Volume 32, Number 8, December 31, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 321-363

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.

- **TORTS—NEGLIGENCE—DAMAGES—MEDICAL EXPENSES—EVIDENCE. A district court denied a motion in limine filed by a defendant asking the court to make a factual determination of the appropriate amount the plaintiff's medical providers should have charged and will charge in the future and seeking an order barring the plaintiff from conveying to the jury any evidence or testimony regarding medical charges in excess of a statutorily determined amount. The defendant relied upon HB 837, as codified in Section 768.0427, as a basis for its motions. Applying the evidentiary rule established by the Florida Supreme Court, which has the authority under the Florida Constitution "to adopt rules for the practice and procedure in all courts," plaintiffs are entitled to present evidence of the full amount billed. Defendants may challenge the reasonableness of the amount for past and expected future medical bills by presenting evidence from other medical providers that show the charges are in excess of that being charged by a plaintiff's providers but may not present evidence of insurance benefits. The court's order included a discussion of the constitutionality of the procedural aspects of the statute.** *STEIGER v. MURALI. Circuit Court, Second Judicial Circuit in and for Gadsden County. Filed November 20, 2024. Full Text at Circuit Courts-Original Section, page 351a.*
- **INSURANCE—PROPERTY—ASSIGNMENT—VALIDITY. An assignment did not strictly comply with statutory requirements where the assignment used the words "service provider" in place of the word "assignee" in the specific notice required by section 627.7152(2)(a)7. and where the statutory timeframe for the rescission of the assignment was shortened by defining "substantial work" on the property to mean the visual inspection of the property.** *IQ RESTORATION, LLC v. STATE FARM FLORIDA INSURANCE COMPANY. County Court, 11th Judicial Circuit in and for Miami-Dade County. Filed September 10, 2024. Full Text at County Courts Section, page 360a.*

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FLW SUPPLEMENT

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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:

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Cite as 32 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention—Under totality of circumstances, officer had reasonable suspicion to conduct DUI investigation where licensee was speeding, admitted to consuming alcohol, and had glassy bloodshot eyes and odor of alcohol—Lawfulness of arrest—Totality of circumstances observed prior to administration of field sobriety exercises in addition to cues observed during exercises established probable cause for arrest—Argument that results of field sobriety exercises were meaningless because of condition of road on which exercises were conducted is rejected—Hearing officer found that road was appropriate for administration of exercises, and there was no evidence that licensee's performance was impacted by condition of road

MICHAEL CAMPBELL, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 5th Judicial Circuit (Appellate) in and for Marion County. Case No. 2024-CA-0620. September 19, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI AND ORDER DENYING MOTION FOR ORAL ARGUMENT AND ORDER CANCELING ORAL ARGUMENTS SCHEDULED FOR NOVEMBER 12, 2024

(GARY L. SANDERS, J.) **THIS CAUSE** is before the Court on Petitioner's Amended Petition for Writ of Certiorari, filed on May 1, 2024. Respondent filed a Response to Amended Petition for Writ of Certiorari on June 20, 2024. Petitioner filed both a Reply to Respondent's Response and a Motion for Oral Argument on July 18, 2024. Having considered said Petition, Response, and Reply, reviewed the court file, and being otherwise duly advised in the premises, the Court finds as follows:

On March 17, 2023, at approximately 11:15 p.m., Ocala Police Department Officer W. Joedicke observed Petitioner's vehicle traveling at approximately 75 MPH in a 35 MPH zone and, as a result, initiated a traffic stop. Officer Joedicke approached the vehicle, spoke with Petitioner, detected the odor of an alcoholic beverage coming from within the passenger compartment of the vehicle, and saw that Petitioner had bloodshot, glassy eyes. Petitioner responded to Officer Joedicke's questioning that he was coming from downtown and had "one or two" drinks. Officer Joedicke then asked Petitioner to exit the vehicle to perform field sobriety exercises ("FSE") and Petitioner did as asked. Officer Joedicke testified that Petitioner did not have any problems hearing or understanding instructions, his speech was normal, his clothing was orderly, he was cooperative, and his exit from his vehicle was normal.

The Alcohol Influence Report indicated Petitioner had a flushed face, he was unsteady while walking, and swayed while standing.

Petitioner performed the FSE and Officer Joedicke and Officer J. Parker observed additional cues of impairment. During the Horizontal Gaze Nystagmus exercise, the odor of an alcoholic beverage emanated from Petitioner's breath, Petitioner swayed while standing, and he had a lack of smooth pursuit in both eyes. During the Walk and Turn exercise, Petitioner swayed while standing, used his arms for balance, took an incorrect number of steps, and missed heel to toe on almost every step. During the One Leg Stand exercise, Petitioner swayed while standing, used his arms for balance, and put his foot down twice. During the Finger to Nose exercise, Petitioner swayed while standing and did not keep his head back or his eyes closed. During the Alphabet exercise, Petitioner swayed while standing, did not keep his head back or his eyes closed, and recited the alphabet incorrectly.

Officer Parker testified that the FSE were conducted on a road that, although "not entirely smooth," was not unlevel. Officer Joedicke testified that the FSE were conducted on an older asphalt road that was relatively flat.

Officer Parker further testified that he did not document in his report that Petitioner "had slurred speech, balance problems in exiting the vehicle, difficulty hearing or understanding instructions, bloodshot or watery eyes, unsteadiness, or the odor of an alcoholic beverage." See Petitioner's Amended Appendix A. 1.

Based on the totality of the circumstances, Petitioner was arrested for DUI. Petitioner was transported to the Marion County Jail where he was read Implied Consent and refused the breath test. Petitioner's driving privileges were suspended.

Petitioner moved to invalidate the suspension based on a lack of reasonable suspicion for a DUI investigation, lack of probable cause for the arrest, and an invalid refusal because the wrong Implied Consent was read. A formal review hearing was held on February 23, 2024[1]. Hearing Officer Bethany Connelly found that the DUI investigation and DUI arrest were lawful, and that Petitioner refused a lawful breath test request. Hearing Officer Connelly denied Petitioner's motion and affirmed the suspension of Petitioner's driving privileges.

Petitioner now seeks review of the Findings of Fact, Conclusions of Law and Decision entered by Hearing Officer Connelly on March 1, 2024, affirming the suspension of Petitioner's driving privileges. Petitioner asks this Court to grant the Amended Petition for Writ of Certiorari and enter an order quashing the order suspending Petitioner's driver license that was entered March 17, 2023, and reinstating Petitioner's driving privilege.

Petitioner raises two issues in his Amended Petition for Writ of Certiorari: (1) the hearing officer's finding that there was reasonable suspicion to detain Petitioner for a DUI investigation was not supported by competent substantial evidence; and (2) the hearing officer's finding that there was probable cause for Petitioner's arrest was not supported by competent substantial evidence.

In reviewing an administrative agency decision, the Court must consider: (1) whether procedural due process was accorded to the parties; (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)). The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *See Dep't. of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "A circuit court is limited to determining whether the administrative findings and judgment are supported by competent substantial evidence. Whether the record also contains competent substantial evidence that would support some other result is irrelevant." *Clay Cty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] (citations omitted).

I. Whether the hearing officer's finding that there was reasonable suspicion to detain Petitioner for a DUI investigation was supported by competent substantial evidence.

Petitioner first argues that the hearing officer's finding that there was reasonable suspicion to detain Petitioner to conduct a DUI investigation is not based on competent substantial evidence. Specifically, Petitioner asserts that the totality of the circumstances does not establish reasonable suspicion that Petitioner was driving while under the influence of alcohol to the extent his normal faculties were impaired because speeding, the consumption of alcohol, and the odor of alcohol alone are not signs of impairment.

Here, the hearing officer below did not base the finding that that there was reasonable suspicion to detain Petitioner to conduct a DUI investigation solely on the fact that Petitioner was speeding, he had consumed of alcohol, or that Officer Joedicke detected the odor of an alcoholic beverage emanating from the passenger compartment of the vehicle. Rather, the hearing officer found that the totality of Petitioner's speeding, admission to consuming "one or two" drinks, bloodshot and glassy eyes, and the odor of alcohol coming from the vehicle established reasonable suspicion to support a DUI investigation. The totality of these circumstances is sufficient to provide sufficient reasonable suspicion to support a DUI investigation. *See Origi v. State*, 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (defendant's high rate of speed, bloodshot, glassy eyes, and odor of alcohol are enough to give rise to reasonable suspicion to justify DUI investigation); *State v. Castaneda*, 79 So. 3d 41 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (speeding, bloodshot, glassy eyes, and odor of alcohol are enough to give rise to reasonable suspicion to justify DUI investigation even if defendant denies consuming alcohol); *State v. Ameqrane*, 39 So. 3d 339 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b] (speeding, bloodshot, glassy eyes, and odor of alcohol are enough to give rise to reasonable suspicion to justify DUI investigation).

Rather than argue that Hearing Officer Connelly's findings were not supported by competent substantial evidence, Petitioner seems to argue that the evidence in opposition to a finding of reasonable suspicion was more credible and persuasive. As stated above, the Court is not in a position to reweigh the evidence presented and substitute its own findings for those of Hearing Officer Connelly. In consideration of the aforementioned the Court finds there is no legal basis to disturb Hearing Officer Connelly's decision.

II. Whether the hearing officer's finding that there was probable cause for Petitioner's arrest was supported by competent substantial evidence.

Petitioner next argues that the hearing officer's finding that there was probable cause for Petitioner's arrest was not based on competent substantial evidence. Petitioner argues that all of Officer Joedicke and Officer Parker's observations of Petitioner prior to the FSE were that Petitioner's faculties were normal. Petitioner further argues that the FSE were conducted on a surface that was not smooth, which renders the results of the FSE meaningless. However, the hearing officer found that the totality of the circumstances, including Petitioner's speeding, admission to consuming "one or two" drinks, bloodshot and glassy eyes, flushed face, unsteadiness while walking and swaying while standing, the odor of alcohol from the vehicle and Petitioner's breath, and numerous cues of impairment displayed during the FSE established probable cause for Petitioner's arrest. In addition, the hearing officer specifically found that the road wherein the FSE were conducted was appropriate for the administration for the exercises and there was no evidence presented that Petitioner's performance of the FSE was impacted by the condition of the road. The Court finds that there was competent substantial evidence to support these findings.

Based on the foregoing, it is,

ORDERED:

1. Petitioner's Amended Petition for Writ of Certiorari is **DENIED.**
2. Petitioner's Motion for Oral Argument is **DENIED**.
3. Oral arguments, scheduled for November 12, 2024, are **CANCELED**.

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[1]The hearing had been scheduled for April 26, 2023, June 26, 2023, September 27, 2023, January 24, 2024, and February 6, 2024, but was not held on those days because of issues with witnesses.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Appeals—Absence of transcript—Where licensee failed to include transcript of hearing in appendix to petition for writ of certiorari, appellate court is unable to determine if issues raised in petition were preserved for appellate review or whether there is merit to claim that hearing officer failed to review evidence—Timeliness of hearing—Where licensee did not submit request for hearing within ten days of license suspension, review hearing would not have been conducted under and subject to timeliness requirements of statute pertaining to formal review of suspensions, but rather under statute pertaining to requests for review of eligibility for restricted driving privilege—Claim that hearing was untimely is rejected—Applicable statute's 30-day time period for scheduling hearing is not jurisdictional, and record is unclear as to whether hearing was first scheduled within 30 days

RENEE NICOLE COLEE, Petitioner, v. MICHAEL J. DUGGAR, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. AP24-0003. Division 55. September 18, 2024. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HOWARD M. MALTZ, J.) Petitioner Renee Colee seeks review of the Final Order of the Hearing Officer of the Bureau of Administrative Review, Florida Department of Highway Safety & Motor Vehicles ("Department") entered May 24, 2024. The Final Order of the Department's Hearing Officer affirmed the suspension of Petitioner's driver's license. This Court, having considered the briefs of the parties, finds as follows:

On March 11, 2023, Petitioner was arrested by an officer of the St. Augustine Beach Police Department for driving while under the influence ("DUI"). Petitioner refused to submit to a breath test, and as a result her driving privilege was suspended, pursuant to Fla. Stat. § 322.2615. In January, 2024, Petitioner submitted an application to the Department for a review of the suspension of her driver's license. According to the Hearing Officer's Final Order, "[a] hearing was conducted as noticed on April 29, 2024, May 3, 2024, and May 8, 2024 to afford Petitioner the opportunity to submit evidence to show her driving privilege should not have been suspended." Following the hearings, the Hearing Officer issued his Final Order on May 24, 2024, affirming the suspension of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.

Jurisdiction

Petitioner seeks review of the Hearing Officer's Order affirming the suspension of her driving privilege. This Court has jurisdiction to consider the Petition for Writ of Certiorari, pursuant to Rule 9.030(c)(3), Fla. R. App. P.

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent, substantial evidence. *Fla. Dep't. of Hwy. Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27

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

Analysis

Petitioner raises a single argument in her Petition asserting she was denied due process. Petitioner asserts in her Petition she was denied access to video evidence at the hearings.

The Court notes it is unable to determine what happened at the hearings due to the Petitioner's failure to include a transcript of the hearings in the appendix to her Petition. Because there is no transcript of the hearings, this Court cannot determine whether the issue raised in the Petition was properly preserved. *Above Par Loss Prevention, Inc. v. Albano,* 983 So.2d 775, 776 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1609a] (citing *Applegate v. Barnett Bank of Tallahassee,* 377 So.2d 1150 (Fla. 1979)). Where arguments were not offered in the lower tribunal, the arguments are waived. *Dep't. of Highway Safety & Motor Vehicles v. Lankford,* 956 So.2d 527 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a]. Because there is no record of arguments presented to the Department at the hearing, this Court cannot determine that any of the arguments included here have been preserved for appellate review.

Petitioner questions the timing of the hearings. It appears Petitioner is confusing review under Fla. Stat. § 322.2615, with review under Fla. Stat. § 322.271. Fla. Stat. § 322.2615(1)(b)(3) provides "[t]he driver may request a formal or informal review of the suspension by the Department within 10 days after the date of issuance of the notice of suspension or may request review of eligibility for a restricted driving privilege under s. 322.271(7)." Petitioner concedes in her Petition that she did not make a request within 10 days of her suspension. Petitioner acknowledges she was arrested on March 11, 2023, when her driving privilege was suspended, but didn't submit a request for a hearing until January 2024. As such, Petitioner's review would not have been under that statute, but under Fla. Stat. § 322.271, which requires a hearing "as early as practicable within not more than 30 days after receipt of such a request." Petitioner asserts she first made her request for hearing on January 18, 2024, and then made another request on February 13, 2024. According to the Final Order, the first hearing was scheduled for February 28, 2024, which was ultimately continued. Eventually, the first hearing was conducted on April 29, 2024.

The record is unclear whether the hearing was first scheduled within 30 days. Moreover, the 30 day time period in § 322.271 is not jurisdictional and does not mandate relief if the hearing was not conducted within 30 days. *See Pazos v. Dep't. Highway Safety & Motor Vehicles,* 30 Fla. L. Weekly Supp. 715a (Fla. 11th Cir. Ct. December 21, 2022).

Lastly, Petitioner seems to also contend the Hearing Officer failed to review evidence. As discussed above, because there is no transcript of the proceedings, this Court is unable to determine what the hearing officer reviewed, and thus, Petitioner has not met her burden on this point.

Accordingly, Petitioner has not demonstrated she is entitled to the issuance of a Writ of Certiorari, and thus, her Petition will be denied.

Therefore, it is ORDERED AND ADJUDGED that:
Petitioner's Petitioner for Writ of Certiorari is DENIED.

* * *

Municipal corporations—Zoning—Rezoning—Village council failed to follow essential requirements of law in denying application to rezone property from agricultural to estate modified where council members applied their own criteria, rather than evaluation criteria enumerated in code of ordinances, and disregarded village's comprehensive plan and future land use map—No merit to claim that denial of rezoning constituted reverse spot zoning—Although area around applicant's property was predominantly zoned EM, two adjacent properties were zoned AG—Decision denying application was not supported by competent substantial evidence—Public comments expressing generalized concerns were not based on fact, and staff report stated that proposed rezoning was consistent with surrounding community and future land use for single family homes

FAIRCHILD BAY SUBDIVISION LLC, Petitioner, v. VILLAGE OF PALMETTO BAY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-33-AP-01. September 10, 2024. On Petition for Writ of Certiorari from the Village of Palmetto Bay's denial of a request for rezoning. Counsel: Thomas H. Robertson and Nicholas J. Rodriguez-Caballero, Bercow Radell Fernandez Larkin & Tapanes, PLLC, for Fairchild Bay Subdivision LLC, Petitioner. John Quick, Laura K. Wendell, Edward G. Guedes and Richard Rosengarten, Weiss Serota Helfman Cole & Bierman, P.L., for Village of Palmetto Bay, Respondent.

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

OPINION

(TRAWICK, J.) This matter comes before this Court on a Petition for Writ of Certiorari filed by Petitioner Fairchild Bay Subdivision LLC to quash the Village of Palmetto Bay's denial of Fairchild's application to rezone its property.

Background

Petitioner Fairchild Bay Subdivision LLC ("Petitioner") is the owner of a 1.70-acre property located at 9000 SW 174 Street ("Property") within the Village of Palmetto Bay ("Respondent" or Village"). The Property is designated as "low density residential" on the Respondent's Comprehensive Plan and is zoned agricultural.

On January 17, 2023,[1] Petitioner submitted an application to amend the zoning map and rezone the Property from Agricultural ("AG") to Estate Modified ("EM"). EM allows one dwelling unit per 15,000 net square feet of land. Petitioner's lot size is 73,920 square feet and has 1,790 square feet of actual living area. Petitioner maintains that the rezoning is consistent with Respondent's comprehensive plan and the established development pattern in the neighborhood.

Petitioner asserts that this Property is part of a group of remnant AG-zoned properties that do not meet the minimum requirements of the AG zoning district—which requires a minimum lot area of 5 gross acres and limits density to 0.2 units per acre i.e., 1 unit per 5 acres. Conversely, the low-density residential designation in the comprehensive plan allows detached single-family homes at a minimum density of 2.5 dwelling units per gross acre and a maximum of 6.0 dwelling units per acre. Currently, there is a single-family residence on the Property, built in 1954; there is no active agricultural use on the Property.

On April 17, 2023, a public hearing was held on Petitioner's rezoning application. At the hearing, Village staff testified and submitted a detailed staff report that recommended approval of the rezoning, and further recommended that Petitioner modify the sketch of their site plan at a later date to conform to the requirements of the EM zoning district. Village staff also recognized that the subsequent development plan would have to be resubmitted for consideration at a later platting hearing. Staff testified that the Property is currently non-conforming on two out of three requirements for the agricultural classification.

Mrs. Sainz, Petitioner's representative, testified that Petitioner was seeking to rezone to conform to the development pattern of the neighborhood. She explained that Petitioner intended to subdivide the Property; build two homes for the owners and have two single-family homes available for sale; to comply with the EM zoning district standards; and to preserve the mango trees located on the property if possible. Mrs. Sainz also stated that Petitioner was not looking for a variance.

The synopsis of the rest of the hearing was as follows:

- Vice Mayor Tellam questioned the existing mango trees on the Property and potential loss of shade, and opposed the rezoning due to the number of lots proposed and the perceived need for future variances.
- Councilmember Cody observed that the frontage lengths within Petitioner's sketch of its site plan did not comply with the minimum requirements of the EM district.
- Councilmember Watson stated that the Village Council should not support any development proposed to be connected to a septic system, and expressed concern about the mango trees.
- Councilmember Matson opposed the rezoning because there were abutting remnant AG zoned properties.
- Mayor Cunningham opposed the rezoning because there is "nothing really that requires us to change the zoning."
- Public comment. Six members of the public expressed concern and opposition due to the mango trees, and the potential development of a segment of SW 91st Avenue.

The Council then voted 5-0 to deny the rezoning without prejudice.[2]

Standard of Review

A three-part standard governs this Court's review: (1) whether procedural due process is accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative decision is supported by competent substantial evidence. *Vill. of Palmetto Bay v. Palmer Trinity Priv. Sch., Inc.,* 128 So. 3d 19, 24 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c].

Petitioner does not argue the procedural due process prong of the standard.

Essential Requirements of Law

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

Reverse spot zoning

We first address the issue of whether the denial of rezoning for Petitioner's Property constitutes "reverse spot zoning" and would thus be a failure to comply with the essential requirements of law.

> Reverse spot zoning occurs when a zoning ordinance prevents a property owner from utilizing his or her property in a certain way, when virtually all of the adjoining neighbors are not subject to such a restriction, creating, in effect, a veritable zoning island or zoning peninsula in a surrounding sea of contrary zoning classification.

City of Miami Beach v. Robbins, 702 So. 2d 1329, 1330 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D2750f].

Petitioner contends that the Property does not conform to the requirements of the AG district with respect to lot area and lot depth, and the existing AG zoning is inconsistent with the underlying comprehensive plan designation. Moreover, Petitioner argues that it is entitled to have its Property appropriately zoned EM based on proper zoning concepts and the established development pattern of the surrounding area.

Petitioner cites the case of *Richard Rd. Estates, LLC v. Miami-Dade Cnty. Bd. of Cnty. Comm'rs,* 2 So. 3d 1117, 1118 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D448a] for the proposition that reverse spot zoning is occurring. We disagree. In *Richard Rd.,* the Third District Court of Appeal held that the county's refusal to grant a change in zoning resulted in impermissible spot zoning and was sufficient to warrant second tier certiorari review. However, we find that *Richard Rd.* is distinguishable from the case at bar in that in *Richard Rd.* the petitioner's property was unjustly being used to drain all the water that accumulated on the surrounding land. Indeed, the District Court held that "Richard Road's property is thus forced to act, as it were, as an uncompensated storm sewer for the neighborhood." *Id.* at 1119.

Petitioner also cites the case of *Palmer Trinity Private Sch., Inc. v. Vill. of Palmetto Bay,* 31 So. 3d 260, 262 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D672b], in support of its argument that a rezoning ordinance resulted in impermissible spot zoning.[3] In *Palmer Trinity,* the District Court held that the circuit court departed from the essential requirements of the law as the school was not afforded the same beneficial use and restrictions for one of its parcels (Parcel B) that were enjoyed by the owners of the surrounding properties. *Id.* The District Court agreed that the zoning classification of the surrounding properties rendered Parcel B an "island" or "peninsula" resulting in impermissible "reverse spot zoning." *Id.* at 262.

The Respondent contends that the Council's decision does not result in impermissible reverse spot zoning. In support of their position, the Respondent cites this Court's decision in *Yacht Club by Luxcom, LLC v. Vill. of Palmetto Bay Council,* 2019-265-AP-01, Supp. App. 1-12, *aff'd* 316 So. 3d 748, 750 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D526a], in which we held that the change in zoning classification in that case did not constitute spot zoning.[4] This Court, as did the Third District in affirming our decision, rejected the reverse spot zoning argument where the owner's adjacent property was zoned the same as the property at issue, and where the record did not conclusively establish disparate treatment from surrounding properties.

Similarly, in *Town of Juno Beach v. McLeod,* 832 So. 2d 864, 867 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2537b], the Fourth District rejected a spot zoning argument. The Town rezoned the subject property from RS-1 (residential single family) to CO (commercial office). The District Court reasoned that this decision did not constitute "spot zoning" because the land use designation for the property was changed to commercial, and an adjacent property across the highway contained a 60,000 square foot commercial shopping center. *Id.* at 866.

Respondent argues that the facts here are even stronger than the *Yacht Club* case. The Village contends that Petitioner's Property was and will continue to be surrounded on three sides by properties that are zoned AG, regardless of the decision on the proposed rezoning.[5]

Petitioner counters these arguments in asserting that it is being denied the right to develop the Property consistent with the surrounding zoning and the Comprehensive Plan, and maintaining that the Village's reliance on *Yacht Club* is misplaced. Petitioner argues that this case, unlike *Yacht Club,* involves the denial of a rezoning proposed by a private applicant, where the proposed rezoning is consistent with the Property's comprehensive plan designation and consistent with the professional staff recommendation for approval. Petitioner further attempts to distinguish *Yacht Club* by arguing that the Property is part of an island or peninsula of remnant AG-zoned properties within a surrounding sea of EM zoning. Finally, unlike *Yacht Club,* Petitioner argues that the Village's action perpetuates an inconsistency between the Property's zoning designation and the

Village's Comprehensive Plan. Petitioner rightly contends that the Property clearly cannot meet the current requirements of the Zoning Code.

We agree with Respondent and find that *Yacht Club* is the applicable precedent. Here, while the area around Petitioner's Property is predominately zoned EM,[6] the properties immediately to the north and west of Fairchild are zoned AG. Petitioner's attempt to otherwise distinguish *Yacht Club* by raising an inconsistency between the zoning designation and the Comprehensive Plan is unpersuasive. Thus, we reject Petitioner's contention that the denial of the requested rezoning constitutes reverse spot zoning.

Reliance on Unenumerated Rezoning Criteria to Deny Petitioner's Application

Petitioner next contends that the Respondent departed from the essential requirements of law when the Council disregarded their Comprehensive Plan and applied their own unenumerated criteria in denying Petitioner's rezoning application.

The Code of Ordinances, Palmetto Bay, Section 30-30.7 (Amendment to the official zoning map or the text of the Land Development Code) (b) states:

> *Process and criteria for review.* All proposed amendments, regardless of the source, shall be evaluated by the department of planning and zoning, the local planning agency and the village council. In evaluating proposed amendments, the village council shall consider the following criteria:
>
> (1)Whether the proposal is consistent with the comprehensive plan, including the adopted infrastructure minimum levels of service standards and the village's concurrency management program.
>
> (2)Whether the proposal is in conformance with all applicable requirements of Chapter 30.
>
> (3)Whether, and the extent to which, land use and development conditions have changed since the effective date of the existing regulations, and whether the changes support or work against the proposed change in land use policy.
>
> (4)Whether, and the extent to which, the proposal would result in any incompatible land uses, considering the type and location of uses involved, the impact on adjacent or neighboring properties, consistency with existing development, as well as compatibility with existing and proposed land uses.
>
> (5)Whether, and the extent to which, the proposal would result in demands on transportation systems, public facilities and services would exceed the capacity of the facilities and services, existing or programmed, including: transportation, water and wastewater services, solid waste disposal, drainage, recreation, education, emergency services, and similar necessary facilities and services.
>
> (6)Whether, and to the extent to which, the proposal would result in adverse impacts on the natural environment, including consideration of wetland protection, preservation of groundwater aquifer, wildlife habitats, and vegetative communities.
>
> (7)Whether, and the extent to which, the proposal would adversely affect the property values in the affected area, or adversely affect the general welfare.
>
> (8)Whether the proposal would result in an orderly and compatible land use pattern. Any positive and negative effects on land use pattern shall be identified.
>
> (9)Whether the proposal would be in conflict with the public interest, and whether it is in harmony with the purpose and intent of Chapter 30.
>
> (10)Other matters which the local planning agency or the village council in its legislative discretion may deem appropriate.

Rather than question Petitioner's counsel regarding any of the above enumerated criteria, Council members asked questions related to the cost to acquire the Property; the Property's ownership history; the Property's topography; the potential loss of mango trees; and Petitioner's site plan for the future development of the Property. Further, there was public comment considered by the Council, as discussed in more detail below. None of the questions, public comment or discussion by Council members were relevant to the established criteria for rezoning.[7] Further, although the Village Council extensively discussed the details and dimensions of Petitioner's site plan, both the Village staff and the Council acknowledged the site plan was not before the Council for approval. The Staff report stated: "Florida state law does not require a site plan at the time of a rezoning hearing and does not allow a zoning district to be conditioned for approval."

In contrast to the Council, the Staff responded to each of the aforementioned criteria in their report, which was presented at the meeting in a digital format.[8] Some of the highlights of the report are as follows:

> (1)The exiting parcel of land is less than the minimum lot area of five acres, and it exceeds the comprehensive plan requirements.
>
> (2)The proposed rezoning will be required to meet all requirements of Chapter 30 at the time of platting and development.
>
> (3)Most of the adjacent surrounding homes within 1 block in each direction are zoned Estates Modified. The parcel immediately to the north and west are also remnant Agricultural zoned properties that also do not meet the minimum required lot sizes. The subject property is not operated in a manner that meets the uses of the existing Agricultural Zoning District Designation. The introduction of new residential homes would be consistent with the existing land use and development conditions of the surrounding area.
>
> (4)The surrounding character of homes are all single-family homes. EM zoning district would be consistent with the surrounding neighborhood.
>
> (5)The surrounding streets are below capacity for Level of Service. . .
>
> (6)Miami-Dade County DERM will determine if existing specimen trees would need to be preserved or a mitigation permit will need to be obtained at the time of permitting any new development. DERM will also determine if any endangered or threatened species are present.
>
> (7)The proposal is consistent with the surrounding community and Future Land Use for single family homes.

As is argued by Petitioner and which was recognized by the Staff in its report, the Property cannot currently meet the requirements of the zoning code under its current designation, AG. The regulations of the AG District require a minimum lot size of 5 acres—while the Property is only 1.7 acres in size. Petitioner maintains that while it cannot build a new single-family house on the Property (there is already an existing house on the Property)—similarly-situated property owners in the surrounding neighborhood are permitted to build new homes on 15,000 sq. ft. lots—i.e. approximately 1/3 acre.

The testimony of the Village staff and Staff report reflected that the Property is currently a legally non-conforming parcel, surrounded by AG-zoned properties and is in an area characterized by other residential properties that are zoned EM. The trend of development is to support a change from AG zoned parcels to EM parcels. It is notable that the Petitioner's application is consistent with the future land use map (FLUM) as well as the Comprehensive Plan. The request is also consistent with the applicable land development regulations of the surrounding area. Thus, as in *Palmer Trinity,* Petitioner is not being afforded the same beneficial use of the Property as is being permitted by neighboring property owners.

Upon consideration of the enumerated Code criteria, the Staff report, as well as the hearing record, we are constrained to find that the Council unjustifiably applied their own unenumerated criteria in denying Petitioner's rezoning application. In so doing, the Council also disregarded the Village's Comprehensive Plan and FLUM.

Accordingly, the Village failed to follow the essential requirements of law.

Substantial competent evidence

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

Petitioner maintains that there is no competent substantial evidence to support the Council's decision to deny the rezoning. Petitioner argues that its application materials; the Office of the Property Appraiser Summary Report; the Village staff's report and recommendation; Village staff's presentation; and the testimony offered by both Petitioner's planning expert, Mr. Lopez, and its representatives, Mr. and Mrs. Sainz, all constitute competent substantial evidence in support of the rezoning. On the other hand, Petitioner argues that the testimony offered by members of the public in objection to the rezoning did not relate to the Village's rezoning evaluation criteria and is therefore irrelevant.

The testimony of the public at the hearing consisted of six speakers:

(1)Speaker 1 testified that she lived on the cul-de-sac of the Property, and it "may be opened up to traffic at one point." She was also concerned that putting "four houses on that lot would be not in keeping with the houses surrounding—surrounding the property."

(2)Speaker 2 testified that "developer after developer say that they're going to live there and everything's going to be wonderful, and it doesn't turn out to be like that at all." She also stated that "I've eaten mangoes from that property for 23 years," and "we have very little agricultural land left in Palmetto Bay."

(3)Speaker 3 testified she lives blocks away from the Property, and she was concerned about the trees and the wildlife. She was also "very, very concerned that it's going to change the environment."

(4)Speaker 4 testified that she lived just south of the Property, and she was concerned "with the plans that the developer is proposing is opening up (sic) at 91st Avenue," which will create more traffic and danger to her kids.

(5)Speaker 5 testified that she agreed with the other speakers, and wanted to "deny the request for any variances in rezoning."

(6)Speaker 6 lived next to the Property, and she testified that Southwest 91st Street would be opened up and ruin their "quiet cul-de-sac." She also testified that "transient people would be coming in and out of that."

These comments expressed the neighbors' negative view of the Property, and centered on the future possible traffic impact, impact on mango trees and wildlife, possible variances, and upcoming changes in the environment. While this Court cannot reweigh the evidence, the aforementioned public comments expressed only generalized concerns and were not factually based. In *City of Apopka v. Orange Cnty.*, the Orange County Commission turned down a zoning request for an airport, based on public input which was "in the main laymen's opinions unsubstantiated by any competent facts." 299 So. 2d 657, 660 (Fla. 4th DCA 1974). The "testimony" in that case was mainly from "[s]everal other property owners [who] speculated about what would happen to the area's zoning, complained about the anticipated noise, and generally wanted to keep the status quo in the area." *Id.* at 659. *See also Metro. Dade Cnty. v. Blumenthal,* 675 So. 2d 598, 607 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c] (Cope, J. dissenting) ("Mere generalized statements of opposition are to be disregarded, but fact-based testimony is not.").

A thorough review of the record fails to establish substantial competent evidence to support the Village's decision. The Respondent fails to identify any specific material and relevant statements from the public hearing that constitute competent substantial evidence. The evidence primarily addressed the Property's ownership history, the potential loss of mango trees and Petitioner's site plan for the future development of the Property. In addressing these issues, the Staff report indicated that DERM would need to make a report on whether the trees needed to be preserved and whether any endangered or threatened species were present. As to future development of the area, the Staff report specifically stated that the "proposal is consistent with the surrounding community and Future Land Use for single family homes." This evidence is insufficient to support the Respondent's position. We thus find that the decision denying Petitioner's rezoning application is not supported by competent substantial evidence.

Accordingly, the Petition for Writ of Certiorari is **GRANTED**. The decision of the Village to deny Petitioner's application is hereby **QUASHED**. (SANTOVENIA, J., concurs.)

(ARECES, J., concurs.) I agree with the majority's opinion, except that I would also find that Petitioner has been subjected to reverse spot zoning. *See Kugel v. City of Miami,* 206 So. 2d 282, 284 (Fla. 3d DCA 1968) ("Where changed conditions create a situation where the zoning of appellants' property is so unreasonable as to constitute a taking of his property, then the courts are justified in striking down the arbitrary zoning classification."); *City Com'n of City of Miami v. Woodlawn Park Cemetery Co.,* 553 So. 2d 1227, 1235 (Fla. 3d DCA 1989) ("Central to the analysis of a reverse spot zoning case, as previously noted, is that the land of the complaining landowner must be treated unjustifiably different for zoning purposes than that of the land which surrounds it."); *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260, 263 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D672b] ("A zoning authority's insistence on considering the owner's specific use of a parcel of land constitutes not zoning but direct governmental control of the actual use of each parcel of land which is inconsistent with constitutionally guaranteed private property rights."); *Yacht Club by Luxcom, LLC v. Village of Palmetto Bay Council,* 316 So. 3d 748, 751 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D526a] (distinguishing *Palmer Trinity* because unlike *Palmer Trinity,* nothing showed the lower tribunal "sought to treat Petitioner differently because of the proposed use of the property.").[9]

For the reasons stated in the majority opinion, the decision to deny Appellant's zoning reclassification was arbitrary, unreasonable and confiscatory. *Kugel,* 206 So. 2d at 285 (finding denial of a rezoning request unreasonable and arbitrary where "[t]he character of the property has already been changed by other actions of the municipality."). Accordingly, I would grant the Writ of Certiorari because Respondent failed to follow the essential requirements of the law, rendered a decision wholly unsupported by competent substantial evidence and subjected Petitioner to reverse spot zoning that resulted in a confiscatory taking of its real property.

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[1]Petitioner dated the application January 17, 2023. However, the Zoning Department date-stamped the application as received on February 23, 2023.

[2]This was the Petitioner's fourth attempt to rezone the property. Similar requests were denied in June 2021, October 2021 and January 2022.

[3]In *Palmer,* the school sought to rezone Parcel B from AU (one home per five acres) and EU-M to EU-2 (estate modified single family zoning allowing one home per 15,000 square feet).

[4]For example, we noted that "the record shows that Luxcom's own undeveloped 10 acres located immediately west of the Property had the same E-1 zoning designation as the Property at issue." *Id.* at 750-751.

[5]The parties differ on whether the Property is surrounded on two or three sides by property zoned AG. However, the record reflects that the Property is surrounded on two sides by property zoned AG. *See* Village of Palmetto Bay's website https://www.palmettobay-fl.gov/462/Village-Maps

[6]See Supp. App., p. 2 (Official Zoning Map).

[7]It can be argued that Code criteria 7, which states that the Council could consider whether the proposal would "adversely affect the general welfare", criteria 9, which allows consideration of "[w]hether the proposal would be in conflict with the public interest" and criteria 10 which mentions "[o]ther matters . . . the village council in its legislative discretion may deem appropriate" would support the decision of the Council here. However, the language from these provisions is so broad and general in scope that it would permit the Council, in the exercise of this practically limitless discretion, to consider virtually any matter in reviewing a rezoning application. Such a reading of these provisions would seemingly render the remaining specific criteria superfluous. "[A] specific statute controls over a general statute covering the same subject matter." *Surf Works, L.L.C. v. City of Jacksonville Beach,* 230 So. 3d 925, 932 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2398a]. "A statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." *Dep't of Child. and Fam. Servs. v. P.S.,* 932 So. 2d 1195, 1201 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1805a], quoting *Palm Beach Cnty. Canvassing Bd. v. Harris,* 772 So. 2d 1273, 1287 (Fla. 2000) [26 Fla. L. Weekly S26c]. While we are bound to consider and give effect to all of the language of a statutory provision, consideration of general language must be done in a manner that is harmonious with the provision's more specific language. "It is well settled that a statute should be construed in its entirety and as a harmonious whole. . . . Further, where two laws are in conflict, courts should adopt an interpretation that harmonizes the laws, for the Legislature is presumed to have intended that both laws are to operate coextensively and have the fullest possible effect." *Harris,* 772 So. 2d at 1287. We also find it appropriate to consider this general language consistently with the Village's Comprehensive Plan.

[8]Among the rezoning recommendations in the Staff report were that "[t]he Comprehensive Plan allows the density, true agricultural uses would be disruptive to the surrounding community, the trips generated and impacts on infrastructure are minimal."

[9]I agree with Petitioner that *Yacht Club* can be easily distinguished. Unlike *Yacht Club,* in this case Respondent denied the rezoning *precisely* because of what it believed Petitioner intended to do with the property, In this case, moreover, the proper zoning designation is not "fairly debatable," as everyone agrees that Petitioner's property does not currently conform to its agricultural zoning designation.

* * *

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

OLIGON PROPERTIES, LLC, Appellant, v. MIAMI-DADE COUNTY DEPT. OF REGULATORY AND ECONOMIC RESOURCES, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2023-72-AP-01. September 13, 2024. On Appeal from the Final Administrative Action of the Miami Dade County Office of Code Enforcement. Counsel: Bryan Morera and Austin Gomez, Morera Law Group, P.A., for Appellant. David Sherman and Benjamin Simon, Assistant County Attorneys, for Appellee.

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

OPINION

(PER CURIAM.) This case presents legal and factual issues identical to those raised in *RR 1 Developer, LLC v. Miami-Dade County Dept. of Regulatory and Economic Resources,* Case No. 2023-60-AP-01 [32 Fla. L. Weekly Supp. 195a].[1] This Court adopts and incorporates by reference its June 25, 2024 Opinion in Case No. 2023-60-AP-01, which is attached hereto. Appellee did not file a notice of appeal in *RR 1,* nor has it filed a Confession of Error in this case.

In *RR 1,* this Court found the Hearing Officer failed to observe the essential requirements of the law, made a decision unsupported by competent substantial evidence and denied Appellant the due process of law when it incorrectly held that the owner of a property zoned for industrial use could be cited for purported violations of zoning provisions applicable to properties that are zoned for agricultural use. For the reasons stated in this Court's *RR 1* Opinion dated June 25, 2024, the Hearing Officer in this case, like the Hearing Officer in *RR 1,* departed from the essential requirements of the law, made a decision unsupported by competent substantial evidence and denied Appellant the due process of law when he incorrectly reached the same conclusion.

Accordingly, all citations issued in this case are quashed.

[1]The Appellant and Appellee in this case are represented by the same lawyers who represented the appellant and appellee in *RR 1.*

* * *

Appeals—Dismissal—Brief—Failure to include references to record in statement of case and facts—Failure to file and serve corrected initial brief that complied with rule 9.210(b)(3)—Reconsideration—Motion for reconsideration of order dismissing appeal treated as motion for rehearing, which is proper vehicle for seeking review of final order dismissing appeal, and is denied—Motion filed more than 20 days after issuance of dismissal order was untimely

OLIVIA LEDUC, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appeal. Case No. 23-CA-16396, Division K. L.T. Case No. 22-TR-086279. February 15, 2024. On Motion for Reconsideration June 18, 2024. Counsel: Alex Reed Stavrou, Alex, R. Stavrou, P.A., Tampa; and Patrick N. Leduc, Law Offices of Patrick Leduc, P.A., Tampa, for Appellant. Office of the State Attorney, Tampa; and Ian Macalister, City Attorney City of Tampa, Tampa, for Appellee.

[Order on Motion for Reconsideration published below.]

ORDER DISMISSING APPEAL

(LINDSAY M. ALVAREZ, J.) On December 14, 2023 the Court entered an order striking Appellant's initial brief (Doc. #10) because, among other errors, Appellant's brief (Doc. #9) failed to include any references to the record in its statement of the case and facts as required by Florida Rules of Appellate Procedure Rule 9.210(b)(3). This order (Doc. #10) further directed Appellant to submit a corrected initial brief in compliance with the rules. Appellant was forewarned in this order (Doc. #10) that failure to file and serve a brief that complies with the rules would result in dismissal of the appeal without further opportunity to be heard.

Despite this court's explicit order to include citations in the initial brief's statement of the case and facts, Appellant's amended initial brief (Doc. #13) again fails to include any references to the record in its statement of the case and facts. Although Appellant excused this second lapse with the statement that no record of the trial exists,[1] this statement is belied by the fact that the record on appeal appears on the appellate docket. (Doc. #4).[2] An appellate record consists of more than a transcript.

It is therefore

ORDERED that the appeal is DISMISSED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature. It is further ORDERED that all pending motions in this appeal are DENIED as moot.

[1]Doc. #13, p.7

[2]Notably, Appellant filed Directions to the Clerk for items to include in the Record on Appeal (Doc. #4, p. 38-39).

ORDER ON MOTION FOR RECONSIDERATION

(LINDSAY M. ALVAREZ, J.) **THIS CASE** is before the Court on Appellant's March 7, 2024 Motion for Reconsideration (Doc. 15) of this Court's February 15, 2024 Dismissal (Doc. 14).

Because the dismissal to which Appellant's Motion (Doc. 15) is directed is a final order, reconsideration is not the correct procedure for review of the order. Being an appellate rather than civil trial

proceeding, the rules of *appellate* procedure apply. The Court will treat the Motion as one for rehearing. Rule 9.330, Fla. R. App. P. The Motion (Doc. 15), filed 20 days after the issuance of the dismissal, is untimely. Rule 9.330(a)(1), Fla. R. App. P. Appellant did not seek an extension of time or leave of court to file the Motion.

Notwithstanding the untimeliness, the Court has reviewed the Motion, and, in turn, the history of this case in depth. The Court previously struck Appellant's first brief because it failed to contain citations to the record (Docs. 9, 10). The Court then struck the second brief Appellant filed for the same deficiencies. (Doc 13). Appellant explained in the second brief (Doc. 13) that no record of the trial exists because "the civil trial wasn't recorded," and "this brief is unable to make references to the specific record of proceedings since none exist. . .Appellant respectfully suggests that the Court should benefit from hearing counsel explain how the trial court's findings are not supported by the evidence or the lack thereof. Clearly, any testimony is lost in the cold record, and some further elucidation beyond that contained in the written brief would benefit the Court in these proceedings. The Appellant seeks a reversal of the trial court based upon the application of the undisputed facts in this case to the law in addition to other legal errors committed by the trial court, and it is in understanding the nuances in the facts of this matter as applied to the law where oral arguments would benefit." (Doc. 13, p. 7)

It is axiomatic that it is the petitioner or appellant's burden to ensure that the record is prepared and transmitted in accordance with the rules. Rule 9.200(e), Fla. R. App. P. In the absence of a record, a court is constrained to affirm the trial court's decision.[1] *Applegate v. Barnett Bank of Tallahassee,* 377 So. 3d 1150, 1152 (Fla. 1979).

The record shows that the appeal was filed September 5, 2023. On November 3, 2023,[2] Appellant filed directions to the clerk which included designations for a transcript of the unrecorded proceeding to an unnamed court reporter. After the Court struck the first brief, Appellant then filed a motion for extension of time to file an amended brief on December 20, 2023 (Doc. 11). In the motion for extension of time (Doc. 11), Appellant cited difficulties, mostly financial, in obtaining the record of the trial. It also stated that the "record should not be extensive," and that once the record was received, "it will take little time. . ." for the initial brief to be completed (Doc. 11, p. 3). Before the Court ruled on the pending motion for extension of time, Appellant filed the second brief stating there are no citations to the record because "none exist." (Doc. 13, p. 7).

Appellant now requests in the Motion that the Court allow Appellant to recreate a record in the absence of a transcript (Doc. 15, para. 13), pursuant to 9.200(b)(5) Fla. R. App. P. Therein, arguing that the trial court should have "shared such knowledge" before the brief was stricken,[3] and suggests that the Court should have *sua sponte* entered an order relinquishing jurisdiction to enable Appellant to pursue the development of a statement of the evidence.[4] (Doc. 15, p. 3-4).

Rule 9.200(e), Fla. R. App. P. states that a party may enforce the provisions of the rule by *motion.* The Court must order supplementation of the record only if it finds it is incomplete. 9.200(f), Fla. R. App. P. Appellant here not only never filed such a motion to enforce this rule prior to the Court's dismissal (Doc. 14), but Appellant also repeatedly stated that there was no record. Further, the first instance of Appellant referencing the procedure outlined in 9.200(b)(5) was in Appellant's Motion for Reconsideration (Doc. 15), which is being treated as one for rehearing. Rehearings are intended to correct or address matters *the court* may have overlooked.

Because, the Motion is untimely, pursuant to 9.330 Fla. R. App. P., does not address matters the Court overlooked, and no motion was filed pursuant to 9.200(e), Fla. R. App. P., it is **ORDERED** that Appellant's Motion for Reconsideration (Doc. 15) is **DENIED**.

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[1]The dismissal had the effect of affirming the trial court's decision.

[2]Directions to the clerk, if filed, are due within 10 days after filing the notice of appeal. Rule 9.200(a)(2), Fla. R. App P.

[3]It is not clear whether "such knowledge" that Appellant is referring to is the 9.200(b)(5) procedure or the fact that the proceeding had not been recorded or that the proceeding was a civil one requiring counsel to make arrangements for a court reporter. (Doc. 15, para 16). The trial court cannot be expected to know the appellate briefing schedule, nor can it be expected to make such revelations in conjunction with it.

[4]Under Rule 9.200(b)(5), an order of the appellate court is not required unless a record must be *supplemented* with a statement of the evidence. The procedure under 9.200(b)(5) is optional and rarely sought. Leave to supplement a record will be ordered upon filing of a motion. An order to supplement the record will be initiated by the court only if it is aware that the record is incomplete and can be supplemented. Here, the Appellant said repeatedly that there was no record.

* * *

Municipal corporations—Code enforcement—Parking of boat trailers—Special magistrate properly interpreted city ordinance regarding parking of boat trailers in determining that trailer parked on grass with concrete pavers placed under each wheel did not comply with requirement that trailer be parked on hardened surface that provides minimum of one-foot perimeter around parked vehicle—No merit to argument that magistrate violated section 162.07(4) by failing to issue findings of fact and conclusions of law in final order—Order contains basic findings supported by evidence, and transcript that is part of record reveals additional findings and conclusions of law

ROY SINGHAL, Appellant, v. CITY OF WILTON MANORS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE23-013266 (AP). L.T. Case No. 2022-000079. June 27, 2024. Appeal from the City of Wilton Manors; Thomas Ansbro, Esq., Special Magistrate. Counsel: Ryan A. Abrams, Abrams Law Firm, P.A., Fort Lauderdale, for Appellant. Aylin Ruiz, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Roy Singhal ("Appellant") appeals the Special Magistrate Final Order, dated April 5, 2023. Having carefully considered the Briefs, Appendix, the record and the applicable law, this Court dispenses with oral argument, and **AFFIRMS** the Final Order as set forth below.

On 1/12/2023, Code Enforcement for the City of Wilton Manors (the "City") issued Appellant a Courtesy Notice for violations of the City's Code of Ordinances (the "Code"). On 2/15/2023, following a re-inspection of Appellant's property, the City issued a Notice of Violation ("NOV") and Failure to Comply-Summons to Appear. These notices were sent certified mail (and posted at the property), gave Appellant 15 days from receipt to remedy the violations, and set a hearing date for 4/5/2023 in the event of non-compliance. The NOV noted infractions for Code Sections 19-27 and 19-50, however, the City only pursued the violation for Sec.19-27 at the 4/5/2023 hearing. This section relates to the stopping, standing and parking of boats and/or boat trailers. Appellant was present at the hearing before the Special Magistrate. Ultimately, the Special Magistrate entered a Final Order on 4/5/2023 stating that Appellant was still in violation of Section 19-27 and gave the Appellant until 6/4/2023 to comply with the Code before a per diem fine would begin. Appellant timely filed this appeal on 5/3/2023.

Pursuant to Florida Statutes Section 162.11, an appeal of code enforcement hearing to the circuit court is not a hearing de novo but is limited to a review of the record created before the Special Magistrate. "In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979). The familiar three-prong test utilized for appellate review of an agency or board decision is: whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings

and judgment are supported by competent, substantial evidence. *City of Deland v. Benline Process Color Co., Inc.,* 493 So. 2d 26, 28 (Fla. 5th DCA 1986) (quoting *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982). The review for a direct appeal goes one-step further and considers not only whether the proper law was applied, but also considers whether the law was correctly applied. *Central Florida Investments, Inc. v. Orange County,* 295 So. 3d 292, 295 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2717a]. Moreover, on an appeal pursuant to §162.11, ". . . all errors below may be corrected: jurisdictional, procedural, and substantive." *Id.* (quoting *M.M. v. Dep't of Child. & Fams.,* 189 So. 3d 134, 138 (Fla. 2016) [41 Fla. L. Weekly S141a].

Appellant puts forth two arguments in their appeal which are examined below: (1) that the City of Wilton Manor's interpretation of the City's Code of Ordinances pertaining to the parking of a boat trailer violated the basic meaning of the English language; and (2) that the Special Magistrate Final Order ("Final Order" or "Order") violated Appellant's right to due process because it failed to issue findings of fact and conclusions law.

I. Interpretation of City's Code of Ordinances—Section 19-27

City ordinances are subject to the same rules of construction as state statutes. *Great Outdoors Trading, Inc. v. City of High Springs,* 550 So. 2d 483 (Fla. 1st DCA 1989). "The first place we look when construing a statute is to its plain language—if the meaning of the statute is clear and unambiguous, we look no further." *State v Hackley,* 95 So. 3d 92, 93 (Fla. 2012) [37 Fla. L. Weekly S441a]. In understanding the statute's plain language, "words or phrases in a statute must be construed in accordance with their common and ordinary meaning," *Donato v. Am. Tel. & Tel. Co.,* 767 So. 2d 1146, 1154 (Fla. 2000) [25 Fla. L. Weekly S44a], and phrases within a statute are not to be read in isolation, but rather considered within the context of the entire section. *Thompson v. State,* 695 So. 2d 691, 692 (Fla. 1997) [22 Fla. L. Weekly S340a]. "When a statute includes an explicit definition, courts must follow that definition, even if it varies from that term's ordinary meaning." *Deloatch v. State,* 360 So. 3d 1165, 1169 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D1054d].

The pertinent parts of Section 19-27 (Stopping Standing Parking—Boat and/or Boat Trailers) read:

> (b) Boats and/or boat trailers shall be limited to one (1) each in the front yard on a *hardened surface.* Boats and/or boat trailers are permitted in the rear yard as long they are parked or stored on a *hardened surface.*
>
> (g) Boats and/or boat trailers, when and where permitted, shall be parked or stored:
> (1) Within a garage, carport or enclosed building;
> (2) In or upon a *hardened surface*;
> (3) In or upon a rear or side yard on *hardened surface;* or
> (4) A boat and/or trailer is not permitted to encroach onto the swale of any property. Boats and/or trailers are required to be parked a minimum of three (3) feet from the property lines and shall meet the clear sight triangle requirements set forth in Section 155-060 of the City of Wilton Manors Unified Land Development Regulations.

(*Emphasis added.*)

At the hearing, it was agreed that the wheels of the boat trailer were sitting on large concrete pavers placed on the grass. The City maintained that the ordinance requires the boat trailer to be parked on a "permitted hardened surface," whereas the Appellant argued that the pavers ***were*** a hardened surface and that no permit was required. The City informed the Appellant and Special Magistrate that the Code had been revised in 2022, and that "pavers underneath the wheels" were no longer an acceptable *hardened surface*.

The definition of hardened surface (added to the City's Code of Ordinances in 2022) appears in Section 19-12:

> *Hardened surface* shall mean any surface such as concrete, asphalt, brick or pavers, which has been approved by a City issued permit from the Community Development Services Department, if required, and provides a minimum one-foot perimeter around the vehicle or vehicle(s) being parked.

Ultimately, the Special Magistrate determined, "It's not a hardened surface—. . . I'm dealing with the boat and trailer that is not on an approved, by the city building department, surface. Using those—things [pavers] does not help you." (Trans. 16:6 . . . 17:2-5.)

The plain language of Sections 19-27 and 19-12 is clear and unambiguous; therefore, this Court need not look further than the ordinances as written. The *hardened surface* definition in Section 19-12 contains an "and" and has two requirements. In addition to obtaining a permit, if required, a *hardened surface,* per the City's Code, "provides a minimum one-foot perimeter around the vehicle or vehicle(s) being parked." The City maintains that a building department permit is required for this surface. However, whether or not a permit is required, it is obvious that several large concrete pavers placed under the wheels of a boat trailer do not provide the required minimum one-foot perimeter around the boat trailer. Therefore, the pavers at issue do not constitute a *hardened surface* per the Code. Accordingly, the Special Magistrate properly interpreted the City's Code of Ordinances when he determined that the Appellant was in violation of Code Section 19-27.

II. Special Magistrate Final Order

Appellant contends that the Special Magistrate failed to issue findings of fact and conclusions of law in his Final Order, thereby violating Florida Statute 162.07(4) and Appellant's right to due process.

Section 162.07(4) of the Florida Statues provides:

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

The plain language of Section 162.07(4) appears clear and unambiguous. It requires two tasks from the enforcement board, or in this case the special magistrate. First, at the conclusion of the hearing the board/special magistrate *shall issue* finding of fact, based on the evidence of record and conclusions of law; next, the board/special magistrate *shall issue* an order affording the proper relief. In *Dover v. Town of Lake Park, Florida,* 19 Fla. L. Weekly Supp. 761a (Fla. 15th Cir. Ct. 2012), our sister court stated, "Section 162.07, which governs administrative code enforcement proceedings, does not literally require that a special magistrate's findings of fact be made within the final order." *Id.*. The court additionally noted that a special magistrate's order should be reversed when "neither the Order itself *nor the transcript of the hearing* actually makes a finding of fact which illustrates the record evidence upon which the Special Magistrate relied." *Id*. (quoting *Feder v. Palm Beach County,* 19 Fla. L. Weekly Supp. 222a (Fla. 15th Cir. Ct. 2011) (emphasis added)). This Court has routinely considered the order and hearing transcript (when available) when reviewing administrative actions.

Appellant cited to *Gentry v. Dep't of Prof'l & Occupational Regulations, State Bd. of Med Examiners,* 283 So. 2d 386 (Fla. 1st DCA 1973) and *Hayes v. Monroe,* 337 So. 3d 442 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D170b] to support their argument that the Final Order was insufficient.

In *Gentry* a hearing examiner's disciplinary report was reviewed by the State Board of Medical Examiners (the "Board"). This report contained findings of fact, conclusions of law and recommendations.

After considering Gentry's exceptions to the report, the Board issued its final order. The final order, for the most part, *adopted* the hearing officer's *recommendations.* However, the final order ***did not contain any*** findings of fact ***nor*** did it adopt, ratify or confirm the hearing officer's findings of facts. On certiorari review, the First District stated, "every final order entered by an administrative agency in the exercise of its quasi-judicial functions must contain specific findings of fact upon which its ultimate action is taken." *Gentry* at 387. Because it was important for Gentry to understand the Board's reasoning, the court remanded the case with directions that an appropriate final order be entered.

Hayes was a code enforcement case where the homeowners resided their stilt home in the Keyes. Despite the fact that the permit issued prohibited work on the lower level, the entire home was resided and passed inspection. Seven months later, Monroe County determined the downstairs siding was unauthorized and the downstairs enclosure and garage were an illegal expansion. At the violation hearing, the homeowners attempted to argue the defenses of estoppel and laches. However, these attempts were redirected by the magistrate. Although the magistrate commented that the case "unfortunate" and "unfair," he nevertheless found the homeowners in violation. Again, the violation order ***did not include*** factual or legal findings. The homeowners appealed contending that "the lack of factual findings by the magistrate rendered the order statutorily and regulatorily noncompliant, which, in turn obfuscated the issue of whether the magistrate considered estoppel and laches or considered himself precluded from doing so." *Hayes* at 445. The Sixteenth Judicial Circuit affirmed the order determining "the Special Magistrate was attuned to the equitable principles in play." *Hayes* at 446. Then on second tier review, the Third District held that the circuit court departed from the essential requirements of the law when they affirmed the order because "it will remain unknown whether the magistrate considered and rejected the doctrines of laches and estoppel or simply believed he was precluded from doing so." *Id.* The Third District determined these were important issues and *not* considering them compromised the homeowners' due process—their right to be heard on these defenses.

These cases are distinguishable because unlike the final orders in *Gentry* and *Hayes* which did not include ***any*** findings of fact, the Final Order in this case ***does*** contain findings of fact, for example: code enforcement found a violation, proper notice was given, the Appellant owns the property, and testimony and evidence (photos) were presented at the hearing. Then, based upon the evidence and testimony, the Special Magistrate made a conclusion of law that the violation still existed at the property. As noted in *Hayes,* "while neither the Act nor the Code mandates any specific amount of detail, the magistrate was required to make basic findings supported by evidence." *Id.* at 445. This Final Order contains *basic* findings supported by evidence. Also, unlike in *Gentry* where the Board merely adopted the hearing officer's recommendations without giving reasons why (*Gentry* at 387), or in *Hayes* where no findings of fact were proffered by the magistrate as to the homeowners' affirmative defenses in his order or on the record (*Hayes* at 444), here the transcript, which is a part of the record, revealed additional findings. For example, the Special Magistrate found that the pavers did not constitute a hardened surface ("Using those - things [pavers] does not help you." (Trans. 17:5.)); and that the boat trailer was not on an approved surface per the City's Code. (Trans. 171-4.) The Special Magistrate further determined on the record that compliance could be achieved by removing the boat from the pavers or getting a proper hardened surface; and that the failure to remedy the violation meant a fine would be charged. (Trans. 17:20-25.) Therefore, in addition to the Final Order containing "basic findings," when the hearing transcript is also considered it is evident that the Magistrate issued sufficient "findings of fact, based on evidence of record and conclusions of law" consistent with Section 162.07(4). Therefore, the Special Magistrate's Final Order complies with Florida Statute Section 162.07(4) and the Appellant's rights to due process were not violated.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Special Magistrate Final Order, dated April 5, 2023, is **AFFIRMED**. (BOWMAN, TOWBIN-SINGER, and USAN, JJ., concur.)

* * *

ARCK MB, LLC, Plaintiff, v. CITY OF HALLANDALE BEACH, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24006214. Division AP. October 1, 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 an Initial Brief that complies with Florida Rule of Appellate Procedure 9.210 and Appendix within 30 days. As of the date of this Order Appellant has failed to comply with this Court's August 13, 2024, Order.

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

* * *

NORTH SPRINGS IMPROVEMENT DISTRICT, Plaintiff, v. CITY OF CORAL SPRINGS, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24009708. Division AW. October 1, 2024.

ORDER OF DISMISSAL GRANTING AGREED MOTION TO DISMISS

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Petitioner's Agreed Motion to Dismiss dated August 27, 2024. The parties have agreed to dismiss the Petition for Writ of Certiorari and proceed with a direct appeal.

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

* * *

CARLOS SOLANO, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE24-005026. Re: D.L.#: [Editors note: Number redacted]. September 18, 2024. Petition for Writ of Certiorari from State of Florida Department of Highway Safety and Motor Vehicles, Alicia Bacon, Hearing Officer. Counsel: Russell J. Williams, Law Office of Russell J. Williams, P.A., Fort Lauderdale, for Petitioner. Kathy A. Jimenez Morales, DHSMV, Tallahassee, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) **THIS CAUSE**, comes before the Court for consideration on Petitioner's, Carlos Solano, "Petition for Writ of Common Law Certiorari," filed on April 11, 2024. Having carefully considered the Petition, Response, Reply and Appendix, and the applicable law, being otherwise duly advised, the Petition for Writ of Certiorari is hereby **DENIED.** (BOWMAN, GARCIA-WOOD, and ODOM, JR., JJ., concur.)

* * *

Volume 32, Number 8
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CIRCUIT COURTS—ORIGINAL

Civil procedure—Continuance—Denial—Joint motion to continue trial is denied—Case does not qualify for treatment as complex litigation, and parties have caused own problems by failing to diligently move case forward—Neither fact that party has overextended itself with work nor fact that attorney is involved in another case that is set for trial during same trial term is good cause for continuance

CARL MARSHALL, Plaintiff, v. SOUTHWEST GEORGIA OIL COMPANY, INC., Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2024-CA-000027-AXXX-CX. September 16, 2024. David Frank, Judge. Counsel: Kimberly Young, Orlando, for Plaintiff. Matthew C. Williams, Tallahassee, for Defendant.

ORDER DENYING CONTINUANCE

This cause came before the Court for hearing on the parties' September 10, 2024 joint motion for continuance of the jury trial set for January 2025, and the Court having reviewed the motion and any other documents submitted in support or opposition to the motion and the court file, and being otherwise fully advised in the premises, finds

This case does not involve numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve; does not require management of a large number of separately represented parties; does not require coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; does not require pretrial management of a large number of witnesses or a substantial amount of documentary evidence; does not require substantial time to complete the trial; will not require special management at trial of a large number of experts, witnesses, attorneys, or exhibits; will not require substantial post-judgment judicial supervision; and there are no other analytical factors identified by the Court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

In other words, the present case does not qualify for treatment as complex litigation under the rules. This case is either a streamlined case or general case. *See* this Circuit's *Uniform Order for Active, Differential Civil Case Management* previously issued in this case.

The uniform order issued in the beginning of this case provided:

> Orders setting firm trial dates and addressing scheduling matters will be issued by the presiding judge for each case. Absent good cause, trials for all streamlined and general cases will be completed **no later than**: 12 months from the date of filing for STREAMLINED CASES (County Court cases and non-jury Circuit Court cases); 18 months from the date of filing for GENERAL CASES (Circuit Court cases where the complaint demands a jury trial)

The above time frames were clearly stated as a "projected trial dates," not firmly set or even expected. More importantly, they were clearly given as **"no later than"** dates. In other words, the maximum not to exceed dates. The purpose is to avoid setting trials close to the Florida Supreme Court time limits for resolving a civil case. *See Florida Rule of General Practice and Judicial Administration 2.250(a)*. In fact, the Supreme Court's concern and determination that civil cases should resolve by these deadlines was serious enough to require trial courts to report when they do not. *Fla. R. Gen. Prac. & Jud. Admin. 2.250(b)*.

Our Florida Supreme Court's directives on active differential case management require trial court judges "To maximize the resolution of all cases. . .to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown." *Florida Supreme Court Administrative Order No. AOSC21-17, Amendment 2, In Re: Covid-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts*, November 4, 2021. *See also* the Judicial Management Council's draft *Final Report Workgroup on Improved Resolution of Civil Cases*.

Apparently, the parties believe that an unelaborated "timing of service" and "attempted early settlement efforts" establish good cause to let a case sit for six months and then request a continuance of the trial. Apparently, the parties have invented a new civil case management fixture called "active litigation." Apparently, "active litigation" is a time at which the parties choose on their own to begin working on a case, even after it has been sitting idle for months. Apparently, the parties believe all is well as long as they begin working on their case at some point after this self-defined, self-appointed "active litigation" begins.

The situation about which the movants complain is not good cause for an exception to the strict policy governing continuances mandated by the Florida Supreme Court. A party will not be granted a continuance if it has caused its own problems by failing to diligently move the case forward, even if it means the party will not have certain witnesses or evidence at trial. *HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1293 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a]. The fact that a party has overextended itself with work is not good cause for a continuance. *Id*. at 1292. Finally, the fact that an attorney involved in this case is currently set to be in trial during the same trial term in another case is not good cause for a continuance. *See* the Court's order setting pretrial conference and jury trial. Scheduling conflicts with other courts will be resolved at the pretrial conference.

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

* * *

Labor relations—Public employees—Department of Corrections—Correctional officers—Discipline—Grievances—Arbitration—Vacation of award—Arbitrator acting in excess of authority—Arbitrator in instant case exceeded his authority by mitigating department's chosen level of discipline after having determined that there was cause to discipline grievant—Collective bargaining agreement governing arbitration relating to correctional officers' union and Department of Corrections only authorized arbitrator to determine whether there was just cause to discipline a grievant and, if not, what the remedy should be—Arbitrator further exceeded his authority by finding that department violated grievant's due process rights without indicating any basis in law or in collective bargaining agreement for that conclusion—Portion of arbitrator's award finding cause for discipline is upheld, and portions related to mitigation and due process violation are vacated

THE FLORIDA DEPARTMENT OF CORRECTIONS, Petitioner, v. THE FLORIDA POLICE BENEVOLENT ASSOCIATION, IN RE: THE ARBITRATION OF SHAWN RUSSELL, Respondent. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2024 CA 852. October 9, 2024. Angela C. Dempsey, Judge. Counsel: Sena Lizenbee, Tallahassee, for Petitioner. Jesse Smith, Tallahassee, for Respondent.

ORDER VACATING ARBITRATION AWARD

THIS CAUSE was heard on Petitioner's Petition for Judicial Relief. Petitioner filed its Petition pursuant to Sections 682.015 and 682.13(1)(d), Florida Statutes seeking to vacate portions of an

arbitration award wherein the arbitrator had exceeded his powers under the arbitration agreement and the law. The Petitioner filed its written petition on May 13, 2024, and the Respondent filed its written response on June 3, 2024. The parties were then given the opportunity to present oral arguments at hearing on September 12, 2024. Having reviewed the written submissions and heard the oral arguments of the Parties, the Court finds as follows:

1. Under Section 682.13(1)(d), Florida Statutes, the court shall vacate an arbitration award if the court finds that the arbitrator exceeded his or her powers. The Security Services Bargaining Unit Agreement, 2021-2023, ("CBA") is the agreement that currently governs arbitration matters relating to the Parties. There is nothing contained in this agreement that specifically grants the power of mitigating an employee's discipline to an arbitrator. The CBA states with specificity that the arbitrator's decision "shall set forth the arbitrator's opinion and conclusions on the issue(s) submitted." In this case, the arbitrator's award states that the issue before the arbitrator was "whether the Florida Department of Corrections had just cause to dismiss/terminate the Grievant, Shawn Russell, from his position as a Correctional Officer? If not, what shall the remedy be?" The arbitrator is charged with determining just cause and only if he does not find cause existed for the discipline, an appropriate remedy. "Remedy" does not equate to mitigation of the discipline. Mitigation of a career service employee's disciplinary action is solely and explicitly granted to the Public Employees Relations Commission by Section 110.227, Florida Statutes, and is not an option granted to the arbitrator via the CBA. If the employee wished to have his disciplinary action mitigated, the appropriate venue to do so would have been to file his appeal with the Public Employees Relations Commission.

2. The CBA provides for the arbitrator to determine if there was cause or not. In the instant case, the arbitrator found that the Petitioner had cause to discipline the Employee based on the evidence presented and, as such, no further assessment of remedy was warranted. It is highly counterintuitive within the scope of arbitration to determine that the Petitioner had cause to discipline an employee but then to subsequently mitigate the Petitioner's chosen level of discipline. Doing so seems to imply that the arbitrator believes there actually was ***not*** cause to issue the level of discipline imposed by the Petitioner, contrary to what the arbitrator actually stated in his award. Both Federal and State courts have agreed that the question for the arbitrator is whether there was just cause and if an arbitrator finds that there was cause or "just cause" then he/she has no authority to fashion a remedy different than what the employer has already issued. *Northern States Power Co. v. Electrical Workers (IBEW) Local 160,* 711 F. 3d 900, (8th Cir. 2013); *Williams v. Dep't of Transp.,* 531 So. 2d 994 (Fla. 1st DCA 1988). Accordingly, the CBA specifically states that the arbitrator shall have no authority to determine any other issue and shall refrain from issuing any statement of opinion or conclusion not essential to the determination of the issues submitted and that the arbitrator shall limit the decision strictly to the application and interpretation of the specific provisions of the Agreement. Art. 6(4)(c)(5)(c).

3. Furthermore, the Court finds that the arbitrator exceeded his power and authority under the CBA and the law by finding that the Petitioner violated the employee's due process rights. In his award, the arbitrator opines that the Petitioner violated the employee's due process rights but indicates no basis in law or the CBA for this conclusion. The Petitioner has shown that it has met all statutorily mandated time frames and CBA mandated time frames for issuing discipline to the employee and carrying out the employee's procedural due process. The Respondent makes an argument that the employee's substantive due process was what was in fact violated. A substantive due process analysis must begin with a careful description of the asserted right. *Reno v. Flores,* 507 U.S. 292, 302 (1993). No such asserted right was presented here. The arbitrator went outside of his scope of authority by penalizing the Petitioner for complying with the law. The CBA states under the powers of the arbitrator that the "arbitrator shall be without power or authority to make any decisions that are: (i) contrary to or inconsistent with, adding to, subtracting from, or modifying, altering or ignoring in any way, the terms of this Agreement or of applicable law. . . ." Art. 6(4)(c)(5)(e)(i). In this instance the arbitrator did both. He issued a decision that was inconsistent with his ability and authority under the CBA and that was inconsistent with Section 110.227, as it relates to due process of the employee and the issuance of disciplinary actions. Therefore, it is

ORDERED AND ADJUDGED that:

The arbitrator's award in the matter of the Arbitration between the State of Florida Department of Corrections (Employer) and Shawn Russell (Grievant) under the Collective bargaining agreement between the Florida Police Benevolent Association and the State of Florida (Union) is hereby **VACATED** in part and **UPHELD** in part. The portion of the award as it relates to the arbitrators finding of just cause is within the arbitrator's powers and authority under the CBA and is therefore **UPHELD**. The portion of the award as it relates to the arbitrator's mitigation of the level of disciplinary action clearly exceeds the arbitrator's authority under the CBA and is therefore **VACATED**. The portion of the arbitrator's award as it relates to the Petitioner having violated the employee's due process rights clearly exceeds the arbitrator's authority under the CBA and is also inconsistent with the applicable law and is therefore **VACATED**.

* * *

Torts—Indigent prisoners—Department of Corrections—Failure to properly train and supervise correctional staff—Prisoner's action against Department of Corrections seeking damages for mental or emotional injury and injunctive relief stemming from incident in which correctional staff allegedly deliberately waved metal detection wand over chest of plaintiff, who had pacemaker—Section 57.085(6) requires court to dismiss indigent prisoner's claim for mental or emotional injury where there has been no related allegation of physical injury—Exhaustion of administrative remedies—Claim of physical injury cannot be raised in court where no reference to physical injury was made during grievance process—Claim for injunctive relief to prevent department from using handheld detection equipment on prisoners who have implanted devices was vague and did not address required elements for injunctive relief

JEROME BIVENS, DC # 054717, Plaintiff, v. RICKY DIXON, SECRETARY, FLORIDA DEPT. OF CORRECTIONS, Defendant. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2023-CA-122. September 13, 2024. John C. Cooper, Judge.

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE comes before the Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint, filed on June 26, 2023. Defendant asserts in the Motion that Plaintiff's Petition should be dismissed on the basis that Plaintiff has not exhausted administrative remedies for all of his claims, and the claims that Plaintiff has exhausted are barred by application of § 57.085(6), Fla. Stat., specifically, on the basis that Plaintiff is attempting to recover damages without an accompanying assertion of physical injury. This Court, having reviewed the motion, the petition, and being otherwise fully advised in the premises, finds as follows:

Plaintiff filed his original Complaint on January 19, 2023. In it, he alleged that on November 29, 2020, a correctional officer deliberately waved a metal detection wand over his chest, where Plaintiff has a pacemaker, in an attempt to frighten Plaintiff. (Compl. at 1). Plaintiff alleged that as a result of the incident, he suffered a great deal of

emotional stress, but made no mention of suffering any physical injury as a result. (*See generally* Compl.). On May 22, 2023, Defendant filed a Motion to Dismiss, seeking to dismiss Plaintiff's Complaint on the basis that it was time barred, or in the alternative, that Plaintiff, a prisoner, was seeking relief for emotional or mental injury without any related allegation of a physical injury, and accordingly his claim was barred by § 57.085(6). In response, Plaintiff filed an amended complaint, wherein he alleged that he suffered an electrical shock when the correctional officer waved the detection wand over his pacemaker, and again on two other occasions when the pacemaker prematurely discharged. (Am. Compl. at 5-7). He asserts three claims: two negligence claims against Defendant for failure to properly train and failure to properly supervise correctional staff, and one claim for injunctive relief seeking an injunction prohibiting Defendant from using handheld detection equipment on prisoners who have implanted devices. He additionally attached the grievances that he submitted regarding the matter; however, none of the grievances made mention of any electrical shock or physical harm. Defendant then filed the instant Motion, seeking again to dismiss Plaintiff's Complaint on the grounds that Plaintiff was barred by § 57.085(6) regarding his negligence claims, and that he had failed to exhaust administrative remedies regarding the injunction.

To the extent Defendant asserts that Plaintiff did not exhaust his administrative remedies in regard to his claims of suffering a physical harm, the Court finds that Defendant is correct. A prisoner plaintiff is procedurally required to demonstrate that all other available remedies, including administrative remedies, have first been exhausted. *Byrnes v. State*, 619 So. 2d 522 (Fla. 1st DCA 1993); *Tunstall v. Folsom,* 616 So. 2d 1123 (Fla. 1st DCA 1993); *Jackson v. Parkhouse*, 826 So. 2d 478, 479 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2062d]. An inmate properly satisfies this exhaustion requirement by perfecting his appeal at the Bureau of Inmate Grievance appeals. *Park v. Dugger,* 548 So. 2d 1167, 1168 (Fla. 1st DCA 1989); *Jackson v. Parkhouse*, *supra.* An inmate must properly exhaust each claim raised in his petition prior to bring a case in circuit court. *Riddell v. Florida Dept. of Corrections*, 538 So. 2d 132 (Fla. 1st DCA 1989). Florida law clearly requires "that where adequate administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted." *Communities Financial Corp. v. Florida Dept. of Environmental Regulation*, 416 So. 2d 813, 816 (Fla. 1st DCA 1982). All state prisoners are required to properly exhaust their administrative remedies through the inmate grievance procedures contained in Chapter 33-103, Florida Administrative Code, before filing any civil complaint related to their care and custody. *See Adlington v. Mosley,* 757 So. 2d 573, 574 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1019a]; *see also Jackson v. Parkhouse, supra.* An inmate must properly comply with the procedures of the grievance process in order to satisfy the exhaustion requirement prior to filing the petition. *Cf. Ross v. Blake,* 136 S. Ct. 1850 (2016) [26 Fla. L. Weekly Fed. S205a]; *Woodford v. Ngo,* 548 U.S. 81, 90-96 (2006) [19 Fla. L. Weekly Fed. S332a]; *Johnson v. Meadows,* 418 F. 3d. 1152, 1157 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C737a].

In the instant case, Plaintiff did not exhaust his claims of a physical injury prior to bringing the instant case. Although Plaintiff has attached Exhibits referencing informal grievances, formal grievances, and grievance appeals that he filed regarding the alleged waving of a metal detection wand over his pacemaker, in none of them did he make any reference to any physical harm, whether in the form of an electrical shock or otherwise, suffered as a result of that event. (Pl.'s Am. Compl. Exs. A-C). As such, he is unable to bring such a claim now.

To the extent Defendant asserts that Plaintiff is barred from asserting his claims due to the language of § 57.085(6), the Court finds that Defendant is correct. § 57.085(6), Fla. Stat. states, in part, that:

> Before an indigent prisoner may intervene in or initiate any judicial proceeding, the court must review the prisoner's claim to determine whether it is legally sufficient to state a cause of action for which the court has jurisdiction and may grant relief. The court shall dismiss all or part of an indigent prisoner's claim which:
>
> (c) **Seeks relief for mental or emotional injury where there has been no related allegation of a physical injury**;

The Court notes that until Defendant sought to invoke the above statute in its original Motion to Dismiss, Plaintiff made no mention of **any** physical injury suffered as a result of the alleged incident. It was only following Defendant's assertion of § 57.085(6) that Plaintiff amended his Complaint to include claims regarding an alleged electrical shock suffered as a result of the event. However, as Plaintiff did not properly exhaust his administrative remedies regarding claims of physical injury prior to filing the instant case, he cannot assert such claims now. As such, to the extent Plaintiff has asserted properly exhausted claims, such claims entail the seeking of relief for mental or emotional injury with no related physical injury. Accordingly, such claims are properly dismissed pursuant to § 57.085(6), Fla. Stat.

To the extent Plaintiff attempts to argue that this Court is barred from making such a finding, and that such would be "res judicata," he has misunderstood the function of said principle. Plaintiff, in his Reply to Defendant's instant Motion, asserts that because this Court has previously found him indigent, it has implicitly already made a determination that none of his claims are subject to dismissal pursuant to § 57.085(6), and accordingly, pursuant to the principle of res judicata, it cannot make a determination that his claims are subject to dismissal pursuant to said statute. (Pl's Reply to Df's Mot. to Dismiss Pl's Am. Compl. at 12). As an initial matter, *res judicata,* as a principle of law, prohibits a party whom has already had a **case** finally decided by a court from having the case relitigated. It is not applicable to the re-determination of a ruling within a case prior to the conclusion' of that case, as Plaintiff attempts to argue in his Reply. Furthermore, the fact that this Court did not dismiss Plaintiff's case for seeking relief for emotional or mental harm without a related allegation of a physical injury in determining Plaintiff's indigency does not prohibit the Court from making that determination now. As Plaintiff is a pro se prisoner plaintiff, the Court afforded Plaintiff leeway in the assertion of his claims, as he lacks the same level of expertise that a licensed attorney would have. Accordingly, even though Plaintiff did not allege a physical injury in his initial complaint, this Court did not dismiss the case, as the possibility existed that Plaintiff had exhausted remedies regarding a physical injury and had simply neglected to assert such in his complaint. Upon Plaintiff's attachment of his grievances to his Amended Complaint, and a subsequent review determining that none made any mention of physical injury, it has become apparent to the Court that Plaintiff would be unable to assert such a claim, and accordingly, allowing Plaintiff's claim to proceed any further would be in contravention of statutory law.

Finally, to the extent Defendant asserts that Plaintiff is not entitled to injunctive relief, the Court finds that Defendant is correct. In order to be entitled to injunctive relief, a party must show that (1) there is a likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of the public interest. *See Islandia Condominium Association, Inc. v. Vermut,* 438 So. 2d 89 (Fla. 4th DCA 1983); *Playpen South, Inc. v. City of Oakland Park*, 396 So. 2d 830 (Fla. 4th DCA 1981). Plaintiff's only argument in relation to his request for injunctive relief is that he states a cause of action "because of the inherent risks to prisoners with medically implanted surgical devices. . . . and Defendant's continued use of the devices in reckless and hazardous manner by unqualified or supervised employees."

(Am. Compl. at 10). As Respondent indicates, this "is insufficient and only vaguely pled," and does not address the required elements to be granted injunctive relief. (Mot. to Dismiss Am. Compl. at 18). Accordingly, Plaintiff is not entitled to the grant of injunctive relief.

It is therefore:

ORDERED AND ADJUDGED that Defendant's "Motion to Dismiss Plaintiff's Amended Complaint" is hereby **GRANTED**. Plaintiff's Amended Complaint is hereby **DISMISSED WITH PREJUDICE. Any motions still currently pending are hereby DENIED as moot.** The Clerk is directed to **CLOSE** this file.

* * *

Civil procedure—Pro se filings—Prohibition

LORENZO BROOKS, Petitioner, v. RICKY DIXON, AS SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS, Respondent. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 39-2024-CA-000023-CAAM. October 14, 2024. David Frank, Judge. Counsel: Lorenzo Brooks, Pro se, Bristol, Plaintiff.

ORDER DISMISSING CASE AND PROHIBITING LORENZO BROOKS FROM FILING PRO SE

This cause came before the Court upon Lorenzo Brooks' emergency petition for writ of mandamus, the Court's order to show cause why sanctions should not be entered against petitioner, and petitioner's response to the order to show cause, and the Court having reviewed petitioner's response and the court file, and being otherwise fully advised in the premises, finds

The present action filed by Mr. Brooks is frivolous and constitutes an ongoing abuse of the civil justice system and a waste of scarce judicial resources that takes court attention from deserving litigants. *See Pettway v. McNeil*, 987 So.2d 20, 22 (Fla. 2008) [33 Fla. L. Weekly S355a] (A court has inherent judicial authority to sanction an abusive litigant and one justification for such a sanction lies in the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings.) (quotations omitted).

Mr. Brooks expresses no remorse nor does he assure the Court that he will stop the abusing filings. See *Nairn v. State*, 375 So.3d 889, 890 (Fla. 2023) [48 Fla. L. Weekly S256b] ("[The petitioner] failed to acknowledge or express any remorse for his repeated misuse of this Court's limited resources nor state that he would abstain from further frivolous filings in this Court. Upon consideration of [petitioner's] response, we find that he has failed to show cause why sanctions should not be imposed.").

Based on Mr. Brooks' extensive history of filing pro se petitions and requests for relief that were meritless or otherwise inappropriate for this Court's review, I find that he has abused the Court's limited judicial resources. It is apparent that if no action is taken, Mr. Brooks will continue to burden the Court's resources.

Accordingly, it is ORDERED and ADJUDGED that Mr. Brooks' petition in this case is DISMISSED and Mr. Brooks is prohibited from filing any paper in the Second Judicial Circuit without the signature of an attorney in good standing with the Florida Bar.

* * *

Insurance—Commercial general liability—Excess policies—Exclusions—Damage to property owned by insured—Damage to "your work"—Insurer had no duty to defend general contractor in underlying suits brought by homeowners alleging construction defects and violations in homes built by contractor where underlying complaints did not allege facts that would bring complaint within coverage of policy issued to general contractor—Discussion of eight-corners rule, under which insurer's duty to defend arises from the "eight corners" of the complaint and the policy, and exceptions to that rule, including uncontroverted fact exception and exception for facts that would not normally be pled—Policy clearly excluded coverage for damage to property that occurred when general contract was owner of homes—Because undisputed record specifically established that contractor admitted ownership of each home prior to completion, any damages occurring to the homes during that period was excluded from coverage—Damages that occurred after completion fell within exclusion for "your work" provision excluding damage to home caused by insured general contractor—Because policy did not contain a subcontractor exception, exclusion applied even if the damages arose out of defective work of one of the insured's subcontractors—Insurer's motion for partial summary judgment granted—Priority of coverage—Insured's motion for partial summary judgment on cross-claim is denied—Separate and apart from exclusions, policy issued to general contractor was excess over "additional insured" coverage provided to general contractor by subcontractors' insurers—Although contractor's policy stated that if no other insurer defended the general contractor, the general contractor's insurer would undertake the defense, contractor did not present any record citations to support conclusion that it was not defended by any insurer

ASHLEY HOMES, LLC, Plaintiff, v. ASH-BROOKE CONSTRUCTION, et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2022-CA-000703. September 24, 2024. Steven B. Whittington, Judge. Counsel: Mark A. Boyle, Amanda K. Anderson, and George H. Featherstone, Boyle, Leonard & Anderson, P.A., Fort Myers, for Plaintiff. Todd M. Davis, Timothy H. Snyder, and Michael J. Zeigerman, Davis Law Firm, Jacksonville, for Defendant.

ORDER GRANTING SOUTHERN-OWNERS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING ASHLEY HOMES' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause came before the Court for hearing on August 27, 2024, on Defendant Southern-Owners Insurance Company's ("Southern-Owners") Amended Motion for Summary Judgment (Dkt. Ent. No. 260, filed May 9, 2024) and Plaintiff Ashley Homes, LLC's ("Ashley's") Cross-Motion for Summary Judgment (Dkt. Ent. No. 256, filed May 6, 2024). This Court, having heard the arguments of counsel, having reviewed the record, and being otherwise advised as to this cause, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Ashley Homes, LLC, served as a general contractor in the construction of six single family Homes. *See respectively,* Dec. Compl. Exhibit "A", "B", "C", "D", "E", "F" at ¶¶ 21 and 29, Dkt. Ent. No. 3.

2. At issue in the competing motions for partial summary judgment is whether Southern-Owners is required to defend Ashley against Underlying Complaints that have been dismissed with prejudice. *See respectively,* Underlying Plaintiff's Notices of Dismissal with Prejudice filed in 2020 CA 940, 2020 CA 945, 2020 CA 943, 2020 CA 935, 2020 CA 966, 2020 CA 944.

3. Southern-Owners and Ashley settled Ashley's additional insured claims under policies that Southern-Owners issued to Ashley's subcontractors.

4. The present motions for partial summary judgment only concern Ashley's own policies of insurance with Southern-Owners. *See generally,* Dkt. Ent. Nos. 256, 260, 269, 280, 281, 282.

Ashley Owned the Homes During Construction

5. Ashley built the Homes and the Underlying Plaintiffs "later closed on the Home(s)." *See respectively,* Dec. Compl. Exhibit "A", "B", "C", "D", "E", "F" at ¶ 13

6. Each Underlying Complaint states:

"13. Defendant built the Home and Plaintiffs *later closed on the Home*."

See id. at ¶ 13 (emphasis added).

7. Each Underlying Complaint references a building permit issued to Ashley. *See respectively, id.* at ¶ 13. Each of the building permits referenced in each Underlying Complaint identifies Ashley as the owner of the Home. *See Building Permits,* Am. MSJ Comp. Exhibit 1-6.

8. Each Certificate of Occupancy issued by the Clay County Building Department identifies Ashley as the owner of the Home. *See Certificates of Occupancy,* Am. MSJ Comp. Exhibit 1-6.

9. Ashley states in each of its notarized warranty deeds, filed with the Clay County Clerk of Court, that it "fully warrants" its "title to the property" as to each Home prior to sale. *See Warranty Deeds,* Am. MSJ. Comp. Exhibit 1-6.

10. Ashley has not offered or identified any evidence disputing the accuracy or authenticity of the building permits, its warranty deeds, or the Certificates of Occupancy. *See generally Ashley MSJ Response,* Dkt. Ent. No. 269.

Only Damages to the "Home" Alleged

11. The damages allegations in each Underlying Complaint are identical. *Id.* ¶¶ 21 and 29.

12. Paragraphs 21 and 29 of each Complaint state, respectively:

> 21. As a direct and proximate result of the construction defects and violations, *the Home* has suffered damages not only to the exterior stucco, but also to the underlying wire lath, paper backing, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

Id. ¶ 21 (emphasis added).

> 29. As a direct and proximate result of the construction defects, deficiencies and violations, *the Home* has suffered damages not only to the exterior stucco, but also to the underlying wire lath, paper backing, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

Id. ¶ 29 (emphasis added).

13. Each Complaint further states "Plaintiffs have been damaged in that the defects and violations substantially reduce the value of the *Home*." *Id.* at ¶ 22 and ¶ 30 (emphasis added).

Ashley's Additional Insured Claims Against Other Insurers

14. Ashley's Complaint attaches agreements with its subcontractors which require each subcontractor to name Ashley as an additional insured under that subcontractors' insurance Policy. These Agreements are attached to Ashley's Complaint as Exhibits "H," "I," "J," "K," "L," "M." *See Dec. Compl.,* ¶ 44, a.-g.

15. Specifically, the subcontracts attached by Ashley each state that Ashley "shall be named as an additional insured" on each subcontractor's policy. *See Dec. Compl.,* ¶ 44, a.-g., and, respectively, incorporated Exhibit H, Dkt. Ent. No. 79, Page 7; Exhibit I, Dkt. Ent. No. 80, Page 12; Exhibit J, Dkt. Ent. No. 81, Page 7; Exhibit K, Dkt. Ent. No. 82, Page 7; Exhibit L, Dkt. Ent. No. 83, Page 7; Exhibit M, Dkt. Ent. No. 84, Page 7 (collectively "Subcontracts").

16. The subcontracts attached by Ashley also each state that Ashley's own Southern-Owners Insurance Policy is excess and that the subcontractor insurance policies are primary. Specifically, each subcontract states:

> The Subcontractor's insurance coverage shall be primary insurance as respects work on this project for Contractor [Ashley], its directors, officers and employees. **Any insurance or self-insurance maintained by Contractor shall be excess of the Subcontractor's insurance.**

See id. (bold emphasis added).

17. Ashley also attaches and incorporates its subcontractors' policies of insurance into each Count against Southern-Owners. *See Dec. Compl.* ¶ 45, note 3, and Dec. Compl. Ex. 1 (subcontractor policies "specifically incorporated" into the Complaint).

18. Specifically, Ashley attaches and incorporates the following subcontractor policies of insurance into its Counts against Southern-Owners:

a. National Builders Insurance Company (Ash-Brooke). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 3.

b. MCC (Capital). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 6.

c. FEDNAT (Capital) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 7.

d. IHIC (Capital). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 8.

e. Builders (Cercy) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 9.

f. Gemini (J&S Stucco). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 11.

g. Scottsdale (J&S Stucco) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 12.

h. Colony (J&S Stucco) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 13.

i. Endurance (K&G Construction) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 14.

j. USIC (K&G Construction) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 15.

k. Cypress (Wolf). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 17.

19. As to the subcontractor insurance policies above, the priority of coverage and additional insured clauses in the subcontractor's policy state that the additional insured coverage provided by these other insurers to Ashley is primary and will not seek contribution from Ashley's own insurers. *See e.g., Response* Composite Exhibit 9, *respectively,* pgs. 11 (National), 17 (American), 34 (Scottsdale), 44 (Endurance), 50, 57, 64, (United) (bold in original).

20. For purposes of providing but a few of several examples, the Priority of Coverage clauses in the National Builders Policy issued to subcontractor Ashbrooke, the American Builders Policy issued to Cercy, the Scottsdale Policy issued to J&S, and the Endurance American and United Specialty Policies issued to K & G, all state:

> 2. **Primary and Noncontributory**. The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:
> This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:
> **(1)** The additional insured is a Named Insured under such other insurance; and
> **(2)** You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

See Response Composite Exhibit 9, *respectively,* pgs. 11 (National), 17 (American), 34 (Scottsdale), 44 (Endurance), 50, 57, 64, (United) (bold in original).

Ashley's Southern-Owners Policy

21. Southern-Owners issued a Tailored Protection Commercial General Liability insurance policy to Ashley under policy number [Editor's note: Omitted by court]. *See* Ashley's Southern-Owners Policy, Dec. Compl. Ex. 4.

22. The Policy states that it only covers "bodily injury" and "property damage" to the extent it is "caused by an 'occurrence' that takes place in the 'coverage territory' . . . "during the policy period". *Id.* at Section I.A., ¶ 1.b. An "occurrence" under the Policy "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at Section V, ¶ 14.

A. "Property You Own" Exclusion

23. The Policy includes several relevant exclusions. In particular, the Policy excludes damage to property "you own, rent, occupy or use." Policy Form 55300 *at* Section I.A., ¶ 2.j.

24. Specifically, Policy Form 55300 *at* Section I.A., ¶ 2.j. excludes:

> **j. Damage to Property**
> "Property damage" to:
> (1) Property you own, rent, occupy or use, including any cost or expense incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

Policy Form 55300 at Section I.A., ¶ 2.j.

B. "Your Work" Exclusion

25. The Policy also contains a "Your Work" exclusion. Policy Form 55300 *at* Section I.A., ¶ 2.1. excludes:

> **1. Damage To Your Work**
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

Id. at Section I.A., ¶ 2.1.

The "products-completed operations hazard" includes "completed" or "abandoned" work. *See id.* at Section V ¶ 17.

C. Conditions of Coverage: Primary vs Excess

26. Separate and apart from the exclusions highlighted above, Section IV of Ashley's Southern-Owners Policy lists relevant "Conditions" of coverage. Policy Form 55300 at Section IV.

27. The Section IV conditions of coverage provide that Ashley's Southern-Owners' Policy is excess over:

> Any other primary insurance available to an insured, other than an additional insured, covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

See Response Exhibit 8, Dkt. Ent. No. 271. (This is an excerpt of Ashley's Declaratory Complaint Exhibit 4, Policy Form 55300 *at* Section IV, ¶ 4.b.2.)

28. Ashley's Southern-Owners' Policy further provides:

> When this insurance is excess, we will have no duty under Coverage A or Coverage B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Id. at Section IV, ¶ 4.b.2.

LEGAL STANDARD

To be entitled to summary judgment, a movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). *Duran v. Crab Shack Acquisition, FL, LLC,* 384 So. 3d 821, 824 (Fla. 5th DCA 2024) [49 Fla. L. Weekly D914a]; *Synergy Contracting Group, Inc. v. People's Tr. Ins. Co.,* 49 Fla. L. Weekly D1236a (Fla. 2d DCA June 7, 2024).

If the moving party meets this burden, the burden then shifts to the nonmoving party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law. *Id.*

A. Determining Coverage Under Insurance Contracts

As an insurance policy is a contract, "contract principles apply to its interpretation." *Principal Life Ins. Co. v. Halstead as Tr. of Rebecca D. McIntosh Revocable Living Tr. Dated September 13, 2018,* 310 So. 3d 500, 502 (Fla. 5th DCA 2020) [46 Fla. L. Weekly D56a], *reh'g denied* (Jan. 29, 2021), *review denied sub nom. Halstead v. Principal Life Ins. Co.,* SC21-313, 2021 WL 2774746 (Fla. July 2, 2021).

Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written. *See State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]; *Washington Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a].

Stated simply, "if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings, Inc. v. U.S. Fid. and Guar.,* 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a].

B. Determining Duty to Defend

An insurer has no duty to defend a lawsuit where the underlying complaint does not allege facts that would bring the complaint within the coverage of the policy. *Auto-Owners Ins. Co. v. Marvin Dev. Corp.,* 805 So. 2d 888, 891 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2486a]; *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.,* 358 So. 2d 533, 535 (Fla. 1977), *opinion adopted sub nom. Nat. Union Fire Ins. Co. v. Lenox Liquors,* 360 So. 2d 122 (Fla. 3d DCA 1978). The Court recognizes that the duty to defend is much broader than the duty to indemnify, as it is based solely upon the allegations in the complaint. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871 (Fla. 2007) [32 Fla. L. Weekly S811a. The duty to defend is separate and apart from the duty to indemnify, and the insurer is required to defend the suit even if true facts later show there is no coverage. *Grissom v. Commercial Union Ins. Co.,* 610 So. 2d 1298 (Fla. 1st DCA 1992). Here, as will be further explained, the Court finds Southern Owners had no duty to defend Ashley in the underlying lawsuits.

C. Florida Recognizes Two Exceptions to the Eight Corners Rule

The Court generally must look only to the Underlying Complaints in determining the duty to defend. *See Marvin,* 805 So. 2d at 891.

Notwithstanding, Florida recognizes two exceptions which require the Court to look outside the "eight corners. *See Diamond State Ins. Co. v. Florida Dep't of Children & Families*, 305 So. 3d 59, 62 (Fla. 3d DCA 2019 [44 Fla. L. Weekly D2624a] (matter that would not normally be pled exception); *BBG Design Build, LLC v. S. Owners Ins. Co.,* 820 Fed. Appx. 962, 965 (11th Cir. 2020); *S.-Owners Ins. Co. v. Midnight Tires Inc.,* 2023 WL 6126491, at 4 (M.D. Fla. Sept. 19, 2023); *opinion clarified,* 2023 WL 8113239 (M.D. Fla. Nov. 22, 2023); *Nationwide Mut. Fire Ins. Co. v. Keen,* 658 So. 2d 1101 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1667a] (uncontroverted fact exception).

Uncontroverted Fact Exception

Florida recognizes a "common-sense" exception to the "eight corners" rule, that requires the Court to look outside the "four corners" of the Underlying Complaint to facts that are not subject to a genuine dispute. *See BBG Design Build, LLC v. S. Owners Ins. Co.,* 820 Fed. Appx. 962, 965 (11th Cir. 2020); *S.-Owners Ins. Co. v. Midnight Tires Inc.,* 2023 WL 6126491, at 4 (M.D. Fla. Sept. 19, 2023); *opinion clarified,* 2023 WL 8113239 (M.D. Fla. Nov. 22, 2023); *Nationwide Mut. Fire Ins. Co. v. Keen,* 658 So. 2d 1101 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1667a] .

In *Keen, supra,* Florida's Fourth District Court of Appeal looked to the insured's pre-suit communication admitting to the horsepower of his boat, in determining there was no coverage. *Keen,* 658 So. 2d. at 1103.

Plaintiff cites *Higgins,* arguing that *Higgins* prevents this Court from considering uncontroverted records of the Clerk of Court and public records of the County. *See Higgins v. State Farm Fire & Cas.*

Co., 894 So. 2d 5, 10, 20 n.2 (Fla. 2004) [29 Fla. L. Weekly S533a]. But *Higgins* explicitly recognizes exceptions to the "eight corners" rule.

In discussing the "eight corners rule" the Florida Supreme Court explained:

> We note, however, that there are some natural exceptions to this where an insurer's claim that there is no duty to defend is based on factual issues that would not normally be alleged in the underlying complaint.

Id. See also Diamond State Ins. Co. v. Florida Dep't of Children & Families, 305 So. 3d 59, 62 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2624a](Court must look beyond the pleadings if the fact is not one that would normally be pled in the Complaint.)

In *Midnight, supra,* the federal court was sitting in diversity and applying Florida Law. *See Midnight,* 2023 WL 6126491, at 3.

Coverage turned on ownership of a vehicle and the insured's argued that Southern-Owners must defend because ownership of the vehicle could not be determined from the "four corners" of the Underlying Complaint. *See Midnight,* 2023 WL 6126491, at 4. Summarizing the "Uncontroverted Fact" Exception, the Midnight Court explained:

> [A] court may consider extrinsic facts 'if those facts are undisputed, and, had they been pled in the complaint, they clearly would have placed the claims outside the scope of coverage.'

Id. at 3.

Further, noting that there was no actual factual dispute as to ownership of the vehicle, the Court granted summary judgment in Southern-Owners' favor explaining:

> Thus, this is just the scenario where the exception to the eight corners rule is appropriate, for the fact that "[a]t some point in legal pleadings, common sense should prevail, which is in essence the basis for the limited exception to the four corners rule.

Id. (internal citations omitted). *See also BBG,* 820 Fed. Appx. at 965.; *Keen,* 658 So. 2d at 1101 (applying Florida's undisputed fact/common-sense exception to the "eight corners" rule).

"Fact That Would Not Normally be Pled" Exception

Diamond, supra, highlights Florida's second exception to the "eight corners rule." Where coverage turns on a fact that would not normally be pled in an Underlying Complaint, the Court must look beyond the four corners. *Diamond*, 305 So. 3d at 62. Put in other words, if a fact is relevant to coverage but not an element of the Underlying Claim, the Court may look outside the "four corners" of the underlying complaint. *Id.*

Diamond concerned Policy Exhaustion. Noting that this is not a fact that would ordinarily be pled in an Underlying Complaint, the Diamond Court explained this second exception:

> Because the existence and exhaustion of policy limits is not a matter normally addressed in a complaint, it would be impossible to enforce the bargain reached by the parties if the court refused to look beyond the pleadings. For this reason, a case like this one presents a narrow exception to the general rule that the duty to defend is determined by looking only at the pleadings. In order to resolve a duty to defend dispute which turns on whether the policy limits were exhausted, courts must look to the actual facts behind the pleadings.

Id.

LEGAL ANALYSIS

A. Exclusion "j": "Property You Own" Exclusion Excludes all Damage Prior to Sale

The Policies at issue in this case are Commercial General Liability Policies rather than owners policies and therefore exclude damage to "property you own." Policy Form 55300 at Section I.A., ¶¶ j.(1).

Florida Courts have found this exact exclusion to be clear and unambiguous. *See Danny's Backhoe Serv., LLC v. Auto Owners Ins. Co.,* 116 So. 3d 508, 511 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1185c]; *See also Nationwide Mut. Fire Ins. Co. v. Cypress Fairway Condo. Ass'n, Inc.,* 6 : 13-CV-1565-ORL-31, 2015 WL 4496148, at 3 (M.D. Fla. July 23, 2015).

Nationwide, for instance, concerned an identical exclusion "j" to that at issue in the present case. *Id.* Cypress owned an apartment complex but later sold the property. When it was sued for failing to prevent water intrusion and resulting damage that occurred prior to sale, Cypress sought coverage under its Nationwide Policy. *Id.* at 1.

Noting that exclusion "j" is unambiguous and specifically excludes coverage for damage to property that was owned by the named insured at the time the damage occurred, the Court entered summary judgment in Nationwide's favor. In issuing this ruling, the Court rejected Cypress' contention that the exclusion only applies if it still owns the property. *Id.* at 3.

Here, Plaintiff does not dispute that the "property you own" exclusion excludes damage that occurred during Ashley's ownership of the Homes. Instead, Plaintiff argues this Court is not permitted to consider the building permits referenced within the four corners of the Underlying Complaint, the notarized warranty deeds filed with the Clay County Clerk of Court, or the Clay County Certificates of Occupancy all identifying Ashley as the owner of the Homes.

In particular, Ashley attempts to distinguish *Keen, BBG, Midnight,* and *Diamond, supra,* by arguing that the record shows that it never admitted to ownership of the Homes. *See Ashley Response,* at pg. 23 ¶ 1.

However, Plaintiff's arguments are contradicted by the record. Ashley does not identify a single record citation showing that it disputes its ownership of the Homes. *See generally, id.* On the contrary, the record reveals notarized warranty deeds filed with the Clay County Clerk of Court in which Ashley "fully warrants" its "title to the property" as to each Home. *See Warranty Deeds,* Am. MSJ. Comp. Exhibit 1-6.

While Ashley attempts to distinguish *Keen, BBG, Midnight, and Diamond,* by arguing that its notarized statement of ownership filed with the Clay County Clerk of Court is not an admission and not admissible, this argument reflects a misunderstanding of Florida's rules of evidence. *See* § 90.803, Fla. Stat. ¶ (8), (15), & 18.[1]

"Statements in documents affecting an interest in property" are an exception to the hearsay rule. *See* § 90.803, Fla. Stat. ¶ (15). "Public records and reports" are also an exception to the hearsay rule. *See* § 90.803, Fla. Stat. ¶ (8). An admission is a statement that is offered against a party and is the "party's own statement in either an individual or representative capacity." *See* § 90.803, Fla. Stat. ¶ (18).

Furthermore, each of these public records is properly before the Court. Southern-Owners gave Ashley more than three-months-notice of its request that the Court take judicial notice of these County records. *See* Dkt. Ent. No. 260, n. 1-6. Ashley does not dispute the authenticity of the County Records. Therefore, the Court's judicial notice of these public records is mandatory pursuant to Florida Statutes § 90.202(6) and 90.203. *See Fla. Stat.* § 90.202(6) and 90.203. *See also, Keen, BBG, Midnight, and Diamond* (for proposition that consideration of these undisputed records is proper).

Here, the undisputed record specifically establishes that Ashley admits ownership of the Homes prior to completion. *See Warranty Deeds,* Am MSJ. Comp. Exhibit. 1-6. As Ashley admits ownership of the Homes prior to completion, the Court need not resolve whether the building permits referenced inside the four corners of the Underlying Complaints are within the "four **c**orners."

Rather, applying the precedent set forth in *Keen, BBG, Midnight,* and *Diamond, supra,* and the undisputed fact that Ashley owned each

Home until after completion, the Court finds that any damages occurring prior to completion are excluded by Ashley's Southern-Owners Policy. *See Danny's,* 116 So. 3d at 511; *Nationwide* 2015 WL 4496148, at 3.

B. Exclusion "l": "Your Work" Exclusion Excludes Damage to Homes after Completion

Having concluded that damages prior to completion are excluded under the "property you own" exclusion, the question becomes whether damages after completion are excluded by the exclusion "l", "your work" exclusion.

Here, Ashley was the general contractor and, as to each Home at issue, built the entire Home. *See Dec. Compl.* ¶ 38 a. - f. and attached Exhibit "A", "B", "C", "D", "E", "F" at ¶¶ 6 - 13. In this case, the parties agree that Ashley elected to purchase a policy with a "Your Work" Exclusion that does not have a subcontractor exception. *See Policy Form 55300 at Section I.A.,* ¶ *2.i.*

The parties also agree that without the subcontractor exception, Exclusion "l" acts to exclude all damage to the home caused by an insured general contractor, even if the damages arise out of one of the insured's subcontractor's defective work. *See e.g., Auto-Owners Ins. Co. v. Elite Homes, Inc.,* 160 F. Supp. 3d 1307, 1314 (M.D. Fla. 2016), *aff'd,* 676 Fed. Appx. 951 (11th Cir. 2017); *J.B.D. Const., Inc. v. Mid-Continent Cas. Co.,* 571 Fed. Appx. 918, 925 (11th Cir. 2014).

Rather, the disagreement between the parties hinges on whether the Underlying Complaints allege damage other than damage to the Homes. The Kohn, Luna, North, Obasa, Queen, and Schedlbauer Complaints each contain identical allegations as to damages. Each Complaint asserts, in pertinent part:

> the *Home* has suffered damages not only to the exterior stucco, but also to the underlying wire lath, paper backing, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

Id. at ¶ 21 and ¶ 29 (emphasis added).

Each Complaint further states "Plaintiffs have been damaged in that the defects and violations substantially reduce the value of the *Home*[.]" *Id.* at ¶ 22 and ¶ 30 (emphasis added).

As noted in Southern-Owners' Amended Motion for Summary Judgment, while the Underlying Complaints include the phrase "and/or other property" this phrase is qualified by the fact that it is part of a description of damage to the "Home" rather than an allegation of damage to property other than the Home. *Id.* at ¶ 21 and ¶ 29.

Further, even ignoring that the words "other property" specifically refer to damage to the Homes, *Elite Homes* reflects a consensus in Florida that "buzz words" do not trigger coverage. *See Elite,* 160 F. Supp. 3d at 1312; *see also e.g. Keen v. Florida Sheriffs' Self-Ins.,* 962 So. 2d 1021, 1024 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1900a]; *Glob. Travel Intl, Inc. v. Mount Vernon Fire Ins. Co.,* 2022 WL 16753564, at 2 (11th Cir. Nov. 8, 2022) (use of "buzz words" in a complaint will not trigger coverage).

In *Elite Homes, supra,* Elite Homes, Inc. contracted to build a single-family home. After the house was completed, the windows leaked, causing damage to the home. The homeowners sued Elite Homes alleging "extensive damage to other property includ[ing] the frame subsurface, sheathing, insulation, drywall, and interior finishes"; "damage to interior portions of the home"; and "damage to other property including, but not limited to, exterior wood framing, wood substrate, vapor barriers, insulation, drywall, and interior finishes."

Noting that all damage to the home fell within the same "your work" exclusion at issue here, and finding there was no duty to defend, the Court explained:

> Nothing on the face of the Croziers' amended complaint suggests that the water intrusion damaged anything beyond Elite Homes' work, as defined in the "your work" exclusion. Any other reading of the amended complaint would require the Court to give credence to conclusory "buzz words," and to indulge in impermissible inferences.

Id. at 1314; *See also e.g. Keen v. Florida Sheriffs' Self-Ins.,* 962 So. 2d 1021, 1024 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1900a]; *Glob. Travel Int'l, Inc. v. Mount Vernon Fire Ins. Co.,* 2022 WL 16753564, at 2 (11th Cir. Nov. 8, 2022) (use of "buzz words" in a complaint will not trigger coverage).

Ignoring that the words "other property" specifically refer to damage to the Homes, Ashley asks the Court to speculate as to damages that the Underlying Homeowners could have suffered. But this invitation is both not contextual and a clear contravention of binding Florida precedent. *See e.g., Keen,* 962 So. 2d at 1024. *See also, Glob. Travel Int'l, Inc.,* 2022 WL 16753564, at 2 ("buzz words" do not trigger coverage).

Under Florida law:

> "[C]onclusory 'buzz words' unsupported by factual allegations are not sufficient to trigger coverage.

Glob. Travel at 2 (internal citations omitted). *See also e.g., Keen,* 962 So. 2d at 1024.

C. The "Property you Own" and "Your Work" Exclusions Overlap

Finally, as the Underlying Complaints do not allege covered property damages, the timing of property damage is irrelevant. *Auto-Owners Ins. Co. v. Marvin Dev. Corp.,* 805 So. 2d 888, 891 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2486a] (no coverage for property damage that is excluded).

Policy exclusion "j(l)" excludes coverage for damage to property that was owned by the named insured at the time the damage occurred. Policy Form 55300 at Section I.A., ¶ 2.j. The Exclusion "l" "your work" Exclusion likewise excludes damages to the Homes after completion of the Homes. As the record establishes that Ashley owned each Home until after completion, the two exclusions overlap and Ashley's "timing" caselaw is not on point.

D. Priority of Coverage

As a final matter, the Court notes that Southern-Owners has raised priority of coverage in response to Ashley's Cross Motion for Summary Judgment. Separate and apart from the exclusions highlighted above, Section IV of Ashley's Southern-Owners Policy lists relevant "Conditions" of coverage. Policy Form 55300 at Section IV. The Section IV conditions of coverage provide that Ashley's Southern-Owners' Policy is excess over:

> Any other primary insurance available to an insured, other than an additional insured, covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

See Response Exhibit 8, Dkt. Ent. No. 271. (This is an excerpt of Ashley's Declaratory Complaint Exhibit 4, Policy Form 55300 *at* Section IV, ¶ 4.b.2.)

Ashley's Southern-Owners' Policy further provides:

> When this insurance is excess, we will have no duty under Coverage A or Coverage B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Id. at Section IV, ¶ 4.b.2.

To counter Ashley's Cross Motion for Summary Judgment, Southern-Owners offers Ashley's written subcontracts with its subcontractors which 1) require the subcontractors to provide Ashley with additional insured coverage and 2) state that Ashley's Southern-

Owners Policy is excess over the additional insured coverage provided to Ashley by the subcontractor insurers. *See Dec. Compl.* Ex. "H", "I", "J", "K", "L", "M."

Southern-Owners further offers the Policy Excerpts set forth in Composite Exhibit 9, for purposes of establishing 1) that Ashley qualifies as an additional insured under the subcontractor's policies of insurance and 2) that the priority of coverage clauses in the: a) National Builders Insurance Company (Ash-Brooke), b) MCC (Capital), c) FEDNAT (Capital), d) IHIC (Capital), e) Builders (Cercy), f) Gemini (J&S Stucco), g) Scottsdale (J&S Stucco), h) Colony (J&S Stucco), i) Endurance (K&G Construction), j) USIC (K&G Construction), and k) Cypress (Wolf) policies make the additional insured coverage provided by these policies primary and Ashley's own Southern-Owners Policy excess. *See Am. Resp.* Comp. Ex. 9.

Ashley attached each of the above exhibits to its Declaratory Action Complaint and also authenticated several of these exhibits through affidavit. *See Affidavits,* Dkt. Ent. Nos. 189, and 240.

However, Ashley now attempts to attack its own Complaint and exhibits, arguing that the Court cannot consider Ashley's own attachments that it incorporated into the Complaint. *See Ashley Reply,* Dkt. Ent. No. 282, at pg. 7. Ashley further argues that its own exhibits and its own incorporated allegations as to these other insurers are unsupported. *See generally,* Ashley Reply, Dkt. Ent. No. 282.

However, there are several problems with Ashley's arguments. First, as Ashley attached and incorporated these exhibits into its own Complaint and allegations against Southern-Owners, these exhibits are part of the Complaint and control over contrary allegations. *See* e.g., *Fladell v. Palm Beach County Canvassing Bd.,* 772 So. 2d 1240, 1242 (Fla. 2000) [25 Fla. L. Weekly S1102b]; *Skupin v. Hemisphere Media Group, Inc.,* 314 So. 3d 353, 355 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a] ("[I]ncorporated exhibits" are part of the complaint and control over allegations.) *See also* Rule 1.130, Fla. R. Civ. P.

Thus, Ashley's effort to challenge the authenticity of the exhibits that Ashley incorporated into and attached to its own Declaratory Complaint, is not supported by Florida law. *Id.*

Second, the parties apparently agree that Ashley settled these claims against other insurers. Ashley now contends that its allegations against the other insurers are unsupported. Ashley does not, however, present the settlement agreements with the other insurers or contend that these other insurers did not fund a defense. *See generally,* Ashley Reply, Dkt. Ent. No. 282. Thus, there are questions of fact related to priority of coverage that are unresolved.

Ashley also argues that the subcontractor policies of insurance do not cover the same risk as its own policy. However, this is again a contradiction of Ashley's own factual position as alleged in its own Declaratory Complaint. Ashley states:

> The HOMEOWNERS' claims of construction defects and damages implicated the work of the TRADES[.]

Dec. Compl. ¶ 39.

As the allegations "implicated the work of the TRADES" Southern-Owners Policy is excess over the subcontractor policies. *See e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Travelers Ins. Co.,* 214 F.3d 1269, 1272 (11th Cir. 2000); *Zurich Am. Ins. Co. v. Nat'l Specialty Ins. Co.,* 246 F. Supp. 3d 1347, 1364 (S.D. Fla. 2017).

Ashley next points out an exception to the priority of coverage clause which states:

> If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Policy Form 55300 *at* Section IV, ¶ 4.b.2.)

Ashley does not present any record citations to support the conclusion that it was not defended by any insurer. *See generally* Ashley Cross-MSJ, Dkt. Ent. No. 256. Rather, Ashley argues that Southern-Owners must disprove the exception to the priority of coverage condition. However, under Florida law, it is the insured's burden to prove exceptions. *Florida Windstorm Underwriting v. Gajwani,* 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a]. *See also, Marvin Dev. Corp.,* 805 So. 2d at 891.

Even if the Priority of Coverage *condition* of coverage were an exclusion, which it is not, it is the insured's burden to prove exceptions to policy provisions. *Id.* In *Gajwani,* for instance, Florida's Third District Court of Appeals explained:

> As the insured has the burden to prove an exception to an exclusion contained within an insurance policy, and the Gajwanis did not offer any evidence to support an exception to the unambiguous exclusion in the policy, they clearly did not meet their burden.

Gajwani, 934 So. 2d at 506 (internal citations omitted).

Accordingly, the Court finds that Southern-Owners' priority of coverage evidence and arguments are separate grounds for denying Ashley's Cross Motion for Summary Judgment.

Accordingly, it is:

ORDERED and ADJUDGED

That Southern-Owners Motion for Partial Summary Judgment is granted and Ashley's Cross Motion for Summary Judgment is denied.

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[1]Southern-Owners Amended Motion for Summary Judgment requested that the Court take judicial notice of these County Records as permitted under Fla. Stat. § 90.202(6). As these are Clay County Records, no authentication is required. *Id.*

* * *

Insurance—Property—Insured's action against insurer—Standing—Plaintiff that has sold insured property has standing to seek to recover under policy where plaintiff had insurable interest on date of claimed loss—However, summary judgment is appropriate where there is no evidence of repairs or other damages incurred before property was sold

KRISTINA FREDETTE DUBOIS, as Personal Representative of the Estate of Robert Fredette, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2023-CA-011159-O. September 18, 2024. Eric J. Netcher, Judge. Counsel: Francisco Abad, Shilling Silvers, Fort Lauderdale, for Plaintiff. Scharome Wolfe, Scharome R. Wolfe, P.A., Orlando, for Defendant.

Order Granting Defendant's Motion for Final Summary Judgment and Final Judgment in Favor of Defendant

This action comes before the Court on Defendant's Motion for Final Summary Judgment (filed 4/4/2024). A hearing on the motion was held on July 24, 2024. The Court has carefully considered the motion, Plaintiff's response (filed 7/3/2024), and the summary judgment evidence. Having considered the issues, the Court **grants** the motion for the reasons that follow.

This suit arises from a homeowners' insurance claim. Defendant insured property that was owned by Robert Fredette. The applicable policy period is from September 2, 2020 through September 2, 2021. The alleged date of loss is September 8, 2020. Defendant denied the claim, and this action for breach of contract was filed. The action was filed by the personal representative of the Estate of Robert Fredette given that Mr. Fredetted passed away prior to the action being filed.

During the pendency of this case, the property at issue was sold. On June 13, 2023, Kristina Fredette DuBois (the personal representative) deeded the property to a third party. Thus, the Plaintiff in this action no longer has an ownership interest in the property. On this basis, Defendant moves for summary judgment. Defendant contends that Plaintiff no longer has standing to bring the action. Further, Defendant asserts that no repairs or other damages were incurred by Plaintiff

before the property was sold.

The Court rejects Defendant's position that Plaintiff lacks "standing." Plaintiff had an insurable interest and thus has standing to seek to recover under the policy of insurance. But the Court agrees with Defendant that summary judgment is appropriate in light of the fact that there is no evidence of damages incurred before the property was sold.

On this front, the Court is guided by *Universal Property & Casualty Insurance Company v. Qureshi*, 2024 WL 3514542 (Fla. 4th DCA July 24, 2024) [49 Fla. L. Weekly D1575a]. There, the Fourth DCA reversed a jury verdict in a first-party property insurance dispute because "the trial court erroneously allowed the jury to consider evidence of the estimated cost to repair items damaged by a covered loss because [the insureds] sold the property before making the repairs." *Id.* at *1.

Plaintiff makes several arguments in an effort to defeat summary judgment. Each fails. First, Plaintiff asserts that Defendant's motion is not supported by competent evidence. This argument represents a misunderstanding of the present summary judgment standard. Under the summary judgment standard, Defendant met the initial burden by simply indicating that there is no evidence to support Plaintiff's damages claim. Where, as here, "the nonmoving party bears the burden of proof on a dispositive issue at trial, the moving party need only demonstrate 'that there is an absence of evidence to support the nonmoving party's case.' " *Rich v. Narog*, 366 So. 3d 1111, 1118 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1933a] (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). That is, it is sufficient to say: "there is no evidence." A movant cannot be expected to cite to evidence when its position is that there is no evidence. Once the initial burden is met, "the burden shifts to the nonmoving party to 'make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *Id.* It's the functional equivalent of a directed verdict motion.

In response to the summary judgment motion, Plaintiff failed to identify any summary judgment *evidence* to create a genuine dispute of material fact regarding any damages incurred before the sale of the property. The only materials cited in the response and attached are the policy, Defendant's Answer and Affirmative Defenses, Defendant's denial letter, and Plaintiff's Complaint. The Complaint is not verified and is not itself evidence. Thus, there is no evidentiary basis for Plaintiff's statement that "Plaintiff sold the property with repairs having been completed to the affected areas." (Plaintiff's Response at ¶ 8).

Second, Plaintiff argues that summary judgment is not appropriate when discovery is still pending. But the modified summary judgment rule addresses how to handle this situation. "If a nonmovant shows by *affidavit or declaration* that, for specified reasons, it cannot present facts essential to justify its opposition," the Court has several options. Fla. R. Civ. P. 1.510(d) (emphasis added). These include deferring consideration of the motion, denying it, allowing time to obtain affidavits or take discovery, or issuing any other appropriate order. *Id.* But each of these discretionary routes is triggered by the filing of an affidavit or declaration that specifies why Plaintiff could not present facts to justify the opposition. Plaintiff has not filed an affidavit or declaration to that effect.

Moreover, it is unclear how more discovery would be needed to combat the present motion. Defendant's summary judgment motion was filed in April. The hearing was held in July. The issue raised is very discreet. Namely, Defendant challenges Plaintiff's assertion that damages were incurred before the home was sold. Creating a genuine dispute of material fact on that issue does not require discovery. A simple affidavit or declaration from Plaintiff identifying the repairs made and costs for such repairs would have sufficed. Plaintiff has not presented any such evidence.

Lastly, Plaintiff's reliance on *Davis v. Allstate Insurance Company*, 781 So. 2d 1143 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D664a] is misplaced. That case involved a claim for coverage regarding the replacement of a home following severe damage after Hurricane Andrew. The insured purchased a new home as a replacement home in light of the severe damage. *Id.* at 1144. There has never been an allegation in this case that the property was sold because of the alleged loss. Indeed, there is no evidence that the home has been replaced. Mr. Fredette passed away, and the personal representative of his estate sold the home. *Davis* provides no refuge for Plaintiff.

At bottom, Plaintiff has failed to present evidence to support a genuine dispute of material fact on an issue on which she bears the burden of proof at trial—damages. There is no evidence of any repairs or other damages incurred before the property was sold (or after for that matter). For these reasons, Defendant's Motion for Final Summary Judgment (filed 4/4/2024) is **granted**. Final Judgment is entered in favor of Defendant and against Plaintiff. Plaintiff shall take nothing by this action, and Defendant shall go hence without day. The Clerk is **directed** to close this case.

* * *

Criminal law—Elections—Evidence—Other wrongful acts of former co-defendant turned state witness—Fact that witness's other wrongful acts may show that he has propensity to take money from others by failing to honor agreements, which may tend to corroborate defendant's claim that witness was scamming him, is insufficient basis to allow evidence of those acts in case alleging that defendant violated election laws by running witness as no-party "ghost candidate"—Acts at issue are not admissible as reverse *Williams* rule evidence where none of them in any way demonstrates that someone other than defendant committed election crimes at issue, and acts would not be admissible against witness if he were on trial—Acts are not admissible under section 90.404(2)(a) where acts are not evidence of plan, intent, or motive, and defendant seeks to admit acts to prove propensity or bad character of witness

STATE OF FLORIDA, Plaintiff, v. FRANK ARTILES, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F21-4768B. Section 60. May 6, 2024. Miguel M. de la O, Judge. Counsel: Timothy Vandergiesen and William Gonzalez, for Plaintiff. Jose Quiñon, Frank Quintero, and Jessica Fonseca-Nader, for Defendant.

ORDER REGARDING ARTILES' NOTICE OF INTENT TO RELY ON EVIDENCE OF OTHER WRONG ACTS

THIS CAUSE came before the Court on Defendant, Frank Artiles' ("Artiles"), Notice of Intent to Rely on Evidence of Other Wrong Acts pursuant to section 90.404 of the Florida Evidence Code. The Notice proffers various acts allegedly committed by co-Defendant turned State witness, Alexis Rodriguez ("Rodriguez"). The Court has reviewed the Notice, heard argument of counsel, and is fully advised in the premises.

Artiles seeks to introduce other wrongful acts Rodriguez has allegedly committed under three distinct theories: (1) evidence that tends to cast a reasonable doubt as to Artiles' guilt; (2) evidence admissible as reverse-*Williams* rule or pursuant to section 90.404; and (3) evidence of bias as defined in *Davis v. Alaska*, 415 U.S. 308 (1974). Evidence that falls within categories 1 or 3 is admissible. This conclusion is neither controversial nor contested by the State. However, not all the proffered evidence is admissible under these two theories, in which case Artiles seeks their admission under category 2. Category 2 is contested by the State and will be the primary focus of this Order.

The proffered acts listed under the heading "Admissible Incidents

Involving Artiles" in the Notice are all admissible as evidence that tends to cast doubts on Artiles' guilt. However, the proffered acts listed under the heading "Admissible Incidents Involving Others" do not tend to cast doubts on Artiles' guilt, except to the extent they may show a propensity by Rodriguez to take money from others by failing to honor agreements, which may or may not rise to the level of fraud. In other words, these acts may tend corroborate Artiles' claim that Rodriguez was "scamming him," but that is an insufficient basis to allow evidence of other wrong acts.

Artiles quotes the Florida Supreme Court in *Rivera v. State*, 561 So. 2d 536 (Fla. 1990) endorsing the idea that if "evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Notice at 4. In the very next sentence, the Supreme Court notes: "However, the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." *Rivera*, at 539. *See Mizell v. State*, 350 So. 3d 97, 101 (Fla. 1st DCA 2022) [47 Fla. L. Weekly D1943a] ("even in a death penalty case, a trial court's ruling excluding potentially exculpatory evidence will be upheld if the evidence is not sufficiently relevant."). Essentially, Artiles argues that any wrongful act by a State witness should be admissible to show the witness is unreliable or untruthful. Such a theory of admissibility would swallow section 90.404 whole. The Court rejects this view. To be admissible, evidence of other wrongful acts by a witness must either directly negate the defendant's guilt or it must fall within the limits set by section 90.404.

The incidents involving others are also inadmissible as evidence of bias, a point not disputed by Artiles. Thus, the only basis for admitting these acts would be as reverse-*Williams* rule or if they are otherwise admissible under section 90.404.

Let's address the easy issue first. These incidents do not constitute reverse-*Williams* rule evidence because they do not point to someone else's guilt exonerating Artiles.

> "Reverse *Williams* rule" evidence is evidence of a crime committed by another person that a defendant offers to show his or her innocence of the instant crime. The defendant must demonstrate a "close similarity of facts, a unique or 'fingerprint' type of information" for the reverse *Williams* rule evidence to be admissible.

Sexton v. State, 221 So. 3d 547, 555 (Fla. 2017) [42 Fla. L. Weekly S713a] (quoting *McDuffie v. State*, 970 So. 2d 312, 323 n.2 (Fla. 2007) [32 Fla. L. Weekly S763a]). None of the proffered incidents involving others concern election law or in any way demonstrate that someone other than Artiles committed the crimes at issue. *See State v. Storer*, 920 So. 2d 754, 757 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D459b] ("Because Mr. Storer is not intending to introduce this evidence to suggest that someone else ran over Mr. Wilson, we doubt that it falls within the case law on reverse *Williams* rule. Instead, this is an issue involving the character of the victim under section 90.404(1)(b)(1). Such evidence is generally inadmissible by a defendant except when introduced to prove a relevant 'trait.' *See* § 90.404(1)(b)(1), Fla. Stat. (2003).. . .
Mr. Storer apparently wants to prove that Mr. Wilson was a habitual robber who targeted Asian businessmen. We doubt that this is a 'trait' contemplated by the applicable rule of evidence.").

Furthermore, for Rodriguez's acts to be admissible as a means of exonerating Artiles they would have to be admissible against Rodriguez if he were on trial. *See State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990) ("If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense."); *accord McDuffie v. State*, 970 So. 2d 312, 324 (Fla. 2007) [32 Fla. L. Weekly S763a]. Coincidentally, Rodriguez was Artiles' co-defendant until he pled guilty. Were Rodriguez on trial for the same charges, there is *no* possibility the State could introduce the proffered incidents involving others against him because they would not be relevant to any issue; they would only show—if true—a propensity to lie and defraud.

Artiles is, thus, left with only one avenue for admission of the incidents involving others—section 90.404(2)(a):

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Artiles suggested at the hearing that the incidents involving others could be introduced as evidence of plan, intent, or motive. They are evidence of no such thing. Even if proven to be true, these incidents would merely demonstrate that Rodriguez is a scoundrel. But being a scoundrel is not a crime, and trying to prove Rodriguez is a scoundrel or a fraudster at Artiles' trial would be the very definition of introducing evidence "solely to prove bad character or propensity."

To be admitted as proof of a plan, intent, or motive, the wrong acts must be relevant to the charged crimes or Artiles' defense. "Essentially, *Williams* holds that evidence of another crime is irrelevant unless it has direct probative value to the crime charged." *Moreno v. State*, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982). *See Duncan v. State*, 291 So. 2d 241, 243 (Fla. 2d DCA 1974). As the Florida Supreme Court stated in *Williams*: "Our view of the proper rule simply is that relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy." *Williams v. State*, 110 So. 2d 654, 659-60 (Fla. 1959). Any other wrongful acts Rodriguez committed while perpetrating the charged crimes are admissible as part of the scheme or plan. Likewise, evidence that Rodriguez had a motive for filing in the District 37 race which involved other wrongful acts he had previously committed would be admissible because the bad acts would not be introduced solely to prove propensity or bad character.

Any fair review of the proffered incidents involving others leads to only one conclusion: Artiles wants to prove that Rodriguez is a shady businessperson, possibly even a thief. In other words, to prove propensity or bad character. Whether this conclusion is accurate is beyond this Court's purview. For purposes of Artiles' trial, the incidents involving others bear no relevancy on any material issue and are, thus, inadmissible.

* * *

Criminal law—Driving under influence—Evidence—Blood test results—Court adopts order of administrative law judge and denies defendant's motions in limine with regard to blood test and test results and motion to suppress blood test and test results—Administrative law—Sufficiency of administrative rules—Defendant has standing to challenge rule that governs conduct of persons who collect blood samples and deliver them to labs for testing and portions of rule that establish eligibility for licensure of blood analysts—Rules 11D-8.012, 11D-8.013(1)(e), (2)(a), (3)(a) & (3)(f) are determined to be valid where none of defendant's objections to rules is based on claim that compliance with rules inevitably, or even likely, would lead to inaccurate test result, and objections are based either on misreading or strained interpretation of rule language, false or incorrect premise, or "failure" to address remote or theoretical problem that would best be explored on case-by-case basis rather than solved by statements of general applicability

STATE OF FLORIDA, Plaintiff, v. GLENN BRIMMER, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CF-28322-AXXX-

XX. October 4, 2024. Samuel Bookhardt III, Judge. Final Order dated June 19, 2024, John G. Van Laningham, Administrative Law Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Law Office of Stuart I. Hyman, P.A., Orlando; and Kenneth Alan Barlow, Jr., Law Office of Corey Cohen, P.A., Orlando, for Defendant.

[Editor's note: Administrative order published below.]

ORDER ADOPTING ORDER OF THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS AND DENYING DEFENDANT'S MOTIONS

THIS CAUSE came before the Court upon the Defendant's Motion in Limine with Regard to Blood Test and Blood Test Results I, filed on February 8, 2022; Motion in Limine with Regard to Blood Test and Blood Test Results II, filed on February 8, 2022; and Motion to Suppress Blood Test and Blood Test Results or in the Alternative Motion in Limine with Regard to Blood Test and Blood Test Results Based Upon the Insufficiency of the F.D.L.E. Rules and Regulations and Failure to Meet the Requirements of Daubert and Florida Statutes 90.702 and 90.704, filed on October 13, 2021. On March 23, 2023, this Court issued an Order Granting State's Motion to Invoke the Doctrine of Primary Jurisdiction, transferring the three motions to the Florida Division of Administrative Hearings for an administrative determination. On June 19, 2024, the Division of Administrative Hearings issued a final order on the Defendant's three motions. The parties each submitted memoranda of law and a hearing was held on September 30, 2024. The Court has thoroughly reviewed the Defendant's motions, the final order of the Division of Administrative Hearings, and the memoranda of the parties, and has heard and considered the arguments of counsel. Based upon this review, and being otherwise fully advised in the premises, it is **ORDERED AND ADJUDGED:**

1. The Court adopts the findings made by Administrative Law Judge John G. Van Laningham in the June 19, 2024 final order of the Division of Administrative Hearings.

2. The Defendant's Motion in Limine with Regard to Blood Test and Blood Test Results I is **DENIED**.

3. The Defendant's Motion in Limine with Regard to Blood Test and Blood Test Results II is **DENIED**.

4. The Defendant's Motion to Suppress Blood Test and Blood Test Results or in the Alternative Motion in Limine with Regard to Blood Test and Blood Test Results Based Upon the Insufficiency of the F.D.L.E. Rules and Regulations and Failure to Meet the Requirements of Daubert and Florida Statutes 90.702 and 90.704 is **DENIED**.

GLENN BRIMMER, Petitioner, v. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, Respondent. Case No. 23-3262RX. June 19, 2024.

FINAL ORDER

This case came before Administrative Law Judge ("ALJ") John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by Zoom conference on March 25 through 27, 2024.

APPEARANCES

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For Respondents: Christopher David Bufano, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Florida Administrative Code Rules 11D-8.012, 11D-8.013, 11D-8.014, and 11D-8.015, relating to the administration of blood-alcohol tests under the implied consent law, are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On August 31, 2023, Petitioner Glenn Brimmer ("Brimmer") filed a Petition for Invalidity of Rule, initiating the instant action, which was assigned to the undersigned on September 5, 2023. Brimmer challenges rules 11D-8.012, 11D-8.013, 11D-8.014, and 11D-8.015, which Respondent Florida Department of Law Enforcement ("FDLE"), the agency responsible for administering the blood-alcohol testing programs that are used in enforcing the laws prohibiting drunk driving, has adopted in the exercise of delegated legislative authority. Brimmer, who is currently being prosecuted in Brevard County on charges relating to driving while intoxicated, sought to suppress his blood test results, arguing that the subject rules are inadequate to ensure scientifically reliable results. The circuit court presiding over the criminal proceeding, citing the doctrine of primary jurisdiction, declined to adjudicate the validity of the rules but gave Brimmer an opportunity to file a rule challenge with DOAH, which is how Brimmer wound up here.

Brimmer sought immediate review of the court's nonfinal order on primary jurisdiction and moved to place this case in abeyance pending the outcome of his interlocutory appeal. Brimmer's motion was granted on September 12, 2023, bringing this case to a halt. Then, on January 5, 2024, the Fifth District Court of Appeal dismissed Brimmer's petition for certiorari review. One week later, the undersigned set this case for a multiday hearing beginning March 25, 2024.

The final hearing took place as scheduled on March 25 through 27, 2024. At the hearing, Brimmer called two witnesses: Gabriel Kaufman and Janine Arvizu. He also moved 16 exhibits into evidence, namely, Petitioner's Exhibits 2, 5, 7, 8, 16, 25, 27, 29, 36, 38 through 41, 44, 46, and 48. FDLE offered no exhibits and presented two witnesses: Bruce Goldberger and Brett Kirkland.

The undersigned directed the parties to file their respective proposed final orders on or before May 20, 2024, and both sides met this deadline. The parties' proposed orders have been considered.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2023. Likewise, unless otherwise indicated, citations to administrative rules reference the most recent codification.

FINDINGS OF FACT

1. Pursuant to statutorily delegated legislative authority, FDLE, a state agency, is responsible for promulgating rules relating to the collection and analysis of blood drawn from persons arrested for driving under the influence ("DUI"), for the purpose of measuring blood-alcohol content. Under the state's implied consent law, codified in sections 316.1932, 316.1933, and 316.1934, Florida Statutes, which deems consent to such testing to have been given implicitly by the act of driving, the government, when prosecuting DUI cases, is entitled to the benefit of a presumption that blood tests administered in accordance with FDLE's rules produce reliable results; further, if the driver's blood-alcohol level matches or exceeds a prescribed threshold, i.e., 0.08, then a presumption of impairment arises, as well.

2. Brimmer is the defendant in a criminal proceeding pending in Brevard County, facing DUI-related charges grounded in events that occurred on March 2, 2018. In the criminal case, the government intends to offer the results of a blood test to prove impairment, with the help of the statutory presumptions.[1]

3. Brimmer filed various motions seeking to suppress his blood test results on the grounds that FDLE's rules are insufficient to ensure

scientific reliability. At the government's urging, however, the circuit court invoked the doctrine of primary jurisdiction as authority for concluding that the validity of the rules should be determined administratively. Thus, the circuit court deferred ruling on the defense motions and directed Brimmer to file a rule challenge with DOAH if he wanted to invalidate FDLE's rules on blood collection and analysis. He did and, accordingly, filed his Petition for Invalidity of a Rule as instructed.[2]

4. Specifically, Brimmer has challenged the following rules, as currently codified in the Florida Administrative Code: rules 11D-8.012 Blood Samples —Labeling and Collection; 11D-8.013 Blood Alcohol Permit—Analyst; 11D8.014 Blood Alcohol Permit—Analyst: Renewal; and 11D-8.015 Denial, Revocation, and Suspension of Permits. Collectively, these four rules will be referred to as the "Rules."

5. FDLE contends that Brimmer lacks standing to challenge the Rules. The undersigned agrees with FDLE, in part, and finds that Brimmer lacks standing to challenge many of the Rules. To the extent the Rules do not substantially affect Brimmer, his objections thereto, which he lacks standing to make, must be dismissed. On the other hand, Brimmer *is* substantially affected by some of the Rules, as he claims, and these Rules are, therefore, properly challenged herein.

6. Rule 11D-8.012 sets forth rules of practice governing the conduct of individuals who collect blood samples[3] and deliver them to a lab for testing. These regulations might seem not to substantially affect Brimmer; most rules like these do not, for purposes of standing, affect persons other than licensees regulated by them. The goal of rule 11D-8.012, moreover, is to establish procedures that, when followed, should lead to reliable test results. This goal benefits everyone; it is a common good. Surely rule 11D-8.012 is not subject to challenge by anyone who claims that the rule is insufficiently stringent or detailed (or, conversely, for that matter, is too heavy-handed), for then nearly everybody would have standing. Even if such an allegation sufficed to satisfy the standing requirement of an injury in fact, however, proving causation—that the rule, for lack of adequate standards, poses a risk of immediate injury from unreliable results—would be extremely difficult. It is far from self-evident, and cannot simply be assumed, that most persons who collect blood for testing will fail consistently to perform this task with due care and concern for accuracy unless coerced to do so by law; the likelihood of such an injury being realized in a particular case is, therefore, probably too remote or speculative to support standing.

7. Brimmer, however, is threatened with an injury that goes beyond the risk of an unreliable test result.[4] This is because compliance with the Rules raises a presumption of reliability.[5] Brimmer's blood was drawn and collected, allegedly pursuant to rule 11D-8.012, after his arrest on DUI related charges. The government plans to introduce the test results as evidence to prove that Brimmer was intoxicated at the time of the alleged offense. Assuming the government can show that the test was administered in conformance to rule 11D-8.012 and any other of the Rules governing the administration of the test (an issue beyond the scope of this proceeding), the results likely will be admitted into evidence (although, again, that is not being decided here). Then, the presumption of impairment will arise,[6] shifting the burden to Brimmer to prove that the results are *not* reliable, if he is to rebut the presumption and, possibly, keep the results from the jury.

8. The presumptions at issue arise by operation of law, irrespective of the actual reliability of the results. Because the basic fact is compliance with the Rules governing administration of blood-alcohol tests, these Rules threaten Brimmer with a nonspeculative, reasonably foreseeable, immediate injury. In addition, as will be seen, courts have held that FDLE is statutorily required to promulgate rules for administering blood tests that produce scientifically reliable results, and that rules which fall short of this mark are invalid. Brimmer's injury, in other words, falls within the zone of interests that the statutes are designed to protect. He has standing to challenge rule 11D-8.012.

9. The remaining disputed rules, i.e., rules 11D-8.013, 11D-8.014, and 11D-8.015 (the "Licensing Rules), establish the regulatory regime for the individuals who evaluate blood samples in the lab. These technicians, known as blood analysts, must be licensed by FDLE, and the Licensing Rules address, respectively, the license application and initial licensure process, the renewal of such licenses, and the discipline of licensees. Except for certain provisions of rule 11D-8.013, the Licensing Rules establish, not rules of practice, but the conditions of eligibility for licensure to practice in the field of blood analysis.

10. Rules establishing eligibility for licensure to engage in an occupation or profession usually specify the qualifications—e.g., educational requirements, passing score on an examination, good moral character—that one must have to become licensed. These criteria substantially affect persons engaging, or seeking to engage, in such occupation or profession. While various unregulated individuals, such as current or prospective patients or clients of persons licensed to practice or engage in a profession or occupation, might be genuinely interested in the stringency of the relevant licensing rules, these people do not ordinarily have standing to challenge them.[7]

11. Rule 11D-8.013 prescribes conditions for licensure, but it also provides that an applicant for licensure as a blood analyst must describe, in his or her application, a proposed gas chromatographic analytical procedure ("Methodology"), which the analyst will be required to use if FDLE approves the proposed Methodology and issues the applicant a license. *See* Fla. Admin. Code R. 11D-8.013(1)(e), (2)(a). Rule 11D-8.013(3)(a) through (f) prescribes the minimum requirements that a Methodology must meet to be approved. The provisions of rule 11D-8.013 that require each applicant to propose a Methodology and to employ such Methodology once approved not only establish conditions of licensure, but also effectively regulate the conduct of licensees qua licensees, which makes them rules of practice as well.

12. To elaborate, the Rules do not establish a uniform analytical procedure that all licensees must follow in all cases. Had FDLE gone this route, the standard procedure would have been clearly dissociated from applicant qualifications. A criminal defendant would have standing to bring a rule challenge alleging that such a procedure is insufficient to consistently produce scientifically reliable results, the undersigned believes, for the same reasons that Brimmer has standing to challenge rule 11D-8.012. As it happened, however, instead of prescribing a single analytical procedure, FDLE elected to allow each applicant to propose his or her own procedure, subject to FDLE's approval. The upshot is that, at least in theory, there could be as many Methodologies as there are licensees.[8]

13. Brimmer has standing, it is concluded, to challenge rule 11D-8.013 on the grounds that the provisions directing applicants to define their own Methodologies, together with the minimum requirements for such Methodologies, are invalid exercises of delegated legislative authority. These aspects of rule 11D-8.013 substantially affect Brimmer in the same ways that rule 11D-8.012 does, for they allegedly fail to ensure that test results will consistently be scientifically reliable.[9] Conversely, because the undersigned's subject matter jurisdiction hinges on Brimmer's standing, the merits of his objections to the Licensing Rules, except as just mentioned, will not be considered herein.

14. As mentioned, Brimmer has raised dozens of objections to the Rules. Below, the undersigned summarizes these objections and organizes them under the rule provision(s) to which the objection pertains. Brimmer's objections are italicized to distinguish his

contentions[10] from the text of the Rules. Each objection is assigned a lowercase Roman numeral and, going forward, will be identified by that number, to avoid repetition. The reader might find it necessary to refer to these paragraphs when a particular objection is discussed hereinafter.

15. Brimmer alleges that rule 11D-8.012 is invalid for the following reasons:

11D-8.012 Blood Samples—Labeling and Collection.

i. Fails to require a uniform blood alcohol test and collection kit and, thus, fails to ensure that an identical kit is used for "all" blood samples.

(1) Before collecting a sample of blood, the skin puncture area must be cleansed with an antiseptic that does not contain alcohol.

ii. Fails to specify how to use antiseptic or to determine that it does not contain alcohol.

(2) Blood samples must be collected in a glass evacuation tube that contains a preservative such as sodium fluoride and an anticoagulant such as potassium oxalate or EDTA (ethylenediaminetetraacetic acid). Compliance with this section can be established by the stopper or label on the collection tube, documentation from the manufacturer or distributor, or other evidence.

iii. Improperly delegates to someone other than FDLE authority to determine whether stopper or label demonstrates compliance.

iv. Vague or ambiguous for lack of standards for determining whether stopper or label demonstrates compliance.

v. No methodology specified for detecting micro-clotting.

vi. Fails to specify the type of preservative that must be used.

(3) Immediately after collection, the tube must be inverted several times to mix the blood with the preservative and anticoagulant.

vii. No provision that interior glass of tube must be sterile.

viii. No provision mandating the size of the glass evacuation tube.

ix. No provision that preservative or anticoagulant be present or present in appropriate amounts.

x. Volume of blood to be drawn not specified.

xi. The amount of vacuum required not specified.

xii. Storage temperature for the tube not specified.

xiii. Tubes not required to be inverted any specific number of times or even to be inverted in accordance with manufacturer's instructions.

* * *

(5) Blood samples need not be refrigerated if submitted for analysis within seven (7) days of collection, or during transportation, examination or analysis. Blood samples must be otherwise refrigerated, except that refrigeration is not required subsequent to the initial analysis.

(6) Blood samples must be hand-delivered or mailed for initial analysis within thirty days of collection, and must be initially analyzed within sixty days of receipt by the facility conducting the analysis. Blood samples which are not hand-delivered must be sent by priority mail, overnight delivery service, or other equivalent delivery service.

xiv. No minimum criteria as to temperature for storage.

xv. No definition of "refrigerate."

xvi. No definition of "submitted."

xvii. No requirement that sample ever be refrigerated if submitted to lab within seven days.

xviii. No time limit for receipt of sample by lab.

xix. No provision for treatment of sample upon lab's receipt besides requiring that initial analysis occur within 60 days thereafter.

xx. No requirement that sample be refrigerated after initial analysis.

(7) Notwithstanding any requirements in chapter 11D-8, F.A.C., any blood analysis results obtained, if proved to be reliable, shall be acceptable as a valid blood alcohol level.

xxi. No definition of "reliable" or standards for determining same.

xxii. Fails to identify person(s) responsible for determining reliability or require such decision-maker(s) to be "scientifically qualified."

xxiii. Fails to require establishment or documentation of chain of custody.

16. Brimmer alleges that rule 11D-8.013 is invalid for the following reasons:[11]

11D-8.013 Blood Alcohol Permit—Analyst.

(1) The application for a permit to determine the alcohol level of a blood sample shall be made on the Application for Permit to Conduct Blood Alcohol Analyses FDLE/ATP Form 4, revised December 2014, effective date July 2015, hereby incorporated by reference, https://www.flrules.org/Gateway/reference.asp?No=Ref-05640, provided by the Department and shall include the following information:

* * *

(e) A complete description of proposed analytical procedure(s) to be used in determining blood alcohol level.

(2) Qualifications for blood analyst permit—To qualify, the applicant must meet all of the following requirements:

(a) Department approval of analytical procedure(s). All proposed analytical procedures will be reviewed and a determination of approval will be made by the Department;

xxiv. Fails to identify the procedures reviewer.

xxv. Fails to establish a process for appointing the reviewer.

xxvi. Fails to prescribe qualifications for serving as reviewer.

xxvii. Fails to specify uniform blood test equipment or prescribe standards for approval of such equipment.

xxviii. Fails to define or specify a uniform "approved procedure" for use in all analyses.

(3) The department shall approve gas chromatographic analytical procedures which meet the following requirements:

(a) Includes the approved method used and a description of the method, and the equipment, reagents, standards, and controls used;

xxix. Fails to prescribe standards and controls and, thus, delegates to individual analysts the authority to make those choices using "unpromulgated procedures."

xxx. Fails to identify either the person(s) having authority to approve the procedures, or the qualifications for serving in that capacity.

xxxi. Fails to prescribe criteria for approving procedures.

xxxii. Fails to establish protocols for preventing contamination of samples.

(b) Uses commercially-prepared standards and controls certified by the manufacturer, or laboratory-prepared standards and controls verified using gas chromatography against certified standards. For commercially-prepared standards and controls, the manufacturer, lot number and expiration date must be documented for each sample or group of samples being analyzed. For laboratory-prepared standards and controls, date, person preparing the solution, method of preparation and verification must be documented;

xxxiii. Fails to establish maximum expiration dates or shelf lives for standards and controls.

(c) A statement of the concentration range over which the procedure is calibrated. The calibration curve must be linear over the stated range;

(d) Uses a new or existing calibration curve. The new calibration curve must be generated using at least three (3) standards: one at 0.05 g/100mL or less, one between 0.05 and 0.20 g/100mL (inclusive) and one at 0.20 g/100mL or higher, and must be verified using a minimum of two (2) controls, one at 0.05 g/100mL or less and one at 0.20g/100mL or higher. The existing calibration curve must be verified using a minimum of two (2) controls, one at 0.05 g/100mL or less and one at 0.20g/100mL or higher;

xxxiv. Fails to specify the type or manufacturer of standards to be used in any calibration curve and, thus, delegates to individual analysts the authority to make those choices using "unpromulgated procedures."

(e) Includes the analysis of an alcohol-free control, and the analysis of a whole blood or serum control. The whole blood or serum control may be used to satisfy the control requirement(s) in paragraph (d);

(f) A gas chromatographic analytical procedure must discriminate between methanol, ethanol, acetone and isopropanol and employ an internal standard technique;

xxxv. Fails to prescribe maintenance and repair criteria for ensuring the reliability of testing equipment.

(4) The permit shall be issued by the Department for a specific method and procedure. Any substantial change to the method or analytical procedure must receive prior approval by the Department before being used to determine the blood alcohol level of a sample submitted by an agency. The Department shall determine what constitutes a substantial change.

xxxvi. Fails to specify criteria for determining whether a change in method or procedure is "substantial."

xxxvii. Fails to identify the person(s) responsible for determining substantiality.

xxxviii. Fails to prescribe qualifications necessary to determine substantiality.

17. It is noteworthy that none of the nearly 40 objections is based upon a claim that compliance with the Rules, as far as they go, inevitably or even likely would lead to an inaccurate result. Instead, Brimmer's position is that the Rules do not go far enough. Conceptually, this is a difficult case to make because, once the minimum requirements have been established, decisions about how much additional detail the Rules should include rest on policy choices committed to FDLE's discretion. The "minimum requirements," moreover, according to the Florida Supreme Court, are those that due process demands, and those demands are small. The dispositive question, as will be seen, is whether the Rules, if followed in conjunction with standard laboratory practices (which need not be codified in the Rules), "inevitably preclude" an accurate result due to their failure to regulate against a foreseeable error; if not, then the Rules pass.

18. This is an exceedingly high standard, tantamount to saying that the Rules are invalid only if the complained-of deficiency inevitably, i.e., *always*, produces an inaccurate result.[12] Brimmer has not shown that, unless the Rules are revised to meet his many objections, inaccurate results are likely, much less inevitable. Indeed, most of his objections target nonexistent problems and hence fail to identify a "deficiency" in the Rules. The objections can be classified, for ease of discussion, into three categories: (1) those based upon a misreading, or a strained reading, of the Rules, e.g., urging an unreasonable or unscientific interpretation of the language when a better, more natural understanding is available; (2) those based upon a false or incorrect premise; and (3) those based upon the "failure" to address a remote or theoretical problem that would be best explored on a case-by-case basis rather than "solved" by statements of general applicability.[13]

19. Unreasonable interpretations. In this category are objections xvii, xviii, and xix, which relate to the refrigeration provisions. Everyone agrees that refrigeration is necessary to prevent degradation of the sample over time and protect the integrity of the test results. Of them all, Brimmer's most serious allegation is objection xvii, the claim that rule 11D-8.012(5) allows a sample *never* to be refrigerated if submitted to a lab within seven days after collection. A loophole like this would be a substantial, possibly fatal, defect. The objection, however, misinterprets the rule.

20. The rule addresses refrigeration of the sample at three stages in the chain of custody, first while the blood is in the hands of law enforcement, then during transportation (in the custody of a carrier, e.g., FedEx), and finally when stored at the lab. Law enforcement officers need not refrigerate the sample unless they maintain custody thereof for more than seven days after collection, in which latter event, no later than the eighth day, the sample would need to be placed in a refrigerator. When the sample is submitted to the lab, the delivery service is not required to provide refrigeration during transport. It is contemplated, however, that the sample will not be out for delivery for an extended period since the rule requires hand-delivery, overnight delivery, priority mail, or the equivalent. So, in theory, although it is possible that a sample might not be refrigerated for up to ten days or so after collection, this would require law enforcement to wait until the seventh day to submit the sample and to use the slowest permissible method of delivery.[14]

21. Still, ten days, while perhaps suboptimal, is different from "never." Moreover, the rule clearly specifies, contrary to Brimmer's contention, that refrigeration is "otherwise" required, meaning that refrigeration is mandatory except when the custodian is specifically exempted from this obligation. Once the sample arrives at the lab, therefore, it must be refrigerated, except during examination or analysis, for which purpose the sample obviously must be removed from the refrigerator. Brimmer is mistaken in claiming that the rule does not provide for treatment of the sample by the lab besides requiring that the testing occur within 60 days after receipt thereof.

22. While it is true that the rule does not limit the acceptable time during which a sample may remain in the hands of a carrier, it does require expedited delivery of the sample to the lab, a point Brimmer overlooks or ignores. In the run of cases, the sample should not be in transit for more than one day. If delivery of a particular sample takes more than two or three days, the defendant might have grounds to challenge the reliability of his results on that basis.

23. As regards refrigeration, the rule, as written, does not inevitably preclude an accurate result.

24. False premises. Falling under this heading are objections iii, iv, vi, xx, xxi, xxii, xxiii, xxiv, xxv, xxvi, xxix, xxx, xxxi, xxxvi, xxxvii, and xxxviii.

25. Objections iii and iv are flawed because FDLE does not determine compliance. If disputed, the question is for the court to decide when the government seeks to rely upon the presumptions.

26. Objection vi overlooks that rule 11D-8.012(2) does specify the type of preservative, i.e., sodium fluoride or something similar.

27. As for objection xx, Brimmer is correct that the rule does not require refrigeration after the initial analysis. The rule does not "fail" to include such a requirement, however; it explicitly states that post-analysis refrigeration "is not required." At the same time, the rule does not prohibit analysts from continuing to refrigerate a sample after initial analysis, either. Thus, Brimmer is incorrect in reading rule 11D-8.012(5) as containing no requirement in this regard. The rule "requires" that decisions regarding continued preservation of samples be made locally instead of by FDLE—for good reason.

28. Once a blood sample has been analyzed, its handling is no longer a matter of testing but one of preservation of potential evidence, which is outside of FDLE's rulemaking purview under the implied consent law. The question of whether the government must preserve blood samples *after* the completion of testing is grounded in due process concerns and, accordingly, is for the courts to decide, not the executive.[15] The rule's provision regarding post-analysis refrigeration has no bearing on the reliability of the initial test results.

29. Objections xxi and xxii incorrectly presuppose that FDLE engages in adjudicating reliability. It does not. If disputed, a court would make the required determinations respecting reliability in connection with the government's attempt to offer the test results into evidence. Similarly, contrary to the premise of objection xxiii, it is not FDLE's responsibility to establish chain-of-custody procedures; these are matters bearing on admissibility rather than testing and are for the courts to decide, not the agency.

30. Objections xxiv, xxv, xxvi, xxx, and xxxi are based upon the incorrect notion that someone other than the agency head would be taking the agency action in question. Brimmer complains that the rule lacks specificity as to the process for reviewing applications for licensure, especially as regards approval of the applicant's proposed Methodology. The approval or denial of an application determines the substantial interests of the applicant; the decision becomes final agency action (technically, an order[16]) at the conclusion of proceedings under sections 120.569 and 120.57, if requested, or when the right to a hearing is waived.[17] (A disappointed applicant would be entitled to a clear point of entry to contest, at hearing, an intended denial.[18]) Final agency action is taken in the name of the agency, by the agency head (or a designee) exercising final order authority, not by a subordinate employee or agent without such authority.[19] The matters described in objections xxiv, xxv, xxvi, xxx, and xxxi might give rise to disputed issues of material fact that would be hearable in a formal proceeding, if requested, to determine an applicant's substantial interests. None of these matters, however, bears on the reliability of test results.

31. Objections xxxvi, xxxvii, and xxxviii are likewise flawed because when questions arise concerning whether a "substantial change" has been made to an approved Methodology; and, if so, whether such change should be approved for use, a licensee's substantial interests are at stake and must be determined through final agency action. If the licensee disagrees with the intended agency decision, he or she has the right to a hearing, in which proceeding FDLE would be required to prove the grounds for a finding that the change is "substantial" as well as the reasons why the change, if substantial, should not be approved for use. None of these matters bears upon the reliability of test results.

32. Objection xxix is based upon the premise that FDLE is inviting individual applicants to use "unpromulgated procedures" (presumably meaning unadopted rules) to make choices regarding which standards and controls to use in his or her proposed Methodology. Brimmer has not identified the statements that allegedly constitute these "unpromulgated procedures." That is a fatal flaw, but beyond that, Brimmer's allegations negate the idea that the statements—whatever they might be—are agency statements as opposed to applicant statements. "Unpromulgated procedures" developed by a private citizen to govern his or her personal choices cannot fall under the definition of an "unadopted rule" since the latter must be, among other things, an *agency* statement.[20] Finally, as will be seen, FDLE's decision to allow applicants to propose testing Methodologies has been upheld judicially as a valid exercise of delegated legislative authority. For multiple reasons, therefore, objection xxix fails as a ground for invalidating rule 11D-8.013.

33. Theoretical problems. Half of Brimmer's objections can be categorized as, basically, flyspecking; that is, pointing out some minute detail that the Rules "fail" to address. Of course, there is no end to the number of objections that can be raised using this approach, for no matter how comprehensive the Rules may be, there will always be something else that someone can think of, which has not been included. Objections ii, vii, viii, ix, x, xi, xii, and xiii are textbook examples of this type of criticism. The Rules would never be thorough enough if they could be invalidated for "failing," e.g., to prescribe the amount of vacuum for, or the size of, the collection tube, or to micromanage the collection process by instructing health care providers on how to use antiseptic.[21] These eight objections are so plainly unlikely to negatively affect the test results in any but the rare case[22] that further discussion of them is unnecessary.

34. The remaining objections in this category are i, v, xiv, xv, xvi, xxvii, xxviii, xxxii, xxxiii, xxxiv, and xxxv. Objections xiv, xv, and xvi relate to refrigeration, which is, to repeat, an important consideration since the failure to properly refrigerate samples would jeopardize reliability. These objections, however, are wide of the mark. The terms "refrigerate" and "submit" are too common and readily understood to require definitions (objections xv and xvi); giving these terms their ordinary meanings will not inevitably, or even likely, lead to unreliable results. Similarly, it is not necessary to prescribe the temperature for storage under refrigeration. Ordinary people understand what "refrigeration" is, and what it feels like, without consulting a gauge. A properly functioning refrigerator would be sufficient to preserve samples for testing.[23]

35. Objections i, xxvii, and xxviii have, as a common denominator, the claim that the Rules fail to require uniformity—of test kits, blood test equipment, and analytical procedures. Uniformity as to these matters would be required, however, only if variety inevitably leads to erroneous results. There is no persuasive evidence in the record that it does. To the contrary, it is found that a "one size fits all" approach to regulating the administration of blood-alcohol tests likely would do more harm than good, considering the multiple steps and number of persons involved in the process from start to finish, and taking account of the fact that the key participants are trained professionals or technicians who should be given room to exercise some independent judgment in the performance of their duties.

36. In the same vein is objection xxxii, which argues that the Rules are invalid for failing to establish protocols for preventing contamination of the samples. There is no evidence suggesting that trained professionals and technicians need to be told how to prevent contamination; further, if every imaginable action that might be undertaken to prevent contamination, e.g., hand washing, were promulgated as mandatory "protocols," the rules would be unwieldy. This objection fails to identify a deficiency that dooms reliability.

37. Objection xxxiii complains about the absence of maximum expiration dates for standards and controls. Rule 11D-8.013(3)(b) requires, however, that expiration dates must be documented for all standards and controls used. This is sufficient to protect the integrity of the testing process because it assures that information will be available to the defense for purposes of independently verifying that the standards and controls used had not expired before testing, and of challenging the results in those (presumably few) instances where the standards and controls might have been out of date.

38. Objection xxxiv, like objection xxix, asserts that "unpromulgated procedures" are being used by individual analysts, here to decide which type of standards should be used in generating the calibration curve. Assuming such procedures exist in fact (there is no persuasive record evidence thereof), they cannot be unadopted rules for the reasons previously given. In addition, there is no evidence that allowing analysts leeway in selecting standards for use in generating calibration curves necessarily, or even likely, leads to unreliable results.

39. Objection xxxv faults FDLE for not prescribing maintenance and repair criteria for keeping testing equipment in good working order. Like so many of Brimmer's objections, this underscores how detailed the Rules could be, if FDLE were inclined to regulate every aspect of the process. And, as with so many other objections raised herein, there is no evidence that the "failure" to promulgate an instruction manual for keeping lab equipment in good repair threatens, to any degree, the reliability of results.

40. Finally, objection v regarding "micro-clotting" finds no support in the evidentiary record as a basis for invalidating the Rules. There is no evidence, for example, that micro-clotting is a major, unaddressed problem. Further, as will be seen, the issue of clotting has been reviewed and rejected as a rule challenge ground by the Florida Supreme Court.

CONCLUSIONS OF LAW

41. DOAH has personal jurisdiction in this proceeding pursuant to sections 120.56, 120.569, and 120.57(1).

42. FDLE disputes Brimmer's standing to maintain this action. In administrative proceedings, standing is a matter of subject matter jurisdiction. *Abbott Labs. v. Mylan Pharms., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1265a]. Thus, the jurisdiction of DOAH to entertain this rule challenge proceeding has been called into question.

43. To have standing to challenge the validity of an administrative rule in a proceeding before an ALJ, a person must be "substantially affected" by the rule in question. § 120.56(1)(a), Fla. Stat.

44. As the First District Court of Appeal has observed,

> [t]o establish standing under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005) [31 Fla. L. Weekly D104a].

Off. of Ins. Regul. v. Secure Enters., LLC., 124 So. 3d 332, 336 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2159a]; *see also, e.g.*, *Fla. Med. Ass'n, Inc. v. Dep't of Pro. Regul.*, 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983). To satisfy the immediacy of injury requirement, the rule's harmful effect cannot be purely speculative or conjectural. *Lanoue v. Fla. Dep't of Law Enf't*, 751 So. 2d 94, 97 (Fla. 1st DCA 1999) [25 Fla. L. Weekly D76a].

45. The petitioner need not actually have realized the injury, however, to have standing. In *NAACP, Inc. v. Florida Board of Regents*, 863 So. 2d 294, 300 (Fla. 2003) [28 Fla. L. Weekly S815a], for example, the Florida Supreme Court held that student members of the NAACP who were genuine prospective candidates for admission to a state university were, as African-Americans, substantially affected by the proposed repeal of rules which authorized certain affirmative action policies for which only minority applicants were eligible; thus, they had standing to challenge these proposed rules without showing "immediate and actual harm," such as the rejection of an application for admission.

46. Brimmer is not regulated by the Rules because he is neither a licensed blood analyst (or law enforcement officer or other person involved in the collection and testing of blood samples), nor is he a would-be applicant for licensure. For reasons stated in the Findings of Fact above, Brimmer is nevertheless substantially affected by rule 11D-8.012 and parts of rule 11D-8.013 due to the legal presumptions that attach to test results obtained in compliance with FDLE's rules governing the administration of blood-alcohol tests.[24]

47. Brimmer, however, is not substantially affected by rules 11D-8.014, 11D-8.015, and the parts of 11D-8.013 that exclusively regulate, not the administration of blood tests, but the licensing of analysts. This is because the Licensing Rules, which place no restrictions or burdens whatsoever on Brimmer, could cause him a particularized injury in fact, if at all, only through the actions of independent actors, e.g., licensed blood analysts and others subject to the Licensing Rules, who are not parties to this proceeding. The responses of others to the Licensing Rules are not predictable (or at least were not proved to be), which means that Brimmer (and the undersigned) can only speculate about the unfettered choices that these independent actors might make in response to the Rules at issue. Speculation, however, is insufficient to establish the requisite causal connection between the challenged rules and the alleged injury in fact. *See Food & Drug Admin. v. All. for Hippocratic Med.*, No. 23-235, 2024 WL 2964140 (June 13, 2024) [30 Fla. L. Weekly Fed. S247a]. Accordingly, Brimmer lacks standing to challenge the Licensing Rules (again, except for portions of rule 11D-8.013).

48. Regarding the Rules that substantially affect Brimmer, it is his burden to prove by "a preponderance of the evidence that the existing rule[s constitute] an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(3)(a), Fla. Stat.

49. A rule is an invalid exercise of delegated legislative authority if any of the following apply:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

§ 120.52(8), Fla. Stat. Brimmer is not especially conscientious about grounding his objections in the statutory definition of invalidity, preferring instead to rely upon the alleged failure of the Rules to achieve scientific reliability. His legal theory is sound, nonetheless. The Florida Supreme Court has held that the implied consent law's "core policy" obligates FDLE to promulgate rules that ensure scientifically reliable and accurate blood-alcohol test results. *Goodman*, 238 So. 3d at 114. The Rules would be invalid if, and to the extent, they failed to uphold this core policy.

50. That said, the Court has watered down this proposition to the point that challenges to the Rules based upon core policy objections have little chance of success. First, FDLE is required only to "set a due process floor," thereby allowing "some flexibility for science to advance." *Id*. at 115. This means, among other things, that the Rules need not "lay[ ] out every minute detail of a test." *Id*. at 117. Further, it is presumed that analysts will follow standard laboratory practices ("SLP"), which are implicit and incidental to the procedures prescribed in the Rules, even if not codified. So, in evaluating the Rules' validity, the broad question is not whether the Rules *alone* ensure reliable results, but whether they do so in conjunction with SLPs, which are deemed to be incorporated therein. *Id*. at 116. Finally, the Court has instructed that, while FDLE's rulemaking responsibility is "weighty," the legislature has not "oppress[ed] FDLE with the impossible task of continuously regulating the potential existence of every theoretical problem that could occur during a blood draw," *id*. at 114, which would be a "hopeless endeavor" resulting in the Rules' reaching "epic lengths." *Id*. at 117.

51. Consequently, core policy objections that raise theoretical problems or complain about the Rules' omission of minute testing details or SLPs are legally suspect, if not insufficient, because FDLE does not need to make rules addressing such remote or peripheral concerns. As found above, the majority of Brimmer's objections do not clear this hurdle and, thus, fail as a matter of law.

52. In *Goodman*, the main fact issue was whether the use of a butterfly needle instead of a larger gauge straight needle could impact the sample by increasing the chance of clotting. The ALJ's finding in *Goodman* was that clots in the sample do not, in fact, "inevitably preclude"[25] an accurate result because analysts follow SLPs that involve checking for clots, noting irregularities, and performing "simple calculations"[26] to adjust results to account for clots—using so-called "curative procedures."[27] The Court rejected Goodman's argument that the ALJ had applied the wrong factual standard in making the ultimate finding that the Rules' failure to regulate needle size did not compromise reliability. *Id*. at 112. In affirming this

finding, the Court reasoned that because of the curative procedures in the SLPs, "we can be confident in the results"[28] since analysts "routinely"[29] check for clots and make corrections to account for them when necessary. Thus, the absence of standards in the rule concerning needle gauges did not render the Rules inadequate, either in fact or facially.

53. The *Goodman* standard sets an extremely high bar for the challenger. Just as the ALJ in *Goodman* found with respect to the Rules' failure to prescribe acceptable needle gauge(s), the undersigned has found that none of Brimmer's objections identifies a deficiency that inevitably precludes a reliable result. These objections fail, therefore, on factual grounds.

54. It should be mentioned, however, that in *State v. Miles*, 775 So. 2d 950, 954-55 (Fla. 2000) [25 Fla. L. Weekly S1082a], the Court affirmed a finding that the version of rule 11D-8.012 then in effect was invalid for failure to provide for the preservation, via refrigeration or otherwise, of blood samples pending testing.[30] There, though the trial court had denied the defendant's motion to suppress the blood-alcohol test results, it had held that the government would not be entitled to the presumption of impairment because of the rule's failure to protect the integrity of the process. *Id*. at 951. Specifically, it was established at trial "without dispute that the blood alcohol content of a blood sample *may be affected* by the sample's exposure to heat or by the presence of certain bacteria in the sample." *Id*. (Emphasis added). The Supreme Court, in affirming this finding, stressed that all the experts had agreed upon the "fundamental importance of proper preservation of blood samples." *Id*. at 955.

55. Obviously, the *Miles* standard (may affect the accuracy of results) is substantially more lenient than the *Goodman* standard (inevitably precludes accurate results). Because of the consensus in *Miles* that preservation of the sample is fundamental to maintaining the integrity thereof, it seems likely that the same bottom line would have been reached in that case even under the more stringent *Goodman* standard. The issue is academic here, however, for two reasons. One, none of Brimmer's objections—except for a few that are based upon a misreading of rule 11D-8.012 and must be rejected for that reason—goes to a matter of quality control such as preservation of samples, which everyone agrees is fundamental and irremediable. Two, there is no persuasive evidence that any of the alleged deficiencies may affect the accuracy of the result, provided "may affect" is understood, as it must be, to incorporate the notion of reasonable foreseeability.[31] Accordingly, Brimmer's objections fail as a matter of fact, even under the less demanding *Miles* standard.

56. One more case is instructive, *Mehl v. State*, 632 So. 2d 593 (Fla. 1993), which involved an attempt to suppress blood-alcohol test results on the grounds that the Department of Health and Rehabilitative Services ("HRS"), the agency responsible in those days—before the authority was transferred to FDLE—for adopting rules governing the administration of blood tests under the implied consent law, had failed to adopt rules "for the use, maintenance, calibration, testing, upkeep, and repair of gas chromatographs." *Id*. at 594. The defendant's factual allegations were true:

> At the suppression hearing, an FDLE forensic toxicologist testified that HRS indeed does not have standards for the use, maintenance, calibration, testing, upkeep, and repair of gas chromatographs. Rather, HRS issues permits only after an applicant has satisfactorily analyzed "proficiency samples" sent to the applicant by HRS. After a permit is issued, the applicant is sent proficiency samples every three months; and the permit is automatically terminated if the permittee unsatisfactorily analyzes two of four consecutive sets of samples. The person analyzing Mehl's blood sample had been qualified and licensed under this procedure.

Id. It will be seen that the foregoing describes, in general terms, the current licensing procedure as codified in rule 11D-8.013.

57. The trial court had granted the suppression motion, but that ruling had been reversed on appeal, so that the blood-test results would be admissible, and the presumptions available to the government, if the Supreme Court affirmed the underlying appellate decision, which it did, despite having some disagreement with the district court's rationale. The Supreme Court's opinion bears quoting at length:

> [T]he legislature intended for HRS to "specify precisely the test or tests" that must be used as well as to "provide an approved method of administration which shall be followed in all such tests," *see* § 316.1932(1)(f)1., Fla. Stat. (1989).[32] It therefore is incumbent upon HRS not merely to test particular machines, methods, or operators for accuracy, but also to specify the precise blood-alcohol tests and the method of administration approved for use in this state.

Id. at 595.

58. The Court described the HRS rules at issue:

> Rule 10D-42.028 authorizes two procedures for the testing of blood for alcohol content: alcohol dehydrogenase and gas chromatography.[33] This clearly meets the statutory requirement of specifying the approved test. However, [the defendant] contends that the regulations do not provide an approved method of administration. The State responds that under the rules a technician who wishes to qualify for a permit must submit to HRS the complete description of the procedure to be used and must satisfactorily analyze proficiency samples. The tests may only be performed by the permittee in a designated laboratory facility. Every three months, the permittee is given control samples to test to insure the accuracy of testing equipment and methodology. Each permit must be renewed annually, and unsatisfactory test results mandate termination of the permit.[34]

Id.

59. The Court held that HRS's rules constituted valid exercises of delegated legislative authority:

> Because HRS approves the methodology of the applicant and tests proficiency before issuing a permit, we conclude that HRS has met the statutory requirement of providing an approved method of administration. Therefore, the results of [the defendant's] blood test are not subject to suppression.

Id. In *Mehl*, then, the Florida Supreme Court rejected complaints about the licensing regulations, to which many of Brimmer's objections to rule 11D-8.013 are analogous. Given that HRS's predecessorial rules were upheld as valid by the Supreme Court more than 30 years ago,[35] it is concluded that rule 11D-8.013 likewise must be found valid when, as here, similar objections are raised.

60. It is concluded that the Rules are not invalid exercises of delegated legislative authority as that concept is defined in section 120.52(8).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Florida Administrative Code Rules 11D-8.012, 11D-8.013(1)(e) and (2)(a), and 11D-8.013(3)(a) through (f) are hereby determined to be valid exercises of delegated legislative authority. It is further ORDERED that Brimmer lacks standing to challenge the balance of rules 11D-8.013, 11D-8.014, and 11D-8.015; to the extent he is attempting to do so, this action is dismissed.

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[1]If, for whatever reason, the presumptions were unavailable to the government, the prosecutor could still seek to introduce the test results as evidence of impairment but would need to lay a substantial predicate to secure admission thereof. *See State v. Miles*, 775 So. 2d 950, 956 (Fla. 2000) [25 Fla. L. Weekly S1082a].

[2]Brimmer claims that the court transferred the defense motions to DOAH for disposition as well. Without deciding whether this is accurate, the undersigned notes only that the jurisdiction of DOAH under section 120.56(3), Florida Statutes, is limited to declaring "all or part of a rule invalid." *See* § 120.56(3)(b), Fla. Stat. No opinions

regarding the admissibility of Brimmer's blood test results are expressed herein.

[3]The withdrawal of blood for purposes of the implied consent law must be undertaken at the request of a law enforcement officer and be performed by a licensed health care provider or other person trained in phlebotomy. *See* § 316.1932(1)(f), Fla. Stat.

[4]Indeed, ironically, he might benefit from unreliable results, which could be suppressed for that reason, if proved, and kept from the jury deciding his criminal case.

[5]*See* § 316.1934(2), Fla. Stat. It bears mentioning that *obedience* to, rather than a *violation* of, the Rules is what harms a criminal defendant like Brimmer, as far as the presumption is concerned. Brimmer argues that the Rules are too lax, to the point that one cannot be confident that blood-alcohol test results are accurate. If his allegations are true, then the Rules should be invalidated: a presumption of correctness cannot logically follow from the fact of compliance with Rules that fail to provide a reasonable assurance of reliability, and criminal convictions should not be based upon false presumptions. So, underregulation is a genuine concern. But, so too is overregulation, which in this situation means promulgating such strict standards that the marginal benefits of compliance (e.g., an increase in the number of reliable results, reducing the risk of wrongful convictions) are not significant enough to justify the costs (e.g., a decrease in compliance, making DUI cases harder to prosecute and thereby raising the odds that the guilty will go unpunished). Brimmer's lack of concern for the costs of overregulation is reflected in his position that the Rules are invalid for failing to contain many dozens of minute details, which he urges are necessary to ensure reliability. Rules as comprehensive and granular as Brimmer contends are required would be easy to violate inadvertently, even by the most careful analysts, whose every action could be (and often would be) retroactively nitpicked, making the presumptions harder to come by.

[6]The undersigned does not know what the analysis showed to be the alcohol content of Brimmer's blood. It is inferred that the result was a concentration of 0.08 or higher, which would give rise to the adverse presumption of impairment were that fact received in evidence at trial.

[7]Everyone shares an interest in the competence of licensees. Whether the regulated field is medicine, dentistry, blood analysis, or any other of the myriad classes of licensed professions and occupations, we all prefer the services of the well-qualified, the well-trained, and the skillful. Stated differently, no one wants to be treated by an unqualified or incompetent physician or dentist, nor would anyone want an unqualified or incompetent analyst determining the blood-alcohol content of his or her blood under the implied consent law. But this common interest does not give patients standing to challenge, for example, the Board of Medicine's rules for licensing doctors. There is almost never any particularized injury to unregulated individuals resulting from allegedly lax licensing regulations, which is not too remote or speculative to support standing.

[8]The undersigned guesses that, in practice, this is not the case. Although there is no evidence in the record as to the ratio of licensees to approved Methodologies, it seems likely to be greater than 1:1 because, rather than reinventing the wheel, an applicant probably would prefer to propose a previously approved Methodology.

[9]Brimmer contends that the Methodologies are unadopted rules, although this argument is not one that he emphasizes. To the extent Brimmer is attempting to pursue a section 120.56(4) rule challenge, the proceeding fails to achieve liftoff. This is because, if for no other reason, none of the unknown number of approved Methodologies was shown to be generally applicable. Thus, none can be deemed a rule by definition. *See* § 120.52(16), Fla. Stat.

[10]To be clear, the objections as set forth herein are not verbatim quotes from Brimmer's papers, although the undersigned has used much of his language; they do, however, fairly and accurately reflect the substance of Brimmer's objections.

[11]Brimmer alleges that other provisions of this rule are invalid for additional reasons, but for reasons already discussed, he lacks standing to challenge rule 11D-8.013 except to the extent that it sets forth rules of practice. Therefore, his objections to the provisions of rule 11D-8.013 that relate solely to the conditions of licensor are outside of the subject matter jurisdiction of DOAH in this proceeding and need not be listed above.

[12]Stated yet another way, the Rules are valid unless they inevitably facilitate inaccurate results.

[13]These categories are not, of course, mutually exclusive, and many of the instant objections fall under more than one.

[14]To be sure, other things could go wrong that would delay delivery in a specific situation, e.g., the package could be lost in transit due to error or accident, resulting in an extended period wherein the sample remains in an unrefrigerated environment. No rule, however, can guard against every foreseeable contingency. These are matters best left to adjudication on a case-by-case basis.

[15]In fact, the courts have decided the issue. *See Houser v. State*, 474 So. 2d 1193, 1195-96 (Fla. 1985) (state is not obligated to preserve a blood sample on behalf of criminal defendant).

[16]*See* § 120.52(2), Fla. Stat.

[17]*See* § 120.52(7), Fla. Stat.

[18]*See* § 120.60(3), Fla. Stat.; *Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Pro. Regul.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D280a] ("It is self-evident that the permit applicant has standing to challenge the denial of its own application.").

[19]*See* § 120.52(3), Fla. Stat.

[20]*See* § 120.52(20), Fla. Stat.

[21]On the flip side, if FDLE regulated this closely, the Rules, being larded with red tape, would present a target rich environment for the defense because any deviation from the Rules' exacting details might be grounds for defeating the presumptions.

[22]No set of rules can eliminate the possibility of human error, negligence, or even incompetence leading to faulty results in some small percentage of cases. Unfortunately, perfection is an impossible standard.

[23]Specific concerns about the adequacy of refrigeration are best resolved on a case-by-case basis.

[24]*Goodman v. Florida Department of Law Enforcement*, 238 So. 3d 102 (Fla. 2018) [43 Fla. L. Weekly S61a], which will be discussed further in the main body, is nearly indistinguishable from this case on the question of standing. There, as here, a criminal defendant, namely Goodman, facing DUI related charges, moved to suppress the result of his blood-alcohol test, arguing that FDLE's rules were insufficient to produce scientifically reliable results. *Id.* at 103-04. The court required Goodman, like Brimmer here, to take his rule challenge to DOAH, where Goodman sought to invalidate rules 11D-8.012 and 11D-8.013. Unlike this case, however, where standing is disputed, in *Goodman,* FDLE stipulated that the criminal defendant was substantially affected by, and had standing to challenge, the subject Rules. *See Goodman v. Fla. Dep't of Law Enf't*, 2014 WL 3818213, at *2, Case No. 14-1918RX (Fla. DOAH July 30, 2014). As a result, the ALJ did not address standing, and neither, in the ensuing appeals, did the Fourth District Court of Appeal or the Florida Supreme Court despite that parties cannot stipulate to subject matter jurisdiction. On the other hand, courts *can* raise the question of jurisdiction sua sponte; yet, both appellate courts in *Goodman* declined even to mention the issue, which implies that Goodman's standing was plausible enough to prevent the stipulation from raising any judicial eyebrows on review. The upshot is that, while *Goodman* is not binding authority on the question of standing, for the standing question was not reached therein, it is fair to say, at a minimum, that Brimmer, like Goodman, is not patently without standing to challenge rules 11D-8.012 and 11D-8.013.

[25]*Id*. at 111.

[26]*Id*. at 112.

[27]*Id*. at 107.

[28]*Id*. at 113.

[29]*Id*.

[30]It has since been amended to fix this problem, as we have seen.

[31]In *Miles*, there was no dispute that, if the sample is not preserved, it is not just theoretically possible, but reasonably foreseeable that the resulting degradation will adversely affect the accuracy of the blood test. For this reason, and because *Goodman* holds that FDLE need not regulate against theoretical problems, it would be a mistake to interpret "may affect" as meaning "may *conceivably* affect."

[32]This language remains the same in the 2023 version of the statute.

[33]Currently, rule 11D-8.011 authorizes only one test method, i.e., gas chromatography.

[34]As described by the Court, the HRS rule was no different, in relevant part, from rule 11D-8.013(2).

[35]The Court went on to take an unusual action:

> Notwithstanding our conclusion that HRS has sufficiently met the statutory requirements, we believe that the public as well as those who may wish to obtain a testing permit should be apprised in advance of all approved methods of administering the test. Therefore, beginning at 12:01 a.m. on April 1, 1994, the State shall not be allowed the benefit of the presumptions . . . unless (a) the state has established reasonably definite rules specifying the precise methods of blood alcohol testing that are approved for use in this State, and (b) the State and its agencies substantially comply with these rules. Of course, even when the presumption is not available, the State should still have the benefit of the *Robertson* analysis, upon a proper request.

Id. This is something of a head-scratcher. Even though the HRS rules were valid (and evidently not otherwise unconstitutional), the Court nevertheless gave "the state" (referring apparently to nonparty HRS) six months to promulgate new rules consistent with the Court's assessment of the public interest, or else forfeit "the State's" (referring obviously to the government prosecutors) right to rely upon the presumptions. It is axiomatic, however, that although the Court may strike down a rule it finds unlawful, the judicial branch is constrained by the separation of powers doctrine *not* to order an executive branch agency to draft or revise a rule so as to reflect the judiciary's preferred policy decisions, even if the stated reason is to "improve" the rule. It is hard to avoid concluding that the Court in *Mehl*, being unimpressed by HRS's *lawful* policy choices, forced the agency to make "better" ones despite the agency's having "sufficiently met the statutory requirements." Whatever one thinks of the Court's ultimatum, though, it does not take away from the primary holding, which is that HRS's rules were valid and lawful.

* * *

Torts—Dismissal—Death of plaintiff—Substitution of party—Case dismissed with prejudice where motion for substitution was not made within 90 days following defendant's filing of suggestion of death

MELISSA BEST, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, JASON COTE, and COTE'S CUSTOM LAWN CARE, INC., a Florida Corporation, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2016-CA-030370-XXXX-XX. September 30, 2024. Michelle Naberhaus, Judge. Counsel: Melissa Best, Pro se, Oak Hill, Plaintiff. William K. Pratt, Orlando, for Defendant.

FINAL ORDER OF DISMISSAL WITH PREJUDICE AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR PLAINTIFF FAILURE TO SUBSTITUTE THE PROPER PARTY

THIS CAUSE having come on to be heard on Defendant's Motion to Dismiss for Plaintiff Failure to Substitute the Proper Party on 9/10/2024, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss for Plaintiff Failure to Substitute the Proper Party is hereby *Granted.*

This Court specifically finds that on 3/6/24 Defendant filed the Suggestion of Death of Plaintiff, Meliss Best. 91 days later, on 6/5/2024 the Defendant filed its Motion to Dismiss for Failure for Plaintiff to Substitute the Proper Party. As of the filing of Defendant's Motion to Dismiss Plaintiff had failed to file a Motion to Substitute or Motion for Enlargement of Time within the prescribed statutory time period. Therefore, this Court specifically finds that pursuant to Florida Rules of Civil Procedure 1.260 and 1.420(b) this matter should be dismissed with prejudice.

Under Florida law, the passing of a party does not extinguish a cause of action. Florida Statutes §768.20 states that a personal injury action against the Defendant survives the Defendant's death and should be brought against the Defendants Personal Representative in a pending action.

Pursuant to Florida Rules of Civil Procedure 1.260, the Plaintiff must move to substitute Defendant's Estate within 90 days of the filing of a Notice of Suggestion of Death, or the action shall be dismissed against the deceased party. Specifically, Florida Rules of Civil Procedure 1.260(a)(1) Substitution of Parties, provides that:

> (a) Death. (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in rule 1.080 and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.

Under Florida Rules of Civil Procedure 1.420(b), any party may move for dismissal of an action for an adverse party's failure to comply with these rules.

The suggestion of death is the triggering mechanism for the 90-day window to begin to run, during which the substitution must occur. Following the suggestion of death, counsel for a deceased party may move to dismiss the action if a motion for substitution has not been made after the expiration of the 90-day deadline. As Defendant in this case filed the suggestion of death on 3/6/2024. This window expired on 6/4/2024. As a result of Plaintiff's failure to abide by its obligations under Florida Rules of Civil Procedure 1.260(a)(1) Defendant is entitled to a Final Order of Dismissal with Prejudice.

* * *

Insurance—Property—Insured's action against insurer—Conditions precedent—Presuit notice—Supplemental claim—Whether insured complied with section 627.70152's presuit notice requirements is properly considered on motion to dismiss—Where notice of intent to initiate litigation was submitted prior to insurer issuing coverage determination regarding supplemental claim, notice is invalid, and lawsuit is premature

AKEYIA WATTS, Plaintiff, v. EDISON INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 24-CA-004622. September 23, 2024. Alane Laboda, Judge. Counsel: Bryce James Uy, for Plaintiff. Dayana Hernandez, Salehi, Boyer, Lavigne, Lombana, P.A., Coral Gables, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on September 16, 2024, upon Defendant's *Motion to Dismiss, or in the Alternative, Abate Premature Litigation* ("Defendant's Motion") and the Court after considering oral arguments of the parties, the motions, the court file, the Complaint, applicable law, and being otherwise advised in the premises, the Court finds as follows:

ORDERED AND ADJUDGED:

The Court **GRANTS** the Defendant's Motion to Dismiss and finds as follows:

1. Defendant argues that the Court cannot consider the motion because they pled in their Complaint that they complied with all conditions precedent to filing suit. However, the Court finds that based on the plain language of section 627.70152 and Florida Rule of Civil Procedure 1.130(b), as well as all of the pleadings and pertinent case law, this Court determines that it is proper for it to consider whether Plaintiffs' notice complied with section 627.70152.

2. Specifically, section 627.70152(5), Florida Statutes, provides in pertinent part that "[a] court must dismiss without prejudice any claimant's suit relating to a claim for which a notice of intent to initiate litigation was not given as required by this section . . . ." (Emphasis added). That the statute requires courts to "dismiss without prejudice" for failure to submit a compliant notice of intent to initiate litigation establishes that compliance with the statute can be considered on a motion to dismiss. This is buttressed by the Florida Third District Court of Appeal's recent decision of first impression in *Citizens Prop. Ins. Corp. v. Walden*, No. 3D24 196, 2024 WL 4031549, at *1, *1 (Fla. 3d DCA Sept. 4, 2024) [49 Fla. L. Weekly D1815a], wherein the Court granted certiorari and quashed a trial court's order denying an insurer's motion to dismiss based on the plaintiff's failure to submit a section 627.70152 notice prior to suit. In so holding, the Walden Court relied on a "bevy of medical malpractice cases finding that a litigant's failure to satisfy the mandatory presuit procedures . . . satisfies the threshold jurisdictional inquiry" to satisfy certiorari jurisdiction, and held that "[s]ection 627.70152 cannot be meaningfully enforced on post-judgment appeal because the purpose of providing the presuit notice is to prevent the premature filing of a lawsuit" *Id.* (emphasis added); *accord Brundage v. Evans*, 295 So. 3d 300, 305 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D627a] (quashing trial court's order denying physician's motion to dismiss where plaintiff's statutory presuit notice of intent failed to include an expert opinion as required by section 766.106, Florida Statutes). Thus, as an order denying a motion to dismiss which meritoriously raises noncompliance with section 627.70152 is immediately appealable due to the irreparable harm of allowing the case to proceed, it follows that the issue is properly considered upon a motion to dismiss.

3. In the matter before the Court, the Plaintiff submitted a notice of the loss to Defendant on or about October 6, 2022. The Defendant then investigated the claim and issued an initial coverage determination by letter dated November 19, 2022.

4. The coverage determination letter enclosed an estimate which

provided coverage for damage observed to the right elevation of the property as well as the garage.

5. The Insured subsequently submitted a Notice of Intent to Litigate on June 4, 2024.

6. The Notice of Intent to Litigate was accompanied by an estimate dated April 17, 2024, which included a full roof replacement as well as repairs to the several of the property. Defendant's argue this is a supplemental claim as no claim was ever previously made for a full roof replacement and the first notice they had of same was at the time of the filing of the Notice of Intent.

7. Florida Statute 627.70131 states follows:

> Within 90 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. The insurer shall provide a reasonable explanation in writing to the policyholder of the basis in the insurance policy, in relation to the facts or applicable law, for the payment, denial, or partial denial of a claim. If the insurer's claim payment is less than specified in any insurer's detailed estimate of the amount of the loss, the insurer must provide a reasonable explanation in writing of the difference to the policyholder. Any payment of an initial or supplemental claim or portion of such claim made 90 days after the insurer receives notice of the claim, or made more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later, bears interest at the rate set forth in s. 55.03. Interest begins to accrue from the date the insurer receives notice of the claim. See Florida Statute 627.70131(7)(a).

8. Further, in *Hernandez v. Citizens Property Insurance Corp.*, 278 So. 3d 797 (Fla. 3d DCA 2019), the court clarified that a supplemental claim occurs when new or additional damages are identified after the initial adjustment.

9. The Court finds that the Notice of Intent to Litigate was the first indication of an existing dispute following the initial adjustment of the claim and was the first time the Insured was provided with the abovementioned estimate.

10. As such, Florida Law provided Defendant until at least September 2, 2024 to provide a coverage determination on the Plaintiff's supplemental claim.

11. Florida Statute 627.70152(2)(a) requires a Complainant that "[a]s a condition precedent to filing a suit under a property of insurance policy, a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department. Such notice must be given at least 10 business days before filing suit under the policy, but may not be given before the insurer has made a determination of coverage under s. 627.70131.

12. Consequently, Florida Law clearly states that a Notice of Intent to Litigate must be given at least 10 business days before filing suit under the policy but may not be given before the Insurer has made a determination of coverage under s. 627.70131.

13. In this case the Notice of Intent to Litigate was submitted prior to Defendant's issuing a coverage determination regarding Plaintiff's supplemental claim.

14. Given that the Notice of Intent to Litigate is invalid as a matter of law, Plaintiff's lawsuit is premature as they failed to comply with the strict requirements of Florida Statute 627.70152.

WHEREFORE the reason enumerated herein Defendant's Motion to Dismiss is **GRANTED**. This matter is hereby ***dismissed without prejudice.***

* * *

Torts—Automobile accident—Damages—Evidence—Past and future medical expenses—Defendant's motion in limine, which asks the court to make factual determination of appropriate amount plaintiff's medical providers should have charged and will charge in the future, and which also seeks an order barring plaintiff from in any manner conveying to jury any evidence or testimony regarding medical charges in excess of statutorily determined amount, is denied—Defendant's reliance on HB 837, as codified in Section 768.0427, fails—Pertinent subsections of 768.0427(2), which relates to admissible evidence of medical treatment or service expenses in certain civil trials, are procedural in nature—Constitution gives Florida Supreme Court authority to "adopt rules for practice and procedure in all courts"—Plaintiffs are entitled to present evidence of full amount of bills, and defendant may challenge reasonableness of bills through evidence from other medical providers that show charges are in excess of those charged by plaintiff's providers

KAREN P. STEIGER, individually, and as parent and natural guardian of, D.C.P., a minor, Plaintiff, v. NURZOD MURALI, MS EXPRESS, INC., and AKBAR NIZOMOV, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2023-CA-482. November 20, 2024. David Frank, Judge. Counsel: T. Patton Youngblood, Jr., St. Petersburg, for Plaintiff. Brendan Keeley and William M. Blume, III, Jacksonville, for Defendants.

ORDER ON DEFENDANTS' MOTION IN LIMINE ON HOUSE BILL 837

The Court having reviewed the defendants' amended motion in limine on House Bill 837, plaintiff's initial response and notice of filing authorities, heard argument of counsel at two hearings, and being otherwise fully advised in the premises, finds

The Cause of Action

This is a negligence case for personal injury damages filed by a mother and daughter against the driver and owners of a motor vehicle that collided with their vehicle on November 24, 2019.

Defendants' Motion

Defendants moved in limine to address evidentiary matters regarding the application of House Bill 837 (Florida Statute 768.0427) to medical bills and letters of protection, pointing to the following subsections of the statute:[1]

> (2) ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES.—Evidence offered to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action is admissible as provided in this subsection.
>
> (a) Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment.
>
> (b) Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment or services shall include, but is not limited to, evidence as provided in this paragraph.
>
> * * *
>
> 3. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, evidence of 120 percent of the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

4. If the claimant obtains medical treatment or services under a letter of protection and the health care provider subsequently transfers the right to receive payment under the letter of protection to a third party, evidence of the amount the third party paid or agreed to pay the health care provider in exchange for the right to receive payment pursuant to the letter of protection.

(c) Evidence offered to prove the amount of damages for any future medical treatment or services the claimant will receive shall include, but is not limited to, evidence as provided in this paragraph.

1. If the claimant has health care coverage other than Medicare or Medicaid, or is eligible for any such health care coverage, evidence of the amount for which the future charges of health care providers could be satisfied if submitted to such health care coverage, plus the claimant's share of medical expenses under the insurance contract or regulation.

* * *

Motion at 2-3.

The relevant sections of the Act are: "Section 30. Except as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." and "Section 31. This act shall take effect upon becoming a law." The act was approved by the governor and became law on March 24, 2023.

Defendant spends more than four out of nine pages arguing that the Act is constitutional because it applies prospectively and not retroactively. The Court agrees with defendants and approximately 125 circuit courts across Florida, including this Court, who have previously ruled on the that general proposition that the Act cannot be applied retroactively. But that does not answer the questions here.

Defendants simply argue that the provisions apply to cases filed after the effective date of March 24, 2023, and that there is no dispute that this case was filed after that date, and so—end of discussion.

Plaintiffs contend that there is a "property right" argument to be made regarding causes of action already existing prior to the effective date. Defendants reject the argument with the admonition that plaintiffs could have moved more quickly to file their lawsuit.

The Specific Relief Sought by Defendants

Defendants ask the Court to:

. . .make a factual determination of the appropriate amount Plaintiff's medical providers should have charged and will charge in the future pursuant to House Bill 837 and enter an Order barring Plaintiffs, their counsel and witnesses, from directly or indirectly mentioning, introducing, referring to, or attempting to convey to the jury in any manner whatsoever, any evidence or testimony regarding any medical charges in excess of the statutorily determined amount.

Motion at 9.

First, and with ease, the Court will deny the defendants' request to "make a factual determination of the appropriate amount Plaintiff's medical providers should have charged and will charge in the future." If the appropriate procedure for this case requires such a determination, it will be made by the jury or by the Court during post-trial setoffs.

That leaves defendants' request for, "an order barring Plaintiffs...from...attempting to convey to the jury...evidence...regarding medical charges in excess of the statutorily determined amount."

For the second request, the answer will be based on the constitutional sufficiency of the subsections provided above that purport to outline the procedure for determining the amount of past and future medical bills.

Here We Go Again; Is It Substantive or Procedural?

The first step is to determine whether the subject subsections of the statute are substantive or procedural. The Court disagrees with the plaintiffs' contention that the relevant subsections are substantive.

The Third District recently summarized the law on this issue:

"The Florida Supreme Court's exclusive rulemaking authority is well-established of course, as is the Legislature's exclusive authority to enact substantive laws." *Romero v. Green*, 49 Fla. L. Weekly D1555a (Fla. 3d DCA July 24, 2024). ". . .[T]he distinction between 'substantive' and 'procedural' is often 'neither simple nor certain'. . . ." *Id.* (citation omitted).

The Florida Supreme Court has provided the following guidance:

Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses.

Id., quoting *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (citations and internal quotations omitted).

The Court finds that the subject subsections of the statute are procedural.[2] They affect discovery and the admissibility of evidence on medical damages. They do not impose an additional burden on a plaintiff to prove anything. In fact, a close reading of the express words of the statute reveals little more than additional statutory direction on collateral sources.[3]

Authority Over Procedure

It is uncontested that the present case was filed after the effective date of the statute and, thus, there is no temporal concern.[4]

However, Article V, Section 2(a) of the Florida Constitution gives the Florida Supreme Court the authority to "adopt rules for the practice and procedure in all courts."

This authority over procedure has long been strongly upheld by trial and appellate courts of this state. For example, the Second District recently reminded a trial judge that the Florida Rules of Criminal Procedure and related appellate decisions on purely procedural matters could not be overruled by the bail statutes:

Moreover, to the extent the first appearance judge appeared to reflexively deem statutes that she considered pertinent superior to the rules that this court applied and interpreted in Benoit, we remind her that although substantive law is the purview of the legislature, article V, section 2(a), of the Florida Constitution grants the Florida Supreme Court the exclusive authority to adopt rules of judicial practice and procedure. See art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . ."); see also art. II, § 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."); *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) [30 Fla. L. Weekly S500a] ("It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm."); *Kalway v. State*, 730 So. 2d 861, 862 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1139b] ("If the procedural elements of [a] statute were found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures.").

Lindsey v. Gualtieri, 367 So.3d 1255, 1256, FN 1 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D1381a].

There are two caveats. First, the Legislature can repeal a procedural dictate if both houses pass the law by at least two-thirds vote. Art. V, Sec. 2(a), Fla. Const. Second, the Florida Supreme Court can issue an

opinion adopting the legislation. Neither has happened here.

The appropriate analysis here is outlined by the Florida Supreme Court in *DeLisle v. Crane Co.*, 258 So.3d 1219, 1229 (Fla. 2018) [43 Fla. L. Weekly S459a]:

> Our consideration of the constitutionality of the amendment does not end with our determination that the provision was procedural. For this Court to determine that the amendment is unconstitutional, it must also conflict with a rule of this Court. (Citations omitted).
>
> * * *
>
> A procedural rule of this Court may be pronounced in caselaw. *See Sch. Bd. Of Broward Cty. v. Surette*, 281 So.2d 481, 483 (Fla. 1973), receded from on other grounds by *Sch. Bd. Of Broward Cty. v. Price,* 362 So.2d 1337 (Fla. 1978) ("Where rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure . . . the statute must fall.") While the Legislature purports to have pronounced public policy in overturning Marsh, we hold that the rule announced in Stokes and reaffirmed in Marsh was a procedural rule of this Court that the Legislature could not repeal by simple majority.

The Law Applied to the Subject Subsections

The Florida Supreme Court has consistently prohibited the admission of evidence of a plaintiff's entitlement to past or future insurance benefits. *Joerg v. State Farm Mutual Automobile Insurance*, 176 So.3d 1247, 1249-50 (Fla. 2015) [40 Fla. L. Weekly S553a]; *Sheffield v. Superior Ins. Co.*, 800 So.2d 197, 203-04 (Fla. 2001) [26 Fla. L. Weekly S706a]; *Gormley v. GTE Prods. Corp.*, 587 So.2d 455, 457-58 (Fla. 1991). The only exception relates to evidence of government benefits, which are not at issue in this case. *Dial v. Calusa Palms Master Ass'n, Inc.*, 337 So.3d 1229 (Fla. 2022) [47 Fla. L. Weekly S115b].

Applying the evidentiary rule established by the Florida Supreme Court, the Fifth District has held that the plaintiff is entitled to present evidence of the full amount of their medical bills with issues concerning insurance benefits paid or lesser amounts negotiated by an insurance carrier treated as a collateral source set-off to be made by the judge after post-trial pursuant to §768.76, Florida Statutes. See *Nationwide Mut. Fire Ins. Co. v. Darragh*, 95 So.3d 897, 899 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1355a], citing *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So.3d 1084, 1086-87 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2873a].

Plaintiffs, therefore, are entitled to present evidence of the full amount of her bills. Defendants, of course, will be permitted to present evidence challenging the reasonable amount of the past or expected future medical bills, but would be prohibited from offering evidence of insurance benefits to do. Instead, they must present evidence from other medical providers that show the charges are in excess of that being charged by plaintiff's doctors. An apple-to-apple comparison.

It makes sense. Mentioning "insurance" to a jury has always been deemed prejudicial. Whether it is the jury believing defendants should pay more because they have liability insurance, or a jury believing plaintiffs should be awarded less because they have health insurance. The proper place to handle "double recoveries" or potential windfalls is *post-trial*.[5]

As procedural legislation, Florida Statute 768.0427 unconstitutionally attempts to change this procedural law.

Moreover, Florida Statute 768.0427 states, "Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment. This text does not say that evidence of insurance benefits is admissible at trial. To harmonize the new statute, it must refer to the evidence admitted post-trial during the determination of setoffs.

The argument against the constitutionality of the subsections is even stronger for future medical expenses.

The Florida Supreme Court summarized the concerns and controlling procedural law governing future medical expenses:

> We explained that "it is absolutely speculative to attempt to calculate damage awards based on benefits that a plaintiff has not yet received and may never receive, should either the plaintiff's eligibility or the benefits themselves become insufficient or cease to continue." *Id*. at 1255. Ultimately, we "conclude[d] that the trial court properly excluded evidence of [the plaintiff]'s eligibility for future benefits from Medicare, Medicaid, and other social legislation as collateral sources." *Id*. at 1257

Dial v. Calusa Palms Master Ass'n, Inc., 337 So. 3d 1229, 1231 (Fla. 2022) [47 Fla. L. Weekly S115b], quoting *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So.3d 1247 (Fla. 2015) [40 Fla. L. Weekly S553a].

Imagine for a moment, the extensive sideshow, the "trial within a trial," that would occur if the parties were forced to bring in experts to somehow calculate the incalculable future dollar amounts and contracts and rates and co-pays and other data that would be required to accomplish the dictate of the new statute.

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

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[1]Defendants included the subsections on letters of protection but did not make any request addressing them.

[2]Because plaintiffs' injuries occurred before the effective date of the law, if the subject provisions were deemed substantive, their imposition would result in the type of impediment to a preexisting cause of action is constitutionally impermissible. *See Glaze v. Worley*, 157 So.3d 552, 556 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D555a], *citing Am. Optical Corp. v. Spiewak*, 73 So.3d 120, at 133 (Fla.2011) [36 Fla. L. Weekly S435a].

[3]Moreover, Florida Statutes 768.76 and 627.736(3) have not been repealed and remain the controlling law on reductions to a plaintiff's medical expense component of damages based on benefits received from insurance, Medicare, or Medicaid. To the extent that the new statute tugs at the existing, controlling statute, ". . .the doctrine of in pari materia, [ ] provides that we should view statutes in a manner that would harmonize the applicable law. *Raik v. Dep't of Legal Affairs, Bureau of Victim Comp*., 344 So.3d 540, 550 (Fla. 1st DCA 2022) (citation omitted).

[4]Although there would be constitutional concern over legislative procedural provisions that conflict with Florida Supreme Court pronouncements, there generally is no concern over legislative direction that procedural statutes apply prospectively. *In re Florida Evidence Code*, 376 So.2d 1161 (Fla. 1979).

[5]Florida's current laws and decisions regulating collateral sources and setoffs strike the appropriate balance between ensuring the plaintiff does not receive a windfall and ensuring defendants do not shift the responsibility for damages they have caused to the plaintiffs or third parties.

* * *

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COUNTY COURTS

Insurance—Costs—Expert witness fee—Motion to tax fee of expert witness as cost is denied where witness completed affidavit in support of motion for partial summary judgment that was never set for hearing, witness was never accepted by court as expert, and expert's testimony was never received by court

COLONIAL CHIROPRACTIC ASSOCIATES, LLC., d/b/a INJURY HEALTH CENTER, a/a/o Laura Roman, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-SC-021233-O. October 4, 2024. Eric H. DuBois, Judge. Counsel: William S. England, Chad Barr Law, P.A., Altamonte Springs, for Plaintiff. David Gagnon, Taylor, Day, Grimm & Boyd, Jacksonville, for Defendant.

ORDER

THIS MATTER came before the Court on the Defendant's Motion to Tax Costs, and being considered by the Court and otherwise being fully advised of the premises; it is hereby **ORDERED AND ADJUDGED** that:

1. Plaintiff filed suit on December 15, 2016 for underpayment of its services.

2. Subsequent to the Plaintiff's Request for Admission, State Farm filed its Motion for Partial Summary Judgment on the Issue of Whether CPT Code A4595 is Separately Reimbursable under F.S. 627.736 (2013) and the Subject Policy of Insurance ("Motion for Summary Judgment") and an affidavit of Denisha Torres-Lich.

3. Defendant's Motion for Partial Summary Judgment was never set for hearing, nor was Ms. Torres-Lich accepted by this Court as an expert and her testimony was never received by this Court.

4. In reviewing the Florida Evidentiary Code, specifically Rule 92.231, Expert Witnesses; Fee states, "(1) The term "expert witness" as used herein shall apply to any witness who offers himself or herself in the trial of any action as an expert witness. . . and who is permitted by the court to qualify and testify as such, upon any matter pending before the court."

5. To be eligible to qualify for an expert fee the witness must testify at a court hearing and be qualified as an expert by the court. *Travieso v. Travieso*, 474 So.2d 1184 (Fla. 1985).

6. At no point in this litigation has Ms. Torres-Lich been accepted as an expert nor adjudicated as an expert under Florida Statute 92.231.

7. If a court awards expert fees to a witness prior to the expert testifying or being qualified by the court, then reversible error has occurred. *See* Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and *Junkas v. Union Stm Homes*, 412 So.2d 52 (Fla. 5th DCA 1982).

8. Further, Ms. Torres-Lich's affidavit does not constitute "court testimony" nor "trial testimony" as the affidavit was never proffered to this court during hearing or trial, was never accepted as such.

9. While this Court acknowledges that Defendant's expert did expend time in preparation of an affidavit, the Court is unpersuaded that these actions satisfy the elements necessary for expert cost reimbursement. The award of expert costs solely on the basis of an affidavit is improper as the opposing party has no opportunity to cross-examine the witness and challenge the basis of his or her opinions. *Soundcrafters, Inc. v. Laird*, 467 So.2d 480 (Fla. 5th DCA 1985) and *Salinas v. U.S. Bank Trust*, 2019 WL 5655886 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2666b].

10. Ms. Torres-Lich also did not testify that she expects to be compensated for her testimony, which does remove any potential mandatory imposition of award of attorney fees and costs and places the discretion before this court. *See Crittenden Orange Blossom Fruit v. Stone*, 514 So. 2d 351, 352 (Fla. 1987); and *Travieso v. Travieso*, 474 So. 2d 1184 (Fla. 1985).

11. For the above referenced reasoning, Defendant's Motion to Tax costs is hereby **DENIED**.

* * *

Attorney's fees—Prevailing party—Voluntary dismissal without prejudice

DISCOVER BANK, Plaintiff, v. OSVALDO RUWE, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2024SC005663000000. October 4, 2024. John Flynn, Judge. Counsel: Susan Sparks, Rausch Sturm LLP, for Plaintiff. Bryan A. Dangler and Shawn Wayne, Power Law Firm, Altamonte Springs, for Defendant.

ORDER GRANTING ENTITLEMENT TO ATTORNEY'S FEES AND COSTS IN FAVOR OF DEFENDANT

THIS MATTER coming before the Court without a hearing on Defendant's Motion for Attorney's Fees and Costs (entitlement), and the Court having reviewed the motion together with the record and case law, and understanding the parties are *in agreement*, it is hereby:

ORDERED AND ADJUDGED as follows:

1. At bar, Plaintiff took a voluntary dismissal without prejudice. *Hatch v. Dance*, 464 So. 2d 713, 714 (Fla. 4th DCA 1985)(in a case where plaintiff voluntarily dismissed "after limited pre-trial activity," court held that "it is well-established that statutory or contractual provisions providing for an award of attorney's fees to the prevailing party in a litigation encompasses defendants in suits which have been voluntarily dismissed"); *State ex rel. Marsh v. Doran*, 958 So. 2d 1082 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1501a] ("We hold that a defendant is entitled to recover attorney's fees . . . which awards fees to the prevailing party, after the plaintiff takes a voluntary dismissal without prejudice.")

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

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

* * *

Insurance—Personal injury protection—Medical expenses—Exhaustion of policy limits—Allegedly improper payment of claims to another medical provider does not demonstrate that insurer acted in bad faith towards plaintiff—Insurer's motion for summary judgment granted where there is no genuine issue of material fact to refute that insurer properly exhausted all benefits available under policy

GABLES INSURANCE RECOVERY, INC., a/a/o Zucely Garcia, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-015350-SP-26. Section SD03. October 4, 2024. Lissette De la Rosa, Judge. Counsel: Aymee Gonzalez and Robert Pelier, for Plaintiff. Jared Lord and Priscilla Freitas, Law Offices of Terry M. Torres & Associates, Doral, for Defendant.

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

This Cause having come before the Court on September 16, 2024, on Defendant's Motion for Final Summary Judgment, and the Court having reviewed the Motion for Final Summary Judgment, the Affidavit in support, and the entire Court file; reviewed the relevant legal authorities; having heard arguments by the parties, and been sufficiently advised in the premises the Court thereby makes the following findings:

STATEMENT OF FACTS

1. On or about July 9, 2015, Zucely Garcia ("Claimant") sustained personal injuries related to the operation, maintenance or use of a motor vehicle in the State of Florida.

2. Gables Insurance Recovery, Inc. ("Plaintiff") filed the instant action seeking benefits for treatment allegedly rendered to Claimant.

3. At the time of the accident, the Claimant was covered under a policy of insurance issued by the Defendant that provided $10,000 in PIP benefits in conformance with the Florida Motor Vehicle No-Fault Law. The policy provided PIP benefits in conformance with the Florida Motor Vehicle No-Fault Law and Florida Statute § 627.736.

4. The undisputed facts and plain reading of the record evidence, including but not limited to Defendant's Notice of Filing Affidavit in Support of Defendant's Motion for Summary Judgment with included exhibits (Docket Entry No. 42 Filed on or about May 8, 2024) demonstrate that Defendant exhausted all available PIP benefits under the policy on April 22, 2016. Additionally, the Defendant paid all bills that were received in accordance with the law.

5. Based on the record evidence and argument of counsel, there exists no genuine issue of material fact to refute the fact that Defendant properly exhausted all PIP benefits available under the policy.

6. INFINITY paid $10,000.00 in PIP Benefits on behalf of Claimant, and there are no remaining PIP benefits under the subject policy.

LEGAL STANDARD

The Florida Supreme Court recently adopted the federal summary judgment standard and amended Florida Rule of Civil Procedure 1.510 to be construed and applied in accordance with the federal summary judgment standard. *See In re Amendments to Fla. R. of Civ. P. 1.510*, 309 So. 3d 192 (Fla. Dec. 31, 2020) [46 Fla. L. Weekly S6a]. The initial burden is on the movant to demonstrate the absence of a "genuine, triable issue of material fact." *See* Fla. R. Civ. P. 1.150(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Once the moving party has met its initial burden, the nonmoving party must come forward with sufficient evidence supporting the existence of a genuine triable issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249; *Celotex*, 477 U.S. at 327. "Under this new summary judgment standard. . . 'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.' " *Nembhard v. Universal Prop. & Cas. Ins. Co.*, No. 3D20-1383, 2021 Fla. App. LEXIS 12104, at *5 (3d DCA 2021) [46 Fla. L. Weekly D1869b] (internal quotations omitted). This Court also has jurisdiction pursuant to Fla. Sm. Clm. R. 7.135.[1]

LEGAL ANALYSIS AND CONCLUSION

Once an insurance company has paid PIP benefits up to the $10,000 policy limit, the insurance company has fulfilled its obligation to its insured and is not liable to pay any additional PIP benefits, even those that are in dispute. *See Progressive Select Insurance Co. v. Dr. Rahat Faderani, DO, MPH, P.A., a/a/o Roberson Pierre*, 46 Fla. L. Weekly D2420a (Fla. 4th DCA 2021); *see also Simon v. Progressive Express Ins. Co. ("Simon")*, 904 So. 2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b]; *Progressive American Ins. Co. v. Stand-Up MRI of Orlando,* 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]; *Sheldon v. United Services Automobile Association*, 55 So. 3d 593 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D23a]; *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a].

"[I]n the absence of a showing of bad faith, a PIP insurer is not liable for benefits once benefits have been exhausted." *Progressive American Ins. Co. v. Stand-Up MRI of Orlando,* 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]. Plaintiff cannot gain more from the insurance company than the contractual benefit amount. *See Id.* at 6*; see also GEICO v. Robinson*, 581 So.2d 230 (Fla. 3rd DCA 1991); *Allstate v. Shilling*, 374 So.2d 611 (Fla. 4th DCA. 1979); *Atkins v. Bellefonte Insurance Co*., 342 So.2d 837 (Fla. 3rd DCA 1977); *Dixie Insurance Co. v. Lewis*, 484 So.2d 89 (Fla. 2nd DCA 1986).

In 2021, the Fourth District Court of Appeals considered whether an insurance company's "improper" payments to another provider constitute bad faith sufficient to overcome the insurance company's exhaustion of benefits defense to a provider who sues for payment after the policy limits have been exhausted. *Progressive Select Insurance Co. v. Dr. Rahat Faderani, DO, MPH, P.A. a/a/o Roberson Pierre*, 330 So. 3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a]. The answer was a resounding no. It held that where the insurer "had paid out the statutory policy limits of the claimant's PIP benefits . . . It could not be required to pay in excess of the claimant's PIP benefits in the absence of bad faith, and there was no basis for a bad faith allegation." The Court went on to state:

> Were we to write on a clean slate, and except for untimely payments, we would hold that an insurance company's "improper" payments to another provider do not constitute bad faith sufficient to overcome the insurance company's exhaustion of benefits defense to a provider who sues for payment after the policy limits have been exhausted. In *Northwoods*, we allowed bad faith "*in the handling of the claim by the insurance company"* to overcome the defense. 137 So. 3d at 1057. We construe that to mean bad faith in the handling of the claim at issue, not a claim by a third party, particularly where there is no evidence that the third party contested how the insurance company handled that party's claim. In other words, the conduct of the insurance company must be directed at the provider attempting to avoid the exhaustion of benefits claim.

Id.; *see also Simon v. Progressive Express Insurance Co.*, 904 So. 2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b]; *Progressive American Insurance Co. v. Stand-Up MRI of Orlando*, 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]; *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]; *GEICO v. Robinson*, 581 So.2d 230 (Fla. 3d DCA 1991) (without bad faith, an automobile insurance carrier's liability cannot exceed the amount of coverage limits); *see also Envision Physical Therapy, Inc. a/a/o Cromwell Harris v. GEICO General Insurance Company*, No. 3D22-1819 (March 13, 2024) [49 Fla. L. Weekly D593d].

Thus, to overcome Defendant's exhaustion of benefits, the Plaintiff would have had to allege, and prove, Defendant acted in bad faith toward Plaintiff—irrespective of its conduct toward other providers. There has been no such allegation and no such proof.

Defendant issued payments to Health in Motion, Inc. for several codes that the Plaintiff alleges were *improper*, claiming they were submitted in violation of Florida's Motor Vehicle No-Fault Law and Florida Statute § 627.736(5)(d). However, § 627.736(5)(b)(1), Fla. Stat., uses permissive rather than mandatory language ("[a]n insurer or insured ***is not required to pay*** a claim or charges" emphasis added), indicating that it is the insurer's decision to pay a claim, and that decision must be evaluated under a bad faith standard. In this context, the Plaintiff must demonstrate bad faith towards the Plaintiff, meaning that a mere improper payment is insufficient to render the payment gratuitous.

Additionally, Plaintiff is attempting to broaden the scope of *Coral Imaging Services v. Geico Indemnity Insurance Co.*, 955 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a], even though other such efforts have already been rejected by both the Third and Fourth District Courts of Appeal. In one such effort to expand *Coral Imaging*, the Third District Court of Appeals held that *Coral Imaging* only applies where the PIP insurer exhausts benefits by improperly paying untimely claims. *Geico Indem. Co. v. Gables Ins. Recovery*, 159 So. 3d 151, 155.

In another such effort to expand *Coral Imaging*, the Fourth District Court of Appeal held that, "[w]ere we to write on a clean slate, and except for untimely payments, we would hold that an insurance company's 'improper' payments to another provider do not constitute bad faith sufficient to overcome the insurance company's exhaustion of benefits defense to a provider who sues for payment after the policy limits have been exhausted." *Progressive Select Insurance Co. v. Dr. Rahat Faderani, DO, MPH, P.A. a/a/o Roberson Pierre*, 330 So. 3d 928, 931 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a].

Finally, while Plaintiff argued that the payments made to Health in Motion, Inc. in and of itself were improper, the Plaintiff has no standing to dispute payment to another provider except with respect to late-submitted bills pursuant to *Progressive Select Insurance Co. v. Dr. Rahat Faderani, DO, MPH, P.A. a/a/o Roberson Pierre*, 330 So. 3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a].

Infinity saved no money by its actions. *Progressive v. Stand-Up MRI*, 990 So.2d 7 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]. Thus, there can be no argument that Defendant should have to pay in excess of contractual limits. *See Progressive American Insurance Company v. Stand-Up MRI of Orlando a/a/o Isaac Eusebio,* 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]; *see also Progressive Select Ins. Co. v. Dr. Rahat Faderani, DO, MPH, P.A. a/a/o Roberson Pierre*, 46 Fla. L. Weekly D2420a (Fla. 4th DCA November 10, 2021).

In this case, the Court finds that the record shows Defendant properly exhausted benefits. Plaintiff's mere speculation does not create evidence to overcome a properly supported motion for summary judgment. There is no allegation of nor any evidence of bad faith on the part of the Defendant, nor is there evidence of any gratuitous payment. The Defendant gained nothing by way of its actions. Thus, the Court finds that the Defendant established that there's no genuine issue of material fact to refute that it fully performed on its contract and the insured received the full benefit of said contract.

For the reasons states above, it is hereby ORDERED and ADJUDGED that Defendant's Motion for Final Summary Judgment is **GRANTED.** Judgment is entered in favor of the Defendant and Plaintiff shall take nothing by this action and the Plaintiff shall go hence without a day. The Court reserves jurisdiction to determine attorney's fees and costs related to the Defendant's expired Proposal for Settlement.

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[1]The Court specifically notes that no motion to continue was filed or requested at hearing, nor was a proposed order submitted to the Court.

* * *

Insurance—Failure of non-party treating physician to appear for hearing—Sanctions—Attorney's fees

S. VIROJA, P.A., d/b/a SHREE MRI, a/a/o Siceron Nicaise, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-002769-SP-21. Section HI01. June 28, 2024. Milena Abreu, Judge. Counsel: Nik Salles, Patino Law Firm, for Plaintiff. Robert Phaneuf, Law Offices of Terry M. Torres & Associates, Doral, for Defendant.

ORDER GRANTING FEE ENTITLEMENT IN FAVOR OF INFINITY INDEMNITY INSURANCE COMPANY AGAINST NON-PARTY DR. JAGMOHAN VIROJA

THIS CAUSE, having come before the court on June 27, 2024, to be heard on Defendant's Motion Renewed Motion for an Order to Show Cause why Dr. Jagmohan Viroja should not be Held in Contempt of Court and for Sanctions / Writ of Bodily of Attachment. The Court having reviewed the file, declarations, pleadings, record evidence, and considered the arguments of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

FINDINGS OF FACT

1. On review of the motion, docket entries, and pleadings, the Court finds that Dr. Jagmohan Viroja was served with the notice of hearing for the subject hearing by process server. Specifically, proper notice and service are confirmed by the affidavit of process server filed into the court record. (Notice of Filing of Proof of Service on Non-Party for Renewed Motion for Order to Show Cause Hearing, *Docket No. 75*)

2. The court furthermore finds that based on the representations of defense counsel, that attorney Abdul-Sumi Dalal, Esq. represented through correspondence that he had been retained as the counsel of record for the witness, Dr. Jagmohan Viroja, in this matter.

3. Additionally, in addition to the verbal representations of counsel, the court finds that Defense counsel electronically served and filed its Notice of Hearing for today's hearing and electronically served a copy of the same notice again to the docket on June 21, 2024. *Docket No. 79*

4. The Court furthermore finds that Abdul-Sumi Dalal, Esq. had proper notice of hearing as well as electronic service of the hearing and had been in communication with both Plaintiff and Defense counsel in advance of the hearing.

5. In spite of proper service and notice, neither Dr. Jagmohan Viroja nor his purported counsel appeared for the hearing held on June 27, 2024 at 4:15PM.

6. Lastly, the Court made a courtesy call to attorney Dalal's office in attempts to have him appear for the duly noticed hearing. The courtesy call was made by judicial staff and was met with a voice mail recording.

FINDINGS

7. The Court finds that the non-party treating physician has been ordered to appear for deposition three hundred fifty-eight (358) days prior to the time of the hearing. *See* Order Granting the Motion to Compel Deposition (or the "Order") (*Docket Entry 32*

8. Although the treating physician was served with the notice of hearing, and ultimately retained counsel for purposes of compliance with the Order, neither the witness nor the witness' attorney appeared for the hearing held June 27, 2024.

9. The court attempted contacting the counsel for the witness but could not reach any person at the law firm for Dr. Viroja.

10. Accordingly, the Court furthermore finds that Defense counsel(s) in this matter have expended an undue amount of time and burden in the effort and resources required to communicate and coordinate the deposition with the treating physician in this matter. Therefore, the Court hereby orders that the Defense is entitled to an award of monetary sanctions in its favor.

11. It is ordered that Defense shall collect monetary sanctions from the non-party witness, Dr. Jagmohan Viroja, as a result of the failure of this witness (or witness' counsel) to appear for the subject hearing held June 27, 2024.

ACCORDINGLY, it is ORDERED and ADJUDGED that Defendant's Motion for a Finding of Fee Entitlement as a Sanction is

GRANTED**;** the court hereby RESERVES RULING on any finding of CONTEMPT.

It is further ORDERED and ADJUDGED that the Court shall conduct an evidentiary hearing for the purposes of determining the appropriate amount of attorney's fees to be awarded to the Defendant, as a result of the Non-Party treating physician's failure to appear for scheduled hearing, failure to timely obey the deposition order, failure to request a continuance of the June 27, 2024 hearing or otherwise file any type of good cause as to why he cannot be present for the June 27, 2024 hearing.

FURTHERMORE, the Court hereby specially reserves jurisdiction for the evidentiary hearing regarding the amount of sanctions to be awarded in this matter.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Exhaustion of policy limits—Insurer's motion for summary judgment is granted where motion and supporting documents and affidavit show that insurer exhausted policy limits in payments to medical providers, and plaintiff medical provider provided no evidence that it submitted any bills to insurer prior to serving demand letter —Unauthenticated USPS return receipt without any supporting affidavit from records custodian is not competent substantial evidence that provider mailed any bills to insurer—Affidavit filed less than five hours before summary judgment hearing may not be considered by court

UNIVERSAL X RAYS CORP., a/a/o Damaris Broche, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-010748-SP-05. Section CC02. February 2, 2024. Miesha S. Darrough, Judge. Counsel: Robert J. Lee, Law Offices of Robert J. Lee, P.A., for Plaintiff. Robert Phaneuf, Law Offices of Terry M. Torres and Associates, Doral, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before the court on January 31, 2024, to be heard on Defendant's Motion for Final Summary Judgment based on failure of the Plaintiff to timely submit the bills claimed to be unpaid by the Plaintiff. The Court having reviewed the file, declarations, pleadings, record evidence, and considered the arguments of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

Facts

1.Plaintiff filed a Personal Injury Protection ("PIP") suit, as assignee of Damaris Broche (the "Claimant") against the Defendant for compensation of a single date of service: August 6, 2021.

2. At the time of the accident, the Claimant was covered under a policy of insurance issued by the Defendant that provided $10,000.00 in PIP benefits.

3. The policy provided PIP benefits in conformance with the Florida Motor Vehicle No-Fault Law and Florida Statute § 627.736.

4. The undisputed facts and plain reading of the record evidence, including but not limited to Defendant's Notice of Filing Affidavit in Support of Defendant's Motion for Summary Judgment with included exhibits (Docket Entry No. 47 Filed on or about December 13, 2023) demonstrate that Defendant exhausted all available PIP benefits under the policy on November 11, 2021. Additionally, the Defendant paid all bills that were received in accordance with the law. The Defendant through its Demand Response provided to Plaintiff that no such bills for the alleged date of service had been received.

5. Plaintiff filed suit on April 20, 2022.

6. Thereafter the Defendant promptly initiated discovery of facts and requested any proof of billing submissions through "Defendant's First Request for Production as to Untimely Billing" (Docket Entry 14).

7. The suit continued on, and the parties litigated the issue of untimely submission of the bills at issue.

8. Defendant maintains that it never received bills from Universal X Rays Corp as assignee of the Claimant which entitles Defendant to summary judgment as a matter of law. Defendant filed its Motion for Summary Judgment on November 6, 2023.

9. On January 31, 2024, the Defendant's Motion for Final Summary Judgment was heard in open court where the Plaintiff provided no substantial or competent evidence to raise any genuine issue of material fact to rebut Defendant's argument.

Summary Judgment Standard

"The summary judgment standard provided for in [Rule 1.510] shall be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 4477 U.S. 317, . . . (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 . . . (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 . . . (1986)" *In re Amends. To Fla. Rule Civ. Proc. 1.510*, 317 So. 3d 72, 74 (Fla. 2021) [46 Fla. L. Weekly S95a] (citation omitted). "Summary judgment is warranted where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)." *Auriga Polymers Inc. v. PMCM2, LLC as Tr. For Beaulieu Liquidating Trust*, 40 F. 4th 1273, 1281 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1396a]. Under this standard, "the correct test for the existence of a genuine factual dispute is whether the evidence 'is such that a reasonable jury could return a verdict for the nonmoving party." *In re: Amendments*, 317 So. 3d at 75 (qquoting *Anderson*, 477 U.S. at 248). This standard "mirrors the standard for a directed verdict . . ." *Chowdhury v. BankUnited, N.A.*, 366 So. 3d 1130, 1133 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D691a]. "When deciding the appropriateness of a directed verdict or JNOV, Florida trial and appellate courts use the test of whether the verdict is, for JNOVs, or would be, for directed verdicts supported by competent, substantial evidence." *Forbes v. Millionaire Gallery, Inc.*, 335 So. 3d 1260, 1262 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D281a] (citation omitted).

The focus for determining whether a genuine dispute exists, so as to bar summary judgment, is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Like the standard for directed verdict, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251-252.

Legal Analysis

Florida Rule of Civil Procedure 1.510(c)(5)(5) provides a clear definition that opposition evidence must be provided with at least 20 days prior to the hearing. *See* "Timing for Supporting Factual Positions. At the time of filing a motion for summary judgment, the movant must also serve the movant's supporting factual position as provided in subdivision (1) above. At least 20 days before the time fixed for the hearing, the nonmovant must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1) above."

In this case, the record evidence shows that the Plaintiff issued its demand letter seeking payment for single date of service August 6, 2021. The Defendant provided its presuit demand response providing that no such bill referenced by the Plaintiff's Pre-Suit PIP Demand had been timely received by Infinity.

Thereafter, the Plaintiff initiated suit on April 20, 2022. In response to the Complaint, the Defendant filed its answer on August 1, 2022, raising the defense that "the statement of charges must be furnished to the insurer by the provider and may not include, and the insurer is not

required to pay, charges for treatment or services rendered more than 35 days before the postmark date of the statement, except for past due amounts previously billed on a timely basis under this paragraph, and except that, if the provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement." Fla. Stat. § 627.736(5)(c). The parties then engaged in discovery, particularly respecting the complaint and defenses raised therein.

After seeking the requested documents and exchanging information, the parties advanced toward trial in regular course. The Defendant filed its Motion for Summary Judgment on November 6, 2023. Defendant included in support of its Motion for Summary Judgment the affidavit of Matthew Rowden providing that defendant Infinity never received the bills claimed to be unpaid by the Plaintiff. Thereafter the Defendant's Motion for Summary Judgment was scheduled to be heard on January 31, 2024.

On January 10, 2024, the Plaintiff filed its "Notice of Intent to Rely on Proof of Mailing," which included an unauthenticated United States Postal Service (hereafter "USPS Card") return receipt bearing handwriting (but no supporting affidavit from any records custodian). (DE 50). The unsupported USPS card fails to provide competent and substantial evidence connecting the proof of mailing to any submission of bills for failure to provide means by which the document in itself may be received into evidence.

Taking facts in the light most favorable to the non-moving party, the Court provided due diligence to allow the Plaintiff to explain its position respecting evidence. Plaintiff counsel stated on record that he had filed an affidavit further in support of the Plaintiff's position but that it had been done only the same morning of the hearing.

The Plaintiff also claimed that he needed an "emergency continuance" and that the grounds for continuance involved his need to provide authenticated evidence. The Plaintiff counsel provided to the court that the records custodian of the Plaintiff had authenticated the USPS Card but that he needed additional time in order to prove the authenticity. This request for continuance was made in open court in spite of the Motion for Summary Judgment having been set at least 43 days prior to hearing. As to the"emergency continuance," the Plaintiff counsel provided no valid reason or basis to necessitate any emergency.

The Plaintiff's mere allegations respecting his personal beliefs concerning postal records as represented by any evidence filed less than hours (5) before the hearing do not create a genuine issue of material fact. A genuine issue of material fact is one that is not based on mere statements of counsel or other unauthenticated sources. *Matsushita Electric Industrial Co., LTD*, 475 U.S. at 586. Moreover, the statements of an attorney are not evidence. *Olson v. Olson*, 260 So. 3d 367, 369 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2527a].

As to any alleged claim that the evidence filed hours before the hearing should be received, the Plaintiff argues the holding of UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, vs. PROFESSIONAL MEDICAL GROUP, INC., A/A/O GLORIA URIARTE, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County (17 Fla. L. Weekly Supp. 1063a) in support of its position.

Uriarte stands for the proposition that an affidavit may be amended to correct a technical defect within the affidavit. As stated by the *Uriarte* court sitting in its appellate capacity, "technical deficiencies in the expert's affidavit were: failing to state what was wrong with the patient; offering no medical explanation for the charge of negligence; and failing to connect the alleged negligence to the patience." *Id.* In this instance, the timely affidavit of the expert in that case was found to be defective for conclusory allegations regarding treatment of a patient. Nowhere in the *Uriarte* case is it demonstrated that the expert affidavit had first been filed less than hours before the summary judgment hearing as in the instance here. The late filing of the Plaintiff in this matter precludes even reaching an analysis under *Uriarte* as neither the court, nor opposing counsel, were afforded the affidavit any time before the same day of the hearing that had been scheduled for approximately six (6) weeks.

The Plaintiff also references *Mesa v. Citizens Prop. Ins. Corp.*, 358 So. 3d 452 in raising the argument that the affidavit of Infinity's litigation representative Matthew Rowden (hereafter "Rowden Affidavit" or "Adjuster Affidavit") should not be considered by the court. Nowhere in the court record did the Plaintiff attempt to strike the adjuster's affidavit or provide any challenge to the authenticity or validity of the *Rowden Affidavit* signed under oath by Infinity's adjuster.

Furthermore, the *Mesa* case is also distinguishable in that a new party attempted to authenticate evidence in a first-party property insurance case at trial. *See* "[a]t trial, the parties agreed that the subject 'policy was in effect when the loss was incurred,' and that a policy 'exclusion applied as the loss occurred due to rain causing water damage to the interior of the home.' *Id.* at 457. While the *Mesa* court received evidence from an affiant, a new party was introduced for purposes of testimony at trial, thereby giving rise to the objection at issue. *See* "[i]mportantly, Citizens' field adjuster did not testify at trial. Nor did Citizens seek to introduce the field adjuster's report into evidence as a business record. Rather, Citizens presented the testimony of Alicia Wright, who identified herself as " 'the corporate representative for Citizens.' " *Id.* 454. A congruent challenge was not raised contrary to the Rowden Affidavit filed in support of Defendant's Motion for Summary Judgment. Additionally, the Plaintiff did not introduce any evidence, testimony, written or oral, in contravention to the original documentary evidence provided by the Rowden Affidavit or any of the attached exhibits, including the PIP Log, Explanations of Review, and Demand Letter.

Finally, the Plaintiff relied upon *Rainbow Restoration, LLC v. Citizens Prop. Ins. Corp.*, 337 So. 3d 406 (3d DCA 2021) [47 Fla. L. Weekly D12c] in support if its contention that there may have been a misapprehension of evidence and that contradictory evidence provided by the Plaintiff may preclude summary judgment. This argument by Plaintiff also fails in that the affidavit filed the same day of the hearing was never properly proffered under the Rules of Civil Procedure. Additionally, the Plaintiff cannot point to a contradiction in line with the *Rainbow* holding. *Rainbow* respects a misapprehension of testimony in live trial, not summary judgment. *See* "Rainbow argues—and we agree—that the trial court erred in granting summary judgment because it apparently misunderstood Grajales's testimony." *Rainbow Restoration, LLC v. Citizens Prop. Ins. Corp.*, 337 So. 3d 406, 407.

Accordingly, neither *Uriarte*, *Mesa*, or *Rainbow* assist the Plaintiff in its position that its affidavit filed less than five hours before the start of the summary judgment hearing may be validly considered by the Court under the Florida Rules of Civil Procedure or the specific cases argued before the Court at the time of hearing. Regarding the plethora of filings submitted by the Plaintiff on the morning of the hearing, the documents were not timely provided to opposing counsel or the court in advance of the instant hearing as required under local rules and customary courtesy.

Therefore upon all review of evidence and in the light most favorable to the non-moving party, the court finds that the record shows that Defendant properly paid benefits to exhaustion to all medical providers up to the full $10,000 as indicated on the PIP Log.

The Plaintiff's mere speculation that an additional medical bill may have been submitted does not create evidence to overcome a properly supported motion for summary judgment. *Matsushita Elec. Indus. Co., Ltd.* 475 U.S. at 586. There is no evidence that the Plaintiff submitted any bills as demonstrated by the unsupported USPS document, without affidavit, filed January 10, 2024.

Therefore the Defendant gained nothing by the way of its actions, and the Defendant performed fully on its contract. Additionally, the insured received the full benefit of the contract as evidenced by the payments reflected in the PIP Log attached to the *Rowden Affidavit* filed in support of Defendant's Motion for Summary Judgment. Furthermore, the Plaintiff failed to timely file any evidence contrary to the Defendant's evidence, arguments, and case law.

ACCORDINGLY, it is ORDERED and ADJUDGED:

1. That Defendant's Motion for Final Summary Judgmnet is hereby GRANTED.

2. Plaintiff's Counter-Motion for Summary Judgment is denied.

It is further ORDERED and ADJUDGED that Plaintiff shall take nothing by this action and Defendant shall go hence without day. The Court shall reserve jurisdiction as to Defendant's attorneys' fees and taxable costs.

* * *

Insurance—Property—Standing—Assignment—Plaintiff does not have standing to sue insurer where assignment agreement does not comply with section 627.7152(2)(a)3. & 7.—Use of words "service provider" in place of word "assignee" in specific notice required by section 627.7152(2)(a)7. invalidated assignment—Shortening statutory timeframe for rescission of assignment by defining "substantial work" on property to mean visual inspection of property also invalidated assignment

IQ RESTORATION, LLC, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2023-048387-CC-25. Section CG01. September 10, 2024. Jorge A. Perez Santiago, Judge. Counsel: Jared M. Marguilis and Robert F. Gonzalez, Florida Insurance Law Group, LLC, Miami, for Plaintiff. Stephen M. Udagawa, Butler Weihmuller Katz Craig, LLP, Tampa, for Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on Defendant's Motion for Summary Judgment (Index 50). Plaintiff filed a late response in opposition that included an affidavit, and Plaintiff later asked for a motion for continuance to take depositions after Defendant filed a motion to strike Plaintiff's late response. The Court exercised its discretion to accept Plaintiff's late-filed response and would have granted Plaintiff's continuance to allow Plaintiff to take discovery related to other potentially fact-driven issues, but the Court heard argument on the two legal issues about the validity of the assignment of benefits under section 627.7152(2)(a)3. and 7. For the reasons more thoroughly discussed at the hearing, Defendant is entitled to summary judgment as a matter of law because:

1. It is undisputed that Plaintiff's assignment of benefits does not contain the exact language that ***must*** be contained in all assignment agreements under section 627.7152(2)(a)7. and by shortening the timeframe for rescission of the assignment agreement provided in section 627.7152(2)(a)3. by defining "substantial work" to mean a "visual inspection."

2. The requirements under section 627.7152(2)(a) are strictly construed and enforced.

3. The Court, then, must reject Plaintiff's counterargument that substitution of the required word ASSIGNEE in uppercase and boldfaced type 18 font for the term "Service Provider" is an insignificant alteration or should be ignored because it substantially complies with the statute. Unlike other cases involving other statutes cited by Plaintiff, this statute requires specific language to be used, does not allow for substantial compliance or use of substantially similar language, and identifies the remedy if a party fails to comply with that statutory subsection—the assignment is invalid and unenforceable.

4. Similarly, the Court must reject Plaintiff's counterargument that its assignment agreement complies with subsection (2)(a)3. Changing "substantial work" to mean performance of a "visual inspection" is not a clarification, it substantially limits the insured's substantive right to rescind the agreement.

5. For these reasons, Plaintiff does not have standing to sue Defendant because the assignment agreement does not comply with section 627.7152(2) and, thus, is invalid and unenforceable.

* * *

Landlord-tenant—Eviction—Transient occupant—Unlawful eviction action brought by hotel guest who stopped paying room charges after fourth month of seven-month stay in hotel alleging that hotel violated Florida Residential Landlord and Tenant Act—Hotel is entitled to summary judgment based on law of collateral estoppel and res judicata where it was determined in related unlawful detainer case that guest was transient occupant of hotel, not tenant entitled to protections of the Act—Hotel is entitled to summary judgment on counterclaim for unpaid daily room rates on which default was entered, but is not entitled to double rental value under section 82.03(2) since statutory burden of proof requires evidentiary hearing

EDDIE ROBINSON, Plaintiff, v. LAUDERDALE PARTNERS, LLC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE24013713. Division 82. September 19, 2024. Kal Evans, Judge. Counsel: Eddie Robinson, Pro se, Plaintiff. Miguel J. Chamorro, Fuerst Ittleman David & Joseph, Miami, for Defendant.

ORDER GRANTING DEFENDANT & COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT ON COMPLAINT AND COUNTERCLAIM

THIS CAUSE came before the Court on September 19, 2024, on the Motion for Summary Judgment on Complaint and Counterclaim filed by Defendant & Counterclaimant Lauderdale Partners, LLC, d/b/a Hyatt Place (the "Hotel"), and with the Court having heard argument of counsel for the Hotel—there was no appearance by Eddie Robinson (the "Guest")—and been duly advised in the premises, it is hereupon ORDERED AND ADJUDGED as follows:

The Hotel's Motion for Summary Judgment is hereby **Granted**. The Court hereby makes the following findings of fact and conclusions of law.

I. INTRODUCTION

This action has its genesis in the Guest's belief and allegation that he was a *tenant* instead of an ordinary hotel guest of the Hotel, who owns and manages the property located at 8530 West Broward Boulevard, Plantation, Florida 33324, under the "Hyatt Place" brand. The Hotel is a transient public lodging establishment as defined in section 509.013, Fla. Stat., and is licensed as a *hotel* by the State of Florida's Department of Business and Professional Regulations, who issued it License Number HOT1618388.

On September 8, 2023, the Guest checked into the Hotel as a transient guest. He stayed until April 8, 2024. For most of his stay, the Guest paid the daily rates due. But as of January 16, 2024, he stopped paying the Hotel. On January 18, 2024, the Hotel's General Manager—Raymond Seah, whose Sworn Declaration was submitted in support of this motion—instructed the Guest to leave because of his failure to pay. Since the Guest refused to leave, the General Manager called the local police to have the Guest removed. The police refused to remove him based on its mistaken belief that the Guest qualified as a tenant as opposed to a regular hotel guest (*i.e.*, a transient guest)

because he had been there for several months.

Two things then occurred. On February 23, 2024, the Hotel filed an action for unlawful detainer against the Guest in Broward County Court, Case No. COCE-24-011888, styled *Lauderdale Partners LLC, d/b/a Hyatt Place v. Edward Robinson, a/k/a Eddie Robinson* (the "Related Case"). On March 4, 2024, while the Related Case was set for trial, the Guest filed a separate lawsuit for damages against the Hotel based (this case). Let's first address the Related Case.

II. THE (PREVIOUS) RELATED CASE

On March 4, 2024, the Guest filed an Answer in the Related Case in which he denied being "in transient occupancy," alleged that he received mail at his room, and alleged that he *did* have "documentation, correspondence, or identification sent or issued by a government agency that show I used the property as an address of record with the agency." These allegations address the statutory factors that establish if one is a transient occupant. *See* §82.035(1), Fla. Stat. The Guest asserted these allegations to contest the Hotel's claims that he was a transient occupant who could be evicted under Chapter 82 and prove that he was owed the rights of a tenant under Chapter 83 (*i.e.*, that he was a tenant and the Hotel was his landlord).

On April 5, 2024, the Honorable Betsy Benson presided over a trial of the Related Case. The Court issued a verdict and entered a final judgment in the Hotel's favor—with a writ of possession to issue forthwith—which provided as follows:

> The [Hotel] presented sworn evidence in the form of testimony and documents, that was credible and consistent with the [Hotel's] position that [Guest] is currently in unlawful possession of the real property in question, that [Hotel] has revoked any and all permission to remain in the property by way of a Notice to Vacate issued to [Guest] on January 18, 2024, and that [Guest] has refused to comply.
>
> The Court further adopts the arguments put forth by [Hotel] at trial and in filings in this cause. *The [Guest] put forth no credible evidence that [Guest](s) have a right to possession of the property that is the subject of this action.*

Thus, the final judgment established that the Guest was a transient occupant and ***not*** a tenant (as the Guest contends *sub judice*), and could thus be removed from the premises pursuant to the law of unlawful detainer.

III. THIS CASE.

While the Related Case was set for trial, the Guest filed this lawsuit for damages against the Hotel. In his Amended Complaint, the Guest made substantially the same allegations that he made in the Related Case, namely, that the Hotel violated his rights under Chapter 83, Fla. Stat., by committing prohibited practices under § 83.67, Fla. Stat., engaging in retaliatory conduct in violation of § 83.64, Fla. Stat., etc.

On April 8, 2024, shortly after the entry of the unlawful detainer judgment in the Related Case, the Guest finally vacated the Hotel. The Guest left behind an unpaid bill of $16,645.77 for which the Hotel filed a counterclaim for damages. A default was entered against the Guest for his failure to respond to the Counterclaim.

The Hotel has moved for summary judgment on two issues. As to the Guest's claims, the Hotel relies on its affirmative defenses that the doctrines of collateral estoppel and *res judicata* bar the Guest's case. The Hotel has also moved for summary judgment on its counterclaim for Damages for Unlawful Detention of Property (Count I) and Unjust Enrichment (Count II).

IV. THE HOTEL IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE LAW OF COLLATERAL ESTOPPEL AND RES JUDICATA.

A. The trial of the Related Case established that the parties did not have a landlord-and-tenant relationship.

The Guest's unlawful eviction claim in this case is based on his belief that the parties have a landlord-and-tenant relationship, with all the attendant rights and responsibilities under chapter 83, Fla. Stat. Due to the Hotel's attempts to remove him by requesting police assistance and disabling electronic access to his room, the Guest sued the Hotel for: (1) "committing prohibited practices under § 83.67, Fla. Stat. (engaging in "illegal 'self-help' eviction practices by preventing [his] access to his unit without a court order" and terminating his air conditioning and utilities); (2) retaliatory conduct under § 83.64, Fla. Stat. ("threatening [him] with legal action and denying access to his unit because [he] asserted his legal rights"); (3) breaching the lease agreement "by failing to maintain the premises in a habitable, safe condition and failing to make necessary repairs promptly;" (4) violating the Fair Housing Act "by refusing and delaying repairs;" and (5) violating his covenant of quiet enjoyment. The Guest's case *sub judice* is premised on his allegation that he is a tenant/lessee under Chapter 83, Fla. Stat.—an allegation that he unsuccessfully asserted as a defense in the previous, unlawful detainer case:

> Under Florida Law and Statutes we have a status as tenants at the [Hotel]. Therefore, myself and all other occupants are afforded all of the rights and protections under Chapter 83 of the Florida Statutes. . . . there is no question that we are tenants and cannot be removed/evicted without a court order proceeding under Chapter 83 . . . Further, myself and all other occupants have the right to quiet enjoyment while residing in the rental unit.

The transcript of the trial of the Related Case shows that the disposition of that case turned on whether he was, in fact, a tenant. Significant evidence focused on the factors identified in § 82.035(1), Fla. Stat., for establishing whether a person is a transient occupant. As to these factors, the evidence at the trial of the Related Case showed the following:

- The Guest did not have a financial, ownership, or leasehold interest in the Hotel; the Hotel did not offer him a rental agreement, nor did the Guest tell the Hotel that he wanted a rental agreement or lease upon checking in. *See* Trans.
- The Guest did not have any property utility subscriptions at the Hotel such as an electricity bill, water bill, or sewer bill.
- The Hotel did not charge the Guest first month's rent or last month's rent or impose an early termination fee.
- The Guest did not receive mail at the Hotel aside from a single parcel that he mailed to himself.
- Neither the Guest, nor his daughter—Chloe Sears Robinson, who testified at the trial—had any documentation, correspondence, or identification cards sent or issued by a government agency, to show that he used the Hotel's address as an address of record.
- When the Guest—or someone on his behalf—checked into the Hotel, he checked in as a company called "Miami Wedding Event" and provided a permanent address in Sunrise, FL.

In addition, the trial focused on the Hotel's status as a hotel. As to the latter, the following evidence was uncontroverted:

- The Hotel has 126 rooms and, at the time of trial, about 250 guests—only approximately three of which had been staying for more than one month.
- As with most other hotels, the Guest made his reservation at this Hotel through the Hyatt's website, Booking.com, or Expedia. The Guest had "to make a reservation every day to extend his reservation."
- The Hotel is licensed as such by the State of Florida.

After considering the evidence, the Court in the Related Case conclusively ruled against the Guest, leading to the entry of a Final Judgment and the issuance of a writ of possession in the Hotel's favor.

B. Summary judgment is proper against the Guest's claims because the final judgment in the Related Case effectuates the application of the doctrine of collateral estoppel and is dispositive of the Guest's case.

Under Florida law, "[c]ollateral estoppel prevents relitigation of an issue resolved in a prior judicial proceeding, provided that (1) the identical issue has been fully litigated, (2) by the same parties, and (3) a final decision has been rendered by a court of competent jurisdiction." *Community Bank of Homestead v. Torcise*, 162 F.3d 1084, 1086 (11th Cir. 1998) (citing *Essenson v. Polo Club Assocs.*, 688 So.2d 981, 983 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D552a]).

The final judgment in the Related Case makes collateral estoppel applicable to the Guest's claims in this case about how his alleged "landlord"—the Hotel—allegedly violated his rights as an alleged "tenant" under Chapter 83, Fla. Stat. In light of the final judgment, the criteria of collateral estoppel are met in this case.

First, the identical "issue" of whether the parties are landlord and tenant (instead of hotel and transient guest) was fully litigated in the Related Case—an issue that is crucial here as it was there. There, the issue was his defense to the Hotel's unlawful detainer claim. *Here*, it is the basis for the Guest's damages claims of illegal "self-help" eviction, retaliatory conduct under § 83.64, Fla. Stat., quiet enjoyment, etc. Without a ruling in the Related Case that the Guest was a tenant, that the Hotel was his landlord, and that the parties had a rental agreement, the Hotel could not have used the unlawful detainer law to remove the Guest—it would have had to pursue eviction proceedings under Chapter 83 instead. Without a ruling that the Hotel could proceed under Chapter 82, the Hotel could not have violated Chapter 83—thus precluding the Guest's damages claims. *See Community Bank*, 162 F.3d at 1086.

Second, the "same parties" are involved in both lawsuits (with their roles reversed). *See id*. And third, the Final Judgment is unquestionably a final decision that was "rendered by a court of competent jurisdiction." *Id*. There is no question that the County Court in the Related Case had jurisdiction over the Related Case and that its judgment is final.

Given the facts, the Guest is collaterally estopped from relitigating the parties' alleged status as landlord and tenant. The Guest had his chance to prove that allegation, but the court in the Related Case disagreed and entered an unlawful detainer judgment against him. Since the Guest's claims *sub judice* depend on the existence of a landlord-and-tenant relationship, they fail as a matter of law. Collateral estoppel compels this conclusion.

C. Similarly, summary judgment is also proper because the Final Judgment effectuates the application of the doctrine of *Res judicata*.

The Guest's damages claims are also barred by *res judicata*. As explained by the Supreme Court of Florida:

> A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) [26 Fla. L. Weekly S784a]. For *res judicata* to bar a subsequent suit, "(1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases." *I.A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986).

Here, it is likewise clear that *res judicata* applies. The Related Case resulted in a final judgment on the merits by a court of competent jurisdiction, the two cases involve the identical parties, and the cases involve the same cause of action. *See I.A. Durbin*, 793 F.2d at 1549. Matters that the Guest "might" have "litigated and determined" in the Related Case, namely, whether he is a tenant with rights under Chapter 83, were in fact litigated and determined in the Related Case. *Juliano*, 801 So. 2d at 105.

The Guest's case is barred *res judicata*. He cannot now relitigate his defense to the Related Case in the guise of a damages claim.

V. THE HOTEL IS ENTITLED TO SUMMARY JUDGMENT, IN PART, ON ITS COUNTERCLAIM FOR DAMAGES FOR UNPAID HOTEL RATES.

In its counterclaim for Damages for Unlawful Detention of Property (Count I), the Hotel seeks to recover from the Guest all the daily rates that he failed to pay from January 18, 2024, through April 8, 2024, when he finally left the Hotel (shortly after the judgment issued in the Related Case). The Hotel seeks that same relief under its alternative counterclaim for Unjust Enrichment (Count II). The Court finds that the Hotel has met its burden of proof. Through April 7, 2024, the Guest's outstanding balance with the Hotel is $16,645.77. Accordingly, the Court hereby enters summary judgment in favor of the Hotel for $16,645.77.

Pursuant to section 82.03(2), Fla. Stat., the Hotel argues that it is entitled to *double* the above amount of damages because the Guest's detention of the hotel room was "willful and knowingly wrongful." Counterclaim ¶ 28. Section 82.03(2), Fla. Stat., provides as follows:

> If the court finds that the entry or detention by the defendant is willful and knowingly wrongful, the court must award the plaintiff damages equal to double the reasonable rental value of the real property from the beginning of the forcible entry, unlawful entry, or unlawful detention until possession is delivered to the plaintiff. The plaintiff may also recover other damages, including, but not limited to, damages for waste.

However, the Court will not enter summary judgment as to the double damages because it finds that the Hotel's statutory burden of proof requires an evidentiary hearing, notwithstanding the fact that a default "admits every cause of action that is sufficiently well-pled to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought." *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 662 (Fla. 1983).

In conclusion, the Court hereby enters summary judgment in favor of Lauderdale Partners, LLC, and against Eddie Robinson on the Amended Complaint and on the Counterclaim, for the sum of $16,645.77, plus interest and costs. A final judgment shall issue separately.

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Insurance—Homeowners—Water damage—Insurer's motion for summary judgment based on homeowner having discarded defective shower rough-in valve after it was replaced and before insurer's adjuster could examine valve is denied—Jurors could reasonably conclude that replaced valve was source of loss based on damage in area of valve and testimony that leak was resolved once replacement was made

JOHNSON GAIBOR, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX23070203. Division 53. September 26, 2024. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

This cause came before the Court on September 25, 2024 for hearing of the Defendant's Motion for Final Summary Judgment, and the Court's having been sufficiently advised in the premises, rules as follows:

The Motion is DENIED. The Court finds that there is a genuine dispute as to a material fact, and therefore the Defendant is not entitled to judgment as a matter of law.

This case involves a claim for water damage occurring as the result of a defective rough-in valve in a residential shower. It is without dispute that the homeowner discarded the old valve once it was replaced, but before the insurer's adjuster could examine it. According to the Defendant's argument, this is the linchpin of its entitlement to a judgment in its favor. But the record evidence filed for and against the summary judgment motion shows that a jury could find in the Plaintiff's favor even in the absence of the defective valve.

Here, the Defendant's expert properly relied on information gleaned from a conversation with another person as to the source of the leak, i.e., the defective valve. Even though the conversation may be deemed hearsay, an expert is permitted to rely on such a statement so long as it is not "spoon fed" by counsel or not the only evidence supporting the cause of the loss, neither circumstance which appears on this record. Ehrhardt's Fla. Evidence §704.1 (2024). The Plaintiff's timely-filed expert's report also includes photographs that corroborate the rough-in valve as being the source of the leak. Further, the Court would note that jurors are permitted to use some dose of common sense when evaluating the evidence. *See Crane v. Simpson*, 213 So.2d 299 (Fla. 2d DCA 1968). In this case we have a photograph of what clearly appears to be a newer rough-in valve, with nearby evidence of water damage that remains. Coupled with the testimony that the matter was resolved once this repair was made, a juror could reasonably conclude that the replaced rough-in valve was the source of the loss.

Further, this is not a case where the homeowner did all repairs before the insurer was able to observe the loss. The homeowner—understandably—made only the repair necessary to stop the leak and mitigate his loss. The resulting damage was on full display for the insurer's adjuster to timely observe.

This case shall remain on the Court's calendar for jury-track pretrial conference.

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Insurance—Declaratory action—Proposal for settlement is not confession of judgment in equitable action seeking declaratory relief

BEACHES MRI, a/a/o Sarah St-Amour, Petitioner, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Respondent. County Court, 18th Judicial Circuit in and for Seminole County, Civil Division. Case No. 2023CC005206. October 17, 2024. Wayne Culver, Judge. Counsel: Thomas J. Wenzel, Steinger, Green & Feiner, Fort Lauderdale, for Petitioner. Jennifer W. Opiola and Anthony J. Parrino, Reynolds Parrino Shadwick, P.A., St. Petersburg, for Respondent.

ORDER ON PETITIONER'S MOTION TO DEEM PFS A CONFESSION

THIS CAUSE having come before the Court for hearing on October 16, 2024, on Petitioner's/Plaintiff's Motion to Deem Respondent's/Defendant's PFS (Proposal for Settlement) a Confession of Judgment, and the Court being otherwise fully advised in the premises and the law, it is **ORDERED and ADJUDGED** as follows:

1. Petitioner's Motion to Deem the PFS a Confession is **DENIED**.

2. Service of a proposal for settlement (PFS), or "offer of judgment," under section 768.79, *Florida Statutes*, is not a confession of judgment in an equitable action seeking declaratory relief.

3. This Court's trial and pre-trial deadlines found in its June 7, 2024 order will be extended to allow the parties to set their pending Motions for Summary Judgment(s) for hearing.

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