Volume 32, Number 3, July 31, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 115-160

Reports of Decisions of:

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **MUNICIPAL CORPORATIONS—CODE ENFORCEMENT—NOTICE. A U.S. Postal Service tracking webpage was insufficient to demonstrate that the city sent a notice of violation and notice of hearing via certified mail to the address listed in the tax collector's office where the webpage did not list a full address, suggested that whatever was sent was delivered to the original sender, and listed an incorrect zip code. Posting of notices on the violating property is in addition to, and not a substitute for, other required forms of notice.** *ORTEGA v. CITY OF MIAMI GARDENS. Circuit Court, Eleventh Judicial Circuit (Appellate) in and for Miami-Dade County. Filed April 25, 2024. Full Text at Circuit Courts-Appellate Section, page 115a.*

- **CIVIL PROCEDURE—PARTITION OF PROPERTY—UNIFORM PARTITION OF HEIRS PROPERTY ACT—VOLUNTARY DISMISSAL. A notice of voluntary dismissal filed by the plaintiff in an action to partition heirs' property was void where the notice was filed after the defendant had fully complied with the court's buyout order by delivering certified funds in the buyout amount to the plaintiff's attorneys, in accordance with the terms of the buyout agreement.** *CROCKETT v. CROCKETT. Circuit Court, Eighth Judicial Circuit in and for Baker County. Filed April 3, 2024. Full Text at Circuit Courts-Original Section, page 120a.*

- **CRIMINAL LAW—DRIVING UNDER THE INFLUENCE—EVIDENCE—BLOOD AND URINE TESTS. The county court denied a motion to suppress the results of blood and urine tests performed by a hospital as part of completing a medical clearance which was required before an arrestee who had been involved in a serious crash could be transported to jail. Where the arrestee's blood and urine were drawn exclusively for medical purposes, the fact that the state ultimately obtained the test results through a subpoena did not render the results inadmissible under the implied consent law.** *STATE v. SMITH. County Court, Eighth Judicial Circuit in and for Alachua County. Filed April 24, 2024. Full Text at County Courts Section, page 137a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

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CIRCUIT COURTS—APPELLATE

Municipal corporations—Code enforcement—Due process—Notice—Postal service tracking webpage was insufficient to demonstrate that notice of violation and notice of hearing were sent via certified mail to address listed in tax collector's office where webpage did not list full address, suggested that whatever was sent was delivered to original sender, and listed incorrect zip code—Even if tracking webpage were somehow sufficient to establish statutory notice of violation, there would still be no record evidence that alleged violator received notice of hearing, and there is no evidence that either notice of violation or notice of hearing was hand-delivered or left at violator's usual place of residence with person over age 15—Posting of notices on violating property is in addition to, and not a substitute for, other required forms of notice—Order of special master upholding violation is quashed

PEDRO L. ORTEGA, Appellant, v. CITY OF MIAMI GARDENS, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-25-AP-01. April 25, 2024. Counsel: Pedro L. Ortega, Pro se, Appellant. Zachary Stokes, Assistant City Attorney, City Attorney's Office, City of Miami Gardens, for Appellee.

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

OPINION

(ARECES, R., J.) Appellant Pedro L. Ortega ("Appellant") appeals a Final Administrative Order that upheld a Code Enforcement violation. Appellant contends this Court should reverse the Final Administrative Order because Appellant was not provided notice of the alleged violation or of the proceedings below. This Court agrees.

Florida law provides a few different ways in which notice to a violator may be given. *See* Fla. Stat. § 162.12(1)(a). Specifically, and most pertinent to the instant case, Florida law allows notice (1) via certified mail "to the address listed in the tax collector's office for tax notices or to the address listed in the county property appraiser's database;" (2) by hand delivery; and, (3) by leaving the notice at the violator's usual place of residence with any resident over the age of 15. *Id.*[1]

In this case, there is no record evidence of notice via certified mail to Appellant at the address listed in the county appraiser's database or tax collector's office. Appellee appears to be relying on a USPS Tracking Webpage in support of its contention that notice of the violation was provided via certified mail. The Tracking Webpage, however, is insufficient to demonstrate that Appellant was notified via certified mail for at least three reasons. First, it fails to provide the full address to which delivery was made—listing, instead, only the city, state and zip code. Second, it appears to suggest that whatever was sent via certified mail was delivered to the "original *sender*." Finally, even if the package arrived at its intended destination, the zip code provided is different from Appellant's zip code.

In any event, even if the Tracking Webpage were somehow sufficient to establish statutory notice of the violation, there would still be no record evidence that Appellant was notified via certified mail of the Notice of Hearing.[2]

In addition to the total absence of record evidence that would purport to show notice via certified mail, there is also an absence of record evidence that would tend to show that notice was effectuated by hand delivery, or by otherwise leaving said notice at the violator's usual place of residence with a person over the age of fifteen.

Appellee, nevertheless, contends it complied with its notice requirements because it posted notice of the violation at [Editor's note: Address redacted], Miami Gardens, Florida. Appellee misreads the applicable law.

Appellee can, of course, post notice on the violating property. This form of notice, however, is in addition to, and not a substitution for, other *required* forms of notice. *See* Fla. Stat. § 162.12(2) ("*In addition to* providing notice as set forth in subsection (1), at the option of the code enforcement board or the local government, notice may be served by publication or posting, as follows. . . .") (emphasis added); *see also Little v. D'Aloia*, 759 So. 2d 17, 20 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D675a] (" 'In addition to' does not mean 'instead of.' ").

In summary, Appellant was not provided statutory notice of the alleged violation or the hearing concerning said violation. The Special Master below erred in finding notice had been properly effectuated and Appellant, as a result, was denied the due process of law.

Accordingly, the Order of the Special Master is QUASHED. (TRAWICK and SANTOVENIA, JJ., CONCUR.)

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[1]The record reflects Appellant's place of residence is [Editor's note: Address redacted], Miami Gardens, FL 33055.

[2]Appellee twice mentions notice via certified mail and purports to reference two exhibits from the record below—Exhibits 3 and 4. Exhibit 3 and its deficiencies are discussed above. Exhibit 4 does not even contain a certified mail receipt. Exhibit 4 is, instead, a Notice of Intent to Lien, which purports to notify Appellant of a hearing on March 22, 2023. There is, however, no record evidence that Appellant was ever notified via certified mail at any time prior to the Order Imposing Lien/Fine. There is no record evidence of a Certified Mail receipt or even a purported tracking history webpage. If, in fact, Appellant *had* received notice of the hearing via certified mail at any time prior to the hearing, this Court cannot imagine it would have been difficult to prove below.

* * *

Prohibition—Jurisdiction—Traffic infractions—Failure to use due care—Writ of prohibition is not proper vehicle to challenge trial court's ruling on motion to dismiss for lack of personal jurisdiction

TRIVIS PAISLEY, Plaintiff, v. STATE OF FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24000300. Division AW. April 25, 2024.

ORDER DISMISSING PETITION FOR WRIT OF PROHIBITION

(JOHN BOWMAN, J.) **THIS COURT**, in its appellate capacity, having reviewed Petitioner's Petition for Writ of Prohibition, Respondent's Motion in Opposition to the Petition for Writ of Prohibition, Petitioner's Response to Respondent's Motion, the trial court record, and applicable law, finds as follows:

In March, 2023, Petitioner was issued a uniform traffic citation for Failure to Use Due Care. In June, 2023, Petitioner filed a Motion to Dismiss for Lack of Personal Jurisdiction in the trial court. The trial court denied the Motion to Dismiss on June 9, 2023.

In January, 2024, Petitioner filed the instant Petition for Writ of Prohibition, requesting that this Court direct the trial court to grant the Motion to Dismiss.

This Court finds that the current state of the law does not permit a Writ of Prohibition to be used to remedy a lower court's ruling on personal jurisdiction. In *Cruz v. Citimortgage, Inc.*, 197 So. 3d 1185 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1610b], the Fourth District Court of Appeal held that "[A]n appeal of an order determining jurisdiction of the person does not deprive the trial court of subject matter jurisdiction over the dispute" and that "[P]rohibition will not lie to review the correctness of an order of a trial court overruling a challenge to its jurisdiction over the person of a defendant where that court has jurisdiction over the subject matter of the suit." *Id.* at 1189. *See also, Baden v. Baden,* 253 So. 3d 1104, 1104 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2550a] (*holding that "prohibition is not available to prohibit a court from exercising personal jurisdiction over a party when the court has subject-matter jurisdiction over the*

case" and that such denial ". . . is without prejudice to any party raising the issue on post-judgment appeal.")

This Court notes that while Respondent alleges that there exists authority for the proposition that a writ of prohibition may be a proper remedy to challenge a trial court's ruling on personal jurisdiction, the case law cited in support of this claim is from the 1930's to the 1960's. However, as set forth herein, the prevailing case law from the Fourth District Court of Appeal as recently as 2016 holds that prohibition is not an appropriate remedy in this instance.

Finding that a writ of prohibition is not a proper vehicle to challenge the trial court's ruling on a matter of personal jurisdiction, the instant Writ must be dismissed. This Court makes no finding as to the merits of the trial court's order on Petitioner's Motion to Dismiss for Lack of Personal Jurisdiction. This is a matter that may be addressed on any potential appeal that may eventually be filed.

Accordingly,

It is **ORDERED AND ADJUDGED** that the instant Writ of Prohibition is hereby **DISMISSED**.

* * *

PIERRE A. LOUIS, Plaintiff, v. CITY OF FORT LAUDERDALE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23022490. Division AP. April 25, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon Appellant's Joint Stipulation for Dismissal, dated April 16, 2024. Upon review of the stipulation and Court file, this Court finds as follows:

The Joint Stipulation for Dismissal is hereby **ACCEPTED** by this Court.

The Broward County Clerk of Courts is **DIRECTED** to close this case as "disposed" of by way of joint stipulation for dismissal.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Without testimony of law enforcement to clear up material discrepancies in documents, there was no competent substantial evidence to support hearing officer's finding that licensee was arrested prior to request that he submit to breath test—Remand for further proceedings

RICKY JOSEPH DELANO COBB, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Brevard County. Case No. 05-2023-AP-046128-XXXX-XX. March 1, 2024. Counsel: Robert R. Berry, Tallahassee, for Petitioner. Linsey Sims-Bohnenstiehl, FDHSMV, Tampa, for Respondent.

(PER CURIAM.) The Petitioner challenges the Findings of Fact, Conclusions of Law and Decision (hereinafter "Decision") entered on August 14, 2023, which upheld the suspension of his commercial and general driving privileges for his refusal to submit to a breath-alcohol or blood-alcohol test after being requested to do so by law enforcement. The basis of the Petitioner's challenge is that the Decision did not comport with the essential requirements of law in that there was material discrepancies and unclear evidence before the hearing officer as to whether the Petitioner was arrested prior to the request for and refusal of the breath or alcohol test. The Petitioner argues that based solely on the documents submitted without live sworn testimony of law enforcement to clear up the material discrepancies amount to a deviation from the essential requirements of law. *See Department of Highway Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1076 (Fla. 2011) [36 Fla. L. Weekly S654a] (holding that a driver's license cannot be suspended for refusal to submit to a breath test if the refusal was not incident to a lawful arrest); *Trimble v. Department of Highway Safety and Motor Vehicles*, 821 So. 2d 1084 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] and *Department of Highway Safety and Motor Vehicles v. Colling*, 178 So. 3d 2 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b]. Based upon the specific facts of this case, there is no competent substantial evidence to support the suspension without the live testimony of law enforcement to support the hearing officer's Decision. *See Trimble v. Department of Highway Safety and Motor Vehicles*, 821 So. 2d at 1087.

Accordingly, we grant the petition for writ of certiorari and remand for further proceedings consistent with this opinion. *See Dep't of Highway Safety & Motor Vehicles v. Clay*, 152 So. 3d 1259, 1260 (Fla. 5th DCA 2014) [40 Fla. L. Weekly D51c] ("This court has consistently held that when a circuit court quashes an order issued by a hearing officer on due process grounds, the matter is to be remanded to the administrative agency for further proceedings.").

Petition **GRANTED** and **REMANDED** for further proceedings consistent with this opinion. (C. JACOBUS, PATEL-DOOKHOO and MALONEY, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Homeowners—Coverage—Collapse—Insureds failed to show that loss fell within policy's additional coverage for collapse where they did not establish that broken subfloor to shower was "abrupt falling down or caving in of building or part of building to flattened form or to rubble"—Further, insurer's assertion that damage pre-existed policy coverage and was caused by repeated seepage or leakage of water or moisture over time was not contradicted and was, in fact, supported by insureds' lawsuit against builder of home and deposition of insureds' contractor—Insurer's motion for final summary judgment is granted

DONALD and ANNE WILLIAMS, Plaintiffs, v. FIRST PROTECTIVE INSURANCE CO., d/b/a FRONTLINE INSURANCE CO., Defendant. Circuit Court, 7th Judicial Circuit in and for St. Johns County. Case No. CA22-1386. Division 59. January 25, 2024. Kenneth J. Janesk, II, Judge. Counsel: Lateshia Frye, for Plaintiffs. William M "Bill" Mitchell, Sr., Conroy Simberg, Tampa, for Defendant.

ORDER GRANTING FINAL SUMMARY JUDGMENT

This matter is before the Court pursuant to Defendant's Motion for Final Summary Judgment ("MSJ"). [DIN 49]. The Court having considered the MSJ, Response[1] by Plaintiff [DIN 71], arguments of counsel, all the record evidence filed, and the Court being otherwise advised in the premises[2], finds as follows:

This case arises out of a first-party property insurance breach of contract dispute involving damages to the master bathroom of the insured property on or about July 15, 2022 (the "loss"). Plaintiffs' Complaint alleges that the loss resulted from a "collapse." *Complaint* ¶5 [DIN 5].

Defendant relied upon several exclusions within the policy of insurance to deny coverage for the loss. Specifically, Defendant alleged that inadequate construction of the shower pan resulted in repeated seepage or leakage of water over a period of time; therefore, the damages preexisted the date the policy was issued.

Defendant filed its MSJ arguing that the policy did not provide coverage for the loss and thus Plaintiffs could not establish breach of contract. Notably, Defendant also argued that Plaintiffs' claim is frivolous and without merit as a result of Plaintiffs' additional lawsuit against the builders of the insured property alleging defective construction prior to Plaintiffs' ownership of the property[3].

PROCEDURAL HISTORY

On August 3, 2022, Plaintiffs reported damages to Defendant with a reported date of loss of July 15, 2022. *See declaration of Mimi McAndrews* ¶4. On October 10, 2022, Plaintiffs filed suit against Toll Jacksonville Limited Partnership alleging multiple counts related to the alleged defective construction of portion of the insured property. *See Case No.: CA22-1317, Seventh Judicial Circuit in and for St. Johns County, Florida*. On October 24, 2022, Plaintiffs' filed the instant lawsuit. On November 18, 2022, Defendant filed its Answer and Affirmative Defenses. [DIN 28].

On December 4, 2023, the parties attended a hearing on the MSJ, which had been noticed by counsel for Defendant. Prior to the hearing Plaintiffs had not filed any response in opposition to Defendant's motion. At the hearing, Plaintiffs' counsel represented to the Court that summary judgment could not be granted as relevant discovery remained outstanding. Specifically, Plaintiffs' counsel stated that she required the deposition of Plaintiffs' own contractor in order to respond to the MSJ.

Over defense objection, the hearing was continued to January 3, 2024, and Plaintiffs' counsel was instructed to file Plaintiffs' response and/or evidence in opposition to Defendant's motion prior to the hearing. [DIN 63]. On January 3, 2023, Plaintiffs filed a response in opposition, which relied upon an affidavit of Donald Williams, as well as the transcript from the deposition of Plaintiffs' contractor, Drayton Drake. [DIN 71].

THE POLICY

The subject policy of insurance contains the following relevant provisions:

SECTION—PERILS INSURED AGAINST

1. We insure for sudden and accidental direct physical loss to covered property described in Coverages A and B **unless the loss is otherwise excluded or limited in this policy**. However, loss does not include, and we will not pay for, any "diminution in value."

***

SECTION I—EXCLUSIONS

A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

***

11. Existing Damage, meaning:

a. Damages which occurred prior to policy inception regardless of whether such damages were apparent at the time of the inception of this policy or discovered at a later date; or

b. Claims for damages arising out of workmanship, repairs or lack of repairs arising from damage which occurred prior to policy inception.

12. Repeated seepage or leakage of water or steam, or the presence or condensation of humidity moisture or vapor that occurs or develops over a period of time, whether hidden or not.

In the event this exclusion applies, we will not pay for any damages sustained starting from the first day and instant the repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture, or vapor began.

***

B. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.

***

3. Faulty, inadequate or defective:

***

b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

c. Materials used in repair, construction, renovation or remodeling; or

d. Maintenance;

of part or all of any property whether on or off the "residence premises."

The policy also includes the following provision relied upon by Plaintiffs:

E. Additional Coverages

8. Collapse

a. The coverage provided under this Additional Coverage-Collapse applies only to an abrupt collapse.

b. For the purposes of this Additional Coverage-Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building to a flattened form or to rubble with the result that the building or part of the building cannot be occupied for its intended purposes.

c. This Additional Coverage-Collapse does not apply to:

(1) A building or any part of a building that is in danger of falling down or caving in;

(2) A part of a building that is standing, even if it has separated from another part of the building; or

(3) A building or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

Exhibit A to Plaintiff's MSJ. [DIN 49].

LEGAL STANDARD

Rule 1.510, Fla. R. Civ. P. was amended to "align Florida's summary judgment standard with that of the federal courts and of the supermajority of states that have already adopted the federal summary judgment standard." *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 309 So.3d 192, 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. Effective May 1, 2021, Rule 1.510(a) now provides:

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.

This amended rule governs the adjudication of any summary judgment motion decided on or after May 1, 2021, including pending cases. *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 317 So.3d 72; 46 Fla. L. Weekly S95a (Fla. April 29, 2021).

Rule 1.510 now follows the standard set forth in Fed. R. Civ. P. 56, which provides summary judgment is appropriate when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the jury could reasonably find for that party. *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

The motion for summary judgment must be filed at least 40 days before the hearing on the motion. Rule 1.510(b). At the time of filing a motion for summary judgment, the movant must also serve the movant's supporting factual position. Rule 1.510(c)(5). At least 20 days before the scheduled hearing, the party opposing the summary judgment must serve its response, including its factual position. *Id.*

ANALYSIS

Defendant asserts that the Plaintiffs' damages are the result of inadequate and/or defective construction, which pre-dates the effective period of the policy and resulted in exposure of the building components to repeated seepage and leakage of water or moisture. Defendant relies upon the totality of their investigation, as outlined in the declaration of Mimi McAndrews, Defendant's corporate representative. Defendant's investigation included an inspection by a forensic engineer, Mr. Alec Haugdahl, who authored a report that includes his detailing findings regarding the cause and origin of the Plaintiffs' damages. *Exhibit B of Plaintiff's MSJ.* [DIN 49].

Plaintiffs' have provided no evidence in opposition to Defendant's assertion that Plaintiffs' loss falls under multiple exclusions to coverage under the policy. Rather, Plaintiffs maintain that the loss occurred as a result of a collapse as defined by the policy for which coverage is listed under the "Additional Coverages" portion of the policy.

In support of their position, Plaintiffs' rely upon the affidavit of Mr. Williams that states that his contractor, Drayton Drake, was hired to replace the master shower tiles because of cracks in the grout. *Affidavit of D. Williams ¶7.* Mr. Williams averred that during the process Mr. Drake's knee caved into the sub-floor liner. *Id. at ¶8.*

However, the deposition testimony of Mr. Drake tells quite a different story.

> ***Q.*** *Okay. So prior to you going to the home and completing—you said your evaluation, what was your evaluation? How did you—what did you do?*
>
> ***A.*** *Well, the evaluation was—is that there was some type of issue with—underneath the shower pan. We agreed to pull the shower pan, mudset, mudset, then retile. Upon removal is where we found the issue within the subfloor. And there—it was a spongy/weak spot. And that right then and there determined that there was water damage underneath the pan. On the record, to be honest with you, that is a liability. And I knew something that happened and I cannot mudset and put in the new shower pan. Honestly, above subfloor with damages rendered, a possibility someone could fall through the floor. So that's why I stopped within the means and recommended that the Williams contact their insurance, make note and, you know, take it from there. Drake Dep. 23: 8-25.*
>
> ***
>
> ***Q.*** *And upon moving the mudset, what did you do after that?*
>
> ***A.*** *Actually, I was in the process of removing the tile pan floor and within halfway, I noticed a soft spot, and at that time that's when I stopped and contacted Mr. and Mrs. Williams to come up, and I wanted to verify the issues that I found, and we took it step by step.*
>
> ***Q.*** *All right. So how—you said that you were—you had already moved half of the shower pan?*
>
> ***A.*** *Correct.*
>
> ***Q.*** *And then that's when you noticed—and that's when it was discovered that there was a issue?*
>
> ***A.*** *There was a issue beforehand. It was a matter of—of the point of finding the issue.*

Drake. Dep. 24: 8025.

Mr. Drake goes on to testify very specifically that his knee did not break the wood and that the issue he discovered existed prior to the start of his repair in the bathroom. *Id. at pages 29-31.*

The Court is required to "read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Pride Clean Restoration, Inc. v. Citizens Prop. Ins. Corp.,* 317 So.3d 1274 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1109c]. "Where the language in an insurance contract is plan and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 2d 943,948 (Fla. 2013) [38 Fla. L. Weekly S511a].

At best, the record evidence presented by Plaintiffs establishes a dispute as to how and when the subfloor of the master shower came to be broken. However, accepting Mr. Williams' version of facts in light most favorable to Plaintiffs, the Plaintiffs have still failed to establish the requisite trigger for "Collapse" coverage under the policy as they have not shown that "an abrupt falling down or caving in of a building or any part of a building ***to a flattened form or to rubble*** with the result

that the building or part of the building cannot be occupied for its intended purposes. . ." occurred at the insured property.

Here, the Plaintiffs' bathroom was unusable as a result of the renovation. Moreover, the policy language states that the coverage does not apply to "[a] building or ***any part of a building that is standing,*** even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion." *(Emphasis added)*

Despite Plaintiffs' characterization of the loss as a "Collapse", the plain reading of the policy reveals that this characterization is misplaced as it relates to the terms of this policy of insurance. The facts set forth by the Plaintiffs do not bring the loss under the terms of the additional coverage for collapse.

Additionally problematic for Plaintiffs' claim is the existence of Plaintiffs' lawsuit against the builder of the home as the allegations therein directly contract Mr. Williams' affidavit and support Defendant's denial of coverage. At both of the hearings on the MSJ, Plaintiffs' counsel offered no explanation for the allegations contained within the Plaintiffs' suit against the homebuilder. At a minimum, the additional suit presents a clear attempt at double recovery. Regardless, it presents evidence in support of Defendant's denial of coverage for the loss.

However, more fatal to Plaintiffs' claim is that they failed to provide evidence in opposition to Defendant's engineer and the policy exclusions consistent with his declaration. They provided no evidence regarding the duration of the water exposure aside from the testimony of Mr. Drake, which actually supports Defendant's position. Accordingly, Defendant's assertion that the damages were pre-existing and caused by repeated seepage or leakage of water or moisture over time are consistent with the record evidence before the court and remains unopposed or contradicted.

Further, Defendant's policy language contains the following lead in language for their exclusions: "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." The Court notes that the anti-concurrent causation language in Defendant's policy is identical to the language examined by the Third District Court of Appeal in *Security First Insurance Co. v. Czelusniak*, 305 So. 3d 717 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1151b]. After reviewing that case, the Court reaches a similar conclusion in the present case.

If an insurer "relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations of the complaint are cast solely and entirely within the policy exclusion and subject to no other reasonable interpretation." *Deshazior v. Safepoint Insurance Company*, 305 So. 3d 752, 755 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1210a]. Once the movant produces competent evidence in support of summary judgment, "the opposing party must come forward with counterevidence sufficient to reveal a genuine issue" of material fact. *Id. quoting Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979).

In light of the above, Defendant's denial of coverage for the Plaintiffs' loss is consistent with the plain and unambiguous terms of the policy. As discussed above, Plaintiffs have failed to establish any genuine issue of material fact exists, which would preclude summary judgment in favor of Defendant. Thus, Plaintiffs' claim is barred and final summary judgment in favor of Defendant is appropriate.

It is therefore ORDERED and ADJUDGED that:

1) Defendant's Motion for Final Summary Judgment is GRANTED.
2) This case is **DISMISSED** with Prejudice.
3) Plaintiffs shall take nothing and Defendant shall go hence without day.
4) This Court retains jurisdiction to hear any timely brought post-judgment motions.

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[1]Defendant filed a Motion to Strike the Response citing it not being filed timely. The Court denied such motion as it was agreed upon at a previous hearing that Defendant was waiving any argument in regards to the timing of the MSJ Response.

[2]The Court ordered both parties to email proposed orders on this matter to Division59@circuit7.org no later than 16 January 2024; however, by the date of this Order Plaintiff has not yet submitted a proposed order nor requested additional time for submission.

[3]Defendant stated during the MSJ order that it would be seeking sanctions for this; however, to date a motion has not yet been filed.

* * *

Criminal law—Aggravated assault—Immunity—Stand Your Ground law—Defendant's use of force was reasonable under circumstances as they appeared to him where defendant encountered victim as she emerged from brush on his property holding a machete and defendant fired single warning shot into ground to make victim leave—Charge of aggravated assault is dismissed

STATE OF FLORIDA, v. HEATH S. FLYNN, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023-100735-CFDL. May 17, 2024. Randell H. Rowe, III, Judge. Counsel: Daniel Megaro, Assistant State Attorney, for State. Stacey E. Kircher and Bill Arnau, Kircher & Arnau, P.L., for Defendant.

ORDER GRANTING DEFENDANT'S PETITION TO DETERMINE IMMUNITY FROM PROSECUTION

This matter came before the Court for an evidentiary hearing upon the "Defendant's Petition to Determine Immunity From Prosecution," in which the Defendant asserts that he is immune from criminal prosecution pursuant to Sections 776.032, 776.012, 776.013, and 776.031 of the Florida Statutes, generally referred to as the "Stand Your Ground" law. The Court, having considered the motion, the testimony of the witnesses, the exhibits entered in evidence, and argument of counsel, and now being fully advised in the premises, hereby finds as follows:

The Defendant is charged in a Consolidated Information with Count I - Aggravated Assault (Firearm) and Count II - Manufacture of Cannabis. He seeks dismissal of Count I of the State's Information based on his contention that his use of force against the victim was reasonably justified under the circumstances, and that, therefore, he is entitled to immunity from prosecution.

The pertinent testimony in this matter reflects that the victim was looking for scrub jays on her client's property as part of an environmental survey her company was hired to conduct for the client. The victim mistakenly entered onto the Defendant's land when she crossed through an opening in a fenced area, thinking she was on an FPL powerline easement. Although the easement is owned by FPL, it is located on the Defendant's land. The victim then entered a wooded area and went into some bushes looking for scrub jays. She was armed with a machete, a tool which she regularly carries with her for hacking the branches of bushes. When she exited the bushes, she encountered the Defendant who yelled at her to get off of his property. The testimony is disputed as to what happened next. The Defendant claims the victim came out of the bushes and walked toward him carrying the machete, that she stopped about 10 to 15 feet away and raised the machete toward him, that he fired one warning shot from his gun into the ground, and that the victim turned and ran away still carrying the machete. The Defendant testified that he never pointed his gun at the victim but slightly raised it as she turned and ran. He claimed that he was afraid of being attacked by the machete and that he was "scared." According to the Defendant, he fired the warning shot into the ground in front of the victim to "change her mind" and make her leave. The victim testified that she heard a gunshot and that the Defendant came toward her when she exited the bushes. She stated he yelled and cussed at her to get off his property and then fired three shots into the ground. According to the victim, she slowly backed away and then begged for her life. She stated that she turned and ran away and then heard three more shots fired. The victim denied that she ever raised

her machete at the Defendant. Notably, there is no other testimony that supports the victim's claim that a total of seven shots were fired. A Defendant's neighbor who lives about 500 feet from him testified that he heard only one gunshot.

The Defendant has raised a prima facie claim of self-defense immunity. "[A] defendant who files a sufficient motion to dismiss on grounds of immunity is entitled to it unless the State clearly and convincingly establishes that he is not." *Bouie v. State,* 292 So. 3d 471, 483 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D415a]. It is the State's burden to prove by clear and convincing evidence that the statutory immunity does not apply. *Guida v. State,* 356 So. 3d 310 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D327a]. Section 776.012 "authorizes the use of nondeadly force when a defendant reasonably believes such force is necessary to defend himself against another's imminent use of unlawful force." *Garcia v. State,* 286 So. 3d 348, 351 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2859c]. "Under Section 776.012, a defendant is justified in using deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself, or to prevent the imminent commission of a forcible felony. *Id*. This Court "must determine whether, based on the circumstances as they appeared to the defendant, a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew would have used the same force as did the defendant." *Id*. To justify the use of deadly force, "the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force." *Huckelby v. State,* 313 So. 3d 861, 866 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D321c]; *Garcia v. State,* at 286 So. 3d 352.

According to the Defendant, when he encountered the victim and fired his gun at the ground, she was dirty, disheveled, and crawling out of the bushes holding a machete. He argues that he acted reasonably in self-defense against an armed trespasser on his property. The display of a firearm, without more, constitutes non-deadly force as a matter of law. *Burns v. State,* 361 So. 3d 372 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1067a] (holding that, after the confrontation had ensued, it was reasonable for the defendant to have anticipated the possibility that he would need to act in self-defense while verbally directing trespassers off his property). As previously stated, in order to justify the use of deadly force, "the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force." *Huckelby v. State,* 313 So. 3d at 866; *Garcia v. State,* 286 So. 3d at 352.

The Defendant's testimony is undisputed that he was afraid of being attacked by the machete and that he felt "scared" when he suddenly encountered the victim emerging from the brush on his property holding a machete, and that he fired the warning shot into the ground to make her leave. Given this undisputed testimony along with the rest of the Defendant's testimony, the Court determines that based on the circumstances as they appeared to the Defendant, a reasonable and prudent person situated in the same circumstances and knowing what the Defendant knew would have used the same force as did the Defendant. Based on the evidence presented, the Court concludes that the State has not met its burden of proof by clear and convincing evidence to overcome the Defendant's claim of immunity from prosecution.

Therefore, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Defendant's Petition to Determine Immunity From Prosecution is granted, and Count I of the Consolidated Information is dismissed.

2. Count II of the Consolidated Information remains pending, and the pre-trial hearing on that count remains set for May 28, 2024.

* * *

Real property—Partition—Uniform Partition of Heirs Property Act—Civil procedure—Voluntary dismissal—Notice of voluntary dismissal filed by plaintiff was prohibited by rule 1.420(a) and void where defendant fully complied with co-tenant buyout order by delivering certified funds for ordered amount to plaintiff's attorneys and notice of voluntary dismissal was filed after receipt of funds—Further, voluntary dismissal was prohibited while funds delivered to plaintiff's counsel were within court's constructive custody—No merit to argument that plaintiff was entitled to voluntarily dismiss action because funds were not deposited in court registry as required by Uniform Partition of Heirs Property Act where plaintiff expressly agreed to alternative depository by submitting proposed buyout order requiring delivery of funds to his attorney—Notice of voluntary dismissal vacated—Property interest is transferred and reallocated

BOYNTON CROCKETT, Plaintiff, v. WILLIAM JOHN CROCKETT, JR. and VICKI CROCKETT, Defendants. Circuit Court, 8th Judicial Circuit in and for Baker County. Case No. 02-2023-CA-000114. April 3, 2024. Sean Brewer, Judge. Counsel: Michelle Martino, McCabe & Ronsman, Ponte Verda Beach, for Plaintiff. Kevin S. Rabin and Steven R.V. McDaniels, Three Rivers Legal Services, Inc., Gainesville, for Defendants.

ORDER VACATING NOTICE OF VOLUNTARY DISMISSAL AND FINAL JUDGMENT OF PARTITION OF HEIRS PROPERTY

THIS CAUSE came before the Court at hearing on March 19, 2024 on Defendant William John Crockett, Jr.'s "Motion to Vacate Notice of Voluntary Dismissal and Motion for Taxation of Costs," filed on January 5, 2024 and Plaintiff's response in opposition, filed on February 22, 2024. Present before the Court were: Plaintiff, Boynton Crockett; Attorney for Plaintiff, Michelle Martino; Defendant, William John Crockett, Jr.; Defendant, Vicki Crockett; Attorneys for Defendant William John Crockett, Jr., Steven McDaniels and Kevin Rabin; and non-party witnesses Tammy Hines and Tammy Folsom.

The Court, having reviewed the procedural history of this action and the Court's previous Order Determining Value of Real Property for Partition, Determining Share Value with Equitable Accounting, and Providing Co-Tenant Buyout (hereinafter the "Co-Tenant Buyout Order"), having received documentary evidence concerning Defendant William John Crockett, Jr.'s performance of the co-tenant buyout, having reviewed the Uniform Partition of Heirs Property Act, having reviewed applicable case law concerning the propriety of vacating dismissal and having heard arguments from counsel on the same, and being otherwise fully advised in the premises, the Court finds as follows:

1. This Court's Co-Tenant Buyout Order, rendered November 27, 2023, determined the fair market value of the property at issue in this partition action ("Property") and conducted an equitable accounting. Having received notice that Defendant William John Crockett, Jr. opted to purchase Plaintiff's interest in the Property, the Court ordered payment by January 19, 2024. Once the funds were delivered, Defendant was required to "file proof of the transaction with the Court."

2. On December 13, 2023, Defendant William John Crockett, Jr., by and through his attorneys, utilized United Parcel Services (UPS) to mail a certified check issued by VyStar Credit Union for $42,254.00 U.S.D. to Plaintiff at the address provided by his attorneys. The certified check was made payable to "McCabe and Ronsman," enabling the immediate deposit of the co-tenant buyout payment into counsel's trust account to verify the authenticity of the funds, and was enclosed together with a letter from Defendant William John Crockett, Jr.'s attorneys that specified the funds' relation to this action.

3. On December 19, 2023, Defendant filed proof of delivery with the court that the certified check for $42,254.00 had been delivered and received by Plaintiff's attorneys on December 14, 2023. Those funds were deposited successfully into counsel's trust account and remain in that trust account pending this Court's ruling.

4. Accordingly, Defendant William John Crockett, Jr. fully complied with the Co-Tenant Buyout Order, and, as of December 19, 2023, was entitled to judgment transferring Plaintiff Boynton Crockett's interest as mandated by the Uniform Partition of Heirs Property Act.

5. Despite Defendant William John Crockett, Jr.'s compliance with the Court's Co-Tenant Buyout Order and the submission of the action for a statutorily-mandated judgment, on January 2, 2024, Plaintiff filed a Notice of Voluntary Dismissal to end the action immediately and divest the Court of jurisdiction to enter the required judgment transferring his interest to Defendants William John Crockett, Jr. and Vicky Crockett.

6. While Florida Rule of Civil Procedure 1.420(a) ordinarily permits a party to terminate or dismiss its action voluntarily without a court's order, this right is not absolute. Rule 1.420(a) itself contains two textual limits that, here, preclude Plaintiff from voluntarily dismissing this action and render his notice purporting to do so void.

7. First, Rule 1.420(a) expressly limits dismissal to any time "before submission of a nonjury case to the court for decision." Submission generally requires "the close of all proceedings and all opportunities for the parties to make argument." *Kelly v. Colston,* 977 So. 2d 692, n.2 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D769c]. Submission is context dependent, and whether an action has been submitted focuses not on form but whether any substantive dispositions or determinations remain for the court. *Submission of Controversy,* Black's Law Dictionary_(11th ed. 2019) ("The completion of a series of acts by which the parties to a particular dispute place any matter of real controversy existing between them before a court with jurisdiction for a final determination."); *Submission,* Black's Law Dictionary (11th ed. 2019) ("The state or quality of an impending decision's being under active consideration by a court . . . .").

8. The effect of Florida Statute § 64.207(5) is immediate and submits the case to the Court with no additional requirement to take evidence, hear argument, or utilize any discretion. "If all electing cotenants timely pay their apportioned price . . ., the court *shall issue a judgment of partition* reallocating all the interests of the cotenants, disburse the amounts held by the court to the persons entitled to them, and direct the clerk of the court to record the judgment in the official records of the county where the property is located." § 64.207(5)(a), Fla. Stat. (emphasis added).

9. The Co-Tenant Buyout Order was equally unequivocal—"[i]f William John Crockett, Jr. pays the apportioned price for Plaintiff's interest, then the Court, by William John Crockett, Jr.'s election, shall issue a judgment of partition reallocating the interests in equal share to Defendants, William John Crockett, Jr. and Vicki Crockett as cotenants each with a 50% interest in the Property and the clerk will be directed to record said judgment. § 64.207(5)(a), Fla. Stat. (2020)."

10. The submission of the matter for judgment was set to occur once Defendant William John Crockett, Jr. delivered certified funds to Plaintiff via counsel and "file[d] proof of the transaction with the Court," in compliance with the Uniform Partition of Heirs Property Act. *See* § 64.207(5)(a), Fla. Stat. (providing that submission occurs once the electing cotenants "pay their apportioned price into the court").

11. It is undisputed that Defendant William John Crockett, Jr. delivered certified funds to Plaintiff via counsel on December 13, 2023 and proof of this transaction was filed with the Court on December 19, 2023. Therefore, this nonjury action was submitted to the Court for rendition of the judgment on December 19, 2023 and Plaintiff's notice of voluntary dismissal on January 2, 2024 was prohibited by Rule 1.420(a) and void.

12. Second, Florida Rule of Civil Procedure 1.420(a) does not permit a voluntary dismissal by a party "in actions in which property has been seized or is in the custody of the court."

13. Custody is not limited to physical custody, but rather focuses on the "control of a thing or person for inspection, preservation, or security." *Custody,* Black's Law Dictionary (11th ed. 2019). Property in the custody of court includes funds deposited with the court registry, but is not exclusively limited to such physical possession.

14. Florida Statute § 64.207 normally requires the apportioned price to be paid into the court registry. However, nothing within the plain language of Florida Statute § 64.207 precluded the Court from using an alternative to the court registry for the payment of the co-tenant buyout funds provided the parties involved consented to the alternative. *See Band v. Libby,* 113 So. 3d 113, 115 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1121c] (discussing that parties, by knowledge and conduct, can waive or be estopped to raise a wide array of constitutional, statutory, and common law rights).

15. The parties affirmatively agreed to[1], and the Court ordered, a cost-saving alternative whereby Defendant William John Crockett, Jr. could deliver the co-tenant buyout payment of $42,254.00 to the partitioning co-tenant, Plaintiff Boynton Crockett, into the court registry or "deliver certified funds to Plaintiff through counsel".

16. Therefore, the Co-Tenant Buyout Order's alternative is sufficiently analogous to the court registry to qualify as within the custody of the Court. Though the funds were deposited into the trust account of Plaintiff's attorney, the Court maintained constructive custody over the funds upon delivery with the Co-Tenant Buyout Order dictating the specific function and use of the funds.

17. Plaintiff argues that he was entitled to voluntarily dismiss this partition action because Defendant William John Cockett, Jr. "never provided a payment to the Court as required by the Statute".

18. The Co-Tenant Buyout Order entered on November 27, 2023 was collaboratively submitted for the Court's approval following the equitable accounting hearing by counsel for Plaintiff and Defendant William John Crockett, Jr. By submitting this proposed order, Plaintiff expressly agreed to an alternative depository for the co-tenant buyout that removed it from the Court's direct custody. Furthermore, Plaintiff failed to raise any objection to the terms set forth in the Co-Tenant Buyout Order.

19. Inducing a party to rely on a position taken in litigation only to later assert a legal infirmity in the induced action violates long-established estoppel rules for positions taken in legal proceedings. *See McPhee v. State,* 254 So. 2d 406, 409-10 (Fla. 1st DCA 1971) ("Estoppel by the acceptance of benefits finds application in many different fields and under a wide variety of circumstances. The estoppel is applied to prevent one *who accepts the benefit* of a judgment or *decree* from questioning its validity or *opposing the enforcement of its terms*.") (citation omitted, emphasis added); *see also Flowers v. State,* 149 So. 3d 1206, 1207-08 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2326a] ("The invited error doctrine is succinct: '[a] party cannot successfully complain about an error for which he or she is responsible or *of rulings that he or she invited the court to make*.' ") (quoting *Anderson v. State,* 93 So. 3d 1201, 1203 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1891c]).

20. Similarly, misleading an opposing party to their detriment is unconscionable. *See Gulf Stream Boat Builders, Inc. v. South Dade Boat, Inc.,* 583 So. 2d 807 (Fla. 3d DCA 1991) (unconscionable for plaintiff to obtain default by misleading the defendants).

21. Unlike other civil actions where defendants benefit from dismissal, Defendants William John Crockett, Jr. and Vicki Crockett

have no other remedy at law or equity to divest Plaintiff of his interest and maintain their ownership of the subject property. The Uniform Partition of Heirs Property Act provides this unique right in the context of this action alone, where the cotenants can purchase only if they are the non-partitioning cotenants.

22. The notice of voluntary dismissal, filed after the buyout funds were available for disbursement[2], simply came too late in the co-tenant buyout process. It is unconscionable for Plaintiff to attempt to deprive this Court of the jurisdiction to render a judgment effectuating the transfer of interest in the subject property of this action based on a technical defect the Plaintiff invited the Court and Defendants to make.

It is therefore ORDERED AND ADJUDGED that:

1. Defendant William John Crockett, Jr.'s Motion to Vacate Notice of Voluntary Dismissal is hereby **GRANTED.**

2. Plaintiff's Notice of Voluntary Dismissal is hereby **VACATED**.

3. By operation of section 64.207(5), Florida Statutes, and in consideration of the Forty-Two Thousand Two Hundred Fifty-Four Dollars ($42,254.00), paid by William John Crockett, Jr., the Court **REALLOCATES, TRANSFERS, AND CONVEYS** all of **Boynton Crockett's** right, title, and interest in the hereafter described real property, situated in Baker County, Florida, to wit:

> Lot Three (3) in Block Sixty-Nine (69) of the Town of Macclenny, Baker County, Florida, according to the plat of said town on file in Deed Book D, page 800, of the Public Records of Baker County, Florida;
>
> a/k/a: 351 South College Street, Macclenny, FL 32063;
>
> Property Appraiser's Parcel Identification Number RE#: 322S22004900690030.
>
> Subject to covenants, easements, and restrictions of record.

to **William John Crockett, Jr.** and **Vicki Crockett,** in fee simple absolute.

4. Given their previously determined 1/3 undivided interests in the above-described real property and the conveyance of Boynton Crockett's interest to each of them herein, **William John Crockett, Jr.** and **Vicki Crockett** each hold a 1/2 undivided interest in the above-described real property.

5. The Clerk of this Court shall record this Final Judgment in the official records of Baker County, Florida, which shall serve as record notice to all persons of the transfer of interest detailed herein.

6. Plaintiff shall take the $42,254.00 co-tenant buyout payment from this suit, and nothing further.

7. All parties shall bear their own attorney's fees and court costs in this action, as no party predominantly prevailed in this action for partition.

8. This Final Judgment fully concludes and adjudicates all claims and disposes of all parties in this action. The Court maintains its jurisdiction only to the extent necessary to amend this Final Judgment if needed for title clarity.

9. The Clerk of Court is directed to close this file.

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[1]This alternative procedure had benefits to each party involved. For Plaintiff, the buyout funds would be immediately available upon receipt for his use and would not involve a further court order to disburse from the court registry. For Defendant William John Crockett, Jr., the alternative would provide savings of $648.81 in deposit fees to the Clerk of Court and would expedite rendition of the judgment after delivery of the funds.

[2]Defendant William John Crockett, Jr. indicated that the funds received by Plaintiff's counsel on December 14 were deposited and cleared counsel's trust account on or about December 29. The notice of voluntary dismissal was not filed until January 2.

* * *

Insurance—Coverage—Material misrepresentations on application—Summary judgment—Supporting affidavit—Absence of explanation as to how alleged premium increase was calculated or determined—Affidavit stricken

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. MELISSA BAILEY GROOMS and JULIE GROOMS, Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CA-007911. June 11, 2024. Mark R. Wolfe, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF ROSE CHRUSTIC AND ORDER GRANTING DEFENDANTS' SECOND AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on June 6, 2024 on Defendants' Motion to Strike Affidavit of Rose Chrustic and Defendants' Second Amended Motion for Final Summary Judgment. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant's Motion Strike argues that the affidavit of underwriter Rose Chrustic does not satisfy Rule 1.510(e) which requires that an affidavit to be made upon personal knowledge and set out facts as would be admissible in evidence.

2. The Court has reviewed the subject affidavit and has reviewed the controlling precedent of *Sunita Roberts v. Direct General Ins. Co.*, 337 So. 3d 889, [47 Fla L. Weekly D737b] (Fla. 2d DCA 2022). While the affidavit does track the personal knowledge language contained in *Roberts*, the affidavit does not contain any explanation as to how the alleged premium increase was calculated or determined.

3. As such, Defendants' Motion to Strike Affidavit of Rose Chrustic is **HEREBY GRANTED**.

4. Based upon the striking of the underwriting affidavit of Rose Chrustic, Plaintiff has no admissible evidence to support materiality of the alleged misrepresentation. As such, Defendant's Second Amended Motion for Final Summary Judgment is **HEREBY GRANTED.**

5. The following motions were noticed for hearing, but not heard inasmuch as the granting of Defendant's Second Amended Motion for Final Summary Judgment was dispositive; specifically, Plaintiff's Motion for Final Summary Judgment and multiple Plaintiff's Motions for Partial Summary Judgment.

* * *

Municipal corporations—Building code violations—Appeals—Stay—Motion to stay special magistrate's order pending appeal is denied—Appellant has failed to make compelling showing of likelihood of prevailing on appeal, irreparable harm if stay is not granted, or that stay would be in public interest

ARCK MB, LLC, Petitioner, v. CITY OF HALLANDALE BEACH, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE23021920. Division AP. May 15, 2024. John Bowman, Judge. Counsel: Robert H. Cooper, Miami, for Petitioner. Jennifer Merino, City Attorney for City of Hallandale Beach, for Respondent.

ORDER DENYING MOTION TO STAY

THIS CAUSE is before the Court, upon the Appellant's, Second Motion for Stay of Fines Accruing during Pending Appeal, filed on March 25, 2024. Having carefully reviewed the motion, the response in Opposition, the case file, the Special Magistrate's Order Denying Motion to Stay dated March 11, 2024, the applicable law, and being duly advised in the premises, the Court finds as follows:

Appellant seeks review of the City of Hallandale Beach Special Magistrate's denial of the Motion for Stay Pending Appeal and the entry of an Order of Stay herein pursuant to Florida Rule of Appellate Procedure 9.310(f). Rulings on motions for stay are governed by the abuse of discretion standard of review. *See*, *Parker v. Estate of Bealer*, 890 So. 2d 508, 512 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D145a]; *U.S. Borax, Inc. v. Forster*, 764 So.2d 24, 29 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1220a].

"A party seeking to stay the lower tribunal order pending appeal should demonstrate a likelihood of prevailing on appeal, irreparable harm to movant if the motion is not granted, or a showing that a stay would be in the public interest." *Lampert-Sacher v. Sacher*, 120 So. 3d 667 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1939a]. "As noted in *Cerrito v. Kovitch*, 406 So.2d 125, 126 (Fla. 4th DCA 1981), the trial court has "considerable latitude in controlling the circumstances under which the proceedings may be stayed pending review." *Pabian v. Pabian*, 469 So. 2d 189, 191 (Fla. 4th DCA 1985). Moreover, "[i]t is well settled that an appellate court will not disturb an order of the trial court in the exercise of its judicial discretion unless an abuse of that discretion is clearly shown. There is a presumption in favor of the proper exercise of discretion, and the burden is on appellant to clearly show that there was a palpable abuse of discretion." *Feldman v. Feldman*, 324 So. 2d 117, 118 (Fla. 3d DCA 1975).

After review, the Court agrees with the reasoning and rationale of the Special Magistrate and the argument in opposition to stay by the City. Moreover, the Court finds that the Appellant has failed to make a compelling showing a likelihood of prevailing on appeal, irreparable harm to movant if the motion is not granted, or a showing that a stay would be in the public interest.

Accordingly, it is **ORDERED** that Appellant's, Second Motion for Stay of Fines Accruing during Pending Appeal is hereby **DENIED**.

* * *

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COUNTY COURTS

Civil procedure—Dismissal—Failure to comply with court orders—Willfulness—Insurance—Assignee's action against insurer—Sanctions are warranted where *Kozel* factors have been substantiated in abundance through multiple court orders and noncompliant amended complaints—Privilege to amend has been abused where plaintiff has failed on five occasions to sufficiently state a cause of action and is unwilling to amend its pleadings to comply with court orders to provide a more definite statement—Dismissal with prejudice is appropriate

APEX ROOFING AND RESTORATION, LLC, a/a/o Gabriele Bush and Frederick Bush, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2021-CC-003360. Division III. January 19, 2024. Kristina D. Lightel, Judge. Counsel: Joshua D. Giancarlo, Katranis, Wald & Garner, PLLC, Fort Lauderdale, for Plaintiff. Christopher S. Dutton, Dutton Law Group, P.A., Pensacola, for Defendant.

ORDER DISMISSING PLAINTIFF'S FOURTH AMENDED COMPLAINT WITH PREJUDICE AND GRANTING SANCTIONS

THIS CAUSE, having come before the Court on November 29, 2023, on Defendant's Motion to Dismiss the Complaint with Prejudice, Motion for Sanctions and Motion for Fraud upon the Court, and the Court having reviewed the papers filed in support and opposition and the court file, considered evidence presented, heard argument of counsel, and being otherwise fully advised in the premises, finds:

PROCEDURAL HISTORY AND FACTS

The initial complaint was filed on June 22, 2021, against the wrong entity. The initial pleadings contained an Assignment of Benefits that included a purported estimate, and Defendant filed a Motion to Dismiss in response thereto. Prior to this motion being heard, Plaintiff filed an Amended Complaint on October 18, 2021, which included the same attachment. Defendant filed a Motion to Dismiss or for a More Definite Statement on December 6, 2021, arguing, in-part, the need to plead special damages with specificity. A hearing was held on January 31, 2022. The hearing record reflects that the Motion to Dismiss was denied, and the Motion for More Definite Statement was granted. Plaintiff was ordered to specify the repairs regarding the roof and any additional damages being claimed/requested.

On February 16, 2022, this Court issued a written Order on the hearing requiring Plaintiff to file a Second Amended Complaint within twenty (20) days specifying 1) a specific amount being sought for the repair/replacement of the roof and 2) a specific description of any additional areas of damage to the subject property that Plaintiff is seeking in this suit and specific amounts for repair/replacement. Plaintiff failed to file an Amended Complaint within the time-period prescribed by the Court. Defendant then filed a Motion to Enforce Court Order on April 22, 2022.

On April 29, 2022, Plaintiff filed its Second Amended Complaint in response to Defendant's Motion to Enforce Court Order, without a hearing being held on the motion. Plaintiff alleged that it was seeking damages from American Integrity Insurance Company of Florida in excess of $8,000, but less than $30,000.00. The Second Amended Complaint alleged it had standing upon an Assignment of Benefits but did not attach the purported Assignment of Benefits or the estimate that had been previously attached to the prior complaints. Rather, Plaintiff attached an entirely new and distinct document The Second Amended Complaint also included multiple new allegations and prayers for relief and did not address items required in the February 16, 2022 Order. Specifically, Plaintiff failed to include an amount for the roof and specific descriptions of any additional areas of damage to the subject property.

On May 23, 2022, Defendant filed a Motion to Dismiss and for Sanctions. A hearing was held on January 18, 2023. Plaintiff's counsel asserted the attachment was inadvertently missing but could not reasonably account for why Plaintiff did not seek leave to amend their Second Amended Complaint prior to January 18, 2023, even though the motion had been filed approximately seven months prior. Plaintiff's counsel indicated at the hearing that this Court had jurisdiction in this case based upon the estimate minus any payments by Defendant.

On January 23, 2023, this Court filed an Order granting Defendant's Motion to Dismiss without prejudice, based upon Plaintiff's non-compliance with the February 16, 2022 Order and failure to attach a valid Assignment of Benefits Agreement. Plaintiff was granted seven days to amend the complaint to comply with the February 16, 2022 Order, which required the complaint include a specific amount being sought for the repair/replacement of the roof and a specific description of any additional areas of damage to the subject property that Plaintiff is seeking in this suit and specific amounts for repair/replacement. This Court also granted Defendant's Motion for Sanctions and struck any new grounds for relief/recovery.

On January 25, 2023, Plaintiff filed a Third Amended Complaint; however, Plaintiff failed to include any of the specific information ordered by the Court other than an amount at issue of $19,343.64n. The Third Amended Complaint added a basis for relief under Sec. 627.70131, Fla. Stat., despite this Court's previous order striking any new grounds for relief. Furthermore, the estimate attached to the Plaintiff's Motion to Amend Complaint includes items other than roof replacement.

Defendant filed a Motion to Dismiss with Prejudice or a Motion for More Definite Statement, for which a hearing was held on July 12, 2023. At the hearing, Plaintiff argued the $19,343.64 "for the roof" and asserted the specifics were in the estimate. No language was contained anywhere within the Third Amended Complaint that the amount in controversy was specifically for the roof itself or what it considered to be damages for the roof. Furthermore, there was nothing in the Third Amended Complaint providing a specific description of any additional areas of damage to the subject property that Plaintiff was seeking in this suit and specific amounts for repair/replacement, nor anything in the complaint asserting Plaintiff was not seeking recovery of anything additional to the roof. The foregoing details had been required by the Orders from February 16, 2022, and January 23, 2023, and the absence again required Defendant and the Court to guess or intuit Plaintiff's meaning.

Plaintiff attached the identical purported Assignment of Benefits Agreement and estimate that had been attached to the Amended Complaint considered in the February 16, 2022 Order. At the July 12, 2023 hearing, Plaintiff argued the estimate qualified as the specific damages and repairs being sought. If it was sufficient, however, there would have been no need for the February 16, 2022 Order Requiring a More Definite Statement. Furthermore, Plaintiff argued that there was no requirement that it plead anything with specificity, even though the Court had already ordered Plaintiff to do so. This argument, tied in with an argument that a previously considered estimate was sufficient to comply, is counterintuitive. Essentially, Plaintiff argued it was good enough then and should be good enough now, so there was no need to comply. The Court could reach no other conclusion but that Plaintiff's failure to comply with the Orders from February 16, 2022 and January 23, 2023 was willful.

Following the July 12, 2023 hearing, this Court issued an Order on July 27, 2023 discussing the timeline of events, Plaintiff's willful non-

compliance, and addressing the factors as required in *Kozel v. Ostendorf,* 629 So. 2d 817, 818 (Fla. 1993). The Defendant's Motion to Dismiss was denied, but Motion for More Definite Statement was granted. At the hearing, Plaintiff was ordered to file a Fourth Amended Complaint by July 26, 2023, which complied with the specifications outlined in the previous Court Orders. Plaintiff was additionally instructed to indicate precisely what was at issue in the case. The Court ordered specificity regarding the repairs claimed in this case and the amounts at issue for the repairs. At the hearing, Plaintiff's counsel indicated it would order the hearing transcript to ensure compliance in filing a Fourth Amended Complaint. include the precise information ordered by the Court at the hearing on July 12, 2023, and so the Court ordered Plaintiff to include said specific information in its Fourth Amended Complaint.

Defendant's Motion for Sanctions was granted. The Court struck Plaintiff's allegations brought under Sec. 627.70131, Fla. Stat. and any claim other than for the direct repairs to the roof (ex., shingles, lumbar, labor), including any additional or collateral damages (such as haul away, driveway protection, and window protection).

Plaintiff filed its Fourth Amended Complaint on July 26, 2023; however, it removed previous sections of its Third Amended Complaint. Specifically, Plaintiff deleted the portions that it had been ordered to add by the February 16, 2022, January 23, 2023 and July 27, 2023 Orders regarding the specific amount being sought for the repair/replacement of the roof, the specific description of any additional areas of damage to the subject property being sought in this suit and the specific amounts for repair/replacement. In the Third Amended Complaint, Plaintiff specified that the action was for damages in the value of $19,343.64. The Fourth Amended Complaint removed any reference to the amount at issue, other than indicating that $29,645.35 was owed for replacement of the roof, thereby altering the amount that it claimed is owed (or removing it entirely), removed any amounts of the prior payments from its figure, and attached an estimate for the first time as Exhibit C. The entirety of the estimate attached as Exhibit C was $31,584.68, and included new areas of damage for the comb and straighten a/c condenser fins, repair and replace window screens, repair and replace wood posts and fencing, dumpster loads, taxes insurance, permits, and fees, window labor, as well as other items that are ancillary to the roof, which were not included in the alleged Assignment of Benefits Agreement's Estimate Plaintiff argued previously to be conclusive.

The figures plead in the Fourth Amended Complaint are clearly based upon the entire estimate, thus proving Plaintiff's claim that $29,645.35 only corresponded to the roof was false. Plaintiff's counsel had previously represented to the Court at the July 12, 2023 hearing that the $19,343.64 was only for the roof. In addition, on June 28, 2023, Plaintiff filed its Response to Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint stating the amount of $19,343.64 was only for the roof; the purpose of this was the Plaintiff to show that it had complied with the Court Orders because it had separated out the items that did not involve the roof from the roof and corresponding price. Plaintiff's claim that $19, 343.64 was only for specific roof repairs includes the entirety of the invoice amounting to $31, 584.68, minus offsets. Plaintiff then claims the $29,645.35 amount requested does not include any off-sets, but excludes items that were not directly related to the roof. If Plaintiff's representations of their requests were both correct, the amounts would have been equal. They were not and it is clear the representation that $19,343.64 was solely for the roof was false. If, as Plaintiff now claims, any offset is an affirmative defense and Plaintiff is seeking recovery, the original total requested would be $31,584.68 and outside the jurisdiction of County Court when the Complaint was filed.

Defendant filed a Motion to Dismiss the Complaint with prejudice, Motion for Sanctions and Motion for Fraud upon the Court. Defendant also filed its Motion to Deem Fees and Costs Agreed to and Objections Waived for Plaintiff's Failure to Comply with Court Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees for Motion to Dismiss Hearing on January 18, 2023. A hearing was held on November 29, 2023. The Court issued an Order on December 8, 2023, granting Defendant's Motion for Sanctions. Defendant's Motion to Deem Fees and Costs Agreed to was deemed moot in effect based upon the granting of Defendant's Motion for Sanctions.

Defendant's Motion to Dismiss asserted several grounds for dismissal. Those grounds related to the validity of the Assignment of Benefits Agreement and compliance with Florida Statute 627.7152 were previously addressed on the merits in the Court's July 27, 2023, order. The Court finds Defendant's assertions and grounds in the Motion to Dismiss the 4th Amended Complaint are the same as those denied in the July 27, 2023 Order, which the Court adopts and incorporates in This Order, without further discussion. The new grounds are now addressed.

Plaintiff has previously been sanctioned for non-compliance with court orders and directives and has continued non-compliance. Plaintiff filed a response to Defendant's motion the night before the hearing at approximately 10:30 PM, accordingly to the E-portal time stamp. The response was approximately 100 pages and Plaintiff stated the response was largely identical to Plaintiff's response to the Motion to Dismiss the Third Amended Complaint. A hard copy was not provided to the Court. Plaintiff was already previously admonished for the filing of last-minute pleadings and motions. Plaintiff once again did not comply with judicial preferences. On August 15, 2023, the Court issued an Order Preliminary to Hearing on the Attorney Fees ordered as sanctions for the hearing on January 18, 2023. Defendant filed a Certificate of Compliance with the Order. Plaintiff was to respond in twenty (20) days, in-writing, listing any specific objections. Plaintiff did not respond. At the hearing, Plaintiff explained its office did not have an objection to some items requested, but stated its general objections in March were sufficient; this was unspecific and contrary to the Court's Order. Plaintiff's explanations are dismissive and self-contradictory, in light of Plaintiff's repeated non-compliance with Court directives and orders. The December 8, 2023 Order imposed sanctions awarding fees to Defendant for the January 18, 2023 hearing, as well as two hours for the November 29, 2023 hearing.

The Court granted sanctions but allowed the parties to file additional authority to determine if it will dismiss the complaint or impose alternate sanctions. Based upon the authority and argument presented by Defendant, this Court hereby dismisses this action with prejudice pursuant to *Kozel v. Ostendolf,* 629 So. 2d 817 (Fla. 1993), based upon Plaintiff's repeated willful noncompliance with court orders.

CONCLUSIONS OF LAW AND FINDINGS

I. THE *KOZEL* FACTORS

It has long been recognized that trial courts have the discretionary power to impose sanctions for a counsel's failure to comply with court orders. *See Mercer v. Raine,* 443 So. 2d 944, 946 (Fla. 1983); *Canakaris v. Canakaris,* 382 So.2d 1197 (F1a.1980). *See also Moakley v. Smallwood,* 826 So. 2d 221, 226 (Fla. 2002) [27 Fla. L. Weekly S357b] ("We thus hold that a trial court possesses the inherent authority to impose attorney's fees against an attorney for bad faith conduct"); *see also Robinson v. Ward,* 203 So. 3d 984, 989 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2497a] (affirming imposition of sanctions against attorney for attorney's misconduct during jury trial in personal injury action). Florida Rule of Civil Procedure 1.420(b)

provides that: "Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court."

Florida courts give trial court judges great latitude in determining whether parties comply with procedural rules, because they are in the best position to do so. *See Farish v. Lum's, Inc.,* 267 So. 2d 325, 327-28 (Fla. 1972) (reasoning that the exercise of discretion by a trial judge who sees the parties first-hand and is more fully informed of the situation, is essential to the just and proper application of procedural rules). "Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So.2d 606, 608-09 (Fla. 1994) (citation omitted). This includes taking strong action to make it clear that violations of court orders, discovery abuses, and excessive unnecessary delays will not be condoned or tolerated. *Louis Miller v. Florida Trails, Inc.,* 31 Fla. L. Weekly Supp. 111a, Case No. 22-CA-785 (Fla. 2d Cir. Ct June 5, 2023).

In the interests of an efficient judicial system and in the interest of clients, it is essential that attorneys adhere to filing deadlines and other procedural requirements. *Kozel v. Ostendorf,* 629 So. 2d 817, 818 (Fla. 1993). Dismissal of an action with prejudice may be an appropriate sanction for a party's disregard of or gross indifference to a court order, as evaluated under the six factors established by the Florida Supreme Court in *Kozel*:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

Id.

"A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness." *Mercer,* 443 So. 2d at 946. To impose the extreme sanction, the trial court must make express findings of fact showing that the refusal to obey discovery orders constituted willful and deliberate disregard. *See Commonwealth Fed. Sav. & Loan Ass'n v. Tubero,* 569 So. 2d 1271, 1272-73 (Fla. 1990).

The trial court must make express findings of fact concerning each of the *Kozel* factors in its written order dismissing the action. *Deutsche Bank Nat'l Tr. Co. v. Cagigas,* 85 So. 3d 1181, 1182 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D903a]. "Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation." *Id.* (quoting *Ham v. Dunmire,* 891 So. 2d 492, 496 (Fla. 2004) [30 Fla. L. Weekly S6a]; *see also Buroz-Henriquez v. De Buroz,* 19 So. 3d 1140, 1142 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2112a]; *Alvarado v. Snow White and the Seven Dwarfs, Inc.,* 8 So. 3d 388 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D491a]; *Hawthorne v. Wesley,* 82 So. 3d 1183, 37 Fla. L. Weekly D653a (Fla. 2d DCA Mar. 16, 2012)). "While no 'magic words' are required, the trial court must make a 'finding that the conduct upon which the order was based was equivalent to willfulness or deliberate disregard.' " *Deutsche Bank,* 85 So. 3d at 1182 (quoting *Ham,* 891 So. 2d at 496). Although the Court must consider each factor and contemplate the appropriateness of alternative sanctions, no single factor is exclusive and must be weighed in conjunction with all factors. *See Ham,* 891 So. 2d at 497, holding "the *Kozel* decision does not indicate that litigant involvement should have a totally preemptive position over the other five factors, and such was not this Court's intent. Although extremely important, it cannot be the sole factor. . ."

1) Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;

This Court finds that the *Kozel* factors have been substantiated in abundance As documented in this Court's Orders on January 23, 2023, July 27, 2023, and December 8, 2023, this Court has previously found that Plaintiff's disobedience was willful, deliberate or contumacious. It is well documented that Plaintiff has continued to act in willful, deliberate and contumacious disobedience during the course of two-and-a-half years of litigation.

At the November 29, 2023 hearing and as evinced in the hearing worksheet, dated December 14, 2023, the Court found ongoing repeated, willful, non-compliance with Court Orders, including Plaintiff filing of 100 page response at 10 PM the night before the hearing without a courtesy copy to the Court or opposing counsel. This Court's preferences state that case law in support is to be submitted 5 days prior and anything over 20 pages to be printed and physically delivered. Additionally, Plaintiff filed a response to "Defendant's Motion to Deem Objections Waived" at approximately 9:52 A.M. the morning of the November 29, 2023 hearing on the same. It has been an ongoing issue as this occurred in the previous hearings.

Plaintiff also did not comply with the August 15, 2023 Court Order preliminary to hearing on attorney's fees. Plaintiff's new counsel reported at the November 29, 2023 hearing that what he stated in March was the objection—even though there were clear directives that the objections needed to be in writing. The Court addressed this in detail in the December 8, 2023 Order, as well as the hearing worksheet from the November 29, 2023 hearing, e-filed December 14, 2023, both of which are incorporated by reference into This Order.

Plaintiff has a history of non-compliance and its newest Amended Complaint remains noncompliant, as Plaintiff is now seeking more than $10,000.00 greater than the jurisdictional amount previously requested. Plaintiff justified the jurisdiction in county court by alleging the amount alleged in its Third Amended Complaint was offset by the amounts previously paid by Defendant, and claimed the alleged amount related to the roof only. Yet Plaintiff's Fourth Amended Complaint now asserts an entirely new amount of over $29,000, for what Plaintiff again claims to be for only the roof. Plaintiff still argues that some of the items excluded could have been for the roof, but states Plaintiff did not initially ask for it and offsets were affirmative defenses. This still does not comply because Plaintiff continues to toy with the numbers to meet jurisdictional requirements. The offsets either count or they do not The amounts over $29,645.35 either count or they do not. Manipulating the jurisdiction ($30,000 limit based on the type of Complaint) is procedural prejudice. Repeatedly manipulating figures and justifying designations differently is not compliant with the Court Orders for a More Definite Statement, so counsel and the Court know in which Court this case should have been filed. If the offsets were only affirmative defenses and should not be plead, the only reason Plaintiff plead them in the Third Amended Complaint was to manipulate jurisdiction as to the amount of $3,000+ without offsets, so Plaintiff did not comply and intentionally toyed with the numbers. Only after the Court excluded any items other than the roof did Plaintiff allege the $29,645.35 figure and argued at the December 14, 2023 hearing that it should not have to include the offset, again manipulating the figures as to how it was safely under the limit after the Court sanctions.

Plaintiff's counsel's argument that they repeatedly and voluntarily complied by orders by filing amended complaints is misplaced. Plaintiff objected to the necessity of amending its pleadings in their responses to the Motions to Dismiss. The Second Amended Complaint and those thereafter were filed only after contesting hearings on the matters were held, where failure to file an amended complaint would have resulted in dismissal. Plaintiff's counsel affirmatively and repeatedly argued that they did not need to plead anything with specificity, despite this Court's orders specifically requiring them to do so. Again, the explanation for non-compliance has been, simply put, that Plaintiff did not believe they should have to comply, so they did not

Plaintiff's ongoing, misrepresentative and willful non-compliance and subversion of court orders warrants dismissal of this case with prejudice based upon the *Kozel* factors.

2) Whether the attorney has been previously sanctioned;

Plaintiff has previously been sanctioned in Court Orders dated January 23, 2023 and July 27, 2023. After the Order requiring Plaintiff to file an Amended Complaint with a More Definite Statement on February 16, 2022, Plaintiff did not comply until April 29, 2022, after Defendant filed a Motion to Enforce Court Order and for an Order to Show Cause. The motion was not heard due to the Amended Complaint being filed. Despite being cautioned and sanctioned on numerous occasions, Plaintiff continues to willfully defy and subvert the Court's orders and argues that Plaintiff should not have to comply in their untimely responses to the motions to dismiss. Then, Plaintiff further seek to argue compliance despite conflicting pleadings. Plaintiff asserts in their declaration on December 15, 2023, that all these mistakes were inadvertent or based on mistaken belief. The Court orders and directives have been clear, and the non-compliance was a willful and deliberate choice. Simple assertions of negligence or misunderstandings after multiple allowances for amendments and corrections, seek to abuse the system that would allow the Court to grant leave to amend. Counsel claims an inadvertent error in calculation despite repeated probing requests from the Court in the July, 2023, hearing wherein Plaintiff adamantly and affirmatively stated the amounts were solely for the roof; plaintiff stood by this assertion despite the Court inquiring about objects on the purported estimate specifically being for items that were not the roof. In fact, Plaintiff still argues in their December 15, 2023 Brief (page 6) that they believed the initial Order for a More Definite Statement was wrongly decided, so they attempted to comply "without providing more information than was absolutely necessary;" Plaintiff knew exactly what they were doing by continuing this course with each pleading, then arguing it was a mistake. Sanctions have not effectively alleviated the willful non-compliance and disregard for court orders and directives. Plaintiff continues to make any convenient assertion to prevail on motions, and claims it was an accident.

3) Whether the client was personally involved in the act of disobedience;

While there is not sufficient information in this case to determine whether Plaintiff, the client, was personally involved in the disobedience, this is just one of the factors to be weighed and does not preclude dismissal as the appropriate sanction. *See Ham v. Dunmire,* 891 So. 2d 492 at 497-98. In *Ham,* the Supreme Court of Florida noted that several appellate courts had interpreted *Kozel* as requiring a litigant's personal involvement to justify dismissal. *Id.* at 496. The state's highest court clarified that *Kozel* sanctions do *not* require misconduct on the part of the litigant himself or herself a prerequisite for dismissal:

> We reiterate that the interests of justice in this state will not tolerate the imposition of sanctions that punish litigants too harshly for the failures of counsel. We nonetheless maintain that the litigant's involvement in discovery violations or other misconduct is not the exclusive factor but is just one of the factors to be weighed in assessing whether dismissal is the appropriate sanction. Indeed, the fact that the Kozel Court articulated six factors to weigh in the sanction determination, including but not limited to the litigant's misconduct, belies the conclusion that litigant malfeasance is the exclusive and deciding factor. **The text of the *Kozel* decision does not indicate that litigant involvement should have a totally preemptive position over the other five factors, and such was not this Court's intent. Although extremely important, it cannot be the sole factor if we are to properly administer a smooth flowing system to resolve disputes.**
>
> To the contrary, this Court has long recognized the existence of circumstances where it may be appropriate to dismiss a litigant's action based upon an attorney's neglect. *See Beasley v. Girten,* 61 So. 2d 179, 181 (Fla. 1952); *see also Johnson v. Landmark First Nat'l Bank,* 415 So. 2d 161 (Fla. 4th DCA 1982). In *Beasley,* this Court recognized that the interests of justice may support a dismissal with prejudice for a "persistent refusal" to comply with court orders. *See Beasley,* 61 So. 2d at 181; *see also Johnson,* 415 So. 2d at 162 (affirming an order dismissing an action resulting from the plaintiffs attorney's failure to appear at various hearings and to comply with multiple trial court orders). **Precluding dismissal in those cases with extensive misbehavior even where the client is not involved in the misconduct would fail to recognize the principles of agency underlying attorney-client relationships, and may not serve the goal and public interest of an orderly flow of cases through the judicial process.** While not at all optimal, a party who is subject to a dismissal or default judgment due to the actions of counsel would have some recourse in the form of a legal malpractice claim against his or her attorney, but such only produces a multiplication of litigation and is not an acceptable alternative. **Therefore, because we hold that there may be circumstances involving such misbehavior by counsel in which dismissal is appropriate even absent the litigant's involvement in an attorney's misconduct, we must reject [the client's] contention that her lack of personal involvement in the discovery infractions at issue alone precludes a dismissal of her personal injury action.**

Id. at 497-98 (emphases added).

For instance, Judge Frank of the Second Judicial Circuit in *Louis Miller v. Florida Trails, Inc.,* 31 Fla. L. Weekly Supp. 111a, Case No. 22-CA-785 (Fla. 2d Cir. Ct June 5, 2023) imposed *Kozel* sanctions, despite noting the court had no knowledge as to whether the party was personally involved in the dilatory conduct. The court examined the third *Kozel* factor:

> Here we have no answer because the parties presented no evidence, or even information, in this regard. We just do not know if the defendant driver or the defendant company's corporate representatives engaged in the dilatory and obstructive conduct or whether it was exclusively the call and decisions of the attorneys. We do know, however, that this factor is not a mandatory element of the criteria. It is but one of the several factors that must be considered. Although *Kozel* notes that a party should not be unduly punished for the acts of her attorney, the party's (client's) active involvement, ". . .cannot be the sole factor if we are to properly administer a smooth flowing system to resolve disputes." *Ham v. Dunmire,* 891 So.2d 492, 497 (Fla. 2004) [30 Fla. L. Weekly S6a].

Louis Miller v. Florida Trails, Inc., 31 Fla. L. Weekly Supp. 111a, Case No. 22-CA-785 (Fla. 2d Cir. Ct June 5, 2023).

In consideration of the Supreme Court's decision *Ham v. Dunmire,* this Court finds that it is not dispositive under *Kozel* as to whether Apex Roofing and Restoration LLC was personally involved or not in the dilatory conduct in this case. Indeed, Florida courts have cautioned that "clients should be warned that they cannot escape total responsi-

bility for their counsel's actions, whether intentional or negligent" *Rohlwing,* 884 So. 2d at 406; *cf. Rose v. Fiedler,* 855 So. 2d 122, 129-30 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1772a] (Warner, J., concurring specially) (warning that a client cannot claim ignorance and then receive another trial when the client allows counsel to obstruct and obfuscate the proceedings for over three years; the client must take responsibility to inform herself of her affairs; if the client suffers as a result of counsel's egregious behavior, it is because she chose to hire that counsel and then remain uninformed and uninterested in the manner counsel represented her). The Court notes this matter is two and one-half (2 ½) years old of ongoing litigation that has yet to get beyond the initial Motion to Dismiss stage, with amended pleadings, filings, and supplements. It is hard to contemplate how the client is not aware of the multitude of orders and admonishments in this case. The Court cannot speculate as to the precise level of involvement with wrong-doing, but Plaintiff has obstructed and obfuscated the proceedings to a contumacious degree that would require them to actively ignore or feign ignorance to the status of their case.

4) Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;

There is no question that Plaintiff's actions have unfairly prejudiced Defendant through undue burden and expense, and significant delay. This case was initiated two-and-a-half years ago, in June 2021, and is still in its procedural infancy due to Plaintiff's willful failure to comply with this Court's orders. Plaintiff has now filed its Fourth Amended Complaint, which remains in defiance of this Court's repeated instructions. This matter is well outside the dates and deadlines set by the Case Management Order. Furthermore, Defendant has had to file multiple motions to effectively enforce compliance with court orders. Critical information to the claim remains unclear even at this juncture, such as the specific jurisdictional amount at issue and the alleged damages. The Court does not agree with Plaintiff's contention that Defendant was an equal cause of the delay. Although Defendant sought a Motion to Dismiss on grounds that had previously been ruled on, Defendant did so based on allegations and assertions from Plaintiff changing again, filed in conjunction with additional grounds. The Court disagrees with Defendant that the changes amounted to substantive changes on the merits of the AOB challenges but does not find Defendant completely disregarded the Court's order. The hearing would still have been held due to new/additional assertions of willful non-compliance and misrepresentations.

5) Whether the attorney offered reasonable justification for noncompliance; and

As described by this Court in its July 27, 2023 and December 8, 2023 Orders, Plaintiff offers no reasonable justification for its repeated noncompliance with the court orders other than willful failure to comply. For instance, Plaintiff essentially argued that its pleadings and attached Assignment of Benefits and Estimate were good enough, despite this Court's direct findings in its previous orders that they were not. Plaintiff's explanations for non-compliance have been that they did not comply, that they did not believe they had to comply, or various inchoatives of said non-compliance being accidental—none of which comport with each other.

6) Whether the delay created significant problems of judicial administration.

Plaintiff's delay has undoubtably caused significant problems of judicial administration. This Court has had to file numerous orders to force Plaintiff to comply with Florida law, the Rules of Civil Procedure and of Judicial Administration and rules of this court. Despite this Court's protracted efforts, Plaintiff still refuses to follow basic instructions and continues to waste this Court's time and judicial resources.

As of late, Plaintiff's Fourth Amended Complaint continues to toy with the amount in controversy to meet jurisdictional requirements. Manipulating the jurisdictional requirements (now asserting the amount is over $29,645.35, which is just under the $30,000.00 limit based upon the type of complaint filed) is procedural prejudice. Repeatedly manipulating figures and justifying designations differently is noncompliance with previous orders for more definite statement, and continues to leave Defendant and this Court in the dark as to what is owed and in what court this action should be filed. There were multiple time-consuming hearings on the repeated motions, extensive research outside of the hearings, correspondence, and coordination as well as order drafting.

As was enunciated by another trial court in our neighboring Second Judicial Circuit based on this factor of *Kozel*:

> The action and inaction of defendants has caused significant problems of judicial administration. The Court has devoted an enormous amount of time and energy to the matters of defendants' noncompliance—two exhausting hearings, a case management conference, an extended pretrial conference, a mountain of motions, responses, and memoranda, extensive research and order drafting, emails and correspondence. All of this did not occur in a vacuum. Attention that should have gone to other cases pending before the Court was suctioned off and re-directed to this case.
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> *Louis Miller v. Florida Trails, Inc.,* 31 Fla. L. Weekly Supp. 111a, Case No. 22-CA-785 (Fla. 2d Cir. Ct June 5, 2023).

Plaintiff does accurately state there was a long delay between when Defendant's Motion to Dismiss the Amended Complaint was filed in May of 2022 and the hearing was held January 18, 2023. This was addressed briefly at the hearing. In May, 2022, Judge Broderson, who had been the presiding judge, left the judicial division. In the interim, various senior and substitute judges presided over the division until filled in August, 2022. It is unclear what efforts were made to set this hearing, but a Notice of Hearing on the Motion was filed in September, 2022, after coordination with parties. The first mutually available date was January. Plaintiff did not file a response until January 16, 2023, where it, again, claimed an inadvertent oversight in its failure to attach crucial documents to their rushed Second Amended Complaint. Plaintiff managed to assert entirely new allegations and grounds for relief, while not addressing the additional information required by court order, but asserts mistake. Plaintiff had no explanation as to why, given the delay Plaintiff now asserts was far too lengthy, they did not seek to supplement the pleadings or file this additional information (81 pages in the response) prior to two days before the hearing.

II. DISMISSAL WITH PREJUDICE IS WARRANTED BASED ON OTHER FINDINGS OF LAW OUTSIDE OF THE *KOZEL* FACTORS.

Plaintiff has failed on five occasions to sufficiently state a cause of action for which relief may be granted. Plaintiff is unwilling to amend its pleadings to comply with the orders to provide a more definite statement, despite claiming each time they would do so, because they argue they should have filed a Motion for Reconsideration almost two years ago that they neglected. The Court agrees with Plaintiff that a motion would have been the better course over repeatedly and intentionally subverting the Court's Orders to comply as little as possible based on their disagreement with the ruling, then seeking to argue it did comply and sought to do so every time. These arguments are contradictory and in bad faith. Plaintiff has abused its privilege to amend.

Florida Rule of Civil Procedure 1.190(a) requires that leave to amend be freely given unless a party has abused the privilege to amend. *Fla. Nat'l Org. for Women, Inc. v. State,* 832 So. 2d 911, 915

(Fla. 1st DCA 2002) [28 Fla. L. Weekly D21a] (holding that the trial court should grant leave to amend, rather than dismiss a complaint with prejudice, unless a party has abused the privilege to amend, an amendment would prejudice the opposing party, or the complaint is clearly not amendable; this holds true even if an amended complaint fails to state a cause of action).

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. *Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank,* 592 So. 2d 302, 305 (Fla. 1st DCA 1991); *see also Tuten v. Fariborzian,* 84 So. 3d 1063, 1069 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D144a] ("Although leave of the court shall be freely given when justice requires, the court need not allow an amendment that would be futile.").

"Whether granting [a] proposed amendment would prejudice the opposing party is analyzed primarily in the context of the opposing party's ability to prepare for the new allegations or defenses prior to trial." *Progressive Select Ins. Co. v. Imaging Ctr. of W. Palm Beach,* 356 So. 3d 842, 845 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D512b] (citing *Morgan v. Bank of N.Y. Mellon,* 200 So. 3d 792, 795 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2157a]). A proposed amendment is futile if it is insufficiently pled or is "insufficient as a matter of law." *Quality Roof Servs. v. Intervest Nat'l Bank,* 21 So. 3d 883, 885 [34 Fla. L. Weekly D2205d] (citing *Thompson v. Bank of N.Y.,* 862 So. 2d 768, 770 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2536d]); *Burger King Corp. v. Weaver,* 169 F.3d 1310, 1320 (11th Cir. 1999); *Cason v. Fla. Parole Comm'n,* 819 So. 2d 1012, 1013 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1538a]; *Fields v. Klein,* 946 So. 2d 119, 121 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D200a].

"Where a trial court grants a motion to dismiss with prejudice based on too many attempts to plead a cognizable complaint, we review such dismissal for abuse of discretion." *Griffin v. City of Sweetwater Police Dep't,* 319 So. 3d 89, 92 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D605a] (citing *Kohn v. City of Miami Beach,* 611 So. 2d 538, 539 (Fla. 3d DCA 1992)). As noted by the Third District in *Kapitanov v. Spinnaker Bay at the Waterways Condo. Ass'n,* 349 So. 3d 538, 538-39 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D2170c], historically, the court has approved dismissal with prejudice when more than three attempts have been made to properly state a claim:

> While there is no magical number of amendments which are allowed, we have previously observed that with amendments beyond the third attempt, dismissal with prejudice is generally not an abuse of discretion. There is simply a point in litigation when defendants are entitled to be relieved from the time, effort, energy, and expense of defending themselves against seemingly vexatious claims.

Kohn, 611 So. 2d at 539 (citations omitted). *See also Hickman v. Barclay's Int'l Realty, Inc.,* 5 So. 3d 804, 807 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D680a] ("[T]hree attempts to amend the complaint are enough."); *Turkali v. City of Safety Harbor,* 93 So. 3d 493, 495 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1755b] ("Since this was his third amended complaint and was essentially the same as his second amended complaint, the trial court was within its discretion to dismiss with prejudice."); *Bradley v. Trespalacios,* 353 So. 3d 1282, 1282 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D151b] (ruling trial court did not abuse its discretion in denying plaintiff's motion for rehearing that sought leave to file a proposed third amended complaint which failed to state a cause of action).

The trial judge's conclusion to permit or refuse amendment to pleadings will not be disturbed on appeal in absence of some demonstration that he has abused his discretion. *Versen,* 347 So. 2d 1047, 1050 (Fla. 4th DCA 1977) (citing *Houston Texas Gas & Oil Corporation v. Hoeffner,* 132 So. 2d 38 (Fla. 2d DCA 1961); *see Kohn,* 611 So. 2d at 539 (explaining that "as an action progresses, the privilege of amendment progressively decreases to the point that the trial judge does not abuse his discretion in dismissing with prejudice").

Furthermore, the liberality for amending pleadings is not absolute and gradually diminishes as the case progresses to trial. *Versen,* 347 So. 2d 1047. "[I]n addition to the desirability of allowing amendments to pleadings so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached." *Jain,* 322 So. 3d at 1206 (citing *Vella v. Salaues,* 290 So. 3d 946, 949 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2553a].

Plaintiff's Fourth Amended Complaint is insufficient as a matter of law and dismissal with prejudice is warranted considered the unique procedural history and facts of this case. Florida Rule of Civil Procedure 1.110(b) requires a litigant to provide a short and plain statement of the ultimate facts justifying relief, and to provide a demand for judgment for the relief sought. "*At the outset of a suit,* litigants must state their pleadings with sufficient particularity for a defense to be prepared." *Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.,* 915 So. 2d 220, 222 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2509a] (quoting *Horowitz v. Laske,* 855 So.2d 169,173 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2052b]; *see also Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So.2d 561, 563 (Fla. 1988)("[L]itigants, at the outset of a suit, *must be compelled* to state their pleadings with sufficient particularity for a defense to be prepared.").

The purpose of a complaint is to advise the defendant of the cause of action. The Complainant must "plead a factual matter *sufficient to apprise his adversary of what he is called upon to answer* so that the court may, upon proper challenge, determine its legal effect." *Messana v. Maule Indus.,* 50 So. 2d 874, 876 (Fla. 1951) (emphasis added). *See Royal Phosphate Co. v. Van Ness,* 43 So. 916 (Fla. 1907) (a cause of action must allege distinctly every fact that is essential to the plaintiff's right of action and *must apprise defendant of the nature and extent of the demand*) (emphasis added); *Barrett v. City of Margate,* 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2398a] ("The complaint must set out the elements and the facts that support them so that the court and *the defendant can clearly determine what is being alleged.*") (emphasis added).

Florida is a fact-pleading jurisdiction. *Continental Baking Co. v. Vincent,* 634 So. 2d 242, 244 (Fla. 5th DCA 1994); *see also Deloitte & Touche v. Gencor Indus., Inc.,* 929 So. 2d 678, 681 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1401a] ("As we wearily continue to point out, Florida is a fact-pleading jurisdiction, not a notice-pleading jurisdiction."). "In order to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Louie's Oyster, Inc.,* 915 So. 2d at 222. Pleadings must contain ultimate facts supporting *each element* of the cause of action. *Clark v. Boeing Co.,* 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (citation omitted). Mere conclusions are insufficient. *Id.* at 1220 (citing *Maiden v. Carter,* 234 So. 2d 168 (Fla. 1st DCA 1970) ("It is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted.").

"Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." *Continental Baking Co.,* 634 So. 2d at 244, (quoting *Horowitz,* 855

So. 2d at 172-73). "The quality of pleading that is acceptable in federal court and which will routinely survive a motion to dismiss for failure to state a claim upon which relief may be granted will commonly *not* approach the minimum pleading threshold required in our state courts." *Continental Baking Co.,* 634 So. 2d at 244; *see also Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.,* 915 So. 2d 220, 221-22 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2509a] (quoting *Ranger Constr. v. Martin Cos.,* 881 So.2d 677, 680 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1977a] ("Unlike the pleading requirements in the federal courts where notice pleading is the prevailing standard, the Florida Rules of Civil Procedure require fact pleading.")).

"Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort" *Continental Baking Co.,* 634 So. 2d at 244, (quoting *Horowitz,* 855 So. 2d at 172-73). "As a general rule the plaintiff may not be permitted to cure the defect of non-existence of a cause of action when suit was begun, by amendment of his pleadings to cover subsequently accruing rights." *Orlando Sports Stadium, Inc. v. Sentinel Star Co.,* 316 So.2d 607, 610 (Fla. 4th DCA 1975).

A motion to dismiss tests the legal sufficiency of the claims being made and not the resolution of any factual disputes. However, "there is no obligation to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Rockledge HMA, LLC v. Lawley,* 2020 Fla. App. LEXIS 7486 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1282b]. Allowing another amendment to the complaint is futile and unduly prejudicial to Defendant. Plaintiff clearly ignores court orders and directives that it does not like, refuses or fails to correct the inefficiencies and argues whatever suits them at the time to prevail on any challenges. In fact, Plaintiff reverted to improperly naming Defendant after having to previously correct the same mistake. The privilege to amend has been abused by Plaintiff. Therefore, dismissal with prejudice is proper.

Accordingly, it is **ORDERED and ADJUDGED** that an Order Dismissing this case with prejudice is hereby **ENTERED**. Defendant shall go hence without delay. The Court is **GRANTING** sanctions in accordance with this Order of Dismissal, as well as the Order filed on December 8, 2023.

* * *

Limitation of actions—Contracts—Quasi-contracts—Open account—Unjust enrichment—Action for unpaid anesthesia bill—Claim for open account accrued on dates services were provided where defendant was uninsured and there was no agreement to bill entity other than defendant—Claim for unjust enrichment accrued on dates benefit of services was conferred—Action filed more than four years after accrual of claims is barred by statute of limitations—Motion to vacate final judgment entering summary disposition in favor of defendant, based on argument that counsel for medical provider was unprepared to provide argument in opposition to defendant's motion for summary disposition at hearing on motion, is denied—Provider was aware of statute of limitations issue that was basis for motion for over a year, and pattern of inaction and oversight due to negligence is not excusable neglect

NORTH FLORIDA ANESTHESIA CONSULTANTS, Plaintiff, v. SARAH HARDIN, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2021-SC-28169. September 21, 2023. Order on Motion to Vacate and Rehear February 12, 2024. Mose L. Floyd, Judge. Counsel: Evan Kidd, Consuegra & Duffy P.L.L.C., Tampa, for Plaintiff. Michael Pelkowski, Jacksonville Area Legal Aid, Inc., Jacksonville, for Defendant.

ORDER ON MOTION FOR SUMMARY DISPOSITION

THIS CAUSE came before the Court on the Plaintiff's Motion for Summary Disposition and the Defendant's Motion For Summary Disposition at a hearing on September 18, 2023. The Court finds that the Plaintiff failed to meet its burden of showing entitlement to summary disposition and failed to raise any opposition to Defendant's Motion for Summary Disposition at the hearing.

The Court further finds that the Defendant's Motion for Summary Disposition is well taken. The Plaintiff's claims for unjust enrichment and open account for alleged unpaid anesthesia services began to accrue at the time of service which occurred on August 21, 2017 and September 21, 2017 respectively. Pursuant to Fla. Stat. 95.11(3), the statute of limitations for each count is four years. The instant action was filed on September 24, 2021, which is more than four years from the accrual of the causes of action. Therefore, the Plaintiff's claims are barred by the statute of limitations.

It is, therefore, ORDERED:

1. That the Plaintiff's claims in this action are hereby DISMISSED with PREJUDICE.

DONE and ORDERED this Thursday, September 21, 2023.

ORDER ON PLAINTIFF'S VERIFIED MOTION TO VACATE FINAL JUDGMENT AND TO REHEAR THE ISSUES PRESENTED IN PLAINTIFF AND DEFENDANT'S MOTIONS FOR SUMMARY DISPOSITION

THIS CAUSE came before the Court on the Plaintiff's Verified Motion to Vacate Final Judgment and to Rehear the Issues Presented in Plaintiff and Defendant's Motions for Summary Disposition. A hearing was held on December 14, 2023 and the Court announced it's ruling on January 11, 2024.

The Plaintiff seeks to vacate the Court's Order on Motion for Summary Disposition entered on September 21, 2023 on the grounds of excusable neglect because the counsel present at the hearing on summary disposition was unprepared to provide any argument in opposition to Defendants Motion for Summary Disposition. The Court finds that the Plaintiff engaged in a pattern of neglect in this case that goes beyond the excusable neglect, mistake, fraud, or any other reason contemplated by Fla. Sm. Claims Rule 7.190(b).

The Plaintiff was notified of Defendants intent to raise a statute of limitations argument via email in January of 2022, over a year and a half prior to the statute of limitations issue being argued. The Defendant served the Plaintiff with discovery relevant to the statute of limitations issue in February of 2022. The Plaintiff failed to produce the "Consent Form" and other documents responsive to Defendant's discovery requests that Plaintiff produced for the first time along with its Motion to Vacate. Plaintiff then attempted to introduce additional new documents after the hearing on the motion to vacate and only moments before the Court's pronouncement of its ruling. These documents were relevant to Defendant's statute of limitations argument and the delayed production prevented the Defendant from addressing them. No adequate excuse was given for the failure to produce these documents timely, nor the prejudice caused by Plaintiff's withholding the same. The Court finds that the bills provided on January 11, 2023 are untimely.

The Plaintiff was further made aware of the Defendant's statute of limitations argument via Defendants Motion for Summary Disposition filed on August 18, 2023. The Plaintiff's sole claim of neglect is that the counsel who was present at the summary disposition hearing was unprepared. This pattern of inaction and oversight due to negligence is acknowledged, but not considered excusable in nature, nor is it due to mistake, or inadvertence, newly discovered evidence,

or fraud; therefore, this motion to vacate based on mistake or excusable neglect is denied.

As to the merits of Plaintiff's arguments that its claims are not barred by the statute of limitations, the Court finds the Plaintiff's arguments unpersuasive. The relevant anesthesia services were performed on August 21, 2017 and September 21, 2017. At the time of services, the Defendant was not covered by insurance. Plaintiff claims that the Defendant desired to have her services covered by a charitable HOPE program and this delayed the billing. However, the evidence presented showed that the HOPE program specifically did not cover anesthesia services and that Plaintiff was aware that its services were not covered by the HOPE program. Therefore, there was no reason to delay billing.

For an action based on open account, the cause of action accrues and the Statute of Limitations begins to run immediately upon services unless the parties have agreed to some other form of billing. Since there was no other agreement in place and no other person or entity to be billed, the Statute of Limitations for open account began to run on the dates of service for each: August 21, 2017 and September 21, 2017 respectively.

Similarly, the action for unjust enrichment accrued and the Statute of Limitations began to run when the benefit was conferred (the rendering of anesthesia services) on August 21, 2017 and September 21, 2017. See *Flatirons Bank v. Alan W. Steinberg Ltd. P'ship*, 233 So. 3d 1207, 1213 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2560b]. The instant action was filed on September 24, 2021, more than four years after the causes of action began to accrue. Therefore, the Plaintiff's claims based on open account or unjust enrichment are barred by the Statute of Limitations.

It is, therefore, ORDERED:

That the Plaintiff's Verified Motion to Vacate Final Judgment and to Rehear the Issues Presented in Plaintiff and Defendant's Motions for Summary Disposition is hereby DENIED.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Medicare budget neutrality adjustment is not applicable when determining reimbursement amounts under Florida PIP law

PROFESSIONAL RADIOLOGY ASSOCIATES, P.A., d/b/a ADVANCED IMAGING PARTNERS, a/a/o Angeliz Torres, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 35420 COCI. Division 84. March 19, 2024. Rehearing Denied April 4, 2024. Robert A. Sanders, Jr., Judge. Counsel: Keith Petrochko, DeLand, for Plaintiff. Michael Rosenberg, Cole, Scott & Kissane, P.A., Plantation; and Daniel Flood, Law Office of Alexa C. Salem, Orlando, for Defendant.

ORDER ON PLAINTIFF'S AND DEFENDANT'S COMPETING MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on March 7, 2024, upon the Parties' competing Motions for Final Summary Judgment and the Court having considered said Motions, having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

SUMMARY JUDGMENT STANDARD

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

The moving party bears the initial responsibility of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Starr Indem. & Liab. Co. v. Rodrigues,* 495 F. Supp. 3d at 1279 (S.D. Fla. 2020). The court must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts about the facts in favor of the nonmoving party. *Id.*

Moreover, Rule 1.510(f), in line with its federal counterpart, allows for the granting of summary judgment for a nonmovant; the granting of the motion on grounds not raised by a party; or for the Court to consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

FACTUAL BACKGOUND

The underlying facts of this case are not in dispute. The Defendant issued a policy of insurance that provided Personal Injury Protection ("PIP") benefits to the Defendant's insured, the Assignor, Angeliz Torres, for a motor vehicle accident. Subsequent to the accident, Ms. Torres received diagnostic services from the Plaintiff, which were billed to the Defendant under CPT 72141 to be reimbursed pursuant to the PIP insurance policy. Defendant, throughout its motion, pleadings, and oral argument makes clear that payments for said charge had been made pursuant to the policy of insurance at the 2007 Limiting Charge of the Medicare Physicians Fee Schedule. The Limiting Charge is calculated by multiplying the Medicare Physicians Fee Schedule by 1.0925.

PROCEDURAL BACKGROUND

1. The Defendant moved for summary judgment advancing the position that it is entitled to Final Summary Judgment because it a) properly elected the Medicare Part B Fee Schedule method of PIP benefit reimbursement, and b) properly paid the subject charges.

2. Plaintiff has stipulated that, for purposes of the motions, the Medicare Part B Fee Schedule method of PIP benefit reimbursement had been properly elected by the Defendant.

3. Plaintiff moved for summary judgment alleging that the Defendant underpaid the subject charge, as, according to the Plaintiff, 80% of 200% of the limiting charge in the applicable locality for CPT 72141 is $889.87 based upon the Medicare RVU formula, while Defendant reimbursed $879.28, which results in a discrepancy of $10.59.

4. Defendant's supporting affidavit was not filed contemporaneously with its amended motion for summary judgment. Additionally, the affidavit failed to meet the business records exception to the hearsay rule, contained hearsay statements without exception, and offered inappropriate lay witness testimony. In fact, the supporting affidavit does not mention that Defendant availed itself of the Budget Neutrality Adjustment (BNA). As such, the Court, finds the affidavit does not support the legal conclusion that Defendant "properly paid" the subject charge.

FINDINGS OF FACT

1. As Plaintiff has stipulated to Defendant's election of the Fee Schedule Method of PIP benefit reimbursement, and the simple election does not in and of itself necessitate the issuing of summary judgment in any parties' favor, the same will be deemed moot and not be discussed by this Court further, other than to say that the policy does not stop at an election. Defendant's policy includes the use of Medicare coding policies and payment methodologies of the Federal Centers for Medicare and Medicare Services as long as that methodology does not constitute a utilization limit. This expansion is supported by *Kingsway Amigo Insurance Company v. Ocean Health*, 63 So. 3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] which specified that "an insurance company is not precluded from offering greater coverage than that required by statute. . . policy provisions requiring payment in accordance with the PIP statute should not be construed to limit coverage to the minimum amount authorized by the PIP statute

. . . when the insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control."

2. The summary evidence regarding Defendant's payments appears in the form of a PIP payment log and admissions of the parties—all of which describe payment as having been made pursuant to the policy at the 2007 Limiting Charge rate. Therefore, as the pleadings make clear that the Defendant utilized the Limiting Charge in calculating its payment, which it deems a "proper payment," the *applicability* of the Limiting Charge is deemed moot, and not discussed further.

3. As discussed by the Plaintiff, Defendant's documents make numerous references to issuing "proper" reimbursement pursuant to its policy of insurance at the 2007 Limiting Charge rate. The Limiting Charge is a payment methodology not constituting a utilization limit, which Defendant's policy elects to use.

4. *Sunrise Chiropractic and Rehabilitation Center a/a/o Bichenet Louis v. Security National Insurance Company,* 321 So.3d 786 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a] mandates that the reimbursement values for services under Physicians Fee Schedule "are calculated by multiplying (1) the relative value of a service; (2) the conversion factor for the particular year; and (3) the geographic adjustment factor applicable to the locality in which the service was provided." The decision of one district court of appeal is binding throughout Florida in the absence of inter-district conflict or contrary supreme court precedent. The circuit court must obey controlling precedent from another district even if it disagrees with the precedent. See *Geico Gen. Ins. Co. v. Tarpon Total Health* Care, 86 So. 3d 585, 585 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1027a]. There is no circuit split, therefore the *Sunrise Chiropractic* decision is binding upon this Court, and the *Sunrise Chiropractic* formula does not include a Budget Neutrality Adjuster ("BNA").

5. Plaintiff correctly argues that Defendant's prior reimbursement incorrectly incorporated a BNA, which resulted in a short payment of $10.59. The same is discussed further below.

ANALYSIS

Defendant improperly included in its calculation a BNA that reduced the reimbursement for the services rendered, and which only applied to reimbursements by Medicare to providers treating Medicare patients in 2007.

The Court adopts the reasoning in *Sunrise Chiropractic.* There, the Fourth District rejected an insurer's argument that it was permitted to use a similar budget neutrality adjustment because it had been calculated into the CMS payment files. The insurer purported to limit reimbursement to a chiropractor based on the schedule of maximum charges but took an additional 2% reduction from the amount reimbursed to the chiropractor for chiropractic manipulation and argued that its payment was proper because it paid 80% of 200% of the amount Medicare pays for the same service.

The Fourth District noted that the propriety of the 2% reduction was addressed in federal district court and adopted the analysis and decision of Judge William P. Dimitrouleas in *Coastal Wellness Centers., Inc. v. Progressive Am. Ins. Co.,* 309 F. Supp. 3d 1216, 1221 (S.D. Fla. 2018), and determined that the insurer could not avail itself of the 2% budget neutrality adjustment. *Id.* Quoting *Coastal Wellness,* the Fourth District noted:

> The reimbursement value for services under PPFS-MPB are calculated by multiplying (1) the relative value of a service; (2) the conversion factor for the particular year; and (3) the geographic adjustment factor applicable to the locality in which the service was provided. See 42 U.S.C. § 1395w-4(6)(1). Therefore, using simple arithmetic (addition and multiplication), the reimbursement value for any service, in any part of the United States, for any given year can easily be ascertained by the Defendant using Medicare Part B Physicians Fee Schedule. The tables of values for the cost factors published each year in the annual Medicare Physicians Fee Schedule Final Rule and are readily available and easily accessible on the Centers for Medicare and Medicaid ("CMS") website.

Id.

The Department of Health and Human Services ("HHS") made it clear that the 2% reduction was only to be applied to Medicare claims:

> Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs.

74 Fed. Reg. 61927; see also 78 Fed. Reg. 74790. The Fourth District concluded as follows:

> The Medicare Physician Fee Schedule ("PFS") does not include the two percent (2%) reduction for CPT codes 98940, 98941 or 98942. To the extent that Defendant relied upon the CMS Payment Files to underpay chiropractic claims by 2%, such practice was improper. Additionally, it runs contrary to the stated point of applying the reduction to the payment files rather than the RVU's, so as to preserve the integrity of the RVU's as they are relied upon by many private payers, such as Defendant.

Id. at 789-90 (quoting *Coastal Wellness,* 309 F. Supp. 3d at 1219-21. The exact same analysis applies here.

The distinction between the actual Medicare Physician Fee Schedule and the budget neutrality payment amounts to Medicare Beneficiaries was further made clear in the Federal Register final rule published on December 1, 2006, and in effect March 2007:

> To calculate the payment for every physician service, the components of the fee schedule (physician work, PE, and malpractice RVUs) are adjusted by a geographic practice cost index (GPCI). The GPCIs reflect the relative costs of physician work, PEs, and malpractice insurance in an area compared to the national average costs for each component. Payments are converted to dollar amounts through the application of a CF, which is calculated by the Office of the Actuary and is updated annually for inflation.
>
> The **general formula for calculating the Medicare fee schedule amount** for a given service and fee schedule area can be expressed as: **Payment = [(RVU work** x **GPCI work) + (RVU PE** x **GPCI PE) + (RVU malpractice** x **GPCI malpractice)] x CF.**

71 Fed. Reg. 69629 (the "General Formula"). The General Formula is the formula referenced in *Sunrise Chiropractic* that produces the allowable amount under the participating physicians fee schedule of Medicare Part B as referenced in the Florida PIP statute. This Court is unaware of any conflicting Appellate rulings straying from the general formula found in *Sunrise Chiropractic,* thus it is binding upon this Court, and must be used in the PIP reimbursement context.

Ultimately, budget neutrality adjustments—like the one at issue in *Sunrise Chiropractic* and the one at issue here—were designed to recoup costs borne by the federal government when it exceeds its budget. The substantial similarities between these two budget neutrality adjustments are obvious when the federal government's descriptions of each are compared side-by-side:

2010-2014 BNA	2007 BNA
"Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. Avoiding an adjustment to the RVUs **would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs."** Sunrise Chiropractic, 321 So.3d at 789 (quoting 74 Fed. Reg. 61927)(E.S.).	"CMS is proposing to create a separate budget neutrality adjuster that can be applied just to the work RVUs for Medicare purposes, without changing the number of work RVUs assigned to a particular service. This would **preserve the integrity of the existing work RVU structure, which is often adopted by other payers."** "CMS Announces Proposed Changes to Physician Fee Schedule Methodology" **"We...recognize the Medicare PFS is used by other payors and for other purposes than just Medicare payments. To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will show the RVUs without the BN adjustment applied.** This will serve as a reference for any interested party and should help to minimize any confusion about the unadjusted codes." 71 ed. Reg. 69736 (December 1, 2006)(E.S.)

Here, Defendant improperly began its payment calculation by adding a BNA to the general formula, directly opposed to the ruling in *Sunrise Chiropractic.*

The Court's analysis is in line with, and further supported by, the following cases which have issued rulings on the 2007 BNA issue present in the instant case: *Clermont Radiology LLC., a/a/o Hope Bryant v. Liberty Mutual Fire Insurance Company,* 2021 36429 COCI (Fla. 7th Judicial Circuit, November, 2023, Judge Heidt); *Empire Imaging, Inc., a/a/o Renouce Miralda v. Security National Insurance Company,* COINX22-008735 (Fla. 17th Judicial Circuit, September 2022, Judge Mollica); *University Diagnostic Institute Winter Park, PLLC a/a/o Doris Cobb v. Government Employees Insurance Company,* 30 Fla. L. Weekly Supp. 693a (Fla. 9th Judicial Circuit, January 2023, Judge Bain); *Chiropractic USA of Plantation Inc. v. United Automobile Insurance Company,* COINX21052809 (Fla. 17th Judicial Circuit, December 2022, Judge Mollica); and *Functional Evaluation Testing of Florida v. United Automobile Insurance Company,* CON021020747 (Fla. 17th Judicial Circuit, December 2022, Judge Schiff).

THEREFORE:

1. SUMMARY JUDGMENT is **GRANTED** in favor of the Plaintiff, finding that $10.59 in outstanding benefits shall be paid together with pre/post judgment interest at the statutory rate, for which let execution issue.

2. DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT is hereby **DENIED**.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Budget neutrality adjustment—It was proper for insurer to pay PIP benefits at 2007 non-facility participating price with budget neutrality adjustment

MRI ASSOCIATES OF WINTER HAVEN, LLC, a/a/o Steven Baier, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY A FOREIGN CORPORATION, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2023 32309 COCI. Division 82. May 20, 2024. Katherine H. Miller, Judge. Counsel: Benjamin L. Jones, De Armas Law, Altamonte Springs, for Plaintiff. Amy L. Blake, Mimi L. Smith & Associates, Orlando, for Defendant.

ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT (LIMITING CHARGE/PROPER PAYMENT/BUDGET NEUTRALITY ADJUSTMENT)

THIS CAUSE came before the Court for hearing on March 18, 2024 on Plaintiff's Amended Motion for Final Summary Judgment (Doc. 29), Defendant's Motion for Summary Judgment (Doc. 26), and Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment on Proper Payment (Doc. 32). The Court having reviewed the competing motions and the materials in the Court record, hearing argument by counsel, considering the applicable law, and being fully advised in the premises, finds as follows:

Summary Judgment Standard

Pursuant to Florida Rule of Civil Procedure 1.510(a), "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court views the evidence in a light most favorable to the non-moving party, and a genuine dispute occurs when the evidence would allow a reasonable jury to return a verdict for that party. *See Welch v. CHLN, Inc.,* 357 So. 3d 1277, 1278 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D583d].

Findings of Fact

Steven Baier was an insured of Defendant State Farm Mutual Automobile Insurance Company ("State Farm") with Florida Policy form 9810A. After Mr. Baier was involved in a motor vehicle accident on March 25, 2021, he received medical treatment from Plaintiff MRI Associates of Winter Haven ("MRI Associates"). MRI Associates submitted medical bills to State Farm for dates of service April 12, 2021 and May 18, 2021, with CPT Codes 72141, 72148, 72100 and 72070, seeking $5,780.00.[1]

State Farm approved CPT Code 72141 at $1,099.08; CPT Code 72148 at $1,164.92; CPT code 72100 at $79.88; and CPT code 72070 at $75.22. State Farm presented Plaintiff with an Explanation of Review, outlining the basis for the reimbursements made. Because the subject policy of insurance did not include Medical Payments coverage, State Farm paid MRI Associates 80% of the allowable amount. The Explanation of Review for CPT Codes 72141, 72148, 72100 and 72070 reflected reason code 681 as the basis for payment, which states:

> Our payment for this service has been based upon the applicable policy language and is no more than the amount provided for by the schedule of maximum charges contained in the Florida No-Fault Act, including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifies. The payment for this service is based upon 200% of the 2007 Limiting Charge of Medicare physician fee schedule for the locale in which the services were rendered.

Case Procedure

MRI Associates filed suit to collect alleged unpaid PIP benefits, and the Parties filed several motions for summary judgment, including on September 14, 2023 Defendant's Motion for Summary Judgment (Doc. 26); on November 8, 2023, Plaintiff's Amended Motion for Final Summary Judgment (Doc. 31); and on November 29, 2023, Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment on Proper Payment (Doc. 32).

The Parties basically agree on the formulas for paying the PIP benefits under the State Farm 9810A and 627.736(5)(a)(2) for non-facility limiting charges and non-facility participating prices, but differ on whether to apply a budget neutrality adjustment to the non-facility participating price.

MRI Associates argues that the formula is as follows:

[(RVU Work * GPCI Work) + (RVU PE * GCPI PE) + (RVU Malpractice * GCPI Malpractice)] * CF

State Farm argues that the formula is as follows:

[(Work RVU * 0.8994 *Work GPCI) + (PE RVU * PE GCPI) + MP RVU * MP GCPI)] * CF

The difference in the two formulas is the 0.8994 budget neutrality adjustment in the first parenthetical of the formula. The budget neutrality adjustment comes from Medicare fee schedules each year, and the 2007 adjustment was 0.8994. Using the budget neutrality adjustment, CPT Code 72141 would equal $1,006.02; CPT Code 72148 would equal $1,066.28; CPT code 72100 would equal $73.10; and CPT code 72070 would equal $68.86. Without the budget neutrality adjustment, CPT Code 72141 would equal $1,018.16; CPT Code 72148 would equal $1,077.66; CPT code 72100 would equal $74.62; and CPT code 72070 would equal $70.36.

MRI Associates appears to be arguing that State Farm paid the limiting charge and cannot avail itself of the participating price, but even if it did use the participating price, the budget neutrality adjustment only applies to payments by Medicare to Medicare providers who treat Medicare beneficiaries, and not to Florida PIP insurers. MRI Associates also relies on a case out of the Third District Court of Appeal, *Priority Medical Centers v. Allstate Insurance Company,* 319 So. 3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], and MRI Associates made a textualist argument that a "fee schedule" and "applicable schedule of Medicare" were separate items.

State Farm argues that the Florida Statute 627.736(5)(a)(2) provides that State Farm and other insurers are supposed to rely on Medicare pricing in calculating the applicable PIP Schedule Cap, and they are entitled to use the participating price and make the budget neutrality adjustment. State Farm's argument is supported by cases from the Fourth and Sixth Districts of Appeal. *See Progressive Select Ins. Co. v. In House Diagnostic Servs., Inc.,* 359 So.3d 817 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D860g] (en banc); *Progressive Express Ins. Co. v. SimonMed Imaging,* 363 So. 3d 1196, 1201 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D990a]. State Farm also cites to another Fourth District opinion for the proposition that "neither the PIP statute, nor State Farm's policy, prohibit State Farm from applying the MPPR to reduce the reimbursement to an amount less than the allowable amount of the 2007 Medicare Part B fee." *State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Raton, P.A.,* 322 So. 3d 87, 94 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1210a]

Conclusions of Law

The Fifth District Court of Appeal has not addressed the question of whether a private insurer can use the 2007 non-facility participating price with the budget neutrality adjustment. This Court finds the recent reasoning of the Fourth and Sixth more persuasive than the Third District, and that it is proper for State Farm to pay benefits under its policy at the 2007 non-facility participating price with the budget neutrality adjustment. As State Farm paid more than this price, and indeed appears to have paid more than the non-facility participating price even without the budget neutrality adjustment, Plaintiff has no damages.

Conclusion

It is ORDERED AND ADJUDGED that Defendant's Cross Motion for Summary Judgment is hereby GRANTED in favor of State Farm, and Plaintiff's Amended Motion for Summary Judgment is DENIED.

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[1]MRI Associates also requested reimbursement for CPT Code 72040, which was apparently paid to Plaintiff's satisfaction. This Code is included in Plaintiff's Thirty Day Pre-Suit Demand Letter Pursuant to Fla. Stat. 627.736(10), but at the summary judgment hearing counsel for Plaintiff represented that it is not part of the amount sought in this suit. Defendant raised this issue in relation to its September 14, 2023 Motion for Summary Judgment (Doc. 26), but the Court declines to rule on an amount not sought by Plaintiff.

* * *

Mobile home parks—Eviction—Conditions precedent—Mobile home park failed to satisfy condition precedent to eviction action where park did not provide notice that tenants failed to qualify for residency in park and were required to vacate park within seven days after date of such notice—Furthermore, park's acceptance of rent directly from tenants who were successors to lot tenant created rental agreement between park and tenants—Park's course of conduct in filing eviction action prior to providing any response to tenants' two residency applications violated park's duty of good faith and fair dealings

GRANITE LAMPLIGHTER, LLC, d/b/a LAMPLIGHTER MOBILE HOME COMMUNITY, Plaintiff, v. LOTRICE GLOVER and JARVIS KENEEN DAVIS, Defendants. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2022-CC-000973. Division IV. June 27, 2023. Meshon T. Rawls, Judge. Counsel: Carol S. Grondzik, Lutz, Bobo & Telfair, P.A., Tallahassee, for Plaintiff. Steven R. McNamara, Three Rivers Legal Services, Inc., Gainesville, for Defendants.

FINAL JUDGMENT IN FAVOR OF DEFENDANT DISMISSING PLAINTIFF'S COMPLAINT FOR EVICTION

THIS ACTION came before the Court on Plaintiff's Complaint for Eviction. A first hearing for possession was held on February 16, 2023. Present at the first hearing were Plaintiff's property managers Stacey Gelske and Kista King, Plaintiff's employee Chasity Garcia, Plaintiff's counsel Carol Grondzik, Defendants Lotrice Glover and Jarvis Keneen Davis, and Defendants' counsel Steven McNamara. A second hearing was held on April 12, 2023. Present at the second hearing were Plaintiff's property manager Kista King, Plaintiff's employee Chasity Garcia, Defendants Lotrice Glover and Jarvis Keneen Davis, and Defendants' counsel Steven McNamara. Both sides presented evidence and testimony from witnesses. Upon presiding over the hearing, considering the evidence, testimony, and legal argument present, this Court **FINDS AS FOLLOWS:**

1. This is an action seeking to evict occupants of a mobile home in Lamplighter Mobile Home Community ("LMHC") pursuant to Fla. Stat. § 723.061(1)(e) (providing for eviction of a mobile home occupant for failure to qualify as a tenant).

2. The mobile home occupied by Defendants Lotrice Glover and Jarvis Keneen Davis and their family is located at [Editor's note: Address redacted], Gainesville, Florida 32609. The mobile home is owned by Defendant Lotrice Glover's aunt, who lives in another mobile home in LMHC.

3. Defendant Lotrice Glover testified that she and her family have lived in the mobile home at LMHC since 2018. Defendant's unrebutted testimony was that at all times LMHC management and staff have been aware of their residence at LMHC. In August 2021 property manager Stacey Gelske informed her that she would be required to

submit a Residency Application if she wished to continue living in LMHC.

4. Defendant Lotrice Glover began paying the monthly rent for Lot #40 in her own name beginning in June 2021. Although Plaintiff's property manager Stacey Gelske testified at the first hearing that LMHC never accepted rent from Defendants in their own names, Defendants presented money orders paid for monthly rent from June 2021 through February 2022 that bore Ms. Glover's signature on them. The money orders paid for June 2021 through September 2021, and for February 2022, also contained the signature of Plaintiff's employee Taylor Poole, acknowledging their receipt by Plaintiff. *Defendant's Exhibit 1.*

5. Defendant Lotrice Glover testified that she when she was first informed by LMHC staff in August 2021 that she needed to fill out a Residency Application, she was instructed to simply fill in her name and sign, and that property management staff would take care of the rest. Defendant Lotrice Glover also testified that she never received a response to her first Residency Application submitted in August 2021.

6. On February 18, 2022, Defendants received a "Demand to Vacate Premises" from LMHC. *Defendant's Exhibit 2.* The Demand letter stated that "[y]ou have failed to complete the application process and become approved for residency as required by the rules and regulations of the Community." The Demand letter further stated that "[y]ou must apply and qualify for residency in Lamplighter MHC or you must vacate the home and Community permanently."

7. Upon receiving the Demand letter, Defendant Lotrice Glover testified that upon inquiring at the property manager's office, she was again instructed to fill out a Residency Application. Defendant Lotrice Glover stated that once again she was instructed to simply fill in her name and information and sign the application. Defendant Lotrice Glover did so and submitted her second Residency Application. *Plaintiff's Exhibit 3.*

8. Defendants never received a response to this second Residency Application. Instead, Plaintiff filed its Complaint for Eviction on March 16, 2022.

9. Defendants were then served with the Complaint for Eviction on April 12, 2022. Defendants filed their Answer and Affirmative Defenses on April 19, 2022.

10. Through the assistance of counsel, Defendants submitted a third Residency Application on May 4, 2022. *Plaintiff's Exhibit 4.* In response to a request for documentation of income from Plaintiff's counsel, Defendants supplemented their third Residency Application with an Affidavit of Income and supporting bank statements. *Defendant's Ex. 3.*

11. The Florida Mobile Home Act was "created for the purpose of regulating the factors unique to the relationship between mobile homeowners and mobile home park owners in the circumstances described herein." *Fla. Stat.* § *723.004(1).* In approving the constitutionality of the Florida Mobile Home Act, the Florida Supreme Court stated that "a hybrid type of property relationship exists between the mobile homeowner and the park owner, and that the relationship is not simply one of landowner and tenant. Each has basic property rights which must reciprocate and harmonize." *Stewart v. Green,* 300 So. 2d 889, 892 (Fla. 1974).

12. By filing a Complaint for Eviction without providing any response whatsoever to Defendants' second Residency Application, just as it failed to respond to Defendants' first Residency Application, Plaintiff failed to meet a condition precedent set forth in its Demand letter dated Feb. 18, 2022. Under Florida law, an eviction action cannot be commenced until all conditions precedent are met. *Ferry-Morse Seed Company v. Hitchcock,* 426 So. 2d 958, 961 (Fla. 1983); *Investment and Income Realty v. Bentley,* 480 So. 2d 219, 220 (Fla. 5th DCA 1985). By specifying an action that Defendants were required to undertake *or* they would be required to leave LMHC, Plaintiff created a condition precedent to filing an eviction action. Defendants duly inquired what they should do in response to Plaintiff's Demand letter and were instructed to submit a second Residency Application. However, Plaintiff failed to provide any response, whether of approval or denial, to Defendants' second Residency Application prior to filing the Complaint for Eviction.

13. Fla. Stat. § 723.061(1)(e) provides as follows:

> Failure of the purchaser, prospective tenant, or occupant of a mobile home situated in the mobile home park to be qualified as, and to obtain approval to become, a tenant or occupant of the home, if such approval is required by a properly promulgated rule. If a purchaser or prospective tenant of a mobile home situated in the mobile home park occupies the mobile home before such approval is granted, the mobile homeowner or mobile home tenant must vacate the premises within 7 days *after the date the notice of the failure to be approved for tenancy is delivered.* (Emphasis Added).

14. Plaintiff failed to meet a condition precedent to eviction that it had set forth in its Demand letter. Specifically, after Defendants submitted their second Residency Application, Plaintiff failed to provide notice that Defendants failed to qualify for residency in Lamplighter MHC and that they must vacate the premises within 7 days after the date the notice of the failure to be approved for tenancy was delivered. *See* Fla. Stat. § 723.061(1)(e).

15. Moreover, contrary to property manager Stacey Gelske's testimony at the first hearing, Defendants produced money orders demonstrating that they had paid rent directly in their own names to LMHC from June 2021 through February 2022. Moreover, the money orders for June 2021 through September 2021, and for February 2022, bore the signature of Plaintiff's employee. *Defendant's Exhibit 1.* Plaintiff's acceptance of rent directly from Defendants created a rental agreement between Plaintiff and Defendants. *Island Vista Estates, LLC v. Lauzon,* 24 Fla. L. Weekly Supp. 468a (Lee Cty. Ct. 2016) (acceptance of rent from successor to lot tenant "created a rental agreement between the parties.").

16. Plaintiff's course of conduct was in bad faith, and consequently violated the duty of good faith and fair dealings contained in Fla Stat. § 723.021. *Harris v. Martin Regency,* 576 So. 2d 1294, 1298 (Fla. 1991) (stating that "even if a park owner offered a facially legitimate reason for eviction, the eviction may be voided if the mobile homeowners prove the park owner acted in bad faith."). Plaintiff's filing of an eviction action prior to providing any response to Defendants' first and second Residency Applications was in violation of Plaintiff's duty of good faith and fair dealings contained in Fla Stat. § 723.021.

It therefore **ORDERED AND ADJUDGED**:

1. The Court hereby enters Judgment denying Granite Lamplighter, LLC's Complaint and enters judgment in favor of Lotrice Glover and Jarvis Keneen Davis.

2. Lotrice Glover and Jarvis Keneen Davis are the Prevailing Party in this action. The Court retains jurisdiction to award reasonable costs and attorney's fees to Lotrice Glover and Jarvis Keneen Davis's counsel.

* * *

Landlord-tenant—Public housing—Eviction—Noncompliance with lease—Failure to complete annual recertification—Allowing landlord to evict long-term tenant who had been in substantial compliance with lease would be inequitable and unconscionable where tenant was unable to complete annual recertification of her tenancy because of her incarceration, but tenant was actively working to complete recertification through power of attorney given to her son and emails to landlord

ALACHUA COUNTY HOUSING AUTHORITY, Plaintiff, v. ERICA GRAHAM, Defendant. County Court, 8th Judicial Circuit in and for Alachua County, Civil Division. Case No. 01-2022-CC-004695. Division IV. May 3, 2024. Meshon T. Rawls,

Judge. Counsel: Rhonda E. Stringer, Saxon, Gilmore & Carraway, P.A., Tampa, for Plaintiff. Mikel Bradley, Three Rivers Legal Services, Inc., Gainesville, for Defendant.

FINAL JUDGMENT IN FAVOR OF DEFENDANT DISMISSING PLAINTIFF'S COMPLAINT FOR EVICTION

THIS CAUSE having come before the Court on Plaintiff's Complaint for Eviction. The first hearing for possession was held on November 7, 2023, and the second hearing was held on March 20, 2024. Both sides presented evidence and testimony from witnesses. Upon presiding over the hearing, considering the evidence, testimony, and legal arguments, this Court FINDS:

1. This is an action seeking to evict occupants in possession of the real property owned by Plaintiff pursuant to Fla. Stat. § 83.59 and Title 24, S966.4 of the Code of Federal Regulations.

2. The real property occupied by Defendant, Erica Graham, and her children, is located at [Editor's note: Address redacted], Alachua, Florida 32615.

3. Defendant has possession of the property under a written Dwelling Lease Agreement dated December 7, 2017.

4. Pursuant to the said Dwelling Lease Agreement, Defendant must annually recertify her tenancy.

5. Plaintiff alleges Defendant failed to complete her annual recertification and failed to cure her noncompliance with the Dwelling Lease Agreement.

6. Due to Defendant's alleged failure to cure the noncompliance, Plaintiff brought this action for removal of the Defendant from the real property.

FINDINGS OF FACT

7. Defendant was due to recertify her tenancy at an appointment with Plaintiff on September 6, 2022.

8. Defendant failed to attend the September 6, 2022, appointment due to being incarcerated.

9. The recertification appointment was rescheduled to September 22, 2022. However, Defendant did not attend due to still being incarcerated.

10. Subsequently, Plaintiff served the Defendant with a thirty (30) day curable noncompliance with lease notice on November 4, 2022, notifying the Defendant that her lease would terminate on December 1, 2022, if she did not complete her annual recertification as required by Defendant's dwelling lease agreement. This notice also stated the Defendant has thirty (30) days from the date of the notice to cure or remedy the non-compliance or the lease would be deemed terminated. Thirty days from the date of the notice would have been December 4, 2022 not December 1, 2022.

11. This notice also informed Defendant her new scheduled appointment was November 17, 2022.

12. The Defendant failed to attend the November 17, 2022 due to her continued incarceration, appointment, however, she gave her son power of attorney to act on her behalf.

13. Defendant's son contacted Ebony Harrington ("Harrington"); but he provided an incomplete recertification packet.

14. Harrington subsequently provided Defendant's son with a letter, dated November 30, 2022, that listed all the documents that needed to be completed and returned by November 30, 2022.

15. Defendant testified that upon her release from incarceration on December 5, 2022, she contacted Plaintiff and attempted to comply with any outstanding requirements. It was at this time that Defendant requested a copy of all notices that were sent to her by Plaintiff.

16. Harrington testified that she sent all the previous notices, which included the recertification checklist, to Defendant on December 6, 2022.

17. Defendant testified that she did not get the recertification checklist from Harrington and on December 9, 2022, she sent Plaintiff an email asking for the outstanding requirements.

18. Defendant further testified that Harrington did not respond to her email.

19. Harrington corroborated the fact that she did not respond to Defendant's email. Harrington testified that she received the email and forwarded it to Cathy Scott, the Public Housing Director of the Alachua County Housing Authority.

20. According to the 30-day notice , Defendant had until December 12, 2022, to vacate the property. It appears from Defendant's testimony that she believed she also had until December 12, 2022, to submit all documents required for recertification.

21. The Complaint for Removal of Tenant and Damages was filed on December 16, 2022.

DISCUSSION

22. County courts have jurisdiction to consider equity defenses. *Horatio Enterprises, Inc. v. Rabin*,614 So. 2d 555 (Fla. 3d DCA 1993); *Kugeares v. Casino, Inc.*, 372 So. 2d 1132 (Fla. 2d DCA 1979).

23. A court may refuse to declare forfeiture of a lease when the circumstances would render it unconscionable, inequitable, or unjust. *Miami-Dade County v. Jackson*, 13 Fla. L. Weekly Supp. 1006b (Miami-Dade Cty. Ct. 2006); *Rader v. Prather*, 100 Fla. 591 (Fla. 1930); *Sharpe v. Sentry Drugs, Inc.*, 505 So. 2d 618, 12 Fla. L. Weekly 1027, (Fla. 3d DCA 1987). *Smith v. Winn Dixie Stores, Inc.*, 448 So. 2d 62 (Fla. 3d DCA 1984).

24. Here, this lease is one that has been in existence since December 7, 2017.

25. Pursuant to the lease agreement, the rent is $0, and Defendant has substantially complied with the other obligations under the lease agreement.

26. Granting the fact that Plaintiff acted in accordance with the terms of the lease agreement insofar as notifying Defendant of her noncompliance, Defendant's failure to turn in the required documents under the circumstances amounts to no more than excusable neglect.

27. Furthermore, Defendant was actively working with Plaintiff to comply with the terms of the lease agreement prior to the deadline stated in the November 4, 2022, notice and Plaintiff's initiation of this eviction action.

28. Under the facts of this case, this Court finds that to allow the Plaintiff to evict the Defendant would be inequitable and unconscionable. *See Smith*, 448 So. 2d at 63.

It is therefore **ORDERED** and **ADJUDGED** that the Complaint for Removal of Tenant and Damages, is hereby **DENIED** and Judgment is entered in favor of the Defendant, Erica Graham.

* * *

Criminal law—Driving under influence—Evidence—Medical records—Blood and urine test results—Collection of defendant's blood and urine was not search and seizure where defendant, who had been involved in serious crash, was transported by arresting trooper to hospital for medical clearance prior to being admitted to jail; trooper did not direct hospital staff to perform any search of defendant's blood or urine, did not direct hospital staff to inquire into defendant's use of any substances and did not order defendant to submit to medical treatment; and purpose of treatment was not to obtain incriminating information but to evaluate and treat defendant—Questioning by hospital staff about defendant's use of benzodiazepine was not interrogation in violation of defendant's *Miranda* rights where staff were not acting as state agents—Where defendant's blood and urine were drawn for exclusively medical purposes, fact that state ultimately obtained test results through subpoena does not render results inadmissible under implied consent law—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. DEMETRIUS SMITH, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2023-CT-000706-A. Division III. April 24, 2024. Thomas M. Jaworski, Judge. Counsel: Ashley Chin, Assistant State Attorney, 8th Circuit State Attorney's Office, Gainesville, for Plaintiff.

Bailey Riley, Assistant Public Defender, 8th Circuit Public Defender's Office, Gainesville, for Defendant.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE comes before the Court upon Defendant's "Motion to Suppress," filed February 9, 2024, pursuant to Florida Rule of Criminal Procedure 3.190(g). On April 15, 2024, a hearing was held on the motion. Trooper Douglas Crandall of the Florida Highway Patrol and Captain Ray Swallows of the Alachua County Sheriffs Office testified at the hearing. Upon consideration of the motion to suppress, the hearing testimony, the evidence presented at the hearing, the legal argument of the parties, and the record, this Court finds and concludes as follows:

Defendant moves the Court to suppress "the use, as evidence at trial, [of] all statements and evidence obtained as a result of the Defendant's unlawful search and seizure as it relates to any and all medical documents obtained from HCA FL N Florida Hospital (North Florida Millhopper Emergency) arising from the incident at issue."

I. FACTS

On May 20, 2023, at approximately 08:45 a.m., Trooper Douglas Crandall of the Florida Highway Patrol responded to a vehicle crash involving a semi tractor-trailer crash on 1-75. Defendant was the driver of the semi involved in the crash. At the crash scene, although EMS staff were present and available to examine Defendant for any injuries, Defendant refused treatment.

During his interaction with Defendant, Trooper Crandall noticed that Defendant was exhibiting signs of impairment: lethargic; sleepy; drooling; yellow shaded eyes; mumbling speech; and disorderly appearance. After lead trooper Jonathan Mathis completed a DUI investigation, Defendant was placed under arrest by Trooper Mathis and placed in Trooper Crandall's patrol car. Trooper Crandall then transported Defendant to a walk-in hospital to be medically cleared before being taken to the jail. The Alachua County Jail requires that any arrestee who has been involved in a vehicle crash be medically cleared by a hospital before being admitted into the jail.[1]

According to Trooper Crandall, during the ride to the hospital, Defendant appeared sleepy. And Defendant continued to appear sleepy at the hospital.

At the hospital, Defendant voluntarily spoke with hospital staff. Trooper Crandall did not order Defendant to speak to hospital staff or otherwise compel Defendant to obtain medical treatment. Further, Trooper Crandall did not tell hospital staff to treat Defendant. After being medically cleared by hospital staff, the hospital provided documentation reflecting that fact for the jail's records.[2] Trooper Crandall then transported Defendant to the jail.

After Defendant was charged with DUI in this case, the State moved for a *subpoena duces decum* for Defendant's medical records from his treatment at the hospital. The court granted the motion and ordered the medical records released to the State.

II. FINDINGS AND CONCLUSIONS OF LAW

The medical staff's collection of Defendant's blood and/or urine in this case was neither a search nor a seizure. As the Twentieth Judicial Circuit Court explained in *State v. Tuttle,*

> [t]he separation of powers principle prohibits the trial court from requiring strict medical or booking procedures or dictating the manner in which health care providers for a jail carry out the Sheriff's duty to provide medical care to arrestees or inmates in its custody. *Bradshaw v. Sandler,* 955 So. 2d 1219, 1221 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1239b] ("Health care decisions of jail inmates are exclusively within the province of the Sheriff, and the Sheriff may impose reasonable guidelines as to how those health care services are provided."). . . . Health care determinations of an arrestee or inmate should be made by medical care providers that are in the best position to make these factual determinations, not patrol deputies or the judiciary. . . . [The] operation of the county jail is within the province of the executive and legislative branches of government, and the unwritten policies of the jail when accepting an arrestee that may require medical attention does not constitute "unbridled discretion."

State v. Tuttle, 20 Fla. L. Weekly Supp. 108a (Fla. 20th Cir. Ct. June 11, 2012) (appellate decision). The fact that Defendant was required to be medically cleared before being admitted into the jail did not render the collection of his blood and/or urine by medical staff at the hospital a search and seizure.

Even if the collection of Defendant's blood and/or urine did constitute a "search and seizure," it was done solely for medical purposes and not at the direction of law enforcement. The trooper's presence at the hospital had no impact on the medical examination or treatment Defendant received. Further, the blood and/or urine draw was done completely at the discretion of medical personnel and for the purpose of a medical evaluation. Additionally, the troopers did nothing to participate in, or encourage, the sampling of Defendant's blood and/or urine draw.

"In the Fourth Amendment context, the exclusionary rule applies to evidence obtained by illegal police or prosecutorial actions, regardless of whether the evidence obtained is reliable or unreliable, because the purpose of the rule in the Fourth Amendment context is to deter illegal state action." *State v. Parker,* 991 So. 2d 411, 415 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2270a]. "{T]he exclusionary rule only applies to state action." *Id.* "[B]ecause the exclusionary rule in respect to Fourth Amendment violations is based upon the deterrence of illegal police or prosecutorial action, it is not triggered by the actions of private persons however egregious they may be." *Id.* (quoting *State v. Pailon,* 590 A.2d 858, 861 (R.I. 1991)); *see also Armstrong v. State,* 46 So. 3d 589, 593-94 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D795b] ("[T]the protection against unreasonable searches and seizures applies only to cases involving governmental action; it does not apply when the search or seizure was conducted by a private individual.").

As explained by the First District Court in *State v. Butler*,

> [w]hen deciding whether the Fourth Amendment applies to particular conduct, Florida courts appear to have agreed with the Ninth Circuit's view of state action, which is present when (1) "a private party acts as an 'instrument or agent' of the state in effecting a search and seizure," and the government knows of and acquiesces to the conduct, and (2) the search is conducted solely in pursuit of a governmental interest, rather than the private actor's self-interest. *Treadway v. State,* 534 So.2d 825, 827 (Fla. 4th DCA 1988) (quoting *United States v. Walther,* 652 F.2d 788 (9th Cir. 1981)); *accord United States v. Koenig,* 856 F.2d 843 (7th Cir. 1988) (inquiring (1) whether the government knew about and acquiesced to the intrusive conduct, and (2) whether the private party acted in self-interest or to assist the government in obtaining incriminating information).

State v. Butler, 1 So. 3d 242, 246 (Fla. 1st DCA 2008) [34 Fla. L. Weekly D40b]. "[A] search by a private person becomes a government search if the government 'coerces, dominates, or directs the actions of a private person' conducting the search." *Armstrong,* 46 So. 3d at 596 (quoting *U.S. v. Souza,* 223 F.3d 1197, 1201 (10th Cir. 2000)).

"The burden of proof to establish government involvement in a private search rests upon the party objecting to admission of the evidence." *Treadway v. State,* 534 So. 2d 825, 827 (Fla. 4th DCA 1988). And "[t]he party objecting to the search or seizure has the burden to establish government involvement by a preponderance of the evidence." *Treadway,* 534 So.2d at 827. As the Fourth District Court in *Treadway* noted,

> [w]hile a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, de minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state. The requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search.

Treadway, 534 So. 2d at 827 (quoting in *United States v. Walther,* 652 F.2d 788, 791-92 (9th Cir. 1981)). Further, "if the only purpose of a private search is to further a government interest, it is subject to Fourth Amendment strictures." *Id.* (quoting *Hooper v. Sachs,* 618 F.Supp. 963 (D.Md.1985)). "When, however, a dual purpose for the search exists such that the private person is also furthering his own ends, the search generally retains its private character." *Id.*

Here, prior to being transported to the hospital, Defendant had been in a serious crash involving a semi tractor-trailer; and had refused medical treatment at the scene of the crash. Both Trooper Crandall and Capt. Swallows testified at the motion hearing that before an arrestee who has been in a vehicle crash can be admitted into the jail, they are required to be medically cleared by a hospital. When Trooper Crandall took Defendant to the hospital, he merely advised the hospital staff that Defendant needed to be medically cleared for admission into the jail. He did not direct medical staff to perform any search of Defendant's urine or blood; nor did he direct them to inquire into Defendant's use of any substances. Further, Trooper Crandall did not order, direct, or coerce Defendant to submit to medical treatment. And there is no evidence that Defendant refused, or acquiesced to, medical treatment. The medical staff were not acting as state actors when they evaluated and treated Defendant prior to his admission into the jail. Further, the purpose of the lab testing, and diagnostics, done by the hospital was not to obtain incriminating information. It was to evaluate and treat Defendant. It not intended to obtain evidence to be used against Defendant by the State.

This Court additionally finds that there was no testimony or evidence that Defendant felt coerced or compelled to submit to medical treatment; or to provide hospital staff with incriminating information. Further, there was no testimony or evidence to suggest that Defendant could not have refused medical treatment at the hospital *just as he had done at the scene of the crash. See State v. Joseph,* 28 Fla. L. Weekly Supp. 557a (Collier Cty. Ct. July 21, 2020) ("Despite there being no written policy or standard practice for a deputy to require an arrestee to be examined by a doctor prior to transport to the jail, . . . it would be an invasion into the province of the executive branch to order otherwise. Additionally, Defendant in the case at bar could have refused treatment by EMS or Physicians Regional Hospital then been transported to the jail to be examined by jail medical staff prior to entry into the custody of the jail or for jail medical staff to determine if medical clearance by a doctor was required prior to entry into the jail.").

Additionally, there was no testimony or evidence that any questions by medical staff related to the presence of benzodiazepine in Defendant's blood or urine were for any purpose other than medical treatment.

As for Defendant's argument that the questioning by medical staff violated his *Miranda*[3] rights, " 'interrogation takes place. . . when a person in custody is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response." *Voltaire v. State,* 697 So. 2d 1002, 1005 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1937a] (quoting *Traylor v. State,* 596 So.2d 957, 966 n.17 (Fla. 1992)). Here, as previously stated, the medical staff were not acting as state agents at the time of their evaluation and treatment of Defendant. Accordingly, their questioning of Defendant as it related to his use of benzodiazepine did not constitute "interrogation."

As for Defendant's argument that the blood and urine results were a violation of the implied consent law, the implied consent law does not apply here. First, Trooper Crandall did not request either a blood or urine sample from Defendant prior to, or during, Defendant's evaluation at the hospital. "[T]he failure to adhere to the implied consent law and its related regulations [does] not render blood-test results inadmissible where blood [is] drawn for an exclusively medical purpose." *Robertson v. State,* 604 So. 2d 783, 790-91 (Fla. 1992). "This is true even though the blood or test results later are seized and used as evidence in a DUI-related prosecution." *Id.* Here, Defendant's blood and/or urine was drawn for an exclusively medical purpose. Even though the State ultimately obtained the results through a subpoena duces tecum, that fact does not render the results inadmissible under the implied consent law (because the implied consent law is inapplicable under the circumstances).

Based on the foregoing, it is **ORDERED AND ADJUDGED** that: Defendant's motion to suppress is hereby **DENIED**.

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[1]State's Exhibits 1 and 2 (Alachua County Jail Policies DOJ 101 ("Admissions") and 901 ("Health Care")). Although the exhibits do not expressly state this policy, Captain Swallows testified that this policy is required under the jail's contract with Wellpath, the jail's medical provider. Further, Both Trooper Crandall and Captain Swallows testified that this policy has been in place for as long as they can remember (i.e., years).

[2]State's Exhibit 3 (Medical Clearance for Demetrius Smith).

[3]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

* * *

Criminal law—Driving under influence—Discovery—Intoxilyzer software and source code—Motions for production of software and source code for Intoxilyzer 8000 are denied—Defendant has failed to demonstrate that items sought are "material" within meaning of rule 3.220(f)—Further, even if defense showed that items were material, justice required their production, and they were in possession of state, court does not have authority to order state to produce them where defendant's motions do not indicate that he has exerted his own efforts to obtain items through his own due diligence—Public records—As a matter of law, software and source code that are not owned by Florida Department of Law Enforcement or state are not subject to public records request—Court cannot issue subpoena duces tecum to non-party out-of-state Intoxilyzer manufacturer to produce items where defendant has failed to show materiality of items—Motion to inspect, photograph, and videotape Intoxilyzer used to test defendant's breath is denied where defendant has not pled any facts to support claims that machine contains exculpatory evidence or that software was substantially modified

STATE OF FLORIDA, Plaintiff, v. SANELA SALKOVIC, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-CT-003679-A-O. May 28, 2024. Carly S. Wish, Judge.

ORDER AFTER RICHARDSON HEARING HELD JANUARY 26, 2024 AND ORDER DENYING DEFENDANT'S MOTION TO PRODUCE, MOTION TO PRODUCE II, MOTION TO PRODUCE III, MOTION TO INSPECT, PHOTOGRAPH AND/OR VIDEO TAPE THE ORANGE COUNTY SHERIFF DEPARTMENT'S INTOXILYZER 80-001420, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM TO C.M.I. THE MANUFACTURER OF THE INTOXILYZER 8000 MACHINE, MOTION FOR PRODUCTION OF THE SOURCE CODE OR IN THE ALTERNATIVE MOTION FOR EXCLUSION OF THE BREATH TEST RESULTS, AND MOTION TO PRODUCE AS PUBLIC RECORD SOURCE CODE AND SOFTWARE REVISION HISTORIES FOR THE INTOXILYZER 8000 PURSUANT TO CHAPTER 119 OF THE FLORIDA STATUTES

THIS MATTER came before the Court for a *Richardson*[1] Hearing

on January 26, 2024. Having heard argument of counsel, reviewed relevant case law and rules of procedure, and the State's Response filed on September 6, 2023, the Court finds as follows:

At the hearing, the parties agreed the State is under no obligation to produce the Intoxilyzer 8000 manuals, schematics, software or source code under either Florida Rule of Criminal Procedure 3.220(b), or Section 316.1932(1)(f)4, Florida Statutes[2]. Accordingly, the Court finds no discovery violation by the State.

Defendant instead seeks an order requiring the State to produce this material pursuant to Florida Rule of Criminal Procedure 3.220(f). This subsection, titled "Additional Discovery," states: "[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require." Fla. R. Crim. P. 3.220(f) (2023). Interpreting a prior version of this rule, the Florida Supreme Court stated:

> The defendant must first utilize the discovery procedures under Rule 3.220(a), CrPR. If the defendant utilizes these procedures without obtaining the desired information, he must then show "materiality to the preparation of the defense" in order to secure an order requiring further discovery. Subsequent discovery shall be "as justice may require."

Eagan v. Demanio, 294 So. 2d 639, 640-41 (Fla. 1974). In other words, only upon a showing of "materiality," may a court then require any "additional discovery," and any additional discovery may be required only upon a determination by the Court that "justice may require" such additional discovery. *Id*.

In this context, "material" means "reasonably calculated to lead to admissible evidence." *Demings v. Brendmoen*, 158 So. 3d 622, 625 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D815a] (quoting *Franklin v. State*, 975 So. 2d 1188, 1190 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D687a]). "The mere possibility that information may be helpful to the defense in its investigation does not establish materiality." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976); *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003) [28 Fla. L. Weekly S517a]); and *State v. Stephens*, 288 So. 3d 104, 106 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D3034a]

In *Stephens*, the trial court granted defendant's request for additional discovery relating to the Hillsborough County Sherriff's Office "operational plan," which was prepared prior to the controlled drug buy that resulted in defendant's charges. *Stephens*, 288 So. 3d at 105. In the trial court, defense counsel attempted to demonstrate Rule 3.220(f) "materiality" by:

> [S]et[ting] forth the type of information that anticipated might be contained in the operational plan, including an indication that law enforcement was familiar with Stephens's physical appearance, clothing preferences, and the locations he frequented. . . . There could be something in the operational plan that shows, they already knew who he was, but maybe they didn't. . . . I have no idea because I am unable to see it.

Id. at 106. The appellate court reversed the trial court's order granting Stephens' request for this additional discovery because, "Stephens . . . advanced nothing more than a 'mere possibility' that the operational plan might aid his defense." *Id.* at 106-07.

Whether to order additional discovery pursuant to Rule 3.220(f) in a particular case necessarily requires careful consideration of the unique facts and evidence in each individual case to determine whether the requested information is "material" for the purposes of Rule 3.220(f). Here, Defendant's motion does not contain any facts indicating why the requested information is material, and there is no reference to any particular observed abnormality or anomaly in the breath test and/or breath result obtained *in this case*. (emphasis added).

While Defendant may be able to demonstrate some perceived issues concerning *whether* the Intoxilyzer 8000 machines are reliable, using data already available and analyzed, Defendant fails to allege any facts showing *this case* is one of those instances where the available data demonstrates a potential issue with the Intoxilyzer 8000 machine and the particular breath result. Instead, Defendant contends the requested information may be helpful in its defense because this information may help explain anomalies in other data already collected and analyzed. Similar to defense counsel in *Stephens*, counsel here cannot know whether the requested information would be helpful in this particular case because, up and until this point, defense and its experts have been "unable to see it." *Cf. Stephens*, 288 So. 3d at 106 (reversing the trial court's order granting additional discovery pursuant to Rule 3.220(f)).

In these instances, a showing of materiality cannot be established by a "mere possibility that the requested information may assist the defense." *State v. Bastos*, 13 Fla. L. Weekly Supp. 1003a (Miami-Dade Cty. Ct., Jun. 27, 2006) (Bloom, J.) (discussing Rule 3.220(f) "materiality" in the context of requested Intoxilyzer 5000 software and source code); *see also State v. Miller*, Case No.: 3492-XCK, 11-38-GBC (Miami-Dade Cty. Ct., Aug. 11, 2009) (Bloom, J.) ("[A] showing of materiality cannot be established by a mere possibility that the source code or an inspection may assist the defense."). In *Miller*, while discussing the "materiality" threshold under Rule 3.220(f), the court appropriately noted the nuance between a defendant's ability to discover *whether* the Intoxilyzer software was working (discoverable), versus being able to discover *how* the Intoxilyzer software works (not discoverable).

In all instances, defendants have a right to investigate their case. *State v. Bastos*, 985 So. 2d 37, 42 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1541a]. While Defendant may already possess a trove of data and expert analysis to argue *whether* the Intoxilyzer 8000 software is reliable, Defendant is not automatically entitled to discover exactly *how* the Intoxilyzer 8000 software or source code works. *See Id.; see also Miller, supra*. Instead, in order to be entitled to this "additional discovery" under Rule 3.220(f), Defendant must demonstrate that the requested information is "material" pursuant to Rule 3.220(f).

In this particular instance, Defendant fails to demonstrate the Intoxilyzer 8000 source code and/or software are "material" *in this particular case*, *i.e.,* more than a "mere possibility that the requested information may assist the defense." This requested information is, therefore, not discoverable pursuant to Florida Rule of Criminal Procedure 3.220(f) at this time.

Furthermore, even if the Defendant were to show the information was material to this particular case, justice required its production, and it was in the possession of the state, the Court does not have the authority to order the State to produce it. In *State v. Coney*, the Florida Supreme Court stated,

> When a pretrial motion for discovery, such as that involved in this case, is presented to the trial court for a ruling, A determination should first be made as to whether all or any part of the information sought by defendant is readily available to him by the exercise of due diligence, through deposition, subpoena, or other means.

Coney v. State, 294 So. 2d 82, 85 (1973).

The Court further states, "[t]he requirement of Crawford as to the prosecuting attorney securing the information for defense counsel arises only upon a showing that defense counsel has first exerted his own efforts and resources and has pursued and concluded other available means and remedies available to him to obtain such information." *Id*. at 87. *See also State v. Wright*, 803 So. 2d 793 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2888a] (holding court must determine whether all or any part of the information sought by the defendants was readily available to them through due diligence and

whether the defendants had exerted and exhausted efforts to obtain the information); *State v. Counce,* 392 So. 2d 1029 (Fla. 4th DCA 1981)(holding that the state has no duty to obtain information for the defense that the defense is able to obtain by means other than production by the state); *Yanetta v. State,* 320 So. 2d 23 (Fla. 3d DCA 1975)(noting that a defendant should not be permitted to employ the pretrial discovery procedures for disclosure of information or documents which by the exercise of due diligence are readily available to him by subpoena or deposition). Here, Defendant's motions do not indicate he has exerted his own efforts to obtain this information through his own due diligence.

Although Defendant has filed motions attempting to obtain the desired information by other means, each of those motion must be denied. Defendant seeks an order from this Court requiring the State of Florida and CMI to produce as a public record for inspection and copying the source code and software for the Intoxilyzer 8000, including subversions and revision histories associated with the software. However, the information sought is not, as a matter of law, subject to public records request pursuant to Chapter 119 of the Florida Statutes. *See Florida Dept. of Law Enforcement v. CMI, Inc.* 2008-CA-3619 (Fla. 2d. Cir., Leon Cty., September 10, 2009).

In *FDLE v. CMI*, the court granted Final Summary Declaratory Judgment in favor of CMI. The court held that the State of Florida does not own the software or the source code of the Intoxilyzer 8000 stating that FDLE's purchase orders with CMI did not transfer any ownership or interest in the intellectual property to FDLE. The rights of the parties and the ownership of the property has been determined by a court of competent jurisdiction in this state. As stated in *Allstate Ins. Co. v. Conde*, one of the purposes of Chapter 86 is to permit parties to have their rights (and obligations) under a contract determined to avoid protracted and unnecessary litigation. *See Allstate Ins. Co. v. Conde*, 595 So. 2d 1005, 1007 (Fla. 5th DCA 1992).

Based upon the Declaratory Judgment entered by Florida's Second Judicial Circuit, the software and source code are owned by CMI and are the intellectual property of CMI *as a matter of law*. Accordingly, even if the State of Florida actually possesses the Intoxilyzer 8000 software and/or source code, as a matter of law, the software and source code are not owned by FDLE or State of Florida for the purposes of Defendant's discovery request(s). Therefore, the Intoxilyzer software and source code cannot be considered a public record as Defendant argues.

Defendant has also requested the issuance of a subpoena duces tecum directed to CMI to produce the software and source code for the Intoxilyzer 8000. In order for the Court to issue a subpoena duces tecum to a non-party out of state corporation, the Defendant must comply with the procedures outlined in Chapter 942, otherwise known as the Uniform Law. *See Ulloa v. CMI, Inc.* 133 So. 3d 914 (Fla. 2013) [38 Fla. L. Weekly S804a]. This requires a defendant to show the requested software is material, notice CMI of any hearing on the motion, and that the defendant has exhausted all diligent efforts to acquire this information from CMI. As currently plead, Defendant's motion does not meet these threshold requirements. As the Court has already determined, Defendant has failed to show materiality as it relates to the facts in this case.

Finally, Defendant's Motion to Inspect, Photograph and/or Videotape the Orange County Sheriff Department's Intoxilyzer 8000, must also be denied. Defendant has not plead any facts or provided any support for the claims that the Intoxilyzer instrument contains exculpatory evidence or that the software was substantially modified in this case.

Therefore, it is **ORDERED and ADJUDGED** as follows:

1. There has been no discovery violation by the State of Florida.

2. Defendant's Motion to Produce, Motion to Produce II, Motion to Produce III, Motion to Inspect, Photograph and/or Video Tape the Orange County Sheriff Department's Intoxilyzer 80-001420, Motion for Subpoena Duces Tecum to CMI, the Manufacturer of the Intoxilyzer 8000 Machine, Motion for Production of the Source Code or in the Alternative Motion for Exclusion of Breath Test Results are **DENIED** without prejudice.

3. Defendant may file any subsequent Motion pursuant to Florida Rule of Criminal Procedure 3.220(f). Such motion shall state, with particularity, the facts supporting additional discovery under Rule 3.220(f) in this particular case and the efforts made by the Defendant to obtain the desired information. Such motion shall be filed within thirty (30) days of entry of this order. Once filed, the parties may coordinate a hearing, if necessary.

4. Defendant may file a motion for a subpoena duces tecum pursuant to the procedure outlined in Chapter 942 Florida Statutes.

5. Defendant's Motion to Produce as a Public Record Source Code and Software Revision Histories for the Intoxilyzer 8000 Pursuant to Chapter 119 of the Florida Statutes is **DENIED**.

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[1]*Richardson v. State,* 246 So. 2d 771 (Fla.1971).

[2]Section 316.192(1)(f)4 requires "full information concerning the results of the test taken . . . be made available to the person or his or her attorney." § 316.1932(1)(f)4., Fla. Stat. (2021). The legislature went on to define what is considered "full information," and what is not: "Full information does not include manuals, schematics, or software of the instrument used to test the person . . . ." *Id.*

* * *

Insurance—Personal injury protection—Default—Vacation—Excusable neglect—Motion to vacate default is denied, and final judgment is entered in favor of medical provider where insurer offered no reason why it did not assign case to counsel until time for filing answer had passed and default had been entered

MEMORIAL HOSPITAL-WEST VOLUSIA, INC., d/b/a ADVENTHEALTH DELAND, a/a/o Shawnqel Cooper, Plaintiff, v. GEICO CASUALTY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-SC-039871-O. May 9, 2024. Amanda S. Bova, Judge. Counsel: Mark. A. Cederberg, Bradford Cederberg, P.A., Orlando, for Plaintiff. Peter Weinstein, Michael A. Rosenberg, and Adrianna De La Cruz-Munoz, Cole, Scott & Kissane, Plantation, for Defendant.

ORDER GRANTING ENTRY OF FINAL JUDGMENT IN FAVOR OF PLAINTIFF AND DENYING DEFENDANT'S MOTION TO VACATE DEFAULT

THIS MATTER having come before this Honorable Court on April 22, 2024 on Plaintiff's Motion for Entry of Final Judgment and Defendant's Motion to Vacate Default entered on August 17, 2023, and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Court finds that to prevail on a motion to vacate default judgment, the moving party [Defendant] must establish: (1) excusable neglect; (2) a meritorious defense; and (3) due diligence. Fla. R. Civ. P. 1.540; *Net One, LLC v. Christian Telecom Network, LLC,* 901 So. 2d 417, 419 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1291a]. *Cedar Mountain Estates, LLC, DAL USA, LLC v. Loan One, LLC,* 4 So. 3d 15 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D209b]. "Failure to satisfy *any* of the three elements results in denial of the motion to vacate" (emphasis added). *Santiago v. Mauna Loa Invs., LLC,* 189 So.3d 752, 758 (Fla. 2016) [41 Fla. L. Weekly S91a].

2. The Court finds that Defendant, GEICO CASUALTY COMPANY, failed to establish excusable neglect associated with its failure to timely respond to Plaintiff's Complaint. It is undisputed that Defendant was served with the Summons, Complaint and Discovery on July 20, 2023 and that Defendant did not assign the matter to counsel until August 25, 2023. The response/Answer to the Complaint

was due on August 9, 2023. A default was entered against the Defendant on August 17, 2023. *The record before the Court is completely silent as to any reason why the Defendant failed to timely respond to Plaintiff's Complaint* (i.e. why it took thirty-six (36) days to assign this case to defense counsel—during which time the response/Answer deadline passed and a default had been entered against the Defendant). "The element of excusable neglect must be proven by a sworn statement or affidavit. *DiSarrio v. Mills,* 711 So.2d 1355, 1356 (Fla. 2nd DCA 1998) [23 Fla. L. Weekly D1506a]; *Schauer v. Coleman,* 639 So.2d 637, 638-39 (Fla. 2nd DCA 1994). The burden rests on the defaulting party to prove it has a legal excuse for failing to respond to the plaintiff's complaint. *See Hornblower v. Cobb,* 932 So.2d 402, 406 (Fla. 2nd DCA 2006) [31 Fla. L. Weekly D1247a]; *Stone-Rich Props. V. Britt,* 706 So.2d 330, 332 (Fla. 2nd DCA 1998) [23 Fla. L. Weekly D254a]. *See also United Capital Funding Corp. v. Technamax, Inc.,* 946 So.2d 63 (Fla. 2nd DCA 2006) [32 Fla. L. Weekly D69b] (Bryan [Defendant] did file a sworn affidavit with the court, but in the affidavit, Bryan failed to offer any reason for her failure to respond to the plaintiff's complaint. Since the affidavit did not address the issue of why Bryan failed to file a timely response, it was insufficient, as a matter of law, to satisfy the element of excusable neglect). *See Rivera v. Dep't of Revenue,* 899 So.2d 1265, 1267 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D1056b] (noting excusable neglect cannot be established if a party offers no facts to support a finding of legal excuse for failure to comply with the rules of civil procedure).

3. As the Defendant failed to satisfy the first of the three (3) required elements necessary to vacate a default, the Court need not address the remaining two (2) elements; however, the Court does note that at the time of the hearing, Plaintiff's Request for Admissions were technically deemed admitted (no response by Defendant and no motion for relief) and although Fla. R. Civ. P. 1.500(c) only allows a party the right to plead or otherwise defend "before default is entered," Defendant waited to file an Answer until April 19, 2024 (one (1) business day before the hearing and two hundred and fifty-four (254) days past the Answer deadline).

4. Defendant's Motion to Vacate Default entered on August 17, 2023 is hereby **DENIED**.

5. Plaintiff's Motion for Entry of Final Judgment is hereby **GRANTED**.

6. Final Judgment is hereby granted in favor of the Plaintiff, MEMORIAL HOSPITAL-WEST VOLUSIA, INC. d/b/a ADVENTHEALTH DELAND, as assignee of Shawnqel Cooper, wherein Plaintiff shall recover from Defendant, GEICO CASUALTY COMPANY, the sum of **$2,293.73** plus 4.34% per annum statutory interest in the amount of **$93.82** for a total sum of **$2,387.55** for which sum let execution issue.*

7. The Court finds Plaintiff is entitled to its reasonable attorneys' fees and costs. The Court reserves jurisdiction to determine the amount of attorneys' fees and costs to Plaintiff pursuant to Fla. Stat. §§627.736, 627.428 and 57.041.

*Post judgment interest shall accrue on this judgment pursuant to Fla. Stat. §55.03.

* * *

Insurance—Personal injury protection—Claims brought in multiple actions—Dismissal—Medical provider's second suit for same claim involving same parties and same date of accident as first suit is barred by section 627.736(15)

THE RIGHT SPINAL CLINIC, LLC, a/a/o Dominguez Cleto Reyes, Plaintiff v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-116058-SP-21. Section CG01. May 1, 2024. Jorge A. Perez Santiago, Judge. Counsel: Abraham Ovadia and Ryan S. Treulieb, Boca Raton, for Plaintiff. S. Nicholas Cruz Encinas, IV, Law Office of Gabriel O. Fundora & Associates, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

THIS CAUSE, having come before this Honorable Court for a hearing on Defendant's Motion to Dismiss Plaintiff's Complaint on April 30, 2024. Having considered the motion, argument of counsel, the record, and applicable law, the Court finds as follows:

1. On or about September 18, 2023, Plaintiff, THE RIGHT SPINAL CLINIC, LLC, filed this instant suit in Miami-Dade County, Florida, alleging that Defendant breached an automobile contract providing Personal Injury Protection ("PIP") benefits for an accident which allegedly occurred on or about November 16, 2018.

2. Plaintiff served this instant lawsuit on or about December 20, 2023.

3. Prior to service of this instant lawsuit, the Plaintiff, by and through a separate attorney's office, previously filed the original lawsuit on August 11, 2023, in Miami-Dade County, Florida, assigned case number 2023-095695-SP-21.

4. The original lawsuit involves (1) the same parties, (2) same date of accident, and (3) same claim.

5. Plaintiff served the original lawsuit on or about September 19, 2023, and is currently pending.

6. On or about January 2, 2024, the Defendant filed a Motion to Dismiss based on this instant lawsuit is barred pursuant to Fla. Stat. § 627.736(15).

7. Section 627.736(15), *Florida Statutes*, provides:

> ALL CLAIMS BROUGHT IN A SINGLE ACTION.—In any civil action to recover personal injury protection benefits brought by a claimant pursuant to this section against an insurer, **all claims related to the same health care provider for the same injured person shall be brought in one action, unless good cause is shown why such claims should be brought separately**. If the court determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant.
>
> (Emphasis added).

8. Plaintiff could not show good cause as to why this instant lawsuit and the original lawsuit should have been brought separately.

9. This Court finds that this instant lawsuit is barred pursuant to Fla. Stat. § 627.736(15), as Plaintiff has failed to show good cause as to why both lawsuits could not have been brought in one action.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that Defendant's Motion to Dismiss Plaintiff's Complaint is hereby **GRANTED**. This case is **DISMISSED** without prejudice.

* * *

Criminal law—Driving under influence—Search and seizure—Investigatory stop—Predecessor judge's order denying motion to suppress is vacated—Although officer investigating accident relayed certain information to DUI investigator, there were no predicate facts indicating how accident investigator knew that defendant was operating vehicle—DUI investigator's testimony that defendant exhibited indicia of impairment is contradicted by body camera video—Motion to suppress granted

STATE OF FLORIDA, Plaintiff, v. DESMOND JAMES BIRCH, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CT-000423-A-O. Citation No. A2GJGVP. March 13, 2024. Amy J. Carter, Judge. Counsel: Destiny Artis, 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.

ORDER VACATING ORDER ON DEFENDANT'S MOTION TO SUPPRESS ENTERED JANUARY 5, 2023 AND GRANTING DEFENDANT'S MOTION TO SUPRRESS

THIS MATTER is before the Court following the granting of the

Defendant's Motion for Reconsideration of the order denying Defendant's Motion to Suppress entered January 5, 2023. A hearing was held on February 14, 2024 on the Defendant's Motion for Reconsideration. At that time, the Court granted the Defendant's Motion for Reconsideration but reserved ruling on the Motion to Suppress. In addition to considering the arguments of counsel at the hearing, the Court listened to the testimony presented at the December 2, 2022 hearing, and watched the body camera footage of Officer Rideaux. As a result, the Court finds as follows:

Defendant makes two arguments in support of his Motion for Reconsideration. First, the State presented insufficient testimony to establish the Defendant was driving and therefore the evidence communicated to Officer Rideaux to establish the Defendant was driving was insufficient Second, the information conveyed to Officer Rideaux from officer Debottis regarding impairment, was insufficient to provide Officer Rideaux with reasonable suspicion to conduct a DUI investigation.

In order to prove the crime of Driving Under the Influence, (hereinafter DUI), the state must prove the Defendant was either driving or in actual physical control of the vehicle. § 316.193(1) Fla. Stat. (2022). If the State does not have a witness who can testify as to who was driving, this may be proved entirely by circumstantial evidence. *Bush v. State,* 295 So. 3d 179 (Fla. 2020) [45 Fla. L. Weekly S145a]. Here, the State failed to present sufficient direct or circumstantial evidence the Defendant was driving.

The testimony presented at the hearing on December 2, 2022 revealed the following: On January 22, 2022, Officer Debottis responded to a traffic accident. Officer Debottis testified he observed a vehicle in the roadway and two on the side of the road. He made contact with the Defendant and observed him bleeding from his right hand and saw blood in the car. Officer Debottis did not say where he made contact with the Defendant or if he was in a car when he arrived. He also did not state where the blood in the car was located. It is unclear from the testimony how Officer Debottis knew the Defendant was driving or what the accident investigation revealed. Officer Debottis did testify he told Officer Rideaux the car the Defendant was operating was the only mobile vehicle at that time and tow trucks were on the way. Although that statement may be sufficient to provide Officer Rideaux with enough information to establish that the Defendant was driving, the statement itself is not supported by any predicate facts indicating how Officer Debottis knew it was the car the Defendant was operating.

For an investigatory traffic stop to be lawful, "the police officer must be able to point to specific and articulable facts" that warrant " 'intrusion upon the constitutionally protected interests of the private citizen.' " *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967). Typically, when a backup officer arrives on scene to conduct a DUI investigation, the State relies on the fellow officer rule to establish reasonable suspicion for that officer to conduct the investigation. "In Florida, the fellow officer rule provides that if an officer relies on a chain of evidence to formulate the existence of probable cause for an arrest or a search and seizure, the rule does not require the officer to possess personal knowledge of each link in the chain of information if the collective knowledge of all the officers supports a finding of probable cause. The rule allows an officer to testify to a previous link in the chain for the purpose of justifying his or her *own* conduct." *State v. Bowers,* 87 So. 3d 704, 709 (Fla. 2012) [37 Fla. L. Weekly S136a].

Here, the only information provided to Officer Rideaux from Officer Debottis was that Officer Debottis "believed the Defendant was under the influence of alcohol". Officer Debottis did testify he smelled alcohol coming from the Defendant's mouth, but he did not relay that information to Officer Rideaux. Officer Debottis' statement that he believed the Defendant was under the influence of alcohol is a conclusion and not supported by articulable facts. He did not convey why he thought the Defendant was under the influence of alcohol. This statement is insufficient on its own to support an investigatory detention.

The order entered by the Court denying the Defendant's Motion to Suppress found Officer Rideaux had reasonable suspicion to conduct a DUI investigation based upon the information he received from Officer Debottis and his own independent observations. Officer Rideaux testified he observed the Defendant to have slurred speech and red eyes. Notwithstanding the fact that there was no evidence introduced that the Defendant was driving, the body camera footage viewed by the Court refutes Officer Rideaux' s testimony that the Defendant had slurred speech and red eyes. The video shows the Defendant speaking clearly, communicating effectively, and interacting appropriately with the officers. The Defendant is initially sitting on the curb under a street light. When he stands up, he is steady on his feet. Officer Rideaux is shining his flashlight into the Defendant's eyes and they do not appear red on the body camera footage viewed by the Court.

This Court is not in the practice of and does not take lightly revisiting the rulings of judges previously assigned to a case. "As a matter of 'comity and courtesy,' a judge should hesitate to undo the work of another judge who presided earlier in the case. *Shermer v. State,* 16 So. 3d 261, 265 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1696a]. However, given the rotation of judges to new assignments this may from time to time occur. It is settled law that while a trial court has jurisdiction of a case, and upon appropriate motion or objection made by either counsel, it has the inherent power to reconsider a previous ruling made on a motion to suppress. *Savoie v. State,* 422 So.2d 308, 312 (Fla.1982); *Obregon v. State,* 601 So.2d 616 (Fla. 3d DCA 1992).

Based upon a thorough review of the evidence in this case, it is **ORDERED** and **ADJUDGED** as follows:

1. The Court finds the State presented insufficient testimony to establish the Defendant was driving on the night of January 22, 2022.

2. The information conveyed to Officer Rideaux regarding impairment was insufficient to provide him with reasonable suspicion to conduct a DUI investigation.

3. The Defendant's Motion To Suppress is hereby **GRANTED.**

* * *

Landlord-tenant—Return of security deposit—Attorney's fees—Prevailing party—Tenants who recovered portion of security deposit are entitled to award of attorney's fees and costs

JULIETTE CAROLINE GACHASSIN-LAFITE, et al., Plaintiffs, v. MARISELA DELGADO, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-042209-SP-25. Section CG01. April 5, 2024. Jorge A. Perez Santiago, Judge. Counsel: Shawn Wayne and Robert Wayne, Law Office of Robert Wayne, Miami, for Plaintiff.

ORDER GRANTING ENTITLEMENT TO ATTORNEY'S FEES AND COSTS FOR THE PLAINTIFFS

THIS MATTER coming before the Court on April 2, 2024, with a special set hearing on Plaintiffs' Motion for Attorney's Fees and Costs (entitlement), and the Court having reviewed the motion together with the record and case law, having heard argument from all parties, it is hereby:

ORDERED AND ADJUDGED as follows:

1. As to entitlement, Plaintiffs' Motion for Attorney's Fees and Costs is **GRANTED**.

2. Plaintiffs initiated this action to recover their security deposit totaling $4,650.00.

3. After hearing testimony and reviewing the evidence at trial, the Court awarded Plaintiffs $2,660.00 on its claim for $4,650.00.

4. The trial court deducted $1,990.00 in setoffs from the security deposit for certain expenses incurred.

5. Under Florida law, Plaintiffs are the prevailing party. *Animal Wrappers & Doggie Wrappers, Inc. v. Courtyard Distribution Ctr., Inc.*, 73 So. 3d 354, 356 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2398a] (tenant prevailed against landlord when tenant recovered a portion of its security deposit . . . "[w]e find no merit to Courtyard's assertion that neither party prevailed based on the fact that Animal

Wrappers received the return of less than the full amount of its security deposit. Animal Wrappers recovered the majority of its deposit."); *Sharpe v. Ceco Corporation,* 242 So.2d 464 (Fla. 3rd DCA 1970)("[a]ppellants argue that Ceco was not the prevailing party because its recovery was not the amount claimed, but a lesser sum. We view that argument as unsound."); *Hutchinson v. Hutchinson,* 687 So.2d 912 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D301b]

6. The return of the security deposit was the significant issue of the case.

7. Plaintiffs achieved affirmative relief on the merits of their claim.

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

9. The Court retains jurisdiction to award an amount of attorney fees and costs to the Plaintiffs that will be determined at a future reasonableness hearing.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Declaratory judgment—Complaint seeking declaration of whether full reimbursement is correct at 200% of allowable amount under 2007 Medicare fee schedule or at 200% of fee schedule without budget neutrality adjustment properly pleads action for declaratory relief

MIAMI OPEN MRI, LLC., a/a/o David Perez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-045161-SP-21. Section SD05. February 1, 2024. Michaelle Gonzalez-Paulson, Judge. Counsel: David S. Kuczenski, Schrier Law Group, Miami, for Plaintiff. Kelly Rock, State Farm House Council, Miami, for Defendant.

ORDER DENYING MOTION TO DISMISS (DE 12)

THIS CAUSE having come before the court on January 8, 2024 on Defendant's Motion to Dismiss Plaintiff's Petition for Declaratory Judgment. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory petition seeking a declaration whether the calculation for the full reimbursement for Plaintiff's MRI service is correct at 200% of the allowable amount under the applicable 2007 fee schedule at 200% of the Medicare Limiting Charge fee schedule or whether the calculation for the full reimbursement for Plaintiff's service is correct at 200% of the allowable amount under the applicable 2007 fee schedule at 200% of the Medicare Limiting Charge fee schedule without the Budget Neutrality Adjustment.

2. Per the compliant, Plaintiff avers that "Respondent has taken the position that it elected the statutory fee schedule reimbursement methodology of Fla. Stat. §627.736(5)(a)1, et seq." Plaintiff does not dispute the policy language for this matter. Petitioner further alleges that Respondent issued payment at the 2007 Medicare Limiting Charge rate as upheld in *Priority Medical Centers, LLC v. Allstate Insurance Company*, 319 So.3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], which remains binding law in Miami-Dade County.

3. However, Petitioner alleges that Defendant's payment includes the Budget Neutralization Adjustment, which according to the complaint allegedly provides a lower rate of reimbursement than the amount Plaintiff contends is proper without the Budget Neutralization Adjustment, and that the reimbursement including the Budget Neutralization Adjustment is incompatible with Florida law. This issue was not addressed in *Priority Medical, Supra*. The divergent positions of both parties interpretation of what is the full reimbursement has placed Plaintiff in doubt of his rights as alleged.

4. Defendant's Motion to Dismiss alleges that Plaintiff has failed to state a cause of action for which relief may be granted because Plaintiff cannot show that there is a bona fide, actual, and present need for the declaration, or that the Plaintiff is unsure of some power, immunity, or privilege. Defendant's Motion also alleges that Plaintiff's Petition is essentially a cloaked breach of contract action.

5. In the matter of *Bristol West Ins. Co. v. MD Readers, Inc.*, 52 So.3d 48 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2832a] the provider sought a declaration as to the proper calculation for reimbursement of MRI services under personal injury protection coverage. Thus, the filing of a declaration of rights action to determine the proper calculation for reimbursement of MRI services under personal injury protection coverage is valid under Florida Law.

6. The Court finds that the Plaintiff has the right to choose its legal strategy and the right to pursue its chosen legal path. The mere existence of another remedy at law does not preclude a judgment for declaratory relief. Section 86.11, Fla. Stat.

7. At this early juncture of the case, it could be that the Defendant hasn't made any additional payments and maybe the Plaintiff could be owed more money, or none at all. However, the question is whether the Plaintiff is entitled to a declaration of rights, not whether the Plaintiff will prevail in obtaining the decree. *Unlimited Diagnostic Center, Inc., v. Metropolitan Casualty Insurance Company*, 2021-004179-SP-21 (Cty. Ct. 11th Jud. Cir. Miami-Dade Cty, Jud. Milena Abreu March 22, 2023) *citing Bell v. Associated Independents, Inc*., 143 So.2d 904 (Fla. 2d DCA 1962).

8. Additionally, in making this determination, the trial court must confine its review to the four corners of the complaint, draw all reasonable inferences in favor of the pleader, and accept as true and accurate all well pleaded allegations. The Court finds has met the requirements to be met under Chapter 86, Fla. Stat., the Declaratory Judgments statute.

Defendant's Motion to Dismiss Plaintiff's Petition for Declaratory Judgment is HEREBY DENIED. This Court's ruling is not on the merits of Plaintiff's case, only that the action for declaratory relief is properly pleaded.

Defendant has 30 days to file an answer to said Petition, and Plaintiff thereafter has 20 days to file its Reply if necessary.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Untimely bills—Provider failed to establish that certain bills were sent in timely manner where affidavit of medical provider's records custodian averring that in normal course of business bills are sent out within 5 to 10 days of treatment was contradicted by attached HCFA forms, and envelopes in which insurer received bills showed that they were not submitted within 35 days of treatment—Insurer properly provided notice allowing it to limit reimbursement of timely bills to statutory fee schedule

KAM HABIBI, D.C., PA, a/a/o Ruthlie Louis, Plaintiff v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-006238-CC-26. Section SD04. March 11, 2024. Lawrence D. King, Judge. Counsel: Richard Patino, The Patino Law Firm, Hialeah, for Plaintiff. Anthony Lewin, Mimi L. Smith & Associates, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

DOCKET INDEX NUMBER: 181

THIS MATTER came before this Court on February 6, 2024, on Defendant's Motion for Final Summary Judgment. Having reviewed and considered Defendant's Motion, Plaintiff's Response in Opposition, the summary judgment evidence, argument of counsel, relevant case law, and being otherwise fully advised, the Court finds as follows:

FACTUAL BACKGROUND

On December 17, 2015, Ruthlie Louis ("Claimant") was involved in a motor vehicle accident. Claimant was covered by State Farm's Florida Policy form 9810A which provided Personal Injury Protection ("PIP") benefits in accordance with the requirements of Florida Statue §627.736. Plaintiff, Kam Habibi, D.C., P.A. rendered medical treatment to Claimant starting on December 29, 2015. Defendant first received bills for dates of service December 29, 2015 through December 30, 2015 on *February 8, 2016.* It is Defendant's position that Plaintiff's charges for service dates December 29, 2015 through December 30, 2015 were submitted outside the 35-day requirement of section 627.736(5) as they never received proof of timely mailing for those service dates.

In opposition to Defendant's Motion for Summary Judgement, Plaintiff filed the affidavit of it's corporate representative. The affidavit stated that it was Plaintiff's normal business practice to mail out its health insurance claim forms ("HFCA") within five to ten days after treatment was rendered. The affidavit further stated specifically that the HCFA for dates of service December 29, 2015 and December 30, 2015 were sent within five to ten days after the treatment. Plaintiff attached the HFCA for these dates of service as an exhibit to their affidavit. However, this HCFA included a date of service for January 12, 2016 in addition to December 29 & 30, 2015. January 12, 2016 is fourteen days after December 29, 2015. Therefore, it could not have been mailed within five - ten days of treatment as sworn to by the corporate representative. The attached exhibit thus contradicts the sworn testimony of the affidavit.

Attached as an exhibit to the affidavit filed by the Defendant, was the envelope that the HCFA was sent in. The envelope has February 5, 2016 as the date of mailing with the expected delivery date of February 8, 2016.

As for other charges paid to Plaintiff by Defendant, Plaintiff's response did not challenge Defendant's use of its 9810a policy to utilize the schedule of maximum charges to reimburse it nor the reimbursements made.

FINDINGS OF LAW

The Florida Supreme Court amended Florida Rule of Civil Procedure 1.510 to conform with the federal summary judgment standard. The amendment became effective on May 1, 2021. *In re Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a].

Section 627.736(5)(c) "sets forth the procedures with which treating medical providers must comply in order to receive payment from the No-Fault insurer for services rendered." *Warren*, 899 So. 2d at 1094. That section states in relevant part:

> With respect to any treatment or service . . . the statement of charges must be furnished to the insurer by the provider and ***may not include, and the insurer is not required to pay, charges for treatment or services rendered more than 35 days before the postmark date*** or electronic transmission date of the statement . . . except that, if the provider submits to the insurer a notice of initiation of treatment within 31 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement.

§ 627.736(5)(c), Fla. Stat. (emphasis added).

"In the context of this statutory provision 'may not' is the equivalent of 'shall not' and cannot reasonably be interpreted as permitting the provider to include untimely charges in its bill." *Coral Imaging Servs. a/a/o Virgilio Reyes v. GEICO Indem. Ins. Co.*, 955 So. 2d 11, 14 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a]. "Therefore, the provider is not even ***permitted to submit*** a bill for untimely services." *Id.* Any proposition which would place the Plaintiff in a position to receive payments would violate the express provisions of section 627.736(5)(c), Florida Statutes. *See Id.* Further, under section 627.736(5)(c)(1), Florida Statutes, "an insurer has no obligation to pay late-filed bills." *United Auto. Ins. Co. v. Garrido, D.C., P.A.*, 990 So. 2d 574 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1846b]; *see also Coral Imaging*, 995 So. 2d 11.

The sole piece of evidence Plaintiff relied upon in opposition to Defendant's Motion for Summary Judgement is the Affidavit of Clara Arbelaez, its records custodian and corporate representative. Essentially, Ms. Arbelaez claims that "in the normal course" of Plaintiff's business, the HFCAs are sent out within five to ten days of treatment. However, Plaintiff provided no actual evidence to support when it mailed the subject bills. In addition, the HFCA attached to the affidavit clearly showed that it was in fact not mailed out in five-ten days.

Defendant, on the other hand, provided evidence of when the subject bills were mailed, including the images of the envelopes that Plaintiff mailed to Defendant with the subject bills that showed that the bills were not timely submitted.

As to the other timely submitted charges that were paid, Defendant's Motion and accompanying affidavit states that as it was the 9810a policy that insured the claimant, this Court is bound by the ruling in *MRI Assocs. of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.* 334 So.3d 577 (Fla. 2021) [46 Fla. L. Weekly S379a], and accordingly Defendant provided proper notice allowing it to limit reimbursement pursuant to fee schedules and did so accordingly. This Court agrees.

In conclusion, based on the legal authority presented herein, Defendant is entitled to entry of final summary judgment in its favor on the basis that Plaintiff did not timely submit its bills for December 29 & 30, 2015 in compliance with Fla. Stat. 627.736(5)(c) and therefore they are not eligible for PIP reimbursement and were properly denied.

Based on the foregoing, it is hereby **ORDERED and ADJUDGED**:

1. Defendant's Motion for Final Summary Judgment is GRANTED.

2. Plaintiff shall take nothing from this action and Defendant shall go hence forth without day.

3. The Court reserves jurisdiction to award attorney's fees and costs, if any.

* * *

Insurance—Personal injury protection—Attorney's fees—Proposal for settlement—Settlement proposal that "reserves any and all rights and defenses [insurer] may have in case and any other action or lawsuits now or hereafter pending related to claim which forms basis for this lawsuit" is ambiguous—Furthermore, proposal impermissibly includes conditions that, if accepted, would cause medical provider to give up claim or right that it could not have otherwise lost in this litigation and is insufficiently specific and particular—Motion for entitlement to fees is denied

MIAMI OPEN MRI, LLC, a/a/o Rolando Amador, Plaintiff, v. INFINITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-010295-SP-26. Section CG03. May 20, 2024. Patricia Marino Pedraza, Judge. Counsel: Kenneth B. Shurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Robert Phaneuf, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES BASED ON A PROPOSAL FOR SETTLEMENT

Docket #: 190
Date: 7/24/23

Name: Infinity's Renewed Motion for Entitlement to Attorney's Fees and Costs and Notice of Filing Proposal for Settlement

This matter having come before the Court on April 3, 2024, on Defendant's Motion for Entitlement to an Award of Attorney's Fees, and the Court having reviewed all matters of record, having heard the arguments of counsel, and being otherwise fully advised therein, the Court finds as follows:

PROCEDURAL BACKGROUND

1. This is an action seeking to recover unpaid PIP benefits.

2. Defendant refused to remit payment for those unpaid medical bills because—according to the Defendant—the insured failed to submit to an examination under oath (EUO).

3. On September 24, 2021, Defendant served a proposal for settlement (PFS), which was not accepted by Plaintiff.

4. Thereafter, the parties filed cross motions for summary judgment on the EUO no-show defense.

5. On March 28, 2022, the trial court granted Plaintiff's motion for summary judgment, and denied Defendant's motion.

6. On April 19, 2022, the trial court entered final judgment for Plaintiff.

7. After the Court denied Defendant's motion for rehearing on the summary judgment motions, Defendant filed its Notice of Appeal on May 31, 2022.

8. The following year, on June 7, 2023, the Third District Court of Appeal issued its opinion reversing this court's order granting summary judgment for plaintiff, with instructions for the trial court to enter summary judgment for Defendant Infinity.

9. That same day, the district court provisionally granted Defendant's motion for appellate fees and stated: "[U]pon consideration of Appellant's Motion for Appellate Attorney's Fees, it is ordered that said Motion is conditionally granted, subject to a determination pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442." (Emphasis supplied).

10. On July 10, 2023, the district court issued its Mandate and Defendant filed its motion for attorney's fees.

11. On remand, and in compliance with the Mandate, this court entered an order on July 24, 2023, *granting* summary judgment for Defendant Infinity. That same day, Defendant filed its renewed motion for attorney's fees based on the rejected PFS, which was identical to its earlier filed motion for fees.

12. For the reasons that follow, the Court finds that Defendant is not entitled to an award of attorney's fees based on the rejected PFS.

A PFS IS GUIDED BY CONTRACT PRINCIPLES

13. The parties agree that a PFS is guided by contract principles. And when interpreting a contract under Florida law, we "give effect to the plain language of contracts when that language is clear and unambiguous." *Arriaga v. Fla. Pacific Farms. L.L.C.*, 305 F.3d 1228, 1246 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C1041a]; *Hamilton Constr. Co. v. Bd. of Pub. Instruction of Dade County*, 65 So.2d 729, 731 (Fla.1953). We must read the contract to give meaning to each and every word it contains, and we avoid treating a word as redundant or mere surplusage "if any meaning, reasonable and consistent with other parts, can be given to it." *Roberts v. Sarros*, 920 So.2d 193, 196 (Fla.Dist.Ct.App.2006) [31 Fla. L. Weekly D467a]. We must give effect to every provision, and "avoid treating a word [or provision] as mere surplusage 'if any meaning, reasonable and consistent with other parts, can be given to it.' " *Equity Lifestyle Props., Inc. v. Florida Mowing and Landscape Serv., Inc.*, 556 F.3d 1232, 1242 (11th Cir. 2009) [21 Fla. L. Weekly Fed. C1463a] (quoting *Roberts v. Sarros*, 920 So. 2d 193, 196 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D467a])(applying Florida law).

14. Given that contract principles control, see, *Tower Hill v. Kushch,* 335 So. 3d 743 (Fla 4th DCA 2022) [47 Fla. L. Weekly D432b], the document must also be free of ambiguity. See, *Allen v. Nunez,* 258 So. 3d 1207 (Fla. 2018) [43 Fla. L. Weekly S421a] (A proposal under the offer of judgment statute must be sufficiently clear and free of ambiguity to allow the offeree the opportunity to fully consider the proposal. *F.S. ,§ 768.79*; *Fla. R. Civ. P. 1.442.*

15. In the instant case, the Defendant's PFS (i.e., its 'offer') served in the instant case states, at paragraph #8:

> "8. This Proposal for Settlement is not to be construed as an admission of liability on the part of the Defendant. **The Defendant accordingly reserves any and all rights and defenses it may have in this case *and any other actions or lawsuits now or hereafter pending relating to the claim which forms the basis for this lawsuit*,** and payment would accordingly be made under such reservation of rights if this Proposal if accepted. Instead this Proposal is being made in an effort to resolve the case and avoid future costs and fees."
> (emphasis supplied).

16. In order to give effect to Defendant's PFS offer, the Court is required to construe the entire document, including paragraph #8, and not treat that (or any other) provision as mere surplusage.

17. In order to do that, the Court must resolve the meaning of "[The Defendant accordingly reserves any and all rights and defenses it may have in this case *and any other actions or lawsuits now or hereafter pending relating to the claim which forms the basis for this lawsuit."*

18. Obviously, a PFS offer can only be used to resolve the claims in the pending case and cannot be used to resolve claims that are not part of the pending case. Claims and defenses that are pending in a related case, but which are not part of the instant case cannot be resolved by a PFS served in this case.

19. And since a PFS is intended to resolve the entire case, it would defy logic for either party to serve a PFS offer which purports to resolve the entire case while reserving to the offeror ". . .any and all rights and defenses it may have in this case and any other actions or lawsuits now or hereafter pending relating to the claim. . . ." It is well established that a PFS is intended to end the litigation, not create more. But the PFS offer served by Defendant in the instant case appears to do exactly that. Defendant's reservation of rights and defenses in this and other cases (or actions) had the opposite effect, making the PFS offer either ambiguous, or impossible for the offeree to consider when determining what they are giving up by accepting the PFS offer.

20. Aside from the penalty of attorney's fees imposed against a litigant deemed to have rejected a PFS, the offeree should not be in any worse position than if he went to trial and suffered an adverse verdict. A loss at trial would not and should not have any additional adverse effect on the ". . .rights and defenses . . . in . . . *any other actions or lawsuits now or hereafter pending relating to the claim which forms the basis for this lawsuit."* A loss at trial should not have any effect on any other case, related or not. A loss at trial should neither improve nor diminish the prevailing party's defenses in any other pending or related case.

21. Defendant appears to rely on *Tower Hill,* supra, for the proposition that its own PFS offer is clear and unambiguous. However, the PFS in the *Tower Hill* case (unlike the PFS in the instant case) stated:

> This Proposal for Settlement is to resolve any and all damages that would otherwise be awarded in a final judgment in this action, including any and all claims and causes of action giving rise to the above-styled lawsuit brought by Plaintiff, ALEX KUSHCH, against Defendant, TOWER HILL SIGNATURE INSURANCE COMPANY, and all potential claims for extra-contractual damages related to Claim No. 3300283404.

22. But the Court in *Tower Hill* found that the PFS in that case was not ambiguous because it was drafted far more concisely than the PFS in the instant case. See paragraph #8 of Defendant's PFS, below.

23. In fact, the PFS in the *Tower Hill* case properly limited its scope to the damage claims presented in that lawsuit, and it did not attempt to extinguish *claims* "*. . .in any and all other related claims or lawsuits now or hereafter relating. . . which forms the basis for this lawsuit."*

24. Contrast the *Tower Hill* PFS with the PFS served by Defendant in the instant case:

> "8. This Proposal for Settlement is not to be construed as an admission of liability on the part of the Defendant. **The Defendant accordingly reserves any and all rights and defenses it may have in this case *and any other actions or lawsuits now or hereafter pending relating to the claim which forms the basis for this lawsuit*,** and payment would accordingly be made under such reservation of rights if this Proposal if accepted. Instead this Proposal is being made in an effort to resolve the case and avoid future costs and fees."
> (emphasis supplied).

25. Defendant's PFS offer cannot stand on its own as it requires this Court to interpret the scope of the text and to make a determination regarding the meaning of the highlighted portion of the text found in paragraph #8, which renders it ambiguous as a matter of law.

CURRENT PFS RULE vs PRIOR PFS RULE

26. Defendant argues that it is entitled to recover fees because the PFS rule in effect at the time it was served controls, and that the civil rules are 'prospective' and not retroactive.

27. Irrespective of which iteration of the PFS rule the Court applies, the Florida Supreme Court has consistently held that the PFS rule requires a PFS "*. . .***be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for Settlement are intended to end judicial labor, not create more.** See, *State Farm v. Nichols* 932 So. 2d 1067 (Fla. 2007) [31 Fla. L. Weekly S358a]. See also, *Allen v. Nunez,* supra.

DEFENDANT'S PFS WAS NOT LIMITED TO THE INSTANT CASE

28. A proposal for settlement cannot include conditions that, if accepted, would cause an offeree to give up a claim or right that it could not have otherwise lost in the litigation. *Nichols,* supra.

29. Here, as in *Nichols,* the language of the proposal was not limited to damages arising out of the underlying action. The *Nichols* court stated: "[a] proposal for settlement should not include conditions that, if accepted, would cause an offeree to give up a claim or right that it could not have otherwise lost in the litigation.

30. By losing the instant case, Plaintiff did not lose any other rights, claims or actions that are pending or related to the instant case. The same is not true if Plaintiff had accepted Defendant's defective PFS.

31. By way of example, if Plaintiff lost the instant case by summary judgment or jury verdict, then Plaintiff would not be paid for the medical bills which were the subject of the action. Period. But, when Defendant's defective PFS is measured against the Plaintiff's claims in this case, an acceptance of the PFS would serve to extinguish Plaintiff's right to be paid any money for its medical services in this case, AND it would be required to surrender other rights and claims that are not even at issue in this case because the "Defendant **accordingly reserves any and all rights and defenses it may have in this case *and any other actions or lawsuits now or hereafter pending relating to the claim which forms the basis for this lawsuit. . ."***

32. If the insured were to seek future medical care from another medical facility for accident-related injuries, would that future claim be affected by Defendant's PFS in this case because that future claim is '*related to the claim*' asserted in the instant case? And what if that other medical facility opts to put its unpaid claim in suit? It would probably not be barred by *res judicata,* see, *United Auto v. Millennium Radiology,* 337 So. 3d 834 (Fla 3rd DCA 2022) [47 Fla. L. Weekly D175a], but would the PFS in this case have any effect on that action, given that any future action might be deemed to fall within the ambit of "*. . . any other actions or lawsuits now or hereafter pending relating to the claim which forms the basis for this lawsuit."*

33. If an ambiguity within the proposal could reasonably affect the offeree's decision, then the proposal will not satisfy the particularity requirement. See, *Nichols, Allen,* and *Palm Beach Polo Holdings,* 904 So. 2d 652 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1626e].

34. The particularity required by rule 1.442(c)(2)(C)-(D) is indispensable and not a mere formality. *Palm Beach Polo,* supra.

35. The Rule drafters comments / committee notes clarified that "all" applies to all claims in the action and not to other claims that are not part of the pending action:

> **2013 Amendment.** Subdivision (c)(2)(B) is amended to clarify that a proposal for settlement must resolve all claims between the proponent and the party to whom the proposal is made except claims for attorneys' fees, which may or may not be resolved in the proposal.
> See, Notes to 2013 Amendment.

36. The case law is in accord, citing to the committee notes:

> An amendment effective January 1, 2014, changed rule 1.442 (c)(2)(B) to require a proposal to "state that the proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F)." *See In re Amendments to the Florida Rules of Civil Procedure,* 131 So.3d 643, 645, 648 (Fla.2013) [38 Fla. L. Weekly S836a]. The purpose of the amendment was "to clarify that a proposal for settlement must resolve all claims between the proponent and the party to whom the proposal is made except claims for attorneys' fees, which may or may not be resolved in the proposal." Fla. R. Civ. P. 1.442 (Committee Notes, 2013 Amendment).
> *See, Bright House Networks, LLC v. Cassidy,* 242 So.3d 456 (2018) [43 Fla. L. Weekly D654a], fn. 3.

37. The foregoing comments to the Rule clarify that a PFS can only be used to extinguish claims presented in the instant case and cannot be used to extinguish claims or causes of action in other related (or unrelated) cases or claims.

38. In *State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So. 2d 1067, 1079 (Fla. 2006) [31 Fla. L. Weekly S358a], the Florida Supreme Court, citing to *Lucas v. Calhoun*, 813 So.2d 971, 973 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D453c], held that the PFS rule intends for a PFS to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. The *Nichols* court went on to say "[F]urthermore, if accepted, the PFS should be capable of execution without the need for judicial interpretation." And that "[P]roposals for Settlement are intended to end judicial labor, not create more." *Id.*

39. Defendant Infinity's PFS in the instant case failed to limit itself to this claim only, and instead sought to extinguish other 'related' claims or lawsuits and therefore it is invalid as a matter of law and cannot support Defendant's claim for fees.

40. In *Nichols.,* supra, the Florida Supreme Court held that a release was ambiguous where it was not limited to claims or causes which were brought [or required to have been brought] in the instant lawsuit. Defendant Infinity's PFS is not limited to the claims in this case.

DEFENDANT'S PFS IS AMBIGUOUS

41. Defendant's PFS is ambiguous and would require construction

by a court. Acceptance of Defendant's PFS, as worded in the instant case is designed to extinguish claims that are not part of the instant action.

42. **Proposals for settlement are intended to end judicial labor, not create more**. *Id.* In order for a PFS to be legally sufficient and valid, all non-monetary terms must be stated with particularity pursuant to Rule 1.442(c)(2)(C) and (D).

43. Rejecting a PFS that is insufficiently particular will not trigger an offeror's right to recover an award of attorney's fees. See, *Connell v. Floyd,* 866 So. 2d 90 (Fla 1st DCA 2004) [29 Fla. L. Weekly D175b]. Rules 1.442(c)(2)(C) and (D) require all terms of an offer to be stated with particularity. *See Zalis v. M.E.J. Rich Corp.*, 797 So.2d 1289 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2592a]; *Gulf Coast Transp., Inc. v. Padron,* 782 So.2d 464 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D806a].

44. This requirement of particularity is fundamental to the purpose underlying the statute and the rule because a proposal for settlement is intended to end judicial labor, not create more. *See Lucas v. Calhoun,* 813 So.2d 971 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D453c]; *Jamieson v. Kurland,* 819 So.2d 267 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1511b]. For this reason, a proposal for settlement should be as specific as possible, leaving no ambiguities, so that the recipient can fully evaluate its terms and conditions. *Id.* at 973 *(citing United Servs. Auto. Ass'n v. Behar,* 752 So.2d 663, 665 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D222a]).

45. The district courts have consistently held that settlement proposals must clarify which of an offeree's outstanding claims against the offeror will be extinguished by accepting the PFS. *See, e.g., Dryden v. Pedemonti*, 910 So.2d 854 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D992a] (holding that the description of a general release was "not as clear and as certain as it should be," because it "could have been found . . . to have extinguished" additional claims.

CONCLUSION

Proposals for Settlement are guided by contract principles and just like contracts, a PFS must be clear and unambiguous. A PFS served under any iteration of the PFS rule must always be limited to the claims set forth in the case; must always be specific and particular; and an ambiguity will render it void. Defendant's PFS was not limited to the damages claims in the instant action and it contains conflicting provisions. Accordingly, Defendant's motion for entitlement to attorney's fees must be denied.

* * *

Insurance—Homeowners—Coverage—Water damage—Summary judgment entered in favor of insurer on homeowner's claim for damage to kitchen walls and floor where homeowner failed to show that there was direct, physical or actual damage to home as result of leak—Conclusory statements in plumber's affidavit are insufficient to establish causal link between leak and damage to kitchen walls and floor reported by homeowner

JUAN C. HERNANDEZ, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No 2022-031522-CC-05. Section CC02. April 29, 2024. Miesha S. Darrough, Judge. Counsel: Peter A. Diamond, Your Insurance Attorney, PLLC, Coconut Grove, for Plaintiff. Katrina Sacayanan and Krissen L. White, Roig Lawyers, Deerfield Beach, for Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on April 16, 2024, on Defendant's Motion for Final Summary Judgment, and the Court having considered the Motion, Response, the applicable law and heard argument of counsel, the Court states as follows:

FINDING OF FACTS

This lawsuit arises out of a dispute between a homeowner, JUAN C. HERNANDEZ, and his insurance company, Citizens Property Insurance Corporation, for property damage. (DE: 2—Complaint). Plaintiff owns the damaged property located at [Editor's note: Address redacted] Miami, FL 33157 (the "Property"). *Id.* The Defendant, Citizens Property Insurance Corporation, issued a policy of insurance to JUAN C. HERNANDEZ with a policy number of 05476969 (the "Policy"). *Id.* Plaintiff reported a loss to Defendant that alleged to have occurred on September 30, 2021. *Id.*

Defendant investigated the loss. (DE: 31—Defendant's Motion for Final Summary Judgment). As a result of Defendant's investigation, on May 30, 2022, Defendant denied the claim and did not afford coverage on the basis that there was no direct physical loss to the subject property associated with the alleged under the slab hot water supply line leak. *Id.*

On June 28, 2023, Defendant filed its Motion for Final Summary Judgment. (DE: 31—Defendant's Motion for Final Summary Judgment). In support of the motion, Defendant filed the affidavits of its filed adjuster, Tim Woodcook, and Jeremy Beagle, the engineer. (DE: 32). In Response, the Plaintiff filed a Response in Opposition to Defenant's Motion on November 2, 2023. (DE: 47—Plaintiff's Response in Opposition to Defendant's Motion for Final Summary Judgment). In support of Plaintiff's Response, Plaintiff filed the affidavits of Juan C. Hernandez, the homeowner, (DE: 47) and Reynaldo Alvarez, Jr., the plumber. (DE: 48).

FINDING OF LAW

Pursuant to the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1976); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which was adopted by the Florida Supreme Court, summary judgment in favor of the Defendant, the moving party, is appropriate as Plaintiffs, as the non-moving party failed to make a sufficient showing to establish an essential element of their case. Instead "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case. In *Re Amends. to Fla. Rule of Civ. Pro. 1.510,* citing *Celotex* at 323. A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial.

In *Homeowners Choice Prop. & Cas. v. Maspons,* 211 So. 3d 1067 (Fla. 3rd DCA 2017) [42 Fla. L. Weekly D203a], the Court found that "there was no evidence that the water exiting the pipe had caused any damage to its surrounding." The insured has the burden of proving facts that bring its claim within an insurance policy's affirmative grant of coverage. *See E. Fla. Hauling, Inc. v. Lexington Ins. Co.,* 913 So. 2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a].

The court further stated, "In order to meet this burden under a policy of property damage insurance, the insured must prove (1) that the property harmed or damaged falls within the "insuring clause" of the policy, and (2) the loss claimed falls within a second, "covered perils" provision contained in each policy." *See Maspons*, 211 So. 3d at 1068.

Like *Maspons*, Plaintiff has not presented sufficient evidence to show that there was direct, physical, or actual damage to the subject property as a result of an under the slab hot water supply line leak. In his affidavit, Mr. Hernandez states he saw the walls close to the kitchen door and close to the water heater becoming yellowish and there being humidity on the walls, he noticed that the kitchen floor was warmer than the rest of the home, and sometime after he saw mold.

In Mr. Alvarez's affidavit, he states Plumbing Diagnostics performed a FLIR evaluation, which "demonstrated evidence of low temperatures reflecting moisture in the kitchen floor. The hot water

supply shows signs of leaking under the title and concrete slab at the time of inspection, the pipes are in adverse conditions, causing them to leak. This is a pipe abnormality." Mr. Alvarez never explains in his affidavit and it's not in the report[1] what exactly is a FLIR evaluation, why is it relevant to this case and what does it mean in this case. The report states, "The FLIR demonstrates evidence of low temperatures reflecting moisture in the kitchen floor." However, he does not state that moisture in the kitchen floor caused any damage or links the moisture in the kitchen floor to what the homeowner reported as damage to the kitchen. Also, there is no mention of how a leak under the title and concrete slab caused the damage that the homeowner reported. There is no connection between what the homeowner reports as a loss to what Plumbing Diagnostics reports during the inspection. Additionally, Mr. Alvarez states in his affidavit that the pipes are in adverse conditions, causing them to leak and that this is a pipe abnormality. How Mr. Alvarez or whoever did perform the inspection can make such a determination that the pipes are in adverse conditions or determines that a "leaking pipe" is a pipe abnormality is never discussed in the affidavit or in the report. At best, these are conclusory statements made with no support.

As such, the affidavits of Juan C. Hernandez and Reynaldo Alvarez, Jr. do not establish that a direct physical loss to the property occurred during the policy period because of the under the title and concrete slab hot water supply line leak.

The Plaintiff cites *Widdows v. State Farm Florida Ins. Co.*, 920 So.2d 149 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D363a] to say that a pipe abnormality is in essence the "physical loss" required within the meaning of the insurance policy at issue in order to trigger coverage. However, *Widdows* is distinguishable from the case here. In *Widdows*, the Appellant called a plumber to repair a backed-up toilet. There was no leaking pipe that was alleged to have caused damage. During the plumber's inspection, the plumber discovered that the drainpipe connecting the toilet to the sewer pipe had become "backpitched," thereby impeding the flow of water. Here, there is no record evidence that shows that a pipe was backpitched or impeded the proper flow of water like in *Widdows*. The leaking of a pipe alone does not make it backpitched or an abnormality.

CONCLUSION

Hence, this Court finds that Defendant has carried its burden to establish summary judgment in its favor because the Plaintiff has failed to establish an essential element of their case that a direct physical loss occurred that would afford coverage under the subject insurance policy and find that as a matter of law no reasonable jury could return a verdict for the non-moving party.

IT IS THEREFORE, ORDERED AND ADJUDGED:

1. That Defendant's Motion for Final Summary Judgment and Final Judgment is hereby entered on behalf of Defendant, Citizens Property Insurance Corporation.

2. Plaintiff, Juan C. Hernandez, shall take nothing by this action and Defendant shall go hence without day.

3. This Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees.

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[1]The Court notes that the Report does not identify who performed the inspection. Mr. Alvarez never alleges he performed the actual inspection or that he was present for the inspection. At paragraph 2, he states he evaluated a video recording following the in-person inspection. A video that is not mentioned anywhere in the actual report.

* * *

Insurance— Property — Standing—Assignment—Validity—Emergency services—Assignment of benefits for emergency water removal services in excess of $3,000 is invalid and unenforceable—No merit to argument that statute limiting assignment for emergency services to $3,000 or 1% of coverage limit merely limits amount assignee can recover and does not render entire assignment invalid—Issue of whether assignment improperly contains administrative fee is factual dispute not ripe for resolution on motion for judgment on pleadings—Equitable assignment—Where assignment violated statutory provisions of section 627.7152, argument that contract should be considered equitable assignment is rejected—Case dismissed with prejudice

SYNERGY PROPERTY RESTORATION, INC., a/a/o George and Jennette Hilton, Plaintiffs, v. PEOPLE'S TRUST INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 23-CC-082595. May 9, 2024. James Giardina, Judge. Counsel: Alexa J. Battisti, Battisti Law Group, Celebration, for Plaintiffs. Michael Greenberg, Deerfield Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGEMENT ON THE PLEADINGS FOR FAILURE TO COMPLY WITH § 627.7152, FLA. STAT.

THIS CAUSE came before the Court on April 23, 2024, upon DEFENDANT'S MOTION FOR JUDGEMENT ON THE PLEADINGS FOR FAILURE TO COMPLY WITH § 627.7152, FLA. STAT. ("Motion for Judgment on the Pleadings") & DEFENDANT'S MOTION TO STAY DISCOVERY PENDING COURT'S RULING ON DEFENDANT'S JOINT ANSWER AND AFFIRMATIVE DEFENSES AND MOTION FOR JUDGEMENT ON THE PLEADINGS FOR FAILURE TO COMPLY WITH § 627.7152, FLA. STAT. ("Motion to Stay"), it is thereupon:

ORDERED AND ADJUDGED THAT:

1. Defendant's Motion for Judgment on the Pleadings is **GRANTED.**

2. Plaintiff's case arises out of an assignment of insurance benefits agreement executed by the insured-assignor and Plaintiff-assignee on April 19, 2022, which is attached to Plaintiff's Complaint as an exhibit along with numerous estimates and invoices for various services rendered by Plaintiff. The Complaint alleges breach of contract and breach of contract with implied equitable assignment of benefits in the alternative.

3. Plaintiff's assignment of benefits agreement is subject to section 627.7152, Florida Statutes (2022), which applies to assignment agreements executed on or after July 1, 2019 through May 25, 2022. §627.7152(13), Fla. Stat.; *see Kidwell Grp., LLC v. Am. Integrity Ins. Co. of Florida*, 347 So. 3d 501, 507 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1910a].

4. Section 627.7152(2) provides the specific requirements which must be included in an assignment agreement for such an agreement to be valid and enforceable. *See* §627.7152(2)(d), Fla. Stat. These requirements are clear and unambiguous.

5. Defendant asserts that Plaintiff's assignment of benefits agreement is invalid and unenforceable for improperly containing an administrative fee in violation of section 627.7152(2)(b)4, and because emergency services were provided under the assignment agreement and said services exceeded $3,000 in violation of section 627.7152(c). Defendant also argues that Plaintiff's alternative count for breach of contract with implied equitable assignment of benefits must be dismissed.

6. The Court denies Defendant's argument concerning section 627.7152(2)(b)4, as what constitutes an "administrative fee" is a factual dispute that is not ripe for resolution at this stage of the litigation.

7. However, the Court agrees that the assignment agreement does not comply with section 627.7152(2)(c), which provides:

> If an assignor acts under an urgent or emergency circumstance to protect property from damage and executes an assignment agreement to protect, repair, restore, or replace property or to mitigate against further damage to the property, an assignee may not receive an assignment of post-loss benefits under a residential property insurance policy in excess of the greater of $3,000 or 1 percent of the Coverage

A limit under such policy. For purposes of this paragraph, the term "urgent or emergency circumstance" means a situation in which a loss to property, if not addressed immediately, will result in additional damage until measures are completed to prevent such damage.

§627.7152(2)(c), Fla. Stat.; *see also* §627.7152(2)(d), Fla. Stat. (providing that "[a]n assignment that does not comply with this subsection is invalid and unenforceable").

8. The Complaint alleges that Plaintiff provided "emergency water removal services, restoration, and/or rebuild services, in addition to any other services necessary to complete the repairs to the Insured Property," and one of the estimates and one of the invoices attached to the Complaint include line items for "emergency service call[s]." Moreover, Plaintiff conceded at the hearing that at least some of the services provided by Plaintiff were provided under an emergency circumstance.

9. One percent of Coverage A under the subject policy, a certified copy of which was attached to the relevant affirmative defense and Motion for Judgment on the Pleadings, is $1,643.99,[1] making $3,000 the applicable statutory limit.

10. The estimate with the "emergency service call" line item totaled $2,747.31, while the other estimates for other services totaled $10,808.34, $20,000.75, and $21,924.78. The self-labeled invoice with the "emergency service call" line item totaled $12,116.50, while the other invoices totaled $12,501.37 and $5,294.62. Thus, whether considering the total amount of the estimates or the total amount of the invoices, the assignment agreement was clearly in exchange for an amount that exceeded $3,000.

11. At the hearing, Plaintiff argued that section 627.7152(2)(c) merely limits the amount that an assignee can recover for emergency services to the greater of $3,000 or 1 percent of the Coverage A limit, and that the entire assignment agreement should not be deemed invalid and unenforceable despite the total amount charged for both emergency and non-emergency services exceeding $3,000. However, such a reading does not comport with the plain language of the statute.

12. Section 627.7152(2)(c) provides that "[i]f an assignor acts under an urgent or emergency circumstance to protect property from damage ***and executes an assignment agreement to protect, repair, restore, or replace property or to mitigate against further damage to the property***, an assignee may not receive ***an assignment*** of post-loss benefits" that exceeds the statutory limit. (Emphases added). The statute then defines "urgent or emergency circumstance" to mean "a situation in which a loss to property, if not addressed immediately, will result in additional damage until measures are completed to prevent such damage," *id.*, and instructs that failure of "***an*** assignment" to comply with subsection (2)(c) renders the agreement invalid and unenforceable per subsection (2)(d). The statute provides that the assignment agreement executed under the "urgent or emergency circumstance" may be to "protect . . . property or to mitigate against further damage to the property," which are purposes that may fall under the statute's express definition of "urgent or emergency circumstance." But critically, according to the statute the assignment agreement executed under the "urgent or emergency circumstance" that may not exceed the statutory limit may also be to "repair, restore, or replace property," which are purposes that cannot be classified as services rendered under the statute's express definition of "urgent or emergency circumstance."[2] Courts must "endeavor[ ] to give effect to every word of a statute so that no word is construed as mere surplusage." *Dean Wish, LLC v. Lee Cnty.*, 326 So. 3d 840, 845-46 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2173a] (quoting *Hardee Cnty. v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017) [42 Fla. L. Weekly S613a]).

13. Thus, the statute provides that "an assignment agreement" ***which may include non-emergency services*** is invalid and unenforceable if the assignment is executed under an emergency circumstance and exceeds the greater of $3,000 or 1 percent of the policy's Coverage A limit. That statute does not delineate which services (emergency or non-emergency) that are rendered under the assignment agreement cannot exceed the statutory limit; rather, the statute simply provides that "an assignee may not receive ***an assignment*** of post-loss benefits under a residential property insurance policy in excess of" the statute's limit.

14. Nowhere does the statute provide or imply the consequence for an assignment agreement executed under an emergency circumstance and exceeding the statutory limits is to limit recovery to the greater of $3,000 or 1 percent of the Coverage A limit. Nor does section 627.7152(2)(d) allow for such an assignment to be deemed partially valid or partially enforceable. Rather, the statute provides that such an assignment is "invalid and unenforceable." §627.7152(2)(d), Fla. Stat. "The judiciary . . . is without power to rewrite a plainly written statute." *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313-14 (Fla. 2016) [41 Fla. L. Weekly S331a].

15. Consequently, because Plaintiff received an assignment agreement under an emergency circumstance for an amount that exceeded the limit imposed by section 627.7152(2)(c), the assignment agreement is invalid and unenforceable. *See generally Restoration Team v. S. Oak Ins. Co.*, 357 So. 3d 236, 241 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D335a] (affirming dismissal of assignment of insurance benefits suit with prejudice because, among other reasons, the assignment agreement for emergency services exceeded the limit allowed under section 627.7152(2)(c)).

16. Finally, as for Plaintiff's equitable assignment theory, "[b]ecause the contract violated the statutory provisions [of section 627.7152] and was thus unenforceable," the Court is bound by *Air Quality Experts Corp. v. Family Sec. Ins. Co.*, 351 So. 3d 32, 39 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c], to "reject the assignee's claim that the contract could be considered an equitable assignment, as this would improperly circumvent the clear statutory requirements" of section 627.7152.

17. "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2567a]. An assignment of benefits "is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place." *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b].

18. Accordingly, Defendant's Motion for Judgment on the Pleadings is **GRANTED**, and the case is dismissed with prejudice due to the incurable defect of the assignment agreement. Plaintiff shall take nothing in this action, and the Defendant may go hence without day.

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[1]It is proper for the Court to consider contents of an insurance policy that is filed with an insurer's motion for judgment on the pleadings where the complaint refers to the policy, the plaintiff's standing to bring suit is premised on the policy, and the policy is attached to the relevant affirmative defense and motion for judgment on the pleadings. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a] ("[B]ecause the complaint impliedly incorporates the [insurance] policy by reference, the trial court was entitled to review the policy in ruling on the motion to dismiss.").

[2]Indeed, at the hearing Plaintiff contended that only services to prevent imminent additional damage should be considered "emergency services" and services to replace or restore property back to its original condition should be considered "non-emergency services."

* * *

Insurance— Property — Standing—Assignment—Validity—Assignment that requires insured to indemnify, release, and hold harmless the assignee is invalid and unenforceable

WELL DONE MITIGATION, LLC, a/a/o Noleysis Cruz Silverio, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2023-CC-008901-XXXX-MB. February 26, 2024. Sarah L. Shullman, Judge. Counsel: Robert F. Gonzalez, The Florida Insurance Law Group, LLC, Miami, for Plaintiff. Michelle R. Musa, Roig Lawyers, Deerfield Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that Defendant's Motion is hereby **GRANTED** with prejudice. Plaintiff's Assignment of Benefits (the "AOB") does not comply with section 627.7152(2)(a)(8), as in two places it requires the *insured/assignor* to indemnify, release, and hold harmless the *service provider/assignee*, opposite of the statutory requirement for the "assignee to indemnify and hold harmless the assignor." The AOB is therefore invalid and unenforceable under section 627.7152(2)(d), Fla. Stat.

As the AOB is referenced in paragraph 13 of the Complaint, and is the legal document upon which Plaintiff's standing is based, it may be considered on a motion to dismiss. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a] ("[W]here 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.") (citing *Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So. 3d 1246, 1249 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a]).

The Court further finds that the offending clause may not be severed, as then the AOB would still not "[c]ontain a provision requiring the assignee to indemnify and hold harmless the assignor from all liabilities, damages, losses, and costs." § 627.7152(2)(a)(8), Fla. Stat. Further, standing may not be cured retroactively. *See Air Quality Experts Corp. v. Fam. Sec. Ins. Co.,* 351 So. 3d 32, 39 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2592c] (citing *Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic,* 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]).

* * *

Landlord-tenant—Public housing—Eviction—Noncompliance with lease—Eviction action is time-barred where action was not instituted within 45 days after landlord obtained actual knowledge of noncompliance—Service of 7-day notice of noncompliance and opportunity to cure does not constitute institution of eviction action—Action is instituted when complaint is filed with clerk of court

THE HOUSING AUTHORITY OF THE CITY OF KEY WEST, Plaintiff, v. ELENA JONES, Defendant. County Court, 16th Judicial Circuit in and for Monroe County. Case No. 2023-CC-192-K. March 11, 2024. Mark Wilson, Judge. Counsel: David Van Loon, Highsmith & Van Loon, P.A., Key West, for Plaintiff. Alexander Maza, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the Court on the plaintiff's Verified Complaint for Possession and the defendant's Motion to Dismiss. Because the action in this case was not instituted within 45 days of the plaintiff receiving actual notice of the defendant's alleged noncompliance, the Court grants the motion to dismiss.

The plaintiff's Verified Complaint for Possession was filed on September 19, 2023. The basis for the complaint is the defendant's alleged noncompliance with terms of her residential lease agreement—namely, her obligations "[t]o comply with the requirements of applicable state and local building or housing codes, materially affecting health and/or safety of Tenant and household[,]" and "[t]o keep the dwelling unit and other such areas as may be assigned to Tenant for exclusive use in a clean and safe condition." Residential Lease Agreement: Terms and Conditions, §§ IX(e) & (f).

Attachments to the complaint[1] reveal that the plaintiff inspected the defendant's unit on March 10, 2023, and again on August 24, 2023, and found she was not in compliance with the lease provisions described above due to "excessive clutter and health and safety violations."[2] Following the March 10th inspection, the plaintiff served the defendant with a seven-day notice of noncompliance and opportunity to cure. Following the August 24th inspection, the plaintiff served her with a seven-day notice of termination. After the defendant failed to vacate the premises, this eviction action was filed on September 19, 2023.

The defendant has moved to dismiss the complaint because, *inter alia,* it is untimely under the terms of section 83.56(5)(c), Florida Statutes. This provision provides, "This subsection does not apply to that portion of rent subsidies received from a local, state, or national government or an agency of local, state, or national government; however, *waiver will occur if an action has not been instituted within 45 days after the landlord obtains actual knowledge of the noncompliance*." Fla. Stat. § 83.56(5)(c) (emphasis added). The defendant's argument in this regard is simple: the plaintiff received actual knowledge of her alleged noncompliance no later than March 10, 2023, and the eviction action was not filed until September 19, 2023—193 days later. Therefore, the complaint is untimely.

The plaintiff counters the complaint was timely because it served the defendant with a seven-day notice of noncompliance and opportunity to cure on March 23, 2023, 13 days after discovering the noncompliance. It cites *The Housing Authority of the City of Key West v. Forde, et al.,* 18 Fla. L. Weekly Supp. 1197c (Fla. Monroe County Ct. Sept. 16, 2011), for the proposition that service of a notice of noncompliance constitutes "initiation of the action as contemplated by § 83.56(5)[,] Fla. Stat." *Id.*

The Court cannot accept the construction of the statute urged by the plaintiff because it is inconsistent with the plain language of section 83.59(5)(c). "Words of common usage, when used in a statute, should be construed in the plain and ordinary sense, because it must be assumed that the Legislature knows the plain and ordinary meaning of words used in statutes and that it intended the plain and obvious meaning of the words used." *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.,* 945 So. 2d 1216, 1225 (Fla. 2006) [31 Fla. L. Weekly S882a]. The Florida Supreme Court has "repeatedly held that the plain meaning of statutory language is the first consideration of statutory construction." *Clines v. State,* 912 So. 2d 550, 555 (Fla. 2005) [30 Fla. L. Weekly S657a] (quoting *Stoletz v. State,* 875 So. 2d 572, 575 (Fla. 2004) [29 Fla. L. Weekly S240a]). Section 89.59(5)(c) states, "[W]aiver will occur if an *action has not been instituted* within 45 days after the landlord obtains actual knowledge of the noncompliance." Fla. Stat. § 83.56(5)(c) (emphasis added). The question, then, is when is an action instituted? The Florida Rules of Civil Procedure provide the answer: "Every action of a civil nature shall be deemed commenced when the complaint or petition is filed[.]" Fla. R. Civ. P. 1.050. "A pleading is 'filed,' in turn, 'when it is delivered to and received by the proper officer for that purpose.' " *Outboard Marine Domestic Intern. Sales Corp. v. Florida Stevedoring Corp.,* 483 So. 2d 823, 824 (Fla. 3d DCA 1986) (*quoting Cook v. Walgreen Co.,* 399 So. 2d 523, 524 (Fla. 2d DCA 1981)).

The Court finds that an action is instituted for purposes of section 83.59(5)(c) "when it when it is delivered to and received by the proper officer for that purpose." *Id.* In other words, an eviction action is

instituted when a complaint is filed with the clerk of court. Service of a notice of noncompliance on a tenant does not constitute initiation of an action. Because the action in this case was not instituted within 45 days after the plaintiff received actual knowledge of the alleged noncompliance, it is time-barred by section 83.59(5)(c). Accordingly, the defendant's Motion to Dismiss is **GRANTED.**

[1]Seven (7) Day Notice of Noncompliance and Opportunity to Cure (March 23, 2023) and Seven (7) Day Notice of Termination (September 6, 2023).
[2]*Id*.

* * *

Civil procedure—Default—Vacation—Motion to vacate default denied—Defendants failed to appear at pretrial conference after court granted their attorney's motion to withdraw from case and required that defendants appear at conference in person, defendants failed to respond to order to show cause or to appear at show cause hearing, and defendants' sole excuse for nonappearance is that they were busy people—Defendants remain entitled to trial on unliquidated damages

EMPIRE WINDOWS SYSTEMS, INC., Plaintiff, v. ANTHONY LEEFATT, et al., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE23069277. Division 53. May 17, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT ANTHONY LEE-FATT'S MOTION TO VACATE DEFAULT

This cause came before the Court for consideration of the Defendant Anthony Lee-Fatt's motion to vacate default, and the Court's having reviewed the motion, all matters of record, and the relevant legal authorities, the Court finds as follows:

The motion is DENIED.

The Defendants were previously represented by counsel. By Order dated March 21, 2024, a pretrial conference for trial was set for April 30, 2024. Several weeks prior to the pretrial conference, however, the Defendants' attorney moved to withdraw. The Defendants were provided a copy of the motion by email to each of their addresses. The hearing was set for April 11, 2024. The Defendants did not appear at the hearing, although it was noticed for remote appearance.

On April 16, 2024, the Court entered its "Order Granting Defendants' Attorney Motion to Withdraw, Requiring Defendants to Appear at Pretrial Conference." The Order advised that the pretrial conference was set for April 30, 2024 at 11:00 a.m. for an in-person appearance. This Order was emailed to both Defendants on April 16, 2024 at 9:24 p.m. In his Motion, Defendant Lee-Fatt acknowledges receiving this Order. Nevertheless, the Defendants did not appear at the April 30 pretrial conference, nor did they respond to the Court's Order.

On April 30, 2024, on the date of the missed pretrial conference, the Court issued its Order to Show Cause on both Defendants to appear before the Court on May 14, 2024 to show cause why their pleadings should not be stricken and a default entered for failure to appear at the pretrial conference. An electronic notice of the hearing was sent to all parties, including both Defendants, via the Court's Case Management System on April 30, 2024 at 12:38 p.m. Further, a copy of this Order was emailed to both Defendants on April 30, 2024 at 9:24 p.m. In the Order to Show Cause, the Defendants were advised that they failed to appear at a mandatory pretrial conference, and they were warned: "THE DEFENDANTS ARE ADVISED THAT IF THEY FAIL TO APPEAR [at the show cause hearing], THE COURT WILL CONCLUDE THAT THEY NO LONGER DESIRE TO DEFEND THIS CASE, AND THE COURT WILL STRIKE THEIR PLEDINGS AND ENTER A DEFAULT AGAINST THEM."

The Defendants did not respond to the show cause order. Further, they did not appear at the hearing. Having been given full warning and an opportunity to demonstrate that their failure to appear was not wilfull, the Court did as advised—the Defendants' pleadings were stricken and a default entered. In light of the several email notices sent to the Defendants, as well as Defendant Lee-Fatt's acknowledgment that they received the order requiring their appearance, the Court concludes that their failure to appear was wilfull. The Court finds that the Defendant's proffered reason for missing the court appearances—that they were in essence busy people—is unavailing. As a result, the Defendant's Motion is DENIED. *See Universal Prop. & Cas. Ins. Co. v. Andre*, 49 Fla. L. Weekly D196a, D197 (Fla. 4th DCA Jan. 17, 2024).

That being said, because this case involves unliquidated damages, the Defendants remain entitled to a trial on damages, for which they were already sent notice on April 30, 2024 for a trial scheduled for June 4, 2024. At this trial, the sole issue for the Court is the amount of damages to be awarded Plaintiff. Further, the parties are strictly limited to witnesses and exhibits preserved at the pretrial conference. The Clerk's notes reflect that the Plaintiff preserved 7 exhibits at the pretrial conference. If the Plaintiff has not already done so, the Plaintiff is hereby directed to provide the 7 exhibits to the Defendants by email attachments, or by hard copies sent to their mailing address in Royal Palm Beach.

* * *

Insurance — Property— Standing—Assignment—Validity—Assignment of benefits under property insurance policy is invalid and unenforceable where assignment does not contain written itemized per-unit cost estimate of services to be performed by assignee—Unsigned invoice that postdated assignment is not substitute for statutorily required estimate

JG PRIME SERVICES, LLC, Plaintiff, v. SOUTHERN FIDELITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21060118. Division 62. May 13, 2024. Terri-Ann Miller, Judge. Counsel: Law Office of Jose C. Leon, Miami, for Plaintiff. Hernandez & Valois, P.A., Ft. Lauderdale, for Defendant.

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

THIS CAUSE having come before this Court on May 9, 2024, on FLORIDA INSURANCE GUARANTY ASSOCIATION's ("FIGA") Motion to Dismiss the Plaintiff's Amended Complaint, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. FIGA's Motion to Dismiss the Plaintiff's Amended Complaint is GRANTED.

2. Plaintiff's Amended Complaint is DISMISSED WITH PREJUDICE.

3. The Assignment of Benefits is invalid and unenforceable as a matter of law as it failed to comply with Fla. Stat. §627.7152 as it did not contain a written, itemized, per-unit cost estimate for services to be performed.

4. While Plaintiff included an unsigned invoice as an attachment to its Amended Complaint, said invoice postdated the Assignment of Benefits by nine (9) days. As such, the Assignment fails to meet the statutory requirement that at the time the assignment is signed, it contain a written, itemized, per-unit cost estimate of the services to be performed.

* * *

Consumer law—Florida Consumer Collection Practices Act—Affirmative defenses—Argument that plaintiff failed to state claim for damages because alleged violations were not cause of plaintiff's injury or damages is simply a denial and not a proper affirmative defense—Good faith is not defense to FCCPA claim—Defense related to punitive damages is stricken because punitive damages are not included in complaint—Defense alleging failure to mitigate damages is stricken as there is no duty to mitigate—Defenses that fail to allege sufficient facts are stricken without prejudice—Defense alleging that mortgage foreclosure is not debt collection is stricken

BRADLEY REANO, Plaintiff, v. SPECIALIZED LOAN SERVICING, LLC, Defendant. County Court, 18th Judicial Circuit in and for Seminole County, General Division. Case No. 2023-CC-2556. May 1, 2024. Wayne Culver, Judge. Counsel: Bryan A. Dangler and Shawn Wayne, The Power Law Firm, for Plaintiff. Joseph Apatov, McGlinchey Stafford, PLLC, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

THIS CAUSE came before the court during a special set hearing on April 22, 2024, on Plaintiff's Motion to Strike Affirmative Defenses ("Motion"), and the Court, having reviewed the Motion and the case law presented, hearing argument of parties' counsel, and being otherwise being fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1) Plaintiff's Motion is **GRANTED**.

2) Affirmative Defense #1 (Failure to State a Cause of Action) is **STRICKEN with prejudice.**

3) Affirmative Defense #2 is **STRICKEN with prejudice**. Damages are statutorily provided in Fla. Stat. §559.77. Plaintiff has alleged both actual damages and statutory damages in its complaint. Moreover, Plaintiff is not required to prove actual damages to prevail on his FCCPA claim, but only that a violation of the FCCPA occurred. *Laughlin v. Household Bank, Ltd.*, 969 So.2d 509 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2761c]; *Carey v. Everbank*, 23 Fla. L. Weekly Supp. 583c (Fla. 5th Jud. Cir. 2015); *Penkava v. FNMA, et. al.* 25 Fla. L. Weekly Supp. 176a (Fla. 5th Jud. Cir. 2017)

4) Affirmative Defenses #3 is **STRICKEN with prejudice.** Defendant argues that "Plaintiff has failed to state a claim for damages because the alleged violations were not the cause of any injury or damages that Plaintiff allegedly sustained. Specifically, any injuries or damages alleged by Plaintiff are instead a result of the other actions or causes outside the conduct of SLS alleged by Plaintiff. Plaintiff's recovery is therefore barred, in whole or in part, to the extent that such injuries or damages were not caused by the conduct allegedly committed by SLS as set forth in the Complaint." This defense is simply a denial, which does not constitute a proper affirmative defense. Moreover, the defense is stated in the broadest of terms. Notably, during argument SLS conceded that it is not taking the position that any communications were made by a separate party.

5) Affirmative Defense #4 is **STRICKEN with prejudice.** The Court finds nothing that would support "good faith" as a defense to the FCCPA. The Legislature provides a defense for a bona fide error within the statute and outlines certain facts to be examined to determine if any alleged violation was the result of a bona fide error. Good faith alone is not sufficient. *Maldonado v. Ocwen Loan Servicing*, 26 Fla. L. Weekly Supp. 224a (Fla. 6th Jud. Cir. 2018)

6) Affirmative Defense #5 was withdrawn by the Defendant.

7) Affirmative Defense #6 is hereby **STRICKEN**. Defendant may seek to re-raise this defense should the Plaintiff amend its complaint to include punitive damages as part of its relief sought.

8) Affirmative Defense #7 is **STRICKEN with prejudice**. Defendant alleged that Plaintiff failed to mitigate damages. Under the FCCPA, Plaintiff is not required to mitigate its damages. *Hernandez v. Ocwen Loan Servicing, LLP*, 25 Fla. L. Weekly Supp. 175a (Fla. 5th Jud. Cir. 2017)

9) Affirmative Defense #8 is hereby **STRICKEN without prejudice and with leave to amend**. Defendant argues that "[a]ny violation that may have occurred was a result of a bona fide error, and SLS has procedures reasonably adapted to avoid any such errors." As pled, this defense provides no facts, details or other information connecting it to Plaintiff's claims. Defendant must provide more facts to substantiate this defense should it choose to amend.

10) Affirmative Defenses #9, #10 and #11 are hereby **STRICKEN without prejudice and with leave to amend**. These defenses were stated in the broadest of terms. Certainty will be insisted upon in pleading a defense and the certainty required is that a pleader must set forth ultimate facts in pleading its defenses**.** Defendant may amend these defenses to the extent it believes it is capable of doing so.

11) Affirmative Defense #12 is hereby **STRICKEN with prejudice.** Under Florida law, mortgage foreclosure is debt collection. *Bank of America v. Siefker,* 201 So.3d 811 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2319a]; *Petracca v. Ditech Financial, LLC,* 25 Fla. L. Weekly Supp. 127a (Fla. 18th Jud. Cir. 2017). Representation in a debt collection action is representation with respect to the debt.

12) Defendant may amend affirmative defenses #8, #9, #10 and #11 within 20 days from the date of this Order.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Campaign literature—According to nine of the twelve members of the committee, a judicial candidate may distribute business cards and campaign literature that includes the candidate's campaign website address where website has an online option to make contributions to the candidate's campaign—According to eight members of the committee, a judicial candidate may not use a cover photo on the candidate's personal Facebook page that includes the candidate's campaign website address where website has an online option to make contributions to the candidate's campaign

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-06 (Election). Date of Issue: May 14, 2024.

ISSUE

1. Whether a judicial candidate may distribute business cards and campaign literature that include the candidate's campaign website address, where the website has an online option to make contributions to the candidate's campaign?

ANSWER: Yes, according to nine members of the Committee; three members would conclude the answer is "no";

2. Whether a judicial candidate may use a cover photo on the candidate's personal Facebook page that includes the candidate's campaign website address, where the website has an online option to make contributions to the candidate's campaign?

ANSWER: No, according to eight members of the Committee; four members would conclude the answer is "yes."

FACTS

A candidate for judicial office inquires whether the candidate may pass out business cards and campaign literature that include a reference to the candidate's campaign website address. The campaign website is maintained by the candidate's campaign committee and contains an online option to make financial contributions to the candidate's campaign. The inquirer also asks whether the candidate may use a cover photograph on the candidate's personal Facebook page that includes a reference to the same campaign website address.

DISCUSSION

This inquiry turns on Canon 7(C)(1) of the Code of Judicial Conduct, which provides as follows:

> C. Judges and Candidates Subject to Public Election.
>
> (1) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

Although the language of this canon would seem fairly straightforward, applying it to the various ways election campaigns seek to communicate to potential voters can sometimes prove challenging.[1] Unfortunately, the Committee is unable to reach a unified consensus as to how to answer the present inquiry. After careful consideration, three views have emerged, which will be briefly summarized below.

The divergence of opinions represents the difficulty in finding the proper balance between: (1) the specific prohibitions of Canon 7(C)(1); (2) a more generalized proscription that cautions against accomplishing indirectly what a judicial canon would forbid directly—*see* Fla. JEAC Op. 1981-05 (advising against a proposed course of action "because it will tend to permit (you) to do indirectly what (you) could not do directly"); (3) Canon 7(C)(1)'s permitted use of campaign committees to maintain websites and social media accounts to promote a candidate—*see* Fla. JEAC Op. 2014-04 [21 Fla. L. Weekly Supp. 459a] (a candidate's campaign committee may maintain a website with a donation link); (4) parsing permissible committee versus impermissible candidate solicitations for contributions—*see* Fla. JEAC Op. 2020-13 [28 Fla. L. Weekly Supp. 246a] (opining that a committee website may include video of the candidate "so long as the candidate's own words do not extend to asking for donations or other financial support"); and (5) the reality that "[t]he heart of the democratic process is candidates stumping for votes," Fla. JEAC Op. 2020-13 [28 Fla. L. Weekly Supp. 246a], which is a vital and necessary component of the contested elections the people of Florida have chosen to have for county and circuit judgeships.

With those principles in mind, three views have emerged from the Committee's deliberations:

I. According to four members: Yes, a candidate may distribute materials displaying a campaign website link; No, a candidate may not use a personal Facebook cover photo with a campaign website link.

Recently, in Fla. JEAC Op. 2023-12 [31 Fla. L. Weekly Supp. 511a], the Committee opined on a somewhat similar inquiry—whether a candidate may "wear a shirt, hat, or other apparel that shows the uniform resource locator (URL) to the website maintained by the candidate's committee, which contains options to donate and to endorse the campaign." As here, the Committee was divided, but a majority concluded that the candidate could permissibly wear such apparel and explained:

> These members [the majority] do not read Canon 7 as prohibiting a judicial candidate from making any reference whatsoever to the campaign's website merely because it contains a link for donation. Context is the key to finding the line between passive advertisement and personal solicitation. As our prior opinions have explained, a candidate must not personally solicit attorneys and others by directing them to the campaign website for the purpose of making donations and showing support.

Four members of the Committee conclude that providing business cards and campaign materials that display campaign website links is sufficiently similar to wearing apparel showing campaign website links such that this activity does not violate Canon 7. These members point out that a candidate must assuredly be allowed to inform voters, in some way, that he or she has a committee; and that committee is expressly authorized to solicit contributions, whether in person, in writing, or through a committee-maintained website. However, these members are of the opinion that providing a campaign website link (where the campaign committee's website includes a donation link) along with a Facebook cover photo on a candidate's personal Facebook page is more akin to direct solicitation than simply handing out elections materials.

For the reasons stated above, four members of the Committee answer the first question in the affirmative and the second question in the negative.

II. According to three members: No, a candidate may neither distribute materials displaying a campaign website link nor use a personal Facebook cover photo with a campaign website link.

In Fla. JEAC Op. 2004-07 [11 Fla. L. Weekly Supp. 374a], the Committee opined that a circuit judge who was a candidate for office could not *personally* distribute campaign material to attorneys, which solicited financial or in-kind contributions, especially not if the

materials contained an envelope for mailing a financial contribution to the campaign. And in a recent case, the Florida Supreme Court accepted a stipulation and disciplined a lawyer who had solicited donations by handing out postcards and giving speeches that directed voters to her website that contained a "Donate Now" button. *See The Florida Bar v. Kaysia Monica Earley*, 368 So. 3d 409 (Fla. 2023).

As noted in Fla. JEAC Op. 2023-12 [31 Fla. L. Weekly Supp. 511a], the common thread running through the Committee's opinions, and the stipulation accepted in *The Florida Bar v. Earley*, is *personal solicitation* by a judicial candidate. Passing out campaign literature by the judicial candidate with the candidate's website on it, which has an online option to make contributions to the candidate's campaign is a personal solicitation prohibited by Canon 7C(1). It is not the sort of passive advertisement discussed in Fla. JEAC Op. 2023-12 [31 Fla. L. Weekly Supp. 511a].

As to the judicial candidate's second inquiry, in Fla. JEAC Op. 2008-11 [15 Fla. L. Weekly Supp. 757a], the Committee opined that a judge could not use the judge's personal website to solicit financial or other support to the judge's campaign. The Committee opined that such a website must be maintained by the committee of responsible persons. Utilizing a candidate's personal Facebook page to direct viewers to a campaign website that includes a donation link would also, in effect, be a form of personal solicitation.

For the reasons stated above, three members of the Committee would answer both questions in the negative.

III. According to four members: Yes, a candidate may distribute materials displaying a campaign website link and may also use a personal Facebook cover photo that includes a campaign website link.

Canon 7(C)(1) proscribes nothing more and nothing less than "personal" solicitation. Passive advertisement—whether on a shirt, or on a business card, or on one's personal Facebook page—of a campaign committee's website URL is not personal solicitation. Of course, context is critical to this inquiry. If a candidate hands out a palm card that features their committee's website address and says, "I'd appreciate it if you could donate to my campaign at the website listed on this card," then the candidate would, in effect, be personally soliciting a contribution. Likewise, if the candidate's personal Facebook page explicitly encourages donations by referencing the committee's website link, that, too, could be deemed a personal solicitation.

But that does not appear to be what this inquiring candidate is contemplating. The querent simply wants to hand out campaign materials that include a reference to their campaign committee's website (like countless judicial candidates have done in the past). The inclusion of a campaign website's URL within campaign materials is common practice in Florida judicial campaigns. And this Committee has previously opined that Canon 7 should not be read so sweepingly as to prohibit any mention of one's judicial campaign on one's personal Facebook page. *See* Fla. JEAC Op. 2016-13 [24 Fla. L. Weekly Supp. 583a] ("Nothing in Canon 7 prohibits a judicial candidate from asking the electorate to vote for him or her—whether on Facebook, in person, or through the mass media.").

For the reasons stated above, four members of the Committee would answer both questions in the affirmative.[2]

REFERENCES

Fla. Code of Judicial Conduct, Canon 7C(1)
The Florida Bar v. Kaysia Monica Earley, 368 So. 3d 409 (Fla. 2023).
Fla. JEAC Ops. 1981-05, 2004-07, 2008-11, 2014-04, 2016-13, 2020-13 and 2023-12

[1]It is partly for this reason that the Committee has a stated policy to refrain from "vetting" specific campaign literature for compliance with the canons. *See* JEAC Ops. 1994-35 [2 Fla. L. Weekly Supp. 501a] and 2023-13 [32 Fla. L. Weekly Supp. 66a].

[2]One of the four members who would answer both questions affirmatively has an additional concern. Although the Committee does not opine on legal questions, this member believes it is necessary and appropriate, when construing Canon 7, to remain especially mindful of the First Amendment implications of proscribing candidates' speech in judicial elections. *Williams-Yulee v. The Florida Bar*, 575 U.S. 433, 455 (2015) [25 Fla. L. Weekly Fed. S213a] ("[b]ecause Canon 7C(1) is *narrowly tailored* to serve a compelling government interest. . . . [F]lorida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees *and to otherwise communicate their electoral messages in practically any way*." (emphasis supplied)).

* * *

Judges—Judicial Ethics Advisory Committee—Membership, organizations, and avocational activities—A judge may participate in a local bar association panel discussion that addresses how judges confer with colleagues or consider amicus filings in cases, so long as discussions remain generalized, do not disclose any nonpublic information or confidential court communications, or indicate how a judicial officer might rule on a particular kind of case or controversy

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-07. Date of Issue: May 21, 2024.

ISSUE

May a judge participate in a local bar association panel discussion that addresses how judges confer with colleagues or consider amicus filings in cases?

ANSWER: Yes, so long as the discussions remain generalized, do not disclose any nonpublic information or confidential court communications, or indicate how a judicial officer might rule on a particular kind of case or controversy.

FACTS

The inquiring judge advises that a local bar association has expressed interest in hosting a roundtable on the topic of judges soliciting advice from fellow judges and others, such as disinterested amicus curiae experts.

While acknowledging that Fla. Code Jud. Conduct, Canon 3B(7)(c) allows judges to consult with other judges in carrying out their adjudicative responsibilities, the inquiring judge also seeks guidance regarding ethical limitations when conferring with fellow judges and others under different factual scenarios, and presents a series of thirteen (13) questions that generally regard the potential application of Canons 3B(7). These questions not only seek guidance on various hypothetical circumstances under which a judge may seek to consult with fellow judges, and with others, about pending case matters, but also include unrelated questions seeking general advice on professionalism, civility, and fulfilling judicial responsibilities.

DISCUSSION

Canon 3B(7) governs ex parte communication generally, while Canon 3B(7)(c) specifically provides: "A judge may consult with other judges or with court personnel whose function it is to aid the judge in carrying out the judge's adjudicative responsibilities."

Canon 3B(7)(c) makes clear that consultation between judges on pending matters does not constitute an improper ex parte communication and is ethically permissible. The Canon places no limitations on how often a judge may seek such consultation with another judge, nor upon the scope or subject matter of any such consultation. Further, a judge may also consult with other court personnel "whose function it is to aid the judge in carrying out the judge's adjudicative responsibilities."

Canon 3B(7) permits a judge to ethically consult with other judges about a pending matter, as well as court personnel who aid the judge in carrying out adjudicative responsibilities—excepting those, such as magistrates, who are tasked with independent adjudicative responsibilities in relation to that pending matter.[1]

Turning, then, to the proposed roundtable, judges are free—and, indeed, encouraged—to discuss the legal process and how they perform their judicial duties to better foster public confidence. *See* Fla. Code Jud. Conduct, Canon 4; Fla. JEAC Op. 2021-09 [29 Fla. L. Weekly Supp. 485a] ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including, but not limited to, the improvement of the role of the judiciary as an independent branch of government, the revision of substantive and procedural law, the improvement of criminal and juvenile justice, and the improvement of justice in the areas of civil, criminal, family, domestic violence, juvenile delinquency, juvenile dependency, probate and motor vehicle law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law." (quoting *Code of Judicial Conduct,* 840 So. 2d 1023, 1031 (Fla. 2003) [28 Fla. L. Weekly S86a])); Fla. JEAC Op. 2011-07 [18 Fla. L. Weekly Supp. 1063a] ("Canon 4 encourages judges to express themselves on 'the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government,' not for the benefit of judges, but so that what judges have to offer the community on these subjects can be available to those charged with decision making."); *cf.* Fla. JEAC Op. 2020-05 [28 Fla. L. Weekly Supp. 92a] ("Though we answer the question presented in the negative, we think, considering the circumstances presented here, it would be prudent for the inquiring judge to decline the meetings or invite all of the stakeholders to be present. A 'judicial roundtable' or 'brown bag lunch' where all of the interested parties are invited to be present are possible suggestions."). Participating in a roundtable discussion with local attorneys about how judges generally utilize what Canon 3(B)(7) allows would not appear to run afoul of any judicial canons, so long as the discussions remain generalized, do not disclose any nonpublic information or confidential court communications, or indicate how a judicial officer might rule on a particular kind of case or controversy. *See* Fla. Code Jud. Conduct, Canon 3(B)(9), (12); Fla. JEAC Op. 2018-23 [26 Fla. L. Weekly Supp. 608a] ("We caution the Inquiring Judge, however, to be careful not to comment on pending cases, not to answer hypothetical questions in a way that appears to commit to a particular position, and not to make any other remarks that could lead to the Judge's disqualification, or be construed as an indication as to how the Judge would rule in a particular case."); *cf.* Fla. JEAC Op. 2022-04 [30 Fla. L. Weekly Supp. 185a] ("The Committee cautions the inquiring judge to be cautious in discussing facts and evidence presented in the hearing. In addition to the confidentiality afforded by the Statutes, Canon 3B(12) prohibits judges from disclosing or using, 'for any purpose unrelated to judicial duties nonpublic information acquired in a judicial capacity.' "). The same limitations would apply to discussions concerning the use and consideration of amicus advocacy.

The Committee is unable to provide any further guidance to the inquiring judge, as the remainder of the inquiry does not identify or contemplate any specific conduct on the part of a judicial officer, but rather seeks guidance on various hypothetical matters that might be discussed in this anticipated roundtable. Such is beyond the purview of this Committee.

REFERENCES

Code of Judicial Conduct, 840 So. 2d 1023 (Fla. 2003).
Fla. Code Jud. Conduct, Canons 3B; 4; commentary to 3B(7)
Fla. JEAC Ops. 2009-17; 2011-07; 2018-23; 2020-05; 2021-09; 2022-04

[1]"Court personnel" is a somewhat broad term. However, in Fla. JEAC Op. 2009-17 [16 Fla. L. Weekly Supp. 1105a], we opined that a magistrate and a referring judge should not communicate outside the presence of the parties concerning a pending or impending proceeding pursuant to Canon 3B(7). The Committee explained that, regarding pending matters referred by a judge to proceedings before a magistrate, because any interested persons and their counsel have a right to be heard according to law, they are "entitled to be heard by a magistrate who has not received 'marching orders,' i.e., substantive direction, from the referring judge without the parties' knowledge."

* * *

Municipal corporations—Building code violations—Fines—Stay pending appeal—Motion to stay fines for multiple building code violations pending appeal of special magistrate's order to circuit court is denied—Appeal is not likely to succeed on merits since finding of violations is supported by competent substantial evidence; granting stay would endanger tenants' health, safety and welfare; stay is not in public interest; and property owner will not be irreparably harmed or prejudiced absent stay

CITY OF HALLANDALE BEACH, FLORIDA, Petitioner, v. ARCK MB LLC, P.O. BOX 801910, MIAMI, FL 33280 and INCORP SERVICES, INC., As Registered Agent of ARCK MB, LLC, 3458 LAKESHORE DRIVE, TALLAHASSEE, FL 32312, Respondent. City of Hallandale Beach, Special Magistrate Hearing. Case No. CEC-23-00618. March 11, 2024. Harry Hipler, Special Magistrate. Counsel: Robert H. Cooper, Miami, for Petitioner. Jennifer Merino, City Attorney, City of Hallandale Beach, for Respondent.

ORDER DENYING MOTION FOR STAY

THIS CAUSE came on to be heard before the undersigned Special Magistrate on March 7, 2024 at approximately 9:00 am in City Hall on Respondent/ARCK MB LLC Motion for Stay of Lower Tribunal Order Pending Appeal. The Final Order of Violations was entered on or about November 2, 2023 and has been appealed by Respondent to the Circuit Court in its appellate capacity, which is now pending. Upon appeal, the Respondent requested a stay of the lower tribunal's Final Order and assessment of per diem fines that was set to begin 90 days after the entry of the Final Order and that is now pending before this appellate court on appeal. The Circuit Court in its appellate capacity denied Respondent's Motion without prejudice, because Respondent failed to file a Motion for Stay that needs to be decided by before a ruling by the Special Magistrate, because the Special Magistrate believed that he did not have jurisdiction to stay a fine absent statutory consent.[1] The Appellate Court ruled that the Special Magistrate does have jurisdiction to consider a Motion for Stay pending appeal, and therefore in accordance with that directive, the Respondent did file a renewed Motion before the Special Magistrate along with the heretofore filed Motion for Stay which have both been considered by the Special Magistrate along with the City's initial Response and an Amended Response. Respondent has filed several Motions to Stay Fines by outlining its positions as stated. There has also been filed with the Clerk of the Court the transcript of the hearing, whether partial or full, and attachments of the evidence which have been considered by the Special Magistrate in its ruling as an Appendix along with the Petitioner's Appendix which the Special Magistrate considered at the initial hearings and for purposes of deciding Respondent's Motions for Stay Pending Appeal.

The matter was heard before the Special Magistrate in two separate hearings, and after considering the evidence that included a voluminous amount of plans and diagrams and testimony from the City and Respondent, the Special Magistrate finds and orders as follows:

1. Respondent owns a multifamily residential building in Hallandale Beach that is being rented to a number of tenants. It was cited for (1) illegal conversion of the three apartment units into four without a permit; (2) plumbing issues related to sewage backup and hot water, which is now moot as that has been corrected; (3) work without building permits for closing and enclosing rear kitchen doors; (4) installing windows without permits.

2. The Special Magistrate entered a Final Order on November 2, 2023, which provided Respondent 90 days in which to comply with all violations. Some have been complied, while others remain noncompliant. It further found the following violations which are stated below:

VIOLATIONS

ILLEGAL CONVERSION. ILLEGAL CONVERSION 3 UNITS ARE NOW 1, 2, 3A, & 3B. OBTAIN PERMITS FOR BUILDING AND ZONING TO RETURN THE BUILDING TO ALLOWABLE 3 UNITS TO INCLUDE APPROVED FINAL INSPECTIONS BY CITY. RESPONDENT MUST SIGN A RESTRICTED COVENANT TO MAINTAIN PREMISES AS 3 UNITS AND NO MORE. CLOSURE AND/OR REMOVAL OF THE SECOND DOOR TO EACH UNIT AND RESTORE THE REAR KITCHEN DOORS THAT WERE CLOSED IN WITHOUT PERMITS IN THE PAST. CITY CODE SECTION 32-311(c).

PLUMBING FIXTURE, WATER PIPE, WASTE PIPE, DRAIN, AND GAS PIPE SHALL BE MAINTED IN GOOD, SANATARY WORKING CONDITION FREE OF LEAKS AND OBSTRUCTIONS. PROVIDE A LICENSED PLUMBER'S REPORT DETERMING THE CAUSE AND REMEDY FOR THE SEWAGE THAT IS/WAS BACKING UP INTO THE BATHTUB & TOILET OF UNIT 2 AND THE ISSUE WITH THE DRAINAGE OF THE SECOND SHOWER IN UNIT 2. CITY CODE SECTION 14-6. *COMPLIED.*

FAILURE TO PROVIDE SATISFACTORY HOT WATER HEATING FACILITIES WITH AT LEAST A 20 GALLON CAPACITY AND SHALL COMPLY WITH THE STANDARDS OF THE NATIONAL FIRE PREVENTION ASSOCIATION AND IT SHALL BE INSTALLED IN ACCORDANCE WITH CHAPTER 46 OF THE SOUTH FLORIDA BUILDING CODE. RESPONDENT MUST PROVIDE PLUMBER'S REPORT REGARDING THE HOT WATER THAT SOMETIMES WORKS AND SOMETIMES DOES NOT WORK. IF THE HOT WATER ISSUE IS RELATED TO THE ELECTRICAL SUPPLY AND/OR FPL BILLING ISSUES, THEN PROVIDE A SOLUTION TO ENSURE THAT ALL UNITS ARE PROVIDED WITH HOT WATER AT ALL TIMES. CITY CODE SECTION 14-41. *COMPLIED.*

WORK WITHOUT BUILDING PERMITS. OBTAIN ALL BUILDING PERMITS AND FINAL APPROVED INSPECTIONS FOR ILLEGAL CONVERSION OF UNIT 3 INTO UNIT 3A & 3B. THREE REAR KITCHEN DOORS THAT WERE CLOSED UP WITHOUT PERMITS. WINDOWS ALONG THE REAR OF THE BUILDING THAT WERE PLACED INTO THE DWELLING AND/OR REPLACED WITHOUT PERMITS. CITY CODE SECTION 8-31. FBC 105.1.

Subject real property: 907 NE 7 STREET #1-3, HALLANDALE BEACH FL 33009

3. Respondent appealed to the Circuit Court in its appellate capacity, and In light of the pending appeal, Respondent seeks a stay of the attendant per diem fines facing Respondent after it was given 90 days to comply from November 2, 2023, and argues essentially that the Special Magistrate failed to apply the correct law, and that there was no competent substantial evidence adduced at the hearings.[2] A third question as always is whether the Respondent was afforded fundamental due process. There should be no question that Respondent has been provided with due process in as much it has been duly cited for the violations, there have been two hearings, and the parties have had ample time to produce whatever evidence they desired. As concerns whether the Special Magistrate applied the correct law, and whether there is substantial competent evidence, it is apparent to this Special Magistrate that he has followed these principles as the evidence produced supports the Final Order. Further discussion of the reasons will follow in this Order.

4. Code violations "run with the land," making current owners responsible for bringing the property into compliance regardless of who caused the violation on the real property. *Henley v. MacDonald,* 971 So. 2d 998, 1000 (Fla. 4th Dist. Ct. App. 2008) [33 Fla. L. Weekly D198c] (citing *Monroe County v. Whispering Pines Assocs.,* 697 So. 2d 873, 875 (Fla. 3d Dist. Ct. App. 1997) [22 Fla. L. Weekly D1434a]); see also *City of Gainesville Code Enf't Bd. v. Lewis,* 536 So. 2d 1148, 1150 (Fla. 1st Dist. Ct. App. 1988). It appears that some of the violations found may have occurred before Respondent purchased the subject real property in 2013, although at least two—back kitchen doors closing, illegal conversion—appear to have occurred after its purchase; but for the sake of following the law, there appears to be *strict liability* upon the purchaser and owner of real property no matter who caused the violations or at whatever time, except for one minor caveat that now exists as concerns Mobile Homes that is inapplicable to this case.[3]

5. The necessary standard for seeking a stay absent filing of a bond or an involuntary pay-off is the following: what is the likelihood of prevailing on the merits of the appeal absent posting of a cash bond or money in escrow. See *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Nken v. Holder*, 556 U.S. 418, 419 (2009) [21 Fla. L. Weekly Fed. S788a]. If a stay is not granted, then Fla. App. R. 9.310 (b)(1) provides the basis to stay enforcement by the posting of bond. Also see *Sheckler v. Monroe County,* 335 So.3d 1265 (Fla. 3rd DCA 2022) [47 Fla. L. Weekly D542a], where Respondent as the owner paid the amount of the fine over objection which translated into a way in which to stay enforcement of a Final Order, and for purposes of argument, it is assumed that Respondent does not wish to post money in escrow pending appeal without requesting a stay without payment of a cash bond. See also *Platt v. Russek,* 921 So.2d 5 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D899a].

6. Therefore, as to the windows, based on the evidence presented, the Special Magistrate found violations by virtue of evidence of a Building Inspector, who advised that the windows in question go back to 1990 and 1995 and that there is no permit allowing them to exist, and that they were installed sometime after 1990 without a required permit and were not original to the unit (Ap. 50, 52, 56-57, 58, 68). Had these windows been subject to a permit, then it would have showed up in the City's computer system that goes back to about 1990-1991 (Ap. 55-56), and there is no record of these windows ever being permitted (Ap. 55-58). There was sufficient evidence to show that no permit was applied for as to the windows and that they were not part of the original unit (Ap. 56-68).

7. As concerns the removal of the kitchen doors,[4] a claim was made by a tenant that water was entering a unit being resided in by a tenant, which placed the City on notice that something was amiss and that resulted in a comparison of a photo showing that back kitchen doors existed in 2013, but sometime thereafter they were closed and/or closed in so that no doors exist (Ap. 19, 21, 23-24; 49, 50; 68-70), and that in any event for fire and safety reasons by eliminating the back kitchen doors a resident's health, safety, and welfare is in danger in case of fire, flooding, or any other bad event for escape. At the instant hearing, the question arose that the Special Magistrate has ordered that one of two doors of each unit needs to be removed, and that the kitchen doors located in the back of each unit needed to be returned.

Respondent has argued that by removing one of the front doors and reopening the back kitchen doors that it closed results in having the same number of doors in each unit. Respectfully, it should be apparent that there is no need for two front doors near each other when one in the front of each unit will do. On the other hand, for purposes of safety, health, and welfare of the person residing in the respective unit, if the front door(s) are blocked for entry and they exist, how can the tenant get in and out of the respective unit in case of fire or flooding or some other bad event? As such, the Special Magistrate stands by his ruling that is based upon the evidence requiring closing in of one of the front doors in each unit and reopening the kitchen doors that were located in the back of each unit.

8. As concerns the illegal conversion, the evidence adduced was that cardboard had been improperly screwed into the hallway, but may have been removed (Ap. 17, 75-78); partition existed but had been removed and cured (Ap. 82); drywall existed that separated two (2) units (Ap. 14-15). All was done without obtaining a permit either before doing the work or to correct and remove what had been done; also the unrefuted evidence is that the kitchen doors were closed in without permits, which is itself part of an illegal conversion (Ap. 91, 97). There was also the on and off matter of showing a number of different unit numbers that included 1-1, 2-2, 3A, 3B, and that the tenant in 3D put a 3D sticker on the door that was all discussed at the hearings in attempting to explain that there are really supposed to be three units, not four, as it appears according to Respondent, these varying numbers were placed on the doors, but that only three (3) persons resided in the premises. Yet again this could have been part and parcel to a past or future illegal conversion (Ap. 9-11) and for which the evidence showed that there was an illegal conversion. As such, once again based upon the evidence produced, a restrictive covenant whereby the Respondent agrees to maintain three units, not four units in light of the evidence of the illegal conversion is warranted thereby showing that there was substantial competent evidence to support the City's position.

9. Ordinarily, no transcript of a code enforcement hearing exists that would allow the Court and parties and Special Magistrate to review what happened at a hearing(s). However, an appeal has been filed that requires a record on appeal of the evidence produced before the Special Magistrate, and based on the evidence and Florida law, the Special Magistrate will not stay[5] the Final Order and any per diem fines now existing or that may accrue during the pendency of the appeal in the future in light of the health, safety, and welfare concerns existing here, absent a Court ruling to the contrary. Granting a stay would place the residents' health, safety, and welfare in danger while individuals reside in the units and rent is being collected and before the violations are corrected. Further, no prejudice or injury exists here against this Respondent LLC in as much as this appellate court will ultimately decide the merits of the appeal,[6] and if the matter is affirmed, then compliance will be required along with the per diem fines will continue to accrue until compliance, but if a reversal occurs even if a partial one occurs, then the matter will be remanded back to the Special Magistrate to determine the amount of fines that have accrued or not accrued.[7] The bottom line is that in either event, there is no prejudice emanating from denying the Motion for Stay to Respondent.

10. The Special Magistrate has considered the "stay factors" in light of his equitable discretion as a Special Magistrate as provided for by Chapter 162 and the Court that includes the likelihood of success on the merits, whether the Respondent will be irreparably harmed or prejudiced absent a stay, whether a stay will substantially injure other parties interested in the proceedings that include the tenants and neighbors and the local community, and whether the stay is in the public interest. See *Nken v. Holder,* 556 U.S. 418, 433 (2009) [21 Fla. L. Weekly Fed. S788a]. None of these factors, most respectfully, favor the Respondent.

ACCORDINGLY, IT IS HEREBY ORDERED as follows:

A. Motion for Stay of the Final Order is hereby DENIED.

B. The Special Magistrate reserves jurisdiction to enter such further orders as are just and equitable, and to follow the directive of the Circuit Court.

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[1]Fla. App. R. 9.310 provides Stay Pending Review, which says that ". . .a party seeking to stay a final or nonflnal order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction in its discretion, to grant, modify, or deny such relief."

[2]Three questions arise from an appeal of code enforcement and quasi-judicial proceedings: (1) whether due process was afforded; (2) whether the Special Magistrate applied the correct law; and (3) whether the findings are supported by competent substantial evidence. *City of Deerfield Beach v. Boca Dominium*, 795 So.2d 145 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2096a]; *Sarasota Co. v. Bow Point on the Gulf Condo. Devel., LLC*, 974 So.2d 431 (Fla. 2nd DCA 2007) [32 Fla. L. Weekly D2551b].

[3]Compare 162.09(3), Florida Statutes, and the case law that provides for strict liability for code violations to whoever owns the real property and is cited by a local government, as distinguished from Section 723.024, Florida Statutes, Mobile Home Park Lot Tenancies, which appears to provide an exception but is inapplicable here. This is merely brought to the attention to the Court in order to provide the state of the Florida in code enforcement proceedings.

[4]It appears that Respondent has conceded that the doors were unlawfully closed in according to the transcript (Tr. 70-71, 90-91, 98), which made reference to obtaining permits to return the premises with open doors in the back where the kitchen exists. As such, it also appears that for two of the three back doors Respondent has duly filed for an obtained a permit for reopening the kitchen doors, except for one which Respondent still opposes. Regardless, for purposes of the Motion for Stay the Special Magistrate stands by the ruling that all must be returned to their status quo before they were closed in without obtaining permits.

[5]For purposes of showing good faith, the Special Magistrate decided to grant another continuance of 30 days to Respondent with the understanding that any per diem fines will continue to accrue until compliance occurs, but that if compliance occurs, then the matter is over. As stated, Respondent has applied for a permit as to the kitchen doors' that has been completed for 2 of the 3 doors, but contests one of the doors being reinstated even though the photographic evidence shows that that there were 3 kitchen doors in or around 2013 before they were sealed and closed in. Depending on progress that is made toward compliance, the Special Magistrate reserves jurisdiction to either grant a further continuance if good faith is shown in order to hold off on entering a Final Order Imposing a Lien that will be subject to this Court's ultimate decision on appeal. Thus, it should be apparent that if the Circuit Court affirms the Special Magistrate, then the per diem fines will continue to run, whereas if the Circuit reverses the Special Magistrate, then those fines will not further accrue in any final order entered by the Circuit Court.

[6]The Order and its factual analysis provided by the Special Magistrate is the basis for the denial of the Motion to Stay in light of the Court's directive to consider the matter and enter a ruling by the Special Magistrate. These are the reasons why the Special Magistrate will not grant a stay of the enforcement of the Final Order and any accruing fines, most respectfully. As always, the Special Magistrate defers to the Court to decide the merits of this case as the Court determines.

[7]City has a very liberal mitigation or abatement process that allows complying violators to obtain substantial reductions of fines and liens upon compliance. As such, if the fines accrue and if there is an affirmance, upon compliance and an appropriate petition, the total amount that accrues should be mitigated substantially accordingly.

* * *

Municipal corporations—Code enforcement—Unsafe structure—Structure must be demolished where property is found to be unsafe and an attractive nuisance and cost of required repairs exceeds 50% of structure's value—If property owners do not demolish structure and demolish and fill pool with soil within 45 days, city building official is authorized to carry out demolition

CITY OF CORAL SPRINGS, FLORIDA, Petitioner, v. RESIDENTIAL MORTGAGE LOAN TRUST, US BANK TR NA TRSTEE c/o PHH MTGE, Respondents. City of Coral Springs, Order on Demolition. Case No. USB22-0007. May 17, 2024. Harry Hipler, Special Magistrate, City of Coral Springs. Counsel: Andrew B. Dunkiel, for Petitioner. Kassia Fialkoff, Duane Morris LLP, for Respondent.

THIS CAUSE (Case No. USB22-0007) came to be heard before the Special Magistrate for the City of Coral Springs, Florida (hereinafter referred to as "SPECIAL MAGISTRATE") on May 16, 2024. Alex Hernandez, Chief Building Official, testified as a witness on

behalf of the Petitioner, along with Christian Aquino, Professional Engineer. Andrew Dunkiel, Esquire appeared as counsel for the Petitioner. Respondent was represented by attorney Kassia Fialkoff, Esquire.

The SPECIAL MAGISTRATE finds that the Petitioner has provided proper and adequate Notice to the Respondent and all other interested parties.

The SPECIAL MAGISTRATE, having considered the evidence and testimony presented at the hearing, including copies of all Notices and other evidence entered into the record, copies of photographs depicting the condition of the property, testimony of the witnesses and having heard argument from counsel, and being otherwise fully advised in the premises, enters

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RELIEF AS FOLLOWS:

1. On May 2, 2023, Case No. USB22-0007 came before the SPECIAL MAGISTRATE at which time the property located at 5939 NW 52 STREET, CORAL SPRINGS FL 33067, and legally described as BUTLER FARMS SECTION TWO 118-49 B LOT 7 BLK Q, Folio No. 484112032260, was found to be an unsafe structure.

2. The May 2, 2023 Final Order for USB22-0007 ordered the Respondent to bring the property into compliance by June 19, 2023 by obtaining a building permit, completing repairs, and completing all required inspections.

3. Per Section 116.5.1 of the Florida Building Code, Broward County Amendments, the Building Official is permitted to take emergency actions if there is an actual or immediate danger of the failure or collapse of a building or structure, or there is a health, windstorm, or fire hazard. It also provides that the Building Official has the authority to "[demolish] the building or structure, as they may deem necessary under the circumstances, and employ the necessary labor and materials to perform the required work as expeditiously as possible." However, the Florida Building Code, Broward County Amendments, does not provide for a due process mechanism to challenge or authorize emergency actions by the Building Official. Due process requires notice and an opportunity to be heard. The Building Official in this case provided notice to all those with an interest in the property for the May 16, 2024 hearing and those with an interest in the property appeared at the hearing. Therefore, notice and an opportunity to be heard was provided to all Parties and fundamental due process has been met.

4. The SPECIAL MAGISTRATE finds that time was of the essence and there was no time to bring this matter before the Unsafe Structures Board. As a result, and consistent with Chapter 162, alternative code enforcement proceedings were required to protect the public health, safety, and welfare of the surrounding community.

5. The SPECIAL MAGISTRATE expressly finds based upon the evidence and sworn testimony at the May 16, 2024 hearing that the structure meets the criteria of the 2023 Florida Building Code 8th Edition, Section 116.2 and deemed the property an unsafe structure pursuant to Sections 116.2.1.1.1, 116.2.1.1.2, 116.2.1.1.3, 116.2.1.2.1, 116.2.1.2.2, 116.2.1.2.3, 116.2.1.2.4, 116.2.1.2.5, 116.2.1.2.6, 116.2.1.2.7, 116.2.1.2.8, 116.2.1.3.1, and 116.2.1.3.2.

6. The structure located at 5939 NW 52 STREET, CORAL SPRINGS FL 33067, and legally described as BUTLER FARMS SECTION TWO 118-49 B LOT 7 BLK Q, Folio No. 484112032260 continues to be an unsafe structure. In addition, the SPECIAL MAGISTRATE finds that the structure at 5939 NW 52 STREET, CORAL SPRINGS FL 33067, and legally described as BUTLER FARMS SECTION TWO 118-49 B LOT 7 BLK Q, Folio No. 484112032260 constitutes an attractive nuisance.

7. The SPECIAL MAGISTRATE finds that the required repairs to the unsafe structure located at 5939 NW 52 STREET, CORAL SPRINGS FL 33067, and legally described as BUTLER FARMS SECTION TWO 118-49 B LOT 7 BLK Q, Folio No. 484112032260 exceeds 50% of the structure's value. Per Section 116.2.2.1 of the Florida Building Code, Broward County Amendments, the unsafe structure must be demolished if the required repairs exceed 50% of the structure's value. Accordingly, the unsafe structure must be demolished.

8. The SPECIAL MAGISTRATE expressly finds that the structure located at 5939 NW 52 STREET, CORAL SPRINGS FL 33067, and legally described as BUTLER FARMS SECTION TWO 118-49 B LOT 7 BLK Q, Folio No. 484112032260 is an immediate threat to the public health, safety, and welfare and windstorm hazard. Further, the structure is at risk of immediate failure or collapse.

9. In addition, the SPECIAL MAGISTRATE finds that due to the significant deterioration and damage to the structure, the Building Official may not lawfully issue a building permit for repairs and may only issue a permit for demolition.

10. The Respondents are ordered to complete the following within forty-five (45) days:

a. A licensed general contractor shall demolish the unsafe structure and remove all debris from the property; and

b. A licensed contractor shall drain the pool and demolish the pool walls and equipment before filling the site with soil and grading it.

11. If the Respondents fail to comply with the above paragraph, the Building Official is hereby authorized to enter the property and demolish the structure, accessory structures, pools, and other improvements or structures located at 5939 NW 52 STREET, CORAL SPRINGS FL 33067, and legally described as BUTLER FARMS SECTION TWO 118-49 B LOT 7 BLK Q, Folio No. 484112032260, remove all debris from the property, and if the pool is demolished, fill the pool site with soil and grade it.

12. The City shall have the right to recover all reasonable costs incurred as a result of prosecuting or otherwise related to the enforcement of the SPECIAL MAGISTRATE's Order, as amended from time to time. If Respondents do not pay the recoverable costs within fifteen (15) days of request for payment from City, the unpaid costs shall become a lien on the property in favor of the City of Coral Springs.

13. The SPECIAL MAGISTRATE shall retain jurisdiction of this case for subsequent measures, if necessary, and for all other purposes authorized by law.

14. The public record, including all sworn testimony and evidence heard by and presented to the SPECIAL MAGISTRATE on May 16, 2024 is hereby incorporated by reference and made a part hereof.

15. A copy hereof shall be forwarded to the Respondents by Registered or Certified Mail, and a copy hereof posted on the premises.

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