Volume 32, Number 5, September 30, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 195-222

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.

- **ZONING—CODE ENFORCEMENT. A property owner was improperly charged with violating provisions of the county code applicable to properties zoned for agricultural use where the property at issue was actually zoned for industrial use. The fact that the property was designated agricultural on the county's comprehensive plan does not change result.** *RR 1 DEVELOPER, LLC. v. MIAMI-DADE COUNTY DEPARTMENT OF LAND REGULATORY AND ECONOMIC RESOURCES. Circuit Court (Appellate), Eleventh Judicial Circuit, in and for Miami-Dade County. Filed June 25, 2024. Full Text at Circuit Courts-Appellate Section, page 195a.*

- **MUNICIPAL CORPORATIONS—CODE ENFORCEMENT—DUE PROCESS—NOTICE. The corporate owner of property charged with code violations was not afforded due process where hearing notices were mailed to the corporate property owner's principal address rather than to the corporation's registered agent.** *HOLLYWOOD MHC, L.L.C. v. CITY OF WEST PARK, FLORIDA. Circuit Court (Appellate), Seventeenth Judicial Circuit, in and for Broward County. Filed May 16, 2024. Full Text at Circuit Courts-Appellate Section, page 205a.*

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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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20CIR 10	Circuit Court - Original (20th Circuit, page 10)
CO	County Court
M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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TABLE OF CASES TREATED

TABLE OF CASES TREATED (continued)

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CIRCUIT COURTS—APPELLATE

Counties—Zoning—Code enforcement—Hearing officer erred in affirming 47 citations charging defendant with violating county code applicable to properties zoned for agricultural use where defendant's property is zoned for industrial use, and uses for which defendant was fined were permitted in IU zone—No merit to argument that, because comprehensive land use plan has designated defendant's property as agricultural, defendant's IU-zoned property is now subject to AU-zone restrictions

RR 1 DEVELOPER, LLC., Appellant, v. MIAMI-DADE COUNTY DEPT. OF REGULATORY AND ECONOMIC RESOURCES, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-60-AP-01. June 25, 2024. On Appeal from Final Administrative Action of the Miami-Dade County Office of Code Enforcement. Counsel: Bryan Morera and Austin Gomez, for Appellant. David Sherman and Benjamin Simon, Assistant County Attorneys, for Appellee.

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

OPINION

(ARECES, R., J.) Appellant RR 1 Developer, LLC ("Appellant") contends the Hearing Officer below erred in affirming 47 citations, which charged Appellant with having violated Miami-Dade County Code Section 33-279.3.[1] This Court agrees.

The facts are simple. Appellant's real property is zoned IU-1 (or, industrial use).[2] The specific use for which Appellant was fined is permitted on IU-zoned properties.[3] Appellant was, nevertheless, found to have violated ordinances applicable to properties zoned AU (or, agricultural use). It is undisputed that Appellant's property is not currently zoned AU.

The outcome of this appeal should appear obvious. In finding that Appellant was in violation of zoning regulations which did not apply to his property, the Hearing Officer failed to observe the essential requirements of the law, deprived Appellant of due process and entered an Order[4] that was not supported by competent, substantial evidence.

Appellee, however, argues that this Court should affirm the Hearing Officer's ruling because the comprehensive land use plan has designated the subject property "agricultural" despite the fact that the property is zoned for light industrial manufacturing. As a result, Appellee contends that Appellant's IU-zoned property is now subject to AU-restrictions. Appellee is mistaken.

It is well-settled that comprehensive land use plan provisions are not zoning laws. *See Gardens* Country *Club, Inc. v. Palm Beach Cnty.,* 590 So. 2d 488, 490 (Fla. 4th DCA 1991). The Third District Court of Appeal has explained the difference between a comprehensive land use plan and zoning laws. *See Machado v. Musgrove,* 519 So. 2d 629 (Fla. 3d DCA 1987). Specifically, the Third DCA explained,

> Land use planning and zoning are different exercises of sovereign power. . . .
>
> A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county of municipality. The plan is likened to a constitution for all *future* development within the governmental boundary.
>
> *Zoning,* on the other hand, is the means by which the comprehensive plan is implemented, and *involves the exercise of discretionary powers within limits imposed by the plan*.

Id. at 631-32 (internal citations omitted) (emphasis added). Simply put, without more, a change to a comprehensive, or future, land use plan does not change an existing parcel's zoning. *See, e.g., City of Gainesville v. Cone,* 365 So. 2d 737, 739 (Fla. 1st DCA 1978) ("The adoption of the Comprehensive Development Plan did not change the zoning or land use regulations of a single parcel of property in the City. The existing zoning categories remained in full force and effect and still remain in full force and effect.").

On the contrary, a comprehensive land use plan sets forth the "long term expectations for growth" which guide *future* zoning and development actions. *See Southwest Ranches Homeowners Ass'n, Inc. v. Broward Cnty.,* 502 So. 2d 931, 936 (Fla. 4th DCA 1987) ("the purpose of a comprehensive plan is to set general guidelines for future development, and not necessarily to accomplish immediate land use changes.").

In this case, the County's own land use map, in at least three places, clearly reflects an understanding, if not the express intent, that mere enactment of, or amendment to, the land use map is insufficient to ensure each individual property is zoned in conformity with the County's vision for long-term future growth. For example, section LU-4E provides,

> Zoning shall be examined to determine consistency with the Comprehensive Plan, and if deemed necessary to remedy an inconsistency, rezoning action shall be initiated. Examination could occur through a special zoning study, area-planning activity, or through a study of related issues.

See Land Use Element § LU-4E (Appx. at 448). The Land Use Element also provides,

> The number of rezoning applications filed by the Department of Regulatory and Economic Resources and approved by the Board of County Commissioners to bring preexisting zoning into closer uniformity with the LUP map shall be logged by the Department of Regulatory and Economic Resources and reported in the EAR.

See Land Use Element Objectives LU-4 and LU-5 (Appx. at 545).

Finally, the Land Use Element specifically provides the County should formulate "zoning overlay or other regulations. . .to orient the uses allowed in business and industrial zoning districts to those which support the rural and agricultural economy of the area." *Id.* at § LU-9L (Appx. at 459). Specifically, section LU-9L reads,

> Miami-Dade County shall formulate and adopt zoning overlay or other regulations applicable to land outside the Urban Development Boundary to orient the uses allowed in business and industrial zoning districts to those which support the rural and agricultural economy of the area. Uses permitted by right would relate exclusively to agricultural or mining industries, and other uses would be approvable as special exceptions upon demonstration that the use supports the non-urban economy of that area or is required by residents of the immediate area.

Id.

The three aforementioned provisions would be entirely unnecessary if the mere amendment to a comprehensive land use map were alone sufficient to change a property's zoning designation.[5]

Moreover, the County's Code of Ordinances recognizes the difference between zoning and comprehensive land use maps. For example, in Section 33-279.2—another provision that is applicable to AU-zoned properties—the Code clearly provides that there will be properties that are zoned IU despite being designated agricultural on the comprehensive land use plan. *See* Miami-Dade County, Fla., Code § 33-279.2. Specifically, said section states, in pertinent part,

> Notwithstanding any provisions to the contrary in Chapter 33 of this Code, the agricultural uses provided in this Section are permissible in areas zoned EU, RU, BU and IU that are designated Agriculture on the Comprehensive Development Master Plan Land Use Plan Map and that are located outside of the Urban Development Boundary.

. . .

For areas zoned BU and IU:

(1)Agricultural uses provided in Section 33-279 of the Code are permitted.

Id. Section 33-279.2 plainly authorizes IU-zoned properties, like Appellant's, to use their properties for agricultural uses that may not have otherwise been permitted under sections 33-259 and 33-259.1—the sections of the Code that set forth the permitted uses for IU-1 zoned properties. Appellee, however, reads sec. 33-279.2 as completely overriding sections 33-259 and 33-259.1 and *limiting* the IU property's permissible uses to only those uses permitted on agricultural-zoned properties. This is a misreading of the law.

When the County has sought to limit the permissible uses of IU-zoned properties, it has done so in clear and obvious ways. For example, section 33-259 specifically provides that "*[n]o land, body of water, or structure shall be used or permitted to be used and no structure shall be erected. . . excepting for one (1) or more*" of an enumerated list of uses on IU-1 zoned properties. *See* Miami-Dade County, Fla., Code § 33-259 (emphasis added); *see also* Miami-Dade County, Fla., Code § 33-259.1(c)-(d) (setting restrictions on certain permitted IU-1 uses).

More importantly, the County knows how to make IU-1-zoned properties subject to other provisions in the Code and even to limitations set forth in the comprehensive development master plan. *See* Miami-Dade County, Fla., Code § 33-259(92). Specifically, the County has legislated,

> Notwithstanding any other provisions to the contrary, on lands zoned IU-1 that are located within an area designated Institutions, Utilities and Communications and are within the Urban Development Boundary on the CDMP Land Use Plan map, the uses enumerated in Section 33- 284.28. 10 are permitted *subject* to the following:
>
> (a)Such uses *shall only be permitted to the extent allowed by the [Comprehensive Development Master Plan].*
>
> . . . .

Id. (emphasis added).

In contrast to the above provisions, section 33-279.2 does not subject IU-1-zoned properties to any limitations or restrictions. Section 33-279.2 also does not make some permitted use subject to any of the terms contained within the Comprehensive Development Master Plan or its Land Use Map. Instead, through section 33-279.2, the County has merely authorized IU-1-zoned properties, like Appellant's, to engage in certain agricultural uses, which would not have otherwise been permitted.

In any event, the evidence before the Hearing Officer clearly established that the County's zoning maps did not include the subject property within the "AU district" as would be required for Appellant to be cited under section 33-279.3. In the proceedings below, Appellee and its witness Mr. Kogon[6] engaged in the following exchange:

> Q: And by that do you mean that the property according to out [sic] designation of unincorporated Miami-Dade, it's zoned as IUl?
>
> A: That is correct.
>
> Q: And essentially TU1 means that a property according to its zoning is generally designated to allow used [sic] consistent with industrial light manufacturing.
>
> A: That is correct.
>
> . . .
>
> Q: So if—you've already described for us that according to the zoning designation for the property, the subject property, that it was zoned as IU1, industrial light manufacturing, and now you're telling us that the CDMP land use plan map designates it as agriculture, so which one controls?
>
> A: In this case the underlying land use controls.
>
> Q: Meaning the land use designated on the CDMP land use plan map.
>
> A: That is correct.

Appx. at 107411.

That is, in fact, incorrect.

The section under which. Appellant was cited refers to certain agricultural activity permitted in the "AU *district*." *See* Miami-Dade County, Fla., Code § 33-279.3(1) (emphasis added). By the Code's own provisions, the boundaries of a zone classification *district* "are shown upon the *zoning* maps on file with the Department." *See* Miami-Dade County, Fla., Code § 33-3(a) (emphasis added). Appellant's designation as AU on the *CDMP's* Land Use Map is irrelevant for purposes of § 33-279.3(1). Instead, what matters is Appellant's zone classification as reflected on the County's own zoning maps. In this case, pursuant to the *zoning* maps, Appellant is quite clearly within the IU district and not within the AU district.

Respondent, nevertheless, maintains that the IU-1.-zoned property at issue in this case is subject to limitations imposed on AU-zoned properties and relies primarily on two cases—*Machado*, 519 So. 2d 629 and *Mojito Splash, LLC v. City of Holmes Beach,* 326 So. 3d 137 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1725a]. Respondent's reliance on these two cases is misplaced.

In *Mojito,* a 2009 ordinance amended the city's comprehensive land use plan to allow vacation rentals in R-2 zoning districts, but limited the occupancy of those vacation rentals to the greater of 6 persons, or 2 persons per room. In 2013, or four years later, the appellant purchased a vacation rental property located within an R-2 zoning district and planned to market the vacation property as one capable of sleeping 12 guests. In 2016, the city enacted an ordinance to create an enforcement mechanism by which to enforce the 2009 amendment. Appellant sued the city under the Private Property Rights Protection Act claiming his property had been devalued as a result of the 2016 ordinance.

Mojito, a Private Property Rights Protection Act case, ultimately turned on (1) "whether the claimed 'existing use of the real property' or the claimed 'vested right to a specific use of the real property' actually existed" *and* (2) "whether the government action inordinately burdened the property." The Second District Court of Appeal found appellant had no right, as of the 2009 Ordinance, to rent his vacation rental property to an unlimited number of persons.

There are at least three reasons why *Mojito* is inapposite. First, this case does not concern the Private Property Rights Protection Act and, as a result, requires no analysis of vested rights or inordinate burdens. Second, the city in *Mojito* did not fine the landowner for violation of some non-R-2-zoning regulation. The city, instead, sought to enforce the very regulations applicable to a property zoned R-2. Finally, unlike the instant case, the local government in *Mojito* enacted one or more additional ordinances to give effect to the local government's long-term vision for future growth as set forth in the comprehensive land use plan. In the instant case, Appellee could have, as set forth in its own land use objectives, sought to rezone Appellant's property to bring it into "closer uniformity" with the land use plan. The County failed, or chose not, to.

Appellee's reliance on *Machado* is equally misplaced. In *Machado,* the landowner sought to have his property rezoned from GU (interim zoning) to RU-5A (professional offices). 519 So. 2d at 630. The case turned on whether the RU-5A zoning designation was incompatible with the comprehensive land use plan, which designated the area as "estate residential -up to two units per acre." *Id.* at 632 ("The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land

use plan is supported by competent and substantial evidence.").

Unlike *Machado,* no one in the instant case is seeking to rezone real property. There is, therefore, no need to engage in an analysis of whether some proposed new zoning designation is consistent with the comprehensive land use plan and its land use element. Additionally, Appellee's attempt to draw support from *Machado* is confusing. In *Machado,* the Third District Court of Appeal expressly stated the obvious—i.e., "local comprehensive plans. . .are not zoning laws." *Id.*[7]

In summary, the subject property is zoned IU-1. Appellee concedes the activity for which Appellant was cited is permitted on IU-zoned properties. Appellant was cited for violating an AU-zoning regulation. Appellant's property is not zoned AU.

The Hearing Officer, therefore, failed to observe the essential requirements of the law, made a decision unsupported by competent substantial evidence and denied Appellant the due process of law.

Accordingly, all 47 citations are quashed. (TRAWICK and DE LA O, JJ., concur.)

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[1]The 47 citations are as follows: T104535, T104538, T104544, T104549, T104555, T104560, T104568, T104571, T104537, T104552, T104559, T104570, T104575, T104579, T104581, T104585, T104541, T104586, T104591, T104593, T104596, T104598, T104600, T104603, T104605, T104607, T104610, T104539, T104548, T104551, T104558, T104564, T104569, T104574, T104626, T104627, T104628, T104629, T104630, T104633, T104635, T104636, T104639, T104640, T104641, T104642, T104644.

[2]Specifically, Industrial Light Manufacturing.

[3]Appellee conceded as much during oral argument.

[4]It is actually *forty-seven* Orders, each finding Appellant in violation of section 33.-279.3 of the Miami Dade County Code of Ordinances, which prohibits the parking of certain vehicles in *AU-zoned* properties. Appellant was assessed one violation per parked vehicle.

[5]Additionally, there are times where a property may have more than one permissible use. Appellee's argument would subject the landowner of one such property to every conceivable, permissible zoning designation's regulations. This would be contrary to Florida law and a gross violation of due process.

[6]Mr. Kogon is the Assistant Director for Development Services for the Regulatory and Economic Resources Department.

[7]Appellee's other arguments—namely, (1) that the AU regulations apply to IU-zoned properties because a County employee says so; and (2) that a statute which permits, but does not require some agricultural related activity on an IU-zoned property—are equally unpersuasive.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Hearing officer's conclusion that request for breath test was incident to lawful arrest was supported by competent substantial evidence—Record stated that officer observed licensee's vehicle fail to maintain single lane and twice swerve within 2-3 feet of vehicle in neighboring lane

TERRENCE J. ROLPH, Plaintiff, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2024 CA 001292 SC. Division H Circuit. May 21, 2024. Counsel: Kathy A. Jimenez-Morales, Chief Counsel, DHSMV, for Defendant.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(DANIELLE BREWER, J.) BEFORE THE COURT is Petitioner's Petition for Writ of Certiorari (DIN 2), Respondent's Response to Petition for Writ of Certiorari (DIN 8), and Petitioner's Reply (DIN 9). The Court has reviewed the Petition, Response, and Reply, the entirety of the record contained within the case file, and all relevant legal authority, and is otherwise fully advised in the premises.

Request for Oral Argument

Petitioner filed a Request for Oral Argument pursuant to Florida Rule of Appellate Procedure 9.320. *See* DIN 10. Pursuant to Florida Rule of Appellate Procedure 9.320(c), the Court declines Petitioner's Request for Oral Argument.

Jurisdiction and This Court's Standard of Review

The Court has jurisdiction pursuant to Section 322.31, *Florida Statutes,* and Section 322.2615, *Florida Statutes.* Section 322.31, *Florida Statutes,* states:

> The final orders and rulings of the department wherein any person is denied a license, or where such license has been canceled, suspended, or revoked shall be reviewable in the manner and within the time provided by the Florida Rules of Appellate Procedure only by a writ of certiorari issued by the circuit court in the county wherein such person shall reside, in the manner prescribed by the Florida Rules of Appellate Procedure, any provision in chapter 120 to the contrary notwithstanding.

§ 322.31, Fla. Stat. Section 322.2615(13), *Florida Statutes,* states:

> A person may appeal any decision of the department sustaining a suspension of his or her driver license by a petition for writ of certiorari to the circuit court in the county wherein such person resides or wherein a formal or informal review was conducted pursuant to s. 322.31. However, an appeal shall not stay the suspension. A law enforcement agency may appeal any decision of the department invalidating a suspension by a petition for writ of certiorari to the circuit court in the county wherein a formal or informal review was conducted. This subsection shall not be construed to provide for a de novo review.

§322.2615(13), Fla. Stat.

This Court's "first tier" certiorari review is limited to "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). The Court's review of the order entered by Chaandi McGruder, Hearing Officer, Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles, dated 8 February 2024, is limited to these considerations; it is not a plenary appeal.

Hearing Officer's Standard of Review

Section 322.2615(7)(b), *Florida Statutes,* details the scope of review for the hearing officer for formal review hearings if a license was suspended for refusal to submit to a breath, blood, or urine test. Section 322.2615(7)(b), *Florida Statutes,* states:

> In a formal review hearing under subsection (6). . .the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:
>
> . . .
>
> (b) If the license was suspended for refusal to submit to a breath, blood, or urine test:
>
> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§322.2615(7)(b), Fla. Stat.

Section 322.2615(11), *Florida Statutes,* states:

> The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents related to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test.

§322.2615(11), Fla. Stat.

Ruling

Based on the Court's review of the Petition, Response, and Reply, the entirety of the record contained within the case file, and all relevant legal authority, this Court finds that procedural due process was accorded to Petitioner; the hearing officer observed the essential requirements of the law in making her decision and entering her 8 February 2024 order; and, the hearing officer's administrative fmdings are supported by competent substantial evidence on the record.

The Petitioner does not dispute that he was provided notice and an opportunity to be heard. Therefore, the Court does not address procedural due process further.

As to the hearing officer observing the essential requirements of the law, the record makes it apparent that the hearing officer applied the appropriate scope of review pursuant to Section 322.2615(7)(b), *Florida Statutes.* This includes the hearing officer's consideration of Petitioner's arguments that the breath test was requested after an unlawful arrest. *See Arenas v. Department of Highway Safety and Motor Vehicles,* 90 So. 3d 828, 832 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1024a] (discussing *Fla. Dept. of Highway Safety and Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S243a]) ("[A] suspension can be the result of a refusal to take a breath test but only if the refusal is incident to a lawful arrest.").

The Second District Court of Appeal, in *Arenas,* in analyzing the Florida Supreme Court's holding in *Hernandez,* stated "[t]he three justices in the plurality *in Hernandez* reasoned, by construing the statutes *in pari materia,* that the hearing officer could invalidate the suspension if the hearing officer found that the DUI arrest was unlawful." *Arenas,* 90 So. 3d at 833 (citing *Hernandez,* 74 So. 3d at 1079). In *Arenas,* the Second District went on to state "[w]e construe the *Hernandez* plurality opinion to mean that someone *other than a judge in a criminal or civil proceeding* can determine as a matter of law the validity of a Fourth Amendment arrest requiring probable cause or an investigatory stop requiring reasonable suspicion." *Arenas,* 90 So. 3d at 833. (emphasis added). The hearing officer's analysis and decision as to the lawfulness of the arrest must be supported by competent substantial evidence.

As to the hearing officer's administrative findings being supported by competent substantial evidence, "[t]he court must review the record and determine *inter alia* whether the agency decision is supported by competent substantial evidence." *Dusseau v. Metropolitan Dade County Bd. Of County Com'rs,* 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]. "Competent substantial evidence is tantamount to legally sufficient evidence." *Id.* It is not this Court's role to usurp the fact-fmding authority of the Department's hearing officer. *Id.* at 1275. This Court is not permitted to reweigh the evidence or to determine whether the hearing officer's decision was opposed by competent substantial evidence. *See Id.*

The Second District Court of Appeal has addressed a trial court's requirements in determining whether a hearing officer's findings are supported by competent substantial evidence as follows:

> On certiorari review to the circuit court, "[t]he relevant issue . . . was whether there was competent, substantial evidence to support the hearing officer's factual fmding of probable cause." *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So.2d 305, 308-09 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]. The circuit court was not permitted to "reweigh [ ] the evidence and substitute [ ] [its] judgment for that of the hearing officer." *Id*. at 309 (holding that "by rejecting the hearing officer's findings when there was competent, substantial evidence in the record to support these findings," circuit court improperly reweighed the evidence). When the circuit court reweighs the evidence, it fails to apply the correct standard of review and thus fails to apply the correct law. *Id.* This court has stated that "the circuit court exceed[s] its scope of review by making an independent probable cause determination" after reviewing the evidence de novo. *Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So.2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (holding that circuit court improperly rejected trial court's findings and made its own determination that no probable cause existed); *see also Dep't of Highway Safety & Motor Vehicles v. Haskins,* 752 So.2d 625, 627 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2730a] (holding that circuit court applied the incorrect law when it "reviewed the evidence and formed its own opinion, without deference to the findings of the hearing officer").

Dep't of Highway Safety & Motor Vehicles v. Rose, 105 So. 3d 22, 23-24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a] (emphasis in original).

"It is well established that the Fourth Amendment's prohibition of unreasonable searches and seizures includes investigatory stops of automobiles." *Dobrin v. Florida Dept. of Highway Safety & Motor Vehicles,* 874 So. 2d 1171, 1173 (Fla. 2004) [29 Fla. L. Weekly S80a] (citation omitted). "An examination of the validity of a traffic stop under the Fourth Amendment thus requires courts to determine whether the stop was reasonable." *Id.* (citation omitted).

"In determining whether an officer had a reasonable suspicion of a crime, we must consider the facts available to the officer and the totality of the circumstances." *Peterson v. State,* 264 So. 3d 1183, 1189 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a] (citation omitted). "This determination must be viewed 'from the standpoint of an objectively reasonable police officer,' and 'the officer's subjective intentions are not involved in the determination of reasonableness.' " *Id.* (first quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996); and then quoting *Hilton v. State,* 961 So. 2d 284, 294 (Fla. 2007) [32 Fla. L. Weekly S401a]). "Reasonable suspicion, like probable cause, is dependent on both the context of information possessed by police and its degree of reliability." *Alabama v. White,* 496 U.S. 325, 330 (1990). "Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture.' " *Id.* (quoting *United States v. Cortez,* 449 U.S. 411, 417 (1981)).

The hearing officer's fmdings of fact and conclusions of law as to the validity of the traffic stop are based on competent substantial evidence contained within the record. In this case, the record clearly states:

> Deputy Meddaugh observed the defendant's vehicle, a red Hyundai Sonata bearing FL 81KKS, southbound in the left lane of US 41 approaching E Seminole Drive. The defendant's vehicle was having difficulty maintaining its lane, twice swerving within 2-3 feet of a red Ford SIN in the center lane.

DIN 3. The record also clearly indicates that the stop and arrest occurred during the early morning hours of 1 January 2024 (New Year's Day). DIN 3.

Petitioner argues that there is no competent substantial evidence to indicate that Petitioner failed to maintain a single lane. However, "even in the absence of a traffic violation, an officer may stop a driver's vehicle when the officer has a reasonable suspicion that the driver is driving under the influence." *Roberts v. State,* 732 So. 2d 1127, 1128-29 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533a]. As stated by the Florida Supreme Court: "Because of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation." *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975).

Petitioner also argues that the record does not specifically indicate Deputy Meddaugh's subjective opinions as to his suspicions of impairment. The record failing to state that Deputy Meddaugh

suspected impairment when he stopped Petitioner also does not affect the outcome here. "[T]he constitutional reasonableness of a traffic stop under the Fourth Amendment does not depend on the actual, subjective motivations of the individual officers involved in conducting the stop." *Dobrin,* 874 So. 2d at 1173 *(citing Whren v. United States*, 517 U.S. 806 (1996)). "The only concern under the Forth Amendment is the validity of the basis asserted by the officer involved in the stop." *Id.* "As the United States Supreme Court held in *Whren,* the validity of a traffic stop is determined by considering whether the officer who stopped the vehicle had an objective basis to do so, not whether it would be standard police practice to stop the vehicle." *Id.* at 1174-75 (citing *Whren*, 517 U.S. at 814). "Accordingly, the absence of a statement in the arrest report, indicating that [the officer] initiated the stop for suspicion of impairment, does not operate to negate the objective existence of probable cause." *State, Dept. of Highway Safety & Motor Vehicles v. Maggert,* 941 So. 2d 431 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2530a].

Here, the hearing officer provided appropriate due process; understood, observed, and applied the essential requirements of the law, and made conclusions of law and fact based on competent substantial evidence.

NOW, THEREFORE, for the foregoing reasons, the Court hereby ORDERS and ADJUDGES as follows:

Petitioner's Petition for Writ of Certiorari (DIN 2) is hereby **DENIED**.

* * *

Municipal corporations—Code enforcement—Fines—Order imposing fine of $5,000 per day for irreparable or irreversible code violation reversed—Statute only authorizes fine of $5,000 per violation, and record lacks any indication that town considered factors required to impose such fine

WALMART STORES EAST, LP, Appellant, v. TOWN OF LAKE PARK, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County. Case No. 50-2022-CA-011404-XXXX-MB. Division AY. June 25, 2024. On Appeal from the Town of Lake Park Special Magistrate. Counsel: Joni Armstrong Coffey, Dana A. Clayton, and Alexander J. Hall, Miami; Richard G. Leland, West Palm Beach, for Appellant. Thomas J. Baird and Lainey W. Francisco, Jupiter, for Appellee.

(PER CURIAM.) Pursuant to section 162.11, Florida Statutes, Walmart Stores East, LP, ("Walmart") seeks review of the Order Finding Violation rendered by the code enforcement special magistrate for the Town of Lake Park ("Town"). Chapter 162, which allows fines to be imposed for code enforcement violations, authorizes up to $250 per day for a first violation, $500 per day for a repeat violation, and $5,000 per violation for an irreparable or irreversible violation. § 162.09(2)(a), Fla. Stat. The Town has adopted the foregoing maximum amounts. Code of Ordinances, Lake Park, Fla. ("Code"), § 9-39(b).

In contravention to the applicable law, an unnumbered provision in the Order Finding Violation imposes a fine in the amount of $5,000 per day if Walmart fails to comply with the compliance dates. Based on the legally permissible maximums, the Court finds that the Town erred by including an unauthorized daily fine of $5,000, which must be reversed. The Order Finding Violation also imposes a $5,000 fine due to the irreparable and irreversible nature of the violation. When determining the amount of a fine, the Town must consider the following factors: the gravity of the violation, corrective actions taken by the violator, and any previous violations. § 162.09(2)(b), Fla. Stat.; Code, § 9-39(c). The Court finds that the record lacks any indication that the Town considered the factors as required by law. This matter must therefore be remanded for an appropriate determination regarding the fine amount.

Additionally, the Order Finding Violation states that Walmart must comply with the first condition by January 18, 2023, and with the second condition by November 18, 2022. Upon remand, the Town shall correct the apparent scrivener's error in the fourth condition that instead recites the dates of compliance as November 18, 2022, for the first condition and January 18, 2023, for the second condition. Accordingly, the Order Finding Violation is **REVERSED** in part as to the fines and the matter is **REMANDED** for proceedings in accordance with this opinion. (PARNOFIELLO, VOLKER, and COLLINS, JJ., concur.)

* * *

Municipal corporations—Code enforcement—Sanitary nuisances—Bedbugs—Appeal of multiple code compliance orders against assisted living facility that serves homeless population based upon bedbug infestations in facility and repeated contamination of public rescue vehicles responding to service calls at facility—State preemption—Argument that Assisted Living Facilities Act preempts city code's nuisance abatement provisions was waived where issue was not raised below—Even if issue were properly raised, it lacks merit because Act does not expressly or impliedly preempt city's authority to protect health and safety of persons delivering and receiving emergency fire and rescue services—Due process—Erroneous use of word "irrevocable" rather than "irreversible" in hearing notice did not deprive facility of due process—Notice otherwise provided full and accurate notice of code violations and issues to be tried, facility was aware that it would be severely fined for repeat violation, and facility presented no evidence that it was prejudiced by use of word "irrevocable"—Orders finding that bed bug infestation at facility was responsible for injuriously affecting emergency service providers and fire and rescue service within city and that such condition was irreversible nuisance are affirmed

RESIDENCE AT WESTLAKE GROUP, LLC, Appellant, v. CITY OF DANIA BEACH, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-013966 (AP), (Consolidated with Case Nos. CACE22-018790 and CACE22-018791). L.T. Case Nos. 2022-0656, 2022-1144, and 2022-1145. June 27, 2024. Appeal from the City of Dania Beach Special Magistrates Ansbro and Hipler. Counsel: Ryan Abrams, Fort Lauderdale, for Appellant. Alexander L. Palenzuela, Miami, for Appellee.

(**PER CURIAM.**) On March 21, 2024, this Court entered a Per Curium Affirmed Opinion in this appeal. On April 5, 2024, Appellant's filed a Motion for Written Opinion. Appellant requested that due to the fact that this appeal was the consolidation of three separate appeals involving similar facts and law, and the fact that Appellant currently has pending before this Court three additional separate appeals that are based on similar facts and law, it would be in the interests of judicial economy to withdraw the prior per curium Opinion and enter a more comprehensive Opinion on the facts and issues that were before this Court. On June 24, 2024, this Court Granted Appellant's Motion for Written Opinion.

Accordingly, the Opinion of this Court entered in this appeal on March 21, 2024, is hereby withdrawn and the following Opinion is hereby entered by this Court.

OPINION

Having carefully considered the briefs, appendixes, the record, and the applicable law, this Court dispenses with oral argument, and the City of Dania Beach Special Magistrate's August 11, 2022, Final Order, in L.T. Case No. 2022-0656, November 28, 2022, Final Order in L.T. Case No. 2022-1144, and November 28, 2022, Final Order in L.T. Case No. 2022-1145, are hereby **AFFIRMED**.

BACKROUND AND PROCEDURAL HISTORY

This matter is before the Court as a consolidated appeal of three (3) separate City of Dania Beach ("Appellee") code compliance Final Orders (entered after two separate hearings) against Appellant ("Residence at Westlake") for violations of Dania Beach City Code

("DBCC"), Section 13-34(a), Nuisance Accumulation (namely, bed bugs in a private assisted living facility and the repeated contamination of public rescue vehicles that respond to service calls from the facility).

The first Order, "0656" was entered after a hearing on August 16, 2022, by Special Magistrate Ansbro. The second and third Orders, "1144" and "1145" were entered on November 28, 2022, after a hearing on November 17, 2022, by Special Magistrate Hipler. The Final Orders "1144" and "1145" are identical with "1145" incorporating the findings of the Final Order in "1144".

During the first hearing (in re: "0656") on August 10, 2022, the Special Magistrate received testimony and documentary evidence from the District Fire Chief for Broward Sheriff Office Fire Rescue, Sergio Pellecer. Pellecer testified that his fire and rescue crews would go to the subject assisted living facility on a regular basis. The residents of the Appellant's facility were low income or homeless. The fire and rescue crews observed active bed bug infestations at the facility on numerous occasions. As the result of having contact with the facility, the fire and rescue crew members and the rescue vehicles were also contaminated by bed bugs on numerous occasions, "approximately, six or seven times", requiring decontamination procedures that took the vehicles out of service for four to six hours each time. The down-time for the decontamination of the vehicles negatively affected the fire and rescue service for the district and created risks to others who might be in need of service. Pellecer testified that frequent bed bug contamination was causing a delay in service. The bed bug problem at the assisted living facility had been ongoing for about one year.

Ms. Melka, the administrator for the facility, testified that the facility had hired Truly Nolen (a pest control company) and that the pest control company had been treating the property on an ongoing basis. Melka testified that due to the environmental situations relating to new residents, namely, homelessness, the new residents would bring bed bugs into the facility in their clothes and other possessions. Pellecer's testimony confirmed that the bed bugs were continually introduced into the facility as the result of the new resident's, formerly homeless, bringing them into the building. Pellecer stated that it is "an ongoing problem" . . . "because, you know, the residents are bringing them in." Mr. Daly, the service inspector for Truly Nolen, testified that the facility was setting up a quarantine room for new residents as a way of controlling the introduction of new beg bugs into the facility.

The Special Magistrate entered the 0656 Final Order finding:

1. Appellant allowed code violations on its property, namely, a violation of Dania Beach City Code Section 13-34(a), Nuisance Accumulation (the bed bug infestation).

2. Appellant had five days to set up a quarantine room;

3. Appellant is fined $1,000, and if Appellant comes back for same violation, a $5,000 fine will be imposed.

Thereafter, on two occasions, Appellant was issued code violations for DBCC § 13-34(a) Nuisance Accumulation (bed bugs). On November 17, 2022, the two violations (1144 and 1145) were heard by a different Special Magistrate.

George White, the code inspector for the City of Dania Beach, testified that on two occasions (09/16/22 and 11/15/22) he observed and took pictures of bed bugs at Appellant's facility. Fire and Rescue Chief Pellecer gave the same testimony that he gave in the first hearing, namely, that his fire and rescue crews would go to the subject assisted living facility on a regular basis; the residents of the Appellant's facility were low income or homeless; the fire and rescue crews observed active bed bug infestations at the facility on numerous occasions; the fire and rescue crew members and the rescue vehicles were also contaminated by bed bugs on two occasions requiring decontamination procedures that took the vehicles out of service for four hours each time; the down-time for the decontamination of the vehicles negatively affected the fire and rescue service for the district and created risks to others who might be in need of service; and it was causing a delay in service.

The Special Magistrate entered the 1144 and 1145 Final Orders finding:

1. Appellant allowed code violations on its property, namely, a violation of Dania Beach City Code Section 13-34(a), Nuisance Accumulation.

2. This is an irreversible/irrevocable violation, as defined in the Dania Beach Municipal Code;

3. This is not a repeat violation;

4. The bed bug quarantine room was being used to quarantine a covid patient rather than being used for the purpose of bed bug quarantine; and

5. Appellant is fined $5,000, on each of the violations.

STANDARD OF REVIEW

"Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence" (*Town of Deerfield Bch. v. Vaillant,* 419 So. 2d 624 (Fla. 1982).

Florida Statutes § 162.11 provides in pertinent part:

An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board.

ANALYSIS

Appellant did not raise the issue of state statutory preemption under Chapter 429, Florida Statutes, in any of the three administrative hearings that are subject to this appeal. An issue not raised before the lower tribunal will be deemed to have been waived. *See Sunset Harbour Condo. Ass'n v. Robbins,* 914 So. 2d 925 (Fla. 2005) [30 Fla. L. Weekly S763a] (as a general rule, it is not appropriate for a party to raise an issue for the first time on appeal)(citing *Dade Cty. Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638 (Fla. 1999) [24 Fla. L. Weekly S71a] (a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell,* 401 So.2d 1322 (Fla.1981)(appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Tillman v. State,* 471 So.2d 32, 35 (Fla.1985). Where Appellant failed to raise argument that statute was unconstitutionally vague at trial, the argument was not preserved. *Hollywood Park Apts. South, LLC v. City of Hollywood*, 361 So. 3d 356, 360 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D801a]. "[A]n issue will not be considered on appeal unless the precise legal argument forwarded in the appellate court was presented to the lower tribunal." *Goodwin v. Fla. Dept. of Children's and Families,* 194 So. 3d 1042, 1047 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D834a]. A party cannot raise issues on appeal that were not properly objected to or challenged before an administrative body. *Henderson v. Dept. of Health, Bd. Of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D966a]. "It is well-established that for an issue to be preserved for appeal, it must be raised in the administrative proceeding of the alleged error." *Yachting Arcade, Inc. v. Riverwalk Condo. Assoc., Inc.,* 500 So.2d 202, 204 (Fla. 1st DCA 1986).

However, even if, assuming *arguendo,* the Appellant could now raise this issue for the first time on appeal, Appellant's argument that Chapter 429, Florida Statutes, preempts the Appellee's municipal code nuisance abatement section is without merit.

Chapter 429, Florida Statutes, is titled "The Assisted Living Facilities Act." Chapter 429 provides the State of Florida Agency for Health Care Administration ("AHCA") with authority to regulate the licensing requirements and operational services of assisted living facilities in the State of Florida. Chapter 429 does not expressly preempt a municipality from exercising its policing powers or nuisance abatement authority against health and safety threats emanating from real property that is located within a municipality and contaminating the public domain. "Express preemption requires a specific statement; the preemption cannot be made by implication nor by inference." *D'Agastino v. City of Miami*, 220 So. 3d 410, 423 (Fla. 2017) [42 Fla. L. Weekly S682a] (*citing City of Hollywood v. Mulligan,* 934 So. 2d 1238 (Fla. 2006) [31 Fla. L. Weekly S461a] (*see also D'Agastino, supra, citing Phantom of Clearwater, Inc. v. Pinellas Cty.,* 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D205a] (Express preemption must be accomplished by clear language stating that intent).

Since there is no express preemption in Chapter 429, Appellant contends that there is an implied preemption. Appellant argues that "[t]he violations at issue concern conditions at an [assisted living facility] which are alleged to impact the health, safety and welfare of residents." In doing so, Appellant ignores the competent and substantial evidence in the record in relation to all three violations, namely, the bed bugs that infest Appellant's assisted living facility are contaminating first responder crews and fire rescue vehicles and are actually impacting the health, safety and welfare of residents in the city at large, not just the residents in the facility, and the repeated decontamination procedures on the vehicles is delaying emergency services to persons who do not reside at the assisted living facility.

Appellant contends that Fla. Stat. § 429.41, which provides that AHCA and "the Department of Elderly Affairs, in consultation with [AHCA] shall adopt rules, policies and procedures to administer this part, which must include . . . standards in relation to: (d) [a]ll sanitary conditions within the facility and its surroundings which will ensure the health and comfort ***of residents,***" preempts municipal police powers and municipal nuisance abatement powers related to businesses and buildings located within a municipality because the subject business and building is subject to Chapter 429 for licensing and regulatory purposes. (Emphasis added).

However, at the point in time when the bed bugs escape the AHCA regulated property and contaminate public emergency vehicles and personnel, the source of the nuisance, namely, the bed bugs, are no longer in the regulated facility, and the source has entered the legally recognized jurisdiction of the municipality, outside of AHCA regulatory authority "of residents" living at the facility. In regard to the three code violations, Appellee was not inspecting the assisted living facility pursuant to AHCA regulatory authority relating to sanitary conditions, but rather it was enforcing municipal law under its municipal home rule powers that were enacted to protect the health and safety of persons in the city, including persons delivering and receiving emergency public fire and rescue services in the city at large. Accordingly, Chapter 429, Florida Statutes, does not preempt DBCC § 13-34(a).

The three notices of hearing all include in the style of the case, "Notice of Formal Hearing," and immediately below it, "(Irrevocable Hearing)." During the first hearing on violation 0656, Appellant did not object to the notice of hearing and proceeded to put on its case in defense including the examination of witnesses and submission of documentary evidence into the record. During the hearing, the Special Magistrate found and informed Appellant of the following, to wit: "So this shuts down an entire truck and the people who are working there. It can't go on. If it comes back to me, I'm going to impose a very severe fine . . . I wouldn't do that unless you had an opportunity to be heard. But at this point I want to make sure it doesn't come back. You understand that, right?" Appellant replied, "Yes, sir." Accordingly, Appellant had actual knowledge that it would be subject to a fine if it was found to be in violation of the nuisance provision again because of the bed bug infestation.

Notwithstanding the facts that Appellant did not object to the first notice of hearing with the exact wording, and then responded that it understood that it would be facing a very severe fine if it came back on the same bed bug violation, during the second hearing on violations 1144 and 1145, Appellant argued that the Notices of Violations included the word "Irrevocable" as opposed to the word "Irreversible," and as such, Appellant was denied due process of law because it was not adequately notified of the potential for a fine to be imposed at the hearing. Appellant argues that "in the body of the notice of hearing, it is stated that the purpose of the hearing is to find whether or not the violation is irrevocable in nature, it should state irreversible in nature, that's what the code states. So only at that point, if its irreversible in nature, would a fine be justified based on the notice of hearing." During the second hearing, the Special Magistrate stated: "It says irrevocable, irreversible in the violation. You know, you're still facing a level five irreparable, irrevocable, $500 to $5,000 fine."

Dania City Code Sec. 2-81. - Administrative fines; liens: provides in pertinent part:

> (a) The order of the magistrate may require the violator to pay a fine . . . [I]f the magistrate finds the violation to be irreparable or irreversible in nature, he or she may impose a fine not to exceed five thousand dollars ($5,000.00) per violation.

In the two Final Orders relating to violations 1144 and 1145, the Special Magistrate found that "f. The Respondent testified under oath that the underlying nuisance (bed bugs) has existed at their facility for approximately one year" and "d. This is an irreversible/irrevocable violation, as defined in the Dania Beach Municipal Code."

In each of the three notices of hearing, Appellant was notified that it was in violation of The Dania Beach City Code, ARTICLE II.—SANITARY NUISANCES, and a copy of the Notice of Violation of municipal ordinance was attached thereto. In addition, all of the notices included an attachment informing Appellant of its right to bring witnesses and documentary evidence to the hearing. At both hearings, in regard to all three separate violations, Appellant had timely and adequate notice of the specific code sections that it was alleged to have violated. Appellant, did in fact, present both testimonial and documentary evidence in its defense at the hearings. Further, during the first hearing, as noted above, Appellant affirmatively acknowledged that it understood that it would be subject to a "severe fine" in accordance with the municipal code, and after due process was provided, if it was found to again violate the ordinance at another hearing. The amount of the fines at the second hearing were in the exact amount that the Special Magistrate had informed Appellant that it would receive in the event that there was another nuisance violation involving the bed bug infestation and the contamination of the emergency vehicles.

The erroneous use of a word in the style of a case, when the notice of hearing otherwise provides full and accurate notice of the code violations and the issues to be tried at the hearing, does not arise to the level of a constitutional violation of due process. Appellant presented no evidence that it had been prejudiced in any manner by the use of the word "irrevocable" in the body of the notice of hearing. Appellant previously acknowledged on the record that it was aware that it would be severely fined at a subsequent hearing if it was deemed to have

violated the nuisance ordinance again, but it now contends that it was without notice of the possibility that it would be fined at the subsequent hearing where it was deemed to have violated the nuisance ordinance again. Appellant was afforded its due process in accordance with Florida law. *See Seiden v. Adams,* 150 So. 3d 1215 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2409a] (*citing Jennings v. Dade Cnty.,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991)(Generally, due process requirements are met in a quasi-judicial proceeding "if the parties are provided notice of the hearing and an opportunity to be heard). As such, Appellant was afforded reasonable notice with full due process and an opportunity to be heard.

In Florida, municipalities are given broad authority to adopt ordinances under municipal home rule powers. Anything that is detrimental to health or which threatens danger to persons or property within a city limit may be dealt with by the municipal authorities as a nuisance. *City of Miami Bch. v. Texas* Co., 141 Fla. 616, 630, 194 So. 368, 374 (Fla. 1940). Under broad home rule powers, a municipality may concurrently legislate with the state legislature on any matter that have not been expressly preempted by the state legislature. *Mulligan, supra* at 1243.

Dania Beach City Code §§ 13-34 and 13-21(n)(7) provide in pertinent part:

> Sec. 13-34. - Prohibitions. (a) It shall be unlawful for any owner or operator of premises within the city to allow the accumulation [of] or to accumulate any garbage, litter, stagnant water, trash, untended vegetation, or to allow any discoloration, or any nuisance as defined in section 13-21 above, upon the premises.
>
> 13-21(n)(7) defines a Nuisance as: Any public nuisance known or recognized as such at common law or in equity jurisprudence or as provided by statute, administrative rule, or ordinance of the city, including this chapter.

The testimony and documentary evidence in both of the administrative hearings in this case establish that, for approximately one year, Appellant's building and property was infested with bed bugs. The bed bugs escaped Appellant's private property via patients that were treated by the public fire and rescue first responders. As a direct result of the bed bug infestation on Appellant's property, the responding fire and rescue vehicles were taken out of service for a minimum of four hours each time after they were contaminated by the bed bugs. The bed bugs were originating from the assisted living facility owned and maintained by Appellant. The first responder crew members also had to be decontaminated. The hospitals receiving patients from Appellant's property must utilize special protocols when receiving the patient transfers from the first responders. There have been at least eight or nine instances of bed bug contamination to public emergency vehicles resulting from the infestation on Appellant's property in relation to the three separate code violations. The contamination of the publicly operated emergency first response vehicles with bed bugs originating from Appellant's property posed a direct risk and/or threat to public health and safety as the result of delayed service in emergency situations.

"It is not possible to define comprehensively 'nuisances' as each case must turn upon its facts and be judicially determined." *Orlando Sports Stadium, Inc. v. State of Fla. Ex rel. Rom W. Powell et al.,* 262 So. 2d 881, 885 (Fla. 1972)(rehearing denied). "A public nuisance violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally." *Id.* The rule has long been established through common law that no person shall use their private property to injure another. *Shamhart v. Morrison Cafeteria Co.*, 159 Fla. 629, 630 (Fla. 1947)(*en banc*)(abutting property owners may not use their property in an unreasonable manner where such unreasonable use makes it both a private and public nuisance). Where a nuisance or continuation of a nuisance arises out of the manner in which a business is operated, equity will abate the nuisance by adopting methods calculated to eliminate or minimize the injurious features thereof. *Baum v. Coronado Condo. Ass'n, Inc.,* 376 So. 2d 914, 919 (Fla. 3rd DCA 1979)(*citing Shamhart, supra*). This Court recognizes the important societal need and the difficulty in operating this type of facility, however, this does not allow the owner of such a business to avoid responsibility for harmful conditions originating from their facility as a direct result of their actions or inactions.

In all three Final Orders, the Special Magistrates found that the testimonial and documentary evidence presented at the hearings, including testimony from the district fire chief in charge of overseeing emergency vehicle deployment, the assisted living facility manager, a City of Dania Beach Code Inspector, Broward Sheriff Office Fire Rescue Reports, emergency vehicle decontamination reports, and the Truly Nolan pest control inspector, constituted competent and substantial evidence that the bed bug infestation at Appellant's assisted living facility was responsible for injuriously affecting emergency service providers and emergency fire and rescue service within the City of Dania Beach, and that such conditions were an irreversible nuisance as defined under DBCC § 13-34(a).

There was competent and substantial evidence in the record to support the Special Magistrates' three Final Orders finding Appellant in violation of DBCC § 13-34; procedural due process was accorded to Appellant, and the essential requirements of the law have been observed. (BOWMAN, TOBIN-SINGER, and USAN, JJ. concur.)

* * *

Municipal corporations—Zoning—Code enforcement—City did not err in rejecting Florida Land Use Environmental Dispute Resolution Act special magistrate's recommendation that code enforcement action finding that owner's use of driveway on residentially-zoned property in city to access owner's industrially-zoned property in adjacent city unreasonably and unfairly burdened use of owner's property—Owner's use of road in residential zone for industrialized purposes to get to industrially-zoned property was not permitted use in residential zone—Barring ingress and egress through residential property for industrialized purposes does not result in taking of property—Furthermore, use of industrial trucks on residential road was expressly prohibited by city code

OAKLAND 95 LLC, a Florida Limited Liability Corporation, Appellant, v. CITY OF OAKLAND PARK, a Florida Municipal Corporation, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-015746. L.T. Case No. SP21-125. June 7, 2024. Appeal from Oakland 95 LLC, John Herin, Jr., Special Magistrate. Counsel: Ian E. DeMello, Shubin and Bass, P.A., Miami, for Appellant. Donald J. Doody, Goren, Cherof, Doody and Ezrol, P.A., Ft. Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the Order of Enforcement rendered on September 28, 2021 is hereby **AFFIRMED** as set forth below.

In the proceedings below, Appellant, Oakland 95, LLC ("Owner") owns two parcels of property that are at the center of this dispute:

> 1. The Oakland Park Property, located at 2600 NW 18th Terrace, Oakland Park, Florida ("Oakland Park Property")
>
> 2. The Fort Lauderdale Property, located at 2598 NW 18th Terrace, Fort Lauderdale, Florida ("Fort Lauderdale Property")

The Fort Lauderdale Property is located within the boundaries of the City of Fort Lauderdale and is zoned M-3, Intense Manufacturing and Industrial. The Oakland Park Property is located within the boundaries of the city and is zoned R-1 single-family residential. The Owner's Fort Lauderdale Property is completely landlocked. The closest public street, NW 18th Terrace, is located approximately 250 feet across the Oakland Park Property. Owner argues that it has been

using its Oakland Park Property as a point of ingress and egress from NW 18th Terrace to the industrially zoned Fort Lauderdale Property for over thirty (30) years.

On July 22, 2021, Oakland Park's Code Enforcement issued a Violation Notice which cited the following: "SEC.24.51.3(B)(1) R1C uses permitted—no building or structure or part thereof shall be erected, altered or used, or land or water used in whole or in part, *for other than the following specified use: Any use permitted in an R-1 District*." (emphasis added) Further, the Violation Notice alleged that the Oakland Park Property is being used for an "unpermitted use" because it is "being used to transport building material to a construction site in Fort Lauderdale" and demanding that Owner stop using the Oakland Park Property to access the Fort Lauderdale Property.

Since Owner did not remedy its violations, it was issued a Notice of Violation Hearing scheduled for September 21, 2021. The Notice alleged the following:

> SEC.24-29(A)(B)(1) Uses Permitted one family
>
> (A) Purpose. R-1 zoning is established for single-family dwelling units and related accessory uses at a density not to exceed five (5) units per gross acres except where (C)(1)(b) below applies.
>
> (B) Uses permitted. No building or structure or part thereof shall be erected, altered or used, or land or water used, in whole or in part, for other than the following specified use:
>
> (1) One-family dwelling.

At the hearing, the Appellee, City of Oakland Park (the "City") argued that Owner was using its Oakland Park Property to transport material through a residential lot that is unimproved to his business in Fort Lauderdale. Owner argues that the City was improperly and unconstitutionally trying to take away access to a public road through the code enforcement hearing. Owner also introduced its July 27, 2021 request for relief pursuant to section 70.51, Florida Statutes (the Florida Land Use Environmental Dispute Resolution Act "FLUEDRA"), outlining the applicable facts and law in an attempt to resolve the constitutional issues related to the City's code enforcement efforts. The Special Magistrate denied Owner's Motion to Dismiss and issued an Order of Enforcement ("Enforcement Order"), finding that it violated the City's Land Development Regulations ("LDRs"), imposing a $150.00 administrative fee, ordering Owner to stop accessing its Fort Lauderdale Property through the Oakland Park Property from the public road within thirty (30) days, and providing for additional monetary fines of "$100/day/violation" should Owner continue to access the Property from the public road.

On October 1, 2021, Owner timely filed a renewed request for relief pursuant to FLUEDRA, again raising the constitutional issues with the City's action that sought to prevent all access to Owner's Property. Despite Owner's renewed FLUEDRA request, the City issued a Notice of Certification of Fine Hearing, contending that Owner is still violating the City's Code by accessing the Fort Lauderdale Property from the public road and that $8,900.00 in fines have accrued. On January 18, 2022, a certification hearing was held, in which the Special Magistrate found that all fines should be deferred until the FLUEDRA proceedings were exhausted or resolved. The Special Magistrate further found that the Owner had violated the City's Code by accessing the Fort Lauderdale Property and that "if the Special Magistrate at the FLEUDRA proceeding recommends that the enforcement action of the City is not unreasonable and does not unfairly burden the violator, or upon issuance of a written decision by the City in accordance with section 70.51(22), Florida Statutes, the fine will be retroactive as of 1/18/2022 and a lien placed on the property, without further hearing." ("Order of Enforcement for Certification").

On August 29, 2022 the FLUEDRA Special Magistrate issued a Report and Recommendation finding that the City's "code enforcement actions unreasonably and unfairly burden the use of Owner's Property and that Owner is entitled to access NW 18th Terrace from the industrially zoned Fort Lauderdale Property by passing through the residentially zoned Oakland Park Property." Then on October 13, 2022, in accordance with section 70.51(22), Florida Statutes, the City issued a written decision to *reject* the recommendation of the FLUEDRA Special Magistrate. Ultimately, the City acted in accordance with the Special Magistrate's September 28, 2021 Enforcement Order, that the Owner's ingress and egress to another zoned property outside of the City of Oakland Park is not a permitted use in the R-1 Zoning District. Owner filed its Notice of Appeal on October 24, 2022.

On appeal, Owner alleges that (1) the Special Magistrate failed to comply with the essential requirements of the law because the City cannot exercise its zoning authority in a manner that violated Owner's constitutional right to access Owner's Property; (2) the Special Magistrate failed to comply with the essential requirements of the law because Owner has a legal right to truck deliveries under the City Code and Florida Law; and (3) the Special Magistrate failed to comply with the essential requirements of the law because access to Owner's Property is not a "use" that is expressly prohibited under the City's zoning code.

"An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed." § 162.11, Fla. Stat. (2022); *see also, Cent. Fla. Invs., Inc. v. Orange Cnty.,* 295 So. 3d 292, 293-94 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. "This Court has described the nature of such an appeal as plenary." *Cent. Fla. Invs., Inc.,* 295 So. 3d at 294. "That is, on appeal, all errors below may be corrected: jurisdictional, procedural, and substantive; and judgments below may be modified, reversed, remanded with directions, or affirmed." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 526 n. 3 (Fla. 1995) [20 Fla. L. Weekly S318a].

Owner argues that the City cannot infringe on its right to access its Fort Lauderdale Property using its zoning laws. In turn, Owner argues that the Special Magistrate violated Florida law when it applied the City's LDRs that resulted in a complete denial of its right to access to its property. While Owner argues that he was denied access to his landlocked property, this is an inaccurate interpretation. Accordingly, SEC.24-29(A)(B)(1) states the following,

> SEC.24-29(A)(B)(1) Uses Permitted one family
>
> (A) Purpose. *R-1 zoning is established for single-family dwelling units and related accessory uses* at a density not to exceed five (5) units per gross acres except where (C)(1)(b) below applies.
>
> (B) Uses permitted. No building or structure or part thereof shall be erected, altered or used, or land or water used, in whole or in part, for other than the following specified use:
>
> (1) One-family dwelling.

(emphasis added).

As argued to the Special Magistrate, the Oakland Park Property is zoned R-1, residential single family district. There are three permitted uses for R-1 zone: (1) single family residential dwelling units, (2) community residential uses, such as sober homes, and (3) family day care. When the Owner uses his trucks/tractor trailers/commercial vehicles to access its industrial property in Fort Lauderdale from the residential zoned property in Oakland Park, it is violating the City's zoning code. The City further argues that it is not preventing the *use* of Owner's Oakland Park Property. In fact, the Owner can use its Oakland Park Property for residential purposes and access that property for those purposes permitted by the code. Although Owner

would like to use the road where the Oakland Park Property is located for industrialized purposes to get to the Fort Lauderdale Property that is not permitted within the R-1 zoning. Furthermore, this does not result in an "absolute taking" of Owner's Oakland Park Property. The City is only requesting Owner to abide by zoning laws when practicing ingress and egress through an R-1 zoned property to a commercially zoned property. The City is not taking away the Owner's complete access to its Oakland Park property.

Moreover, the Owner's arguments that the Special Magistrate failed to comply with the essential requirements of the law because Owner has a legal right to truck deliveries under the City Code and Florida Law is flawed for the same reasons stated above. Owner can access his Oakland Park Property; however, it must be consistent with R-1 zoning codes.

Additionally, Owner argues that the Special Magistrate failed to comply with the essential requirements of the law because access to Owner's Property is not a "use" that is expressly prohibited under the City's zoning code. As stated above, Owner may access the property that which is permitted in the City's R-1 zoning code. Moreover, at the September 21, 2021 hearing, Mr. Tomlinson, a neighbor of Owner testified that the road the Owner uses to access his Fort Lauderdale Property from the Oakland Park property has a sign that says "No through trucks". Further, the Owner's use of the industrial trucks on the road is expressly prohibited under the City's zoning code, which are in place for the protection of the public's health, safety and welfare. While equitable principles would typically apply here in allowing a property owner to allow vehicle access through his own property as he sees fit, in this circumstance doing so causes a disturbance to the neighboring properties. As the Court sees it, common equity among the neighborhood property owners in the immediately surrounding community is what the City intended in enacting the subject city ordinances and zoning codes. This is more so evident by the City's decision to erect the above mentioned "No through trucks" signage.

Lastly, this Court recognizes the "false hope" that the FLUEDRA Special Magistrates' ruling created and likely creates in many similar situations. The procedure as currently enacted and applied is flawed, but such is the allowed under law, and the City's decision to disagree with and disregard the FLUEDRA Special Magistrates' ruling is well within their right and ability.

Ultimately, in none of the arguments brought forward by Owner did the Special Magistrate fail to comply with the essential requirements of the law.

Accordingly, the September 28, 2021 Enforcement Order in favor of Appellee, City of Oakland Park, is hereby **AFFIRMED**. (BOWMAN, and TOWBIN-SINGER, JJ., concur. USAN, J., dissents with opinion.)

(USAN, J., dissenting.) This case essentially involves Appellant landowner using a driveway on his real property located in Oakland Park, Florida to access an adjacent parcel of real property located across the municipal boundary in Fort Lauderdale, Florida. The Fort Lauderdale property is zoned for industrial use and is "landlocked" in as much as there is no possible point of ingress or egress except across the Oakland Park property. Both parcels of property are owned by Appellant. Appellant has been using the driveway of the Oakland Park property to access the Fort Lauderdale property for more than 30 years.

The City of Oakland Park (Appellee), through its Code Enforcement authority seeks to enjoin the Owner from using the driveway to access the Fort Lauderdale Property and to collect variously imposed violation fees and fines. A Special Magistrate denied the Appellant's Motion to Dismiss and issued an Order of Enforcement against the Owner on September 21st, 2021.

Pursuant to F.S. 70.51, the Owner filed a request for relief under the Florida Land Use and Environmental Dispute Resolution Act (FLUEDRA). Further action on the September 21st order was stayed until the FLUEDRA proceedings were exhausted or resolved.

After a full hearing on the merits, the FLUEDRA Special Magistrate concluded that the City of Oakland Park Code Enforcement actions "unreasonably and unfairly burden the use of Owner's Property. . . ." Whereupon, the City of Oakland Park rejected the Special Magistrate's findings and report and continued enforcement action per the September 21st, 2021 Order.

The City of Oakland Park's ability to simply reject findings of a neutral and mutually agreed upon Special Magistrate that the City has "unreasonably and unfairly" burdened the use of Owner's property seems contrary to the intent and purpose of F.S. 70.51. Although Subsection (21)(c) allows the City to reject the recommendations for resolving the issue, one wonders what purpose the procedure has if the Governmental Agency is willing to accept the findings and recommendations only when such findings and recommendations are decided in their favor and can simply chose to ignore the findings when they are not. Such actions give the appearance of nothing more than a disingenuous agreement to resolve an issue.

The Owner's only recourse will apparently be to file a civil action in the Circuit Court for what appears to be and what was found to be by a Special Magistrate an unreasonable and unfair burden the rights of a property owner. This Court must, however, put aside the Owner's credible claim of an unconstitutional taking and defense to any code violation under the doctrine of laches for an activity that has been going on for over thirty years, as this issue is not presently before this Court and shall have to wait for another day in another forum.

We are presented with three issues:

I. Whether the Special Magistrate failed to comply with the essential requirements of the law because the City cannot exercise its zoning authority in a manner that violated Owner's constitutional right to access Owner's Property.

II. Whether the Special Magistrate failed to comply with the essential requirements of the law because Owner has a legal right to truck deliveries under the City Code and Florida Law.

III. Whether the Special Magistrate failed to comply with the essential requirements of the law because access to Owner's Property is not a "use" that is expressly prohibited under the City's zoning code.

As to the first issue, I would find that the Special Magistrate failed to comply with the essential requirements of the law because the City cannot exercise its zoning authority in a manner that violates the Owner's constitutional rights to quiet enjoyment of his property. The September 21st findings of the Special Magistrate ignore or do not address the legitimate concerns raised by and resolved in favor of the Owner in the FLUEDRA action.

With respect to issues II and III, I would also find that the Special Magistrate's Enforcement Order of September 21st, 2021 failed to comply with the essential requirements of law.

The parcel of property in question is zoned R-1, residential single-family district. There are three permitted uses for an R-1 zone: (1) single family residential dwelling units, (2) community residential uses, such as sober homes, and (3) family day care. Oakland Park Zoning Code Section 24-29(A),(B)(1) states:

> (A) Purpose. R-1 zoning is established for single-family dwelling units and related accessory uses at a density not to exceed five (5) units per gross acres except where (C)(1)(b) below applies.
>
> (B) Uses permitted. No building or structure or part thereof shall be erected, altered or used, or land or water used, in whole or in part, for other than the following specified use:

(1) One-family dwelling.

Section 24.51.3(B)(1) states: "R1C uses permitted—no building or structure or part thereof shall be erected, altered or used, or land or water used in whole or in part, for other than the following specified use: Any use permitted in an R-1 District."

(emphasis added).

The property in question is an unimproved parcel that is zoned R-1. The driveway in question accesses a public roadway in Oakland Park and also accesses a parcel of Property in Fort Lauderdale. The driveway is approximately 250 feet long.

Nothing in the cited code would prevent a residential homeowner from having a commercial vehicle access or use a driveway to make deliveries or to service said residential property. In fact, it is common practice for residential homeowner's to have commercial lawn service companies, pool cleaning companies, air conditioning or plumbing contractors and the like, all which use commercial vehicles, to access their residential property via a driveway leading into the property. Homeowners that drive commercial vehicles may also drive onto and park commercial vehicles on their own property (although many municipalities restrict overnight parking of commercial vehicles in a residential driveway).

Whether the vehicles in question in this case move from the Oakland Park property onto the public roadway in Oakland Park or exit the Oakland Park property to the Fort Lauderdale property or come on to the Oakland Park property from the Fort Lauderdale Property makes little difference. That the Owner happens to be using the Fort Lauderdale property for commercial purposes for which it is properly zoned is also of little consequence.

A driveway that cuts across a residential parcel is included by any fair interpretation of the term "related accessory use" of a residential dwelling. Nothing in the Oakland Park code expressly prohibits the use of residential driveways to commercial vehicles or limits the use of driveways to non-commercial vehicles. In this case, the Owner driving a commercial vehicle across his property falls well within the meaning of related accessory use.

For the reasons stated, I would find that the Special Master departed from the essential requirements of the law.

Therefore, I respectfully dissent.

* * *

Municipal corporations—Code enforcement—Due process—Notice—City's citation and imposition of fines violated due process where hearing notices were mailed to corporate property owner's principal address rather than to its registered agent—Because brevity of hearing and transcript makes it clear that special magistrate failed to review documents in record, and magistrate's order does not reference findings of fact or conclusions of law, order is not supported by competent substantial evidence—Magistrate departed from essential requirements of law by failing to make findings of fact in his order or on the record

HOLLYWOOD MHC, LLC., Appellant, v. CITY OF WEST PARK, FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 23-003181. Administrative Hearing Docket # 22-000344. May 16, 2024. Appeal from Hollywood MHC, LLC. Counsel: Shawn D. Arbeiter, Hinden, McLean & Arbeiter, P.A., for Appellant. Michelle Austin Pamies, Burnadette Norris-Weeks, P.A., for Appellee.

OPINION

(PER CURIUM.) Appellant appeals the Special Magistrate's February 8, 2023 Final Order, which found Appellant in violation of the City's code Sections 34-26(a); 42-83(a); and 42-86(a).

In the instant case, Appellant was alleged to have violated the aforementioned City code ordinances. The matter was set before the Special Magistrate where ultimately, a hearing was held on January 26, 2023. The Appellant failed to appear at the hearing date, therefore, the only party in attendance to give testimony and present evidence was the Code Enforcement Officer for the City of West Park.

Upon receipt of the Final Order, Appellants filed a Motion to Vacate Final Order Rendered by Special Magistrate (referencing case 22-000344) & Motion for Rehearing of Code Enforcement Violation Case and For Dismissal ("Motion to Vacate"). At the hearing set for March 9, 2023, the City motioned for continuance, ultimately, the hearing was continued, to date, Appellant's Motion to Vacate has not been addressed.

This Appeal followed.

DUE PROCESS

The record shows that the Notices of Hearing and the Notice of Continuance were mailed to the principal address located in Skokie, Illinois. The record further shows that no notices were mailed to the registered agent of Appellant. The language of §162.12, Florida Statutes and Section 10-9 of the City's code of ordinances, is clear as it pertains to notices provided to property owned by corporations. Yet, the Appellee elected to mail the notices of hearings to the principal address instead of the registered agent, whose primary function is to give the state of Florida a live person upon which to send official state and legal documents.

The City's failure to comply with the statutory notification requirements, constituted an imposition of citation and related fines upon the Appellants without due process of law.

COMPETENT SUBSTANTIAL EVIDENCE

The parties argued as to what portion of the record submitted by the Appellant was to be relied upon by this Court. Due to the conflict, this Court directed the parties to instill the assistance of the Special Magistrate to provide an accurate and complete lower tribunal record. On December 22, 2023, an Order Determining Record on Appeal was entered by the Special Magistrate. Following the guidance as specified, this Court in its capacity limited its review of the record accordingly.

The record shows that the portion of the transcript relating to the case, consisted of less than two pages; 29 lines of testimony to include the Magistrates ruling. The brevity of the hearing and content of the transcript, makes it evident that the Magistrate failed to consider and or review the litany of documents to which he himself, ordered to be part of the record, as stipulated by the December 22, 2024 Order. In light of the de minimis information that was considered in rendering the decision, it is clear there was a lack of foundation for the Magistrate to conclusively render a decision.

The Final Order and testimony entered by the Magistrate fails to make references to findings of fact or conclusions of law and thus fails to be supported by competent substantial evidence.

ESSENTIAL REQUIREMENTS OF LAW

Appellants argue that sufficient findings of fact and conclusions of law combined with the vague and unclear Final Order, represents a departure from the essential requirements of law. Specifically, the Final Order fails to follow the requirements of fact and conclusions of law as set forth in the City's Code of Ordinances Section 10-10.

In the case of *Hayes v. Monroe County,* 337 So. 3d at 442 (Fla. 3rd DCA 2022) [47 Fla. L. Weekly D170b] At the conclusion of any code enforcement hearing "The code enforcement board is required to issue findings of fact, based on evidence of record and conclusions of law" pursuant to § 162.07(4), Fla. Stat.; *inter alia,* "The failure to apply a controlling legal decision or statute "is a classic departure from the essential requirements of the law." *Id.*

It is clear that the intent of the City's Code Section 10-10 and § 162.07(4), Florida Statute, is to provide clarity as to the factual and legal findings to support a decision by a Magistrate. In this instance, the Magistrate failed to make findings of fact in the order or on the record. The Magistrate, in rendering his decision contrary to the

requirements of Section 10-10 of the local code of ordinances and, § 162.07(4), Fla. Stat.162.07(4)[1] constituted ("A departure from the essential requirements of law, alternatively referred to as a violation of clearly established law, can be shown by a misapplication of the plain language in a statute."); *Hayes* at 446.

Having carefully considered the briefs, the record and the applicable law, the Special Magistrate's February 8, 2023 Final Order is hereby **REVERSED.** (J. BOWMAN, M. TOWBIN-SINGER and M. USAN, JJ., concur.)

[1]At the conclusion of the hearing, the enforcement board **shall issue findings of fact**, **based on evidence of record and conclusions of law**, and shall issue an order affording the proper relief consistent with powers granted herein.

* * *

Municipal corporations—Real property—Liens—Void lien—Confession of error

ECBD INVESTMENTS, LLC, Appellant, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE-23-017526 (AP). L.T. Case No. CE23-050188. May 16, 2024. Appeal from the City of Fort Lauderdale Special Magistrate Rose-Ann Flynn. Counsel: Frank Anzalone, Anzalone Law Firm, Davie, for Appellant. Thomas J. Ansbro, City Attorney for City Fort Lauderdale, for Appellee.

OPINION

(**PER CURIAM.**) Having carefully considered the briefs, appendixes, the record, and the applicable law, this Court dispenses with oral argument, and the City of Fort Lauderdale Special Magistrate's July 27, 2023, Final Order and August 2, 2023, Final Order, in L.T. Case No. CE23-050188, are hereby **REVERSED**.

In this cause, the Appellee, City of Fort Lauderdale, filed a Confession of Error and consent that the final orders appealed from should be reversed. The Confession of Error admitted generally that the Fort Lauderdale Special Magistrate departed from the essential requirements of law by entering both of the challenged Final Orders including a lien which was recorded against Appellants real and personal property. Further, Appellee requested that the cause be remanded for the specific purpose of "releas[ing] the lien and clos[ing] the underlying administrative proceeding." In Appellant's response to Appellee's Confession of Error, Appellant did not oppose Appellee's confession that the Special Magistrate departed from the essential requirements of law by entering the challenged Final Orders, to wit: "To be clear, the Appellant does not oppose acceptance of the partial confession of error [that the Special Magistrate departed from the essential requirements of law], [but] only the relief sought."

Therefore, our conclusion is to accept Appellee's Confession of Error, and reverse the said Final Orders upon said Confession of Error without expressing any opinion as to the extent of the error or errors. See *Gulf Power Co. v. Illinois-Florida Land Co.,* 100 Fla. 1594 (Fla. Div. A 1931); *see also Clark v. Caldwell,* 95 So. 754 (Fla. Div. B 1928); *Cameron v. Baker, Gieb & Schaub Motors, Inc.,* 96 Fla. 389 (Fla. Div. B 1928); *Magua v. HSBC Bank USA, etc.,* 197 So. 3d 1274 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1914a]; *UP Apartments, LLC v. Baldera*, 361 So. 3d 954 (Fla. 5th DCA 2023) [48 Fla. L. Weekly D1125a]; *Indian Harbor Estates, Inc. v. Wagner*, 148 So. 2d 757 (Fla. 1st DCA 1963). Further, as the result of the lien being imposed through an admitted departure from the essential requirements of law, this Court finds that the lien imposed and recorded pursuant to the challenged Final Orders is void *ab initio.*

The challenged Final Orders are therefore **REVERSED**, and the cause is **REMANDED** for such proceedings as are consistent with this Opinion. (BOWMAN, TOBIN-SINGER, and USAN, JJ., concur.)

* * *

Municipal corporations—Zoning—Special exception—Zoning board's denial of application for special exception was not supported by competent substantial evidence—Applicant satisfied burden of showing that application met zoning code criteria, and no evidence was adduced showing that requested special exception did not meet criteria

KAJA PROPERTIES, INC., Petitioner, v. CITY OF POMPANO BEACH, FLORIDA, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24003724. Division AW. May 15, 2024.

AGREED ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(JOHN BOWMAN, J.) THIS CAUSE, having come before the Court on Petitioner's, KAJA PROPERTIES, INC. ("Petitioner"), Petition for Writ of Certiorari (the "Petition"), and the Court having reviewed the Petition; the Response filed by Respondent, CITY OF POMPANO BEACH, FLORIDA ("Respondent"); and the Appendix containing the record from the public hearing that was held on February 15, 2024 by Respondent's Zoning Board of Appeals ("ZBA"), the Court hereby, *by way of agreement of the parties, enters this agreed upon Order Granting the Petition for Writ of Certiorari.*

It is herein determined that Petitioner satisfied its initial burden of showing its application for a special exception met all of the relevant criteria in Section 155.2406 of Respondent's Zoning Code; that once this occurred, the application had to be granted unless objectors demonstrated, by competent, substantial evidence presented at the February 15, 2024 hearing and made part of the record, that the special exception requested by Petitioner did not meet the relevant criteria; that no such evidence was adduced at the February 15, 2024 hearing; and thus the ZBA's February 20, 2024 final decision (the "Order") denying the application is not supported by competent, substantial evidence. *See, e.g.*, *Irvine v. Duval County Planning Commission,* 495 So.2d 167 (Fla. 1986); *Jesus Fellowship, Inc. v. Miami-Dade County,* 752 So.2d 708, 709 (Fla. 3rd DCA 2000) [25 Fla. L. Weekly D481a].

Accordingly, the Petition is hereby **GRANTED**, the Order is hereby quashed, and the matter is remanded to the ZBA for further proceedings consistent with this opinion. Respondent shall bear all costs associated with the notice requirements for such additional ZBA proceedings.

* * *

CAPITAL PLACE PROPERTIES, Appellant, v. CITY OF HOLLYWOOD, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-018983 (AP). L.T. Case No. V21-22112. May 16, 2024. Appeal of a decision rendered by the City of Hollywood; Judith E. Secher, Special Magistrate. Counsel: L. Anton Rebalko, Pensacola Beach, for Petitioner. Douglas R. Gonzales, City Attorney, Hollywood, for Respondent.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the (1) November 30, 2022, Final Order for Violation of Section 151.130(A)(1); (2) November 10, 2022, Non-Final Order Denying Emergency Motion for Compliance; (3) November 13, 2022, Non-Final Order RE Motion for Reconsideration of Order Denying Emergency Motion; and (4) November 17, 2022, Non-Final Order RE Capital's Motion to Dismiss/ Motion to Abstain and all hereby, respectively **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and USAN, JJ., concur.)

* * *

MOVING PARTNERS, INC., et al., Petitioner, v. CITY OF HOLLYWOOD, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-19321 (AW). July 18, 2024. Petition for Writ of Certiorari for review of a decision rendered by the City of Hollywood. Counsel: David J. Winker, David J. Winker, P.A., Coral Gables, for Petitioner. Jeffrey S. Bass, Bass Law, P.A., Coral Gables, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition and Appendix, the Response, the Reply, and the applicable law, the Petition for Writ of Certiorari, is hereby **DENIED** on the merits. (BOWMAN, GARCIA-WOOD, and ODOM, JJ., concur.)

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Property—Assignment of benefits—Validity—Assignee's action against insurer—Assignee lacks standing where assignment of benefits fails to comply with statutory requirements

HOLDING INSURANCE COMPANIES ACCOUNTABLE, LLC, a/a/o Mary Gesualdi and William Murphy, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County, Civil Division. Case No. 2023-CA-013470-O. May 1, 2024. A. James Craner, Judge. Counsel: Tyler J. Chasez, Hale, Hale, & Jacobson P.A., Orlando, for Plaintiff. Coleen M. Balkie, Zinober Diana & Monteverde, P.A., Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT/RESPONDENT'S MOTION FOR FINAL SUMMARY JUDGMENT AND LEGAL MEMORANDUM IN SUPPORT THEREOF

THIS CAUSE having come before the Court on Defendant/Respondent's Motion Final Summary Judgment and Legal Memorandum In Support Thereof, and the Court, having considered the record, the argument of counsel at the April 17, 2024 hearing on said Motion, and being otherwise advised in the Premises, it is hereby,

ORDERED AND ADJUDGED that Defendant/Respondent's Motion for Final Summary Judgment is GRANTED based on the following Findings of Fact and Conclusions of Law:

1. The Court finds Plaintiff's Assignment of Benefits is an Assignment that is required to comply with *Florida Statute* §627.7152 (2022).

2. The Court finds Plaintiff's Assignment of Benefits fails to comply with *Florida Statute* §627.7152 (2022) and as such, is not a valid Assignment and therefore, Plaintiff does not have the requisite standing to maintain the subject lawsuit.

3. Therefore, Defendant/Respondent's Motion for Final Summary Judgment is GRANTED.

4. Final Judgment is entered for Defendant/Respondent and against Plaintiff/Petitioner. Plaintiff/Petitioner shall take nothing by this action and Defendant/Respondent shall go hence without day.

5. The Court reserves jurisdiction as to Defendant/Respondent's entitlement to and amount of attorney's fees and costs.

* * *

Arbitration—Class actions—Motion to compel arbitration and to dismiss based on improper class action is denied—Plaintiff properly opted out of arbitration agreement and class action waiver incorporated therein—Class certification argument is premature

JONATHON IPPOLITI, Plaintiff, v. POWERPLAY MOTORSPORTS, LLC, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 59-2023-CA-002620. June 24, 2024. Susan Stacy, Judge. Kristina Paulter, General Magistrate. Counsel: Sarah Cibula Feller and Darren Newhart, Loxahatchee; and Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Alan St. Louis and Juan Xavier Franco, Miami, for Defendant.

ORDER ON REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE ON DEFENDANT'S POWERPLAY MOTORSPORTS, LLC D/B/A PRIME MOTORCYCLES' MOTION TO DISMISS, STAY AND COMPEL ARBITRATION

THIS CAUSE was heard by the General Magistrate on May 20th, 2024. Upon review of the Report and Recommendation (attached as Exhibit "A"), and the Court having considered the findings and recommendations therein and being fully advised in the premises, it is thereupon,

ORDERED: That the Report and Recommendation of the General Magistrate herein above described is approved, ratified, confirmed, and adopted as an Order of this Court, and is incorporated herein by reference. All parties shall be governed thereby and shall comply with the same in each and every one of its particulars.

REPORT AND RECOMMENDATION OF CIVIL GENERAL MAGISTRATE

This cause has come on to be heard before Magistrate Kristina L. Paulter on **May 20, 2024,** pursuant to the **Defendant's Powerplay Motorsports, LLC d/b/a Prime Motorcycles' Motion to Dismiss, Stay and Compel Arbitration**. The General Magistrate, having heard the testimony, reviewed the files, and being otherwise advised, makes the following Findings of Fact and Conclusions of Law:

A. The Magistrate has jurisdiction pursuant to Florida Rule of Civil Procedure 1.490.

B. An Order of Referral for the matter heard by the Magistrate was served upon the parties and no party made a timely objection to the referral.

C. Plaintiff, Jonathan Ippoliti filed his Complaint against Defendants, Powerplay Motorsports LLC on April 12, 2023.

D. On August 8, 2023, Powerplay Motorsports LLC filed its Motion to Dismiss, Stay, and Compel Arbitration.

E. In its Motion, Defendant seeks enforcement of an arbitration agreement, and dismissal based on improper class actions.

F. The court finds that the no agreement to arbitrate exists because Plaintiff properly opted out of the agreement.

G. Likewise, the class action waiver, incorporated into the arbitration agreement is not valid since Plaintiff properly opted out of the arbitration agreement containing the class action waiver.

H. Additionally, Defendant's arguments regarding class certification are premature. Plaintiff has not moved for class certification or class discovery.

I. At the pleading stage, Plaintiff need only plead the existence of a class claim. *Deanne C. Jenkins, v. E.R. Truck & Equipment Corp*., 29 Fla. L. Weekly Supp. 597a (September 29, 2021).

J. Plaintiff has met his burden under Fla. R. Civ. P. 1.220(c) which sets out the requirements to properly allege the existence of a class.

THEREFORE, IT IS RECOMMENDED:

1. Absent timely exceptions pursuant to Rule 1.490(h), Defendant's Motion to Dismiss, Stay and Compel Arbitration is **DENIED.**

2. Defendant shall have twenty (20) days from the date of the entry of the Order Ratifying Report and Recommendation of the General Magistrate to file an Answer.

* * *

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COUNTY COURTS

Criminal law—Violation of county ordinance—Operating or parking motor vehicle on beaches and dunes—Motion to dismiss charge of violating county ordinance that prohibits operating or parking motor vehicle on beaches and dunes of county, based on defendant having parked recreational vehicle within boundaries of his private property, is granted—At best ordinance is ambiguous as to whether it applies to private property, and doubt must be resolved in favor of defendant—Even if ordinance were intended to apply to private property, charge represents arbitrary and capricious application of ordinance to defendant where state abandoned a previous prosecution of defendant after county's chief deputy authored memo raising doubt about application of ordinance to private property, and county entered into settlement agreement allowing another property owner in same block vehicular access to similar property

STATE OF FLORIDA, v. JOHN M. COSENTINO, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2023-CO-12676-NC. July 16, 2024. David Denkin, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court for hearing on Defendant's Motion to Dismiss filed on April 29, 2024. (DIN 21). The Court heard the matter on May 2, 2024, and June 4, 2024. After review of the pleadings, the arguments of counsel, and otherwise being advised in the premises, it is **ORDERED and ADJUDGED** as follows:

Findings of Fact

1. Defendant is charged with violation of Section 130-37(b) of the Sarasota County Code, which prohibits operating or parking a motor vehicle on a beach. It is undisputed Defendant parked a recreational vehicle[1] entirely within the boundaries of his private property, which is a part of Mira Mar Beach in Sarasota County, as depicted in Exhibit 2 to Defendant's Sworn Motion to Dismiss. The Defendant accessed his private property via the right-of-way at the intersection of Beach Road and Avenida Messina abutting his property.

2. The Defendant was charged with the same offense (Section 130-37) previously on September 8, 2016. *See State v. Cosentino,* Case No. 2016-CO-13337-NC (DIN 2).[2] After the Defendant filed a sworn motion to dismiss similar to the instant motion, *id.* (DIN 24), the State down-filed the criminal ordinance violation to a parking infraction. *Id.* (DIN 29).[3]

3. Months later, then-Colonel Kurt Hoffman of the Sarasota County Sheriff's Office[4] wrote a memo stating:

> In reading county ordinance 130-37 and Florida State Statute 161.201 in para materia with Mr. Cosentino's sworn motion to dismiss **the logical conclusion to me is that Mr. Cosentino has property rights in the above parcel such that he should be allowed to park on his own property. The definition of beaches under 130-37 should not be so narrowly construed as to eviscerate private property rights**. While the motion to dismiss was never actually ruled upon it should be noted that the SAO reduced the case from a criminal ordinance violation to a parking citation. Two salient points should be considered when making this determination.
>
> 1. The Florida Beach and Shore Preservation Act **expressly states that a property owner adjacent to coastal waters does not lose his right to ingress and egress**. Mr. Cosentino ingresses and egresses through the right of way that shares a common boundary to his property.
>
> 2. As outlined in the ordinance the primary purpose is to provide a suitable area for sunbathing and other recreational purposes. **Since sunbathing and other recreational activities cannot take place on Mr. Cosentino's property without committing trespassing, it does not seem reasonable that the ordinance's objectives would be met by taking some type of law enforcement against him**.

See **Exhibit 9** attached to Defendant's Sworn Motion to Dismiss ("*Hoffman Memorandum*") (emphasis added).

4. In May 2023, the County entered into a Settlement Agreement and Mutual Release with Siesta Beach Lots relating to four separate lots in Block 7, Mira Mar Beach. See Defense Exhibit 11 (DIN 28). This Settlement Agreement recognized that Siesta Beach Lots[5] "has access to Lots 14, 15, 16 and 17 over the former Beach Road now owned by Siesta Beach Lots **including private vehicular access**." (Emphasis added).

5. The property that is the subject of the Settlement Agreement is in the substantially similar location to the property owned by the Defendant. It is in the same block and approximately 607 feet from Defendant's property. See Exhibit 12 (DIN 31).

Findings of Law

6. A key issue in this case is whether the Ordinance applies to private property. The State argues that the Ordinance applies to both public and private property. The Defendant contends that text within the prohibition clause of the Ordinance compels the conclusion that it is inapplicable to private property. For the following reasons, the Court concludes the Ordinance does not apply to private property.

7. Section 130-37(b) prohibits operating or parking a motor vehicle "upon the Beaches or Dunes *of* Sarasota County, Florida." (Emphasis added). When determining the meaning of a statute or ordinance, Florida adheres "to the supremacy-of-the-text principle—a principle recognizing that the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Levy v. Levy,* 326 So. 3d 678, 681 (Fla. 2021) [46 Fla. L. Weekly S287a] (internal quotation marks omitted).

> Legal text should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts. If a statutory provision appears to have a clear meaning in isolation, but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the court will examine the entire act and those in pari materia in order to ascertain overall legislative intent.

Boatright v. Philip Morris USA Inc., 218 So. 3d 962, 967 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D842a] (internal quotation marks and citations omitted).

8. The Defendant focuses on the preposition "of' in Sec. 130-37(b) and argues it is used in a possessive context. According to a modern dictionary, the preposition "of' is used to "show possession, belonging, or origin." Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/of, (last accessed June 5, 2024). The preposition "of' in the Ordinance would suggest it was intended to connote possession and ownership, *i.e.,* the beaches or dunes of Sarasota County, Florida, and not private property.[6]

9. At best, the Ordinance is ambiguous on whether it was intended to apply to private property.

10. The Court's construction of the Ordinance is supported by reading other provisions in pari materia. "The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." *1944 Beach Boulevard, LLC v. Live Oak Banking Co.,* 346 So. 3d 587, 593 (Fla. 2022) [47 Fla. L. Weekly S193a] (quoting *Fla. Dep't of State v. Martin,* 916 So. 2d 763, 768 (Fla. 2005) [30 Fla. L. Weekly S780a]).

11. Chapter 130 is titled "Waterways" and is composed of three articles. Article II is titled "Boats and Water Safety" and contains Sections 130-31 through 130-37. As relevant here, two sections demonstrate the Ordinance was intended to apply to public lands, not private property. For example, Sec. 130-36(b) prohibits the operation of motorboats "upon the waters of any lakes or ponds located **within any County owned or operated park in Sarasota County, Florida."** (emphasis supplied.). It is undisputed Sarasota County neither owns, nor operates Mr. Cosentino's property as a park. Additionally, Sec. 130-36(e) contains an important exception that excludes application of the Ordinance to "deny any upland owner or lessee common-law riparian rights, including but not limited to: rights of ingress, egress, view, boating, bathing, and fishing."

12. Reading the above sections of the Ordinance *in pari materi*a compels the conclusion that Sec. 130-37 was not intended to apply to private property. The plainly stated intent of the Ordinance is to protect the safety of those members of the public engaged in sunbathing and other recreational activity from the operation of motor vehicles on public property. Absent invitation, such activities cannot occur on Mr. Cosentino's private property without a trespass occurring.

13. Penal statutes must be construed narrowly and limited to their stated purpose. Courts resolve any doubt in favor of the defendant. *Perkins v. State,* 576 So.2d 1310, 1312 (Fla. 1991). The Court is not convinced that the Ordinance was intended to apply to private property.

14. Even if the Ordinance was intended to apply to private property, its application to the Defendant here raises additional concerns of being arbitrary and capricious. The State abandoned a previous prosecution of the Defendant under Section 130-37 after then-Chief Deputy Kurt Hoffman authored a memo raising significant doubt about whether the Ordinance applied to private property. A subsequent memo reinforced this position. *See* Exhibit 10, attached to Sworn Motion to Dismiss. Further, in 2022 Sarasota County entered into a settlement agreement allowing another property owner in the same block vehicular access to property very similar to that of the Defendant.

15. These facts suggest an arbitrary and capricious application of the Ordinance because it results in a construction that allows differing opinions and outcomes to similarly, if not identically, situated individuals. "A statute or ordinance is void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement." *Sult v. State,* 906 So. 2d 1013, 1020 (Fla. 2005) [30 Fla. L. Weekly S470a]; *see also Easy Way v. Lee Cty.,* 674 So. 2d 863, 865-66 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1234a] ("ordinance must provide adequate notice to persons of common understanding concerning the behavior prohibited and the specific intent required: it must provide citizens, police officers and courts alike with sufficient guidelines to prevent arbitrary enforcement."). This is particularly true when an ordinance lacks a specific-intent requirement. *See Sult* at 1021.

16. The two Hoffman memos and settlement agreement demonstrate that the Ordinance is capable of different constructions and applications to similarly situated, if not identical, individuals. Nothing in the 2020 amendment to the Ordinance clarified its application to explicitly prohibit parking on private property. This is a fatal defect and renders the Ordinance void as applied to Mr. Cosentino.

17. Finally, the Court is concerned about the application of an Ordinance that criminalizes conduct that is innocuous on its face. Parking on one's own property may be subject to regulation by the government in some fashion. The exercise of police power to impose criminal penalties and potential incarceration for parking on private property seems to be a matter more suitable for civil court or code enforcement. If the State intends to criminalize parking on private property, it must draft a precise Ordinance making it clear that it applies to private property. It must also apply such a law to all similarly situated persons.

18. For all or any of the above stated reasons, the Court grants Defendant's Sworn Motion to Dismiss.

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[1]Plywood was placed underneath the Defendant's parked residential vehicle.

[2]The 2016 version of the Ordinance defined "beaches" as "the zone of unconsolidated material, such as sand or shell, that extends landward from the mean low-water line to the place where there is a marked change in material, such as sand to pavement, or physiographic form, or to the line of vegetation."

[3]*See Case No. 2017-TR-1089-NC.* The Defendant was found not guilty at trial on the infraction held on April 12, 2017 (DIN 18 and 19).

[4]Mr. Hoffman was previously employed as an assistant state attorney for Sarasota and was elected Sheriff in 2020 and remains in that position today.

[5]Siesta Beach Lots is the owner of Lots 14, 15, 16 and 17.

[6]If the Ordinance had read **"in** Sarasota County" the intent would be clearer.

* * *

Insurance—Personal injury protection—Demand letter—Motion for protective order postponing depositions until after hearing on motion for summary judgment on insurer's demand letter defense is granted given absence of disputed factual issues regarding defense

PHYSICIANS GROUP, LLC, a/a/o Hosain Tornstrom, Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, Civil Division. Case No. 2022 SC 003299. Division C. July 15, 2024. David Lee Denkin, Judge. Counsel: Chase Engelbrecht, for Plaintiff. Stephen Farkas, Hamilton, Miller & Birthisel, LLP, for Defendant.

ORDER ON DEFENDANT'S EMERGENCY MOTION FOR PROTECTIVE ORDER

THIS CAUSE having come on to be heard on Defendant's Emergency Motion for Protective Order and the Court being otherwise fully advised in the premises at a hearing on July 15, 2024, it is hereby **ORDERED AND ADJUDGED:**

1. Defendant's Emergency Motion for Protective Order is GRANTED.

2. There is currently pending before the Court a hearing scheduled to take place on July 26, 2024 on Defendant's Motion for Summary Judgment as to the legal sufficiency of Plaintiff's pre-suit demand letter sent pursuant to Fla. Stat. § 627.736(10).

3. Plaintiff has unilaterally set the depositions of two individuals employed by the Defendant: Brooke Reed, a litigation manager and Rianna Medline, a claims supervisor; both employees of the Defendant. The depositions were set for today, July 15, 2024 and, according to Counsel for Defendant, were not coordinated with anyone at the office of Defendant's Counsel.

4. According to the Defendant's Emergency Motion for Protective Order, it is Defendant's position that the pending Motion for Summary Judgment involves only legal issues precluding the need for discovery depositions taking place.

5. The Court agrees with Defendant's position and in doing so relies on the Second District Court of Appeals case *Hurley v. Werly*, 203 So. 2d 530 (Fla. 2nd DCA 1967) which found, inter alia, where the whole dispute involves an essentially legal issue or question and where the basic facts are not in dispute, a party should not be involuntarily deposed. The Court further finds persuasive and agrees with Judge Fernandez's Order in *Riverview Family Chiropractic Center PA v. State Farm Mutual Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir. Cty. Ct. 2014). Judge Fernandez's Order relied on the *Hurley* case when it held, inter alia, that the issue of whether a purported pre-suit demand letter complies with the statute is a legal issue and the deposition testimony of the insurer's representative will have no bearing on the resolution of that issue.

6. Both cases dealt with the same issues Defendant presented in its

Motion and were cited as supportive authority at the hearing by Defendant's Counsel.

7. The depositions of these two individuals are to be put on hold until after the July 26, 2024 hearing on Defendant's pending Motion for Summary Judgment. After said hearing, the Court will decide if and when the depositions will take place, if at all.

8. Furthermore, the Court is not convinced the depositions were properly set per the Rules of Civil Procedure and the Standards of Professionalism[1] for the Twelfth Judicial Circuit, given that they were set unilaterally without any proper coordination.

9. Finally, given the age of this case being nearly two (2) years old, the Court will also decide, at the July 26 hearing, if and when it needs to set weekly, in-person, status conferences to ensure swift progression.

10. The protective order period shall be in-effect through July 26, 2024.

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[1]Sections regarding Scheduling, Communication, and Discovery Depositions.

* * *

Consumer law—Debt collection—Interest—Usury—Motion to take judicial notice that national banks are exempt from Florida's usury laws pursuant to 12 U.S.C. § 85 is denied—Whether a particular national bank is exempt depends on whether bank is located in Florida

CAVALRY SPV I, LLC, Plaintiff, v. MAUREEN DOYLE, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 58-2023-SC-007567-XXXANC. July 11, 2024. David Denkin, Judge. Counsel: Paul Fischel, Walters Levine & Degrave, Tampa, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER DENYING PLAINTTIFF'S MOTION FOR JUDICIAL NOTICE

THIS ACTION came before the Court on a hearing on June 28, 2024, on Plaintiff's Motion for Judicial Notice (the Motion). At the hearing, the Court reserved ruling on the portion of the Motion where Plaintiff requested that the Court take judicial notice that national banks are exempt from Florida's usury laws pursuant to 12 U.S.C. § 85 and provided to the parties the opportunity to submit to the Court their arguments and supporting case law and other authority. The Court having heard argument of the parties and having considered the arguments, case law and other authority presented by the parties following the hearing and the Court being otherwise informed in the premises, it is HEREBY ORDERED AND ADJUDGED:

1. The Court finds that 12 U.S.C. § 85 provides in relevant part as follows: "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest allowed by the laws of the State, Territory, or District **where the bank is located**". [emphasis added].

2. Based on the plain language of 12 U.S.C. § 85, the Court finds that Florida's usury laws may or may not apply to a national bank depending on whether the particular national bank is "located" in Florida. If the national bank is "located" in Florida, Florida's usury laws will apply.

3. The Court finds that the matter set forth in the Motion for Judicial Notice is NOT whether ***Citibank*** is exempt from Florida's Usury laws. To the contrary, the specific matter that Plaintiff wants the Court to take judicial notice of is whether ***national banks*** are generally, by virtue of the wording of 12 U.S.C. § 85, exempt from Florida's usury laws.

4. Florida Statutes § 90.202(12) provides in relevant part that judicial notice may be taken of "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned".

5. The Court finds that national banks are not exempt from Florida's usury laws as a matter of law in all cases. This is not a matter that can be determined by resort to the provisions of 12 U.S.C. § 85 itself. 12 U.S.C. § 85 does NOT say that national banks are exempt from Florida's usury laws or the usury laws of any other state. Rather, whether a national bank governed by Florida's usury laws depends on the "location" of the national bank.

6. Because the issue of whether a national bank is exempt from Florida's usury laws is conditioned on the "location" of the bank, Plaintiff's request that the Court take judicial notice that national banks are exempt from Florida's usury laws pursuant to 12 U.S.C. § 85 is hereby DENIED.

* * *

Insurance—Personal injury protection—Coverage—Rescission of policy—Material misrepresentation—Attorney's fees— Prevailing party—Hourly rate—Competent substantial evidence supports a reasonable rate of $750 per hour for plaintiff's counsel—Hours expended—Clerical work—Reasonable amount of time counsel worked on case was 110 hours—While counsel's billing records include time spent on tasks historically performed by a paralegal, such as scheduling depositions, counsel was forced to get involved in clerical and minuscule matters because defendant filed a separate action against the insured regarding the same PIP claim without properly notifying plaintiff despite being fully advised of the assignment of benefits executed by insured and plaintiff—Contingency fee multiplier—Plaintiff is entitled to lodestar multiplier of 2.0—Expert witnesses—Reasonable hourly rate for plaintiff's expert is $600 an hour, and reasonable amount of time expended by expert was 45 hours

AJ THERAPY CENTER, INC., a/a/o Jose Martinez Ramos, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-049134. September 9, 2024. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

FINAL JUDGMENT ON PLAINTIFF'S MOTION TO TAX ATTORNEY'S FEES AND COSTS

THIS CASE came before the Court on June 6, 2024 and June 26, 2024 for an evidentiary hearing on Plaintiff's Motion to Tax Attorney's Fees and Costs. On June 6, 2024, the Plaintiff presented testimony of two witnesses: (1) Timothy A. Patrick, Esquire, counsel of record for the Plaintiff, and (2) Elizabeth E. Andrews, Esquire, Plaintiff's expert witness. Plaintiff also admitted three exhibits into evidence and the Court used its Notice of Chronology as an aid only. On June 26, 2024, Defendant presented testimony of its expert witness, William Kirilloff, Esquire.

This Court considered the demeanor and credibility of the witnesses, the weight and admissibility of the evidence presented, Florida Rule of Professional Conduct 4-1.5(b)(1) and (2), the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and applicable case law.

It is **ORDERED and ADJUDGED** as follows:

Introduction

1. On May 3, 2021 Plaintiff AJ Therapy Center, Inc. filed its Petition for Declaratory Judgment against Defendant for rescission of the subject policy. This recission of the policy was premised upon the denial of insurance coverage based on an allegation of a material misrepresentation in the original application for automobile insurance.

2. Insured Jose Martinez Ramos (hereinafter "Ramos") was involved in a car accident on October 12, 2020. On or about October 15, 2020, Ramos executed an Irrevocable Assignment of Benefits ("AOB") to Plaintiff AJ Therapy Center, Inc. Plaintiff filed a PIP claim and billed Direct General Insurance Company for those medical services and/or treatment under the Personal Injury Protection (PIP) portion of the automobile insurance policy.

3. Plaintiff AJ Therapy Center, Inc. provided reasonable, necessary, and related medical services and/or treatment to Ramos after the October 12, 2020 car accident.

4. On October 22, 2020 Plaintiff submitted its first batch of medical bills and its Assignment of Benefits (AOB) to Defendant Direct General Insurance Company.

5. Defendant denied payment of those medical bills advising that the insurance policy was rescinded because it alleged the named insured, Adalberto Martinez Prieto (hereinafter "Prieto"), made a material misrepresentation in the application for insurance.

6. Plaintiff disputed the alleged material misrepresentation and filed a declaratory action seeking a declaration of insurance coverage pursuant to an Irrevocable Assignment of Benefits (hereinafter "AOB") provided by Ramos in exchange for the medical services and/or treatment rendered to Ramos.

7. On June 15, 2021 and during the pendency of this lawsuit, Defendant filed a separate Complaint for Declaratory Judgment and action for Breach of Insurance Contract in Circuit Court Case No. 21-CA-4924 against the Insured Patient and the named insured concerning the same PIP claim at issue in this lawsuit.

8. At the time of the filing of that lawsuit, Defendant was fully advised and aware that the Insured Patient had previously executed and delivered the AOB to Plaintiff, that Plaintiff had billed Defendant for medical services based on that AOB, that Plaintiff had served Defendant with a pre-suit demand letter based on that AOB, that Plaintiff filed the instant lawsuit based on that AOB, and that Defendant had received service of process for the instant lawsuit.

9. Yet, Defendant named only the named insured as the defendant in the circuit court case. Defendant did not name AJ Therapy Center, Inc. as a co-defendant in the circuit court case despite that the law requires all interested parties having a claim be made a party to the suit.

10. On the same day Defendant filed its circuit court case, Defendant also filed a Motion to Dismiss in this case, alleging recission of the contract. However, nothing contained within the Motion to Dismiss referenced the Circuit Court case. Also on the same date, Defendant filed a Motion to Consolidate this case with an unrelated matter under case 21-CC-33355. Again, nothing in that Motion referenced the Circuit Court action. Notably, Defendant's counsel of record was the same on both cases.

11. On July 24, 2021, in Case No. 21-CA-4924, Defendant obtained an unsworn Stipulation and Consent Judgment against the Insured Patient and the named insured, again, without providing any notice or due process to Plaintiff herein.

12. Florida Statutes section 86.091 states "When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard." Thus, it is clear that anyone who was not named as a party to Defendant's declaratory judgment action is not bound by any declaration rendered in that action. See *Flores Medical Center, Inc. (a/a/o Ada Paz) v. Direct Gen. Ins. Co.*, 30 Fla. L. Weekly Supp. 41b (Hillsborough Cnty. Ct. April 13, 2022) (Case No. 21-CC-006605, Hon. Jack Gutman).

13. Likewise, under the previously quoted provisions of Section 86.091, "no declaration shall prejudice rights of persons not parties to proceeding." *See id.* Here, based upon Defendant's prior knowledge of Plaintiff's pre-suit demand and the filing of this suit, there was no reasonable basis for the Defendant not to notice the Plaintiff of the Circuit Court case. The Defendant's nondisclosure appeared intentional and orchestrated in an attempt to prevent Plaintiff from asserting its legal rights to payment under the subject insurance policy.

14. The procedural history of this case is important since Defendants argued vehemently that this was simply a PIP case and nothing more. However, due to the Defendant's failure to include Plaintiff in the circuit court case, this matter was extensively contested, requiring Plaintiff's attorney to get involved with every aspect of the litigation including secretarial and other clerical matters as detailed below.

A. Plaintiff's Entitlement to Award of Reasonable Attorney's Fees and Costs:

15. On January 10, 2024, this Court entered Final Summary Judgment in favor of Plaintiff (Doc. 158). The judgment determined Plaintiff's entitlement to attorney's fees but not the amount of fees.

16. As the assignee of Defendant's insured, Plaintiff seeks an award of attorneys' fees pursuant to Section 627.428(1), Florida Statutes, which states, "Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

17. Well-settled case law confirms that the Final Judgment entered in favor of Plaintiff triggered Plaintiff's entitlement to attorney's fees. *See Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828, 831 (Fla. 1990) (noting that the Florida Supreme Court adopted the lodestar approach in *Rowe*, meaning the prevailing party is entitled to attorney's fees). In this case, Defendant acknowledged that Plaintiff is entitled to an award of reasonable attorney's fees and costs pursuant to Section 627.428, which was in effect at the time the Final Judgment was entered.

18. As the prevailing party in this lawsuit, Plaintiff is entitled to an award of reasonable attorneys' fees and costs. Therefore, Plaintiff's Motion to Tax Attorney's Fees and Costs is hereby **GRANTED.**

B. Reasonable "Lodestar" Amount Awarded to Plaintiff:

19. In *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla.1985) ("*Rowe*"), the Florida Supreme Court adopted the federal "lodestar" approach for awarding reasonable attorneys' fees. "The number of hours reasonably expended . . . multiplied by a reasonable hourly rate . . . produces the lodestar[.]" *Id.* at 1151.

20. Plaintiff's expert Elizabeth Andrews, Esquire, and Defendant's expert William Kirilloff, Esquire, opined as to the reasonable hourly rates of all timekeepers as follows:

Timekeeper	Plaintiff's Expert Elizabeth Andrews Reasonable Hourly Rates	Defendant's Expert William Kirilloff Reasonable Hourly Rates
Timothy Patrick, Esquire	$750.00 - 850.00	$500.00

21. Specifically, with regard to the hourly rate of Timothy Patrick, Esquire, Ms. Andrews testified as to the reasonableness of Mr. Patrick's hourly rate, and provided substantial competent evidence to support her opinion. Specifically, Ms. Andrews testified that in evaluating Mr. Patrick's hourly rate, she reviewed the hourly rates of similarly situated attorneys in the same market area, local orders awarding attorney fees, Plaintiff's case file, billable hours, the pleadings and applicable case law. Based on Mr. Patrick's experience, reputation, skill level, expertise, the number of years of practice, practice area, and complexity of the issues involved, Plaintiff's expert Ms. Andrews opined that $750.00 to $850.00 per hour was a reason-

able hourly rate.

22. In opposition, Mr. Kirilloff, Defendant's expert found that the $500.00 per hour was a usual and customary hourly rate for Mr. Patrick. In support of his opinion, Mr. Kiriloff testified that he reviewed the hourly rate for mediators, fee awards from Lee, Polk, Pinellas, and some Hillsborough County, and also based his opinion on a Florida Bar Survey dated October 2022.

23. In further support of the $750.00 hourly rate, Mr. Patrick testified that he is paid by agreement by one insurance carrier) approximately $807.61 per hour as part of a negotiated rate. Although Defendant objected to Mr. Patrick's testimony regarding his fee arrangement, arguing that the best evidence rule requires the production of the rate agreement between the Counsel and the third party, this Court disagrees and finds Mr. Patrick's testimony and reliance on this agreement reasonable.

24. The Court further reviewed the affidavits filed by Mr. Patrick filed in support of Plaintiff's Motion to Tax Attorney's Fees and Costs. The Court also reviewed the compilation of attorney's fee awards prepared by the Tampa Bay Trial Lawyers Association, and recent Hillsborough County fee award orders for attorneys with both less experience than Mr. Patrick, as well as attorneys with similar skill sets. In determining the reasonableness of the hourly rate for Mr. Patrick the Court considered "the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services. *See Rule 4-1.5—Fees and Costs For Legal Services*, R. Regul. FL. Bar 4-1.5. (*Timothy Patrick's fee affidavit was Plaintiff's Exhibit 2 and the Hillsborough County fee award Orders are Plaintiff's Exhibit 3*).

25. Based on the testimony of the witnesses and evidence, presented the Court finds that $750.00 - $850.00 per hour does not exceed the rate charged by similarly situated attorneys in the market, and the time billed does not affect the hourly rate. The Court finds that Plaintiff produced sufficient competent evidence to support a reasonable hourly rate of $750.00. Mr. Patrick is a skilled attorney, and the relevant market supports his request for $750.00 per hour. Specifically, Mr. Patrick was admitted into the Florida Bar in 1993 after graduating from Stetson Law School in 1992. Since the early 2000's Mr. Patrick has concentrated on litigating first party coverage disputes. Mr. Patrick is one of only a handful of attorneys in the Tampa Bay area that actively litigates PIP cases and coverage disputes arising out of policy rescissions.

26. In determining Mr. Patrick's hourly rate the Court also followed the rationale in several cases (where the attorney is not billing the client on a monthly basis or being paid on a monthly basis) wherein the Court's have held that customary rates charged in the community should be considered. See *Norman v. Hous. Auth. of City of Montgomery*, 836 F. 2d 1292, 1299 (11th Cir. 1998)). Evidence of hourly rates may be adduced through direct evidence of charges by lawyers under similar circumstances or by opinion evidence presented at the fee hearing. *Smith v. School Bd. of Palm Beach County,* 981 So. 2d 6, 9 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2791a].

27. Lastly, Plaintiff presented evidence, not inferences, to show other legal practitioners within the Tampa and/or greater Tampa vicinity that specifically have an hourly rate near, close, or exceeding to $750.00. The conclusion of an expert witness based on inferences not supported by the evidence has no evidential value. *Trumbull Ins. Co. v. Wolentarski,* 2 So. 3d 1050, 1055-56 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D274a] *disapproved on other grounds in Kopel v. Kopel*, 229 So. 3d 812 (Fla. 2017) [42 Fla. L. Weekly S26a] (opinion of an expert witness cannot constitute proof of the existence of the facts necessary to the support of the opinion.) The Court finds that the greater weight of the evidence demonstrates that $750.00 per hour is reasonable and sets Timothy Patrick's hourly rate at $750.00.

C. Determination of Hours Reasonably Expended by Plaintiff's Prosecution of this Case:

28. The lodestar process requires the court to determine the number of hours reasonably expended on the litigation" however, an attorney seeking fees may only "claim those hours that he could properly bill to his client." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985). Further, the applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424 at 437 (1983).

29. In terms of the reasonable amount of time worked by Plaintiff's counsel in this case, both parties provided extensive testimony regarding this matter. Mr. Patrick testified that based upon the procedural history of the case and the acrimonious relationship between the parties he was forced to perform many tasks that are historically performed by a paralegal, such as scheduling. In support, Plaintiff's counsel introduced his billing records, which are consistent with the filings and the chronology of the case, together with testimony of the witnesses indicate that Plaintiff's attorney has expended, and is seeking compensation for 120.1 hours of legal work.

30. Plaintiff's expert Ms. Andrews, Esquire, and Defendant's expert, Kirilloff, Esquire, both opined as to the number of hours reasonably expended on this case. Ms. Andrews testified that upon review of the bills she found that 116 hours were reasonable based upon the type of case, the complexity and nature of the litigation. Mr. Kirilloff made numerous deductions for what he categorized as vague, clerical, duplicate or excessive and opined that 69.9 hours were reasonable.

31. The Court finds that Defendant failed to present evidence to rebut that Plaintiff's counsel did not actually perform the tasks described in their billing records for purposes of this case, or that the amount of time Plaintiff's counsel billed for any particular task reflected in their billing records is inaccurate. In reviewing the time entries, the Court limited Plaintiff's recovery of time up until the date upon which Defendant stipulated to Plaintiff's entitlement to attorney's fees (01/09/24). The Court also struck Mr. Patrick's time entries for duplicate/excessive time entries. The Court further reviewed all the time entries challenged by Defendant's expert as "Clerical." Based on the reasoning in *Spanakos v. Hawk Systems, Inc.,* 362 So.2d 226 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D808a], the Court rejects Defendant's argument that Plaintiff should not be reimbursed for all the time expended in connection with scheduling depositions or other matters. Given the degree of friction and lack of cooperation, this was not a case where one secretary could simply call the other secretary to see whether time was available. This Court is familiar with the extensive nature of the litigation and motion practice in this matter and finds that Plaintiff's counsel was forced to get involved with clerical and minuscule matters based upon the Declaratory Petition filed in Circuit and Defendant's failure to properly notice Plaintiff on that case.

32. The Court finds, based on the greater weight of the evidence and the applicable criteria set forth in *Rowe* and Rule 4-1.5(b)1, the reasonable amount of time worked by Plaintiff's counsel in this case and the reasonable hourly rates is as follows:

Timekeeper ATTORNEYS	Requested Amount of Time	Requested Hourly Rates	Reasonable Amount of Time Awarded	Reasonable Hourly Rates Awarded	Total Awarded
Timothy Patrick, Esq.	120.1	$750 - $850	110	$750.00	$82,500.00

Total Lodestar Amount Awarded					**$82,500.00**

33. Based on the foregoing reasonable amount of time and hourly rate, this Court determines that the reasonable "lodestar" figure (before applying any lodestar multiplier) for the legal services performed by the Plaintiff's counsel in this case is $82,500.00.

Entitlement to a Lodestar Multiplier

34. The Florida Supreme Court first addressed the ability to recover a lodestar multiplier in *Rowe,* and subsequently refined the standards for recovering a multiplier in *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990).

35. Under the applicable law that governs this lawsuit, there is no "rare" and "exceptional" circumstances requirement that must be satisfied before a trial court may apply a multiplier. *See, Joyce v. Federated National Ins. Co.,* 228 So.3d 1122, 1125-28 (Fla. 2017) [42 Fla. L. Weekly S852a]. Indeed, the Florida Supreme Court has confirmed a multiplier can be awarded in cases, like this one, which involve very small amounts in controversy. For example, in *State Farm Fire & Casualty Co. v. Palma,* 555 So.2d 836 (Fla. 1990), the Court held the trial court properly applied a multiplier, resulting in an attorney's fees award of $253,500, in a case where the damages in controversy was merely $600. *Palma* at 836-37.

36. Even though this particular case involved a small amount of damages in controversy, this case was litigated as was the *Palma* case, and where likewise, and here, Direct General Insurance Company firmly challenged a hotly contested issue that is very important to them—allegations of material misrepresentation in policy applications. *See* 555 So.2d at 837. In *Palma* the Court held, "Having chosen to stand and fight over the issue, State Farm made a business judgment for which it should have known a day of reckoning would come should it lose in the end." *Id.* As reasoned in *Palma,* the Plaintiff "did not inflate this small case into a larger one[.]" *Id.* Rather, the "protraction resulted from the stalwart defense" Direct General was entitled to pursue. *Id.* As explained in *Palma,* "Although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost." *Id.* This case illustrates that point.

37. The *Quanstrom* decision identified three categories of cases, for purposes of deciding when it is and is not appropriate to apply a lodestar multiplier: (a) public policy enforcement cases, (b) tort and contract cases, and (c) family law, eminent domain, and estate and trust proceedings. *Quanstrom,* 555 So.2d at 833-835.

38. The second category (tort and contract cases) applies to insurance disputes. *Joyce,* 228 So.3d at 1128. Under that second category, the trial court must consider the following three factors in deciding whether to award a multiplier:

> (1) Whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Evidence of these factors must be presented to justify the utilization of a multiplier. We find that the multiplier is still a useful tool which can assist trial courts in determining a reasonable fee in this category of cases when a risk of nonpayment is established. *Quanstrom* 555 So.2d at 834. *Accord, Joyce,* 228 So.3d at 1128; *Bell v. U.S.B. Acquisition Co.,* 734 So.2d 403,412 (Fla. 1999) [24 Fla. L. Weekly S220a].

39. With respect to the first factor, case law has explained how to go about proving the relevant market requires a contingency fee multiplier to obtain competent counsel. To prove that factor, "there must be evidence that a contingent fee arrangement was necessary in order for the prevailing party to have obtained competent counsel if a multiplier is to be imposed on the nonprevailing party." *Simmons v. Royal Floral Distributors, Inc.,* 724 So.2d 99, 99 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1181a]. This holding from *Simmons* was subsequently quoted with approval by the Florida Supreme Court in *Bell,* 734 So.2d at 410. Similarly, in *Trans Florida Bank v. Miller,* 576 So.2d 752, 753 (Fla. 4th DCA 1991) and *Pompano Ledger, Inc. v. Greater Pompano Beach Chamber of Commerce, Inc.,* 802 So.2d 438, 439 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2909c], the Fourth DCA explained this factor requires the court to consider "whether contingency agreements are customarily used in the type of circumstances involved and whether there is support in the record for a conclusion that the prevailing party would otherwise be unable to afford competent counsel."

40. The first factor can be established through expert testimony. In *Massie v. Progressive Express Ins. Co.,* 25 So.3d 584, 585 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2364b], *rev. dism.,* 32 So.3d 60 (Fla. 2010), the First DCA held a client's testimony is unnecessary to prove the first factor, because "expert testimony that a party would have difficulty securing counsel without the opportunity for a multiplier supports a multiplier's imposition." Likewise, in *McCarthy Brothers Co. v. Tilbury Construction Inc.,* 849 So.2d 7, 10 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D736b], the First DCA held a trial court appropriately applied a multiplier because the prevailing party "presented expert testimony that it would have been difficult to find an attorney willing to take its case without the opportunity for a multiplier."

41. In cases where the amount in controversy is very low, the possibility of being awarded a multiplier "will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee." *See, e.g., Lane v. Head,* 566 So.2d 508, 511 (Fla. 1990). That possibility "assists parties with legitimate causes of action or defenses in obtaining competent legal representation even if they are unable to pay an attorney on an hourly basis," "levels the playing field between parties with unequal abilities to secure legal representation," and is important "in ensuring access to courts." *Bell,* 734 So.2d at 411. Consequently, the Florida Supreme Court has "emphasized the importance of contingency fee multipliers to those in need of legal counsel and made clear trial courts could consider contingency fee multipliers any time the requirements for a multiplier were met." *Joyce,* 228 So.3d at 1132, citing *Bell,* 734 So.2d at 412 and *Quanstrom,* 555 So.2d at 834.

42. Here, the greater weight of the evidence established Plaintiff and similarly situated medical providers in cases where a defense of material misrepresentation is alleged are unable to afford to retain counsel on an hourly rate or flat fee basis in litigation such as this, where the amount in controversy is very small. In this case, and for that matter, any case involving PIP benefits, the maximum recoverable amount is $10,000.00. No medical provider could ever sensibly or economically afford to pay an attorney to sue an insurance company for such a small amount of money, much less multiple times over, absent the attorney's contingency fee contract allowing for the Plaintiff's attorney to seek recovery of his or her attorneys' fees and costs pursuant to Section 627.428 together with the opportunity to seek a multiplier.

43. The evidence also demonstrated that there is a relatively small number of competent attorneys handling material misrepresentation litigation, especially when the number of competent attorneys is measured against the relevant community and the number of material misrepresentation insurance disputes in litigation. Plaintiff's expert, Elizabeth Andrews, Esquire testified competent counsel in the relevant market would not take such a case without the potential for a

contingency fee multiplier. Although Plaintiff's counsel took on this case, there was no guarantee of a positive outcome at the outset. In fact, and in the case filed by the diagnostic company for this same patient, arising out of the same motor vehicle accident, and the same policy of automobile insurance, Plaintiff diagnostic facility dismissed that case without any recovery. *See MRI Associates of Tampa, Inc. d/b/a Park Place MRI a/a/o Jose Ramos v. Direct General Ins. Co.,21-CC-049134,* Hillsborough Cnty. Ct. Also, Plaintiff presented evidence that Defendant has prevailed on summary judgment in multiple cases where the defense was material misrepresentation in the application.

44. Further, Plaintiff presented evidence that there are approximately 40 law firms in the greater Tampa Bay area that refer out these types of coverage cases rather than litigating them themselves. Some of those law firms are prominent trial firms, and since Mr. Patrick started tracking these referrals in 2016, he, himself, has been referred over 200 cases. In fact, only a handful of attorneys are known to actively litigate these types of cases. Accordingly, the greater weight of the evidence demonstrated that the relevant market required a contingency fee multiplier to obtain competent counsel in this case, as that factor is described in *Quanstrom, Bell, Simmons, TransFlorida, Pompano Ledger, Massie, and McCarthy Brothers.*

45. With respect to the second factor identified in *Quanstrom,* the greater weight of the evidence also clearly demonstrated Plaintiff's counsel was retained on a contingency fee basis, and he was unable to mitigate the risk of non-payment if the claim did not succeed. These material misrepresentation cases are not like a personal injury case or a medical malpractice case, where Plaintiff's attorney recovers a contingency fee based on a percentage of a potentially large recovery. Attorneys typically agree to take on personal injury and medical malpractice cases with the expectation their contingent percentage of the client's recovery will, on average, exceed the attorneys' actual time and expense actually incurred, and as a result, the risk of losing a single case can be potentially mitigated by handling many of those cases and winning a good portion of them. However, in a material misrepresentation case, the same model does not work, because obtaining a percentage of the client's recovery will always yield a *de minimus* amount compared to the value of the legal services and the costs needed to secure a good result. Instead of taking a percentage of the recovery, a plaintiff's attorney in a material misrepresentation dispute must rely on Section 627.428 to "break even" by covering his or her reasonable amount of time for each case he or she wins. However, without the opportunity to recover a multiplier, merely "breaking even" on the winning cases will never provide any opportunity to mitigate any of the uncollectable time and expenses sustained by that attorney on any material misrepresentation cases that are lost.

46. With respect to the third factor identified in *Quanstrom,* the greater weight of the evidence also clearly demonstrated the factors outlined in *Rowe* and Rule 4-1.5(b) (including but not limited to the amount involved, the results obtained, and the existence of a contingency fee arrangement between Plaintiff and its counsel), weigh heavily in favor of awarding a multiplier to the Plaintiff in this case.

47. Accordingly, the Court determines Plaintiff is entitled to a lodestar multiplier in this case.

Amount of the Multiplier

48. According to *Quanstrom,* the amount of the multiplier awarded is determined as follows:

> If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1.0 to 1.5;
>
> If the trial court determines that the likelihood of success was approximately even at the outset, it may apply a multiplier of 1.5 to 2.0; and
>
> If the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5.

49. In this case, based on the greater weight of the evidence, the Court determines that a corresponding lodestar multiplier of 2.0 is reasonable and appropriate. At the outset of the case, Defendant had concluded its investigation into the information contained on the subject policy of automobile insurance's application and had spoken with its underwriting department and determined that the risk would not have been underwritten had accurate information been put forth in the application. Defendant had rescinded the subject policy of automobile insurance, denied coverage and had advised the Plaintiff that no payments would be made based on the same. Both Florida Statute §627.409 (Representations in applications; warranties) and the provisions of the subject policy of automobile insurance supported Defendant's denial of coverage. In March of 2022, the 2nd DCA issued an opinion in *Roberts v. Direct General Insurance Company*, 337 So.3d 889 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D737b] upholding Judge Bagge-Hernandez's grant of summary judgment in favor of Direct General Insurance Company in a material misrepresentation case with similar facts. Mr. Patrick was Plaintiff's counsel at the trial level who lost said case on summary judgment on July 1, 2020. As such, *Roberts* was the state of the law when Mr. Patrick filed this case in 2021.

50. The Court also notes that this case was heavily contested by Defendant and that Defendant continued to challenge Plaintiff's entitlement to a judgment under the law even after summary judgment was entered in favor of Plaintiff. Defendant also had obtained a Consent Judgment against the assignor, served a Florida Statute §57.105 Motion, and also filed its own Motion for Summary Judgment. Defendant even served a Proposal for Settlement in the amount of $1. Defendant's fervent defense demonstrates that even Defendant believed that success by Plaintiff was unlikely at the outset of this case.

Total Reasonable Attorney's Fees & Taxable Costs

51. Based on the lodestar figure of $82.500.00 and the multiplier of 2.0, this Court finds that the amount of **$165,000.00** is the reasonable amount of attorney's fees to be awarded to the Plaintiff.

52. Defendant stipulated to Plaintiff's taxable costs claim. Based on the stipulation, the Florida Rule of Professional Conduct 4-1.5(b)(2), and the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, the Court determines the following amount as taxable costs incurred by the Plaintiff's counsel (excluding fees for Plaintiff's attorney's fee expert witness) for work that was reasonable, necessary, served a useful purpose, and are awarded: **$870.55.**

Attorney's Fee Expert

53. Plaintiff also seeks an award of taxable costs for the fees charged by its attorney's fee expert witness, Elizabeth Andrews, Esquire. "Florida has a long-standing practice of requiring testimony of expert fee witnesses to establish the reasonableness of attorney's fees." *Snow v. Harlan Bakeries, Inc.,* 932 So. 2d 411, 412 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1128a]. The fee charged by an attorney to appear as an expert witness is considered a cost, not an attorney's fee. *In re Estate of Assimakopoulos,* 228 So.3d 709, 713 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2232c].

54. It is well settled, an award of expert witness fees for an attorney who testifies as an expert in support of an attorneys' fees and costs claim is not discretionary if the testifying attorney expects to be compensated for his testimony. *Stokus v. Phillips,* 651 So. 2d 1244, 1246 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D627c]; *In re Estate of McQueen,* 699 So. 2d 747, 751-52 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2131a].

55. In this case, Ms. Andrews does expect to be paid for her services, and the amount of time required for her preparation and testifying as an expert witness was burdensome. Accordingly, the

Court concludes Plaintiff is entitled to recover taxable costs for Ms. Andrews' expert witness fee.

56. Based on the greater weight of the evidence, the Court finds a reasonable hourly rate for Ms. Andrews' services as an expert is $600.00 per hour, the reasonable amount of time for the services Ms. Andrews rendered through the termination of her testimony at the fee hearings is 45 hours totaling $27,000.00.

57. Therefore, the Court finds that $27,000.00 is reasonable for Plaintiff's expert's services that were provided by Ms. Andrews. Therefore, the Court hereby awards **$27,000.00** as a taxable cost.

Final Judgment

58. Based on the foregoing findings of fact and conclusions of law, a summary of the reasonable amounts awarded to the Plaintiff are as follows:

Attorneys' Fees	$165,000.00
Expert Witness Fees	$27,000.00
Other Taxable Costs	$870.55
Total	**$192,870.55**

59. Accordingly, final judgment is hereby entered in favor of Plaintiff, AJ Therapy Center, Inc., and against Defendant, Direct General Insurance Company. Plaintiff will recover from Defendant the amount of **$192,870.55** plus post-judgment interest on that sum from the date of this final judgment, and all interest shall be calculated at the rates established by the Florida Department of Financial Services pursuant to Section 55.03, Florida Statutes *(www.myfloridacfo.com/DivisionIAA/LocalGovernments/Current.htm; www.myfloridacfo.com/Division/AA/LocalGovernments/Historical.htm),* for which sum, let execution issue.

60. Defendant's payment shall be by check made payable to "Patrick Law Group, P.A. Trust Account," and delivered to 230 E. Davis Blvd., Tampa, FL 33606. Plaintiff's counsel shall be responsible for disbursing the proceeds.

61. The Court reserves jurisdiction to enforce this Final Judgment and any related matter.

* * *

Insurance—Failure to comply with case management orders—Repeated failure to comply with court-ordered deadlines—Sanctions—Default

ORLANDO THERAPY CENTER, INC., a/a/o Jasmine Basulto, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-016425, Division J. ORLANDO THERAPY CENTER, INC., a/a/o Ariel E. Basulto, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. Case No. 18-CC-016426, Division J. July 16, 2024. Christine K. Vogel, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Nicholas Fronte, McFarlane Law, for Defendant.

ORDER ENTERING DEFAULT AGAINST DEFENDANT

THIS MATTER came before the Court upon the Plaintiff's Ore Tenus Motion for Default on June 19, 2024. Having heard from Counsel for the Plaintiff and Counsel for the Defendant, the motion is granted.

The instant cases were filed on March 22, 2018. The cases have travelled through the court system, including some 24 months in appeal status, which concluded in March 2023.

The Plaintiff filed its Motion to Set Trial in August 2023, and its Notice of Readiness for Trial on October 16, 2023. On December 5, 2023 the Court set a Case Management Conference (CMC) for January 25, 2024 (Clerk's Notes attached). At that time the Court consolidated the cases for trial and orally scheduled the matters for Jury Trial the week of June 10, 2024 and a Pretrial Conference on May 15, 2024.

At the Pretrial Conference on May 15, 2024, the Court realized that it had not entered a written Order Setting Trial from the January Case Management Conference and rescheduled the Jury Trial for the week of July 22, 2024, with Pretrial Conference to be held June 19, 2024. The Court amended some timelines and re-adopted some previously set deadlines in the then-current Differentiated Case Management Order (the original Differentiated Case Management Order was entered December 13, 2021 and is attached). The Defendant's Motion for Enlargement of Time to Comply With the Trial Order was denied (Order attached). The Court further ruled that the Defendant's Motion for Summary Judgment (filed January 11, 2024 but never set for hearing) would not be heard. The Court thereafter entered a written Order Setting Trial and Pretrial on May 15, 2024 (Order attached).

The Plaintiff's Witness List was due May 22, 2024 and was filed on May 16, 2024. The Court had ordered that a Joint Pretrial Statement, Proposed Jury Instructions, and Proposed Verdict Form be filed by June 5, 2024. On June 4, 2024 the Plaintiff filed their Pretrial Statement, Proposed Jury Instructions, and Proposed Verdict Form. On June 18, 2024 the Defendant filed their Proposed Pretrial Statement, Proposed Jury Instructions and Proposed Verdict Form. Exhibit Lists were due May 29, 2024. The Plaintiff filed theirs on June 4, 2024 and the Defendant filed theirs on June 21, 2024. The Defendant's Witness List was due May 29, 2024 and was filed on June 21, 2024.

At the June 19, 2024 the Defendant asked for an extension of time, to which the Plaintiff objected. When the Court questioned Defense Counsel about the lack of a witness list, he responded that he had been told by his paralegal that it had been filed on June 18, 2024—presumably along with the untimely Pretrial Statement, Proposed Jury Instructions, and Proposed Verdict Form. Plaintiff's Counsel stated he had not received a witness list from the Defendant. The Court Clerk checked the Clerk's Office Electronic Filing Portal but did not locate a Defendant's Witness List. Defense Counsel repeatedly stated that Plaintiff's Counsel had not reached out to Defense Counsel, as required by the Trial Order, and seemed to imply that omission had somehow impeded his ability to properly prepare for trial. Defense Counsel did not produce any emails or phone logs that would lead this court to the conclusion that Plaintiff's Counsel was not cooperating with Defense Counsel in getting these cases ready for trial. Defense Counsel acknowledged that he had received the Plaintiff's Witness List on June 4, 2024 and that he did not check the status of the cases until June 14, 2024. The Defendant's Witness List was filed June 21, 2024—two days after the Court orally granted the Plaintiff's Ore Tenus Motion for Default—along with the Defendant's Exhibit List.

Defense Counsel offered no compelling reason as to why an extension of the previously imposed deadlines applicable to these six-year-old cases should be granted. Indeed, that same request had been denied by the Court on May 15, 2024. The Court's Trial Order was very clear that sanctions for failing to comply with the deadlines was a very real possibility:

> .....
>
> 1. ***Deadlines.*** In addition to the deadlines previously set in the current Differentiated Case Management Order (the "DCM Order"), the deadlines set forth below in this Uniform Order Setting Trial & Pretrial are ESTABLISHED and will GOVERN this case. Counsel and any self-represented parties are DIRECTED to review, calendar and abide by them:
>
> .....
>
> 13. ***Sanctions.*** Failure to Comply with this order will result in the imposition of sanctions including, but not limited to, delay of the trial date, costs, attorney fees, reprimand, and striking pleadings. ***The parties should carefully read this order and strictly comply with its deadlines***

and obligations.

The Differentiated Case Management Order entered December 13, 2021 (attached) also addressed non-compliance:

.....

6. **Failure to comply.** The failure to comply with any part of this DCM Order may result in dismissal of the complaint without prejudice; entry of a judicial default; monetary sanctions against counsel or any self-represented parties, or both; or any other sanctions deemed appropriate by the Court.

.....

8. **Deadlines.** The deadlines set forth herein are established and will govern this case and will be enforced by the Court. Counsel and any self-represented parties are directed to review, calendar, and abide by them.

.....

This Court does not take lightly the imposition of the sanction of entering a default against the Defendant. However, the repeated non-compliance with the Court's Orders concerning the deadlines leaves no alternative.

The Plaintiff's Ore Tenus Motion for Default is GRANTED.

* * *

Torts—State attorneys—Immunity—Assistant state attorney has absolute immunity from suit for damages relating to his role in having plaintiff arrested for charge that was ultimately nolle prossed—Immunity exists irrespective of whether ASA acted maliciously or corruptly

STEVEN KENNEDY, Plaintiff, v. JUSTIN L. GRIFFIS, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. 24-17209 COCE 53. July 1, 2024. Robert W. Lee, Judge. Counsel: Walter Dale Miller, Fort Lauderdale, for Defendant Griffis. Robert M. Oldershaw, Fort Lauderdale, for Defendant Kirtman.

SUMMARY DISPOSITION IN FAVOR OF DEFENDANT JUSTIN L. GRIFFIS

THIS CAUSE came before the Court on May 29, 2024 for small claims pretrial conference and for hearing of the Motion for Summary Judgment filed by the Defendant Justin L. Griffis (which the Court treats as a motion for summary disposition under Rule 7.135), and the Court's having reviewed the entire Court file; heard argument; reviewed the relevant legal authorities[1]; and been sufficiently advised in the premises, the Court finds as follows:

The Plaintiff has sued the Defendant Justin L. Griffis, an assistant state attorney, for his role in having the Plaintiff arrested for a charge that ultimately was nolle prossed by the State Attorney's Office. Having considered the matter, the Court finds no triable issue, and enters summary disposition in favor of the Defendant Justin L. Griffis. *See Qadri v. Rivera-Mercado*, 303 So.3d 250, 254 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D2083d] ("As quasi-judicial officers, prosecutors enjoy absolute immunity from lawsuits for damages resulting from the performance of their quasi-judicial functions of initiating or maintaining a prosecution.") While the Plaintiff takes substantial issue with the Defendant's purported motivation in bringing the charges and having the Plaintiff arrested, the Defendant's immunity exists "regardless of whether the prosecutor acted maliciously or corruptly." *Id. See also Hernandez v. Pasco County Sheriff*, 2021 WL 598237, *11 (M.D. Fla. 2021). Although not controlling, the Court notes that a judge found probable cause for the charge, and that the State nolle prossed the case, not because it believed the Plaintiff should be exonerated, but rather based on its conclusion that it could not produce evidence beyond a reasonable doubt to sustain the charge. Accordingly, it is hereby

ADJUDGED that, summary disposition having been entered in favor of the Defendant Justin L. Griffis, this case is DISMISSED with prejudice as to said Defendant. The case shall continue as to the remaining Defendant pending further order of the Court.

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[1]The Court acknowledges with appreciation the research assistance of Nova Southeastern University Judicial Intern Karley A. Lopez.

* * *

Civil procedure—Dismissal—Failure to perfect service within 120 days or within extended period

PATH MEDICAL ACQUISITION COMPANY, INC., Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX24011864. Division 53. July 8, 2024. Robert W. Lee, Judge.

FINAL ORDER OF DISMISSAL

The Plaintiff's having failed to comply with Rule 1.070(j) and this Court's Order of June 22, 2024, this case is DISMISSED without prejudice for failure to timely serve.

The Court notes that the Defendant has filed two documents in response to the Court's June 22 Order: a Motion for Extension of Time to Serve, and a Response to Notice of Lack of Prosecution and Notice of Good Cause. As to the issue of good cause, the Court notes that neither the Motion nor the Response proffer any good cause for failure to timely serve. Indeed, the docket reflects that no summons has even been issued in this case. Further, the Plaintiff raises the issue of a "Notice of Lack of Prosecution" when no such Notice has been issued in this case. Rather, the Notice of Impending Dismissal arises out of Rule 1.070(j). As noted on the docket, the Rules of Civil Procedure have been invoked in this former small claims case, with a few exceptions not related to Rule 1.070.

Finally, the Plaintiff has been given a de facto extension of time to serve in that the Court's Notice of Impending Dismissal was not issued until the 120-day service period had expired, the Plaintiff was given a 10-day period to respond, and another 6-day period has lapsed between the expiration of the response period and the entry of this Order. *See Denose v. Garcia*, Case No. 3D22-1604 (Fla. 3d DCA Sept. 6, 2023) [48 Fla. L. Weekly D1785c].

* * *

Mobile home parks—Eviction—Violation of rules and regulations—Cure period—Reasonableness—Judgment entered in favor of tenant where violations would have been cured within cure period, and the need for eviction complaint would have been mooted, if tenant had been provided a reasonable cure period that took into account tenant's visual impairment and mobility issues

PELICAN BAY COMMUNITIES, LLC, Plaintiff, v. ROBERT NICHOLAS KLAREN and EMILY SMITH, Defendants. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 2023-CC-057901-XXXX-XX. June 3, 2024. David C. Koenig, Judge. Counsel: Ryan Vatalaro and Patrick Boylan, Atlas Law, PLLC, Tampa, for Plaintiff. Andraya Jackson, Community Legal Services of Mid-Florida, Lake Mary, for Defendant.

FINAL JUDGMENT FOR DEFENDANT

THIS MATTER came before the Court on April 18, 2024 for a Final Eviction Hearing. Having considered the Court file, argument of counsel, the memoranda submitted after hearing, and the relevant legal authority, the Court finds the following:

1. The Defendant, Robert Klaren, has leased a lot from Pelican Bay since January 1, 2014. The Defendant is legally blind in one eye and has mobility issues.

2. On August 24, 2023, the Plaintiff was notified that he was in violation of sections 723.023(2) and (3), Florida Statutes and the Community's Rules and Regulations.

3. The Plaintiff verbally requested and received an extension of the cure period. During that time, the Plaintiff cured some, but not all, of the violations.

4. On November 2, 2023, the Plaintiff was notified that his lease

was terminated because he remained in violation of the Rules as they related to vehicles parked at his residence. As the Defendant remained in violation, the violations were continuing, rather than second, violations.

5. On December 11, 2023, the Defendant wrote to Plaintiff's counsel explaining that, based upon his disability, he would need additional time to cure the violations although it was his belief that he had cured all violations prior to that date. The instant Complaint for Tenant Eviction was filed on December 13, 2023.

6. At some time, either prior to December 11, 2023 or prior to the April 18, 2024 hearing, the Defendant had resolved any outstanding violations.

7. Based upon the totality of the circumstances the Court finds that the initial extension of the cure period was not reasonable given the Defendant's disabilities. The Defendant began curing the violations prior to the November correspondence and believed that he had completed curing them prior to December 11, 2023, roughly three and a half months after he received the initial notice. Had the Plaintiff considered the Defendant's disabilities and provided Defendant a reasonable accommodation, i.e. a reasonable amount of time within which to bring his property into compliance, the violations would have been completed in that reasonable amount of time, thereby mooting the need for Plaintiff to proceed with this action.

8. The Court retains jurisdiction to determine entitlement to and the amount of attorney's fees and costs.

Based upon the foregoing, it is

ORDERED AND ADJUDGED

Plaintiff's Complaint for Tenant Eviction is hereby **DENIED** and Final Judgment is entered in favor of the Defendant.

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Criminal law—Driving under influence—Evidence—Breath test—Jurisdiction—Color of office doctrine—Arresting municipal officer, who had stopped defendant within his municipality before transporting defendant outside municipality for administration of breath test at county detention facility, had authority to request administration of test under Florida's implied consent law—Ongoing investigation exception to color of office doctrine applied where evidence obtained by officer outside his municipality was directly related to arrest and ongoing investigation for DUI committed within officer's municipality—Urine test—Arresting municipal officer who had reasonable cause to believe that defendant was under influence of cannabis was authorized by section 316.1932(1)(b) to request administration of urine test at county detention facility

STATE OF FLORIDA, Plaintiff, v. SUSAN MARIE LUMPKIN, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 59-2021-CT-2845. September 6, 2024. Debra Krause, Judge.

ORDER ON AMENDED MOTION TO SUPPRESS DEFENDANT'S ALLEGED BREATH TEST RESULTS AND URINALYSIS RESULTS AS THE REQUEST FOR THE SEARCHES WERE OUTSIDE THE OFFICER'S JURISDICTION

THIS CAUSE came before the Court for hearing on August 28, 2024, upon the Defendant's Amended Motion to Suppress Defendant's Alleged Breath Test Results and Urinalysis Results as the Request for the Searches Were Outside the Officer's Jurisdiction. The Court, having heard the testimony presented, considered the evidence, the arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

On September 12, 2021, the Defendant, Ms. Lumpkin was involved in an automobile crash within the city limits of Casselberry, Florida. Ultimately, Officer Juan Saavedra of the Casselberry Police Department arrived on the accident scene to assist with the traffic accident investigation. Once the traffic accident investigation was concluded, Officer Saavedra began an investigation for the misdemeanor criminal offense of Driving Under the Influence. Based upon his investigation, Officer Saavedra concluded that the Defendant was driving under the influence of cannabis to the extent that her natural facilities were impaired and arrested her for DUI. While Officer Saavedra could smell brunt cannabis coming from her person and the Defendant admitted to smoking cannabis, Officer Saavedra could not smell the odor of alcoholic beverages coming from the Defendant because of the strong odor of brunt cannabis coming from her person nor did the Defendant ever admit to consuming alcoholic beverages. After her arrest, Officer Saavedra transported the Defendant to the Seminole County detention facility in Sanford, Florida. Once at the detention facility, Officer Saavedra requested Breath Technician Ray Garcia to perform a beath test and urine test on the Defendant pursuant to Florida Statute 316.1932. The Defendant submitted to a beath test with the results being .133 and .134. Additionally, the Defendant provided a urine sample for the urine test.

The Defendant's Amended Motion to Suppress Defendant's Alleged Breath Test Results and Urinalysis Results as the Request for the Searches Were Outside the Officer's Jurisdiction alleges that the Defendant's alleged breath test results and urinalysis results were the result of an illegal search because the requesting municipal officer, Casselberry Officer Saavedra, was outside his jurisdiction when he requested the Defendant submit to a Breath and Urine Test at the Seminole County detention facility located in Sanford, Florida. The Defendant's motion further alleges that since the officer was outside of his Jurisdiction, he had no greater authority to request the Defendant submit to a Breath or Urine test than an ordinary citizen would, citing "Under the Color of Office Doctrine" which prevents law enforcement "from using the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen. See *Mattos v. State,* 199 So.3d 416, 419-20 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1974b] (quoting *Phoenix*, 455 So.2d at 1025).

On the specific issue of whether it is permissible for a law enforcement officer outside his or her jurisdiction to request a breath test, this Court recognizes that there is a conflict between the Fifth District Court of Appeal's decision in *State v. Torres,* 350 So.3d 421 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2241a] and the Sixth District Court of Appeal decision's in *State v. Repple* __ So.3d __ (49 Fla. Weekly D1296a) (Fla. 6th DCA 2024). In the cases, although the facts are almost identical, the two Appellate Courts came to two distinctly different decisions based on distinctly different principles of law.

In *Torres,* the Fifth District Court Appeal rejected the Defendant's argument that a request for a breath test made outside the officer's jurisdiction was an illegal search and must be suppressed. The Court found that a municipal officer may continue to act or investigate outside of his or her jurisdiction if the subject matter of the officer's investigation originated inside their city limits under the principle of *Knight v. State,* 154 So.3d 1157, (Fla. 1st DCA 2014) [40 Fla. L. Weekly D58b] and therefore the search of the Defendant's breath was permissible.

In *Repple,* the newly created Sixth District Court of Appeal found that a municipal police officer's powers have territorial bounds and the power to grant municipalities extraterritorial powers belongs exclusively to the state legislature, therefore, a municipal officer, who transported an in-custody defendant out of city limits to a breath test facility, was without authority to use his official power as a law enforcement officer to request the defendant submit to a breath test and the breath test was inadmissible, specifically rejecting the reasoning of *Torres.*

While this Court, located within the territorial boundaries of the

Fifth District Court of Appeal has not issued an opinion on this exact issue, as previously noted the Fifth District Court of Appeals has decided this issue in *State v. Torres,* 350 So. 3d 421 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D2241a] as concerning a breath test. In Florida, the presumption in favor of stare decisis is strong. Stare decisis is the legal principle meaning "to stand by things decided." Vertical stare decisis obligates lower courts to strictly adhere to rulings made by higher courts within the same jurisdiction, and thereby this Court is bound by the decisions of the Fifth District Court of Appeal. "The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled. . ." *Stanfill v. State,* 384 So. 2d 141, 143 (Fla. 1980).

> "The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule, it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts—District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, **if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it**."
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> *Nader v. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 724 (Fla. 2012) [37 Fla. L. Weekly S130a] (quoting *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992)) (emphasis added).

Therefore, this Court is legally bound to deny the Defendant's Amended Motion to Suppress Defendant's Alleged Breath Test Results and Urinalysis Results as the Request for the Searches Were Outside the Officer's Jurisdiction as to the **breath test** based upon the decision in *Torres*.

However, this leaves the issue of the request for a urine test from the Defendant and the jurisdictional issue raised by the Defendant's Amended Motion to Suppress Defendant's Alleged Breath Test Results and Urinalysis Results as the Request for the Searches Were Outside the Officer's Jurisdiction to be decided. Like the Defendants in *Torres* and *Repple,* Ms. Lumpkin was lawfully arrested, based upon probable cause, and was in the legitimate custody of the arresting officer. All three Defendants were subsequently transported by the arresting officer to a facility outside the city limits of the arresting officers' territorial jurisdiction. But unlike the Defendants in *Torres* and *Repple,* Ms. Lumpkin, while at a detention facility, was asked by a Breath Technician, at the request of a law enforcement officer pursuant to Florida Statute 316.1932(1)(b), to provide a urine sample to be tested. Neither the *Torres* nor *Repple* decision deal with this section of the statute, and therefore while those decisions may be persuasive, this Court is not bound to follow either the *Torres* or *Repple* decision on the jurisdictional issue as it relates to a request for a urine test.

It is undisputed that a driver who operates a motor vehicle within the State of Florida implicitly consents to any sobriety test required by law. Specifically, Florida Statute 316.1932(1)(b) provides for the request of a urine test and states that the urine test "must be incidental to a lawful arrest and administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests at the request of a law enforcement officer who has reasonable cause to believe such person was driving or in actual physical control of an motor vehicle within this state while under the influence of chemical substances or controlled substances. The urine test shall be administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such test in a reasonable manner that will ensure the accuracy of the specimen and maintain the privacy of the individual involved."

There is no dispute that Officer Saavedra is a law enforcement officer employed full-time by the City of Casselberry, Florida and thereby "is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state." Florida Statute §943.10(1)(2024). Additionally, as a law enforcement officer, he is permitted to take any action authorized by statute and that he requested the administration of a urine test of Ms. Lumpkin while at the detention facility thru Breath Technician, Ray Garcia, pursuant to Florida Statute 316.1932.

The question becomes whether the extraterritorial transport of a lawfully arrested defendant to the County detention facility devests a municipal law enforcement officer of his or her status as a law enforcement officer to request a urine test at the detention facility. The *Repple* Court concluded that the legislature did not statutorily authorize a municipal law enforcement officer to act as law enforcement officer outside of the city's limit and request a breath test at a breath test center. Under *Repple,* a municipal law enforcement office, prior to leaving the city limits, would be required to use their "phone a friend lifeline" to either call someone at the detention facility and request this person administer a urine test on the arrestee or any "law enforcement officer" who is within their jurisdiction at the detention facility and transfer reasonable cause (pursuant to the fellow officer rule) so this other law enforcement office can request a urine test of the arrestee once the arrestee arrives at the detention facility. If this Court were to adopt the logic and reasoning of the Sixth District Court of Appeal in *Repple*,[1] all municipal police officers would be stripped of their status as law enforcement officers while outside of their territorial jurisdiction and confined to perform a statutorily required duty solely within the city limits of their respective cities. Under *Repple,* even the act of transporting a lawfully arrested defendant to a detention facility could be deemed illegal as "an unlawful detention" because the officer has no authority to continue detention past the magical boundary of the city's jurisdictional limits and any search that followed this illegal detention would need to be suppressed.

However, a plain reading of the statute clearly indicates that the legislature did not intend to strip a law enforcement office of their status as a law enforcement officer if outside their territorial jurisdiction when requesting a urine test under this statue. The statute requires that that test be performed at a "detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests. . ." at the request of a law enforcement officer. The request for the administration of a urine test is not limited to the arresting officer but is statutorily authorized to be requested by any law enforcement officer who has reasonable cause. If the legislature wanted to limit the request of a urine test to a law enforcement officer solely within their jurisdiction, they would have specifically stated it in the statute instead of using such expansive language allowing testing by any law enforcement officer. Additionally, it is fair to conclude that the legislature knew each county would likely have only one detention facility outside the city limits of most cities and the request for a urine sample would be made at the detention facility by a law enforcement officer who most likely is outside their territorial jurisdiction.

It is clear that Florida Statute §316.1932(1)(b) specifically provides that a law enforcement officer who has reasonable cause to believe that a lawfully arrest individual who was driving or was in actual control of a motor vehicle and under the influence of chemical substances or controlled substances may request "the administration" of a chemical test of the individual's urine. The result is the same if the municipal law enforcement officer, while in his jurisdiction, called in to the detention facility to "request" a urine test or made the "request" for a urine test while at the detention facility. The requests are still made by a law enforcement officer acting pursuant to a statutory duty to request a urine test from a lawfully arrested defendant. A law

enforcement officer does not lose their status as a law enforcement officer simply because they are outside their jurisdiction under this statue.

Lastly, the Court notes that Defendant arguments are based upon the conclusion that a breath test and urine test has been deemed searches and therefore are protected under the 4th Amendment and if an improper search occurs, the results of the search should be suppressed. The Fourth Amendment to the United States Constitution protects "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV.* It affords an individual the right to be free from unreasonable and obtrusive searches by a government actor. The exclusionary rule is a judicially-created remedy adopted to protect Fourth Amendment rights by deterring illegal searches and seizures. *Davis v. United States,* 564 U.S. 229, 131 S,Ct, 2419, 2426, 180 L.Ed 285 (2011) [22 Fla. L. Weekly Fed. S1144a]. It is intended to deter police misconduct, not to remedy the prior invasion of a defendant's constitutional rights. *Montgomery v. State*, 69 So.3d 1023, 1033 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D2046a]. This Court is making its ruling relies on the analysis in *Birchfield v. North Dakota,* 136 S.Ct. 2160 (2016) [26 Fla. L. Weekly Fed. S300a], recognizing that the opinion in Birchfield is exclusively in reference to a breath sample, the rationale and opinion would be the same as to a urine sample. Moreover, the Court finds that mere request of a law enforcement officer, who has reasonable cause to believe that a person was driving while under the influence of chemical or controlled substances, and who has been lawfully arrested for such, for a urine test to be administered at a detention facility is neither an unreasonable nor overly invasive search.

Therefore, it is

ORDERED AND ADJUDGED as follows:

1. That the Defendant's Amended Motion to Suppress Defendant's Alleged Breath Test Results and Urinalysis Results as the Request for the Searches Were Outside the Officer's Jurisdiction is **DENIED**.

2. The Results of the Defendant's Urine Tests are admissible in any hearing or trial in this cause.

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[1]The Fifth District Court of Appeal's rationale and reasoning in *Torres* concerning a continuing investigation is slightly more persuasive that *Repple's* exploration of English jurisprudence on the issue of the arrest powers of the police.

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