Volume 32, Number 7, November 27, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 275-319

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CRIMINAL LAW—LEWDNESS—OFFENSES AGAINST STUDENTS BY AUTHORITY FIGURES—CONSTITUTIONALITY OF STATUTE. A circuit court judge rejected a challenge to the constitutionality of section 800.101 raised by a teacher who was charged with violating the statute for sending texts that were sexual or romantic in tenor to a 16-year-old student. The judge concluded that the statute was not overbroad after determining that the unconstitutional applications of the statute proposed by the defendant were not substantially disproportionate to the statute's constitutional and wholesome applications protecting school children. Defendant lacked standing to assert that the statute was unconstitutionally vague because it was apparent from his actions and admissions that he knew he was engaging in wrongdoing when he violated the statute. Moreover, the judge noted that the terms "solicit," "sexual conduct," "romantic," and "lewd" are words of common parlance and are not vague. Finally, the court rejected the defendant's argument that the statute cannot form the basis for a criminal prosecution because it lacks a mens rea requirement. "In the absence of any language expressing legislative intent to dispense with mens rea and create a strict liability crime, a statute will be read to require proof of mens rea."** *STATE OF FLORIDA v. GOODWIN, Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County, Criminal Division. Filed September 3, 2024. Full Text at Circuit Courts-Original section, page 300a.*

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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

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

Bold denotes decision by circuit court in its appellate capacity.

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* * *

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Kwartin v. City of Miami Beach. Circuit Court, Eleventh Judicial Circuit (Appellate), Miami-Dade County, Case No. 2022-10-AP-01. Original Opinion at 31 Fla. L. Weekly Supp. 520a (March 29, 2024). Certiorari Granted; Majority Opinion Quashed at 49 Fla. L. Weekly D2261a

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CIRCUIT COURTS—APPELLATE

Counties—Land Development Code—Special exceptions—Sand mine—Notice—Where provisions of county code requiring that notice of public hearing be mailed by certified mail were not in effect when application for special exception to operate sand mine was filed, but they were adopted prior to final approval of application, procedural notice requirement operated retrospectively—Petitioners were not accorded procedural due process where notices of hearing were not mailed by certified mail, and public notices did not contain required language set forth in county code and statute—Approval was not supported by competent substantial evidence where traffic study required by county code was incomplete at time application was approved and required wildlife impact study had not yet been undertaken at that time

JEFFRY FERGUSON and KIMBERLY SWIFT, Petitioners, v. LEVY COUNTY, a political subdivision of the State of Florida, and RYAN THOMAS, 3RT SAND MINE, In Re: SPECIAL EXCEPTION SE 23-01, Respondents. Circuit Court, 8th Judicial Circuit (Appellate) in and for Levy County. Case No. 38-2024-CA-000075-CAAM. Circuit Civil Division. September 17, 2024. Counsel: Ralf Brookes, Cape Coral, for Petitioners. Gregory T. Stewart and Lisa B. Fountain, Nabors, Giblin & Nikerson, P.A., Tallahassee; and Nicholle M. Shalley, County Attorney, Bronson, for Respondents.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(CRAIG C. DETHOMASIS, J.) THIS CAUSE having come before the court upon Petitioners Petition for Writ of Certiorari and this court having reviewed said Petition, the Respondents' Response in Opposition to Petition for Writ of Certiorari, the Petitioner's Reply, the relevant transcripts, exhibits, case history, and applicable law, finds as follows:

1. This Court has jurisdiction to issue writs of certiorari consistent with Article V, Section 5(b) Florida Constitution and Florida Rule Appellate Procedure 9.030(c)(3). Petitioner filed the Petition for Writ of Certiorari seeking judicial review of a quasi-judicial decision by Levy County Board of County Commissioners (e.g., the lower tribunal) pursuant to Florida Rules of Appellate Procedure 9.100(b), (c) and 9.190(b)(3).

2. The Respondents, after Order Directing Response issued on 5/16/24, and pursuant to Rule 9.100(j), filed a response on 6/12/24 to which the Petitioner then filed a Reply per Rule 9.100(k).

3. The subject of this review is the quasi-judicial decision of the Levy County Board of County Commissioners (hereafter referred to as "BOCC") rendered on 3/19/24, approving a 1,100-acre sand mine after Defendant, 3RT Sand Mine submitted a Petition seeking Special Exception (No. SE 23-01 hereafter referred to as "Application").

4. Petitioners allege in the Petition that the hearing of 3/19/24 was not properly advertised under the Levy County Code 50-3 "Notice" and they were not given proper certified mailing notice of the hearing and were therefore unaware of the hearing and did not attend, but desired to present testimony and evidence in opposition to the sand-mine special exception. The Petitioners also allege the published advertised notice was also not in conformity with the Levy County Code and/or applicable Florida Statutes.

5. The Petitioners further allege that the Applicant failed to meet their burden of proof that the application met the essential requirement of law contained in Levy County Land Development Code 50-719 "Special exceptions for major mining operations; criteria, standards and conditions" in addition to failing to meet the Code requirements for notice of the quasi-judicial hearings held by the BOCC and seek judicial review to quash and reverse the quasi-judicial approval.

6. A prior hearings was held before the BOCC on 5/1/23 and at said hearing the Application was continued to 7/10/23. A copy of the Notice for the 5/1/23 hearing and the mailing list for the Notice is included as part of the County's Appendix. (Cty. App. 6 at 98-104). Among the people that were mailed copies of the Notice were Petitioners, Kimberly Adair Swift at [Editor's note: Address redacted], Bronson, Florida 32621, and Jeffry L. Ferguson at [Editor's note: Address redacted], Williston, Florida 32696. (Cty. App. 6 at 98-104). Regarding the hearing of 7/10/23, On June 22, 2023, notice was published in the Levy Citizen, a weekly newspaper published within Levy County, notifying the public that the Planning Commission would consider the Application on July 10, 2023, and that the Board of County Commissioners (the "Board") would hear the matter on July 25, 2023. (Cty. App. 8 at 109-110). On July 25, 2023, the Application was removed from the agenda and rescheduled for quasi-judicial public hearing on the Application for December 5, 2023. After presentation of the Application, discussion, public comment and commencement of deliberation by the BOCC, the Board ultimately voted to continue the hearing to February 6, 2024, at which time the BOCC reconvened and reopened the public comment and deliberation stages. A vote to approve the Application passed and the Board directed the City Attorney to prepare a written Order to be considered at the March 19, 2024, meeting. On March 19, 2024, the BOCC met and voted to approve the Order which approved the Application and conditions governing the development of the subject property and authorized the Chairman to execute said Order. The Petition under review was then filed on April 18, 2024.

7. The Subject Property consists of approximately 1,100 acres (including the mine property and access to CR 337) located in Section 35, Township 12S, Range 17 E. Levy County Florida. (Cty. App. 2 at 18-20). The current land use and zoning of the Subject Property under the County's Land Development Code ("LDC") was A/RR (Agricultural/Rural Residential) and has historically been utilized for farming and crops. The Levy County Land Development Code allows a mine to be developed in agriculture-rural residential zoning if a special exception is granted by the county commission. Major mining excavation and fill activity operations are listed as a special exception within the land use/zoning district A/RR. (Cty. App. 2 at 18-20).

8. It is undisputed that, in its granting of Application for special exception, BOCC was acting in a quasi-judicial, rather than a legislative, capacity. As such, review of its decision is proper by way of certiorari. See *Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415, 416 (Fla. 2d DCA 1991) (Certiorari is the proper method to review the quasi-judicial actions of a Board of [the] County, whereas injunctive and declaratory suits are the proper way to attack a Board's legislative actions).

9. "In first tier certiorari proceedings as here, the circuit court is limited to a determination of the following: (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence." See, *Broward County v. G.B.V. International, Ltd*., 787 So.2d 838 at 843 (Fla. 2001) [26 Fla. L. Weekly S389a] quoting *Deerfield Beach v. Vaillant*, 419 So. 2d 624 at 626 (Fla. 1982) (emphasis added), see also *City of Dania*,761 So. 2d at 1092; *Heqqs*, 658 So. 2d at 530.

10. In considering a petition for writ of certiorari, "a court has only two options—it may either deny the petition or grant it and quash the order at which the petition is directed. The court may not enter any judgment on the merits of the underlying controversy or direct the lower tribunal to enter any particular order." *Clay Cnty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] (citing *Broward Cnty. v. G.B.V. Intl*, 787 So. 2d 838, 843-44 (Fla. 2001) [26 Fla. L. Weekly S389a]).

11. In certiorari the reviewing court will not undertake to re-weigh

or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law. It is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault. See, *DeGroot v. Sheffield,* 95 So. 2d 912 (Fla. 1957).

12. While the Petition under review contains assertions and averments of the potential and practical impact of the approval of the application submitted by the respondent, this court limits its review as set forth in paragraphs 9, 10, and 11, above.

13. **NOTICE**: Levy County Code 50-3(a) which addresses requirements of Public Notice and specifies that notice by mail be sent via certified mail.

"Levy County Code Sec. 50-3 Types of public notice. (*a) Mailed notice. The applicant is responsible for sending supplemental mailed notice. The mailed notice must identify the property appraiser's parcel identification number(s) for the subject property, the physical address of the subject property (if no address is assigned, the general vicinity or nearest intersection); the date, time, and location of the public hearing; and a general description of the application. The* ***notice must be mailed by certified mail*** *at least 15 calendar days prior to the date of the hearing to all real property owners whose property lies within 300 feet, or 2,500 feet for a special exception for electric generating facilities, or 2,500 feet for a special exception for mining (without blasting and 49 or less one way truck trips per day), or two miles for a special exception for mining (that includes blasting or 50 or more one way truck trips per day) from any property line of the property that is the subject of the application. Addresses for mailed notice must be obtained from the county property appraiser's current ad valorem tax records.*

Subsection (b) of 50-3 also requires posted notice as follows:

(b) Posted notice. Notice signs (which can be obtained from the county planning and zoning office) must be posted by the applicant as follows: (2) Location of signs. a. Street frontage. One sign shall be placed along each road that fronts the property. Signs should be placed on the property (not within the road right-of-way) ***so as to be visible from the road.***

Subsection (c) of 50-3 addresses requirements of notice via published advertisement:

c) Published advertisement. The county will publish notice of each meeting at least ten calendar days prior to the date of the meeting and, at a minimum, ***the notice must contain the following information****: .....*

*(5) That "****In accordance with F.S. § 286.0105****, should any person decide to appeal any decision made with respect to any matter considered at this meeting, such person will need a record of the proceedings, and for such purpose, may need to ensure that a verbatim record of the proceeding is made, which record includes the testimony and evidence upon which the appeal is to be based"*

Florida Statute 286.0105 states as follows*:*

286.0105?Notices of meetings and hearings must advise that a record is required to appeal.—Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. The requirements of this section do not apply to the notice provided in s. 200.065(3).

History.—s. 1, ch. 80-150; s. 14, ch. 88-216; s. 209, ch. 95-148.

The Petitioner alleges that procedural due process was not accorded as the notice mailed was not via certified mail, the posted notice was not visible from the road as the signage was left fallen to the ground, and the record evidence of the published advertisement notices did not contain the required language set forth in 50-3 or F.S. 286.0105.

Regarding the issue of notice, Respondents advance argument that the requirements of 50-3 are not controlling and that the provision of the Levy County Code establishing the requirements of notice for the Application which are relevant to this case are solely contained in Sections 50-719 and 50-798. The Respondent suggests that because Section 50-3 was adopted by the BOCC on December 5, 2023, and became effective on December 12, 2023, and the Application under review was filed prior to the effective date of this code provision, the notice requirements of 50-719 and 50-798 dictate the controlling notice requirements which are determinative in this case. Although the assertion regarding the effective date of 50-3 is not in dispute, the applicability of said section of the Code is.

Section 50-719(11)(d)(11) states, in relevant part:

(*11) Public notice requirement****. In addition to any other notice requirements*** *for a special exception contained within division 5of article XIII, the extent of the notice required to be provided to surrounding property owners for an application for a special exception for a major mining operation shall be extended from 300 feet to two miles in the event that the proposed major mining operation includes blasting or 50 or more one-way truck trips per day. The additional cost incurred by providing notice beyond 300 feet shall be calculated and paid for by the applicant prior to the public hearing on the special exception to be held before the planning commission*.

Significantly, it should be noted that the procedural notice provisions set forth in Section 50-3 were adopted prior to the final approval of the Application. Thus, this Section, being procedural in nature and not substantive, is controlling as to the Application made but not yet approved. See, *Patronis v. United Insurance Company of America*, 299 So. 3d 1152, 1157 (1st DCA, 2020) [45 Fla. L. Weekly D1359d] citing *State Farm Mutual Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) [20 Fla. L. Weekly S173a]. Also, ("a procedural or remedial statute is to operate retrospectively"), while "substantive" laws may not be applied retroactively if they abolish or curtail protected rights or impose unconstitutional obligations. See, *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc*., 127 So. 3d 1258, 1272 (Fla. 2013) [38 Fla. L. Weekly S859a].

14. While the Respondent asserts notice was mailed, the record evidence and exhibits submitted do not establish the requirement of **certified mail** was adhered to. Further, the exhibits of record which represent the public notices advertised in the newspaper did not contain the required language set forth in F.S. 286.0105. This court finds that Section 50-3, in addition to Sections 50-719 and 50-798 and F.S. 286.0105, are controlling. Thus, procedural due process regarding notice was not accorded the Petitioner.

15. **BURDEN OF PROOF**: The Respondent correctly discusses the following as it relates to the issue of whether the Respondents failed to meet their burden of proof in obtaining the approval of the Application: under this Court's limited scope of review, it must be determined whether the record contains any competent substantial evidence to support the decision that was ultimately made. In evaluating the evidence presented, it matters not whether there is also

evidence to support a conclusion different from that reached by the Board, for "[t]he point is that when the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice—not the circuit court." *Metro Dade County v. Blumenthal*, 675 So. 2d 598, 606 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c]. It is not for the reviewing court to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. "The. . .court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment. . ." *DeGroot* v. *Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

16. In conformity with the foregoing, there remain two issues of the several raised by the Petitioner that warrant comment as it relates to presentation of record evidence at the time of approval of the Application and whether it meets the required showing necessary.

a. **Traffic Study**. Levy County Code Section 50-719(d)(3)(d) states, in relevant part: *d. "Hauling requirements. The applicant shall ensure that neither public nor private property will be damaged by the hauling of material, and that hazardous traffic conditions will not be created, as shown by* ***a traffic study*** *prepared by a traffic engineer licensed in the State of Florida,* ***which study shall be submitted by the applicant with the application."***

At hearing on February 6, 2024, the following discussion took place when the BOCC was reviewing the Application (at page 25, line 25 through page 27 line10 February 6, 2024, Transcript filed with the Clerk of Court, docket entry no. 8):

MS. HECTUS: Warrants for the installation of auxiliary lanes, acceleration and 2 deceleration, and left-turn lane shall be investigated.

COMMISSIONER BROOKS: Madam Chair?

CHAIRMAN MILLS: Yes, Commissioner Brooks.

COMMISSIONER BROOKS: Can you please clarify for us what "warrants for the installation" and "*shall be investigated*" specifically mean?

MS. HECTUS: So, per the planning commission, when they were talking about this, they weren't sure that the—based on what the traffic study said, *they were not sure that these—that there was a cause to have these acceleration and deceleration lanes, and they wanted us to look into it further by talking to the road department,* etc. I believe Alice is here from the road department, but they also—after the information was brought to them, also did not think it warranted it.

MR. VANDEURSEN: *We're planning to have the traffic engineer that did the traffic study evaluate it and submit the information to the road department and see what they all say.*

COMMISSIONER BROOKS: Alice, I know in the past that when we have looked at these types of lanes and different projects, a number of things have been taken into account, trips, things of that nature. Is that what we're talking about? here, is looking at—

MS. LALONDE: Yes, the vehicle trips per day. It did not warrant it at this time. We will re-evaluate the situation. Once it's open, we will do more traffic counts and go from there,but at this time, no, it does not warrant.

While the Code requires a traffic study to be submitted with the application, the above colloquy confirms continued study in the future which runs counter to the premise that the Code would require such a study to be in existence to *assure no degradation of road infrastructure* (as required by 50-719(6)) and/or assurance *that the mining operation would not be detrimental to the areas residents or businesses, or the public health, safety, or welfare of the community as a whole* (as required by 50-719(11)). Future plans to complete a traffic study is not what is contemplated by the applicable Code.

b. **Wildlife Impact Study:** An additional safeguard and requirement of the applicable Code contemplates a completed wildlife impact study prior to Application approval. In the record evidence submitted, transcripts of the following hearing reveal such a requirement was not met prior to approval (transcript Page 19 line 18 through page 20 line 4 of the February 6, 2024, transcript of proceedings before the BOCC filed with the Clerk of Court at docket entry no. 8):

MS. HECTUS: Number 12: Meet all FWC and DEP 19 threatened and endangered species guidelines and regulations for habitat protection and restoration.

MR. VANDEURSEN: That's not a problem Mr. Thomas has been in conversations with FWC, and ***we're kind of waiting to go forward with that*** because creatures or animals can come and go on the property. If we would have done this in May, 2 it's different today than what it was then. So we want to—***we want to be able to move forward, and we will comply with that.***

The position articulates a desire to move forward with approval prior to compliance with the requirement of having a wildlife impact study completed before any such approval. While a proffered hypothetical explanation is offered, without substantively ever being corroborated as being reasonable and/or in conformity with the Code, non-compliance with the Code's expectations and directives remains. A willingness to comply in the future does not equate to the requirement of actual compliance at the time of approval of Application.

17. The Florida Supreme Court in *DeGroot* 95 So. 2d 912, 916 described "competent substantial evidence" 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. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. 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. *Jenkins v. Curry,* 154 Fla. 617, 18 So.2d 521. 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. To this extent the 'substantial' evidence should also be 'competent.' Schwartz, American Administrative Law, p. 88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No. 4, p. 481; *United States Casualty Company v. Maryland Casualty Company*, Fla. 1951, 55 So.2d 741; *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126.

18. Given the foregoing examples of incomplete studies and/or those not yet performed, all of which which were necessarily required prior to approval of the Application, as well as there being clear indication that future study remains necessary, it cannot be said that there is competent substantial evidence supportive of the decision to approve the Application.

19. Given the foregoing findings that procedural due process regarding notice was not accorded to Petitioners, that the essential requirements of applicable law were not observed, and that the quasi-judicial judgment to approve the Application was not supported by competent, substantial, evidence, it is, therefore

ORDERED and ADJUDGED that the Petition for Writ of Certiorari is GRANTED and the approval of the Application to which it is directed is hereby QUASHED.

* * *

Municipal corporations—Code enforcement—Unpermitted changes to three-unit apartment building, including converting one unit into two units—Magistrate departed from essential requirements of law by requiring property owner to execute restrictive covenant to maintain the premises as three units and nothing more—City failed to show that restrictive covenant was necessary or proper given that state statute relied upon by city as authority to enforce compliance did not expressly extend authority to city to command future actions and because the conversion undertaken by property owner was already prohibited by provisions of city code—Magistrate's decision to require removal of second front doors added to apartment units without permitting comports with law as it applies to the unit that was unlawfully divided—Protections afforded by city code for construction that was lawful when done but is no longer lawful under code were abandoned when unit was unlawfully altered—However, magistrate's decision to require removal of second front doors from units that were not the subject of unlawful conversions was not supported by competent substantial evidence or applicable law

ARCK MB, LLC, Appellant, v. CITY OF HALLANDALE BEACH, FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 23-021920 (AP). Administrative Hearing Case No. CEC-23-00618. July 17, 2024. Counsel: Robert Cooper, Miami, for Appellant. Jennifer Merino, City Attorney, Hallandale Beach, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief and the applicable law, without oral argument, the Special Magistrate's November 6, 2023, Final Order, is hereby **REVERSED in PART** and **AFFIRMED in PART** for the reasons discussed below.

ARCK MB LLC, ("Appellant") appeals the Final Order dated November 6, 2023 entered by the Special Magistrate for the City of Hallandale Beach, FL. ("Appellee" or City").

In 2013, Appellant purchased the property located at [Editor's note: Address redacted], Hallandale Beach, FL ("subject property), the property included a building with three individual apartment units. On March 25, 2023, Appellant was cited by the City of Hallandale Beach for several code ordinance violations in connection with the subject property.

The matter was set before the Special Magistrate, a hearing was held on October 5, 2023 and continued on November 2, 2023. The issues addressed at the hearing included violations pertaining to the rear windows of the building, which are alleged to have not been original to the property, and installed without proper permitting; the rear kitchen doors of all three units, which were original to the property and had been removed and/or closed-off without proper permitting; the alteration of unit 3, which had been converted into two separate units; and the closure and/or removal of the second front doors to all three units. The order also included the mandate for Appellant to sign a restrictive covenant.

At the conclusion of the hearing the Special Magistrate found that Appellant violated Hallandale Beach code of ordinances as relating to the allegations as set forth herein and concluded that Appellant in addition to having to obtain all proper permits and final approval inspections, must also: **1**. Close and/or remove the second front doors to each unit; **2**. Restore the three rear kitchen doors which were removed and/or closed-off; **3**. Remove the illegal conversion of unit 3; **4**. Obtain after-the-fact permits for the rear windows of the building; and **5**. Sign a restrictive covenant to maintain premises as three units and no more.

Upon careful review of the record, this Court finds that the decision by the Magistrate ordering the execution of a restrictive covenant upon the property and mandating the closures of the second front doors of units 1 and 2 constitute a failure and departure in faithfully adhering to the essential requirements of law and was not supported by competent substantial evidence.

The City maintains that in order to ensure compliance with the current code, Appellant should be required to sign a restrictive covenant. The City relies on Florida Statute §162.08 (5) *Power of enforcement board,* as creating unfettered authorization to impose a mandated written covenant upon the Appellant. The City has failed to show that a restrictive covenant requiring Appellant from converting the property beyond the three units is necessary or proper. First, the Florida Statute relied upon by the City, specifically asserts authority for compliance in the present tense, but does not expressly extend authority of command to future actions. Second, the Hallandale Beach code of ordinances, Sections 32-311 and 7-484, make such a conversion (whether initial or repeat), a violation. Moreover, these code sections assess applicable penalties, thus, the requirement of a restrictive covenant is a redundancy and unnecessary. Therefore, the Magistrate erred in requiring a restrictive covenant to be signed as such is not supported by any legal authority, or precedence.

The City in its Answer Brief acknowledged that the second front door entrances were once legal, but order their closure by stating that Appellant utilized the building's unit 3 second front door in a prohibitive manner. Pursuant to Hallandale Beach code of ordinances Section 32.923, *In order to avoid undue hardship on the citizens and residents of the city, nothing in this article shall be deemed to require any change in the plans, construction or designated use of any structure on which actual construction was lawfully done prior to November 21, 1978. . .*

This exception provides protections to Appellant's building as it was constructed in 1957. However, when Appellant converted Unit 3 into two separate units, an unlawful use was created, triggering Hallandale Beach code of ordinances Sec. 32-926:

> Where a lawful structure exists at the effective date of adoption or amendment of this chapter, and it could not be built under the terms of this chapter by reason of restrictions on area, lot coverage, height, yards, location on the lot, or other property development standards or requirements concerning the structure, such structure, except as otherwise specifically provided, **may be continued so long as it remains otherwise lawful,** subject to the following provisions.

(*Emphasis added*). Thus, the alteration in unit 3 constituted abandonment of such protections. Under these circumstances, Magistrate's decision comports with the essential requirements of law as to the closure of the second front door of unit 3.

However, the record fails to demonstrate how units 1 and 2 lost their protection under Hallandale Beach code of ordinances Sec. 329.923 or otherwise. The City fails to proffer its authority as to mandate closure of the second front doors to both these units, where no alterations and or conversions were made. Thereby, the decision by the Magistrate to extend the violation of the closures to units 1 and 2 is supported neither by competent substantial evidence nor by applicable law.

Accordingly, and because of the foregoing, the Final Order is hereby **REVERSED in part** as to the requirement for Appellant to sign a written restrictive covenant and as to the closures of the second front doors of units 1 and 2. The remainder of the Magistrate's Final Order dated November 6, 2023, is hereby **AFFIRMED.** (J. BOWMAN, M. GARCIA-WOOD and G. ODOM JR., JJ., CONCUR).

* * *

Municipal corporations—Code enforcement—Home-based business—Special magistrate's order finding home-based dog boarding, breeding, and grooming business to be in violation of section 559.955 is affirmed

INVESTMENT MANAGEMENT MARLA, LLC, Appellant, v. TOWN OF SOUTHWEST RANCHES, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-021028. L.T. Case Nos. 2023-108 and 2023-118. August 22, 2024. Appeal from the Town of Southwest Ranches, Broward County; Eugene M. Steinfeld, Special Magistrate. Magistrate's Order dated October 5, 2023. Counsel: Ryan A. Abrams, Abrams Law Firm, P.A., Fort Lauderdale, for Appellant. Richard J. Dewitt, III, Andrew Jake Ingber, and Alan G. Kipnis, Government Law Group, PLLC, Fort Lauderdale, for Appellee.

[Editor's note: Related magistrate's order published in the Miscellaneous section of this issue at 32 Fla. L. Weekly Supp. 279a; FLWSUPP 3207CAME.]

OPINION

(PER CURIAM.) Having carefully considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief and the applicable law, without oral argument, the Special Magistrate's October 5, 2023, Order, and December 5, 2023, Order, are hereby **AFFIRMED**. (J. BOWMAN, M. GARCIA-WOOD, and G. ODOM, JR., concur.)

FINAL ORDER

Case Nos.: 2023-108, and 2023-118, Investment Management Marla LLC, 6540 Melaleuca Road, Southwest Ranches, Florida. 10/5/2023.

Folio No.: 5140 02 01 0173

(EUGENE M. STEINFELD, Special Magistrate.) On June 27, 2023, the undersigned conducted a hearing on two citations issued by the Town of Southwest Ranches to Respondent, Investment Management Marla LLC, at Southwest Ranches Town Hall Council Chambers, for the operation of the property at 6540 Melaleuca Road, within the Town. Case No.: 2023-108 contained two counts, the second count, which was admitted. Case No.: 2023-118 contained five counts, all but one were admitted. This left count one in Case No.: 2023-108 and one count in Case No.: 2023-118, which were left for determination.

It was agreed that the remaining counts in Case No.: 2023-108 and 2023-118 would be tried together in a hearing on the above date.

The Town of Southwest Ranches was represented by Assistant Town Attorney Roger DeWitt, and the Respondent, Investment Management Marla LLC by Ryan A. Abrams, Esquire of the Law Firm of Abrams Law Firm P.A.

The above referenced hearing was conducted at Southwest Ranches Town Hall in front of the undersigned from 10:00AM until 5:10P.M.

Five witnesses testified for the Town and seven for the Respondent. Evidence was entered for both the Town and for Respondent.

The Respondent, Investment Management Marla LLC (Respondent) is the owner of the property at 6540 Melaleuca Road, within the Town of Southwest Ranches (Town). The LLC is owned by the Baiz-Prisco family. On the property the same family owns and operates dog breeding, dog day care, boarding and grooming services by another LLC, Bruno Happy Dogs.

6540 Melaleuca Road is In a Rural and Agricultural District of the Town. Single family homes are permitted; keeping, breeding of animals, commercial equestrian operations, veterinary clinics, crop raising and plant nurseries, are all permitted. However "Kennels, commercial boarding and breeding" are specifically not permitted. (e.s.) However, the Legislature of the State of Florida in 2021 enacted Section 559.955 of the Florida Statutes, preempting municipalities from prohibiting home based businesses in zoning districts which allowed residential use, if certain conditions were met.

In August 2022 the Town issued Certificates of Use for the property at 6540 Melaleuca Road to Bruno Happy Dogs LLC. Two Certificates of Use, one on August 19, 2022 for dog care, boarding and training for 16 dogs and one on August 24, 2022 for 46 dogs for breeding and grooming ,both with conditions as provided in F.S. 559.955. The Certificate of Use for up to 16 dogs for dog care and training was signed by a member of Bruno Happy Dogs LLC. As the date of the hearing, above referenced, the parties disagreed as to whether the August 24, 2023 Certificate of use for up to 46 dogs for breeding and grooming was signed or not by the Respondent. There is a place for a recipient to sign an Issued Certificate of Use, same however is not required by ordinance of the Town. The certificates both appeared as issued to the Respondent on the Town's website at the date of the hearing. Further the issuing Town's employee said he would have acknowledged a signature on it on August 22, 2023 if it were signed at the time. Until complaints as discussed below, the Town of Southwest Ranches made no attempt to either cite or revoke the Certificates of Use for Respondent granting the use of 46 dogs for breeding and grooming purposes.

Thus based upon the above, I find that the second Certificate of Use was granted for the use by Bruno Happy Dogs LLC in 2022.

From August of 2022 the Respondent claims they operated Bruno Happy Dogs LLC pursuant to the above certificates and never reached the number of the dogs authorized in either of the categories, This was continued until complaints by the complainants, and no attempt was made to cite or revoke the two issued certificates.

The Town of Southwest Ranches enforces the ordinances of the Town through its Code Enforcement Department, generally on a complaint basis. Complaints from two residents from a neighboring property filed numerous complaints as to noise of barking dogs, and the operation of the property with the Town's Code Enforcement Department, causing the Town to cite Bruno Happy Dogs LLC's operation at the property at 6540 Melaleuca Road.

The two outstanding violations remaining for hearing were related to the noise ordinances of the Town and whether Bruno Happy Dogs LLC was in conformity of Florida Statute 559.955 in its operation of the above address.

A). Case No. 2023-108 Count One

As above stated, Bruno Happy Dogs LLC is in a zoning district that allows farms and large estate homes. The complainants live one house away and close to the yard of 6540 Melaleuca Road. The complainants testified at the hearing that the barking of numerous dogs that Bruno Happy Dogs LLC keeps when they are outside of the house located at the above address, deprives them of the tranquility and quiet to enjoy their home and the landscaping and gardens on their property.

The Town at the hearing introduced a number of videos which recorded barking noises outside of the property line of 6540 Melaleuca Road and one of barking noises at the complainants property.

Section 9-2 of the Town Code of Southwest Ranches describes a noise disturbance as : "any noise or sound effect, including subharmonic frequencies, that can be heard or felt beyond a real property boundary that would be determined to be objectionable by a reasonable person. Section 9-3 states: No person shall operate or cause to be operated any sound in such manner as to create a noise disturbance."

However, section 9-5 of the Town Code states: "The provisions of 9-3 shall not apply at anytime:... Non-farm animals provided that they do not constitute a nuisance as defined by the Town's Code. . . (e.s.)

However, 1 find nothing in the Town's Code that would define barking dogs as a nuisance, therefore section 9-5 is operative.

B). Case No. 2023-118 Count One

Count One of the above case lists violations of numerous sections of the Land Development Code of the Town of Southwest Ranches.

They are listed below:

Section 045-050-I find this inapplicable to the case at hearing.

Section 045-060-The Town's ordinances are treated infra.

Section 005-120-Is inapplicable as the procedure of the section has not been properly invoked

Section 005-080 is a duplicate of Case 2023-118 Counts, 2, 3, 4 and 5 which have been agreed prior to the hearing.

C). Violations of F.S. 559.955

Case 2023-118 lists six specific violations under the general violation of F.S. 559.955. I shall treat then in reverse order as cited by the Town.

(f). "As viewed from the street, the residential property must be consistent with the uses of the residential areas that surround the property. Any external modifications must conform to the residential character and architectural esthetics of the neighborhood."

I find the colored sign for Bruno Happy Dogs LLC on Melaleuca Road not consistent with the farm and residential estate signs in the neighborhood in shape and color.

I also find the netting on Melaleuca Road and Luray Road also not consistent with residential and farm appearances in the neighborhood.

(e). "Business activities must comply with local, state and federal regulations concerning the ease of waste storage or disposal of hazardous materials."

I find the Town has not met its burden, as to this alleged violation, as the Town has not cited the regulations, Respondent may have violated.

(d). "Business activities must comply with local regulations, (noise, noxious odors)"

I find that Bruno Happy Dogs LLC in compliance with local regulations for noise. (see treatment of Case No. 2023-108 Count one, above).

I find that the Town has not met its burden as to proof of evidence of odors.

(c). "Parking related to businesses may not operate a need for parking greater in volume than a similar residence where no business is conducted. (e.s.) Vehicles must not be parked in spaces that are located in the right-of-way or any unimproved surface."

Respondent, Investment Management Marla LLC, as owner of the property at 6540 Melaleuca Road owns a property of two acres. However, Bruno Happy Dogs LLC at the property does have parking needs for greater volume than would normally be expected at a similar residence where no business is expected.

Complainants have testified to as many as 10-12 vehicles daily parking in the morning on the property. This was unrebutted. This clearly is excessive as required in the standard of F.S. 559.955.

(b). "The business employees who work at the residential dwelling must also reside in the residential dwelling aside from two employees that do not reside at the residential dwelling."

The residence at 6540 Melaleuca Road has two floors. The testimony shows that the family bedrooms are on the second floor with a living area. Both Zulay Prisco and her daughter, Valentina Baiz live on the second floor and are members of Bruno Happy Dogs LLC, and are involved in the dog operations of the LLC. Two salaried employees who also work for the LLC caring for the dogs, share a bedroom on the second floor of the residence. The first floor is almost totally devoted to Bruno Happy Dogs LLC for boarding, grooming and training. The garage also has been converted for grooming equipment and cages for dogs. The property outside the home is used for dog training, dog recreation, and dog urination and defecation. This is also used for recreation of the Biaz-Prisco family. This is in excess of the number of employees and contractors who can work on the property per Florida Statute.

A veterinarian visits the property "twice a week." She works out of a mobile van parked outside the residence. A contractor dog trainer visits approximately twice a month and conducts training in the home and outside.

I therefore find Respondent LLC is in violation of F.S. 559.955 (3)(a) where only certain number of employees and contractors may work on the property.

(a). "Activities of home-based business must be secondary use to the property's use as a residential dwelling."

Though there was testimony that the Baiz-Prisco family owned another rental home nearby, I find that the family generally resides at 6540 Melaleuca Road.

However, I also find that the family runs Bruno Happy Dogs LLC which at the property grooms 40-50 dogs per month and owns 3 male studs, 10 female dames and a number of puppies. The dogs are let out three to four times daily for approximately 20-25 minutes. Bruno Happy Dogs LLC utilizes the two acres for dog uses above described. Dogs of course do bark. Their waste must be gathered and disposed of daily. The Respondent LLC on a website advertises breeding, dog care, training and boarding.

The home and home life of the Baiz-Prisco family residing at 6540 Melaleuca Road revolves around the operation of Bruno Happy Dogs LLC and not vice versa.

While I have no doubt that the Baiz-Prisco family utilizes the property for family and family events, it is the utilization of the property for dog related uses of Bruno Happy Dogs LLC that predominates.

I therefore find that the Respondent is not in compliance with F.S. 559.955(3)(d) in that the home based business is not secondary to the property's use as a residential dwelling.

I have considered the affirmative defense that Respondent has raised for the Certificates issued in the number of dogs provided in the Certificates, however, the Certificates were conditioned by F.S. 559.955.

Therefore, based upon all of the above: 1). I dismiss Case No. 2023-108, Count 1 and 2). I find the property in violation of F.S. 559.955 and Uniform Land Development Code, Code Secs 045-050 and 045-060 of the Town of Southwest Ranches which prohibits kennels and commercial breeding.

The Respondent shall comply by December 4, 2023 in all respects with F.S. 559.955, Code Sections 045-050 and 045-060. Upon completion thereof, Respondent shall notify the Code Enforcement officer of the Town of Southwest Ranches of the fact of such compliance. Respondent shall thereafter continuously comply with all of the aforesaid F.S. 559.955, Uniform Land Development Code, Code Sections 045-050 and 045-060 and a failure to do so shall be considered a violation of the Order, and the matter will then be set for hearing before the Special Magistrate to consider the assessment of an administrative fine of $200.00 per day per violation and the imposition of a lien as provided by Section 162.09 Florida Statutes, for each day such violation(s) shall occur after the date set for compliance hereinabove.

The Code Enforcement Officer of the Town of Southwest Ranches is hereby directed to make an inspection of the subject property upon the expiration of the time proscribed for compliance herein, or, upon receipt of notice from Respondent, that Respondent have complied with this Special Magistrate's Order, and thereafter from time to time to ensure compliance herewith, and to promptly report his findings regarding such inspection(s) to the Special Magistrate.

In the event the Code Enforcement Officer shall report to the Special Magistrate that the Respondent have failed to comply with the Special

Magistrate's Order as set forth herein, the Special Magistrate shall then consider this matter of an administrative fine of $200.00 per violation per day and lien as set forth in Section 162.09, Florida Statutes, and the Special Magistrate retains jurisdiction over this matter for such purpose.

An administrative cost of $150.00 is hereby assessed for this hearing.

SHOULD YOU NOT OBTAIN COMPLIANCE FOR ALL CHARGES WITHIN THE GIVEN TIME ALLOTTED AND CONFIRMED COMPLIANCE WITH THE CODE COMPLIANCE OFFICER, YOU ARE REQUIRED TO APPEAR AT A NON-COMPLIANCE HEARING FOR THE CODE VIOLATION(S) SCHEDULED FOR DECEMBER 5, 2023. NO ADDITIONAL NOTICES WILL BE SENT.

* * *

RESIDENCE AT WESTLAKE GROUP, LLC, Plaintiff, v. CITY OF DANIA BEACH, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23019583. Division AP. September 10, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated August 13, 2024. Appellant was directed by this Court to file a proper motion to stay or file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 10 days. As of the date of this Order Appellant has failed to comply with this Court's August 13, 2024, Order and file a motion to stay or an Initial Brief and Appendix.

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

* * *

RESIDENCE AT WESTLAKE GROUP, LLC, Plaintiff, v. CITY OF DANIA BEACH, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23019584. Division AP. September 10, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated August 13, 2024. Appellant was directed by this Court to file a proper motion to stay or file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 10 days. As of the date of this Order Appellant has failed to comply with this Court's August 13, 2024, Order and file a motion to stay or an Initial Brief and Appendix.

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

* * *

RESIDENCE AT WESTLAKE GROUP, LLC, Plaintiff, v. CITY OF DANIA BEACH, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23019585. Division AP. September 10, 2024.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause dated August 13, 2024. Appellant was directed by this Court to file a proper motion to stay or file an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 10 days. As of the date of this Order Appellant has failed to comply with this Court's August 13, 2024, Order and file a motion to stay or an Initial Brief and Appendix.

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

* * *

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CIRCUIT COURTS—ORIGINAL

Estates—Civil indigency status of petitioner for summary administration—Expectancy of interest in property—Clerk's review of application for civil indigency status filed by petitioner for summary administration should be limited to information on application unless information makes it clear that petitioner is on verge of obtaining interest in property—Clerk may reassess indigency status if information arising during course of litigation indicates petitioner's financial profile has actually changed—After considering additional criteria applicable to court's review of clerk's determination of non-indigency, including whether there will be actual future earnings or acquisitions, court finds that petitioner is indigent

IN RE: ESTATE OF KING JAMES THOMAS, Deceased. Circuit Court, 2nd Judicial Circuit in and for Gadsden County, Probate Division. Case No. 24-CP-398. October 1, 2024. David Frank, Judge. Counsel: Alexandria E. Smith, Quincy, for Petitioner.

ORDER GRANTING MOTION FOR REVIEW OF CLERK'S DETERMINATION OF NON-INDIGENT STATUS AND GRANTING INDIGENT STATUS

This cause came before the Court on petitioner's request for a review of the Clerk's determination of nonindigent status pursuant to § 57.082(2)(e), Florida Statutes, and the Court having reviewed the request and the court file, and being otherwise fully advised in the premises, finds

On August 28, 2024, petitioner filed an action for summary administration and submitted an Application for Determination of Civil Indigent Status requesting relief from payment of filing fees and charges for issuance of a summons to the Gadsden County Clerk of Court office ("Clerk").

On August 28, 2024, the Clerk reviewed petitioner's application and determined that the petitioner did not qualify as indigent pursuant to §57.082, Florida Statutes. Even though all other measures of indigency were substantiated by the application, the Clerk informed petitioner that the request was denied because there was an "expectancy of assets." This review follows.

The Clerk's determination must be based on an appropriate application of the Clerk's limited duty under §57.082(2), Florida Statutes, which provides

> (2) DETERMINATION BY THE CLERK.—The clerk of the court shall determine whether an applicant seeking such designation is indigent based upon the information provided in **the application and the criteria prescribed in this subsection**.
>
> (a)1. An applicant, including an applicant who is a minor or an adult tax-dependent person, **is indigent if the applicant's income is equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the applicant by the United States Department of Health and Human Services**.
>
> 2. **There is a presumption that the applicant is not indigent if the applicant owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net equity value of $2,500 or more, excluding the value of the person's homestead and one vehicle having a net value not exceeding $5,000**.
>
> 3. Notwithstanding the information provided by the applicant, the clerk may conduct a review of the property records for the county in which the applicant resides and the motor vehicle title records of this state to identify any property interests of the applicant under this paragraph. The clerk may evaluate and consider the results of the review in making a determination under this subsection. If a review is conducted, the clerk must maintain the results of the review in a file with the application and provide the file to the court if an applicant seeks review under subsection (4) of the clerk's determination of indigent status.
>
> * * *
>
> (d) The duty of the clerk in determining whether an applicant is indigent is limited to receiving the application, conducting a review of records under subparagraph (a)3., and comparing the information provided in the application and identified in the review of records to the criteria prescribed in this subsection. **The determination of indigent status is a ministerial act of the clerk and not a decision based on further investigation or the exercise of independent judgment by the clerk.** The clerk may contract with third parties to perform functions assigned to the clerk under this section.

Fla. Stat. 57.082(2) (a) and (d) (2024) (emphasis added).

Unfortunately, there seems to be little or no guidance from statutes or appellate courts that would help this Court analyze the application of an "expectancy" during the Clerk's "ministerial" review.

Calculating the exact "expectancy of an interest in property" would be hard if not impossible during the initial Clerk review, even where a petition for summary administration has been filed. It certainly would be beyond the ministerial duty of reviewing the information provided on the application. It also would offend the principle that:

> The possibility that a person will inherit property from an ancestor is but an expectancy and not an interest in property. While a descendant may expect or hope to inherit, neither a present nor future interest in property actually exists in the absence of a conveyance.

Diaz v. Rood, 851 So.2d 843, 845 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1857b].

Our First District has given us guidance for statutory interpretation when faced with conflicting provisions:

> We review statutory interpretation issues de novo and interpret unambiguous statutes according to their plain and obvious meaning. When faced with two different, but applicable statutes, courts must favor a construction that gives effect to both statutes rather than construe one statute as being meaningless or repealed by implication. The rule of construction . . . is that if the courts can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation, it is their duty to do so.

Alachua Cnty. Sch. Bd. v. Office of State, Chief Fin. Officer for Dept. of Fin. Services, Div. of Worker's Comp., 138 So.3d 480, 482-83 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D659b].

The provision to keep the Clerk review ministerial and base the conclusion of the information provided by the applicant tugs at the presumption of non-indigency for applicants who have an expectation of an interest in property exceeding a specific dollar amount.

The tension between these two provisions can be resolved in a manner that maintains the purpose of both. That manner is to limit a Clerk's initial review to the information on the application. If the information makes it clear that the applicant is on the verge of obtaining an interest in personal or real property, then it should be considered. Otherwise, the Clerk should stay within the parameters of its limited review and not be compelled to predict future earnings or acquisitions. Of course, if information during the course of the litigation indicates the applicant's financial profile has actually changed, the Clerk should be permitted to re-assess indigency at that time.

Even if this Court's analysis of the Clerk's initial review is incorrect, unlike the Clerk's purely ministerial determination, the

Court's determination of indigent status requires further investigation of the applicant's financial circumstances pursuant to subsection (4). This subsection of the statute provides:

> (4)(a) If the clerk of the court determines that the applicant is not indigent and the applicant seeks review of the clerk's determination, the court shall make a final determination of indigent status by reviewing the information provided in the application against the criteria prescribed in subsection (2) and by considering the following additional factors:
>
> 1. Whether paying for private counsel or other fees and costs creates a substantial hardship for the applicant or the applicant's family.
> 2. Whether the applicant is proceeding pro se or is represented by a private attorney for a fee or on a pro bono basis.
> 3. When the applicant retained private counsel.
> 4. The amount of any attorney's fees and who is paying the fees.
> 5. Any other relevant financial circumstances of the applicant or the applicant's family.

Paying the fees to file this action for summary administration would create a substantial hardship for the petitioner considering her financial circumstances. As shown on petitioner's application, petitioner's net monthly income is $843.00. petitioner's main source of income is her monthly Social Security benefits. She does not have enough money in her bank account to pay for the filing fee. In addition, she is not paying for the legal services provided by her attorney. In fact, the consideration of whether there will be actual future earnings or acquisitions more appropriately would be for the Court under number 5 above.

Accordingly, it is ORDERED and ADJUDGED that the request for circuit court review of the Clerk's determination of non-indigency is GRANTED and the Court finds that the applicant is INDIGENT.

* * *

Guardianship—Minors—Sister's petition to be guardian of her minor brother is denied—Allegation that parents did not answer phone when detention center holding brother called parents to obtain consent for some unelaborated medical service or medication and vague concerns regarding parents' disorderly home do not establish threat of significant harm required to interfere with parental rights

IN RE: The Guardianship of Minor J.E.R., JR., Ward. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 37-2024-GA-000042-1000M. September 8, 2024. David Frank, Judge. Counsel: Jennifer P. Lavia, Tallahassee, for Petitioner.

AMENDED ORDER DENYING PETITION

This cause came before the Court on September 3, 2024, on D.N.C.'s petition to be the guardian of her minor brother, and the Court having reviewed the papers filed in support and opposition and the court file, and being otherwise fully advised in the premises, finds

Facts and Procedural History

The proposed guardian of the minor, D.N.C., is 25 years old, lives in Tallahassee, and appears to otherwise be qualified to serve as a guardian. Unfortunately, that is the extent of the merit of the petition.

The proposed ward, J.R., Jr. is a minor who is 16 years old, who resides in Tallahassee. The petition states that his address is the same as his sister's. His Mother, J.B., lives in Quincy and his Father, J.R., lives in Tallahassee.

The petition states, "The proposed guardian should be appointed because J.R. is a minor and his parents are unable or unwilling to consent to necessary treatment for him."

At the hearing, D. stated that her primary concern was that when Department of Juvenile Justice representatives called her parents to get consent for some unelaborated medical service or medication, they did not answer the phone or respond. (Her brother is currently in a DJJ detention). When asked what else is causing her concern, D. stated that her parents' house is unkept and she believes they are not fulfilling their duties as parents, again without much elaboration.

No other information or evidence was presented.

A Fundamental Liberty Right

"Chapter 744 notwithstanding, as natural guardians, parents have a fundamental liberty right in the care, custody, and management of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 334 (Fla. 2013) [38 Fla. L. Weekly S812b]." *D.R. v. Heidrich*, 312 So.3d 517, 521-22 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D2585b]. "That parental authority over decisions involving their minor children stems from the liberty interests emanating from the Fourteenth Amendment to the United States Constitution and the guarantee of privacy in article I, section 23 of the Florida Constitution. *Glob. Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 398 (Fla. 2005) [30 Fla. L. Weekly S511a]." *Id*. "Consequently, a state may not infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made." *Id*. (citation and internal quotations omitted).

"Nor does that fundamental liberty interest evaporate simply because they have not been model parents. *J.B. v. Fla. Dep't of Child. & Fam. Servs.*, 768 So. 2d 1060, 1064 (Fla. 2000) [25 Fla. L. Weekly S715a] (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982))." *Id*. (internal quotations omitted).

The Significant Harm Requirement

Judicial intervention in parental decisions may usurp parental control only when the child is threatened with significant harm as a result of a parent's decisions. *Von Eiff v. Azicri*, 720 So.2d 510, 514 (Fla. 1998) [22 Fla. L. Weekly D2176a] ("Neither the legislature nor the courts may properly intervene in parental decision-making absent significant harm to the child threatened by or resulting from those decisions.").

"The Florida Constitution's privacy provision provides greater protection than is afforded by the federal constitution and includes specific protection against State interference in parents' fundamental right to raise their children except in cases where the child is threatened with harm. *Beagle v. Beagle*, 678 So. 2d 1271, 1275, 1276 (Fla. 1996) [21 Fla. L. Weekly S340a]. In a contest between the wishes of a parent and the wishes of a non-parent, a parent cannot be deprived of the companionship, care, custody, and management of his or her children unless there has been a finding, after notice required by due process, of demonstrable harm to the child. *Id*. at 1275-76. Only if the trial court finds demonstrable harm to the children from the parent's choice may the court apply the general 'best interests of the ward' standard when appointing a guardian for the minor child. *See Wilson*, 917 So. 2d at 313 (explaining that trial court's discretion in appointing guardian is limited in sense that it must be exercised consistent with law)." 312 So.3d at 522.

In *Heidrich*, the father of the minor children had died. *Id*. at 518-19. The mother was arrested. *Id*. Eight days after mother's arrest, Ms. Heidrich, an unrelated acquaintance, filed a petition for appointment as plenary guardian of the minor children. *Id*. Shortly thereafter, the mother's sisters filed a petition for temporary custody with her consent. *Id*. The trial court did not find that mother's decision was harmful to the minor children, but still chose Ms. Heidrich as the minor children's guardian of the person, concluding that it was in their best interests. *Id*.

The Fifth District reversed, holding that the mother's choice could not be overrode unless the requisite harm was established:

> Detriment is something more than the normal trauma of uprooting a child from familiar surroundings. It is mental, physical or emotion[al] harm of a lasting nature, transcending the normal adjustment period associated with such custody changes.

Id. at 522, quoting *Reiner v. Wright*, 942 So.2d 944, 947 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2880a] (citing *Ward v. Ward*, 874 So.2d 634, 638 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D919a]). The court concluded that, "[t]he trial court's order interferes with Mother's fundamental right to raise her minor children without any finding that they were threatened with harm by her choice to have her sisters serve as co-guardians of her minor children." *Id*.

Our own First District gave Florida its guiding principle when ordering emergency medical treatment for a minor:

> There is no brightline rule or presumption that applies to the dispute here at issue. An illustrative listing of cases addressing this problem can be found in *Newmark v. Williams*, 588 A.2d 1108 (Del.1991). But the courts must carefully consider the facts and circumstances of each individual case as it arises, in weighing the various competing interests. Medical treatment may thus be rejected when the evidence is not sufficiently compelling to establish the primacy of the state's interest, or that the child's own welfare would be best served by such treatment. *See Barry*; *Newmark*. On the other hand, the parents' wishes may be overcome when there is sufficient medical evidence to invoke the state's parens patriae authority, and to establish that the child's welfare will be best served by the disputed treatment.

M.N. v. S. Baptist Hosp. of Florida, Inc., 648 So.2d 769, 771 (Fla. 1st DCA 1994) (citations omitted).

When faced with allegations that a parent is withholding medical care of a child, ". . .the court must balance competing interests. It must consider the parent's interest in making fundamental decisions about a child's care, the State's interest in preserving human life, and the child's own welfare and best interests in light of the severity of the child's illness, the likelihood of effectiveness of the proposed treatment, the child's chances of survival with and without such treatment, and the invasiveness and nature of the treatments with regard to its effect on the child." *In re D.G.*, 970 So.2d 486, 490 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2957a]; citing *M.N. v. S. Baptist Hosp. of Fla., Inc.*, 648 So.2d 769, 770 (Fla. 1st DCA 1994), citing *Padgett v. Dep't of Health and Rehab. Servs.*, 577 So.2d 565 (Fla.1991).

Within the Context of Dependency

The primary avenue for addressing parental harmful conduct, including the failure to provide a child medical care, is dependency. Florida law provides the Department of Children and Families the tools it needs to provide appropriate medical and mental health care for children removed from a home. *See* Florida Statute 39.407. Of course, to use this avenue there must be abuse, abandonment, or neglect as provide in Chapter 39.

The parameters of harm sufficient to trigger dependency protection of a child are detailed in the respective statutes:

> (2) "Abuse" means any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes the birth of a new child into a family during the course of an open dependency case when the parent or caregiver has been determined to lack the protective capacity to safely care for the children in the home and has not substantially complied with the case plan towards successful reunification or met the conditions for return of the children into the home. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.
>
> (1) "Abandoned" or "abandonment" means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child's care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both. For purposes of this subsection, "establish or maintain a substantial and positive relationship" includes, but is not limited to, frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities. Marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child. A man's acknowledgment of paternity of the child does not limit the period of time considered in determining whether the child was abandoned. The term does not include a surrendered infant as described in s. 383.50, a "child in need of services" as defined in chapter 984, or a "family in need of services" as defined in chapter 984. The absence of a parent, legal custodian, or caregiver responsible for a child's welfare, who is a servicemember, by reason of deployment or anticipated deployment as defined in 50 U.S.C. s. 3938(e), may not be considered or used as a factor in determining abandonment. The incarceration, repeated incarceration, or extended incarceration of a parent, legal custodian, or caregiver responsible for a child's welfare may support a finding of abandonment.
>
> (53) "Neglect" occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired. The foregoing circumstances shall not be considered neglect if caused primarily by financial inability unless actual services for relief have been offered to and rejected by such person. A parent or legal custodian legitimately practicing religious beliefs in accordance with a recognized church or religious organization who thereby does not provide specific medical treatment for a child may not, for that reason alone, be considered a negligent parent or legal custodian; however, such an exception does not preclude a court from ordering the following services to be provided, when the health of the child so requires:
>
> (a) Medical services from a licensed physician, dentist, optometrist, podiatric physician, or other qualified health care provider; or
>
> (b) Treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.
>
> Neglect of a child includes acts or omissions.
>
> (50) "Medical neglect" means the failure to provide or the failure to allow needed care as recommended by a health care practitioner for a physical injury, illness, medical condition, or impairment, or the failure to seek timely and appropriate medical care for a serious health problem that a reasonable person would have recognized as requiring professional medical attention. Medical neglect does not occur if the parent or legal guardian of the child has made reasonable attempts to obtain necessary health care services or the immediate health condition giving rise to the allegation of neglect is a known and expected complication of the child's diagnosis or treatment and:
>
> (a) The recommended care offers limited net benefit to the child and the morbidity or other side effects of the treatment may be considered to be greater than the anticipated benefit; or
>
> (b) The parent or legal guardian received conflicting medical recommendations for treatment from multiple practitioners and did not follow all recommendations.

Within the Context of Emergency Health Care

Florida law also covers the situation where immediate emergency care of a minor child is required but the medical provider is unable to reach the legal guardian. *See* Florida Statute 743.064 ("The absence of parental consent notwithstanding, a physician licensed under chapter 458 or an osteopathic physician licensed under chapter 459 may render emergency medical care or treatment to any minor who has been injured in an accident or who is suffering from an acute illness, disease, or condition if, within a reasonable degree of medical

certainty, delay in initiation or provision of emergency medical care or treatment would endanger the health or physical well-being of the minor. Emergency medical care or treatment may be rendered in the prehospital setting by paramedics, emergency medical technicians, and other emergency medical services personnel, provided such care is rendered consistent with chapter 401.").

Within the Context of Temporary Custody

Florida law also recognizes that children sometimes need a temporary caregiver who has legal authority to handle the child's medical and other needs. *See* Chapter 751, Florida Statutes. The law authorizes the filing of a petition by, "[a]ny extended family member who has the signed, notarized consent of the child's legal parents; or Any extended family member who is caring full time for the child in the role of a substitute parent and with whom the child is presently living." Fla. Stat. 751.02(1) (2024).

There are two paths within this avenue. First, temporary custody can be granted if the parents' consent. Fla. Stat. 751.05(2) (2024). Second, custody can be granted if the petitioner establishes the requisite harmful conduct. Fla. Stat. 751.05(3)(b) (2024) (". . .the court shall grant the petition only upon a finding, by clear and convincing evidence, that the child's parent or parents are unfit to provide for the care and control of the child. In determining that a parent is unfit, the court must find that the parent has abused, abandoned, or neglected the child, as defined in chapter 39.").

Conclusion

D.'s love and concern for her younger brother is more than commendable. It could be important to his safety and welfare at some point. But according to the information presented to the Court, we are not at that point.

D. did not call the DCF hotline and initiate a dependency action. She did file a petition for temporary custody by an extended family member. And there is no indication that immediate emergency medical care was required.

Even if she had called DCF or filed for temporary custody, her petition would still fail. D.'s concern falls well short of the significant harm threshold, a requirement that maintains the integrity of the fundamental liberty right of a parent to raise his or her child. A sister may not interfere with or take the parental rights of her mother and father who are the natural and legal guardians of the child absent such harm. Failing to return the phone calls from the detention center and vague concerns of a disorderly home are not enough.

This Court must apply the law, and the law in the state of Florida and the United States demands that a parent's right to parent not be denied or restricted absent severe circumstances that do not apply here.

Accordingly, it is ORDERED and ADJUDGED that the petition is DENIED.

* * *

Torts—Defamation—Media—Newspaper article describing plaintiff as "top figure in one of nation's most notorious crime families"—Statement at issue is substantially true where article repeatedly uses terms such as "accused" and "alleged," and changing statement to more accurate "alleged top figure" or removing words "top figure" would not have different effect on mind of reader given uncontested contents of article—Further, statement is protected by official reports privilege where article is fair and accurate report of government and other public records, including plaintiff's federal indictment, and by wire service defense for republication of reporting from another established news service—Complaint is dismissed with prejudice

PETER G. GERACE, JR., Plaintiff, v. MCCLATCHY COMPANY, LLC, (THE), et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-001715-CA-01. Section CA08. August 27, 2024. Robert T. Watson, Judge. Counsel: Devin M. Freedman, for Plaintiff. Dana J. McElroy, James J. ("Jim") McGuire, Karen Williams Kammer, and Daniela Abratt-Cohen, Thomas & LoCicero, PL, Tampa, for Sun-Sentinel Company, LLC and Ariza Mario, Defendants. Scott D. Ponce, for McClatchy Company, LLC and Jay Weaver, Defendants.

ORDER GRANTING WITH PREJUDICE MOTION TO DISMISS (SUN-SENTINEL DEFENDANTS)

This matter came before the Court for hearing on October 19, 2023, on the motion to dismiss by Defendants Sun-Sentinel Company, LLC and Mario Ariza ("Sun-Sentinel Defendants' Motion" or "Motion") [DE 21, 3/23/23]. The Court having reviewed the Motion, Plaintiff's Opposition [DE 36, 7/18/23], and the Reply [DE 40, 7/24/23]; having heard argument of counsel; and having carefully reviewed applicable legal authorities, the Sun-Sentinel Defendants' Motion is Granted, and Counts 3 and 4 of Plaintiff's Complaint are hereby dismissed with prejudice.

Background

Plaintiff Peter Gerace, Jr. seeks recovery against the Sun-Sentinel Defendants for publication of one statement—that Plaintiff is a "top figure in one of the nation's most notorious crime families"—claiming such statement is false and defamatory and caused him harm. However, because the Court finds the statement at issue is substantially true, is protected by the official reports privilege defense, and is protected by the wire service defense, the Plaintiff cannot prevail on his claims against the Sun-Sentinel Defendants as a matter of law.

The Sun-Sentinel Article

Plaintiff's claims in Counts 3 and 4 against the Sun-Sentinel Defendants arise from a March 1, 2021, Sun-Sentinel news article titled, "Nephew of alleged Buffalo mob boss arrested in Fort Lauderdale" (the "Article").

The Article, which is attached as Exhibit B to the Complaint, described Plaintiff's arrest as he attempted to check in to a hotel in Fort Lauderdale a few days after a federal grand jury in Buffalo, New York, indicted him on charges of "bribing a DEA agent, drug dealing, and human trafficking." The Article stated that federal prosecutors have charged Plaintiff with a total of five crimes, including bribery of a federal official, manufacturing and distributing narcotics, human trafficking of at least 40 people, and conspiracy.

The Article reported that Plaintiff is "one of a half-dozen men accused by federal prosecutors in the Western District of New York of engaging in illicit activities." The Article further explained that Plaintiff and his brother, who was also among those six charged, are the nephews of Joseph Todaro, Jr. and cited to court records which refer to Mr. Todaro as the "capo of the Buffalo mob."

The Article also referred to the federal indictment itself, in which prosecutors allege that a strip club owned by Plaintiff—Pharoah's—was at the "center of a drug and human trafficking operation that lasted at least a decade. [Prosecutors] also say that Gerace bribed a DEA agent into protecting his establishment."

Plaintiff's Claims Against the Sun-Sentinel Defendants

Plaintiff's claims for defamation (Third Cause of Action) and defamation per se (Fourth Cause of Action) against the Sun-Sentinel Defendants (the newspaper and reporter) arise from a single phrase that appears in the first sentence of the Article: namely, the statement that Plaintiff is "[a] top figure in one of the nation's most notorious crime families." *See* Compl. ¶ 13. (Somewhat ironically, in the actual counts of the Complaint, Plaintiff misquotes the Article, alleging that it described him as " 'a top leader' " (¶¶ 36, 39, 46). The parties and the Court have considered the issue based on the actual language of the Article.) The phrase at issue is contained within the first sentence of the Article which states in its entirety: "A top figure in one of the nation's most notorious crime families was arrested in Broward County after a federal grand jury in Buffalo, N.Y., indicted him on

charges of bribing a DEA agent, drug dealing, and human trafficking." *See* Compl. ¶ 13.[1] Plaintiff claims that by falsely "branding the Plaintiff as [a] mafia boss," this statement has "prejudiced the Plaintiff in the eyes of the community." *See id.* at ¶ 38.

The Indictment Against Plaintiff

On February 25, 2021, just a few days before he was arrested, federal prosecutors filed and unsealed a Second Superseding Indictment against Plaintiff and his childhood friend, an indicted former DEA Agent named Joseph Bongiovanni (the "Indictment").[2]

The Indictment charges Plaintiff with five crimes: Conspiracy to Defraud the United States (Count 2), Paying a Bribe to a Public Official (Count 6), Maintaining a Drug-Involved Premises (Count 7), Conspiracy to Distribute Controlled Substances (Count 8), and Conspiracy to Commit Sex Trafficking (Count 9). Throughout the Indictment, the government references Plaintiff's involvement in what the prosecutors call "Italian Organized Crime," or "IOC."

For example, in Count 2, the government charges that, as part of the conspiracy between Plaintiff and Bongiovanni, "in exchange for payments [Bongiovanni] received and in order to ingratiate himself to individuals whom he believed were members and associates of IOC, the defendant BONGIOVANNI utilized his position as a DEA [Special Agent] to attempt to dissuade other members of law enforcement: from conducting investigations of his coconspirators, friends, associates and individuals the defendant believed to be connected to or associated with IOC, including the defendant GERACE [Plaintiff] and others. . ." *See* Indictment at 19, ¶ 5.

Similarly, as part of the manner and means of the conspiracy, Count 2 charges Bongiovanni with failing to disclose in any DEA report information about Plaintiff, "who was an individual whom the defendant BONGIOVANNI . . . had reason to believe to be a member of, connected to, or associated with IOC." *Id.* at 23, ¶ 23.

The *Buffalo News* Article

The Article also cites and links to a news article published on February 28, 2021, in *The Buffalo News* titled, "Is the mob back? Feds probe Buffalo Mafia after calling it all but dead" (the "Buffalo Article").[3] The Buffalo Article reported that federal prosecutors were investigating organized crime activities that include those of "two nephews of the man law enforcement has claimed heads the Buffalo Mafia." It then lists six men—including Plaintiff and his brother—who "form the cast of characters" in the effort to prosecute "what government attorneys call the 'Italian Organized Crime' family of Western New York." The Buffalo Article further described Plaintiff as the childhood friend of Bongiovanni, an indicted former DEA agent accused of accepting $250,000 in bribes, and the nephew of Joseph A. Todaro, Jr., "who law enforcement authorities have claimed for years headed the local mob. Prosecutors identified the Gerace brothers as unindicted coconspirators of Bongiovanni."

The Buffalo Article includes screenshots of, and references to, a detention hearing for another one of the six men identified in the investigation (Joseph Bella), in which prosecutors repeatedly referred to the investigation as an "active organized crime investigation" and identified Plaintiff as a "relative of the reputed head of the Buffalo mafia family."

Finally, the Buffalo Article describes the search federal agents conducted of Pharoah's in December 2019 for evidence related to narcotics and racketeering.

Standard Applicable to the Sun-Sentinel Defendants' Motion

When considering a motion to dismiss, this Court must take the facts alleged in a complaint as true and draw all reasonable inferences in favor of Plaintiff. *See Skupin v. Hemisphere Media Grp.*, 314 So. 3d 353, 355-56 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a] (citations omitted). But where, as here, the claim is deficient as a matter of law, it should be dismissed. *Id.* at 356 (affirming trial court dismissal of defamation action with prejudice).

Additionally, the Court may also rely upon documents cited or incorporated by reference in the Complaint, and is not bound by Plaintiff's assertions as to their meaning. *Id.*; *see also* Fla. R. Civ. P. 1.130(b) ("Any exhibit attached to a pleading must be considered a part thereof for all purposes."); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a] (trial court properly considered documents attached to motion to dismiss which were referenced in the complaint). Specifically, the Third District has held that news publications described in a complaint may be considered on a motion to dismiss. *Skupin,* 314 So. 3d at 356 (trial court properly considered entire broadcasts and referenced hyperlinks on motion to dismiss).

To state a claim for defamation under Florida law, Plaintiff must plead and prove the following elements: (1) an unprivileged publication to a third party; (2) a false and defamatory statement of fact which is of and concerning him; (3) fault on the part of the publisher; and (4) damages. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D701c] (citation omitted). Whether an alleged statement is susceptible to defamatory interpretation is a question of law for the court's determination. *See Turner v. Wells*, 879 F.3d 1254, 1262-63 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C539a] (applying Florida law).

In light of these standards, Plaintiff's claims in Counts 3 and 4 fail to plead facts giving rise to plausible claims for relief. Specifically:

The Statement at Issue Is Substantially True.

A false statement of fact is the *sine qua non* of an action for defamation. *See Turner*, 879 F.3d at 1262 and 1267; *Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305, 1308 (11th Cir. 2001) [15 Fla. L. Weekly Fed. C49a] (a "statement must be false to be libelous."). So long as a statement is "substantially" true, it is not actionable under Florida law. Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the "gist" or the "sting" of the statement is accurate. *See, e.g., Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502-03 (Fla. 3d DCA 1993) (holding no liability for news broadcast that reported plaintiff had spent four years in jail for murder when in fact she had served only two years for attempted murder).

In analyzing whether a statement is actionable the Court must consider the broader context of the publication at issue. *See Smith v. Cuban American Nat'l Foundation*, 731 So. 2d 702, 706 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b] ("There is no way to determine the 'gist' or 'sting' of the publication in the mind of the average viewer without examining the statement in context."); *Turner*, 879 F.3d at 1262-63 (stating that in making such assessment, the "court should construe statements in their totality, with attention given to any cautionary terms used by the publisher in qualifying the statement."); *Parekh v. CBS Corp.*, 820 F. App'x 827, 833 (11th Cir. 2020) (finding court must look at other statements in article to determine whether challenged statement is defamatory in context); *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983) (noting that articles are "to be considered with their illustrations; pictures are to be viewed with their captions; stories are to be read with their headlines").

Here, the sole allegedly defamatory statement—"a top figure in one of the nation's most notorious crime families"—is set forth under a headline that refers to Plaintiff as "nephew of *alleged* Buffalo mob boss" (emphasis added) and in an article that used the terms "accused," "alleged," or "charged" at least five times in referring to Plaintiff, his business, his conduct, and his uncle. Notably, the Article ends with a description of Plaintiff as "the *accused* mobster."

While starting the Article with "An alleged top figure" or "An accused top figure" or "A suspected top figure" or "A purported top figure" would have been more accurate, viewing what was written in context, which the Court must do, leads to the conclusion that the challenged statement is not defamatory. *Rasmussen v. Collier Cnty. Publ. Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3112a] ("court must consider the context in which the statement was published and accord weight to cautionary terms used by the person publishing the statement").

Relatedly, a statement is not actionable unless it would have a "different effect on the mind" of the reader from that which the pleaded truth or accurate facts would have produced. *Woodard*, 616 So. 2d at 502-03; *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1234 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D836a] (dismissing defamation claim in part because statement that plaintiff sent a picture of a dead body to a federal prosecutor was substantially true, even though the story failed to mention the recipient was not yet a federal prosecutor but was later to become one).

A "workable test" for determining whether the Article is substantially true is to "eliminate the alleged falsities" from the Article and then assess how the "common mind would understand" the Article with those words removed. *Bishop v. Wometco Enters., Inc.*, 235 So. 2d 759, 762 (Fla. 3d DCA 1970); *Hill v. Lakeland Ledger Publ'g Corp.*, 231 So. 2d 254, 256 (Fla. 2d DCA 1970). Or as Plaintiff phrases it: "The fundamental question in Florida in applying the substantial truth doctrine is whether the defamatory statement produced no different effect on the mind of the reader than would the truth." Resp. at 12. Plaintiff agrees that a "news report that contains a false statement is actionable only when significantly greater opprobrium [public discredit or disgrace] results from the report containing the falsehood then would result from the report without the falsehood." Resp. at 12 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F. 3d 1222, 1228 (7th Cir. 1993).

Here, removing the words "top figure" from the Article would have little impact on the gist or sting of the Article. Even without those words, any reasonable reader would understand that Plaintiff is "one of a half-dozen men accused by federal prosecutors in the Western District of New York of engaging in illicit activities"; is the nephew of Joseph Todaro, Jr., "a man who court documents say is capo of the Buffalo mob"; is the owner of a strip club that the Indictment says was "at the center of a drug and human trafficking operation that lasted at least a decade"; and has been federally charged with five separate crimes, including "bribery of a federal official, manufacturing and distributing narcotics, human trafficking at least 40 people and conspiracy." In other words, the common reader would come away with a similar perception of Plaintiff—that he is allegedly a significant criminal figure—with or without the inclusion of the allegedly defamatory words.

Moreover, Plaintiff challenges none of these other statements in the Article and thus the "top figure" description would have no different effect on the mind of the reader than the pleaded truth. *See Turner*, 879 F.3d at 1259-60 (finding statements that coach knew about bullying were true where plaintiff did not contest that he was present when the player was subjected to the insults nor does he identify any action he took to stop them). The uncontested image or impression of Plaintiff left by the Article is that Plaintiff is one of a mere handful of Buffalo-area men prosecutors have accused of engaging in organized crime activities. Plaintiff's arguments to the contrary accordingly must be rejected.

Then-Judge Neil Gorsuch of the Tenth Circuit Court of Appeals, in writing about this issue, posited:

> "Can you win damages in a defamation suit for being called a *member* of the Aryan Brotherhood prison gang on cable television when, as it happens, you have merely *conspired* with the Brotherhood in a criminal enterprise? The answer is no. While the statement may cause you a world of trouble, while it may not be *precisely* true, it is *substantially* true. And that is enough to call an end to this litigation as a matter of law."

Bustos v. A & E Television Networks, 646 F.3d 762, 762 (10th Cir. 2011) (emphasis in original). The same rationale holds true here. Plaintiff's allegations thus are insufficient to sustain any claim for reporting which is substantially true.

The Statement at Issue Is Protected by the Official Reports Privilege.

Additionally, although unnecessary to the result and merely as icing on an already frosted cake, Plaintiff's claims against the Sun-Sentinel Defendants additionally fail because the statement at issue is protected by the official reports privilege.

Reading the Article as a whole, the Court finds the Article is a fair and accurate report of government and other public records, including Plaintiff's federal indictment. *See Folta v. New York Times Co.*, No. 1:17cv246-MW/GRJ, 2019 WL 1486776, at *10 (N.D. Fla. Feb. 27, 2019). Florida's official reports privilege shields journalists from defamation liability where they "report accurately on information received from government officials." *Id.* at *2 (explaining that privilege covers court proceedings and a wide range of government-derived sources); *Rasmussen v. Collier Cty. Publ'g Co.*, 946 So. 2d 567, 570 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3112a] (finding privilege shielded news articles recounting criminal information, executive orders, and plea agreements); *Steven H. v. Duval Cty. School Bd.*, No. 99-500-CIV-J-20C, 1999 WL 1427666, at *1 (M.D. Fla. Sept. 3, 1999) (finding privilege protected use of statements provided by public school teacher/football coach); *Stewart*, 695 So. 2d at 362 (privilege applied to reporting on sheriff's press releases); *Jamason v. Palm Beach Newspapers, Inc.*, 450 So. 2d 1130 (Fla. 4th DCA 1984) (newspaper has a qualified privilege for accurate reporting of defamatory deposition testimony of witness in judicial proceeding).

The official reports privilege is broad and simply requires the publication to contain a substantially correct account of information obtained from public records. *See, e.g., Folta*, 2019 WL 1486776, at *2, *4 (finding application of privilege is a question of law when facts and circumstances of communication are undisputed) (citations omitted); *Rasmussen*, 946 So. 2d at 570 (finding privilege applied because the publications were "substantially truthful" accounts). "It is not necessary that [the publication] be exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." *Woodard,* 616 So. 2d at 502-03 (finding privilege applied to reporting on contents of FDLE report). Further, it is irrelevant whether the government record itself contains factual errors. *Id.* at 502 (holding privilege applies "even if the official documents contain erroneous information"); *Ortega v. Post-Newsweek Stations, Florida, Inc.,* 510 So. 2d 972, 976 (Fla. 3d DCA 1987) (finding press has no duty to independently determine accuracy of statements in government records).

Additionally, the privilege does not dictate that news organizations report on the contents of official files in sterile language. Rather, news reporting may be "phrased to catch the . . . readership's attention" without losing the protection afforded by the privilege. *See Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D116a]. In other words, "[t]he law of defamation is concerned with whether a publisher reports a story *truthfully*, not generously." *Turner*, 879 F.3d at 1270 (emphasis in

original; citation omitted) (deferring to defendants' "editorial discretion in what to publish" in their report).

Once the official report privilege attaches, it can be defeated only where the challenged report is not "reasonably accurate and fair" in describing the contents of the records. *Woodard*, 616 So. 2d at 502 (citations omitted); *see also Stewart*, 695 So. 2d at 362 (finding news reports of beatings by corrections officers privileged because there were "no material differences" between reports and information contained in official files). To assess the privilege, the Court need only compare the challenged statements to the corresponding public records. *See Folta*, 2019 WL 1486776, at *4 (comparing *New York Times* article statements to public university professor's emails and holding that official report privilege shielded the newspaper from liability for defamation).

Here, the Indictment charges Plaintiff with five crimes, including conspiracy with other indicted individuals, and repeatedly references the conspiracy as that related to "Italian Organized Crime."[4] Specifically, Count 2 of the Indictment directly references Plaintiff as being "connected to or associated with IOC [Italian Organized Crime]". The transcript of the detention hearing of another indicted individual (cited in the Buffalo Article) repeatedly references the government's wide-ranging investigation into "organized crime" and identifies Plaintiff as a "relative of the reputed head of the Buffalo mafia family."[5]

In addition, the Article reports—and Plaintiff does not dispute—that he is one of only six men targeted by prosecutors for their involvement in the "Italian Organized Crime" family of Western New York. In this context, and based upon the facts alleged in the Indictment, the use of "top figure" in relation to Plaintiff's close association with the Buffalo mob and the criminal charges is a fair and accurate summation of a government record.

The Court has reviewed the entirety of the Second Superseding Indictment in Western District of New York case number 19-cr-227, filed on February 25, 2021 and unsealed on March 1, 2021. It reflects that a federal grand jury found probable cause to file felony charges against Plaintiff for: conspiracy to defraud the United States for a period of some 14 years; bribery of public officials and witnesses for some 10 years; maintaining for some 13 years premises for the purpose of distributing and using cocaine, methamphetamine and heroin; conspiring for some 10 years to distribute cocaine, methamphetamine and heroin; and conspiring for some 9 years to commit sex trafficking. The alleged conduct is extremely substantial. As the U.S. Magistrate Judge stated at Plaintiff's first appearance in the Southern District of Florida on March 1, 2021, "the charges in this case are so substantial but for the government's recommendation you would be detained." Tr. 33:25-34:1. The cumulative potential time of imprisonment totals some 75 years. Tr. 11:4-15:11 (summary of possible sentence by count). Based on the allegations in the Indictment, it is more than objectively reasonable to view Plaintiff as a "top figure" in the eyes of the Government.

Plaintiff relies on a 1983 decision from a federal trial court in Pennsylvania to support his argument that "an indictment provides no justification for a defamatory statement about a person's status as a criminal." Resp. at 9 (citing *Marcone v. Penthouse Int'l*, 577 F. Supp. 318 (E.D. Pa. 1983)). But a federal trial court decision is not binding on this court—let alone one that does not apply Florida law. Instead, the Court finds that the binding decision in *Ortega v. Post-Newsweek Stations, Florida, Inc.,* 510 So. 2d 972, 976 (Fla. 3d DCA 1987) is instructive and applicable here. There, the Third District found that a reporter could rely on and report on law enforcement information and testimony to a Congressional subcommittee—as here, mere allegations of wrongdoing—and that the qualified privilege of reporting on official proceedings applied.

Plaintiff's arguments in opposition are not consistent with Florida law, which broadly applies the privilege to information received from government officials, including charging documents such as indictments. *See Folta*, 2019 WL 1486776, at *2; *Rasmussen*, 946 So. 2d at 570; *see also Larreal v. Telemundo of Fla., LLC*, 489 F. Supp. 3d 1309, 1321-22 (S.D. Fla. 2020) (applying Florida law and applying fair report privilege to reporting of public records, including arrest report of Plaintiff); *Alan*, 973 So. 2d at 1178-80 (fair report privilege protected statements obtained from court documents, including arrest warrant and probable cause affidavit, even though individual was ultimately acquitted). Additionally, the Article makes repeated references to the fact that it is based upon prosecutor's allegations, and that Plaintiff has been accused, rather than convicted, of serious organized crime related activities.

Accordingly, the statement at issue protected by Florida's official reports privilege and is not actionable.

The Wire Service Defense Also Requires Dismissal.

Finally, because the Sun-Sentinel cannot be liable for republishing *The Buffalo News'* reporting pursuant to long-established Florida law, the Court finds Plaintiff cannot recover here on that basis as well. The Florida Supreme Court originally adopted the wire service defense or privilege for republication more than 90 years ago, insulating news agencies from liability for republishing news reports from established news sources. The defense broadly protects a republication or rebroadcast of a news report "from a generally recognized reliable source of daily news . . ."
Layne v. Tribune Co., 146 So. 234, 238 (Fla. 1933). Under this doctrine, a republisher is permitted to rely on the research of the original publisher "absent a showing that the republisher had, or should have had, substantial reasons to question the accuracy of the articles or the bona fides of [the] reporter." *Nix v. ESPN, Inc.*, 772 F. App'x 807, 813 (11th Cir. 2019) (affirming application of wire service defense to ESPN's and *USA Today*'s reliance on the Associated Press' reporting, which was a "substantially accurate summary of judicial proceedings.")

In fact, although described as the "wire service" privilege, this defense is not limited to republication of information from an actual wire service. In *Nelson v. Associated Press*, the court held that the defense applied to an article in *Newsweek*, which condensed and summarized "an array of other newspapers and wire service reports" with no differentiation between the newspaper reports relied upon and the wire service reports relied upon. *Nelson v. Associated Press, Inc.*, 667 F. Supp. 3d 1468, 1475-77 (S.D. Fla. 1987). Again, the wire service defense precluded liability based upon *Newsweek*'s reliance on quality sources of news information, including the Associated Press. *Id.* at 1477.

Here, the Court finds the Sun-Sentinel's reporting falls within the wire service defense as it relied upon and summarized reporting of a reliable news source, *The Buffalo News.*[6] The Article contains a hyperlink directly to the Buffalo Article.[7] Statements in the Article, when compared to the one in *The Buffalo News*, are facially similar. Among other things:

- The Article explains that "Gerace is one of a half-dozen men accused by federal prosecutors in the Western District of New York of engaging in illicit activities." Similarly, the Buffalo Article states: "These six men—and others who know them—form the cast of characters in the latest effort by federal law enforcement to prosecute what government attorneys call the 'Italian Organized Crime' family of Western New York." Gerace's name is listed as one of those six men.
- The Article states that Gerace and his brother "are the nephews of Joseph Todaro Jr., a man who court documents say is capo of the Buffalo mob." Again, the Buffalo Article says that Gerace and his brother "are the nephews of Joseph A. Todaro, who law enforcement authorities have claimed for years headed the local mob."

• The Article provides: "According to reports from the Buffalo News, federal agents raided Pharoah[']s in 2019." Similarly, the Buffalo Article states, "Pharoah's was searched by federal agents in December 2019."

Plaintiff's arguments to the contrary, Resp. at 4-7, are not persuasive. Under the facts here, the Court finds the Sun-Sentinel Defendants are not liable for defamation as a matter of law. *See Nix*, 772 F. App'x at 813.

For all of these reasons, it is:

ORDERED AND ADJUDGED:

The Sun-Sentinel Defendants' Motion is granted. Counts 3 and 4 of Plaintiff's Complaint are dismissed with prejudice.

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[1]Plaintiff misquotes this sentence in Counts 3 and 4 as saying "top *leader*," when in the Article in fact said "top *figure*." *See* Compl. at ¶¶ 36, 46; Compl. Exh. B at 1 (emphasis added).

[2]*See* Second Superseding Indictment (D.E. 89), *USA v. Bongiovanni, et al.*, No. 1:19-cr-00227-JLS-MJR (W.D.N.Y. 2019). A copy of this Indictment was also filed in the Southern District of Florida upon Plaintiff's arrest in Fort Lauderdale on March 1, 2021. *See* Exhibit 1 to the Sun-Sentinel Defendants' Motion (Second Superseding Indictment (D.E. 1), *USA v. Bongiovanni & Gerace*, No. 0:21-mj-06112-AOV (S.D. Fla. March 1, 2021)).

[3]A copy of the Buffalo Article is attached as Exhibit 2 to the Sun-Sentinel Defendants' Motion.

[4]The Indictment is incorporated into the Complaint because it is central to the Article itself, which is the operative document and an exhibit to the Complaint. In fact, the Indictment is hyperlinked in its entirety in the Buffalo Article, which is hyperlinked by the Article.

[5]The detention transcript is similarly hyperlinked in the Buffalo Article. Because the Article contains a hyperlink to the Buffalo Article, the hyperlinks are also part of the four corners of the Complaint and may be considered on a motion to dismiss. *See Skupin*, 314 So. 3d at 356 (noting "the trial court did not deviate from the four corners of the complaint when considering defendant's motion to dismiss because all the broadcasts, either via hyperlink or attached transcripts, were attached to the complaint and thus incorporated.").

[6]Plaintiff's argument that the defense applies only to a "mostly verbatim" republication of the underlying wire story is premised upon a mischaracterization of the authorities cited. No Florida case holds that the defense applies only to "mostly verbatim" republications. Rather, the wire service defense protects a republication that contains only "minor and insignificant deviations" from the underlying story. *Defamation: A Lawyer's Guide*, § 6:8; *MacGregor v. Miami Herald Publ'g Co.*, 119 So. 2d 85, 86 (Fla. 2d DCA 1960).

[7]This Court may determine and apply the wire service defense on a motion to dismiss. *See, for example, Layne*, 108 Fla. at 183; *Nix*, 772 F. App'x at 813. For purposes of the wire service defense, the primary concern is what statements were made in the Buffalo Article and that the Defendants relied upon those statements; the truth of the statements in the Buffalo Article is not at issue.

* * *

Torts—Defamation—Media—Official reports privilege—Wire service defense—Newspaper article describing plaintiff as part of group that comprises "Italian Organized Crime" family of Western New York is not actionable where statement is fair and accurate report of plaintiff's federal indictment and republishes reporting from another established news service—Sentences describing plaintiff as "leader" or "top member" of alleged organized crime family are substantially true where article repeatedly uses terms such as "accused" and "alleged," and changing statements to more accurate "alleged top member" or removing words entirely would not have different effect on mind of reader given uncontested contents of article—Count for defamation per se fails as there is no such cause of action—Complaint is dismissed with prejudice

PETER G. GERACE, JR., Plaintiff, v. MCCLATCHY COMPANY, LLC, (THE), et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. August 27, 2024. Robert T. Watson, Judge. Counsel: Devin M. Freedman, for Plaintiff. Dana J. McElroy, James J. ("Jim") McGuire, Karen Williams Kammer, and Daniela Abratt-Cohen, Thomas & LoCicero, PL, Tampa, for Sun-Sentinel Company, LLC and Ariza Mario, Defendants. Scott D. Ponce, for McClatchy Company, LLC and Jay Weaver, Defendants.

ORDER GRANTING WITH PREJUDICE MOTION TO DISMISS (MCCLATCHY DEFENDANTS) AND CLOSING CASE

THIS CAUSE came before the Court on October 19, 2023, on the motion to dismiss filed by Defendants The McClatchy Company, LLC ("McClatchy") and Jay Weaver (the "Motion") (DE 20, 3/13/23). The Court having reviewed the Motion and Plaintiff's Opposition (DE 36, 7/18/23), having heard argument of counsel, and having carefully reviewed applicable legal authorities, the Motion is GRANTED and Counts 1 and 2 of Plaintiff's Complaint are dismissed with prejudice because they fail to state a cause of action.[1]

I. INTRODUCTION

Defendant Jay Weaver is a professional journalist. Compl. ¶ 5. Defendant McClatchy publishes the newspaper, *The Miami Herald. Id.* ¶ 3. An article bearing Mr. Weaver's byline and entitled, *Feds arrest alleged New York crime family leader in South Florida on conspiracy charge*, was published in the online edition of *The Miami Herald* on March 2, 2021 (the "*Miami Herald* Article"). *Id.* ¶¶ 5, 10-11, Ex. A.

The *Miami Herald* Article reports that Plaintiff Peter G. Gerace, Jr. was arrested "by federal agents in Ft. Lauderdale on drug-related conspiracy charges," and that Plaintiff is "a nephew of reputed Buffalo mob boss Joseph A. Todaro, Jr." "who authorities say has headed the local mob. . . ." Compl. at Ex. A.

The *Miami Herald* Article reports: "Gerace is among six men targeted by federal prosecutors who have called the group the 'Italian Organized Crime' family of Western New York." Compl. ¶ 10 and Ex. A (blue text and underlining in original). The blue, underlined part of that sentence is a hyperlink to an article that was published in the *Buffalo News* a few days before the *Miami Herald* Article was published. *See, e.g., Adelson v. Harris*, 973 F.Supp.2d 467, 483 (S.D.N.Y. 2013) (quoting *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 n.1 (2d Cir. 1997)) (" 'a hyperlink is highlighted text or images that, when selected by the user, permit him to view another, related Web document' ") (internal brackets and quotation marks omitted).

The linked *Buffalo News* article identifies Plaintiff and five other men (including Plaintiff's brother), and reports: "These six men—and others who know them—form the cast of characters in the latest effort by federal law enforcement to prosecute what government attorneys call the 'Italian Organized Crime' family of Western New York." The *Buffalo News* article was attached to the Motion as Exhibit 1, and a link to the article was provided in the Motion. Plaintiff did not object to the Court considering the *Buffalo News* Article in connection with the Motion.[2]

The *Miami Herald* Article also reported:

> Prosecutors identified the Gerace brothers [Plaintiff and his brother] as co-conspirators of Joseph Bongiovanni, a retired U.S. Drug Enforcement Administration agent who was arrested in 2019 on charges of accepting $250,000 in bribes to help drug dealers avoid arrest, including some the government says are connected to organized crime.

Compl. Ex. A.

The reporting regarding the prosecutors and their allegations comes from a Second Superseding Indictment that charges Plaintiff with multiple crimes (the "Indictment"). The Indictment was attached to the Motion as Exhibit 2. Plaintiff did not object to the Court considering the Indictment in connection with the Motion to Dismiss.[3]

The Indictment—which was returned by a federal grand jury empaneled in the U.S. District Court for the Western District of New York—charges, among other things, that "defendant **GERACE** . . . was an individual whom the defendant **BONGIOVANNI** [the retired

DEA agent] knew and had reason to know was involved in possession, use, and distribution of controlled substances, ***and had reason to believe to be a member of, connected to, or associated with IOC*** [Italian Organized Crime]." Mot. Ex. 2 at 23 ¶ 24 (all capitals and bold typeface in original; italics, underlining, and brackets added); *see also id.* at 2 ¶ 3 (defining IOC as Italian Organized Crime).

Counts 1 and 2 arise from the *Miami Herald* Article and purport to state causes of action against McClatchy and Mr. Weaver for defamation (Count 1) and defamation *per se* (Count 2). Specifically, Plaintiff alleges that there are a total of *five* sentences in the Article that are false and defame him.

One of the sentences is: "Gerace is among six men targeted by federal prosecutors who have called the group the 'Italian Organized Crime' family of Western New York." Compl. ¶10 (blue text and underlining in original to show hyperlink). As mentioned above, that sentence contains the hyperlink to the earlier *Buffalo News* article. Plaintiff alleges that "th[is] statement that Plaintiff is part of a group which comprises the 'Italian Organized Crime" family of Western New York is false and defamatory." Compl. ¶10; *see also id.* ¶¶ 20-21, 30-31.

The other four sentences that Plaintiff alleges are false describe Plaintiff as being a "leader" or "a top member" of an alleged organized crime family:

- "*Feds arrest alleged New York crime family leader in South Florida on conspiracy charge*" (title/headline of the Article)
- "Federal agents arrested a top member of an alleged New York crime family in Fort Lauderdale in connection with a drug-conspiracy case in Buffalo." (caption under a photo of a judge's gavel)
- "A top member of an alleged New York crime family was arrested Sunday by federal agents in Fort Lauderdale on drug-related conspiracy charges." (first sentence of the Article)
- "Peter G. Gerace, Jr., a top member of an alleged New York crime family, is arrested in Fort Lauderdale." (caption beneath a police photograph of Plaintiff).

Compl. ¶¶ 10, 20-21, 30-31.

Plaintiff does ***not*** allege that those four sentences are false because they say that he is alleged to be a member of, or associated with, Italian Organized Crime. Instead, the complaint alleges that those sentences "falsely charged the Plaintiff with the serious criminal activity of ***leading*** an organized crime family." Compl. ¶ 21 (emphasis added); *see also id.* ¶ 23 ("By branding the Plaintiff as mafia boss . . ."); ¶ 24 ("By falsely and maliciously describing the Plaintiff as a 'leader' and 'top member' of an Italian-American organized crime family . . . ."); ¶ 31 ("As stated above, the above-quoted false statements in the March 2, 2021 Miami Herald article calling the Plaintiff a 'leader' and 'top member' of an 'Italian Organized Crime' family wrongfully and falsely charge the Plaintiff with the serious criminal activity of ***leading*** an infamous organized crime family—also known as the 'mafia'—and therefore as being ***a mafia boss***.") (emphasis added).

II. DISCUSSION

A. The Applicable Law

McClatchy and Mr. Weaver argue that various legal doctrines render those five sentences from the *Miami Herald* Article non-actionable in causes of action for defamation and defamation *per se.* Before applying those principles to the five statements, the Court will briefly discuss those principles.

First, the substantial truth doctrine. Falsity is one of the essential elements of defamation-related claims. *See Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008) [33 Fla. L. Weekly S849a]; *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983) ("A false statement of fact is the *sine qua non* for recovery in a defamation action."). However, "[u]nder the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *See Smith v. Cuban American National Foundation*, 731 So.2d 702, 706 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b] (citing *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991)); *see also Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240 (11th Cir. 1999) (applying Florida law). "According to U.S. Supreme Court and Florida case law, falsity exists only if the publication is substantially and materially false, not just if it is technically false." *See Smith*, 731 So.2d at 707.

Put another way, "[a] 'statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " *See id.* (quoting *Masson*, 501 U.S. at 517). Thus, instead of requiring perfect accuracy, what Florida " 'law requires is that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial.' " *See McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197, 200 (Fla. 2d DCA 1962) (quoting 53 C.J.S. Libel and Slander §122). The substantial truth doctrine is properly applied at the motion to dismiss stage. *See, e.g., Readon v. WPLG, LLC*, 317 So.3d 1229, 1234-35 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D836a] (affirming dismissal on the basis that the statements were substantially true); *Marshall v. Amerisys, Inc.*, 943 So.2d 276, 280 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2967c] (same); *Marder*, 2020 WL 3496447, at *5 (dismissing defamation claims based on the substantial truth doctrine).

Second, the privilege for fair and accurate reports of government and court documents:

"The news media has been given a qualified privilege[5] to accurately report on the information they receive from government officials. This privilege includes the broadcast of the contents of an official document, so long as their account is reasonably accurate and fair, even if the official documents contain erroneous information."

Rigmaiden v. NBCUniversal Media, LLC, 307 So.3d 918, 918 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2237a] (quoting *Woodard v. Sunbeam Television Corp.*, 616 So.2d 501, 502 (Fla. 3d DCA 1993)) (additional internal quotation marks omitted). *See also Marder v. TEGNA, Inc.*, 2020 WL 3496447, at *4 (dismissing defamation claims based on fair report privilege); *Ortega v. Post-Newsweek Stations, Florida, Inc.*, 510 So.2d 972, 977 (Fla. 3d DCA 1987); *Huszar v. Gross*, 468 So.2d 512, 515-16 (Fla. 1st DCA 1985) (granting motion to dismiss); *Alan v. Palm Beach Newspapers, Inc.*, 973 So.2d 1177, 1179-80 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D116a] 1179-80 ("The Post obtained the information for the published statements from court documents and court proceedings surrounding Alan's arrest and trial."); *Stewart v. Sun Sentinel Co.*, 695 So.2d 360, 362 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D400a]. The press has no duty to determine the accuracy of the information it receives from government officials or documents before publishing fair and accurate reports of it. *See Woodard*, 616 So.2d at 502-03; *Ortega*, 510 So.2d at 976.

Florida's Third District Court of Appeal has expressly noted that the need for this privilege is particularly strong in the context of reports regarding alleged organized crime:

> [B]ecause organized crime has become so large, sophisticated, and secretive, "only the largest and most sophisticated intelligence-gathering entities can monitor them effectively." Consequently, the press has difficulty in reporting on organized crime: "In light of the difficulty in obtaining independent corroboration of [information on crime provided by a government agency], the press may often have to rely on materials the government acquires if it is to report on organized crime at all."

Ortega, 510 So.2d at 976-77 (quoting *Medico v. Time, Inc.*, 643 F.2d

134, 142 (3d Cir. 1981)) (brackets in original).

Third, the wire service defense. Florida courts "recognize that a republisher may rely on the research of the original publisher, absent a showing that the republisher had, or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of the reporter." *Nix v. ESPN, Inc.*, 2018 WL 8802885, at *6 (S.D. Fla. Aug. 30, 2018) ("*Nix I*") (internal citations and quotation marks omitted) (granting motion to dismiss) *aff'd* 772 F. App'x 807, 813 (11th Cir. 2019) ("*Nix II*") (affirming dismissal of complaint) ("Here, AP—a reputable news source—published an article with a statement that was a substantially accurate summary of judicial proceedings. Appellants did not assert facts to show, and there is nothing else to suggest, that ESPN or USA Today were negligent, reckless, or careless in relying on AP's content. The district court thus correctly concluded that the republishers of this statement—ESPN and USA Today—prevail on their wire service defenses."); *Nelson v. Associated Press, Inc.*, 667 F.Supp. 1468, 1482-83 (S.D. Fla. 1987) (applying wire service defense).

With these principles in mind, the Court now turns to the five sentences from the *Miami Herald* Article on which Plaintiff is suing.

B. The Sentence Reporting the Prosecutors' Allegations of an Association with Organized Crime Is Not Actionable.

Plaintiff was indicted by a federal grand jury in Buffalo, New York on February 25, 2021. Ex. 2. The Indictment alleges that a DEA agent (who was indicted along with Plaintiff) "knew and had reason to know" that Plaintiff "was involved in possession, use, and distribution of controlled substances, ***and had reason to believe [Plaintiff] to be a member of, connected to, or associated with IOC [Italian Organized Crime]***." Mot. Ex. 2 at 23 ¶24 (emphasis and brackets added); *see also id.* at 2 ¶ (defining IOC as Italian Organized Crime).

Three days later, on February 28, 2021, the *Buffalo News* (the newspaper of record in Buffalo, New York) published an article entitled, *Is the mob back? Feds probe Buffalo Mafia after calling it all but dead.* Mot. Ex. 1. The *Buffalo News* article reported that Plaintiff and five other people "form the cast of characters in the latest effort by federal law enforcement to prosecute what government attorneys call the 'Italian Organized Crime' family of Western New York." *Id.*

The *Miami Herald* Article was published two days later, on March 2, 2022. Compl. Ex. A. It reported, "Gerace is among six men targeted by federal prosecutors who have called the group the 'Italian Organized Crime' family of Western New York." Compl. ¶10 and Ex. A. The blue, underlined part of that sentence is a hyperlink to the *Buffalo News* article.

Plaintiff's complaint alleges that "th[is] statement that Plaintiff is part of a group which comprises the 'Italian Organized Crime' family of Western New York is false and defamatory." Compl. ¶¶ 10, 20-21, 30-31.

McClatchy and Mr. Weaver argue that that statement is not actionable because it is a fair and accurate report of the Indictment and, additionally, is protected by the wire service defense. Mot. at 10-12. The Court agrees.

First—as to the privilege for fair and accurate reports of court documents and information received from government officials—this statement from the *Miami Herald* Article fairly and accurately reports (1) that Plaintiff was indicted and, thus, was targeted by federal prosecutors, and (2) the Indictment's express allegations that Plaintiff is someone who the DEA agent "had reason to believe to be a member of, connected to, or associated with IOC [Italian Organized Crime]." Although Plaintiff disagrees with what is charged and written in the Indictment, Plaintiff's disagreement with the prosecutors' allegations does not change the fact that McClatchy and Mr. Weaver were privileged to fairly and accurately report the Indictment's allegations. *See Rigmaiden*, 307 So.3d at 918 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2237a] (quoting *Woodard*, 616 So.2d at 502) ("This privilege includes the broadcast of the contents of an official document, so long as their account is reasonably accurate and fair, ***even if the official documents contain erroneous information***.") (emphasis added); *Ortega*, 510 So.2d at 977; *Huszar*, 468 So.2d at 515-16 (Fla. 1st DCA 1985) (granting motion to dismiss); *Alan*, 973 So.2d at 1179-80; *Stewart*, 695 So.2d at 362.

Plaintiff argues that there are three reasons that the privilege for fair and accurate reports of court filings and government documents does not apply here: (1) the privilege categorically does not apply to indictments, (2) the privilege does not apply unless the report expressly states that it is reporting the contents of court filing or information received from the government, and (3) the report must be "correct." Resp. at 8-11.

These arguments fail because they are contrary to Florida law. The Court has not located any Florida decisions, and Plaintiff cites none, holding or even suggesting that the privilege does not apply to reports of indictments. Instead, and as held in the Florida decisions cited above, the privilege applies broadly to reports of court documents and information received from the government. Similarly, no Florida decision holds that the report must expressly state that it is reporting the contents of a court document or information received from the government. And, even if there were such a decision, the *Miami Herald* Article—including this particular sentence—clearly states that it is reporting that the prosecutors have "called" Plaintiff and what the government "says." Last, and as held in the decisions cited above, Florida law requires only that the report be "reasonably accurate and fair." It is also worth noting that even if Florida law required the report to be "correct," the complaint does not allege that this sentence in the *Miami Herald* Article is incorrect in describing what the prosecutors alleged. That Plaintiff contends that what the prosecutors say is wrong is of no consequence because the privilege applies to fair and accurate reports of incorrect information contained in court documents or received from the government.

Second—as to the wire service defense—this sentence from the *Miami Herald* Article repeats the *Buffalo News*'s previous reporting that Plaintiff is among six people who are charged in the federal government's prosecution of Italian Organized Crime, and the sentence actually links to the underlying *Buffalo News* article. The complaint does not allege that McClatchy and Mr. Weaver were negligent, reckless, or careless in relying upon the *Buffalo News*'s content. Consequently, the wire service defense bars Plaintiff's attempt to sue on this statement. *See Nix I*, 2018 WL 8802885, at *6 (granting motion to dismiss); *Nix II*, 772 F. App'x at 813 (affirming dismissal of complaint) ("Here, AP—a reputable news source—published an article with a statement that was a substantially accurate summary of judicial proceedings. Appellants did not assert facts to show, and there is nothing else to suggest, that ESPN or USA Today were negligent, reckless, or careless in relying on AP's content. The district court thus correctly concluded that the republishers of this statement—ESPN and USA Today—prevail on their wire service defenses."); *Nelson*, 667 F.Supp. at 1482-83.

Plaintiff argues that the wire service defense is inapplicable here because it applies only to verbatim or mostly verbatim reproductions of prior reporting. Resp. at 4-7.[6] The treatise that Plaintiff cites as support for this argument (*Defamation: A Lawyer's Guide*, §6.8) does not actually say what Plaintiff attributes to it and, in any event, Plaintiff's argument fails because the Florida decisions that he cites do not limit the wire service defense *only* to verbatim or mostly verbatim reproductions. Although a verbatim reproduction would certainly satisfy the wire service defense, there is nothing in Florida law that limits the applicability of the defense to verbatim reproductions. In

fact, one of the decisions that Plaintiff cites at page 5 of his response notes that the defense applied where the defendant "republished direct quotes *or summarized the content* of a Washington Post article." *See Nix I*, 2018 WL 8802885, at *6 (citing *Rakofsky v. Washington Post*, 971 N.Y.S.2d 74 (Sup. Ct. 2013)) (emphasis added).

Counts 1 and 2 are hereby dismissed to the extent that they are premised upon the sentence in the *Miami Herald* Article that "Gerace is among six men targeted by federal prosecutors who have called the group the 'Italian Organized Crime' family of Western New York, and the dismissal is with prejudice because "no amendment of the complaint would change the non-defamatory statement[ ] to [a] defamatory one[ ]." *See Skupin*, 314 So.3d at 357 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a].

C. Sentences Describing Plaintiff as a Top Member or a Leader of an Alleged Crime Family Are Not Actionable.

Counts 1 and 2 also are premised upon the following four sentences in the *Miami Herald* Article, which Plaintiff alleges are false and defamatory because they describe Plaintiff as a top member or a leader of an alleged organized crime family:

- *Feds arrest alleged New York crime family leader in South Florida on conspiracy charge*" (title/headline of the Article)
- "Federal agents arrested a top member of an alleged New York crime family in Fort Lauderdale in connection with a drug-conspiracy case in Buffalo." (caption under a photo of a judge's gavel)
- "A top member of an alleged New York crime family was arrested Sunday by federal agents in Fort Lauderdale on drug-related conspiracy charges." (first sentence of the Article)
- "Peter G. Gerace, Jr., a top member of an alleged New York crime family, is arrested in Fort Lauderdale." (caption beneath a police photograph of Plaintiff).

Compl. ¶¶ 10, 20-21, 30-31 and Ex. A.

Plaintiff does not allege that those four sentences are false because they say that Plaintiff is accused of being a member of, or otherwise associated with, Italian Organized Crime. Indeed, that is what the federal government alleges in the Indictment.

Instead, Plaintiff alleges that those statements are false and actionable as defamation because he is not a *top member* or *leader* of the crime family of which the federal prosecutors allege he is a member. Compl., ¶ 21 ("The above-quoted statements . . . falsely charged the Plaintiff with the serious criminal activity of ***leading*** an organized crime family." (emphasis added); ¶ 23 ("By branding the Plaintiff as mafia boss . . ."); ¶ 24 ("By falsely and maliciously describing the Plaintiff as a 'leader' and 'top member' of an Italian-American organized crime family . . . ."); ¶ 31 ("As stated above, the above-quoted false statements in the March 2, 2021 Miami Herald article calling the Plaintiff a 'leader' and 'top member' of an 'Italian Organized Crime' family wrongfully and falsely charge the Plaintiff with the serious criminal activity of ***leading*** an infamous organized crime family—also known as the 'mafia'—and therefore as being ***a mafia boss***.") (emphasis added)).

McClatchy and Mr. Weaver argue that Plaintiff's attempt to sue on those four sentences is barred by the substantial truth doctrine because alleged errors in describing Plaintiff's rank or position in organized crime do not affect the gist or sting of the accurate reporting of the government's charges that Plaintiff is "a member of, connected to, or associated with IOC [Italian Organized Crime]." Motion at 12-13. The Court agrees.

"Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *See Smith*, 731 So.2d at 706 (citing *Masson*, 501 U.S. at 517); *see also Levan*, 190 F.3d at 1240. "According to U.S. Supreme Court and Florida case law, falsity exists only if the publication is substantially and materially false, not just if it is technically false." *See Smith*, 731 So.2d at 707. "A 'statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " *See id.* (quoting *Masson*, 501 U.S. at 517). Thus, instead of requiring perfect accuracy, what Florida " 'law requires is that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial.' " *See McCormick*, 139 So.2d at 200 (quoting 53 C.J.S. Libel and Slander §122).

In analyzing whether a statement is actionable the Court must consider the broader context of the publication at issue. *See Smith v. Cuban American Nat'l Foundation*, 731 So. 2d 702, 706 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b] ("There is no way to determine the 'gist' or 'sting' of the publication in the mind of the average viewer without examining the statement in context."); *Turner*, 879 F.3d at 1262-63 (stating that in making such assessment, the "court should construe statements in their totality, with attention given to any cautionary terms used by the publisher in qualifying the statement."); *Parekh v. CBS Corp.*, 820 F. App'x 827, 833 (11th Cir. 2020) (finding court must look at other statements in article to determine whether challenged statement is defamatory in context); *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983) (noting that articles are "to be considered with their illustrations; pictures are to be viewed with their captions; stories are to be read with their headlines").

Here, three of the allegedly defamatory statements—that Plaintiff is "a top member of an alleged New York crime family"—are set forth under a headline that refers to Plaintiff as an "*alleged* New York crime family leader" (emphasis added) and in an article that used the term "alleged" every time "New York crime family" or "Mafia organization" is mentioned.

While describing Plaintiff as "an alleged top member" or "an accused top member" or "a suspected top member" or "a purported top member" would have been more accurate, viewing what was written in context, which the Court must do, leads to the conclusion that the challenged statement is not defamatory. *Rasmussen v. Collier Cnty. Publ. Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3112a] ("court must consider the context in which the statement was published and accord weight to cautionary terms used by the person publishing the statement").

The "gist" or "sting" of the *Miami Herald* Article is its accurate reporting that Plaintiff has been charged with being a member of, connected to, or associated with Italian Organized Crime. Alleged inaccuracies regarding Plaintiff's exact membership status, rank, or stature within the suspected criminal organization do not render the reporting actionable because supposed inaccuracies regarding rank or position do not "affect materially the purport of the article." The "gist" or sting" of the accurate reporting of the government's allegations—that Plaintiff is a member of, connected to, or associated with Italian Organized Crime—remains unchanged.

A "workable test" for determining whether the Article is substantially true is to "eliminate the alleged falsities" from the Article and then assess how the "common mind would understand" the Article with those words removed. *Bishop v. Wometco Enters., Inc.*, 235 So. 2d 759, 762 (Fla. 3d DCA 1970); *Hill v. Lakeland Ledger Publ'g Corp.*, 231 So. 2d 254, 256 (Fla. 2d DCA 1970). Or as Plaintiff phrases it: "The fundamental question in Florida in applying the substantial truth doctrine is whether the defamatory statement produced no different effect on the mind of the reader than would the truth." Resp. at 12. Plaintiff agrees that a "news report that contains a false statement is actionable only when significantly greater opprobrium [public discredit or disgrace] results from the report containing the falsehood then would result from the report without the false-

hood." Resp. at 12 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F. 3d 1222, 1228 (7th Cir. 1993).

Here, removing the word "top" or even "top member" from the Article would have little impact on the gist or sting of the Article. Even without those words, any reasonable reader would understand that Plaintiff is "among six men targeted by federal prosecutors, who have called the group the 'Italian Organized Crime' family of Western New York:" is the nephew of Joseph Todaro, Jr., "who authorities say has headed the local mob, according to the Buffalo News;" and was accused by federal prosecutors of conspiring with a retired DEA agent, including related to bribes "including some the government says are connected to organized crime." In other words, the common reader would come away with a similar perception of Plaintiff—that he is allegedly a significant criminal figure—with or without the inclusion of the allegedly defamatory word(s).

Plaintiff argues that "[h]ere, it clearly cannot be said that a statement that someone is the nephew of a crime family leader, or even accused of being associated with a crime family, conveys the same meaning or impression as falsely saying someone is a 'crime family leader.' " Resp. at 13. This argument misses the mark. The issue is whether the gist or sting of the four statements would change if they did not refer to Plaintiff as "leader" or "top member," and said only that the federal government has charged Plaintiff with being a member of, connected to, or associated with Italian Organized Crime. The Court finds that the sting would be substantially similar. *See, e.g., Readon*, 317 So.3d at 1234-35 (affirming dismissal on the basis that the statements were substantially true); *Marshall*, 943 So.2d at 280 (same); *Marder*, 2020 WL 3496447, at *5 (dismissing defamation claims based on the substantial truth doctrine).

Counts 1 and 2 are dismissed to the extent they are premised upon those four sentences, and the dismissal is with prejudice because "no amendment of the complaint would change the non-defamatory statements to defamatory ones." *See Skupin*, 314 So.3d at 357 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a].

D. Count 2, for Defamation *Per Se*, Fails for the Additional Reason that There Is No Such Cause of Action.

McClatchy and Mr. Weaver argue that Count 2, for defamation *per se* against McClatchy and Mr. Weaver, should be dismissed with prejudice for the additional reason that there is no longer any such cause of action. Motion at 14-15. The Court agrees.

> At common law, before [*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)], we said words amounting to libel per se necessarily import damage and malice in legal contemplation, so those elements need to be pleaded or proved, as they are conclusively presumed as a matter of law. ***This statement is no longer accurate regarding a libel action against the media.*** Nonetheless, for purposes of pleading a negligence action against the media, labeling an action libel per se remains useful shorthand for giving a media defendant notice that plaintiff is relying upon the words sued upon as facially defamatory, and therefore actionable without resort to innuendo.

Mid-Florida Television Corp. v. Boyles, 467 So.2d 282, 283 (Fla. 1985) (internal citation and quotation omitted) (emphasis added); *see also id.* at 284 (Ehrlich, J., concurring specially) ("Libel per se is dead, and let no one read from this decision that this ghost which we find still persists lingers in any form other than as a shorthand term.").

Plaintiff argues that *Boyles* means only "that Florida no longer recognizes presumed damages in the context of defamation per se claims, not that it no longer recognizes defamation per se as a cognizable claim." Resp. at 13. Plaintiff contends that because he is not seeking presumed damages, he can assert a cause of action for defamation *per se*. Plaintiff's argument fails because he does not—and cannot—explain what the difference is between his purported causes of action for defamation and defamation *per se*. Given that "defamation *per se*" no longer gives rise to presumed damages, there is no difference between Counts 1 and 2, which makes Count 2 duplicative of Count 1 and ripe for dismissal.

III. CONCLUSION

For these reasons, Counts 1 and 2 of the Complaint are DISMISSED with prejudice. Counts 3 and 4 of the Complaint having been dismissed with prejudice by prior Order, the Clerk shall CLOSE this case.

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[1]Defendants Sun-Sentinel Company, LLC and Mario Arza filed a separate motion to dismiss, which the Court granted by separate Order.

[2]In any event, it was appropriate for the Court to consider the *Buffalo News* Article in connection with the Motion. The *Miami Herald* Article was attached as an exhibit to the complaint and, consequently, "must be considered a part thereof for all purposes." *See* Fla.R.Civ.P. 1.130(b). The *Miami Herald* Article, in turn, included a hyperlink to the *Buffalo News* article, and materials that are hyperlinked in an article that is attached to the complaint are considered to be contained within the four corners of the article/exhibit. *See, e.g., Skupin v. Hemisphere Media Group, Inc.*, 314 So.3d 353, 356 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a] ("In the case before us, the trial court did not deviate from the four corners of the complaint when considering defendant's motion to dismiss because all the broadcasts, either via hyperlink or attached transcripts, were attached to the complaint and thus incorporated.") *Adelson v. Harris*, 973 F.Supp.2d 467, 483-486 (S.D.N.Y. 2013); *Edwards v. Schwartz*, 378 F.Supp.3d 468, 501-02 (E.D. Va. 2019) (considering a document "without converting the motion to dismiss into one for summary judgment" because an exhibit to the complaint contained "active hyperlinks" to the document).

[3]It was appropriate for the Court to consider the Indictment in connection with the Motion. As noted in the immediately preceding footnote, the *Miami Herald* Article was attached to the complaint as an exhibit and thus "must be considered a part [of the complaint] for all purposes" under Rule 1.130(b). The *Miami Herald* Article reports the contents of the Indictment, and "where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So.3d 749, 752 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a].

[5]That this privilege is "qualified" means only that the report of the underlying government or court documents must be accurate. *See, e.g., Ortega v. Post-Newsweek Stations, Florida, Inc.*, 510 So.2d 972, 975 (Fla. 3d DCA 1987) ("[W]hile the press may report upon a defamatory statement made at an official proceeding, it will nevertheless be liable if the private plaintiff shows that the press failed to take reasonable measures to insure that the report of the *proceeding* is accurate.") (emphasis in original); *Alan v. Palm Beach Newspapers, Inc.*, 973 So.2d 1177, 80 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D116a] (quoting *Walsh v. Miami Herald Pub. Co.*, 80 So.2d 669, 671 (Fla.1955)) ("This statement merely means that the report of judicial proceedings must be correct.").

[6]In this section of Plaintiff's response, he also argues that the wire service defense does not apply to statements that Plaintiff was a leader or top member of an organized crime family. For example, Plaintiff argues that "the four (4) statements in the Miami Herald article that the Plaintiff is a 'top member of an alleged New York crime family' simply do not appear in the Buffalo News article." Resp. at 6. McClatchy and Mr. Weaver did not raise the wire service argument in connection with the four sentences to which Plaintiff is referring. They raised the argument only in connection with the statement that "Gerace is among six men targeted by federal prosecutors who have called the group the 'Italian Organized Crime' family of Western New York." That statement does not say that Plaintiff is a leader or top member of anything.

* * *

Criminal law—Post conviction relief—Counsel—Ineffectiveness—Counsel was not ineffective for failing to depose witness where witness could not be located, and contents of potential testimony was speculative—Counsel was not ineffective for failing to call defendant's girlfriend to testify at trial where there was no trial due to defendant's acceptance of plea offer, girlfriend repeatedly refused to make herself available as defense witness if case went to trial, and girlfriend's testimony would have consisted of inadmissible hearsay statement by nonparty admitting to committing crimes with which defendant was charged—Counsel was not ineffective for failing to obtain crime scene surveillance video where there is no evidence that video ever existed, that video still existed when counsel took over case one year after crimes were committed or that video was exculpatory—No merit to claim that counsel was ineffective for failing to present testimony of person defendant claims committed crimes where witness could not be expected to admit to guilt, and his testimony would actually have been detrimental to defense—Counsel was not ineffective for failing to develop evidence showing that defendant could not fire gun with right hand due to childhood injury where there is no evidence that defendant could not fire gun with left hand or by using both hands—Counsel was not ineffective for failing to provide incarcerated defendant with state's discovery responses—Counsel was not ineffective for failing to conduct crime scene reconstruction where reconstruction would, at best, show that defendant was not shooter but was liable under law of principal/accessory as getaway driver

STATE OF FLORIDA, Plaintiff, v. YOSVANY TORRES ACOSTA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F19-6627. September 13, 2024. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

I. Introduction

Defendant was charged with nine counts of very serious and violent felonies. He was then made a favorable plea offer pursuant to which he would plead guilty to four counts and serve ten years in prison with no mandatory minimum term, followed by ten years of probation. He accepted that plea offer on June 6, 2022.

The presiding judge, Hon. Ariana Fajardo, conducted her customarily thorough and thoughtful change-of-plea colloquy. Although trial counsel for the defense made clear that he was ready for trial, Tr. 3, 6,[1] the plea offer extended by the State was too good to pass up. Mr. Torres Acosta was looking at 50 years in prison with a 20 year mandatory minimum term. Tr. 6, 9-10.[2] So far as appears, the evidence against him was daunting. Judge Fajardo very diligently reviewed with the defendant the potential consequences of trial and conviction. As she explained to him:

> I need to go over this with you very carefully because I want to make sure that you fully understand everything that we're doing here today[,] because while you're going to get all the credit for time served, you're still going to be in prison for a period of time.
>
> I want to make sure that you're not going to be sending me notes telling me you've changed your mind, you were taking medication, you didn't understand. So, I want to go over everything very carefully here today.

Tr. 10-11. Judge Fajardo made quite sure that Mr. Torres Acosta had, prior to deciding to accept the plea offer, "talked to [his] lawyer about this plea," Tr. 13; that the lawyer had gone "over the evidence that the State ha[d] against" Torres Acosta, *id.*; and that the lawyer had "explain[ed] . . . the benefits of this plea," compared to the potential consequences of trial, *id.* The following exchange then ensued:

> [BY THE COURT]: Is there anything you asked him [*i.e.*, your lawyer] to do that he refused to do on your behalf?
>
> [BY THE DEFENDANT]: No. No.
>
> [BY THE COURT]: Okay. So are you satisfied with [your lawyer's] services and legal advice to you in this case?
>
> [BY THE DEFENDANT]: Yes, I am.

Tr. 13. Mr. Torres Acosta acknowledged that no one forced him to accept the plea, that no one promised him anything in return for accepting the plea, and that he was pleading guilty freely and voluntarily *because he was actually guilty* and because it was in his best interest to accept the plea deal. Tr. 15. So meticulous and courteous was Judge Fajardo's conduct of the plea colloquy that, at its conclusion, after sentence was imposed upon him, the defendant thanked her "so much." Tr. 20.

That was in June of 2022. Then in June of last year, as if the foregoing had never taken place at all—as if "the world were now but to begin/Antiquity forgot, custom not known," Wm. Shakespeare, *Hamlet* Act IV sc. 5—Mr. Torres Acosta was persuaded to file, through counsel, a post-conviction motion contradicting, under oath, almost everything to which he had sworn, under oath, during the change-of-plea colloquy.[3] The judge to whom the motion was initially assigned—not Judge Fajardo, and not me—ordered a hearing on all of Torres Acosta's claims. As noted *supra* at n.1, I conducted that hearing on August 14 of this year. Page references from this point forward are to the transcript of that hearing.

II. The Post-Conviction Claims

Mr. Torres Acosta's present motion makes seven claims, all of them asserting that Torres Acosta was, in one way or another, deprived of his constitutional right to the effective assistance of counsel. Such claims are evaluated according to the familiar standard of *Strickland v. Washington,* 466 U.S. 668 (1984), which asks whether trial-level counsel provided deficient legal representation, and if so, whether the defendant was prejudiced thereby. Where, as here, a case is resolved by plea rather than trial, the prejudice prong requires a showing that, "there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *Grosvenor v. State,* 874 So. 2d 1176, 1179 (Fla. 2004) [29 Fla. L. Weekly S125a] (citing *Hill v. Lockhart,* 474 U.S. 52, 59-60 (1985)). *See also Godwin v. State,* 352 So. 3d 884 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D2349b]; *Graham v. State,* 174 So. 3d 617 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2135a]; *Lara v. State,* 170 So. 3d 133 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1559d].

Familiar as is the *Strickland* standard, there is a tendency on the part of post-conviction movants and their counsel to couch the issue as one of: Is there something, anything, more that could have been done at the trial level? A moment's reflection will suggest that the application of that "standard" would render every specimen of lawyering ineffective. There is, after all, always something more that could be done.

> [Movant] recurs to his motif: yes, his attorneys litigated this issue, but they rendered ineffective assistance because there must have been something more that could have been done. Did counsel check "GPS cell phone records, [and] pictures from Facebook"? Did they interview "several friends of the defendant?" *Mtn* p. 29. But this is a standard that is never satisfied, a test that is never met. Did they interview "several friends?" Why not all the defendant's friends? And his acquaintances? And everyone in the neighborhood?
>
> Fortunately, this unsatisfiable standard, this unmeetable test, is not the standard, not the test, for effective assistance of counsel. It is trial counsel's job to pursue the strongest leads and arguments of any case—not to try to foreclose specious claims of ineffective assistance by pursuing ever-more-purposeless leads and arguments.

State v. Dowdy, Case No. F15-18110 (11th Cir. Ct. 2022). And again:

> It is, unfortunately, a commonplace in post-conviction motions nowadays for the pleader to take as his or her theme: But there was more that could have been done. Did trial counsel take the depositions of all "A" witnesses? But there was more that could have been done: Counsel could have asked more questions, and then still more questions. And there was more that could have been done: Counsel could have moved the court to reclassify all "B" witnesses so they, too, could be asked questions and still more questions. If this is the standard by which post-conviction claims are to be evaluated, all post-conviction motions must be granted. For there will always be more that could have been done.
>
> Fortunately, however, this is not, decidedly not, the standard for evaluation of post-conviction claims. Mr. Perez recognizes the applicability of the *Strickland* standard: the requirement that he show both deficient legal performance on the part of his trial lawyers and resulting prejudice—outcome-determinative prejudice—to him. Cataloging all the "something more that could have been done" is not the same, not at all the same, as alleging that what was actually done was legally deficient.

State v. Perez, Case No. F11-11535B (11th Cir. Ct. 2022).

The motion at bar is an example of the foregoing approach to post-conviction pleading. Generally, and certainly as to claims three, five, six, and seven, the motion avers nothing more than that there was something trial counsel could have done that he didn't do. But a facially-sufficient pleading under Rule 3.850 must allege considerably more than that. It must identify the evidentiary artifact or other thing that would have been unearthed if trial counsel had done what he didn't do, and explain why a reasonable defendant, possessed of that evidentiary artifact or other thing, would have rejected the generous plea tendered in this case and insisted on exposing himself to the hazards of trial.[4]

I decline any invitation to vary from the *Strickland* line of jurisprudence. I consider Mr. Torres Acosta's claims in turn, in strict accordance with *Strickland.* In so doing, I bear always in mind that *Strickland* "places a demanding burden on a [post-conviction movant] to show that he was prejudiced by his counsel's deficient performance," *Pye v. Warden,* 50 F. 4th 1025, 1041 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1802a] (en banc); and it "strongly presume[s counsel] to have rendered adequate assistance," *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011) [22 Fla. L. Weekly Fed. S904b].

1. Post-Conviction Claim One: Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Take the Deposition of Marcos Lopez

Torres Acosta's post-conviction motion alleges that trial counsel rendered ineffective assistance of counsel by failing to take the deposition of one Marcos Lopez. "[W]hen a failure to depose is alleged as part of an ineffective assistance of counsel claim, the [defendant] must specifically set forth the harm from the alleged omission, identifying 'a specific evidentiary matter to which the failure to depose witnesses would relate.' " *Ferrell v. State,* 29 So.3d 959, 969 (Fla. 2010) [35 Fla. L. Weekly S53a] (quoting *Davis v. State,* 928 So.2d 1089, 1117 (Fla. 2005) [30 Fla. L. Weekly S709a]). *See also Reed v. State,* 326 So. 3d 767 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1884a]. Reed alleged that his trial lawyers were ineffective for failing to take the depositions of victims of collateral crimes. But Reed's allegations were "conclusory and insufficient." *Reed,* 326 So. 3d at 774. "[M]erely asserting that a deposition would have revealed reliability and impeachment issues is not sufficient to warrant post-conviction relief." *Id.* at 775.

Mr. Torres Acosta's motion at bar asserts even less than that. His trial counsel testified at the post-conviction hearing (and I suspect post-conviction counsel knew in advance of the hearing) that he, "tried to take his [*i.e.*, Mr. Lopez's] deposition and he failed to show. . . . The State said they had no contact with him whatsoever. And then I had my investigator try to get a new address and it was the same address that the State had." Tr. 15. *See also* Tr. 17 ("I set him for deposition. He did not show, the address was bad. I ask[ed] the State, the State did not have a good address. My investigator could not find a good address."); 32 ("Marcos Lopez . . . nobody could find him"); 53.

Post-conviction counsel attempted to conjure up an inference that Lopez had exculpatory testimony to give, but there was no evidence of that. Tr. 53. Post-conviction counsel did not call Lopez as a witness at the August 14 hearing. She did not produce an affidavit from Lopez. She did not account for his whereabouts, or claim to know where he could have been found at time of trial or plea. Her position, in effect, was: trial counsel was constitutionally ineffective for being unable to do what I am equally unable to do. Whatever that is, it isn't a claim of ineffective assistance of counsel.

The Sixth Amendment guarantees a criminal defendant the services of a lawyer. More than that, it guarantees that those services will meet a level of competence and professionalism consistent with the standards of the legal community. But it does not guarantee a lawyer who can pull bunny rabbits, or missing witnesses, out of hats. Here, trial counsel made all possible efforts to locate Marcos Lopez and determine what testimony, if any, he had to offer in this case. The efforts he made were unavailing, but they were consistent with standards and practices in the legal community. For that purpose he was required to be effective; he was not required to be successful. Post-conviction counsel's apparent inability to produce Mr. Lopez for the post-conviction hearing, or obtain a statement from him, corroborates the conclusion that trial counsel did all that could be done. Where Mr. Lopez was at time of trial, and where is he is now, are matters of the rankest speculation. What Mr. Lopez might have testified to had he appeared at trial, and what he might have testified to had he appeared at the post-conviction hearing, are matters of the rankest speculation. Such unbridled speculation does not support a claim of ineffective assistance of counsel.

2. Post-Conviction Claim Two: Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Call the Defendant's Girlfriend, Madelyn Ramos, at Trial

Trial counsel was pressed repeatedly on this point: Why didn't he call Madelyn Ramos as a witness at trial? (This would have been a tad difficult to do. There was no trial, because Torres Acosta *didn't want one.* Tr. 29, 31, 64. But never mind that for now.) His answer never varied. Madelyn Ramos categorically refused to be a witness. Tr. 24 ("Absolutely, 100 percent" she refused); *id.* ("She refused to be a witness"); 24-25 ("She refused to be a witness in the case, and I begged] her again and again"); 30 ("she would not be a witness. I can't tell you how many times I asked and she refused to be a witness"); 50 ("She refused to be a witness"). Her reluctance was perfectly understandable. It was her car that Mr. Torres Acosta was driving when his crimes were committed. A bullet hit and lodged in the car. As a result, Ms. Ramos, "was scared to death. She . . . was interviewed by the police when they found out whose car [it was]. She was scared to death that she was going to be arrested because her car was used." Tr. 24. In the circumstances, it is hardly surprising that, had there been a trial—and there wasn't, because Mr. Torres Acosta, as he very emphatically swore to Judge Fajardo, wanted to take the plea—Ms. Ramos wanted no part of it. *See Melton v. State,* 949 So. 2d 994, 1004 (Fla. 2006) [31 Fla. L. Weekly S811a] (counsel is not deficient for failing to call a witness who refuses to cooperate with the defense).

Ms. Ramos testified at the August 14 hearing. *Mirabile dictu,* she swore up and down that she had been ready, willing, and able to testify on behalf of her inamorato at trial. Tr. 101-102. I don't believe her; but even if I did, her testimony would have been entirely inadmissible at trial.

In his post-conviction motion, Mr. Torres Acosta alleges that Ms. Ramos would have testified if called that one Enrique Garcia Escobar, referred to as Kiki, acknowledged to her that it was he and not Torres Acosta who committed the crimes for which Torres Acosta was prosecuted. *Motion for Post Conviction Relief* 15; Tr. 98-99. Of course such testimony would not have been received at trial from the lips of Ms. Ramos. Garcia Escobar was not a party to this criminal litigation. His out-of-court statement, if offered by the defense, would not have constituted the admission of a party-opponent, Fla. Stat. § 90.803(18). And it would not be admissible as a declaration against penal interest, Fla. Stat. § 90.804(2)(c), because, "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement." Here, there are absolutely no corroborating circumstances that show the trustworthiness of the statement. Thus even if Ms. Ramos had been willing to testify at trial—and she wasn't—she would not have been permitted to retail hearsay from Mr. Garcia Escobar. There can be no serious suggestion that Mr. Torres Acosta, or any reasonable defendant similarly situated, would have rejected the extremely favorable plea offer extended to him and insisted on going to trial based on testimony that was inadmissible and would never have been received at trial.

Ms. Ramos's testimony and that of trial counsel are in diametric opposition. I find trial counsel to be credible. I believe that he asked Ms. Ramos, not once but time and again, to make herself available as a defense witness if the case were to go to trial. I believe that Ms. Ramos, rightly concerned with her own potential exposure to criminal liability, declined to do so. I note—and this is discussed in greater detail *infra* at 11 *et. seq.*—that post-conviction counsel did not produce the evanescent Mr. Garcia Escobar at the post-conviction hearing, and did not produce an affidavit or statement from him. Perhaps he exists, somewhere. Perhaps he knows something about this case, somehow. Add these "perhapses" to the list of categories of speculation upon which the motion at bar is built. This claim is without merit.

3. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Obtain Surveillance Videos from the Crime Scene

This averment may be readily disposed of. The crimes for which Mr. Torres Acosta was convicted occurred, or at least began, in or near a bar. Post-conviction counsel appears to believe that the bar had a surveillance camera and, based on that belief, takes the position that trial counsel was ineffective for failing to obtain any surveillance video that may have been generated reflecting the crime. The testimony given by trial counsel at the August 14 hearing, however, is entirely to the contrary. He explained that, "The bar had closed in 2020. I got on the case in 2021. At that time, I asked [the] lead detective about it. [The police] had . . . never recovered any video. It was two years later." Tr. 36. Trial counsel learned from the person who had owned the bar when it existed "that she had no copies of it," *i.e.,* of any video. Tr. 36. "There was no evidence of any video." *Id.* And again: "There was no video that existed, so I—I had confirmed that with the lead detective and later on the owner of the bar." *Id.*. Tr. 59-60.

If trial counsel had failed to investigate the existence of any video, and had failed to inquire of the police regarding a video, an argument could be made that his performance was deficient. Here, no such argument can be made. If there were reason to believe that a video of the criminal incident in question existed, and that it exculpated Mr. Torres Acosta, an argument could be made that counsel's deficient performance prejudiced his client. Here, no such argument can be made. Post-conviction counsel offered no evidence whatever to suggest that there ever was a video; or that if there was a video, it still existed and could be located at the time trial counsel took over the case; or that the video was exculpatory in its content. Indeed in the post-conviction motion itself, post-conviction counsel concedes that any "surveillance videos were erased" before use could be made of them. *Motion for Post-Conviction Relief* 45.

Trial counsel's performance in this regard was neither deficient nor prejudicial, and therefore not ineffective. This claim, too, is without merit.

4. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Locate and Present the Testimony of the Person on Whom he Hoped to Blame the Crime

Had the case gone to trial, the theory of the defense would have been, not that the crime wasn't committed, but that Mr. Torres Acosta wasn't the man who committed it. Tr. 65. For such a defense to have a chance of success, it helps to provide the jury with the name of the person whom the defense alleges was the true culprit, and to have some evidence of his culpability. In the argot of the courthouse, this is sometimes known as a SODDI defense (SODDI being an acronym for "some other dude did it"), or a "Plan B" defense. Had this case gone to trial, Enrique "Kiki" Garcia Escobar would have been the other dude. He would have been Plan B. Tr. 65.

When that's the defense, trial counsel will spend the days and weeks before trial wishing, hoping, praying that the other dude, the Plan B, will be somewhere far, far away from the Richard E. Gerstein Justice Building at the time of trial. "Where is the *real* perpetrator?", defense counsel wants to be able to ask the jury rhetorically. "Why aren't the police bringing him in here? Why aren't the police out looking for him? Wherever he's hiding, we know what he's doing. He's laughing—laughing at us, for putting my innocent client on trial for *his* crime."

It's not a bad argument. It's even been known to work. But nothing will upend it faster than having the other dude, the Plan B, walk through the courtroom door, take the witness stand, and declare with outrage, feigned or real, "Me? Oh, no, I didn't do it. Don't try to blame me for that defendant's crime."

All of the foregoing is well known to experienced and accomplished criminal defense lawyers, and both trial counsel and post-conviction counsel here are very experienced and very accomplished. Thus during trial counsel's testimony at the August 14 hearing, he seemed almost flabbergasted at the suggestion by post-conviction counsel that he rendered ineffective assistance by failing to locate Mr. Garcia Escobar and to subpoena him for trial. *See, e.g.,* Tr. 32 ("I wouldn't call Kiki . . . because why would you call somebody that you're trying to blame[?]"). Asked, "[Y]ou did not . . . attempt to speak to Mr. Garcia, correct?", trial counsel was so befuddled by the implication behind the question that he almost stammered in responding, "Never. I mean, why—why again, you're with someone on the [witness] stand and accuse them of—of being the shooter and they're going to say, 'Yes, I'm the shooter[?]." Tr. 33. If the only, or best, defense that would have been available to Torres Acosta had this case gone to trial was making Garcia Escobar the other dude, the Plan B, there is an argument that trial counsel would have performed deficiently if he *had* secured Garcia Escobar as a trial witness.

There was no suggestion at the hearing that Mr. Garcia Escobar was willing, at time of trial; or is willing, now; to come forward, confess his guilt, and exculpate Mr. Torres Acosta.[5] Thus even if there is some version of affairs pursuant to which it was a specimen of deficient performance for trial counsel not to locate and subpoena Garcia Escobar for trial—and I confess that I cannot conceive of such a version of affairs—there can be no argument whatever that prejudice inured to Mr. Torres Acosta as a consequence of that deficient performance.

This claim is without merit.

5. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Develop Evidence Tending to Show that Torres Acosta Could not Shoot a Gun with his Right Hand

There are a great many reasons why the novel To Kill a Mockingbird and the movie made from that novel are considered among the finest of American literary and cinematic achievements. Well down the list of those reasons, but not to be overlooked, is the cross-examination that the protagonist, Atticus Finch, conducts of the wretched Bob Ewell in the course of defending Tom Robinson for a crime that Ewell actually committed. Ewell's daughter was badly beaten; and her injuries, predominantly on the right side of her face and body, were inflicted by someone who did most of the damage with his left fist. Atticus Finch was too good a lawyer to come right out with the question, "Are you left-handed?" Instead, his cross proceeded in this fashion:

Q: Can you read and write?

A: I most positively can.

Q: Will you write your name and show us?

A: I most positively will. How do you think I sign my relief checks?

Then, in the plain view of the judge and jury, the witness signed his name—with his left hand.

I was reminded of the foregoing in connection with Mr. Torres Acosta's fifth post-conviction claim. He claims that although he is right-handed, some three decades ago during his boyhood in Cuba, his right hand was badly injured, such that he would be unable to hold a pistol and pull the trigger. When Torres Acosta testified at the post-conviction hearing, prosecution counsel was presented with a once-in-a-lifetime opportunity to reproduce Atticus Finch's cross-examination of Bob Ewell. Asked if he could read and write, Torres Acosta would likely have answered that he could do so in Spanish. (Of course there was the possibility that he would have replied that he couldn't read and write at all. The best-laid schemes of mice, men, and cross-examiners often go astray.[6] When that happens, you try to look like the answer you got was the one you were hoping for and you move on.) Prosecution counsel could then have handed Torres Acosta a pen and piece of paper and asked him to sign his name. Had he done so with his right hand, counsel could then have asked me, pursuant to Fla. Stat. § 90.105 (preliminary questions), to so find, noting that the gripping of a pen requires strength and flexibility comparable to that required to grip a pistol. Had he done so with his left hand, counsel could then have asked me to so find, noting that the writing of one's name requires as much dexterity as the firing of a pistol. Regrettably, none of this happened.

And apart from the disappointment associated with missing an opportunity to recreate one of the greatest trial scenes in American movie history, it really doesn't matter that none of this happened. As trial counsel pointed out, Mr. Torres Acosta has had, by his own admission, thirty years or so to learn to do things with his left hand. Tr. 44. Apparently he drives a car, relying principally if not exclusively on his left hand; and driving a car in the whirligig that is Miami traffic certainly requires as much or more manual dexterity than shooting a pistol. Suppose, as post-conviction counsel seems to suggest, trial counsel could have called members of Mr. Torres Acosta's family, or a physician, to testify at trial that Torres Acosta experiences some disability in the use of his right hand. That still leaves wide open the prospect that he shot with both hands, or with his left hand. Tr. 92 (Torres Acosta acknowledges that he "grabs things" and "drives" with his left hand.) It is a prospect that a family member or doctor would have been unable to deny; and that being the case, the testimony of such a witness might actually have benefitted the State. Such a witness would have been obliged to concede that Mr. Torres Acosta has gotten along in life just fine for the past thirty years or so using his left hand, or both hands. Such a witness would of course be asked about all manner of everyday things that he or she had seen Mr. Torres Acosta do. Does he eat with a fork and knife? Does he open doors? Does he own any guns, and if so, does he shoot them? And so on and on.

And as trial counsel pointed out in his testimony, even if Mr. Torres Acosta never shot the gun at all but merely drove the getaway car, he would be criminally liable on principal-accessory theory.[7] Any claimed deficiency in trial counsel's performance on this point is no more than speculative, as is any claimed ensuing prejudice. No reasonable defendant, situated as Torres Acosta was on the eve of trial, would have rejected the remarkably charitable plea offer extended by the State and gambled the rest of his life on the exculpatory effect of testimony such as might have been offered on this point.

6. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Provide Copies of the State's Discovery Responses to Torres Acosta in Jail

This portion of Mr. Torres Acosta's pleading laments that trial counsel "did not adequately furnish discovery, motions, documents, or transcripts to Defendant" while Torres Acosta was in jail awaiting trial. *Motion for Post-Conviction Relief* 4l. It is less than clear how this states a claim for relief under Rule 3.850.

To be sure, Rule 4-1.4 of the Rules Regulating the Florida Bar obligates a Florida lawyer to "keep the client reasonably informed about the status of" his case, Rule 4-1.4(a)(3), on an ongoing basis. And when the client is called upon to make one of those decisions that only the client can make, such as whether to accept the State's plea offer, a Florida lawyer must "inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required," Rule 4-1.4(a)(1); and must "explain a matter to the client to the extent reasonably necessary to permit the client to make informed decisions," Rule 4-1.4(b). Apart from ethical obligations, business considerations also militate in favor of a lawyer's placating a client's reasonable requests for documents relating to his case. An incarcerated defendant who is happy with the attention he gets from his lawyer may encourage other, less-happily-incarcerated defendants to retain that lawyer

But what, exactly, does Mr. Torres Acosta complain of here? Generally, a lack of attention from his trial counsel? Or specifically, the failure of trial counsel to inform him of the advantages and disadvantages of the State's plea offer, such that he could make a fully-informed decision about accepting or rejecting that plea offer?

If the former, Torres Acosta is entitled to no relief. Not providing a jailed client with the attention he craves may be bad from a client relations (or future client development) standpoint, but it is not deficient performance. In this case, trial counsel testified that his policy is the same as that of every sensible and experienced criminal-defense attorney. As a general rule, he does *not* send a copy of the State's discovery response, Fla. R. Crim. P. 3.220(b), or of transcripts of depositions or like-kind documents to an incarcerated client. Tr. 39, 13-14. Bitter experience has taught that in jail there is neither privacy nor secrecy, and that the discovery documents meant for the hands of a client inevitably find their way into the hands of other jailbirds. Those other jailbirds are then in a position to claim (based on information garnered from the discovery materials) that the client made a jailhouse confession to them, which they will be pleased to retail at trial in exchange for consideration as to their own charges and sentences. As trial counsel testified, "[Y]ou're always worried that someone else is going to look at that [discovery document] and then they're going to say that, 'Hey, I—I—he gave me a—jail has [*sic*; jailhouse] confession.' " Tr. 39. It happens again and again.[8]

Wisely, then, trial counsel does not send materials received in discovery to in-custody defendants. Of course if such a client makes a specific request for a specific document, counsel provides it. Tr. 39. Other than that, he brings discovery materials with him when he meets

with clients, and takes them away with him when he leaves. *Id.* That is what he did in this case. Far from being deficient performance, it is cautious and well-considered practice.

As noted *supra,* it may be that Mr. Torres Acosta is alleging in the present claim, not that trial counsel provided him with insufficient attention (or insufficient paperwork) in general, but that trial counsel failed to inform Torres Acosta adequately about the strengths and weaknesses of his case so that he could make an informed, intelligent decision to accept or reject the State's plea offer. I proceed, however, on the premise that that is *not* the crux of Mr. Torres Acosta's claim. I proceed on that premise because in the course of his change-of-plea colloquy before Judge Fajardo, Torres Acosta swore on his oath that that was not the case. Recall, as noted *supra* at 2, that Judge Fajardo made quite sure that Mr. Torres Acosta had, prior to deciding to accept the plea offer, "talked to [his] lawyer about this plea,"; that the lawyer went "over the evidence that the State ha[d] against" Torres Acosta; and that the lawyer "explain[ed] . . . the benefits of this plea," compared to the potential consequences of trial. The following exchange then ensued:

> [BY THE COURT]: Is there anything you asked him [*i.e.,* your lawyer] to do that he refused to do on your behalf?
>
> [BY THE DEFENDANT]: No. No.
>
> [BY THE COURT]: Okay. So are you satisfied with [your lawyer's] services and legal advice to you in this case?
>
> [BY THE DEFENDANT]: Yes, I am.

Mr. Torres Acosta acknowledged that no one forced him to accept the plea, that no one promised him anything in return for accepting the plea, and that he was pleading guilty freely and voluntarily because he was actually guilty and because it was in his best interest to accept the plea deal. And Judge Fajardo made clear to Mr. Torres Acosta *why* she was sifting him so carefully to make a record of the informed, voluntary nature of his plea:

> I need to go over this with you very carefully because I want to make sure that you fully understand everything that we're doing here today . . .
>
> I want to make sure that you're not going to be sending me notes telling me you've changed your mind, you were taking medication, you didn't understand. So, I want to go over everything very carefully here today.

If the motion at bar were to be understood, at least as to the present claim, to be one of those "notes telling me you've changed your mind . . . [or that] you didn't understand," that Judge Fajardo worked so hard to pretermit, it would be difficult not to view the present claim as the sort of perjury by contradictory statements made felonious by Fla. Stat. § 837.021. I would then be obliged either to impose summary punishment, *see* Fla. Stat. § 914.13, or to refer the matter to the Office of the State Attorney for Mr. Torres Acosta's further criminal prosecution.

Absent incontrovertible evidence that this is what Mr. Torres Acosta intended by his present claim, I decline to afford it that interpretation. Rather, I treat the present claim as complaining, as discussed *supra* at 16-18, that Torres Acosta was disappointed by the lack of visits from, attention from, chit-chat with, his trial counsel. Perhaps his disappointment is understandable. But it does not make out a claim for relief under Rule 3.850.

7. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Reconstruct The Crime Scene, and to Inspect Ms. Ramos's Vehicle

This claim is difficult to fathom. The post-conviction motion alleges that Torres Acosta told his trial counsel:

> that he was not the shooter and a thorough investigation of the crime scene, including reconstructing the shooting and inspecting the vehicle, where there was a bullet hole in the vehicle Defendant was allegedly driving, would have been vital to proving that Defendant, while at the bar, was not the person who shot from the vehicle. [Trial counsel] made insufficient efforts to investigate the case, and if he had made a timely, reasonable investigation regarding the crime scene, he could have been in a better position to advise his client on whether to proceed to trial immediately, seek a continuance, or agree to a plea bargain.

Motion for Post-Conviction Relief 47-48. The foregoing does not withstand scrutiny.

First, the foregoing largely concedes that, at a minimum, Mr. Torres Acosta was involved in the shooting as the getaway driver. As trial counsel pointed out in his testimony at the hearing, under the law of principal/accessory, that would make him liable for the crimes committed. That doesn't help.

The author of the post-conviction motion muses that if a crime scene reconstruction had been done it might have proved that Mr. Torres Acosta was not the shooter (although he would still be the driver). What is the basis of these musings? Did post-conviction counsel conduct a crime-scene reconstruction? Did it reveal new, specific evidence establishing Torres Acosta's innocence? No such evidence was presented at the hearing on the post-conviction motion. No such evidence was even hinted at. Of course it is possible to speculate that a crime-scene reconstruction might have shown this and might have shown that, but such speculations are grossly insufficient to support a claim under Rule 3.850. (And just one crime-scene reconstruction wouldn't have been enough. Under the "but something more could have been done" theory of post-conviction litigation, trial counsel would have been ineffective if he didn't commission two crime-scene reconstructions. Or three. Or . . .)

The post-conviction motion muses further that if trial counsel had done additional investigation of the crime scene, he might have been better situated to advise his client regarding the plea. What would he have learned that would have altered the advice he gave his client, or the decision that his client made? The reader of the motion will never learn, because the motion identifies nothing. And at the hearing nothing was presented. All in all, this is an example of the "but perhaps something else could have been done" notion of ineffective assistance of counsel, *see supra* 4-5.

The irony in all this is that, by the time trial counsel was retained in this case, the crime scene had ceased to exist. The bar was gone. A new restaurant was in its place. Tr. 46. For what it was worth—and it wasn't worth much—trial counsel had his investigator take photos of the new and improved former crime scene, *id.*; and for what it was worth—and it wasn't worth much—he showed them to Mr. Torres Acosta. *Id.*

This claim is entirely without merit.

III. Conclusion

To Oscar Wilde (among others) is attributed the aphorism, "Be careful what you wish for, you may get it." Mr. Torres Acosta, through the motion at bar, wishes for his judgment and sentence to be set aside. If that were to be done, the State would be free to prosecute him as originally charged. The State would have little incentive to again extend the plea bargain from which Torres Acosta presently benefits, because at any retrial the State would offer into evidence Mr. Torres Acosta's sworn acknowledgment to Judge Fajardo that he was actually, factually guilty of the crimes charged. *See supra* at 3. Armed with that sworn confession, and all the other evidence at its command, the State would have little difficulty procuring a conviction. Torres Acosta would then likely receive a sentence worse—much worse—than the one he presently undergoes. Recall that his exposure is 50 years with a 20-year mandatory minimum, *see supra* at 1.

Fortunately for Mr. Torres Acosta, the motion at bar is respectfully denied. This is a final order. The movant has 30 days in which to

appeal. Fla.R.Crim.P. 3.850(k). In the event of an appeal, the Clerk of Court is directed to transmit to the Court of Appeal the present motion, the change-of-plea transcript referenced herein, the transcript of the August 14 hearing referenced herein, and this order. *See* Fla.R.Crim.P. 3.850(f)(5).

No motion for rehearing will be entertained. *See* Fla.R.Crim.P. 3.850(j).

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[1]Page references in this part of the present order are to the transcript of the change-of-plea colloquy of June 6, 2022, the transcript of which is being filed with the Clerk of Court. A hearing on Mr. Torres Acosta's post-conviction motion was conducted on August 14, 2024. Page references to the transcript of that hearing appear *infra* at 3 *et. seq.* That transcript is also being filed with the Clerk of Court.

[2]*But cf.* Tr. 12 ("you could face sixty years in prison with two minimum mandataries of twenty years, which means you would do forty years, consecutively, day for day").

[3]*Cf.* Fla. Stat. § 837.021 (perjury by contradictory statements).

At the hearing, Keneyvis Fernandez, Mr. Torres Acosta's ex; and Yosnaydis Torres, Mr. Torres Acosta's daughter; testified briefly. Their testimony was of a piece with the version of affairs to which Torres Acosta swore in the motion at bar, and therefore diametrically at odds with the version to which Torres Acosta swore at the change-of-plea hearing before J. Fajardo. I afford them little if any credibility. But at least they aren't subject to prosecution under § 837.021.

[4]As noted *supra*, I was not the judge who ordered an evidentiary hearing on the motion at bar. But the hearing having been ordered and the case having come to me, I felt obliged to go forward on the hearing.

[5]Post-conviction counsel requested and was afforded yet another hearing on September 11. At that hearing she called, for reasons not readily discerned, a bail bondsman who had at some time in the past taken Mr. Garcia Escobar out on bail in cases in Miami and Tampa. The bondsman testified that Mr. Garcia Escobar had fled, and that the bondsman had been searching for him. At some point in the year 2022—the bondsman couldn't say when, couldn't even narrow it as to month or season—Ms. Ramos provided the bondsman with information that enabled him to locate Garcia Escobar and surrender him to the police. The bondsman was never asked, and did not testify, whether Mr. Garcia Escobar had anything to say about the crimes with which Mr. Torres Acosta was charged. The bondsman was unable to say whether Mr. Garcia Escobar was taken into custody before or after Torres Acosta took his plea. Thus the relevance of this testimony is difficult to divine.

[6]Apologies to Robert Burns. *See* Robert Burns, *To a Mouse* ("The best-laid schemes o' Mice an' Men/Gang aft agley").

[7]*See* Fla. Stat. § 777.011, captioned "Principal in the first degree:"

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

[8]I am entitled to take judicial notice of, "Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court." Fla. Stat. § 90.202(11).

* * *

Criminal law—Offenses against students by authority figures—Constitutionality of statute—Overbreadth—Vagueness—Teacher charged with violating section 800.101 by sending texts that were sexual or romantic in tenor to 16-year-old student argues that statute is unconstitutionally overbroad and vague—Statute is not overbroad where fanciful unconstitutional applications of statute proposed by defendant are not substantially disproportionate to statute's constitutional and wholesome applications protecting school children—Defendant lacks standing to raise claim of vagueness where it is apparent from his acknowledging to police that texts were inappropriate and his repeated cautioning of student that she keep texts secret that he knew he was engaging in wrongdoing when he was violating statute—Further, terms "solicit," "sexual conduct," "romantic," and "lewd" are words of common parlance and not vague—Mens rea—No merit to argument that statute cannot form basis of prosecution because it lacks mens rea requirement—In absence of any language expressing legislative intent to dispense with mens rea and create strict liability crime, statute will be read to require proof of mens rea—Motion to dismiss is denied

STATE OF FLORIDA, Plaintiff, v. JOSH RUDY GOODWIN, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F24-2823. September 3, 2024. Milton Hirsch, Judge.

ORDER ON DEFENDANT'S MOTION TO DISMISS

Defendant Josh Rudy Goodwin, charged with violation of Fla. Stat. § 800.101, moves to dismiss on the grounds that the language of the statute is both overbroad and vague.[1] The issue is one of first impression.

I. Facts

In late 2023 and early 2024 Mr. Goodwin, then 35 years old, was a school teacher in Homestead. A 16-year-old girl identified in court documents as N.M. was a student at the school at which Mr. Goodwin taught. Mr. Goodwin and N.M. exchanged many hundreds of text messages, the majority authored by Goodwin. Many of the messages are entirely innocuous. Some of Mr. Goodwin's messages, however, are sexual or romantic in tenor.

Concerned, N.M. brought the matter to the attention of law enforcement. The police questioned Mr. Goodwin, who admitted that he had communications with N.M. that he himself described as "inappropriate."

II. Analysis

Mr. Goodwin is not charged with any form of sexual battery. There is no suggestion that he physically molested N.M. The statute for the violation of which he is charged is Fla. Stat. § 800.101, captioned "Offenses Against Students by Authority Figures." It provides, in pertinent part, that an authority figure (defined to mean any adult who works at a school, Fla. Stat. § 800.101(1)(a), which certainly includes Mr. Goodwin) shall not "solicit or engage in" sexual conduct, or a "relationship of a romantic nature," or lewd conduct, with a student ("a student" being defined to mean a person who is enrolled at a school, Fla. Stat. § 800.101(1)(c), which certainly includes N.M.). It is the thesis of the motion at bar that to the extent the demised statutory language is designed to reach the text messages that Mr. Goodwin sent to N.M., the statutory language is overbroad or vague or both.

A. Overbreadth

So far as appears, Mr. Goodwin claims that the statutory language in question is overbroad, not merely as applied to him, but on its face. Claims of facial unconstitutionality are rare in any context, but perhaps less so in the First Amendment context. Courts have been more receptive ("more" being, as ever, a relative term) to claims of facial unconstitutionality on grounds of First Amendment overbreadth than they have been to other claims of facial unconstitutionality because of the importance of avoiding "an impermissible risk of suppression of ideas." *Nightclubs, Inc. v. City of Paducah,* 202 F. 3d 884, 889 (6th Cir. 2000) (quoting *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-4 (1990) (plurality opinion)); *see also United States v. Frandsen,* 212 F. 3d 1231, 1236 (11th Cir. 2000) (citing *Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F. 3d 1097, 1100 (9th Cir. 1998)). Here, Mr. Goodwin claims that text messages of the kind for which he is being prosecuted are protected by the First Amendment and by Art. I § 4 of the Florida Constitution,[2] and that the statute pursuant to which prosecution is brought is laden with that "impermissible risk of suppression of ideas" inimical to those constitutional provisions.

Presented with such a facial challenge, the question that a court must consider is "whether 'a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *Moody v. NetChoice, LLC, DBA Netchoice, et al.,* 144 S.Ct 2383, 2397 (2024) [30 Fla. L. Weekly Fed. S565a] (quoting *Americans for Prosperity Foundation v. Bonta,* 594 U.S. 595, 615 (2021) [28 Fla. L. Weekly Fed. S1071a]). "[E]ven a law with 'a plainly legitimate sweep' may be struck down in its entirety. But that is so only if the law's unconstitutional applications substantially outweigh its constitutional ones." *Moody,* 144 S.Ct. at 2397. "To

justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *United States v. Hansen,* 599 U.S. 762, 770 (2023) [29 Fla. L. Weekly Fed. S1062a] (citing *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 14 (1988); *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800-01 (1984)).

In his thorough and scholarly pleading, Mr. Goodwin offers no shortage of "fanciful" examples of conduct that, although clearly not intended by the Legislature to be punishable, could fall within what he views as the too-capacious grasp of § 800.101. "Does the eleventh-grade literature teacher who asks his . . . students to write an essay on James Joyce's *Ulysses* . . . engage in the solicitation of sexual or lewd conduct?", he asks.[3] The short answer is: No. He doesn't.

Reasonable educators may debate the age and grade level at which students ought to be exposed to literary works such as Joyce's *Ulysses* or D. H. Lawrence's *Lady Chatterley's Lover*—works that are generally deemed classics of their genres, but which undoubtedly require of their readers a mature understanding of the role of sex in interpersonal relationships. But neither reasonable educators nor anyone else need debate whether 16-year-old students should be exposed to sexual advances or sexually suggestive missives from their 35-year-old schoolteachers. The statute law of Florida, including § 800.101, quite properly acts to ward off such unseemly advances and missives. There can be no suggestion that by doing so § 800.101 departs from, in the language of *Hansen, supra,* its "lawful sweep." This and other "fanciful" unconstitutional applications of the statute conjured up by Mr. Goodwin's motion cannot be deemed substantially disproportionate to the statute's entirely constitutional and wholesome applications.

As to this point, Mr. Goodwin places substantial reliance on *J.L.S. v. State,* 947 So. 2d 641 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D263a]. In *J.L.S.,* a juvenile challenged as unconstitutionally overbroad Fla. Stat. § 810.0975(2)(b), which makes it a crime to trespass within a school safety zone without "a legitimate business in the school safety zone." The Third District rejected that claim.

J.L.S. "had [previously] been warned not to return to [this particular] school safety zone." *J.L.S.,* 947 So. 2d at 643. To J.L.S.'s claim that barring him from entering school property, and prosecuting him for doing so, infringed upon his freedom of expression and association, the court of appeal quite properly replied that, "The fact that a person may be exercising First Amendment rights while violating otherwise proper restrictions upon his or her entry to a public facility does not insulate that person from prosecution for trespass." *Id.* (citing *Downer v. State,* 375 So. 2d 840, 844-45 (Fla. 1979)). In *J.L.S.,* as here, "[t]he purpose of [the challenged] statute is clearly the protection of school children. We note . . . that this is a compelling governmental interest." *J.L.S.,* 947 So. 2d at 645.

The State of Florida has the same "compelling governmental interest" in protecting its school children from trespasses against their innocence that it does in protecting its school children from trespasses against their property. Giving effect to that protection may limit association or expression in which some authority figures (such as Mr. Goodwin), or some delinquents (such as J.L.S.), wish to engage. That does not render the State of Florida helpless to protect its children. Just as the Constitution is not "a suicide pact," *Terminiello v. Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J., dissenting), the First Amendment is not a child-abuse pact. The statute at issue here may implicate expression, but it regulates misconduct.

"All reasonable doubts about [a] statute's validity must be resolved in favor of constitutionality." *N.D. v. State,* 315 So. 3d 102, 104 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2478c]. I am "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome wherever possible." *Florida Dep't. of Revenue v. Howard,* 916 So. 2d 640, 642 (Fla. 2005) [30 Fla. L. Weekly S498a]. Applying that standard, I have no difficulty concluding that Fla. Stat. § 800.101 is not overbroad.

B. Vagueness

Mr. Goodwin argues that the statute in question is vague, in that the meanings of many of its key terms—terms such as "to solicit," "sexual conduct," "a relationship of a romantic nature," and "lewd conduct"—are unclear, thereby encouraging arbitrary and discriminatory enforcement. *See gen'ly Jones v. Williams Pawn & Gun, Inc.,* 800 So. 2d 267, 270 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2444a] (statute must "give[ ] a person of ordinary intelligence fair notice of what constitutes forbidden conduct"). This is an argument Mr. Goodwin is hard-pressed to make. Recall that at the time he was interviewed by the police, he acknowledged that the messages he sent to N.M were, as he himself phrased it, "inappropriate." More than once he cautioned N.M. to keep his communications secret, from which it may be inferred that he knew he was engaging in wrongdoing. Apparently he found nothing vague about the statute at the time he was allegedly transgressing it. And that being the case, Mr. Goodwin is without standing to raise a claim of vagueness.

> [A] person to whom a statute may constitutionally be applied lacks standing to raise a facial vagueness challenge on the ground that the statute may conceivably be applied unconstitutionally to others in situations not before the Court. If the record demonstrates that a defendant has engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute, then he cannot successfully challenge it for vagueness.

State v. Brake, 796 So. 2d 522, 526 (Fla. 2001) [26 Fla. L. Weekly S651a]. *See also D.M.T. v. State,* 367 So. 3d 576 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D1322b]. By his own admission, Goodwin was aware of the wrongness—the "inappropriateness"—of his campaign of sexual text messages to a 16-year-old child at his school. He will not be heard to complain that he, or any person of common intelligence, could not be expected to obey a law that barred him from doing what he understood he should not have done.

Even if Mr. Goodwin were possessed of standing to press his argument, however, it is simply not the case here that the demised language is so hopelessly vague as to befuddle a person of common understanding and subject him to arbitrary prosecution. The words about which Mr. Goodwin complains—solicit, sexual conduct, romantic, lewd—are words in common parlance. They appear in many places in Florida law; and when they do, they are either offered without definition, or accompanied by a "definition" that is nothing more than a synonym or series of synonyms. So for example Fla. Stat. § 777.04(2), which defines the inchoate crime of solicitation, offers the synonyms "command, encourage, hire, or request another person to engage in specific conduct." Does the lack of a more particularized, more technical definition render the statute void for vagueness, in the sense that the meaning of the language employed in the statute is beyond the understanding of persons of ordinary intelligence? The standard jury instruction used in connection with the crime of lewd and lascivious conduct, Fla. Stat. § 800.04(6), offers nothing more by way of definition than a series of synonyms no less opaque than the words they seek to define: wicked, lustful, unchaste, licentious. Does this mean that the statute is unconstitutionally vague, in the sense that it defies common understanding? The felony battery statute refers to "a dating relationship" and defines that term as "a continuing and significant relationship of a romantic or intimate nature." Fla. Stat. § 784.041(2)(b)2. Is the statute void for vagueness because a reader of the statute is not told how continuing, or how significant, or how romantic, or how intimate, a relationship must be to qualify? The statute vesting the Florida Education Practices Commission with

authority to discipline teachers, Fla. Stat. § 1012.795, provides that the Commission may punish a teacher for "engaging in or soliciting sexual, romantic, or lewd conduct with a student"—the very language at issue here. That statute has been on the books for decades. No one suggests it is void for vagueness.

In his magisterial treatise on the law of evidence, Prof. Wigmore recounts with approval an incident related in *Lenert v. State,* 63 S.W. 563 (Tex. 1901), in which:

> The jury sent word to the court . . . that they desired an additional charge upon the meaning of "reasonable doubt." . . . Thereupon the court told the jury verbally "that the two words 'reasonable doubt' were words of common use, and the jury could understand them as easily as the court, and the court had a *reasonable doubt* as to whether or not he could under the law charge them as to their meaning."

John Henry Wigmore, IV *A Treatise on the System of Evidence in Trials at Common Law* § 2497 p. 3544 at n. 6. The good common sense of that long-ago Texas trial judge is entirely applicable here.

It is a fair construction of Mr. Goodwin's statement to the police that he well understood what the demised statute barred him from doing, and that he well understood that he had done it. That is not the only possible construction, but it is a fair one. Whether it is the correct one in this case is something for a jury to determine. Jurors, like schoolteachers and other persons of common intelligence, are perfectly capable of understanding and applying words such as solicit, sexual, romantic, and lewd.

The purpose of the statute is the protection of children. Statutes having such a purpose have always been liberally construed in favor of the intended protection. Apropos claims of vagueness, or kindred claims, the law, in this context, may "require[ ] a man to find out present facts, as well as to foresee future harm, at his peril, although they are not such as would necessarily be inferred from the facts known." Oliver Wendell Holmes, *The Common Law* 58 (Dover ed. 1991) (1881). In plain language: before a grown man starts sending sexually explicit texts to a 16-year-old, he should make it his business to understand the factual and legal consequences of his actions; and if those consequences are not readily apparent to him—whether because they seem to him "vague," or for some other reason—he should find them out.[4]

Fla. Stat. § 800.101 is not void for vagueness.

C. Lack of requirement of *mens rea*

As a spinoff of his overbreadth and vagueness challenges, Mr. Goodwin argues briefly that the statute at issue lacks a *scienter* requirement and for that reason may not be the basis of his prosecution. It was a maxim at common law that *actus non facit reum nisi mens sit rea*—the act does not make a person guilty unless the mind be also guilty. In Hamlet's words, "[F]or there is nothing either good or bad, but thinking makes it so." Wm. Shakespeare, *The Tragedy of Hamlet, Prince of Denmark,* Act II sc. 2. Mr. Goodwin complains that the statute for the violation of which he is charged contains no *mens rea* requirement.

Goodwin himself relies in his pleading on the opinion of the Third District in *N.D. v. State,* 315 So. 3d 102 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2478c]. There, the court cited earlier authority for the universal proposition that "criminal statutes are generally read to include a *mens rea* element, even when not expressly included in the statute." *N.D.* at 105 (quoting *Siplin v. State,* 972 So. 2d 982, 989 (Fla. 5th DCA 2007) [33 Fla. L. Weekly D82a]). The statute for the violation of which Mr. Goodwin is charged does not contain any language by which the Legislature expressed its intent to dispense with *mens rea* and create a strict-liability crime. *Cf.* Fla. Stat. § 893.101, in which the Legislature expressly repudiated the holdings of the Florida Supreme Court in *Scott v. State,* 808 So. 2d 166 (Fla. 2002) [27 Fla. L. Weekly S31a] and *Chicone v. State,* 684 So. 2d 736 (Fla. 1996) [21 Fla. L. Weekly S458a], that the prosecution must prove that a defendant knew of the illicit nature of a controlled substance found in his or her possession. Absent specific expression of legislative intent to strip a criminal statute of a *scienter* requirement, the general rule applies. The statute at issue here will be read to require proof of *mens rea.*[5]

III. Conclusion

Defendant Goodwin's Motion to Dismiss is respectfully denied.

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[1]To employ the example favored by generations of law professors to distinguish between these two constitutional concepts: A statute providing that, "All conduct which the legislature is duly and constitutionally empowered to criminalize is hereby made criminal" would not be overbroad at all, but would be the epitome of vagueness. "Too often, courts and lawyers use the terms 'overbroad' and 'vague' interchangeably. It should be understood that the doctrines of overbreadth and vagueness are separate and distinct." *Southeastern Fisheries Association, Inc., v. Department of Natural Resources,* 453 So. 2d 1351, 1353 (Fla. 1984).

[2]Art. I § 4 provides, in pertinent part, that, "Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press."

[3]The New York City law firm of Greenbaum, Wolff, & Ernst included among its client list the publishing firm of Random House, Inc. In the early 1930's, Random House sought legal advice on a very intriguing issue: Random House wanted to publish an American edition of James Joyce's *Ulysses.* The novel was viewed in some quarters as among the greatest, perhaps the very greatest, literary work of the 20th century; and in other quarters as pornography of a particularly disgusting variety.

One option, of course, was simply to acquire the rights to publish an American edition and then run off ten or twenty thousand copies for sale. It was an option, but an expensive and dangerous option: if it were to be determined that the novel was illicit pornography, a large financial investment would have to be written off.

Greenbaum, Wolff, & Ernst came up with an ingenious alternative. A young associate at the firm was dispatched to Paris to purchase a single copy of *Ulysses.* When he returned to New York City, the book would surely be seized as contraband by Customs, and Random House could then litigate the fate of that single volume. If it were determined to be pornography, no great investment had been made (apart from a nice voyage to Paris for a first-year law associate). If it were determined not to be pornography, publication on a grand scale could go forward.

(Legend has it that the ship on which the young lawyer was sailing returned to New York in the dead of night, and that when he presented himself before a weary Customs inspector at the end of his shift, the inspector attempted to wave him through. His entire legal future passing before his eyes, the young associate practically screamed at the inspector something like: Hey, this book in my suitcase is contraband! You have to seize it! Please!)

The resulting litigation is captioned *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933). The opinion issued by Judge John M. Woolsey was something of a literary specimen in its own right. Excerpts follow:

> "Joyce has attempted—it seems to me, with astonishing success—to show how the screen of consciousness with its ever-shifting kaleidoscopic impressions carries, as it were on a plastic palimpsest, not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions, some recent and some drawn up by association from the domain of the subconscious. He shows how each of these impressions affects the life and behavior of the character which he is describing.
>
> . . .
>
> Joyce's
>
> "attempt sincerely and honestly to realize his objective has required him incidentally to use certain words which are generally considered dirty words and has led at times to what many think is a too poignant preoccupation with sex in the thoughts of his characters. . . . In respect of the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season spring.
>
> . . .
>
> "[I]n *Ulysses,* in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic."

Random House reprinted Judge Woolsey's full opinion in every copy of its first run of *Ulysses.* The opinion is, therefore, arguably the most widely-reproduced judicial writing in American history.

[4]

> It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

Oliver Wendell Holmes, *The Common Law* 48 (Dover ed. 1991) (1881).

[5]Enough for now to say that the prosecution will be obliged at trial to establish the existence of criminal intent on the part of the defendant. What the precise definition of that intent state is—whether, for example, the crime created by the statute is a specific or a general intent crime, *see M.H. v. State,* 936 So. 2d 1, esp. at 3 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D982a]—is a matter to be addressed at or shortly before trial, and in no event later than at the charge conference that will precede closing argument. I note, however, that as to this point Mr. Goodwin's overbreadth argument comes back to haunt him. It may be a defense in whole or in part to prosecution under the statute at issue here to say that Joyce's *Ulysses* or Lawrence's *Lady Chatterley's Lover* was assigned to all students, male and female, by decision of the English Department of the high school. The messages that Mr. Goodwin sent to the child in this case were not sent to all students—only one. And they were certainly not sent as part of a curriculum selected by the English Department. This may bear upon the issue of criminal intent.

* * *

Attorney's fees—Proposal for settlement—Prevailing party—Denial of motion for fees and costs under sections 768.79 and 57.041 based on finding that proposal for settlement was not valid and that movants did not recover a judgment

THE PORTER LAW FIRM, LLC, a Foreign Limited Liability Company, and SHEILA JACKMAN, Plaintiffs, v. LAW OFFICES OF MICHAEL B. BREHNE, P.A., a Professional Association, Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2015-CA-000188. September 3, 2024. Susan Stacy, Judge. Counsel: Richard C. Wolfe, Wolfe Law Miami, P.A., Miami; and Marwan E. Porter, The Porter Law Firm, LLC, Stuart, for Plaintiff. Michael B. Brehne, Law Offices of Michael B. Brehne, P.A., Altamonte Springs, for Defendant.

ORDER DENYING PETITIONERS' MOTION FOR FEES AND COSTS

This cause came before the Court August 22, 2024 on PETITIONERS' MOTION TO TAX FEES AND COSTS, the Court having reviewed the file and otherwise been advised in the premises, makes the following findings of facts and conclusions of law:

1. This is an action in equity to determine the attorney's fees and costs to be awarded after a personal injury lawsuit was settled.

2. Both law firms (Brehne and Porter) claimed entitlement to a 1/3 contingency fee based on Brehne's settlement of the liability and underinsured motorist coverages available to Sheila Jackman.

3. Brehne claimed entitlement to the fee based on his settlement of the claim and his contingent fee contract and Porter claimed the same fee for his negotiating outstanding bills and liens pursuant to his contingent fee contract with Jackman.

4. The Court granted summary judgment in favor of Brehne and Porter against the Estate of Sheila Jackman awarding them both quantum meruit fees, but not any percentages based on the contingent fee contracts.

5. Shortly afterwards, Sheila Jackman and Porter[1] moved to tax fees and costs against Brehne based upon the proposal for settlement Sheila Jackman served on Brehne on December 19, 2017.

6. That proposal identified Sheila Jackman (now the Estate of Jackman) as the offering party in her capacity of "Petitioner" to the Brehne law firm as the Respondent.

7. This is akin to a plaintiff offering to pay a defendant in a civil action for purposes of Fla. Stat. §768.79. The proposal is also defective in that it does not address the counterclaim and is not specific and overbroad as to which damages it addresses or does not address.

8. Fla. Stat. §768.79 says: "If a *plaintiff* (petitioner) files a demand for judgment which is not accepted by the defendant (respondent) within 30 days and the *plaintiff* (petitioner) recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand from the defendant.

9. In order for the statute to apply, the Estate would have to "recover a judgment."

10. The Estate did not recover a judgment.

11. As such, the Estate is not entitled to fees under the statute.

12. The Estate then requests prevailing party costs against the Brehne law firm.

13. Fla. Stat. §57.041(1) states:

"The party *recovering judgment* shall recover all his or her legal costs and charges which shall be included in the judgment."

14. In order to be considered a "prevailing party," either the Porter law firm or the Estate would have to have received a judgment against Brehne law firm.

15. Neither party received a judgment against Brehne law firm.

16. As such, neither party may claim to have prevailed against Brehne law firm and therefore, can not recover any costs against them.

It is therefore **ORDERED and ADJUDGED**:

Petitioners, Estate of Sheila Jackman and the Porter Law Firm's motion to tax fees and costs against Law Offices of Michael B. Brehne, P.A. is hereby DENIED.

[1]Porter did not make any proposals to Brehne yet claimed entitlement to fees based on the proposal served by Jackman. There being no proposal, the Court can not consider any award for fees for Porter.

* * *

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COUNTY COURTS

Creditors' rights—Garnishment—Bank accounts—Exemptions—Spousal accounts—Tenancy by entireties—Unities—Debtor added to account opened by non-debtor spouse in his name only prior to marriage—Creditor of debtor spouse is allowed to garnish bank account titled in name of both spouses, despite fact that account's signature card expressly designates account as tenancy by entireties, because unities of possession, interest, time, marriage, and title were not present—Section 655.79(1) did not eliminate common law requirement that entireties account must be established in accordance with unities of possession, interest, time, title, survivorship, and marriage

SOUTHERN ACCOUNT SVCS., INC., Plaintiff, v. ELIAS FERNANDES, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2006-001863-SP-23, Section HI01. August 27, 2024. Milena Abreu, Judge.

ORDER DENYING DEFENDANT'S CLAIM OF EXEMPTION

COMES NOW, the Court, after hearing on Defendant's Claim of Exemption, and considering the testimony of the parties, documentary evidence, the legal memoranda provided by both counsels, consideration of the statutory authority and applicable case law, the Court hereby rules as follows:

This case stems from a Final Judgment entered against the Defendant on March 9, 2006. A certified copy of the Final Judgment against Defendant was recorded in the Official Records of Miami-Dade County, Florida. The Final Judgment was subsequently assigned to the Judgment assignee, Southern Account Services, Inc. Defendant failed to satisfy the Final Judgment and there still remains a balance due and owing to the Judgment Assignee/Southern Account Services, Inc. Judgment assignee served its Writ of Garnishment upon BB America's Bank in which the bank answered that Defendant/Debtor indeed maintains bank accounts with BB America. Defendant filed a Claim of Exemption asserting the funds in said bank account are owned as a marital account-specifically a "tenants by the entireties" account. The Court was provided with the signature cards of said bank account that name *"Christiane Montalvo Delboni or Elias Fernandes with Right of Survivorship*." The Court further notes that the bank account record indicates the Account was open on November 6, 2018 in the name of Christiane Montalvao Delboni and on June 16, 2020 the defendant debtor, Ms. Fernandes was added to the account. The parties were married in December of 2018. Defendant further asserts that because the account is a "tenants by the entireties" account, the Judgment Assignee is not entitled to the garnishment of funds in the account. Plaintiff alleges that because the parties did not open the account together at the same time and the subject account already existed when Defendant was added as an owner, said account cannot be considered owned as tenants by the entireties and garnishment is appropriate.

LEGAL ANALYSIS:

Common law provides that "property held as a tenancy by the entireties possesses six characteristics: 1) unity of possession (joint ownership and control); 2) unity of interest (the interests in the account must be identical; 3) unity of title (the interests must have or initiated in the same instrument); 4) unity of time)the interests must have commenced simultaneously); 5) survivorship; 6) unity of marriage (the parties must be married at the same time the property became titled in their joint names). *See Beal Bank, SSB v. Almand and Assoc.*, 780 So.2d 45, 52 (Fla. 2001) [26 Fla. L. Weekly S156a].

As explained in the *Beal* case the unity of title requires the interest must have originated in the same instrument, and the unity of time requires the interests must have commenced simultaneously. Plaintiff cites to several cases for the proposition where one spouse individually opens an account and later adds his/her spouse, that an entireties account is not created. *See In re McCuan*, 569 BR 511 (Bankr. M.D. Fla. 2017); *Smart v. City of Miami Beach, Fla.,* 51 F.Supp 3d 1299, 1303 (S.D. Fla. 2014).

Defendant on the other hand asserts the provisions of Florida Statute 655.79 applies, stating in relevant part under section (1):

> *Unless otherwise expressly provided in a contract, agreement, or signature card executed in connection with the opening or maintenance of an account, including a certificate of deposit, a deposit account in the names of two or more persons shall be presumed to have been intended by such persons to provided that, upon the death of any one of them, all rights, title, interest, and claim in, to and in respect of such deposit account, less all proper setoffs and charges in favor of the institution, vest in the surviving person or persons. Any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing.*

Defendant also cites to *Versace v. Uruven, LLC*, 348 So.3d 610 (2022) [47 Fla. L. Weekly D2068a], asserting the common law presumption of unity in *Beal* s supplanted and eliminated as "Section 655.79(1) now eliminates even that unity showing, because all spousal bank accounts are considered and presumed to being held by tenancies by the entireties unless otherwise specified in writing.

However, this Court does not find anything in 655.79 abrogates the six unities requirement under common law. The second district recently ruled the same. See *Loumpos v. Dove Investment Corp.*, 2D22-3908, 49 Fla. L. Weekly D1636a, (Fla. 2nd DCA, August 2, 2024). The *Loumpos* case is factually similar to the case at bar, where a bank account was opened by a non-debtor spouse, who later added the debtor spouse to the subject bank account. The Second District confirmed that in order to establish a bank account as owned as tenants by the entireties, the six unities must still be established when the account was originally opened. The Second DCA disagreed with the 4th DCA's analysis in *Versace* of the plain language of the statute 655.79. The 2nd DCA found that nothing in the statute changes or eliminates the common law requirements of unity. The 2nd DCA states: "a basic rule of textual interpretation is that "statutes will not be interpreted as changing the 'common law unless they effect the change with clarity." *Peoples Gas Sys. v. Posen Constr., Inc.*, 322 So.3d 604, 611 (Fla. 2021) [46 Fla. L. Weekly S166b]. "The rule of construction is well settled that where statutes are in derogation of the common law, they should be strictly construed, and that statutes will not be held to have changed well-settled common-law principles by implication unless the implication is clear, or is necessary to give the express provisions of the statute, and the public policy thus establish, full force and effect." This Court whole heartedly agrees.

This Court finds nothing in the language of the statute eliminates the common law requirements of unity of possession, interest, time, title, survivorship and marriage. The statute simply creates a statutory presumption that if the owners of an account are married, that such account is owned as tenants by the entireties. In this case, there was no unity of possession at the time the bank account was opened, no unity of interest until almost two years after the account was created and even then the parties were not married so no unity of marriage or title. Here, the only exemption being claimed is that the subject account is owned by the entireties.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Claim of Exemption is *denied.*

* * *

Landlord-tenant—Eviction—Standing—Successor in interest to landlord—Successor in interest who purchased apartment complex from original plaintiff lacked standing to pursue eviction action where motion for substitution of parties in residential eviction action was not filed within 90 days—Motion to dismiss is granted

SP LINCOLN FIELDS GP, INC, Plaintiff, v. TAMERA BROWN, et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-000911-CC-20. Section CL01. September 19, 2024. Gordon Murray, Judge. Counsel: Whitney Daly, MGFD Law Firm, P.A., Clearwater, for Plaintiff. Michael Angelo Tata, Legal Services of Greater Miami, Miami, for Defendant.

ORDER DISMISSING CASE (RESIDENTIAL EVICTION)

THIS CAUSE, having come before the Court on the Defendant's Motion to Dismiss, and the court having held a hearing on September 18, 2024, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff filed a for-cause eviction against Defendant on February 9, 2023 alleging a behavioral noncompliance with her lease.

2. On January 26, 2023, the property sold, changing hands from SP Lincoln Fields LP ("Lincoln Fields") to Buena Vista Apartments LLC ("Buena Vista"). This transfer was memorialized with a Special Warranty Deed.

3. Under Florida Rules of Civil Procedure 1.260(c), Buena Vista—the property's Successor in Interest—had 90 days to file a Motion for Substitution of Parties. This window expired on April 25, 2024.

4. As a result, the Court finds that Plaintiff currently lacks standing to pursue its eviction against Defendant pursuant to Florida Rules of Civil Procedure 1.260(c).

5. In addition, the attorney who filed Lincoln Fields' eviction motioned the Court to withdraw from the case on March 7, 2024. Her request was granted on March 15, 2024.

6. Since then, no attorney has appeared for Plaintiff and Lincoln Fields is unrepresented.

7. Because Lincoln Fields is a corporation and hence not a natural person, it cannot pursue this action in the absence of representation.

8. The court also finds that Plaintiff Lincoln Fields is an unrepresented corporation.

9. Because Plaintiff both lacks standing and is an unrepresented corporate entity, Defendant's motion to dismiss is granted and the present action is dismissed.

THIS CAUSE, having come before the Court on the Defendant's Motion to Dismiss, and the court having held a hearing on September 18, 2024, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff filed a for-cause eviction against Defendant on February 9, 2023 alleging a behavioral noncompliance with her lease.

2. On January 26, 2023, the property sold, changing hands from SP Lincoln Fields LP ("Lincoln Fields") to Buena Vista Apartments LLC ("Buena Vista"). This transfer was memorialized with a Special Warranty Deed.

3. Under Florida Rules of Civil Procedure 1.260(c), Buena Vista—the property's Successor in Interest—had 90 days to file a Motion for Substitution of Parties. This window expired on April 25, 2024.

4. As a result, the Court finds that Plaintiff currently lacks standing to pursue its eviction against Defendant pursuant to Florida Rules of Civil Procedure 1.260(c).

5. In addition, the attorney who filed Lincoln Fields' eviction motioned the Court to withdraw from the case on March 7, 2024. Her request was granted on March 15, 2024.

6. Since then, no attorney has appeared for Plaintiff and Lincoln Fields is unrepresented.

7. Because Lincoln Fields is a corporation and hence not a natural person, it cannot pursue this action in the absence of representation.

8. The court also finds that Plaintiff Lincoln Fields is an unrepresented corporation.

9. Because Plaintiff both lacks standing and is an unrepresented corporate entity, Defendant's motion to dismiss is granted and the present action is dismissed.

* * *

Insurance—Personal injury protection—Medical provider's action against insurer—Venue—Venue is proper in Brevard County, not in Miami-Dade County, where provider's principal place of business is Brevard County, payment was due in Brevard County, provider maintains no offices and has no officers in Miami-Dade County, none of treatment was rendered in Miami-Dade County, and insured resides in Brevard County—Motion to transfer venue to Brevard County is granted

LAPINE FAMILY CHIROPRACTIC CLINIC, INC., f/k/a BAYS, a/a/o Jeffrey Bucklin, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-158310-SP-21. Section ND06. September 4, 2024. Ayana Harris, Judge. Counsel: Chris Kasper and Abraham Ovadia, for Plaintiff. Stephen B. Farkas, Hamilton, Miller & Birthisel, LLP, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION TO TRANSFER VENUE TO BREVARD COUNTY

THIS CAUSE having come on to be heard on Defendant's Motion to Transfer Venue to Brevard County (filed under certificate of service March 21, 2024), the Court being otherwise fully advised in the premises at a hearing on August 8, 2024, it is hereby **ORDERED AND ADJUDGED:**

1. Defendant's Motion to Transfer Venue to Brevard County is **GRANTED**.

2. It is Defendant's position that venue is appropriate in Brevard County under Fla. Stat. § 47.122. In support of its position, Defendant relies on Plaintiff's Response to Defendant's Requests for Admissions (filed on April 8, 2024) as well as the Affidavit of Defendant's Representative, Jade Green (filed on July 31, 2024).

3. There appears to be no factual issues as Plaintiff admitted, in Response to Requests for Admissions, that its principal place of business is in Brevard County, the services were rendered in Brevard County, payment was due in Brevard County, Plaintiff maintains no office(s) in Miami-Dade County, none of Plaintiff's officers are located in Miami-Dade County, none of the treatment rendered to the insured/patient took place in Miami-Dade County, the insured/patient resides in Brevard County, and that the information on Plaintiff's submitted CMS-1500 forms is true and accurate.

4. The Affidavit relied upon by the Defendant includes the certified policy and copies of the applicable medical bills. Furthermore, Defendant's affiant is not located in Miami-Dade County.

5. This Court ruled on a similar issue in *Dr. J Comerford, P.A., v. First Acceptance Insurance Company, Inc.*, 31 Fla. L. Weekly Supp. 321a (Fla. Miami-Dade Co. 2023) (Order on Defendant's Motion to Dismiss or in the Alternative Transfer Venue).

6. When a party establishes that venue is improper in the county in which the suit was filed by way of an affidavit, the burden shifts to the opposing party to rebut the affidavit with sworn evidence. *Gino Vitiello, M.D., P.A., v. Genovese Joblove & Battista, P.A.,* 123 So. 3d 1185 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2206b]. See also *E.I. Dupont De Nemours & Co. v. Fuzzell,* 681 So. 2d 1195 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a].

7. The Plaintiff did not file a response in opposition to Defendant's Motion and/or Defendant's Affidavit.

8. Accordingly, since Defendant established venue was improper in Miami-Dade County by way of an affidavit, the burden now shifted to Plaintiff to rebut the affidavit with sworn evidence. Because Plaintiff filed nothing in opposition [to either the Motion or Affidavit], Plaintiff has not met its burden.

9. Therefore, transfer to the County Court of the Eighteenth Judicial Circuit in and for Brevard County is appropriate.

10. Furthermore, Defendant is ordered to pay the transfer fee.

11. The Clerk is hereby directed to transfer this case to Brevard County.

* * *

Attorney's fees—Insurance—Personal injury protection—Amount

PHYSICIANS GROUP, LLC, a/a/o Janice Josey, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2022 SC 4247 NC. June 12, 2024. Maryann Olson Uzabel, Judge. Counsel: Chase Engelbrecht, Alpha Law Group, PLLC, Sarasota; and Joseph F. Diaco, Jr. (co-counsel), Diaco Law, Tampa, for Plaintiff. David B. Kampf, Kampf Inman & Associates, Tampa, for Defendant.

ORDER AND FINAL JUDGMENT FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE, having come before the Court to be heard on April 24, 2024, and May 14, 2024, for an evidentiary hearing on the Plaintiff's Motion for Attorney's Fees and Costs, Interest on Fees and Costs from Date of Entitlement, Risk Multiplier, Taxation of Attorney Fee Expert Costs and For Entry of Final Judgement, and the Court having heard the testimony of witnesses, argument of counsel, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. In this case, Defendant filed a Confession of Judgment on December 4, 2023. Plaintiff's entitlement to attorney's fees was ordered by the Court on December 18, 2023. "In calculating reasonable fees, the trial court must determine the number of hours reasonable expended and a reasonable hourly rate, then multiply the two to arrive at the 'loadstar' amount." *Wolfe v. Nazaire,* 758 So.2d 730, 733 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1114a].

2. This Court based its decision on and applied the factors contained in *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990); *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985) and Rule 4-1.5(b) of the Florida Bar Rules of Professional Conduct.

3. Specifically, in making its ruling, the Court considered the following factors[1] in determining the reasonable hourly fee and the reasonable number of hours spent litigating this case:

a. The time and labor required, the novelty and difficulty of the question(s) involved, and the skill requisite to perform the legal services properly.

b. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer.

c. The fee customarily charged in the locality for similar legal services.

d. The amount involved in the results obtained.

e. The time limitations imposed by the client or the circumstances.

f. The nature and length of the professional relationship with the client.

g. The experience, reputation, and ability of the lawyer or lawyers performing the services.

h. Whether the fee is fixed or contingent.

Accordingly, the Court finds the reasonable hourly rates for the professionals in this matter to be as follows:

Chase Englebrecht, Esq.:	$300.00
Mark Maynard, Esq.:	$650.00
Joseph Diaco, Esq.:	$650.00
Paralegals (Debra Drabina, Darlene Squires):	$125.00

After reviewing the evidence presented at hearing, the Court determines that the reasonable number of hours expended by Chase Englebrecht in the representation of Plaintiff in this case is 77.6 hours.

The Court determines that the reasonable number of hours expended by Mark Maynard in the representation of Plaintiff in this case is 5.9 hours.

The Court determines that the reasonable number of hours expended by Joseph Diaco in the representation of Plaintiff in this case is 94.4 hours.

The Court determines that the reasonable number of hours expended by Debra Drabina in this case is 4.10 hours.

The Court determines that the reasonable number of hours expended by Darlene Squires in this case is 22.50 hours.

The Court finds that Plaintiff's expert witness, Russel Lazega, Esq., is entitled to an expert witness fee for 26 hours at an hourly rate of $650.00, for a total expert witness fee of $16,900.00, which is taxed against the Defendant as a cost. The Court finds that a rate of $650.00 per hour is a reasonable hourly rate for the services of Mr. Lazega.

Additionally, the Court finds that the Plaintiff is entitled to taxable costs in the amount of $4,258.60, all of which the Court finds to have been reasonable incurred.

THEREFORE, it is hereby ORDERED and ADJUDGED that Plaintiff, PHYSICIANS GROUP, LLC, shall recover for attorney's fees and costs as follows:

For Chase Englebrecht, Esq.:	$23,280.00
For Mark Maynard, Esq.:	$ 3,835.00
For Joseph Diaco, Esq.:	$61,360.00
Debra Drabina:	$ 512.50
Darlene Squires:	$ 2,812.50
Costs:	$ 4,354.18
For expert fee, R. Lazega:	$16,900.00

ORDERED AND ADJUDGED that Plaintiff, PHYSICIANS GROUP, LLC, shall recover the **total sum of the above, $113,054.18** from Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, plus interest, calculated at the applicable and adjusted rate of interest set by Florida's Chief Financial Officer pursuant to section 55.03(1), *Florida Statutes,* until this Final Judgment is fully satisfied, for which sums let execution issue.

The Court shall retain jurisdiction over all proceedings to enforce and execute upon this Final Judgment, including, but not limited to, discovery in aid of execution,

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[1]*Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985).

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Demand letter—Presuit demand letter that contains two itemized statements, one listing amounts demanded if insurer has not opted for use of statutory fee schedule and one listing amounts demanded if insurer has opted for use of fee schedule, is valid

PHYSICIANS GROUP, LLC, a/a/o Hosain Tornstrom, Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, Civil Division. Case No. 2022 SC 003299 NC. Division C. September 10, 2024. David Denkin, Judge. Counsel: Chase Engelbrecht, Alpha Law Group, PLLC, Sarasota; and Gregory A. Zitani, West Coast Law, PLLC and Alpha Law Group, PLLC, Sarasota, for Plaintiff. Edwin V. Valen, Hamilton, Miller & Birthisel, LLP, Tampa, for Defendant.

ORDER DENYING DEFENDNAT'S MOTION FOR SUMMARY JUDGMENT BASED UPON FAILURE OF PLAINTIFF TO COMPLY WITH STATUTORY CONDITION PRECEDENT FOR PRESENTING INVALID PRESUIT DEMAND LETTER

This matter came on for hearing on July 26, 2024, before the Hon.

David Denkin, County Court Judge. The court having reviewed the pleadings, case law submitted and heard the argument of counsel, it is hereby Ordered as follows:

I

FACTUAL BACKGROUND

1. This is a PIP case in which Defendant plead an affirmative defense that Plaintiff failed to comply with the presuit demand letter condition precedent set forth in F.S. §627.736 (10).

2. Specifically, Defendant alleges that the demand letter is void because it contains two alternative amounts demanded and contains two separate itemized statements, one if the insurer hasn't opted for the permissive Medicare Fee Schedule pursuant to FS §627.736 (5) (a), and another if it has.

3. Defendants does state in its moving papers, without any citation, "that the statute requires a presuit demand letter "state with specificity" and an itemized statement specifying each exact amount, the date of treatment, service or accommodation, and the type of benefit demanded to be due".

4. Defendant nevertheless maintained that the presuit demand letter must state with specificity the exact amount the insurer must pay to avoid suit and cites to *Rivera v. State Farm Mutual Auto Ins. Co.,* 317 So. 3d 197, 205 (Fla. 3d DCA, 2021) [46 Fla. L. Weekly D447a].

5. Plaintiff relies on *Bain Complete Wellness, LLC v. Garrison Property & Casualty Insurance Company,* 356 So. 3d 866 (Fla. 2d DCA, 2022) [47 Fla. L. Weekly D2623a], *Mercury Indemnity Company of America v. Pan Am Diagnostic of Orlando,* 368 So. 3d 27 (Fla. 3d DCA, 2023) [48 Fla. L. Weekly D2090a] and *Mercury Indemnity Company of America v. Central Florida Medical & Chiropractic Center, Inc.,* 380 So. 3d 477, 480 (Fla. 5th DCA, 2023) [48 Fla. L. Weekly D2090a].

II

Legal Analysis

A

Rivera v. State Farm Mutual Auto Insurance Co., 317 So. 3d 197 (Fla. 3d DCA, 2021)

6. *Rivera, supra* involved claims for transportation for 16 visits to a medical provider. The 3d DCA noted that Rivera's attorney sent a letter asking for payment for transportation costs. It did not list treatment dates, the address for the clinic, nor the dollar amount for each trip, that State Farm would have to pay to avoid Rivera proceeding with his lawsuit. State Farm requested further information and ultimately Rivera's attorney sent correspondence entitled "Demand Letter Under FS 627.736 (10) that merely attached the previous correspondence. Suit was filed by Rivera.

7. State Farm raised an affirmative defense that the demand letter was defective in that it failed to state, "with specificity or include an itemized statement specifying each exact amount, date of treatment, service or accommodation, and the type of benefits claimed to be due." *Rivera, supra at 200.*

8. The Court cited *MRI Associates of America, LLC v. State Farm Fire and Casualty,* 61 So. 3d 462, 465 (Fla. 4th DCA, 2011) [36 Fla. L. Weekly D960b] for the proposition that FS §627.736 (10) requires precision in a demand letter by its requirement of an "itemized statement specifying each exact amount". The Court agreed with the reasoning in *MRI Associates, id.* And held the lack of an itemized statement rendered the presuit demand letter fatally flawed and affirmed summary judgment for the Defendant.

9. Defendant in the case at bar asserts that because there were two itemized statements, one using the permissive Medicare Fee Schedule and the other using the billed amount as "reasonable" under the PIP statute, under *Rivera, supra* it was fatally flawed as State Farm could not decide which one to use to avoid suit, and that the demand letter itself failed to specify an exact total amount claimed to be due.

B

Bain Complete Wellness, LLC, v. Garrison Property & Casualty Insurance Company 356 So. 3d 866

10. *Bain* involved a case where the Defendant filed a Motion under FS §57.105 for sanctions and a Motion for Summary Judgment on the grounds that the presuit demand latter in this case was defective because it failed to "state with specificity...each amount...claimed to be due" and suit was filed for an amount greater than the amount of benefits available under the policy, to wit $36,215.09.

11. When plaintiff's counsel's ore tenus motion for a continuance of the hearing on the Defense Motion for Summary Judgment was denied, Plaintiff voluntarily dismissed the suit and the court ultimately awarded $17,348.00 in attorneys fees and $262.50 in costs to Defendant as sanctions for punitively defective presuit demand letter and filing suit for in excess of the statutory $10,000.00 in available PIP benefits.

12. The Second District Court of Appeals reversed as to the attorney's fees and made specific holdings as to the sufficiency of the demand letter and the amount sued for by Plaintiff.

13. On appeal, "Garrison argued that the demand letter must specify the exact amount claimed to be due under the insurance policy" *Bain, id.* At the hearing in the instant case on its Motion for Summary Judgment, State Farm made the same argument.

14. The *Bain* Court rejected that argument and instead set forth a "fair reading of the statutory language in context indicates the itemized statement included with the demand letter must include 3 pieces of information: (1) "each exact amount; (2) the date of treatment, service, or accommodation"; and (3) the type of benefit claimed to be due...Nowhere in the statute is there requirement for a precise, aggregated amount in a demand letter...Bain complied with the statute by including an itemized statement specifying each amount to which Ban believed itself entitled...Further that Bain field its lawsuit for less than the amount requested in the demand letter does not retroactively render Bain's demand letter statutorily deficient." *Bain, id.*

15. The Court further went on to distinguish *Rivera v. State Farm Mutual Automobile Ins. Co.,* 317 So. 3d 197 (3d DCA, 2021) [46 Fla. L. Weekly D447a] by noting that the presuit demand letter in *Rivera was* clearly deficient and in any event to the extent that *Rivera* could possibly be read to include and aggregate demand amount, a demand only within policy limits, the statute does not support the imposition of such requirements.

16. In the case at bar, the Court adopts the reasoning and holding of *Bain* and holds that the inclusion of an itemized statement meeting the three requirements set forth in that decision and FS § 627.736 (10) meets the statutory requirements for a presuit demand letter.

17. Furthermore, the Court holds in the instant case, that as the Plaintiff lacked the insurance policy underlying the claim herein, that the inclusion of two itemized statements, clearly identified as with and without the application of the permissive Medicare Fee Schedule was not impermissibly vague or ambiguous or otherwise confusing to the insurer and as such did not render the presuit demand letter invalid.

C

Mercury Indemnity Company of America v. Pan Am Diagnostic of Orlando 368 So. 3d 27 (Fla. 3d DCA, 2023)

18. In this case, the Third DCA took up the issue of whether a properly completed CMS 1500 form would suffice to meet the requirement for an itemized statement and whether or not Mercury's

argument that *Rivera* required the presuit demand specify the exact amount claimed to be owed by Mercury to avoid the filing of a PIP suit.

19. This case is notable in the Third DCA clarified its holding in Rivera and instead set forth the same requirement as the *Bain* Court, to wit, that an itemized statement is what is required by the PIP statute, not an exact total amount claimed to be due.

20. Furthermore, the Court went on to hold that the *CMS* 1500 form contained all the relevant information required by the PIP statute for a presuit demand and thus functioned as an itemized statement.

21. Applying this case's holding to the case at bar, the Court adopts the reasoning of the *Pan Am Diagnostic* case that *Rivera* does not require a specific total amount claimed to be due in the body of a presuit demand letter and that an itemized statement meeting the three specificity requirements set forth in FS §627.736 (10) results in a presuit demand letter being statutorily compliant and not deficient.

22. This court holds, in the case at bar, that Plaintiff Physicians Group's presuit demand letter in this case is valid as it does contain an itemized statement meeting the requirements of the statute and as interpreted by the Second DCA's holding in *Bain.*

C.

Mercury Indemnity Company of America v. Central Florida Medical & Chiropractic Center, Inc. 380 So. 3d 477 (Fla. 5th DCA, 2023)

23. This case involves a similar claim made by Mercury to that it made in *Pan Am Diagnostic,* to wit, that *Rivera, supra* requires that a presuit demand letter must contain a total amount claimed to be due by the provider in order for it to meet the requirement of a proper condition precedent for a PIP suit to be filed and maintained.

24. In this case, the Fifth DCA, joins the 3d DCA in *Pan Am Diagnostic* and the Second DCA in *Bain* in rejecting that reading of *Rivera* that requires the cumulative amount claimed to be in the demand letter, but does require an itemized statement as set forth in the PIP statute and *Bain* (which is cited) to include "(1) the name of the insured upon which such benefits are being sought, including a cop of the AOB, (2) The claim number or policy number under which the claim was originally submitted to the insurer and (3) *an itemized statement setting forth the name of the provider and the treatment rendered and the exact amount, date of treatment, service, or accommodation, and the type of benefit claimed to be due." Central Florida Medical & Chiropractic Center, Inc., supra (emphasis in original).*

25. This Court holds that Physicians Group's presuit demand letter and itemized statement meets those requirements.

III

HOLDING

Based upon all of the foregoing, the Motion for Summary Judgment of Defendant Permanent General Assurance Corporation is hereby DENIED.

* * *

Insurance—Evidence—Business records—Insurer's second amended declaration and certification of business records is stricken on ground that declaration contains primarily inadmissible hearsay

AJ THERAPY CENTER, INC., a/a/o Alfredo Silveria Garcia, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 23-CC-060056, Division I. September 15, 2024. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S AMENDED MOTION TO STRIKE DECLARATION AND CERTIFICATION OF BUSINESS RECORDS AND DENYING DEFENDANT'S SECOND AMENDED MOTION FOR FINAL SUMMARY /DISPOSITION/JUDGMENT

THIS MATTER having come before the court on August 12, 2024 on Plaintiff's Amended Motion to Strike Defendant's Declaration and Certification of Business Records and Defendant's Second Amended Motion for Final Summary Disposition/Judgment. The Court, having reviewed the record, considered the motions, the arguments of counsel, and the applicable law, and being otherwise advised in the premises, finds:

1. On May 29, 2024, Defendant filed its Second Amended Declaration and Certification of Business Records in support of its Second Amended Motion for Final Summary Disposition/Judgment.

2. In support of Plaintiff's Motion to Strike, Plaintiff attached the transcript of the deposition of Defendant's Corporate Representative, Nicole Perrelli, conducted on January 9, 2024.

3. Defendant's declaration is deficient, containing primarily inadmissible hearsay. For an affidavit to be admissible, it: [M]ust be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts therein referred to in an affidavit must be attached thereto or served therewith. Fla. R. Civ. P. 1.510(e) (2021); All lay witnesses are required to have personal knowledge in order to testify. See 90.604, Fla. Stat. (2023). Florida's Evidence Code specifically forbids a witness from testifying to matters outside of their personal knowledge. Evidence to prove or disprove an affiant's personal knowledge may be given by the affiant's own testimony. *See id*.

4. *Savoy v. Am. Platinum Prop. & Cas. Inc. Co.,* 363 So. 3d 1102, 1107 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1241a] cites to the following proposition:

> Here, as in *Rodriguez, Gromann,* and *Huertas,* the affiant provided no basis for the affiant's personal knowledge or competency. The corporate representative simply stated his knowledge was "based upon my review of [the insurer's] file" and he was "serving as Corporate Representative in these actions for [the insurer]." He did not provide any further basis for his knowledge, much less indicate any employment, training, or experience that might provide him with personal knowledge of the insurer's recordkeeping practices. He did not even claim any personal knowledge of these practices (apart from a conclusory restating of the elements of the business records exception).
>
> Furthermore, the corporate representative's statements that various letters were mailed required additional proof. The mere fact that a letter was drafted "is not enough to allow a trial court to infer that the letter was mailed." *Mace v. M&T Bank,* 292 So. 3d 1215, 1219 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D719a]. Instead, a witness generally must: (1) have personal knowledge of the mailing, (2) provide evidence of routine mailing practices, or (3) provide records of the mailing, such as a log or return receipt. *Id.* at 1219-20. The corporate representative's affidavit in this case did not come close to providing such evidence.

5. The corporate representative therefore failed to demonstrate his affidavit was "made on personal knowledge, set out facts that would be admissible in evidence, and show[ed] . . . [his] competen[cy] to testify on the matters stated" regarding the business record exception. Fla. R. Civ. P. 1.510(c)(4). Accordingly, the trial court should have disregarded the affidavit and the attached documents. *See, e.g., Roberts v. Direct Gen. Ins. Co.,* 337 So. 3d 889, 891 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D737b] ("[T]he business-records exception . . . does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence." (quoting *Thompson v. State,* 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D449b].

6. Plaintiff's Amended Motion to Strike Defendant's Declaration and Certification of Business Records is **HEREBY GRANTED**.

7. Based upon the striking of said Declaration, Defendant's Second Amended Motion for Final Summary Disposition/Judgment is **HEREBY DENIED**.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Discovery—Depositions—Insurer's representatives—Motion for protective order barring deposition insurer's representatives, including fact witnesses, is granted, as information or opinions possessed by those witnesses is completely irrelevant to contested issue—Whether defendant paid medical bills in accordance with statute is a question of law to be resolved by court based exclusively on face of policy

TAMPA FAMILY CHIROPRACTIC, a/a/o Ana Cadavid, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 23-CC-093927. Division K. September 12, 2024. Jessica G. Costello, Judge. Counsel: George David, George A. David, P.A., Coral Gables, for Plaintiff. Roy Kielich, Andrews Biernacki Davis, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS CAUSE, having come on to be heard on September 10, 2024 upon Defendant's Motion for Protective Order, filed on June 07, 2024, and the Court, having reviewed the Court file, the Motion, heard argument of the parties, and being otherwise advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

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

2. Because the resolution of the issue(s) presented in the Defendant's Motion for Summary Judgment, filed on May 30, 2024, is a question of law to be resolved by this Court based exclusively on the face of the insurance policy and the applicable law, any information or opinions possessed by the Defendant's representative(s) that the Plaintiff seeks to depose, is completely irrelevant to this Court's determination of whether the Defendant paid the medical bills in accordance with s. 627.736(5)(a)1, Florida Statutes. *See cf. Hurley v. Werly*, 203 So. 2d 530 (Fla. 2d DCA 1967). As such, the discovery sought by the Plaintiff, including the deposition of any fact witness in this matter, can do nothing to further the Plaintiff's position on that issue. *See cf. Riverview Family Chiro. Ctr. a/a/o Sherri Chapman v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir., Hillsborough Cty. Ct., Nov. 3, 2014).

3. All depositions in this matter shall be postponed until after the hearing on Defendant's Motion for Summary Judgment.

4. The parties shall coordinate a hearing date for Defendant's Motion for Summary Judgment within ten (10) days of the entry of this order.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Motion to stay to enforce appraisal is granted—Appraisal provision is not ambiguous—Insurer did not waive appraisal by filing answer where it had invoked appraisal prior to filing answer

SAME DAY WINDSHIELDS, LLC, a/a/o Latavia Martin, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 23-CC-055850. Division L. August 28, 2024. Richard H. Martin, Judge. Counsel: Marc Nussbaum and Alyson Fontaine, Reeder & Nussbaum, St. Petersburg, for Plaintiff. Kimberly A. Sandefer, Staff Council, First Acceptance Insurance Company, Inc., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STAY TO ENFORCE APPRAISAL and DEFENDANT'S SECOND MOTION FOR PROTECTIVE ORDER

This cause came on before the Court on August 26, 2024, upon Defendant's Motion to Dismiss, or in the alternative, Motion to Stay to Enforce Appraisal (Doc. 40) and Defendant's Second Motion for Protective Order (Doc. 41). Counsel for both parties appeared before the Court. After having heard arguments of counsel, having considered Defendant's Motion, and being otherwise fully advised in the premises, the Court finds:

1. The appraisal provision set forth in Defendant's insurance policy is not ambiguous.

2. Defendant extended coverage for the alleged loss and did not deny coverage.

3. Plaintiff had an obligation, as assignee, to comply with the appraisal provision.

4. A dispute over the amount of loss exists and is clearly reflected in the pleadings, docket entries and on the record. As such, an appraisable issue exists.

5. Plaintiff failed to comply with the *condition precedent* of appraisal.

6. Defendant did not waive appraisal when it filed its Answer, as Defendant asserted that appraisal had been invoked prior to the filing of this action.

It is thereupon, ORDERED ADJUDGED that:

Defendant's Motion to Stay to Enforce Appraisal is hereby granted and Defendant's Motion to Dismiss is hereby denied. The parties are directed to comply with the policy's appraisal provision, exchange the name and contact information of their respective appraisers within 30 days of entry of this Order, and complete the appraisal of the loss at issue within 180 days of entry of this Order. Defendant's Second Motion for Protective Order is hereby granted as to all discovery, pending completion of appraisal.

* * *

Arbitration—Waiver—Defendants that failed to pay arbitration services' invoices waived right to arbitrate—Motion to reinstate proceedings is granted

MAYRA LOPEZ, Plaintiff, v. U DRIVE MOTORS, LLC, et al., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO21003565, Division 62. August 28, 2024. Terri-Ann Miller, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hollywood, for Plaintiff. Keith D. Silverstein, Coral Gables, for Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO REINSTATE PROCEEDINGS AND FOR ORDER TO SHOW CAUSE

This matter came before the Court on August 26, 2024, on Plaintiff's Motion to Reinstate Proceedings and for Order to Show Cause ("**Motion**") [DE 30]. Attorney Joshua Feygin, Esq., represented the Plaintiff MAYRA LOPEZ. Attorney Jose Peralta represented Defendants U DRIVE MOTORS, LLC, and WESTLAKE FINANCIAL SERVICES, LLC ("**Defendants**"). Attorney Ira Silverstein appeared on behalf of WESTLAKE FINANCIAL SERVICES, LLC. After reviewing the record and the Motion, and hearing the arguments of counsel, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. The Motion is **GRANTED**.

2. Having failed to pay the invoices of the American Arbitration Association or the Judicial Arbitration and Mediation Services, Inc., both of the Defendants have waived their right to arbitrate this dispute. *Steffanie A. v. Gold Club Tampa, Inc.*, No. 8:19-cv-3097-T-33TGW, 2020 U.S. Dist. LEXIS 129334 (M.D. Fla. July 22, 2020) ("Defendant's repeated refusal to pay the AAA initial filing fee in this case constituted both a waiver of the right to arbitrate and a breach of the parties' agreement to arbitrate").

3. Having failed to comply with this Court's July 18, 2022, Order [DE 20] and this Court's February 22, 2024, Order [DE 27], Defendants are hereby ordered to show cause within THIRTY (30) days of the entry of this Order as to why sanctions should not be entered for failing to comply with each order.

* * *

Attorney's fees—Landlord-tenant—Return of security deposit—Tenant who prevailed on claim for return of security deposit is entitled to award of attorney's fees and costs—Amount—Contingency risk multiplier—Multiplier of 1.5 is appropriate where counsel represented tenant on purely contingency fee basis in rare and exceptional circumstance in which competent counsel could not have otherwise been retained, and litigation carried considerable risk of non-recovery for counsel,

JILLIAN C. RODRIGUEZ, Plaintiff, v. BLANCA MUNOZ, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2023 SC 002056. August 21, 2024. Wayne Culver, Judge. Counsel: M. Parker Landers and Joseph M. Sternberg, Landers & Sternberg PLLC, Orlando, for Plaintiff. Blanca Munoz, Pro se, Defendant.

FINAL JUDGMENT FOR ATTORNEYS FEES AND COSTS AGAINST DEFENDANT BLANCA MUNOZ

THIS CAUSE came on to be heard before this Court upon Plaintiff's Motion For Attorneys Fees and Costs ("Plaintiff's Motion"). The Court having reviewed Plaintiff's Motion, and otherwise being advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

I. FINDINGS OF FACT

1. On March 15, 2024, this Court entered a Final Judgment finding Plaintiff to have prevailed on Count I of her Statement of Claim.

2. Plaintiff pled entitlement to attorney's fees in this action in her Statement of Claim, and reiterated entitlement to fees in a timely filed Motion for Attorney's Fees and Costs. Accordingly, Defendant was on notice of Plaintiff's intent to seek fees in this action.

3. Plaintiff's Motion cited several statutory bases for entitlement to attorney's fees and costs in this action, including: §83.49 and §83.48, Fla. Stat. for the claim to the security deposit.

4. Defendant filed no response or memorandum opposing Plaintiff's Motion and raised no argument against Plaintiff's entitlement to attorney's fees and costs.

5. The Court held a hearing on Wednesday, August 14, 2024, where the Plaintiff and Plaintiff's fee expert testified.

6. The Court, therefore, finds Plaintiff, as the prevailing party, is entitled to her attorney's fees and costs in this action.

II. PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES AND COSTS

7. The Court has reviewed the factors to be considered in determining reasonable attorney's fees and costs as set forth in Rule 4-1.5, Rules Regulating the Florida Bar, *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), and *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla. 1990), and the Court has applied those factors in this ruling.

8. Plaintiff presented attorney David H. Abrams as her attorney's fee expert (the "Expert Witness"). Mr. Abrams is an attorney practicing in Orange County and the surrounding areas in consumer protection and landlord-tenant litigation. Mr. Abrams has practiced as an attorney within that subject matter for nearly twenty years. Mr. Abrams has handled significant class action litigation involving consumer and landlord-tenant law and is familiar with the fees charged by attorneys in consumer litigation matters.

9. Based on the foregoing, this Court finds Mr. Abrams to be a competent, qualified, and reliable expert witness in this action.

10. "The first step in the lodestar process requires the court to determine the number of hours reasonably expended on the litigation." *Rowe*, 472 So.2d at 1150 (Fla. 1985). The Court reviewed the sworn declarations of attorney M. Parker Landers and a copy of his respective time sheets showing the full hours worked on this matter and the reduced number of hours sought payment for in this action, after the exercise of billing discretion.

11. In total, Plaintiff sought compensation for 32.71 hours by Mr. Landers and his co-counsel Joseph M. Sternberg (the "Plaintiff's Counsel").

12. Based upon the evidence presented and further detailed above, this Court finds $450 per hour to be a reasonable hourly rate for Plaintiff's Counsel[1], and 32.71 hours to be a reasonable number of compensable hours in this case.

13. The Court therefore concludes that the lodestar amount for attorney Landers' and attorney Sternberg's hours at a rate of $400 to $450 per hour is $13,364.50.

14. Plaintiff is also entitled to costs in the way of attorney's fees charged by Plaintiff's expert witness David H. Abrams. See *Travieso v. Travieso*, 474 So.2d 1184 (Fla. 1985). Mr. Abrams testified to an hourly rate of $500.00 per hour, which the Court finds reasonable based on Mr. Abram's background and experience. Mr. Abrams testified that, together with the hearing time itself, he spent one hour of time on the case reviewing the file and appearing to testify. Therefore, at one (1) hour of attorney time, Mr. Abram's lodestar is $500.

III. The Multiplier

15. The Court has reviewed the law regarding applying a contingency risk multiplier, as set forth in Fla. Stat. §57.104 (2), which states "[i]n any action in which attorney fees are determined or awarded by the court, there is a strong presumption that a lodestar fee is sufficient and reasonable. This presumption may be overcome only in a rare and exceptional circumstance with evidence that competent counsel could not otherwise be retained."

16. The evidence presented by the Expert Witness and Plaintiff supported that Plaintiff's Counsel represented Plaintiff on a purely contingency fee basis in this matter and that this was a rare and exceptional circumstance in which competent counsel could not have otherwise been retained.

17. The Court finds that the Plaintiff, a tenant, faced significant difficulty in securing legal representation. The Plaintiff testified that despite diligent efforts, she encountered immense difficulty in finding counsel willing to take on her case. She called numerous law firms before hiring Landers & Sternberg PLLC, which either would not speak with her because the firms only represented landlords or the firms requested advanced retainers, which she could not afford. Without Plaintiff's Counsel's representation, she would not have been able to afford any other attorney to assist her.

18. The Court further finds the testimony of the Expert Witness credible, who opined that there was a substantial risk taken by Plaintiff's Counsel in accepting this case; the litigation, while not high stakes, carried a considerable risk of non-recovery for Plaintiff's Counsel. The Expert Witness further stated that it would be exceedingly difficult for tenants in similar situations to secure attorneys with comparable skill and experience as Plaintiff's Counsel if not for a contingency multiplier.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. Having found a lodestar of $13,364.50 (32.71 hours at $400 and $450 per hour) to be objectively reasonable, and a multiplier of 1.5 to be appropriate, the Court orders the Defendant to pay Plaintiff, via Plaintiff's attorneys, Landers & Sternberg PLLC, the total amount of $20,046.75 for attorney's fees in this action.

2. The Court orders the Defendant to pay costs in the amount of $881.65.

3. The Court further finds that Plaintiff is entitled to recover her expert witness attorney's fees cost of $500 from Defendant.

4. The Plaintiff shall recover from Defendant, the total sum of $21,428.40, paid c/o to Landers & Sternberg PLLC, address 100 East Pine Street, Ste 110, Orlando, FL, 32801, which shall bear interest at the full legal interest rate prescribed by 55.03, Fla. Stat. (currently 9.46%), until satisfied, from the date of this Judgment, for which let execution issue forthwith.

5. It is further ordered and adjudged that the judgment debtor shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney.

6. This amount is *in addition* to the $3,678.42 in damages awarded to Plaintiff in the Final Judgment previously entered.

7. This Court reserves jurisdiction to enforce this Order and Judgment as necessary.

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[1]Plaintiff's Counsel's hourly rate was $400 for time prior to January 1, 2024

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Tip—Citizen informant—Witnesses who reported to officers in person that they observed defendant stumbling into truck and thought she was intoxicated were citizen informants despite fact that officers failed to obtain their contact information where witnesses remained on scene for few minutes after report, and exigencies of situation required that officers act immediately to stop dangerous situation rather than delaying to obtain identities of witnesses—Tip was corroborated when officers observed defendant's vehicle hit curb—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. JASMINE NICOLE DENSMORE, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052023MM045719AXXXXX. August 26, 2024. Judith E. Atkin, Judge. Counsel: Audra Alexander and Ben Fox, Assistant State Attorneys, State Attorney's Office, Viera, for Plaintiff. Patrick Landy, Cook & Landy, PLLC, Melbourne, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came on to be heard on May 16, 2024 on the Defendant's Motion to Suppress filed December 28, 2023. Having heard the testimony of witnesses, viewed the videos presented during the hearing, heard argument of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

The pertinent facts occurred on September 9, 2023. At approximately 12:30 a.m. on that date, Officer Rosa and Officer Morris of the Cocoa Beach Police Department (CBPD) were assisting other CBPD officers with an unrelated DUI investigation at North Atlantic Avenue in Cocoa Beach. Officer Morris was a trainee at the time, having been a law enforcement officer with CBPD for about three to four months. Officer Rosa was Officer Morris's field training officer (FTO).

While assisting the other officers, Officers Rosa and Morris were approached by two male pedestrians, one wearing a black shirt and one wearing a white shirt. The pedestrians told the officers that they had just observed a female (later identified as the Defendant) who was stumbling into a truck and appeared to be intoxicated; the pedestrians asked the officers to go check on the situation. The pedestrian in the black shirt directed Officer Rosa toward the truck with the Defendant inside, and the two of them walked together toward the truck. Officer Rosa testified that there was nothing about the pedestrians' demeanor that would have given him an indication that they might be lying.

Based on the information received from the pedestrians, Officer Rosa "waved over" to the Defendant to check on her well-being, and the Defendant stopped the truck. Just prior to the truck stopping, Officer Rosa noticed that the Defendant was trying to back into a parking space instead of pulling out into the roadway; and he noticed that the truck's back right tire hit or touched the curb at the edge of the street. Within seconds after the Defendant stopped the truck, Officer Rosa approached the truck and smelled the odor of an alcoholic beverage coming from the vehicle. He then asked the Defendant to get out of the truck. Ultimately, the Defendant was arrested for DUI.

Officer Morris testified that the two witnesses (i.e., the pedestrians) remained on scene for about three to five minutes before departing. Both Officer Morris and Officer Rosa conceded on cross-examination that they did not obtain any contact information from the witnesses and that there was no discussion of having one officer remain with the witnesses while the other officer conducted the stop. Officer Rosa explained that because Officer Morris was in training, Officer Morris was supposed to come with him as he checked on the Defendant. Officer Rosa testified on re-direct examination that he would not have had time to ask the questions of the witnesses that Defense Counsel suggested he should have asked.

The Defense argued that the stop in this case was unlawful because it was based on an anonymous tip that was not corroborated. The Defense argued that the witnesses could not qualify as "citizen informants" because the officers failed to obtain any contact information from them and thus their identities were never ascertained. The State argued that the stop was supported by reasonable suspicion of Defendant's impairment. The State argued that the witnesses did qualify as "citizen informants," not anonymous tipsters, because the witnesses spoke to the officers in person and described their observations as the incident was still occurring. The State added that even if the informants were deemed anonymous tipsters, Officer Rosa's observation of the Defendant's vehicle backing into and touching the curb at the edge of the street constituted sufficient corroboration to give rise to a reasonable suspicion of impairment.

Each side cited a number of cases to support their arguments.

This Court finds that the witnesses in this case were citizen informants. They spoke to the officers in person. They described the situation. They were in a position to see the Defendant stumbling into the pick-up truck. As to the State's alternative corroboration argument, there was a little bit of corroboration when the vehicle hit, or touched, the curb when the Defendant was backing up.

The Court finds also that the exigency of the situation did not allow for the officers to remain in the area to ascertain the witnesses' identity. The officers were dealing with an extremely dangerous situation of driving under the influence in which the person was stumbling into the vehicle and the witnesses thought she was intoxicated. The officers needed to stop this dangerous situation before it went any further.

The Court further finds that it would only take a very short time to determine if there was reason to go on with the investigation. And

Officer Rosa quickly discovered that there was, indeed, reason to proceed with the investigation when he approached the truck and immediately smelled the odor of alcohol coming from the truck and therefore had the Defendant exit the vehicle. So it was important that he act immediately.

The Court recognizes the Defense's argument that there were two officers present and that, as such, one of them could have remained with the witnesses to obtain their contact information while the other officer proceeded with the investigation. However, one of the officers was a field training officer, Officer Rosa; and the other officer, Officer Morris, was a trainee who had to stay with the field training officer. Officer Morris was very inexperienced at that point in time, and therefore was not in a position to separate from Officer Rosa.

Further, the witnesses did stay on the scene for a few minutes. It wasn't like they told the officers the information and ran off. It appears to the Court that the witnesses were concerned about the situation. And one of the witnesses actually walked with Officer Rosa to the Defendant's vehicle, which the Court believes is an important factor. The witnesses were not just running off; they were citizen informants concerned about a situation for the public. The Court finds that it was important to have a well-being check, both for the person who was getting in the truck as well as for the community at large, to make sure that somebody who was under the influence wasn't driving.

This Court finds that the instant case falls most closely within the circumstances of *Carattini v. State,* 774 So.2d 927 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D175a], where the witness was properly classified as a citizen informant, despite her identity being unknown, because the exigencies of the situation prevented the officer from ascertaining the identity of the informant. Similar to what occurred in *Carattini,* here there was face-to-face contact between the eyewitnesses and the officers. The witnesses saw the Defendant stumble into the truck and she appeared to be intoxicated. One of the witnesses assisted the officer by walking the officer to the truck and pointing out the truck. And the exigency of the situation required that the officers act immediately to stop this dangerous situation from occurring. This was an ongoing crime.

In view of the foregoing, it is hereby

ORDERED and ADJUDGED that Defendant's Motion to Suppress is DENIED.

* * *

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MISCELLANEOUS REPORTS

Municipal corporations—Certificates of use—Revocation—Home-based business—No merit to argument that special magistrate does not have jurisdiction to conduct hearing on notice of intent to revoke certificate of use for home-based business because prior special magistrate orders finding business owners to be in violation of section 559.955 for having business that is primary rather than secondary use of residence and exceeding limits on parking and number of non-residential employees and contractors on premises is on appeal—Revocation action is separate proceeding from matters on appeal, and business owners failed to post bond or file motion to stay enforcement of prior orders—No merit to arguments that proceeding is political or that it is impossible to comply with prior rulings as it is not clear what business owners must do to comply—Objections to notice to revoke are denied, and town is authorized to revoke certificates of use

THE TOWN OF SOUTHWEST RANCHES, Broward County, a Florida Municipal Corporation, Petitioner, v. PRISCO CAMERINI, ZULAY MARIA, Respondents. Town of Southwest Ranches, Code Enforcement. Case No. 2024-148. July 29, 2024. Harry Hipler, Special Magistrate. Counsel: Richard J. Dewitt, III, for Petitioner. Ryan A. Abrams, for Respondents.

[Editor's note: Magistrate's final order and circuit court's affirmance of final order published in this issue at 32 Fla. L. Weekly Supp. 279a; FLWSUPP 3207TOWN.]

FINAL ORDER DENYING RESPONDENT'S OBJECTION TO TOWN'S NOTICE OF INTENT TO REVOKE CERTIFICATE OF USE

THIS CAUSE came before the Special Magistrate on July 25, 2024 beginning at 9:30 am. This case relates to violations involving TSWR CODE SEC.005-120 (C)(1)(4) of the Town Code which provides: THE TOWN ADMINISTRATOR MAY NOTIFY A CERTIFICATE OF USE HOLDER OF THE INTENT TO REVOKE A CERTIFICATE OF USE IF IT IS BELIEVED THE HOLDER IS NOT IN COMPLIANCE WITH THE RESTRICTIONS SET BY THE CERTIFICATE OF USE. The subject real property is located at 6540 MELALEUCA ROAD, SOUTHWEST RANCHES FL 33330. Its legal description is EVERGLADES SUGAR & LAND CO SUB 2-39 D 2-51-40 TRACT 25 LESS N 990.51 & LESS W 40 & LESS S 40 FOR RDS, and whose ID/Folio number is 5140 02 01 0173.

After considering the evidence presented, including testimony, witnesses, exhibits, court file, and arguments of counsel, the Special Magistrate makes the following finds of fact and conclusions of law:

1. On March 15, 2024, the Town served a Notice of Intent to Revoke Certificate of Use (CU) on the grounds that that premises are being used in a manner that is inconsistent with and contrary to the provisions of the ULDC or any other applicable code or statute.[1] The holder of the CU requested a hearing in writing on April 1, 2024 before the Special Magistrate, which occurred.

2. In earlier proceedings on June 27, 2023 the result of which is codified in a Special Magistrate Final Order entered on October 5, 2023 in Case No. 2023-108, 2023-118, the Special Magistrate found pursuant to an intensive factual analysis that Respondent[2] violated Florida Statute 559.955 (3)(a), and accordingly the home based business was is not secondary to the real property's use as a residential dwelling and in fact the home based business is primary. A subsequent hearing occurred on December 5, 2023 pursuant to the Town's Motion to Impose Sanctions and Enforce in Case No. 2023-118 by the entry of an Order Imposing Municipal Code Enforcement and Administrative Fine where the Special Magistrate imposed a fine of $200.00 per day that is to be assessed beginning December 5, 2023.[3]

3. The Special Magistrate hearing held on June 27, 2023 involved two counts, one for nuisance that was attributable to excessive dog barking which was dismissed by the Special Magistrate, and the other violation was for violations pursuant to Florida Statute 559.955 (3)(a) where the Town alleged and proved that the owner of the residential real property was primarily used as a dog related business where the business conducted on the property revolved around and continued to revolve around the operation of Bruno Happy Dogs LLC; it was determined that Respondent unlawfully permitted commercial breeding, dog care, training, kennels, and boarding among other activities that included commercial breeding, and accordingly the home based business is not secondary to the real property's use as a residential dwelling, but rather the home based business as to dogs was primary to its use in a residential neighborhood.

4. After a contested proceeding, the Special Magistrate in Case No. 2023-108 and 2023-118 found that while CUs was issued, Respondent failed to comply with pertinent portions of Florida Statute 559.955 (3)(a) in that Respondent violated the parking related to the business by over parking vehicles to as many as 10-12 vehicles daily parking that was excessive in a residential neighborhood; there were too many employees and contractors on the premises that were working in violation of this Florida statute; the activities of the home based business via Happy Dogs LLC was primary rather than secondary to the use of the residential dwelling where Respondent provided commercial breeding, dog care, training, kennels, and boarding among other activities that included commercial breeding all of which were commercial and that showed by substantial competent evidence that the subject residence revolves around the operation of Bruno Happy Dogs LLC and not the family life and use of the dwelling and of its owners.[4]

5. Respondent has presently pending two appeals, one from Case No. 2023-108 and 2023-118 and the other from Case No. 2023-118. Both of these cases concern violations of Florida Statute 559.933 (3)(a) home based business statute. In neither event, has Respondent posted a bond pursuant to Fla. App. R. 9.310 that provides that an aggrieved party may stay enforcement of a judgment only if it complies with Fla. App. R. 9.310(b)(1) by posting a good and sufficient bond or moving for an obtaining a stay. Respondent has failed to file a Motion to Stay absent posting of a bond, neither of which Respondent has done. For a Motion for Stay if no bond has been filed, there are grounds that must be alleged and shown by the aggrieved party, including but not limited to likelihood of prevailing on the merits of the appeal, prejudice, effect on the health, safety, and welfare to the community, among others. See *Hilton v. Braunskill,* 481 US 770, 776 (1987); *Nken v. Holder,* 556 US 418, 419 (2009) [21 Fla. L. Weekly Fed. S788a]. Absent a stay, then Fla. App. R. 9.310 (b)(1) provides the basis to stay enforcement by posting of a bond or cash in escrow. See also *Sheckler v. Monroe County,* 335 So.3d 1265 (Fla. 3rd DCA 2022) [47 Fla. L. Weekly D542a], where Respondent as the owner paid the amount of the fine over his objection which constituted a way in which to stay enforcement of a Final Order, and for purposes of argument and assuming arguendo, that Respondent does not wish to post bond or money in escrow pending appeal without requesting a stay, Respondent cannot stay enforcement. See also *Platt v. Russek,* 921 So.2d 5 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D899a]; *Finst Development, Inc. v. Bemaor,* 449 So.2d 290 (Fla.3rd DCA 1983).

6. Town has filed a separate claim with its Notice of Intention to Revoke CU on account of Respondent's violations of Florida Statute 559.933 (3)(a), and in filing this separate action the Town has sought to revoke the CU.[5] In these proceedings, Respondent has argued that (a) the Special Magistrate does not have jurisdiction over the instant

matter; (2) that the instant proceeding is "political" based on the main complainants' who are a retired Circuit Court Judge and former Broward County Property Appraiser; (3) that the impossibility doctrine makes it impossible to comply with the Town's prior Special Magistrate's rulings as it is not clear as to what Respondent must do to comply, among other things. The Special Magistrate will go through each one of these responses and provide the reasons for his ruling.

7. As to the claim that the proceeding is "political", respectfully, the former Special Magistrate ruled against the position of the main complaining witnesses, ie a retired Circuit Court Judge and the retired Broward County Property Appraiser who are owners of nearby property, and denied the nuisance claim after a highly contested proceeding. There is nothing more which needs to be said about this argument by Respondent, except that if a violation has been shown, then the Town has the right and obligation to move forward and seek to obtain compliance in accordance with its code provisions. There is also no evidence that has been provided of any selective enforcement or bias or prejudice here as the facts speak for themselves.

8. As to the argument that there was no jurisdiction to hear these proceedings, respectfully, this proceeding constitutes a separate proceeding some one and one-half years after the former Special Magistrate decided that there was substantial competent evidence to support the Town's position that Respondent's home based business was primary to its residence and not secondary to its residence and that the dog related business constituted a violation of Florida Statute 559.933 (3)(a). In other words, the activities of the home based business involving dogs was primary rather than secondary to the use of the residential dwelling where the Respondent provided commercial breeding, dog care, training, kennels, and boarding among other activities that included commercial breeding all of which were commercial and that showed by substantial competent evidence that the subject residence revolves around the operation of Bruno Happy Dogs LLC and not the family life and use of the dwelling and of its owners.

9. This matter has involved a separate proceeding in light of the non-compliance by Respondent with Sec. 005-120, where the CU is subject to revocation, because any CU that was issued is subject to compliance with the Town's code and Florida statutes as provided for in the town's code in Sec.005-120; and regardless there is nothing to preclude the Town from moving forward with a Revocation proceeding in light of the fact that even though the instant proceeding is separate from prior proceedings, as has been suggested earlier, Respondent has failed to post or set bond or even file a Motion to Stay Enforcement, which is required to stay enforcement. Please see paragraph 5, supra.

10. It is the Special Magistrate's findings that the CU was issued subject to compliance with Florida law and the Town's code provisions which is specifically provided for in that section of the code.[6] This view is consistent with the proposition that there must be great deference to a local government's interpretation of its own code unless that interpretation is clearly erroneous. See *Verizon Fla., Inc. v. Jacobs,* 810 So.2d 906, 908 (Fla. 2002) [27 Fla. L. Weekly S137a]. Further, it is improper to displace a code's plain language reading which specifically provides what the law is in a local government regardless of any outstanding tradition or settlement agreement. See *Verizon Wireless v. Sanctuary at Wulfert*, 916 So.2d 850, 854-55 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D2046a]; *Town of Longboat Key v. Islandside Prop. Owners Coal, LLC,* 95 So.3d 1037, 1042 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D2058a] (cannot displace a code's plain language no matter long standing tradition or settlement agreement). When the language of the statute is unambiguous and conveys a clear and ordinary meaning, it must be followed. These cases also suggest that blending of legislative and quasi-judicial functions is not permitted, and that the decision maker, here the Special Magistrate, may only apply the existing code provision as they read and must apply it to the case at hand. Here, Respondent is required to comply with the Florida Statutes as provided for by the Town's code provision, which it has not.

11. As to Respondent's claim that the impossibility doctrine makes it impossible to comply with the Town's prior Special Magistrate's ruling, that ruling speaks for itself and complies with fundamental due process as it sets forth what the violations are and what they are not. Respectfully, a cursory reading of the Special Magistrate's Final Order provides the basis of the Special Magistrate's ruling and the violations. As such, this argument is hereby rejected. Here, Respondent was provided with a meaningful opportunity to appear and present evidence and argument of counsel, which Respondent did. See generally, *Miami-Dade Cnty. v. Reyes,* 772 So. 2d 24, 29 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2014b]; *Cherry Comms., Inc. v. Deason,* 652 So. 2d 803, 804 (Fla. 1995) [20 Fla. L. Weekly S179a]. *Brown v. Pinellas County*, No. 09-000041AP-88A (Fla. 6th Cir. App. Ct. October 22, 2010). The Final Order specifically provides the basis of the Special Magistrate's ruling as to the violations, which Respondent must comply with, and there is substantial competent evidence to sustain the Town's position of non-compliance as stated herein.

involving TSWR CODE SEC.005-120 (C)(1)(4) of the Town Code which provides: THE TOWN ADMINISTRATOR MAY NOTIFY A CERTIFICATE OF USE HOLDER OF THE INTENT TO REVOKE A CERTIFICATE OF USE IF IT IS BELIEVED THE HOLDER IS NOT IN COMPLIANCE WITH THE RESTRICTIONS SET BY THE CERTIFICATE OF USE. The Special Magistrate hereby denies Respondent's Objection to Town's Notice of Intent to Revoke Certificate of Use, and hereby sustains the Town's Revocation.

13. The Town was represented by RICHARD DEWITT, Esq. Respondent was represented by RYAN A. ABRAMS, Esq.

CONCLUSIONS OF LAW

13. The Town Administrator and/or its agents and representatives are hereby authorized to revoke certificates of use (CU) and sustain the Town's decision for revocation of the certificates of use (CU). Respondent is not in compliance with Sec. 005-120 (C)(1)(4) as well as Florida Statute 559.933 (3)(a). The Special Magistrate incorporates by reference its findings of facts within the Conclusions of Law herein. Respondent's objection to the Town's Notice of Intent to Revoke is hereby DENIED.

ORDER

A. THEREFORE, BASED UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE SPECIAL MAGISTRATE SUSTAINS THE TOWN'S REVOCATION OF THE CERTIFICATES OF USE (CU) AS IT HAS MET ITS BURDEN OF PROOF BY SUBSTANTIAL COMPETENT EVIDENCE THAT THE VIOLATIONS OCCURRED AS ALLEGED. IF NECESSARY, THIS MATTER SHALL BE REFERRED BACK TO THE SPECIAL MAGISTRATE FOR ANY FUTURE ORDER IMPOSING FINES AND LIEN AND THE SPECIAL MAGISTRATE IS HEREBY AUTHORIZED TO ENTER A FINAL ORDER CERTIFYING THE CODE ENFORCEMENT FINE AND LIEN THAT SHALL BE RECORDED IN THE PUBLIC RECORDS OF THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR BROWARD COUNTY, FLORIDA AND SAID FINAL ORDER IMPOSING FINE AND LIEN SHALL CONSTITUTE A LIEN.

B. AN ADMINISTRATIVE FEE OF $150.00 IS HEREBY ASSESSED FOR THIS HEARING.

C. ANY FINES AND LIENS IMPOSED BY THE SPECIAL MAGISTRATE PREVIOUSLY OR CURRENTLY SHALL CONTINUE TO ACCRUE UNTIL THE RESPONDENT AND OWNER COMES INTO COMPLIANCE WITH THE FINAL ORDER.

D. THE SPECIAL MAGISTRATE RESERVES JURISDICTION TO ENTER SUCH FURTHER ORDERS AS ARE NECESSARY AND PROPER INCLUDING ANY FURTHER ADMINISTRATIVE FINES AND FEES AND COSTS IF NECESSARY.

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[1]Sec. 005-120(C)(1) specifically provides that if the Town Administrator has reasonable grounds to believe that the premises is being used in a manner that is inconsistent with or contrary to the provision of the ULDC or any other applicable code or statute, the town administrator shall notify the holder. This same code provision in Sec. 005-120(C)(4) also provides that if the holder of the CO refuses to permit an authorized code compliance officer to inspect the premises during normal business hours for the purpose of investigating a complaint which has been filed against the business operation, then a CU may be revoked. This latter provision has been upheld in at least one appellate court decision as to an owner's failure to allow inspection to determine if a violation exists which permitted the agency to sanction the party. See *Miami-Dade County v. Concrete Structures, Inc.,* 114 So.3d 333 (Fla. 3DCA 2013) [38 Fla. L. Weekly D1076a].

[2]Initially, the owner of the subject real property was INVESTMENT MANAGEMENT MARLA LLC, however, the subject real property was transferred to PRISCO CAMERINI and ZULAY MARIA on October 4, 2023, which was a day before the ruling by the Special Magistrate on October 5, 2023.

[3]It should be noted that at no time did Respondent ever post bond or file a Motion to Stay Bond pending appeal, which Respondent's counsel concedes. More will be said later in this Order.

[4]For a detailed description by the Special Magistrate of what was found pursuant to the evidence and the reason for the violations, please see pages 4-5 of the Final Order entered on October 5, 2023 by the Special Magistrate that describes its ruling and why.

[5]Sec. 005-120 of the Town's code provides the grounds where a CU is subject to revocation. They include reasonable grounds such as the premises are being used in a manner inconsistent with or contrary to the provisions of the ULDC or any other applicable code or statute, the holder of the CU refuses to permit a code enforcement officer or law enforcement officer to investigate a complaint and gain entry onto the premises, which has been filed against the business operation, among other reasons. At this hearing Respondent's counsel conceded that Respondent has refused to allow the Town to gain entry into and onto the premises, which may be fatal to any of Respondent's arguments in light of the decision in *Miami-Dade County v. Concrete Structures, Inc.,* 114 So.3d 333 (Fla. 3DCA 2013) [38 Fla. L. Weekly D1076a] which persuasively concluded that where the parties had an entry or access right provision into premises provision by the governmental agency for inspection purposes to insure compliance, a failure to allow admission to confirm compliance was fatal and would result in revocation and/or sanctions. In the instant case, this section of the Town code has such a provision, therefore, the Special Magistrate has concluded that that is at least one ground in which to sustain the Town's decision to revoke the CU in addition to the violations shown via Florida Statute 559.933 (3)(a).

[6]The case of *American Casualty Co. v. Coastal Caisson Drill Co.,* 542 So.2d 957 (Fla. 1989) suggests in the public works project context that there can be no waiver to a contractor's bond as was required pursuant to Sections 255.05 and 337.18 Florida statutes. This case concerns a so-called mechanics or construction lien matter, yet statute's requirement cannot be waived even if there is an agreement to do so.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—A judge who is married to a supervisor at the state attorney's office must recuse himself or herself from criminal matters if spouse is supervising or in the line of supervision of prosecutors appearing before the judge

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-14. Date of Issue: September 3, 2024.

ISSUE

Is a county court judge required to recuse himself/herself from cases at bond hearings or on warrant duty when the judge's spouse is the chief of the felony division at the State Attorney's Office in the same county where the judge presides?

ANSWER: Yes, if the spouse is the "boss," or is supervising or in the line of supervision of the prosecutors appearing before the judge.

FACTS

The inquiring judge is a county court judge presiding over criminal misdemeanor cases. Since we received this initial inquiry, the judge's spouse has just been promoted to be the chief of the felony division at the State Attorney's Office in the same county where the judge presides. As part of the judge's duties as county court judge, the judge presides over bond hearings and reviews search and arrest warrants. These hearings and warrants are prosecuted and/or presented by felony prosecutors at the State Attorney's Office where the judge's spouse is a chief.

The inquiring judge seeks guidance on whether the judge is required to recuse himself/herself from felony bond hearings and warrant duty because of the spouse's position at the State Attorney's Office.

DISCUSSION

The following Canons and Commentary to the Canons of Judicial Conduct offer guidance:

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.

The facts presented herein are not unusual as the Committee has previously considered and provided input regarding similar scenarios over the years. The affiliation of family members with the system partners that work with the judges and judicial system is quite common.

In JEAC Op. 2023-05 [31 Fla. L. Weekly Supp. 281a], a judge was married to a deputy sheriff. The deputy served in a supervisory role within the sheriff's office. In that opinion, the Committee determined that the judge may preside over cases involving the police agency so long as the spouse was not directly involved. Further, the opinion allowed the judge to review search warrants or arrest warrants originating from the agency so long as the spouse did not author the affidavit for the warrant and was not involved in the investigation. Lastly, the opinion advised that the judge was not required to disclose the relationship each time the police agency appeared before the judge.

In JEAC Op. 2021-18 [29 Fla. L. Weekly Supp. 693b], a judge serving in the criminal division was not required to recuse from cases prosecuted by the State Attorney's Office where his spouse worked as an administrative assistant. That said, the judge was required to disclose if the judge's spouse had direct involvement with the case, such as notarizing a document.

In JEAC Op. 2018-13 [26 Fla. L. Weekly Supp. 251a], a judge presiding over criminal mental health, drug and veteran diversion courts was married to a public defender who supervised attorneys in the respective diversion courts. The Committee opined that the judge could preside over cases so long as the spouse was not the attorney of record or working in a direct supervisory capacity. The Committee found that the judge could preside over first appearances, plea hearings or cover for other judges, as long as there was compliance with Canons 2A, 2B, 3E(1) and 3E(1)(d).

In JEAC Op. 2011-21 [19 Fla. L. Weekly Supp. 306a], the Committee opined that a judge presiding over a felony arraignment docket could not do so in the county where the judge's spouse was the supervisor at the State Attorney's Office. The opinion was premised

on the spouse being the "boss" even though the spouse was not the direct supervisor. The Committee found that the canons required a disqualification since "the appearance of impropriety created when the presiding judge's spouse is in a position of authority over that county's State Attorney's Office militates in favor of a blanket disqualification. . ."

Lastly, the Third District Court of Appeal recently addressed a similar matter in *Laurence v. State*, 49 Fla. L. Weekly D1700a, 2024 WL 3801742 (Fla. 3d DCA Aug. 14, 2024). The *Laurence* court adopted the sound reasoning of JEAC Op. 2023-09 [31 Fla. L. Weekly Supp. 454a] finding that a trial judge is not required to recuse himself where his spouse is the executive director of the State Attorney's Office in the same circuit where the trial judge presides over criminal cases. *Id*. The opinion focused on the duties of the executive director. *Id*. Since as executive director the spouse had no supervisor authority over the prosecutors, the court found that there was no conflict requiring recusal of the trial judge. *Id*.

"[Q]uestions regarding the employment cases of a judge's spouse must be considered on a case-by-case basis." *Id*. *citing* JEAC Op. 2023-09 [31 Fla. L. Weekly Supp. 454a] *citing* JEAC Ops. 2023-05 [31 Fla. L. Weekly Supp. 281a] and 2003-08 [10 Fla. L. Weekly Supp. 1064a]. In analyzing the facts presented in the present scenario, the answer focuses on the role of the spouse at the State Attorney's Office. If the spouse is a direct supervisor of the prosecutors that appear before the judge or in the line of supervision, then we opine that the inquiring judge may not preside over criminal cases that involve the State Attorney's Office. Further, it would not be proper for the judge to sign search warrants and/or arrest warrants where the spouse has discernable involvement in the case. It should be noted that supervision does not have to be direct. If the spouse is a supervisor in the chain of command of the prosecutors who appear before the judge, then the judge cannot preside over the case.

Avoiding the appearance of impropriety must prevail each and every time. Ultimately, each judge must separately consider and determine "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." *See* Commentary to Canon 2.

REFERENCES

Laurence v. State, 49 Fla. L. Weekly D1700a, 2024 WL 3801742 (Fla. 3d DCA Aug. 14, 2024)
Fla. Code Jud. Conduct, Canon 2A, 2B, and 3E(1)
Fla. JEAC Ops. 2023-05, 2021-18, 2018-13, and 2011-21

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—So long as judge proceeds purely pro se, a judge may advocate on behalf of judge to actively oppose creation of gated community in judge's neighborhood, including communicating with government officials; attending and speaking at public meetings or hearings; wearing messaged apparel; and posting signs in judge's yard—Judge's non-judicial, co-habitating partner's activities in opposition to gated community are not restricted by Code of Judicial Conduct so long as partner does not appear to be acting indirectly as judge's representative and doing what judge is prohibited personally from doing

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2024-15 (revised). Original Date of Issue: September 17, 2024. Revised Date of Issue: September 17, 2024.

ISSUES

1. Whether a judge may advocate on behalf of the judge to actively oppose creation of a gated community in a portion of the judge's neighborhood by communicating with government staffers and county officials, attending and speaking at public meetings or hearings, wearing messaged apparel, and posting a sign in the judge's yard opposing the gated community.

ANSWER: Yes, as long as the judge proceeds purely pro se representing the judge and the judge's interests only.

2. Whether the judge's non-judicial partner's activities in opposition to the gated community are restricted by the Code of Judicial Conduct.

ANSWER: No, as long as the partner does not appear to be acting indirectly as the judge's representative and doing what the judge is prohibited from personally doing.

FACTS

The inquiring judge is a homeowner in a residential community comprised of half-acre homes and one-acre homes. A group of homeowners in the one-acre homes section has petitioned the county to allow them to create a special taxing district that would create a gated community immediately adjacent to the judge's property. The inquiring judge is concerned that because the judge's property would be outside the gated community, it may be negatively impacted by this measure. The process is currently at the staff review level. Some of the half-acre homeowners, including the judge, have formed a group in opposition to the creation of the special taxing district and the proposed gated community.

The judge inquires as to whether the judge is permitted to participate in the process as a homeowner regarding the potential impact on the judge's property, to include attending related public meetings, speaking against the proposal to county staff, appearing at county commission meetings to speak against the proposal, placing a sign in the judge's yard, and wearing messaged apparel opposing creation of the gated community. The judge will not be involved in any fundraising, nor will the activities of the judge or the homeowners' group involve partisan political activity. The judge also inquires as to whether the judge's cohabiting partner is limited by considerations of judicial ethics as to what the partner may do to oppose the gated community.

DISCUSSION

Relevant to this inquiry, Canons 4C and 5C(1) prohibit a judge from appearing "at a public hearing before, or otherwise consult[ing] with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration or justice or except when acting pro se in a matter involving the judge or the judge's interests." Fla. Code Jud. Conduct, Canons 4C, 5C(1). Interpreting a statute or rule requires application of the supremacy of the text principle, meaning that the words of the governing text are of paramount concern. *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) [46 Fla. L. Weekly S9a]. Furthermore, another canon of construction, *expression unis est exclusion alterus,* which means the mention of one thing implies the exclusion of another, likewise applies when considering what Canons 4C and 5C(1) permit and prohibit. *State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007) [32 Fla. L. Weekly S177a]. Those Canon provisions can be said to present the general rule that prohibits judges from appearing at public hearings or consulting with legislative or executive bodies or offices, subject to the two specific expressly stated exceptions. Consideration must be given to determine if either exception applies here.

The judge is not planning to expound on the law, legal system or administration of justice when consulting with county staff and officials, nor when appearing at any public hearings; thus, that exception does not come into play. The judge's inquiry focuses on pro se activities on a matter involving the judge or the judge's interests,

which is specifically permitted by the second exception. "Pro se" is defined as acting or appearing for oneself by Black's Law Dictionary, 5th Edition, pg. 1099. Thus, subject to compliance with other Code provisions, the judge would be relatively free to proceed individually to express and advocate for the judge's personal concerns about the judge's property and personal opposition to creation of a gated community when consulting with the county staffers or officials and while attending public meetings.

However, neither of those Canon sections provides an exception that would permit the judge to advocate for the opposition group of half-acre homeowners that has interests and goals similar if not identical to the judge's. In the Commentary to Canon 5G, the distinction is made between a judge practicing law in the representation of others, which is prohibited, as opposed to proceeding pro se, i.e. self-representation, in legal matters which is permitted. That Commentary continues by noting that "[*a*] *judge may act for himself or herself in . . . matters involving appearances before or other dealing with legislative and other governmental bodies*." Therefore, the judge should avoid acting or speaking on behalf of the opposition homeowner's group, rather than proceeding purely pro se, as that likely falls outside what is permitted by the "pro se" exception to Canons 4C and 5C(1). *See* JEAC Op. 2021-03 [29 Fla. L. Weekly Supp. 54a].

There is nothing in Canon 4 or 5 that forbids the judge from pro se advocacy by utilizing a yard sign or wearing messaged apparel regarding the judge or the judge's interests, as long as the sign or apparel does not violate any other provisions of the Code of Judicial Conduct. Wearing certain messaged apparel while the judge is expressing opposition to the gated community could create the appearance that the inquiring judge was acting on behalf of the group rather than proceeding purely pro se; that would be ill-advised. The JEAC has consistently declined to review or approve judicial campaign materials and we likewise will not review or approve anti-gated community yard signs or messaged apparel.

In any such pro se activities by the judge opposing the special taxing district and the gated community, Canon 1 requires that the judge must personally observe high standards of conduct and integrity. In the interactions between the judge and others regarding this dispute, Canon 2A requires the judge "to respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It is imperative that the judge's position as a judge must not be injected into any aspect of the dispute, including communications with staff, county officials, or participation at any governmental meeting. "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." Fla. Code Jud. Conduct, Canon 2B. The Commentary to Canon 2B reminds judges not to allude to their judgeship to gain any personal advantage or deferential treatment and to avoid use of the judge's official letterhead when conducting personal business.

Canon 5A requires judges to conduct all extra-judicial activities in a way that does not demean the judicial office, interfere with performance of judicial duties, appear to be coercive, etc. According to the information provided, in keeping with the directives of Canon 5C(3)(b)(i), the judge has neither personally or directly participated, nor lent the prestige of the judicial office in the solicitation of funds to support the homeowners group's opposition to the gated community. The inquiring judge is aware of and will abide by Canon 7's admonition to refrain from partisan political activity in seeking a resolution of this dispute.

Given that the Code of Judicial Conduct does not apply to those outside the judiciary, we find that the judge's non-judicial co-habiting partner is not restricted by the Code. *See* Fla. Code Jud. Conduct, Application. However, the judge should take reasonable steps to ensure that the partner does not appear to be acting indirectly as the judge's representative and doing what the judge is prohibited from personally doing. *See* JEAC Op. 2016-02 [23 Fla. L. Weekly Supp. 885b]. Beyond that, we express no opinion regarding the partner's activities in opposing the gated community.

REFERENCES

Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 946 (Fla. 2020)
State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007)
Fla. Code Jud. Conduct, Canons 1, 2A, 2B 4C, 5A, 5C1, 5C(3)(b)(i), 5G, 7 and related Commentary
Fla. Code Jud. Conduct, Application
Fla. JEAC Ops. 2021-03, 2016-02
Black's Law Dictionary, 5th edition, p. 1099

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