Because it is clear from the undisputed facts and unambiguous terms of the Easement that Mitchell Partnership cannot establish the elements necessary to warrant entry of the requested injunction, the Court finds that summary judgment on Count II in favor of Duke Energy is warranted.

3. Breach of Contract (Count III)

To succeed on a claim for breach of contract under Florida law, a plaintiff must establish "(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." *Farman v. Deutsche Bank Nat'l Tr. Co. as Tr. for Long Beach Mortg. Loan Tr. 2006-05,* 311 So. 3d 191, 195 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1902a]. In Count III, Plaintiffs allege Duke Energy has breached the Easement by "interfering with Plaintiffs' property rights in Mitchell Ranch South and Mitchell Ranch East, including Plaintiffs' rights to construct, operate, and maintain the [Stormwater Facilities and Man-made Wetland] within the Easement Area." Compl. ¶ 76; *see id.* ¶¶ 74-80. As found above, Plaintiffs do not have the right to construct the Stormwater Facilities and Man-made Wetland within the Easement Area but, in fact, are expressly prohibited from doing so under the unambiguous terms of the Easement. *See supra* section II.B. Therefore, any alleged interference by Duke Energy of such construction is not an interference with Plaintiffs' property rights or otherwise a breach of the Easement. Thus, the Court finds Plaintiffs' claim for breach of contract fails as a matter of law and entry of summary judgment on Count III against Plaintiffs and in favor of Duke Energy is warranted.

E. Summary judgment in favor of Duke Energy is further warranted on Count III because Plaintiffs have failed to establish Duke Enemy breached the Easement.

Plaintiffs have not put forth any evidence that Duke Energy breached the Easement. Plaintiffs' breach of contract claim is premised on Duke Energy's alleged interference with the permitting process for Mitchell Ranch South—specifically Duke Energy's objection to placement of the Mitchell Ranch South Improvements within the Easement Area and on Duke Energy's alleged objection to placement of the Mitchell Ranch East Improvements within the Easement Area (and therefore Duke Energy's anticipated interference with the permitting process for Mitchell Ranch East). *See generally* Compl. at Count III. Plaintiffs' breach of contract claim fails as to both Mitchell Ranch South and Mitchell Ranch East because the Easement does not require Duke Energy to consent to the placement of the Stormwater Facilities and/or Man-made Wetland within the Easement Area and does not prohibit Duke Energy from objecting to their construction within the Easement Area to the full extent of Duke Energy's right to object. The Easement places no affirmative obligation on Duke Energy to issue a letter of no objection or otherwise provide its consent to the placement of the Stormwater Facilities and/or Man-made Wetland within the Easement Area. Likewise, the Easement does not prohibit Duke Energy from objecting to the

placement of the Stormwater Facilities and/or Man-made Wetland within the Easement Area. Therefore, the Court finds Plaintiffs' claim for breach of contract fails as a matter of law.

For the reasons set forth above, it is **ORDERED** and **ADJUDGED** that

1. Defendant's Motion is **GRANTED**.

2. Plaintiffs' Motion is **DENIED**.

3. The relief sought by Plaintiffs in Count I is dismissed with prejudice.

4. The relief sought by Mitchell Partnership in Count II is dismissed with prejudice.

5. The relief sought by Plaintiffs in Count III is dismissed with prejudice.

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[1]Terms not defined herein have the meaning ascribed to them in the Complaint.

[2]The Complaint refers to the Easement as the "Non-Exclusive Easement." Compl. ¶ 13. The Complaint also references a Supplemental Non-Exclusive Easement granted by Fairway-Mitchell, LLC to Defendant, which granted Defendant additional rights of use. The Complaint alleges that the Supplemental Non-Exclusive Easement also encumbers Mitchell Ranch South and Mitchell Ranch East. *Id.* at ¶ 14. However, a factual dispute exists as to whether the Supplemental Non-Exclusive Easement actually encumbers Mitchell Ranch South and Mitchell Ranch East. *See* June 13, 2023 Mitchell Dep. Tr., attached to Plaintiffs' July 21, 2023 Notice of Filing Transcript, 40:18-42:23 ("I'm not sure that the supplemental easement is valid on the Mitchell property, the Mitchell Ranch property"). Irrespective, resolution of this dispute is not required because this Court can resolve all matters set forth in the Complaint solely based on the rights and restrictions contained in the original Easement.

[3]Because I find that the terms of the Easement are unambiguous, this Court declines to consider parol evidence submitted in connection with the Motions. *See, e.g., Razin v. A Milestone, LLC,* 67 So. 3d 391, 396 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1713a]; *TECO Barge Line, Inc. v. Hagan,* 15 So. 3d 863, 865 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1537a].

* * *

Criminal law—Trespass—Trespass charge dismissed where defendant departed restaurant when told to do so by officer working an off-duty detail and, after again being told to leave as he stood on public sidewalk outside of restaurant, defendant walked to adjacent building—Resisting officer with violence—Resisting charge based on defendant's reaction to being forcefully pulled by officer when he attempted to walk away after officer asked him to produce identification so that officer could make trespass arrest is also dismissed—Officer was not engaged in execution of lawful duty, but acting as agent of restaurant manager, in issuing trespass warning—For the same reason, charge of battery on law enforcement officer is dismissed and reduced to charge of simple battery, which does not require proof that officer was engaged in execution of lawful duty

STATE OF FLORIDA, Plaintiff, v. RAYMOND JOSEPH RAUBER, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CF-009447-A-O. March 1, 2024. Barbara Leach, Judge. Counsel: Harlenys Bruno, Office of the State Attorney in and for Orange County, Orlando, for Plaintiff. Matthews R. Bark and Ethan W. Carlos, Matthews R. Bark, P.A., Altamonte Springs, for Defendant.

AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S AMENDED MOTION TO DISMISS

(Amended as to add Statute number to page 7)

THIS CAUSE having come on to be heard before this Court upon Defendant's Amended Motion to Dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), and the Court having listened to the facts, heard arguments from counsel, and being otherwise fully advised in the premises, hereby finds as follows:

The Defendant has been charged by Information with (1) one count of Battery on a Law Enforcement Officer pursuant to Florida Statutes Section 784.07(2)(b); (2) one count of Resisting Officer with Violence pursuant to Florida Statutes Section 843.01; and (3) one count of Trespass in a Structure pursuant to Florida Statutes Section 810.08. The Defendant filed an Amended Motion to Dismiss all three charges pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) on November 2, 2023, and the State of Florida subsequently filed its Traverse/Demurrer one and half hours prior to the hearing previously scheduled and held on December 18, 2023.

At the outset, this Court finds that the State's Traverse/Demurrer does not specifically dispute any of the material facts as set forth in the Defendant's Amended Motion to Dismiss, nor does it allege any additional material facts that are sufficient to establish a prima facie case. As a result, this Court relies on the Defendant's Amended Motion to Dismiss, as well as viewing Officer Orlando's body camera video as stipulated by the parties, in establishing the following findings of fact.

On August 12, 2022, Mr. Rauber was at a restaurant called the Whole Enchilada Fresh Mexican Grill & Bar in Winter Garden, Florida. Officer Christian Orlando of the Winter Garden Police Department was also at the Whole Enchilada working an off-duty detail. Officer Orlando was equipped with a body camera, which began recording as he was approaching Mr. Rauber on the second floor of the building. The video shows that around 10:26 PM Mr. Rauber was standing in a large group of individuals when the manager of the Whole Enchilada, John Hartman, and Officer Orlando approached him. Mr. Hartman gestured with his hand and told Mr. Rauber to follow him downstairs.

After a brief conversation between Mr. Rauber and his girlfriend regarding driving him home, Mr. Rauber proceeded to the stairwell with Mr. Hartman and Officer Orlando. Mr. Rauber stopped for a moment in the stairwell to ask why he was being asked to leave, to which both Mr. Hartman and Officer Orlando instructed him it was "time to go." Mr. Rauber proceeded down the stairs and followed Mr. Hartman through the first floor of the building. Mr. Rauber is seen exiting the front entrance of the building at approximately 10:28 PM. The video shows Mr. Rauber pass the metal railing and walk onto the public sidewalk in front of the building. Officer Orlando walks toward Mr. Rauber and tells him that his girlfriend "went that way." Officer Orlando then tells Mr. Rauber "You got to go, get off the property." Officer Orlando immediately looks to Mr. Hartman and asks if he wants Mr. Rauber trespassed, to which Mr. Hartman says yes.

Within seconds of being told to get off the property, Mr. Rauber walks to the front of the business next door. Officer Orlando then asks Mr. Rauber for his ID and Mr. Rauber begins walking away, continuing in the direction away from the Whole Enchilada. Officer Orlando grabs Mr. Rauber's arm, swings Mr. Rauber around to face him, and this is where Mr. Rauber contacts Officer Orlando with his hand. Mr. Rauber is instantly thrown to the ground and placed under arrest.

This Court will first address Defendant's Amended Motion as it relates to Count Three—the charge of Trespass. Defense argues that the Trespass charge should be dismissed because the undisputed facts establish that the Defendant did in fact depart the Whole Enchilada once requested to do so. As set forth above, Mr. Rauber was asked to leave the second floor of the very crowded Whole Enchilada at approximately 10:26 PM and is seen exiting through the front door of the building at approximately 10:28 PM. Mr. Rauber only stops from exiting for a brief moment, a second, to ask why he had to leave. He was told it was time to go and continued his departure.

Officer Orlando's body camera shows Mr. Rauber pass the metal railing in front of the building and walk onto the public sidewalk. Mr. Rauber is looking for his girlfriend when Officer Orlando tells him that he needs to walk away. Within 21 seconds of being told to leave Mr. Rauber walked away from the Whole Enchilada and walked in front of the building next door. The Court finds that these facts do not support a prima facie case of Trespass as Mr. Rauber clearly departed the building onto the public sidewalk once requested to do so and

moved from the sidewalk within seconds of being told to leave the property. As a result, the Court hereby **GRANTS** the Defendant's Motion to dismiss Count Three. It is hereby **ORDERED** that the charge of trespass is **DISMISSED** by the court.

The next issue this Court will address is Count Two—the charge of Resisting an Officer With Violence. Defense argues that the Resisting with Violence charge should be dismissed because Officer Orlando was not engaged in the lawful performance of his duties when he grabbed Mr. Rauber by the arm and swung him around. In order to establish a prime facie case of guilt for this charge, the State must prove that at the time of the incident the officer was engaged in the lawful performance of a legal duty. See *Rodriguez v. State,* 964 So.2d 833, 837 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2218a], Florida Statutes Section 843.01, and Fla. Std. Jury Instr. (Crim.) 21.2.

The court has already found that Officer Orlando did not have probable cause to arrest Mr. Rauber for Trespass. Thus, the question is whether Officer Orlando was engaged in the lawful performance of his duties when he grabbed Mr. Rauber to issue him a trespass warning.

"[W]hen determining whether the evidence proved the 'lawful execution' elements of sections 784.07(2) and 843.01, [the court] must apply the 'legal standards governing the duty undertaken by the law enforcement officer at the point that an assault, battery, or act of violent resistance occurs.' " *Rodriguez v. State*, 964 So. 2d at 837. In *Rodriguez v. State*, 29 So.3d 310, 312-13 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1673a], the Second DCA held that the officer who attempted to stop the defendant to issue a trespass warning was conducting the stop as an agent of the property owner and not in his own official capacity. The Court explained "that a stop merely to issue a trespass warning is not a *Terry* stop, but rather a consensual encounter. As a result, a citizen's refusal to provide accurate identification during such an encounter would not be an arrestable offense." *Id.*

Here, Officer Orlando, in order to issue Mr. Rauber a trespass warning, demanded Mr. Rauber provide his identification. As explained in *Rodriguez,* this encounter was required by law to be consensual. Officer Orlando was merely acting as an agent of Mr. Hartman and not in his own official capacity. Mr. Rauber was within his rights to leave and not consent to this encounter or provide his identification. Officer Orlando forcefully pulling Mr. Rauber to engage in what should have been consensual, not authoritative, means Officer Orlando was not engaged in the execution of his lawful duties. Accordingly, this Court hereby **GRANTS** the Defendant's Motion as to Count Two and hereby **ORDERS** that the charge of Resisting an Officer With Violence is **DISMISSED**.

The final issue this Court must address in Defendant's Amended Motion is regarding Count One—the charge of Battery on a Law Enforcement Officer. Defense's argument as to Count One similarly mirrors that of Count Two, i.e., that Officer Orlando was not engaged in the lawful execution of a legal duty when the alleged battery was committed.

As explained above, Officer Orlando did not have probable cause to arrest Mr. Rauber for Trespass and was acting as an agent of Mr. Hartman when he demanded Mr. Rauber provide his drivers license in order to issue him a trespass warning. This was a consensual encounter in which Mr. Rauber had the right to refuse to provide his identification. Thus, Officer Orlando was not engaged in the performance of a lawful duty when the alleged battery occurred. *See Rodriguez*, 29 So.3d at 312-13 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1673a]. Accordingly, the State cannot establish a prima facie case of guilt for Battery on a Law Enforcement Officer.

However, that does not end this Court's analysis as to this charge. The Court holds that while the undisputed material facts do not constitute a prima facie case of battery on a law enforcement, simple battery does not require the State to prove that the law enforcement officer was engaged in the execution of his lawful duties. Because there is insufficient prima facie evidence of this element, the charge of Battery on a Law Enforcement Officer is hereby **DISMISSED** and **REDUCED** to the lesser included offense of simple misdemeanor battery pursuant to *Rodriguez,* 964 So.2d at 838. As such, this Court hereby **DENIES** Defendant's Amended Motion to wholly dismiss Count One, but further **GRANTS** the Amended Motion to Dismiss the portion of Count One regarding the battery being on a law enforcement officer, and hereby **ORDERS** the charge is reduced to simple misdemeanor battery.

WHEREFORE, based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. The Defendant's Amended Motion to Dismiss is **GRANTED** as to **COUNT TWO** and **COUNT THREE**. **COUNTS TWO AND THREE** are hereby **DISMISSED**.

2. The Defendant's Amended Motion to Dismiss is **DENIED** in part as to **COUNT ONE**, but is **GRANTED** to the extent that the Court **DISMISSES** the portion of the offense requiring the State to prove the battery was on a law enforcement officer acting in his legal duties. The Court, therefore, reduces **COUNT ONE** from the felony of battery on a law enforcement officer to simple misdemeanor battery pursuant to Florida Statutes Section 784.03(1), such that it classifies as a misdemeanor and this matter should be transferred to county court.

* * *

Criminal law—Sentencing—Death penalty—Jury instructions—Motion to reconsider ruling agreeing to take judicial notice of order in *State v. Rojas* modifying standard jury instruction to omit advice to jurors in capital case that their penalty-phase verdict would only be a recommendation is denied—Advice is not required by statutory law, precedent, or rules of criminal procedure—While advice is not inaccurate, it is inadequate and may diminish jurors' sense of responsibility for verdict

STATE OF FLORIDA, Plaintiff, v. TAVARES CALLOWAY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F98-16016A. Section 60. March 27, 2024. Miguel M. de la O, Judge. Counsel: Abbe Rifkin, Jonathan Borst, and Justin Funck, for Plaintiff. Scott Sakin, Carmen Vizcaino, and Sarah Sweetapple, for Defendant.

ORDER DENYING STATE'S SECOND MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court on the State of Florida's Second Motion for Reconsideration of the Court's ruling granting Defendant, Tavares Calloway's, motion to take judicial notice of the December 2, 2023, order this Court issued in *State v. Rojas* modifying standard jury instruction 7.11 ("*Rojas* Order"). The Court has reviewed the motion and response, heard argument of counsel, and is fully advised in the premises. The Second Motion for Reconsideration is **DENIED**.

The Second Motion for Reconsideration is grounded primarily in Florida Rule of General Practice and Judicial Administration 2.580, which provides in part:

> (a) Use; Modification. The standard jury instructions appearing on The Florida Bar's website ***may*** be used by trial judges in instructing the jury in every trial to the extent that the instructions are applicable, unless the trial judge determines that an applicable standard jury instruction is erroneous or inadequate, in which event the judge ***shall*** modify the standard instruction or give such other instruction as the trial judge determines to be necessary to instruct the jury accurately and sufficiently on the circumstances of the case. If the trial judge modifies a standard jury instruction or gives another instruction, upon

> timely objection to the instruction, the trial judge ***shall*** state on the record or in a separate order the respect in which the judge finds the standard instruction erroneous or inadequate or confusing and the legal basis for varying from the standard instruction.

Id. (emphasis added).

A plain reading of the rule means that a trial court *may*, but does not have to, give a standard jury instruction which appears on the Florida Bar's website. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016) [26 Fla. L. Weekly Fed. S254a] ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); *Fixel v. Clevenger*, 285 So. 2d 687, 688 (Fla. 3d DCA 1973) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.' ").

By contrast, the rule uses "shall" twice to explain what the trial judge must do. The trial court must modify an instruction that is erroneous or inadequate. If the trial court modifies a standard jury instruction, upon objection by any party, it must explain why it finds the standard instruction erroneous or inadequate—which this Court has already done in its *Rojas* Order.

Consequently, this Court has the discretion to modify any jury instruction,[1] and it must do so if an instruction is erroneous or inadequate. The State argues that standard jury instruction 7.11 is not erroneous or inadequate. The State is only partially correct. This Court agrees that instruction 7.11 is not erroneous. While the instruction violates the spirit of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), it does not, strictly speaking, violate *Caldwell's* holding. Instruction 7.11 is, however, inadequate.[2]

Any instruction that lessens a juror's sense of personal moral responsibility for their vote in a capital sentencing procedure is inadequate because it introduces information into the decision-making process that is unnecessary for a juror to carry out their responsibility under Florida's capital sentencing scheme. Worse still, it allows jurors to downplay their responsibility for the sentencing decision. *See Rojas Order*, at 7-8.

The State further argues that this Court's modified instruction misstates the law because section 921.141 provides that the jury's decision is a recommendation. First, jury instructions need not track the applicable statute, a jury instruction is judged in its entirety. *See Thompson v. State*, 814 So. 2d 1103, 1106 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D706a] ("[A] correct jury instruction is not necessarily required to track the language of the standard instruction or the statute. If the instructions, as a whole, fairly state the applicable law, the failure to give a particular instruction is not error."), *disapproved on other grounds*, *Battle v. State*, 911 So. 2d 85 (Fla. 2005) [30 Fla. L. Weekly S608a].

Second, not explaining to the jury that their decision is a recommendation does not misstate the law. It simply means the Court omits educating the jury about a procedural step in the sentencing process; a procedural step that is superfluous to their ultimate task. This is not novel. Trial judges do not advise jurors about all procedures. For example, jurors do not learn in non-death penalty cases that the trial judge can serve as an additional "super" juror and grant a new trial. *See* Fla. R. Crim. P. Rule 3.600. Nor are jurors instructed that they have the power of nullification; that the double jeopardy clause means an acquitted defendant cannot be tried again on the same charges. We don't instruct jurors on these procedures because it is not relevant to their task.

In the context of a death penalty sentencing phase, the jury is instructed, among other things, on (1) the burden of proof; (2) the requirement that it find only those aggravating factors that were proven beyond a reasonable doubt; (3) the requirement that it consider established mitigating circumstances; and, (4) its obligation to weigh the aggravators and the mitigators before making a final decision. The State's argument that the modified instruction materially changes this, or any other applicable law, is wrong.

The law as set forth in section 921.141 is being, and will continue to be, fully complied with in this trial. The jurors will, in accordance with the law, make their findings. If the jurors' find in favor of death by a margin of at least 8-4, then this Court will give great weight to the jury's recommendation of death. If, on the other hand, the jurors do not recommend death by a margin of at least 8-4, this Court will, again in accordance with the law, sentence the Defendant to life imprisonment. The modified 7.11 instruction does not change the law in any way whatsoever.

Simply put, the Court will not educate the jury on the *impact* of their decision, but the Court will give great weight to their decision if it is for death and will implement their decision if it is for life. Any suggestion that the law has been changed or ignored or modified finds no support in this Court's *Rojas* Order.

One final point. In *Rojas*, this Court noted that the State had not justified the need to advise jurors that the decision is only a recommendation.

> Since neither Florida statutory law, precedent, nor the rules of criminal procedure require that the jury be advised that its verdict is a recommendation, the burden is on [the] State to justify why this Court should so instruct the jury. However, the State has not given this Court any basis for concluding that the jury's verdict constituting a recommendation is a relevant fact about which the jury should be informed.

Rojas Order, at 9. The State has again chosen not to explain the relevance of instructing jurors that their decision is, in fact, a mere recommendation. Instead, the State insists the burden is on this Court to justify its modification of instruction 7.11. The Court did exactly that in its *Rojas* Order. The State, on the other hand, has failed to refute this Court's conclusions or address the Court's findings regarding the Capital Jury Project and the underlying premise of *Caldwell*—specifically, that "a death sentence [ ] determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" is constitutionally infirm. *Caldwell*, at 328-29. Rather than address these issues, the State maintains the modified instruction increases their burden of proof. The State is incorrect for the reasons stated in the *Rojas* Order.

None of the State's arguments explain why knowing the *impact* of their vote is relevant to the jury's decision. Knowing the impact does not factor into whether the State has proven an aggravating factor beyond a reasonable doubt. Or whether the defense has shown the existence of a mitigating factor by the greater weight of the evidence. Nor does it assist the jury in weighing the aggravators and mitigators. But if it affects how jurors go about making their individualized decision about the appropriateness of the death penalty in this case, then it violates the underlying premise of *Caldwell*. No juror should feel any less responsibility for their decision simply because the Court makes the final decision as to imposition of the death penalty.

In short, the modified instruction is necessary to correct an otherwise inadequate instruction. The modified instruction does not change any of the applicable law and the State has failed to demonstrate why the jury should be told its vote of death is a mere recommendation. For the reasons stated above, in the *Rojas* Order, and in *Caldwell*, the standard instruction would lessen the jury's personal moral responsibility because they would learn the irrelevant fact that their decision is not the final word on the Defendant's fate, and it would taint their deliberations and decisions. Accordingly, the standard instruction must be modified.

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[1]To be clear, this Court is not suggesting that trial judges should modify standard jury instructions on a whim. Any examination of the *Rojas* Order reveals that the Court based its decision on the principles enunciated by the Supreme Court in *Caldwell* and the conclusions reached by the Capital Jury Project. In other words, this Court did not act arbitrarily or capriciously in concluding that instruction 7.11 should be modified to not lessen the jury's sense of personal moral responsibility for its decision.

[2]Inadequate is defined as "not adequate: not enough or good enough : insufficient" (found at https://www.merriam-webster.com/dictionary/inadequate) (last visited March 23, 2024).

* * *

Criminal law—Competency to stand trial—Restoration of competency—Neither rule 3.212(c)(2) nor due process requires that court make restorability findings before ordering that competency restoration treatment be administered to defendant in jail—"Substantial probability" that defendant can be restored to competency means that chance that incompetent defendant is likely to be restored to competency in foreseeable future is real and material, not imaginary, has actual existence, and is more than mere chance or bare suspicion, but may be less than 50% probability—Even if court were required to make restorability findings, it finds that there is substantial probability that defendant's competency is restorable

STATE OF FLORIDA, Plaintiff, v. AMON BUSH, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case Nos. F20-3467, F21-12394. Section 09. March 7, 2024. Joseph Perkins, Judge. Counsel: Kevin Betancourt, Assistant State Attorney, for Plaintiff. Damaris Del Valle, Assistant Public Defender, for Defendant.

ORDER REGARDING COMPETENCY

(1) Do Rule 3.212(c)(2) of the Florida Rules of Criminal Procedure and the decisions in *Jackson v. Indiana*, 406 U.S. 715 (1972) and *Schofield v. Judd*, 268 So. 3d 890 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D850a] require the Court, upon adjudicating a defendant to be incompetent to proceed, to make restorability[1] findings before ordering that competency restoration treatment be administered in jail to an incarcerated defendant? If so, **(2)** what do the words "substantial probability" of restorability mean, and **(3)** is there a substantial probability that Defendant Amon Bush's competency is restorable?

As discussed in detail below, the answer to the first question is no. Florida Statutes and Rule 3.212 require restorability findings only before involuntarily committing a defendant for competency restoration. *Jackson* expressly holds that due process ***permits*** involuntary commitment for a reasonable period of time necessary to determine restorability. That is, *Jackson* expressly authorizes commitment to determinate restorability and does not require a restorability finding as a prerequisite to commitment. *Schofield* applies *Jackson* and requires the Court to release an incompetent defendant when the Court determines, ***after*** having involuntarily committed a defendant for competency restoration, that the defendant is not restorable.

The answer to the second question is that a "substantial probability" that a defendant will be restored to competency in the foreseeable future exists when the degree to which an incompetent defendant is likely to be restored to competency in the foreseeable future is real and material, not imaginary, and has actual, not fictitious, existence. That a probability is more than mere chance or bare suspicion is insufficient, but the required probability is less than 50 percent.

The answer to the third question is yes.

BACKGROUND AND PROCEDURAL HISTORY

Amon Bush had a stroke in 2018. The following year, the State alleges, Bush attempted to murder Isaazl Dwayn Simmons with a firearm (Case # F20-3467). Two years later, the State alleges, Bush murdered Timothy Joseph Mitchell with a firearm (Case # F21-12394).

The defense raised Bush's competency to proceed, and the Court appointed Drs. Ralph Richardson, Barton Jones, and Alejandro Arias to evaluate him. All three opined that Bush was incompetent to proceed due to a neurocognitive disorder, that Bush's prognosis for restoration was guarded and uncertain, and that a neuropsychological examination was necessary to accurately assess restorability.

The State paid[2] Dr. Arias, and the defense hired Dr. Martin Segel, to administer neuropsychological examinations. In his written report, Dr. Arias opined, based on the results of the examination and other factors, that Bush could be restored to competency within eight to twelve months and that Bush's neuropsychological deficits would not prevent full competency restoration. In his written report, Dr. Segel opined that Bush is likely non-restorable.

The Court held multiple hearings. It heard testimony on November 14, 2023 and January 25, 2024, primarily from Drs. Arias and Segel but also from Drs. Richardson and Jones. It also heard summation and legal arguments on December 6, 2023, December 8, 2023, February 7, 2024, and February 26, 2024.

DISCUSSION

I. THE COURT IS NOT REQUIRED TO MAKE RESTORABILITY FINDINGS AFTER AN INITIAL DETERMINATION OF INCOMPETENCY BEFORE ORDERING THAT AN INCARCERATED DEFENDANT RECEIVE COMPETENCY RESTORATION TREATMENT IN JAIL.

As discussed below, neither Rule 3.212 nor the Due Process Clause requires that the Court make restorability findings before ordering that an incarcerated defendant receive competency restoration treatment in jail.

A. The plain, ordinary, and obvious meaning of Rule 3.212(c) and (d), Florida Rules of Criminal Procedure is that the Court must make restorability findings (1) before involuntarily committing a defendant, and (2) after committing the defendant if the Court finds that the defendant no longer meets criteria for involuntary commitment.

Rule 3.212 governs the procedure for a competency hearing and the available options depending on the Court's findings. When interpreting Rule 3.212, the Court must apply the same canons of construction applicable to statutes. *See Patino v. State*, __ So. 3d __, 2024 WL 818748, *3 (Fla. 3d DCA, Feb. 28, 2024) [49 Fla. L. Weekly D799a] (citing *Barco v. School Bd. of Pinellas Cty.*, 975 So. 2d 1116, 1121 (Fla. 2008) [33 Fla. L. Weekly S87b]). Text is paramount, and the Court must apply the "ordinary, contemporary, common meaning" of text. *State v. Arshadnia*, __ So. 3d __, 2023 WL 8793248, *3 (Fla. 3d DCA, Dec. 20, 2023) [49 Fla. L. Weekly D8a]; *accord Cascar, LLC v. City of Coral Gables*, 274 So. 3d 1231 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1646a] (" '[W]hen 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 and construction; the statute must be given its plain and obvious meaning.' ") (quoting *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) [37 Fla. L. Weekly S439a]).

When determining the ordinary, contemporary, and common meaning of text, the Court must "always be mindful of the fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 324 (Fla. 2022) [47 Fla. L. Weekly S134a] (quotation omitted). "Context is a primary determinant of meaning." *Id.* (quotation omitted).

The ordinary, contemporary, and common meaning of Rule 3.212(c)(2) is that it does not require restorability findings before the Court may order that an incarcerated defendant receive competency restoration treatment in jail:

> If the defendant is incarcerated, the court may order treatment to be administered at the custodial facility or may order the defendant transferred to another facility for treatment or may commit the defendant as provided in subdivision (3).

Fla. R. Crim. P. 3.212(c)(2). Of the three options available to the Court in Rule 3.212(c)(1)-(3), only the third option—involuntary commitment—requires restorability findings:

> (3) A defendant may be committed for treatment to restore a defendant's competence to proceed if the court finds[, *inter alia*,] that:
>
> (A) the defendant meets the criteria for commitment as set forth by statute;[3]
>
> (B) there is a substantial probability that the mental illness or intellectual disability causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future . . . .

Id., Rule 3.212(c)(3)(A)-(B).

The only other provision of Rule 3.212 requiring the Court to make a restorability finding is subdivision (d). The "ordinary, contemporary, [and] common meaning" of Rule 3.212(d), however, when read in context with the rest of Rule 3.212(c), indicates that it requires restorability findings when an involuntarily committed defendant, despite previously meeting the criteria for commitment, remains incompetent but no longer meets such criteria. Specifically, subdivisions (c)(4)-(9) govern once the Court commits a defendant. The hospital administrator must notify the Court upon determining that a committed defendant no longer meets commitment criteria or has become competent to proceed, and the Court must promptly hold a hearing. *Id*., subdiv. (c)(6)-(7). If, "following the hearing," the Court determines that the defendant remains incompetent and continues to meet commitment criteria, the Court must order continued commitment or treatment. *Id.*, subdiv. (c)(7). If, "after hearing," the Court determines the defendant is competent to proceed, the Court shall enter an order so finding and shall proceed. *Id*., subdiv. (c)(8). If, "after any such hearing, the court determines that the defendant remains incompetent to proceed but no longer meets the criteria for commitment, the court shall proceed as provided in rule 3.212(d)." *Id*., subdiv. (c)(9).

Rule 3.212(d) then details the options available to the Court depending on the reason the Court has determined that the (previously involuntarily committed) incompetent defendant no longer meets criteria for involuntary commitment. If, at this juncture, the Court finds that the defendant remains incompetent "and there is a substantial probability that the defendant will gain competency to proceed in the foreseeable future, but does not meet the criteria for commitment, the defendant may be released on appropriate release conditions," *id.*, first sentence, which may include outpatient treatment. *Id*., second sentence. This section would apply, for example, if a defendant no longer meets commitment criteria because all less restrictive treatment alternatives to involuntary hospitalization are no longer judged to be inappropriate. *See* Fla. Stat. § 916.13(1)(b); Fla. Stat. § 916.302(1)(c).[4] If, however, the reason a defendant no longer meets involuntary commitment criteria is because there is no substantial probability that the defendant is restorable, the defendant must be released, or the State must initiate civil commitment proceedings. Fla. R. Crim. P. 3.212(d), last sentence.

Thus, the plain, ordinary, and obvious meaning of Rule 3.212(d), when considered in context with the express language of subdivision (c)(9) and the remaining provisions of subdivision (c), indicates that subdivision (d) applies when an involuntarily committed defendant, despite previously meeting commitment criteria, remains incompetent but long longer meets such criteria. It does not apply to require restorability findings before ordering treatment under subdivision (c)(2) upon an initial adjudication of incompetency.

B. To the extent there is textual ambiguity, various canons of construction support interpreting Rule 3.212(d) as stated above.

Even if, for purposes of argument, the text Rule 3.212(d) were ambiguous, interpreting it as requiring restorability findings before a court can order that an incarcerated defendant receive competency restoration treatment in jail would render various provisions of subdivision (c) either superfluous or internally inconsistent. It would also conflict with the Supreme Court's expressly stated purpose of requiring restorability findings in Rule 3.212(d), which is to comply with the constitutional limits of *Jackson* as applied in *Schofield*.

1. Interpreting Rule 3.212(d) as not applying after an initial incompetency finding is necessary to avoid rendering portions of Rule 3.212(c) superfluous and rendering other portions internally inconsistent.

When interpreting Rule 3.212(c) and (d), "[n]o word should be construed as superfluous." *Arshadnia*, __ So. 3d at __, 2023 WL 8793248, at *3. "On the contrary, each word, phrase, sentence, and part of the [rule] should be given effect." *Id*. "That is because courts should presume that the [Supreme Court] says in a [rule] what it means and means in a [rule] what it says there." *Id*.

Interpreting Rule 3.212 as containing separate subdivisions governing **(1)** the options available after an initial (in)competency determination, *id*., subdivisions (b) & (c)(1)-(3), **(2)** the procedures if the Court commits the defendant, *id*., subdivisions (c)(4)-(9), and **(3)** the procedures if a previously committed defendant stops meeting statutory criteria for involuntary commitment, *id*., subdivisions (c)(9) & (d), is the only way to avoid rendering various sections of the rule either superfluous or inconsistent. For example, if subdivision (d) applied upon an initial determination that a defendant is incompetent, then the first sentence would be superfluous to subdivision (c)(1) (which already authorizes imposition of release conditions) and inconsistent with subdivision 3.212(c)(2) (which authorizes the Court to order that incarcerated defendants receive treatment in jail). It would render illusory the discretion afforded to the Court in subdivisions (c)(1)-(3)—apparent in the Supreme Court's repeated use of the word "may"—because it would mandate only a single option: treatment in the community. Additionally, if the last sentence of subdivision (d) governed upon an initial determination that a defendant is incompetent, subdivision (c)(3)(B) would be superfluous because a restorability finding would be a prerequisite to ***all*** of the options in subdivisions (c)(1)-(3), and there would be no need to specifically require a restorability finding in subdivision (c)(3)(B).

The Court rejects Bush's argument that "commitment" encompasses all of the options in Rule 3.212(c)(1)-(3) and, thus, that ordering that Bush receive competency restoration treatment in jail constitutes "commitment" requiring a restorability finding. First, although the title of subdivision (c) is "Commitment on Finding of Incompetence," the plain, ordinary, and obvious meaning of commitment does not include incarceration in jail or, with respect to subdivision (c)(1), treatment in the community.

Second, within the text of subdivision (c)(2) the Supreme Court provides two options using different words separated by a disjunctive "or." The Court may "order treatment . . . at the custodial facility" **or** "commit the defendant as provided in subdivision (3)." Absent context indicating otherwise, the Supreme Court's use of different words separated by a disjunctive indicates that the Supreme Court intended that ordering treatment in jail mean something different from commitment. *See Burgess v. State*, 198 So. 3d 1151, 1157 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2038a]. Here, not only does context not indicate otherwise, but accepting Bush's interpretation would destroy the harmony of the rest of the rule. Subdivisions (2) and (3) would be superfluous, and there would be simply no explanation for

subdivision (3) requiring various findings subdivision (2) does not require.

Third, Bush's interpretation would also render meaningless the Supreme Court's referring to treatment in a "custodial facility" in subdivision (c)(2) but in a "treatment facility" in subdivision (c)(6).

Finally, for what it is worth, in 1992 the Supreme Court added headings to various subdivisions of the Florida Rules of Criminal Procedure, including to Rule 3.212's subdivisions. *See In re Amendments to Fla. R. of Crim. P.*, 606 So. 2d 227, 283-86 (Fla. 1992). Although the Supreme Court explained the purpose of various changes to Rule 3.212, it did not mention any intention to broaden the meaning of commitment by adding a heading. *See id*.

2. The history of Rule 3.212(d) indicates it was enacted to conform with *Jackson* as applied in *Schofield*.

The Supreme Court expressly amended Rule 3.212(d) to require restorability findings to conform to *Jackson* as applied in *Schofield*. *See In re Amendments to Fla. R. Crim. P. 3.212*, 324 So. 3d 457 (Fla. 2021) [46 Fla. L. Weekly S231a].[5] In *Jackson*, the United States Supreme Court held that Indiana's statutory scheme for ***indefinite*** commitment of incompetent defendants ran afoul of the Due Process Clause:

> The issue in *Jackson* was the constitutionality of Indiana's statutory scheme for pretrial commitment of incompetent defendants, which permitted involuntary commitment until such time as the Department of Mental Health certified there was evidence that Jackson, who was identified as a "mentally defective deaf mute with a mental level of a pre-school child," was competent. *Jackson,* 406 U.S. at 717-19. Under that statutory scheme, Jackson's involuntary commitment could potentially constitute a life sentence. The *Jackson* Court found that such an ***indefinite commitment*** of a criminal defendant based solely on his incompetence to stand trial violated the Fourteenth Amendment's guarantee of due process. Thus, the Court held that where a person is charged with a criminal offense and is committed solely due to his incompetency to proceed to trial, ***he cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain the requisite capacity in the foreseeable future.*** *Id.* at 738-39. If not, the State must either institute civil commitment proceedings or release the defendant under those circumstances.

State v. Miranda, 137 So. 3d 1133, 1141 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D693a] (some emphasis omitted, some added, and some in original); *see Dept. of Children & Families v. State*, 201 So. 3d 78, 80-81 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2105a] ("[T]he liberty interests, which lie at the heart of our nation's heritage, preclude the State from holding an individual ***indefinitely*** against his will on criminal charges when it is plain that he can never be brought to court to answer for his crimes." (emphasis added)). *Schofield*, applying *Jackson*, held that the trial court violated the defendant's due process rights when it imposed release conditions ***after*** the defendant had already been involuntarily committed for competency restoration, ***after*** the defendant spent a year and a half in the hospital, and ***after*** the hospital administrator notified the trial court that the defendant was not restorable. 268 So. 3d at 891-92.

As discussed in footnote three above, the Florida Legislature, unlike the U.S Congress,[6] has chosen not to authorize involuntary hospitalization for competency restoration to the full extent *Jackson* permits. Rather, the Legislature has authorized involuntary commitment only when the defendant meets various statutory criteria, one of which being that the Court determine, before commitment, that the defendant is restorable. *See* Fla. Stat. § 916.13(11)(c); Fla. Stat. § 916.302(1)(d).[7] It is, of course, the Legislature's prerogative to decide the circumstances under which to allocate funds for involuntarily committing incompetent defendants for competency restoration. *Dept. of Children and Families v. State*, 201 So. 3d 78, 83-85 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2105a]. The Supreme Court expressly amended Rule 3.212(d) to require restorability findings, however, not to conform to Florida's legislative judgment regarding when involuntary commitment is appropriate but, rather, expressly to conform to the constitutional limits of *Jackson* as applied in *Schofield*.

The Supreme Court's expressly amending Rule 3.212(d) to require restorability findings to conform to a United States Supreme Court opinion prohibiting indefinite hospitalization (but expressly authorizing hospitalization for a reasonable period of time necessary to determine restorability), as applied in a district court opinion involving a defendant not being restored to competency despite his having been involuntary hospitalized, adds further support (beyond the text and context of Rule 3.212(c)-(d)) for interpreting Rule 3.212(d) as applying after a committed defendant no longer meets statutory criteria for involuntary hospitalization.

C. Rejection of Bush's constitutional argument.

Bush argues that restorability findings upon an initial determination of incompetency are constitutionally required. The Court disagrees. *Jackson* expressly permits commitment of a defendant solely due to his incompetency to proceed for a reasonable period of time to determine restorability. *Miranda*, 137 So. 3d at 1141 (discussing *Jackson* 406 U.S. at 738-39); *Garrett v. State*, 390 So. 2d 95, 97 (Fla. 3d DCA 1980) (holding that defendant's due process rights were violated where the trial court involuntarily committed the defendant and, after more than a reasonable period of time to determine restorability passed, did not make restorability findings).

A review of federal cases applying *Jackson* is helpful. Congress enacted 18 U.S.C. § 4241(d) to conform to *Jackson*. *United States v. Strong*, 489 F.3d 1055, 1061 (9th Cir. 2007). As discussed above, § 4241(d) ***requires*** a trial court, upon finding with a preponderance of the evidence that the defendant is incompetent, to involuntarily commit the defendant for a reasonable period of time to determine restorability. It neither requires nor permits the trial court to make restorability findings upon an initial incompetency determination. *See United States v. Quintero*, 995 F.3d 1044, 1048 n. 1 (9th Cir. 2021) (noting that the trial court exceed the scope of § 4241(d) by making restorability findings upon an initial determination of incompetency).

Every United States Circuit Court of Appeals to consider the issue has upheld § 4241(d)'s mandatory commitment proceedings against due process challenges. *See Quintero*, 995 F. 3d at 1052-56; *United States v. McKown*, 930 F.3d 721, 728 (5th Cir. 2019) (collecting a long list of cases) ("We agree with every court of appeals to have addressed the constitutionality of § 4241(d) in holding that the statute complies with due process."); *U.S. v. Dalasta*, 856 F. 3d 549, 554 (8th Cir. 2017) (holding that committing the defendant to the custody of the Attorney General and the Federal Bureau of Prisons does not violate due process, even when the evidence is uncontroverted that the defendant cannot be restored to competency).

The Court finds these federal opinions to be persuasive. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738. As various federal appeals courts have noted, competency restoration treatment enables medical professionals to accurately determine whether a criminal defendant is restorable. "Such a determination requires a more 'careful and accurate diagnosis' than the 'brief interviews' and 'review of medical records' that tend to characterize the initial competency proceeding." *Strong*, 489 F.3d at 1062 (citing *United States v. Ferro,* 321 F.3d 756, 762 (8th Cir. 2003); *United States v. Filippi*, 211 F.3d 649, 651 (1st. Cir. 2000)); *accord Quintero*, 995 F.3d at 1052. Dr. Arias's testimony,

discussed below, supports this proposition. He testified that within his field of neuropsychology, a major factor he considers when evaluating restorability is the extent to which prior restoration efforts have been successful.

In sum, due process does not prohibit the Court from ordering that Bush receive competency restoration treatment in jail without first making restorability findings.

D. Language in *Dep't. of Children & Families v. Pierre* suggesting a different interpretation of *Schofield* is dicta.

The Court is aware of the decision in *Dept. of Children & Families v. Pierre*, 373 So. 3d 1272 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D2182a]. In that case, on the Department of Children and Families' petition for writ of certiorari, the Second District Court of Appeals quashed an involuntary commitment order, issued upon the trial court's initial determination that the defendant was incompetent, because there was not clear and convincing evidence that the defendant was restorable. The State asked the district court to "issue a ruling which would allow the State a finite period of time to conclusively determine, in a secure setting, the viability of restoring [the defendant] to competency." *Id*. at 1276. Despite "declin[ing] to entertain the request" because it "reaches beyond the scope of this court's authority," the district court went on to state that "the law clearly dictates that in situations like the one before us 'the State must either institute civil commitment proceedings or release that defendant.' " *Id*. at 1276 (quoting *Schofield*, 268 So. 3d at 900).

The issue before the district court was the legality of a commitment order where there was insufficient evidence that the defendant met the statutory criteria for involuntary commitment, not whether the trial court was required to make restorability findings upon an initial determination of incompetency and the effect of such findings. The quoted statement is thus dicta and not binding. *See Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) [45 Fla. L. Weekly S93a] (holding that the only statements of law in an opinion are those within its holding, which "consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment"); *Cont'l Assur. Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986) (dicta is persuasive but not binding).[8] Additionally, based on the supremacy of text principle and other reasons discussed above, the Court also does not find such *dicta* to be persuasive.

II. EVEN IF, *ARGUENDO*, THE COURT IS REQUIRED TO MAKE RESTORABILITY FINDINGS, THE COURT FINDS THAT THERE IS A SUBSTANTIAL PROBABILITY THAT BUSH WILL BE RESTORED TO COMPETENCY IN THE FORESEEABLE FUTURE.

Even if, arguendo, the Court were required to make restorability findings, the Court finds based on the evidence presented that there is a substantial probability that Bush will be restored to competency in the foreseeable future. The Court first discusses the definition of "substantial probability." Next, the Court discusses the applicable standard of proof. Finally, the Court discusses the application of this definition and standard to the evidence presented regarding Bush's restorability.

A. Definition of "Substantial Probability."

The Rules of Criminal Procedure do not define "substantial probability" of restorability, and there is no binding authority and scant persuasive authority.[9] For the reasons below, the Court holds that a substantial probability of restorability as used in Rule 3.212(d) exists when the degree to which an incompetent defendant is likely to be restored to competency in the foreseeable future is real and material, not imaginary, and has actual, not fictitious, existence. That a probability is more than mere chance or bare suspicion is insufficient, but the required probability is less than 50 percent.

1. Plain, ordinary, and obvious meaning of "probability."

The plain, ordinary, and obvious meaning of "probability" as used in Rule 3.212(d) is the degree to which something (restorability to competency) is likely to occur.[10] This is one of Black's Law Dictionary's alternative definitions of "probability." *Probability*, Black's Law Dictionary (11th ed. 2019) (defining probability as including "[t]he degree to which something is likely to occur, often expressed mathematically; possibility").

Black's Law Dictionary alternately defines probability as meaning likely: "The quality, state, or condition of being more likely to happen or to have happened than not; the character of a proposition or supposition that is more likely true than false." *Id*. As the Florida Supreme Court reaffirmed in *Davis*, however, context matters. 339 So. 3d at 323-24. To illustrate, it is apparent that "probability" in the sentence "despite the challenges, there is still a probability of finding a solution" means that "the character of [the] proposition [that a solution will be found] is more likely true than false." *Id*. Where, as in Rule 3.212(d), however, an adjective modifies "probability," the plain, ordinary, and obvious meaning of the term is the degree to which something is likely to occur. It would require mental gymnastics, for example, to interpret the sentence, "there is a very low probability of winning the lottery," as meaning that the likelihood of winning the lottery is slightly over 50 percent.

The Supreme Court recently recognized the different meanings of the words "probably" and "reasonable probability" in *Damren v. State*, __ So. 3d __, 2023 WL 5968167 (Fla. Sept. 14, 2023) [48 Fla. L. Weekly S173a]. In *Damren*, the Court discussed the different prejudice standards governing post-conviction newly discovered evidence claims (requiring a showing that the newly discovered evidence "would probably produce an acquittal on retrial," *id.* at *2) on one hand and ineffective assistance of counsel and *Brady*[11] claims (requiring a showing that there is a "reasonable probability" that, but for counsel's deficiency or the State's nondisclosure, the result of the proceeding would have been different) on the other. The "probably" prejudice standard means more likely than not; the reasonable probability standard is much lower:

> [W]hile the "reasonable probability" prejudice standard means a probability higher than mere chance, it does not mean a probability greater than fifty percent; conversely, the "probably" prejudice standard (and, accordingly, the "more likely than not" standard) ***does*** mean a probability greater than fifty percent.

Damren, 2023 WL 5968167 at *2 (emphasis in original).

The Third District Court of Appeal has also recognized that the word "probability" does not mean more than 50 percent, only to be further modified by any preceding adjective:

> Probable cause doesn't require proof that something is more likely true than false. It requires only a fair probability, a standard understood to mean something more than a bare suspicion but less than a preponderance of the evidence at hand.

J.J. v. State, 312 So. 3d 116, 120 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1804a] (quotation and emphasis removed).

Unlike the newly discovered evidence standard but like the ineffective assistance and *Brady* standards, Rule 3.212(d) contains an adjective-plus-probability standard governing restorability findings, not a "probably" standard. Therefore, consistent with *Damren* and the plain, ordinary, and obvious meaning of the word, the Court holds that "probability" as used in Rule 3.212(d) means the degree to which restorability in the foreseeable future is likely to occur.

2. Plain, ordinary, and obvious meaning of "substantial."

There are no Florida decisions defining "substantial" in Rule 3.212(d), but there are some guideposts. First, Black's Law Dictionary

contains nine definitions of substantial, three of which would be appropriate adjective phrases to modify the word "probability":

> **1.** Of, relating to, or involving substance; material <substantial change in circumstances>. **2.** Real and not imaginary; having actual, not fictitious, existence <a substantial case on the merits>. **3.** Important, essential, and material; of real worth and importance <a substantial right>.

Substantial, Black's Law Dictionary (11th ed. 2019).

Second, substantial probability is more stringent than probable cause. *Parker v. State*, 843 So. 2d 871, 879 (Fla. 2003) [28 Fla. L. Weekly S262b]. Probable cause "requires only a fair probability, a standard understood to mean something more than a bare suspicion but less than a preponderance of the evidence[.]" *J.J. v. State*, 312 So. 3d 116, 120 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1804a]. The Supreme Court appears to view "reasonable probability" and "fair probability" to be synonymous or nearly synonymous. *See Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002) [27 Fla. L. Weekly S299a] (describing the probable cause standard as requiring that there be a "reasonable probability that contraband will be found at a particular place and time" and quoting in support a portion of *Illinois v. Gates*, 462 U.S. 213, 214 (1983) providing that probable cause requires a " 'fair probability that contraband or evidence of a crime will be found in a particular place' "); *accord Damren*, 2023 WL 5968167 at *2 (holding that "reasonable probability" standard "means a probability higher than mere chance" but less than fifty percent).

Finally, *Horton v. Judd*, 80 So. 3d 439 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D451b] provides a guidepost. Before involuntarily committing a defendant for competency restoration treatment, the Court must find, with clear and convincing evidence, that "[t]here is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future." Fla. Stat. 916.13(1)(c); *see also* Fla. Stat. § 916.302(1)(d). In *Horton*, the trial court involuntarily committed the defendant based on evidence that "it was possible that Horton could be restored to competency if there was some new type of treatment that had not been tried before, but that because of Horton's history of not responding and his inability to benefit from competency training, this was highly doubtful." *Id*. at 440 n. 2. The Second District held that such evidence did not constitute ***clear and convincing evidence*** of a substantial probability of restorability. *Id*. at 440.

The Court holds, based on these guideposts, that the word substantial in Rule 3.212(d) means that the degree to which an incompetent defendant is likely to be restored to competency in the foreseeable future is real and material, not imaginary, and has actual, not fictitious, existence. That a probability is more than mere chance or bare suspicion is insufficient, but the probability need not be more than 50 percent to be substantial.

B. Standard of Proof

For the reasons below, the Court holds that substantial probability is itself a standard of proof. Even if, *arguendo*, a separate standard of proof applies, the standard is less than clear and convincing evidence.

1. "Substantial probability" is itself a standard of proof as used in Rule 3.212(d).

Both the State and Bush stipulate that "substantial probability" as used in Rule 3.212(d) is not a standard of proof.[12] Rather, they agree, "substantial probability" is akin to an element, and a separate standard of proof must govern the quality of evidence establishing a substantial probability of restorability. *See* Dec. 6, 2023 Tr. at 68; Dec. 8, 2023 Tr.

A review of the three instances other than in Rule 3.212 in which the words "substantial probability" appear in Florida jurisprudence suggests they are right. As discussed above, sections 916.13(1)(a)(c) and 916.302(1)(d) include a substantial-probability-of-restorability finding as one of the criteria for involuntary commitment. Additionally, various subdivisions of section 907.041(5), governing pretrial detention, require the Court of find a substantial probability that the defendant has committed the offense. In each of these instances, a separate standard of proof governs the quality of evidence that must support the Court's findings. *See* Fla. Stat. § 916.13(1) (requiring proof by clear and convincing evidence); *id*., § 916.302(1) (same); Fla. R. Crim. P. 3.132(c)(1) (requiring the State to prove beyond a reasonable doubt the need for pretrial detention pursuant to section 907.041).

The complication, however, is that the Supreme Court in *Parker v. State*, 843 So. 2d 871 (Fla. 2003) [28 Fla. L. Weekly S262b] refers to substantial probability as a standard of proof. In upholding the constitutionality of section 903.0471, Florida Statutes, which permits a court to revoke pretrial release and hold a defendant in custody without bond if the court finds probable cause that the defendant committed a crime while on release, the Supreme Court reasoned:

> **Various standards of proof are used in criminal proceedings wherein a defendant may be deprived of his or her liberty**. For instance, "probable cause" is required for an arrest; **"substantial probability" is required for an initial order of pretrial detention**; "in the discretion of the court" is required for denial of probation; "in the conscience of the court" is required for the revocation of probation; and "beyond a reasonable doubt" is required for a criminal conviction.
>
> The type of proceeding that is at issue in the present case, i.e., a revocation of pretrial release, is similar in nature to a revocation of probation, for both proceedings involve the revocation of a significant form of legal restraint. Similarly, the "probable cause" standard that is called for in section 903.0471 is no more onerous for a defendant than the "in the conscience of the court" standard that traditionally has been used in revocation of probation proceedings. **Further, in light of the fact that a court may initially order pretrial detention based on the "substantial probability" standard, it is logical for a court to apply a less forgiving standard (i.e., "probable cause") when a detainee seeks release following a subsequent violation.**

Id. at 878-79 (footnotes omitted; emphasis added).

Although *Parker* had nothing to do with competency restorability, the Supreme Court's characterization of "substantial probability" as a standard of proof was within its decisional path of reasoning leading to the conclusion that section 903.0471 is constitutional. *See Pedroza*, 291 So. 3d at 547 (discussing what parts of an appellate opinion are within its holding and therefore binding). The parties' stipulations notwithstanding, the Court is not free to depart from this holding.

2. Even if a separate standard of proof applied, it would be less than clear and convincing evidence.

Bush argues not only that a separate standard of proof applies, but also that the standard is a heightened clear and convincing evidence standard. This argument is initially based on sections 916.13(1) and 916.301(1), which require various findings by clear and convincing evidence, including that there is a substantial probability of restorability, before involuntarily committing a defendant. Rule 3.212(c)(3)(A), governing the procedure for involuntarily committing a defendant, adopts this heightened standard by requiring a finding that the defendant meets statutory commitment criteria before committing a defendant. Subdivision (c)(3) also separately requires, however, that the Court find that there is a substantial probability that the defendant is restorable. Fla. R. Crim. P. 3.212(c)(3)(B). Rule 3.212(c)(3)'s **(1)** requiring the Court to find pursuant to subdivision (A) that the defendant meets statutory commitment criteria, which include a finding by clear and convincing evidence that the defendant is restorable, and **(2)** seemingly redundantly, requiring the Court to find

in subdivision (B) that the defendant is restorable, must be interpreted in a way that does not render either provision superfluous. *See Arshadnia*, __ So. 3d at __, 2023 WL 8793248, at *3 ("No word should be construed as superfluous."). The way to do this, consistent with the text, is **(1)** to interpret subdivision (c)(3)(A) as reflecting an intent to defer to the Legislature (or moot substance-versus-procedure / separation-of-powers issues) by incorporating the Legislature's heightened standard of proof, and **(2)** to interpret (c)(3)(B) as reflecting an intent to require restorability findings, without a heightened standard of proof, even if the Legislature amends the commitment statutes to eliminate the required restorability findings.

Similarly, there is no textual basis for imposing a clear and convincing evidence standard on Rule 3.212(d) restorability findings. That subdivision already contemplates that a defendant "does not meet the criteria for commitment," which based on the context of Rule 3.212 must refer to statutory commitment criteria, including the heightened standard for restorability findings. Rule 3.212(d)'s separately requiring restorability findings, consistent with the text and to avoid being rendered superfluous, must be interpreted as not including a heightened standard. The Supreme Court knows how to incorporate standards of proof in rules of procedure. *See*, *e.g.,* Fla. R. Crim. P. 3.693(b); *id*., Rule 3.812(d). It did not do so in Rule 3.212(d). If it had intended to include a heightened standard in Rule 3.212(d)'s restorability findings, it would have expressly done so.

Bush also argues that notwithstanding the text of Rule 3.212(d), a restorability finding based on clear and convincing evidence is a constitutional requirement. As discussed above, the Supreme Court expressly stated that it amended Rule 3.212(d) to include restorability findings to comport with *Jackson* as applied in *Schofield*. Additionally, as discussed above, every United States Circuit Court of Appeals to consider this issue has upheld against due process challenges 18 U.S.C. § 4241(d)'s mandatory commitment proceedings without restorability findings. If mandatory commitment upon a determination that a defendant is incompetent survives constitutional scrutiny, then in follows that there is no constitutional requirement that a Court make restorability findings with a heightened standard of proof before ordering competency restoration treatment.

Based on the foregoing, the Court holds that even if the Court is required to make restorability findings and even if a standard of proof separate from substantial probability applies, the standard is less than clear and convincing evidence.

C. Evidence before the Court.

Drs. Arias and Segel—the neuropsychologists who administered neurocognitive examinations—were the primary witnesses to testify. Each has decades of experience in the field of neuropsychology, which is a realm of psychology focused on studying how brain functions impact certain behaviors. Nov. 14, 2023 Tr. at 104, 119. Both agreed that a 2018 stroke caused Bush's neurocognitive impairment.[13] *Id*. at 53-58, 130. Both administered similar tests, and the patterns of Bush's scores were very similar during both examinations. *Id*. at 124, 145-46.

The doctors also discussed the difference between cognitive recovery and competency restoration. Using lay terminology, cognitive recovery refers to efforts to "fix the brain." It has nothing to do with competency. *Id*. at 176. Examples include efforts to recuperate memory, the ability to think logically, or the ability to process information, or to improve visuospatial deficits, depending on the patient's specific deficit. While treatments to "fix the brain" after a stroke exist, timing is critical, and there is a very minimal chance of cognitive recovery if medicine is not administered until five years after a stroke, such as in Bush's case. *Id.* at 59-61, 134, 162-63, 174-77.

Competency restoration, unlike cognitive recovery, refers to efforts to teach an individual information and skills to enable the individual to have a sufficient ability to consult with counsel with a reasonable degree of rational understanding and a rational, and factual, understanding of the pending court proceeding:

> With competency training,
>
> You teach them, you teach them, you teach them, you teach them, you review and assess as you go along, there are serial assessments, and then you kind of compare how he's doing or not doing, and then you—at that point, the examiner says we need more work or usually they say we need more work, more time. And then they'll go back at it, keep going, keep going. At that point now, let's say, two, three, four months have gone by, the examiner will say, hey, I think he's made progress, let's do more, or he hasn't made any progress, send him back to the court to get him reassessed one more time to see what they think.

Id. at 103; *accord id*. at 62-63, 176-77.

Drs. Arias's and Segel's opinions differed on whether there was a substantial probability that, with competency training, Bush would be restored to competency in the foreseeable future. Dr. Arias opined that there is such a probability. January 25, 2024 Tr. at 14-19. Dr. Segel opined there is not. Nov. 14, 2023 Tr. at 143.

1. Dr. Arias.

Dr. Arias based his opinion on Bush's demonstrated ability to retain certain information and show nonverbal memory improvement with the right type of training. *Id*. at 174-177. Specifically, Bush's composite intelligence index, which is like a summation, is 55. This is very low (intellectually disabled individuals have scores below 70), but Dr. Arias questioned its accuracy as a measure for Bush because of how lopsided Bush's scores on the various subtests were.

On one hand, Bush's verbal intelligence index is 40, which is also extremely low. This low score significantly brings down Bush's composite score. *Id*. at 92, 105. With such a low score, Dr. Arias would have expected Bush to have a very hard articulating himself and speaking clearly, but that was not the case. Bush was able to speak and engage in conversation. The inconsistency between Bush's demonstrated verbal abilities and his verbal intelligence score could indicate general anxiety or some type of lateralized deficit, with one side of the brain being affected and the other not affected. *Id*. at 63-67; 102-103. Dr. Arias is concerned that background noise in the jail might explain Bush's extremely low verbal subtest score. *Id*. at 100-01.

Bush's nonverbal intelligence score was 85, which is low average but a good score. This score suggests that Bush can recuperate some type of functioning for restoration purposes because he has that 85 level of capacity. *Id*. at 67, 103. There is such a huge difference between Bush's nonverbal intelligence score and his verbal intelligence score that it calls into question the reliability of the composite score of 55. *Id*. at 67. Dr. Arias interprets all of Bush's scores as indicating that Bush's true intellectual function is in the 85 range. *Id*. at 67, 103. He makes this estimate based on Bush's level of education and premorbid function score of 76, which is a good score. He also considered how Bush presents well and his professional experience evaluating individuals with similar functioning. *Id*. at 104-05.

As for the cause of Bush's low verbal intelligence score, it is the composite score of two tests—the Guess What test and the Verbal Reasoning test. Bush scored a 9 on each test, which is the lowest possible score. The Guess What test measures the number of words Bush knows. It might ask, for example, "What flies in the sky and has wings and two engines?" and the answer would be an airplane. *Id*. at 72. A person may not know a lot of words due to a lack of education, and not necessarily due to incompetency. Dr. Arias took Bush's Guess What score with a grain of salt because it was not consistent with the

reality of Bush's ability to communicate. *Id*. at 68-71. Dr. Arias did not attribute the 40 score to the stroke's having affected the left side of Bush's brain because one would expect such a stroke to bring his score to 60 or 65, but not down to 40, especially since Bush is verbal. *Id*. at 75.

The Verbal Reasoning test asks questions such as, "A tree is tall, and a fern is ___." The answer might be small. The test focuses on analytical reasoning. It asks open-ended questions and is not a multiple-choice test. *Id*. at 89. Dr. Arias asked a total of 25 questions, and Bush got 11 wrong. *Id*. at 84-85. Dr. Arias gave a few examples of questions Bush got wrong. One is, "Driver is to car as pilot is to _____." Bush answered "helicopter." Dr. Arias advised that helicopter is the wrong answer and airplane is the right answer. *Id*. at 76-82.[14] Another was, "A mountain is high and a valley is ____." Bush answered "deep," which is wrong; the right was answer was "low." *Id*. at 85-86.[15] Another was "An actor is to stage as a teacher is to _____." Bush answered "instruct," but the right answer was "classroom." *Id*. at 86. Another is "Brush is to painter as hammer is to ____." Bush incorrectly answered "tool." Another is "Mouth is to face as feet are to ____." Bush incorrectly answered "toes." Another is "Disappointment is to frown as satisfaction is to ____." Bush incorrectly answered "happy." *Id*. at 86-88. Bush's score of 9 on the Verbal Reasoning test does not mean 9th percentile. It is a weighted score, with 9 being the lowest and the highest score being around 15 or 16. *Id*. at 90-91. Dr. Arias would expect someone with a level 9 score to be unable to maintain sentences, and unable to communicate rationally or logically, but that is not the case with Mr. Bush. *Id*. at 106-07.

Based on Bush's scores on the various subtests, it is clear to Dr. Arias that Bush is a visual learner and would do better with visual learning instead of verbal. The tests indicate that Bush will be able to remember information communicated visually better than information communicated verbally or auditorily. *Id*. at 97-98. For example, if he is verbally taught that the judge is neutral, the defense attorney is here to protect Bush's interests, and the prosecutor is seeking information, he might forget that information. He is more likely to retain that information if it is taught to him in written format or pictures. *Id*. As for communicating with his lawyer, he can communicate with his lawyer using written format. Dr. Arias noted that Bush had a 10th grade reading level. *Id*. at 98-99. Dr. Arias opined that within five to six months, it would be clear whether the competency restoration efforts are succeeding. Nov. 14, 2023 Tr. at 46. Dr. Arias did not see any indicators that would suggest Bush cannot be restored. *Id*. at 4.

As for the degree to which it is likely that Bush is restorable, at the November 14, 2023 hearing, Dr. Arias on cross-examination testified that Bush "may be restorable, he may be not . . . We don't know [until] we try." Nov. 14, 2023 Tr. at 47-48. The Court sought clarification regarding this testimony. After being provided with the definition of "substantial probability," Dr. Arias clarified that he believed the probability of restorability to competence was low but substantial. January 25, 2024 Tr. at 14-19. Dr. Arias also confirmed that as a neuropsychologist, the extent to which previous competency restoration efforts have been attempted and have been successful or unsuccessful is a factor Dr. Arias considers and to which he allocates heavy weight when evaluating the likelihood of a person's being restored to competency in the foreseeable future. Jan. 25, 2024 Tr. at 8-9. This is because the competency trainer has more time to spend with the individual and will be able to document the existence or lack of existence of progress toward restoration in various areas. *Id*. at 9.

2. Dr. Segel.

As discussed above, Dr. Segel administered tests similar to the tests Dr. Arias administered, and the pattern of Bush's scores was very similar for both doctors. Nov. 14, 2023 Tr. at 124, 145-46. Specifically, like on Dr. Arias's tests, Bush showed strength for tests requiring use of the right side of the brain when compared to the left side of the brain. *Id*. at 126. Additionally, Dr. Segel's evaluation was consistent with Dr. Arias's evaluation with respect to rapport and effort. *Id*. at 126.

Dr. Segel administered a test called the Trail Making Test, which tests attention, processing speed, and cognitive flexibility, which means the ability to divide attention. The test is designed to take up to 85 seconds. Above 85 seconds is impaired and above 121 is severely impaired. It took Bush 132 seconds, and he made two errors. Dr. Segel opined that this demonstrates Bush has deficits in processing speed, attention, and cognitive flexibility. This could impact Bush's ability to testify in a trial because Bush may get stuck on something and keep saying the same thing over and over and not shift from one concept to another. Nov. 14, 2023 Tr. at 137-141.

On the restorability question, Dr. Segel agreed that sometimes cognitive training may work to an extent. *Id*. at 134. Dr. Segel opined that training is usually the most effective up to two years after a brain injury, but since Bush's stroke occurred over five years ago, training efforts would likely be unsuccessful. *Id*. at 134, 162-63. He did not believe that the probability of restorability was "fiction," but did believe the probability was minuscule at best. January 25, 2024 Tr. at 22.[16]

3. Dr. Arias's and Dr. Segel's additional testimony.

After hearing Dr. Segel's testimony, Dr. Arias testified that he administered a test similar to the Trail Making Test. The test Dr. Arias administered uses colors instead of letters. On part one of the test, Bush performed at the near borderline range. On part two, however, which is supposed to be harder than part one, Bush's score improved to within the average range. Dr. Arias opined based on this test result that Bush can achieve a level of cognitive functioning within the average range. *Id*. at 166-174. Dr. Segel took the stand again and opined that Bush did better on Dr. Arias's test because processing letters and numbers uses the left side of the brain and processing colors uses the right side. When asked specifically about Dr. Arias's test using both colors and numbers, however, Dr. Segel qualified his answer and stated that both tests are considered to test general brain functions and load heavily on the front. He believed Dr. Arias's test leaned more on the right side of the brain because it uses colors. *Id*. at 179-81.

4. Testimony from additional doctors.

Dr. Richardson and Dr. Jones observed the testimony of Dr. Arias and Dr. Segel. Dr. Richardson opined that there is not a substantial probability that Bush could be restored to competency in the foreseeable future. *Id*. at 183. Dr. Richardson agreed that training could improve Bush's competency with respect to some factors but did not believe he would be restored in all areas of competency. *Id*. at 187. Dr. Jones opined that Bush was not restorable because the deficit is in the part of the brain regulating rational thought. *Id*. at 191-92, 94.

D. Application of law to facts: There is a substantial probability that Bush can be restored to competency in the foreseeable future with appropriate treatment.

Applying the substantial probability standard, as defined above, to the evidence as its own standard of proof, the Court finds that the degree to which Bush is likely to be restored to competency in the foreseeable future is real and material, not imaginary, and has actual, not fictitious, existence. The Court gives great weight to Dr. Arias's testimony that Bush's neurocognitive examination results indicate an ability to absorb and learn competency related information if Bush is taught through non-verbal means.

These findings would be the same if a separate standard of proof applied and if the standard were anything less than clear and convinc-

ing evidence.[17] If, however, a separate clear and convincing evidence standard applied, the Court would find that there is not clear and convincing evidence of a substantial probability that Bush will be restored to competency in the foreseeable future.

CONCLUSION AND NEXT STEPS

For the foregoing reasons, where, as here, there have not yet been efforts at competency restoration, the Court does not have to make restorability findings before ordering that an incarcerated defendant receive restoration treatment in jail. Even if such findings are required, the Court finds that there is a substantial probability that Bush's competency will be restored to competency in the foreseeable future.

The State and defense agree that before ordering that Bush receive competency restoration training in jail, the Court must determine whether appropriate treatment is available at the jail and implement procedures to periodically review Bush's condition. *See Marino v. State*, 277 So. 3d 219, 223 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1848a]. The Court will promptly hold a hearing to determine whether treatment is available in jail. If it finds that it is, the Court will order that treatment be administered in the jail and will allow the treatment to continue only for the reasonable period of time necessary to determine whether there is a substantial probability that Bush will be restored to competency in the foreseeable future. *See Miranda*, 137 So. 3d at 1141 (discussing *Jackson* 406 U.S. at 738-39).

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[1]Whenever the Court refers to "restorability," "non-restorability," or whether the defendant is "restorable" or "non-restorable," or whether there is a substantial probability of restorability, it is referring to whether "there is a substantial probability that the defendant will gain competency to proceed in the foreseeable future." Fla. R. Crim. P. 3.212(d).

[2]The State thus mooted the legal question of whether the Administrative Office of the Courts must pay for a neuropsychological examination when the examination is necessary to determine the cause of a defendant's incompetency and, therefore, to determine whether the defendant meets criteria for involuntary commitment and/or is restorable.

[3]The Legislature has authorized involuntary commitment only when **(a)** the cause of a defendant's incompetency is mental illness, autism, or intellectual disability, Fla. Stat. §§ 916.13(1)(a); 916.302(1)(a), and **(b)** the defendant meets various statutory criteria, one of which being that there is a substantial probability that the defendant is restorable. *See* Fla. Stat. § 916.13(1)(c); Fla. Stat. § 916.302(1)(d). The parties agree that there is no authority to involuntarily commit Bush because there is no evidence that the cause of his incompetency is mental illness, autism, or intellectual disability. As for intellectual disability and autism, they must, by definition, have an onset during childhood or before the age of 18, *id*., §§ 916.106(2) & (13); § 393.063(5) & (23), and the evidence at the competency hearing was that a stroke Bush had as an adult caused Bush's current incompetency.

[4]When the first and second sentences of Rule 3.212(d) apply, Rule 3.213(a) ensures that any court-ordered outpatient treatment not last indefinitely.

[5]The Court appreciates that statutory text controls over legislative history, such as a staff analysis or comments by individual legislators, because the latter do not reflect legislative intent. *See*, e.g., *Arshadnia,* __ So. 3d at __, 2023 WL 8793248, at *3. Although a rule's text, like a statute's text, of course controls, it is not so clear to this Court that a Supreme Court opinion—joined by all justices—explaining the purpose of an amendment to a procedural rule should not be given weight. The Third District Court of Appeal appears to view a Supreme Court opinion amending a procedural rule as a valid interpretive tool, *see Walls v. Roadway, Inc.*, __ So. 3d __, 2023 WL 6133323, *4-5 (Fla. 3d DCA, Sep. 20, 2023) [48 Fla. L. Weekly D1878a], so this Court considers here the Supreme Court's expressly stated purpose when amending Rule 3.212(d) to require restorability findings.

[6]In federal practice, once a federal court determines that a mental illness or defect renders a defendant incompetent to proceed, the court "shall" involuntarily commit the defendant for competency restoration "for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future [the defendant] will [regain competency]." 18 U.S.C. § 4241(d)(1).

[7]Additionally, unlike in federal practice, which curtails judicial discretion and requires involuntary commitment upon an incompetency finding, the Florida Supreme Court in Rule 3.212(c), as discussed above, has provided trial courts with a roadmap of options available to the Court, in its discretion.

[8]The statement would, of course, bind the Court if it were part of the district court's holding. *See, e.g., Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992).

[9]The parties presented only two cases. *See United States v. Loughner*, 672 F.3d 731, 769-70 (9th Cir. 2012) (defining substantial probability as requiring less than a preponderance of the evidence); *United States v. Brown*, 352 F. Supp. 3d 589, 595 (E.D. Va. 2018) (purporting to rely on the plain text of the words and defining substantial probability as meaning more than fifty percent).

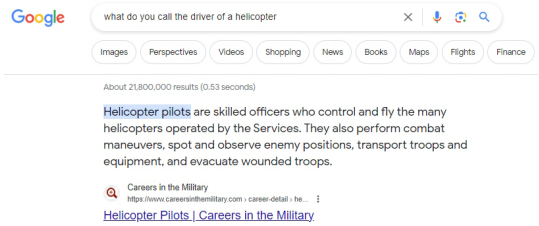
[10]*See* Dec. 12, 2023 Tr. at 12.

[11]*Brady v. Maryland*, 373 U.S. 83 (1963).

[12]"Standard of proof" refers to the quality of proof, such as preponderance of the evidence or clear and convincing evidence, demanded for a particular decision. *See Standard of Proof*, Black's Law Dictionary (11th ed. 2019). "Every standard of proof allocates some risk of an erroneous factual determination . . . ." *Hill v. Humphrey*, 662 F. 3d 1335, 1355 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C582a]; *see In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (a standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks [s/]he should have in the correctness of factual conclusions for a particular type of adjudication" and "allocate[s] the risk of error [based on] the relative importance attached to the ultimate decision.").

[13]Intellectual disability is a developmental disorder with an onset before the age of 18. Although a neurocognitive disorder may present like an intellectual disability, it cannot be called intellectual disability when the onset does not occur before the age of 18. Nov. 14, 2023 Tr. at 50-52, 132-33.

[14]This surprised the Court:



Accessed on February 21, 2024.

[15]This also surprised the Court. *See Valley*, Wikipedia, https://en.wikipedia.org/wiki/Valley (accessed February 21, 2024) (using the word "deep" to describe valleys nine times); *Valley*, Wikipedia Simple English, https://simple.wikipedia.org/wiki/Valley (accessed February 21, 2024) (describing valleys as "deep" nine times).

[16]The transcript incorrectly quotes Dr. Segel as saying "—fiction," but this Court vividly recalls looking at Dr. Segel and his saying "not fiction."

[17]Because the Court's restorability findings would be the same based on any standard less than clear and convincing evidence, the Court need not identify such lower standard. *See Kilgore v. State*, 55 So. 3d 487, 510 (Fla. 2010) [35 Fla. L. Weekly S665a] (holding that a court need not rule on what standard of proof governs when the evidence satisfies all the potentially applicable standards).

* * *

Torts—Negligence—Hospitals—Permanent injury resulting in permanent total disability to parent of unmarried dependent—Father's action against hospital on behalf of himself and his children—Father's agreement to hospital's request to strike counts alleging distinctive theories of liability for children's loss of parental consortium in exchange for hospital's agreement that, if it is found liable under any theory of liability advanced by father in his individual capacity, then liability for loss of parental consortium will exist—Motion to dismiss counts alleging that physicians acted with apparent authority of hospital and that hospital owed father non-delegable duty of care, based on general consent form incorporated by reference and excerpted in part in amended complaint, is denied—Consent form was not referenced in second amended complaint that completely displaced first amended complaint—Even if magistrate could consider consent form, motion to dismiss would be premature as father is entitled to assert affirmative defenses to form and argue whether facts support apparent agency or non-delegable duty despite language of consent form—No merit to argument that father was required to attach consent form to second amended complaint to support count alleging non-delegable duty—Motion to dismiss count alleging hospital's non-delegable duty of care is also denied based on conclusion that every general hospital that has emergency department owes statutory non-delegable duty under section 395.1041 to provide non-negligent medical care to relieve or eliminate emergency medical conditions

JOSEPH F MACRI III, JOSEPH F MACRI III as Parent and Natural Guardian of TJM

and DRM, JOSEPH F MACRI as Parent and Natural Guardian of TJM and DRM, Plaintiff, v. ISSAM A HALABY MD, SURGICAL ASSOCIATES OF VENICE AND ENGLEWOOD, P.A., Defendants. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2022 CA 005220 SC. Division H Circuit. April 3, 2024. Danielle Brewer, Judge. Bradley Ellis, General Magistrate. Counsel: Ben Murphey, John Lawlor, and Howard Pomerantz, Lawlor White & Murphey, LLP, Ft. Lauderdale, for Plaintiffs. Dan Shapiro and Ashleigh Dyer, Cole Scott & Kissane, Tampa, for Defendant Venice HMA, LLC. Paula Rousselle, Bitman O'Brien & Morat, Tampa, for Defendant Dr. Halaby & Surgical Assoc. of Venice.

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

BEFORE THE COURT without hearing is the Recommended Order filed by Magistrate Bradley J. Ellis, rendered on March 18, 2024, docketed at DIN 156, and attached to this Order ("Recommended Order"). The Court considered the findings, if any, legal conclusions, and the recommendation. It is,

ORDERED AND ADJUDGED that:

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

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

3. Special additional instructions (none if blank):

RECOMMENDED ORDER OF MAGISTRATE RE: (1) VENICE HMA, LLC'S MOTION TO STRIKE COUNTS 11, 12, 14, 15, 17, AND 18 OF PLAINTIFF'S SECOND AMENDED COMPLAINT [DIN 79]; AND (2) VENICE HMA, LLC'S MOTION TO DISMISS COUNTS 10, 13, AND 16 OF PLAINTIFF'S SECOND AMENDED COMPLAINT [DIN 80]

This matter came for hearing on January 30, 2024 on Defendant Venice HMA, LLC's **(1)** *motion to strike Counts 11, 12, 14, 15, 17, and 18 of Plaintiff's second amended complaint* [DIN 79]; *and* **(2)** *motion to dismiss Counts 10, 13, and 16 of Plaintiff's second amended complaint* [DIN 80]. The Magistrate has jurisdiction pursuant to Rule 1.490, *Fla. R. Civ. P.*, and Fla. 12th Jud. Cir. AO ##2024-03.4 & 2024-04.1. The Magistrate submits this *recommended order* for approval by the Court.

For the reasons stated on the Record, and as supplemented herein, the Magistrate recommends that the Court **(1) GRANT in part and DENY in part** the *motion to strike Counts 11, 12, 14, 15, 17, and 18 of Plaintiff's second amended complaint* [DIN 79], and **(2) DENY** the *motion to dismiss Counts 10, 13, and 16 of Plaintiff's second amended complaint* [DIN 80], as follows:

1. Plaintiff's *second amended complaint* is at [DIN 72].

I. Motion to Strike [DIN 79]

2. Defendant Venice HMA, LLC's *motion to strike Counts 11, 12, 14, 15, 17, and 18 of Plaintiff's second amended complaint* is at [DIN 79].

3. Plaintiff's *response to Defendant, Venice HMA, LLC's motion to strike Counts 11, 12, 14, 15, 17, and 17 of second amended complaint* is at [DIN 126].

4. Plaintiff alleges he is permanently and totally disabled as contemplated by §768.0415, *Fla. Stat. Second amended complaint* [DIN 72], ¶35.

5. Plaintiff sued Defendant Venice HMA, LLC (the hospital) for negligently injuring him (Count 7), apparent agent liability (Count 10), actual agent liability (Count 13), and breach of non-delegable duty (Count 16.) *Second amended complaint* [DIN 72], ¶¶ 60-66, 73-77, 86-90, 99-109.

6. Plaintiff followed each count (theory of liability) with separate counts for loss of parental consortium for each of his children based on each theory of liability advanced by Plaintiff. *Second amended complaint* [DIN 72], ¶¶ 67-72, 78-85, 91-98, 110-115.

7. Defendant Venice HMA, LLC moved to strike Counts 11, 12, 14, 15, 17, and 18 as duplicative of the claims for loss of parental consortium made in Counts 8 and 9.

8. Plaintiff responded that the counts were not duplicative, but instead were required to be pled as distinctive theories of liability under Florida law.

9. At the January 30, 2024 hearing, the Magistrate agreed on the Record that Rule 1.110(f), *Fla. R. Civ. P.*, required Plaintiff to plead the separate and distinct theories of liability as separate counts.

10. Nonetheless, Defendant Venice HMA, LLC requested that Counts 11, 12, 14, 15, 17, and 18 be stricken as independent counts to streamline the pleadings, based on a stipulation by Defendant Venice HMA, LLC that these theories of liability may be combined by Plaintiff into Counts 8 and 9. In turn, Plaintiff stipulated to complying with Defendant's request. The Parties stipulated to memorializing their agreement into this *recommended order*.

11. As such, the Magistrate recommends the Court **GRANT in part and DENY in part** Defendant, Venice HMA, LLC's motion to strike Counts 11, 12, 14, 15, 17, and 17 of second amended complaint is at [DIN 126]. In exchange for Plaintiff agreeing to drop Counts 11, 12, 14, 15, 17, and 18 and streamline the pleadings, Defendant Venice HMA, LLC agrees that if it is found liable under any theory of liability advanced by Plaintiff in his individual capacity, then Defendant's liability for loss of parental consortium will exist as though Counts 11, 12, 14, 15, 17, and 18 were not dropped. Stated another way, Defendant Venice HMA, LLC's liability under Counts 8 and 9 encompasses any liability the Defendant may have for loss of parental consortium under any theory of liability.

12. Based on the stipulation of the Parties that is incorporated into this *recommended order*, Plaintiff need not file a further amended complaint dropping Counts 11, 12, 14, 15, 17, and 18 and pleading the loss of parental consortium damages within Counts 8 and 9. Rather, the *second amended complaint* [DIN 72] shall be deemed interlined consistent with this *recommended order* as of the date the Court renders its *order adopting* this *recommended order*, without necessitating further action by the Plaintiff.

13. However, if Plaintiff desires to file a further amended complaint consistent with this *recommended order* to truly clean up on the docket the now streamlined pleadings, then no later than ten (10) days after the date the Court renders its *order adopting* this *recommended order*, Plaintiff shall file the further amended complaint.

14. If Plaintiff files a further amended complaint, then no later than twenty (20) days after the date the Plaintiff files the further amended complaint, Defendants shall serve their responses to the further amended complaint. If Plaintiff files a further amended complaint prior to the Court rendering its order adopting this recommended order, then this 20-day period shall be tolled until the Court renders its order adopting.

II. Motion to Dismiss [DIN 80]

15. Defendant Venice HMA, LLC's *motion to dismiss Counts 10, 13, and 16 of Plaintiff's second amended complaint* is at [DIN 80].

16. Plaintiff's *response to Defendant, Venice HMA, LLC's motion to dismiss Counts 10, 13, and 16 of the second amended complaint* is at [DIN 127].

A. Count 10—Negligence (Apparent Agency)

17. "When a party in a civil lawsuit files an amended complaint or answer, for example, we regard the amended document as a new and separate filing that displaces its predecessor." *Gannon v. Cuckler*, 281 So.3d 587, 596 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2543a]. *See also Thomas v. Hosp. Bd. of Dirs. of Lee Cty.*, 41 So. 3d 246, 254 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1038a] ("[I]t is a long established rule of law that an original pleading is superseded by an amended pleading which does not indicate an intention to preserve any portion of the original pleading.").

18. "Certainty is required when pleading defenses and claims alike, [sic] and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient." *Bliss v. Carmona*, 418 So.2d 1017 (Fla. 3d DCA 1982) (*citing Chris Craft Industries, Inc. v. Van Valkenberg*, 267 So.2d 642 (Fla. 1972)) [internal citations omitted]. ***"[T]he certainty required is that the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence."*** *Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach*, 318 So.2d 175, 176 (Fla. 3d DCA 1975). [***emphasis added***]. "Where there are no facts pled to support general allegations of affirmative defenses, the defenses are legally insufficient." *Leal v. Deutsche Bank Nat'l Trust Co.*, 21 So.3d 907, 909 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2304c]. Allegations that "[are] mere conclusions tracking the language of the [elements or] statutory definitions, unsupported by facts, and are legally insufficient." *Bohannon v. Shands Teaching Hosp. & Clinics, Inc.*, 983 So.2d 717, 721 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1491a]. When an "affirmative defense [is] insufficiently particularized, it [is] subject to beingstricken with leave to replead." *Calero v. Metro. Dade County*, 787 So.2d 911, 914 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1189a] (*citing* Rule 1.140(b), *Fla. R. Civ. P.*).

19. When a court determines the sufficiency of a complaint to state a cause of action, it applies the so-called "four corners rule" in the analysis." *Santiago v. Mauna Loa Invs., LLC*, 189 So.3d 752, 755 (Fla. 2016) [41 Fla. L. Weekly S91a]. "Under this rule, the court's review is limited to an examination solely of the complaint and its attachments." *Id*. The "four corners rule" applies to the Court's "futility" analysis when ruling on a motion for leave to amend pleadings pursuant to Rule 1.190, *Fla. R. Civ. P. See Posey v. Magill*, 530 So.2d 985, 986 (Fla. 1st DCA 1988)("Unless it is clear from the face of a complaint that amendment would be futile, failure to grant a plaintiff at least one opportunity to amend his complaint constitutes an abuse of discretion.")[emphasis added]. "Moreover, the attachment of documents to the motion to dismiss does not allow for their consideration in deciding the motion." *Kidwell Grp. LLC v. Fla. Farm Bureau Cas. Ins. Co.*, 348 So.3d 1239, 1240-41 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2111b] (*quoting Enlow v. E.C. Scott Wright, P.A.*, 274 So.3d 1192, 1193 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1543a]).

20. Absent a stipulation by the Parties, judicial notice may not be used to side-step the "four corners rule." *See generally Riggins v. Clifford R. Rhoades, P.A.*, 373 So.3d 655, 659 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D2080d]; *Fla. Int.'l Univ. Bd. Of Trustees v. Alexandre*, 365 So.3d 436, FN 5 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1008a]; *Medicability, LLC v. Blue Hill Buffalo Consulting, LLC*, 352 So.3d 467, 469 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2528a]; *Tower Radiology Ctr. v. Direct Gen. Ins. Co.*, 348 So.3d 1147, 1149 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1927a]; *Schneiderman v. Baer*, 334 So.3d 326, 330 & FN 2 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D362d]; *Bayview Loan Servicing, LLC v. Brown*, 329 So.3d 210, 211-14 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2302b]; *Newberry Square Florida Laundromat LLC v. Jim's Coin Laundry and Dry Cleaners Inc.*, 296 So.3d 584 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1376a]; *Norwich v. Glob. Fin. Assocs., LLC*, 882 So.2d 535, 537 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2136b]; *and Cazares v. Church of Scientology of California, Inc.*, 444 So. 2d 442, 445-46 (Fla. 5th DCA 1983).

21. However, "[i]f a party refers to a document within the complaint, a trial court may rely on that document to determine the nature of the claim being alleged." *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So.3d 1246, 1249 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a]. *See also United States Fire Ins. Co. v. ADT Sec. Servs., Inc.*, 134 So.3d 477, 479 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1990a] (*citing Veal*); *andOne Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So.3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]:

> In ruling on a motion to dismiss, a trial court is limited to the four corners of the complaint and its incorporated attachments. *U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc.*, 861 So.2d 74, 76 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2481b]. But where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss. *See Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So.3d 1246, 1249 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a] (rejecting argument that the trial court erred by considering the contents of a settlement agreement that was attached to a motion to dismiss: "[I]n this case, the complaint refers to the settlement agreement, and in fact, Veal's standing to bring suit is premised on the terms of that agreement. Accordingly, since the complaint impliedly incorporates the terms of the agreement by reference, the trial court was entitled to review the terms of that agreement to determine the nature of the claim being alleged.").
>
> Here, the trial court did not err in considering the contents of the insurance policy that was filed in connection with the insurer's motion to dismiss. The complaint refers to the policy, and One Call's standing to bring suit is premised on an assignment of the policy. Accordingly, because the complaint impliedly incorporates the policy by reference, the trial court was entitled to review the policy in ruling on the motion to dismiss.[1]
>
> FN 1 While we agree that some of Security First's arguments against the validity of the assignment probably cannot be resolved on a motion to dismiss, we interpret the trial court's ruling as being based exclusively on Security First's argument concerning the anti-assignment and loss payment provisions of the insurance policy. Moreover, in this case, in contrast to *Nextgen Restoration Inc. v. Citizens Property Ins. Corp.*, 126 So.3d 1255 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2386a], the policy was placed in the record, and it was incorporated by reference in the complaint, so the trial court was permitted to consider it in ruling on the legal issue that formed the basis for the dismissal.

22. *Roessler v. Novak*, 858 So. 2d 1158, 1162 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2566b]:

> Under certain circumstances, however, a hospital may be held vicariously liable for the acts of physicians, even if they are independent contractors, if these physicians act with the apparent authority of the hospital. *Cuker v. Hillsborough County Hosp. Auth.*, 605 So.2d 998, 999 (Fla. 2d DCA 1992). The doctrine of apparent authority has been applied to physicians who rendered care and treatment to individuals treated in hospital emergency rooms, *see Orlando Regional Medical Center, Inc. v. Chmielewski*, 573 So.2d 876 (Fla. 5th DCA 1990), as well as in hospital departments other than emergency rooms, *see Cuker*, 605 So.2d 998. The question of a physician's apparent authority to act for a hospital is often a question of fact for the jury. *See Cuker*, 605 So.2d at 999 (Fla. 2d DCA 1992); *Chmielewski*, 573 So.2d at 876.

23. *Ginsberg v. Nw. Med. Ctr., Inc.*, 14 So.3d 1250, 1252-53 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1349a]:

An apparent agency relationship exists if three elements are present: (1) a representation by the purported principal, (2) a reliance on that representation by a third party, and (3) a change in position by the third party in reliance on the representation. *Guadagno v. Lifemark Hosps. of Fla., Inc.*, 972 So.2d 214, 218 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2889a]. In *Guadagno*, a widower appealed a final judgment entered in favor of the hospital pursuant to the trial court's order granting the hospital's motion for judgment notwithstanding the verdict. *Id.* at 216. The third district affirmed, explaining that the evidence at trial established the doctor was an independent contractor, and, generally, a hospital may not be held liable for the negligence of independent contractor physicians to whom it grants staff privileges. *Id.* at 218. The third district noted that the hospital expressly disavowed an agency relationship and conveyed that information to the decedent in its admission forms that she signed. *Id.* In sum, none of the elements of an apparent agency relationship were established at trial. *Id.*

Northwest Medical's reliance on *Guadagno* is misplaced because the instant case involves a final summary judgment and not an order entered at trial after submission of all the evidence. ***Here, the consent form alone fails to quiet all genuine issues of material fact. At the summary judgment hearing, Ginsberg explained that when he signed the consent form, he was in pain, did not have his glasses, and had taken pain medication, rendering him unable to understand the form***. . . .Northwest Medical's presentation of the consent form, at this juncture, did not conclusively refute Ginsberg's allegations that Northwest Medical, by its actions, held the two doctors out as possessing the authority to act on its behalf and knowingly permitted the two doctors to hold themselves out as possessing the authority to act on its behalf. In *Villazon v. Prudential Health Care Plan, Inc*., 843 So.2d 842 (Fla.2003) [28 Fla. L. Weekly S267a], our supreme court explained that it is not uncommon for parties to include conclusory statements in documents with regard to the independence of the relationship of the parties, and this may occur even where the totality of the circumstances reflects otherwise. *Id.* at 853-54 (*quoting Cantor v. Cochran*, 184 So.2d 173, 174 (Fla.1966) ("While the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.")).

[***emphasis added***].

24. Defendant Venice HMA, LLC's *motion to dismiss* [DIN 80] argues that Count 10 is contradicted by language in a "General Consent for Tests, Treatment, Photo, Video, and Services" that was partially incorporated in Plaintiff's *amended complaint* [DIN 12], ¶¶208 & 222. The "General Consent" form itself was not attached to the *amended complaint* [DIN 12], and the alleged language relied upon by Defendant was not included in the portions stated within *amended complaint* [DIN 12], ¶¶208 & 222. In other words, the *amended complaint* [DIN 12] incorporated a document by reference while only excerpting certain portions, and *Veal* would then permit Defendant to introduce the full document in a motion to dismiss attacking the *amended complaint* [DIN 12].

25. However, Plaintiff's *second amended complaint* [DIN 72] does not similarly incorporate by reference any "General Consent" form. As such, the Magistrate finds that the *second amended complaint* [DIN 72] completely displaced the *amended complaint* [DIN 12], and further that the Magistrate is precluded from considering the language of Defendant's proffered "General Consent" form language in ruling on Defendant's *motion to dismiss* [DIN 80] Count 10, absent a stipulation by Plaintiff to consider such form. At the January 30, 2024 hearing, Plaintiff's counsel objected to the Magistrate considering the "General Consent" form on this *motion to dismiss* [DIN 80].

26. Separately, even if the Magistrate could consider the proffered "General Consent" form at this stage, *Ginsberg* would support denying Defendant's *motion to dismiss* [DIN 80] Count 10 as premature, as Plaintiff is entitled to assert reply affirmative defenses to the "General Consent" form and argue whether the facts support an apparent agency being created despite the language of the "General Consent" form.

27. Further, the Magistrate finds that Count 10 sufficiently pleads the elements of apparent authority with sufficient ultimate facts to "reasonably inform [the Defendant] of what is proposed to be provedin order to provide the [Defendant] with a fair opportunity to meet it and prepare [Defendant's] evidence."

28. As such, the Magistrate recommends the Court **DENY** Defendant Venice HMA, LLC's *motion to dismiss* [DIN 80] Count 10. This denial is without prejudice for Defendant to continue to assert its substantive arguments against apparent authority as defenses in this case.

B. Count 13—Negligence (Actual Agency)

29. *Parker Waichman LLP v. Chaikin*, 313 So.3d 921, 923 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D617d]:

The elements essential to the existence of an actual agency relationship are: (1) acknowledgement by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *Ilgen v. Henderson Props., Inc*., 683 So. 2d 513, 515 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D898b] (*citing Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990)).

[***emphasis added***].

30. *Insinga v. LaBella*, 543 So. 2d 209, 212 & 214 (Fla. 1989):

[U]nquestionably, the hospital would be liable if the individual rendering treatment was actually employed by the hospital.

. . .

[W]e find, as a matter of public policy, that hospitals are in the best position to protect their patients and, consequently, have an independent duty to select and retain competent independent physicians seeking staff privileges. We note that the hospital's liability extends only to the physician's conduct while rendering treatment to patients in the hospital and does not extend to his conduct beyond the hospital premises. . .Moreover, the hospital will only be responsible for the negligence of an independent physician when it has failed to exercise due care in the selection and retention of that physician on its staff. As have a number of jurisdictions before us, we adopt the corporate negligence doctrine independent of the statute. . . .We find that the enactment of the 1985 statute expressly codified the doctrine.

[***emphasis added***].

31. The Magistrate finds that Count 13 sufficiently pleads the elements of actual authority with sufficient ultimate facts to "reasonably inform [the Defendant] of what is proposed to be proved in order to provide the [Defendant] with a fair opportunity to meet it and prepare [Defendant's] evidence."

32. As such, the Magistrate recommends the Court **DENY** Defendant Venice HMA, LLC's *motion to dismiss* [DIN 80] Count 13. This denial is without prejudice for Defendant to continue to assert its substantive arguments against actual authority as defenses in this case.

C. Count 16—Breach of Non-Delegable Duty

33. Plaintiff's *second amended complaint* [DIN 72], Count 16 alleges the Defendant owed Plaintiff a non-delegable duty pursuant to §395.1041, *Fla. Stat.*, and §59A-3.255, *F.A.C.*

34. Defendant Venice HMA, LLC's *motion to dismiss* [DIN 80] Count 16 argues:

a. The "General Consent" form language refutes any duty owed by Defendant to Plaintiff for the acts or omissions of independent contractor doctors;

b. Rule 1.130, *Fla. R. Civ. P.*, requires Plaintiff to attach the "General Consent" form to the *second amended complaint* [DIN 72]; *and*

c. §395.1041, *Fla. Stat.*, and §59A-3.255, *F.A.C.*, do not create a non-delegable duty pursuant to *Wax v. Tenet Health System Hospitals, Inc*., 955 So.2d 1 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D641a], *Tarpon Springs Hosp. Found., Inc. v. Reth*, 40 So.3d 823, 828 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1532a], *and Tabraue v. Drs. Hosp., Inc*., 272 So.3d 468 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D810b].

35. First, the Magistrate's rulings pertaining to the "General Consent" form pertaining to the arguments against Count 13 equally apply to Count 16. As such, the Magistrate declines to consider the language of Defendant's proffered "General Consent" form on the *motion to dismiss* [DIN 80] Count 16.

36. Second, the Magistrate finds that Rule 1.130, *Fla. R. Civ. P.*, does not require Plaintiff to attach the "General Consent" form to the *second amended complaint* [DIN 72] to support Court 16. Rule 1.130, *Fla. R. Civ. P.* ("Attaching a cause of action and exhibits") states, in pertinent part:

> (a) Instruments Attached. All bonds, notes, bills of exchange, ***contracts***, accounts, or documents ***on which action may be brought*** or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments."

[***emphasis added***]. Plaintiff's *second amended complaint* [DIN 72], Count 16 is not "brought on" the "General Consent" form. Rather, Count 16 is brought on §395.1041, *Fla. Stat.*, and §59A-3.255, *F.A.C.* As such, Rule 1.130 does not require Plaintiff to attach the "General Consent" form to the *second amended complaint* [DIN 72] to support Count 16. Rather, Rule 1.130 requires Defendant to attach the "General Consent" form to any affirmative defense to Count 16 to the extent such affirmative defense is "brought on" the "General Consent" form.

37. The third argument against Count 16 is much more difficult to navigate.

38. Section 395.1041, *Fla. Stat.*, states in pertinent parts:

> Access to ***and ensurance of*** emergency services; transfers; patient rights; diversion programs; reports of controlled substance overdoses.—
>
> (1) LEGISLATIVE INTENT.—The Legislature finds and declares it to be of vital importance that emergency services ***and care*** be provided ***by hospitals*** and physicians to every person in need of such care. The Legislature finds that persons have been denied emergency services ***and careby hospitals***. It is the intent of the Legislature that the agency vigorously enforce the ability of persons to receive ***all necessary and appropriate*** emergency services ***and care*** and that the agency act in a thorough and timely manner against hospitals and physicians which deny persons emergency services and care. It is further the intent of the Legislature ***that hospitals***, emergency medical services providers, and other health care providers work together in their local communities to enter into agreements or arrangements ***to ensure*** access to emergency services ***and care***. The Legislature further recognizes that appropriate emergency services ***and care*** often require ***followup consultation and treatment*** in order ***to effectively care*** for emergency medical conditions.
>
> . . .
>
> (3) EMERGENCY SERVICES; DISCRIMINATION; LIABILITY OF FACILITY OR HEALTH CARE PERSONNEL.—
>
> (a) ***Every general hospital*** which has an emergency department ***shall provide*** emergency services ***and care*** for any emergency medical condition when:
>
> 1. Any person requests emergency services ***and care***; or
>
> 2. Emergency services ***and care*** are requested on behalf of a person by
>
> a. An emergency medical services provider who is rendering care to or transporting the person; or
>
> b. Another hospital, when such hospital is seeking a medically necessary transfer, except as otherwise provided in this section.
>
> . . .
>
> (g) ***Neither the hospital*** nor its employees, nor any physician, dentist, or podiatric physician ***shall be liable in any action arising out of a refusal to render emergency services or care if the refusal ismade after*** screening, examining, and evaluating the patient, ***and is based on the determination, exercising reasonable care***, that the person is not suffering from an emergency medical condition or a determination, exercising reasonable care, that the hospital does not have the service capability or is at service capacity to render those services.
>
> . . .
>
> (5) PENALTIES.—
>
> (b) Any person who suffers personal harm as a result of a violation of this section or the rules adopted hereunder may recover, in a civil action against the responsible hospital administrative or medical staff or personnel, damages, reasonable attorney's fees, and other appropriate relief. However, this paragraph shall not be construed to create a cause of action beyond that recognized by this section and rules adopted under this section as they existed on April 1, 1992.

[***emphasis added***].

39. Section 395.002(9), *Fla. Stat.*, states:

> (9) "Emergency services ***and care***" means medical screening, examination, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under the supervision of a physician, to determine if an emergency medical condition exists ***and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition***, within the service capability of the facility.

[***emphasis added***].

40. Section 59A-3.255, *F.A.C.*, states in pertinent parts:

> (6) Service Delivery Requirements.
>
> (a) ***Every hospital*** offering emergency services and care ***shall provide emergency care*** available 24 hours a day within the hospital to patients presenting to the hospital. At a minimum:
>
> 1. ***Emergency services personnel shall be available to ensure that emergency services and care are provided in accordance with Section 395.002(10), F.S.***
>
> 2. At least one physician shall be available within 30 minutes through a medical staff call roster; initial consultation through two-way voice communication is acceptable for physician presence.
>
> 3. Specialty consultation shall be available by request of the attending physician or by transfer to a designated hospital where definitive care can be provided.

[***emphasis added***]. The Magistrate notes that present-day, §59A-3.255(6)(a)(1), *F.A.C.*'s reference to §395.002(10), *Fla. Stat.* ("General Hospital") appears to be a scrivener's error, as the definition of "General Hospital" does not appear to make sense in the context of §59A-3.255(6)(a)(1), *F.A.C.* Rather, it appears to the Magistrate that the reference was intended to be to §395.002(9), *Fla. Stat.* ("Emergency Services and Care"). This conclusion is supported by the fact that certain versions of §395.002, *Fla. Stat.*, previously numbered this "Emergency Services and Care" provision as subsection (10). *See e.g.* §395.002(10), *Fla. Stat.* (2005).

41. The present dispute turns on the meaning of §395.002(9), *Fla. Stat.*'s ". . .and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condi-

tion. . . ." In other words, does that language create a duty on the part of the hospital to provide adequate care and not just adequate staffing?

42. The definition of "emergency services and care" was added to §395.002, *Fla. Stat.*, by *Laws of Florida* 92-289. (http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1992/1992V1Pt2.pdf ; retrieved by the Magistrate on March 18, 2024). The original definition was:

> (9) "Emergency services and care" means medical screening, examination, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under the supervision of a physician, to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility.

As such, the definition of "emergency services and care" provided by §395.002(9), *Fla. Stat.*, has remained unchanged since 1992.

43. The Magistrate finds that *Wax v. Tenet Health System Hospitals, Inc.*, 955 So.2d 1 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D641a], *Tarpon Springs Hosp. Found., Inc. v. Reth*, 40 So.3d 823, 828 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1532a], *and Tabraue v. Drs. Hosp., Inc.*, 272 So.3d 468 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D810b], are not dispositive of the present dispute. *Wax* did not involve §395.1041, but held that §395.1055 & §395.002(13)(b) created a statutory non-delegable duty involving anesthesia services *Tarpon Springs* certified conflict with *Wax*, and held conversely that §395.1055 & §395.002(13)(b) did not create a statutory non-delegable duty to provide nonnegligent anesthesia services. In so holding, the *Tarpon Springs* Court broadly stated:

> Chapter 395 regulates hospitals and addresses standards governing hospitals, not standards applicable to the practice of medicine that is regulated by other chapters of the *Florida Statutes*. *See, e.g.*, ch. 458, *Fla. Stat.* (2005). The statutory duty of hospitals is to have available and to competently and adequately staff their anesthesia departments. If a hospital fails to have an anesthesia service directed by a physician member of its medical staff, or to provide for adequate numbers of anesthesia providers, or if it allowed an incompetent anesthesia provider to be granted privileges, it could be held liable if this proximately caused injury to one of its patients.

Tarpon Springs, 40 So.3d at 828. *Tarpon Springs* did not involve §395.1041 and did not cite §395.1041 in any way. *Tabraue* involved a claim for a non-delegable duty under §395.1041, but did not in any way analyze the meaning of "emergency services and care." Instead, *Tabraue* noted that *Wax* and *Tarpon Springs* are in conflict, aligned itself with *Tarpon Springs*, and then reiterated *Tarpon Springs'* broad statement that "Chapter 395 regulates hospitals and addresses standards governing hospitals, not standards applicable to the practice of medicine." *See also Gradia v. Baptist Hospital*, 345 So.3d 385 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1698b] (*citing Tabraue* without any mention or analysis of §395.1041). *But see Ramsay v. South Lake Hospital*, 357 So.3d 253 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D384a] (in part analyzing the applicable statute of limitations for a claim against a hospital brought under §395.1041, *Fla. Stat.*, but not disposing of the case outright for a lack of duty).

44. To recap, the Magistrate understands the case law progression to be:

a. *Wax* (Fla. 4th DCA 2007) [32 Fla. L. Weekly D641a] found a statutory non-delegable duty for non- negligent anesthesia services under §395.1055 & §395.002(13)(b).

b. *Tarpon Springs* (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1532a], certified conflict with *Wax*, held §395.1055 & §395.002(13)(b) do not create a statutory non-delegable duty for non-negligent anesthesia services, and then broadly announced nothing in Chapter 395 creates a non-delegable duty for any medical negligence.

c. *Tabraue* (Fla. 3d DCA 2019) [44 Fla. L. Weekly D810b] relied on *Tarpon Springs'* broad statement, and held §395.1041 does not create a non-delegable duty, but did not in any way analyze the meaning of "emergency services and care" under §395.002(9).

d. *Gradia* (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1698b] relied on *Tarpon Springs'* broad statement, without any mention or analysis of the meaning of "emergency services and care" under §395.1041 & §395.002(9).

e. *Ramsay* (Fla. 5th DCA 2023) [48 Fla. L. Weekly D384a] did not cite any of the prior cases, indicated there is a statutory cause of action against hospitals under §395.1041 for medical negligence, and applied a 2-year statute of limitations to such claims.

None of these cases engaged in any analysis of the meaning of "emergency services and care" employed by §395.1041 & §395.002(9).

45. At the outset, the Magistrate finds that the requirement of §395.002(9), *Fla. Stat.*, that "and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition," cannot be reasonably read in any other way other than to require non-negligent medical services to "relieve or eliminate the emergency medical condition." The question then is whether that obligation ends with the treating physician, or also extends to the hospital itself.

46. The Magistrate finds that §395.1041(1) includes an intent by the Legislature that emergency patients ". . .receive all necessary and appropriate emergency services and care. . ." This language includes an intent that patients receive "appropriate. . .care." "Appropriate care" is synonymous with "due care":

> "due care"
>
> - noun
> - : the care that an ordinarily reasonable and prudent person would use under the same or similar circumstances
> - called also ordinary care, reasonable care
> - see also DUE DILIGENCE compare FAULT, NEGLIGENCE

Merriam-Webster online dictionary (https://www.merriam-webster.com/legal/due%20care), retrieved by the Magistrate on March 18, 2024. Ergo, the express Legislative intent in §395.1041(1) includes the concepts of duty and negligence built into the statute. By the express terms of §395.1041, this duty is on owed by both the hospital and the physicians. *See* §395.1041(3)(a) ("Every general hospital. . .shall provide emergency services and care for any emergency medical condition when. . . .").

47. As such, the Magistrate finds that a general hospital which has an emergency department owes a statutory non-delegable duty under §395.1041 to provide non-negligent medical care to relieve or eliminate an emergency medical condition. This duty of reasonable care does not extend beyond relieving or eliminating the emergency medical condition.

48. The Magistrate's ruling is supported by §395.1041(3)(g) excusing a hospital from liability under §395.1041 if a refusal to provide care is a determination based on "exercising reasonable care" and made after a screening, examination, and evaluation. If the hospital holds no duty under §395.1041 whatsoever, then this language excusing the hospital from liability under certain circumstances in §395.1041(3)(g) would be rendered superfluous and meaningless. Conversely, when reading all the provisions of §395.1041 *in pari materia* with each other and with §395.002(9), the only reasonable interpretation is that §395.1041 creates a statutory non-delegable duty for a hospital to provide non-negligent medical care to relieve or eliminate an emergency medical condition.

49. As such, the Magistrate recommends the Court **DENY** Defendant Venice HMA, LLC's *motion to dismiss* [DIN 80] Count 16. This denial is without prejudice for Defendant to continue to assert

its substantive arguments against a statutory non-delegable duty as defenses in this case.

50. No later than twenty (20) days after the date the Court renders its *order adopting* this *recommended order*, Defendant shall serve its answer to the *second amended complaint* [DIN 72].

51. However, if Plaintiff voluntarily files a further amended complaint as discussed above pertaining to the motion to strike, then no later than twenty (20) days after the date the Plaintiff files the further amended complaint, Defendant shall serve its response to the further amended complaint. If Plaintiff files a further amended complaint prior to the Court rendering its order adopting this recommended order, then this 20-day period shall be tolled until the Court renders its order adopting.

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

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

* * *

Criminal law—Evidence—Polygraph examination—State is barred from advising jury that another suspect identified by alleged victim passed polygraph examination where information is cumulative and of little probative value since suspect was cleared by police on basis that his DNA did not match DNA evidence found on victim

STATE OF FLORIDA, Plaintiff, v. GREGORY MARTIN, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F11-3185. Section 60. January 16, 2023. Miguel M. de la O, Judge. Counsel: Scott Warfman, for Plaintiff. Lane Abraham and Amy Agnoli, for Defendant.

ORDER GRANTING DEFENSE MOTION IN LIMINE REGARDING POLYGRAPH

THIS CAUSE came before the Court on Defendant, Gregory Martin's ("Martin"), Motion in Limine regarding Polygraph ("Motion"). Martin seeks to prohibit the State from advising the jury that Jean Robas, a suspect identified by the alleged victim, passed a polygraph examination. The Motion is **GRANTED**.

Mr. Robas was cleared by police as a suspect because his DNA did not match the DNA deposited by the assailant in the alleged victim's vaginal canal. Therefore, allowing the jury to learn that Mr. Robas passed a polygraph examination is cumulative and of little additional probative value. Worse still, any probative value would require that the polygraph be reliable as a lie detector. It is not. In *Davis v. State*, 520 So. 2d 572 (Fla. 1988), the Florida supreme court noted:

> The courts of this state have repeatedly held that the factors contributing to the results of a polygraph test—the skill of the operator, the emotional state of the person tested, the fallibility of the machine, and the lack of a specific quantitative relationship between physiological and emotional states—are such that the polygraph cannot be recognized as a sufficiently reliable or valid instrument to warrant its use in judicial proceedings unless both sides agree to its use.

Id. at 573-74. In fact, our appellate courts will quash a trial order which merely sets a hearing to determine whether to admit the results of a polygraph examination. *See, e.g.*, *State v. Narval Hardware*, 868 So. 2d 574 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D377c].

Because DNA is reliable and probative (depending on the circumstances), if Robas' DNA had been found in the alleged victim's vaginal canal, no contrary polygraph result would have ever convinced the State to exonerate Mr. Robas. If the State introduces the results of the polygraph in Martin's trial, one purpose would be to bolster the DNA results. Yet, DNA results need no such bolstering. If the purpose is to convince the jury that the police thoroughly investigated the possibility of Mr. Robas being the assailant, relying on the administration of an inadmissible and notoriously unreliable test is unlikely to be persuasive in light of the DNA results which exonerated Mr. Robas.

One final point must be made. It is indisputable that if Mr. Robas testified at Martin's trial, neither side could question him about the results of the polygraph examination, regardless of whether he passed or failed.

> The law in Florida is clear that the mere mention of polygraph results in a criminal case is grounds for a mistrial. *Walsh v. State,* 418 So. 2d 1000 (Fla. 1982); *Kaminiski v. State* 63 So. 2d 339 (Fla. 1952). This includes not only the suggestions regarding a defendant and a polygraph exam but also testimony regarding witnesses and their polygraph results which may weigh heavily in the case on the question of defendant's guilt or innocence. *Simeon v. State,* 520 So. 2d 81 (Fla. 3d DCA 1988).

McFadden v. State, 540 So. 2d 844, 845 (Fla. 3d DCA 1989). Consequently, were the State to introduce the results of Mr. Robas' polygraph examination through a law enforcement witness, it would be circumventing clearly established Florida law.

The Court acknowledges that the State seeks to only introduce the fact that detectives administered a polygraph examination to Mr. Robas and not the actual results. This is really a distinction without a difference. Considering the fact Mr. Robas is *not* on trial, but Martin is, the jurors would have to be especially dull not to deduce that Mr. Robas passed his polygraph while Martin either failed or declined to take one. Because both inferences would be inadmissible as evidence against Martin, the Court concludes the wiser course is to not put the jurors in a position to speculate about either.

* * *

Torts—Contractors—Subcontractors—Negligence—Material violations of building code—Crossclaims—Indemnity—Contribution—Condominium association's action against developer and others alleging violations of section 553.84, section 718.203(2), and Florida Deceptive and Unfair Trade Practices Act—Crossclaim filed by developer's general contractor against independent subcontractor seeking common law indemnity and contribution—Subcontractor's motion to dismiss crossclaim is granted—Because damages in negligence action must be apportioned on basis of each party's percentage of fault, contractor and subcontractor are not jointly and severally liable to association, and contractor cannot be vicariously, constructively, derivatively, or technically liable for acts of its independent subcontractor—Indemnity crossclaim is dismissed without prejudice because it may be raised in action by association asserting contractual rights against contractor

OCEAN DUNES CONDOMINIUM AT AQUARINA CONDOMINIUM ASSOCIATION, INC., a not-for-profit Florida corporation, Plaintiff, v. P.A.V.C.O. CONSTRUCTION, INC. a Florida Corporation, P.A.V.C.O. CONTRACTING GROUP, LLC, a Florida limited liability company, OCEAN DUNES AQUARINA DEVELOPERS, INC., a Florida corporation, TD BANK, N.A. f/k/a MERCHANTILE BANK, a national association, FIFTH THIRD BANK, an Ohio corporation, BRENNER EQUITIES GROUP, d/b/a BRENNER REAL ESTATE GROUP, a Florida corporation, 84 LUMBER COMPANY, LIMITED PARTNERSHIP d/b/a 84 LUMBER COMPANY, a Pennsylvania limited partnership, HARDY HOLDINGS, INC., a

Pennsylvania corporation, ZIMMER CONSTRUCTION CONSULTANTS, P.A., a Florida corporation, and RICHARD M. ZIMMER, an individual, Defendants. AND RELATED THIRD-PARTY CLAIMS AND CROSSCLAIM. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2012-CA-066613. March 31, 2015. Lisa Davidson, Judge. Counsel: Jason Bruce, for Plaintiff. Hardy L. Roberts, Carey, O'Malley, Whitaker, Mueller, Roberts & Smith P.A., Tampa, for 84 Lumber Company, Defendant.

ORDER GRANTING 84 LUMBER COMPANY'S MOTION TO DISMISS COUNTS II AND V OF CROSSCLAIM

THIS CAUSE having come before the Court on the Motion to Dismiss Counts II and V of Crossclaim with Prejudice and Dismiss Remainder without Prejudice filed by Defendant/Cross-Defendant, 84 Lumber Company ("84 Lumber"), the Court having heard argument of counsel for the parties at the duly noticed hearing on March 11, 2015, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED

1. The Motion is **GRANTED** without prejudice with respect to Count II (common law indemnity) of the Crossclaim filed by Defendant/Cross-Plaintiff, P.A.V.C.O. Construction, Inc. ("P.A.V.C.O."). In its Amended Complaint, Plaintiff Ocean Dunes at Aquarina Condominium Association, Inc. (the "Association") asserts claims (a) against all Defendants for negligence (Count I), (b) against P.A.V.C.O., 84 Lumber, and Hardy Holdings, Inc., for violation of Section 553.84[1] (Count II), (c) against P.A.V.C.O., 84 Lumber, and Hardy Holdings, Inc., for violation of Section 718.203(2) (Count IV), and (d) against P.A.V.C.O., 84 Lumber, and Hardy Holdings, Inc., under the Florida Deceptive & Unfair Trade Practices Act ("FDUTPA") (Count VI). In Count II of its Crossclaim, P.A.V.C.O., seeks common law indemnity from 84 Lumber for the damages the Association seeks against P.A.V.C.O. in the Amended Complaint.

Section 768.81(3) provides: "APPORTIONMENT OF DAMAGES.—In a negligence action, the court shall enter judgment against each party liable on the basis of each party's percentage of fault and not on the basis of joint and several liability." Section 768.81(1)(c) defines such a negligence action as follows:

> "Negligence action" means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.

The allegations of P.A.V.C.O.'s Crossclaim, including the "Purchase Orders" incorporated by reference and attached to P.A.V.C.O.'s July 2, 2014, Notice of Filing Amended Composite Exhibit "S," establish that P.A.V.C.O. was the developer's general contractor on the project at issue in this litigation and that 84 Lumber was P.A.V.C.O.'s independent subcontractor. The damages sought by the Association under negligence, Section 553.84, Section 718.203(2), and FDUTPA theories must be apportioned "on the basis of each party's percentage of fault." Sections 768.81(1)(c) and (3); *see also Paul N. Howard Co. v. Affholder,* 701 So. 2d 402 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2551d]. P.A.V.C.O. is not entitled to common law indemnity from 84 Lumber for any such "negligence action" maintained by the Association because P.A.V.C.O. and 84 Lumber are not jointly and severally liable to the Association and P.A.V.C.O. is neither alleged to be nor can it be vicariously, constructively, derivatively, or technically liable for 84 Lumber, P.A.V.C.O.'s independent subcontractor.

The Association has, however, contended in a separate action that it is entitled to assert contract rights against P.A.V.C.O. *See* Ex. B to P.A.V.C.O.'s March 9, 2015, Response to 84 Lumber's Motion to Dismiss. Because such claims have not been adjudicated, P.A.V.C.O.'s claim for common law indemnity against 84 Lumber in Count II of the Crossclaim is dismissed without prejudice.

2. The Motion is **GRANTED** with prejudice with respect to Count V (contribution) of the Crossclaim. Because all of the Association's claims against P.A.V.C.O. and 84 Lumber must be apportioned "on the basis of each party's percentage of fault," 84 Lumber and P.A.V.C.O. cannot be jointly and severally liable to the Association and no contribution claim may lie. *See* Section 768.81(1)(c) and (3); *T & S Enterprises Handicap Accessibility, Inc. v. Wink Indus. Maint. & Repair, Inc.,* 11 So. 3d 411, 413 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D953a]. Count V of the Crossclaim is dismissed with prejudice.

3. 84 Lumber shall serve its answer to the remaining counts of the Crossclaim within twenty (20) days of this Order.

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[1]All statutory references are to the Florida Statutes.

* * *

Mortgage foreclosure—Attorney's fees—Amount—Contingency risk multiplier—Multiplier of 1.5 is appropriate where relevant market requires contingency risk multiplier to obtain competent counsel willing to take foreclosure case to trial, attorney was able to mitigate risk of nonpayment by just $1,000, results obtained were excellent in that mortgagor was able to retain his most significant asset, and likelihood of attorney recovering attorney's fees at outset of case was less than 50%—Expert witness fees, costs and prejudgment interest are awarded

WILMINGTON SAVINGS FUND SOCIETY FSB, Plaintiff, v. GEORGE PAPASPIROU, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE16010078. Division 14. February 23, 2024. Carlos Augusto Rodriguez, Judge. Counsel: Jonathan H. Kline, Jonathan Kline, P.A., Weston, for Defendants George Papaspirou and Olympus 1808, LLC.

FINAL JUDGMENT

FINAL JUDGMENT AND ORDER ON DEFENDANT'S HEARING TO DETERMINE THE AMOUNT OF PREVAILING PARTY ATTORNEYS' FEES AND COSTS

THIS CAUSE, having come to be heard on October 5, 2023, and February 22, 2024, on the Defendant, GEORGE PAPASPIROU AND OLYMPUS 1808, LLC's (George Papaspirou is the 100% shareholder and Managing Member of Olympus 1808, LLC) (*hereinafter* Defendants), hearing to determine the amount of prevailing party attorneys' fees and costs, and upon consideration of the evidence and its application to *Rule of Professional Conduct 4-1.5*, *Rules Regulating the Florida Bar*, *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), *Joyce v. Federated National Insurance Company*, 2017 WL 4684352 (Fla. 2017) [42 Fla. L. Weekly S82a], and *Lane v. Head*, 556 So. 2d 508 (Fla. 1990), it is ORDERED AND ADJUDGED that:

1. Both parties agreed to this hearing to determine the amount Defendants attorneys' fees and costs pursuant to an agreed order on entitlement signed by this Court on September 1, 2022.

2. The Defendant was seeking $850 per hour for Jonathan Kline, $550 per hour for a Senior Associate, $350 for a Junior Associate, and $170 per hour for a paralegal. This court has reduced the hourly rate for Jonathan Kline, Senior Associate, and the Junior Associate pursuant to paragraph 3 of this order.

3. The Court finds the following:

Person	Actual Hours Billed	Reasonable Hours	Reasonable Hourly Rate	Total
Jonathan Kline	73.27	58.2	$700	$40,740.
Senior Associate	46.8	35.40	$400	$14,160.
Junior Attorney	3.17	3.00	$275	$ 871.75
Paralegal	2.88	2.68	$170	$ 455.60
Lodestar Amount				**$56,227.35**

4. After considering, the factors enunciated in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) and *Joyce v. Federated National Insurance Company*, 2017 WL 4684352 (Fla. 2017) [42 Fla. L. Weekly S82a], this Court determines that (1) the relevant market requires a contingency fee multiplier to obtain competent counsel. The Court heard testimony that although there may be attorneys who are willing to defend foreclosures, very few attorneys are willing to take such cases to trial and Mr. Kline is one such attorney. None of the attorneys willing to take a foreclosure case to trial would be willing to do so without a multiplier. Thus the relevant market required a multiplier for Mr. Papaspirou to obtain competent counsel. *TRG Columbus Development Ventures LTD., v. Sifontes*, 163 So. 3d 548 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D796a] (2) Jonathan Kline, P.A. was paid $1,000 by Mr. Papaspirou, but handled the rest of the case on a contingency fee basis. Thus, Mr. Kline was able to mitigate the risk of non-payment by just $1,000. The results obtained by Mr. Kline for Mr. Papaspirou were excellent because the case was dismissed. The three (3) factors set forth in *Rowe* are applicable, especially, the amount involved (his most significant asset), the results obtained (Mr. Papaspirou did not lose his house), and the type of fee arrangement between the attorney and his client.

5. Based on the evidence, the Court finds that the likelihood of Mr. Kline recovering attorney's fees from the opposing party at the outset of the case was significantly less than 50%. The likelihood of Mr. Papaspirou prevailing on the merits of the case was about 10%. Since the ability to recover attorney's fees from the Plaintiff was less than 50% at the outset of the case, Mr. Kline is entitled to a multiplier between 1.50 to 2.00. Utilizing the multiplier awarded in this case of 1.5 the attorneys' fees now total **$ 84,341.03** pursuant to the formulation set forth in *Lane v. Head*, 556 So. 2d 508 (Fla. 1990) to calculate attorney's fees on a partial contingency basis.

6. Defendant's Expert Witness, James C. Hauser Esq., was necessary to render an opinion relating to the reasonable number of hours, a reasonable hourly rate and the applicability of a contingency fee multiplier. James C. Hauser, Esq. was required to take time away from his practice. Mr. Hauser spent 28.40 hours, which the court finds reasonable. The court finds that Mr. Hauser's hourly rate of $700 is reasonable. Thus, a reasonable expert witness fee for Mr. Hauser is $19,880. Mr. Hauser was previously paid $2,800 by the plaintiff for his deposition, which subtracted from $19,880 yields **$ 17,080.**

7. The Defendant is awarded **taxable costs of $500** for copies (2000 copies at .25 per copy).

8. Judgment against the Plaintiff, WILMINGTON SAVINGS FUND SOCIETY FSB DBA CHRISTIANA TRUST NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE OF THE BROUGHAM FUND I TRUST, is GRANTED in the principal amount of (adding and computing paragraphs 2, 3, 4, and 5)(**$56,227.35** x 1.**5** = **$84,341.03 fees plus $500 costs, plus expert fee $17,080.**), a total for attorney fees, expert fee and costs of **$101,921.03.**

9. The Defendant is entitled to prejudgment interest computed from the date of entitlement (September 1, 2022) to December 31, 2022, (121 days), at a rate of 4.34 percent **plus** from January 1, 2023, to December 31, 2023, (365 days) at a rate of 5.52 percent **plus** January 1, 2024, to February 22, 2024, (53 days) at a rate of 9.09 percent. Pre-judgment interest is based upon those rates established by the Office of the Chief Financial Officer of the State of Florida and pursuant to Florida Statute § 55.03. Pre-judgment interest accrues from the date of entitlement to fees to the date of this order. See *Quality Engineered Installation, Inc. v. Higley S., Inc.*, 670 So. 2d 929, 930 (Fla. 1996) [21 Fla. L. Weekly S141a] and *Parsons v. Trynor*, 790 So. 2d 1285, 1286 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1980a]. Defendant is entitled to prejudgment interest on the attorney fee portion of the award, **$84,341.03** as follows; September 1, 2022 to December 31, 2022, (121 days), at a rate of 4.34 percent **plus** January 1, 2023, to December 31, 2023, (365 days) at a rate of 5.52 percent **plus** January 1, 2024, to February 22, 2024, (53 days) at a rate of 9.09 percent. The mathematical calculation on this prejudgment interest will be computed as follows: [Fee award $84,341.03 x .000118904] x 121 days = **$1,213.41 plus** [Fee award $84,341.03] x .000151233 x 277 days =**$3,533.11 plus** [Fee award $84,341.03] x .000248361 x 53 days = **$1,110.18**, total **prejudgment interest of $5,856.70** which is added to the attorney fees and costs for a **TOTAL JUDGMENT of $ 107,777.73** which shall be paid to Jonathan Kline, P.A., 2761 Executive Park Drive, Weston, FL 33331, which shall bear interest at a rate pursuant to Florida Statutes §55.03, which is currently 9.09% *per annum* from the date of this order, all for which let execution issue forthwith.

10. As per Florida Rule of Civil Procedure 1.560(c), it is further ordered and adjudged that the judgment debtor 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 creditors attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment unless the final judgment is satisfied or post-judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor to complete form 1.977, including all required attachments, and serve it to the judgment creditor's attorney or the judgment creditor if the judgment creditor is not represented by an attorney.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Coverage—Medical expenses—Conditions precedent—Demand letter—Sufficiency—Language of section 627.736(10)(b)3 requires that presuit demand include itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due and to provide notice of amount for which insured would be sued—Demand letter in instant case did not satisfy requirements of statute where amount asked for in demand letter was several thousand dollars more than the amount the provider claimed in its suit against PIP insurer—Although statute permits claimant to meet itemization requirement by attaching a properly completed CMS 1500 form, UB 92 forms, or other approved standard form, ledger attached to provider's demand letter in instant case did not satisfy this requirement—Ledger was also noncompliant because it reflected charges in excess of that permitted by PIP statute

MARGATE CHIROPRACTIC CLINIC, INC., a/a/o Kianna Necy, Plaintiff, v. ALLSTATE FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001205-SP-24. Section MB01. April 1, 2024. Stephanie Silver, Judge. Counsel: Erick Evans, The Patino Law Firm, Hialeah, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING PRESUIT DEMAND

Docket Index # 86 Date Filed: September 22, 2022

Title of Motion: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING PRESUIT DEMAND

THIS CAUSE came before the Court on Defendant, Allstate's Motion for Summary Judgment or Disposition as to Plaintiff's Pre-suit Demand (Filing# 157982167, September 22, 2022); and having reviewed the Motion, having heard argument of Counsel at an extensive hearing, and being sufficiently advised in the premises, finds as follows:

Undisputed Material Facts

Following a motor vehicle accident, Plaintiff rendered medical treatment to the claimant from March 10, 2016 through July 26, 2016. Plaintiff submitted bills to Allstate for medical services in the total amount of $17,067, representing numerous different services billed under unique codes over the months' long course of treatment. Allstate reimbursed Plaintiff's bills in the total amount of $8,145.04 in accordance with the fee schedules incorporated into Section (5) of the PIP Statute and into Allstate's policy. In its Explanations of Benefits, Allstate explained how each individual code/service was paid.

On January 4, 2018, the Plaintiff submitted a presuit demand for all dates of service. The presuit demand sought an additional payment of $5,524.56, allegedly representing 80% of all the charges Plaintiff billed minus the total amount paid by Allstate. The demand did not account for the $10,000 statutory limits on PIP benefits or the allowable amounts for the services under the PIP Statute. Plaintiff attached to its demand a Ledger showing all of the charges comprising the $17,067 total and the lump payments it received. Plaintiff then hand wrote in the total amounts billed and paid. The balance on the ledger reflects a claim of entitlement to 100% of everything billed while the demand letter claims entitlement to 80% of everything billed. Allstate responded to the demand, and in an effort to avoid litigation, paid an additional $955.76 for benefits, interest, penalty and postage for CPT Codes 98941 that were previously denied. The demand response further noted that Plaintiff's charges were adjusted in accordance with the fee schedules. Allstate also produced its Declarations page, Payout Ledger and Explanations of Benefits, itemizing how each individual charge/service was paid. The Payout Ledger showed that Plaintiff had received most of the benefits paid to date and only $278 had been paid to a different provider.

Plaintiff filed suit March 30, 2018, claiming damages of $99—not the $5,524.56 it claimed in its demand. Even though they had been paid in response to the demand, Plaintiff later answered interrogatories, claiming damages based only on *denials,* not underpayments, of CPT code 98941—not all the codes it billed as reflected in the demand.

Applicable Law

Section 627.736(10), Fla. Stat., states:

(10) DEMAND LETTER—

(a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is **overdue**, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) **The notice must state** that it is a "demand letter under s. 627.736" and state with **specificity**:

***

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and **an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d)** or the lost-wage statement **previously submitted may be used as the itemized statement.**

Fla. Stat. § 627.736(10) (emphasis added).

Florida District Courts of Appeal are currently split regarding the construction of Fla. Stat. § 627.736(10)(b)(3). The Third and Fourth District Courts of Appeal have construed the language of Section (10)(b)3 in favor of the insurer and found that Section (10)(b)3. requires the Plaintiff to submit a presuit demand that provides the Defendant notice of the amount for which it will be sued. *See Rivera v. State Farm Mut. Auto. Ins. Co.*, 317 So.3d 197, 204 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a] ("*Rivera*") (*adopting Venus Health Center (Joaly Rojas) v. State Farm Fire & Cas. Co.*, 21 Fla. L. Weekly Supp. 496a (Fla. 11th Cir. App. Mar. 13, 2014) ("*Venus Health*")); and *Chris Thompson, PA a/a/o Elmude Cadau v. GEICO Indemnity Co.*, 347 So.3d 1, 2 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1588b] ("*Chris Thompson*"). In *Chris Thompson*, the provider sent a demand letter for almost $3,000 in benefits. When the insurance company did not pay, the insurance company was sued for $100.00. The Fourth District held that precision is required in demand letters to reduce litigation. The decision further approves *Rivera* and quotes the language discussing that the purpose of the demand letter is to notify the insurance company of the amount of which it will be sued if payment is not rendered.

The Second and Fifth District Courts of Appeal construed the language of Section (10)(b)(3) in favor of the Plaintiff and held that the presuit demand is not required to provide notice of the amount for which Defendant would be sued. *See Bain Complete Wellness, LLC v. Garrison Property & Cas. Ins. Co.*, 356 So.3d 866 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D2623a]; and *Mercury Indem. Co. of Am. v. Central Fla. Med. & Chiropractic Ctr. d/b/a Sterling Med. Group (Sthefany Santiago)*, 48 Fla. L. Weekly D2090a (Fla. 5th DCA Oct.

27. 2023). In *Bain*, the demand letter requested amounts far in excess of $10,000. When the insurance company did not pay, it was sued for $99. The Second District held that the demand letter does not require a precise, aggregated amount required. It also rejected the notion that the demand letter must correlate to the amount sued. 356 So.2d 866, 871-874.

In *Central Florida*, the provider sent a demand letter for almost $1600 less any payments previously made and included an itemized statement of every charge. The insurance company claimed that the statute required the provider to state the exact amount remaining due and required the exact amount for which it would be sued. The appellate court rejected the insurance company's position holding that the plain language of the statute did not require the exact amount "claimed to be due" as that provision only applied to the "type of benefit" required in the statute. The Fifth District Court of Appeal rejected *Rivera*'s holding which indicated that "it makes sense to require the claimant to make a precise demand so that the insurance can pay" before expensive and time-consuming litigation ensues. The Fifth District conflicted with the *Rivera* holding. The Fifth DCA noted that it disagreed with the Third DCA's opinion in *Rivera* because *Rivera* attempted to create a new statute by abandoning the text of what the statute actually says. Page 4, citing Reading Law, Scalia and Gardner. Further, the Fifth DCA held that the demand letter statute stated that a CMS 1500 that was properly completed could serve as the itemized statement. Because the statute allowed the CMS 1500, certain other portions of the statute are not required. The learned judges on that panel then certified conflict with *Rivera* and *Chris Thompson*.

This Court is bound by the decisions of the Third District Court of Appeal, and is therefore bound by *Rivera*, which held:

> As the statute clearly states, the letter "shall state with specificity" "the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim" **and** "an itemized statement specifying **each exact amount**, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." (emphasis added). **In addition, the purpose of the demand letter is not just notice of intent to sue. The demand letter also notifies the insurer as to the exact amount for which it will be sued if the insurer does not pay the claim.** . . .:
>
> > If the intent of § *627.736(10)* is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to make a precise demand so that the insurer can pay and end the dispute before wasting the court's and the parties' time and resources. If the provider simply includes in its demand letter a statement of all the charges incurred. . . then it is not stating an exact amount that the insurer owes. If the PIP insurer must guess at the correct amount and is wrong, then the provider sues and exposes the insurer to attorney's fees. Before being subject to suit and attorney's fees, the insurer is entitled to know the exact amount due as fully as the provider's information allows.

Rivera at 204 (*quoting Venus Health*) (emphasis added). *Rivera* further affirmed that substantial compliance is not the legal standard in determining the sufficiency of a demand letter by extensively quoting the trial court's opinion in *Menendez v. State Farm*, 2012 1780 sp 25.

After *Rivera*, the Third DCA issued its opinion in *Mercury Indemnity Co. of America v. Pan Am Diagnostic of Orlando (Joceline Pierrilus)*, 368 So.3d 27 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1131a] ("*Mercury*"). The *Mercury* decision explicitly declined to revisit or reverse *Rivera*'s statutory interpretation of Section (10)(b)3. Instead, *Mercury* construed the plain language of Section (10)(b)(3) to add an exception to Section (10)(b)3.'s itemization requirement in cases where the Plaintiff attaches to the demand the "completed forms satisfying the requirements of Section (5)(d):"

> Pan Am refutes Mercury's position in two ways. First, Pan Am contends that the clause "claimed to be due" applies only to the last item listed ("the type of benefit"), and, by nature of the relationship between a provider and the insurer (e.g., the insurer possesses the insurance policy and knows how much it has already paid in total benefits), the statute cannot require that a demand letter include the exact amount due.
>
> Second, and independent of the statutory construction argument, Pan Am contends that it satisfied the requirement of *section 627.736(10)* through the *statutory alternative* of attaching to the demand letter the *completed* CMS-1500 form *expressly provided* for in lieu of providing an itemized statement.
>
> We agree with Pan Am's second contention—that it complied with the statute by attaching the requisite form to the demand letter.

Mercury at 31 (emphasis added).

"Because a ***properly completed*** form was used as the itemized statement in compliance with the statutory requirement, we affirm." *Mercury* at 28 (emphasis added). The phrase "properly completed form compliant with Section (5)(d)" is repeated seven times throughout *Mercury*. The decision is thus narrowly tailored and bound by the plain language of the statutory exception at Section (10)(b)3.: "A **completed form** satisfying the requirements of paragraph (5)(d)." The Court applied the plain language of the statutory exception to the facts before the Court where the parties had agreed that the Plaintiff had attached "properly completed" HICFs "in compliance with Section (5)(d)" to the demand. The *Mercury* decision explicitly declined to address the numerous other demand issues presented in the appeal. S*ee Mercury* at 31, and fns. 2 and 4. In contrast to *Mercury*'s narrow decision tailored to the plain language of the statute and the facts presented, the Third DCA in *Rivera* sought to provide broad guidance on Section (10) beyond the facts presented in that case: "We thus affirm and write further to clarify what section 627.736(10) requires in a pre-suit demand letter." *Rivera* at 202. *Rivera* provides the Rule for interpreting the itemization/specificity requirement in Section (10)(b)3. *Mercury* delineates the statutory exception to the itemization/specificity requirement in Section (10)(b)3.

The Court must also read *Mercury* in harmony with existing law as well as with the purposes of Section 10 and the PIP Statute cited by *Rivera:* respectively, to provide notice of the amount for which Defendant will be sued (*Rivera* at 204) and to ensure the swift payment of PIP benefits (*Id.* at 203). The Court is not at liberty to apply *Mercury* more broadly than it is written or to rewrite the plain language of the (10)(b)3 exception limited to "a **properly completed form satisfying the requirements of paragraph (5)(d)"** to include, for example, all previously submitted HICFs regardless of whether they were "properly completed" or, further yet, the Patient Ledger, as argued by Plaintiff in this case. Such a conclusion would be inconsistent with *Rivera*, the purpose of Section (10), the overall purpose of the PIP Statute and the existing decisional law cited favorably by both *Rivera* and *Mercury*. *See MRI Assocs. of America, LLC (Ebba Register) v. State Farm Fire and Casualty Co.,* 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b] ("*MRI Associates*") (invalidating demand that merely reattached the previously submitted bills because "the statute requires the same precision in a subjection 627.736(5)(d) health insurance claim form as it does in a subsection 627.736(10)(b)3. demand letter"); *see also Venus Health* at 3 (adopted by the Third DCA in *Rivera* and cited favorably by the 4th in *Chris Thompson*, considering a demand with HICFs attached and concluding that "[i]f the provider simply includes in its demand letter a statement of all the charges incurred. . . then it is not stating an exact amount that the insurer owes"); *Fountain Imaging of West Palm*

Beach, LLC (Charlotte Jennings) v. Progressive Express Ins. Co., 14 Fla. L. Weekly Supp. 614a (Fla. 15th Cir. App. March 30, 2007) ("*Fountain Imaging*") (adopted by the 4th in *MRI Associates* and invalidating demand where the attached HICF merely listed charges in excess of that permitted by the PIP Statute); *Government Employment Ins. Co. v. Open MRI of Miami Dade, Ltd.,* 18 Fla. L. Weekly Supp. 337a (Fla. 11th Cir. App. February 16, 2011) (holding that "it defies reason that the law would permit merely attaching a bill that has absolutely no relation to the amount claimed due"); *Chambers Medical Group, Inc. (Marie St. Hillare) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. App. December 1, 2006) (cited favorably by Third DCA in *Rivera*, and rejecting Plaintiff's contention "that the attachment of the claim forms complied with the letter of the law, as set forth within section 627.736(10)(b)3., as though accuracy were not a factor to be considered in their attachment").

Application

This Court is bound by the Third District Court of Appeal's *Rivera* and *Mercury* decisions. *Rivera* construed the language of Section (10)(b)(3) to conclude that a presuit demand must be precise and provide notice of the amount for which Defendant would be sued. *Mercury* provided an exception to this requirement where the Plaintiff attaches to its demand "[a] completed form satisfying the requirements of paragraph (5)(d)." *Mercury* at 31 (*quoting* Section 627.736(10)(b)(3), Fla. Stat.)

The demand in this case did not provide notice of the amount for which Defendant would be sued. The demand asked for $5,524.56 and Plaintiff's claim in suit is for $99. Furthermore, the Plaintiff cannot avail itself of the statutory exception to the itemization requirement in this case because Plaintiff did not attach "completed form[s] satisfying the requirements of paragraph (5)(d)" to its demand. Plaintiff merely attached the Patient Ledger showing the previous charges. The Ledger does not satisfy the requirements of paragraph (5)(d), which provides:

> All statements and bills for medical services rendered by a physician, hospital, clinic, or other person or institution shall be submitted to the insurer on *a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office and adopted by the commission for purposes of this paragraph.*

The Plaintiff's ledger attached to the demand in this case is not a CMS 1500 form, UB 92 form or other "form approved by the office and adopted by the commission." The ledger does not satisfy the plain language of the requirements of the Section (10)(b)3 exception and the Court is not at liberty to rewrite *Mercury* or Section (10)(b)3 to include private ledgers within the statutory language of a "completed form satisfying the requirements of paragraph (5)(d)." Furthermore, the ledger merely reflected charges in excess of the amounts permitted by the PIP Statute and for this reason was also not compliant with Section (5)(d). *See MRI Associates*, *supra* (invalidating demand that merely reattached the previously submitted bills seeking amounts in excess of that permitted by the PIP Statute); *accord Fountain Imaging, supra*. The Plaintiff claims that the itemized statement it provided is, in essence, the same information that a CMS 1500 would. Unfortunately for the Plaintiff, neither the statute nor any opinion holds that the ledger the Plaintiff submitted qualifies under the statute as a CMS 1500. In *Mercury*, the provider attached to its demand letter the completed CMS 1500 form in lieu of an itemized statement. Therefore, the Court held that the provider complied with the statute. The Third DCA went even further, however by holding that "*Rivera* involved the issue of compliance by way of an itemized statement (rather than the alternative use of the completed form in lieu of an itemized statement), and for that reason, *Rivera* is inapplicable to the instant case." *Id.* at 32, fn. 4 Here, the ledger was not a completed CMS 1500 form. *Rivera* therefore applies. While the Plaintiff's demand letter and the demand letter furnished in *Rivera* are far different, the Third DCA reaffirmed *Rivera* six months ago in *Mercury v. Pan Am* and held that the exception applies to a properly completed CMS 1500 form or form authorized by statute. Therefore, Plaintiff's demand did not comply with the requirements of the statute.

The demand in this case asks for an amount in excess of $10,000. Even assuming the $278 paid to a different provider was paid in error (which Allstate denies and Plaintiff does not claim), the maximum payable under the policy would be $10,278, leaving a possible maximum claim of $2,132.96. Notwithstanding that Plaintiff was provided an itemized breakdown of all charges and payments prior to the demand, the demand also did not itemize any of the amounts claimed to be due, merely listing the charges and lump payments. The Plaintiff urges this Court to narrow the holding of *Rivera* because of the nature and content of the *Rivera* demand letter. In other words, it suggests that because the demand letter in *Rivera* was so deficient, the Court should not consider that it applies in this case. The Plaintiff does not state how *Rivera* and *Venus Health* are not applicable here.

While this Court understands the positions of the conflicting District Courts of Appeal, it is required to follow what the Third DCA has required thus far. If this Court was located in a different jurisdiction, this Order could have been very different. Furthermore, this Court fully understands that a different panel on the Third District Court of Appeal may affirm *Rivera*, recede from the requirements of *Rivera*, or even render an entirely different interpretation of the statute. *See, e.g.*, *Normandy Ins. v. Bouayad*, 372 So.3d 671, 694-5 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D2045b] ("the idea that three independent judicial officers constituting one of this court's panels are legally bound by a decision of a prior panel . . . is a fallacy, a figment, a chimera")(Tanenbaum, J., concurring).

Conclusion

Based upon the forgoing, it is ORDERED:

1. Defendant's Motion for Summary Judgment regarding the Presuit Demand is GRANTED.
2. This Court will entertain a motion for reconsideration.
3. This matter is not final.

* * *

Criminal law—Search and seizure—Vehicle stop—Obscured tag—License plate frame that obscured words "MyFlorida.com" did not provide legal basis for traffic stop—Motion to suppress granted

STATE OF FLORIDA, v. KELLY AYN WINIFRED CASSIDY, Defendant. County Court, 5th Judicial Circuit in and for Citrus County. Case No. 2023-CT-1170. March 12, 2024. Bruce Carney, Judge. Counsel: Michael A. Tinari, Assistant State Attorney, Inverness, for State. Tyler K. Vaughn, Clark Hartpence Law, St. Petersburg, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court on March 6, 2024, before the Honorable Bruce E. Carney upon the defendant's Motion to Suppress, and appearing before the Court were the defendant, KELLY AYN WINIFRED CASSIDY, and TYLER KEITH VAUGHN, counsel for the defendant; and MICHAEL ANTHONY TINARI, Assistant State Attorney for the STATE OF FLORIDA, and upon the pleadings and proofs and the Court being fully advised and finding that it has jurisdiction of the subject matter and of the parties, hereby FINDS, ORDERS and ADJUDGES:

FACTS

1. On November 16, 2023, Deputy Alexis McDonald of the Citrus County Sheriff's Office observed a silver Cadillac driving east on State Road 44 in Crystal River with an obstructed license plate.

2. Prior to stopping the vehicle, Deputy McDonald called in all relevant portions of the plate including, but not limited to, all of the alphanumeric characters and the State of Florida as the issuing state.

3. The Defendant's Eagle Buick GMC dealer license plate frame completely obstructed the "MYFLORIDA.COM" marking on the top of the license plate.

4. The license plate clearly showed the images of oranges, orange blossoms, a silhouette of the State of Florida and the words, "IN GOD WE TRUST."

5. All parts of the registration sticker were visible and not compromised by the license plate frame.

LEGAL ANALYSIS

Both parties stipulated to the following:

a. the facts,

b. the current version of section 316.605(1) Fla. Stat., and

c. that in 2016, section 316.605 Fla. Stat. was amended to remove the requirement that the word "Florida" be plainly visible and legible on a license plate. *See* Ch. 14-216, § 14 at 2787, Laws of Fla. In fact, the Florida legislature specifically removed this requirement "to allow the use of license plate frames that might otherwise partially obscure the word 'Florida' when it appears at the top or bottom of the license plate." *Id.*

That leaves this Court with a traffic stop in this case based solely on the fact that the words "MY . . . .COM" are covered by the Eagle Buick GMC dealer license plate frame.

In *State v. Morris*, 270 So.3d 436 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1062a], the Court dealt with a similar issue albeit a partially obstructed tag as opposed to totally obstructing "MYFLORIDA.COM." The Court finds *Morris* very intuitive and instructive. At no time did the deputy have any difficulty identifying the alphanumeric characters, the registration, nor the state.

AND FOR THIS REASON, the defendant's Motion to Suppress is hereby GRANTED.

* * *

Contracts—Fabrication and installation of railings—Where plaintiff substantially completed the work contracted for, defendant breached contract by tendering amount less than the final payment due indicated on plaintiff's invoice

SIR ARNOLD ENTERPRISES, LLC, d/b/a PYRAMID ALUMINUM OF FL., Plaintiff, v. RONALD and MARY DEBIASE, Defendants. County Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 23-003900-CO. March 14, 2024. Susan Bedinghaus, Judge. Counsel: Jason S. Lambert, Hill Ward Henderson, Tampa, for Plaintiff. Ronald and Mary Debiase, Pro se, Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on March 11, 2024 at 1:15pm on Plaintiff, Sir Arnold Enterprises, LLC d/b/a Pyramid Aluminum of FL's ("Pyramid"), Motion for Partial Summary Judgment ("Motion"), and the Court, having reviewed the Motion and summary judgment evidence of record, having heard the argument of the parties, and being otherwise advised in the premises, hereby finds as follows:

Procedural History

1. On May 23, 2023, Pyramid filed this lawsuit against Defendants.

2. On December 20, 2023, after engaging in discovery, Pyramid filed the Motion. In support of the Motion, Pyramid filed an affidavit of its President, Wayne Popiolek (the "Pyramid Affidavit"), and copies of the Defendants' Interrogatory Responses.

3. Attached to and authenticated by the Pyramid Affidavit were copies of the contract with Defendants, a copy of the final invoice from Pyramid to Defendants, and correspondence from Pyramid to Defendants transmitting various documents and returning a check to the Defendants.

4. The hearing on the Motion was originally set for February 22, 2024 to occur via Zoom. When Defendants failed to appear, the hearing was continued for an in-person hearing, at Defendants' request, on March 11, 2024.

5. At the March 11, 2024 hearing, Pyramid was represented by counsel. Mr. & Mrs. DeBiase both appeared at the hearing.

6. The Defendants failed to file anything in response to Pyramid's Motion.

Findings of Fact

7. In December 2022, Pyramid and Defendants entered into a contract, pursuant to which Pyramid was to fabricate and deliver Key West style railing for $6,275.00 to the Defendants, and fabricate and install a separate section of railing for $4,229.00, making the total contract price $10,504.00. Pyramid Aff. at ¶ 3.

8. The Defendants paid Pyramid a deposit of $4,500.00. Pyramid Aff. at ¶ 4; Def. Inter. at ¶ 2.

9. Between February 17, 2023 and February 22, 2023, Pyramid substantially completed its work under the contract and sent a final invoice to Defendants seeking payment of the balance due of $6,004.00. Pyramid Aff. at ¶ 7.

10. In response, Defendants sent Pyramid a check in the amount of $3,864.00, marking it as "payment in full" under the contracts. Pyramid Aff. at ¶ 7.

11. Pyramid returned this check to Defendants as an improper tender a week later. Pyramid Aff. at ¶ 8.

12. A short time later, Pyramid recorded a construction lien against Defendants' home and initiated this lawsuit.

13. In response to Pyramid's Interrogatory Number Three, which asked Defendants to "identify the total amount you believe Pyramid is owed under the contract attached to the Complaint," Defendants sworn response was $3,864.00.

Applicable Law

14. "A movant is entitled to summary judgment if no reasonable finder of fact could return a verdict for the nonmoving party." *G & G In-Between Bridge Club Corp. v. Palm Plaza Associates, Ltd.*, 356 So. 3d 292, 297 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D275a]. "A summary judgment movant under the federal standard need not preemptively tackle all of the nonmovant's affirmative defenses" *Id.* at 299.

15. The Court may grant summary judgment on any claim or defense, or part of a claim or defense, on which summary judgment is sought. Fla. R. Civ. P. 1.510(a). Moreover, the Court, even if it does not grant all relief requested, "may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case. Fla. R. Civ. P. 1.510(g).

16. To establish its breach of contract claim, a movant must establish (1) the existence of a valid contract between the Parties, (2) a breach of the contract, and (3) damages. *JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.*, 292 So. 3d 500, 508 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D455a]. Failing to make final payment under a contract is a material breach of that contract. *Mortellaro v. Caribe Health Ctr., Inc.*, 322 So. 3d 128, 132 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1199a], reh'g denied (Aug. 2, 2021).

17. Substantial performance of a contract entitles a contractor to final payment. "Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages have been occasioned him by the promisee's failure to render full performance." *J.M. Beeson Co. v.*

Sartori, 553 So. 2d 180, 182 (Fla. 4th DCA 1989); *Oven Dev. Corp. v. Molisky*, 278 So. 2d 299, 303 (Fla. 1st DCA 1973).

Conclusions of Law

18. The undisputed summary judgment evidence before the Court establishes that Pyramid and Defendants entered into a contract for Pyramid to provide and install certain railings at Defendants' home in exchange for $10,504.00.

19. Defendants paid an initial deposit under that contract and nothing more. Pyramid substantially completed its work under the contract.

20. Defendants, through both their attempted tender of $3,864.00 to Pyramid in advance of litigation and their response to Pyramid's interrogatories, admit that Pyramid is owed at least $3,864.00 for the work performed at Defendants' home.

21. Defendants' failure to make payment properly following the initial deposit is a breach of the contract between them and Pyramid. Accordingly, Defendants' are liable to Pyramid for its damages under the contract between them.

22. Moreover, because Defendants have admitted that Pyramid is owed at least $3,864.00 under the contract, the floor for any future damages award in favor of Pyramid is $3,864.00.

Accordingly, it is hereby ORDERED and ADJUDGED as follows

23. Pyramid's Motion is hereby GRANTED.

24. Defendants are liable to Pyramid for its damages sought in this lawsuit.

25. The minimum amount of such damages is hereby set at $3,864.00.

26. Nothing in this order should be construed as ruling on or otherwise limiting any entitlement to additional damages, interest, attorneys' fees, or costs. Those items may be addressed at a future date.

27. Pyramid's counsel is hereby ordered to ensure a copy of this order is sent to Defendants by First Class Mail within five days after its entry.

* * *

Insurance—Personal injury protection—Answer and affirmative defenses—Amendment—Motion to amend insurer's answer and affirmative defenses to specifically allege that it does not owe PIP benefits for massage therapy because that service is not reimbursable under PIP statute is granted—There is no prejudice to provider, whose pleadings reveal that it had full knowledge of insurer's specific defense regarding massage therapy

HONOR HEALTH CENTER, INC., a/a/o Imar Morrero, Plaintiff, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-012723-SP-26. Section SD05. March 11, 2024. Michaelle Gonzalez-Paulson, Judge. Counsel: Maylin Castenada, Kenneth B. Schurr, P.A., for Plaintiff. Jamelia A. Hudson, Law Office of George L. Cimballa, III, Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER AND AFFIRMATIVE DEFENSES

DOCKET ENTRY NUMBER: 44

FILE NAME: DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND AFFIRMATIVE DEFENSES

FILED: May 09, 2022

THIS CAUSE came before the Court upon Defendant's Motion For Leave To Amend Answer And Affirmative Defenses. Plaintiff, HONOR HEALTH CENTER INC A/A/O IMAR MARRERO, was represented by Maylin Castenada of Law Offices of Kenneth B. Schurr, P.A. and Defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY, was represented by Jamelia Hudson of The Law Office of George L. Cimballa III. The Court, having heard argument of the Parties on January 31, 2024, and being otherwise duly advised in the matter, **GRANTS** Defendant's Motion For Leave To Amend Answer And Affirmative Defenses and makes the following finds of fact and conclusions of law:

MATERIAL FACTS

1. This is a case for payment of personal injury protection ("PIP") benefits pursuant to the governing policy (the "Policy") of insurance issued by GEICO.

2. On March 19, 2020, Defendant answered Plaintiff's complaint, and raised this sole defense:

> Defendant affirmatively states that it fully complied with its contractual obligations pursuant to the instant policy of insurance. Section II, Part 1, under the subsection titled "Payments We Will Make" states that Defendant "will pay in accordance with the Florida Motor Vehicle No Fault Law (as enacted, amended, or newly enacted), and where applicable in accordance with all fee schedules contained in the Florida Motor Vehicle No Fault Law, to or for the benefit of the injured person".'

3. On May 09, 2022, Defendant filed a Motion to Amend its Affirmative Defenses to specifically allege how it processed Plaintiff's claim in accordance with the Florida Motor Vehicle No Fault Law:

> Defendant affirmatively states that it does not owe Plaintiff benefits for massage therapy services because massage therapy services are not covered under the policy of insurance provided to the insured in this claim, nor are massage therapy services recoverable through a policy of PIP in Florida pursuant to § 627.736(1)(a)(5), Fla. Stat. (2013), which states: "Medical benefits do not include massage as defined in s. 480.033 or acupuncture as defined in s. 457.102, regardless of the person, entity, or licensee providing massage or acupuncture, and a licensed massage therapist or licensed acupuncturist may not be reimbursed for medical benefits under this section." All of Plaintiff's bills from dates of service February 14, 2019 through March 19, 2019 are for massage therapy services not recoverable through a policy of PIP in Florida. Therefore, the Defendant is not responsible for the payment of the subject medical bills.

4. On May 17, 2021, prior to Defendant filing its Motion to Amend its Affirmative Defenses, Plaintiff filed a Motion for Summary Judgment (hereinafter referred to as "MSJ"). In this MSJ Plaintiff makes it clear that they are aware of Geico's specific defense. Plaintiff states "Defendant claims that all the services rendered and charges submitted are unlawful and noncompensable because treatment was supposedly provided by a licensed massage therapist" MSJ, page 2 at ¶7. This summary judgment seeks to establish that Plaintiff's bills are compensable, despite the treatment being rendered by an license massage therapist (hereinafter referred to as "LMT") because "[t]he legislature did not intend to outlaw LMT"s or acupuncturist from working at, or being business owners and owning a medical facility that submits bill to PIP insurers" MSJ, page 6 ¶1.[1]

5. On May 9, 2022, Defendant filed its pretrial catalogue, clearly identifying the LMT issue, and advising payment is not due.

6. This is Defendant's first time moving to amend its Answer & Affirmative Defense.

Analysis

1. Florida case law is clear in that "it is the public policy of this state to freely allow amendments to pleadings so that cases may be resolved upon their merits" *Adams v. Knabb Turpentine Co.,* 435 So.2d 944, 946 (Fla. 1st DCA 1983).

2. Plaintiff asserts that despite their MSJ baring evidence of their knowledge of the true issues of this case, it is of no relevance because Defendant did not specifically plead the Affirmative Defense. This

type of approach is precisely what the Courts caution against and is evident in the caselaw. Absent prejudice, the Courts have been consistent in their desire to allow cases to be resolved on their merits.

3. Plaintiff seeks to prevent Defendant's amendment, to permit a potential win based on a technicality since the Third District Court of Appeals has already ruled on this issue in the insurers favor.

4. As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile. *See New River Yachting Center, Inc. v. Bacchiocchi*, 407 So.2d 607 (Fla. 4th DCA 1981).

5. Plaintiff is not prejudiced because they had full knowledge of the issues of the case, and even filed a MSJ on the issue in 2021, prior to Defendant's amendment.

6. The case has been litigated with that issue in mind, therefore Plaintiff cannot in good faith assert prejudice.

7. It is clear that the interests of justice are far better served by determining a case on its substantive merits, rather than a mistake in the pleading, *see Dole v. Arco Chemical Co.*, 921 F.2d 484 (3d Cir. 1990).

8. Courts should be especially liberal when leave to amend, as in the instant case, "is sought at or before a hearing on a motion for summary judgment." *Montero v. Compugraphic Corp.*, 531 So.2d 1034, 1036 (Fla. 3d DCA 1988).

9. Moreover, The District Court of Appeals has consistently held that lawsuits should be allowed to be determined on their merits. *Stroh v. Arthur & Dororthy Dudley*, 476 So.2d 230 (Fla. 4th DCA 1985), & *Love v. Allis-Chalmers Corporation*, 362 So.2d 1037 (Fla. 4th DCA), cert dismissed, 366 So.2d 879 (Fla. 1978). The Defendant believes this cause is defendable and should be treated as such.

Accordingly, it is:

ORDERED AND ADJUDGED that Defendant's Motion for Leave to Amend Answer and Affirmative Defense is **GRANTED**. The Defendant's Amended Answer and Affirmative Defense attached to Defendant's Motion as Exhibit A shall be deemed filed as of that date. Plaintiff shall have 20 days from the date of this Order to respond to Defendant's Affirmative Defenses.

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[1]Please note the Third District Court of Appeals has ruled on this issue and affirmed LMT services are not reimbursable under the No Fault Law. See *Geico General Insurance Co. v. Beacon Healthcare Ctr. Inc*., 298 So.3d 1235 (2020) [45 Fla. L. Weekly D437a]

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to compel appraisal is denied where windshield repair shop has properly pled declaratory counts that challenge appraisal provision—Further, appraisal process that requires parties to petition court to select third appraiser in event that their selected appraisers cannot agree on third appraiser is legally deficient—No Florida court has jurisdiction over petition to select appraiser, and policy cannot confer that jurisdiction—Finally, motion is denied because appraisal process is actually complete—Shop participated in appraisal process by sending email naming its chosen appraiser, giving that appraiser's opinion of prevailing competitive price, and naming third appraiser, but insurer chose to completely ignore appraisal process

DR. CAR GLASS, LLC, a/a/o Juan Gando, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-030017-SP-26. Section SD04. March 27, 2024. Lawrence D. King, Judge. Counsel: Martin I. Berger, Berger|Hicks, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND COMPEL APPRAISAL

This matter, having come on to be heard on the 7th day of March, 2024, on Defendant's Motion to Dismiss Plaintiff's Amended Complaint and to Compel Appraisal, and the Court, having heard argument on same, and being otherwise fully advised on the premises, it is:

CONSIDERED, ORDERED and ADJUDGED:

Defendant's Motion to Dismiss Plaintiff's Amended Complaint and Compel Appraisal is **DENIED,** as set forth below.

First and foremost, the Florida Third District Court of Appeal has held that when a party properly pleads declaratory counts that go to the very essence of the appraisal process, it is not proper to compel appraisal without first adjudicating those declaratory counts. In *Progressive American Ins. Co. v. Dr. Car Glass*, 327 So 2d 447 (Fla. 3d DCA, 2021) [46 Fla. L. Weekly D2030c], the Third District ruled that when there are challenges to the very appraisal provision that Defendant is seeking to enforce, it is proper to litigate those matters prior to making the parties engage in the very process that is called into question by the properly pleaded declaratory counts. "Because these are challenges targeting the enforceability of the appraisal and other policy provisions themselves, the trial court could not have granted the motion to compel appraisal as to the breach of contract claim without improperly and prematurely adjudicating these issues with regard to the declaratory judgment claims. *People's Tr. Ins. Co. v. Marzouka*, 320 So.3d 945, 948 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1155a] *Dr. Car Glass*, at 447.

The same holds true in the case at bar. Plaintiff has properly pleaded declaratory counts that go to the heart of the appraisal provision. As these counts are pleaded properly, they must be handled before the appraisal process can begin. *See, Dr. Car Glass v. State Farm Mutual Automobile Ins. Co.*, Case No. 2021-25870 SP-26, J. Lawrence D. King, Order On *Defendant's Motion to Dismiss or in the Alternative Motion to Stay and Compel Appraisal*, October 19, 2022; See also; *See, Dr. Car Glass v. Star Casualty Ins. Co.*, Case No. 2022-3163 SP-26, J. Lawrence D. King, Order On *Defendant's Motion to Dismiss or Alternatively Motion to Stay and Compel Appraisal*, October 12, 2022.

The second critical reason why Defendant's Motion must be denied is that the appraisal process as written cannot be completed. More specifically, the appraisal clause states as follows:

If there is disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal will be used as the first step toward resolution. Appraisal will follow the rules and procedures as listed below:

a) The owner and we will each select a competent appraiser.

b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or we may petition a court that has jurisdiction to select the third appraiser.

The reason this process cannot be completed before suit is filed is that no court in Florida has jurisdiction over a petition to select a third appraiser and no insurance policy can confer that jurisdiction on this Court. *State Farm Florida Ins. Co. v. Roof Pros Storm Division, Inc.*, 346 So. 3d 163 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1426a]. In *Roof Pros*, State Farm filed, in four separate original actions, petitions for Courts to appoint appraisers. The Court, in finding that there is no such thing in Florida as invoking a trial court's jurisdiction for the purpose of appointing third appraisers, ruled, "Contrary to the initial position taken by State Farm in this appeal, subject-matter jurisdiction cannot be conferred by agreement of the parties, and we find State

Farm's argument that the language of the policy gave the court the necessary jurisdiction to appoint an umpire wholly unpersuasive." The Court further states: "State Farm opted to file a non-existent cause of action to simply appoint an umpire." Finally, in further dismissing State Farm's claims, the Court states: "Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim." *Roof Pros*, at 164, 165.

In *State Farm Florida Ins. Co. v. Parrish*, 312 So. 3d 145 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D85a], approved by *Parrish v. State Farm Florida Ins. Co.*, 356 So. 3d 771 (Fla. 2023) [48 Fla. L. Weekly S27a], the Court again struck down State Farm's desire to use the Court as its tool, holding: "To the contrary, State Farm's filing was styled, framed, and constructed, from beginning to end, as if there were a legally recognized, standalone cause of action to have a disinterested appraiser appointed in an insurance coverage dispute. But there isn't." *Parrish*, at 148.

In accordance with the two above cases, there cannot be a condition precedent in an insurance policy that cannot be legally completed. The Third District also holds that a party cannot create causes of action that are not set forth in the Florida Rules of Court. *State Farm Florida Ins. Co. v. Gonzalez*, 76 So. 3d 34 (Fla. 3rd DCA 2011) [36 Fla. L. Weekly D2692a]. As such, Defendant's Motion is denied.

Defendant's Motion is also denied because despite the appraisal process being legally deficient, Plaintiff participated in the process and Defendant chose to completely ignore the process, thus rendering the process complete. As seen at the hearing. Plaintiff began the appraisal process by sending an email to defense counsel on September 19, 2024. In the email, Plaintiff delineated the name of the owner's chosen appraiser, the claim number, the appraiser's opinion on prevailing competitive price, and among other things Plaintiff's chosen third appraiser. Since receiving the email, some six months prior to the hearing, Defendant chose to do nothing. When a party chooses to ignore the appraisal process, the process is complete, just as this Court has ruled in prior similar cases. *Dr. Car Glass v. State Farm Mutual Automobile Ins. Co.*, Case No. 2022-31739 SP-26, J. Lawrence D. King, Order Denying Motion to Dismiss or Alternatively Motion to Stay and Compel Appraisal, January 31, 2024. See also, *See, ADAS Windshield Calibrations v. Progressive Select Ins. Co.*, Case No. 2022-25700 SP-26, J. Lissette De La Rosa, *Order Denying Motion to Dismiss or Alternatively Motion to Abate or Stay and Compel Appraisal*, October 26, 2023.

Defendant's Motion is hereby **DENIED**. Defendant shall file an answer to Plaintiff's Amended Complaint within **ten (10) days** of this Order and shall file responses to all outstanding discovery within **twenty (20) days** of this Order.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Medical provider advised by insurer from outset that it lacked standing to bring declaratory action against insurer seeking opinion on correct method of reimbursing for CPT codes billed for amounts less than 200% of Medicare fee schedule because the insurer's payment of duplicate bill under the mistaken belief that it was a new bill for a different CPT code resulted in the provider being overpaid and made whole for any error in insurer's calculation of benefits—Because provider did not file voluntary dismissal until after expiration of safe harbor period, insurer is entitled to award of attorney's fees and costs

ASSOCIATESMD MEDICAL GROUP, INC., a/a/o Natalie Ivey, Plaintiff, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22009617. Division 50. November 16, 2022. Mardi Levey Cohen, Judge.

ORDER ON DEFENDANT'S MOTION FOR ENTITLEMENT TO REASONABLE ATTORNEY'S FEES AND COSTS PURSUANT TO PREVIOUSLY FILED 57.105 MOTION FOR SANCTIONS

THIS CAUSE having come before the Court on October 12, 2022 on Defendant's, Motion for Entitlement to Reasonable Attorney's Fees and Costs Pursuant to Previously Filed 57.105 Motion for Sanctions and the Court having heard arguments of the parties, and otherwise having been fully advised as to the premises thereof, it is hereby:

ORDERED and ADJUDGED as follows:

1. Plaintiff, ASSOCIATESMD MEDICAL GROUP LLC, a/a/o Natalie Ivey filed a Petition for Declaratory action against Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION.

2. The Plaintiff commenced this case on or about February 16, 2022.

3. The Petition for Declaratory Action alleged that "Plaintiff submitted one or more bills for services in an amount less than 200% of the participating physicians fee schedule of Medicare Part B.

4. The Petition further alleged that "Instead of patently choosing, or providing notice. . . between the two statutory options—either paying 80% of 200% of the participating fee schedule of Medicare Part B or paying "the amount of the charge submitted"—Respondent inconspicuously paid 80% of the amount of the charge submitted."

5. The Petition claimed that Plaintiff was "in doubt concerning its rights, and a bona fide, present controversy exists between the Plaintiff and Defendant. . ."

6. The Petition requested a "declaration of its rights and/or obligations concerning the proper interpretation and application of the subject Policy and Fla. Stat. 627.736."

7. From the very outset, the Defendant advised the Plaintiff that it lacked standing to maintain the declaratory action. Respondent made an overpayment to Petitioner. Petitioner submitted a bill for date of service 9/15/21 on two separate occasions. The first bill was received by Respondent on 10/26/21. The first bill consisted of CPT codes 99204; 95999; 97530; 97535; and 98960. CPT codes 99204, 97535, and 98960 were reimbursed at 80% of 200% of the applicable Medicare or Workers Compensation Fee schedules. CPT code 95999 was reimbursed at 80% of the billed amount since it is not reimbursable under Medicare, but it is reimbursable under Workers Compensation as a by report code. CPT code 97530 was reimbursed at 80% of the billed amount of $70.00 since the billed amount was less than the applicable fee schedule. The second bill was received by Respondent on 11/10/21. The second bill was difficult to read, so Respondent mistakenly believed that CPT code 97535 was 97533. So, Respondent mistakenly reimbursed Petitioner for an unbilled CPT code of 97533 at $56.00. Accordingly, regardless of whether the Court decides that CPT code 97530 was allowed to be reimbursed at 80% of the billed amount, 100% of the billed amount, or at 80% of 200% of the fee schedule amount, the Petitioner was still overpaid and made whole. The total amount paid by Respondent to Petitioner was $579.47. If the Court determined that CPT code 97530 was to be paid at 80% of the billed amount, the amount owed to Petitioner should have been $523.47. If the Court determined that CPT code 97530 should have been reimbursed at 80% of 200% of the fee schedule, the amount owed to Petitioner should have been $528.76. If the Court determined that CPT code 97530 should have been reimbursed at 100% of the total billed amount, the amount owed to Petitioner should have been $537.47. As such, no matter how this court would have decided Plaintiff's Petition for Declaratory Relief, an overpayment was still made, and Petitioner is owed $0.00.

8. The Plaintiff was merely seeking an advisory opinion on the billed amount issue, as the issue did not apply to the facts of the case.

9. On April 29, 2022, the Defendant timely served the Plaintiff with a copy of a Safe Harbor Letter and Proposed Motion for Sanctions to further place the Plaintiff on notice that it had no standing to maintain an action for declaratory relief.

10. The Plaintiff failed to dismiss during the 21-day safe harbor period after receiving the Safe Harbor Letter on April 29, 2022.

11. Therefore, on May 25, 2022, the Defendant filed its Motion for Sanctions Pursuant to Florida Statute Section 57.105.

12. On June 14, 2022, Defendant filed its Motion for Summary Judgment and its evidence in support of the overpayments.

13. On July 14, 2022, Plaintiff filed a Voluntary Dismissal without Prejudice.

14. Based on the foregoing, the Defendant is the prevailing party in this suit and is entitled to receiving its fees and costs pursuant to Florida Statute Section 57.105.

Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION'S, Motion for Reasonable Attorney's Fees and Costs Pursuant to 57.105 Motion for Sanctions, is hereby **GRANTED**.

* * *

Small claims—Default—Excusable neglect—Fact that defendant erroneously believed that notice of appearance would excuse its appearance at pretrial conference does not constitute excusable neglect—Small claims rules provide that failure to appear at pretrial conference entitles plaintiff to default—Defendant's belated discovery of summons served at private mailbox service is not excusable neglect where mailbox was defendant's registered address for service of process

RAYMOND ROSALES, Plaintiff, v. TRIDENT REALTY GROUPS, LLC, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24008036. Division 53. April 5, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT

This cause came before the Court for consideration of the Defendant's Motion to Vacate Default, and the Court's having reviewed the Motion, Court file, and relevant legal authorities, finds as follows:

The Defendant was defaulted in this case by operation of rule for failure to appear at the small claims pretrial conference. Rule 7.170(a) (failure of a defendant to appear "entitles" the plaintiff to a default). The Defendant raises two arguments that it asserts constitutes"excusable neglect." First, the Defendant states that it filed a Notice of Appearance, along with a request to extend time to file a responsive pleading. However, there is no requirement to file a responsive pleading in a small claims case. Rather, the parties are to appear at the pretrial conference to make their positions known, and failure to do so results in a default, regardless of any filing by the defendant.

Attorneys are expected to know what the rules are, and they cannot claim their neglect is excusable when they act contrary to the rules. *See Geer v. Jacobsen*, 880 So.2d 717, 720-21 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a] ("[t]he attorney's errors, even if constituting mistakes of law, tactical errors, or judgment mistakes, do not constitute excusable neglect. Similarly, an attorney's inadvertence or ignorance of the rules does not constitute excusable neglect."); *Joe-Lin, Inc. v. LRG Restaurant Group, Inc.*, 696 So.2d 539, 541 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1701a] ("a defendant's failure to understand the legal consequences of his inaction is not excusable neglect"). *See also Quantum Imaging Holding LLC v. Allstate Fire & Cas. Ins. Co.*, 19 Fla. L. Weekly Supp. 843a (Broward Cty. Ct. 2012) (declining to vacate a default entered against Allstate under similar circumstances). As a result, the fact that the Defendant believed its Notice of Appearance would excuse its appearance is not excusable.

Next, the Defendant claims that the party being served discovered belatedly the summons in its post office box at a private mailbox service. However, this is the address that the Defendant has registered with the State of Florida for service of process, and the Plaintiff complied with the provisions of Florida law using the procedure for service at a private mailbox service. Fla. Stat. §48.031(6)(a). Indeed, the fact that the Defendant uses a private mailbox service as its registered address may well not be excusable, but certainly neither is having such an address, and then failing to check the mail routinely. *See id.* §48.091(3). As a result,

The Defendant's Motion is DENIED.

* * *

Landlord-tenant—Eviction—Failure to deposit rent into court registry—Although tenants deposited portion of past due rent into court registry and expressed some doubt as to balance due, and tenants failed to appear at rent determination hearing and thereafter expressed confusion as to hearing date, final judgment of eviction entered following rent determination hearing was proper where tenants failed to comply with court order to deposit future rent coming due into registry—Motion for rehearing denied

GUARDIAN ISLE OF VENICE, LLC, Plaintiff, v. JAMES ROSEN, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE24016768. Division 53. April 10, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANTS' MOTION FOR REHEARING

THIS CAUSE having come before this Court for consideration of the Defendants' James Rosen and Marla J Rosen Motion for Rehearing, and this Court's having reviewed the Defendants' Motion, the court file, and the applicable law, and being sufficiently fully advised in the premises, it is hereupon:

ORDER AND ADJUDGED that said Motion be **DENIED**.

This is a residential eviction. The Defendants were served a summons that advised of the requirement to put undisputed rent into the Court Registry. The Defendants were also advised to place future rent "coming due" into the Court Registry. *See* Fla. Stat. §83.60(2). The Defendants tendered a portion of the rent, but filed a response expressing some doubt as to the balance due. In that response, the Defendants provided an email address. As a result, the Court set a rent determination hearing for April 5, 2024. On March 28, 2024, the Court's Judicial Assistant attempted to coordinate the in-person hearing date and time by telephone, but received a message that the Defendants' phone voicemail was full. Nevertheless, a copy of the Order Setting Hearing was provided to the Defendants by email on March 28, 2024. The hearing went forward as scheduled on April 5, but the Defendants did not appear. The Court entered its Order on Rent Determination on April 5, 2024 requiring the Defendants to tender $4,210.24 into the Court Registry no later than April 8, 2024 at 3:00 pm, a sum that included the rent that had come due for the month of April 2024. Again, this Order was emailed to the Defendants the same day at 11:07 a.m. on April 5 at the email address provided by the Defendants. The Defendants did not lodge any objection or other response to this Order. When the Defendants did not tender the required rent into the Court Registry, the Plaintiff properly submitted its proposed Final Judgment of Eviction which the Court entered on April 9, 2024, and which was also emailed to the Defendants. Thereafter the Defendants filed their Motion for Rehearing.

The Court recognizes that the hearing had earlier been set erroneously by the Plaintiff for April 11, 2024, and that the Defendants claim they were confused as to the proper hearing date. Even if this were so, the Court sent out an Order for an earlier hearing date, which the Defendants received. Further, Florida law requires the tenant, at a

minium, to tender rent "coming due" into the Court Registry, which the Defendants did not do. *Gill v. Parvez*, 332 So.3d 543, 544 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2663b]. Moreover, the Defendants received the Order on Rent Determination that they did not challenge notwithstanding their confusion. Having failed to comply with the Court's explicit order, or alternatively not timely tendering April rent into the Court Registry as required by Florida law, final judgment was proper. The Sheriff's Office shall proceed with the execution of the writ of possession forthwith.

* * *

Attorney's fees—Contracts—Prevailing party—Reciprocity—Buyer who prevailed in action to collect on loan is entitled to award of fees and costs where retail installment contract and security agreement for sale of automobile contained provision requiring buyer to pay lender's court costs and attorney's fees in event of default—Amount of fees calculated using lodestar method

WESTLAKE SERVICES, LLC., d/b/a WESTLAKE FINANCIAL SERVICES, Plaintiff, v. DANIELLE GUMP, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2022-CC-001448. April 8, 2024. Wayne Culver, Judge. Counsel: Ramiro Kruss, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. N. James Turner, Debt Relief Law Center, Orlando, for Defendant.

FINAL ORDER ON MOTION FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before the Court on the Motion for Attorney's Fees and Costs filed by the Defendant, DANIELLE GUMP, and after reviewing the file and conducting a hearing on April 8, 2024, and being fully advised in the premises, the Court makes the following Findings and Rulings:

PROCEDURAL HISTORY

1. This action was brought on April 8, 2022, by Plaintiff, WESTLAKE SERVICES, d/b/a WESTLAKE FINANCIAL SERVICES, and against Defendant, to collect on a deficiency resulting from the sale of her motor vehicle after an alleged default.

2. Throughout the lawsuit, Defendant asserted that she was sold a mechanically defective motor vehicle by a Casselberry, FL car dealer named Autosport, LLC.

3. Defendant contended in this lawsuit that she was legally permitted to use any defense that she would have had against the seller, Autosport, LLC, also against the Plaintiff, WESTLAKE SERVICES, d/b/a WESTLAKE FINANCIAL SERVICES, pursuant to the FTC Rule on Holders in Due Course.

4. On March 5, 2024, this matter was tried before the Court without a jury and a Final Judgment in favor of against Defendant was entered by the Court. In its Final Judgment, the Court reserved jurisdiction to award entitlements[1] and amount of attorney's fees to Defendant.

DEFENDANT'S ENTITLEMENT TO FEES

5. Section 57.105(7) of the Florida Statutes provides that:

> (7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

6. Defendant was the prevailing party in this action by virtue of the Court's Final Judgment in her favor and she is entitled to recover attorney's fees pursuant to Section 57.105(7) of the Florida Statutes.[2]

7. The decision of *Harris v. Bank of N.Y. Mellon*, 311 So.3d 66 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D141a] sets forth, in plain and simple language, the factors required for a party to recovery attorney's fees pursuant to Section 57.105(7) of the Florida Statutes:

> In order to obtain prevailing party fees pursuant to section 57.105(7), the moving party must prove (1) that the contract provides for prevailing party fees, (2) that both the movant and opponent are parties to that contract, and (3) that the movant prevailed. *See Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896, 898 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1409a] (en banc).

Defendant meets all of these essential elements.

DEFENDANT'S EVIDENCE IN SUPPORT OF HER MOTION

8. On March 6, 2024, Defendant's counsel submitted an extensive affidavit in support of the Motion in Support of Attorney's Fees covering the period from June 11, 2023 through March 6, 2024, detailing the dates, services and times for each service rendered in the defense of the Plaintiff's claim in the above matter.

9. On April 8, 2024, Defendant's counsel submitted a Final Supplemental affidavit in support of the Motion in Support of Attorney's Fees, covering the period from June 11, 2023 through March 6, 2024, detailing the dates, services and times for each service rendered in the defense of the Plaintiff's claim in the above matter.

10. The total time reflected in the Attorney's Fees Affidavits referred to in paragraphs 8 and 9 indicate that that Defendant's counsel expended a total of **29.92** from June 11, 2023, through April 8, 2024.

11. Plaintiff filed no affidavit on attorneys' fees, or other paper, contesting Defendant's $450 hourly rate or the reasonableness of the hours expended.

LODESTAR METHOD OF CALCULATING FEES

12. Determining the reasonable amount of Court-awarded attorney's fees entails a three step process: first, the Court must calculate the reasonable hourly rate for the professionals involved in the case, second, the Court must determine the number of hours reasonably expended, and third, after calculating the lodestar, i.e. the number of hours reasonably expended multiplied by the reasonable hourly rate, the Court must make any necessary adjustments to the lodestar, including (if applicable) application of a contingency fee multiplier.

13. With respect to the first step of the lodestar, the "reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." In calculating the reasonable hourly rate, the Florida Supreme Court instructs trial courts applying Florida law to consider all eight of the so-called *Rowe* factors: (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly, (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, (3) The fee customarily charged in the locality for similar legal services, (4) The amount involved and the results obtained, (5) The time limitations imposed by the client or by the circumstances, (6) The nature and length of the professional relationship with the client, (7) The experience, reputation, and ability of the lawyer or lawyers performing the services, and (8) Whether the fee is fixed or contingent, less the time and labor required, the novelty and difficult of the question involved, the results obtained, and whether the fee is fixed or contingent. *Joyce v. Federated Nat. Ins. Co.,* 228 So. 3d 1122, 1126 (Fla. 2017) [42 Fla. L. Weekly S852a].

14. Having reviewed the evidence presented, the Court finds and Plaintiff does not dispute, that the hourly rate for attorney N. James Turner of $450 per hour is reasonable under the factors set forth in Florida Rule of Professional Conduct 4-1.5(b)(1)(A)-(H), *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), and *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

15. The next and final step in the computation of the lodestar is the ascertainment of reasonable hours.

16. A total of 29.92 hours expended by attorney N. James Turner through from June 11, 2023 through April 8, 2024, is also reasonable under the factors set forth in Florida Rule of Professional Conduct 4-1.5(b)(1)(A)-(H), *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), and *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

17. In ruling on the reasonableness of the hourly rate and total hours, the Court makes the following findings:

a. The hourly rate of $450 per hour for Defendant's counsel is a reasonable hourly rate and is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.

b. The total time of 29.92 hours is a reasonable amount of time for counsel for the Defendant in defending the Plaintiff's claims in the above matter to conclusion.

c. Results. The results for the Defendant, DANIELLE GUMP were excellent.

COSTS

18. Defendant is entitled to recover from Plaintiff her costs.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

1. Defendant's Motion for Attorney's Fees and Costs be and the same is hereby **granted.**

2. Defendant shall recover from Plaintiff her costs of $465.00.

3. Based on the factors in Rule 4-5.1, the Court finds that $450 is reasonable for counsel for Defendant.

4. Based on the factors in Rule 4-5.1, the Court finds that the total number of hours of 29.92 for counsel for the Defendant is reasonable.

5. Defendant, DANIELLE GUMP shall have and recover from Plaintiff, WESTLAKE SERVICES, LLC, d/b/a WESTLAKE FINANCIAL SERVICES, a foreign limited liability company, located at 4751 Wilshire Boulevard, #100, Los Angeles, CA 90010, reasonable attorney's fees of $13,464.0 and $465.00 in costs, for a total of **$13,929.00**, all for which let execution issue.

6. It is further ordered and adjudged that the Plaintiff, WESTLAKE SERVICES, LLC., d/b/a WESTLAKE FINANCIAL SERVICES, shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), a copy of which is attached hereto, including all required attachments, and serve it on the Defendant's attorney, within 45 days from the date of this Order, unless this Order is satisfied, or post judgment discovery is stayed.

7. Jurisdiction of this matter is retained to enter further orders that are proper to compel the Plaintiff, WESTLAKE SERVICES, LLC d/b/a WESTLAKE FINANCIAL SERVICES, to complete from 1.977, including all required attachments, and serve it on the Defendant's attorney.

8. Pursuant to Florida Statutes Sections 57.105(7) and 57.115(1), the Court also retains jurisdiction of this matter to award further costs and attorney's fees incurred in connection with the execution and collection of amounts awarded to Defendant and against Plaintiff set forth in paragraph 5 hereof.

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[1]In *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830 (Fla. 1993), the Florida Supreme Court held that, among other things, fees incurred litigating entitlement to fees were recoverable. 629 So. 2d at 833.

[2]The Retail Installment Contract and Security Agreement dated December 21, 2016 also contains the following language:

If you default, you agree to pay our court costs and fees for repossession, repair, storage, and sale of the Per securing this Contract. You also agree to pay reasonable attorney's fees after default and referral to an attorney not a salaried employee of ours.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Fundraising—Gifts—Juvenile drug court judges and associated staff may attend a lunch at the courthouse hosted and paid for by a 501(c)(3), non-profit organization devoted to supporting the circuit's juvenile treatment court programs that consist of Early Childhood Court, Juvenile Drug Court and Family Treatment Court—Judges should not discuss any pending or impending cases and avoid any conduct that would create any doubt as to the judges' impartiality—Juvenile drug court judges and associated treatment court staff may attend a fundraiser organized by the same non-profit—Canon 4 encourages judges to engage in quasi-judicial activities as long as they are designed to improve the law, the legal system, and the administration of justice—Judges must make reasonable and continuous efforts to ensure that their participation in the event falls clearly within the parameters of Canon 4D(2)(b) and that the judge's participation does not violate Canon 4A(1)-(6)

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-04. Date of Issue: April 5, 2024.

ISSUES

1. (A). May the juvenile court judges and associated staff attend a lunch at the courthouse hosted and paid for by a 501(c)(3), non-profit organization devoted to raising funds to support youth and families participating in Early Childhood Court, Juvenile Drug Court and Family Treatment Court? The purpose of the lunch would be to allow the members of the board to meet the court staff and judicial officers to gain a better understanding of the juvenile specialty court programs in the circuit.

ANSWER: Yes, where the majority of the committee found the activity to which the judiciary are invited is devoted to the improvement of the law, the legal system or the administration of justice.

B) Two board members of the non-profit organization referenced in question #1(A) above are also volunteers with the Guardian Ad Litem Program, who have cases before the juvenile court judges. The volunteers appear as advocates before the judges. May the juvenile court judges and court staff attend the lunch with the two guardian ad litem volunteers present?

ANSWER: Yes, as long as the judge does not discuss any pending or impending cases thereby violating the rules against ex-parte communication and does not create any doubt as to the judge's impartiality.

2. A). The non-profit referenced in question 1 above organizes an annual fundraiser to support Early Childhood Court, Juvenile Drug Court and Family Treatment Court. Would it be permissible for the judges and court staff to attend and have their meals paid for by the non-profit?

ANSWER: Yes, as long as the judge makes reasonable and continuous efforts to ensure that the judge's participation in the event falls clearly within the parameters of Canon 4D(2)(b), Fla. Code of Jud. Conduct, and that the judge's participation does not violate Canon 4A(1)-(6), Fla. Code of Jud. Conduct.

(B) If the judges and court staff are able to attend the fundraiser in questions 2(A), would it be permissible for them to also participate in the silent auction?

ANSWER: Yes.

(C) If the judge and court staff decided to pay their own way to attend the fundraiser, would it be permissible for them to be introduced as attendees at the fundraiser referenced in 2(A)?

ANSWER: Yes.

FACTS

The inquiring circuit administrative judge seeks an opinion as to whether it would be permissible under the judicial canons for a non-profit, tax exempt organization formed pursuant to section 501(c)(3) of the Internal Revenue Code, and created to raise funds to support youth and families participating in Early Childhood Court, Juvenile Drug Court and Family Treatment Court, can host and pay for a lunch for the juvenile judges and staff. The purpose of the in-person lunch meeting would be for the members of the board to meet court staff and judicial officers to gain a better understanding of the juvenile specialty court programs.

A related question asked by the inquiring judge is whether it would be permissible for the juvenile court judges and staff to attend the in-person lunch where two of the board members also serve as guardian ad litem's in their circuit. The Guardian Ad Litem program is separate from the court system. They are volunteers who appear as advocates before the judges.

The final question relates to an annual fundraiser the Board of the 501(c)(3) organization is planning, that will include dinner and a silent auction. Judges who attend are invitees, and are not being honored. The inquiring judge asks whether the juvenile judges and court staff can a) attend the fundraiser; b) accept payment for their meal by the non-profit; c) participate in the silent auction; and d) if the judge and court staff paid their own way to attend the fundraiser, whether it would be permissible for them to be introduced as attendees at the fundraiser.

DISCUSSION

Issue #1 A, and B:

The Florida Supreme Court amended Canon 4 and 5 to permit judges to participate in fundraising activities in the judge's quasi-judicial activities that are designed to improve the law, the legal system, and the administration of justice. *See In Re: Amendments to the Code of Judicial Conduct-Limitations on Judges' Participation in Fundraising Activities*, 983 So. 2d 550 (Fla. 2008) [33 Fla. L. Weekly S328a]. Canon 4 addresses a judges' quasi-judicial activities and is titled: "A Judge is Encouraged to Engage in Activities to Improve the Law, the Legal System and the Administration of Justice."

Our committee has held that if the function to which the judiciary are invited is devoted to the improvement of the law, the legal system or the administration of justice, a judge may attend the function. *See e.g.*, Fla. JEAC Op. 2006-06 [13 Fla. L. Weekly Supp. 517a] (Judges may attend the annual holiday party hosted by the guardian ad litem program); Fla. JEAC 2000-20 [7 Fla. L. Weekly Supp. 822a] (The Code of Judicial Conduct does not prohibit a judge from attending law-related functions where fees are waived for the judiciary); Fla. JEAC Op. 2000-14 [7 Fla. L. Weekly Supp. 816a] (Judges may attend functions, including luncheons, annual dances, and judicial receptions on complimentary invitations, of aligned bar associations, such as the Dade County Trial Lawyers Association or the Florida Defense Lawyers Association, because these are functions devoted to the improvement of the law, the legal system, or the administration of justice); and Fla. JEAC Op. 1984-04 (Judges may accept free lunch and membership in the local County Bar Association (dues are normally $75 per year) and lunches served at eight membership meetings per year (normal charge is $10 per meal), because the meetings are law related, and are an appropriate setting for contact between members of the Bar and the Bench, who must work together for the improvement of the legal system). Fla. JEAC Op. 2012-26 [19 Fla. L. Weekly Supp. 1107a] (A judge may request local bar associations to convene a special lunch meeting so that the judge may solicit attorneys to volunteer for appointment as pro bono attorney's ad litem

for children in dependency cases.)

Three committee members expressed an opposing view on the application of the canons to the inquiry, stating that while the purpose of the lunch would be to allow the members of the non-profit board to meet the court staff and judicial officers to gain a better understanding of the juvenile specialty court programs in the circuit, it still appeared that accepting payment from an entity whose clients' interests come before the court would be violative of Canon 5D(5)(h).

Issue #2A, B, C:

The Judge is also inquiring about the appropriateness of accepting food/drink by the non-profit as two board members also serve as guardian ad litems on cases that come or may come before the juvenile judges. Canon 5D(5) of the Code prohibits gifts that judges may receive, with several exceptions. One such exception permits a judge to accept a gift if the donor is not a party who has come or is likely to come or whose interests have come or are likely to come before the judge; AND, if its value exceeds $100.00, the judge is to report it in the same manner as the judge reports compensation in Canon 6B.

The majority of the committee do not believe there would be a violation of the canons as it is the non-profit organization, and not these two particular board members, paying for the lunch meeting. Further, no particular case will be discussed during the lunch. The process of the lunch is to discuss the general process and procedures of treatment court and would therefore not constitute a gift. *See,* Fla. JEAC 2017-04 [25 Fla. L. Weekly Supp. 209a], and Fla. JEAC Op. 2020-05 [28 Fla. L. Weekly Supp. 92a] (the Canons do not prohibit a judge from meeting individually or collectively with stakeholders to discuss courtroom procedure.)

However, three committee members do not recommend the inquiring juvenile judges accept food/drink from the two board members who also serve as guardian ad litems. Although they are coming in their capacity as board members and will not be discussing any cases, the dissenting members see it as violative of Canon 5(D)5, and the lunch would need to be reported as a gift.

In Fla. JEAC Op. 2007-05 [14 Fla. L. Weekly Supp. 510a], this committee was of the opinion that the drug court judge may not accept any donations from lawyers or law firms for the treatment program, if they have come or are likely to come before the judge. The judge is also ethically obligated to instruct court personnel to act in a manner consistent with the judge's ethical duties by directing them not to accept such donations either for the drug court program. *See* Canon 3B(2), which states *"a judge should require his staff and court officers subject to his direction and control to observe the standards of fidelity and diligence that apply to him.* (*But see* Fla. JEAC Op. 2021-12 [29 Fla. L. Weekly Supp. 488a], an unsolicited one-time gift from a bar association is permissible for acceptance where there was no solicitation involved from the treatment court judge or their staff; and Fla. JEAC Op. 1993-29 [1 Fla. L. Weekly Supp. 417b], where juvenile court judges could not attend fundraiser, as the purpose of the event was to raise funds for private attorneys.)

The inquiry at bar is distinguishable from Fla. JEAC Ops. 2007-05 [14 Fla. L. Weekly Supp. 510a] and 2021-12 [29 Fla. L. Weekly Supp. 488a] in that the non-profit organization is not making a donation to the treatment court program. Rather, the non-profit is setting up an educational, law-related lunch meeting to learn more about the juvenile specialty court programs and the individuals who run the circuit's program. Since the purpose and function of the lunch is devoted to the improvement of the law, the legal system or the administration of justice, it would be permissible for the judiciary and staff to attend and have the cost covered by the non-profit organization.

In Fla. JEAC Ops. 2017-22 [25 Fla. L. Weekly Supp. 769a] and 2008-17, we discussed the limited circumstances when a judge may appear at a fundraiser. In Fla. JEAC Op. 2008-17, it was found to be permissible for the inquiring judge to be the speaker at a drug court fundraising dinner upon the determination that the event was devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice. Fla. JEAC Op. 2008-17 (citing Fla. Code Jud. Conduct, Canon 4D(2)(b)).

The fundraiser in this inquiry, likewise "concerns the law," and the funds raised will be used for a law-related purpose, as it is hosted by a non-profit organization specifically created to support Early Childhood Court, Juvenile Drug Court and Family Treatment Court, which constitutes a "law-related purpose." It therefore falls within the category of permissible events under Canon 4D(2)(b).

In Fla. JEAC Op. 2008-17, we emphasized that prior to agreeing to participate in fundraising events, "*the JEAC urges judges who wish to engage in fundraising to make extensive and comprehensive inquiries to those person(s) responsible for the fundraising event and those person(s) who are intimately knowledgeable about the current mission of the organization to determine if the criteria set forth in Canon 4D(2)(b) are met;"* and to *"determine that the money collected from the fund-raising event is used for law-related purposes as required by Canon 4D(2)(b) and not commingled in an account used for other purposes." Id.*

The Commentary to Canon 4D(1) further advises:

> *The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.*

Canon 4D(1) underscores the need for judicial vigilance when it comes to affiliations with organizations in order to uphold the integrity and independence of the judiciary.

Additionally, Canons 5D(5)(a) and (h) provide:

5) A judge shall not accept, and shall urge members of a judge's household not to accept, a gift, bequest, favor or loan from anyone **except for:**

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, **or an invitation to a judge and the judge's spouse or guest to attend** a bar-related function **or an activity devoted to the improvement of the law, the legal system or the administration of justice . . .** [Emphasis added.]

* * *

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value, or the aggregate value in a calendar year of such gifts, bequests, favor, or loans from a single source, exceeds $100.00, the judge reports it in the same manner as the judge reports gifts under Section 6B(2).

Three members expressed their dissent to the judges attending the fundraiser because, in their view, while the non-profit is an organization "devoted to raising funds to support youth and families participating in Earley Childhood Court, Juvenile Drug Court, and Family Treatment Court," it is not an activity "designed to improve the law, the legal system, and the administration of justice, as required by Canon 4D(2)(b). While the cause is noble, the dissenting members expressed that the entity's funds are being used to support individuals and families, not a law related purpose.

Pursuant to Canon 5D(5)(a), judges do not have to report on their Financial Disclosure Form 6A, the complimentary attendance at a legal aid, law school, lawyers association, university, high school, community service organization, or similar entity luncheon, dinner, or reception if the organization is devoted to the improvement of the law, the legal system, or the administration of justice, and the value of attending a single event does not exceed $100 for you and your guest, if applicable. If the value of attending a single event exceeds $100, you must report it. If the event is not devoted to the improvement of the law, the legal system, or the administration of justice, the judge must report the value. *See* Fla. JEAC Op. 2018-07 [26 Fla. L. Weekly Supp. 63a].

As the annual fundraiser in this inquiry concerns "the law, the legal system, or the administration of justice," a majority of the committee concludes that the juvenile judges and their court staff may attend the fundraiser, have their admission provided gratis, be acknowledged as attendees, participate in the silent auction, and be announced as attendees at the event.

REFERENCES

In Re: Amendments to the Code of Judicial Conduct-Limitations on Judges' Participation in Fundraising Activities, 983 So. 2d 550 (Fla. 2008).

Fla. Code Jud. Conduct, Canon 3B(2), Canon 4, 4A(1)-(6), 4D(1), 4D(2), 4D(2)(b), Canon 5, 5D(5)(a), 5D(5)(h), Canon 6B, and Commentary to Canon 4D(1).

Fla. JEAC Ops. 1984-04, 1993-29, 2000-14, 2000-20, 2006-06, 2007-05, 2008-17, 2012-26, 2017-04, 2017-22, 2018-07, 2020-05 and 2021-12.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Family member affiliations—Judge is disqualified from serving on county election canvassing board for specific race involving elected county official who currently employs judge's spouse as general counsel where spouse's continued employment is likely dependent on the outcome of the election—Judge is not disqualified from serving on canvassing board for other races during that election cycle

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-05. Date of Issue: April 11, 2024.

ISSUES

1. Must a judge recuse from serving on the county canvassing board with regard to the specific election where the judge's spouse works for the incumbent office holder and the spouse's continued employment post-election is unlikely if the challenger wins the election?

ANSWER: Yes.

2. If the judge is the only county judge in that county, does the rule of necessity eliminate the judge's need to recuse in the specific election that may impact the spouse's employment?

ANSWER: No.

3. Must the judge also recuse entirely from serving on the canvassing board as to all other races not involving the judge's spouse's employer?

ANSWER: No.

FACTS

The inquiring judge serves on the county election canvassing board, which board is composed of a county judge (who shall serve as chair), the supervisor of elections, and the chair of the board of county commissioners. § 102.141, Fla. Stat. (2023).

The judge's spouse serves as general counsel to an elected county official who is facing opposition. The judge initially inquired as to whether recusal was necessary simply because the spouse was employed by the incumbent elected official. However, on further inquiry, the judge confirmed that the spouse serves at the pleasure of whoever holds that elected office and the spouse's employment would most likely be terminated if the incumbent were to be defeated during the upcoming election.

The judge wanted to know if those circumstances created the appearance of impropriety such that recusal in the race concerning the spouse's employer would be required. The judge wanted to know whether recusal from the canvassing board as to other races during that same election cycle would be required based on any judicial ethics concerns. The inquiring judge is the only county judge serving in this particular county.

DISCUSSION

As an initial matter, we must determine whether the judge's service on the canvassing board is subject to the Code of Judicial Conduct, given that it is not what some would consider to be a strictly judicial proceeding. The introductory title of Canon 2 of Florida's Code of Judicial Conduct states: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities. Canon 2A requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Fla. Code Jud. Conduct. Canon 3A provides in part that a "judge's judicial duties include all the duties of the judge's office prescribed by law." Fla. Code Jud. Conduct. The commentary to Canon 3E notes that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply." Fla. Code Jud. Conduct.

In Fla. JEAC Op. 92-32, the inquiring judge was advised not to sign the petition of an individual who wanted to qualify for elected office without having to pay the usual filing fee. The Committee opined that signing would be prohibited by Canons 7 and 2 because the judge's "signature on the petition may reasonably be perceived as an endorsement of the candidate for public office." The Committee expressed one further concern, specifically relevant to this matter: "[f]urther, you may have to sit on a canvassing board and your signature on the petition may give that appearance that you are not impartial." Thus, based on the foregoing provisions of the Code, the above-quoted commentary, and the cited JEAC opinion, we conclude that the judge's service on the canvassing board as a county judge is subject to the Code of Judicial Conduct.

Whether the judge must recuse from serving on the canvassing board in the election concerning the spouse's employer is governed by Canon 3E(1) which provides:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . .
>
> (c) the judge knows that . . . the judge's spouse . . . has an economic interest in the subject matter in controversy . . . or has any other more than de minimis interest that could be substantially affected by the proceeding;
>
> (d) . . . the judge's spouse . . .
>
> . . .
>
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding[.]

Fla. Code Jud. Conduct.

The judge's duties as a member of the canvassing board include many tasks that would not be perceived as affecting the outcome of any contested race. However, the canvassing board, according to the inquiring judge and the governing statute, may determine whether an absentee vote was properly executed or timely received and may also be called upon to determine the voter's intent if the voter's ballot was not clearly marked. The judge acknowledged that some races can be decided by a very close margin, meaning that any decision by the canvassing board regarding even a single ballot could conceivably change the outcome of any given race.

Because the judge's spouse's continued employment as general counsel is likely contingent on the outcome of that specific election, that means that the judge's spouse has more than a de minimis interest and indeed has an economic interest in the proceedings, should there be any contested or questioned ballots. Returning to Fla. JEAC Op. 92-32, if the act of simply signing a candidate's qualifying petition might reasonably create the impression of partiality of a judge who might later serve on a canvassing board, it would be hard to reach a different conclusion here. Based on all the foregoing considerations, we conclude that the inquiring judge's recusal or disqualification in that specific race is appropriate.

There are occasionally circumstances that make judicial recusal impractical if it would result in delay and distant travel for the parties when there is only one county judge who would be ethically disqualified from ruling on urgent or emergency matters affecting those parties. The commentary to Canon 3E notes that the rule of disqualification may occasionally be overridden by the rule of necessity in such situations. However, section 102.141 has detailed provisions for how to proceed when the county judge or another member of the canvassing board is unable to serve. Thus, the fact that the inquiring judge is the only county judge does not alter the Committee's recommendation.

There is nothing to suggest that the judge or the judge's spouse has any similar interest in the outcome of the other races; thus, general disqualification of the judge from serving on the canvassing board is not required by the Code of Judicial Conduct**.**

REFERENCES

Section 102.141, Florida Statutes (2023)
Fla. Code Jud. Conduct, Canons 2, 2A, 3E, commentary to 3E
Fla. JEAC Op. 92-32

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