Volume 32, Number 6, October 31, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 223-273

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.

- **INSURANCE—AUTOMOBILE—PROPERTY DAMAGE—COVERAGE—PREVAILING COMPETITIVE PRICE. An insurer was granted summary judgment in an action brought against it by an assignee/repair shop where the applicable policy provisions stated that the cost of repair was based on the prevailing competitive price and the policy defined the prevailing competitive price as the price charged by the majority of the repair market in the area as determined by a survey made by the insurer, and the insurer made payment based on its cost-estimating methodology and the price reported by the majority of area repair facilities surveyed. The court rejected an attempt to challenge the insurer's survey methodology after finding that the policy gave the insurer tremendous discretion as to how to conduct its survey.** *ELITE EURO CARS COLLISION SERVICES, INC. v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. Circuit Court, Fifth Judicial Circuit in and for Hernando County. Filed June 20, 2023. Full Text at Circuit Courts-Original Section, page 238a.*

- **INSURANCE—AUTOMOBILE—WINDSHIELD REPAIR—APPRAISAL. An appraisal process that provides for parties to petition the court to select a third appraiser if they are unable to agree on a third appraiser cannot legally be completed prior to suit because no court in Florida has jurisdiction over a petition to select a third appraiser. The complaint properly alleged a cause of action for breach of contract where the complaint stated that the appraisal process was complete and incorporated evidence of the plaintiff repair shop's presuit efforts to complete appraisal.** *ADAS WINDSHIELD CALIBRATIONS, LLC v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, County Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed August 7, 2024. Full Text at County Courts Section, page 251b.*

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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.**

Subject Matter Index and Tables

Page prefixes in the subject matter index and tables identify the courts in the following manner:

10CIR 25	**Circuit Court - Appellate (Bold type) (10th Circuit, page 25)**
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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DISPOSITION ON APPELLATE REVIEW

Disposition of cases previously reported in FLW Supplement on review by appellate courts. This is not a comprehensive listing.

Florida Hospital Ocala, Inc. (Thomas) v. Progressive Specialty Insurance Company. County Court, Ninth Judicial Circuit, Orange County, Case No. 2019-SC-034548-O. Original Opinion at 30 Fla. L. Weekly Supp. 96a (June 30, 2022). Reversed at 49 Fla. L. Weekly D2050a

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Leaving scene of accident involving injury—Licensee who was provided with notice and opportunity to present evidence was accorded procedural due process—No merit to argument that Department of Highway Safety and Motor Vehicles had affirmative duty to initiate new investigation or introduce witness testimony before upholding automatic suspension—For purposes of revoking driver's license under section 322.28(4)(b), "conviction" includes withheld adjudication for offense of leaving scene of accident involving injury—Licensee's claim that agreement was made during plea negotiations to ensure that his license would not be suspended is refuted by plea form stating that plea may result in automatic mandatory license suspension or revocation

EDWIN ARNOLD MCGUSTY, Petitioner, v. DEPT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 22-000017-AP. UCN No. 522022AP000017XXCI. January 17, 2024. Petition for Writ of Certiorari for relief from a final administrative order of the Department of Highway Safety and Motor Vehicles. Counsel: Edwin Arnold McGusty, Pro se, Petitioner. Linsey Sims-Bohnenstiel, DHSMV, for Respondent.

(**PER CURIAM**.) Petitioner, Edwin Arnold McGusty, seeks certiorari review of a final administrative order, Findings of Fact, Conclusions of Law and Decision, entered on July 26, 2022 by the hearing officer for the State of Florida Department of Highway Safety and Motor Vehicles (hereafter, "DHSMV"). This Court has appellate jurisdiction pursuant to Art V § 5(b), Fla. Const., § 322.31, Fla. Stat., Fla. Admin. Code R. 15A-6.019, and Fla. R. App. P. 9.030(c). Following review, we affirm the decision of the lower tribunal.

STATEMENT OF FACTS

On October 27, 2018, Petitioner, Edwin Arnold McGusty, in his automobile, was involved in an accident with a bicyclist in close proximity to the Petitioner's waterfront residence. Petitioner left the scene of the accident by way of Jet Ski. Petitioner was cited for failing to stop and render aid at a crash that resulted in injury to another. On April 27, 2022, Petitioner pleaded guilty to the offense as cited, and pursuant to a negotiated agreement with the State, adjudication was withheld.

Pursuant to § 316.027, Fla. Stat., the DHSMV suspended Petitioner's driving privileges effective April 27, 2022. Petitioner requested a formal review and a hearing was held on June 27, 2022. Petitioner was given the opportunity to submit evidence to show his driving privilege should not have been revoked. Subsequently, the hearing officer affirmed the suspension of the Petitioner's driving privileges by final administrative order dated July 26, 2022. Petitioner alleges that this hearing resulted in due process and double jeopardy violations.

STANDARD OF REVIEW

Fla. Stat. § 322.31 provides a right of review for the final orders and rulings of the DHSMV when the department denies, cancels, suspends, or revokes driver's licenses. The appellate court shall review the decision "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 resides, in the manner prescribed by the Florida Rules of Appellate Procedure." *Id*.

The Supreme Court of Florida, in *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982), held that where full review of administrative action is given in the circuit court as a matter of right, the circuit court must determine: (1) whether procedural due process is accorded, (2) whether the essential requirements of law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence.

ANALYSIS

Petitioner's primary issue for review is whether Petitioner was accorded procedural due process when, after entering a plea to the charge of failing to stop and render aid at a crash that resulted in injury to another, the DHSMV upheld an automatic driver's license suspension without conducting an investigation and without hearing witness testimony at the hearing held on June 27, 2022 where the Petitioner was unrepresented.

First, the requirements of procedural due process pursuant to the United States Constitution, as well as the Florida Constitution, are fair notice and a reasonable opportunity to be heard. *Housing Authority of City of Tampa v. Robinson,* 464 So. 2d 158,164 (Fla. 2d DCA 1985). "[T]here is . . . no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met." *Hadley v. Department of Administration,* 411 So. 2d 184, 187 (Fla. 1982). These are flexible concepts to be discerned from the facts of each case. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

This Court notes that a notice of hearing does not appear on the appellate record. However, the record reflects that the hearing was held on June 27, 2022 and the hearing officer provided Petitioner with an opportunity to submit evidence to show his driving privilege should not have been revoked. Final Order.[1] There is no evidence in the record that Petitioner opted to exercise this option nor is there any allegation that Petitioner was denied this opportunity. On these facts alone, this Court may conclude that Petitioner was accorded procedural due process.

Second, whether the essential requirements of law have been observed hinges upon the lower tribunal's application of the correct law. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 531 (Fla. 1995) [20 Fla. L. Weekly S318a]. A deviation from the essential requirements of law entails a violation of a clearly established principle of law resulting in a miscarriage of justice. *Id*.

The Petitioner's central claim is that because he entered into a plea with adjudication withheld, he "cannot be deemed to be convicted" under the automatic, mandatory suspension statute. Pursuant to Florida Statute § 322.01(11)(a), a conviction is defined as:

> "a conviction of an offense relating to the operation of motor vehicles on highways which is a violation of [Chapter 322] or any other such law of this state or any other state, *including an admission* or determination of a noncriminal traffic infraction pursuant to s. 318.14. . ." (emphasis added).

The Petitioner attempts to distinguish his plea from this definition by arguing that 1) the residential street the accident occurred on was not a highway under this definition and 2) this technical distinction is only for noncriminal traffic violations and since he was subject to a criminal charge, it is inapplicable. Pet'r's Resp. at 4-5. The Court is not persuaded by these arguments. Further, a second definition of "conviction" as it relates to this case can be found in Florida Rule of Criminal Procedure 3.701(d)(2) which expressly includes "a determination of guilt *resulting from plea or trial regardless of whether or not adjudication was withheld,* or whether imposition of sentence was suspended." (emphasis added). A plea may Properly be the basis of a conviction under the applicable definitions.

The Florida Supreme Court has ruled that a withheld adjudication resulting from a negotiated plea is a "conviction" within the meaning of a similar statute affecting driving privileges. *Raulerson v. State,* 763 So. 2d 285 (Fla. 2000) [25 Fla. L. Weekly S542a]. This Court is bound by the interpretation of that case. Such interpretation is

consistent with the legislative intention in protecting public safety—an intent that is separate and distinct from punishing the offender. A withheld adjudication may properly be the basis of a conviction for purposes of § 322.28(4)(b), Florida Statutes.

Pursuant to Fla. Admin. Code R. 15A-6.013(5), Petitioner had a right "to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against, the driver." The Petitioner, however, is not entitled to a new investigation as he claims. Additionally, Petitioner claims that no witness testimony was heard, though it appears that Petitioner was given the opportunity to introduce such evidence, if it were available.

This Court, and others, have reasoned that the judiciary does not have the authority to make binding determinations or interfere with the DHSMV's adherence to automatic driving privilege suspension when such is statutorily mandated. *Fla. Dep't of Highway Safety & Motor Vehicles v. Vogt,* 489 So. 2d 1168 (Fla. 2d DCA 1986) (holding that county court had no authority to order the offender's driver's license to be revoked for less than the statutorily required period); *See also Fla. Dep't of Highway Safety & Motor Vehicles v. Gordon,* 860 So. 2d 469 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2498b] ("Administrative revocation, which is designed to protect the public, cannot be negotiated away as part of a criminal sentence in a plea agreement"). This reasoning is particularly salient when, as in this case, the litigant enters a plea to the underlying charge that explicitly states:

> "If I am entering a plea to an offense for which automatic, mandatory driver's license suspension or revocation is required, regardless of whether the suspension or revocation is by the court or by a separate agency, I understand that this this plea may result in the automatic, mandatory suspension or revocation of my driver's license."[2] Plea Form at 2.

We conclude that the lower tribunal accorded procedural due process and applied the correct law.

Third, whether the administrative findings and judgment are supported by competent substantial evidence demands an honest look at the evidence. *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a]. The evidence cannot be untruthful or nonexistent. *Id*. Competent, substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957).

Notwithstanding the Petitioner's insistence that an agreement was made during his plea negotiations to ensure his license would not be suspended, the explicit terms of his plea agreement establish competent substantial evidence that Petitioner fell under the automatic, mandatory suspension statute. Plea Form at 1. The DHSMV does not have an affirmative duty to initiate a new investigation or to introduce witness testimony; they may rely on evidence in the court record. Petitioner had a right to present relevant evidence or witness testimony, but did not take advantage of the opportunity to do so. Even if he had, competent, substantial evidence on the record supports the hearing officer's Findings of Fact, Conclusions of Law and Decision, entered on July 26, 2022. Plea Form at 1.

DISPOSITION

Affirmed. (SHERWOOD COLEMAN, GEORGE JIROTKA, and PATRICIA MUSCARELLA, JJ.)

[1]Because the Petitioner's exhibits and attachments are not compiled in a single appendix, this Court's citations to the record will refer to the title of the document.

[2]The Petitioner cites the use of "may" instead of "shall" in this section of his plea agreement as a distinction that "further bolster[s] [his] understanding that the would never be any License Suspension." [sic]. However, this distinction has no effect on whether or not the lower court applied the correct law. Instead, this claim attacks the validity of his plea agreement and the effectiveness of his counsel. Both of which are beyond the scope of this appeal.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Breath test—Request incident to lawful arrest—There was competent substantial evidence to support conclusion that licensee's breath test was administered incident to lawful arrest despite entry in arrest report indicating that arrest occurred after test where narrative portion of arrest report unambiguously reflected that licensee was taken into custody after roadside investigation and transported to county jail where breath test was performed

SWETAL NIRANJAN GANDHI, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. AP23-04. Division 55. July 1, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HOWARD M. MALTZ, J.) Petitioner Swetal Gandhi seeks review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Review, Florida Department of Highway Safety and Motor Vehicles ("Department") entered on November 13, 2023. The decision of the hearing officer affirmed the order of suspension of the driving privilege of Petitioner. This Court, having considered the briefs of the parties, finds as follows:

According to the hearing officer's Findings of Fact, Conclusion of Law and Decision, on May 13, 2023, Petitioner was arrested by St. Johns County Deputy Sheriff Brendan Riggins for Driving Under the Influence ("DUI"). Petitioner was stopped for speeding and upon contact with Petitioner, the deputy noticed signs of impairment resulting in the deputy conducting a DUI investigation. The Petitioner performed poorly on field sobriety exercises and was arrested for DUI. Petitioner submitted to breath testing resulting in breath alcohol results of .174 and .171.

As permitted by Fla. Stat. § 322.2615(6), Petitioner requested a formal review of his driver's license suspension. A formal review hearing was held by a hearing officer employed by the Department. The following documents were entered into the record at the formal hearing:

1. Florida DUI Uniform Traffic Citation #7730-XBH
2. Florida Unlawful Speed Uniform Traffic Citation #AHDEDHE
3. Arrest Report
4. FIBRS Incident Report
5. DUI Alcohol / Drug Influence Report
6. Alcohol Testing Program Breath Alcohol Test Affidavit

At the formal review hearing, Petitioner sought to invalidate the administrative suspension of his driver's license. On November 13, 2023, the hearing officer issued an order affirming the suspension of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.

Jurisdiction

Pursuant to Fla. State. §§ 322.2615(13) and 322.31, Petitioner seeks review of the hearing officer's order affirming the suspension of his driving privilege. This Court has jurisdiction to consider the Petition for Writ of Certiorari, pursuant to Rule 9.030(c)(3), Fla. R. App. P.

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by

competent, substantial evidence. *Fla. Dep't. of Hwy. Safety and Motor Vehicles v. Trimble*, 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *Id.* The competent, substantial evidence standard requires the Court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings. *Fla. Dep't. of Hwy. Safety and Motor Vehicles v. Hirtzel*, 163 So.3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a]. The Court's certiorari review power does not allow the Court to direct the lower tribunal to take any action, but rather, is limited to the Court quashing the order being reviewed. *See Tynan v. Fla. Dep't. of Hwy. Safety and Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a].

Analysis

Petitioner asserts in his Petition that there was no competent, substantial evidence before the hearing officer to support the finding that Petitioner's breath test was administered pursuant to a lawful arrest. Petitioner's argument is premised on the fact that according to the records in evidence before the hearing officer, the breath test was administered at 12:50 a.m. and 12:53 a.m.; however, Deputy Riggins' Arrest Report reflects an arrest time of 2:17 a.m. Petitioner asserts that because the breath test was administered prior to the arrest time reflected in the deputy's report, it therefore, was not incidental to or prior to the arrest.

The narrative portion of Deputy Riggins' Arrest Report begins with the following statement by the deputy:

> The undersigned certifies and swears that there is probable cause to believe the above-named defendant who was positively identified by the Florida Driver's License on the 13th of May 2023, at approximately 12:03 a.m. at Nocatee Parkway and Davis Park within St. Johns County, violated the law and did then and there:

Deputy Riggins then went on in the narrative portion of his Arrest Report to provide details of how he initiated a traffic stop of Petitioner for speeding, upon contact with Petitioner clues of impairment were observed, Petitioner performed poorly on field sobriety exercises, and Petitioner admitted drinking and being impaired. The narrative portion of the Arrest Report concludes by stating "The defendant provided breath samples for Breath Test Operator B. Riggins of .174 and .171 after an over 20-minute observation period at the sally port of the county jail."[1]

In a field on the Arrest Report entitled "Arrest Date/Time," it indicates May 13, 2023 2:17 a.m. It is this entry that Petitioner relies upon in his argument that the breath testing preceded the arrest.

Fla. Stat. §316.1932(1)(a)1.a. provides that a breath test must be incidental to a lawful arrest. The term "incidental to lawful arrest" in this statute "means that the arrest must precede the breath test." *Fla. Dep't. of Hwy. Safety and Motor Vehicles v. Whitley,* 846 So.2d 1163, 1167 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a].

The narrative portion of Deputy Riggins' Arrest Report provides a sequence of events that reflects upon completion of his DUI investigation the breath test was administered "after an over 20-minute observation period *at the sally port of the county jail*." (emphasis added) After completion of the DUI investigation, including Petitioner's poor performance on field sobriety exercises and admission he was impaired, he was transported to the county jail where the breath test was administered. Once placed in the police car and transported to the county jail, Petitioner was under arrest. *See e.g. Kollmer v. State*, 977 So.2d 712 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D833a] (seizing individual, placing him in police car, and transporting him jail constitutes an arrest which must be founded on probable cause).

There are ambiguities or conflicts in the reports regarding the time of Petitioner's arrest. It is unclear whether the "arrest time" noted in the report of 2:17 a.m. was the time Petitioner was formally booked into the jail, was the time Deputy Riggins completed his paperwork, or is a typographical error. However, what is not ambiguous is the sequence of events in the narrative portion of the Arrest Report and FIBRS Report reflecting the roadside DUI investigation, resulting in the Petitioner being taken into custody for DUI and transported to the county jail where the breath test was performed.[2] Thus, there was competent, substantial evidence before the hearing officer to support the conclusion that Petitioner's breath test was administered incidental to a lawful arrest.

Accordingly, the hearing officer's Findings of Fact, Conclusions of Law and Decision is supported by competent, substantial evidence.

Therefore, it is ORDERED AND ADJUDGED that:

The Petitioner for Writ of Certiorari is hereby DENIED.

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[1]Although one could read the narrative portion of Deputy Riggins' Arrest Report to mean his first contact with Petitioner was on May 13, 2023 at 12:03 a.m., in another portion of the report, in a field entitled "Occur Date/Time Range," it reflects May 12, 2023 at 11:31 p.m. Because Deputy Riggins' first contact with Petitioner was upon observing him speeding, rather than a report to a call for service, this could mean the first contact with Petitioner was actually 11:31 p.m., rather than 12:03 a.m. This ambiguity is not germane to disposition of the issues raised in the Petition.

[2]The same sequence of events is also provided in Deputy Riggins' FIBRS Report, which was also before the hearing officer.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Officer who responded to single-vehicle crash had probable cause to arrest licensee for driving under influence after licensee demonstrated visible signs of impairment, including slurred speech, watery bloodshot eyes, and unsteady balance, and after licensee stated to witness that she was "high"—Hearing officer correctly applied law in concluding that fact that officer did not note odor of alcohol on licensee's breath was not dispositive in determining whether there was probable cause for arrest

LEEMARIE SANCHEZ, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2024 10090 CIDL. Division 01. July 24, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MICHAEL S. ORFINGER, J.) THIS CAUSE came before the Court on the Petition for Writ of Certiorari filed herein by Petitioner, LEEMARIE SANCHEZ [Doc. 2]. The Court has reviewed the Petition and the Appendix attached thereto, the Response submitted by Respondent STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("the Department") [Doc. 6], and the Petitioner's Reply [Doc. 7]. Being now duly advised in the premises, the Court finds the Petition for Certiorari should be denied.

On August 24, 2023, Petitioner was involved in a single vehicle crash in DeLand, Florida. Trooper Hudgen self-dispatched himself to the scene to assist Sergeant Van Buskirk, who was already at the scene and conducting a crash investigation [PX.B, 7].[1] Sergeant Van Buskirk identified Petitioner to Trooper Hudgen as the driver of the crashed vehicle. *Id.* Trooper Hudgen then made contact with Petitioner. He observed that Petitioner was having trouble keeping her balance, and that she had to lean against her vehicle on several occasions to keep from falling to the ground. *Id.* Petitioner almost fell to the ground several times anyway, and Trooper Hudgen and Sergeant Van Buskirk had to hold her up. *Id.* On further observation, Trooper Hudgen saw that Petitioner's eyes were watery and blood-

shot, and he noted that in addition to her balance difficulties, her speech was slurred. *Id.* After writing these observations in his probable cause affidavit, Trooper Hudgen wrote, "Based on my training I had probable cause to believe the defendant was impaired by an alcoholic drink." *Id.*

At this point, Trooper Hudgen informed Petitioner that he had completed his accident investigation and was now beginning a DUI investigation. [PX.B, 8]. Petitioner invoked her *Miranda* rights. Trooper Hudgen asked Petitioner to perform Field Sobriety Exercises ("FSEs"), which she refused to do. Trooper Hudgen gave Petitioner a second opportunity to perform the FSEs, and she refused again. *Id.* Next, Trooper Hudgen placed Petitioner under arrest. Trooper Hudgen asked Petitioner to furnish a breath sample to determine her blood alcohol level, but she refused. *Id.*

On the "Alcohol and Drug Influence Report" [PX.B, 10], Trooper Hudgen noted his observations that Petitioner's face was flushed, that her eyes were bloodshot, watery, glassy, and reddened around the rims, and that her speech was slurred, mumbling, and thick-tongued. *Id.* Of significance to Petitioner's argument in this case, the "Observations" section of the Alcohol and Drug Influence Report asks where there was an odor of alcoholic beverage on Petitioner's breath. Trooper Hudgen answered this question in the negative. *Id.* One of the witnesses from whom Sergeant Van Buskirk obtained a statement said that after the crash, Petitioner told the witness she was "high," and had a previous history of DUIs. [PX.B, 15].

As a result of Petitioner's refusal to submit to a breath alcohol test, and a second refusal after being advised of the consequences of such refusal, her driver's license was administratively suspended for one year by the Department.[2] *See* sections 316.1932(1)(a), 322.2615, Florida Statutes. Petitioner requested a formal review of the suspension as authorized by section 322.2615(6), Florida Statutes. As required by section 322.2615(7)(b), Florida Statutes, the scope of review at the hearing was confined to the following issues: (a) whether the law enforcement officer had probable cause to believe that Petitioner was either driving or in actual physical control of a motor vehicle in Florida while under the influence of alcohol or chemical or controlled substances; (b) whether Petitioner refused to submit to a breath test after being requested to do by a law enforcement officer; and (c) whether Petitioner was told that if she refused to submit to a breath test, her license would be suspended for a year, or if this was a second or subsequent refusal, for a period of 18 months [PX.A, 2]. After considering the documentary evidence presented at the hearing, and the written and oral arguments of Petitioner's counsel, the Hearing Officer upheld the administrative license suspension [PX.A, 4-5].

Petitioner timely filed the instant Petition for Writ of Certiorari with this Court. Petitioner disputes the Hearing Officer's denial of her various arguments and motions to invalidate the suspension, calling into question the existence of probable cause to arrest Petitioner for driving while under the influence of alcohol. Petitioner argued to the Hearing Officer, and argues again in this Court, that Trooper Hudgen had neither direct nor indirect evidence that Petitioner had consumed alcohol, such as the odor of alcohol on Petitioner's breath or otherwise, and therefore he could not have determined that probable cause existed to arrest her for driving while under the influence of alcohol.

Standard of Review

When reviewing an administrative agency decision, this Court must consider: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). Importantly, this Court cannot reweigh the evidence presented to the Hearing Officer or substitute its judgment for the findings of the Department's hearing officer. *See Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20 (Fla. 5th DCA 1989); *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether Smith's driver's license should have been suspended.")." In the instant case, Petitioner challenges the second and third elements of review, *i.e.,* whether the Hearing Officer observed the essential requirements of law, and whether the Hearing Officer's administrative findings and judgment are supported by competent substantial evidence.

Legal Analysis.

In the Court's view, Petitioner argument intermingles the second two elements of certiorari review. The crux of Petitioner's argument appears to be that because Trooper Hudgen did not smell alcohol on Petitioner's breath, he did not have probable cause to arrest her for driving under the influence of alcohol. Petitioner appears to argue that the Hearing Officer's finding that Trooper Hudgen did have probable cause for the arrest is not supported by competent substantial evidence, and that the Hearing Officer departed from the essential requirements of law by finding that probable cause could exist absent the odor of alcohol or other direct or indirect evidence in the documentary evidence that it was alcohol causing Petitioner's impairment.

Determining whether agency action is supported by competent substantial evidence means determining whether there is legally sufficient evidence to support the decision below. *See, e.g., Florida Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]. Perhaps the most common definition of "competent substantial evidence" appears in *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). There the Supreme Court of Florida defined the term as follows:

> We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

Id. at 916 (internal citations omitted).

To the extent Petitioner argues that a law enforcement officer must smell alcohol on the driver's breath before probable cause can exist to arrest the driver for a DUI attributable to alcohol, *see* Petition at p.5, [PX.B, 3], such is not the law in Florida. *See Dep't of Highway Safety & Motor Vehicles v. Rose,* 105 So. 3d 22, 24-25 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a], *rev. denied,* 121 So. 3d 1038 (Fla. 2013). Rather, "although an odor of alcohol is significant, it may not be dispositive. *State v. Kliphouse,* 771 So. 2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. Other factors 'may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.' *Id.*" *Mathis v. Coats,* 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b].

The Hearing Officer found as matters of fact that (a) Trooper Hudgen went to the scene of a one-vehicle crash in which Petitioner was involved; (b) Petitioner demonstrated signs of impairment; (c) those signs of impairment included slurred speech, watery, bloodshot eyes, and unsteady balance; (d) Petitioner was leaning on her vehicle and almost fell to the ground several times; (e) Petitioner was apologetic to one witness and stated she was "high;" (f) Trooper Hudgen noted no odor of alcohol on the Alcohol and Drug Influence Report; (g) Trooper Hudgen did not mention odor of alcohol in his probable cause affidavit; (h) Petitioner refused to perform FSEs, and (i) Petitioner refused to provide a breath sample after being advised of the consequences of refusal. [PX.A, 2-3]. The Court finds that these findings are supported by competent substantial evidence as defined in *DeGroot,* and that these factual findings are legally sufficient to support the Hearing Officer's decision.

Further, the Hearing Officer correctly stated the limited issues on which a formal review of the administrative suspension of Petitioner's driver's license could be based [PX.A, 2]. The Hearing Officer also correctly applied the law in concluding that the odor of alcohol on Petitioner's breath was not dispositive in determining whether Trooper Hudgen had probable cause to arrest her for driving under the influence of alcohol.[3] Thus, the Court concludes that the Hearing Officer did not depart from the essential requirements of law.

CONCLUSION AND RULING

Based upon all the foregoing, it is hereby ORDERED AND ADJUDGED that the Petition for Writ of Certiorari shall be, and the same is hereby DENIED.

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[1]References to the Appendix to the Petition are designated by "[PX.__, __]," where the blanks represent the letter of the exhibit followed by the page number(s) thereof. Documents in the court file are designated by "[Doc. __]," followed by the appropriate docket entry number.

[2]The Court cannot determine from the record whether Petitioner had ever previously refused to submit to a breath alcohol test, in which case the Department would have administratively suspended her license for 18 months.

[3]While Petitioner's primary argument relies upon the absence of any evidence of the odor of alcohol on Petitioner's breath, she also mentions the absence of any mention in the probable cause affidavit of "any circumstantial evidence that might tend to show that she was consuming alcohol, such as open containers, empty alcohol bottles, [or] odor of alcohol coming from the vehicle[.]" Petition at 3. The Hearing Officer made no mention of this fact. The Court mentions it here simply to acknowledge that the argument was made, but specifically does not intend for its mention to constitute a reweighing of the Hearing Officer's evidentiary findings.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop and arrest—Officer had reasonable suspicion for traffic stop and probable cause for DUI arrest where licensee was observed driving at high rate of speed, driving through closed shopping center, and driving off of road and onto grass three times; and, when stopped, licensee could not say where she was going or where she was coming from, could not produce registration, and could not pass any field sobriety exercises

CARY ALEXANDER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2023 12708 CIDL. Division 01. June 17, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MICHAEL S. ORFINGER, J.) THIS CAUSE came before the Court on Petitioner, CARY ALEXANDER's, Petition for Writ of Certiorari [Doc. 2]. The Court has reviewed the Petition and exhibits[1] attached thereto, the Response submitted by Respondent STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department") [Doc. 7], and the Petitioner's Reply [Doc. 9]. Being now duly advised in the premises, the Court finds the Petition for Certiorari should be denied.

This case arises from a traffic stop that occurred at approximately 1:09 a.m. on March 13, 2023 in South Daytona, Florida. The arrest affidavit prepared by South Daytona Police Officer Kyle Wells [PX.B, 2-5],[2] which was put in evidence before the Department Hearing Officer, showed that Officer Chiappa observed Petitioner driving her vehicle north on U.S. Highway 1 at what he believed to be a high rate of speed, after which she "cut through" a shopping center parking lot, and made a left turn heading toward Anastasia Drive and Ridge Boulevard. After Petitioner turned onto Anastasia Drive, Officer Chiappa observed Petitioner's vehicle drive off the paved portion of the road and into the grass three times. After Petitioner turned left onto Big Tree Road and then right on James Street, Officer Chiappa then made the traffic stop.

The body camera footage from Officer Chiappa shows that Petitioner was unable to answer even relatively simple questions, such as where she was going or coming from, without looking to her adult son for answers [PX. 3]. Officer Chiappa instructed Petitioner to get out of the car, and Officer Wells administered field sobriety tests, which Petitioner failed. The field sobriety tests are captured on Officer Wells' body camera footage [PX. 3]. Upon failing the exercises, Petitioner was placed under arrest for driving under the influence. She later refused to submit to a breath alcohol test, and as a result, her driver's license was administratively suspended for one year by the Department [PX. B-6].

Petitioner requested a formal review hearing of her license suspension, and that hearing was conducted on October 12, 2023 [PX. A]. In addition to the evidence introduced by the Department, Respondent pleased all the body camera footage into evidence, as well as a series of photographs [PX. A at 2; PX D-E].

In his decision dated October 23, 2023, the Hearing Officer upheld the administrative suspension of Petitioner's driver's license [PX A]. He found that Officer Chiappa

> had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if 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.

[PX. A, 6]. These findings constitute the limit of the Hearing Officer's scope of review. *See* § 322.2615, Fla. Stat.[3] The Hearing Officer further found "that all elements necessary to sustain the suspension for refusal to submit to a breath, blood, or urine test under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence." [PX. A, 6]. Accordingly, the Hearing Officer upheld the Department's administrative suspension of Petitioner's license. *Id.*

Petitioner timely filed her Petition for Writ of Certiorari [Doc. 2]. The Department filed a response as ordered [Doc. 7], after which Petitioner filed a reply [Doc. 9]. The Court has jurisdiction to consider this Petition pursuant to Fla. Stat. § 322.31 and Fla. R. App. P. 9.030(c)(3).

In reviewing an administrative agency decision by certiorari, this Court's role is strictly limited to consideration of: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). Petitioner does not argue

that she was not afforded procedural due process. Rather, she argues that the Hearing Officer's findings of fact are not supported by competent substantial evidence ("CSE"), and that the Hearing Officer departed from the essential requirements of law regarding vehicular stops. This Court does not agree.

Assessing the existence of CSE requires the Court to determine whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957) (defining "competent substantial evidence"). The Court in its review is not entitled to reweigh the evidence or substitute its judgment for the findings of the Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [petitioner's] driver's license should have been suspended").

"In order to effect a valid stop for DUI, the officer need only have a 'founded suspicion' of criminal activity." *Florida Dept. of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). Whether a suspicion is "founded" requires examination of the totality of the circumstances. "Although reasonable persons might differ regarding whether the circumstances observed by a police officer provide founded suspicion that criminal activity was afoot, certain other factors may be considered in determining the possibility of criminality. Those facts include the time of day, the day of the week, the location, the physical appearance of the subject, the behavior of any vehicle involved, or anything unusual in the situation as interpreted in light of the officer's knowledge." *State v. Pye,* 551 So. 2d 1237, 1238 (Fla. 1st DCA 1989).

In the instant case, there is CSE that Officer Chiappa acted correctly in pulling Petitioner over. By the time he made the stop at 1:09 a.m., Officer Chiappa had observed Petitioner driving at what he believed was a high rate of speed on U.S. 1, driving through the parking lot of a closed shopping center, and driving off the road into the grass three times on a residential street. Upon approaching Petitioner's vehicle and first speaking with her, the body camera footage that Petitioner asserts is at odds with the Department's evidence shows that (1) Petitioner could not say where she was going; (2) Petitioner could not say where she was coming from; (3) Petitioner could not produce the registration for the vehicle, producing various other documents from the glove compartment instead; and (4) Petitioner could not pass any of the field sobriety exercises. In short, there is ample CSE to demonstrate that the South Daytona Police Department had reasonable suspicion to effectuate a traffic stop on Respondent, and ultimately probable cause to arrest her for driving under the influence.

Cases Petitioner cites such as *Crooks v. State,* 710 So. 2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b] are of no avail to her. The defendant in *Crooks* was stopped after officers observed him drive over the right-hand line on the edge of the right lane of northbound traffic three times. *Id.* at 1042. The officers did not claim to be put in danger by these maneuvers, nor did they present evidence of how far over the line he drifted. There were no other cars or pedestrians near the defendant, and law enforcement did not believe the defendant was intoxicated. The traffic stop in *Crooks* was based on a violation of § 316.089(1), Fla. Stat., which stated, "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." *Id.* at 1043. In the absence of evidence of how far into the right-hand emergency lane the defendant drove, the *Crooks* court could not say he was outside the "practicable lane." *Id.* The Court said that a violation of section 316.089(1) "does not occur in isolation, but requires evidence that the driver's conduct created a reasonable safety concern." *Id.*

When viewing the totality of the circumstances, it is evident to this Court that *Crooks* is inapplicable to the instant case. The stop in *Crooks* took place at 2:30 in the afternoon on Interstate 75. The officer who stopped him did not think he was intoxicated or otherwise impaired. *See id.* at 1042. The defendant drove into the emergency lane but apparently stayed on the pavement. In the instant case, however, Petitioner was stopped shortly after 1:00 a.m. on a residential street after cutting through a closed shopping center's parking lot and veering off the road and into the grass three times. The photographic evidence Petitioner presented to the Hearing Officer demonstrates that, contrary to Petitioner's argument, driving off the road and into the grass even once, let alone three times, presents a danger both to third parties and to Petitioner herself. The photographs show that the grassy areas appear to directly abut and run parallel with the driving lanes of the road. Regardless of the time of day, one who drives in the grass parallel to the road must avoid such things as mailboxes, trees, and what appears to be at least one tree stump. Unlike *Crooks,* Petitioner in the instant case did in fact create a reasonable safety concern, and thus the traffic stop was proper.

In sum, the Court concludes that Petitioner has failed to demonstrate that the Hearing Officer departed from the essential requirements of law, or that the decision of the Hearing Officer was not supported by competent substantial evidence. Therefore, it is now

ORDERED AND ADJUDGED that the Petition for Certiorari shall be, and the same is hereby DENIED.

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[1]Among the exhibits the Court reviewed was the body camera footage referenced in the Petition and the Response, but which the Court recently had to order Petitioner to resubmit.

[2]References to the Appendix to the Petition are designated by "[PX. __, __]," where the blanks represent the letter of the exhibit followed by the page number(s) thereof. Documents in the court file are designated by "[Doc. __]," followed by the appropriate docket entry number.

[3]The Department correctly points out on page 7 of its Response to the Petition that "implicit within this scope of review is consideration of the lawfulness of the arrest." Response at p.7 [Doc. 7] (citing *Fla. Dept. of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S243a].

* * *

Licensing—Driver's license—Revocation—Fourth DUI conviction—Appeals—Certiorari—Record on first-tier certiorari review of license revocation that was not the subject of a formal review hearing is limited to items before the Department of Highway Safety and Motor Vehicles when it made decision to revoke license—Certified driving record showing four DUI convictions, without more, constitutes competent substantial evidence to establish prior convictions—Due process—Prior notice or preliminary hearing is not required when department permanently revokes license for four DUI convictions—No merit to claim that licensee was not notified of revocation and right to request review hearing where notice of revocation was sent to licensee's last known address—No merit to argument that department departed from essential requirements of law by permanently revoking license despite negotiated criminal plea for fourth DUI that included agreed one-year license suspension—Plea agreement cannot affect department's statutorily mandated administrative revocation action

DAVID KENT JOHNSON, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 12th

Judicial Circuit (Appellate) in and for Manatee County. Case No. 2023-CA-004744. July 8, 2024. Petition for Writ of Certiorari to the Circuit Court of the Twelfth Judicial Circuit for Manatee County; sitting in its appellate capacity. Counsel: William C. Price, III, William C. Price, III, P.A., West Bradenton, for Petitioner. Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, Tampa, for Respondent.

(EDWARD NICHOLAS, J.) David Kent Johnson ("Petitioner") petitions the Court to issue a writ of certiorari quashing a July 10, 2023, Notice of Order of Revocation and Final Order ("Final Order") issued by the Department of Highway Safety and Motor Vehicles ("Department" or "Respondent") permanently revoking his driving privilege. This Court has jurisdiction under § 322.31, Fla. Stat.

I. Case Background

Petitioner entered a negotiated plea on March 7, 2023, to a driving under the influence ("DUI") charge, requiring a one-year suspension of his driving privilege. The criminal trial court approved the plea and ordered a one-year suspension of Petitioner's driving privilege. On July 10, 2023, the Department entered the Final Order notifying Petitioner that his driving privilege was permanently revoked, pursuant to § 322.28, Fla. Stat., because of four DUI convictions. In addition to the March 7, 2023, DUI conviction, the Final Order listed DUI convictions from Manatee County in 1980, 1986, and 1996. The Final Order further specified that Petitioner could request a hearing pursuant § 322.271, Fla. Stat., should he believe there is any basis why permanent revocation of his driving privilege was incorrect, and stated that he had 30 days to appeal the Final Order under § 322.31, Fla. Stat.

On August 7, 2023, Petitioner timely filed a Petition for Writ of Certiorari ("Petition") pursuant to § 322.31, Fla. Stat. By order rendered November 6, 2023, the Court directed the Department to show cause why the relief requested in the Petition should not be granted. The Department filed its Response to Petition for Writ of Certiorari on December 20, 2023, (the "Response") with Petitioner filing a reply on February 9, 2024.

Thereafter, the Court ordered the Department to file a supplemental appendix containing Petitioner's unredacted address within: (1) the Final Order; and (2) Petitioner's certified driving record. The Department complied with the Court's order on April 4, 2024.

II. Standard of Review

On first-tier certiorari review of an administrative decision, the Court must determine: "(1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Fla. Dep't. of Highway Safety & Motor Vehicles,* 209 So.3d 1165, 1170-1 (Fla. 2017) [42 Fla. L. Weekly S85a] (citing *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles,* 87 So.3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a] and quoting *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]) (citations and footnote omitted). Petitioner claims that the Department's decision to permanently revoke his driving privilege violated all three prongs on certiorari review.

III. Appendices

As an initial matter, the Court emphasizes that on first-tier certiorari, its review is limited to the record items before the Department when it made its decision to permanently revoke Petitioner's driving privilege. Fla. R. App. P. 9.190(4)(1) ("Appendices must not contain any matter not made part of the record in the lower tribunal"); *see also Vichich v. Dep't of Highway Safety & Motor Vehicles,* 799 So.2d 1069, 1073 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a] (finding that a circuit court on first-tier certiorari review departs from the essential requirements of the law by engaging in fact-finding and considering evidence beyond the appellate record). As noted in *Vichich,* when the Department does not conduct an administrative hearing to determine the sufficiency of a driving privilege revocation, the appellate court may be uncertain what "records constitute the record in [these] specific quasi judicial proceeding[s]. . ." 869 So. 2d at 1073. Petitioner and the Department seem to agree that the revocation is based on Petitioner's certified driving record. Pet. 4; Resp. 8.

Based on the foregoing, the Court shall review Petitioner's arguments based on his certified driving record, copies of which are contained in Petitioner's Appendix 4, Respondent's Appendix 2, and Respondent's Supplemental Appendix 2. The Court shall also consider the Final Order contained in Respondent's Appendix 1 and Respondent's Supplement Appendix 1, pursuant to Fla. R. App. P. 9.220(b). Items 1, 2, 3, 5, and 6 in Petitioner's Appendix, and item 3 in Respondent's Appendix, shall not be considered in the Court's adjudication of the Petition.

IV. Analysis

A. Competent, Substantial Evidence

Petitioner argues that his computerized driving record does not constitute competent, substantial evidence that he was convicted of four DUI offenses. Petitioner "denies or does not remember" the three DUI convictions between 1980 and 1996. Pet. 2. Accordingly, Petitioner contends that the Department lacked competent, substantial evidence to revoke his driving privilege.

In response, the Department states that the certified driving record is sufficient proof upon which it can rely to revoke a person's driving privilege. The Court agrees. *See* § 316.193(12), Fla. Stat. ("If the records of the Department. . . show that the defendant has been previously convicted of the offense of driving under the influence, that evidence is sufficient by itself to establish that prior conviction for driving under the influence. However, such evidence may be contradicted or rebutted by other evidence. . ."); *see also Littman v. Dep't of Highway Safety & Motor Vehicles,* 869 So. 2d 711, 713 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D851b] (holding that a certified copy of a driving record is sufficient to prove by a preponderance of the evidence that the petitioner had been convicted of DUIs requiring revocation of his driving privilege). The Petitioner's certified driving record unequivocally shows that Petitioner received DUI convictions on December 16, 1980, January 22, 1986, August 16, 1996, and March 07, 2023, and Petitioner does not allege there was contrary evidence before the Department when it entered the Final Order.[1] Accordingly, competent, substantial evidence existed to revoke Petitioner's driving privilege under § 322.28(2)(d), Fla. Stat.

Based on the foregoing, Petitioner's claim that his certified driving record alone does not amount to competent, substantial evidence to revoke his driving privilege for obtaining four DUI convictions is **DENIED.**

B. Procedural Due Process

Next, Petitioner claims that the Department failed to afford him due process by permanently revoking his driving privilege without the ability to contest or have a preliminary hearing prior thereto.

The Court does not find merit in Petitioner's claim. Prior notice or a preliminary hearing is not required when the Department permanently revokes a person's driving privilege for four DUI convictions. § 322.28(2)(d), Fla. Stat. ("The court shall permanently revoke the driving privilege of a person who has been convicted four times for violation of s. 316.193 or former s. 316.1931 or a combination of such sections. . .**If the court has not permanently revoked such driver license or driving privilege within 30 days after imposing sentence, the department shall permanently revoke the driver license or driving privilege pursuant to this paragraph**. . .") (Emphasis supplied); *see also Dep't of Highway Safety & Motor Vehicles v. Davis,* 775 So.2d 989 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2744b] and *Dawson v. State of Fla., Dep't of Highway Safety & Motor Vehicles,* 19 So.3d 1001, 1003-4 (Fla. 4th DCA 2009) [34 Fla.

L. Weekly D1583a] (holding that the Department revoking driving privileges without prior notice or opportunity to be heard did not violate due process clause). As explained in *Davis,* and reinforced in *Dawson,* due process is not violated because the driver can request a hearing upon receipt of the revocation. In Petitioner's case, such hearing is authorized pursuant § 322.271(1)(a), Fla. Stat., which states in relevant part:

> "Upon the . . . revocation of the driver license of any person as authorized or required in this chapter,. . .the [D]epartment shall immediately notify the licensee and, upon his or her request, shall afford him or her an opportunity for a hearing pursuant to chapter 120, as early as practicable within not more than 30 days after receipt. . ."

The Court rejects the Department's contention that Petitioner "waived his right to such a hearing when he chose to not request the hearing." Resp. 5. The Department cites no authority for this assertion, and the plain language of § 322.271(1)(a), Fla. Stat., does not place a time requirement on Petitioner's ability to request a hearing in front of the Department. *See Parker v. Dep't of Highway Safety & Motor Vehicles,* 338 So.3d 450, 454 n. 3 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1013a] (explaining that § 322.271(1)(a), Fla. Stat., entitles a driver to request an agency review hearing upon receiving notification of the revocation); *see also* 15A-1.0195, Fla. Admin Code ("Right of Review. Any person whose driving privilege has been cancelled, suspended or revoked, may petition the Department for an administrative review to present evidence showing why their driving privilege should not have been cancelled, suspended, or revoked. Application for such review shall be made by personal letter specifying the action for which the review is requested, and the documents in the possession of the Department which the licensee requests to review.").

However, the Court notes that pursuant to § 322.251, Fla. Stat., Petitioner was provided notice of his revocation and his right to request a review hearing, despite his claim that he never received the Final Order. Section 322.251, Fla. Stat., states in relevant part:

> "(1) All orders of . . .revocation . . . issued under the provisions of this chapter. . . shall be given either by personal delivery thereof to the licensee . . .or by deposit in the United States mail in an envelope, first class, postage prepaid, addressed to the licensee at his or her last known mailing address furnished to the [D]epartment. Such mailing by the [D]epartment constitutes notification, and any failure by the person to receive the mail order will not affect or stay the effective date or term of the . . .revocation. . .of the licensee's driving privilege. . .
>
> . . .
>
> (2) The giving of notice and an order of cancellation, suspension, revocation, or disqualification by mail is complete upon expiration of 20 days after deposit in the United States mail . . . Proof of the giving of notice and an order of cancellation, suspension, revocation, or disqualification in either manner shall be made by entry in the records of the [D]epartment that such notice was given. The entry is admissible in the courts of this state and constitutes sufficient proof that such notice was given.

The unredacted address contained within the Final Order and Petitioner's certified driving record show that the Department mailed written notice of Petitioner's driving privilege revocation to his last known address on record with the Department.[2] Resp't Supp. App. 1-2.

Accordingly, Petitioner's claims that his due process rights were violated by the Department's decision to permanently revoke his driving privilege based on a fourth DUI conviction are **DENIED**.

C. Essential Requirements of the Law

Petitioner's final claim is that the Department's decision to permanently revoke his driving privilege departed from the essential requirements of the law. Petitioner seems to argue that he pled to a third DUI conviction outside of a ten-year period, with an agreed one-year suspension of his driving privilege, and since this plea was approved by the criminal trial court the maximum permissible revocation of his driving privilege is one year.[3]

Defendant's argument is flawed. "Any bargain a defendant may strike in a plea agreement in a criminal case has no bearing on administrative consequences that flow from the defendant's actions." *State of Fla., Dept. of Highway Safety & Motor Vehicles v. Gordon,* 860 So.2d 469, 471 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2498b] (citing *State v. McFarland,* 884 So.2d 957 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2298a]). Therefore, Petitioner's negotiated criminal plea to his fourth DUI cannot affect the Department's statutorily mandated administrative action. Further, as found earlier, the Department was required to revoke Petitioner's driving privilege pursuant to § 322.28(2)(d), Fla. Stat., based on the four DUI convictions on his certified driving record.

Based on the foregoing, the Petition for Writ of Certiorari is **DENIED**.

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[1]The Court again emphasizes that under the bounds of first tier certiorari it cannot consider whether this presumption was rebutted by evidence outside of the record.

[2]The August 7, 2023, Petition, represents Petitioner still lived at this address on the date the Final Order was mailed in July 2023. Pet 3.

[3]Petitioner affirmatively states the Department's action departed from the essential requirements of the law, however, the "ARGUMENT" section of the Petition fails to provide any factual support to this claim. However, since the Petition states that Petitioner pled to a third DUI and the criminal trial court specified the period of revocation was a year, therefore, the maximum permissible revocation is one year, the Court addresses Petitioner's essential requirements of the law claim within the parameters of this allegation.

* * *

WAYNE FRAZER, Plaintiff, v. THE VALVE ADJUSTMENT BOARD, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24000054. Division AP. August 13, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Orders to Show Cause dated March 26, 2024, and June 4, 2024. Appellant was directed by this Court to file an Initial Brief within 30 days. Appellant was warned that pursuant to Florida Rules of Appellate Procedure 9.410(a) a failure to comply would result in immediate dismissal of this appeal. As of the date of this Order Appellant has failed to comply with this Court's March 26, 2024, Order and file a proper Initial Brief and Appendix. Appellant's April 24, 2024, Initial Brief fails to comply with rules 9.210 and 9.220. Moreover, Appellant has failed to file a response to Appellee's Motion to Dismiss as directed by the Court. This appellate proceeding has been pending since January 3, 2024.

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

* * *

YOH HOLDINGS, LLC, Plaintiff, v. CITY OF LIGHTHOUSE POINT, FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24007451. Division AP. August 13, 2024.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon Appellant's Notice of Withdrawal of Appeal, dated June 26, 2024. Upon review of the notice and Court file, this Court finds as follows:

Appellant's Notice of Withdrawal is hereby **ACCEPTED** by this Court and this proceeding is dismissed with prejudice. Additionally, per Appellant's request, jurisdiction of the Order of Imposition of Fine

and Claim of Lien dated May 1, 2024, is hereby returned to the Special Magistrate for Code Enforcement for the City of Lighthouse Point, Florida.

The Broward County Clerk of Courts is **DIRECTED** to assign this case as "disposed" by way of Appellant's Voluntary Dismissal.

* * *

FULLER FARMS, LLC, Plaintiff, v. THE TOWN OF DAVIE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24004838. Division AP. August 13, 2024.

ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THE COURT** has been advised that this matter has been resolved as to all parties and therefore, it is hereby:

ORDERED AND ADJUGED that this case is *dismissed with prejudice* and that each parties shall bear its own fees and costs.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful alcohol level—Licensee under age 21—Hearings—Timeliness—Failure to conduct formal review hearing within 30 days of request for hearing did not deprive licensee of due process where hearing was scheduled to occur within 30 days, as required by statute, and was continued due to unavailability of hearing officer—Affidavits—Although attesting officer mistakenly signed his name on both "signature of law enforcement officer" line and "signature of notary public" line of probable cause affidavit, minor technical defect does not render affidavit a nullity where another officer properly attested to affidavit—Incident report was not required to be in affidavit form or made under oath—Breath test—Where licensee did not raise argument regarding approval of breath testing machine before hearing officer, argument cannot be raised on appeal—Scrivener's error in citing model of Intoxilyzer used to test licensee's breath does not render breath test result affidavit a nullity—Breath test affidavit is presumptive proof of licensee's impairment—Hearing officer's decision to uphold suspension was supported by competent substantial evidence

ALLISON WALKER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 23-07-AP. June 26, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

(CHRISTOPHER SPRYSENSKI, J.) Petitioner Allison Walker seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of her driver's license for driving or being in actual physical control of a motor vehicle with an unlawful alcohol level while under the age of 21. This Court has jurisdiction pursuant to section 322.2616(14), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

BACKGROUND

On March 24, 2023, at approximately 12:44 a.m., UCF Police Officer Frank Imparato conducted a traffic stop after he observed a white Jeep Cherokee being driven on campus without headlights. Upon making contact with Petitioner, the driver of the white Jeep Cherokee, Officer Imparato smelled the odor of alcohol coming from inside the vehicle and noticed that Petitioner had bloodshot and watery eyes. Petitioner advised Officer Imparato that she had been at a social event and consumed half of a bottle of wine at approximately 8:00 p.m. Officer Imparato asked Petitioner to step out of the vehicle and once in close proximity to her, he noticed the odor of alcohol was coming directly from Petitioner's facial area and she had a "noticeable orbital sway." She agreed to participate in field sobriety exercises. Based on his investigation, Officer Imparato did not believe he had probable cause to arrest Petitioner for driving under the influence, but he did offer her the opportunity to take a roadside breath test. She agreed and the samples measured .072 and .068. Petitioner was issued a notice of driver's license suspension for breath test results of above .02 while under the age of 21. She was released on the scene and her vehicle was released to her parents. Her license was suspended pursuant to section 322.2616, Florida Statutes. She sought formal review of the license suspension.

The Department conducted an initial formal review hearing on June 15, 2023. The hearing was originally scheduled for April 27, 2023, but was continued by the hearing officer. The following documents were submitted into the record: Notice of Suspension, photocopy of Petitioner's Florida Class E Driver License, Affidavit of Probable Cause, Incident Report, Breath Test Result Affidavit for Under Age 21 Suspensions, and the U.S. Department of Transportation Conforming Products List of Evidential Breath Measurement Devices. Counsel for Petitioner moved to exclude the Incident Report and two Affidavits, and moved to set aside the license suspension arguing that Petitioner was entitled to have a hearing within the thirty-day period required under section 322.2616(7)(a), Florida Statutes. The hearing officer reserved ruling on the motions. No witnesses were called at the hearing.

On June 23, 2023, the hearing officer issued her Final Order of License Suspension. The hearing officer found that Petitioner was driving without headlights at 12:44 a.m., admitted being at a party where she consumed one-half bottle of wine, was under 21 years of age, performed field sobriety exercises poorly, displayed additional signs of impairment, and submitted to a breath test with results of 0.072 and 0.068. The hearing officer concluded that Petitioner's driving privilege was properly suspended for six months. Petitioner filed a timely petition to appeal the suspension.

STANDARD OF REVIEW

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (internal citation omitted).

ANALYSIS

In a formal review hearing pursuant to section 322.2616 for suspension of a driver's license for driving with blood-alcohol level or breath-alcohol level of 0.02 or higher while under the age of 21 years old, the hearing officer's scope of review is limited to the following issues:

> 1. Whether the law enforcement officer had probable cause to believe that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages.
>
> 2. Whether the person was under the age of 21.
>
> 3. Whether the person had a blood-alcohol level or breath-alcohol level of 0.02 or higher.

§ 322.2616(8)(a), Fla. Stat. (2023).

"The hearing officer shall determine whether the suspension . . . is supported by a preponderance of the evidence," and "is the sole decision maker as to the weight, relevance and credibility of any

evidence presented." Fla. Admin. Code R. 15A-6.013(7)(c); § 322.2616(8), Fla. Stat. (2023). "The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or correctional officer, including documents relating to the administration of a breath test or the refusal to take a test." § 322.2616(12), Fla. Stat. (2023); *see also* Fla. Admin. Code R. 15A-6.013(2) ("The hearing officer may consider any report or photocopies of such report submitted by a law enforcement officer . . . relating to the suspension of the driver, the administration or analysis of a breath or blood test, [or] the maintenance of a breath testing instrument . . ."). Such reports are self-authenticating. Fla. Admin. Code R. 15A-6.013(2) ("Any such reports submitted to the hearing officer shall be in the record for consideration by the hearing officer. No extrinsic evidence of authenticity as a condition precedent to admissibility is required.")

Petitioner argues that: (1) the hearing officer departed from the essential requirements of law because she failed to provide a formal review hearing within thirty days of receiving Petitioner's timely request; (2) the Department departed from the essential requirements of law because it failed to submit affidavits that were properly signed and notarized; and (3) the hearing officer's judgment is not supported by competent, substantial evidence of Petitioner's breath-alcohol level because the breath test device utilized in this case was not listed on the U.S. Department of Transportation Conforming Products List of Evidential Breath Measurement Devices.

Timeliness of Formal Review Hearing

Petitioner contends that she was not provided a meaningful hearing within thirty days under section 322.2616(7)(a), Florida Statutes. The Department argues that Petitioner was not deprived of due process because a hearing was properly scheduled within thirty days.

As Petitioner acknowledges in her petition, section 322.2616(7)(a) provides that when the person whose license was suspended requests a formal review, "the department must *schedule* a hearing to be held within 30 days after the request is received by the department and must notify the person of the date, time, and place of the hearing." § 322.2616(7)(a), Fla. Stat. (2023) (emphasis added); *see also* Fla. Admin. Code R. 15A-6.013(1) ("Upon receipt of a timely request for formal review, the division shall schedule a hearing to be held within 30 days after the request is received by the division, unless waived by the driver."). "If the department fails to *schedule* the formal review hearing within 30 days after receipt of the request therefor, the department shall invalidate the suspension." § 322.2616(10), Fla. Stat. (2023) (emphasis added).

Here, the Department received Petitioner's request for a formal review hearing on March 31, 2023. The hearing was originally scheduled for April 27, 2023, and was subsequently continued due to the hearing officer's unavailability.[1] Thus, the Department complied with the statute by *scheduling* the hearing within thirty days of receipt of Petitioner's request.

Furthermore, nothing in the statute or relevant case law requires the Department to actually conduct or complete the formal review hearing within thirty days. *See Donohue v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 551b (Fla. 17th Cir. Ct. Mar. 5, 2013) (holding petitioner misinterpreted section 322.2615(6)(a) by arguing he had a right to a *completed* formal review hearing within thirty days of his request); *Vodar v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 226a (Fla. 13th Cir. Ct. Jan. 11, 2008) (holding petitioner's argument that Department deprived her of due process rights by not holding hearing within thirty days lacked merit, and if hearing was required to be conducted within thirty days "there would be no purpose of any rules outlining continuance procedures under section 322.2615(9)"). As such, Petitioner was not deprived of a meaningful hearing and, therefore, there was no departure from the essential requirements of law.

Sufficiency of the Affidavits

Petitioner argues that the Affidavit of Probable Cause was not properly signed or notarized because Officer Imparato improperly attested to his own signature by signing on the line labeled "attesting officer," and the identity of the affiant could not be established. She also argues that the Incident Report does not meet the statutory requirements for an affidavit because it does not contain any signatures. The Department argues that the Affidavit was properly signed by Officer Imparato and included language indicating the Affidavit was sworn and subscribed before another person who signed on the "signature of notary public" line and the "personally known" option was circled.

As Petitioner acknowledges in her petition, section 117.10, Florida Statutes, authorizes law enforcement officers to administer oaths in the physical presence of an affiant when engaged in the performance of official duties; however, an officer may not notarize his own signature. § 117.10(2), Fla. Stat. (2023). The Affidavit of Probable Cause contains two different signatures—what appears to be the signature of Officer Frank Imparato on the "signature of law enforcement officer" line and the "signature of attesting officer" line, and the signature of another officer on the "signature of notary public" line—and the "personally known to me" option was circled. Although it appears that Officer Imparato mistakenly signed his name a second time on the "signature of attesting officer" line, another officer properly attested to the Affidavit and such "minor technical defects in an affidavit do not render it a nullity." *Gupton v. Dep't of Highway Safety,* 987 So. 2d 737, 738 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1700a] ("Since no seal was on the document, it is not unreasonable to conclude that the attestor was a fellow law enforcement officer, a conclusion buttressed by common experience and the fact that the attestor indicated that the affiant was personally known to him.").

Furthermore, section 322.2616 does not require that the Incident Report be in affidavit form or under oath. *See Dep't of Highway Safety v. Edgell-Gallowhur,* 114 So. 3d 1081, 1086-87 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1312a] (holding the circuit court departed from the essential requirements of law in finding that the speeding citation could not be considered as part of the sworn documents where it was not properly incorporated into the arrest affidavit because section 322.2615 "does not require that any other document submitted to the hearing officer—including the alcohol test report; the DUI Test Report . . . ; the results of any breath or blood test; a crash report or videotape of the field sobriety exercises—be in affidavit form or under oath.").

Additionally, Petitioner did not challenge the authenticity of the Affidavit or Incident Report themselves, and did not subpoena Officer Imparato or any other officer to challenge the authenticity of the signatures or attestation. The hearing officer obviously found the Affidavit and Incident Report to be sufficient, and this Court cannot reweigh that evidence. *See Dep't of Highway Safety v. Brown,* 179 So. 3d 547 (Fla. 3d DCA. 2015) [40 Fla. L. Weekly D2651a] ("Because the circuit court was acting in an appellate capacity when reviewing the factual findings of the hearing examiner, the circuit court could not reweigh this evidence."). Thus, the Court finds that the Affidavit of Probable Cause and Incident Report were sufficient and properly considered by the hearing officer; thus, the Department did not depart from the essential requirements of law.

Evidence of Breath-Alcohol Level

Petitioner contends that the hearing officer's decision is not supported by competent, substantial evidence because there was no proper predicate showing that the breath test device used in this case was an approved device. The Department argues that Petitioner failed to move to invalidate the suspension based on this argument and

therefore the argument is waived. The Department alternatively argues that the Breath Test Result Affidavit was sufficient evidence of compliance.

The hearing transcript shows that although Petitioner's counsel argued that the Breath Test Result Affidavit was not the best evidence for a breathalyzer test, counsel did not argue that the breathalyzer device was not in the conforming products list at the hearing. This Court's review is "limited to the issues raised before the hearing officer." *Dep't of Safety & Motor Vehicles v. Marshall,* 848 So. 2d 482, 485 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b]. Because Petitioner did not raise this argument before the hearing officer at the formal review hearing, the argument is waived and cannot be properly used as a basis for reversal of the hearing officer's decision to suspend her license. *Dep't of Highway Safety & Motor Vehicles v. Lankford,* 956 So. 2d 527, 527-28 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a].

Even if the argument had been presented to the hearing officer, there was competent, substantial evidence of Petitioner's breath-alcohol level. First, the Court notes that although the Affidavit lists "Intoxilyzer 800" as the breath test device used in this case, this appears to be a mere scrivener's error as the "Intoxilyzer 8000" is listed in the conforming products list. As stated above, "minor technical defects in an affidavit do not render it a nullity." *Gupton,* 987 So. 2d at 738.

Second, the Breath Test Result Affidavit constitutes presumptive proof of Petitioner's impairment. *See Dep't of Highway Safety & Motor Vehicles v. Berne,* 49 So. 3d 779, 783 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D2238e] ("Once admitted, the affidavit 'is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath . . . .' ") (citing § 316.1934(5), Fla. Stat. (2005)). Here, the Affidavit included the serial number of the breath test device used, indicated that the device was listed in the conforming products list, that it had been properly calibrated and checked in accordance with the manufacturer's and/or agency's procedures, and that Officer Imparato administered the breath test in accordance with section 322.2616, Florida Statutes. Thus, the hearing officer's decision was supported by competent, substantial evidence. *See Dep't of Highway Safety & Motor Vehicles v. Alliston,* 813 So. 2d 141, 144 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D610a] ("Once the breath test results were admitted into evidence, the record contained competent, substantial evidence of impairment, and the burden shifted to Mr. Alliston."); *Sapienza v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 42a (Fla. 9th Cir. Ct. June 2, 2014).

Based upon the foregoing, it is hereby **ORDERED** and **ADJUDGED** that Petitioner Allison Walker's "Petition for Writ of Certiorari" is **DENIED**. (RUDISILL and STACY, JJ., concur.)

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[1]*See Niemann v. Dep't of Highway Safety & Motor Vehicles*, 30 Fla. L. Weekly Supp. 528a (Fla. 6th Cir. Ct. Oct. 21, 2022) (holding the petitioner was not deprived of due process where formal review hearing was timely scheduled within thirty days but hearing officer continued formal review hearing due to unavailability).

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of arrest—Officer conducting crash investigation was not required to personally witness licensee driving in order to make lawful arrest—Officer could rely on witnesses to place licensee behind wheel

CHRISTOPHER GIULIANO, Plaintiff, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Defendant. Circuit Court, 20th Judicial Circuit (Appellate) in and for Charlotte County. Case No. 23001492CA. June 20, 2023. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Defendant.

Order Denying Petition for Certiorari

(GEOFFREY H. GENTILE, J.) **THIS CAUSE** came before the court on June 20, 2023 on Christopher Giuliano's (Plaintiff) Petition for Writ of Certiorari (4/13/23); Order to Show Cause (4/14/23); State's Response (5/16/23); Plaintiff's Reply (6/1/23); and Plaintiff's Supplemental Authority (6/5/23); counsel for the parties having agreed to waive oral argument and the Court being otherwise fully advised in the premises, finds as follows:

There was competent substantial evidence to support the following factual conclusions. Plaintiff was driving his car, leaving a restaurant and crashed into another car. Plaintiff confirmed these facts and added that he had alcohol earlier in the day. An off duty officer (from another jurisdiction) heard and saw the crash. The investigating officer was investigating the crash but did not see Plaintiff behind the wheel. The investigating officer saw that Plaintiff had bloodshot eyes and slurred speech and had odor of alcohol coming from Plaintiff's breath. Due to his medical history, Plaintiff could not undergo all the physical testing for impairment. Plaintiff otherwise refused testing. Based on the testing he did perform, the investigating officer determined that there was probable cause to believe Plaintiff was driving his car while leaving the restaurant while impaired.

This Court's review is limited to three issues: 1) whether procedural due process was accorded, 2) whether the essential requirements of the law were observed and 3) whether the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624,626 (Fla. 1982).

Most pointedly, Plaintiff argues that the arresting officer lacked probable cause because the officer did not personally witness Plaintiff operating the vehicle. Section 316.645 provides an exception to the rule that the officer must personally witness the driver behind the wheel. Because the arresting officer here was conducting a crash investigation, he could rely upon other witnesses to place Plaintiff behind the wheel. Florida Statute Section 316.645 provides an exception to the requirement that the officer personally witness Plaintiff driving. *State v. Hemmerly,* 723 So.2d 324,326 (Fla. 5th DCA 1999) [23 Fla. L. Weekly D2666b]. See, other citations in State's Response at page 11-15).

Here, there was a crash, the investigating officer was investigating the crash and could rely on others to place Plaintiff behind the wheel.

The Court otherwise finds that Plaintiff was accorded procedural due process, the essential requirements of law were observed and the administrative findings were supported by competent substantial evidence.

For the foregoing reasons, the Petition for Writ of Certiorari is denied and the Clerk is instructed to close the file.

* * *

Volume 32, Number 6
October 31, 2024
Cite as 32 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Torts—Conversion—Plaintiff met its burden of proving that defendant that purchased property on which salvage company was located and "all personal and other property currently located" on the property took dominion over property owned by plaintiff and stored on the property and permanently disposed of it for money or otherwise—Plaintiff was not required to prove that defendant either knew property belonged to plaintiff or that defendant intended to convert the property—Damages awarded—Breach of contract—Claim by operator of salvage company against plaintiff for breach of contract based on Deposit Receipt and Acknowledgment between salvage company and plaintiff for sale of property that was ultimately unsuccessful fails where contract contained liquidated damages provision that allowed company to retain $50,000 deposit, which it did—Unjust enrichment—Salvage company's claim against plaintiff for unjust enrichment, seeking reimbursement for cost of clean up work it did on property after plaintiff was locked out of property, fails where there was an express contract between the parties, there was no evidence that plaintiff requested or voluntarily accepted salvage company's post-lockout work, and company's decision to do clean-up work did not benefit plaintiff—Property owner has valid claim for unjust enrichment against plaintiff where plaintiff sold equipment belonging to property owner—Further plaintiff owes rent for one month it remained on property after it was purchased by new owner—Complaint—Amendment of complaint to conform to evidence—Vicarious liability—Although post-trial motion to amend complaint to conform to evidence regarding property owner's vicarious liability for the actions of operator of salvage company was not untimely, the only plausible scenario for vicarious liability would be agency, and plaintiff failed to prove existence of principal-agency relationship

RUBEN GOMEZ and FIRST STOP AUTO SALES, LLC, Plaintiff/Counter-Defendant/ Third-Party Defendant, v. 31556 BLUE STAR, LLC, Defendant/Counter-Plaintiff, and ACE SALVAGE, INC., Third-Party Plaintiff. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2023-CA-461. July 12, 2024. David Frank, Judge. Counsel: James M. Durant, Jr., Berger Singerman, LLP, Tallahassee, for Plaintiff. David K. Markarian and David R. Glickman, Palm Beach Gardens, for Defendant.

FINAL JUDGMENT

This action was tried before the Court May 29 - 30, 2024. All parties were present in person with their counsel. On the evidence presented

Introduction

In a non-jury trial such as this the Court assumes the role of jurors, which means that in addition to legal issues, it must determine the facts. It is a solemn responsibility that this Court takes very seriously.

Although the attorneys did the best that they could given the facts of the case and availability of proof, the parties' presentations were at many junctures ambiguous and conflicting. The Court had to rely heavily on its assessment of witness and exhibit credibility and weight as it strived to reconcile large amounts of information that pointed in different directions.

In evaluating the believability of the witnesses and the weight to give the testimony of each, the Court considered the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case.

And, of course, the burden of proof for the plaintiff, counterplaintiff, and third-party plaintiff is greater weight of the evidence, which is the more persuasive and convincing force and effect of the entire evidence in the case.

Findings of Fact and Conclusions of Law

I. The Purchase Agreements and Lock Out

On February 29, 2022, a Receipt of Deposit and Acknowledgement was signed by Ruben Gomez, on behalf of plaintiff (First Stop"), and Sandra Doty, as owner of Ace Salvage, Inc., that depicted an agreement to pursue First Stop's purchase of the subject property (31556 Blue Star Highway, Midway, Florida) and the business that had operated on it, Ace Salvage, Inc., from Ms. Doty for $600,000. First Stop paid a $50,000 deposit. First Stop's "investors," needed to fund the purchase, pulled out due to concerns over environmental regulations and inspections. First Stop advised Doty and requested more time. Doty denied the request and sought another buyer. The deposit was never returned.

Doty gave First Stop the key to the premises, ". . .with the purpose of the Buyer being able to clean up the property and set appointments for inspections prior to the actual closing date. . . ." First Stop did much more. It brought hundreds of vehicles and other equipment onto the property and began to store and process the vehicles and other items for salvage. Doty testified that she really did not know First Stop was doing all of these things, but her testimony on this point was unconvincing. If nothing else, Doty took no action to curtail First Stop's activities.

Doty then sold the property to defendant ("Blue Star") on February 7, 2023. The agreement specified that Blue Star purchased the twenty (20) acres of property and "All personal and other property currently located on the above described Property, including but not limited to scrap, inventory, equipment, fixtures, and HVAC systems."

At the same time, Doty sold the corporate entity Ace Salvage, Inc. to Shannon Cook, which eventually became the third-party plaintiff ("Ace"). Blue Star owned the salvage yard and the personal property on it and Mr. Cook owned Ace. After the closing on the property, Ace entered into a lease and operation agreement with Blue Star, which included cleaning up the salvage yard and removing the scrap.

Within a month after closing on its purchase, personnel from Blue Star and (the new) Ace prevented First Stop from accessing the salvage yard. The lock out prevented First Stop from retrieving its motor vehicles and other personal property.

First Stop sued Blue Star for conversion and injunctive relief. At trial, however, First Stop only requested and argued for money damages. Under the same cover, Blue Star counterclaimed, and Ace was added as a third-party plaintiff. Ace sued First Stop and Gomez for breach of contract and Blue Star and Ace sued First Stop and Gomez for unjust enrichment.

II. Liability for Plaintiffs' Claims

To begin, Blue Star conceded liability at trial. Counsel agreed that at least some First Stop vehicles were taken and sold, and that the only issue was damages—the number of vehicles and equipment taken and their value. So clear was this notion that the parties even stipulated to a price per vehicle to streamline the determination of damages.

Blue Star and Ace, however, have taken a different approach in their post-trial briefing. Even if Blue Star had not conceded liability, Blue Star's actions and inaction provide a separate and additional ground for direct liability.

First Stop argues that Blue Star's own actions constitute conversion and that, alternatively, Blue Star is vicariously liable for the actions of Ace. Because vicarious liability was not pled, First Stop

filed a post-trial motion to amend the pleadings to conform to the evidence to add it.

Blue Star argues that it is too late to amend the pleadings to conform, that at this point the matter has been waived, and that adding the alternate theory of liability now would violate its due process right to have pre-trial notice of the claims.

The Courts finds that it is not too late, see express wording of Florida Rule of Civil Procedure 1.190(b) (an amendment to conform ". . .may be made upon motion of any party at any time, even after judgment. . .").

The unpled theory was tried by consent of the parties. First Stop presented testimony and evidence regarding the actions of Ace that supported Blue Star's objectives. Blue Star made no objection to this evidence being outside of the pleadings. Indeed, the same allegations were comprehensively covered in the complaint, which even sometimes referred to "Defendant, or employees or other agents working on behalf of Defendant." In summary, Blue Star ". . .had a fair opportunity to defend against the unpleaded issue." *Bldg. B1, LLC v. Component Repair Services, Inc.,* 224 So.3d 785, 790 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1561a], citing *Dey v. Dey,* 838 So.2d 626, 627 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D604a].

Accordingly, the motion to amend the pleadings to conform with the evidence is GRANTED.

Unfortunately for First Stop, the alternate theory itself is unavailing.

The only plausible scenario for vicarious liability of Blue Star for the actions of Ace in this case would be agency.[1]

"To prove an agent-principal relationship existed, the following elements must be proven: '(1) acknowledgement by the principal that the agent will act for him or her, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent.' *Robbins v. Hess*, 659 So. 2d 424, 427 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1801b]. An agency exists only if all the elements are present, and the party alleging the agency relationship has the burden to prove it. *Id.*" *WB's Septic & Sitework, Inc. v. Tucker,* 365 So.3d 1242, 1246 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1337a].[2]

Although it could be argued that Blue Star and Ace acknowledged and accepted the fact that Ace would be taking at least some action on behalf of Blue Star, Blue Star did not endeavor to maintain control over that action. Accordingly, plaintiff has not proven the classic principal - agent relationship.[3]

Accordingly, the claim that was tried and that will be considered by the Court is First Stop's count for conversion against Blue Star that is based on Blue's Star own action or inaction.

III. Blue Star's Conversion of First Stop Property

"[A] conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time. *Mayo v. Allen*, 973 So. 2d 1257, 1258 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D460c]. A conversion claim is based on a positive, overt act or acts of dominion or authority over the money or property inconsistent with and adverse to the rights of the true owner." *Beach Cmty. Bank v. Disposal Services, LLC,* 199 So.3d 1132, 1134 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2185a] (internal quotations and citations omitted).

First Stop is not required to prove Blue Star either knew the personal property belonged to First Stop, or that Blue Star intended to convert First Stop's property. *Eagle v. Benefield-Chappell, Inc.,* 476 So.2d 716, 718 (Fla. 4th DCA 1985) ("Liability for conversion does not require proof of knowledge or intent to deprive one of his property."). Intent is an element of civil theft. First Stop elected not to bring a claim for civil theft. See *Utah Power Sys., LLC v. Big Dog II, LLC,* 352 So.3d 504, 509 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D2564a] ("[C]ompared to conversion, even more must be shown to prove civil theft.").

Blue Star exercised dominion over First Stop's assets. Blue Star literally bought and assumed authority over all of the property on the salvage yard, including First Stop vehicles and equipment. *Carberry v. Foley,* 213 So.2d 873, 877 (Fla. 1968) ("[C]onversion takes place at any time offender asserts right of dominion.") (citation omitted).

Blue Star claims it thought, at least at first, it was crushing and selling its own property. Nevertheless, Blue Star then refused to stop the ongoing conversion despite First Stop's many efforts to correct Blue Star's mistaken understanding. Blue Star's decision to lease the salvage yard and its day-to-day operations to Ace was an overt act of authority and does not limit Blue Star's liability.[4]

The purchase contract governing Blue Star's purchase of the salvage yard said the following personal property would be included in the sale: "All personal and other property currently located on the above described Property including but not limited to scrap, inventory, equipment, fixtures, and HVAC systems." Mr. Don Bailey—the owner of Blue Star—testified he believed Blue Star had purchased not only the salvage yard, but all equipment and other personal property located at the salvage yard.

Despite its initial misunderstanding of the inventory on the yard, Blue Star took possession of (dominion over) First Stop material and disposed of it, for money or otherwise. Even if Blue Star had never learned about the First Stop inventory on its property, conversion would still lie. *Eagle,* 476 So.2d at 718.

Aggravating this situation was the evidence that Blue Star was on notice of First Stop's claims soon after its purchase on the salvage yard. Most of the invoices for the unauthorized sale of First Stop's crushed vehicles were dated after the lawsuit was pending.[5]

In addition to taking dominion over First Stop property, Blue Star initiated the process (crushing and selling the inventory on its yard) by contracting out the manual labor to Ace.

Blue Star wanted to "clean up" the property to maximize profitability. After Blue Star bought the salvage yard it entered into a Lease, Assignment and Operations Agreement with (the new owner of) Ace. In the Agreement, Blue Star directed Ace to "remove and clean up the scrap" and to "restore salvage operations as soon as possible." The evidence indicated that Blue Star instructed Ace to remove First Stop property, at a minimum the vehicles.

First Stop met its burden of proving that Blue Star, by its own actions and inaction, overtly took dominion over First Stop's property, which resulted in First Stop being permanently deprived of the same.

IV. Plaintiffs' Damages - Vehicles

The crucial number for damages analysis is the number of vehicles left on the salvage yard when First Stop was locked out.

First Stop primarily relies on the testimony of its principal, Mr. Gomez, and an employee, Mr. House. They both testified that the lock out was in March 2023. Blue Star did not contest this date, or at least did not challenge the credibility of the evidence nor offer any evidence to the contrary.

Blue Star did argue that the restricted access was not exactly a hard "lock out." The Court finds the attempt to soften unconvincing. The evidence showed it was a lock out.

Mr. Gomez and Mr. House testified that First Stop transported 4,500 vehicles to the salvage yard. From those, they testified he removed 2,100 from the property before he was locked out. They said some were sold in the ordinary course of his business. Others were moved in early 2023, before the first lawsuit was dismissed. They testified that 2,400 of First Stop's vehicles (not including any vehicles owned by Ace Salvage or others) were at the salvage yard when First Stop was locked out. The testimony was that these vehicles were crushed and sold for scrap, either to Panhandle Recycling, Trademark Metals, or other recycling companies not revealed to First Stop.

Subtracted from this number are the vehicles that were returned to First Stop pursuant to the Court's earlier order requiring a joint site survey.[6] First Stop, therefore, seeks compensation for 2,352 vehicles.[7]

Blue Star presented no evidence to dispute the initial number of 4,500 First Stop vehicles placed on the salvage yard and, as such, the Court accepts that number.[8] The validity of the other numbers—how many First Stop vehicles were sold and disposed of by First Stop before the lock out and how many First Stop vehicles were sold and disposed of by Ace after the lockout—are not so easily determined.

The parties challenged each other's numbers in this regard. They presented somewhat ambiguous and conflicting circumstantial evidence. The circumstantial evidence included drone videos showing parts of the salvage yard at disputed times, samples of vehicle titles and other paperwork, tickets from salvage sales, and website reports that may mean little or nothing to salvage operators based on the conflicting testimony regarding reporting requirements.

Further muddying the water is the $440,000 that Ace and Blue Star representatives testified was the entire amount of proceeds collected for "clean up" operations after the lock out. Using reverse math and the parties' stipulated $400 per vehicle, that would equate to 1,100 vehicles.[9] The assertion that this money represents all of the proceeds for the salvage work performed by Ace on the property is uncorroborated, not credible, contrary to almost all of the other evidence in the case, and not helpful to the Court's determination.

What does assist the determination are the numbers regarding the purchase and processing of vehicles by Panhandle Recycling and Davis Auto Crushers, the two companies for which evidence was presented regarding their operations during the subject time period. *See* testimony of witnesses Gomez, Cook, House, and McCardle, and Defendant's Exhibits 13 and 14.

Using defendant's summary filed on May 24, 2024, the average weight of a selection of vehicles was 3,165.67 pounds. Assuming every pound was for vehicles, the greater weight of this evidence is that approximately 2,100 vehicles were sold by First Stop (1,052,200 pounds handled by Panhandle and 5,595,792 pounds handled by Davis). This is precisely consistent with the testimony of Mr. Gomez and Mr. House. Both testified that 2,100 vehicles were sold by First Stop, leaving 2,400 at the yard.[10]

Using the stipulated $400 per vehicle, First Stop has proven conversion damages of $940,800.

V. Plaintiff's Damages—Other Equipment

Mr. Gomez testified that two front end loaders and two car lifts were among the equipment left at the salvage yard. He said the car lifts were valued between $3,200 and $4,000. He testified the front end loaders were between $30,000 and $40,000. Neither Ace nor Blue Star offered any conflicting evidence on value. Mr. McCordle testified that he recognized one of the front end loaders among the materials scrapped by Ace.

Using these undisputed and unrebutted numbers, First Stop is requesting and has proven conversion damages of $88,000.

VI. Ace's Third-Party Claim for Breach of Contract

Ace's breach of contract claim arises out of the Deposit Receipt and Acknowledgement signed by (old) Ace and First Stop. To prove a claim for breach of contract, a plaintiff must prove "(a) the existence of a contract; (b) a breach of the contract; and (c) damages resulting from the breach." *Ford Motor Credit Co., LLC v. Parks,* 338 So.3d 1070, 1072 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1027a].

The Deposit Receipt (contract) was admitted into evidence as Defendant's Exhibit 2.[11] It was in essence an agreement to agree. Neither party followed through with its pronouncement that the parties would sign an agreement for the purchase and sale of the real estate. It described First Stop's $50,000 up-front payment as a "deposit."

The deposit requirement constituted a liquidated damages provision, permitting Ace to retain the deposit as agreed-upon damages should First Stop fail to complete the purchase transaction. Having kept the $50,000 deposit, Ace has been compensated for any damages according to the terms of the writing and is estopped from seeking additional damages. "A party to a contract, who agrees to accept a sum as liquidated damages, cannot sue for actual damages." *Shaw v. Newham,* 376 So.3d 97, 99 (Fla. 2d DCA 2023) [49 Fla. L. Weekly D6a], citing *Waters v. Key Colony E., Inc.,* 345 So.2d 367, 367 (Fla. 3d DCA 1977). Additionally, the evidence did not reflect, much less prove, cognizable damages suffered by Ace that were caused by the alleged breach.[12]

Ace failed to prove its breach of contract claim.

VII. Ace's Claim for Unjust Enrichment

Ace seeks $20,000 from First Stop and Mr. Gomez for the "clean up" work it did on the subject property after the lock out.

Preliminarily, the Court should note that neither claimant presented evidence suggesting a benefit was conferred on Mr. Gomez, individually. His business, First Stop, took possession of the salvage yard and used it for business purposes. Mr. Gomez, individually, has no liability for unjust enrichment.

"The essential elements of unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff." *Gutierrez v. Sullivan,* 338 So.3d 971, 975-76 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D290a] (citation omitted).

Importantly here, there must be evidence that the benefit was either requested or knowingly and voluntarily *accepted. CMH Homes, Inc. v. LSFC Co., LLC,* 118 So.3d 964, 966 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1712a]. *See also Citicorp Real Est., Inc. v. Buchbinder & Elegant, PA,* 503 So.2d 385, 387 (Fla. 3d DCA 1987) ("There is little question . . . that Citicorp reaped substantial benefits from the services of the law firm . . . . However, not every person who may ultimately benefit from another's labors thereby becomes responsible to pay for those labors. It is only when it can be fairly said that the benefiting party has knowingly and voluntarily accepted the benefits that the benefiting party may be held to have been unjustly enriched.")

Finally, "[a] plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter." *Sterling Breeze Owners' Ass'n, Inc. v. New Sterling Resorts, LLC,* 255 So.3d 434, 437 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2040c].

There is an express contract between these parties (see above). Accordingly, Ace's claim for unjust enrichment fails.

Additionally, there was no evidence that First Stop requested Ace to do "clean up work" after the lock out, nor did it voluntarily accept anything Ace did after the lock out. Indeed, it really cannot be said that Ace's decision to do clean up work after the lock out, and get paid for it, was a benefit to First Stop in the first place.

VIII. Blue Star's Counterclaim for Unjust Enrichment

Preliminarily, the Court should note that neither claimant presented evidence suggesting a benefit was conferred on Mr. Gomez, individually. His business, First Stop, took possession of the salvage yard and used it for business purposes. Mr. Gomez, individually, has no liability for unjust enrichment.

Unlike Ace, Blue Star did confer benefits upon First Stop. And First Stop was aware of the benefits, voluntarily accepted them, and retained them.

First Stop took Blue Star's Al-jon Bailer and sold it to a third-party, Mr. David Kyle, and kept the $40,000 paid by him. (Testimony of

witnesses McCardle and Lincoln).

The Court also finds that Defendant/Counter-Plaintiff Blue Star is entitled to damages for rent. The Deposit Receipt contract between Doty and First Stop did not have a rental payment requirement. However, Doty sold the property to Blue Star on February 7, 2023. First Stop remained on the property another month until the lock out in mid-March of 2023 and did not pay rent to Blue Star. Blue Star, therefore, is entitled to payment of rent for one month. Mr. Bailey testified that the amount of monthly rent he is charging the company that occupies the property and uses the facilities is $15,000.[13]

Blue Star is entitled to unjust enrichment damages of $55,000.

IX. First Stop's Claim for Prejudgment Interest

First Stop's damages occurred when it was locked out of the salvage yard. The Court finds this occurred no later than March 23, 2023. First Stop is entitled to prejudgment interest on its damages from that date. *Florida Farm Bureau Cas. Ins. Co. v. Patterson,* 611 So.2d 558, 559-60 (Fla. 1st DCA 1992) ("[T]he correct measure of compensatory damages for the conversion of appellee's auto is the fair market value of the auto at the time of its conversion, plus prejudgment interest.").

The statutory interest rate on judgments was 5.52% as of March 23, 2023. The interest rate is revised quarterly under section 55.03, Florida Statutes. See https://myfloridacfo.com/division/aa/local-governments/judgement-interest-rates (last accessed June 12, 2024). Based on the damages awarded, and the interest rate on judgment set under section 55.03, Florida Statutes, prejudgment interest is due in these amounts through June 14, 2024:

Effective Date	Annual Rate	Daily Rate	Interest Days	Interest
January 1, 2023	5.52%	0.000151233	8	$1,244.71
April 1, 2023	6.58%	0.000180274	91	$16,877.39
July 1, 2023	7.69%	0.000210685	92	$19,941.24
October 1, 2023	8.54%	0.000233973	92	$22,145.41
January 1, 2024	9.09%	0.000248361	91	$23,251.72
April 1, 2024	9.34%	0.000255191	74	$19,428.02

First Stop is entitled to recover $102,888.50 in prejudgment interest.

Conclusion

Accordingly, it is ADJUDGED that

Plaintiff First Stop Auto Sales, LLC, whose address is 7533 W. Tennessee Street, Tallahassee, FL 32304, recover from Defendant 31556 Blue Star, LLC, the sum of $1,028,800, with prejudgment interest in the sum of $102,888.50, making a total of $1,131,688.50, that shall bear interest at the statutory rate, for which let execution issue.

Counterplaintiff 31556 Blue Star, LLC, recover from Plaintiff First Stop Auto Sales, LLC, the sum of $55,000, that shall bear interest at the statutory rate, for which let execution issue.[14]

Third-party Plaintiff Ace Salvage, take nothing by this action.

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[1]Plaintiff did not argue apparent agency, nor would the facts at trial have supported it.

[2]A similar analysis is used to determine a commercial property owner's liability for the actions of a tenant in negligence cases. "Under Florida law, 'the duty to protect third persons from injuries on the premises rests not on legal ownership of the premises, but on the rights of possession, custody, and control of the premises.' *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 15 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1369a]. . . ." *Johnson v. Garrett,* 6D23-1205, 2024 WL 1460183, at *3 (Fla. 6th DCA Apr. 4, 2024) [49 Fla. L. Weekly D756b]. "In cases involving a leased property, "the extent of responsibility for injuries occurring on the leased premises during the term of the lease depends upon the extent the owner of the property maintains control over the premises." *Id.* (citation omitted).

[3]As will be discussed below, this does not eliminate liability for the tort of conversion.

[4]Nor does the fact that at least some of the proceeds from the sale of converted property were put into a trust account rather than delivered to Blue Star defeat conversion. *Batista v. Rodriguez,* 49 Fla. L. Weekly D1099a (Fla. 3d DCA May 22, 2024).

[5]Defendant's Exhibit 11 included multiple purchase tickets showing Panhandle Recycling paid over $400,000 for vehicles and scrap metal collected from the salvage yard.

[6]Unfortunately, the survey occurred so late in the game that it accomplished very little.

[7]Blue Star agreed that it owed First Stop payment for 132 vehicles based on matching vehicle titles with Auto Data Direct records. At the stipulated $400 per vehicle, Blue Star conceded to $52,000. In its proposed final judgment, Blue Star states that it will stipulate to the number of 125. At trial, however, it confirmed that 132 titles matched.

[8]The Court reviewed its notes on Blue Star's cross examination of Mr. Gomez. There was no attempt to challenge the credibility or otherwise attack the evidentiary sufficiency of Mr. Gomez' testimony regarding the number of First Stop vehicles brought to the salvage yard (4,500). Nor was there any evidence offered by Blue Star to dispute it.

[9]In its proposed final judgment, Blue Star states that the evidence indicated that this dollar amount includes all salvaged items, not just vehicles.

[10]In fact, it may be conservative since the evidence indicated First Stop sold items other than vehicles. The assumption that every pound was for vehicles inures to the benefit of Blue Star.

[11]The parties and the Court refer to Ace as one entity over time. In other words, it is the entity under the previous ownership of Doty and the current ownership of Cook. The "Deposit Receipt" contract was entered into by Ms. Doty as "President and Owner of Ace Salvage, Inc."

[12]Ace sold the property to Blue Star for $400,000 and then earned $440,000 for its "clean up." This even surpasses the original purchase price offered to First Stop, which was $600.000.

[13]The Court notes that Blue Star's decision not to charge rent to Ace is not a benefit bestowed upon First Stop.

[14]Blue Star did not request prejudgment interest.

* * *

Insurance—Automobile—Coverage—Prevailing competitive price—Assignee's action against insurer—Insurer is entitled to summary judgment where applicable policy provisions state that cost of repair is based on prevailing competitive price and define prevailing competitive price as price charged by majority of repair market in area as determined by survey made by insurer, and insurer made payment based on cost-estimating method and price reported by majority of area repair facilities surveyed—Attempted challenge to insurer's survey methodology fails—Policy gives insurer tremendous discretion in how to conduct survey

ELITE EURO CARS COLLISION SERVICES, INC., a/a/o Carlos Uzzo, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Circuit Court, 5th Judicial Circuit in and for Hernando County. Case No. 2021-CA-507. June 20, 2023. Donald E. Scaglione, Judge. Counsel: Christopher Kasper and Ryan Treulieb, Ovadia Law Group, P.A., Boca Raton, for Plaintiff. Johanna W. Clark, Carlton Fields, P.A., Orlando, for Defendant.

ORDER AS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FRO SUMMARY JUDGMENT

THIS MATTER having come before the Court at hearing on June 15, 2023 and the court having reviewed the file, pleadings, as well as argument of counsel finds as follows:

1. Case filed June 28,2021.
   Case set for Trial at CMC for Trial Term of August 21, 2023. (Currently #2 in Priority Order)
   Defendant's Summary Judgment filed May 1, 2023.
   Notice of Hearing filed May 16, 2023 for hearing of June 15, 2023.
   Plaintiff's Response with Cross Motion for Summary Judgment filed May 23, 2023.
   Hearing held June 15, 2023.

2. This Case is under Florida Supreme Court SC 20-1490 (December 31, 2020) and Amended SC-1490 (April 29, 2021).

New rule 1.510 took effect on May 1, 2021. This means that the new rule must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases. *Cf. Love v. State,* 286 So.3d 177, 187-88 (Fla. 2019) [44 Fla. L. Weekly S293a].

In cases where a summary judgment motion was denied under the pre-amendment rule, the court should give the parties a reasonable opportunity to file a renewed summary judgment motion under the new rule. *See Wilsonart, LLC v. Lopez,* 308 So.3d 961, 964 (Fla. 2020) [46 Fla. L. Weekly S2a]. In cases where a pending summary judgment motion has been briefed but not decided, the court should allow the parties a reasonable opportunity to amend their filings to comply with the new rule. Any pending rehearing of a summary judgment motion decided under the pre-amendment rule should be decided under the pre-amendment rule, subject of course to a party's ability to file a renewed motion for summary judgment under the new rule.

A party moving for summary judgment has the burden of demonstrating to the court that there are no material facts that are genuinely disputed and that the movant therefore is entitled to judgment as a matter of law. But a key question is what standard the court should apply to determine whether the movant has satisfied its burden.

The Supreme Court addressed this question in its 1986 decision in *Celotex Corporation v. Catrett.* That case involved an action charging that the death of plaintiff's husband resulted from exposure to asbestos products manufactured or distributed by defendants. Defendant moved for summary judgment on the ground that during discovery plaintiff had failed to produce any evidence to support the allegation that the decedent had been exposed to defendant's products—an issue on which plaintiff would bear the burden of proof at trial. Plaintiff then produced three documents, which defendant challenged as inadmissible hearsay. The District court granted summary judgment and a divided panel of the District of Columbia Circuit reversed on the ground that the defendant had failed to meet its Rule 56 burden because it had not supported its motion with any evidence, so that plaintiff therefore had no obligation to respond with evidence. The Supreme Court reversed.

Although the Court issued a five-to-four decision, the majority and dissent both agreed as to how the summary-judgment burden of proof operates, they disagreed as to how the standard was applied to the facts of the case. Justice Rehnquist, writing for the majority, ruled that there was "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. This conclusion was bolstered by the recognition that courts may enter summary judgment sua sponte. As Justice Rehnquist noted,

> It would surely defy common sense to hold that the District Court could have entered summary judgment sua sponte in favor of the petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

The satisfaction of the moving party's summary judgment burden was influenced by the fact that the nonmovant would bear the burden of proof at trial. When that was so, the moving party could make a proper summary judgment motion in reliance on the pleadings and the allegation that the nonmovant had failed to establish an element essential to that party's case. Rule 56 then would require the opposing party to go beyond the pleadings to designate specific facts showing there was a genuine issue for trial. Justice Rehnquist concluded the majority's opinion with the policy justification that supported this conclusion.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

In the dissenting opinion by Justice Brennan, he elaborated more fully on the way in which the burden shifts between the parties to the action, as well as how it can be satisfied. Rule 56 first imposes a burden of production on the moving party to make a prima facie showing that it is entitled to summary judgment. That can be satisfied, in cases in which the ultimate burden of persuasion at trial rests on the nonmoving party, either by submitting affirmative evidence negating an essential element of the nonmovant's claim or, as in *Celotex*, by demonstrating that the nonmoving party's evidence itself is insufficient to establish an essential element of its claim. As described by Justice Brennan, the moving party may make this showing by deposing the nonmoving party's witness, by establishing the inadequacy of documentary evidence or, if there is no evidence, by reviewing for the court what exists to show why that does not support a judgment for the nonmoving party. To this extent, the dissent agreed with the majority that the movant need not present affidavits or new evidence of its own to meet its initial burden, but may premise its summary judgment motion on an attack of the opponent's evidence. If it is successful in arguing that the nonmovant's evidence is insufficient, the burden shifts to that party to call evidence to the attention of the court to dispute that contention. The dissent argued, however, that in *Celotex* itself defendant had not met this initial burden because it had ignored supporting evidence clearly contained in the record and thus had not demonstrated that no evidence existed to support plaintiff's claim.

There are numerous ways in which the movant can satisfy its burden on summary judgment to show that there are no genuine issues of fact. Indeed, when Rule 56 was rewritten in 2010, a new subdivision (c) was included that explicitly provides that a movant must support its position that there is no genuine dispute of material facts by citing to materials in the record that demonstrate the absence of a dispute, by showing that those materials do not establish the presence of a genuine dispute, or, as in *Celotex*, by showing that the opposing party cannot produce admissible evidence to support a material fact. In short, the movant may discharge the Rule 56 burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the opposing party. This may occur, for example, if a movant, by means of uncontroverted affidavits or by using any of the other materials specified in Rule 56(c), completely explores and establishes the facts, thereby demonstrating the absence of any genuine dispute as to the facts and securing the entry of summary judgment. If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless, and the movant is entitled to a judgment as a matter of law.

Indeed, applying this principle, even if the movant's own evidentiary material reveals an issue of credibility, summary judgment still may be warranted if it also appears that the party opposing the motion cannot prevail in any event so that the issue or credibility is immaterial.

Situations in which credibility issues are unimportant because the adversary cannot prevail occasionally result the interplay between the burden of proof on the summary judgment motion and the burden of persuasion at trial. For example, in *Dyer v. MacDougall,* the allegations in a complaint in a slander action were countered by affidavits signed by all of the witnesses to the supposed defamation, each denying that the wrong had occurred. Plaintiff was unable to resist defendant's motion for summary judgment since even if he succeeded in impeaching the credibility of defendant's witnesses at trial, the

court concluded that he nevertheless would be unable to discharge his burden of persuasion the issue of slander. Thus, defendant had demonstrated that a trial would be useless and summary judgment appropriate; there would be no competent evidence that could support a verdict for plaintiff, especially since he could not impeach the testimony of the witnesses to the alleged defamation if he called them to testify at trial.

Finally, it is important to note that, as established in *Celotex*, it is not necessary for the movant to introduce any evidence in order to prevail on summary judgment, at least in cases in which the nonmoving party will bear the burden of proof al trial. The movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him. On the other hand, the party moving for summary judgment cannot sustain its burden merely by denying the allegations in the opponent's pleadings, or merely by asserting that the nonmovant lacks evidence to support its claim. The movant must show why the opponent's allegations of fact are insufficient to support the claim for relief as a matter of law or why the court should conclude that its opponent lacks sufficient evidence. Remember that in *Celotex* itself discovery was completed, and the only evidence plaintiff produced was found to be inadmissible hearsay.

In contrast, if the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing. If the movant fails to make that initial showing, the court must deny the motion, even if the opposing party has not introduced contradictory evidence in response.

In meeting its burden, it is important to note that despite the usual rule that all doubts are resolved against the moving party, there is one inference to which the movant is entitled. If the movant presents credible evidence that, if not controverted at trial, would entitle the movant to a Rule 50 judgment as a matter of law, that evidence must be accepted as true on a summary judgment motion when the party opposing the motion does not offer counter-affidavits or other evidentiary material supporting the opposing contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(d) why he is unable to present facts justifying opposition to the motion.

The amendment adopted by the Florida Supreme Court in SC20-1490 largely replaces the text of existing rule 1.510 with the text of Federal rule 56. New Rule 1.510(a) will also include the following sentence: "The summary judgment standard provided for in this rule shall be construed and applied in accordance with the Federal Summary Judgment Standard."

In the December 31, 2020, decision amending rule 1.510, the Court made it clear that adopting the federal summary judgment standard means that Florida will now adhere to the principles established in the *Celotex* trilogy. In the broadest sense, those cases stand for the proposition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action." *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). More specifically, though, embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state. *In re Amends. to Fla. Rule of Civ. Pro. 1.510,* 309 So.3d at 192-93.

Those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson,* 477 U.S. at 251 (noting that "the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id.* at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments,* 76 Fla. Bar J., Feb. 2002, at 26; *see also Anderson,* 477 U.S. at 255.

Those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under *Celotex* and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.,* 915 F.3d 987, 997 (5th Cir. 2019).

Those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

The new rule will continue to require adherence to "the federal summary judgment standard," which itself cannot be understood apart from the *Celotex* trilogy. But the Court removed the textual reference to the cases themselves. The Court recognized that "30 years of practice under the has refined and added to the trilogy." Gensler & Mulligan, supra. And naturally, courts applying the new rule must be guided not only by the *Celotex* but by the overall body of case law interpreting federal rule 56.

In any event, the Court in adopting the text of federal rule 56 almost verbatim has made it unnecessary to list specific cases in new rule 1.510. That is because our act of transplanting Federal Rule 56 brings with it the "old soil" of case law interpreting that rule. *See Fla. Hwy. Patrol v. Jackson,* 288 So.3d 1179, 1183 (Fla. 2020) [45 Fla. L. Weekly S32a] ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947))).

3. This action out of a claim for repairs Plaintiff, Elite Euro Cars Collision Services, Inc., to a 1963 Chevrolet owned by State Farm's insured, Carlo Uzzo ("Mr. Uzzo"). is a repair facility located in Hernando County, Florida, which is within the Tampa-St. Petersburg-Clearwater core-based statistical area. Because Plaintiff is a stranger to the insurance policy between State Farm and Mr. Uzzo, Plaintiff has brought this one-count breach of contract action pursuant to a purported assignment of benefits executed by Mr. Uzzo. Plaintiff seeks, $22 increase to the paint/materials rate paid by State Farm.

For the purposes of this dispute, the contract between State Farm

and Mr. Uzzo requires only that State Farm pay the cost of repairing the vehicle by paying the prevailing competitive price or "PCP" as determined by State Farm's survey. Plaintiff is seeking $50 per hour for paint/materials—a rate it obtained from a paint and materials rate calculator. However, on the date of State Farm's initial repair estimate, the majority (more than half) of the repair market responding to State Farm's survey and based on capacity 1) were not using an automated paint and materials rate calculator and 2) were charging $28.00 per hour or less for paint and materials.

Defendant submits that because State Farm has already paid the prevailing competitive price for paint/materials, State Farm has satisfied its obligation under the insurance contract and is entitled to summary judgment on the paint/materials rate dispute as a matter of law.

4. Mr. Uzzo submitted a claim to State Farm under his State Farm Policy No. 118 9764-59F (the insurance "Policy") for collision damage sustained to his vehicle. Policy sets forth, in clear and unambiguous language, the following provision governing State Farm's duty to pay for collision damage:

PHYSICAL DAMAGE COVERAGES

The physical damage coverages are Comprehensive Coverage, Collision Coverage, Emergency Road Service Coverage, and Car Rental and Travel Expenses Coverage.

This policy provides:

...

2. Collision Coverage if "G";

...

Is shown under "SYMBOLS" on the Declaration's Page.

. . . The deductible that applies to Collision Coverage is shown on the Declaration Page.

The Policy also includes the following provision that limits State Farm's liability under this Collision provision:

Limits and Loss Settlement—Comprehensive Coverage and Collision Coverage

We have the right to choose to settle with you or the owner of the covered vehicle in one of the following ways:

a. Pay the cost to repair the covered vehicle minus any applicable deductible.

(1) We have the right to choose one of the following to determine the cost to repair the covered vehicle:

(a) The cost agreed to by both the owner of the covered vehicle and us;

(b) A bid or repair estimate approved by us; or

(c) A repair estimate that is written based upon or adjusted to:

(i) the prevailing competitive price;

(ii) the lower of paintless dent repair pricing established by an agreement we have with a third party or the paintless dent repair price that is competitive in the market; or

(iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by us. . .

Policy at pp. 32-33.

The parties do not dispute that State Farm elected to pay the cost to repair Mr. Uzzo's vehicle. As provided for in the Policy, State Farm determined the "cost to repair" based upon State Farm's written repair estimate, which was "based upon the prevailing competitive price." State Farm's Policy explicitly defines "prevailing competitive price" to mean "prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by [State Farm]."

In March of 2019, Mr. Uzzo's 1963 Chevrolet Corvette was insured under an automobile insurance policy issued by State Farm. On or about March 24, 2019, Mr. Uzzo's vehicle was involved in a motor vehicle accident. Mr. Uzzo chose to have his vehicle repaired at Elite Euro Cars Collision Center in Spring Hill, Florida.

Upon notification of the claim, State Farm's estimator inspected the damage to Mr. Uzzo's vehicle. The State Farm estimator thereafter prepared a written estimate of damage. During the repair process, the repair facility notified State Farm of additional repair costs. Accordingly, State Farm's estimator inspected the vehicle and prepared a supplemental estimate. Based upon its original and supplemental written estimates, State Farm issued payments to Elite Euro Cars Collision Center and the Ovadia Law Group totaling $4,284.98.

As State Farm's estimates reflect, State Farm paid $28 per refinish hour for the paint/materials necessary to complete the repairs. This rate was paid pursuant to State Farm's survey that identified the prevailing competitive prices charged by a majority of the repair market in the Tampa-St. Petersburg-Clearwater CBSA on the date State Farm prepared its first written estimate on the Uzzo vehicle. In April of 2019, State Farm's survey results establishing the prevailing competitive price for paint/materials in the Tampa-St. Petersburg-Clearwater CBSA showed that the majority of the responding repair market, based on capacity, did not use an automated paint and materials rate calculator and charged $28 per hour or less for paint/materials.

Plaintiff filed suit claiming, that State Farm "has refused and continues to refuse to issue payment of all sums due Plaintiff in breach of its contract with [Carlo Uzzo]."

Plaintiff claims it is owed an additional $22 per hour for paint/materials (Plaintiffs $50 per hour as set by a paint calculator, versus $28 per hour paid by State Farm). State Farm maintains it paid for paint/materials based on its survey which revealed the majority of the responding repair market based on capacity was accepting $28 per hour or less for paint and materials and was not using a paint and materials calculator.

5. This case presents a narrow question of law with respect to the rate State Farm paid for paint/materials. The Policy permits State Farm to pay for the cost of repairs based upon the prevailing competitive prices charged by a majority of the repair market as determined by State Farm's survey.

6. In this case, the Policy provides that the cost of repair (and State Farm's resultant liability) may be determined by utilizing the prevailing competitive prices charged by a majority of the responding repair facilities based on capacity as identified by a survey performed by State Farm. Here, the undisputed evidence shows State Farm paid for the cost of repairs to Mr. Uzzo's vehicle based upon a written estimate, prepared by State Farm, which utilized the prevailing competitive price as determined by State Farm's survey for the paint/materials rate.

State Farm's Estimatics Team Manager attested that State Farm's survey results indicated a majority of the responding repair facilities located within the Tampa-St. Petersburg-Clearwater CBSA, based on capacity 1) did not use an automated paint and materials rate calculator and 2) charged $28.00 per hour or less for paint/materials. Thus, State Farm's survey revealed, at that time, the prevailing competitive price for paint/materials in the market area was $28 per hour. State Farm paid Plaintiff exactly $28 per hour for paint/materials for the Uzzo vehicle. Because the Policy requires nothing further with respect to that rate and State Farm's corresponding payment, State Farm could not have breached, and did not breach, the Policy as a matter of law.

At least seven Florida courts have decided similar rate disputes governed by the same Policy language at issue here. First, just like the paint/material charges in this case, in *Coastline Auto, Inc., a/a/o*

Harrynarine Maharaj v. State Farm Mut. Auto. Ins. Company, 23 Fla. L. Weekly Supp. 972a (Fla. 17th Cir. Ct. February 1, 2016), a plaintiff/repair facility sought a paint/material rate that was set via an automated paint/material calculator and resulted in a rate that was $7.32 per hour higher than the PCP rate determined by State Farm's survey. The Honorable Stephen J. Zaccor found that "[t]he undisputed evidence is the survey made by the Defendant [State Farm] revealed a 'majority of the repair market' does not use a paint calculator, and charges twenty-four dollars or less per hour for paint and materials." Ex. D at p. 2 (footnote omitted). Accordingly, the court held that the PCP for paint/materials was $24 per hour—which is what State Farm paid—and entered judgment in favor of State Farm.

Second, in *Collision Concepts of Delray, LLC, ala/o Larry Canipe v. State Farm Mut. Auto. Ins. Co.,* the circuit court, sitting in its appellate capacity, affirmed the trial judge who granted State Farm's motion for summary disposition as to PCP paid by State Farm pursuant to State Farm's survey process. No. 15-AP-000081-CA (Fla. 15th Cir. App. Ct. Dec. 13, 2016) [24 Fla. L. Weekly Supp. 670b]. In *Collision Concepts/Canipe*, the plaintiff/repair facility sought body and refinish labor rates that were $2 higher than the PCP rates established by State Farm's survey. 23 Fla. L. Weekly Supp. 614d (Fla. 15th Cir. Ct. September 29, 2015). That Court held that not only was State Farm's insurance contract language clear and unambiguous, but that State Farm was entitled to summary disposition on the breach of contract claims as to the body labor rates and refinish labor rates paid by State Farm where State Farm had presented evidence that it: 1) performed a survey of the repair market where the vehicle was to be repaired, and 2) paid the prevailing competitive prices determined by that survey. *Id.* The Plaintiff in *Collision Concepts/Canipe*, like here, presented no counter evidence (nor could it) to show that State Farm had either failed to perform a survey or failed to pay the prevailing competitive prices determined by State Farm's survey. *Id.* Judgment was entered for State Farm, and the appellate court affirmed.

Third, on June 16, 2016, in a separate lawsuit filed by yet another plaintiff repair facility (*James McHugh a/a/o Haline Gregory v. State Farm Mut. Auto. Ins. Co.,* Broward County, Florida, Case No.: 12-06933 COCE56) involving the same issues and the same contract language, the Honorable Linda Pratt granted State Farm's motion for partial summary judgment in State Farm's favor based on State Farm's payment of body labor, refinish labor, and paint/material at the PCP rates established by State Farm through its survey.

Fourth, in *James McHugh d/b/a James McHugh's a/a/o Kenneth Braden v. State Farm Mut. Auto. Ins. Company,* Broward County, Florida, Case No.: COCE 11-024975 (52) and *James McHugh d/b/a James McHugh's a/a/o Susan Reich v. State Farm Mut. Auto. Ins. Company,* Broward County, Florida, Case No.: COCE 12-012906 (52), a plaintiff/repair facility sought higher body and refinish labor rates, as well as a higher paint/material rate for repairs it made to a vehicle insured by State Farm. See Orders Granting Defendant's Motion for Partial Summary Judgment, entered August 23, 2017. The Honorable Giuseppina Miranda found that "[t]he amount State Farm paid for the repairs at issue was subject to a limit of liability provision in the governing insurance contract" and rejected plaintiffs argument that terms found within the limit of liability provision (specifically, "prevailing competitive price, "prices", "repair market" and "majority") were ambiguous. *Id.* The court held that State Farm complied with the subject insurance policy by paying the PCP as determined by a survey made by State Farm and entered judgment in favor of State Farm. *Id.*

Additionally, in January 2018, the Honorable Sandra Bosso Pardo granted State Farm's motions for partial summary judgment in State Fames favor based on State Farm's payment of body labor, refinish labor, and paint/material at the PCP rates as determined by State Farm's survey as required by the governing insurance contract in three separate matters: 1) *Swift Investments, Inc. d/b/a Fantastic Finishes of Palm Beach, a/a/o Inna Kallas v. State Farm Mutual Automobile Insurance Company,* Palm Beach County, Florida, Case No. 50-2015-SC-001147; 2) *Swift Investments, Inc. d/b/a Fantastic Finishes of Palm Beach a/a/o Arthur Goldberg v. State Farm Mutual Automobile Insurance Company,* Palm Beach County, Florida, Case No. 50-2015-SC-001104; and 3) *Auto Krafters, LLC a/a/o Kristie West v. State Farm Mutual Automobile Insurance Company,* Palm Beach County, Florida, case No. 502014SC006468XXXXNB. *See* Orders granting State Farm's Motion for Partial Summary Judgment.

In March of 2019, the Honorable Bob Grode granted State Farm's motion for partial summary judgment in State Farm's favor based on State Farms payment of body labor, refinish labor, and paint/material labor at the PCP rates as determined by State Farm's survey as required by the governing insurance contract in *Auto Body, Inc. a/a/o James Thompson v. State Farm Mutual Automobile Insurance Company,* Polk County, Florida, Case No. 2018-SC-000883-000. *See* Order granting State Farm's Motion for Partial Summary Judgment.

Finally, in July of 2019, the Honorable Jennifer Waters granted State Farm's Motion for Partial Summary Judgment in two cases, including 1) *Zero 6 a/a/o Alina Vazquez,* Case No. 181354-SC, and 2) *Zero 6 Incorporated a/a/o Parker Davis,* Case No. 18-1356-SC. In so holding, Judge Waters ruled that there was no ambiguity in the State Farm contract as to the definition of prevailing competitive price and found that State Farm had complied with its obligations under said policy by paying the prevailing competitive prices for body labor, refinish labor, and for paint/materials.

To the extent Plaintiff attempts to "test" or "attack" State Farm's survey methodology or assert a different pricing model altogether, all such efforts must fail. In *Coastline Auto Inc./Maharaj,* Judge Zaccor explained that State Farm's "insurance contract gives the Defendant [State Farm] tremendous discretion in how to conduct its survey." Ex. D at p. 3. Likewise, two California appellate courts have rejected plaintiffs' attempts to state a breach of contract claim centered on a dislike for "how" State Farm performs it survey. In *Levy v. State Farm Mut. Auto. Ins. Co.*, 150 Cal. App. 4th I (Cal. 4th DCA March 23, 2007), the plaintiff alleged that State Farm breached the terms of the contract because plaintiffs labor costs were $4 higher than the repair estimate State Farm provided. *Id*. But the *Levy* Court rejected, as a matter of law, plaintiff's allegation that State Farm breached the terms of the insurance contract. *Id.* The court held that nothing in the contract prevented State Farm from conducting the survey however it saw fit—so long as the survey was conducted. *Id. See also, Joaquin v. Geico General Insurance Co.,* No. C 07-3259 JSW, 2008 53150, at *3 (N.D. Cal. Jan 2, 2008) (holding that "there is nothing in Geico's policy that requires it to conduct a labor survey in any particular way").

Levy involved contract language that is identical to the contract language at issue here, and as is true under Florida law, the *Levy* Court explained that it was not permitted under California law "under the guise of strict construction, [to] rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Levy,* 150 Cal. App. 4th at 7 (quotations and citations omitted). Just as the *Levy, Coastline/Maharaj, Collisions Concepts/Canipe, McHugh/Gregory, McHugh/Reich, McHugh/Braden, Swift Investments/Kallas, Swift Investments/Goldberg, Swift Investments/West, and A&E/Thompson* courts were not free to rewrite the State Farm contract, neither may this Court rewrite that same contract provision to require State Farm to pay amounts greater than the PCP amounts established by State Farm's survey.

"In contract interpretation cases, the issue to be addressed is not what this Court or the petitioner would prefer the policy cover, but what losses the mutually agreed-upon contractual language covers." *Siegle v. Progressive Consumers Ins. Co.,* 819 So.2d 732, 739 (Fla. 2002) [27 Fla. L. Weekly S492a] (insured's interpretation of the term "repair" to include compensation for lost value of damaged vehicle would impermissibly negate the insurer's choice of remedy explicitly contained in the contractual text). A repair facility is free, of course, to charge its customers with State Farm Insurance an amount exceeding PCP, but no third party—including Elite Euro Cars Collision Center—may change State Farm's contractual obligation to its insured.

Therefore, based upon the forgoing, the Court GRANTS the Defendant's Summary Judgment.

The Court DENIES the Plaintiff's Summary Judgment.

The Case is Stricken from the August 12, 2023 Trial docket and any other scheduled hearings.

Parties are referred to Arbitration on all other remaining issues.

* * *

Insurance—Property—Standing—Assignment—Where plaintiff's assignment fails to comply with requirements of section 627.7152(1)(b), summary judgment is entered in favor of insurer

HOLDING INSURANCE COMPANIES ACCOUNTABLE, LLC, a/a/o Stephen Wells, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 5th Judicial Circuit in and for Lake County, Civil Division. Case No. 2021-CA-00523. June 29, 2023. Dan R. Mosley, 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.

AMENDED ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

THIS CAUSE having come before the Court on Defendant's Motion Final Summary Judgment and Memorandum of Law In Support Thereof, and the Court, having considered the record, the argument of counsel at the June 1, 2023 hearing on said Motion, and being otherwise advised in the Premises, it is hereby,

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

1. The Court finds the Complaint in the subject lawsuit is an action seeking benefits for claimed wind damage to the Insured Property located at [Editor's note: Address redacted], Clermont, FL 34711 allegedly occurring February 6, 2020 under Policy no. AGH005353904 and Claim no. CHO00097496. Plaintiff alleges to bring the subject lawsuit as an Assignee of the Insured.

2. *Florida Statute* §627.7152(1)(b) (2019) holds that an "Assignment agreement" means any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in *Florida Statute* §627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage.

3. In the instant matter, the record evidence includes the following:

a. Noland's Roofing Contract with Direction of Payment and estimate for roof replacement.

b. Plaintiff's Assignment of Benefits upon which Plaintiff bases its standing to bring the subject lawsuit, which states that "*Any payments shall be made in accordance with any Direction of Payment relative to the below referenced claim*"

c. Plaintiff's Insured Acknowledgment Form, which states "*I want HICA to hold my insurance company accountable for their obligation(s) under the policy of insurance and also to ensure that the direction to pay that I signed with a separate company is honored*".

d. Plaintiff's Amended Complaint, which states in the "Wherefore" Clause that Plaintiff "*demands judgment against Defendant for all covered losses with interest on any overdue payments, payment in accordance with the existing Direction of Payment. . .*"

e. Plaintiff's Answer to Defendant's Interrogatory no. 9, which states "*Plaintiff is seeking the fair market value of services which were required to place the property back in pre-loss condition*".

4. The Court finds the record evidence in this matter evidences that Plaintiff's Assignment constitutes an Assignment Agreement as defined by *Florida Statute* §627.7152 as Plaintiff's Assignment provides a service to protect, repair, restore or replace property as contemplated by *Florida Statute* §627.7152 and the purpose of funds sought by Plaintiff is to protect, repair, restore, or replace property or to mitigate against further damage. As such, Plaintiff's Assignment was required to comply with the requirements of *Florida Statute* §627.7152(1)(b) (2019).

5. The Court finds Plaintiff's Assignment fails to comply with the requirements of *Florida Statute* §627.7152(1)(b) (2019).

6. Therefore, Defendant's Motion for Final Summary Judgment is **GRANTED.**

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

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

* * *

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COUNTY COURTS

Civil procedure—Discovery—Admissions—Failure to file motion for relief from admissions that automatically resulted when plaintiff failed to timely answer defendant's request for admissions—Summary disposition entered in favor of defendant

SYNCHRONY BANK, Plaintiff, v. CATHERINE WOLF, Defendant. County Court, 4th Judicial Circuit in and for Clay County. Case No. 10-2024-SC-000421. August 8, 2024. Raymond E. Forbess, Jr., Judge. Counsel: John Toro, Aldridge Pite Haan, LLP, Delray Beach, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDNT'S MOTION FOR SUMMARY DISPOSITION

THIS ACTION came before the Court on August 7, 2024, on a hearing on Defendant's Motion for Summary Disposition at which counsel for Defendant appeared and presented argument and counsel for Plaintiff failed to appear, it is HEREBY ORDERED AND ADJUDGED:

1. The Court finds that Defendant filed Defendant's First Request for Admissions on March 26, 2024 and that Plaintiff failed to timely respond.

2. The Court also finds that Plaintiff responded to Defendant's First Request for Admissions but the responses were not timely. Also, the Court finds that Plaintiff filed affidavits with the Court.

3. In addition, the Court finds that Plaintiff failed to file a motion requesting relief or withdrawal of the admissions as required by Rule 1.370(b) of the Florida Rules of Civil Procedure.

4. At the hearing, counsel for Defendant cited the matter of *Morgan v. Thomson,* 427 So.2d 1134 (Fla. 5th DCA 1983) for the proposition that Rule 1.370(b) of the Florida Rules of Civil Procedure requires the filing of a motion. The *Morgan* court noted as follows: "a motion must be made for relief for relief from the admissions automatically resulting from a failure to timely answer a request for admissions. In this regard a trial judge cannot err until he rules on a proper motion for relief. No motion, no relief, no error". The Court finds that *Morgan* is controlling and persuasive.

5. Moreover, the Court finds that the hearing was properly noticed.

6. Based on the above findings, Defendant's Motion for Summary Disposition is hereby GRANTED, and summary disposition is hereby granted in favor of Defendant and against Plaintiff and Plaintiff shall take and recover nothing in this lawsuit.

7. The Court hereby retains jurisdiction for the purpose of ruling on a motion for prevailing party attorney fees.

* * *

Attorney's fees—Contracts—Prevailing party—Voluntary dismissal

SELECT EQUIPMENT PUMPING, LLC, Plaintiff, v. MARCOS MACHADO, et al., Defendant. County Court, 5th Judicial Circuit in and for Marion County, General Division. Case No. 2023-CC-573. July 17, 2024. Leann Mackey-Barnes, Judge. Counsel: Christian Granados, for Plaintiff. Robert Wayne and Shawn Wayne, for Defendant.

ORDER ON DEFENDANT MARCOS MACHADO'S MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES AND COST

THIS CAUSE came before the Court with a special set hearing on July 16, 2024, on the above referenced motion and the Court hearing argument from the parties, reviewing the motion, the case law presented and being duly advised in the premises, it is:

ORDERED AND ADJUDGED, as follows;

1. Defendant's entitlement to attorney's fees and costs is **GRANTED**.

2. Plaintiff and Defendant are parties to the real estate contract subject to the instant action. The contract contains a prevailing party attorney's fee provision.

3. Plaintiff took a voluntary dismissal without prejudice which rendered the Defendant the prevailing party for purposes of attorney's fees and costs. *Hatch v. Dance*, 464 So. 2d 713 (Fla. 4th DCA 1985)(in a case where plaintiff voluntarily dismissed "after limited pre-trial activity," court held that "it is well-established that statutory or contractual provisions providing for an award of attorney's fees to the prevailing party in a litigation encompasses defendants in suits which have been voluntarily dismissed"); *Larry's Olde Fashioned Ice Cream Parlours v. Narthdale Court LTD*, 556 So.2d 803 (Fla. 2nd DCA 1990); *Nudel v. Flagstar Bank FSB*, 60 So.3d 1163 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1065a]; *See also Point E. Four Condo Corp. v. Zevuloni & Assocs.* 50 So.3d 687 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2691a] (the contract provided that "the prevailing party in any action shall be entitled to reasonable attorney's fees" . . . "[c]ourts have no discretion to decline to enforce this kind of contractual provision" . . . "When one party loses in an action for breach of contract, the adverse party is the prevailing party")

4. The Court retains jurisdiction to award an amount of reasonable attorney's fees and costs to the prevailing Defendant.

* * *

Insurance—Attorney's fees—Proposal for settlement—Good faith—Proposal for settlement was served in good faith where insurer had reasonable foundation for offer and made it with intent to settle claim—Factors such as the potential for unsettled law and original right of one-way attorney's fees for the plaintiff are factors that apply in determining reasonableness of fee award, not whether proposal was made in good faith

COLONIAL MEDICAL CENTER, INC., a/a/o Donald King, Plaintiff, v. USAA GENERAL INDEMNITY COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022-12789-CODL (73). June 28, 2024. Rachel D. Myers, Judge. Counsel: Joseph W. Engel, Kimberly Simoes, P.A., for Plaintiff. Sean P. Greenwalt, Marshall Dennehey, PC, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEY FEES AND COSTS

THIS CAUSE came before the Court for consideration of the Defendant's Motion for Attorney's Fees and Costs, and the Court having reviewed the motions, the entire record, argument of both counsel, and having been sufficiently advised in the premises, the Court hereby finds:

1. On May 19, 2023, Defendant served its Proposal for Settlement pursuant to Florida Rule of Civil Procedure 1.442 and § 768.79 Fla. Stat. on Plaintiff. The Defendant's Proposal for settlement was for $300.00, which went unaccepted by Plaintiff.

2. On January 16, 2024, this court granted Defendant's Motion for Final Summary Judgment and on March 25, 2024, entered Final Judgment for Defendant resulting in $0.00 recovered for Plaintiff.

3. Under § 768.79 Fla. Stat. right to attorney's fees is established once the two statutory requisites are satisfied: "(1) a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least 25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor is relevant in determining the question of entitlement." *Miccosukee Tribe of Indians of Fla. v. Lewis Tein P.L. ,* 277 So. 3d 299, 302 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1557a] (*Citations Omitted*).

4. In response to Defendant satisfying the procedural requirements, Plaintiff made argument that Defendant's proposal for settlement was

not served in good faith by citing to the amount served, the potential for unsettled law, and the original right of one-way attorney fees for Plaintiff.

5. However, the "question of whether a proposal was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make his offer and made it with the intent to settle the claim against the offeree should the offer be accepted." *Progressive Select Ins. Co. v. Kagan Jugan & Assocs., P.A.,* 348 So. 3d 1168, 1172 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D521a]

6. Further, the factors referenced by Plaintiff do not apply to the entitlement requirements of a proposal for settlement, but rather go to the amount or reasonableness of an the final fee award per § 768.79(7)(b). *Id.* (a "trial court may not rely on these factors to decline to award fees altogether.")

Therefore, **ORDERED AND ADJUDGED,** as follows:

(1) Defendant's Motion for Attorney's Fees and Costs as to entitlement is **GRANTED.**

(2) The Court reserves ruling as to the amount of attorney fees and costs to be determined at a later date.

* * *

Insurance—Homeowners—Standing—Assignment—Validity—Emergency services—Assignments of benefits for emergency services in excess of $3,000 and in excess of 1 % of Coverage A Limit of insured's policy are invalid and unenforceable

LOSS RESTORATIONS, LLC, a/a/o David Isenbarger, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY, d/b/a FRONTLINE INSURANCE, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2022 15268 CODL. January 31, 2024. Rachel D. Myers, Judge. Counsel: Zuleika Castro De Jesus, Kuhn Raslavich, P.A., for Plaintiff. William M "Bill" Mitchell, Sr. and Amy Klotz, Conroy Simberg, for Defendant.

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

THIS CAUSE having come on to be heard on January 29, 2024, on Defendant's Amended Motion for Final Summary Judgment, Plaintiff's Response in Opposition, and the Court having heard argument of counsel and being otherwise advised in the premises, the Court finds as follows:

1. This is an action for breach of contract brought by Loss Restorations, LLC ("Plaintiff"), a/a/o David Isenbarger ("Insured"), against First Protective Insurance Company d/b/a Frontline Homeowners Insurance ("Defendant").

2. Plaintiff alleges that the Insured had a policy of homeowner's insurance with Defendant and that the Insured's property sustained a loss on or about August 18, 2020, in connection with which it performed services pursuant to Assignments of Benefits ("AOBs") executed by the Insured.

3. Plaintiff asserts that Defendant breached the policy by failing to pay for the services it performed.

4. Defendant filed an Amended Motion for Final Summary Judgment, arguing that the AOBs on which Plaintiff relies are invalid and unenforceable pursuant to § 627.7152, Fla. Stat., and that Plaintiff therefore lacks standing to bring this suit.

5. The Court agrees with Defendant.

6. Pursuant to § 627.7152(2)(c), Fla. Stat., "[i]f an assignor acts under an urgent or emergency circumstance to protect property from damage and executes an assignment agreement to protect, repair, restore, or replace property or to mitigate against further damage to the property, an assignee may not receive an assignment of post-loss benefits under a residential property insurance policy in excess of the greater of $3,000 or 1 percent of the Coverage A limit under such policy."

7. The statute defines "urgent or emergency circumstance" as a situation in which a loss to property, if not addressed immediately, will result in additional damage until measures are completed to prevent such damage. *Id.*

8. Section 627.7152(d), Fla. Stat., provides that an assignment agreement that does not comply with the subsection is invalid and unenforceable.

9. The Court finds that each of the AOBs Plaintiff submitted to Defendant pertains to services to be performed under an urgent or emergency circumstance in an amount in excess of $3,000.00.

10. And there was no argument or evidence that any of the estimates did not exceed one percent of the Coverage A limit of the Insured's policy.

11. The Court therefore finds that the AOBs are invalid and unenforceable pursuant to § 627.7152(2)(d), Fla. Stat., and that Defendant is entitled to final summary judgment as a matter of law.

Accordingly, it is **ORDERED** and **ADJUDGED** that, for the foregoing reasons, Defendant's Amended Motion for Final Summary Judgment is hereby **GRANTED**. Final Judgment is rendered in favor of Defendant. Plaintiff shall take nothing by this action. The Court reserves jurisdiction to consider attorney's fees and/or costs.

* * *

Landlord-tenant—Eviction—Judges—Disqualification—Bias—Successor judge—Motion to disqualify or recuse successor judge to whom case was assigned after disqualification of original judge is denied—Quickness of successor judge's ruling on motion to stay following his assignment did not demonstrate bias—Although order granting motion to disqualify and order denying stay were e-filed 16 minutes apart, successor judge was notified of reassignment hours earlier—Mere fact that successor judge is Facebook friends with original judge is not basis for disqualification—Fears that tenant may not receive fair trial does not warrant disqualification—Tenant who has not alleged that she has paid rent owed and has not deposited rent into court registry is not entitled to trial—Where previous judge has been disqualified for alleged partiality or prejudice, successor judge may not be disqualified on a successive motion filed by the same party unless successor judge rules that he or she is in fact not fair or impartial—Successor judge may comment on truth of facts alleged in motion

JEAN C. CUELLO, Plaintiff, v. BRITTANY N. SNIPES, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-CC-008700-O. August 5, 2022. Brian Sandor, Judge. Counsel: Matthew T. Farr, The Farr Group PL, Orlando, for Plaintiff.

ORDER

This case having come on the Defendant's Motion To Disqualify Or Recuse and Emergency Motion for Relief of Court Default & Final Judgment and Reconsideration of Subsequent Filings and the Court having reviewed the file:

1. Plaintiff filed this action for eviction under Florida State Statute 83.625 for non-payment of rent on June 8, 2022 alleging the Defendant owed an amount of $4,280.00.

2. On June 17, 2022 the Plaintiff e-filed its affidavit and proof of service upon the Defendant by posting completed on June 13, 2022.

3. On June 20, 2022, the Defendant timely filed her Answer to the Complaint denying the allegations in the Complaint, asserting various defenses, and requesting a determination of rent.

4. On June 27, 2022 the prior Judge in this case issued an Order denying the Defendant's request for a rent determination for failing to properly file exhibits, affidavits, or any evidence in support of Defendant's allegation pursuant to Florida State Statute 83.60(2) and *Olszewska v. Ferro,* 590 So. 2d 11 (Fla. 3d DCA 1991).

5. On June 28, 2022, Defendant filed two separate but identical amended Answers; one at 12:17:58PM (filing # 152325041) and the second at 12:23PM filed with the Clerk of Court. The Amended Answer again denies all allegations in the Complaint, asserts various defenses, seeks dismissal and requests a rent determination.

6. On June 30, 2022, the prior Court issued a Final Judgment for Possession in favor of Plaintiff. Specifically, the Court found that the Defendant's Answer did not allege the rent claimed in the Complaint was paid; Defendant's Request for a Rent Determination hearing was insufficient, and Defendant failed to deposit the money allegedly owed into the Clerk of Court Registry pursuant for Florida State Statute 83.60(2) thereby waiving any and all defenses the Defendant plead but for payment in full, which the Defendant *did not plead.*

7. On July 1, 2022 the Defendant filed a Notice of Appeal and a Motion to Stay the Writ of Possession.

8. On July 1, 2022, Judge Wish entered an Order Denying the Emergency Motion to Stay Writ of Possession.

9. On July 5, 2022 the Defendant filed an Emergency Motion for Reconsideration.

10. On July 5, 2022 the prior Court Granted Defendant's Emergency Motion for Reconsideration temporarily so that it may conduct a hearing.

11. The prior Court held a hearing on July 18, 2022 where in the Court lifted the temporary stay. The Court Ordered the Plaintiff to deposit money into the registry within 5 days and would allow Plaintiff to amend its Complaint and if amended, for Defendant to respond to the Complaint within 10 days. The Court denied Defendant's Motion to Determine Rent.

12. On July 20, 2022, the Plaintiff deposited $800.00 into the Clerk of Court Registry.

13. On July 21, 2022, the Clerk issued a writ of possession.

14. On July 22, 2022, the Defendant filed a Motion to Stay the Writ of Possession.

15. On July 22, 2022. the prior Court Granted Defendant's Emergency Motion to Stay the Writ of Possession and set it for hearing on July 25, 2022.

16. On July 25, 2022, Defendant filed an Emergency Motion to Continue the hearing.

17. On July 25, 2022, the prior Court, within its discretion, Denied Defendant's Motion to Continue.

18. On July 26, 2022, the Defendant filed an Emergency Motion for Reconsideration on the Motion for Continuance.

19. On July 27. 2022, Plaintiff filed a Motion for Default and requested an Order lifting the Stay.

20. On July 27, 2022, Defendant filed its Objection and Motion to Strike Plaintiff's Motion for Default and Order Lifting Stay.

21. On July 27, 2022, the prior Court entered an Order Entering Default and Lifting Stay Pending Appeal authorizing the Clerk of Court to enter an alias writ of possession to Plaintiff.

22. On July 27, 2022, the Honorable Court for the 5th District Court of Appeals Ordered Upon consideration of "Appellant's Notice of Filing of Order," filed July 21, 2022, it is ORDERED that the above-styled case shall proceed. It is further ORDERED that Appellant's "Emergency Motion for Reconsideration and Motion for Stay of Writ of Possession Pending Reconsideration, Alternatively; Motion for Stay Pending Appeal," filed July 21, 2022, is denied.

23. Again on July 27, 2022, Defendant filed an Emergency Motion to Vacate Court Default and Final Judgment and a separate Emergency Motion for Reconsideration for Continuance.

24. On July 28, 2022 a writ of possession of was issued.

25. On July 29, 2022, the prior Court entered an Order Denying a Stay of the writ of possession.

26. On August 3, 2022 the Defendant filed a Motion to Disqualify or Recuse and an Emergency Stay of the Writ of Possession.

27. On August 3, 2022, the prior Court Granted the Defendant's Motion to Disqualify and by administrative order this case was reassigned to this current Court.

28. On August 3, 2022, this Court entered an Order Denying the Defendant's Emergency Motion to Stay.

29. On August 4, the Defendant filed a Motion to Disqualify or Recuse this Court on allegations of prejudice and bias and because this Court was able to issue a timely Order on Defendant's Emergency Motion.

This Court looks to Florida Rules of Judicial Administration 2.330(i) which states:

> Determination - Successive Motions. ***If a judge has been previously disqualified*** on motion for alleged prejudice or partiality under subdivision (e), ***a successor judge cannot be disqualified based on a successive motion*** by the same party ***unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts*** alleged in support of the motion.

Therefore, this Court may respond directly to Defendant's allegations of this Court's prejudice and bias. First, Defendant cites to the time stamps of the filings of the Order of Disqualification and the Order Denying the Defendant's Stay. What the Defendant fails to understand is that the time stamps are merely when things are filed and are not reflective of the actual order of events. Judge Carter Granted Defendant's Motion and this Court was notified of the reassignment well before the documents were e-filed. This Court issued its Order Denying the Stay earlier in the day and both judicial assistants filed the Orders towards the end of the day to make sure they went out before the close of business. The time stamps are not reflective of when the decisions were made, just reflective of when they were uploaded into the system. The entirety of this process lasted hours and not sixteen minutes as reflected in e-filing time stamps.

Second, the mere friendship of Facebook with colleagues is not a grounds for disqualification. There are hundreds of judges and attorneys on Facebook. The Supreme Court has previously ruled that mere friendship on Facebook is not a grounds for disqualification. *Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n,* Case No. SC17-1848, 2018 Fla. LEXIS 2209 (Fla. Nov. 15, 2018) [43 Fla. L. Weekly S565b]. If mere social media friendship or connections were the litmus test of impartiality in 2022, courts may cease to exist. This Court is an independent judicial officer looking at this case with open eyes and is free from bias in inheriting it.

Third, this is not a complex case as alleged by the Defendant. Florida Statutes with regard to landlord/tenant eviction cases are short and succinct. In Order to maintain any Defense other than payment of the rent allegedly owed in the Complaint, Defendant MUST deposit all of the allegedly owed funds into the Clerk of Court Registry. Third, the Defendant states she **FEARS** gravely (*emphasis in original*) that she is not receiving, has not received, and will not receive a fair trial based on the Judge being biased, and is questioning the Judge's impartiality. The Defendant, by law, is not entitled to a trial in this matter where she has failed to comply with Florida State Statute 83.60(2). This Court had hours to review this file, is very familiar with Florida State Statutes 83.56(5)(a) and 83.60(2) as cited by the Defendant. The Defendant cites to Florida State Statute 83.60(2) in her motion but has not complied with ANY of its requirements.

This action was file on June 8, 2022 and to date Defendant has not made one deposit into the Clerk of Court Registry thereby waiving ANY AND ALL DEFENSES to the eviction but for full payment. Specifically the statute language states a failure to deposit rent into the registry constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to ***an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon.***

Defendant still to this date has never alleged payment of the $4,280 as alleged in the Complaint; only that Defendant made a partial payment that was accepted by the Plaintiff after the filing of the Complaint. That money, per Court Order, is in the Clerk of Court Registry. Therefore, pursuant to Florida law, Defendant is entitled to a final judgment WITHOUT the necessity of a hearing.

IT IS ORDERED AND ADJUDGED:

Therefore, based on the filing, this Court **DENIES** Defendant's Motion to Disqualify this Court. Further it is **ORDERED** that the Clerk of Court **not accept** any further Emergency Motions to Stay in this Case until and unless the Defendant deposits the entire balance alleged in the Complaint minus the amount in the registry *PLUS* the rent for the months of June and August of $1,800 per month per the lease, which totals **$7,080.00**. If the Defendant pays this amount in full, the Defendant still shall continue to deposit the rental amount of $1,800.00 on the first day of each successive month this case is pending pursuant to Florida State Statute 83.60(2).

* * *

Attorney's fees—Amount—Reasonable hours expended and reasonable hourly rate determined—Expert witness fee awarded

CITIBANK, N.A., Plaintiff, v. YOUSSEF LAMBAITIL, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-048474-O. August 16, 2024. Amanda Bova, Judge. Counsel: Flynn LaVrar, for Plaintiff. Bryan A. Dangler, Power Law Firm, Altamonte Springs, for Defendant.

FINAL JUDGMENT OF ATTORNEY'S FEES AND COSTS

THIS CAUSE CAME to be heard during an evidentiary proceeding on August 12, 2024, upon Defendants' Motion for Attorney Fees and Costs[1], and the Court having reviewed the entire court file, including the relevant time records and expert reports submitted, having heard uncontroverted testimony by both counsel and his expert, and being otherwise fully advised in the premises, finds as follows:

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

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

3. Mr. Dangler's affidavit states that he has been a member of the Florida Bar in good standing for 10 years with his practice focused on the areas of consumer debt and insolvency law at both the trial and appellate level. The affidavit and attached time entries reflect a total time of 16.0 hours billed at an hourly rate of $450.00. The affidavit also states that no costs were incurred by Mr. Dangler during the case. No objections to the affidavit or any of its time entries were raised or filed with the Court.

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

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

6. Mr. Dangler's time and costs were also supported by a "Declaration" authored by Mr. Shawn Wayne, Esq. ("Mr. Wayne" or "fee expert") ("expert report"), a qualified attorney fee expert and active member of the Florida Bar for over a decade. In addition to his expert report, Mr. Wayne, who has previously testified as a fee expert in other cases, provided uncontroverted expert testimony during the hearing in support of the reasonableness of Mr. Dangler's time and costs incurred, given the issues that were presented and the result that he ultimately achieved. Mr. Wayne's expert report and his testimony during the hearing affirmed the work and skill displayed by Mr. Dangler in undertaking the case and bringing it to a successful end. He also affirmed Mr. Dangler's hourly rate as reasonable given his years of practice, experience, and success in prior cases, in combination with the customary fees charged for similar work by attorneys in the area, and the rates that Mr. Dangler has been awarded in prior cases as recently as 2023.

7. The Court determines, sitting in its fact-finding capacity, that the reasonable hours spent by Mr. Dangler in representing the Defendant during this case are 16.0 hours. No reduction is warranted.

8. The Court further determines, sitting in its fact-finding capacity, that the reasonable hourly rate for the work performed by Mr. Dangler during this case is $450.00. No reduction is warranted.

9. These findings are based upon all the competent substantial evidence and testimony presented to the Court, together with all the factors enumerated both in the Florida Bar Code of Ethics 4-1.5, and *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom*, 472 So. 2d 1145 (Fla. 1985).

10. Accordingly, this Court finds that the reasonable hourly rate times the reasonable (respective) hours equal $7,220.00, which represents the "lodestar" for the attorney's fees to be awarded to Mr. Dangler in this case.

11. As for Defendant's fee expert, the Court finds that the contracted hourly rate of $450.00 to be reasonable for the work performed by Mr. Wayne, and that the 3.3 hours he incurred were reasonably expended, for a total of $1,485.00.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Bryan A. Dangler, Esq., as counsel for the Defendant, shall recover from the Plaintiff, Citibank, N.A. ("Judgment Debtor"), the following: **$7,200.00** for attorney's fees, **$0.00** for costs, and **$1,485.00** for expert witness fees, for a total sum of **8,685.00**, all of which shall bear post-judgment interest at the statutory rate from the date this Final Judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which amount let execution issue.

IT IS FURTHER ORDERED that the Judgment Debtor, whose mailing addresses are c/o Corporation Service Company, 1201 Hays St., Tallahassee, FL 32301, and c/o RAS LaVrar, LLC, 6409 Congress Avenue, Suite 100, Boca Raton, FL 33314, shall complete under oath, Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the Judgement Creditor, Bryan A. Dangler, Esq. ("Judgment Creditor"), at The Power Law Firm, 5415 Lake Howell Rd., #189, Winter Park, FL 32792, within forty five (45) calendar days from the date of this Final Judgment, unless this Final Judgment is satisfied or post-judgment discovery is stayed.

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

[1]Defendant's entitlement to recovery of his attorney fees and costs was previously granted via Agreed Order entered on June 18, 2024.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement rate—Where PIP policy provided notice that insurer would pay 80% of reasonable expenses for medically necessary services and defined "reasonable expenses" as the lesser of amount provided by schedule of maximum charges or amount provider customarily charges for like services or supplies, the insurer was permitted to pay 80% of the charge submitted by medical provider in an amount that was less than the amount reimbursable under statutory fee schedule

FLORIDA INJURY KISSIMMEE, LLC, a/a/o Carmen Valentin, Plaintiff, v. SECURITY NATIONAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-034796-O. July 18, 2024. Eric H. DuBois, Judge. Counsel: Matthew Emmanuel, Landau & Associates, Sunrise, for Plaintiff. Ashley Venegas Ingalls, Law Office of Acosta Farmer & Marsh, Oklahoma City, Oklahoma, for Defendant.

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

THIS MATTER having come before this Court for consideration on the Parties Competing Motions for Summary Judgment, the Court having reviewed the court file, including the operative Motions, Defendant's affidavit, the pleadings and attachment thereto, heaving heard the arguments of counsel and the Court being otherwise fully advised in the premises, does hereby find as follows:

BACKGROUND

Defendant (or "SNIC") issued a policy of insurance providing Personal Injury Protection ("PIP") benefits. Plaintiff filed this action alleging Defendant breached the contract by failing to properly pay for services/treatment rendered to the assignee, Carmen Valentin.

Plaintiff submitted medical bills for services rendered to the claimant for date of service December 17, 2015, through January 14, 2016. The parties agree the only payment at issue is for CPT Code A4556, paid at 80 percent of the amount billed. *See Plaintiff's Motion for Summary Judgment filed March 24, 2022.* Defendant allowed Plaintiff's charges for CPT Code A4456 at 100 percent of the amount billed. Defendant then reimbursed Plaintiff for 80 percent of the charge as submitted.

Plaintiff argues Defendant breached the contract by failing to pay 100 percent of the charge as required when the charge submitted for CPT code A4556 was less than 80 percent of 200 percent of the applicable MPBFS. In the alternative, Plaintiff argues Defendant breached the contract by failing to pay 80 percent of 200 percent of the applicable MPBFS after providing notice in its policy of insurance it would pay in accordance with the same. Defendant argues that both Florida Statute and its policy allow payment of Plaintiff's charges at 80 percent of the charge as submitted when the amount billed is less than 200 percent of the applicable MPBFS, and more specifically, less than 80% of 200% of the applicable MPBFS as are the facts in this case.

Similar to the issue before this Court, the Florida Supreme Court framed "the question for decision [a]s whether the insurer here may pay 80% of a charge submitted by a provider even when that reimbursement amount is less than the amount that would be reimbursable under the limitations of the statutory schedule of maximum charges." *Allstate Ins. Co., et al., v. Revival Chiropractic, LLC,* No. SC2022-0735 (April 25, 2024) [49 Fla. L. Weekly S113a]. As the arguments presented by both Defendant and Plaintiff have been addressed recently by the Florida Supreme Court in *Revival,* this Court begins its analysis there.

ANALYSIS OF THE FLORIDA SUPREME COURT'S DECISION

On April 25, 2024, the Florida Supreme Court issued its decision in *Revival.* Relying on the 11th District Court of Appeals now superseded ruling in *Revival,* Plaintiff argues that Defendant was required to pay CPT Code A4556 at 100 percent of the amount billed and not 80 percent of the amount billed because the charge as submitted was less than 80 percent of 200 percent of the applicable MPBFS.

The Florida Supreme Court addressed Plaintiff's primary argument that Defendant was required to pay 100 percent of the charge submitted and clarified that 80 percent "of reasonable expenses requirement [w]as the 'overarching mandate' of the PIP statute." Indeed, "the heart of the PIP statute's coverage requirements" is for PIP insurers to "reimburse eighty percent of reasonable expenses for medically necessary services." citing, *Virtual Imaging,* 141 So. 3d at 155.

The Florida Supreme Court previously considered "the interaction of the PIP statute's foundational requirement that insurers pay 80% of 'all reasonable expenses' for medically necessary services with the statutory authorization for an insurer to pay 80% of expenses based on the statutory schedule. . ." in *MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Co.,* 334 So. 3d 577 (Fla. 2021) [46 Fla. L. Weekly S379a].

In *MRI Associates,* the Florida Supreme Court affirmed the plain language of the PIP statute does not "preclude an insurer that elects to limit PIP reimbursements based on the schedule of maximum charges from also using the separate statutory factors for determining the reasonableness of charges." *Id.* at 584-85. Therein the court noted that the "permissive nature of the statutory notice language . . . signals that the insurer is given an option that may be used in addition to other options that are authorized." *Id.* Based on "the full context of these provisions," the Florida Supreme Court held "a reasonable reading of the statutory text requires that reimbursement limitations based on the schedule of maximum charges be understood . . . simply as an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates," or in other words, "a ceiling but not a floor." *Id.*

While Defendant argued that *MRI Associates* decision was directly binding on this Court, the Plaintiff argued that *MRI Associates* undermined but did not directly repudiate the two decisions that were binding on this Court and required Defendant to pay 100 percent of the charge submitted under these facts. *See*, *Hands On Chiropractic PL v. GEICO General Insurance Co.,* 327 So. 3d 439 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a]; and *Geico Indemnity Co. v. Accident & Injury Clinic, Inc. a/a/o Frank Irizarry,* 290 So. 3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b]. This Court need not delve further into the parties' arguments as the Florida Supreme Court squarely addressed this issue by holding *Hands On,* which affirmed *Irizarry,* were in fact superseded by *MRI Associates* and now *Revival. See, Revival.*

As required by Florida Statutes, and urged by Defendant, Plaintiff's charge as submitted must be reasonable. Even when a provider submits a charge for less than the allowable amounts in the applicable fee schedule, the requirement of subsection (5)(a) that providers "may charge the insurer and injured party only a reasonable amount" reinforces the notion that the plain language of § 627.736(5)(a) Fla. Stat., when read as a whole, only ever requires an insurer to pay 80 percent. *See, Revival*; *citing Nationwide Mut. Ins. Co. v. Jewell,* 862 So. 2d 79, 86 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2605a] ("[T]here is simply no basis for complaining that a payment rate a provider has agreed to accept is inadequate and therefore not reasonable."); approved by *Allstate Ins. Co. v. Holy Cross Hosp., Inc.,* 961 So. 2d 328 (Fla. 2007) [32 Fla. L. Weekly S453a]. Accordingly, and as clarified by the Florida Supreme Court, Plaintiff's first argument fails as a matter of law.

Plaintiff's secondary argument is that once Defendant provided notice of its election to use the fee schedules, Defendant was required to reimburse the provider at 80 percent of 200 percent of the applicable MPBFS. The Florida Supreme Court addressed Plaintiff's argument as follows:

> As *MRI Associates* makes clear, the PIP statute contemplates that an insurer providing notice that it may use the schedule of maximum charges ***will not thereby be precluded from paying 80% of reasonable charges as otherwise determined under the provisions of subsection (5)(a)***. 334 So. 3d at 585 (emphasis added). The PIP statute thus sets up the framework for an insurer to opt into a "hybrid-payment methodology." *Id.* And it flows from the permissive language used in subsection (5)(a)1. that establishes the underlying authorization for the schedule of maximum charges: an insurer "may limit reimbursement to 80 percent" of the schedule of maximum charges. All this language denoting permissive limitation establishes that the schedule constitutes an optional limitation that may be invoked by an insurer—if the insurer's policy contains the necessary notice—in determining reasonableness under the overarching mandate to pay 80% of reasonable charges.

Thus, at this time, the only issue for this Court to determine is whether Defendant's policy language is similar to that of Allstate in *Revival,* and whether Defendant provided notice that it was not limited to exclusive use of the fee schedules to limit payment to 80 percent.

ANALYSIS OF DEFENDANT'S POLICY LANGUAGE

In *Revival,* the Court analyzed Allstate's policy and found that it expressly provides that Allstate will pay "eighty percent of reasonable expenses," noting as follows:

> [I]n addition to giving notice that payments will be limited by the schedule of maximum charges, the policy in describing the "methodology" for determining the amount to be paid specifically makes that determination subject to "any other limitations established by Section 627.736 . . . or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law." (Emphasis added.) This is in line with the permissive language of subsection (5)(a)5.'s notice provision and subsection(5)(a)1.'s authorization of the schedule, which both signal that the schedule is designed as a non-exclusive option. It is, of course, possible that an insurer could employ policy language making an exclusive election of the schedule of maximum charges. But Allstate certainly has not done so.

As Defendant urges this Court, Defendant's contract of insurance must be read as a whole. *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569 (Fla. 2011) [36 Fla. L. Weekly S469a] (When "interpreting an insurance contract," this Court is "bound by the plain meaning of the contract's text"). Defendant's Florida Personal Auto Policy Form 1005 02/11 with endorsement Form FLSNPIP02 (01/13) states in pertinent part as follows:

> Florida Personal Auto Policy Endorsement
>
> **Your** policy is modified as follows:
>
> PART C—PERSONAL INJURY PROTECTION COVERAGE is replaced by the following:
>
> PERSONAL INJURY PROTECTION COVERAGE
>
> **BASIC PERSONAL INJURY PROTECTION COVERAGE**
>
> **INSURING AGREEMENT**
>
> If you pay a premium we will pay to or on behalf of the **injured person** the following benefits. Payments will be made only when **bodily injury** is caused by an **accident** arising from the ownership, maintenance, or use of a **motor vehicle.**
>
> 1. Medical Benefits—Eighty percent of all **reasonable expenses** (as defined in this policy) for **medically necessary** medical, surgical, x-ray, dental, and rehabilitative services, including prosthetic devices and **medically necessary** ambulance, hospital, and nursing services if the individual receives initial services and care pursuant to 1.a., below, within 14 days after the motor vehicle accident. . .
>
> The definition of **reasonable expenses** is defined under **Additional Definitions** Part C—Personal Injury Protection Coverage of the FLSNPIP02 (01/13) endorsement as definition no. 7 and states:
>
> "**Reasonable expenses** *shall mean the lesser of* the amount provided by the schedule of maximum charges as contained in the Florida Motor Vehicle No-Fault Law (§§627.730-627.7405), Florida Statutes) as may be amended from time to time *or* the amount the person or institution customarily charges for like services or supplies." [emphasis added]

Defendant's policy endorsement defines "Medical Benefits" as "Eighty percent of all reasonable expenses (as defined in this policy). . ." and states in its definition of reasonable expenses it will only pay the lesser of "the amount provided by the schedule of maximum charges as contained in the Florida Motor Vehicle No-Fault Law (§§627.730-627.7405), Florida Statutes) as may be amended from time to time *or* the amount the person or institution customarily charges for like services or supplies."

Although the PIP statute does not define a reasonable expense, according to Florida Statute, Section 627.736(5)(a), "in determining whether a charge for a particular service. . . is reasonable, consideration may be given to evidence of usual and customary charges. . ."

As the PIP statute requires Plaintiff's charges as submitted to be deemed a reasonable expense, which includes evidence or the acceptance of usual and customary charges as a reasonable expense, Defendant's policy does not deviate from the statute by setting the "floor" for reimbursement as the lesser amount between the amount provided by the schedule of maximum charges or the amount customarily charged for like services and supplies. Specifically, a plain reading of Defendant's policy endorsement Form FLSNPIP01 (01/13), along with ss. (1)(a), (5)(a), and (5)(a)(1) of the PIP statute show that not only is notice of its intention to utilize any applicable fee schedule limitation provided, but also, notice is provided as to its intention to limit reimbursement to 80 percent of the fee schedules or what the provider charges, whichever is less. As such, Plaintiff's secondary argument that once Defendant elected fee schedules its policy of insurance required it to pay in accordance with the same must fail as a matter of law.

CONCLUSIONS OF FACT AND LAW

As clarified by the Florida Supreme Court, the overarching mandate of the PIP statute is payment of 80 percent of reasonable expenses for medically necessary services. See, *Revival.* While Defendant's policy language provides notice of intention to limit payment pursuant to 627.736(5)(a)(1), there is nothing in the PIP statute nor Defendant's policy language that advises payment in accordance with the schedule of maximum charges will be the exclusive payment methodology.

Therefore, this Court finds Defendant's policy clearly advises Plaintiff medical benefits will not exceed 80 percent of all reasonable expense even where the charge as submitted is less than the fee schedule. Therefore, while 80 percent of a reasonable expense is the minimum Defendant must pay pursuant to Florida law, it is also the maximum Defendant will pay as defined by its policy.

Wherefore, Defendant is entitled to judgment as a matter of law.

Accordingly, it is hereby ORDERED and ADJUDGED that Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiff's Motion for Summary Judgment is hereby DENIED.

Final Judgment is hereby entered in favor of the Defendant and against the Plaintiff. This matter is dismissed with prejudice, and

Defendant shall go hence forth without delay.

* * *

Attorney's fees—Prevailing party—Timeliness of request for fees—Case dismissed for lack of prosecution before defendant filed his answer—Defendant provided timely notice of intent to seek attorney's fees and costs as prevailing party where he filed his motion for attorney's fees and costs within 30 days of dismissal—Mutuality or reciprocity of obligation—Defendant is entitled to award of fees and costs under fees provision of contract underlying plaintiff's claim

BARATO EN USA, Plaintiff v. JESUS VASQUEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-003638-SP-21. Section HI05. May 16, 2024. Myriam Lehr, Judge. Counsel: Vivian E. Restrepo, Miami, for Plaintiff. Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Defendant.

ORDER AWARDING ENTITLEMENT TO ATTORNEY FEES

THIS CAUSE having come to be heard by the Court on May 14, 2024, on the Defendant, JESUS VASQUEZ's ("Defendant"), Motion for Attorney's fees filed on February 01, 2023 [DE 18] ("Motion"). Joshua Feygin, Esq. of Joshua Feygin P.L.L.C. represented Defendant at the hearing. Plaintiff, "BARATO EN USA" failed to appear despite being duly noticed [DE 19]. Having heard the argument of Counsel, reviewed the record, relevant legal authority, and being otherwise fully advised in the premises,

NOW THEREFORE, the Court finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This action was filed by Plaintiff, BARATO EN USA on 04/16/2021. [D.E. No. 2]

2. On 09/10/2021, Defendant was served with the lawsuit in this action. [D.E. No. 7]

3. On 11/24/2021, Defendant filed his Motion to Compel Arbitration. [D.E. No. 13]

4. On 11/16/2022 this Honorable Court entered a F.W.O.P. notice advising that the action would be dismissed if no record activity occurred prior to the February 1, 2023 FWOP hearing. [D.E. No. 15]

5. Plaintiff appeared through counsel at the FWOP hearing on February 1, 2023.

6. Defendant appeared through counsel at the FWOP hearing on February 1, 2023.

7. The Court noting that no record activity occurred in the months preceding the hearing summarily dismissed the action on February 1, 2023. [DE 17].

8. That same day, Defendant, as the prevailing party, timely filed a Motion for Attorney's Fees and Costs. [DE 18].

9. Plaintiff failed to ever respond.

10. On May 7, 2024, this court *sua-sponte* noticed the Motion for hearing for May 14, 2024, commencing at 9:30 a.m.

11. The Parties were duly noticed. [DE 19].

12. Attorney Joshua Feygin timely appeared on behalf of the Defendant.

13. After waiting five minutes to start the hearing, no appearance was made on behalf of the Plaintiff.

14. As articulated by the Defendant, Fla. Stat. § 57.105(7) provides:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

15. Pursuant to the contract attached to and incorporated in the operative statement of claim for this action, Plaintiff, as the prevailing party, would be entitled to the recovery of its attorney's fees and costs. Pg. 8, Statement of Claim. [DE 2].

16. This Court finds Fla. Stat. § 57.105(7) clear and unambiguous. Fla. Stat. § 57.105(7) provides for a reciprocal award of attorney's fees and costs in the event a contract contains an attorney's fee provision in favor of a party enforcing the contract.

17. Here it is undisputed that the subject contract had an attorney fee provision in favor of the party enforcing the contract. It is further undisputed that the subject contract was entered into on or after October 1, 1988.

18. A demand for attorney's fees and costs must be plead to place the adverse party on notice. However, "must be pled" is to be construed in accord with the Florida Rules of Civil Procedure. Complaints, answers, and counterclaims are pleadings pursuant to Florida Rule of Civil Procedure 1.100(a). A motion to dismiss is not a pleading. The failure to set forth a claim for attorney fees in a complaint, answer, or counterclaim, if filed, constitutes a waiver. However, the failure to set forth a claim for attorney fees in a motion does not constitute a waiver. Until a rule is approved for cases that are dismissed before the filing of an answer, we require that a defendant's claim for attorney fees is to be made either in the defendant's motion to dismiss or by a separate motion which must be filed within thirty days following a dismissal of the action. If the claim is not made within this time period, the claim is waived. *Green v. Sun Harbor Homeowners'*, 730 So. 2d 1261 (Fla. 1998) [23 Fla. L. Weekly S438a].

19. The Court finds that the Defendant provided timely notice of its intention to seek attorney's fees and costs as the prevailing party by virtue of timely filing its Motion for Attorney's Fees and Costs [DE 18].

It is hereby **ORDERED AND ADJUDGED**:

Defendant's Motion Awarding Entitlement To Attorney's Fees [DE 18] is **GRANTED.**

Defendant shall be entitled to recover its attorney's fees and costs as the prevailing party this action from the Plaintiff pursuant to Fla. Stat. § 57.105(7);

The Court reserves jurisdiction to liquidate the amount of attorney's fees and costs upon the submission of a fee petition by the Defendant.

The Court further reserves jurisdiction to enter further Orders to obtain enforcement of this Order.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to dismiss complaint and compel appraisal is denied—Appraisal process that provides for parties to petition court to select third appraiser if they are unable to agree on third appraiser cannot legally be completed prior to suit because no court in Florida has jurisdiction over a petition to select a third appraiser—Insured properly alleged cause of action for breach of contract where complaint stated that appraisal process was complete and incorporated evidence of repair shop's presuit efforts to complete appraisal

ADAS WINDSHIELD CALIBRATIONS, LLC, a/a/o Jessica Gomez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-021725-SP-25. Section ND01. August 7, 2024. Myriam Lehr, Judge. Counsel: Martin I. Berger, Berger|Hicks, Miami, for Plaintiff.

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

This matter, having come on to be heard on the 22nd day of July, 2024, on Defendant's Motion to Dismiss Plaintiff's Complaint and to Compel Appraisal, and the Court, having heard argument on same,

and being otherwise fully advised on the premises, it is:

CONSIDERED, ORDERED and ADJUDGED:

Defendant's Motion to Dismiss is Denied.

It must be noted at the outset that despite defense counsel's representation at the hearing to the contrary, there is no alternative motion to stay the proceedings to complete the appraisal process. The only Motion to Stay filed in this matter concerned a Motion to Stay discovery pending a resolution of the underlying Motion to Dismiss. This Court therefore only has in front of it a Motion to Dismiss the Complaint and Compel Appraisal, not an alternative motion to stay the proceedings to complete appraisal.

In light of the above, the Motion to Dismiss must be denied because Florida Law does not recognize a standalone petition to appoint a third appraiser, as required under the policy of insurance. Therefore, the State Farm appraisal process as written in its contract cannot be completed. More specifically, the appraisal clause states as follows:

> **If there is disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal will be used as the first step toward resolution. Appraisal will follow the rules and procedures as listed below:**
>
> **a) The owner and we will each select a competent appraiser.**
>
> **b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or we may petition a court that has jurisdiction to select the third appraiser**.

The reason this process cannot be completed before suit is filed is that no court in Florida has jurisdiction over a petition to select a third appraiser and no insurance policy can confer that jurisdiction on this Court. *State Farm Florida Ins. Co. v. Roof Pros Storm Division, Inc*., 346 So. 3d 163 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1426a]. In *Roof Pros*, State Farm filed, in four separate original actions, petitions for Courts to appoint appraisers. The Court, in finding that there is no such thing in Florida as invoking a trial court's jurisdiction for the purpose of appointing third appraisers, ruled, "Contrary to the initial position taken by State Farm in this appeal, subject-matter jurisdiction cannot be conferred by agreement of the parties, and we find State Farm's argument that the language of the policy gave the court the necessary jurisdiction to appoint an umpire wholly unpersuasive." The Court further states: "State Farm opted to file a non-existent cause of action to simply appoint an umpire." Finally, in further dismissing State Farm's claims, the Court states: "Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim." *Roof Pros*, at 164, 165.

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

In accordance with the two above cases, there cannot be a condition precedent in an insurance policy that cannot be legally completed. The Third District also holds that a party cannot create causes of action that are not set forth in the Florida Rules of Court. *State Farm Florida Ins. Co. v. Gonzalez*, 76 So. 3d 34 (Fla. 3rd DCA 2011) [36 Fla. L. Weekly D2692a]. Further, as the appraisal process cannot be completed without an underlying lawsuit, this Court cannot grant the Motion to Dismiss as the parties would again be back in a posture where appraisal can never be completed. As such, Defendant's Motion is denied.

Defendant's Motion is also denied because in this Motion to Dismiss, the Court must only look to the four corners of Plaintiff's Complaint and the attachments thereto. *Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752 (Fla. 2016) [41 Fla. L. Weekly S91a]. *See also*, *District Board of Trustees of Miami-Dade College v. Verdini*, 339 So. 3d 413 (Fla. 3rd DCA 2022) [47 Fla. L. Weekly D857b]. In reviewing Plaintiff's Complaint, it is clear that the complaint properly sets forth all of the elements of a breach of contract. Further, the Complaint states that the appraisal process is complete and attached to the Complaint are Plaintiff's efforts to complete the appraisal process pre-suit. In accordance with the four corners rule, Defendant's Motion is denied as Plaintiff has properly alleged a cause of action for breach of contract.

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

* * *

Insurance—Property—Assignee's action against insurer—Conditions precedent—Notice—Failure of assignee to submit written notice of intent to initiate litigation prior to filing suit—2022 amendment to section 627.70152 made notice requirement applicable to suits brought by assignees—Complaint dismissed without prejudice

407 RESTORATION, INC., Plaintiff, v. PEOPLE'S TRUST INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-053229-CC-05. Section CC01. August 13, 2024. Michael Barket, Judge. Counsel: Vyacheslav Borshchukov, Fort Lauderdale, for Plaintiff. Michael B. Greenberg, Deerfield Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH § 627.70152(3)(A), FLA. STAT.

THIS CAUSE, having come before the Court upon on August 6, 2024, on DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH § 627.70152(3)(a), FLA. STAT. ("Motion to Dismiss"), and the Court having heard arguments of counsel, and the Court having been otherwise fully advised, it is hereby:

ORDERED and ADJUDGED that:

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

2. Section 627.70152(3)(a), Florida Statutes, requires submission of a written notice of intent to initiate litigation through the Florida Department of Financial Services as a condition precedent to filing suit under a property insurance policy.

3. Effective December 16, 2022, section 627.70152, Florida Statutes, "applies exclusively to all suits arising under a residential or commercial property insurance policy." *See* § 627.70152(1), Fla. Stat. Notably, this same subsection of the prior version of the statute (effective from May 26, 2022 to December 15, 2022) provided that "[t]his section applies exclusively to all suits ***not brought by an assignee*** arising under a residential or commercial property insurance policy."(Emphasis added).

4. "When a statute is amended to change a key term ***or to delete a provision***, 'it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment.' " *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 126 (Fla. 2016) [41 Fla. L. Weekly S146a] (emphasis added) (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977)). Thus, because the Legislature had deleted the assignee exception from the version of section 627.70152(1) that was in effect when Plaintiff filed the Complaint, Plaintiff was required to submit a written notice of intent to initiate

litigation pursuant to section 627.70152(3)(a) prior to filing suit.

5. As Plaintiff admittedly did not submit a written notice of intent to initiate litigation prior to filing suit as required by section 627.70152, the Court must dismiss the suit without prejudice pursuant to section 627.70152(5). *See Cantens v. Certain Underwriters at Lloyd's London*, No. No. 3D22-0917, 2024 WL 591695, at *1, *3 (Fla. 3d DCA Feb. 14, 2024) [49 Fla. L. Weekly D360a].

6. Accordingly, Defendant's Motion to Dismiss is hereby **GRANTED without prejudice.**

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to dismiss and compel appraisal is denied because appraisal process as written is complete

ADAS WINDSHIELD CALIBRATIONS, LLC, a/a/o John Anderson, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2024-004216-SP-25. Section CG03. July 30, 2024. Patricia Marino Pedraza, Judge. Counsel: Martin I. Berger, Berger|Hicks, Miami, for Plaintiff.

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

This matter, having come before the Court on the 29th day of July, 2024, on Defendant's Motion to Dismiss Complaint and Compel Appraisal, and the Court, having heard argument of counsel and being otherwise advised on the premises, it is:

CONSIDERED, ORDERED AND ADJUDGED,

Defendant's Motion to Dismiss is Denied. Based upon the case law cited by both parties, *State Farm Florida Ins. Co. v. Roof Pros Storm Division, Inc*., 346 So. 3d 163 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D1426a], and *State Farm Florida Ins. Co. v. Parrish*, 312 So. 3d 145 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D85a], *approved by Parrish v. State Farm Florida Ins. Co*., 356 So. 3d 771 (Fla. 2023) [48 Fla. L. Weekly S27a], this Court determines that the appraisal process as written is complete. This Court is further bound by the well pleaded facts of Plaintiff's Complaint which properly alleges that the appraisal process is complete. Therefore, Defendant's Motion to Dismiss is denied.

Defendant shall have twenty (20) days to file a responsive pleading to Plaintiff's Complaint and shall respond to Plaintiff's discovery within thirty (30) days.

* * *

Insurance—Automobile—Windshield repair—Attorney's fees—Amount—Reduction—Hourly rate claimed by attorneys is reduced, as claim was based on rates for attorneys with more experience and credentials and was not based on examination of rates in relevant market—Hourly rate for paralegals is also reduced—Total hours claimed are reduced, as the hours were unreasonably expended, excessive, duplicative, or administrative and ministerial in nature—Contingency risk multiplier—Award of multiplier is not warranted in absence of competent substantial evidence that market required multiplier to obtain competent counsel in similar cases or that attorneys could not mitigate risk of nonpayment—Further, case did not involve any difficult, novel, or complex questions of law

PAGE 42, LLC, a/a/o Shazam Auto Glass, LLC, a/a/o Sharon Himes, Plaintiff, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-050244. Division J. July 21, 2024. J. Logan Murphy, Judge. Counsel: Ronald S. Haynes, Christopher Ligori & Associates, Tampa, for Plaintiff. David S. Dougherty, Law Office of David S. Dougherty (Employees of GEICO), Tampa, for Defendant.

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR FEES AND COSTS

BEFORE THE COURT is Plaintiff's Amended Motion for an Award of and Determination of the Amount of Attorney's Fees and Costs (Doc. 109). The parties appeared for an evidentiary hearing on May 17, 2024. At the hearing, Plaintiff disclaimed any entitlement to costs.

I. BACKGROUND.

Page 42 filed this action on December 6, 2017. Shazam assigned the claim to Page 42 the recover the cost of replacing Sharon Himes' windshield. After the parties appeared for a small claims pretrial conference on February 13, 2018, very little happened. Except for requests for admission served with the statement of claim, Page 42 did not issue discovery to GEICO until February 9, 2021. GEICO filed a motion to dismiss, which was never heard or resolved, along with initial discovery. After the case languished for three years, the Court issued a notice of intent to dismiss for lack of prosecution on January 26, 2021. A predecessor judge found good cause and allowed the case to proceed. Still, little happened.

Page 42 disclosed its experts in April 2022, and GEICO filed an answer in early 2023. After GEICO also disclosed an expert witness, Page 42 served a round of expert and trial-related discovery in August 2023. That trial discovery was accompanied by an amended expert disclosure. Then, about a month later, GEICO confessed judgment for $593.90, plus interest. All in all, no significant litigation occurred in this case. Page 42 served minimal discovery, no depositions were taken, and other than the initial, 60-second small claims pretrial conference, no hearings were held.

II. STANDARD.

There are two halves to a fee determination. First, the proponent must provide competent evidence of the reasonable amount of time spent on a case. *Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). The proponent should "present records detailing the amount of work performed." *Id.* "Competent evidence includes invoices, records, and other information detaining the services provided as well as the testimony from the attorney in support of the fee." *Black Point Assets, Inc. v. Ventures Trust 2013-I-H-R by MCM Cap. Partners*, 236 So. 3d 1134, 1136 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D118a] (quoting *Diwakar v. Montecito Palm Beach Condo. Ass'n*, 143 So. 3d 958, 960 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1372b]).

Second, the proponent must prove, and the court must find, a reasonable hourly rate for the services provided. *Rowe*, 472 So. 2d at 1150. In determining the hourly rate, the Court must consider all of the *Rowe* factors except the time and labor required, the novelty and difficulty of the question involved, the results obtained, and whether the fee is fixed or contingent. *Id.* To determine whether the rate is reasonable, the trial court must consider the prevailing market rate for attorneys of reasonably comparable skill or experience. *Lizardi v. Federated Nat'l Ins. Co.*, 322 So. 3d 184, 188 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1368a].

Once the proponent provides evidence of both halves of the equation, the court must multiply the number of hours reasonably expended by the reasonable hourly rate to find the lodestar. *Rowe*, 472 So. 2d at 1151. The lodestar is the appropriate award, unless the court increases or decreases the award based on distinct factors. The number of hours expended, the hourly rate, and the total amount of the award must be supported by competent evidence and expert testimony. *Black Point Assets*, 236 So. 3d at 1136. Expert testimony must address the *Rowe* factors:

> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Rowe, 472 So. 2d at 1150. *See Raza v. Deutsche Bank Nat'l Trust Co.*, 100 So. 3d 121, 126 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2243c]. And the court must "make specific findings concerning the hourly rate, the number of hours reasonably expended, and the appropriateness of any reduction or enhancement factors." *Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc.*, 928 So. 2d 495, 498 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c].

The movant has the burden of proving the fees are reasonable. *Philip Morris USA Inc. v. Jordan*, 333 So. 3d 300, 304 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D259a]; *Faulkner v. Woodruff*, 159 So. 3d 319, 321 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D594c]; *White v. Guardianship of Lubin*, 150 So. 3d 1256, 1258 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2436a]. But " 'the opponent of a fee has the burden of pointing out with specificity which hours should be deducted.' " *Universal Prop. & Cas. Ins. Co. v. Deshpande*, 314 So. 3d 416, 420 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2511a] (quoting *Brake v. Murphy*, 736 So. 2d 745, 749 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1443a).

III. DISCUSSION.

A. Page 42's requested hourly rates are unreasonable.

Page 42 requested $975.00/hour for both of its attorney timekeepers, $275.00/hour for two paralegals, and $225.00/hour for a junior paralegal. There is no competent market evidence to support the rates requested.

Page 42's expert testified that the "famous four" of the plaintiffs' bar—scions of the legal profession—command rates between $900.00 and $1,000.00 per hour. Other than the expert's conclusory opinion that Page 42's attorneys should be awarded the same rate, there is no competent evidence suggesting that the attorneys—while experienced in their own right—should command the same hourly rate as the most experienced and well-known trial attorneys in the state.

I do not find Page 42's expert's opinions credible. He is, himself, a trial attorney of extraordinary accomplishment and experience, but he has little familiarity with windshield litigation, and he failed to examine the "prevailing market rate for attorneys of reasonably comparable skill or experience." *Lizardi*, 322 So. 3d at 188. Instead, he reviewed about a half-dozen orders awarding fees, and relied heavily on the *Cherry* order, where neither party contested the rates. Indeed, on cross-examination, he admitted that he "adopted the rate in *Cherry*," rather than performing an independent analysis of the market-driven hourly rate. He drew no logical link between the lawyers in this case and the rates commanded by attorneys of comparable skill or experience. His testimony is therefore afforded no weight, and Page 42 has failed to supply competent, substantial evidence supporting the rate requested.[1]

I find GEICO's expert to be more credible. He opined that a reasonable rate would be $550.00 per hour, and I agree. The expert testified to the fees customarily charged in the market, the time limitations imposed, the relationship with the client, and the appropriate rate given the experience and reputation of the lawyers. I agree with GEICO's expert that the attorneys' quarter-century of experience warrants a rate of $550.00. Neither are board certified or show significant leadership in the bar or the community that would demonstrate a reputation commanding a thousand dollars an hour. The expert canvassed other, similar fee awards in detail and translated those awards into a market expectation of $550.00 per hour. Similar attorneys of similar experience and reputation in windshield litigation have been awarded comparable rates, some of whom have shown more leadership in the industry. Overall, I agree with the expert's opinion that Page 42's timekeepers do not command the same rates as the most experienced and renowned plaintiffs' attorneys in the state.

I likewise agree with GEICO that the rates requested for the paralegals are too high. Even Page 42's expert admitted that the requested rates were "a little high." Based on the evidence presented, I find that a reasonable rate for paralegals MM and AP would be $175.00 based on their significant experience. I find that a reasonable rate for CF, who is not a certified paralegal and lacks comparable experience, would be $125.00.

B. The number of hours reasonably incurred.

To determine a lodestar, I multiply the reasonable hourly rates by the number of hours reasonably expended on the case. "Reasonably expended" means:

> the time that ordinarily would be spent by lawyers in the community to resolve this particular type of dispute. It is *not* necessarily the number of hours actually expended by counsel in the case. Rather, the court must consider the number of hours that should reasonably have been expended in that particular case.

Centex-Rooney Constr. Co., Inc. v. Martin Cnty., 725 So. 2d 1255, 1258 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D336a] (quoting *In re Estate of Platt*, 586 So. 2d 328, 333-34 (Fla. 1991)). Fees should be awarded only "for services . . . in the handling of the case that were reasonably or necessarily required, but not for services that went beyond that which was called for." *Allstate Ins. Co. v. Baer*, 334 So. 2d 135, 137 (Fla. 3d DCA 1976). And "work that is necessitated by the client's own behavior should more properly be paid by the client than by the opposing party." *Baratta*, 928 So. 2d at 499. The trial court has an obligation to distinguish between "hours actually worked" and "hours reasonably expended." *Fla. Birth-Related Neurological Injury Compensation Ass'n v. Carreras*, 633 So. 2d 1103, 1110 (Fla. 3d DCA 1994). The latter number is used for the lodestar; not the former. *Id.*

In contesting the fees sought, GEICO argues that several categories of requested fees are categorically barred from collection. One category is block-billed entries. Sometimes, block-billing may prevent a trial court from determining whether certain fees are reasonable. *See Cousins v. Duprey*, 325 So. 3d 61, 76 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1685a]; *Moore v. Kelso-Moore*, 152 So. 3d 681, 682 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2402a]. But it is not verboten. Substantial evidence of reasonableness may still exist when time is block-billed. That may be why I can find only one published case that categorically bans recovery of block-billed fees. *State ex rel. Harris v. Rubino*, 126 N.E.3d 1068, 1071 ¶ 7 (Ohio 2018). Everywhere else, block-billed fees are disfavored but regularly awarded if the time entries do not impede meaningful review. *See, e.g.*, *Raja v. Burns*, 43 F.4th 80, 87 (2d Cir. 2022) ("We have found block billing to be permissible as long as the district court is still able to conduct a meaningful review of the hours for which counsel seeks reimbursement.") (internal quotation omitted); *The Ne. Ohio Coal. For the Homeless v. Husted*, 831 F.3d 686, 706 n.7 (6th Cir. 2016) ("This court has held block billing can be sufficient if the description of the work performed is adequate.") (internal quotation omitted); *Fafaras v. Citizens Bank & Tr. of Chicago*, 433 F.3d 558, 569 (7th Cir. 2006) ("Although 'block billing' does not provide the best possible description of attorneys' fees, it is not a prohibited practice."); *Cadena*

v. Pacesetter Corp., 224 F.3d 1203, 1215 (10th Cir. 2000) ("[T]his court has not yet established a rule mandating reduction or denial of a fee request if the prevailing party submits attorney-records which reflect block billing.").[2]

Florida law is not to the contrary. *See Spanakos v. Hawk Sys., Inc.*, 362 So. 3d 226, 242 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D808a] ("We agree with the Second Circuit that 'block-billing'—the grouping of multiple tasks into a single billing entry—is not per se unreasonable.") (quoting *Hines v. City of Albany*, 613 F. App'x 52, 55 (2d Cir. 2015)). *Cousins* and *Moore* are the only two reported cases precluding recovery of block-billed fees, but neither case categorically bans them. In *Cousins*, the court found the time entries unreasonable not just because they were block billed, but because they were "insufficiently detailed" and contained "duplicative time." 325 So. 3d at 76. And in *Moore*, the block-billed entries "made it impossible to determine the reasonableness of the hours expended on several matters." 152 So. 3d at 682.

Categorically rejecting block-billed fees would be inconsistent with the longstanding touchstones of reasonableness and competent proof. *Cf. CED Cap. Holdings 2000 EB, LLC v. CTCW-Berkshire Club, LLC*, 363 So. 3d 192 (Fla. 6th DCA 2023) [48 Fla. L. Weekly D261c] (holding any legally sufficient evidence can be used to prove the amount of fees). And there is nothing in *Rowe* that precludes a court from evaluating its factors by using block-billed entries. If those entries frustrate the appropriate analysis, then they may be rejected. But if the analysis is not imperiled, block-billed entries may be considered.

Plaintiff also argues that Defendant cannot recover for ministerial or administrative tasks. As with block-billing, the law does not quite match Plaintiff's categorical approach. "[T]ime spent on simple ministerial tasks" may be "noncompensable," but only if that time is "excessive." *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 195, 196 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b]. *See Deshpande*, 314 So. 3d at 420.

On several occasions, GEICO's expert opined that time entries were duplicative. As a general rule, "duplicative time charged by multiple attorneys working on the case is usually not compensable." *Baratta*, 928 So. 2d at 499. *See N. Dade Church of God*, 851 So. 2d at 196 ("Duplicative time charged by multiple attorneys working on the case are generally not compensable."). But attorney fees incurred by different lawyers and paralegals for similar tasks are not necessarily precluded, as long as "the services rendered are necessary, not duplicative, and the total fee is reasonable." *Centex-Rooney*, 725 So. 2d at 1259 (quoting *Fla. Drilling & Sawing v. Fohrman*, 635 So. 2d 1054, 1055-56 (Fla. 4th DCA 1994)). Similarly, all of the timekeepers participating in a meeting may bill for that meeting, as long as the time is reasonable. *See Centex-Rooney*, 725 So. 2d at 1259. But if the nature of the meeting or the simplicity of the case does not warrant duplicative billing for conferences, then it cannot be awarded. *Mokover v. Neco Enters., Inc.*, 785 F. Supp. 1083, 1090 (D.R.I. 1992) (as cited in *Centex-Rooney*, 725 So. 2d at 1259-60).

Trial courts may award time spent by paralegals and legal assistants for "nonclerical, meaningful legal support to the matter." § 57.104(1), Fla. Stat. (2024). *See In re Estate of Platt*, 586 So. 2d 328, 336 (Fla. 1991) ("Usually, secretarial work is included in an attorney's hourly fee while paralegal work may be charged separately."). But the trial court cannot award fees for "excessive time spent on simple ministerial tasks such as reviewing documents or filing notices of appearance." *Deshpande*, 314 So. 3d at 420 (quoting *N. Dade Church of God*, 851 So. 2d at 196).

With that settled, I find the following entries to be unreasonable in amount or time that cannot be recovered. Weighing heavily in favor my findings here is my credibility determination lending more weight to GEICO's expert's testimony than to Page 42's.

12/06/17 MM (.2) Meeting with KDC to discuss drafting Plaintiff's request for admissions. *Administrative and ministerial.*

12/06/17 MM (.2) Received confirmation from KDC to prepare summons, which GEICO companies to include and file the complaint along with the Request for Admissions. *Administrative and ministerial.*

12/06/17 KDC (.1) Meeting with MM to prepare summons and file complaint and request for admissions along with instructions on which Geico companies to add. *Administrative and ministerial.*

12/06/17 MM (.2) Meeting with KDC to review summons and request for division assignment. *Administrative and ministerial.*

12/06/17 MM (.5) Electronically filed the complaint and summons and request for admissions. *Administrative and ministerial.*

12/06/17 AP (.1) Received and reviewed e-service notification of notice of service of court documents. *Administrative and ministerial.*

12/11/17 AP (.1) Received and reviewed email notification from court verifying the receipt, process, and acceptance of case as well as the case number, division assignment, and attached prepared summons. Reviewed the attached summons and entered info in file. *Administrative and ministerial; duplicative.*

12/11/17 KDC (.1) Review the email notification of court verifying receipt, process and acceptance of case as well as case number, division assignment and attached prepared summons. *Administrative and ministerial; duplicative.*

01/24/18 AP (.1) Meeting with KDC. She requested I forward the summons, complaint and request for admission to DFS for service. *Administrative and ministerial; duplicative.*

01/24/28 AP (.2) Sent the Summons, Complaint and Request for Admissions to the Florida Department of Financial Services for service on the Defendant. *Administrative and ministerial.*

01/24/18 AP (.1) Received and reviewed confirmation of payment to the Florida Department of Financial Services for the [*sic*]. *Administrative and ministerial.*

02/09/18 AP (.3) Drafted the Notice of Service of Process for the three returns of service. Meeting with KDC for review. *Administrative and ministerial; duplicative; block billing.*

02/09/18 AP (.1) Meeting with KDC regarding approval of notice of service of process. *Administrative and ministerial.*

02/09/18 AP (.3) Forwarded the notice of service of process for the three summons to the court for filing. *Administrative and ministerial; unreasonably excessive time for the task.*

02/09/18 AP (.1) Received and reviewed email notification from court verifying the processing and acceptance of three notice of service of process. *Administrative and ministerial.*

02/12/18 AP (.1) Receipt and review of acceptance of plaintiff's notice of service of process by the court. *Administrative and ministerial.*

04/18/18 AP (.1) Meeting with RSH to review [offer of judgment]. *Duplicative of entry 51.*[3]

07/27/18 RSH (1.0) Performed research on what are the elements for breach of contract and who has the burden of proof when Defendant raises a failure to state a cause of action in a motion to dismiss. *An attorney of this experience seeking $975.00 per hour should not require 1.5 hours to discover the elements of a claim of breach of contract. The time is excessive, and 0.5 hours is recoverable for this task.*

05/14/19 RSH (.5) Reviewed file to prepare to draft Plaintiff's response to defendant's request for production to plaintiff. *Duplicative of entry 69. Excessive and unreasonable because this attorney did not draft the discovery response.*

05/14/19 AP (.3) Meeting with RSH to discuss drafting Plaintiff's response to Defendant's request for production. *Duplicative.*

05/15/19 RSH (.5) Review file to prepare Plaintiff's responses to defendant's request for admissions to defendant. *Duplicative of entry 74. Excessive and unreasonable because this attorney did not draft the discovery response.*

05/15/19 AP (.3) Meeting with RSH to discuss drafting a response to Defendant's request for admissions. *Duplicative.*

05/15/19 RSH (1.0) Reviewed Plaintiff's Response to Defendant's Request for Admissions. Reviewed motions and other answers to request for admissions in similar cases and defendant's defenses in other cases and motions filed to prepare an answer. Approved and requested AP to file and serve. *Block billing; reasonableness cannot be determined.*

05/16/19 RSH (.5) Review file to prepare answers to defendant's interrogatories to plaintiff. *Duplicative of entry 81. Excessive and unreasonable because this attorney did not draft the discovery response.*

06/04/19 AP (.2) Meeting with RSH to discuss drafting Plaintiff's response to Defendant's Interrogatories. *Duplicative.*

06/06/19 AP (.1) Meeting with RSH. He requested I draft a Notice of Serving Verified Answers to Interrogatories. *Administrative and ministerial; duplicative.*

06/11/19 AP (.3) File and served Plaintiff's Response to Defendant's Request for Admissions, Plaintiff's Response to Defendant's Request to Produce and the Notice of serving verified answers to Defendant's Interrogatories. *Administrative and ministerial.*

06/11/19 AP (.1) Received and reviewed confirmation that the responses to Defendant's discovery were received by the clerk. *Administrative and ministerial.*

06/12/19 AP (.1) Received and reviewed confirmation that the responses to Defendant's discovery were accepted by the clerk. *Administrative and ministerial.*

06/12/19 AP (.1) Meeting with RSH to inform him Plaintiff's responses to discovery were filed and accepted. *Administrative and ministerial.*

06/12/19 RSH (.1) Meeting with AP. She informed me that the court filings of discovery were accepted by the clerk. *Administrative and ministerial.*

02/26/20 AP (.1) Meeting with RSH and informed him that the interrogatories to defendant had been filed and served. *Administrative and ministerial.*

02/26/20 RSH (.1) Meeting with AP. She informed me that the interrogatories have been filed and served on the defendant.

01/26/20 AP (.1) Received and reviewed small claims dismissal notice. Meeting with RSH to review. *I agree with GEICO that Page 42 cannot recover fees for the time it spent remedying the potential dismissal for lack of prosecution because the time is not reasonably expended.*

01/26/21 RSH (.1) Meeting with AP. Reviewed the Notice of Dismissal. *Not reasonably expended.*

01/26/21 RSH (1.5) Review of case law on dismissal. *Not reasonably expended.*

01/26/21 RSH (.5) Review of the court file to determine what was done prior to the notice of dismissal being filed by the court. *Not reasonably expended.*

01/26/21 RSH (.2) Review of rules of civil procedure regarding dismissal. *Not reasonably expended.*

01/26/21 RSH (.5) Review of the file to determine what discovery was served and what discovery remained to be served in order to show record activity in file. *Not reasonably expended.*

02/09/21 RSH (.5) Review of file to draft Plaintiff's request for production to Defendant. *Not reasonably expended; excessive; duplicative of entry 107.*

02/09/21 RSH (.5) Determine specific Request to Produced to be served on the defendant. *Not reasonably expended because this attorney did not draft this discovery; excessive; duplicative of entry 107.*

02/09/21 AP (.1) Meeting with RSH. He requested I draft the Statement of Good Cause. *Not reasonably expended.*

02/09/21 AP (.5) Prepared draft of Plaintiff's Statement of Good Cause. *Not reasonably expended.*

02/09/21 RSH (.1) Reviewed the Statement of Good Cause. Requested AP file and serve the request for production and statement of good cause. *Not reasonably expended.*

02/09/21 AP (.2) Filed and served Plaintiff's Request to Produce and Plaintiff's statement of good cause. *Not reasonably expended.*

02/09/21 AP (.1) Meeting with RSH informing him that the plaintiff's request to produce and statement of good cause have been filed with the court. *Not reasonably expended; administrative and ministerial.*

02/09/21 RSH (.1) Meeting with AP. She informed me that Plaintiff's Request to Produce and statement of good cause was filed. I asked that she check to see if this was removed from the docket. *Not reasonably expended; administrative and ministerial.*

02/10/21 AP (.1) Received and reviewed defendant's notice of filing the subject policy. Meeting with RSH to review. *Duplicative.*

02/26/22 AP (.2) Meeting with RSH to discuss preparing a Motion to Extend Discovery Deadlines. *Duplicative.*

02/26/22 AP (.2) Filed and served Plaintiff's Motion for Extension of Time to Complete Fact Discovery. *Administrative and ministerial.*

02/26/22 AP (.3) Meeting with RSH to discuss drafting additional interrogatories to the Defendant. *Duplicative.*

02/26/22 AP (.2) Filed and served the notice of service of Plaintiff's Interrogatories to Defendant. *Administrative and ministerial.*

02/26/22 RSH (.1) Meeting with AP. Informed that she had filed the motion for extension of time for fact discovery. *Administrative and ministerial.*

02/26/22 AP (.1) Meeting with RSH. Informed him that the motion for extension of time for fact discovery has been filed. *Administrative and ministerial; duplicative.*

02/26/22 RSH (.5) Review file and calendar regarding discovery deadlines and what needed to be done next including [*sic*]. *Administrative and ministerial; excessive; duplicative of entry 131.*

03/11/22 AP (.1) Received the possible date of June 22, 2022 for the deposition of Defendant's Corporate Representative. *Administrative and ministerial.*

03/11/22 AP (.2) Meeting with RSH to see if the date provided by defense counsel of June 22, 2022 was okay to set based on his calendar. *Administrative and ministerial.*

03/11/22 RSH (.1) Meeting with AP reviewed the calendar and cleared the date of June 22, 2022 for the deposition of Defendant's Corp. Rep. *Administrative and ministerial.*

03/11/22 AP (.1) Coordinated with Defense counsel to set the deposition of Defendant's Corporate Representative for June 22, 2022. *Administrative and ministerial.*

03/11/22 AP (.1) Meeting with RSH informing him that deposition of corporate rep has been scheduled. He requested I draft the notice of deposition. *Administrative and ministerial.*

03/11/22 RSH (.1) Meeting with AP. She informed me that the defendant's deposition of corporate rep has been scheduled. I requested she draft the notice of deposition for my review. *Administrative and ministerial.*

03/11/22 AP (.1) Contacted the court reporter to schedule the deposition of Defendant's Corp. Rep. for June 22, 2022. *Administrative and ministerial.*

03/11/22 AP (.1) Receipt and review of email confirmation from the court reporter that the deposition was scheduled for June 22, 2022. *Administrative and ministerial.*

03/11/22 AP (.1) Meeting with RSH informing him that we have email confirmation from court reporter that deposition has been scheduled for June 22, 2022. *Administrative and ministerial.*

04/12/22 AP (.3) Meeting with RSH. He requested I prepare a draft of Plaintiff's Expert Disclosure for his review and retain the expert. *Duplicative; excessive.*

04/12/22 AP (.2) Meeting with RSH for him to review draft of plaintiff's expert disclosure, make corrections and he requested I file and serve. *Administrative and ministerial; duplicative; excessive.*

04/12/22 AP (.1) Filed and serve Plaintiff's Expert Disclosure. *Administrative and ministerial.*

04/12/22 AP (.1) Meeting with RSH. Informed that expert disclosures have been filed and served. *Administrative and ministerial.*

04/12/22 RSH (.1) Meeting with AP. Informed that expert disclosures have been filed and served.

06/15/22 AP (.1) Receipt and review of email from Greenwalt confirming the cancellation. *Administrative and ministerial; excessive.*

06/15/22 AP (.1) Contacted the court reporter to cancel the 6/22 deposition. *Administrative and ministerial.*

06/15/22 AP (.1) Receipt and review of email confirmation from the court reporter that the deposition for 6/22 has been cancelled. *Administrative and ministerial.*

06/15/22 AP (.2) Filed and served Plaintiff's notice of Cancellation of Deposition of Defendant's Corporate Representative. *Administrative and ministerial.*

06/20/23 RSH (.5) Meeting with AP. Review of the subject policy that was filed and compared it to the invoice to ensure there was coverage for this vehicle and it was not different from what they filed in the past. *Duplicative of entry 116; excessive and unnecessary given nature of the dispute.*

08/24/23 RSH (.5) Determine what needs to be included in our Expert/Boecher RTPs.[4] *Excessive and unreasonable because this attorney did not draft this discovery.*

08/24/23 AP (.3) Meeting with RSH to discuss preparing a draft of Plaintiff's Boecher request for production. *Duplicative.*

08/24/23 AP (.3) Meeting with RSH for review Drafted Plaintiff's Boecher/Springer request for production to Defendant. *Unnecessary and excessive; duplicative of attorney's time spent reviewing.*

08/24/23 RSH (.5) Determine what questions need to be in Plaintiff's Boecher Interrogatories and any additional questions. *Excessive and unreasonable because this attorney did not draft this discovery.*

08/24/23 AP (.3) Meeting with RSH to discuss preparing a draft of Plaintiff's Boecher Interrogatories to Defendant. *Duplicative.*

08/24/23 RSH (.5) Review of the file to prepare the draft Plaintiff's Impeachment RTP. *Excessive and unreasonable because this attorney did not draft this discovery.*

08/24/23 AP (.3) Meeting with RSH to discuss drafting Plaintiff's Impeachment Request to Produce to Defendant. *Duplicative.*

08/24/23 RSH (.5) Determine what language needs to be in Reviewed Plaintiff's Impeachment Request to Produce to Defendant. *Excessive and unreasonable because this attorney did not draft this discovery.*

08/25/23 AP (.3) Filed and served Plaintiff's Amended Expert Disclosures. *Administrative and ministerial.*

08/25/23 RSH (.5) Determined what language to include in the supplemental trial interrogatories. *Excessive and unreasonable because this attorney did not draft this discovery.*

08/25/23 AP (.3) Meeting with RSH to discuss drafting Plaintiff's Supplemental Trial Interrogatories to Defendant. *Duplicative.*

08/25/23 RSH (.5) Determine language of Plaintiff's Supplemental Trial Request to Produce. *Excessive and unreasonable because this attorney did not draft this discovery.*

08/25/23 AP (.3) Meeting with RSH about drafting Plaintiff's Supplemental Trial Request to Produce to Defendant. *Duplicative.*

08/25/23 AP (.1) Meeting with RSH Regarding whether he will approve plaintiff's supplemental trial request to produce to defendant. *Duplicative.*

08/25/23 AP (.5) Filed and served Plaintiff's Boucher expert Springer Request for Production to Defendant . . . .[etc.] *Administrative and ministerial.*

08/25/23 AP (.1) Meeting with RSH to inform him that Plaintiff's Boucher expert Spring Request for Production to Defendant . . . . [etc.] *Administrative and ministerial.*

08/25/23 RSH (.1) Meeting with AP. . . . [etc.] *Administrative and ministerial.*

08/25/23 RSH (.1) Meeting with AP. Requested AP request against dates for the deposition of Defendant's corporate representative. *Administrative and ministerial.*

08/25/23 AP (.1) Meeting with RSH. He requested I schedule the deposition of Defendant's Corporate Representative. *Administrative and ministerial.*

08/30/23 AP (.2) Meeting with RSH to review possible dates for Defendant's corporate representative as well as possible dates for the deposition of Plaintiff's corporate representative. *Administrative and ministerial.*

08/30/23 RSH (.2) Meeting with Apryl to discuss possible dates for Defendant's corporate representative as well as possible dates for the deposition of Plaintiffs corporate representative. *Administrative and ministerial.*

C. The lodestar.

Based on those reductions, I calculate the lodestar:

Timekeeper	Hours	Rate	Lodestar
KDC	5.0	$550.00	$2,750.00
RSH	37.7	$550.00	$20,735.00
MM	1.5	$175.00	$262.50
AP	11.7	$175.00	$2,047.50
CF	0.9	$125.00	$112.50
		TOTAL	$25,907.50

I find this lodestar to be reasonable, and I do not believe that any adjustments are appropriate. In finding the lodestar to be reasonable, I have evaluated all of the *Rowe* factors. Particularly relevant here is the amount involved, which is small. Also relevant is the time and labor required, along with the novelty and difficulty of the question involved and the required skill. Nothing of import occurred in this case; it did not require an unusual amount of time or advanced skill. And no novel or difficult questions came up. I also find that the experience, reputation, and ability of plaintiff's counsel more justify the rate and the calculated lodestar.

D. Page 42 is not entitled to a multiplier.

"[T]here is a strong presumption that a lodestar fee is sufficient and reasonable." § 57.104(2). "This presumption may be overcome only in a rare and exceptional circumstance with evidence that competent counsel could not otherwise be retained." § 57.104(2). To justify a fee multiplier, the moving party must present evidence of (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 *Rowe* factors apply, especially the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. *Foot & Ankle Ctr. of Fla., LLC v. Vargas*, __ So. 3d __, 49 Fla. L. Weekly D887a, 2024 WL 1688836, at *2 (Fla. 6th DCA Apr. 19, 2024) (citing *Std. Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 834 (Fla. 1990)). "[E]vidence of each of these factors must be presented to justify the utilization of a multiplier." *Quanstrom*, 555 So. 2d at 834.

To prove the first factor, the movant must present evidence from the client that they would have had difficulty retaining counsel without a multiplier. *See SafePoint Ins. Co. v. Castellanos*, __ So. 3d __, 2024 WL 3168334, at *2 (Fla. 3d DCA June 26, 2024) [49 Fla. L. Weekly D1364a]. Page 42 has not sustained its burden to prove this factor. Indeed, very little, if anything, "in the record supports the statement that the relevant market required a contingency fee multiplier to obtain counsel." *State Farm Mut. Auto. Ins. Co. v. Cedolia*, 571 So. 2d 1386, 1387 (Fla. 4th DCA 1990). Plaintiff's expert briefly touched on this issue, but I do not find his testimony to be credible. He has no experience in windshield litigation and no knowledge of the relevant market. He also acknowledged that he had no information about whether *clients* in the market—including Page 42—had trouble retaining counsel.

Even if this factor could be met without testimony from clients,[5] I would find that Page 42 has not met its burden of proving that a multiplier is required. Page 42 simply failed to present competent, substantial evidence that the market for windshield cases requires a contingency risk multiplier to obtain competent counsel. Testimony from both experts revealed that a number of local lawyers and firms began taking windshield cases over the last decade. The evidence did not demonstrate that Page 42 would have had "difficulty securing counsel without the opportunity for a multiplier"—in fact, the windshield litigation landscape and the expert testimony demonstrates the opposite. *Citizens Prop. Ins. Corp. v. Laguerre*, 259 So. 3d 169, 177 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1934b]. Page 42's expert testified that "higher rates" were necessary "to compensate for the extra time" spent on these cases, but that is not the standard for a multiplier. The question is not whether the market commanded higher rates, but whether it was so difficult to obtain counsel that the promise of a multiplier was the only factor that attracted counsel to the work. Page 42's expert also testified that he relied on the *Dick* decisions to find that a multiplier was warranted. Two problems: First, the expert testified on cross-examination that he had not read these decisions, and it became clear from questioning that he had no familiarity with the issues in those cases. Second, the complaint in this case was filed *before* any of the *Dick* decisions were released, so it is impossible for counsel to have relied on those cases for a complexity assessment when deciding whether to take the case. Because the expert "failed to testify that [Page 42's counsel] was the only competent counsel in the relevant market" and that "other competent counsel available in the relevant market . . . would [have taken the case] only if the multiplier was available," a multiplier is not appropriate. *Deshpande*, 314 So. 3d at 421.

Moreover, Page 42 has not sustained its burden of proving that it could not mitigate against the risk of nonpayment. Although this case took 7 years to litigate, "there was no testimony that [Page 42 or its attorneys] were entirely dependent on the outcome of this case and could not take other cases." *Castellanos*, 2024 WL 3168334, at *2. To the contrary, plaintiff's counsel testified that they *stopped* taking these cases to focus on other litigation.

The *Rowe* factors likewise suggest that a multiplier is not required. The amount involved was minimal, and this was not a case where Page 42's opponent went to the mat in a manner that required sustained, difficult litigation. While complex questions have been raised in other windshield litigation, *this* case did not involve any difficult, complex, or novel questions of law.[6] In fact, Page 42 hardly did anything before GEICO confessed judgment seven years after the complaint was filed. A multiplier is therefore not warranted. *Accord U.S. Sec. Ins. Co. v. LaPour*, 617 So. 2d 347, 348 (Fla. 3d DCA 1993) ("Here, there was nothing novel or complex about the [PIP] claim, nor was any significant legal expertise required to complete the representation.").

E. Page 42 is entitled to prejudgment interest on the fees awarded.

Pre-judgment interest on attorney fees must be calculated from the date of entitlement: September 18, 2023, when GEICO confessed judgment. *Genser v. Reef Condo. Ass'n, Inc.*, 100 So. 3d 760, 762 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2594c].

Accordingly,

1. The Court TAXES attorney fees against Defendant Government Employees Insurance Company and in favor of Plaintiff Page 42, LLC a/a/o Shazam Auto Glass, LLC a/a/o Sharon Himes, in the amount of $25,907.50, plus prejudgment interest of $1,873.84, for a total of **$27,781.34**, which sum shall accrue interest at 9.46% until

December 31, and thereafter at the rate permitted by § 55.03 of the Florida Statutes, for which sum let execution lie.

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[1]I also note that the requested rate exceeds the actual fee agreement between Page 42 and its attorneys, which sets the rate at $650.00, even though it was clear from the testimony that Page 42 expected that rate to be paid through a contingency fee, and neither party to that contract seemed to expect that the rate would be paid. *See Western & Southern Life Ins. Co. v. Beebe*, 61 So. 3d 1215, 1215 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1082a]; *Int'l Bankers Ins. Co. v. Wegener*, 548 So. 2d 683, 685 (Fla. 3d DCA 1989). Mr. Ligori even testified that Page 42 *could not* pay the contracted rate.

[2]*See also Gatehouse Media, LLC v. City of Worcester*, 102 Mass. App. Ct. 1107 (2023) (Block billing "is a valid consideration that may justify a reduction, although not where 'how the time was allocated among several tasks performed on the same day [wa]s not critical.' ") (quoting *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 1024, 1026-27 (2010)); *Lakeside Retreats LLC v. Camp No Counselors LLC*, 985 N.W.2d 225, 235-36 (Mich. App. 2022) ("[W]e are unable to find anything intrinsically vague about block billing—so long as the block-billing entries are sufficiently detailed to permit an analysis of what tasks were performed, the relevance of those tasks to the litigation, and whether the amount of time expended on those tasks was reasonable."); *In re TransPerfect Glob., Inc.*, No. CV 10449-CB, 2021 WL 1711797, at *31 (Del. Ch. Apr. 30, 2021) ("Delaware courts have noted the absence of any Delaware case that finds block-billing objectionable per se. The relevant inquiry is whether the use of block billing 'make[s] it more difficult for a court to assess the reasonableness of the hours claimed.' ") (internal quotations omitted), *aff'd sub nom. TransPerfect Glob., Inc. v. Pincus*, 278 A.3d 630 (Del. 2022); *In re Brown*, 211 A.3d 165, 168 (D.C. 2019) (declining to prohibit all "bundled" fee entries "so long as the description of bundled tasks is sufficiently detailed to permit a court to assess the reasonableness of the time billed"); *McKool Smith, P.C. v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 213 (5th Cir. 2016) (holding arbitrator did not disregard well defined Texas law by allowing party to collect block-billed fees) (citing, among others, *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)); *RS Indus., Inc. v. Candrian*, 377 P.3d 329, 335 (Ariz. Ct. App. 2016) ("Although the better practice may be to avoid block-billing when it can be done reasonably . . . no Arizona authority holds that a court abuses its discretion by awarding fees that have been block-billed."); *Freidman v. Yakov*, 138 A.D.3d 554, 555-56, 30 N.Y.S.3d 58, 60 (N.Y. App. Div. 2016) (Block billing "does not render the invoiced amounts per se unreasonable."); *Ravenstar LLC v. One Ski Hill Place LLC*, 405 P.3d 298, 307 (Co. App. 2016), *aff'd* 401 P.3d 552 (Co. 2017); *In re Margaret Mary Adams 2006 Trust*, 131 Nev. 1293 (2015) ("But only where a district court determines that none of the task entries comprising the block billing were necessary or reasonable may a district court categorically exclude all of the block-billed time entries."); *Gurrobat v. HTH Corp.*, 346 P.3d 197, 204 (Haw. 2015) ("Neither current Hawai'i law nor the recent practice of American courts suggest that block billing is categorically unacceptable, or that block billing should normally result in denial of the block billed entries. If anything, it appears generally accepted that block billing should not automatically lead to the rejection of block billed entries."); *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008) ("[T]he use of block billing does not justify an across-the-board reduction or rejection of all hours."); *Thomson, Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 1025 (Ind. Ct. App.2014) (Indiana cases expressly permit block billing); *546-552 W. 146th St. LLC v. Arfa*, 99 A.D.3d 117, 123, 950 N.Y.S.2d 24 (N.Y. App. Div. 2012) (holding that block billing does not render a fee request per se unreasonable); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of State*, 284 P.3d 348, 361 (Kan. App. 2012) (preferring an across-the-board reduction of fees when block billed, "not denial of the fees"); *N. Va. Real Estate, Inc. v. Martins*, 80 Va. Cir. 478 (2010) ("When tasks are reasonably listed in block listings, in a manner that provides a rational summary of the time spent on various projects, the Court will accept the block billing summary as reasonable.").

[3]The 0.1 hours spent reviewing the offer of judgment is recoverable, but the 0.1 hours spent meeting with RSH to review the offer is not.

[4]I disagree with GEICO's argument that Page 42 cannot recover fees for time spent preparing trial-related discovery.

[5]While the Sixth District appears to hold that evidence from the client is required, the Supreme Court held in *Joyce* that a trial court errs by looking at the client's "actual experience in the market rather than looking at the relevant market itself." *Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122, 1134 (Fla. 2017) [42 Fla. L. Weekly S852a]. I do not perceive these decisions to be in conflict because of the manner in which the evidence was used in the Sixth District. But I address both issues in this order to demonstrate that that Page 42 failed to prove either a subjective inability to retain counsel or that, examining the market as a whole, a multiplier was required to attract counsel.

[6]*See generally Advanced Physical Therapy of Kendall, LLC v. Camrac, LLC*, 319 So. 3d 735, 738 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D980a] ("Among the factors a trial court considers, particularly in determining the applicability of a multiplier, is the novelty, complexity or difficulty of the questions involved in the case.").

* * *

Insurance—Automobile—Windshield repair—Attorney's fees—Amount—Total hours claimed by plaintiff's attorneys are reduced to account for hours that were excessive, duplicative, or result of plaintiff's own conduct in prosecuting case—Hourly rate claimed is rejected as being based on rates in other communities, rates awarded in dissimilar cases, or rates for attorneys with substantially more experience or credentials—Rate recommended by insurer's expert is accepted—Lodestar is reduced by 10% as sanction for plaintiff repeatedly and intentionally failing to comply with fee procedures order—Contingency risk multiplier—Award of multiplier is not appropriate where relevant market did not require multiplier to obtain competent counsel to represent a plaintiff that was looking to file hundreds of suits against insurers, attorneys were able to mitigate risk of nonpayment, and case was not novel or complex—Expert witness fees and prejudgment interest awarded

SHAZAM AUTO GLASS, LLC, a/a/o Amy Smith, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 17-CC-017087. Division L. August 9, 2024. Richard H. Martin, Judge. Counsel: Christopher Ligori and Ron Haynes, Christopher Ligori & Associates, Tampa, for Plaintiff. David Dougherty, Sheri Lewis, Natoria Sallet, and Scott Zimmer, Law Office of David S. Dougherty, Tampa, for Defendant.

FINAL JUDGMENT ON PLAINTIFF'S CLAIM FOR ATTORNEY'S FEES AND COSTS

Plaintiff, the prevailing party in this action ("Amy Smith 2"), filed on May 4, 2017, for breach of an auto insurance policy for coverage for replacement of a windshield has filed a motion for attorneys' fees and costs pursuant to Section 627.428, Florida Statutes. A full-day evidentiary hearing was held on June 28, 2024, in this case and another related case, *Shazam Auto Glass, LLC a/a/o Amy Smith v. GEICO Indemnity Company,* Case No. 17-CC-017024 ("Amy Smith 1").

I. Background

On May 4, 2017, Plaintiff, as assignee of defendant's insured, filed this single-count complaint for breach of an insurance policy for failure to pay for replacement of a vehicle windshield. A small claims pretrial conference was held on June 13, 2017. The parties exchanged written discovery over the next several years, but no depositions were taken and no other court hearings were scheduled. In 2019 and 2021, the case was noticed for dismissal for lack of record activity, but each time Plaintiff demonstrated good cause to avoid dismissal by serving written discovery. On September 19, 2023, Defendant filed a notice reflecting it had paid the benefits and interest under the policy to Plaintiff, totaling $722.07, which Plaintiff had accepted, and that it stipulated to Plaintiff's entitlement to recover attorneys' fees and costs. (Pl. Ex. 3.) A final judgment was entered on February 13, 2024, against Defendant GEICO Indemnity Company, reserving jurisdiction to award attorneys' fees and costs. (Pl. Ex. 4.) Defendant has satisfied the judgment by its payment on confession. On February 5, 2024, Plaintiff filed its motion for attorneys' fees and costs.

On January 29, 2024, the Court entered its Order Setting Final Evidentiary Hearing on Attorney's Fees and Costs and Establishing Pre-Hearing Requirements (the "Fee Procedures Order"). (DN 46.) The Fee Procedures Order set forth specific requirements for the Plaintiff to file an affidavit of attorneys' fees and costs within 30 days, including that the affidavit set forth:

> a. Unless the parties have a written stipulation as to the reasonableness of the hourly rate(s) and the time and labor expended, the following information shall be included in the affidavit of attorneys' fees and costs (or attached thereto as an exhibit): The time and labor expended in the case and an itemization of each request for attorneys' fees and each item of cost for which the moving party is seeking reimbursement including, without limitation, an itemization setting forth the date each task was performed or cost was incurred; a reasonably

detailed description of the task performed or cost expended; the amount of time or billable hour(s) expended in performing the task; and the name of the attorney or paralegal performing each itemized task for which a fee was incurred. The Court encourages the parties to use a table or spreadsheet format with row numbering to facilitate resolution of disputes at the Fee Hearing.

Example:

Row# Date Description of Task Time Spent Timekeeper Rate ($)

b. A description of the factors contained in R. Regulating Fla. Bar 4-1.5(b) including the following: (i) Novelty, complexity, and difficulty of question(s) involved in the case and the skill requisite to perform the legal services properly; (ii) Preclusion of other employment by the attorney due to the acceptance of this case; (iii) Fee or rate of fee customarily charged in the locality for similar legal services; (iv) The significance of, or amount involved, in the subject matter of the representation, and the results obtained; (v) Time limitations imposed by the client or the circumstances; (vi) The nature and length of the professional relationship with the client; (vii) The experience, reputation, diligence, and ability of the attorney or attorneys performing the services, and the skill, expertise, or efficiency of effort reflected in the actual performing of legal services; (viii) The fee arrangement of agreement with the Client and whether the fee is fixed or contingent, and if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

c. Awards in similar cases.

The purpose of these requirements is obvious: it requires the Plaintiff to state under oath early in the process the basis for its claim for attorneys' fees and provides both parties, their experts and the Court the detail needed in order the evaluate the claim for attorneys' fees under existing law (discussed below). Presumably, attesting to the matters set forth above in the fee affidavit would also require the Plaintiff to scrutinize its own fee records prior to requiring the experts and this Court to do so. The Fee Procedures Order makes clear that the Court may impose sanctions for failure to comply with the order. (DN 46, ¶ 13.)

Plaintiff failed to comply with the Fee Procedures Order in this case and in five other cases that were supposed to be heard on June 28, 2024. On February 28, 2024, Plaintiff's deadline to file its fee affidavit in this case, Plaintiff filed an affidavit of costs, (DN 60) and a motion for extension of time to file its fee affidavit. In the ensuing months, Plaintiff never set its motion for extension of time for hearing and did not file a fee affidavit.

Defendant filed a motion (in Case 17-CC-10585) to continue all six cases due to Defendant's non-compliance and set that motion for hearing on June 18, 2024. Defendant took the position that it had the spreadsheet of time records for this case and Case 17-CC-17024, and thus had some basic information to proceed to the hearing. At the June 18 hearing, the Court orally ordered Plaintiff to file a compliant affidavit in this case and Case 17-CC-17024 by June 24, 2024 at 5 p.m. The Court granted Defendant's motion for continuance in the remaining four cases and ordered the remaining four cases be rescheduled for hearing within 120 days. The Court also approved a stipulation between the parties to present direct testimony of witnesses by affidavit, and required that any affidavits upon which the party was going to rely for direct testimony be filed by close of business on Wednesday, June 26, 2024.

Plaintiff filed an affidavit of its attorney on June 24, 2024, at 5:25 p.m. (DN 78). The affidavit contained the total number of hours Plaintiff was seeking, the hourly rates, and addressed the factors in Rule 4-1.5(b), but it failed to attach the time records upon which Plaintiff was relying. Plaintiff filed an affidavit of its attorney's fee expert on June 25 (DN 79), and a supplement on June 26 (DN 82).

At the hearing, Plaintiff presented the testimony of three witnesses. Sean Martineau, the owner of Plaintiff, testified that in 2017, he was unable to find attorneys to take cases representing Plaintiff against Defendant and that he retained the firm of Christopher Ligori & Associates for that reason. Mr. Martineau testified that he had retained another law firm for windshield cases, but that firm was not willing to take cases against GEICO. He testified that he searched for other attorneys, but he had to establish his company as a viable company "as a matter of volume and credibility" for other attorneys to accept his cases. The contingency fee contract Mr. Martineau signed in 2016 provided that all attorney's fees would be recovered from the insurance company defendants pursuant to Section 627.428, Florida Statutes. (Pl. Ex. 1.) It also provided that "normal hourly rates" charged by the law firm were $650 per hour for attorneys and $185 per hour for paralegals. (*Id.*) Mr. Martineau testified he never received a bill from Mr. Ligori's firm.

Christopher Ligori, the owner of Christopher Ligori & Associates, testified that his firm was claiming an hourly rate of $975 per hour for attorneys and $275 for paralegals, and that this was based primarily upon his review of fee award orders from around the state. The primary attorney on the case, Ronald Haynes, was admitted to the Florida Bar in 1998 and has nearly 20 years of experience in first-party insurance litigation. (Pl. Ex. 9.) Attorney Kristin Demers-Crowell, the primary attorney before Mr. Haynes, was admitted to the Florida Bar in 1998 and has more than 20 years of experience in first-party insurance litigation. (Pl. Ex. 22.) Paralegal Apryl Pemberton has an Associate of Science degree in paralegal studies, which she obtained in 2016. (Pl. Ex. 10.) Mr. Ligori testified his firm used a billing system where attorneys and paralegals entered tasks contemporaneously into the system. Attorneys and paralegals did not assign time spent to the tasks in the records. Instead, in preparing the claim for attorneys' fees, his firm reviewed the tasks and reconstructed the amount of time spent by assigning a reasonable amount of time based upon the described activity.

Mr. Ligori testified Plaintiff was seeking multiplier of 2.0 in this case. Mr. Ligori, who is related to Mr. Martineau, testified there were other firms handling windshield insurance litigation but the firms were overloaded with cases. He testified he would not have taken the cases without the possibility of a multiplier because he thought the likelihood of success was low, he had to increase his staff to take on the caseload, and it took time away from other cases in his practice.[1]

Anthony Martino, Plaintiff's attorneys' fee expert, testified that a reasonable hourly rate would be $975 for attorneys and a range of $150 to $275 for paralegals, depending upon experience and quality of work. He further testified that he reviewed the time records and the time expended was reasonable. Mr. Martino also opined that, based upon his conversations with other plaintiff's attorneys who filed windshield insurance litigation and his consideration of the relevant factors from the caselaw, there was a "no question" that a contingency fee with a multiplier was required in the community. In his opinion, the status of the law was unsettled in 2017, and thus there was a level of risk in taking the cases. In 2017, according to Mr. Martino, lawyers taking windshield litigation were doing so with the hope of establishing favorable precedent. He opined that a multiplier of 2.0 was appropriate.

Defendant presented the testimony of two witnesses. David Dougherty, who has been employed by GEICO for over 12 years and is responsible for supervising the office that handles windshield litigation in the region, testified that, prior to 2018, there were 18 law firms filing windshield cases against GEICO, including Mr. Ligori's firm. He testified GEICO began experiencing litigation on windshield claims in 2013, and the volume increased substantially over the next several years. He testified there were nine decisions at the trial court

level in 2016, all on summary judgment, primarily in Hillsborough County, finding GEICO's policy language ambiguous and interpreting it in favor of plaintiffs. The parties both referenced the *Matthew Dick* case, *Superior Auto Glass of Tampa Bay, Inc. a/a/o Matthew Dick v. Government Employees Insurance Company,* Case No. 15-CC-009347 [29 Fla. L. Weekly Supp. 472a], which was filed in 2015, resulted in multiple appeals, and remains pending. Mr. Dougherty testified that over 6,000 windshield lawsuits had been filed against GEICO by the end of 2016, and the number had risen to over 10,000 by the end of 2017.

William Davis, Defendant's attorneys' fee expert, opined that a reasonable hourly rate would be $550 for attorneys and a range of $90 to $200 for paralegals, depending upon experience and quality of work. Mr. Davis testified that he had reviewed the fee records and made reductions in several places where he believed the time entries were excessive, redundant, unnecessary, clerical or administrative. Mr. Davis opined that the award of a multiplier was not appropriate, and that if any multiplier was awarded, a multiplier should be in the range of 1.0 to 1.5. He testified that other lawyers, prior to Plaintiff's existence, had established the viability of bringing windshield insurance litigation against GEICO. He testified that, by then end of 2016, GEICO had lost five cases in Hillsborough County, thus the viability of pursuing a case was manifest. He testified other competent lawyers were filing cases in Hillsborough County at the time.

II. Standard for Motion for Attorneys' Fees

Plaintiff claims the right to recover attorneys' fees pursuant to Section 627.428, Florida Statutes, as applicable to this case, which provided, "Upon the rendition of a judgment or decree by the courts of this state against an insurer and in favor of any named or omnibus insured. . . .the trial court. . .shall adjudge or decree against the insurer and in favor of the insured. . .a reasonable sum as fees or compensation for the insured's. . .attorney prosecuting the suit in which the recovery is had."

In determining what amount constitutes a reasonable attorney's fee, the Court applies the lodestar: a reasonable hourly rate times the number of hours reasonably expended. *Florida Patients Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985).

> [I]n computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and, when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims.

Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1151-52 (Fla. 1985).

In determining the reasonable hourly rate and reasonable number of hours, the court must apply the factors in Rules Regulating the Florida Bar 4-1.5. *Id.*

Attorneys' fee awards must be supported by a predicate of competent substantial evidence in the form of testimony by the attorneys performing the services and an expert witness as to the value of those services. *Mitchell v. Flatt,* 344 So. 3d 588, 592 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1659a]. This includes invoices, records and other information detailing the services provided. *Black Point Assets, Inc. v. Ventures Trust 2013-I-H-R,* 236 So. 3d 1134, 1136 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D118a].

The court is not bound by expert opinion testimony or attorney affidavits submitted if the court based on its independent review of the record or experience in the case finds a departure is justified and the basis for that departure is explained. *Lizardi v. Fed. Nat. Ins. Co.,* 322 So. 3d 184 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1368a]. In evaluating the reasonableness of a requested fee award, judges should not abandon what they learned as lawyers or their common sense. *D'Alusio v. Gould & Lamb, LLC,* 36 So. 3d 842, 846 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1226a] (quoting *Trumbull Ins. Co. v. Wolentarski,* 2 So. 3d 1050, 1057 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D274a]).

III. Applicable Law and Analysis

In reaching the findings of fact and conclusions of law in this order, the Court has considered the demeanor and credibility of witnesses, the weight and admissibility of the evidence presented, Florida Rule of Professional Conduct 4-1.5(b), the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and applicable caselaw.

A. Factors in Determining a Reasonable Attorneys' Fee

The first factor is the "time and labor required, the novelty, complexity, difficulty of the question involved, and the skill requisite to perform the legal service properly." R. Reg. Fla. Bar 4-1.5(b)(1)(A). Nothing about this case was novel or complex. Windshield insurance litigation is even less complex than typical insurance coverage litigation because neither coverage nor the cause of loss is in dispute. The only dispute is over the amount of the loss. The valuation of the loss involves only a few discrete factors (the cost of the windshield and parts, the hourly rate for labor and the amount of labor hours). Here, the Defendant had made a presuit partial payment.

The second factor is the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer." R. Reg. Fla. Bar 4-1.5(b)(1)(B). The case was not complex or time consuming and would not preclude the lawyer from other employment. Indeed, Plaintiff's counsel has filed a large volume of similar cases for the same client.

The third factor is the "fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature." R. Reg. Fla. Bar 4-1.5(b)(1)(C). This factor is not significant. The only evidence presented was that attorneys in the locality customarily rely upon contingent fee agreements, like the one here, which permit recovery of the attorney's fees from the insurer.[2]

The fourth factor is the "significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation and the results obtained." R. Reg. Fla. Bar 4-1.5(b)(1)(D). This case was not complex. It involved no novel issues. This was a run of the mill insurance dispute involving the payment of less than the full amount of an invoice for replacement of a windshield. No hearings were conducted by the court. No rulings were obtained which would have any significance beyond this case. The amount involved was very small. The results obtained—the payment of $751.11 in benefits under an insurance policy—were not significant.

The fifth factor is the "time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client." R. Reg. Fla. Bar 4-1.5(b)(1)(E). Here, there were no significant time limitations imposed by the client or the circumstances.

The sixth factor is the "nature and length of the professional relationship with the client." R. Reg. Fla. Bar 4-1.5(b)(1)(F). Here, plaintiff presented evidence it was a new client with a high volume of low-dollar insurance claims.

The seventh factor is 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." R. Reg. Fla. Bar 4-1.5(b)(1)(G). In this case, Ronald Haynes has been a practicing attorney for over 20 years and has significant insurance coverage litigation experience. The same is true for attorney Kristin Demers-Crowell. The qualifications and experience of both attorneys are well above that needed to competently

handle a case like this.

The eighth factor is "whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation." R. Reg. Fla. Bar 4-1.5(b)(1)(H). In this case, Plaintiff had a contingent fee agreement with its attorney. However, due to the statutory right to attorney's fees upon prevailing in obtaining any recovery, the risk of non-payment was moderate. Plaintiff had to prevail to recover its attorney's fees but the possibility of recovery was moderate in a case where coverage was not disputed.

B. Number of Hours Reasonably Expended

In determining the number of hours reasonably expended, the Court must look at the time that ordinarily would be spent by lawyers in the community to resolve this particular type of dispute. *In re Estate of Platt,* 586 So. 2d 328, 333 (Fla. 1991). The fee applicant bears the burden of showing the hours claimed were reasonably expended on the case, consistent with the exercise of billing judgment. *Universal Prop. & Cas. Ins. Co. v. Deshpande,* 314 So. 3d 416, 419 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2511a]. The opponent of the fee claimed has the burden of pointing out which hours should be deducted. *22nd Century Props., LLC v. FPH Props., LLC,* 160 So. 3d 135 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D782a].

The number of hours may be reduced where there is inadequate documentation or if the court finds the services were excessive or unnecessary. *Lizardi v. Fed. Nat. Ins. Co.,* 322 So. 3d 184, 188 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1368a]. Duplicative hours may be reduced if supported by specific findings. *Mitchell v. Mitchell,* 94 So. 3d 706, 708 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1953a]; *Haines v. Sophia,* 711 So. 2d 209 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1241b]. However, an award of time spent by two or more attorneys is proper if it reflects the distinct contribution of each lawyer in the case. *Spanakos v. Hawk Sys.,* Inc., 362 So. 3d 226, 241 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D808a]. Time spent in conferences is generally compensable for each participant if it is reasonable or necessary to delegate work to colleagues who bill at a lower rate than lead counsel. *Id.* Excessive time spent on clerical or ministerial tasks is also not compensable. *Id.* at 243; *N. Dade Church of God, Inc. v. JM Statewide, Inc.,* 851. So. 2d 194 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b]. Work that is necessitated by the client's own behavior should more appropriately be paid by the client than the opposing party. *Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc.,* 928 So. 2d 495 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c].

The Plaintiff is claiming the following total amounts of time[3]:

Timekeeper	Initials	Hours
Ronald Haynes	RSH	48.9
Kristin Demers-Crowell	KDC	10.3
Total Attorney Time		**59.2**
Apryl Pemberton	AP	19.1
Cassidy Fanning	CF	2.0
Total Paralegal Time		**21.1**

The fact that the timekeepers failed to contemporaneously enter the amount of time the task took makes diminishes the reliability of the hours claimed. In reviewing the time records submitted by Plaintiff, the Court finds that, in many places, time entries were excessive, redundant, unnecessary, or were devoted to clerical or ministerial tasks which an ordinary lawyer in this community, in the exercise of reasonable billing judgment, would not customarily bill to a client. For example, the Plaintiff billed a total of 6 hours in the Smith1 and Smith2 cases for attending a 30-minute small-claims pretrial conference at which both cases were heard, along with many other cases. The Plaintiff claims an excessive amount of time for generating routine discovery requests repeatedly used in this type of high-volume litigation. In many instances, upon reviewing the time records, there was excessive and duplicative time billed by the attorney and paralegal for reviewing the same filings.

In addition, the Court finds several time entries, such as time spent responding to notices of intent to dismiss by the Court for lack of prosecution, were caused by the Plaintiffs own conduct in failing to generate even minimal record activity to progress the case. Lawyers must act with reasonable diligence in representing a client, and have a duty to expedite litigation consistent with the interests of the client. R. Reg. Fla. Bar 4-1.3, 4-3.2. Unless a client had instructed counsel to take no action to move forward with a case, time spent responding to a notice of lack of prosecution would not ordinarily be charged to a client, particularly a plaintiff, and is not chargeable to the other side.

Accordingly, the Court finds many of Plaintiff's time entries are not compensable or should be reduced. In reviewing the time entries, the Court has made reductions and detailed its findings in ***Appendix 1*** to this Order. The Court finds the Plaintiff has demonstrated that Plaintiff reasonably expended the following hours in this case:

Timekeeper	Initials	Claim	Reduction	Award
Kristin Demers-Crowell	KDC	10.3	3.2	7.1
Ronald Haynes	RSH	48.9	20.5	28.4
Total Attorney Time				**35.5**
Apryl Pemberton	AP	17.5	6.4	11.1
Cassidy Fanning	CF	2.0	1.6	0.4
Total Paralegal Time				**12.2**

C. Reasonable Hourly Rate

In determining the reasonable hourly rate, the court must take into consideration the fee or rate customarily charged in the community for legal services of similar nature as well as the rate for attorneys of reasonably comparable experience to those involved in handling the case. *Eve's Garden, Inc. v. Upshaw & Upshaw, Inc.,* 801 So. 2d 976, 979 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2119a]; *Lizardi,* 322 So. 3d at 188.

The fee agreement between Plaintiff and its attorney called for an initial hourly rate of $650. The Court agrees with Defendant's expert that most of the attorney's fee awards offered by Plaintiff for purposes of establishing an hourly rate of $975 per hour for attorneys and $275 per hour for paralegals are not persuasive because they are from other communities, do not involve similar cases, or involve attorneys with substantially more experience or credentials. Based upon the evidence presented and the application of the above factors, the Court accepts the opinion of Defendant's expert witness that a reasonable hourly rate would be $550.00 per hour. I also find that a reasonable hourly rate for paralegals is $175.00 per hour.

D. Lodestar Calculation

Based on the greater weight of the evidence, and the applicable criteria set forth in *Rowe,* Rule 4-1.5(b)1, I determine the lodestar in this case to be:

Timekeeper	Reasonable Hours	Reasonable Hourly Rate	Total
Attorneys KDC and RSH	35.5	$550.00	$19,525.00
Paralegals AB and AP	12.2	$175.00	$2,135.00
		Total:	$21,660.00

E. Reduction of the Lodestar as a Sanction for Plaintiff's Non-Compliance with the Fee Procedures Order

Plaintiff repeatedly and intentionally failed to comply with the Fee Procedures Order. Even after being ordered a second time to file a compliant fee affidavit with attached time records at the June 18, 2024 hearing, Plaintiff failed to do so. At the hearing, Defendant moved to strike Plaintiff's claim for attorneys' fees due to Plaintiff's non-compliance.

The prejudice to Defendant as a result of Plaintiff's non-compliance was apparent, and became more apparent during the hearing. Plaintiff also failed to disclose in advance of the hearing the attorney's fee awards in similar cases upon which it intended to rely until shortly before the hearing, causing Defendant's expert to have to scramble to familiarize himself with the background in those cases. The purpose of the Fee Procedures Order is to ensure materials are timely disclosed so that fee records can be reviewed, and issues can be narrowed, in advance of the hearing. The Plaintiff's non-compliance increased the confusion and disarray that compliance with the Fee Procedures Order is intended to minimize.

Plaintiff's repeated non-compliance justified the imposition of sanctions. However, because Defendant's expert was at least provided with a spreadsheet of time records Plaintiff intended to rely upon, and was provided with the fee awards in similar cases shortly before the hearing, imposition of a lesser sanction is appropriate. As announced at the hearing, the Court imposed a monetary sanction by reducing the lodestar by 10 percent. Accordingly, the lodestar amount will be reduced to *$19,494.00.*

F. Adjustments Based on the Contingent Nature of the Litigation and the Results Obtained

Once the lodestar amount is determined, the court may add or subtract from that amount based upon a "contingency risk" factor and the "results obtained," *Citizens Prop. Ins. Corp. v. Anderson,* 241 So. 3d 221, 225 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D353b]. "[T]he existence of a contingent-fee agreement between an attorney and client does not automatically require application of a multiplier." *Sun Bank of Ocala v. Ford,* 564 So. 2d 1078, 1079 (Fla. 1990).

In determining whether a contingency risk multiplier is appropriate in a contract case, the court must consider (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 non-payment in any way, and (3) whether any of the *Rowe* factors are applicable, especially the amount involved, the results obtained and the type of relationship between the attorney and client.[4] *Citizens Prop. Ins. Corp. v. Anderson,* 241 So. 3d 221, 225 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D353b] (quoting *Quanstrom,* 555 So. 2d at 834). Evidence as to these factors must be presented to justify using a multiplier. *Id.* If there is no evidence the relevant market required a contingency fee multiplier to obtain competent counsel, a multiplier should not be awarded. *Id.* In considering the *Rowe* factors, the court may consider the complexity and difficulty of the case, along with the outcome. *Citizens Prop. Ins. Corp. v. Laguerre,* 259 So. 3d 169, 178 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1934b]. A multiplier is not appropriate in a "run of the mill" insurance benefits case where there is nothing particularly novel or complex about the claim. *U.S. Sec. Inc. Co. v. LaPour,* 617 So. 2d 347 (Fla. 3d DCA 1993).

The purpose of the relevant market factor is to assess whether there are attorneys in the relevant market who both have the skills to handle the case effectively and who would have taken the case absent the availability of a contingency fee multiplier. *Foot & Ankle Ctr. Of Fla., LLC v. Vargas,* ___ So. 3d ___, 2024 WL 1688836 at *2 (Fla. 6th DCA Apr. 19, 2024) [49 Fla. L. Weekly D887a]. Substantial difficulties by a client in obtaining competent counsel in a relevant market is relevant to this factor.

In assessing whether the attorney was able to mitigate the risk of nonpayment in any way, relevant evidence includes the length of relationship with the client and whether the client was able to afford a retainer or hourly fee. *See Certain Underwriters at Lloyd's London v. Candelaria,* 339 So. 3d 463 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1086b]. The fee agreement between the attorney and client is relevant to this factor.

Weighing the conflicting evidence, including the credibility of the witnesses, I agree with Defendant and find that the relevant market did not require the award of a contingency risk multiplier in order to obtain competent counsel at the time this case was filed. I further find that the award of a lodestar upon prevailing was sufficient incentive for competent counsel to be retained.

Mr. Martineau's testimony distinguishes it from the reported cases involving multipliers in that his company, as a prospective client, did not present as a client with a single, isolated insurance dispute seeking representation in a single case. Instead, he was looking to file hundreds, possibly thousands, of small-claim insurance lawsuits against insurance companies, valued usually between a few hundred dollars to a thousand dollars. Mr. Dougherty testified there were numerous other lawyers in the community who were filing windshield insurance lawsuits against GEICO during the relevant time period.

Defendant presented competent, substantial evidence that there were ways an attorney could mitigate the risk of non-payment. The statutory right to recovery of attorneys' fee upon *any* monetary recovery mitigates the risk of non-payment. Mr. Davis testified that the statute of limitations was five years, § 95.11, Fla. Stat. and that an attorney could decide to file fewer, stronger cases initially, to establish favorable precedent before filing a larger volume of cases or seeking to negotiate wider settlements. According to him, this is what had been done by the "trailblazers" of windshield litigation—the attorneys who began filing cases in 2013 to 2015. Instead, Plaintiff filed these claims within weeks of the date of loss and filed hundreds more in the ensuing months and years. While taking on an entire portfolio of claims mitigates against the risk of nonpayment on any individual claim, when every claim is litigated it has the countervailing effect of significantly expanding the required legal work.

Nor do the *Rowe* factors justify award of a multiplier. This was not a bell-weather case. This case was neither novel nor complex. It was one of many thousands of cases filed against the same defendant relating to the same issue. It was neither aggressively prosecuted nor defended. It required no high degree of time or skill to handle. It was a "run of the mill" claim, like many thousands of others. *U.S. Sec. Ins. Co.,* 617 So. 3d at 348. I find *State Farm Fire & Cas. Co. v. Palma,* 555 So. 2d 836 (Fla. 1990) to be distinguishable. There are certain windshield insurance litigation cases where a Defendant has chosen to aggressively defend the claim, all the way up to trial, through trial and on appeal. This is not one of those cases. The defense in this case was minimal until Defendant confessed judgment. It was nowhere near the level of aggressive defense displayed in *Palma.*

For all of these reasons, I find that the award of a multiplier is not appropriate in this case.

IV. Taxable Costs

At the hearing, Plaintiff waived all taxable costs, with the exception of its expert witness fee for its attorney's fee expert. Expert witness fees incurred in proving the reasonableness of attorneys' fees may be taxed as costs. *Travieso v. Travieso,* 474 So. 2d 1184, 1186 (Fla. 1985). "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 award of

attorneys' fee expert witness fees for an attorney who testifies as an expert is not discretionary if the testifying attorney expects to be compensated for his or her testimony. *Stokus v. Phillips,* 651 So. 2d 1244, 1246 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D627c].

In this case, the Plaintiff offered the testimony of Anthony Martino as an expert witness on the reasonableness of attorneys' fees. He is highly qualified. The Court finds the testimony of Mr. Martino to have been useful. Mr. Martino testified that he expects to be compensated for his testimony at an hourly rate of $750.00 and that he had expended a total of 17 hours in reviewing the Plaintiffs' files and preparing for and testifying in the case. (Pl. Ex. 14.) Defendant's attorneys fee expert did not object to Mr. Martino's hourly rate at $750.00 and found it reasonable. I find a reasonable hourly rate for Mr. Martino is $750.00 per hour and the reasonable amount of time for Mr. Martino rendered in connection with his testimony to be 17 hours. Accordingly, $12,750.00 are taxed as costs. One-half of the amount ($6,375.00) will be taxed in this case. The other half will be taxed in the Smith 1 companion case, Case No. 17-CC-17024.

V. Prejudgment Interest

Prejudgment interest begins to run on the fee award when entitlement to attorneys' fees is determined. *Lizardi,* 322 So. 3d at 191 (citing *Quality Engineered Installation, Inc. v. Higley S., Inc.,* 670 So. 2d 929, 930 (Fla. 1996) [21 Fla. L. Weekly S141a]). In an insurance case under Section 627.428, Florida Statutes, the entitlement to attorney's fees is determined when a notice of settlement of the underlying claim, a confession of judgment, or a final order is entered. *Id.* Defendant confessed judgment on September 19, 2023. Plaintiff is entitled to prejudgment interest from that date, through the date of the award, on the attorneys' fees expended. Plaintiff presented evidence that it was seeking prejudgment interest at the statutory rate of interest set forth in Section 55.03, Florida Statutes, which is adjusted quarterly. The Court takes judicial notice of the below statutory interest rates which are published by the Chief Financial Officer pursuant to Section 55.03, Florida Statutes.[5] I calculate the prejudgment interest as follows:

Fee Award:	$19,494.00		
Date Range (# days)	Statutory Interest Rate	Per Diem Statutory Rate	Prejudgment Interest Award
7/1/24-8/9/24 (39)	9.46	0.00025847	196.51
4/1/24 - 6/30/24 (90)	9.34	0.00025519	447.72
1/1/24 - 3/31/24 (90)	9.09	0.00024836	435.74
10/1/23- 12/31/24 (91)	8.54	0.00023397	415.06
9/19/23 - 9/30/23 (11)	7.69	0.00021069	45.18
		Total:	$1,540.20

VI. Conclusion

For the foregoing reasons, Plaintiff's motion for attorneys' fees and costs is GRANTED. Final judgment is entered in favor of Plaintiff, Shazam Auto Glass, LLC, and against Defendant, GEICO Indemnity Company, for $19,494.00 in reasonable attorneys' fees, $6,375.00 in taxable costs, and $1,540.20 prejudgment interest, together with post-judgment interest at the statutory rate set forth in Section 55.03, Florida Statutes, for which sum let execution issue.

Defendant shall make payment by check made payable to "Christopher Ligori & Associates, P.A. Trust Account" and delivered in care of Christopher Ligori, Esq., who shall be responsible for distributing the proceeds.

[1]On cross-examination, Mr. Ligori testified he formed a separate company, SHL Enterprises, LLC, which he owned and which purchased accounts receivable and assignment of claims from Plaintiff for the purpose of pursuing litigation on the claims through separate counsel outside his firm.

[2]No evidence was presented to analogize windshield insurance litigation to other types of high-volume, low dollar, low complexity practice areas typically litigated in county court.

[3]Plaintiff withdrew the claim for time for attorney Frank Menendez at the hearing.

[4]Neither party argued the applicability of Section 57.104(2), Florida Statutes, as adopted by Chapter 2023-15, Laws of Florida.

[5]*See* https://myfloridacfo.com/division/aa/audits-reports/judgment-interest-rates.

* * *

Insurance—MedPay—Subrogation—Insurer may not recover MedPay benefits paid on insured's behalf from proceeds of settlement with tortfeasor where insured was not made whole for her loss

CARMELLA SCALA, Plaintiff, v. LIBERTY MUTUAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23023618. Division 72. May 15, 2024. John Hurley, Judge. Counsel: Thomas J. Wenzel, Steinger, Greene & Feiner, Plantation, for Plaintiff. Edwin Valen, Hamilton Miller & Birthisel, for Defendant.

ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE having come before the court on May 9, 2024, and the Court, having reviewed the motions and the court file, having heard argument of counsel, and being otherwise sufficiently advised in the premises, finds as follows:

BACKGROUND

Carmella Scala was a named insured under a policy of insurance issued by Defendant which, *inter alia*, covered $2,000 in Medical Payments ("MEDPAY") coverage. On July 28, 2020, Ms. Scala was seriously injured in a motor vehicle accident. During the course of her post-accident care, Defendant issued $2,000 of payments under the MEDPAY coverage. Ms. Scala was ultimately able to reach an undifferentiated settlement with the tortfeasor. Defendant sent correspondence to Ms. Scala's attorneys asserting a lien for its subrogation rights. Ms. Scala's attorneys requested Defendant withdraw its lien. Ms. Scala took the position that Defendant did not have the right to subrogate primarily due to application of the "made whole doctrine" to the facts of her case. The instant lawsuit followed seeking a declaration that Defendant did not have enforceable subrogation rights or that any such rights could not be enforced against Ms. Scala specifically because of the "made whole doctrine".

Defendant filed a motion for summary judgment on March 6, 2024 and an affidavit of Patrick Omlor in support thereof on March 11, 2024. Its motion and the affidavit, in sum, simply alleges that Defendant has a general contractual right to subrogate. Plaintiff filed a specific response to this motion 20 days prior to the date affixed for the summary judgment motion noting, *inter alia*, that pursuant to Rule 1.510(d) Plaintiff had discovery outstanding because of Defendant's non-appearance for an April 9 deposition addressing to the validity of the subrogation provision.

Plaintiff filed its motion for summary judgment on March 29, 2024 focusing on the fact that even if Defendant is correct that the contract has a general provision allowing for subrogation of MEDPAY, the "made whole doctrine" preempts Defendant's ability to subrogate in this instance. The motion alleges numerous facts establishing the fact that Ms. Scala reached an undifferentiated settlement with the tortfeasor and that Ms. Scala, who was left totally disabled post-accident, was not made whole by the settlement, would not receive a double-recovery for any expenses if the $2,000 was not repaid, and explained that she required post-accident care, services, medication and lost wages that, in sum, eclipsed the settlement amount. In support thereof, Plaintiff primarily relied on a declaration from Ms. Scala.

Defendant filed a response in opposition to Plaintiff's motion for summary judgment, however the response was filed on April 22, 2024 and only gave notice that it was relying on its previously filed motion and affidavit of Mr. Omlor in opposition to Plaintiff's motion.

FINDINGS

This Court finds that the "*made whole doctrine*" *(*hereinafter, *doctrine),* is a recognized doctrine Florida and is applicable in the present case.

Regarding the *doctrine*, the Florida Supreme Court explained as follows:

> *Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract. In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from a tortfeasor.*

Intervest Const. of Jax, Inc. v. General Fidelity Ins. Co., 133 So.3d 494 (Fla. 2014) [39 Fla. L. Weekly S75a]. *See also Humana Health Plans v. Lawton*, 675 So.2d 1382 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1299g]; *Magsipoc v. Larsen*, 639 So.2d 1038 (Fla. 5th DCA 1994).

This Court finds that Plaintiff's allegations are largely uncontested, and especially as they pertain to facts germane to the *doctrine* issue.

Specifically. this Court finds that there would be *no* double-recovery if Ms. Scala is not forced to repay the MEDPAY benefits previously paid by Defendant. Further, the Court finds no express terms in the contract that would preclude or attempt to supersede the *doctrine*.

Therefore, this Court finds that the *doctrine* applies to this case.

Furthermore, this Court finds that Ms. Scala was not "made whole" and, even if the $2,000 MEDPAY was never repaid to Defendant, Ms. Scala would still not be "made whole" from the loss. Accordingly, the Court finds that Defendant is precluded from pursuing a claim to any entitlement to any portion of Ms. Scala's settlement proceeds and cannot seek reimbursement for any portion of the $2,000 of MEDPAY coverage previously paid for Ms. Scala's benefit.

Accordingly, the Court **ORDERS AND ADJUDGES** as follows:

1. Defendant's Motion for Final Summary Judgment is **DENIED**.
2. Plaintiff's Motion for Final Summary Judgment is **GRANTED**. Plaintiff shall prepare and submit a Final Judgment/Decree in Plaintiff's favor.

* * *

Insurance—MedPay—Subrogation—Attorney's fees—Insured who recovered final judgment or decree in action seeking declaration that insurer was not entitled to to recover MedPay benefits from insured is entitled to award of attorney's fees under section 627.428

CARMELLA SCALA, Plaintiff, v. LIBERTY MUTUAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23023618. Division 72. August 22, 2024. John Hurley, Judge. Counsel: Thomas J. Wenzel, Steinger, Greene & Feiner, Plantation, for Plaintiff. Edwin Valen, Hamilton Miller & Birthisel, for Defendant.

ORDER ON DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S MOTION TO DETERMINE REASONABLE AMOUNT OF ATTORNEY'S FEES

THIS CAUSE having come before the court and the Court, having reviewed the motions and the court file, having heard argument of counsel, and being otherwise sufficiently advised in the premises, the court finds as follows:

The instant case concerned a dispute between Ms. Scala and her insurer. Defendant issued a policy of insurance affording Medical Payments ("MEDPAY") coverage. Ms. Scala was injured in an automobile accident. Her first-party carrier, Defendant, issued several payments under the MEDPAY coverage. When Ms. Scala settled her bodily injury claim with the tortfeasor, Defendant claimed lien rights against the settlement proceeds and sought subrogation of benefits paid out under the MEDPAY coverage. The instant lawsuit was filed as an action for declaratory relief seeking the Court find that Defendant was not entitled to subrogation under the facts. The Court entered a final judgment and final decree in Plaintiff's favor on May 28, 2024 holding, *inter alia*, that Ms. Scala was not made whole and, thus, Defendant could not seek repayment for any of the MEDPAY benefits paid. The following day, Plaintiff filed its timely motion seeking taxation of attorney's fees and costs. Plaintiff also later filed a motion for supplemental relief, seeking injunctive relief which was granted by separate order.

On July 17, 2024, Defendant filed a motion to strike Plaintiff's fee motion. Defendant's motion alleges that attorney's fees were only awardable pursuant to "a coverage declaration, a suit for breach of contract, and/or a suit alleging damages". Thus, Defendant contends, the Court should strike Plaintiff's motion pursuant to Rule 1.140(f). At the hearing, Defendant also raised, *ore tenus*, a position that the statutory language stating "in which the recovery is had" is an expression of limitation to solely a money damages claim.

Plaintiff filed its opposition on August 8, 2024. Plaintiff contended that, at the outset, Defendant's motion was procedurally improper because Rule 1.140(f) can only be used against *pleadings* and Plaintiff's motion is not a pleading. *See* Fla. R. Civ. P. 1.100. Plaintiff also contended that there is no language in §627.428 limiting applicability to only certain causes of action as contended by Defendant. Plaintiff objected to Defendant's reliance on the "recovery is had" argument as it was unpreserved in Defendant's motion, but also responded that the Court should consider the fact that §627.428 uses the language "judgment **or decree**" (emphasis added). Because the declaratory judgment statute was in existence for a significant period of time and because "decree" is used in the equitable (and not money damages) context, the legislature is presumed to know the effect of usage of that term. Moreover, Plaintiff cited a litany of cases—from every level of the Florida Court system—awarding attorney's fees against first party insurance carriers in the context of declaratory judgment or other equitable remedies. For example, the case of *Insurance Co. of North America v. Lexow*, 602 So.2d 528 (Fla. 1992) is functionally identical to the instant action and the Supreme Court awarded fees to the insured. In another case, an insured was awarded fees where he lost his money damages claim, but where he prevailed on the pure equity claims. *Rodriguez v. Government Employees Ins. Co.*, 80 So.3d 1042 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2788a].

Thus, it is clear to the Court that §627.428 is not as limited as Defendant contends. The Court agrees with Plaintiff and adopts its August 8 response. The Court finds that in this case, attorney's fees are awardable because the insured recovered a final judgment or decree after filing an action seeking declaratory relief. Accordingly, the Court ORDERS AND ADJUDGES as follows:

1. Defendant's motion is **DENIED**.
2. Because the Court is adjudicating the merits of the issue of whether Plaintiff is entitled to an award of attorneys' fees at Defendant's request, the Court will reach the conclusion on this issue today and finds **that Plaintiff is entitled to a reasonable award of attorney's fees and costs**.
3. The foregoing moots the hearing set for September 3, 2024. Accordingly, the September 3 hearing is cancelled. The parties shall reset an evidentiary hearing to address the amount of reasonable fees and costs to be awarded to Plaintiff.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Testimony—If duly subpoenaed, a judge may testify in a court proceeding as to weight of evidentiary burden applied in a prior case if such testimony is otherwise admissible—Majority finds that judge may not testify as to weight and impact of prior testimony of a witness in a prior case—Minority finds that such testimony would be permissible if ordered by trial court

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-09. Date of Issue: July 23, 2024.

ISSUE

May a judge testify, if duly served with a subpoena, in a court proceeding as to the weight of the evidentiary burden applied in a prior case?

ANSWER: The Committee concluded only if otherwise admissible.

May a judge testify, if duly served with a subpoena, in a court proceeding as to the weight and the impact of prior testimony of a witness in a prior case?

ANSWER: A majority of the Committee concluded "No"; four members of the Committee concluded "Yes, if ordered to do so by the trial court."

FACTS

The facts of this inquiry are unique and specific. The historical facts that are significant to the inquiry are as follows: as a part of a domestic relations case, a judge (not the inquiring judge) ordered that the children have no contact with the mother. The no-contact order was based on the representation that the therapist would testify that the children would be harmed by contact with the mother. The inquiring judge was assigned the domestic relations case after the no-contact order was issued by the prior judge.

The inquiring judge then learned that the therapist had married the father, and the father committed perjury and other fraudulent acts while the inquiring judge was assigned the case. Accordingly, the inquiring judge removed the children from the father's care and ultimately the mother was reunified with the children and gained full custody. The father entered into a deferred prosecution agreement with the State Attorney regarding his perjury and fraudulent acts.

The parties (mother, father, therapist and the therapist's employer) are now involved in an entirely separate civil suit that relates to the therapist and her employer committing professional malpractice. The attorney representing the mother seeks to subpoena the inquiring judge to elicit testimony regarding the significance of the evidentiary burden that a party must meet in order to secure a no-contact order in a domestic relations case, and the impact of the therapist's testimony in the prior domestic relations case.

DISCUSSION

This Committee has written extensively on the question of when a judge may or may not provide testimony in a variety of proceedings. Those opinions rely upon Canon 2B of the Code of Judicial Conduct as it provides that:

> A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

The Commentary to Canon 2B sets forth the reasoning for Canon 2B:

> A judge must not testify voluntarily as a character witness because to do so may lend the prestige of judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

The facts of the instant inquiry do not involve the potential for the inquiring judge to testify as a character witness, instead the inquiring judge's testimony is sought to focus on the impact of certain testimony in a prior case in which the judge, or a predecessor judge, may have relied upon that testimony in reaching a decision.

The Committee has dealt with a scenario involving a judge participating in a case in which perjured testimony had been presented. In Opinion 2000-07 [7 Fla. L. Weekly Supp. 417a], the Committee was posed the question of whether a judge could give a voluntary statement to a police supervisor who was investigating a police officer who lied under oath before the judge. The Committee found that the statement would be allowed only if the judge was under subpoena. However, that decision was overruled by the Committee in 2003-04 [10 Fla. L. Weekly Supp. 662a], which found that Opinion 2000-07 [7 Fla. L. Weekly Supp. 417a] would prevent a judge from cooperating with the investigatory actions of law enforcement, The Florida Bar, and the Judicial Qualifications Commission. In 2003-04 [10 Fla. L. Weekly Supp. 662a], the Committee went on to find "that non-testimonial interviews about factual matters, as long as they are not in violation of any other parts of the Code of Judicial Conduct, do not require a subpoena."

The Committee in Opinion 2003-04 [10 Fla. L. Weekly Supp. 662a] held that the Commentary to Canon 2B allows a judge to give information pursuant to a formal request to a sentencing judge or a probation or corrections officer but does not require a subpoena. There is no difference between a judge giving information to an investigative entity upon a request and a judge giving information to a sentencing judge, a probation officer, or a parole officer upon request. To find otherwise would create a scenario in which the judge could be viewed as obstructing justice or failing to meet their ethical obligation to cooperate with these entities. The Committee did point out that if either side requires a sworn statement from the Judge at a deposition, a trial, or otherwise, the Judge is required to be under subpoena pursuant to Canon 2B, since to do otherwise would be lending the prestige of judicial office to one side or the other in a matter.

In the instant case, the significant issue is not whether a party seeks a judge to provide a statement without a subpoena or testimony pursuant to a subpoena, but instead the focus is on the subject of the statement or testimony that the inquiring judge has been asked to provide. Specifically, the evidentiary burden that is required in order to have a no-contact order in a domestic relations case, and the weight and impact of the testimony of the father and possibly therapist in the prior case.

Regarding the evidentiary burden that applied in a prior case, we are not addressing the admissibility of such testimony, but rather if a judge under subpoena would be prevented by the Florida Judicial Code of Conduct from testifying as to such. While the Committee can opine multiple reasons why this testimony would not be otherwise admissible in any proceeding, we find that there are no Canons that are implicated in such testimony.

Regarding the specific weight or persuasiveness that a witness or witnesses' testimony was given in a prior proceeding and the role that played in the judge or a predecessor judge's decision to enter an order,

the majority of the Committee points to the inherent function of our judicial system and the role of a judge in a family law case as the trier of fact. Canon 3B(12) provides a judge "shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity." Any testimony or evidence that is nonpublic cannot be disclosed whether under subpoena or not. Additionally, as the prior case was a domestic relations case, the judge was sitting as both the trier of fact and of law. The judge was required to consider all legally admissible evidence and render a decision. The extent that the judge found some evidence, including testimony, to be more reliable than other evidence falls within the judge's purview as the trier of fact. Much like a jury in a criminal trial, the judge may not be required to testify about the weight he gave one piece of evidence once lawfully admitted. By way of analogy, Florida Standard Jury Instruction 4.2 which is given upon the discharge of a jury states:

> No juror can ever be required to talk about the discussions that occurred in the jury room, except by court order. For many centuries, our society has relied upon juries for consideration of difficult cases. We have recognized for hundreds of years that a jury's deliberations, discussions, and votes should remain their private affair as long as they wish it. Therefore, the law gives you a unique privilege not to speak about the jury's work.

The majority of the Committee finds that the Judicial Canons would prohibit the inquiring judge from testifying as to the persuasiveness of individual pieces of evidence that they based their order upon.

The minority position on this issue is that the focus should be on whether a judge under subpoena would be prevented by the Florida Code of Judicial Conduct from testifying as to such matters and not the admissibility of the elicited testimony. The minority expressed concern that to answer "No" to the second question would possibly put the inquiring judge in the difficult position of refusing a court order. The minority felt that: (1) the Canons do not forbid such testimony, and (2) refusal to abide by a court order would violate the Canons. As such, the minority determined there are no Canons that are implicated in such testimony, if it is deemed admissible by a court of competent jurisdiction.

REFERENCES

Fla. Code Jud. Conduct, Canons 2; 3B(12)
Fla. JEAC Ops. 2000-07; 2003-04
Fla. Crim. Jury Instruction 4.2

* * *

Judges—Judicial Ethics Advisory Committee—Professional relationships—Conduct towards lawyers, parties, witnesses, and court personnel—Elections—Judge who continues to employ a judicial assistant who is actively running for office would not be viewed as endorsing or lending prestige of office for the advancement of JA's private interests so long as judge avoids personal participation in JA's campaign and ensures that no campaign activities take place at the courthouse

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-10. Date of Issue: August 2, 2024.

ISSUES

1. If the inquiring judge's judicial assistant (JA),who is actively running for elective office, is allowed to continue to work for the inquiring judge, could the judge be viewed as lending the prestige of judicial office for the advancement of the JA's private interests?

ANSWER: No.

2. If the JA continues to work for the judge while running for elective office, could the mere fact that the judge "allows" the judicial assistant to run for such office be viewed as an endorsement of their candidacy?

ANSWER: No.

FACTS

The inquiring judge currently serves as the sole county court judge in the county. The inquiring judge's JA has served for many years as a judicial assistant, and previously as a clerk in the Clerk of Court's office. The judicial assistant has qualified to run for Clerk of Court for that county, a non-partisan seat.

Even if the JA does not specifically name the inquiring judge as employer while campaigning, it may be readily apparent as the inquiring judge is the only county judge in the county. The inquiring judge asks whether this may potentially be viewed as "lending" the prestige of judicial office for advancement of the JA's private interests. And further, would the mere fact that the inquiring judge "allows" the JA to continue working be viewed as an "endorsement" of their JA's candidacy? Finally, are there other considerations and/or limitations that may apply?

DISCUSSION

The inquiring judge advises this committee that the JA is being "allowed" by the judge to continue working while running for public office, pending this committee's advice on the judicial ethics questions presented. The ultimate question of whether the JA can continue to be employed by the inquiring judge is within the inquiring judge's discretion.

Canon 2A states, "A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B directs, "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

In JEAC Op.92-33, this Committee opined that Canon 7 applied to JAs, so that they were precluded from engaging in partisan political activities. However, in JEAC Op. 92-33, this matter was readdressed by the Florida Supreme Court in conference on September 8, 1992, and by letter advised this Committee that it was the unanimous opinion of the Court that a JA may not be prohibited from engaging in partisan political activity during personal time, providing such activity is conducted entirely independently of the judge and without reference to the judge or the judge's office. *See* Fla. JEAC Op. 93-45 [1 Fla. L. Weekly Supp. 497d].

In Fla. JEAC Opinions 06-32 [14 Fla. L. Weekly Supp. 195a] and 00-08 [7 Fla. L. Weekly Supp. 418a], this Committee cited the Application Section of the Code of Judicial Conduct and confirmed that the Code of Judicial Conduct applies only to judicial officers and quasi-judicial officers and does not apply directly to JAs.

Canon 3C(2) states, "A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge. . ." This opinion was quoted with approval by the Florida Supreme Court in *In Re: Luzzo*, 756 So. 2d 76 (Fla. 2000) [25 Fla. L. Weekly S343a].

The inquiring judge is cautioned to avoid any conduct, statements, or actions on or off the bench that may be perceived as favoring or endorsing their JA during the campaign. Fla. Code Jud. Conduct, Canon 7 provides, a judge "shall refrain from inappropriate political activity." Fla. Code Jud. Conduct, Canon 7A(1)(b) provides, a judge "may not publicly endorse or publicly oppose another candidate for office."

In JEAC Op. 91-23, the inquiry was whether a JA may engage in fundraising activities. If the judge's name or position is connected to the JA's fundraising, that would violate Canon 5(B)(2). Canon 5 (B)(2) mandates a judge not to permit others, whether court personnel or not, to use the prestige of the office for fundraising. The JA position is an arm of the Court and carries with it the prestige of that office. However, eight members of the ten-member committee concluded

that the JA may fundraise as long as the contributions solicited by the JA are completely unconnected with the judicial office, and personal to the JA, such activity would be permitted.

The inquiring judge asks if there are other considerations and/or limitations that may apply. The inquiring judge emphasizes their clear understanding that they cannot be involved or participate in any aspect of their JA's campaign, nor offer any endorsements or support. The inquiring judge is additionally cautioned to avoid any conduct that may be perceived as endorsing their JA. As the JA's supervisor, the inquiring judge must enforce office rules and expectations of no campaign related work, calls, or e-mails during the workday, and reiterate that the judge's name or office must not be used or referenced during fundraising activities. No courthouse resources such as paper, printer, scanner, etc., may be used. There can be no campaign related conversations with attorneys, litigants or other stakeholders who phone into or visit the judge's office or courtroom. No campaign related activity may occur at the courthouse. Time sheets must also accurately reflect all leave taken by the JA to campaign.

This Committee concludes that as long as the inquiring judge avoids any personal participation in the JA's campaign and ensures that no campaign activities take place in any way at the courthouse, the inquiring judge would be in compliance with the judicial canons. This Committee recognizes that certain conduct by court employees could create unfortunate appearances or worse. As was suggested in JEAC Op. 06-32 [14 Fla. L. Weekly Supp. 195a], 00-08 [7 Fla. L. Weekly Supp. 418a], 92-33 and 93-45 [1 Fla. L. Weekly Supp. 497d], we agree with the recommendation that the Florida Supreme Court appoint a committee or commission to draft a code of conduct for all judicial employees and staff. The model code for judicial employees and staff drafted by the American Judicature Society does permit limited political activity.[1]

REFERENCES

Petition of the Committee on Standards of Conduct Governing Judges, 698 So. 2d 834 (Fla. 1997).
In Re: Luzzo, 756 So. 2d 76 (Fla. 2000).
Fla. Code Jud. Conduct, Canons 2A, 2B, 3(C)(2), 5(B)(2), 7, 7A, 7A(1), 7A(1)b
Fla. JEAC Ops. 06-32, 00-08, 93-45, 92-33, 91-23

[1]The judge and JA may wish to review sections 99.012(3)(e)1, 104.31, 106.15, and 110.233, Florida Statutes. Given that the JEAC's role is limited to offering advice regarding judicial ethics, we express no opinions as to the applicability or impact of any of those statutory provisions.

* * *

Judges—Judicial Ethics Advisory Committee—Elections—Political activity—A judge not currently running for election or retention may not attend a victory/watch party for the judge's spouse who is running for partisan position as school superintendent

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-11 (Election). Date of Issue: August 2, 2024.

ISSUE

May a judge who is not currently running for election or retention attend a victory/watch party for the judge's spouse who is running for a partisan position as a school superintendent.

ANSWER: No.

FACTS

The inquiring judge's spouse is a candidate for election as a local school superintendent. In this county, that position is subject to a partisan election, and the judge's spouse is running as a political party's candidate.

The judge's spouse anticipates scheduling what is known as a "watch party," likely in a local hotel ballroom. This event would be attended by supporters of the judge's spouse's campaign. The judge predicts that most in attendance will be members of the spouse's political party. The purpose of the event would be to watch election returns as they are reported, and then, if the candidate is successful, celebrate the candidate's victory. The inquiring judge asks whether it is permissible for the judge to attend this watch party. The judge notes that the judge would not appear on stage with the spouse, nor would the judge be introduced at any point. Further, the judge would not attend the event until after the election polls had closed.

DISCUSSION

Three provisions of Canon 7 are implicated in this inquiry. Canon 7A(1)(b) states that a judge shall not "publicly endorse or publicly oppose another candidate for public office." Canon 7A(1)(d) prohibits a judge or judicial candidate (except as authorized under Canon sections 7B(2), 7C(2), and 7C(3)) from attending "political party functions." Canon 7D further states: "A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law." The question here is whether the inquiring judge's proposed conduct constitutes a public endorsement for purposes of Canon 7A(1)(b), attending a "political function" under Canon 7A(1)(d), or "political activity" under Canon 7D.

We begin our examination of this issue with the applicable text of Canon 7 because it is the text, ultimately, that provides notice of what conduct is permissible under the code. "Public endorsement," in the context of a political election, is a term that is generally understood to mean an individual's publicly stated approval of a particular candidate and encouragement for others (the "public" aspect of the endorsement) to likewise support that candidate in an election. A "public endorsement" in this context often entails a quoted statement the endorsing person either provides or approves. Florida Statutes appear to embrace this meaning of "public endorsement." *Cf.* § 106.143(4), Fla. Stat. ("It is unlawful for any candidate or person on behalf of a candidate to represent that any person or organization supports such candidate, unless the person or organization so represented has given specific approval in writing to the candidate to make such representation."). Public endorsements are often utilized by campaigns and may feature prominently in political advertisements in various media.

In the past, this Committee has interpreted Canon 7A(1)(b) a bit more capaciously than what the text would seem to contemplate. In Fla. JEAC Op. 2012-03 [19 Fla. L. Weekly Supp. 509a], for example, we advised that a judge should not attend a friend's victory party following an unopposed mayoral election. We thought it inappropriate because

> [a]lthough it is possible that the attendees [of the victory party] would belong to more than one political organization and the party is not for one particular group, it appears that the party is not a "purely social function," but a part of the campaign of the judge's friend as it is a victory party to celebrate a successful candidacy. As the cited Committee opinions indicate, the judge's "action" in appearing at a "campaign-related event" such as a victory party could give the impression that the judge endorsed the friend's candidacy for public office. The fact that the candidacy was unopposed does not negate such conclusion as section 105.071(4)[, Florida Statutes] prohibits the endorsement of *any* candidate. Consistent with the reasoning of the above-cited opinions and the standards set forth in Canon 2A and Canon 7A(1)(b), the appearance of impropriety created when the judge attends a celebration for a candidate suggests that the judge should not attend the victory party.

(Emphasis supplied) (footnote omitted). Whether attending a party that might "give the impression" of some kind of implied support—as opposed to an express public statement of support (such as publicly

wearing a button supporting a spouse's partisan campaign, *see* Fla. JEAC Op. 2017-16) [25 Fla. L. Weekly Supp. 682a]—constitutes a "public endorsement" is an interesting and debatable issue given the canon's text.[1]

Fla. JEAC Op. 2014-16 [21 Fla. L. Weekly Supp. 1112a] comes a bit closer to the mark for the present inquiry, and in that instance, we reached the opposite conclusion. There, the inquiring judge also wished to attend a watch/victory party, but for the judge's son who happened to be a candidate for judicial office. We concluded that attending such a watch party was not a public endorsement and provided an in-depth analysis as to why:

> First, the Committee assumes this function is intended as a typical victory party following the *completion* of the election. If so, it is difficult to conceive how the judge's personal appearance could influence any voters given that the act of voting was accomplished hours before the event commenced. A different conclusion would have been drawn if the inquiring judge's child were in a multi-candidate race with the prospect of a runoff.
>
> Second, the majority's determination is limited to judicial races only, in which partisanship is not a factor and the candidates themselves do not make endorsements. In other words, this will not be a combination of celebration and "rallying the troops" such as may be experienced in partisan or issue-oriented politics. A post-election gathering can easily become a political event based on what occurs, which will not be known until the event is in progress. *See, e.g.,* Fla. JEAC Op. 10-20 [18 Fla. L. Weekly Supp. 122a]: "[C]aution is strongly advised when attending these types of events, since the purpose is for the citizens to voice their opinions on varying issues and their expectation of receiving a pledge or commitment on particular issues from the public figures and/or elected officials.". *See also* Fla. JEAC Op. 98-17 [5 Fla. L. Weekly Supp. 859b] (judicial candidates should be cautious that their presence, remarks, and/or actions are not construed by others to be political or partisan).
>
> Third, it is important that the inquiring judge not be up for election or retention during the same cycle as the judge's child, lest the event be perceived as participation in a slate of candidates rather than an event limited to honoring a specific and successful individual candidate. Conceivably a different conclusion might be drawn if both the judge and the judge's child had won their respective races, but for purposes of this opinion we limit ourselves to the actual facts.
>
> Fourth and finally, the majority have placed considerable weight on the fact the candidate is the inquiring judge's child. It is difficult to imagine that any voter would *not* assume that the judge supports the child's electoral efforts even if the judge cannot personally say so during the campaign.

Using this four-part framework, the present inquiry satisfies most, but not all, of the points the Committee thought were important in construing Canon 7A(1)(b). First, the judge's attendance at the watch party will be after the polls have closed for the superintendent election, so it is virtually impossible that the judge's attendance could influence anyone's vote in the race. However, the second factor identified in Fla. JEAC Op. 2014-16 [21 Fla. L. Weekly Supp. 1112a] is markedly different. This is not a non-partisan judicial race, but a partisan political race. Further, the judge predicts that the majority of those in attendance at the watch party will be members or supporters of the spouse's political party. As to the third factor, the inquiring judge is also not up for election or retention. And fourth, we would liken a judge's spouse to a judge's child insofar as a typical voter would likely assume the judge supports the judge's spouse's electoral efforts, even if the judge is prohibited from expressing his or her public support.

Ultimately, though, we must reluctantly advise against the judge's attendance at this gathering. Not because the judge's unannounced attendance is a "public endorsement" of the judge's spouse (and whose support most reasonable people would simply assume). Rather, a watch party for a partisan office would appear to be a "political function" generally prohibited under Canon 7A(1)(d), and attending such a watch party, even at the conclusion of a contested, partisan election, would likely constitute "political activity" proscribed under Canon 7D. As we observed in Fla. JEAC Op. 2014-16 [21 Fla. L. Weekly Supp. 1112a], watch parties in partisan races often become partisan rallies. We would further note that a watch party for a particular partisan race can often become a watch party for all the partisan races in that election cycle. Thus, "[a] post-election gathering can easily become a political event," which a judge who is not up for election is prohibited from attending under Canons 7A(1)(d) and 7D.

In so opining, we acknowledge the awkward imposition Canon 7 places on judges in circumstances such as this. No doubt, a judge would want to be by his or her spouse's side at the conclusion of a contested political campaign to celebrate (or commiserate) with their spouse, depending on the outcome of the election. And judges may do so, but not in a public, partisan function such as a watch party.

REFERENCES

§ 106.143(4), Fla. Stat.
In re Glickstein, 620 So. 2d 1000, 1002 (Fla. 1993)
Fla. Code Jud. Conduct, Canon 7, 7A, 7A(1)(b), 7D
Fla. JEAC Ops. 17-16, 14-16, 12-03, 07-13

[1]On the other temporal end of a campaign, we once advised a judge not to attend the judge's spouse's initial "meet and greet" campaign party at the judge's own house because that "would be a very clear and improper endorsement of the spouse's candidacy." *See* Fla. JEAC Op. 2007-13 [14 Fla. L. Weekly Supp. 1071a]. In so advising, we cited *In re Glickstein*, 620 So. 2d 1000, 1002 (Fla. 1993), for the broad proposition that Canon 7A is "absolute" in its prohibition against judges providing public endorsements in political campaigns. But *Glickstein*'s pronouncement must be understood in the context of the facts of that case. In *Glickstein*, the Florida Supreme Court admonished an appellate judge *who had written a letter to the Florida Flambeau and Citrus County Chronicle newspapers* which began, "I am voting 'YES' to retain Chief Justice Leander Shaw for the following [five] reasons . . . ." Unlike the present inquiry, there was no question that Judge Glickstein gave a public endorsement to a candidate because his letter to the newspapers said as much; indeed, the judge's letter may be the quintessential example of what a public endorsement in a political election looks like.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Judge need not automatically recuse from all cases involving a defendant that judge had previously prosecuted while a prosecutor for the state attorney's office—Relevant facts regarding judge's involvement in defendant's prior prosecution must be disclosed to the defendant—Judge should evaluate each case individually and must disqualify himself or herself where his or her impartiality might reasonably be questioned

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-12 (Amended). Date of Issue: August 27, 2024. Date Originally Issued: August 2, 2024.

ISSUE

Whether a judge must recuse from all cases involving a defendant who the judge previously prosecuted.

ANSWER: No, judge need not automatically recuse from all such cases. However, a judge may need to recuse from such a case depending on the specific facts. Additionally, if a judge is aware of his or her involvement in a prior prosecution, the judge must disclose the relevant facts to the defendant even if the facts do not require automatic recusal.

FACTS

Prior to being appointed to the bench (and subsequently elected), the inquiring judge was a prosecutor in the same county/circuit. The judge was a trial attorney at the State Attorney's Office and actively

prosecuted all types of cases, ranging from misdemeanors, sex crimes, career criminals, firearm offenses, and homicides. The judge did not have any official supervisory capacity over any other attorneys. While the judge was given specialty designations, such as when prosecuting sex crimes and career criminals/firearms, each Assistant State Attorney ("ASA") handled their own cases, and the judge did not have supervisory duties for any special divisions.

When the judge was appointed to the bench, the judge spent 2.5 years in a non-criminal Circuit division but has now been transferred to a Circuit Criminal division. In the county where the judge presides, Circuit Criminal cases are assigned to each judge based on the beginning letter of the defendants' last name.

While at the State Attorney's Office, the judge was assigned to several different divisions in front of several different judges. As an ASA, the judge was assigned specialty cases (such as sex crimes) and handled all of the defendants assigned to that courtroom with all letters assigned to that courtroom (such as A, B, C, D). The judge would also handle "non-specialty cases" and be assigned all the defendants with that letter (ex: B). Each division would include a Sex Crimes/ Child Abuse ASA, Career Criminal/Firearm ASA, general felony cases ASA and a Division Chief.

In the Criminal Circuit courtroom to which the judge is now assigned, the judge was assigned as an ASA approximately 10 years ago. During that time frame, the judge handled the sex/child abuse cases, as well as other felony cases in that division.

According to the judge, it appears that, over the course of 10 years, the "letters" assigned to the division have not changed significantly. While the judge is seeing very few cases where the judge was actually the ASA who prosecuted the defendants' current case, the judge identified cases where he recognized that the defendants previously prosecuted by the judge in his former ASA capacity have new cases. Those defendants are assigned to the judge's courtroom by virtue of their last names.

DISCUSSION

Canon 2A states, "A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In the Commentary to Canon 2A, it is noted that, "The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

Additionally, Canon 3(E)(1)states, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." In the Commentary to Canon 3(E)(1), it is noted that, **"Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply." [Emphasis added]**

In JEAC Op. 2021-18 [29 Fla. L. Weekly Supp. 693b], this committee opined that a judge did not have to recuse from presiding over a sex offender/predator's failure to register case, where the underlying sex offense convictions that formed the basis of the registration requirement, where initially charged by the judge, when the judge was an ASA. The committee based its conclusion on the fact that the judge made the charging decision but did not actually prosecute the case or supervise the attorneys who did. And concluded that, "when applying the plain reading of Canon 3E(1)(b), the inquiring judge did not serve as a lawyer in the matter in controversy, as the matter in controversy is a failure to register charge and not the original sexual offense."

The inquiring judge asks a slightly different question in that this judge was the prosecuting (not just charging) attorney in a case involving this same criminal defendant on different charges. This makes JEAC Op. 2021-18 [29 Fla. L. Weekly Supp. 693b] distinguishable.

In fact, in *Goines v. State*, the court found that it was ineffective assistance of counsel for the defense attorney not to seek disqualification where the judge presiding over the defendant's trial had prosecuted defendant on other charges, six years earlier. 708 So. 2d 656 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D921c]

"The test for appearance of impropriety is **whether the conduct would create in reasonable minds**, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, **a perception that the judge's ability to carry out judicial responsibilities with** integrity, **impartiality**, and competence is **impaired**." Commentary to Canon 2A. Additionally, the Commentary to Canon 3(E)(1) states clearly that, ". . .a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply." Commentary to Canon 3(E)(1).

The inquiring judge may need to recuse from a case. But the judge must evaluate each case individually. Relevant factors may include: the judge's involvement in the defendant's case, the time since the prosecution of the defendant, comments the judge may have made to the defendant or about the defendant, and any other factor that the judge deems relevant to the recusal inquiry.

The rules require that the inquiring judge disqualify himself or herself where his or her impartiality might reasonably be questioned. That is a fact dependent inquiry that depends on the circumstances of each individual situation. The inquiring judge must consider the factors outlined above and any other facts a litigant might deem relevant to the recusal inquiry. Additionally, once advised of prior involvement with a defendant's earlier cases a judge must disclose those facts.

We note that one committee member expressed an opposing view and believes that a former prosecution by the judge would always call into question the judge's impartiality. This committee member prefers the "bright line" position that a judge must recuse from all cases involving a defendant who the judge previously prosecuted.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 3(E)(1)
Fla. JEAC Op. 2021-18
Goines v. State, 708 So.2d 656 (Fla. 4th DCA 1998)

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Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—A judge assigned to a juvenile division is not required to recuse from all juvenile delinquency cases if judge's child is arrested or charged with a crime in county where judge presides—Judge must disclose that judge's child has been arrested or charged to the parties in juvenile delinquency division in which judge presides

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-13. Date of Issue: August 17, 2024.

ISSUES

1. Must a judge who is assigned to a juvenile delinquency division recuse from all juvenile delinquency cases in his/her division if a child of the judge has been arrested in the county where the judge presides?

ANSWER: No.

2. Must the judge disclose the arrest of his/her child to the parties in the juvenile delinquency division in which the judge presides?

ANSWER: Yes.

3. If the judge's child is charged with a crime by the State Attorney's Office, must the judge recuse on all juvenile delinquency cases in the juvenile division in the county where the child was charged?

ANSWER: No.

4. May the judge serve in a division where the charges are filed if there is a reassignment of the case involving the judge's child to another circuit?

ANSWER: Yes.

5. Must the judge disclose to the parties in a juvenile delinquency division in which the judge presides that the judge's child has been charged with a crime and is being prosecuted by the State Attorney's Office?

ANSWER: Yes.

FACTS

A child of a judge who presides over a juvenile delinquency division has been arrested in the county where the judge presides. The child has yet to be charged by the State Attorney's Office. The inquiring judge requests an opinion on whether the judge must recuse from serving in the juvenile delinquency division. Further, the judge inquires as to whether the judge must disclose to the parties in the juvenile delinquency division that the judge's child has been arrested. Finally, if charged by the State Attorney's Office, the judge inquires whether recusal or disclosure is necessary. If charged, the judge will be hiring legal counsel for the child and will not be utilizing the services of the Public Defender's Office.

DISCUSSION

Canon 2 of the Florida Code of Judicial Conduct provides that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities. The Commentary to Canon 2 describes the test for appearance of impropriety as "whether the conduct would create in reasonable minds, with knowledge of all of the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Canon 3E(1) requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, regardless of whether any of the specific instances listed in Section 3E(1) apply.

At the time of the issuance of this opinion, the judge's child has been arrested, but not yet charged by the State Attorney's Office. This Committee addressed a similar situation in Fla. JEAC Op. 2002-05 [9 Fla. L. Weekly Supp. 417a]. In that opinion, a judge in a family law division was divorced and was contemplating potential litigation concerning the judge's children. Suit had not yet been filed. The Committee determined that the judge's situation was not one where the judge's impartiality might reasonably be questioned, and that there was no requirement for a judge to disclose a personal family matter, or for a judge to disqualify himself/herself based on the judge's personal family matter.

The facts of the current inquiry are different in that the judge presides in the division where prosecutors would make the charging decision regarding the judge's child's case. The Committee believes the judge has a duty to disclose the arrest until such time as the case is no actioned or the charges resolved, because of the perception that the judge could have an incentive to not "rock the boat" with the State Attorney's Office in the hopes of obtaining favorable treatment on the judge's child's case. Further, the judge must recuse if asked to do so. Disclosure would not be required if the State Attorney's Office recused itself and asked the Governor to reassign the case to another state attorney.

The judge further inquires whether recusal in juvenile delinquency cases would be required if the judge's child was charged by the State Attorney's Office. A judge is not required to recuse in all cases where the judge or close family member of the judge has been a party in a suit in the division in which the judge presides. See Fla. JEAC Op. 2016-04 [24 Fla. L. Weekly Supp. 269a] (Judge not required to recuse from all Engle progeny cases assigned to the judge where a member of the judge's family brought an Engle progeny suit against a tobacco company within the same judicial circuit, but before a different judge, even if some lawyers representing the parties in the judge's family member's case appear before the judge); Fla. JEAC Op. 2015-14 [23 Fla. L. Weekly Supp. 501a] (Judge not required to recuse on all foreclosure cases involving the same lawyers, lenders or assignees who were involved in the judge's personal foreclosure case in which the judge was a defendant, unless the judge determines that the judge has a personal bias or prejudice against the lawyers, lenders or assignees); Fla. JEAC Op. 2011-17 [19 Fla. L. Weekly Supp. 148a] (Judge not required to recuse when attorney appearing before a judge is the spouse of an attorney representing the judge in an unrelated civil matter where the spouses are and always have been in different firms). The question is whether a disinterested person aware of the relevant facts would reasonably question the judge's impartiality.

The opinion most on point with the inquiry at hand, assuming that the judge's child is charged by the State, is Fla. JEAC Op. 2017-21 [25 Fla. L. Weekly Supp. 767a]. In that opinion, the brother-in-law of a general magistrate who presided over Marchman Act cases became a respondent in a Marchman Act case before another magistrate. The attorney who regularly appeared before the inquiring magistrate was appointed to represent the magistrate's brother-in-law. This Committee determined that the general magistrate was not required to recuse from presiding over Marchman Act cases or cases where the court-appointed attorney who appeared before the general magistrate represented the general magistrate's brother-in-law in a Marchman Act case before another magistrate. However, the Committee concluded that if the general magistrate determined that a personal bias or prejudice existed, the magistrate should recuse from cases involving the brother-in-law's attorney.

The inquiring judge intends to hire legal counsel to represent the judge's child, should the child be charged. The judge should recuse from cases where the attorney who was hired to represent the judge's child is appearing in a case before the judge. See JEAC Op. 1999-13 (Judge should recuse where an attorney from the firm who represents the judge, appears before the judge, because an impermissible appearance of impropriety applies to all members of the attorney's firm); Fla. JEAC Op. 2001-17 [9 Fla. L. Weekly Supp. 345a] (Judge should be disqualified from hearing cases in which one of the parties was represented by a law firm currently representing the judge's spouse's law firm in a malpractice action); Fla. JEAC Op. 2005-15 [12 Fla. L. Weekly Supp. 1200a] (Judge must recuse when lawyer and/or members of lawyer's firm who represented judge in civil action appears before the judge); Fla. JEAC Op. 2012-37 [20 Fla. L. Weekly Supp. 193a] (Judge was required to recuse from all cases involving the attorney and firm that represented the judge, judge's mother and brother in a personal injury suit against them.

As far as disclosure if the child has been charged, this Committee in Fla. JEAC Op. 2017-21 [25 Fla. L. Weekly Supp. 767a] determined that even though recusal was not required, the magistrate had a duty to disclose facts and information relevant to the parties' consideration of whether the magistrate should be disqualified, even if the magistrate believes there is no real basis for disqualification. As such, if the State Attorney's Office files formal criminal charges against the judge's child, then disclosure is warranted, and should be for a reasonable period of time during and following the conclusion of the matter. This Committee has previously suggested that a reasonable

period of time is from several months to one year, depending upon the unique facts and circumstances of the representation. Fla. JEAC Ops. 1986-09, 1993-19, 2001-17 [9 Fla. L. Weekly Supp. 345a], 2011-17 [19 Fla. L. Weekly Supp. 148a], 2012-09 [19 Fla. L. Weekly Supp. 674a], 2012-37 [20 Fla. L. Weekly Supp. 193a] and 2016-04 [24 Fla. L. Weekly Supp. 269a].

REFERENCES

Fla. Code Jud. Conduct, Canons 2, 3E(1)
Fla. JEAC Op. 1986-09
Fla. JEAC Op. 1993-19
Fla. JEAC Op. 1999-13
Fla. JEAC Op. 2001-17
Fla. JEAC Op. 2002-05
Fla. JEAC Op. 2005-15
Fla. JEAC Op. 2011-17
Fla. JEAC Op. 2012-09
Fla. JEAC Op. 2012-37
Fla. JEAC Op. 2015-14
Fla. JEAC Op. 2016-04
Fla. JEAC Op. 2017-21

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